CAMBODIAN CONSTITUTIONAL LAW

Edited by

HOR Peng
KONG Phallack
Jörg MENZEL

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The cover picture of the book was taken from the frescos of the Silver Pagoda inside the Royal Palace in Phnom Penh. It shows a scene from the "Reamker", the Khmer adaption of the Indian "Ramayana" epic.
Photo by Christine Schmutzler

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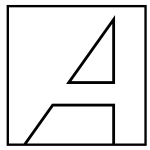

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FOREWORD

The current Cambodian Constitution is the supreme law of the Kingdom of Cambodia, enshrining values such as the rule of law, human rights, democracy and power separation deep into the Kingdom's legal and political system. Its relevance and importance for ordinary Cambodian citizens covers varying aspects, ranging from freedom of religion, expression and access to information to fundamental rights such as labor, economic, women's and social rights as well as the right to education and institutional protection. Furthermore, the Constitution regulates Cambodia's state organization by identifying roles and responsibilities of the country's institutions, the electoral system and political parties.

It is due to the Constitution's significant importance that Konrad-Adenauer-Stiftung Cambodia, in cooperation with the editors of this book, decided to create a comprehensive source of information on Cambodian constitutional law. As there is, to-date, only a limited number of English publications on the Cambodian Constitution available, we believe that this book serves as a useful guide into the different areas covered by the Constitution. Its comprehensive coverage will be a unique contribution to the academic field of international analysis and research on Cambodia´s Constitution.

One particular aim of the book has been to motivate Cambodian scholars to academically engage with legal questions and contribute with their articles towards the analysis and evaluation of Cambodian Constitutional Law.

We would like to express our gratitude to those who have made this publication possible. A special appreciation is directed towards Jörg Menzel, who initiated this book and assured its feasibility. Additionally, we would like to thank all authors for their contributions and Martina Mayr for her successful efforts to finalize this book.

Phnom Penh, July 2016

Denis Schrey
Former Country Representative
Konrad-Adenauer-Stiftung
Cambodia
(September 2011 until January 2016)

Rene Gradwohl
Country Representative
Konrad-Adenauer-Stiftung
Cambodia
(since February 2016)

EPILOGUE

We dedicate this book to our esteemed former colleague and friend Dr. Jörg Menzel, who has initiated the idea of this first comprehensive English academic work on "Cambodian Constitutional Law". Dr. Menzel died too early at the age of 51 on April 09th 2016 in Istanbul.

Dr. Menzel became an internationally recognized expert on constitutional, administrative and international legal aspects of transformation processes in developing and emerging countries. The impressive portfolio of his consulting and academic lectures involved not only Cambodia and the South East Asian region, but also extended to other world regions.

His heart bet for South East Asia, especially for Cambodia. As an international key advisor to the Cambodian Senate between 2003-2010 he not only promoted the ongoing internal legal reform process of the Senate to support its development into a recognized and more assertive Second Legislative Chamber in Cambodia, but also build capacity for the in-house legal and research departments of the National Assembly, the Senate, the Cambodian Government as well as for Cambodian Law Students.

The core legal literature on Cambodian Law available in English today has been the result of Dr. Menzel's ceaseless efforts to promote a culture of legal academic work and legal discourse in Cambodia and the region.

The Law Talks initiated by Dr. Menzel in cooperation with Konrad-Adenauer-Stiftung in 2006 are until today the only regular dialogue between legal scholars and practitioners on diverse aspects of legal developments in Cambodia.

Throughout his career Dr. Menzel convinced his audience with his comprehensive and profound legal knowledge and his unique ability to transfer and apply international and European legal concepts and approaches to constitutional, administrative and legal reform processes in Cambodia and other South East Asian Countries in a humble, collaborative and culturally sensitive manner, always bearing in mind the insufficiencies and historical highs and lows of the own Western legal systems and the diverse legal history and culture of SE Asian countries.

For the Cambodian counterparts Dr. Menzel has been a source of inspiration for their work as well as a motivator and mentor for the development of their own professional careers.

The KAS Cambodia Office as well as all partners, colleagues and Cambodian friends will miss Dr. Menzel very much. We are grateful to his commitment to the development of the Rule of Law in Cambodia and to Konrad-Adenauer-Stiftung over the last 15 years. Our thoughts and prayers are with him and with his family.

Denis Schrey
Former Country Representative
Konrad-Adenauer-Stiftung in Cambodia

Rene Gradwohl
Country Representative
Konrad-Adenauer-Stiftung in Cambodia

PREFACE

This book is initiated to introduce the 1993 Constitution of the Kingdom of Cambodia. It is a collective effort by Cambodian and foreign authors to provide an overview of the Constitution as well as comparisons and analyses. From our knowledge this is currently the only Handbook on the Cambodian Constitution written in English. The aim of this publication is to provide a helpful guide, not only for foreign readers, but also for Cambodians, especially for those who choose to study law.

As it would be too ambitious to provide a comprehensive overview on all issues covered by the Constitution in a single publication, we aimed at providing basic information. All chapters have been written recently but as legal developments in Cambodia are dynamic and fast-paced some information might be outdated soon after writing. Law is like a river, always flowing and changing and any attempt to describe it can only be temporary. Generally, as with any academic legal book, neither editors nor authors can guarantee the full accuracy of the provided information. We can only assure that we have tried to state the law as accurately as possible. As editors we have tried to ensure that important topics of the Constitution are covered, but the authors are solely responsible for the content of their chapters.

The editors wish to express a special thank you to Ms. Martina Mayr for her valuable work and extensive contributions which made the completion of this publication possible. We also thank the Konrad-Adenauer-Stiftung, its former Country Representative Mr. Denis Schrey, its current Country Representative, Mr. Rene Gradwohl and all their staff for the strong and patient support of this project. Furthermore, we thank the numerous authors, who despite other obligations spent their valuable time and energy to write their chapters. Finally, we hope that the readers of this book find the information provided helpful and that it will encourage further academic discussion of Cambodian law within and outside the country.

As editors, we would like to express our heartfelt gratitude to Jörg Menzel, who passed away in April 2016, before the publication of this Handbook. We wish him Rest in Peace.

Phnom Penh, May 19, 2016

HOR Peng
KONG Phallack

INTRODUCTION TO CAMBODIAN CONSTITUTIONAL LAW FROM A COMPARATIVE PERSPECTIVE

SUMMARY AND INTRODUCTION

Due to the untimely loss of Jörg Menzel, the initiator and one of the editors of this book, we were not able to retrieve his article "Introduction to Cambodian Constitutional Law from a Comparative Perspective", which was intended to serve as introductory chapter of this book. His expertise in this subject matter is unmatched and it would be presumptuous to write his article instead.

However, due to his previous publications, we were able to identify two articles, which address the subject matter separately. The first article, titled *Cambodia – From Civil War, To Constitution, to Constitutionalism?*[1], provides an introduction to Cambodian Constitutional Law. The other article, titled *Constitutionalism in South East Asia: Some Comparative Perspectives*[2], provides a comparative view on other South East Asian Constitutions.

The editors decided to reprint *Cambodia – From Civil War, To Constitution, to Constitutionalism?* in this book as this publication provides a comprehensive introduction to Cambodian Constitutional Law. The other article can be accessed and downloaded online, please refer to the respective footnote above.

The purpose of this preface is to provide a short introduction, how the reader can use these two articles as a guide for an introduction to Cambodian Constitutional Law from a comparative perspective.

1 Jörg Menzel, Constitutionalism in South East Asia, Volume 2 Reports on National Constitutions, Eds. Claus Peter Hill, Jörg Menzel, 2008, Konrad-Adenauer-Stiftung, Singapore.

2 Jörg Menzel, Constitutionalism in South East Asia, Volume 3, Cross Cutting Issues, Eds. Claus Peter Hill, Jörg Menzel, 2008, Konrad-Adenauer- Stiftung, Singapore. The article can be accessed and downloaded through the following link: www.kas.de/wf/doc/kas_20986-1522-1-30.pdf?110815045024

Introduction to Cambodian Constitutional Law

The first article[3], published in 2008, includes an introduction to the Cambodian Constitution. Even though the article is more than eight years old, the publication is still relevant and (with some minor changes) up-to-date. We reviewed the article with regards to recent changes. The following table provides an update on events since 2008.

Page [4]	Issue	Update
49	Constitutional Amendments	Amendment of the CC in 2014 to make the National Election Committee an independent body
53	Election of Councils	Indirect election, Art. 14 Law on Administrative Management of the Capital, Provinces, Municipalities, Districts and Khans (2008)
54	Commissions of the National Assembly	10 Commissions
62	Penal Code	Promulgated 2009
67	Commune Elections	And 2012
67	National Elections	Except 2013

In the title of this publication Jörg Menzel implies the question whether Cambodia arrived at a constitutionalist state. He draws a historical line from a state at civil war, where – in practice – the prevailing Constitutions were irrelevant, to a state with a new liberal Constitution on paper, to a constitutional state in practice. A constitutionalist state, he infers, should not only outline constitutional principles on paper, but has the mandate to operationalize the normative aspects of these principles, and – most importantly – should respect these principles.

The article provides a short overview of the constitutional history and the making of the Cambodian Constitution. He further outlines the core elements of the Constitution, the system of government, fundamental rights, judicial review, the legal system, rule of law, as well as Cambodia's place in the world.

3 Ibid Vol. 2

4 Jörg Menzel, Constitutionalism in South East Asia, Volume 2, Reports on National Constitutions, Eds. Claus Peter Hill, Jörg Menzel, 2008, Konrad-Adenauer-Stiftung, Singapore.

The Cambodian Constitution from a Comparative Perspective

The article *From Civil War to Constitution to Constitutionalism?* does not provide a detailed comparative perspective. Jörg Menzel briefly concludes that the core elements of a liberal Constitution such as democracy, fundamental rights, rule of law, and separation of powers were influenced by other countries, but also acknowledges distinct Cambodian elements.[5] His article concludes,

> *"The Cambodian Constitution, as every constitution, can be put into a variety of comparative perspectives. It can be compared and analysed in the context of its historical precedents, regional or global constitutional developments and last but not least, with other states facing similar problems of transition to democracy. Cambodia's current constitution draws heavily from the past, in particular from Cambodia's first constitution of 1947 and the immediate predecessor of 1989, but is also influenced by foreign developments. The making of this constitution comes at a time of major constitutional change in many states, be it in Southeast Asia or globally. Since the end of the 1980s there has been a clear worldwide trend towards strengthening of constitutional order, democracy, fundamental rights and rule of law. Transition is, however, a difficult process and Cambodia has a particularly long way to go after the complete breakdown of civilized statehood in the 1970s. In addition it should be acknowledged that the concept of liberal and pluralistic democracy and comprehensive fundamental rights protection, hardly had any consolidated stronghold in Southeast Asia at the beginning of the 1990s, nor does it have today. A fair assessment of development in Cambodia must take this regional context into account."*[6]

In *Constitutionalism in South East Asia: Some Comparative Perspectives*[7] Jörg Menzel provides us with a framework as well as criteria for comparing Constitutions. Assessment criteria are constitutional core principles, such as the separation of powers, rule of law, basic human rights, democracy, etc. These criteria determine the level of Constitutionalism in a given country. Constitutionalism requires a certain level of depth and substance, as well as a common understanding of what these core elements mean and how to assess them in terms of achievement/performance. A comparative view as well as common understanding helps to establish a baseline for constitutionalism, comparing for example, constitutional elements in Germany with those in France and Cambodia.

5 Ibid, Jörg Menzel, p. 13.
6 Ibid, Jörg Menzel, p. 29.
7 Jörg Menzel, Constitutionalism in South East Asia, Volume 3, Cross Cutting Issues , Eds. Claus Peter Hill, Jörg Menzel, 2008, Konrad-Adenauer- Stiftung, Singapore.

However, Jörg Menzel was sensitive enough to point out,

> *"Constitutionalism may be on the rise worldwide but it develops differently from state to state. There may be a tendency to more similarity in constitutions around the world, but, as Cheryl Saunders has rightly pointed out, this tendency should not be overestimated. There is no universal "model constitution" and it would not be a good idea to develop one. Comparative constitutional law, which is as much on the rise as constitutionalism, examines the similarities and differences. For the time being, comparative law in general (comparing legal systems, traditions etc.) and comparative constitutional law are not yet well-integrated disciplines. Only recently has comparative constitutional law been included in some general comparative law handbooks. As the field is relatively new (or re-awakened after a long sleep), inevitably there is debate about benefits, risks and methodology. One of the traditional shortcomings in comparative constitutional law has been its euro-centrism, but there is increasing awareness of interesting and important constitutional developments in all corners of the world and the internet has revolutionized access to information about developments even in formerly remote jurisdictions."* [8]

This article by Jörg Menzel provides further reference to the reader regarding frameworks and Jörg Menzel's view on how Cambodia compares with other countries in South East Asia. We understand that this is an insufficient substitute for what Jörg Menzel would have written and contributed to this book. His fierce intellect complemented by his humorous and sensitive writing will be dearly missed.

Kai Hauerstein

8 Ibid, Jörg Menzel, p. 11.

CAMBODIA FROM CIVIL WAR TO A CONSTITUTION TO CONSTITUTIONALISM?

Jörg MENZEL

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CAMBODIA FROM CIVIL WAR TO A CONSTITUTION TO CONSTITUTIONALISM?

Jörg MENZEL *

I. Introduction

The current Constitution of Cambodia of 1993 is the fifth constitution since the first written constitution was adopted in 1947[1]. The concepts followed in these constitutions could not be more diverse, but they hardly give an impression of the dramatic history that unfolded during this time in a country which has a record of centuries of great ancient history, but which is nowadays mostly associated with the absolute terror of the Khmer Rouge regime that lasted less than four years between 1975 and 1979.

The following report attempts to give an overview of the historical developments and current constitutional structures in Cambodia, which have only rarely been discussed in academic literature so far. This article argues that the adoption of the 1993 constitution has been a big step in the direction towards liberal democracy, but that one and a half decades later constitutionalism is still more concept than reality in the political and legal system of Cambodia.

* Associate Professor, University of Bonn, Germany; Legal Advisor, Phnom Penh, Cambodia.

1 Constitution of 1993. This constitution has been amended a number of times, but with the amendment of 1999 a new chapter (on the Senate) was included, which changed the numbers of articles from article 99 onward. Article numbers quoted here are according to the current "post-1999" version. For a useful collection of the historic constitutions of Cambodia see *Raoul M. Jennar*, The Cambodian Constitutions (1953-1993), Bangkok 1995 (White Lotus Press). *Jennar* lists six constitutions altogether, treating the extensive amendments of the constitution of 1981 in 1989 effectively as the adoption of a new constitution. For a French language collection of the historic 20th century constitutions see *Kim Y* (ed.), Collection Droit Khmer. Droit Constitutionnel, 1947-1993, Phnom Penh 1997.

II. A Short Constitutional History

No country's constitutional system can be understood without some knowledge of its historical background. In Cambodia, this trivial wisdom is probably even more important to keep in mind than in many other places. Cambodia is in many respects stricken by its past, with visions of ancient grandeur and in the horrors of its recent history. However, whereas the general history of the country is quite well researched[2], its constitutional or legal history is not[3]. The following can only offer some glimpses.

1. The Pre-Colonial Time, "Angkor" in Particular

There is some uncertainty, as to the existence of a "state" in the era of Funan (beginning in the first century AD). Funan was considered a state by contemporary Chinese reports, but these are questioned in recent historical research which suggests that it was probably only a loose alliance of towns[4]. Knowledge is not better regarding "Chenla", which seemingly emerged with the decline of Funan. The leaders in Pre-Angkorian times are sometimes (not always) called "kings", but from what we know their "kingdoms" typically were small and unstable.

It is not disputed, however, that Cambodia achieved statehood and was an absolute monarchy in the Angkorian time, which is generally considered to have started in the early 9th century. At its peak time, the capital area of Angkor was probably the most populous city worldwide. Angkor Wat, the main temple complex built in the first half of the twelfth century, is considered to be the largest sacral building complex in the world. The Empire of Angkor was an absolute monarchy with the king at the top holding legislative, executive and judicial control[5]. There is some discussion about how "divine" the kings were supposed to be but undoubtedly they exercised very earthly powers. Showcasing strong power was therefore a necessity and religious symbolism sometimes seems

2 For "general histories" see *John Tully*, A Short History of Cambodia, Chiang Mai 2006 (Silkworm Books) and *David P. Chandler*, A History of Cambodia, 2007 (Westview Press).

3 For a short outline with a legal/constitutional focus *Laksiri Fernando*, Khmer Socialism, Human Rights and UN Intervention, in: Alice Tay (ed.), East Asia – Human Rights, Nation Building, Trade, Baden-Baden 1999 (Nomos Verlag), pp. 441-497; see also *Claude-Gilles Gour*, Institutions Constitutionelles et Politiques du Cambodge, Paris 1965 (Dalloz), pp. 17-87.

4 *Michael Vickery*, Society, Economics, and Prehistostory in Pre-Angkor Cambodia. The 7th and 8th Centuries, Tokyo 1998 (The Toyo Bunko); *Tully* (note 2), p. 9. Knowledge is not better for the later "state" called Chenla, in respect to which even its precise location is unclear.

5 For the Angkorian society with some information on political and legal structures see *Ian Mabett / David Chandler*, The Khmers, Oxford 1995 (Blackwell Publishers); *Charles Higham*, The Civilization of Angkor, London 2003 (Orion Books). The most cited source with some information on the political and legal system is the report by a Chinese visitor, who spent a year in Angkor between 1296 and 1297. The report contains some information on law (chapter 14), but does not elaborate on the constitutional system. For a new edition of this important report see *Zhou Daguan*, A Record of Cambodia. The Lands and its People, translated with an introduction and notes by Peter Harris, Chiang Mai 2007 (Silkworm Books).

to merge with state symbolism. The Bayon Temple in Angkor, built in the time of Jayarvarman VII, is famous for the hundreds of faces watching and listening in every direction; probably symbolizing a divine ruler as a perfect "Big Brother" of its time[6]. There was, however, no intergenerational constitution in the sense that succession to the throne was effectively regulated. The Angkor Empire was plagued not only by external, but also by internal violent power struggles, assassinations and violent regime change. There is some discussion about the extent of totalitarianism of this system, but it seems evident that it was based on a massive amount of collective labour. Significant parts of the population are reported to have been slaves[7].

However, knowledge about the legal system during the Angkor period is limited. There seems to be an understanding that Indian texts played an important role. Interestingly, some of the main problems during that time seem similar to current concerns. Land conflicts are reported to be among the most common legal disputes and according to some historians deforestation contributed to the decline of Angkor. Although the role of the Khmer kingdom was of reduced strength after the end of the Angkor period because of the rise of neighbouring powers and internal struggles, the principle of monarchy prevailed until the French takeover of the country in 1863.

2. French Protectorate [8]

The French takeover has been labelled as "gun boat diplomacy", not escalating in actual violence, but probably not without coercion[9]. There is, however, a common perception among historians that the French takeover rescued Cambodia from the risk of vanishing between more powerful and chronically invasive neighbours, Siam and Vietnam (the Khmer saw themselves "between the tiger and the crocodile"). In fact, the Cambodian King had asked France for protection as early as 1853[10]. When taking control by treaty with King Norodom, France did not formally and fully colonize Cambodia, but gave it the status of a protectorate[11]. During its time as a protectorate, the Cambodian monar-

6 For the "Big Brother"-Interpretation of the Bayon Temple see also *Mabett/Chandler* (note 5), p. 207; the "meaning" of the Bayon is highly controversial, however, see recently *Joyce Clark* (ed.), Bayon. New Perspectives, Bangkok 2007 (River Books).

7 See *Daguan* (note 5), Chapter 9; *Fernando* (note 3); pp. 446-448; *John Tully*, France on the Mekong. A History of the Protectorate in Cambodia 1863-1953, Lanham / New York / Oxford 2002 (University Press of America), pp. 36-38; on the remaining relevance of slavery in the 19th century see *Tully* (2), pp. 42-45.

8 The period of the French protectorate is comprehensively described and analyzed by *Tully*, (note 7); see also *Milton E. Osborne*, The French Presence in Cochinchina and Cambodia, Bangkok 1997 (White Lotus; reprint of the original edition 1969) .

9 See *Tully* (note 7), p. 3.

10 *Tully* (note 7). p. 13.

11 *Tully* (note 7), p. 18, speaks of a "de facto colony". From the perspective of constitutional and legal history the difference between "colony" and "protectorate" is noteworthy, however, and it had relevant, practical consequences at least in the early times of French rule in Cambodia.

chy was not abolished, but was limited by French control. Whereas France initially did not interfere much in the internal government of Cambodia with the treaty of 1863 being a protection against such interferences, it pressured the king (with open threat to use force[12]) to accept substantial reforms in 1884 and cede much of his power[13]. The treaty amendment was followed by a devastating revolt, but slavery was formally abolished and French power was increased. Following the crowning of King Sisowath in 1904 attempts to reform the legal system intensified[14] and French control over the government was tightened. In 1913, a Consultative Council was established, whose main purpose was to exercise some control over the king's rule. Apart from this, France did not promote any representative political institutions before the Second World War[15].

In 1941, France handpicked the new king for the country, eighteen year old Norodom Sihanouk[16], apparently assuming that the underage man would be easy to control in the further process. Sihanouk, however, quickly developed an ambition for politics and power. He declared Cambodia's independence when Japanese forces temporarily took over control in Cambodia during World War II[17], immediately reversing inter alia, the French decision to introduce the Latin script in Cambodia. After the French regained control in 1945, King Sihanouk continued in office (and the Khmer script remained untouched). Sihanouk first pressured for more autonomy in internal affairs and finally went on a "royal crusade" to achieve complete independence from France in 1953.

3. Kingdom of Cambodia

King Sihanouk substantially influenced the process that led to the adoption of the country's first written constitution in 1947[18]. A Constituent Assembly to advise the king on the Constitution was elected in a general election in 1946, the first democratic election ever held in Cambodia. The Democratic Party, which won a landslide victory in this election, successfully pushed for strong democratic elements in the constitution. In substance, the original Constitution of 1947, to a large extent modelled on the French constitution of

12 Compare *Tully* (note 2), p. 75: "on bayonet point".

13 Article 2 of the Treaty reads: "His Majesty the King of Cambodia accepts all the administrative, judicial, financial, and commercial reforms which the French government shall judge, in future, useful to make their protectorate successful." Prince *Norodom Sihanouk* stated in 1972: "From 1884 to 1945, our kings were nothing more than what the Khmer people called 'parrots' , trained to say 'Bat, Bat' (yes), quoted in Tully (note 2), p. 135.

14 *Tully* (note 2), pp. 142-143.

15 *Fernando* (note 3), p. 454.

16 For the life of Sihanouk see the first volume of his autobiography "Shadows over Angkor", edited by *Julio A. Jeldres*, Phnom Penh 2005 (Monument Books), covering the years until 1991, as well as *Milton Osborne*, Sihanouk. Prince of Light, Prince of Darkness, Chiang Mai 1994 (Silkworm Books).

17 For an analysis of this short period of „independence" compare *David Chandler*, The Kingdom of Cambodia, March-October 1945, in: David Chandler, Facing The Past, Chiang Mai 1996 (Silkworm Books), pp. 165-188.

18 For a French language analysis of the constitutional system of this time *Gour* (note 3).

the 4th republic, provided the model of a parliamentary monarchy. The king was head of state, but not head of the government. He had, however, extensive emergency powers, which should have become very relevant in practice. Apart from an elected National Assembly there was a Council of the Kingdom as a second chamber. The Constitution also provided for Popular Assemblies and a National Council. There was no special Constitutional Court or Constitutional Council. The Constitution also provided for a catalogue of fundamental rights.

In subsequent political history, the Democratic Party won the elections held in 1947 and 1951, but Sihanouk removed the elected government with the help of French troops, dissolved parliament and took over direct control in 1952. His "democratic" approach of 1946 was replaced by a concept that Sihanouk himself later described as, the "original form of guided democracy"[19], whereas others have labelled it as "authoritarian". The young king maintained that "those following democracy in Cambodia are either bourgeois or princes …. The Cambodian people are children. They know nothing about politics. And they care less."[20] Formally, the Constitution of 1947, which was subject to a total number of nine amendments with major changes in 1956 and 1960, remained the Cambodian basic law until 1970.

Sihanouk resigned as King in 1955 in order to lead the country as Prime Minister of his party that controlled all seats in the National Assembly after the elections in 1955. When his father, who had been installed as king, died in 1960, Sihanouk took the role of a "Head of State"[21] and put his mother in formal charge of the regency (without making her the "Queen" in a formal sense). Be it as King (1946-1955), Prime Minister (1955-1960) or Head of State (1960-1970), Sihanouk dominated Cambodian politics until 1970, when he was removed from office by forces within his own government which opposed his position on the issue of the Indochina War.

19 Memoirs, p. 59.

20 Cited in *David P. Chandler*, The Tragedy of Cambodian History. Politics, War, and Revolution since 1945, Chiang Mai 1991 (Silkworm Books), p. 72.

21 See Article 122 of the Constitution (as amended in 1960).

4. Republic of Cambodia

Sihanouk was removed from office as Head of State through a parliamentary non-confidence vote on March 18, 1970, initiated by United States backed Prime Minister, General Lon Nol and Deputy Prime Minister, Sirik Matak in 1970[22]. On October 9, 1970, Cambodia was declared a republic[23]. General Lon Nol, who allegedly never recovered his full intellectual capacities after a stroke in 1971 and who was strongly influenced by spiritual ideas and advisors, declared himself President in March 1972 and dissolved parliament. A new constitution was put to referendum, accepted with 97.5 % of the votes and than promulgated on May 10, 1972. The constitution contained a catalogue of fundamental rights and prescribed a presidential model of government, a bi-cameral parliament, a catalogue guaranteeing human rights and a "Constitutional Court"[24]. This constitution, fairly distinct from earlier and later constitutions in Cambodia, never came into full effect and did not get much attention inside or outside of Cambodia. An increasingly barbaric war was raging, the United States tried to bombard Cambodia back to the stone age[25], corruption was out of control[26] and the government lost control of more and more parts of the country. When the Khmer Rouge finally took Phnom Penh on April 17, 1975, Lon Nol had already left the country, but nearly all officials of his government and administration not able or willing to leave, were killed.

22 The removal of Sihanouk was accepted by a parliamentary secret vote of 89 - 3. Sihanouk immediately criticized his removal as a coup d'état, a view which was more than two decades later officially endorsed by the Cambodian Constitutional Assembly on 14 June 1993. The extent of US-involvement in the "coup" is a matter of discussion, see for example *Tully* (note 2), pp. 154-155.

23 For a history of the Khmer Republic comparatively sympathetic to the regime see *Justin Corfield*, Khmer Stand Up! A history of the Cambodian Government 1970-1975, Melbourne 1994.

24 The notion that this was a European-style Constitutional Court *Stephen P. Marks*, The New Cambodian Constitution: From Civil War to a Fragile Democracy, 26 Columbia Human Rights Law Review 43-110 (1994), p. 53, is misleading, however, as in substance this "court" was more a French style Constitutional Council. Compare also supra VII.

25 There have been reasonable suggestions that United States bombardments in Cambodia until August 1973, which according to estimates killed between 150.000 and 750.000 people, amount to severe violations of international law. The most famous criticism is *William Shawcross*, Sideshow. Kissinger, Nixon and the Destruction of Cambodia, London 1991 (The Hogarth Press); for a legal analysis see *Nicole Barrett*, Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos, 32 Columbia Human Rights Law Review 429 (2001).

26 On the corruption within the Khmer Republic system (commonly called the system of "bonjour") see for example *Tully* (note 2), pp. 165-6.

5. Democratic Kampuchea

The Khmer Rouge implemented the most extreme version of communism ever adopted in the 20th century[27]. The rule of terror opened with a range of drastic measures, among which was the execution of all leaders of the former regime, the abolition of money, and the worst being the evacuation of all towns including the capital Phnom Penh, which harboured maybe up to three million inhabitants and internally displaced people at the time[28]. People were moved to the countryside, where they were labelled as "new people" and subjected to the most severe forced labour.

The Khmer Rouge basically abolished any notion of law in Cambodia. In a literal sense the most lawless state in recent world history was established. As historian David Chandler put it: "There is no evidence that any judges held office in DK or that there was a legal system in Cambodia between 1975 and 1979"[29]. The only law adopted during the reign of the Khmer Rouge was the Constitution of 1946, a crude text of twenty-one articles which remained widely unknown in Cambodia and basically had the function of documenting the full statehood of the Khmer Rouge Cambodia to the outside world[30]. Head of State, Khieu Samphan, allegorically declared that this constitution was "not the result of any research of foreign documents, nor [was it] the fruit of any research by scholars. In fact, the people – workers, peasants, and revolutionary army – wrote the constitution with their own hands."[31] A "People's Representative Assembly", which was part of the institutional system prescribed by the constitution (Article 5), was dubiously "elected" once and met only once in 1946. Courts were not operating, although the existence of "People's Courts" was stipulated in the constitution (Article 9). The constitution mentioned

27 For historical analysis see e.g. *Ben Kiernan*, The Pol Pot Regime, 2nd edition, Chiang Mai 2002 (Silkworm Books); *Michael Vickery*, Cambodia 1975-1982, Chiang Mai 1984 (Silkworm Books); *Craig Etcheson*, The Rise and Demise of Democratic Kampuchea, Boulder 1984 (Westview Press); *Elisabeth Becker*, When the War was Over. Cambodia and the Khmer Rouge Revolution, New York 1986 (Simon & Schuster); *Karl D. Jackson* (ed.), Cambodia 1975-1978. Rendezvous with Death, Princeton 1989 (Princeton University Press); for biographies of Pol Pot see *David Chandler*, Brother Number One. A Political Biography of Pol Pot, Revised Edition, Chiang Mai 2000 (Silkworm Books); *Philip Short*, Pol Pot. The History of a Nightmare, London 2004 (John Murray Publishers).

28 According to one document, the following eight measures were announced by Pol Pot immediately in time of victory: „1. Evacuate all people from all towns. 2. Abolish all markets. 3. Abolish Lon Nol regime currency, and withhold the revolutionary currency that had been printed. 4. Defrock all Buddhist monks, and put them to work growing rice. 5. Execute all leaders of the Lon Nol regime beginning with the top leaders. 6. Establish high-level cooperatives throughout the country, with communal eating. 7. Expel the entire Vietnamese minority population. 8. Dispatch troops to the borders, particularly the Vietnamese border. (cited in *Ben Kiernan*, How Pol Pot came to Power, London 1985 (Verso), p. 415/6).

29 *Chandler* (note 20), p. 262.

30 For a discussion at that time see *David Chandler*, The Constitution of Democratic Kampuchea, 79 Pacific Affairs (1979), p. 505.

31 Quoted in: *Chandler* (note 20), p. 262.

some fundamental rights, among which the "right to work" and the statement that there was to be "absolutely no unemployment" (Article 12) seems most ironical in a state that effectively had become an oversized labour camp.

According to the most common estimate around 1.7 million people lost their lives due to system related reasons under the Khmer Rouge regime[32], with intellectuals of all kind being particularly targeted. Around 14,000 people were tortured and killed in the central prison "S 21" ("Tuol Sleng") alone, without any legal procedure [33].

6. People's Republic of Cambodia

After a short war between Vietnam and Cambodia in 1978/79, Vietnam occupied Cambodia[34] and a Vietnamese backed government took control. Cambodia's development in the decade to follow was not only hampered by structural problems of the political system, but also by international isolation and an ongoing civil war with the Vietnamese backed government on one side and a coalition of resistance forces (Khmer Rouge, Royalists etc.) on the other. Cambodia was seeking its own identity but was still a place of internal and external struggles. A socialist constitution was adopted in 1981[35]. A long preamble emphasized the friendship with Vietnam and Laos, at the same time blaming the United States and China for the developments that lead to the disastrous "Pol Pot – Ieng Sary – Khieu Samphan Clique". The political system was typically socialist in the Soviet and Vietnamese model, with a single party playing a major role. Some fundamental rights and the system of a state run economy were stipulated. Chapter VII of the constitution was dedicated to the "local people's revolutionary committees", whereas chapter VIII defined the role of the judiciary, without stipulating the concept of independence of the courts.

32 The varying estimates are discussed by *Ben Kiernan*, The Demography of Genocide in Southeast Asia, The Death Tolls in Cambodia 1975-79, and East-Timor, 1975-80, 35 Critical Asian Studies 585-597 (2003).

33 The absurdity of S-21 is well documented; see *David Chandler*, Voices from S-21. Terror and History in Pol Pot's Secret Prison, Chiang Mai 2000 (Silkworm Books), updated summary in: Judy Ledgerwood (ed.), Cambodia Emerges from the Past, 2002 (Northern Illinois University), pp. 16-37; for the memories of one of the reportedly seven survivors see *Vann Nath*, A Cambodian Prison Portrait. One Year in Khmer Rouge's S-21, Chiang Mai 1998 (Silkworm Books); for an investigation into the life of S-21 Commander Kaing Guek Eav ("Duch") see *Nic Dunlop*, The Lost Executioner. A Story of the Khmer Rouge, London 2005 (Bloomsbury Publishing).

34 The legality of the Vietnamese action is still under discussion. Whereas the USA, most Western states, China and local neighbours such as Thailand called it an illegal invasion, Vietnam mainly argued that it acted in self defence, but also indicated the notion of a humanitarian intervention. For a justification see *Gary Klintworth*, Vietnam's intervention in Cambodia in international law, Canberra 1989 (Australian Government Publishing Service).

35 For an extensive study on the "people's republic" see *Evan Gottesman*, Cambodia After the Khmer Rouge. Inside the Politics of State Building, New Haven & London 2002 (Yale University Press). This book is indispensable for an advanced understanding of Cambodian politics and law today. Another good and somewhat more favorable account is *Margaret Slocomb*, The People's Republic of Kampuchea. The Revolution after Pol Pot, Chiang Mai 2003 (Silkworm Books).

In reality, the criminal justice system worked with hardly any legal foundations and arbitrary arrests were common during the people's republic time. These were evidenced last but not least by numerous appeals of the then Minister of Justice, to end these practices[36].

7. State of Cambodia

The "winds of change" in the Socialist block resulted in a reduction of Soviet assistance for Vietnam in the second half of the 1980s, which was then not able to sustain its intensive engagement in Cambodia. Prime Minister Hun Sen and Prince Sihanouk started to engage in negotiations. Attempts at constitutional reform culminated in a fundamental amendment to the constitution in 1989. The abolishment of socialism was symbolized in the change of the state's name to "State of Cambodia", leaving a decade of being a "People's Republic" behind. The state was once again re-named, this time to "State of Cambodia". The peace process and attempts to overcome international isolation culminated in the Paris Agreements of 1991, a comprehensive international treaty that was designed to settle internal conflict and external interference in Cambodia[37].

Part of the Paris Agreements was the installation of a "United Nations Transitional Authority in Cambodia", widely know by its acronym UNTAC. During its eighteen month's mandate, given by the UN-Security Council[38], UNTAC employed up to 22,000 foreign personnel in Cambodia and consumed a budget of around 1.6 billion dollars, the largest and most expensive UN peace building mission until that time. UNTAC's main responsibility was to provide a neutral environment for free and fair elections in 1993. Legally the United Nations obtained supreme authority in Cambodia during the mission of UNTAC. The government of the State of Cambodia (SOC) continued to be in control of the country. Whereas UNTAC was not able to prevent the re-emergence of the Khmer Rouge insurgency in Cambodia[39], and produced a range of serious problems for Cambodian

36 See *Gottesman* (note 35), p. 255, citing Minister of Justice Uk Bunchheuan with a statement made in 1987: "We should impose some punishment on people who hold power and have violated the law. Now, we take the rights of the citizens and the lives of the citizens as pieces in a game for us all to play. We want to arrest people and do whatever we want to them. If we want to release them, we can. If not, we can." Reports about arbitrary arrests were also published by Amnesty International etc.

37 See generally *Steven Ratner*, The Cambodia Settlement Agreements, 87 AJIL 1-41 (1993).

38 Resolution 745 of 1992.

39 For a critical assessment see for example *Serge Thion*, Watching Cambodia, Bangkok 1993 (White Lotus), Chapter 10 ("United Nations Traditional Apathy in Cambodia").

society, it was somewhat successful in the sense that arguably free and fair elections to a Constituent Assembly were held in 1993[40]. The balance sheet might be mixed, but UNTAC certainly had better results than some other UN missions that would follow in the 1990s[41].

III. The Making and Development of the Constitution

1. The Paris Agreements

Constitution making in Cambodia was requested to be a comparatively quick affair in 1993 as the Paris Agreements required adoption of the constitution within three months after the election of the Constitutional Assembly[42]. The main direction of a Cambodian Constitution was already given as well. The Paris Agreements provided guidance in Annex 5, basically prescribing the supremacy of the constitution and a concept of liberal, human rights and rule of law based democracy:

> *"(1.) The constitution will be the supreme court of the land. It may be amended only by a designated process involving legislative approval, popular referendum, or both. (2.) Cambodia's tragic recent history requires special measures to assure the protection of human rights. Therefore, the constitution will contain a declaration of fundamental rights, including the rights to life, personal liberty, security, freedom of movement, freedom of religion, assembly and association including political parties and trade unions, due process and equality before the law, protection from arbitrary deprivation of property or deprivation of private property without compensation, and freedom from racial, ethnic, religious or sexual discrimination. It will prohibit the retroactive application*

40 The UN Security Council endorsed the elections as basically free and fair. For an analysis of the mission see e.g. *Trevor Findlay*, Cambodia: The Legacy and Lessons of UNTAC, New York 1995 (Oxford University Press); *Michael W. Doyle*, UN Peacekeeping in Cambodia: UNTAC's Civil Mandate, Boulder 1995; *Lucy Keller*, UNTAC in Cambodia – from Occupation, Civil War and Genocide to Peace, 9 Max Planck United Nations Yearbook 127-178 (2005).

41 For general analysis on United Nations Peace Building and Transitional Authority Activities with multiple references to Cambodia see e.g. *Michael W. Doyle / Nicholas Sambanis*, Making War & Building Peace. United Nations Peace Operations, Princeton 2006 (Princeton University Press) and *David Chesterman*, You, The People. The United Nations, Transitional Administration, and State Building, Oxford 2004 (Oxford University Press).

42 For descriptions of the process see *Marks* (note 24), pp. 56-64; *MacAlister Brown / Joseph J. Zasloff*, Cambodia. Confounds of the Peacemakers 1979-1998, Ithaca & London 1998 (Cornell University Press), p. 199; *Raoul Jennar*, International Co-operation in the Drafting of the 1993 Constitution, in: Faculty of Law and Economics / Nagoya University, International Symposium "Constitutionalism in Cambodia", Phnom Penh 2003, pp. 27-36 *Say Bory*, Constitutional Changes in Cambodia in the context of international relations, presentation at the Asian Forum of Constitutional Law, Nagoya, September 22/23.

of criminal law. The declaration will be consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.
(3.) The constitution will declare Cambodia's status as a sovereign, independent and neutral State, and the national unity of the Cambodian people.
(4.) The constitution will state that Cambodia will follow a system of liberal democracy, on the basis of pluralism. It will provide for periodic and genuine elections. It will provide for the right to vote and to be elected by universal and equal suffrage. It will provide for voting by secret ballot, with a requirement that electoral procedures provide a full and fair opportunity to organize and participate in the electoral process.
(5.) An independent judiciary will be established, empowered to enforce the rights provided under the constitution.
(6.) The constitution will be adopted by a two-thirds majority of the members of the constituent assembly."

These benchmarks were drawn from the Namibian Constitution-Making in 1982 and were also used in Bosnia Herzegovina in the beginning of the 1990's[43]. It seems therefore that these criteria are emerging as the necessary nucleus of a modern constitutional state. The Paris Agreements are part of a general development towards a right to good governance and democracy[44]. The constitution making process in post-conflict countries is immediately affected by this development, if it takes place in the context of United Nation's involvement. Cambodia is a remarkable example of this phenomenon, given the fact that a range of parties to the Paris Agreements do not fulfil the aforementioned criteria for a constitution in their own systems.

2. Constitution Making

The elections for the Constituent Assembly had provided the Royalist FUNCINPEC Party, under Prince Norodom Ranaridhh (a son of former King Sihanouk), with a majority, followed by the Cambodian People's Party (CPP) of Prime Minister Hun Sen as the second strongest force. As CPP controlled basically all state institutions and was not prepared to give up control, difficult negotiations were predictable. The relevant draft for a constitution was in the end not prepared by the Constitutional Assembly, but by a small committee consisting of twelve members appointed by the Assembly[45].

43 See *Ratner* (note 37), p. 27.
44 See the groundbreaking article by *Thomas M. Franck*, The Emerging Right to Democratic Governance, 86 AJIL 46, 90-91 (1992); comprehensively *Gregory H. Fox / Brad R. Roth* (eds.), Democratic Governance and International Law, Cambridge 2000 (Cambridge University Press).
45 Six FUNCINPEC, five CPP, one BLDP (Buddhist Liberal Democratic Party).

Despite massive criticism by the media and NGOs about the secrecy surrounding the deliberations[46] they remained widely confidential. The committee had no spokesperson and members were not allowed to speak publicly about the process. Even the other members of the Constituent Assembly were not informed about the drafting process in detail! Foreign influence was blocked from the beginning of the work of the committee[47] and the draft for a "bill of rights" prepared by the UNTAC Human Rights Component was not even disseminated to the members of the Constitutional Assembly[48]. In the end there were two options, one republican (seemingly favoured by CPP) and one monarchic (seemingly favoured by FUNCINPEC)[49]. Hun Sen and Ranaridhh travelled to consult with former King Sihanouk in Pyong Yang (North Korea) and afterwards a draft constitution, reviving a constitutional monarchy, was put for open debate in the National Assembly. Within five days of discussion (September 15 to 19, 1993) this constitution was adopted with 113 votes in favour, 5 against and 2 abstentions.

3. Constitutional Amendments

Since 1993 the Constitution has been amended repeatedly. A first amendment in 1994 related to Article 28, allowing the king to delegate his duty of signing laws, to the acting head of state in case of illness and hospitalization abroad. The most important amendment was made in 1999, when, in order to overcome the difficulties after the elections of 1998, a Senate was created. Another amendment in 2001 affected some provisions about the king. In 2004, again ending a post-election-stalemate, an "additional law to the Constitution" was adopted which allows the amendment of constitutional rules after elections outside the procedure of constitutional amendment[50]. This law did not amend the constitutional text itself, but amended it in substance. In 2005, mainly in reaction to an ongoing boycott of parliament sessions by the opposition, quorums for parliament sessions were lowered, and in 2006 the unusual two-thirds majority for the parliamentary confidence vote on the government was abolished in favour of the internationally more "normal" absolute ("fifty plus one") majority principle. Finally, in January 2008 the provisions on the administration levels (Articles 145, 146) were slightly amended.

46 Phnom Penh Post, August 13-26, 1993 and August 27-September 9, 1993.

47 *Brown/Zasloff* (note 42), p. 195, suggest, however, that a draft of French professor Claude Gilles Gour, who was working in behalf of Norodom Ranaridhh, was most close to the constitution finally adopted.

48 *Brown/Zasloff* (note 42), p. 193-194.

49 *Marks* (note 24), 63; on the Monarchy-Republic-question see also *Brown/Zasloff* (note 42), pp. 197-199.

50 Law of July 8, 2004. Whereas originally such amendments needed at least a two/third majority in parliament they can, after amendment of the law in 2006, now be conducted with the absolute majority of votes.

The number of amendments of the constitution since its adoption in 1993 (seven including the additional law) is not exceptionally high by international standards. Constitutions that are taken seriously occasionally need amendments and there is no general rule that constitutions should be amended as rarely as possible. It is not so much the number of amendments which seem problematic in Cambodia, but the occasions and their means of adoption. Each of the amendments, as well as the "additional law", were more or less a spontaneous reaction to political crisis or situations[51]. In no case has there been any public debate. Furthermore, there has not been and there is not currently, any substantial debate about constitutional reform in Cambodia.

IV. General Overview and Characterisation

1. Core Elements of the Constitution

The Constitution, as it stands in early 2008, is based on the principles of democracy, fundamental rights, rule of law and separation of power[52]. Although details are not always carefully drafted and therefore numerous uncertainties in interpretation remain[53], the constitution undoubtedly follows the concept of a liberal democracy. It is influenced not only by the benchmarks of the Paris Agreements, but also by historical constitutions in Cambodia (particularly the 1947 monarchic Constitution as well as the immediate precedent of 1989) and other sources. Despite certain foreign influences (constitutions as diverse as those of Japan, France, Germany, the United States, the Philippines, Thailand and even Zimbabwe were reportedly taken into account[54]), the constitution has been rightly described as being "distinctly Cambodian"[55].

51 See also *Say Bory* (note 42), p. 8.

52 For overviews on the Cambodian Constitution see *Marks* (note 24); *Maurice Gaillard* (dir.), Droit Constitutionel Cambodgien, Phnom Penh 2005 (Edition Funan); *Jörg Menzel*, Cambodia, in: Gerhard Robbers (ed.), Encyclopedia of World Constitutions, Vol. I, New York 2006 (Facts on File), pp. 150-156; *H. Suresh*, Comments on the Constitution of the Kingdom of Cambodia, Legal Reforms on Cambodia Series. Monograph No. 1, Hong Kong 2001; a basic textbook is *Matthew Rendall*, The Constitution and Government of Cambodia, Phnom Penh 1999.

53 It should be noted that, from a comparative perspective, technical weaknesses in constitutions are fairly normal around the world, as constitutions are often drafted under extreme time pressure and as they often contain vague political compromises on controversial issues. Some imprecision might not be negative at all, as it keeps the constitution open for a dynamic interpretation in time.

54 See *Say Bory*, (note 42), p. 3. Professor Say Bory was involved in the drafting process.

55 See *Brown/Zasloff* (note 42), p. 200, citing two Louis Aucoin and Dolores Donovan, two American law professors who served as advisors in Cambodia during that time.

From a comparative perspective the Cambodian Constitution is medium sized with 158 fairly short articles in sixteen chapters, encompassing the fundamentals of the state, institutions and fundamental rights, and prescribes the major policies[56]. The most remarkable concept of the original version of the constitution, from a comparative constitutional law perspective, was the establishment of a two-third majority for a vote of confidence in favour of the incoming Prime Minister, which gave the constitution a somewhat "consensual" flavour. As mentioned, this peculiarity was abandoned in 2006.

2. The Concept of a Rigid Constitution and the "Additional Constitution"

The Cambodian Constitution is a normative constitution from its textual concept. Article 150 stipulates the supremacy of the constitution in plain words. Every law and every state action shall conform to the provisions of the constitution. A Constitutional Council is established to ensure that this supremacy prevails in practice. The constitution itself tries to put barriers to its amendments by prohibiting amendments "affecting the system of liberal multi-party democracy and the regime of Constitutional Monarchy" (Article 153)[57], thereby also describing a set of core principles of this constitution.

The rules of constitutional amendment were significantly compromised, however, when in 2004 an additional law to the constitution was adopted, which, outside the procedure for constitutional amendment, opened the door for de facto amendments of the constitution after National Assembly elections, by Members of the new National Assembly. The law was, despite strong arguments suggesting unconstitutionality, not declared void by the Constitutional Council, which argued that after its adoption it had constitutional rank and was not subject to control by the Constitutional Council[58]. Its irregularity has been further increased by an amendment of the law adopted in 2006, which allows for such de facto amendments after elections with an absolute majority of votes (instead of the two-thirds normally necessary for constitutional amendments). Because of the "additional constitution", the rigidity of the original constitution is now to a certain extent periodically suspended after national elections.

56 The chapters are as follows: I. Sovereignty; II. The King; III. The Rights and Obligations of Khmer Citizens; IV. On Policy; V. Economy; VI. Education, Culture and Social Affairs; VII. The National Assembly; VIII. The Senate; IX. The Assembly and the Senate; X. The Royal Government; XI. The Judiciary; XII. The Constitutional Council; XIII. The Administration; XIV. The National Congress; XV. Effects, Revisions and Amendments of the Constitution; XVI. Transitional Provisions.

57 Similar "eternity clauses" can be found in other constitutions around the world, particularly in countries with experiences of cruel dictatorship, see e.g. Article 79 (3) of the German Constitution.

58 Decision of September 2, 2004, Dec. No. 060/002/2004. The case might be regarded as a strong reminder about the limits of constitutionalism in current Cambodia, but at the same time it seems remarkable that the "additional law-solution", as doubtful from a constitutional perspective as it may be, is still based on an attempt to formally legitimize the procedure, preferring a doubtful legal construction over open breach of the constitution on a kind of "emergency" argument.

V. System of Government

The institutional system of the Cambodian Constitution is quite standard for a bi-cameral constitutional monarchy nowadays: the King is Head of State with mainly symbolic functions; the Government (Council of Ministers) is headed by a Prime Minister; legislation lies with Parliament, which consists of a National Assembly and a Senate; the constitutionality of laws shall be guaranteed by a Constitutional Council. Apart from these "standard" institutions the Constitution provides for two kinds of congresses. The "Congress" is the common gathering of National Assembly and Senate and it shall "resolve important questions of the nation" (Arts. 116-117). A "National Congress" has Khmer citizens as participants and it shall adopt recommendations for consideration by the National Assembly and Senate (Arts. 147-149). For both congresses no implementing legislation has been adopted and none have been put into practice yet[59]. Whereas these congresses can therefore be neglected for the time being and the Constitutional Council will be discussed in the next chapter, some remarks may be made here regarding king, government and parliament.

1. Monarchy

As mentioned above, re-establishment of the monarchy seemingly was among the controversial topics during the making of the constitution. The sensitivity of the issue is revealed by the fact that not only is the principle of "constitutional monarchy" immune to constitutional amendment (Article 153), but also Article 7 according to which "the king shall reign but not govern" (Art. 17). Despite these "eternity-clauses" protecting the monarchy (and limiting it at the same time) there was from the beginning occasional speculation on whether the monarchy would be upheld after the end of the reign of King Sihanouk. But when Sihanouk, in 2004, declared his definite wish to resign, another problem was on the table first. The constitution stipulates that the office of the king is for a lifetime (Article 7 (2)) and does not mention the possibility of resignation. The Prime Minister accordingly first stated that King Sihanouk legally could not retire, but later changed his mind and King Sihamoni (a son of King Sihanouk and Queen Monique) was crowned in a three day long ceremony October 28-30, 2004. Tensions between the throne and the office of the Prime Minister seemingly have become less since then, as the new king adheres more strictly to a principle of non-interference in politics.

59 In the case of the National Congress this seems to be a violation of the Constitution, as it clearly provides that this Congress shall meet on a yearly basis. It seems that these are simply "forgotten" institutions of the constitution.

Constitutionally, the king has probably more rights than the general clause "the king of Cambodia reigns but does not govern" suggests. One of the powers which are of significant political relevance is the right to grant amnesty (Article 27) and currently there is an uncertainty and controversy on whether the king is free in this decision to grant amnesty or if he can only act on the recommendation of the government[60].

2. Government

The status and function of the Royal Government ("Council of Ministers") resembles that of governments in parliamentary systems around the globe, if one simply bases the analyses on the constitutional text. The candidate for the office of Prime Minister, chosen by the chairman of the National Assembly from the winning party, as well as his candidates for the government, requires a vote of confidence from the National Assembly. The constitution does not have much to say about the government: the chapter on government contains only nine articles, compared to twenty-four articles in the chapter regarding the king. The particular strength of the Office of the Prime Minister is also not apparent from the constitutional provisions, but it has a clear legal basis in the Law on the Organization and Functioning of the Council of Ministers (1994), which stipulates in Article 9 that the Prime Minister "manages and gives out commands on all activities of the executive in all fields". Apart from this law it is mainly a question of the political culture and present political situation in Cambodia, in which current Prime Minister Hun Sen is commonly labelled as the "strong man" of the country[61], a "title" which he has occasionally personally endorsed[62]. This strongman-position is not only intra-governmental, but also applies to the other constitutional institutions. Generally the government is comparatively strong as many laws regulating their conduct are either not in place. Legislation itself is proposed almost exclusively by the government and parliament rarely questions, rejects or modifies proposed legislation in the process. Judicial control of government action is also a theoretical concept.

60 This discussion is interesting as it offers insights into the nature of the criminal justice system itself: As the constitution does not mention any right of the government / prime minister to substantially decide on amnesties, such a right might only derive from the provision that the king shall not "govern". Qualifying amnesties as part of "governing" seems indeed to be quite realistic in Cambodia, given the fact that many politicians in the country have been sentenced and subsequently pardoned in recent history for reasons that critics qualified as "political". Such a line of argument seems to contradict, however, to the concept of a non political criminal justice and judicial system as stipulated in the constitution.

61 For criticism see e.g. *Duncan McGargo*, Cambodia: Getting Away With Authoritarianism?, 16 Journal of Democracy 98-112 (2005); *Steve Heder*, Hun Sen's Consolidation. Death or Beginning of Reform?, Southeast Asian Affairs 2006, pp. 113-131.

62 See *Harish C. Mehta / Julie B. Mehta*, Hun Sen, Strongman of Cambodia, Singapore 1999 (Graham Brash), p. 261.

There is no regulation and no control whatsoever on the size of the government. Cabinet had around 260 members after the establishment of a new government in 2004, making it one of the biggest cabinets in the world. In addition to the Prime Minister, Deputy Prime Ministers, Senior Ministers, Ministers and Secretaries of States, there are, according to some estimates, around a thousand governmental Advisors, which often equal in rank with Ministers. Administratively, the country consists of provinces, districts, communes and villages. Commune councils are directly elected by the people since the first commune elections in 2002. Officials on the other levels have traditionally been appointed, but according to current draft legislation (as of February 2008) there shall be indirectly elected councils on the district and province levels in the future. Decentralization and public service reform are officially top priorities in the field of administrative reform[63].

3. Parliament

The bi-cameral Cambodian parliament consists of a National Assembly and Senate[64]. The current 123 members of the National Assembly are elected in a national election for a five year mandate, whereas the current 61 Senators are mostly indirectly elected by Commune Council and National Assembly members for a six year mandate. Candidates are appointed exclusively by political parties and although the constitution promises freedom of individual mandate, election laws for the National Assembly and Senate stipulate loss of mandate in the case of loss of party membership. This is particularly significant as party structures in Cambodia are traditionally fairly autocratic with no available remedies against expulsion under the Law on Political Parties[65]. Repeatedly there have been expulsions of members from the National Assembly as well as from the Senate[66]. Fur-

63 On Decentralization see generally *Caroline Rusten / Kim Sedara / Eng Netra / Pak Kimchoueun*, The Challenges of Decentralisation Design in Cambodia, Phnom Penh 2004 (Cambodia Development Resource Institute*); Robert B. Oberndorf*, Law Harmonization in Relation to the Decentralisation Process in Cambodia, Phnom Penh 2004 (Cambodia Development Resource Institute).

64 The Law of Parliament consists mainly of the respective constitutional provisions, election laws for National Assembly and Senate, Laws on the Statute of its members and the International Regulations of both houses.

65 The Law on Political Parties (1997) requests the political parties to establish by-laws which, inter alia, shall contain rules regarding admission and expulsion of members (Article 10 (a)(4)), but no grounds for expulsion are listed, nor are there remedies.

66 In practice, members of the National Assembly and the Senate have repeatedly been expelled from their parties and removed from their mandates over the years. The most famous case was the removal of former FUNCINPEC Minister of Finance, Sam Rainsy, from the National Assembly in 1995. Three CPP Senators lost their membership in the Senate after expulsion from their political party in 2001, after the Senate had, with a majority, rejected the controversial law on Aggravating Circumstances for Felonies. Whereas the legality of the Senators' removal at the time was controversial, it is now clarified in the election laws for National Assembly and Senate that loss of party membership implicates loss of mandate as a member of parliament.

thermore, immunity of members of the National Assembly has been lifted on a number of occasions, partly allowing for criminal prosecutions that were labelled as politically motivated by critics.

Laws can be proposed by parliament, but in practice nearly all laws are drafted within the government and then sent to parliament for adoption. Draft laws are first discussed and adopted in the National Assembly and are then reviewed by the Senate within (normally) four weeks. The Senate cannot finally veto any law, but only send it back to the National Assembly with recommendations, which can than either change the draft law or simply overrule the Senate's objections. National Assembly and Senate have some legal possibilities to monitor government activities and they are involved in some appointments of other public officials. National Assembly and Senate have viarious (currently nine) commissions as well as influential permanent committees. The President of the Senate serves as Acting Head of State in case of absence or illness of the king.

Overall there is widespread opinion (even among the parliamentarians themselves) that the functions of parliament (National Assembly and Senate alike) are not fully developed yet in substance[67].

VI. Fundamental Rights

1. The Constitutional Concept of Fundamental Rights

As already mentioned, fundamental rights play a prominent role in the constitution. The constitutional chapter on rights starts with an embracement of the international human rights in Article 31 (1):

> *"The Kingdom of Cambodia recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women's and children's rights. "*

The precise legal relevance of this clause is subject to considerable uncertainty. Whereas human rights organisations are mostly of the opinion that this provision lifts human rights treaties into the rank of constitutional law, the Cambodian Government has been inconsistent with its statements, by sometimes insisting on the necessity for a transformation by national legislation (dualist theory), and sometimes recommending immediate application by courts. The Cambodian Constitutional Council, in a decision of June 19, 2007, has stipulated that the international conventions ratified by Cambodia (like the Child Rights Convention) are to be taken into account when applying national law [68].

67 See also *Hor Peng*, The Reform of Parliament in Cambodia: Towards Effective Working Parliament in Terms of Strong Representation, PhD study (unpublished), Nagoya 2005.

68 On this decision see supra VII.

The fundamental rights granted by the Cambodian Constitution itself mostly resemble a traditional rights catalogue, mixing liberal, political, economic, social and cultural rights. The wording is an obvious mixture of provisions of earlier Cambodian constitutions and modern influences. Part of the Right to Life is the abolishment of the death penalty (Article 32), which is remarkable in the Southeast Asian context where the death penalty is still applied (but which had already been introduced by the 1989 constitutional amendments[69]). An obvious deficit from a general perspective is that many fundamental rights seem only to be granted to "Khmer Citizens" and there are indications that the choice of words is designed to allow discrimination particularly of people of Vietnamese descent[70]. Apart from this it has been criticised that the fundamental rights catalogue would emphasize the limits of fundamental freedoms too much. In the very beginning of the chapter on fundamental rights (Art. 31 (2)) we find a general limitation:

> *"The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedoms of others. The exercise of such rights and freedoms shall be in accordance with the law."*

Seemingly broad restrictions are also made possible in some specific provisions. Particular wide is Article 41 (1):

> *"Khmer citizens shall have freedom of expression of their ideas, freedom of information, freedom of publication and freedom of assembly. No one shall exercise these rights to infringe upon the honour of others, or to affect the good customs of society, public order and national security."*

Although some restrictions of fundamental freedoms in general and the freedom of expression are inevitable in any society, one might argue that such restrictions, as in Article 40, are broad by international standards[71]. They are, however, in line with a certain tradition of Southeast Asian constitutional thinking, which emphasizes community obligations and suggests that individual freedoms (particularly political freedoms) can be effectively traded off against economic and social development.

In this context of Asian (Southeast-Asian) values it seems consequential that the whole chapter containing fundamental rights is titled "The Rights and Obligations of Khmer Citizens" and that it contains a range of obligations of citizens as well as rights (Articles 47, 49, 50). Despite such particularities, it is widely acknowledged from an overall perspective

69 See Constitution of the State of Cambodia (1989), Article 35 (9).

70 See *Marks* (note 24), p. 70-73. Earlier English translations suggest that even the right to life, personal freedom and security (Article 32 [1]) are only attributed to Khmer Citizens, but this is a mistake in translation as the Khmer version speaks of "everybody" insofar.

71 Compare also the ICCPR, Article 19, allowing restrictions on the freedom of opinion and expression if they are "provided by law and are necessary (a) for the respect of the rights or reputation of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.

that the catalogue on civil rights is in line with standards not only in the Asian world, but also from a Western perspective[72]. In parts, the agenda is decisively modern and in line with modern rights language. Women's and children's rights are properly stipulated as is protection from exploitation at work etc. Environmental rights are still missing, however, maybe because environmental degradation was not as visible as a problem in the Cambodia of 1993, as it is today.

2. Fundamental Rights and State Practice

Cambodia's problem in the sphere of fundamental rights is not located on the paper of the constitution, but in the political and legal reality. International organisations, as well as national non-governmental organisations, have continuously criticised the Cambodian human rights record since the adoption of the constitution[73]. A culture of human rights seems not to be established yet[74]. The Cambodian Government unsurprisingly does not accept that criticism, partly claiming that positive developments are not sufficiently taken into account by the numerous reports, and partly insisting that progress takes time and Cambodia is still recovering from a decades long conflict situation. In the case of press freedom, it also claims that freedom in Cambodia is more advanced than most Southeast Asian countries. However, the list of problems is long. With regard to the media it cannot be ignored, for example, that critical and independent reporting has no place in Cambodian Television yet. The constitutionally guaranteed freedom of assembly and demonstration has been largely suspended for years after riots against the Thai Embassy following accusations that a young female Thai singer had insulted Cambodians[75]. Excessive use of force by police, violations of the rights of the accused in criminal procedure and inhuman prison conditions, are all well reported. Domestic violence, particularly against women, is an ongoing problem despite the adoption of a special law and children's rights have been widely disregarded in criminal procedure as has their treatment in prison[76]. Problems of forced land eviction have been in the focus of national and international hu-

72 *Fernando* (note 3), p. 494.

73 For numerous reports see the websites of the Cambodian Office of the Office of the United Nations High Commissioner for Human Rights (http://cambodia.ohchr.org), where yearly general reports as well as numerous thematic reports and statements can be accessed. Further information is available e.g. at the websites of the State Department of the United States, Amnesty International, Human Rights Watch. Important sources of information are also the regular reports of national human rights NGOs like ADHOC (http://www.adhoc-chra.org) and LICHADO (http://www.lichadho.org).

74 See also *Terence Duffy*, Towards a Culture of Human Rights in Cambodia, 16 Human Rights Quarterly 82-105 (1994).

75 The constitutionality of the pre-constitutional and Law on Demonstrations (1991) has been confirmed by the Constitutional Council in its decision of October 4, 2004 (Case No. 062/004/2004). The court did not address, however, the fact that the practice of the authorities does evidently not reflect the state of the law, as it has to be interpreted in the light of the constitution.

76 On prison conditions generally see LICHADO, Prison Conditions in Cambodia 2005 & 2006: One day in the life … (January 2007).

man rights organizations for years[77]. Social rights promised by the constitution still are in sharp conflict with the reality of one of the lowest life expectancies in the region, insufficient healthcare, low quality educational facilities etc. This problem, however, is hardly specific to Cambodia, but is shared by nearly all developing countries which endeavour to guarantee social rights in their constitutions.

3. Institutions of Fundamental Rights Protection

From an institutional perspective the protection of fundamental rights is still in its infancy. Most effective for the time being is the work of NGOs and international organisations. Cambodian Courts, on the other hand, rarely take rights into account. In the National Assembly and the Senate there are commissions that can be petitioned by people with human rights complaints, but government ministries often do not even answer requests from these commissions for explanation about certain events. The Prime Minister has appointed a governmental human rights advisor, but there is no *independent* human rights commission, as in a number of other ASEAN states. Cambodia has also not signed the first additional protocol to the ICCPR and therefore individual complaints are impossible at an international level for the time being.

VII. Judicial Review

1. The Constitutional Council as a Constitutional Court

As mentioned earlier the Constitution clearly stipulates the supremacy of the constitution. The Constitutional Council[78] is the main organ of judicial review. The Constitutional Council is basically an institution inspired by the French constitutional tradition, but also takes up elements of a constitutional court. The Constitution seems to borrow from the Constitution of 1972. However, the "Constitutional Court" stipulated there was much less a court than today's "Constitutional Council". And whereas the Constitutional Court under the 1972 Constitution actually never materialized, the establishment of the current Constitutional Council finally took place five years after adoption of the constitution (raising the question if laws adopted in between were constitutional at all[79]). The Con-

77 See most recently *Amnesty International*, Rights Razed. Forzed Evictions in Cambodia, February 11, 2008.

78 The official website of the Constitutional Council with decisions in Khmer, French and English (from 2004) is http://www.ccc.gov.kh/english/history.php. For an early French language analysis on the Constitutional Council see also *Jeanne Page*, Le Conseil Constitutionnel du Cambodge, Annuaire international de justice constitutionnel, Vol. 17 (2001), p. 75.

79 See *Matthew Granger*, King's Advisor Bemoans Lack of Constitutional Council, Phnom Penh Post, October 6, 1998.

stitutional Council has nine members, who are regularly appointed for a nine year term. Constitutional Council members do not need to have a legal background, but require a high level qualification. There is a minimum age of 45 years but no maximum age[80]. The competences of the court are enumerated in Articles 136, 140 and 141. The Constitutional Council is responsible for deciding on:

- disputes on the election of the members of the National Assembly and Senate (Art. 136 (2)),
- the constitutionality of the internal regulations of the National Assembly and the Senate as well as other organisational laws before promulgation (Article 140 (2)),
- the constitutionality of other laws already adopted by parliament but before promulgation on the request of the King, the Prime Minister, the President of the National Assembly or the Senate, 1/10 of the members of the National Assembly or ¼ of the members of the Senate,
- the constitutionality of laws after promulgation on the request of the King, the Prime Minister, the President of the National Assembly or the Senate, 1/10 of the members of the National Assembly or ¼ of the members of the Senate or the courts,
- the decision of the Ministry of Interior not to register a political party[81].

Furthermore,

- the Constitutional Council shall be consulted by the king on all proposals to amend the constitution (Article 143) and
- it gives advisory opinions based on its competence to interpret the constitution (Article 136 (1))[82].

The overview clearly shows that the Cambodian Constitutional Council combines functions of the French model of a constitutional council with those of real constitutional courts[83]. It makes ex ante and ex post control of laws possible and even allows courts

80 In summer 2007, one member retired at the remarkable age of 103 years!

81 Law on Political Parties (1997), Article 25.

82 One might doubt that Article 136 (1) of the Constitution really provides jurisdiction. It seems more appropriate to understand this provision as an introductory statement on the general function of Council.

83 For qualification as a constitutional court see *Graham Hassall / Cheryl Saunders*, Asia-Pacific Constitutional Systems, Cambridge 2002 (Cambridge University Press), p. 179.

to refer cases to the Constitutional Council if the constitutionality of a law is in doubt[84]. This function of checking laws after adoption and on occasion of their application in the courts, clearly exceeds the French model of a Constitutional Council.

2. Towards a Decade of Jurisprudence

From a practical point of view, cases about election dispute have dominated the Council's work, but the right to make a request to the Constitutional Council has also been used repeatedly by Presidents of the National Assembly and Senate, as well as groups of parliamentarians. It seems fair to assess that the Constitutional Council has been careful not to provoke the government so far[85]. Only rarely has it declared provisions in a law to be unconstitutional[86], and in no case has it challenged the government on a politically sensitive issue. The ascetic style of drafting decisions, hardly offering any reasoning but only presenting results, contributes to the insignificant impact it has had so far on legal development in Cambodia.

The "visibility" of the Constitutional Council is also reduced by having no dissenting votes and its members are not allowed to speak publicly about cases. This in itself might not be a negative concept, given the fact that the court still has to establish itself as an authority. Only in a very few cases has the Constitutional Council delivered a thorough reasoning. One such case was an election control case of 1998[87], another one was in respect of the Law on Communal Administration[88]. In 2006, a law on the status of members of the National Assembly, which seems to contain a significant restriction on parliamentary immunity[89], was declared constitutional on the basis that the law is only supposed

84 The same concept is to be found in Germany, see Article 100 (1) of the German Constitution. The law on the Constitutional Council has limited this right to the Supreme Court, however, it is a restriction which seems questionable as the constitution simply states that "the courts" may refer cases to the Constitutional Council. Until now no cases have yet been referred by the courts to the Constitutional Council. An interesting question could arise if the constitutionality of Cambodian laws becomes a topic at the Extraordinary Chambers in the Courts of Cambodia (Khmer Rouge Tribunal), see *Scott Worden*, An Anatomy of the Extraordinary Chambers, in: Jaya Ramji and Beth van Schaack (eds.), Bringing the Khmer Rouge to Justice, Lewiston 2005 (Edwin Mellen Press), pp. 171-220, at 204-205.

85 UN-Special Representative on Human Rights of December 2006 (http://cambodia.ohchr.org), paragraph 22.

86 See Decision of May 28, 1999 (Dec. No. 07/99), regarding a provision in the law on the formation of the Minister of Womens' and Veterans' Affairs that required the minister to be a woman, decisions of January 28, 2000 (Dec. No. 035/001/2000) and of August 28, 2000 (Dec. No. 037/003/2000), regarding the establishment of the National Audit Authority; Decision of February 12, 2001 (Dec. No. 040/002/2001), regarding the unconstitutionality of a death penalty in the Law on the Extraordinary Chambers.

87 Decision of July, 17, 1998 (Docket No. 03).

88 Decision of January, 15, 2003 (Dec. No. 050/001/2003).

89 Art. 5 of the Law on the Status of the Members of the National Assembly: "The members of the National Assembly shall not use their immunity to violate the credit of other individuals, good custom of society, public order, and national security."

to raise awareness of the parliamentarians, but that they would not be deprived of any constitutionally guaranteed immunity[90]. It should be acknowledged that this decision at least indicates some willingness to enforce constitutional values[91].

3. The 2007 Decision on Children's Rights

On July 10, 2007, the Constitutional Council has, again in only a few words, stated clearly that judges have to consider not only the constitution, but also international human rights treaties ratified by Cambodia when applying the law[92]. The decision has been applauded by the UN Human Rights watchdog in Cambodia as well as by local NGOs. It is indeed "good news" in the sense that it clarifies a most relevant problem in Cambodian law, which seemingly disallowed reduced penalties for children in case of certain felonies. At the same time, the case illustrates the obvious carefulness of the Constitutional Council. The decision is short and vague. The whole reasoning is as follows:

"The Constitutional Council …

- *Understands that [although] article 8 modifies article 70*[93] *of UNTAC law, it does not affect [undermine] the rights and interests of children. The provision of article 8 of the law on aggravating circumstances above is not unconstitutional.*
- *Understands that at case trial, in principle, a judge shall not only rely on article 8 of the law on aggravating circumstances, but also relies on law. The term law here refers to the national law including the Constitution which is the supreme law and other applicable laws as well as the international conventions that Cambodia has recognized, especially the Convention on the Rights of the Child. …"*

These few sentences constitute what is currently considered the most important statement of the Constitutional Council from a human rights perspective. The approach seems to be similar to the decision in the case of immunity of members of the National Assembly of 2006. The law is declared constitutional, but the reason for unconstitutionality is removed by interpretation. In fact, the Constitutional Council seems to practice what in Germany is called interpretation in conformity with the constitution[94]. The lack of clarity in the language of the decision makes it difficult, however, to be sure about the precise content of the decision itself.

90 Decision of November, 10, 2006 (Dec. No. 082/009/2006).
91 But compare the aforementioned OHCHR-Report, in which the decision is simply mentioned as an example for the reluctance of the Constitutional Council to challenge the government
92 Decision of July 10, 2007 (Dec. No. 092/003/2007); for an unofficial English translation see OHCHR Cambodia, Public Statement of July 25, 2007 (http://cambodia.ohchr.org).
93 The number seems to be mistaken, as Article 68 is the relevant provision.
94 See *Donald P. Kommers*, The Constitutional Jurisprudence of the Federal Republic of Germany, 2nd edition, Durham and London 1997 (Duke University Press), p. 51.

VIII. Legal System and the Rule of Law

1. Cambodia and the Global Legal Traditions

The Cambodian constitution does not make any declaration about the legal system[95], nor about its guiding principle, nor about the religious or indigenous legal systems within the country. From the perspective of the world's legal traditions, it is quite clear that Cambodian law has a range of sources. Typically it is characterised as a civil law country as a consequence of the French influences in the late 19th and the first half of the 20th century[96]. This does not mean, however, that other traditions have not had their impact on current Cambodian law. Many other former colonies may be seen as a melting pot of legal traditions[97] and Cambodia is further evidence for the argument that the simple common law – civil law dichotomy is not universally applicable. The socialist concept of law officially dominated in different forms from 1975 to at least 1989 and is also still present in the current system[98]. Concepts from common law countries began to be influential in the 1990s, although they have not had much impact on the system as such[99]. Last but not least, "Asian" influences and more specifically "Khmer customs" should not be forgotten as an influential factor, although it is difficult to identify them in positive law apart from the general invocations by the constitution. Within the dominating civil law tradition, there are again various influences to be identified. Whereas the new criminal law is basically drafted alongside French models, the new civil law is based on Japanese concepts (with Japan itself being influenced by German law). Cambodian law remains, obviously, the result of a patchwork of diverse historic concepts and multiple current interventions.

To make things even more problematic, an important aspect of Cambodian law is the poor quality of all aspects of the legal system of Cambodia. A strong legal system was neither introduced by the French colonial power nor was it developed during the first two decades of independence. During the rule of the Khmer Rouge all legal institutions were shut down and nearly all persons with legal knowledge were killed. According to

95 For short outlines on Cambodian law see *Béatrice Balivet*, (coord.), Introduction au Droit Cambodgien, Phnom Penh (ca.2004); *Sok Siphana / Denora Sarin*, The Legal System of Cambodia, Phnom Penh 1998.

96 See *Loie Avillaneda*, in: Balivet (note 95), p. 29; *Sok/Denora* (note 95), p. 31.

97 See *M.B. Hooker*, Legal Pluralism. An Introduction to Colonial and Neo-Colonial Laws, Oxford 1975 (Clarendon Press); *M.B. Hooker*, A Concise Legal History of South-East Asia, Oxford 1978 (Clarendon Press); for a general perspective see *Jaques du Plessies*, Comparative Law and the Study of Mixed Legal Systems, in: Mathias Reiman / Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, Oxford 2006 (Oxford University Press), pp. 477-512.

98 *Basil Fernando*, Problems Facing the Cambodian Legal System, Hong Kong 1998, p. vi, argues that the country still is based on the socialist concept of law.

99 But compare *Roque Reynolds*, Dicey in Cambodia or Droit Administrative meets the Common Law, The Australian Law Journal 72 (1998), p. 204, (arguing that the jurisdiction of the normal courts for administrative courts would be a common law element); more realistic *Avillaneda* (note 96), p. 37, speaking of occasional influences.

various estimates, a maximum of ten legally educated people within the country survived the Khmer Rouge Regime[100]. Although some legal institutions were re-established during the time of the "People's Republic" the rule of law was not a priority in this period. People selected to become judges typically received a few weeks of 'crash courses' on law (including training on Marxism-Leninism) at best. The government also did not spend much time on preparing and adopting laws; the country was widely ruled by occasional decrees only regulating the most necessary questions. Commitments to improve the legal and judicial system have been expressed since the adoption of the new constitution, but still today the general assessment is that the system is widely dysfunctional[101]. Therefore, the constitution remains somewhat a head without a body, for the time being.

2. The Laws of Cambodia

Part of the Rule of Law in democratic countries of the civil law tradition is the concept that all important laws need to be adopted by a democratically elected parliament. The rule of law in that sense is rule by parliament made laws. In Cambodia, however, law teachers often speak of the "rule of sub-decree", implicating that the main legal source is not parliament made law, but executive regulation.

The prevalence of government regulations is partly the consequence of a simple lack of laws in many fields, and partly it is the consequence of a legislation technique which is still practiced and often hardly regulates issues but only provides for vague guidelines while leaving the rest to governmental sub-decrees. At least in some major areas the situation is improving. A fairly comprehensive Labour Law was drafted with help of the International Labour Organisation and adopted in 1997[102]. Civil and criminal procedure codes, as well as a civil code, have recently been adopted and a penal code is in the final stage of preparation. Cambodia also tries to fulfil international demands by adopting laws on various topics. WTO accession implicated a lengthy "to do list" regarding legislation. International terrorism produced a shorter one.

More fundamental laws are mostly supported by international donors and prepared with the help of international experts. As mentioned, criminal code and criminal procedure code were prepared with the help of French cooperation, while Japanese consultants were

100 An estimate by the Lawyers Committee for Human Rights estimated that in 1979 there were ten persons with a law degree left in Cambodia. Other estimates are even lower (see e.g. *Marks* [note 24],p. 44).

101 A much cited drastic assessment on the dysfunctions of the Cambodian judiciary was given by an expert group appointed by the Secretary General of the United Nations in order to report on a possible concept for a Khmer Rouge Tribunal (see Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135 (February 1999), Annex, U.N. Doc. A/53/850, S/1999/231, §§ 129, 133).

102 On a specific aspect of the the ILO's work in Cambodia see more recently *Kevin Kolben*, Note from the Field: Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories, 7 Yale Human Rights & Development Law Journal 79 (2004).

in charge of drafting the civil code and civil procedure code. A multitude of bilateral and international partners and consultants from around the globe are involved in more specific legislation. Whereas technical quality of the laws of Cambodia has inevitably somewhat increased over time, the patchwork of influences perpetuates systematic problems.

3. Application and Enforcement of the Law

Law implementation is an even bigger problem. The adoption of the new codes in civil law and criminal law means that hundreds of judges, prosecutors and lawyers, many of whom have never received any substantial legal education, must now adapt to a system of highly systematic codes of thousands of articles. It seems impossible that this will happen in the short term and the conclusion is inevitable that re-establishment of a professional legal system and culture is in every respect a task that will take at least a generation to fulfil. The severity of the problem is increased by the fact that it is not simply a matter of "incompetence" and cannot therefore be solved by training and waiting for better educated personnel. The combination of incompetence, corruption and political interference[103] makes it difficult for effective reform. Some steps have been taken to address problems, for instance, with a significant increase in the official salaries of judges[104] and the establishment of a Royal School for Judges and Prosecutors[105]. Change in the overall legal culture obviously needs time, however, and for the time being the lack of independent academic research and debate remains one of the additional obstacles in this process. At universities, law is on offer (and increasingly popular with students) but Cambodian law faculties are hardly places of research and for the time being they are far from being "think tanks" in the field of law. There is no law library of quality, no legal journal or any alternative forum for academic discussion and there are hardly any quality textbooks for the purpose of learning[106].

All human rights reports consider impunity to be one of the most important human rights issues in the country and the Cambodian Government itself has repeatedly acknowledged the problem. High profile criminality often goes unpunished because of police

103 Even the quasi-official "Who's who" of Cambodia, published under the auspices of the Ministry of Information, points to two other problems by stating that "the judicial branch in Cambodia is highly corrupt and can be easily pressured from executive branch" (Who's Who in Cambodia 2006 – 2007, Phnom Penh 2006, p. 299).

104 Salaries of judges are now – after a recent substantial rise – between 300 and 600 dollars. This is progress, but the amount is still clearly insufficient to support the life of an upper middle class family (judges are supposed to belonging to this group) in Cambodia.

105 The Royal School of Judges and Prosecutors conducts two year long preparatory trainings, which mainly consists of classroom sessions in the first year and internships in the second year.

106 For some textbooks of a certain quality see e.g. *Say Bory*, General Administrative Law, 2nd ed. 2001 (Khmer only); *Stuart Cogbill*, Resource Guide to the Criminal Law of Cambodia, Phnom Penh 2000 (Khmer and English); *Eduard De Bouter / Daniel Adler / Lee U Meng / Patricia Baars*, Cambodian Employment and Labor Law, 3rd ed., Phnom Penh 2005 (Khmer and English).

incompetence, corruption or fundamental misunderstandings about constitutional and legal requirements in respect of the action of police, prosecution and courts. Widespread illegal behaviour is also commonly acknowledged in respect of land ownership and use. Although Cambodia has a comparatively modern and comprehensive Land Law (2002), "land grabbing" by the "rich and powerful" is still an acknowledged phenomenon[107] and the Prime Minister has described it as the potential cause of a future "farmer's revolution". It remains to be seen if action against corrupt judges will become a more regular event and will finally result in systemic change[108]. For the time being, "rule of law", the right of all to be equal before the law (Article 31 [2]), the right to security (Article 32 [1]) etc. remain unfulfilled promises of a visionary constitution.

4. The Khmer Rouge Tribunal

The so called Khmer Rouge Tribunal, officially named the Extraordinary Chambers in the Courts of Cambodia (ECCC), is by any standards the most prominent legal event in Cambodia since adoption of the Constitution in 2007. The Tribunal aims to bring to justice the (surviving) senior leaders of the Khmer Rouge Regime of 1975 to 1975 and the ones most responsible for its crimes. The Tribunal is what in international law is called a hybrid court, being composed of national and international judges, prosecutors and staff. The Cambodian ECCC is a novelty in the field as this is the first time that such a court has been made up of a majority of national judges. The court took nearly a decade to be established after Prime Ministers Ranaridhh and Hun Sen requested international assistance for such a tribunal in 1997. After a difficult start it is now fully in process.

It is not necessary to examine the details of the ECCC here. There is a wealth of academic analysis on the topic[109], which contrasts sharply with the lack of interest in the Cambodian Constitution. In the context of this report it should be mentioned that the tri-

107 For an introduction to the Land Law see *Matthew Rendall*, Land Law of Cambodia, Phnom Penh 2003. The problem of lawlessness in the field is the topic of repeated reports of the Special Representatives of the Secretary-General for human rights in Cambodia, see e.g. *Peter Leuprecht*, Land Concessions for economic purposes in Cambodia (2004); *Yash Gai*, Economic land concessions in Cambodia. A human rights perspective (2007) (both at http://cambodia.ohchr.org).

108 Unusual action was taken on August 2007, when, on the occasion of the "launching" of the new Criminal Procedure Code in a Phnom Penh Hotel the Prime Minister announced the removal of the President of the Court of Appeals, allegedly as a sanction for taking a bribe of $ 30.000 in exchange for the acquittal of some brothel owners accused of human trafficking. Cambodia Daily, August 13, 2007, pp. 1-2. The procedure of removal and appointment was criticized afterwards as unconstitutional however, and it caught the attention of the international community in particular because the person appointed to be the new president of the Appeals Court was serving as the investigating judge at the ECCC, raising concerns about the independence of that court and possible delays in its procedures.

109 See for example *Ramji/van Schaack* (note 83); *Jörg Menzel*, Justice delayed or too late for justice? The Khmer Rouge Tribunal and the Cambodian "genocide" 1975-1979, in: 9 Journal of Genocide Research 215-234 (2007), with further references.

bunal faces (potential) constitutional questions[110], for example, regarding the relationship between the ECCC and the Cambodian Constitutional Council[111]. From a general perspective, the ECCC is widely seen as a test case for overcoming impunity and for improving rule of law in Cambodia[112]. Despite all problems ahead it is first of all an opportunity to promote the concept of rule of law in Cambodia and thereby making the constitutional promises more effective. Whether it will fulfil these functions remains to be seen.

IX. Cambodia and the World

As Cambodia's recent history has been much influenced by world politics and as its constitution has been developed in the context of an international agreement and United Nations intervention, it seems interesting to take a closer look at how the constitution deals with questions of national sovereignty and international openness. Perhaps unsurprisingly, taking the cultural background and historical circumstances into account, the constitution embraces the concepts of national sovereignty and internationality at the same time.

1. National Sovereignty and Internationality

The Paris Agreements and the whole process leading up to the elections in 1993 and the adoption of the constitution have often been labelled as "Nation Building". At the outset, Cambodia was considered to be on the edge of being a "failed state" and re-establishing internal unity, as well as external sovereignty were the main goals of the process. The constitution's strong emphasis on this is therefore explicable from the circumstances of the time, but is also deeply rooted in Cambodian constitutional history, beginning with the pathetic constitution of the Khmer Republic of 1972. The Constitution of 1993 makes plenty of references to national sovereignty, unity and the protection of Cambodian culture, referring explicitly as other constitutions before, to the glorious Angkor times. Such

110 The Law on the Extraordinary Chambers was initially declared unconstitutional by the Constitutional Council as it seemingly allowed for application of the death penalty in violation of Article 32 (2) of the constitution (Decision of February 12, 2001, No. 040/002/2001).

111 See *Scott Worden*, An Anatomy of the Extraordinary Chambers, in: Ramji / van Schaack (note 84), pp. 171-220 (at 204-205).

112 Deputy Prime Minister Sok An, who is in charge for the tribunal within the government, expressed hope that the court would become a "model court".

provisions are in fact quite deeply embedded in the psychology of Cambodians and the fear for national sovereignty, pride and culture has resulted in a range of disputes and measures in recent years[113].

When Cambodia reorganized itself at the beginning of the 1990s, by trying to overcome civil war and establish a system based on democracy, human rights and democracy, the whole process was not an internal affair but an international effort. The Paris Agreements is an international treaty framework with eighteen other states as parties. This treaty already contained the framework for the constitution and UNTAC was in charge to guarantee the success of the first free elections. Unsurprisingly, for a system so deeply based on an effort of the international community, the constitution provides a range of guidelines relevant to the foreign policy of the country and its relationship with the outside world. According to Article 2 "[t]he Kingdom of Cambodia shall be an independent, sovereign, peaceful, permanently neutral and non-aligned country." These principles are elaborated in Articles 53 to 55. The principle of non-alignment is not only a constitutional obligation, but part of the Paris Agreements and therefore binding international law for Cambodia, that in return has to be respected by all signatory states of that agreement. As the principle of non-alignment only affects military alliances it does not stop Cambodia from being an active part of regional and international institutional organisations. In fact, the country has become a member to numerous international organisations and treaties. Cambodia is party to most global human rights treaties and most of the important global environmental treaties. It became the 10th member of ASEAN in 1999[114], it was the first Asian state to ratify the Rome Statute on the International Criminal Court in 2002 and is a pioneer among least developed states by joining the World Trade Organisation in October 2004. Cambodia is last but not least a major recipient of international development cooperation, with international organisations, bilateral cooperation partners and numerous NGO's contributing in different ways to the country's budget, administration and development[115].

113 Voices critical of the government have challenged its approach to the regulation of border issues with Vietnam. Critical comments on a border treaty with Vietnam, ratified on October 6, 2005, culminated in a number of criminal court procedures, arrests and escapes at the end of 2005. The situation de-escalated in January 2006. See ADHOC, Human Rights Situation Report 2005 (Phnom Penh 2006), p. 5; LICHADO, Human Rights in Cambodia: The Façade of Stability, Report, May 2006, pp 9-11.

114 Accession to ASEAN was postponed in 1997 due to the "coup" of Second Prime Minister Hun Sen, toppling First Prime Minister Ranaridhh.

115 International cooperation is, last but not least, plentiful in the field of legal and judicial system. Foreigners are involved in nearly every major piece of legislation as well as in the field of legal education. The most significant current involvement of the international community is the establishment of the so called "Khmer Rouge Tribunal", which is based on an international treaty between the Cambodian Government and the United Nations and is mainly financed by foreign contributions.

2. The Rank of International Law

Taking the context of its genesis into account, it might come as a surprise that the Cambodian constitution does not clearly express the status and rank of international law within the national legal framework. In respect of human rights treaties there is, as mentioned earlier, the provision of Article 31 and one might argue that this lifts the respective treaties into the rank of constitutional law[116]. As mentioned before, the Constitutional Council has recently at least clarified that national courts have to consider international human rights treaties when interpreting and applying national laws and thereby indicated that these treaties might be in the rank of the constitution itself[117]. The ECCC, in its first decision, took the same path by applying provisions of the ICCPR[118].

Apart from the field of human rights the constitution does not address the rank of international treaties. However, as international treaties are basically adopted like laws[119] it seems reasonable to assume that they rank as laws (if they are qualified as self-executing), which means inter alia that in case of conflict the later law will prevail[120]. There is no indication regarding the rank of customary international law in the text of the constitution and the author is not aware of any published opinions on this so far[121]. Taking the general tendency of openness and friendliness towards the international community as a basis, one might suggest that customary international law should at least be part of the "law of the land". This topic has yet to be explored in Cambodia.

116 *Cogbill* (note 106), § 2.27.
117 Infra VI.
118 Decision of December 3, 2007, Criminal Case File No 001/18-07-ECCC-OCIJ (PTC01), paragraph 24.
119 Article 26: Signing and ratification by the king after approval by National Assembly and Senate.
120 See similar *Chaing Sinath / Béatrice Balivet*, in: Balivet (note 95), 103.
121 *Rendall* (note 52), p. 58, mentions customary international law as a source of law in Cambodia, but does not indicate any opinion about its rank.

X. Concluding Remarks

The Cambodian Constitution, as every constitution, can be put into a variety of comparative perspectives. It can be compared and analyzed in the context of its historical precedents, regional or global constitutional developments and last but not least, with other states facing similar problems of transition to democracy. Cambodia's current constitution draws heavily from the past, in particular from Cambodia's first constitution of 1947 and the immediate predecessor of 1989, but is also influenced by foreign developments. The making of this constitution comes at a time of major constitutional change in many states, be it in Southeast Asia[122] or globally. Since the end of the 1980s there has been a clear worldwide trend towards strengthening of constitutional order, democracy, fundamental rights and rule of law. Transition is, however, a difficult process and Cambodia has a particularly long way to go after the complete breakdown of civilized statehood in the 1970s. In addition it should be acknowledged that the concept of liberal and pluralistic democracy and comprehensive fundamental rights protection, hardly had any consolidated stronghold in Southeast Asia at the beginning of the 1990s, nor does it have today. A fair assessment of development in Cambodia must take this regional context into account.

One of the very few publications on the Cambodian constitution, published shortly after its adoption, was subtitled "from civil war to a fragile democracy"[123]. The qualification made in that subtitle still seems relevant. After the constitution was adopted the country suffered a few more years from the effects of civil war and the violent clash between the two Prime Ministers in 1997 was a reminder that the country was still far from being a stable constitutional state. In the last decade progress has been made in respect of political stability and economic development, but the Prime Minister himself reminds his people on a regular basis that stability has only recently been achieved and is still fragile. However, some significant institutional developments occurred from 1998. A Senate, the Constitutional Council and a National Audit Authority were established. The future of the monarchy, against widespread predictions, was saved beyond the reign of King Sihanouk, for the time being, through a surprisingly smooth succession to the throne in October 2004. The country will experience National Assembly elections for the fourth time in July 2008 and the constitutional amendments of 2006 might result in the existence of a stronger opposition as there is no longer any requirement for power-sharing to reach a two-third majority in the National Assembly. Commune elections were conducted for the first time in 2002 and again in 2007. The Senate was elected for the first time in 2006. Some aspects of the democratic process seem to have become routine and this success should not be underrated. However, the concept of the constitution, which provides for

122 For current regional perspectives see *Hassall/Saunders* (note 83); *Kevin YL Tan*, The Making and Remaking of Constitutional Orders in Southeast Asia: An Overview, in: Singapore Journal of International and Comparative Law 6 (2002).

123 *Marks* (note 24).

pluralistic democracy, human rights and rule of law, is still ahead of reality in Cambodia. The former single party, CPP, has clearly won all elections after its surprising defeat of 1993 and the same Prime Minister has been ruling the country for more than two decades, with an interim as "Second Prime Minister" from 1993 to 1997. More importantly from a constitutional perspective, separation of powers, a concept sometimes described as strange to Cambodia[124], is still more a formal than substantial concept in Cambodia, as is the concept of "checks and balances". The reality of human rights protection is defined by deficient legal, administrative and judicial institutions and practices. Reform in these areas, although officially at the centre of government policies[125], has proven to be difficult.

Cambodia has gained a constitution, but the spirit of constitutionalism, belief in the advantages of legally limited government, separation of powers and the protection of fundamental rights[126], are still under development.

124 *Jennar* (note 42), p. 34, citing French professor Gour (allegedly a key-contributor to the 1993 constitution).

125 Royal Government of Cambodia, Address by *Samdech Hun Sen*, Prime Minister of the Royal Government of Cambodia on "Rectangular Strategy" for Growth, Employment, Equity and Efficiency, Phnom Penh, July 16, 2004, pp. 12-17.

126 For a comprehensive study on the idea of constitutionalism see *András Sajó*, Limiting Government. An Introduction to Constitutionalism, Budapest 1999 (Central European University Press).

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THE CONSTITUTION OF THE KINGDOM OF CAMBODIA: THE EVOLUTION OF CONSTITUTIONAL THEORIES AND INTERPRETATION

HOR Peng

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THE CONSTITUTION OF THE KINGDOM OF CAMBODIA: THE EVOLUTION OF CONSTITUTIONAL THEORIES AND INTERPRETATION

HOR Peng *

ABSTRACT

The legal system of the Kingdom of Cambodia is based on its Constitution, which went into effect in 1993 and constitutes, amongst others, the principles of Kingship and multi-party democracy. Since its entry into force, as most Constitutions, it has been subject to amendments and interpretation. The following article describes its evolution and development.

I. Introduction

The Kingdom of Cambodia is a democratic nation according to the present Constitution. The present Constitution, Cambodia's sixth written Constitution, was promulgated and went into effect on the 24th of September 1993, after the country had endured the suffering of two decades of civil war and radical revolution. It declared that the nation would be restored as an "Island of Peace" based on a multi-party liberal democratic regime guaranteeing freedom (human rights) and the rule of law.[1] As the highest supreme law of the country, all existing laws or decisions of the state must be in compliance with the current Constitution. Otherwise, such laws or decisions will be completely void.

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1 *See* the Preamble to the present Constitution, which begins with the historic term "WE THE KHMER PEOPLE". This is the declaration of Cambodia's commitment to modern constitutionalism [democracy, human rights and the rule of law].

Throughout its 24 years in effect, the Constitution has made a great contribution to the promotion of democracy, human rights and the rule of law in general.[2] The process of constitutional evolution has occurred through amendments, interpretation, and constitutional legislation. Constitutional interpretations and changes have taken place through cases of political settlements [amendments], constitutional reviews [interpretations] and enactment of new constitutional legislation.[3] The achievements under this process represent original intellectual products of Cambodia's constitutional state. The evolution of constitutional law directs our attention to the relationship between two key elements, the state and the people, and to the notion that the legitimacy of state action and the people's freedom are coherent and respected. In this article, I try to provide observations on the evolution of Cambodia's constitutional law (theories and interpretations) and then examine the general path of its development. I believe that this study will assist students, teachers and researchers by furnishing a better understanding of Cambodia's constitutionalism in the context of the contemporary modern era.

II. Basic Theories of Cambodian Constitutional Law

The present Constitution confirms Cambodia's status as a modern constitutional state. The theories underlying Cambodia's Constitution combines both traditional and modern values. The traditional values are the core historic elements of constitutional institutions, the Kingship, Buddhism and the State institutions. The Kingship and Buddhism represent the dignified element of historic constitutional continuity, the highest moral dignity of the nation; whilst the state institutions: Royal Government, National Assembly, Senate, Judiciary and Constitutional Council, represent the effective element of constitutional authority that governs the nation with modern values. These modern values are regarded as general principles of constitutional authority: democracy, freedom [human rights] and the rule of law, which have been transplanted to Cambodia and have evolved here as the core elements in modern politics. They have been interpreted in the context of and evolved through leading constitutional cases. In Cambodia's modern political atmosphere, the protection of democracy and human rights takes place within the context of the established rule of law. In practice, adherence to these principles requires that: all politicians must be elected through general elections; all Khmer citizens are equal under the

2 *See* HOR Peng, the Modern Era of Cambodian Constitutionalism: Constitutional Analysis of Historical and Contemporary Development, *in* HOR Peng, KONG Phallack and Jörg MENZEL (Eds), Introduction to Cambodian Law, (Konrad-Adenauer-Stiftung, 2012), pp. 23-69. *See also* HOR Peng, the Role of Parliament in the recent Development in Cambodia *in* Clauspeter HILL/Jörg MENZEL (Eds.) Constitutionalism in South East Asia, Volume 3 Cross-Cutting Issues, Konrad-Adenauer-Stiftung (2009), pp.126-134.

3 Throughout its 24 years, the Constitution has been amended 8 times for the purposes of interpretation and outright change.

laws and justice, enjoying the same rights, liberties and duties regardless of race, color, sex, language, beliefs, religions, political tendencies, birth origin, social status, wealth or other status.[4]

In Cambodia's current constitutional system, the modern theory of separation of powers is recognized, imposed and respected.[5] The King reigns, but does not govern. However, the King functions as the Head of State, ratifying the state's acts.[6] Buddhism constitutes the state religion[7]; legislative sovereignty belongs to an elected Parliament (National Assembly and Senate), members of the country's political parties; political sovereignty belongs to the people and the people themselves control the politicians and political parties through the general elections; the Royal Government, especially the Council of Ministers, constitutes a strong executive branch and brings political responsibility to the National Assembly, the representative body of the people, which is in charge to smoothly implement the state's affairs; and the Judiciary holds independent judicial powers to smoothly enforce and equally protect the rule of law and state legitimacy.

In practice, these constitutional theories are realized in an elected government functioning under the law and the rule of law is realized through constitutional supremacy and judicial review. The legal power of judicial review within Cambodia's constitutional system is separated under the aegis of two legal institutional bodies, the Constitutional Council and the Courts. The Constitutional Council has constitutional authority to safeguard constitutional supremacy, to interpret constitutional provisions, to review constitutionality of law and to settle electoral disputes. The judicial system settles all legal cases including civil, criminal and administrative case disputes. Through its interpretive process, the Constitutional Council examines and decides both abstract and concrete cases using a various methods in order to find reasonable legal answers to constitutional questions. The methods of constitutional interpretation employed by the Constitutional Council include the meaning of the text itself, the intention of lawmakers, Cambodia's historical development and the general principles of domestic law as well as relevant foreign juris-

4 *See* Constitution, Articles 31, 76, 118 and 119. In Cambodia's parliamentary democracy, the people elect their representatives by general elections and Parliament elects the Executive Organ: The Royal Government.

5 *See* HOR Peng, Separation of Powers and Independence of Judicial Powers in Cambodia, *in* Cambodian Society of Comparative Legal Studies (Volume 2, 2011, pp.83-96).

6 Cambodia has a long experience monarchy and, historically, the king's will actually was the law. However, the concept of a modern constitutional monarchy, enshrined in the phrase "the King reigns but does not govern," was introduced in 1947 and went through many revolutions (regime changes from a republic to a communist state and then to a socialist state) and was eventually restored with the current liberal multi-party democracy along with the respect of human rights.

7 The state religions of Brahmanism and Buddhism are among the ancient principles underlying Cambodia's constitutionalism. I have attempted to observe and study the whole history of Cambodia's ancient constitutionalism. From my studies, Cambodian constitutionalism combines the three basic elements of religion, the king and the people. The legitimacy of the king is derived from religion as well as from the hereditary system of the royal family.

prudence.[8] In the review process, the Constitutional Council seeks to apply the principles of rationality [necessity] and proportionality [consistency],[9] which are the principles used in most democratic countries for constitutional interpretation.[10]

III. Methods of Reform: Constitutional Interpretation and Change

Theoretically, as well as practically, the Constitution is the highest supreme law of the nation. In the current context, the doctrines of *multi-party liberal democracy* and *modern constitutional monarchy* (the King reigns but does not govern) have been granted a permanent status of *de jure* protection and promotion. The state has no legal authority to abolish these public doctrines, but, rather, the state has a political duty to protect and promote these doctrines. In this sense, constitutional reform requires a positive theory of change and interpretation within a context of safeguarding the rule of law, democratic legitimacy, individual rights and social welfare.

Of course, in democratic countries, amendment (interpretation or change) of constitutions is permitted to promote and protect democracy, human rights, and the rule of law. Amendment processes are necessary because the law is dynamic, not static, reflecting social desires for increased stability, security and socio-economic development. In the constitutional law context, in order to ensure that an amendment reflects the public spirit or common sense, it is not only the privilege of elected representatives to promote change, it requires thorough public dialogue, which is an effective means of citizen engagement.[11] Citizen engagement is essential because the core of every democracy is the participation of the people.[12] Indeed, the constitutional law is the basic law, which represents the public spirit of the people ("We the Khmer People") by limiting the power of the state under the doctrine of separation of powers and an independent judiciary.

8 *See* HOR Peng, The Constitution of Cambodia and the Role of Interpretation in Comparative Perspective, in Cambodian Society of Comparative Legal Studies (Volume 1, 2010, pp.25-35)

9 *See* Internal Rules of the Constitutional Council.

10 *See* Jeffrey GOLDSWORTHY, Interpreting Constitutions: A Comparative Study (Oxford University Press, 2006).

11 Public Dialogue: A Tool for Citizen Engagement is based on the lessons learned from The Society We Want, a national public dialogue project of the Canadian Policy Research Networks (http://ncdd.org/rc/wp-content/ uploads/2010/06/PublicDlog_ToolForCE.pdf).

12 Denis SCHREY, Nathalie LAUER, Political Parties: A Comparative Perspective, presented in the LAWTALK 13, on "Cambodian Constitutional Law – Implication for State Organization and Basic Rights", 20-22 March 2015, at Independence Hotel, Preah Sihanouk Province.

In Cambodia, there are three legal options for seeking constitutional interpretation and change. The first option is through the process of amendment. An amendment must be debated in Parliament and approved by a two-thirds majority vote.[13] The second option is conducted through special lawmaking–a so-called additional constitutional law. This option was created during the time of constitutional crisis in 2003-2004. The conditions for passing such a law must be satisfied at the first meeting of the National Assembly at the beginning of its new mandate if made necessary by a national crisis.[14] The third legal option is to conduct a constitutional review–a so-called constitutional interpretation within the legal authority of the Constitutional Council.[15] As a matter of fact, there have been many constitutional questions that need to be decided by judicial interpretation. In this regard, law students and researchers studying Cambodia's constitutional law should review not only the constitutional text itself, but the decisions of the Constitutional Council as well as relevant constitutional and ordinary laws. Cambodia's constitutional jurisprudence has been developed through leading legal cases.[16]

13 There are eight amendments to the Cambodian Constitution. The first amendment (altering Article 28) deals with concerns of the absence of the King and the delegation of the King's power to sign on *Preah Reach Krom* or on *Preah Reach Kret* in such an absence. It was passed by *Preah Reach Krom* on July 14, 1994. The second amendment (altering Articles 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, and 93. as well as several Articles in Chapters 8 to 14) deals with the establishment of the Senate, the upper house of the Parliament. It was passed by *Preah Reach Krom* on March 8, 1999. The third amendment (altering Articles 19 & 29) deals with the right of the King to establish and to grant national honorific distinctions. It was passed by *Preah Reach Krom* on July 28, 2001. The fifth amendment (altering Articles 88 & 111 (New)) deals with the issue of lowering the number of Members required for a valid quorum at a session of Parliament. It was passed by *Preah Reach Krom* on June 18, 2005. The sixth amendment (altering Articles 28, 88 (New), 90 (New), 98, 106 (New), 111 (New), 114 (New) as well as Article 6 of the Additional Provisions to the Constitution) deals with the issue regarding the changing of the formula for a governmental majority from a two-thirds majority vote to an absolute majority vote (50% +1). It was passed by *Preah Reach Krom* on March 9 2006. The seventh amendment (altering Articles 145 and 146) deals with the issue regarding reforming the administration of the national territory. It was passed by *Preah Reach Krom* on February 15, 2008. The eight amendment (altering Article 76, including a new Chapter 15 as well as revising Articles in Chapter 16) deals with the establishment of the National Election Commission as a constitutionally-protected institution. It was passed by *Preah Reach Krom* on October 23, 2014.

14 There is a special procedure of interpretation and reform contained in the fourth amendment that was conducted at a period of constitutional crisis approximately a year after the third election of the National Assembly [2003-2004]. The fourth amendment deals with the issue of the adoption of an additional constitutional law (known as a "law of package voting"). It was passed by *Preah Reach Krom* on July 13, 2004.

15 Several leading constitutional cases have been settled by the Constitutional Council through constitutional review. These interpretations are significant and become part of Cambodia's constitutional jurisprudence.

16 *See* the official website of the Constitutional Council of Cambodia, available at: www.ccc.org.

IV. The Justification and Evolution

The election in 2013 brought Cambodia to a critical point for constitutional reforms in the election process and in parliamentary democracy more generally.[17] A political agreement was signed between the Cambodian People's Party (CPP) and Cambodia National Recuse Party (CNRP) on the 22nd of July 2014 calling for exploring election reforms. Three important laws were amended to address the issues raised during the election, including: the Constitution, the Internal Rules of Parliament and the Law on Elections.

1. Constitutional Reform: The political parties' agreement led to the constitutional reform of incorporating the National Election Commission (NEC) as a part of the constitutional order.[18] The NEC was elevated to a constitutionally-protected institution in order to re-establish public trust in the election process by guaranteeing the NEC's independence and neutrality.[19]

2. The Reform of the Internal Rules of the National Assembly: After the 2013 elections, these Rules were amended to include a new technical commission (the 10th Commission) tasked with promoting anti-corruption measures and investigating corruption in government. The change also provided a formal legal structure for the leadership of parliamentary political groups.[20] The reason for the latter change is to enhance parliamentary democracy through political dialogue between the leader of majority group (ruling party) and the leader of the minority group (opposition party). This change was part of an overall effort to create a new culture of political dialogue in the parliamentary democratic process.

3. Electoral Reform: The amendment of the Law on the Election of Members of the National Assembly is for the purpose of reforming the election process to ensure free, democratic elections. Specifically, this legislation made the following changes: (1) fixed the total number of seats in Parliament at 125 seats; (2) flexibility of the voting process: voters are required to register to vote, but he/she can choose an appropriate place to vote on election day; (3) strengthening public order during the electoral campaign period: the electoral campaign period was decreased to 21 days and must end 24 hours before election day; (4) strengthening political and moral obligations as well as enforcing legal sanctions

17 The result of 2013 election divided the nation into a two-party system (CPP (68) + CNRP (55) = 123 Seats). The CPP clearly won a majority and obtained full legitimacy to form a government. While the CNRP did not win, it represents the minority and stands as an opposition party in the parliamentary process.

18 This amendment came into effect on 23rd October 2014.

19 See for further details, the amendment in Chapter 15 (new-2) of the Constitution Article 150 (new-2). According to this amendment, the NEC should be created and its functions determined by a specific law, and soon afterwards, the Law on the Organization and Functioning of the NEC was adopted and came into effect on 26th March 2015.

20 See for further details the amended Internal Rules of the National Assembly (19th December 2014), available at: www.national-assembly.org.kh).

for violations after the official election results are determined:, a political party's seats in the National Assembly will be lost automatically if a political party boycotts the first parliamentary session meeting called by the King, fails to honor a legitimate mandate or take the official oaths; and (5) protecting party sovereignty: under this reform, the loss of party membership means the automatic loss of a parliamentary membership. This constitutional interpretation and reform of the election laws is the right direction for Cambodia. In a democratic nation, elections are a crucial part of the democratic process. On the one hand, they establish the parliament and reveal political leaders. They also legitimize the political system in the eyes of the electorate, mobilize the electorate to support social values and political aims and programs as well as raise political consciousness.[21]

This trend of significant constitutional evolution is a very positive development. As important as Kingship, Buddhism and State Institutions are as traditional value of constitutionalism, multi-party liberal democracy, freedom [human rights] and the rule of law have been gradually emerging in Cambodia and are revealing the essential merits of the nation's modern constitutionalism. This constitutionalism embodies the public spirit of all Cambodian people and it places Cambodia's politics in the context of the modern world. Of course, these significant developments cannot occur without a strong commitment from the state and the people. The state and the people have determined that democracy is the best form of government. The political parties are key influencers of Cambodia's modern politics and they are playing increasingly important roles in supporting the progress of effective parliamentary democracy.

In this sense, the significant constitutional evolution that Cambodia has seen means the nation is headed in the right direction and it has transformed Cambodia into a modern democratic nation. However, there remain many issues in advancing democracy and human rights that will require further interpretation and reform. In a democratic nation, the exercise of democracy and civil liberty must occur under the rule of law, otherwise the nation will devolve into anarchy. Of course, the enforcement of the rule of law is the responsibility of the independent judiciary, which strengthens the rule of law to protect the legitimacy of democracy and civil liberty.

21 *See* G. E. EDWARDS, German Political Parties: A Documentary Guide, 1998, p. 41.

V. Concluding Remarks

1. Cambodia has emerged as a modern constitutional state in which the state functions according to the Constitution and existing laws. The values of constitutionalism are a combination of traditional and modern values, which coherently support each other.

2. Kingship and Buddhism are a core part of Cambodia's constitutionalism and have played important roles as symbols of national unity, dignity and reputation.

3. A multi-party liberal democracy based on fair elections is a primary constitutional principle in Cambodia's modern politics and has produced peace, political stability and socio-economic development. The political parties tend to represent the will of the people, which leads to a form of party politics that serves the people's interests.

4. In a multi-party liberal democracy justice and freedom are established under the law. The law is a general expression of national will and guarantees justice and freedom through an independent judiciary. The most worrisome questions are whether the justice system is strong enough to ensure that the constitutional system works correctly and whether the current democratic process is strong enough to encourage people's engagement in the exercise of their freedoms. If the answers to the questions are affirmative, I think that the justice system merits the public's trust.

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THE HISTORICAL DEVELOPMENT OF CAMBODIA'S CONSTITUTIONS

YAN Vandeluxe

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THE HISTORICAL DEVELOPMENT OF CAMBODIA'S CONSTITUTIONS

YAN Vandeluxe *

ABSTRACT

To understand the constitutional law of a country, one needs to consider the historical perspective. The historical aspect of the Constitution of the country shows how the Constitution evolves across a period of time. It is even more important in the context of Cambodia, since it has undergone many political changes in succession throughout its history. Since its accession to independence from the French protectorate in 1953, Cambodia has had five different political regimes. It is therefore important to see how the Constitution has evolved under each regime if a comprehensive understanding of the current one is to be possible.

I. Introduction

Throughout most of Cambodia's history, the absolute monarchy was, as in many other countries in the world, the only model of government. The Constitution of Cambodia was based on unwritten sources, comprised mainly of customary laws. During the French protectorate in the 19th century, which constituted a new era of the Cambodian political system, a written Constitution was introduced for the first time in its history. So far, it has been followed by five further constitutions, each with their own characteristics, due to political changes.

The purpose of this article is to describe the development of the Constitution of Cambodia by giving an account of the general framework of each successive Constitution before turning to the current one. As such, the starting point is to describe the particular context of the first modern Cambodian Constitution and its content before turning to the successive Constitutions. From this perspective, a special linkage between the current Constitution and the first one is demonstrated in order to present the reader with a comprehensive understanding of the Constitution's history.

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II. The Birth of the Cambodian Constitution

A Constitution is fundamental for the creation and survival of a state. It has both symbolic and legal value, as it sets out rules governing and ensuring the regular functioning of the public powers in the society in question. From that perspective, a Constitution is indispensable for the creation and survival of a State.

There are various different possible approaches to defining a constitution. Formally, a constitution has to obey a particular form and procedure different from normal laws; it is either adopted by a special organ democratically representing the people, or by the people themselves following a supermajority vote, such as a two-thirds majority. Regarding its substance, a constitution is a supreme norm governing the organization and functioning of public power; in this sense, it is the source of legal order.

From the above definitions, a state must necessarily be founded on a Constitution. As such, Cambodia has its own Constitution, as do most other countries in the world, whether in written or unwritten forms.

The evolution of the Cambodian Constitutions can be divided into two periods: the time prior to 1863, and that after 1863. The French protectorate treaty, dated August 11th, 1863, set the official date of the French presence in Cambodia. This was the moment when, for the first time in its history, Cambodia was provided with a modern written Constitution.

Prior to 1863, Cambodia had no written Constitution. The country practiced a monarchy qualified as divine and absolute, in which the head of State is a King in whose hands all power is concentrated, powers believed to be bestowed directly by god[1]. To help to clarify the king divine powers, professor *C.-G. Gour* distinguished two distinct time periods: the *Angkorian* and post-*Angkorian* periods[2].

During the *Angkorian* period, the King represented god to assure public order in a determinate territory; he held authority on all matters, legislative, military and religious. The powers of the King were therefore quasi-unlimited. In the post-*Angkorian* period, the King, following the ideas of Buddhism, is not a supra-natural or divine being on earth, but a human being who comes to power because of his activities, merits and accomplishments. Therefore, the powers of the King are limited, and his authority is even constrained by some fundamental texts[3]. Two factors that limited the powers of the King were raised by Doctor *Thioum* in his PhD thesis[4]. The first issues from the Buddhist concept; he is submitted to religious and moral principles. The second follows from the practical point

1 For a brief history of the Cambodian Constitution, *see* Jörg MENZEL, Cambodia*: From civil war to a Constitution to Constitutionalism? In* Clauspeter Hill & Jörg Menzel, Constitutionalism in Southeast Asia, Vol. 2, TimeEdge Publishing Pte Ltd, 2008, pp.37-67.

2 Claude-Gilles GOUR, *Institutions constitutionnelles et politiques du Cambodge,* Dalloz, 1965, p. 21-23.

3 Jean IMBERT, *Histoire des Institutions khmères*, Annales de la Faculté de Droit de Phnom Penh, 1962, p. 55.

4 Thiounn Thioum, *Le pouvoir monarchique au Cambodge*, PhD Thesis, Paris, 1952.

of view; the *Brahmanes*[5] played a very important political role in the society. Within this context, Cambodia was ruled, like other countries in the world, according to an unwritten Constitution, comprising a set of rules set out by the King.

The modern era of Cambodian constitutional law began in 1863 when France entered into Cambodia. Upon the request of King *Norodom* of Cambodia in the face of threats from its neighboring countries, Thailand and Vietnam, who were believed to be planning to divide and control the Cambodian territory, France responded positively. A protectorate treaty was signed on August 11th, 1863. According to this text, Cambodia still maintained its internal sovereignty, but international diplomacy was handed over to France. Within this framework, in 1877, the King initiated a major reform of the country's institutions, ranging from its territorial organization to the judicial and political fields. One of the most remarkable reforms was the creation of Council of Ministers to implement laws adopted. This initiative could be considered as the first step towards the limitation of the powers of the King. The other remarkable event was the introduction of a new treaty, signed under coercion from the French resident in Indochina on June 17th, 1884, which took control of internal affairs away from Cambodia by allowing the French authority to make all decisions in this field. The protectorate was therefore transformed into a real colonization. However, under pressure from public protest, this treaty did not attain its objective.

A period of turbulence in conjunction with the 2nd civil war can be observed within the constitutional history of Cambodia. When Japanese troops entered Cambodia, they neutralized the French authority and installed a pro-Japanese government. In order to completely break with the French authority, the Japanese government forced the King to declare independence. This short period of *de facto* independence from March to October 1945 came to a close when France and her allies won the war. It was in this context that Cambodia entered a new era of its Constitutional history. A new written Constitution was adopted on May 16th, 1947.

This fundamental text was the work of a group of Cambodian intellectuals, who were mostly educated in France. The origin of this fundamental text was the desire of King *Sihanouk*, crowned by the French protectorate, to provide his people with a modern and democratic Constitution. To reach this objective, he created a mixed committee with equal representation from the French and Cambodian sides. The aim was to draft a Constitution which took into account Cambodian culture and tradition. In addition, the King, in accordance with his absolute authority, chose a democratic way to examine the committee's constitutional draft by allowing its citizens to elect a *"consultative assembly"* with the task of giving advice on the future text. The result of the election of September

5 Brahames are known for their knowledge and skill in the political affairs of the country. They were considered to be senior advisors to the King on decisions of importance for the country.

1st 1946 showed that the Democrat Party[6] won the election with a landslide victory. On the basis of its democratic legitimacy, the consultative assembly attempted to take on the role of a real constituent assembly by refusing the draft constitution developed by the mixed committee. They set out a foundation for the first Cambodian Constitution. It is within this context that a first written Constitution was set out.

Some fundamental points characterized the first Cambodian Constitution. The first is the parliamentary system with a soft separation of powers between the executive, legislative and judiciary. The King is the head of state and head of the armed forces. He has some prerogatives provided for by the Constitution such as the right to initiate laws, the right to promulgate laws, the right to dissolve the National Assembly where this has been proposed by the government, nomination of members of government after approval from the National Assembly, the right to preside over the Council of Ministers' meetings, and to appoint some high officials.

The Parliament is bicameral with two chambers: the National Assembly, the lower house which represents the people as a whole; and the Senate, composed of members appointed, designated and elected by socio-professional groups.

Executive power is held by the Royal Government of Cambodia (RGC). The head of the RGC is the President of the Council of Ministers, assigned by the King. The President chooses his collaborators to lead the ministries of the government. A vote of confidence in the National Assembly is necessary to form a government.

Within this general framework, the Cambodian Constitution seems to introduce a parliamentary monarchy in which the King does not hold any powers; instead, they are executed by different organs of the State. Sovereignty should be held by the nation. However, some authors have argued to the contrary. In his PhD thesis, Professor *PHUNG Ton* suggested that sovereignty falls to the King by showing that the Constitution did not make clear that it belongs to the nation. Furthermore, some fundamental functions still belonged to the King, who remained head of state and head of the armed forces. This is especially clear in article 21, which states that *"all powers come from the King and are exercised by different organs of the State"*. Finally, the Constitution is *"provided"*[7] by the King. This controversy is, however, a theoretical debate; from the practical perspective, theoretical dominance depends on the prevailing forces between the party representative in the National Assembly and the King.

This constitutional ambiguity led to political conflict and to a major constitutional amendment in 1956. The conflict resulted from a disagreement between the King and the government following the death of the head of the Democrat Party, Prince *Yutevong*

6 Three parties took part in the election. The Progress Democrat Party, led by Prince *Norodom Montana*; the Liberal Party, led by Prince *Narindeth*; and the Democrat Party led by Prince *Sisowath Youtevong*. The latter was well known for his high level of education as a doctor in biology who studied in France, and demonstrated a high level of intellectual thought. Furthermore, his Democrat Party was joined by Khmer intellectuals from abroad.

7 This is the exact translation of the Khmer terminology *"Protean"*.

on July 18th, 1947. The Democrat Party had won the general elections following the death of the Prince. While the constitutional mechanism functioned correctly, a crisis unfolded between the King and the Democrats because the National Assembly blocked all legislative initiatives from the King. In retaliation, the King maintained his executive cabinet despite the opposition of the National Assembly. There was open controversy over the constitutionality of these measures. However, the personal power of the King, stemming from the great independence accession obtained from France, paved the way for him to make a constitutional amendment. Finally, the political party of the King, *Sangkum Reastr Nyum*, won a landslide victory in September 1955[8]. This victory allowed the Prince to achieve a constitutional amendment in 1955. The *Kram* was dated January 14th, 1956.

The constitutional amendment in 1956 maintained the mechanisms already in place, such as the prerogatives of the King and the parliamentary system with bicameralism and a government responsible to the National Assembly. But there were three major innovations: The Parliament was empowered to participate in combating corruption, and the powers of the Council of Kingdom became more important; the concept of semi-direct democracy was introduced; and provincial and capital assemblies were created.

The remarkable semi-direct democracy through the National Congress, which allowed citizens to express their views on various issues or to remove their representatives from the Parliament, as well as the involvement of local people in local affairs in the provincial and capital assemblies were ambiguous, and subject to constant constitutional contradiction. In practice, the local assemblies were a failure, and the semi-direct democracy directly contradicted the theory of national sovereignty. In combination with this contradiction, political events resulted in major constitutional change in 1972.

III. The New Orientation of the Constitution of 1972

The major event leading to the change of the Cambodian political landscape was the death of King *Suramarith* on April 3rd 1960. This event led to a crisis for the succession to the throne, and posed a dilemma for Prince *Sihanouk*[9]. If he accepted the throne, his political career would be compromised. On the other hand, choosing a new King could minimize his power within the government. Finally, an unprecedented solution was adopted. The Parliament met and adopted a constitutional amendment on June 14, 1960, leading to the creation of the new position of *"head of state"* to be elected by the two chambers

8 *Sangkum Reastr Nyum* means *"Popular Socialist Community",* and it pretended to be a vast popular movement rather than a political party. It was created by Prince Sihanouk when he entered into the political arena following the death of his father. It was joined by many members of other political movements, including some members of the Democrat Party. This mixture of political tendencies from communism to liberal was later the germ of explosive political disagreements within the party itself.

9 If he were to accept the throne, his political carrier would become impossible.

in a joint meeting. Prince *Sihanouk* was then elected as head of state and at the same time held the position of head of the executive. This solution remained problematic from a legal perspective. It raised the question as to which form of political regime was being practiced. The monarchy was actually maintained, yet the monarch's traditional position as head of state in the parliamentary system was removed and could be given, in theory, to a non-monarch. It was hence *de facto* a presidential regime rather than a monarchical one. This *de facto* presidential regime was later transformed into a real presidential regime when the same two chambers of the Parliament dismissed the Prince from his position of head of state in a so-called "*Coup d'Etat"* on March 18th, 1970,[10] and then established a Republic instead of a Monarchy with the Constitution of 1972.

The Constitution of the Khmer Republic promulgated on May 10th, 1972 maintained bicameralism, but completely renewed the political mechanism. The most remarkable change was the transferal of the *"monarchical sovereignty"* to the nation, represented by the President of the Republic.

The Parliament of the Khmer Republic comprises two chambers: the National Assembly and the Senate. The first chamber is elected by the people with a mandate of 4 years; it comprises at least 80 members. The Senate was created in place of the Council of the Kingdom, and comprises between 28 and 40 members. Its members came from various backgrounds: 3/5 regional representatives, 1/5 civil servants and 1/5 from the military council; the mandate is 6 years, and half of its members were renewed every 3 years.

Executive power belongs to the President of the Republic and the government. The President and Vice-President are elected by the people. The President nominates a Prime Minister, head of government, and its members. The government declares the political program before the Parliamentary Congress[11]; this declaration should not be followed by a vote.

However, the Constitution of 1972 established a system of checks and balances between the legislative and executive by allowing the National Assembly to defy government members or actions. With an initiative from one-fifth of its members, the National Assembly could vote on a first recommendation against one or more members of the government by an absolute majority. This recommendation has to be sent to the President within 3 days. In the case of either agreement or silence by the President, the concerned government members will be dismissed. In the case of the President's refusal to maintain

10 March 18th, 1970 is considered the date of the "*Coup d'Etat"* orchestrated by General LON Nol to illegally remove Prince *Sihanouk*, even though in the legal framework, the dismissal of the head of state is a debatable issue. Prince *Sihanouk* considered the parliamentary vote to be illegal, as the position of head of state was supposed to be elected, according to the Constitution, for *"a whole lifetime"*. By contrast, the pro-republican regime argued parallelism of procedure to justify the decision; for them, when the two chambers elected the head of state, they are also empowered to remove him.

11 The Parliamentary Congress is a joint meeting of the National Assembly and the Senate. This terminology must not be confused with the National Congress, which is the forum of public expression, as stipulated in the Constitution of 1947, amended in 1956.

the recommendation, the National Assembly could adopt a 2nd recommendation on the initiative of one-fifth of its members, which would need to receive a two-third majority vote; the concerned government members would then be dismissed. Reciprocity of sanctions is also provided for by the Constitution. If the government is dismissed twice within a period of 18 months, the President of the Republic can dissolve the National Assembly following consultation with the President of the Senate.

This system is quite similar to the one practiced by the 5th Republic of France and could be called a *"semi-presidential regime"*.

On the ground, wide spread corruption and the incapacity of the President LON Nol to control the situation led to the collapse of the regime. The Maoist communists came to power and installed a dictator notoriously known as Pol Pot.

IV. The Constitution of 1975 as Rupture

When the *"Khmer Rouge"* toppled the Khmer Republic and came to powers on April 17th, 1975, a new regime, called *"Democratic Kampuchea",* was established. Initially welcomed by the Khmer people, the regime was notorious for its atrocities, and led to the death of around 1.5 million innocent people.

From a theoretical perspective, the regime installed a communist regime with a one party system. The *Communist Party of Kampuchea* was the main instrument of power, and played an important role in establishing state institutions. To legitimize the regime within the international arena, a new Constitution was adopted on January 5, 1976. A **Representative Assembly** was established, named the *"Representative Assembly of the Cambodian People"*. It is a relatively large Assembly comprising of 250 members elected by a non-universal suffrage. The 150 members are directly elected by farmers, the other 50 by workers and the last 50 by soldiers, for a mandate of 5 years. Its main function is *"to adopt laws and political lines within the internal and international arena",* as well as to assign other leading organs of the State such as the government, tribunals and the head of the state committee. This enormous function was in practice ineffective; the Assembly met only once, during the election of its President.

The **government**, elected by the Representative Assembly, is the executive agency. It answers to the Assembly. The government is in charge of the implementation of laws, as well as political lines adopted by the Assembly. It is in practice the most important and powerful institution of the regime.

The post of **head of state** is held by a committee, elected by the Assembly for a period of 5 years. It comprises one President seconded by two vice-presidents, and fulfils a protocol function by receiving national and international guests.

V. The Political Rupture Within the Continuity of the Institutions

Without any support from the people, the Khmer Rouge regime lasted for only 3 years, 8 months and 20 days. The front of solidarity and rescue of the nation created on December 2nd, 1978 toppled the Khmer Rouge on January 7th, 1979 and created a new communist regime, the *Popular Republic of Kampuchea*. The political rupture generated few institutional changes. A one party system was maintained, and played an important role in establishing the state institutions.

The Constitution officially promulgated on June 27th, 1981 established a Representative Assembly, called the ***"National Assembly"***. Members of the National Assembly were directly elected by the people for a period of 5 years. The powers of the National Assembly are to adopt laws, international treaties and other political programs of the State, to overview the executive and finally, unusually, to elect the **Council of State** and the **Council of Ministers**.

The Council of State is the permanent committee of the National Assembly and represents the regime. It is elected by members of the National Assembly within its mandate. It is presided over by a President, assisted by some vice-presidents, and further comprises a secretary general and members determined by the Assembly. It has a double function; providing leadership to the National Assembly,[12] and fulfilling the function of head of state.

The Council of Ministers is elected by the National Assembly with a term of 5 years. Led by a Prime Minister, the Council of Ministers is the main instrument for the implementation of laws as well as policy lines adopted by the National Assembly.

VI. The Current Constitution as an Intersection of Different Political Views

Within the *"wind of change"*[13] in the international context, explained mainly by closer relations between the Soviet Union and western countries, the main protagonists of the regime in power, led by *HUN Sen*, and the government in exile, led by the then-Prince *Norodom Sihanouk*, held several successive meetings, establishing hope for political change. The first remarkable move was the change from the *"Popular Republic of Kampuchea"* to the *"State of Kampuchea"* through an amendment to the Constitution in 1989. The new name implies the neutrality of the regime while awaiting for a new one, which was yet to be determined. After a long process of negotiation overseen by ASEAN coun-

12 Within this framework, the Council of State determines the agenda of the meetings of the National Assembly, as well as the normal functioning of the Assembly such as budget or staff recruitment.

13 Jörg Menzel, *The constitutionalism in Southeast Asia*, p. 46.

tries with the leadership of western countries, in which France played an important role, a peace agreement, known as the *"Paris Peace Agreement",* was signed on October 23rd, 1991 by all the protagonists of the Cambodian conflict.

The Paris Peace Agreement established a UN mission in Cambodia, known as UNTAC (United Nations Transitional Authority in Cambodia), whose main mission is to ensure a transition to democracy through free and fair elections, and to establish a new regime[14]. During this transitional period, the sovereignty of Cambodia was held by the Supreme National Council (SNC), led by Prince *Norodom Sihanouk*.

As scheduled, the elections were held from April 23rd to 28th, 1993, in spite of a boycott by the Khmer Rouge. The result of the elections, despite irregularities denounced by the Cambodian People's Party (CPP), handed victory to FUNCINPEC, with the CPP coming second, followed by BLDP and MOLINAKA. A political deadlock and crisis set in when the CPP contested the elections result and refused to relinquish power. A *Coup d'Etat* was reported to have been orchestrated by Prince *Norodom Chakrapong*, one of the sons the Prince *Sihanouk*, and the Cambodian territory faced on an unprecedented scale the threat of a separation between the East of Mekong, controlled by CPP forces, and the Capital Phnom Penh by FUNCINPEC. In the face of this worsening situation, Prince *Sihanouk* played the role of a mediator, leading to a political compromise between the two main forces.

A Constituent Assembly was established with the main mission of adopting a new Constitution. In theory, they held the original constituent power, which means that they held absolute sovereignty to determine the content of the Constitution and the political regime (republican or monarchic) of Cambodia as they wanted. However, in practice, this absolute sovereignty did not exist, as they had to follow the principles already set out by the Paris Peace Agreement[15]. Nonetheless, even though the latter established pluralist democracy as the basis of any future political regime, it did not explicitly specify its nature (republican or monarchic), such that the Constituent Assembly was free to determine it.

To draft the Constitution, the Constituent Assembly created a restricted Committee comprising 26 members, and presided over by *SON San*. The drafting process resulted in two options, the one seemingly republican and the other one monarchic[16]. After consultations with Prince *Sihanouk* by leaders of the two main parties, CPP and FUNCINPEC, a final draft was determined. The future political regime would be a constitutional monarchy. It was then submitted to the Constituent Assembly for adoption. As determined by the Paris Peace Agreement, a two-third majority was needed for adoption. Within

14 The mission of UNTAC lasted for 18 months, spending around 1.6 billion dollars and employing 22000 foreign personal.

15 Some principles are set out by the Agreement. Starting from a set of fundamental rights, such as individual and social rights or rights for justice, the Agreement provided for a pluralist democracy.

16 According to Jörg MENZEL, the draft for a Republic seems to have been supported by the CPP, and the draft for the Monarchy by FUNCINPEC. Jörg MENZEL, *op. cit.*, p. 49.

five days of debate, the Constituent Assembly adopted the draft with 113 votes in favor, 5 against and 2 abstentions. Finally, the current Constitution was officially promulgated on September 24th, 1993.

The main character of the Constitution is a mixture of at least three influences: the traditional values characterized by the role of Buddhism and the cult of personality around the King and leader; the communist tradition, pursued by the political force in power; and the new tradition of the rule of law, characterized by the subordination of all, including the state, to the laws adopted.

The Constitution of 1993 begins with a *"**preamble**"*. It is deprived of any binding legal value, as it serves only as a reminder of the past glory of Cambodia, and to express hope for a bright common future. This is in stark contrast to the preamble to the French Constitution, which clearly specifies certain values, especially some new fundamental rights, which were recognized by the Constitutional Council as constitutional principles with the same value as the Constitution itself.

The preamble is followed by Chapter 1, which affirms the *"**sovereignty**"* and *"**territorial integrity**"* of the nation. The constitutional monarchy, the neutrality and independence of Cambodia and territorial mapping standards were also determined by the Constitution. Those affirmations in the opening Chapter are the result of memories of the country's past experiences, in which it was divided by left and right wing ideologies during the cold war, leading to the tragic acts of vengeance carried out by the republicans of LON Nol and the communists of Pol Pot; and afterward, the acts of vengeance within the communist movement itself. The affirmation of the neutrality and independence of Cambodia also serves to reestablish a connection to the previous regime of *Sangkum Reastr Nyum* after a long period of rupture. The determination of the territory according to the mapping carried out in 1933 and 1953 can be seen as the expression of the fear of the Vietnamese domination in 1979, who many believed had not given up their ambition to take over or to control the Cambodian territory.

The **Monarchy** is the first constitutional institution. The character of this institution is formulated in a vague manner. The *"King reigns but does not hold any powers"* is the exact term used by the Constitution in the Khmer terminology and it is the first affirmation of the Cambodian monarchy. This affirmation seems to deprive the King of the right to interfere with any state powers. There is cause to doubt whether this provision was specifically directed to King *Sihanouk*, whose popularity among the Cambodian people was still evident. From this point of view, the King could not create, join or support any political movement. Hence, he remained above politics as an *"arbitrator to ensure the regular functioning of the state powers"* (Art. 9), and a *"symbol of unity and continuity of the Nation"* (Art. 8).

The Cambodian monarchy, unlike in the past, is an elective monarchy, according to which the succession of the heir to the throne shall not be appointed but elected by the Council of the throne. The Council comprises 9 members[17], among them the descendants of Kings *Ang Doung, Norodom* and *Sisowath*.

However, the Constitution assigns some functions to the King. Vis-à-vis legislative power, he signs the *Kram* promulgating adopted laws, and communicates with the Parliament by royal message, which is not subject to any form of debate. Vis-à-vis executive power, he appoints the head of the RGC as well as its members, selecting them from within the political party which won the election. Vis-à-vis judiciary power, he is the *"guarantor of the independence of the judiciary"* (Art. 132), and is the head of the Supreme Council of the Magistracy; however, the effective presidency of this organ falls to the Minister of Justice. Vis-à-vis the military forces, the King guarantees their neutrality. He is hence *"the supreme commander of the Royal Khmer Armed Forces",* and is *"the President of the Supreme Council of National Defense"*; however, effective command of the armed forces falls to the Commander in Chief (Art. 23), and the effective function of head of supreme Council of National Defense is assumed by the Minister of Defense.

The Constitution of Cambodia establishes bicameralism and a **parliamentary regime,** in which significant powers are granted to the National Assembly. Cambodian bicameralism is characterized by the unequal power of the two chambers. The Senate, created in 1999 as the result of a political compromise, is an advisory body. Senators are in part elected by the members of Communal Councils and members of the National Assembly, and in part appointed by the King and the National Assembly[18]. The Senate cannot examine draft laws during the first reading, even those which they themselves have initiated, and instead merely give *advice* on the texts adopted by the National Assembly. The chamber enjoys few privileges in the legislative process; they must examine the text of laws within one month, reduced to five days in case of emergency and to two days in case of urgent budget laws, which is impracticable. They cannot overthrow the government, and their power of oversight of the executive can only be carried out by its specialized Commissions[19].

The National Assembly is in theory, if not in practice, the center of Cambodian public power. Enjoying direct election by the Cambodian people, they take part in a confidence vote to create the government. The Prime Minister must be a member of the National Assembly and is appointed by the King upon nomination by the President of the National

17 According to Article 13 of the Constitution, the membership of the Council of the throne consists of the President and two vice-presidents of the Senate and the National Assembly, the Prime Minister, and the Supreme Patriarchs of the two religious orders.

18 This model is an imitation of the one practiced by the Council of Kingdom of the first Kingdom of Cambodia, itself taken from the one practiced by the Council of Republic of the French second chamber during the IV Republic of France.

19 For more details, see YAN Vandeluxe, *the bicameralism in Cambodia*, PhD thesis, defended on April 12th, 2012.

Assembly (Art. 119). The National Assembly itself is the only body which can determine the agenda of its session meetings[20]. It can also hold the government accountable for its actions or policies by a vote of removal. In return, the government can request its dissolution by the King. However, the dissolution is restricted by strict conditions such as the approval of the President of the National Assembly, which is required before the King can dissolve the Assembly. From a purely constitutional perspective, the executive branch is subordinated to the National Assembly either in the legislative process or in the system of checks and balances.

Judiciary power is held by the Courts of Cambodia. The Constitution forbids the separation of judicial organs into civil and administrative courts, as practiced in France[21]. The judiciary power is organized in a pyramid form. The municipal and provincial courts as well as specialized courts are at the bottom. Appeals against first instance judgments could be made to the Appeal Courts; and the Supreme Court is at the top of pyramid. The independence of judges is guaranteed by the Supreme Council of Magistracy.

VII. Conclusion

Due to political change, Cambodia has had several successive Constitutions. Cambodia's first written Constitution was drawn up on the occasion of the country's accession to independence. The successive Constitutions were mere instruments to vest the ruling regimes with legitimacy in internal and international arenas. The monarchy and institutions of the first Constitution were renewed, adapted and modernized to make them suitable in the new context.

The monarchy is a turbulent institution. It has passed from an elective or designated monarchy to an elective monarchy. However, the specific powers of the monarch remain an open question. Bicameralism has been maintained, as has the supremacy of the first Chamber, although the second chamber has undergone significant changes[22]. The parliamentary system has also been maintained, with the executive, whose existence is conditional on a vote of confidence from the first Chamber, and which is responsible to Parliament. Even though the Parliament is at the center of public power, it is not necessarily in practice. In this regard, the executive plays a dominant role in all political decision-making. By taking the National Congress as its foundation, the King, as head of state, concentrated all political decisions. The executive of the current regime can make

20 The permanent committee, comprising the President and vice-presidents of the National Assembly and the Presidents of various Commissions, is the main decision-making organ. It determines the agenda of meetings, and the government cannot interfere in any way.

21 Article 28: *"the judicial power covers all litigation, including administrative litigation"*.

22 Unlike the Council of Kingdom in the first Kingdom, the current Senate is mostly elected by the Commune Councilors with a more firm affirmation of its identity as representative of the Sub-Administration of Cambodia.

all necessary political decisions using the party system. Regarding judiciary power, the judicial separation between civil and administrative litigation, as it was pursued but never achieved in the first Constitution, is forbidden in the current context.

In brief, through an account of the evolution of the Cambodian Constitutions, a connection was discovered between the first and the current Constitutions following a long period of political rupture.

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THE 1993 CAMBODIAN CONSTITUTION AND INTERNATIONAL LAW: A NORMATIVE PERSPECTIVE

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THE 1993 CAMBODIAN CONSTITUTION AND INTERNATIONAL LAW: A NORMATIVE PERSPECTIVE

MEAS Bora *

ABSTRACT

Although there are several provisions regarding international law in the 1993 Constitution, they are unclear and inconsistent. In addition, several of the norms contained in the Constitution provide narrower protections for human rights than those of treaties.

There are no distinctions between the types of treaties or agreements that require ratification by the executive alone or by both the legislative and executive. There is also no law requiring translation and the official publication of treaties in the Royal Gazette.

It is correct to say that the Cambodian legal system is dualist in its treatment of treaty law. If it is to be seen as monist, it is a conditional type of monism in the theoretical sense that incorporated treaties or provisions thereof could possibly be directly applied. In practice, however, international law is not directly applied by the judiciary. The status of treaty law, though, is clearer than that of customary international law in the Cambodian legal system.

Like other countries, such as Vietnam and Lao PDR, Cambodia should adopt a law clarifying the status of treaties within its legal system as well as the process by which such law is incorporated into domestic law or whether, in some cases, international law may be directly applied. In the meantime, a compilation of all ratified treaties should be made and comprehensive training of the judiciary in consideration of international legal norms should be provided.

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I. Introduction

The Cambodian Constitution is the supreme law of the land and generally incorporates some elements of international law. The Constitution contains several provisions from international law, especially those related to the protection of human rights.

In theory, when discussing the status of international law within a domestic legal system, scholars and other practitioners of international law look to a nation's Constitution as a guide. Lack of certain provisions regarding incorporating international law requires significant reference to international jurisprudence or the domestic legal systems of other countries. It is likely that in Cambodia, in the near future, discussion of the international legal provisions in the Cambodian Constitution will increase as scholars and judges become more familiar with international law and more inclined to apply theory to practice.

A core purpose of this benchmark article is to explore the status, nature and scope of the international law provisions contained in the 1993 Constitution of Cambodia within the domestic law of the Kingdom. Reference to other constitutions, especially those of ASEAN nations, and jurisprudence will be made to help answer questions, which have arisen during the process of clarification of the norms of international law present in the 1993 Constitution. This primarily theoretical study will not be exhaustive, but will pave the way for further research by scholars interested in the topic.

This article consists of two main parts: 1. overall relevant theory and 2. discussion of the international law provisions of the 1993 Constitution before drawing a few preliminary conclusions.

II. Relevant Theories

When discussing domestic implementation of international law, scholars generally start with the theories of "dualism and monism"[1] and other relevant terms of art: transformation,[2] incorporation,[3] direct applicability of international law,[4] self-executing provisions or their absence[5], the last in time rule[6] as well as implementing acts/laws themselves[7]. However, they are much more than theories and worthy of clarification.

1. Monism

Monism, as a theory of the relationship between national and international law, which means that treaty law is automatically incorporated into domestic law.[8] It is premised on the concept that international law always prevails over national laws, including the Constitution, in case of a conflict between both types of laws.[9] Accordingly, it is argued that under a monist system, the Constitution, which is considered the supreme law of the land, is actually subservient to treaty law. Monism, in the context of the implementation of international law, dictates that international law (provisions of treaties) is directly enforceable domestically after the treaty has been ratified, or the existence of an international law norm (customary international law: CIL) is confirmed, without separate domestic legislation incorporating the international law provisions into national law.[10]

1 Aslan Abashidze, The Relationship between International Law and Municipal Law: Significance of Monism and Dualism Concepts, p. 23, *in* Basic Concepts of Public International Law, Monism and Dualism, edited by Marko Novakovic, 2013; Peter Malanczuk, Akhehurst's Modern Introduction to International Law (Peter Malanczuk, IL), 7th ed, 1997, p. 63.

2 Anthony Aust, Modern Treaty Law and Practice (Aust, Modern Treaty), 2nd ed., 2007, pp. 187 -188; John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 the AJIL (1992), pp. 315-316; Anette Faye Jacobsen, Human Rights Monitoring, 2008, p. 607.

3 Dinah Shelton, International Law and Domestic Legal Systems; Incorporation, Transformation, and Persuasion (2011) (Shelton, Incorporation), pp. 216, 228-229; Anthony, Modern Treaty, *supra* note 2, pp. 183-184.

4 Meas Bora, Public International Law, 2014, p. 85 (Khmer version).

5 Lori Fisler Damrosch, *Role of the United States Senate Concerning Self-Executing and Non-Self-Executing Treaties*, 67 Chicago-Kent Law Review (1991), pp. 515-516; Jordan J. Paust, Self-Executing Treaties, 82 the AJIL (1988), 766-768; see also John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 the Columbia Law Review (1999), p. 2218; Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 the AJIL (1995), 695; Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 Denver Journal of International Law and Policy (2003), p. 534.

6 See generally, Julian G. Ku, Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes, 80 Indiana Law Journal 319 (2005); Anthony, Modern Treaty, *supra* note 2, p. 198.

7 Aust, Modern Treaty, *supra* note 2, pp. 194-195.

8 Peter Malanczuk (IL), *supra* note 1, p. 63.

9 *Id*., p. 63; Rebecca M.M. Wallace, International Law (Rebecca, IL), 4th ed., 2002, p.35.

10 Peter Malanczuk (IL), *supra* note 1, p. 63.

Directly applying international law, under a monist theory, is also based on the fact that the legislature of a monist state has already provided approval to the executive to ratify the treaty, and therefore, the ratified treaty may be applied without requiring a separate subsequent act legitimizing that treaty by the legislature. This direct incorporation sometimes occurs in Civil Law countries, like Cambodia and France[11], but even in such countries, the practice is far from the theoretical ideal of monism. Actually, the term "incorporation" of international law into provisions of the national law is often used with a view toward allowing courts to apply international law. Otherwise, courts will ignore a reference to international law on the grounds that there are no laws allowing them to apply international law. This demonstrates that even in monist systems, there is a tendency to make the "direct" application of international law somewhat conditional. Additionally, requirements for laws from the legislature for the purpose of implementing relevant provisions of a ratified treaty, present in some so-called monist systems, provides another example against the direct application of international law.[12]

However, it is also true, in some monist systems, that provisions of treaties are self-executing, i.e., they do not require an implementing law/act, and, therefore, those terms are directly enforceable, which comports with the traditional understanding of the term.[13] As the above examples show, truly monist legal systems are rare as most systems are a mixture of monist and dualist elements.

2. Dualism

Contrary to monism, under a dualist system national law and international law are different types of laws and come from different sources, but international laws must be incorporated into the legal system by means of national legislation.[14] Under a dualist system, there may be conflicts between prior national legislation and international law incorporated into national law. They can prevail over each other in some countries on a case by case basis. Generally, in dualist systems, the Constitution is higher than international law. In truly dualist systems, direct application is impossible because in order to make international law a part of national law – so that courts may refer to international law in response to allegations of violations of international norms raised by a party in a particular case – there must be separate and subsequent national legislation. Why is this the case? As in the case of England, the legislature is not involved in the process before ratification by the executive. In other words, the executive already has the authority necessary to ratify the treaty on behalf of

11 Aust, Modern Treaty, *supra* note 2, p. 148; Article 55 of the 1958 French Constitution, available at www.wipo.int.

12 Aust, Modern Treaty, *supra* note 2, pp. 194-195.

13 Shelton, Incorporation, supra note 3, pp. 228-229.

14 Peter Malanczuk, IL, *supra* note 1, p. 63; Rebecca, IL, *supra* note 9, p.35.

the nation, but not to incorporate it into national law. To make a ratified treaty binding at the domestic level, the legislature "transforms" the terms of the treaty into national law to ensure that the treaty provisions may be enforced domestically.[15]

3. Dualism and Monism in relation to Customary International Law

There has not been much discussion on dualism and monism in relation to CIL, but some have suggested, at least theoretically, that CIL should be directly applied within a nation's legal system. This is due to the fact that this source of international law is automatically binding[16] in the sense that there is no requirement for a concrete process of recognition. It is also observed that there are not many references to CIL in state constitutions, especially regarding cases where the terms of a particular treaty conflict with CIL norms. States tend to place CIL below the norms of their own national laws,[17] even though some CIL norms deserve a higher status than those contained in treaties or even in a state's Constitution.[18] Finally, there is a need for a method of incorporating CIL into constitutional norms, so that domestic courts are entitled to apply CIL domestically.[19]

III. International Law and the 1993 Constitution

Before we proceed further, it is necessary to quote relevant provisions in the 1993 Constitution and a key decision by the Constitutional Council regarding international law:

> **Article 8, para. 2:** *"The king shall be the guarantor of the national independence, sovereignty, and territorial integrity of the Kingdom of Cambodia, and the guarantor of the rights and freedoms for the citizens and respect for international treaties."*

15 Kriangsak Kittichaisaree, *the Effectuation of International Law in the Municipal Legal Order of Thailand*, 4 Asian Yearbook of International Law 171 (1995), at 1383-4 in Thailand's Country Report, Centre of International Law, National University of Singapore, Research Project on International Maritime Crimes, pp. 5-6. It is worth noting that a "transformative" law is different from implementing laws that Common Law and Civil Law countries adopt as required by treaties.

16 Shelton, Incorporation, supra note 3, p. 373.

17 Shelton, Incorporation, *supra* note 3, pp. 137, 342 (Canada). For Japan, Germany, CIL is higher than National Law (Article 25 of 2009 German Constitution), available at www.wipo.int

18 Christopher Harland, Domestic Reception of International Humanitarian Law: UK and Canadian Implementing Legislation, p. 30, edited by Christopher P.M. Waters, British and Canadian Perspectives on International Law, 2006.

19 IENG Sary's Motion against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 28 July 2008, D97, p. 12.

Article 26 (new): *"The King shall sign and ratify international treaties and conventions after a vote of approval by the National Assembly and the Senate."*

Article 31: *"The Kingdom of Cambodia shall recognize 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, women's and children's rights. "Every citizen of Cambodia shall have equality before the law, enjoying the same rights and freedoms and fulfilling the same obligations without discrimination as to race, colour, sex, language, belief, religion, political tendency, national origin, social status, resources or other status. The exercise of personal rights and freedoms by any individual shall not adversely affect the rights and freedoms of others. The exercise of such rights and freedoms shall be in accordance with the law."*

Article 55: *"Any treaty and agreement incompatible with the independence, sovereignty, territorial integrity, neutrality and national unity of the Kingdom of Cambodia shall be annulled."*

Article 90 (new): *"[…The] National Assembly adopts approval or terminates international covenants or conventions […]"*

Article 93: *"[…]Promulgated laws shall be published in the Official Gazette and disseminated throughout the country within the above mentioned set time (10 days in the Phnom Penh Capital and 20 days for whole country)."*

Article 128: *"The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens."*

Article 158: *"Laws and all regulations in Cambodia that guarantee respect for property of State, rights, freedom and property of individual legally and accordance with interest of State shall remain effect till new laws revise or annul except they are against the spirit of this constitution."*

Decision of the CCC: *"…understands that at case trial, in principle, a judge shall not only rely on Article 8 of the Law on Aggravating Circumstances for Felonies, but also relies on the law. The term "the law" here refers to the national law including the Constitution which is the supreme law and other applicable laws as well as the international conventions that Cambodia has recognized, especially the Convention on the Rights of the Child."*

1. Treaty Ratification Process

Before highlighting the scope, nature and status of international law directly or indirectly from the quotations above, this section will provide a brief overview of the process of treaty ratification in the Kingdom of Cambodia.

Because Cambodia is one of the Civil Law countries influenced by the French legal system, the National Assembly is involved in the ratification of treaties as it must adopt a law allowing the government to ratify or accede to a particular treaty prior to ratification or accession.[20] Besides the Minister of Foreign Affairs, who is generally recognized to have treaty negotiating power, other Ministers also have such power via assignment by the government to negotiate treaties or agreements after recommendation by international communities or upon the government's own initiative. Regardless of who is authorized to represent the nation, the government will, in each case, develop a statement of interest indicating its desire to become a party to a particular treaty and submit it to the National Assembly.[21] Both the National Assembly and the Senate signal their approval by adopting the proposed draft law supporting the ratification of a treaty.[22] Then, the King promulgates the law, and the government, through the Ministry of Foreign Affairs, proceeds to ratify or accede to the treaty.[23] There is no specific time set for the Ministry of Foreign Affairs to ratify or accede after receiving approval from the legislature.

It is not clear, in the Cambodian system, whether there are types of treaties or other international instruments that do not require the approval of the legislature and may be made binding through an act of the executive alone.[24] In the United States of America, there are distinctions between treaties and other types of international instruments that

20 For example, see *Royal Kram* No. NS/RKM/0809/123 promulgating the Law on Approval to Accede to the Optional Protocol to the Convention on the Elimination on Discrimination against Women, Year 9, Issue 62, Official Gazette, p. 5974.

21 For example, for seeking the approval from the National Assembly, the Prime Minister made a statement regarding the request on ratification of the Hague Convention on the Protection of the Child and International Cooperation related to Inter-State Adoption. The statement refers to the "best interest of the child" principle, relevant policy of the government, laws and situation of child adoption; contents of the conventions; advantages from being a party to the Convention, *see* the Statement, No. 51 S.Ch. Nor. K.Bor.Chor, September 09, 2006; *see* also Motivation on the ECCC Law 2000, Statement No. 01 SCN.KBC of the Royal Government of Cambodia, January 18, 2000; Letter No. 08 L.S. KBC (18 January 2000) of the Royal Government to the President of the National Assembly on the Draft Law on the Establishment of Extraordinary Chambers within the Existing Cambodian Courts for Prosecution of Crimes Committed during Democratic Kampuchea; Letter of the President of National Assembly No. 450 TS (12 July 2001) to the Senate; Michael John Garcia, International Law and Agreements: Their Effect upon U.S. Law, Congressional Research Service, 2014, p. 4; Anthony, Modern Treaty, *supra* note 2, pp. 184-185, 213. Articles 52 and 53 of the 1958 French Constitution, *supra* note 11.

22 The 1993 Constitution of Cambodia, Article 26 (new).

23 Law on Approval to Accede to the Optional Protocol to the Convention on the Elimination on Discrimination against Women, Year 9, Issue 62, Official Gazette, p. 5974.

24 Article 96 (7) and Article 70 (14) of the 2013 Constitution of Vietnam, available at www.wipo.int

only an act of government is sufficient to create a binding national obligation.[25] Cambodian law, even under the Optional Protocol, requires approval from the legislature to permit the government to ratify or accede to any international agreement.[26]

The timeframe for entry into force of a specific treaty to which Cambodia is a party is based on the timeframe noted in the treaty itself. It is unclear whether the invocation of a ratified treaty provision is valid after the treaty is published in the Official Gazette or whether a delay between ratification and publication, in such a case, would have any effect on validity.

2. Article 31 of the 1993 Constitution and Beyond

A brief survey among the constitutions of ASEAN members reveals that Cambodia's 1993 Constitution contains many provisions reflecting international law in general. In addition to the provisions quoted above, there are several other human rights provisions. Several state organs, including the King and the judiciary, are directly or indirectly responsible for promoting the human rights norms in international law. However, there are several unclear provisions in need of clarification. Some relevant provisions mention international treaties or covenants, but do not refer to bilateral agreements/treaties. CIL and other sources of international law, such as general principles of law recognized, are not specifically mentioned in the 1993 Constitution.

a.) Dualism or Monism and Application of International Law

Of all of the pertinent provisions in the 1993 Constitution, Article 31 is the most detailed one. Article 31 is mainly concerned with human rights. In spite of this, all fields of international law should be understood as human rights in this Article. Article 31 uses the terms "respect" and "recognize" in regard to the rights of Khmer citizens. It is beyond the scope of this Article whether and to what extent it violates the fundamental principle of human rights law of non-discrimination, since it only protects the human rights of Khmer citizens. What is relevant here is that the Article employs "soft words", which do not suggest binding obligations. Furthermore and concretely, it stipulates that the rights and guarantees contained in the Universal Declaration of Human Rights must be respected and recognized, even though some of those norms are not part of CIL. As to whether Article 31 includes CIL, it should be read that way, given the broad scope of Article 31 and the relevant terminology used.

25 Michael John Garcia, International Law and Agreements: Their Effect upon U.S. Law, Congressional Research Service, 2014, p. 4; Anthony, Modern Treaty, *supra* note 2, pp. 184-185, 213. Articles 52 and 53 of the 1958 French Constitution, *supra* note 11.

26 See *supra* note 20.

Article 150 (new) states that the Constitution is the supreme law of the land. Although there is no clear provision regarding the status of international law in general in the Cambodian legal system, my research suggests that treaties are below the Constitution but higher than national laws within the hierarchy of laws. As in other states[27], generally, CIL in Cambodia should be accorded a status equal to national law or perhaps below. This conclusion regarding the status of international law is not negated by reference to the provisions of the Law on Copyrights, since it refers to national law, not including the Constitution, which may be ignored in case of conflict with ratified treaties. That law states:

> *"Provisions of international treaties on industrial rights to which the Kingdom of Cambodia is party shall apply to problems arising related to this law. In case of conflicting with the provision of this law, treaty provisions shall be main provisions"*[28]

The fact that the French Civil Law influenced the Cambodian legal system does not mean that any ratified treaty may be directly applied in Cambodia. If, because of Cambodia's legal history, it is presumed that the nation is a purely monist system, then Article 31 is not necessary in the 1993 Constitution and the 2007 decision of the Constitutional Council has no basis.[29] Doubts regarding whether the decision follows Article 31 are on the record. It might be that courts are sometimes reluctant to apply international law, even though Article 31 supports such an application and the Constitutional Council affirmed this reading. Article 31 and subsequent provisions as well as the decisions of the Constitutional Council reflect incorporation of norms of international law in domestic law. Therefore, these provisions should be seen as a conditional application of international law.

As in many states,[30] implementing acts or laws are made by Cambodia to fulfill obligations imposed by treaties to which it is a party. In this connection, it is unclear whether the concept of a "self-executing" treaty or provision is known among Cambodian judges.[31] If so, let me argue that this should be considered a type of direct application of international law, in the case of the self-executing provisions.

Over the years, Common Law legal systems have influenced the Cambodian legal system through technical assistance by experts and organizations in developing laws or legal frameworks. As a result, a dualist approach has penetrated the Cambodian legal system. Indeed, Cambodia is predominantly dualist in its approach to incorporate international law into its domestic legal system.

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27 Michael John Garcia, *supra* note 25, p. 10.

28 Article 129 of the Law on Letters of Patent, Certificates of Useful Models and Industrial Drawings (2002).

29 IENG Sary's Motion, *supra* note 19, p. 12.

30 For example, UK adopted Geneva Conventions Act 1957, *cited* in Christopher P.M. Waters, British and Canadian Perspectives, *supra* note 18, p. 32.

31 See *supra* note 5.

b.) Invocation of International Norms

As indicated above, dualism or monism is a matter of theory. The important thing is whether a treaty provision is actually given full effect within a particular state in order to fulfill that state's obligation to give effective remedy to a victim harmed by a violation of international human rights law. This process begins when the invocation of a treaty provision is recognized by a state's judicial system, whose courts determine whether the alleged acts violate or do not violate international law. A precondition for such recognition in Cambodia is that the ratified treaty must be translated and published in the Royal Gazette.[32] However, Article 93 only prescribes how national law enters into force. Without clear provisions and other factors, such as a lack of initiative on the part of the judiciary, the recognition of international human rights norms may not occur. As Article 31 notes: "*...the exercise of such rights and freedoms shall be in accordance with the law.*"[33]

c.) The Scope of International Laws in the 1993 Constitution

It is an external and unavoidable mistake for developed and developing countries and one that has caused many of the existing conflicts between national and international law, and that is the lack of a comprehensive review of national laws before states ratify treaties. Here it is not my task to make comparisons between national norms and relevant norms of international law to reveal loopholes and provide recommendations to fill or avoid different results of interpretation. This section only deals with issues arising when national laws are narrower or broader than the norms of international law.

One example of a narrow or inconsistent relationship between national law and international law is the question of who possesses rights. Article 31 of the Cambodian Constitution might be interpreted that only Khmer people possess rights, which directly conflicts with international legal norms. Further, Article 41 guarantees the right to freedom of expression. However, the enjoyment of such rights must not negatively affect the reputation of others, the **good customs of society**, public order or national security. Similarly, Article 43 enshrines the right to freedom of religion, but exercising this right must not negatively affect other belief systems or religions, public order or security. Compared with similar rights or freedoms mentioned in human rights treaties, such as the International Covenant on Civil and Political Rights, freedom and rights are limited, different and more abstract in the Cambodian Constitution than those prescribed in other human rights treaties.[34] The term "good custom of society" is vague. Some customs are good for one society, but not for others. Furthermore, there are several societies within a country.

32 Article 55 of 1958 French Constitution, *supra* note 11; Christopher Harland, Domestic Reception of International Humanitarian Law: UK and Canadian Implementing Legislation, p. 30, edited by Christopher P.M. Waters, British and Canadian Perspectives, *supra* note 18; Aust, Modern Treaty, *supra* note 2, p. 184.

33 Several such laws were adopted, such as the Law on Demonstrations.

34 The International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171, Article 19,

Such inconsistencies would not matter as much if the provisions of the Constitution are interpreted as complementing, or to be considered alongside, those of human rights treaties. This is the approach that the Constitutional Council of Cambodia has already adopted in the case regarding the Law on Aggravating Circumstances as violating the Convention on the Rights of the Child to which the Kingdom of Cambodia is a party.[35]

d.) The Place of International Norms in the Cambodian Legal System

There are no clear provisions in the 1993 Constitution or previous Constitutions regarding the place of international norms (treaties and CIL) in the Cambodian legal system. Most of the Cambodian Constitutions state clearly that the Constitution is the supreme law of the land.[36] Accordingly, any norms to the contrary will be considered void.[37] Given the prevailing position of many states[38] and current attitudes among Cambodian legal practitioners, the interpretation most likely to be supported is that treaties are below the Constitution in the Cambodian hierarchy of laws and that laws are below treaties as noted in Article 129 of the Law on Letter of Patents.

The place of CIL in the Cambodian legal system is unknown. One position might be that CIL should be placed below national laws. However, this is not correct in all cases. Scholars have argued that treaties and CIL may prevail depending on the type and nature of the norm concerned.[39] For example, the customary international norm of the prohibition of genocide must prevail over the norm regarding the death penalty as set out in human rights treaties. Therefore, the rigid position that, in the context of the Cambodian legal system, the Constitution always carries more weight than treaties is not correct. Flexibility is necessary to determine which norm applies in a particular case.

35 Decision of the Cambodian Constitutional Council No. 092/003/2007 (10 July 2007).
36 Article 150 (new) of the 1993 Constitution; Decision of Cambodian Constitutional Council No. 092/003/2007 (10 July 2007).
37 *Id*.
38 Article 70 of the 2013 Vietnamese Constitution, *supra* note 24.
39 Christopher Greenwood, Sources of International Law: An Introduction by Professor, 2008, see untreaty.un.org/cod/avl/ls/Greenwood_IL.html; Michael Akehurst, *the Hierarchy of the Sources of International Law*, BYIL, 1976, pp. 274-275.

IV. Conclusion and Suggestions

In conclusion, the current answer to whether Cambodia's legal system is dualist or monist is that it is conditionally monist, given current views towards actual implementation of international norms domestically. This conclusion supposes that the Constitution ranks first in the legal hierarchy and is followed by treaties/CIL. There is no legal distinction between the types of treaties or agreements that the government is able to ratify without the involvement of the legislature. Even after consulting relevant provisions, it is not clear when a treaty should be translated and published in the Royal Gazette or when treaty provisions may be relied on in national courts.

Given the lack of legal frameworks and practice involving international law, it is difficult to argue that Cambodia implements international treaties effectively. Theoretically, the state has sovereignty and may not be forced to ratify or become a party to any treaty against its will. Therefore, it is expected that the state will fulfill the obligations imposed by the treaties it ratifies under the principle of *pacta sunt servanda*, which holds that "*every treaty in force is binding upon the parties to it and must be performed by them in good faith*"[40] and is also enshrined in the United Nations Charter.[41] Moreover, it is not legally acceptable for a state to structure its national law to justify its failure to fulfill its international obligations. As stated in Article 27 of the Vienna Convention of the Law on Treaties: *"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty* […]."[42]

Some countries do have laws or other legislation regarding treaties in which they make a distinction between treaties that require ratification by the legislature and executive agreements, which simply require a signature from the head of the government. Furthermore, these laws contain provisions on how treaties are ratified, how reservations are entered and so on.[43] Cambodia should prepare and adopt a similar law.

40 The Vienna Convention on the Law of the Treaties (VCLT), May 23, 1969, 1155 U.N.T.S.331.

41 June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945, Article 2 (2); The Declaration on Principles of International Law Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, principle, para. g.

42 The Vienna Convention on the Law of the Treaties, *supra* note 40.

43 For example, the Lao PDR has a Presidential Ordinance on the Conclusion, Accession and Implementation of International Treaties, 2009, see Compilation of Constitutional and Legislative Provisions on Treaty Practice of the Lao People's Democratic Republic, Centre for International Law, the National University of Singapore, 2012, p. 6; section 190 of the 2007 Constitution of Thailand; the Ordinance on Treaty Conclusion and Implementation of 1998, Vienam *cited* in Dr. Nguyen Thi Lan Anh, Viet Nam's Country Report, CIL Research Project on International Maritime Crimes, p.1.

In the meantime, practical steps might be undertaken and courts could take the lead, given that the Cambodian legal system favors the direct application of international law. Therefore, courts are entitled to consider provisions of ratified treaties invoked by a party in court. A consistent interpretive approach should be adopted by the courts to avoid violations of treaty provisions and give a broader scope to the protection of human rights in domestic legislation and human rights conventions.[44] This is not without precedent in the Cambodian judicial system since the Extraordinary Chambers in the Courts of Cambodia regularly applies provisions of international human rights and humanitarian law. This approach is necessary since, as the provisions quoted above show, the 1993 Constitution contains inconsistent provisions and vague terms. This will not be an easy task, in actuality, since such technical work requires comprehensive training in international law for Cambodian judges, prosecutors and lawyers, which does not exist in Cambodia at the current time.

44 *Solicitor General of the Republic v. Venezuela*, Final Award on Jurisdiction, N 1993 (File No 08-1572); ILDC 1279 (VE 2008), Constitutional Chamber, 18 December 2008, pp.35-36.

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TEACHING CONSTITUTIONAL LAW

SOTH Sang Bonn

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TEACHING CONSTITUTIONAL LAW

SOTH Sang Bonn *

ABSTRACT

Article 152 of the current Cambodian Constitution regards the Constitution as the supreme law of the state and requires laws and regulations to be in strict conformity with the Constitution. Despite its importance, constitutional rights guaranteed under the Constitution are hardly understood by the authorities, general public and students for many reasons ranging from improper education to poor awareness raising and dissemination of the law.

This article reflects the importance of the Constitution, inclusion of the Constitution in formal education and the approaches of teaching within the Cambodian context. It also examines teaching and learning methodologies, materials, challenges and modes of assessment.

In order to achieve this, the author carried out a literature review and made observations on different levels of education to identify the extent to which the constitutional concepts have been integrated in formal education, in particular, the integration of constitutional issues in curriculums.

This study combines desk reviews and information obtained from lecturers and professors who have been teaching the Constitution at universities. It also includes the author's 10 year experience as a teacher and practitioner of the Constitution while working for a Cambodian legislative body.

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I. Introduction

Cambodia is a country in Southeast Asia with a population of more than 15 million people.[1] The country adopts a political system of constitutional monarchy, liberal democracy and pluralism.[2]

The current Cambodian Constitution is modeled by the Cambodian constitutional traditions of 1947 and 1989 and is the supreme law of the state. It is a modern written Constitution adopted in 1993. This Constitution provides main principles of the state; a catalogue of protection and promotion of human rights[3] and environment[4]; rights and obligations of state and citizens; respect of rule of law[5]; separation of powers and procedures for establishing important state organs[6].

Although the Constitution provides for important aspects including rights and obligations for state and citizens in addition to respect of the Constitution and laws, the enforcement of the constitutional concepts in real life faces greater challenges ranging from the dissemination of the Constitution, to education, to understanding and interpreting the Constitution.

1. Scope and Methodology

This article aims to explore the educational sector especially the approaches in the teaching of the Constitution in Cambodia. It also examines teaching and learning methodologies, materials, challenges and modes of assessments for the constitutional topic.

In order to achieve this, the author carried out a literature review and made observations on the different levels of education to identify the extent to which constitutional concepts have been integrated in formal education, and in particular, the integration of constitutional topics in the curriculum for general and higher education.

This study combines desk reviews and information obtained from lecturers and professors who have been teaching the Constitution at universities. It also includes the author's 10 year experience as a teacher and practitioner of the Constitution while working for a Cambodian legislative body.

1 World Bank, *East Asia and Pacific Economic update 2013*, Vol. 1 (2013): 1; See also: World Population Review: Cambodia Population 2014 http://worldpopulationreview.com/countries/cambodia-population/ (Retrieved September 9, 2014)
2 Article 1 and 50 of the Constitution of Cambodia, 1993
3 Art 31-50 of the Cambodian Constitution
4 Art 58-59 of the Cambodian Constitution
5 Art 49 of the Cambodian Constitution
6 Art 119 of the Cambodian Constitution

II. The Structure and Main Principles of the Current Constitution

1. The Structure of the Current Constitution

The Cambodian Constitution is medium sized compared to others in the region with 160 fairly short articles and 17 chapters encompassing the fundamentals of the state, namely the state's institutions, fundamental rights of citizens and prescriptions of major policies for the state.[7]

According to the current structure the Constitution covers a wide array of important aspects, ranging from preamble as a prologue of the Constitution to be followed by the sovereignty in Chapter I, the King in Chapter II, the rights and duties of Khmer citizens in Chapter III and the rest of the chapters including the political regime, the economy, education, culture, social affairs, the National Assembly, the Senate, the Congress of the National Assembly and the Senate, the organization of elections, the Royal Government, the judiciary, the Constitutional Council, the National Congress, the effect, the revision and the amendment of the Constitution, the transitional provision and the additional constitutional law of 2004.

Since 1993, the Constitution has been amended eight times. However, the core values of the Constitution have remained unchanged. The amendment in 1998 for the establishment of the Senate has been the most significant amendment because the amendment itself provided not only the solution for the political deadlock after the election in 1998 but also an opportunity for the country to reinstall the bicameral parliamentary systems which dated back to 1947.

2. Main Principles of the Current Constitution

The contents of the current Constitution derived mainly from Annex 5 of the Agreement on a Comprehensive Political Settlement of the Cambodian Conflict that was signed in Paris on 23 October 1991. Annex 5 of the agreement contains main principles for a new Constitution that could be summarized as below:

1. Declaration of the state's status as a sovereign, independent and neutral state and, the national unity of Cambodian people;
2. Define the political system as a liberal democracy, on the basis of pluralism;
3. The Constitution declared as the supreme law of the land;

7 After the general election in 2013, the Constitution was amended with special focus on Article 76, Chapter 15 and Chapter 16, which include the National Election Committee to be an independent constitutional organ with the mandate to ensure independence and neutrality of elections in Cambodia. The amendment took effect as of 10th October 2014.

4. Guarantee of a systematic promotion and an environment protecting fundamental human rights;
5. The concept of rule of law (due process and equality before law);
6. The prohibition of retroactive application of criminal law and recognition of the Universal Declaration of Human Rights and other relevant international instruments;
7. Guarantee of periodic, secret and genuine elections with universal and equal suffrage;
8. Guarantee of an independent judiciary to protect and promote rights of citizens; and
9. The approach to adopt the Constitution based on a two-third majority of the members of the constituent assembly.

In response to this Annex, a committee to draft the Constitution was established on 30 June 1993 and headed by Chem Sngoun, the former head of the Legislative Commission of the State of Cambodia's National Assembly. The 12-member committee comprising of six members from the Front Uni National pour un Cambodge Indépendant, Neutre, Pacifique, et Coopératif (FUNCINPEC), five from the Cambodian People's Party (CPP), and one from the Buddhist Liberal Democratic Party (BLDP) was mandated to draft the Constitution and submit it for further deliberation by the Constituent Assembly.

The Constituent Assembly convened and deliberated on the draft of the Constitution from 15-19 September 1993. During that period, the Constituent Assembly undertook ten plenary sessions, in the mornings and afternoons, to deliberate on different aspects of the draft Constitution. For example, in the morning of the first meeting, the Constituent Assembly deliberated on Article 1 to Article 30 and in the afternoon it continued to discuss Article 31 to Article 35. On the second day, deliberations were on Article 36 to Article 46 and Article 47 to Article 55 in the morning and afternoon respectively. The deliberation on the draft took more or less ten articles per-session until it was finally finalized on 19 September 1993.[8]

The Constituent Assembly adopted the Constitution on 21 September 1993 by a vote of 113 to five, with two abstentions, and it was promulgated by Prince Norodom Sihanouk on 24 September 1993.[9]

According to detailed minutes, the deliberation of the contents and the process of making the Constitution are very important. Unfortunately, the deliberation of both the constitutional contents and the process of making the Constitution have been less known for many reasons including lack of copies and proper dissemination of the constitutional text, limited civic education, insufficient in-service capacity building for teachers or trainers, lack of research incentives and unsystematic enforcement of law, especially copy rights law.

8 Detailed minute of the 2nd plenary session of the Constituent Assembly, the Secretariat General of the National Assembly, 15 September 1993, P 519

9 Laurel E. Miller (ed.) with Louis Aucoin, *Framing the State in Times of Transition: Case studies in Constitution-Making*, Washington, D.C.: United States Institute of Peace, 2010, pp. 207-244

Well-educated people normally agree that the Constitution is the supreme law of the land, or as the statute of the state, which encompasses rights and obligations of the state and citizens, and includes mechanisms to promote and protect human rights and the environment. It defines sovereignty, political system, separation of powers and other important matters. However, the general population would know that the Constitution is the supreme law and that it is important but would not be able to deliberate more substantively.

The limited understanding on the importance of the Constitution and of constitutional concepts could be the result of the limited inclusion of constitutional issues in the general education curriculum and limited capacity of teachers or trainers on the topic. In this regard, the author will look into the curriculum of general education and higher education, which will be discussed in the section below.

III. Introducing the Constitution to General Education

Formal general education in Cambodia is organized in three levels: 6 years of primary education, 3 years of lower secondary education and 3 years of upper secondary education.[10] Although the learning hours will be increased from 4 to 6 hours or to a full day (8 hours) of learning and teaching, the amount of teaching time available is by far less compared to the international standards as Cambodia takes only 38 weeks of learning and teaching per school year.[11]

1. Inclusion of Constitutional Aspects in General Education

Topics relevant to the Constitution have been integrated in a subject of moral and civic study in primary level (grades 1 through 6) and social study in the curriculum of lower secondary school (grades 7 through 9). For instance, the curriculum of grade 7 includes two main human rights aspects relevant to civil and political rights, and to non-discrimination; gender equity and election rights.[12]

According to the current textbook of grade 7, there are some constitutional topics that have been included. For example, Chapter 1 of the book on gender and human rights clearly states that "*every human being, both men and women enjoy equal right before law; they have rights, freedom and bound by obligations; and they are not discriminated basing on race, complexion, sex or social status*". These aspects have been guaranteed in Chapter 3 of the current Constitution, especially from Article 31 and Article 49.

10 http://www.hurights.or.jp/archives/human_rights_education_in_asian_schools/section2/2003/03/cambodian-national-curriculum-and-human-rights-education.html (retrieved 9 October 2014)

11 Ministry of Education, Education Strategic Plan 2014-2018, Phnom Penh, March 2014, p 38

12 Ministry of Education, Youth and Sport (MoEYS), Social Study Grade 7th, Publishing and distributing House of MoEYS, Phnom Penh, 2012, pp 152-168 and pp 200-212

In addition, Chapter 1 further includes other topics on the concept of gender, mindset of Cambodians, mentality on discrimination, elimination of discrimination against women and measures to ensure gender equity.[13] In similar respect, an inclusion of election aspects ranges from the concept of democratic election to the criteria of candidates, participation and to the process of elections.[14]

In grade 8, the social study text book of the Ministry of Education, Youth and Sport (MOEYS) printed in 2013 for the current school year includes only two main constitutional aspects: living with dignity and democratic election to choose members of parliament.[15] In contrast to the current version, the old publication of the social study text book in grade 8, which was printed in 2007, is now invalidated and replaced by the current version of 2013. The old book included important aspects like rights to live with dignity, rights to justice, symbol of Khmer unity and the Constitution of the Kingdom of Cambodia.[16]

Despite some outdated information being included in this part, integration of constitutional aspects in the 2007 publication of grade 8 was more precise with an interesting delivery approach. For instance, the text required reading activities, discussion, and summary of important points, exercises, research and assessment on students' understanding.

Unlike grades 7 and 8, the curriculum of grades 9 and 10 contain only a few constitutional aspects. For instance, topics on understanding the democratic doctrine and neutrality have been included in Chapter 2 of the social textbook for grade 9 on living with the community under the subject of moral and civic education[17] while in grade 10 it included only one topic; the Court[18].

In grade 11, students are required to study not only constitutional topics like democratic doctrine, rights and obligations of citizens, but also brief aspects of important laws of Cambodia including the Labor Law, civil and criminal procedures, and Land Law. Furthermore, in grade 12, there is an inclusion of women rights, child rights, the role of the court and the role of executive bodies including the role of local administration.[19]

13 *Ibid*, MoEYS, Social Study Grade 7th, pp 154-168
14 *Ibid*, MoEYS, Social Study Grade 7th, pp 200-212
15 MoEYS, Social Study Grade 8th, Publishing and distributing House of MoEYS, Phnom Penh, 2013, pp 160-212
16 MoEYS, Social Study Grade 8th (old version), Publishing and distributing House of MoEYS, Phnom Penh, 2007, pp 43-66
17 MoEYS, Social Study Grade 9th, Publishing and distributing House of MoEYS, Phnom Penh, 2011, pp 216-224
18 MoEYS, Social Study Grade 10th, Publishing and distributing House of MoEYS, Phnom Penh, 2014, pp 76
19 Department of Education of Kandal Province, Office of General Education, Course Syllabi for the subject of Moral and Social Studies for grade 11th and grade 12th, Sept 2012

2. Teaching Methodologies on the Constitution in General Education

Although some constitutional topics are included in general education, the teaching approaches presented in social textbooks remain unchanged. Commonly, they started with the objective of the lesson, introduction, content of the subject followed by a summary and questions. Other modern approaches of student-centered learning like research, workshops and presentations have not yet been included in the current materials.

As far as the research is concerned, the inclusion of constitutional topics in the curriculum of general education was small-scale, but teaching and learning materials, learning hours, teaching approaches, and systematic capacity building of teachers should be considered for further improvement.

IV. Teaching the Constitution in Higher Education

Higher Education refers to higher educational establishments of two types, a university and an institution. This level could also be called the third level (3rd Phumasekar) of education following the secondary education.[20] Up until now, there are 105 (one hundred and five) higher educational establishments in Cambodia. According to the Ministry of Education, Youth and Sport (MoEYS) the number of higher educational establishments, both private and public, has been increased significantly since the 1990s to 2012. There are 39 public educational establishments and 66 private universities/institutions located in Phnom Penh and 19 universities/institutions located in the provinces.[21]

Although there is an increase in the number of higher educational establishments, there is still an absence of a well-functioned governmental body designated to coordinate all the ministries or institutions that offer higher education courses in Cambodia. For this reason, the management of higher education in Cambodia is under the management of 14 institutions. There are 65 higher educational institutions, 9 public and 56 private, which are under the MoEYS and another 40 higher educational institutions which are under 13 other ministries.[22]

20 Article 18 of the Law on Education, 2007 promulgated by the decree No. NS/RKM/1207/032

21 MoEYS: Performance in the Academic Year 2012-2013 and Goals for the Academic Year 2013-2014, March 2014, p 46

22 *Ibid*, MoEYS: Performance in the Academic Year 2012-2013; See also SEN Vicheth and ROS Soveacha, Anatomy of Higher Education Governance in Cambodia, Working Paper Series No. 86, CDRI Publication, December 2013, p 14

1. To What Extent has the Constitution Been Taught in Higher Education?

According to Article 18 and Article 19 of the Law on Education, higher education aims at equipping students with necessary skills corresponding to the current market so that they can help develop the country upon the completion of their studies. Subjects for higher education include scientific, technical, cultural and social researches to promote capacity, knowledge, skill, morality, inventive and creative ideas and a spirit of entrepreneurship for students. Besides research skills, it also includes technical and vocational education and training covering all professions and skills provided by public and private technical and vocational education and other training institutions.

From the outset, it seems that the Accreditation Committee of Cambodia (ACC) and the Directorate Department of Higher Education under the MoEYS are empowered to ensure quality and a standard of higher education including curriculum development and quality assurance. However, these institutions have limited roles. For instance, Article 21 of the Royal Decree on the Accreditation Committee of Cambodia set out eight roles ranging from developing a policy on accreditation of quality of higher education, deciding levels of accreditation, and accrediting a foundation year course program to ensure good collaboration with concerned parties.

Article 30 of the same Royal Decree requires higher educational establishments to include four main aspects in the foundation year of undergraduate programs. Those aspects include art and humanity, mathematics, science and computer technology, social sciences, and foreign languages. Although the subsequent articles provide detailed subjects belonging to the above aspects, there is no inclusion of a main constitutional subject yet in the foundation or in the consequence years.

Practically, the Constitution should be a foundation for most majors, particularly for higher education programs. For this reason, some universities included the Constitution in most majors as a compulsory subject. For example, the 2008 curriculum at Pannasastra University of Cambodia (PUC) required students of every major to undertake Cambodian Institution Studies that include the Cambodian Constitution and two other subjects accounting for 9 credits.[23] Unfortunately, Constitutional Law has been removed from all majors except law studies. This means that only students who undertake law studies are required to study Constitutional Law in their second year.[24]

23 PUC, Curriculum, Academic Program office, January 2008
24 PUC, Academic Curriculum and Studies Programs, January 2011, p 19

Although PUC's curriculum requires students to study constitutional law in the second years, some other universities required students to study constitutional Law in the first year. According to the current curriculums of the Royal University of Law and Economics (RULE) (Khmer Program) and the Cambodian University for Specialties (CUS), constitutional law was included in the first year of the law studies.

2. Inclusion of Constitutional Aspects in Higher Education

Since there is no uniform standard for the curriculum development for higher education, higher education establishments may include Constitutional Law in the first or the second year of the school curriculum and may include or exclude some constitutional aspects from the course syllabus depending on individual lecturers. For example: a syllabus for Constitutional Law of a lecturer at the Royal University of Law and Economics (RULE) for the Khmer program includes at least seven important constitutional aspects including the history and historical development of the modern Constitution, historical development of the Cambodian Constitution, the principle of separation of powers in the modern Constitution, governmental system of the Cambodian Constitution, human rights protection systems in the West, human rights protection systems of ASEAN members, and constitutional issues in Cambodia. In addition to these aspects, sub-topics under each aspect seemed to be more theatrical and historical rather than practical.

In contrast to the Khmer program, syllabus of Constitutional Law for the English-based Bachelor of Law program, (ELBBL) at RULE includes five main aspects including historical development and structure of Cambodian Constitution, supremacy of law, fundamental rights, theory of separation of powers, and the role of state institutions.

3. Teaching Methodologies on the Constitution in Higher Education

Teaching methodologies for law and other subjects vary greatly from topic to topic, and the knowledge and skills of teachers/lecturers. This means that readers or students may, to a certain extent, assess teaching approaches of a lecturer by looking in the course syllabus. However, since the course syllabus serves only as a guideline, one may not appropriately assess the teaching performance of a lecturer until they look into the lesson plan, observing or attending the class directly.

According to the affirmation of colleagues who have been teaching Constitutional Law and with reference to course syllabi that the author has received from colleagues who have been teaching Constitutional Law at difference universities, namely PUC, RULE, Cambodia University for Specialties (CUS), and the National University of Management (NUM), teaching follows more or less a teacher-centered approach. For instance, while the uni-

versity library has limited documents and students do not have a good habit of reading due to language barriers, how could they learn about the English revolution era of the 17th century, the origin of the right to a complaint, and the theories of John Locke, etc., under the aspect of historical development of the modern Constitution, a constitutional aspect in the course syllabus of the Khmer program. This means that lecturers may play a more active role than students do.

In similar respect, although the syllabi of other universities includes other activities, requiring students to do research on a particular constitutional topic and after the research requires them to present the result and submit their research report, some important interactive activities of student-centered workshops, mock trials and competitions on constitutional topics are missing in the teachings of Constitutional Law in Cambodia.

In an attempt to promote the quality of teaching and improve learning procedures, especially teaching and learning of Constitutional Law, the author wishes to share the following teaching methodology as a contribution. This methodology is drawn and developed based on personal experience of the author, who used to be a law student, an officer who has been working for a legislative body for more than ten years and a part-time lecturer who has been teaching Constitutional Law since 2008 at private and public universities, namely PUC and RULE.

Normally, teaching Constitutional Law in the above mentioned universities requires 45 hours plus 3 hours for examination, either for summer schools or in a regular school year program. This subject accounts for 3 credits. The summer program refers to a program in between the two regular semesters which is scheduled for three months, requiring students to do intensive study and the teacher to provide intensive teaching. For instance, teaching Constitutional Law at PUC in the summer program requires a lecturer to deliver a three-hour lecture twice a week. In contrast, RULE includes Constitutional Law as a subject in its regular program, which requires the lecturers to give a lecture only once a week, and each session lasts three hours.

Methodologies for teaching Constitutional Law at both universities were applied differently depending on the capacity of students and time availability. However, in most cases, the author applied the following approaches in addition to regular lecturing.

a.) Spotting Constitutional Relevance

The key to improving students' understanding of the Constitution is to apply a well-designed and innovative learning approach, which includes an introductory session, interactive classes where students are encouraged to participate in discussions and to do literature reviews.

The main purpose behind this approach is to encourage students to read around the topic of the Constitution. Normally, students are tasked to read the constitutional text directly, either by chapter or by provisions. However, students may discover other aspects of the Constitution that may be of interest.

During the following session, students have to prove why the articles they read are relevant to the Constitution. When one student proved and defended his/her position, other students were encouraged to provide feedback on whether or not they support the proposition, therefore provoking further questions that lead students to think and encourage students to interact with the class more actively.

b.) Case Studies

Case studies are stories that present realistic scenarios, details of complex issues, and contextually rich situations and often involve an infringement of constitutional rights, a dilemma, conflict, or problem within constitutional aspects. The case studies are teaching tools by which a chunk of reality or some of the stubborn facts that must be faced in real-life situations are brought in for a discussion in the classroom with the facilitation of the lecturer.

The case studies have been an effective tool for teaching in most academic disciplines including medicine, business and law. The benefit of using case studies is that they bridge the gap between theory and practice and between the academy and the workplace. Using case studies allows students to practice identifying factors that cause a problem, and recognizing and articulating their positions. Case studies also help students to evaluate courses of action, and express their arguments in different ways.

Normally, lecturers may prepare constitutional-relevant case studies by themselves based on their teaching goals. The case studies could be long, detailed or short to suit the purpose of their sessions. However, it is reminded that in order to design interesting case studies there should be an inclusion of reality. For instance, you could extract most details from actual cases or circumstances and make sure that students get the most relevant data or information for a discussion and to solve the main issue. When designing case studies, you could also include issues that require students to examine multiple constitutional aspects or just certain aspects of a problem.

The case studies could be presented in lecture-based or discussion-based classes. Presenting a case study in a lecture-based class could be done once you do not have sufficient time to discuss more with students. This may be well-suited in a situation in which you are invited to be a guest speaker at a university or during a seminar requiring you to present certain aspects of constitutional issues. However, depending on the topic and time availability, in some cases, you may also use a particular case study to provoke an active discussion in your lecture.

In addition, presenting a case study in a discussion-based class could be very interesting for students. The lecturers may wish to present a short or long case study to students if they have sufficient time, and may assign students to read the case prior to the session so that students have some time to think about the case. This means that you can assign the case study as homework with some provoking questions. For example, “how would

you approach this case if you were the authority with the obligation to fulfil your assigned task or if you were the victims whose constitutional rights were being abused?" "What would be your recommendations if you were a consultant or a lawyer handling this case?"

The lecturer could break down the steps he/she wishes students to discuss or analyze in the case. For instance, first, you may ask students to identify constrain that was facing each character in the case and the opportunities the character has. Second, you may require students to evaluate the decisions each character made and their implications. Finally, you may encourage students to explain what they would have done differently and why.

In order to make the best use of the discussion on a case study, you may divide the class into small discussion groups so that all students could be fully involved and the discussion could be more serious and more focused on a particular aspect. You may task a group to discuss a particular aspect. For example, group A is to identify courses of action and outline the pros and cons from the perspective of the authority, while other groups are assigned to work on different tasks.

You may request each group to assign a representative to present the results of the discussion, the solutions or the reasons to the class. Most importantly, you may ask one student to do the synthesizing so that at the end of the discussion he/she could synthesize issues raised. Be sure to bring the various strands of the discussion back together at the end, so that students see what they have learned and take those lessons with them.

c.) Workshops

A workshop in a Constitutional Law class is a form of group participatory presentation. The lecturer may assign students to form a group of three or four persons to work on a constitutional topic selected from a list of topics. A presentation does not have to be limited to one person. Each group may assign a group leader or facilitator to lead or facilitate the workshop. Each group member might be responsible for particular parts of the workshop, or all may work together throughout, depending upon the structure and purpose.

The purpose of assigning students to conduct a workshop was to enhance the capacity of students on a topic and provide them an opportunity to practice techniques and skills that are under discussion. The workshop allows students to do good research and be well-prepared to deal with tough questions that other students may raise during the workshop. It gives students a chance to do proper coordination among all members and also requires them to have good time management during the workshop.

Soon after each group gets a topic, the lecturer should explain to students how to conduct their workshop. The explanation includes time allocation for each group, which normally is only 45 minutes to be followed by a 15 minute question and answer (Q&A) session. After the Q&A the lecturer could provide his/her comments regarding the entire workshop performance, contents of the topic, and group-led interaction with the class.

It is also important to remind each group to clarify the topic and make sure they understand it clearly. Moreover, the lecturer should explain to them how he assesses their performance during the workshop.

In order to help each group to prepare and understand the topic, the lecturer may explain to them or ask the group to provoke questions relevant to the topic. For example, one group gets a topic on "Fundamental Rights: Social and Cultural Rights". To begin with, the lecturer may provoke some questions or ask the group to make a list of questions like, "What rights are fundamental? What are social rights? What are cultural rights? What articles are relevant to social and cultural rights? How does a state guarantee social and cultural rights in practice? How do you know whether or not social and cultural rights are properly guaranteed? Have you seen any decisions/interpretation made by the court or the Constitutional Council with regard to the protection of social and cultural rights?"

After provoking questions or having a list of questions in hand, students may feel more confident and have a better understanding on the topic. They also have a better idea on how to structure their research and how to lead the workshop. If they came up with many questions, the group has to decide whether to include or present the most relevant aspects in the workshop to suit the given time frame of 45 minutes.

Before the workshop, students need to do research to answer the above relevant questions, prepare a list of terminologies relevant to the topic, case studies and other materials for the workshop. Most importantly, they need to submit a five-page report with proper references to the lecturer one or two days prior to the workshop so that the lecturer can keep track of what the group is going to present in the workshop while at the same time the lecturer can prepare some comments to help the students during the workshop. It is important for the lecturer to remind students of the upcoming workshop and the topic of the workshop so that other students can prepare and raise some questions during the workshop.

During the workshop, the group will lead the entire process with the facilitation of the group leader. The group leader may start by introducing the topic and the members including steps and necessary instructions to maintain participation in the workshop. In most cases, since each group is given at least two weeks to prepare for the workshop, with a proper follow up and guidance of the lecturer, they turn out to be proactive and they could draw the attention of the entire class very well.

The group either delivers a short presentation first to be followed by questions to make sure that everyone stays alert or provoke some questions and encourage others to contribute ideas rather than doing a presentation by the group alone. The group either distributes materials before or after the workshop depending on their own techniques. After the group deals with questions posted by other students, the lecturer could comment on the performance of the group, and the content of the topic, while other students are also given a chance to assess the group workshop via a prepared form given by the lecturer.

d.) Online Class

In addition to the above teaching techniques, the author has another learning tool and activities to help students understand constitutional topics better. For example, the author uses a website called "MyOnlineClass", a website accessible at www.myonlineclass.kalicee.com. This website allows not only students to download relevant legal documents and interact online with the lecturer, but also provides a forum to the general public who are interested in getting relevant documents and understanding other legal issues.

Through the above forum, students can easily communicate with the lecturer where and whenever they can spare some time. A lecturer could also upload materials or set assignments online for students. Furthermore, students can comment on a particular topic in a forum posted by the lecturer and all comments can be responded to by other colleagues or the lecturer.

e.) Field Visits

The author organizes some activities to enable students to have a better understanding of constitutional topics on the practical level. For example, in order to help students to understand the role of constitutional organs, like the National Assembly, the Senate, the Constitutional Council, etc. the author organizes a visit to the Constitutional Council, the Senate and to the National Assembly. With proper coordination, students could see the premise and facilities of the institutions from the outset and they could learn from administrators of those institutions on administrative issues. Most importantly, students are arranged to meet parliamentarians or senators so that they can learn and understand practical roles and responsibilities, and they can raise questions and concerns to those officials.

V. Conclusion

The Constitution is the supreme law of the state. Every law and regulation shall be in strict conformity with the Constitution. Despite its importance, the Constitution and constitutional rights being guaranteed under the Constitution are hardly understood by the authorities, general public and students for many reasons ranging from improper education to poor awareness raising and dissemination of the law. The subject of the Constitution is very important and shall be fundamental for most majors in both general and higher education; however, the inclusion of constitutional topics in the curriculum of both educational levels is relatively limited.

The capacity of teachers/lecturers who teach the Constitution varies to a great extent requiring systematic training to promote both the knowledge on the Constitution and teaching methodologies at private and public educational establishments. Although some teachers/lecturers have good knowledge on the Constitution and are enriched with teaching techniques, they hardly perform appropriately due to the lack of incentives and time constraints, thus making the constitutional subject less interesting and less important than other subjects.

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THE KING OF THE KINGDOM OF CAMBODIA: A BRIEF ACCOUNT OF THE CONSTITUTIONAL ROLES OF THE KING

HOR Peng

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THE KING OF THE KINGDOM OF CAMBODIA: A BRIEF ACCOUNT OF THE CONSTITUTIONAL ROLES OF THE KING

HOR Peng *

I. Introduction

Cambodia is a Kingdom whose King reigns and rules according to a written Constitution and the principles of a multi-party liberal democracy.[1] The recent restoration of the monarchy demonstrates the country's commitment to the unity and eternity of the nation. The Constitution also provides for a limited form of democratic government and the protection of individual rights and freedoms. Cambodia practices a form of popular sovereignty, such that all political power falls to the people of Cambodia. Nonetheless, the people do not exercise power directly, but rather via elected representatives. It is thus a representative democracy. In representative democracies, the people exercise their political and socio-economic rights through national elections and elected representatives.

This article does not attempt to provide a complete history of the Cambodian monarchy and its place in the Constitution. Rather, it gives a brief account of the role of the King as designated in the Constitution.

II. The Historical Development of the Kingship

Cambodia has a long history of monarchism. The evolution of the Cambodian monarchy can be broken down into three distinct periods: the ancient Khmer Empire, France's colonization, and modernization. In the ancient period, the King held absolute sovereign power, and was considered a divine ruler. During the period of the French protectorate, the powers of the King were delimited by the Cambodia-France treaties. During the period of modernization, characterized by full independence and sovereignty, the doc-

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1 See Article 1 of the Constitution of the Kingdom of Cambodia.

trine of constitutional monarchy was introduced, such that the powers of the King were bound by the Constitution and existing laws. The history of Cambodia's monarchy is not without interruptions – in particular, it was abolished altogether during the period of the Republic and the Khmer Rouge era. The monarchy was reestablished in 1993 and has persisted up to the present day. According to the current Constitution, the King reigns but does not govern. It clearly defines the purely symbolic and ceremonial role that the King fulfills. He attends official functions as the Head of the State, and acts as a symbol of the unity and eternity of the nation.

III. The Appointment of the King of Cambodia

Under the current constitutional system, the King of Cambodia is elected, and has no power to appoint an heir to the throne.[2] In the event of the King's abdication[3], retirement, or death, a new King must be elected by the Council of Throne within a period of no more than seven days.[4] The King of Cambodia must be a member of the royal family, at least 30 years old and a descendant of the hereditary line of King Ang Duong, King Norodom or King Sisowath. Before acceding to the throne, the King must take an oath of allegiance.[5]

IV. The Role of the King of Cambodia

The King of Cambodia reigns but does not govern. This is a basic principle of the current Constitution. Once elected, the King is the Head of State for life, and his reign is inviolable.[6] Furthermore, the King is the symbol of the unity and eternity of the nation. The King is the guarantor of national independence, the sovereignty and the territorial integrity of the Kingdom of Cambodia, as well as of the rights and freedom of its citizens, and of international treaties.[7] In some cases, the King can assume the role of supreme arbitrator, if this is deemed necessary to ensure the regular execution of public powers.[8] The King is also the guarantor of the independence of the judicial power.[9] However, with

2 See Article 10 of the Constitution of the Kingdom of Cambodia.
3 See the Law on Throne (2006). See also the Decision (in case of Interpretation of Article 7) of the Constitutional Council in 2006. This interpretation established a new Law on Throne.
4 See Article 13 of the Constitution. See also the Law of Throne 2006.
5 See Annex 4 of the current Constitution, the Oath of Allegiance of the King "I swear to be respectful to the Constitution and Laws of the Kingdom of Cambodia and to pledge all my efforts to working for the interests of the State and the People".
6 See Article 7 of the Constitution of the Kingdom of Cambodia.
7 See Article 8 of the Constitution of Kingdom of Cambodia.
8 See Article 9 of the Constitution of the Kingdom of Cambodia.
9 See Article 132 of the Constitution of the Kingdom of Cambodia.

regards to matters of state, the King can act only on the basis of official requests from the legislative, executive or judicial branches of government. As such, he cannot act on his own initiative, such that the government alone holds political power.

As the Head of State, the King has the following official functions:

1. The King opens the first session of the National Assembly and the Senate of each new term of election (Art.82 and Art.106).
2. The King communicates with the National Assembly and the Senate by royal messages. The royal message is not subject to debate by the National Assembly and the Senate (Art.18).
3. The King appoints the Prime Minister and the Council of Ministers following a vote of approval by the National Assembly (Art.19).
4. The King grants an official audience to the Prime Minister and the Council of Ministers twice a month to hear their reports on the situation of the nation (Art.20).
5. The King is signatory to *Pheah Reach Kram* promulgating the Constitution and the laws adopted by the National Assembly and thoroughly reviewed by the Senate, as well as *Pheah Reach Kret* proposed by the Council of Ministers (Art.28).
6. The King is signatory to and must ratify all international treaties and conventions following a vote of approval by the National Assembly and the Senate (Art.26).
7. The King receives letters of credentials from ambassadors or envoys, extraordinary and plenipotentiary, of foreign countries accredited to the Kingdom of Cambodia (Art.25).
8. The King, upon the official request of the Council of Ministers, signs *Pheah Reach Kret* appointing, transferring or terminating high-ranking civil and military officials, ambassadors and envoys extraordinary and plenipotentiary (Art. 21[1]).
9. The King is the Supreme Commander of the Royal Khmer Armed Forces. A Commander-in-Chief of the Royal Khmer Armed Forces is appointed to command the Armed Forces (Art.23).
10. The King serves as the Chairman of the Supreme Council of National Defense, which is established by a law. The King makes any declarations of war following the approval of the National Assembly and the Senate (Art.24).
11. The King officially presides as the President of the Supreme Council of Magistracy; the body assists the King in judicial affairs (Art.132 and 134).
12. The King, upon the official request of the Supreme Council of Magistracy, signs *Preah Reach Kret* appointing, transferring or removing judicial judges (Art.21 [2]).
13. The King has the right to grant partial or complete amnesty (Art.27).
14. The King confers national honorific distinctions as well as civil and military ranks and titles (Art. 29).
15. The King has the prerogative right to appoint 3 members of the Constitutional Council and 2 members of the Senate in every mandate (Art. 100 and Art.137).

V. Concluding Remark

The King of the Kingdom of Cambodia acts not only as a symbol of the unity and eternity of the nation, but also as the Head of State, an inviolable position he retains for life. Even though the King technically holds the state's highest position, there is a clear legal distinction between the Head of State and the Head of Government. The King performs official roles as provided for in the Constitution. The King has no power related to politics or government, and acts only when requested to do so by the government; as such, the government alone holds political power in Cambodia.

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THE NATIONAL ASSEMBLY OF THE KINGDOM OF CAMBODIA

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THE NATIONAL ASSEMBLY OF THE KINGDOM OF CAMBODIA

Norbert FEIGE *

ABSTRACT

The Kingdom of Cambodia is – according to its Constitution from 1993 – a parliamentary monarchy with a pluralistic multi-party democracy, based on the separation of power. The National Assembly is one of the two houses (chambers) of the Cambodian Parliament. Their members are elected directly by the Khmer citizens.

The electoral system in Cambodia is based on the proportional representation with provincial and municipal constituencies. The Law on the Election of Members of the National Assembly from 2015 brought some amendments with regard to the electoral procedure.

The National Assembly has three main functions: the legislative function, the oversight function and the representing function.

The National Assembly is led by its President and two Vice-Presidents. The President plays an important role which may have far-reaching impacts on the work of the Parliament, its commissions and its individual members.

The technical work of reviewing draft laws or proposed bills is done in one of the ten commissions. The chairs of these commissions are equally distributed among the two parties that are currently represented in Parliament. In 2015, the National Assembly introduced a legal basis for parliamentary groups, each of them with a separate leader.

Compared to the Royal Government, the position of the National Assembly among the three state powers is still relatively weak. Nearly all the draft laws handled in Parliament are initiated by the Government. The National Assembly – as well as the Senate – hardly makes any use of the right to initiate legislation. Many draft laws from the Government are passed either without any or with only minor amendments. Minority rights are weakly developed, e.g. there is no right of a (qualified) minority to claim the establishment of an investigative commission. There are no legal remedies to review administrative decisions made within Parliament.

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In order to strengthen the democratic structures in Cambodia, the National Assembly could still play a more active and self-confident role in the future for the benefit of the whole Khmer population.

I. The Legislative of the Kingdom of Cambodia

Cambodia is a kingdom in which the King shall rule according to the Constitution and the principles of liberal multi-party democracy (Article 1 of the Constitution[1]). Since Article 7 of the Constitution clarifies that the King shall reign but not govern, the state system is a parliamentary monarchy based on the principle of separation of powers (Article 51 Paragraph 5 of the Constitution). The legislative power is exercised by the bicameral Parliament, consisting of the directly elected National Assembly and the indirectly elected Senate.

The National Assembly (Khmer: រដ្ឋសភា; Rathsaphea) is one of the two houses (chambers) of the Cambodian Parliament. It is sometimes referred to as being the lower house, with the Senate being referred to as the upper house. It is therefore one of the institutions that shall enable Khmer citizens to exercise state power which completely belongs to them (Article 51 Paragraph 3 and 4 of the Constitution).

II. The History of the National Assembly

The history of the Cambodian Parliament can be traced back to the year 1946. At that time, a power vacuum had arisen in Cambodia as an aftermath of the Second World War. In March 1945, still during the war, King Norodom Sihanouk had – with the support of Japan - proclaimed an independent Kingdom of Kampuchea. Only several months later, after the Japanese surrender in August 1945, the Japanese troops had left Southeast Asia. It took some time for the French Government headed by General Charles de Gaulle to recover French Indochina and its colonial system. It was during that phase when Cambodia held its elections for the first Cambodian Parliament, the Constitutional Assembly, on 1 September 1946 with the Cambodian Democratic Party winning 50 out of 67 seats and remaining the most popular party in Cambodia for several years[2].

Cambodia was proclaimed a constitutional monarchy on 6 May 1947. In the same year in December, the next elections took place. From now on, the Parliament was called the National Assembly. At that time Cambodia still had a unicameral parliamentary system based on pluralism. As in the previous polls, the Democratic Party won the absolute majority of seats.

1 The preamble of the Constitution includes a similar formulation to describe the Cambodian state system, see also articles 50, 51 and 153 of the Constitution.

2 Ben Kiernan, How Pol Pot came to Power, Yale, 2004, p. 57

The fourth elections on 11 September 1955 led to a remarkable change. The Sangkum party, an alliance between the Royal Government and four smaller parties, won all of the available seats[3] and that was the first time that the Cambodian Parliament consisted of members coming from one party only.

This single-party system should ultimately last until 1993. While Sangkum Party still had one competitor for the elections in 1958[4], it was the only party contesting in the next elections in 1962 and 1966. Then in 1972, in the first elections after the Cambodian coup of 1970, the Social Republican Party of Lon Nol took over all seats in Parliament[5].

The next elections in 1976 were overshadowed by the Khmer Rouge Regime which allowed only one party, the National United Front of Kampuchea, to contest for the election. It is everything else but a surprise that this party won all the 250 seats[6] in Parliament which was called the "Assembly of People's Representatives of the Democratic Kampuchea" at that time. That was the highest number of seats in the history of Cambodian Parliament.

After the defeat of the Khmer Rouge Regime the Single-Party-System in Parliament was retained. In 1981 the Kampuchean People's Revolutionary Party – which was later renamed Cambodian People's Party (CPP) – was the only party which was permitted to participate in the elections and to send a total of 117 representatives to Parliament.

The National Assembly in its current form is derived from the Constitutional Assembly elected in May 1993 during the United Nations Transitional Authority in Cambodia (UNTAC). This Constitutional Assembly adopted the new Constitution for Cambodia. After the enactment of the 1993 Constitution, the Constitutional Assembly was renamed the National Assembly. The principle of a pluralistic multi-party democracy was expressively incorporated into the Constitution. After the 1993 elections, none of the contesting parties could obtain the absolute majority[7]. Norodom Ranariddh from FUNCINPEC and Hun Sen from the CPP were finally appointed as Co-Prime Ministers, both with an equal level of executive powers[8]. This was the beginning of a coalition between FUNCINPEC and the CPP which was continued during the next four legislatures of the National Assembly, i.e. until 2013.

However, the next elections in 1998 led to a sustainable change in the power structure of this coalition. Since that time and up to date, the CPP has been the leading party in the country and has so far defended this position throughout all further elections held in 2003, 2008 and 2013. At the same time, FUNCINPEC declined continuously and finally

3 At that time the National Assembly had a total of 91 seats.
4 In these elections Sangkum Party won all seats again.
5 Nearly all other parties boycotted the elections in 1972 due to complaints about the election law.
6 Out of these 250 seats, 150 seats were to be elected by the peasantry, 50 seats by the industrial workers and 50 seats – a share of 20 per cent of all seats – exclusively by the Kampuchean Revolutionary Army.
7 FUNCINPEC as the winner of the elections won 58 and the CPP 51 of a total of 120 seats.
8 Benny Widyono, Dancing in Shadows: Sihanouk, the Khmer Rouge and the United Nations in Cambodia, New York, 2008, pp. 128/129 and 131.

failed to win any seat in the 2013 elections. Respectively, the Sam Rainsy Party (SRP) and the Human Rights Party (HRP) have become the second and third strongest Cambodian parties. In 2012, these two parties merged and established the Cambodian National Rescue Party (CNRP).

Meanwhile, the National Assembly is in its fifth legislature[9] and currently has 123 members of which 24 (20 per cent) are women. As a result of the elections held on 28 July 2013, only two parties are represented in the National Assembly, the CPP with 68 seats and the CNRP with 55 seats.

Summary of the 28 July 2013 National Assembly Election Results

Party	Votes	%	Seats
Cambodian People's Party	3,235,969	48.83%	68
Cambodia National Rescue Party	2,946,176	44.46%	55
FUNCINPEC	242,413	3.66%	—
League for Democracy Party	68,389	1.03%	—
Khmer Anti-Poverty Party	43,222	0.65%	—
Cambodian Nationality Party	38,123	0.58%	—
Khmer Economic Development Party	33,715	0.51%	—
Democratic Republican Party	19,152	0.29%	—
Total (turnout 68.0%)	**6,627,159**		**123**

Source: National Election Committee

After the elections there were some objections and complaints on irregularities in the elections and even electoral fraud. Thereupon the CNRP boycotted the National Assembly and refused to participate in the work of Parliament. This boycott should last almost a year and was only terminated on 22 July 2014 by the compromise agreement between CPP and CNRP. This agreement included numerous arrangements, in particular the establishment of a new commission on Investigation and Anti-Corruption, the distribution of the chair positions in the commissions or other official positions within the Parliament among the two parties and amendments in the public relations work of the Parliament. However, some developments in the second half of 2015 have shown that the two-party compromise from July 2014 has not yet affected a stable and lasting reconciliation and an objective cooperation between the two parties since new conflicts have arisen.

9 Also referred to as the "fifth mandate", this counting begins with the first legislature after the 1993 Constitution.

III. The Legal Framework of the National Assembly

The following section shall give a brief overview on legislation that concerns the National Assembly and its work:

- The 1993 Constitution, adopted by the Constitutional Assembly on 21 September 1993 and promulgated on 24 September 1993. The Constitution consists of 17 chapters and is divided into 160 articles. Special provisions on the National Assembly can be found in Chapter VII (Articles 76 to 98).
- The Law on the Election of Members of the National Assembly (LEMNA), adopted on 19 March 2015.
- The Internal Regulations of the National Assembly, adopted as the Internal Regulations of the Fifth Legislature of the National Assembly, last amended on 30 October 2015.
- The Law on the Statute of the Members of the National Assembly, adopted on 31 August 2006 and promulgated on 21 October 2006, divided in five chapters and 29 Articles.
- The Law on the Statute of the Civil Servants of the legislative body, adopted on 3 January 2003 and promulgated on 13 February 2003, consisting of 12 chapters and divided into 74 articles.

IV. The Electoral Law in Cambodia

Since the legislative term of the National Assembly is five years (Article 78 Paragraph 1 of the Constitution), the election of members of the National Assembly shall be held every five years. The term of the National Assembly ends only on the day when the new National Assembly takes office (Article 78 Paragraph 1 of the Constitution). According to Article 76 Paragraph 2 of the Constitution the members of Parliament shall be elected by a free, universal, equal, direct and secret ballot.

The Law on the Election of Members of the National Assembly (LEMNA) in its current version and the related Law on the National Election Committee are a result of an agreement between the two parties represented in Parliament. The two laws were adopted by the National Assembly on 19 March 2015 and passed the Senate only four days later, i.e. on 23 March 2015.

The electoral system in Cambodia is based on the proportional representation with provincial and municipal constituencies (Article 5 Paragraph 2 LEMNA).

The National Assembly consists of least 120 members (Article 76 of the Constitution). Since the Law on the Election of Members of the National Assembly stipulates that the number of seats shall take into consideration the demographic development, the National Assembly currently has 123 members.

The seats are allocated to the constituencies, i.e. to Phnom Penh municipality and to the provinces, according to the number of Cambodian citizens living in the respective constituency. Each constituency has at least one seat in Parliament. In the current (fifth) legislature from 2013 to 2018, the biggest constituency, Kampong Cham Province, has 18 seats[10].

Composition of the National Assembly in the Fifth Legislature

Province	Seats
Banteay Meanchey Province	6
Battambang Province	8
Kampong Cham Province	18
Kampong Chhnang Province	4
Kampong Speu Province	6
Kampong Thom Province	6
Kampot Province	6
Kandal Province	11
Koh Kong Province	1
Kratie Province	3
Mondulkiri Province	1
Phnom Penh	12
Preah Vihear Province	1
Prey Veng Province	11
Pursat Province	4
Ratanakiri Province	1
Siem Reap Province	6
Preah Sihanouk Province	1
Stung Treng Province	1
Svay Rieng Province	5
Takeo Province	8
Kep Province	1
Pailin Province	1
Oddar Meanchey Province	1
Total	**123**

10 The Law on the Election of Members of the National Assembly does not provide an absolute maximum number of seats per constituency. Therefore, a constituency might have more seats in the future, depending on the development of its population.

To be eligible to vote, a citizen must

- Be a Khmer national;
- Be at least eighteen (18) years old counting up to the polling day;
- Have a residence in the commune/sangkat where he/she is going to cast his/her vote;
- Not be in a situation of serving prison term;
- Not be insane or under guardianship as certified by a competent ministry or institution.

It should be highlighted that these regulations exclude a considerable number of Khmer citizens who live abroad, e.g. the Cambodian migrant workers, from the right to vote. This is at least not common in the international context since most democratic countries allow all their citizens to participate in the national elections, no matter if they live within or outside the country.

A Khmer citizen who wants to stand as a candidate in the Election of members of the National Assembly shall meet the following requirements:

1. Be Khmer national by birth;
2. Be at least twenty-five (25) years of age on the date of the Election;
3. Have the right to vote and has name registered in the voters' list;
4. Have a residence in the Kingdom of Cambodia;
5. Be nominated by a registered political party running in the Election.

This means that independent candidates who are not nominated by a political party are not eligible for the elections.

Civil servants, court officials, members of the armed forces, members of the national police, members of the Supreme Council for Magistracy, members of the Constitutional Council, and religious priests, who wish to stand as a candidate running for Election of members of the National Assembly, shall resign from their functions or renounce their priesthood at least seven (7) days prior to the date of the electoral campaign (Article 35 LEMNA).

After the elections the seats allocated to the constituency are distributed among the parties according to their voting proportion within this constituency. This distribution is carried out using the d'Hondt highest averages method[11].

11 The detailed results of the 2013 elections including the results of the individual constituencies are reported in: COMFREL, 2013 National Assembly Elections – Final Assessment and Report., p.117, http://www.comfrel.org/eng/components/com_mypublications/files/781389Final_Report_and_Assessment_National_Assembly_Elections_Final_24_12_2013.pdf. Retrieved 6 November 2015.

Various objections have been raised against the Cambodian electoral system.

First of all the electoral system is considered as not ensuring an equal ballot since the distribution of seats does not completely reflect the voting proportion. At first glance, this criticism seems to be justified to a certain extent. Looking at the results of the two parties represented in the National Assembly there is a difference between the voting proportion and the distribution of seats in Parliament.

National Elections 2013 – Results of the two biggest parties

	Votes	Votes in %[12]	No. of Seats	Seats in %
Cambodian People's Party	3,235,969	52,34	68	55,28
Cambodian National Rescue Party	2,946,176	47,66	55	44,72
	6,182,145	**100**	**123**	**100**

In a mere system of proportional representation, i.e. without the effect caused by distributing the seats to the constituencies, the CPP would have 64 seats (52,34 per cent of 123 seats) while 59 seats (47,66 per cent of 123 seats) would be allocated to the CNRP. But in consideration of all pertinent circumstances, this difference between voting proportion and the distribution of seats in Parliament can still be regarded as being acceptable, since the majority of votes generally leads to the majority of seats in Parliament and sufficiently reflects the will of the electorate.

Differences between voting proportion and the distribution of seats in Parliament are a normal consequence of using a modified system of proportional representation or even a majority voting system like it is traditionally applied in the United Kingdom. This often causes deviations or discrepancies between the proportion of votes and the proportion of seats in Parliament. But there is no legal or even constitutional constraint to make use of a "pure" system of proportional representation. Worldwide, both models are used – often in a mixture or combination – and they both have advantages and disadvantages. The system used in Cambodia facilitates stable majority shareholdings and stable political conditions. Compared to the pure majority voting system as it is used in the United Kingdom, the danger to lose "equality" in the elections can still be neglected. Even smaller parties have a realistic chance to win one or more votes in at least one constituency since the Cambodian law does not include an electoral threshold[13].

12 The percentage in this column refers only to the total number of votes of the two parties represented in Parliament, not to the share of all votes.

13 E.g. in Germany a party must obtain at least five per cent of all votes or it must achieve the majority of votes in at least three constituencies (every German constituency has only one seat in Parliament). In Austria, a threshold of four per cent is applied in the elections of the national Parliament.

Another objection against the Cambodian electoral system is derived from the differences in the number of voters among the constituencies that might lead to an inequality of the elections. While a member of Parliament in Kep Province (35,750 citizens, 1 seat in Parliament) represents only these 35,750 citizens, the number of citizens per seat in Parliament in Phnom Penh (1,500,000 citizens, 12 seats in Parliament) is 125,000. As a consequence, a party needs much less votes to win a seat in Kep province than in Phnom Penh. On the other hand, these differences and their impacts on the result of the elections should not be overestimated. Only in three constituencies which have only one seat in Parliament (Kep Province, Mondulkiri Province and Pailin Province), the number of citizens per seat in Parliament is far below the average of all constituencies[14].

The two new election laws that were unanimously adopted in March 2015 introduced some new regulations that led to controversial discussions and substantial criticism, in particular from human rights groups who claimed that the new legislation might be a threat to freedom of speech[15]. The law forces non-governmental organizations (NGOs) to act "neutral" and prohibits "insults" during the 21-day period set for campaigning. On the other hand, there are provisions that permit security forces to take part in campaigns. These concerns are not completely unjustified since the law does not provide any further definition what "neutral" or "insult" means. So it cannot be excluded that the new law might be misused by authorities and courts by putting restrictions, fines and even bans on organizations that express any kind of political statement or criticism during the campaign.

Other provisions of the new legislation punish any opposition party that boycotts Parliament after the election. The respective party will lose its parliamentary seats which will then be distributed among the other parties in the National Assembly. This regulation which is an apparent "response" to the boycott of Parliament by CNRP after the 2013 elections is more than unusual and can hardly be found in any other electoral law all over the world. It is also questionable if this sanction is legitimate and proportional, since it prevents parties from using political boycotts to protest election fraud and other irregularities. Such boycott usually does not cause a tangible damage and might even harm the boycotting party more than the parliamentary majority. Finally the campaign and procession periods are shortened by the new law without any visible necessity to establish such regulation.

On the other hand the law on the National Election Committee is designed to guarantee that the body will be independent. The committee consists of nine members, four from the ruling party, four from the opposition, and one independent member acceptable to both parties. The law also focuses on enduring improvements with regard to the registration of voters in order to avoid incomplete or incorrect voters' lists.

14 The average number of citizens per seat in Parliament is about 108,000.

15 The article of Constance Johnson, Cambodia: New Election Laws, March 2015, summarizes the criticism and concerns, http://www.loc.gov/law/foreign-news/article/cambodia-new-election-laws/ retrieved 23 November 2015.

V. The Organization and Structure of the National Assembly

The National Assembly holds its ordinary sessions twice a year with each session to last at least three months. Extraordinary sessions are convened at the request of the King, the Prime Minister or at least one third of the members of Parliament (Article 83 Paragraph 1 and 2 of the Constitution).

1. The President and Vice-Presidents of the National Assembly

The National Assembly is headed by the President who is assisted by two Vice-Presidents (Principles 8 and 9 of the Internal Regulations). As one of the results of the two-party compromise from July 2014, one of the Vice-Presidents was nominated by the opposition party.

The President and the two Vice-Presidents are elected in the first meeting of the National Assembly's legislature with the majority of the total number of members of Parliament.

According to Principle 8 of the Internal Regulations the main responsibilities of the President are:

- ensuring that the National Assembly acts appropriately depending upon the Constitution,
- opening, leading and adjourning the meetings of the National Assembly and organizing the discussions within plenary sessions,
- enforcing the implementation of the Internal Regulations of the National Assembly,
- maintaining and protecting law and order within the National Assembly,
- representing the National Assembly, particularly in contacting the King and public authorities.

However, this provision does not clearly define which powers the President may use or may not use and which measures he is allowed to take in order to fulfill these duties. In addition the term "maintaining and protecting law and order within the National Assembly" is both far-reaching and undetermined so it can cover nearly any matters in the work of the commissions and members of the National Assembly. As a consequence, it cannot be excluded that the President might put extensive restrictions on commissions or individual members of Parliament which could influence the work and decisions of members of Parliament and interfere with their independence as it is guaranteed in Article 77 Paragraph 2 of the Constitution.

Furthermore neither the Constitution nor the Internal Regulations provide any legal remedy or other official mechanism to solve conflicts that may arise between the President and a commission or an individual member of Parliament. This is at least uncommon for most of the modern democracies, since the principle of rule of law[16] is of course valid

16 The principle of rule of law stipulates – among other elements – the reviewability of any state action by independent courts.

and applicable within the legislative body of a nation like in any other area of administration[17]. Even if not every activity of the President needs to be subject to a review by a court or another institution, it should at least be considered whether such an instrument can be established in Cambodia in the future in order to offer an independent institution that can arbitrate between the two sides and – if necessary – decide the conflict.

The official position of the President and the Vice-Presidents usually terminates at the end of the Assembly's mandate, i.e. on the day when the new National Assembly takes office (Article 78 Paragraph 1 of the Constitution). A recent occurrence leads to the question whether the National Assembly may decide that the President or Vice-President is to be removed prematurely. On 30 October 2015 the National Assembly decided to remove its First Vice-President, H.E. Mr. Kem Sokha, nominated by the opposition, from his office. With regard to Article 87 Paragraph 3 of the Constitution one might think this decision does not comply with the Constitution arguing that this provision allows the election of a new President or Vice-President only in case of the resignation or death of the former officeholder.

But this interpretation is not compulsory. It cannot be clearly derived from the mere wording in Article 87 Paragraph 3 of the Constitution that the replacement of the Assembly's leadership is only and exclusively possible in these cases. The legitimacy of the decision from 30 September 2015 might be based on the principle of implied powers. Implied powers – also known as annex competences – are those powers authorized by a law, e.g. by the Constitution, which – while not stated – seem to be implied by powers expressively stated[18]. So the right to elect the President and the Vice-Presidents might imply the power to remove them. This interpretation is being confirmed by the fact that ideally these positions should be filled unanimously and the officeholder should have the support and the trust of all members of Parliament. If the officeholder loses this trust, there should be a possibility to remove him or her.

Another question is whether the premature removal requires a good cause or not and – if yes – which quality the good cause shall have. However, it has to be concluded once again that in spite of all these important and open questions there is no legal remedy to review the decision from 30 October 2015.

Apart from the legal point of view, there is the political dimension of this incident indicating that the compromise of the two parties from July 2014 could not permanently solve all existing conflicts between the two sides and could not prevent new conflicts to arise.

17 In Germany a parliamentary group or even an individual member of Parliament can take recourse to the Federal Constitutional Court in case of disputes with the Parliament's President.

18 The institute of implied powers is mainly recognized in the United States of America, but can be applied in any other country as well. The constitutional law in Germany includes unwritten "annex competences".

2. The Permanent Committee

The Permanent Committee of the National Assembly consists of the President and the two Vice-Presidents of the National Assembly and of the chairpersons of all 10 commissions (Principle 7 of the Internal Regulations).

The Permanent Committee has the following rights and functions:

- Prepare agendas for the National Assembly sessions
- Review and forward draft laws and proposed laws to the responsible commission for consideration
- Manage the work of the National Assembly between National Assembly sessions
- Approve budget plans of the National Assembly
- Prepare remuneration for the members of the National Assembly
- Provide appreciation and take disciplinary actions
- Strengthen the regional and international relationship to Parliaments of other countries

3. The Commissions of the National Assembly in the Fifth Legislature

In its fifth legislature the National Assembly has established the following 10 commissions.

Commission	Chairperson	Party
Commission No.1 on Human Rights, Complaints Receipt, Inquiry and National Assembly-Senate Relations	Eng Chhai Eang	CNRP
Commission No.2 on Economy, Finance, Banking and Auditing	Cheam Yeap	CPP
Commission No.3 on Planning, Investment, Agriculture, Rural Development, Environment, and Water Resources	Pol Hom	CNRP
Commission No.4 on Interior, National Defense, and Civil Service Administration	Hun Neng	CPP
Commission No.5 on Foreign Affairs, International Cooperation, Information and Media	Chheang Vun	CPP
Commission No.6 on Legislation and Justice	Pen Panha	CPP
Commission No.7 on Education, Youth, Sport, Religious Affairs, Culture and Tourism	Yem Ponhearith	CNRP
Commission No.8 on Health Care, Social & Veterans' Affairs, Youth Rehabilitation, Labor, Vocational Training & Women's Affairs	Ke Sovannaroth	CNRP
Commission No.9 of Public Works, Transport, Telecommunication, Post, Industry, Mine, Energy, Commerce, Land Management, Urban Planning and Construction	Nin Saphon	CPP
Commission No. 10 on Investigation and Anti-Corruption	Ho Vann	CNRP

Each commission has at least seven members.

As a part of the two-party compromise from July 2014, the new commission No. 10 on Investigation and Anti-Corruption was established. The chair positions of the ten commissions were distributed equally between the two parties so both parties could nominate five of the ten chairpersons. In addition, the composition of the commissions deviates from the proportionality of the parties with the CNRP having the majority or at least an equal number of seats in the commissions chaired by its members while being under-represented in the commissions led by CPP chairpersons. This agreement can be

considered as a unanimous amendment of the principle of proportionality which usually determines the distribution of all kinds of positions to be nominated by the National Assembly (Principle 5 Paragraph 2 and Principle 10 Paragraph 2 of the Internal Regulations)[19].

In case of need the President of the National Assembly can form any special commission with members from all parties represented in Parliament. This special commission can be appointed to support the law adoption process or a particular task to fulfill (Principle 12 Paragraph 2 of the Internal Regulations). For example, a special commission has been appointed to review the Internal Regulations for the fifth mandate of the National Assembly.

The Constitution and the Internal Regulations do not provide an own right of the National Assembly to claim for the establishment of a special commission, e.g. an investigating committee that can investigate a certain case, incident or question. An investigating committee would be a very effective instrument to strengthen the power of the legislative body and to enable the Parliament to fulfill its oversight function towards the Government.

4. Parliamentary Groups

With the previous amendment of the Internal Regulations the National Assembly has introduced the institution of parliamentary groups (Principle 48 of the Internal Regulations). Parliamentary groups are voluntary associations of members of Parliament coming from the same party[20]. Their main functions are

- to contribute to fulfill the tasks of the Parliament;
- to improve the internal decision-making by bundling the – sometimes very different – positions within the group;
- to enhance the technical work of members of Parliament (e.g. by creating specialized working groups);
- to grant stability in Parliament.

The experiences from many other countries show that parliamentary groups can be a very effective instrument to facilitate and to improve the work of the Parliament.

19 Following the principle of proportionality strictly, the CPP could nominate 6 chairpersons while the CNRP could nominate only 4 chairpersons of the commissions. In every single commission, the CPP would have the majority of seats.

20 Germany allows parliamentary groups formed by members of Parliament from different parties as long as these parties do not compete against each other. Due to the federal system of Germany some parties are not active in all of the 16 federal states.

Within the National Assembly of Cambodia, parliamentary groups can be established by parties having at least five per cent of the seats. Each group has a leader. The leader of the ruling party's group is called "majority leader" with the leader of the biggest opposition party referred to as the "minority leader". Up to now, the parliamentary groups do not get any extra funds for their work.

In the past, members of the Cambodian Parliament could also form groups. But the only function of these groups was to distribute the available speaking time in plenary among the various groups. Since the instrument of parliamentary groups with a broader spectrum of tasks is new to Cambodia, it remains to be seen whether the National Assembly can make the best possible use of this instrument.

5. The End of the Legislature

As mentioned above, the usual term of the National Assembly is five years and ends on the day when the new National Assembly takes office. Before the regular end of the term the National Assembly can only be dissolved when the Royal Government is twice deposed within a period of twelve months (Article 78 Paragraph 1 of the Constitution). In this case new elections shall be held not later than sixty days from the date of the dissolution (Article 78 Paragraph 3 of the Constitution).

In time of war or other special circumstances when an election cannot be held, the National Assembly may extend its term for one year at a time, at the request of the King (Article 78 Paragraph 5 of the Constitution). The declaration of an extension of the tern requires a two-thirds majority vote of all members of the National Assembly (Article 78 Paragraph 6 of the Constitution).

6. The General Secretariat of the National Assembly

The National Assembly has a General Secretariat which is led by the Secretary General and a number of Deputy Secretary Generals. The management of the General Secretariat cannot be members of the National Assembly.

The General Secretariat is responsible for all administrative affairs in the National Assembly. This includes keeping and storing the records of the National Assembly and its commissions as well as providing legal and other technical services and support to the leadership, the commissions and the members of the National Assembly.

VI. The Legal Status of Members of Parliament

The members of the National Assembly represent the entire Khmer people, not only Khmers from their constituencies (Article 77 Paragraph 1 of the Constitution). They are independent from all external or internal instructions and any imperative mandate shall be nullified (Article 77 Paragraph 2 of the Constitution).

Members of the National Assembly shall enjoy parliamentary immunity (Article 80 Paragraph 1 of the Constitution) and indemnity (Article 80 Paragraph 2 of the Constitution) and shall only be prosecuted, arrested or detained with the permission of the National Assembly or – between the Assembly's sessions – the Permanent Committee, except in case of a so-called *flagrant delicto* offence (Article 80 Paragraph 3 of the Constitution)[21]. In the latter case the competent authority has to report immediately to the National Assembly or to the Standing Committee and to request permission. Any decision of the Standing Committee that leads to a waiver of parliamentary immunity must be submitted to the National Assembly at its next session and approved in plenary by a two thirds majority vote of all members of the National Assembly (Article 80 Paragraph 4 of the Constitution). In any case, the detention or prosecution of a member of Parliament shall be suspended if this is required by a three quarter majority of all members of the National Assembly (Article 80 Paragraph 5 of the Constitution).

Generally, any decision with regard to the parliamentary immunity has to be taken with a maximum of caution and consideration. On one hand the independence of members of Parliament is a crucial precondition for a well-functioning Parliament in a democratic system. Therefore the waiver of immunity is a very relevant and influential decision only to be taken when all requirements are fulfilled beyond all reasonable doubt. On the other hand the Parliament must avoid to cause the impression that its members enjoy special privileges before the law and can escape a punishment under the protection of parliamentary immunity. Under no circumstances shall the prosecution of members of Parliament and the related decisions on a waiver of parliamentary immunity be misused as an instrument to eliminate political opponents.

This leads to the current case of opposition leader Sam Rainsy. He was removed from his position as a member of Parliament on 16 November 2015, based on a decision of the Standing Committee[22]. This decision has been questioned in the public discussion under several aspects. First of all, it is doubtful whether a sufficient legal basis for this deci-

21 "Flagrant delicto" is an expression from the Latin language which literally translates to "as long as (the crime is) still burning". This requires that the offender is caught by the responsible authority still during or immediately after committing the offence. As soon as the offender manages to move away from the site of crime or some time has passed before the offender is found, it is not a case of "flagrant delicto" anymore. So this is an extraordinary exception that hardly occurs.

22 The Phnom Penh Post: "Rainsy stripped of lawmaker status", 16 November 2015, http://www.phnompenhpost.com/national/rainsy-stripped-lawmaker-status Retrieved on 23 November 2015.

sion is in force[23]. Since a waiver of parliamentary immunity is included in the Constitution (Article 80 of the Constitution), it could be argued that the removal from Parliament, which is a further-reaching measure than the mere waiver of immunity, requires a legal basis in the Constitution as well. But the Constitution of the Kingdom of Cambodia does not include such a provision.

The other questionable circumstance of this example is the responsibility and authority of the Standing Committee to take such decisions. Since the waiver of immunity shall generally be affected by a decision of the plenary, it is doubtful whether the Standing Committee, that represents the National Assembly only during the sessions and in urgent cases, is authorized to remove a member of Parliament. The decision concerning the opposition leader was taken during an ongoing session of the National Assembly. Even if a case of urgency could be detected, one could think of an analogous application of Article 80 Paragraph 4 of the Constitution which requires that any decision of the Standing Committee with regard to immunity must be approved by a two-thirds majority of all members of the National Assembly. Otherwise the relatively stringent regulations on the waiver of immunity could be circumvented through a decision of the Standing Committee without any control of the National Assembly's plenary. Last but not least, there is – once again – no effective legal remedy for a review of the decision by an independent court or another suitable institution.

All members of the National Assembly shall, before taking office, take an Oath of Allegiance as contained in Annex 5 of the Constitution (Article 82 Paragraph 4 of the Constitution).

The members of the National Assembly receive remuneration for their work (Article 81 Paragraph 2 of the Constitution).

23 In order to explain the legal background of the decision, the President of The National Assembly, Samdech Akka Moha Ponhea Chakrei Heng Samrin, referred to the provisions of the Constitution, principle 83 of the Internal Regulations and Article 139 of the Law on the Election of Members of the National Assembly, cited in the article of the Phnom Penh Post, see above.

VII. The Procedure of Law Enacting

The most important function of the National Assembly is of course the legislative function. According to Article 90 of the Constitution this includes particularly:

- Adopting and Amending laws for Cambodia;
- Approving the national budget, state planning, loans, lending, financial commitments and the introduction, amendment or annulment of taxes;
- Approving administrative accounts;
- Adopting a law on general amnesty;
- Approving or repealing international treaties and conventions;
- Adopting a law on the proclamation of war.

Each member of the National Assembly as well as each Senator or the Prime Minister have the right to initiate legislation (Article 91 of the Constitution)[24]. However the parliamentarians of both chambers hardly make any use of this right. Nearly all the draft laws that go through the legislative process are initiated and prepared by the Royal Government.

The President of the National Assembly regularly convenes meetings of the Standing Committee. During these meetings the Standing Committee decides which of the specialized commissions is responsible for the review and consideration of draft laws or proposed bills. The draft law or proposed bill is then forwarded to that commission.

The specialized commission reviews the documents. It can invite the minister or any high-ranking official of the Government[25] to clarify any matter related to specific problems under their responsibilities.

The commission can also ask non-parliamentarian experts for support. These experts shall act as advisers only and shall have no right to make any decision of the commission. However, up to now the commissions of the National Assembly hardly make any use of this promising instrument to improve the quality of draft laws or proposed bills. Generally the commissions should be free to invite any person that could be useful for the work of the commission in order to improve the draft law or proposed bill.

The special commission reports the results of the review of the draft law or proposed bill to the Chairperson of the Permanent Committee. The Permanent Committee then decides in one of its next meetings whether or not to put the draft laws or proposed bills on the agenda of the National Assembly plenary meeting.

24 In theory each single member of the Cambodian Parliament has more rights than parliamentarians in Germany where a draft law can only be submitted by members of Parliament when the proposal is supported by a parliamentary group or a quorum of at least five per cent of the total number of members.

25 Principle 34 of the Internal Regulations calls these high-ranking officials "figures".

In this meeting, the chairperson of the specialized commission reports the results of the commission's work to the National Assembly. Representatives of the Royal Government or from the signatory National Assembly members that have submitted the proposed law and the chairpersons of the specialized commissions attend to defend the draft legislation.

Finally the National Assembly debates and decides on the draft law. In most cases a majority vote is required. Only in exceptional cases a qualified majority is necessary, e.g. an amendment of the Constitution has to be enacted with a two-thirds majority vote of the National Assembly (Article 151 Paragraph 2 of the Constitution).

It can be observed that many draft laws that come from the Government are qualified as being urgent. This qualification reduces the time to review and discuss the draft law to a minimum[26]. Whenever a draft law is proposed to be urgent the National Assembly shall make a decision on this proposal (Principle 45 of the Internal Regulations). Up to date, the National Assembly has hardly raised any objections against the qualification that a draft law is urgent. This practice has raised concerns in public. First of all, handling a draft law as an urgent matter should be an exception that is reserved to the very few cases where a certain situation or maladministration requires a fast reaction of the legislative. The practice to qualify many draft laws as urgent, has made this exception to become the rule. Furthermore, this practice is particularly questionable when objective circumstances that could cause a certain level of urgency are not visible in the slightest or when draft laws that are publicly discussed with much controversy are passed via emergency procedures[27].

After the law has been passed by the National Assembly, it is forwarded to the Senate for review and advice.

Up to now (November 2015) the National Assembly has passed a total of around 500 laws in its five mandates since 1993.

Specific challenges have occurred in the work of the commission on Human Rights, Complaints' Receipt, Inquiry and National Assembly-Senate Relations (commission No.1) and the Commission on Investigation and Anti-Corruption (commission No. 10). These two commissions are not only responsible for the review of draft legislation. They also receive individual complaints of citizens with regard to alleged human rights violations or corruption cases[28]. They have to face considerable challenges whenever they try to invite public servants that might be involved in the case. Very often, these officials do not appear. The commissions must of course respect the administrative regulations on contacting authorities and on inviting staff members of an authority. Unlike an investiga-

26 Unlike the legal regulations for the Senate, there is no expressive time limit for the National Assembly to work on the urgent draft law.

27 One of these examples is the Law on Associations and Non-Governmental Organizations (LANGO) which was passed by the National Assembly on 13 July 2015 and by the Senate on 24 July 2015.

28 Other countries have established own petition commissions for such cases.

tive committee[29] they have no powers to force the invited persons to appear before the commission. If such powers shall be established, a formal law will be necessary since the principle of rule of law requires a legal basis for any restriction of individual rights. A duty to appear before the commission as well as a duty to give a statement of course interferes with the individual rights of the summoned person.

On the other hand, such additional legal instruments are neither inevitable nor necessary for the work of the commissions No. 1 and 10. Inviting the responsible officials is not intended to end up in a strict interrogation since the commissions cannot sentence any person, but only formulate recommendations for the further procedure. It is mostly a matter of a fair treatment to give all persons involved in the case the right to be heard before any decision is taken or any recommendation is formulated. It is at the same time an excellent opportunity for the authority to express and explain its own position and to clarify misunderstandings that may have occurred. If the authority or any other stakeholder does not want to make use of this opportunity, the commission must write its report without such input noting that the authority had the chance to point out its positions but did not express anything different from the complaint. It is up to the commission and its discretion to take into consideration the fact that representatives of a Cambodian authority did not appear before a parliamentary commission which is with no doubt a considerable expression of disrespect.

VIII. The Oversight Function of the National Assembly

Beside the legislative function the National Assembly has to fulfill an oversight function towards the Government.

The National Assembly shall pass a vote of confidence in the Royal Government by an absolute majority of all members (Article 90 Paragraph 8 of the Constitution).

Probably the most important and also – as far as it is used smartly and considerately – the most effective instrument to fulfill the oversight function is the right to raise questions to the Royal Government (Article 96 of the Constitution). Members of Parliament have to submit their questions to the President of the National Assembly in written form. The replies can be given orally or in written form (Article 96 Paragraph 3 of the Constitution). The question and answer session within Parliament usually takes place during the parliamentary sessions. A full day is allocated for questions and answers. If there are

29 The German Constitution gives investigative committees the same powers that German courts have when they investigate a criminal case. This includes the rights to summon and interrogate witnesses, to request any file of an authority as well as to order searches and seizures. But the investigative committee cannot sentence a party to the proceedings to imprisonments or fines.

no or no more questions from the members of Parliament, the meeting is used to spread information on the current work of the Government among the National Assembly. The further procedure is regulated in Principles 32 and 33 of the Internal Regulations.

The commissions of the National Assembly may invite any minister to clarify issues in the responsibility of the respective ministry (Article 97 of the Constitution). According to Principle 34 of the Internal Regulations the commissions may invite any minister or "figure"[30] for this purpose.

Upon the request of at least one tenth of its members, the National Assembly shall invite high-ranking officials to clarify important special issues to the National Assembly (Article 89 of the Constitution). This mechanism is an addition to the right to raise questions to the government. It allows the National Assembly to raise questions not only to the Government, but also to authorities below the level of the Government. Such questions could also be addressed to the Government since any authority belongs to the responsibility of a certain ministry. But it may be more effective for the National Assembly to get information directly from the respective authority.

The National Assembly may dismiss any member of the Council of Ministers or the Royal Government by a motion of censure passed by an absolute majority vote of all members of the National Assembly (Article 98 Paragraph 1 of the Constitution). An initiative for such motion of censure must be supported by at least 30 members of the National Assembly (Article 98 Paragraph 2 of the Constitution).

In summary, it can be said that the oversight function of the National Assembly leaves room for improvements. Among the three state powers, the Government still has the strongest and sometimes dominating position. An indicator for this observation is the fact that nearly all draft laws that come into the legislative process are initiated by the Government and that the National Assembly does not make use of its own right to initiate legislation. Furthermore, most of these draft laws are passed without any or with only a few minor amendments[31]. In many cases, the Government qualifies a draft law as being urgent and the National Assembly accepts this qualification without any visible own assessment so the draft can be passed within a minimum of time and only with a minimum of discussion.

30 In this context „figure" means a high-ranking official of the ministry.

31 In Germany, hardly any draft law, no matter who initiated it, gets through the legislative procedure without any amendment.

This does not mean that a Parliament always needs to be an opposite pole to the Government. Ideally, there is a constructive and trustful cooperation between the executive and the legislative power in order to "produce" the best possible legislation for the benefit of the people of Cambodia. It is desirable that the National Assembly as the representative of the people develops more self-confidence towards the Government. This is also a matter of self-conception of at least some members of Parliament. The Parliament shall not be an instrument to just confirm all papers, may it be draft laws or other documents, coming from the Government. It is an independent body among the state powers. And in the end it is not the Government that can be made responsible and accountable for the legislation and its impacts on the society. It is the Parliament that has the mandate to represent the Khmer people and that is responsible and accountable for the legislation.

IX. The Representing Function of the National Assembly

The third function of the National Assembly is the representing function. The National Assembly as a whole is the representative of the Cambodian people. Its members shall represent the whole Khmer people, not only citizens from their constituencies. (Article 77 Paragraph 2 of the Constitution). In this context, the National Assembly plays an important role in helping citizens to have their voice in society and to bring people's concerns and needs into decisions to the National Assembly.

Another expression of the representative function is the investigative work of commissions No. 1 and 10. The National Assembly is not only a legislative body. Citizens can address their individual cases and specific issues to the Parliament. The responsible commissions No.1 (Commission on Human Rights, Complaints' Receipt, Inquiry and National Assembly-Senate Relations) and 10 (Commission on Investigation an Anti-Corruption) can investigate these cases. The commissions have no right to make an own decision, but they can at least formulate a report with recommendations for the responsible authorities which might give more weight to the concerns of the citizens.

Last but not least the international relations of the National Assembly need to be mentioned. The National Assembly maintains international relations and both bilateral and multilateral cooperation through the participation in the creation of the Parliamentary Friendship Group and as a member of the Inter-Parliamentary Union (IPU), the Asian Parliamentary Assembly (APA), the ASEAN Inter-Parliamentary Assembly (AIPA), the Parliamentarian Assembly of Francophonie (APF), the Asia Pacific Parliamentary Forum (APPF), the Asian Forum of Parliamentarians on Population and Development (AFPPD) and other organizations.

X. Concluding Remarks

The National Assembly of the Kingdom of Cambodia is one of the two chambers that form the Parliament and the legislative power in the country. Nevertheless, the Royal Government is still in the strongest position among the state powers. The role and influence of the National Assembly should be strengthened in order to achieve the best possible quality of legislation. This requires a smart use and application of – in most cases already existing – parliamentary procedures. The practice to qualify and to handle most of the draft laws as being urgent should be reconsidered.

The lack of legal remedies to solve conflicts that may arise within the National Assembly by an independent body has to be considered as a serious problem to be solved in the future. Such instruments to enforce or defend the rights of members of Parliament belong to the standard legal framework in democratic states which respect the principle of rule of law.

Minority rights within Parliament are currently weakly defined. Some reforms in this context, e.g. the right of a – qualified – minority to claim the setting-up of an investigating committee, should be taken into consideration. The decision to allow members of Parliament to create parliamentary groups is an important and encouraging step in the right direction. It remains to be seen whether the National Assembly can make the best possible use of this instrument.

This might require not only some further amendments of the relevant legal regulations but also a change in the self-perception of members of Parliament to develop more self-confidence towards the Government. Naturally, the Parliament shall not be the opponent of the Government. But it is a precondition for exercising the oversight function of the Parliament effectively that the Parliament is not considered as a mere assistant of the Government. These changes would strengthen the role of the National Assembly, underline the importance of the Parliament within the state powers and would bring benefit for the whole Cambodian people.

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THE SENATE OF THE KINGDOM OF CAMBODIA

YAN Vandeluxe

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THE SENATE OF THE KINGDOM OF CAMBODIA

YAN Vandeluxe *

ABSTRACT

Bicameralism has been present since the beginning of Cambodia's first written Constitution. Although this tradition was interrupted due to political regime changes, bicameralism remains in the current Constitution. The Senate enjoys the same functions as the first chamber, that is, the adoption of laws and the overseeing of government actions. However, Cambodian bicameralism is unequal, as the second chamber merely takes part in the legislative process that provides the final say to the first chamber, and it is deprived of some fundamental oversight functions. Even though progress had been made, the second chamber still requires further institutional reforms.

I. Introduction

Without entering into the details of the historical literature on the topic, the term Senate refers to the second chamber of a parliament. When a parliament comprises two chambers, this is called bicameralism. However, in genuine bicameralism, the second chamber must be "differently elected and exercise the parliamentary functions according to conditions determined by the Constitution"1. Unlike the first chamber, which is, in democratic societies, directly elected by people, the second varies in its representation, and enjoys varying functions in accordance with the state Constitution.

It is possible to distinguish three models of bicameralism currently practiced throughout the world. The first is aristocratic bicameralism, in which the second chamber is conceived as an instrument to resist to the rising democratic power, expressed by universal suffrage. The House of Lords in the UK is an example of this. The second is moderate bicameralism, which is adaptable to universal suffrage, in which the second chamber plays the role of curbing any excess of power of state institutions (for example the Sen-

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1 Olivier Duhamel and Yves Meny, *Dictionnaire de droit constitutionnel (Dictionary of constitutional law)*, PUF, 1992, p. 74.

ate of France). The third model, as seen in the US, is federal bicameralism, in which the second chamber represents the conciliation of the interest of citizens equal before the law and the sovereignty of the states of the federation. It is also possible to identify one final form of bicameralism, known as socio-professional bicameralism, in which the second chamber represents various interests of the nation[2].

Cambodian bicameralism is a traditional institution, and yet also a relatively new concept. It was born at the same time as the first written Cambodian Constitution. Throughout the nation's hectic history, Cambodian bicameralism either persisted or perished, according to the political context at any given time. With the current Cambodian Constitution, which marks a return to a parliamentary regime with a constitutional monarchy, the second chamber was restored.

After fifteen years of existence, the Senate is still striving for an identity. The latest law on the elections of senators established a complex electoral system in which commune councilors and members of the National Assembly form a senatorial electorate. The Senate has a definite identity. However, it remains ambiguous and complex. The question persists as to whom the Cambodian Senate represents. The positive evolution of the Senate's representation does not answer the remaining questions on its legislative and oversight functions.

In the following, these questions will each be examined in turn, following an account of the background of Cambodian bicameralism.

2 Oliver Duhamel and Yves Meny, *Op. cit.*, p. 78.

II. The Background of Bicameralism in Cambodia

Bicameralism was installed in Cambodia following the inception of Cambodia's first written Constitution in 1947, and was significantly amended in 1956. The Constitution of 1947 established two separate titles, title V on the **National Assembly** and title VI on the **Council of Kingdom**. The Constitution provided that the legislative function belongs solely to the National Assembly, while the Council of Kingdom provides "*advice*" on the adopted law. The Constitution did not merge the two chambers into a single entity, i.e. a parliament. As such, it is logical to ask whether this was a form of a bicameral parliament.

According to the above definition of bicameralism, a parliament is bicameral when it is composed of two separate chambers. Within this constitutional framework, the Council of Kingdom complies with this, exercising parliamentary functions. Furthermore, the two chambers enjoy different political legitimacy; the National Assembly is directly elected by the people, and the Council of Kingdom is partially appointed by the King, assigned by the National Assembly and elected by the socio-professional electorate[3]. In addition, the Council of Kingdom exercises parliamentary functions through its right to initiate a bill, to provide advice and to make amendments to the laws adopted by the National Assembly. On this basis, it can be concluded that the parliament of the first Kingdom was bicameral.

The vast constitutional amendment introduced by the *Sangkum Reastr Nyum* regime in 1956 slightly modified the mode of representation of the second chamber. In accordance with the philosophical concept of semi-democracy, the councilors representing the regions were to be elected by the members of the Councils of the provinces, themselves directly elected by the population of their provinces.

The Council of Kingdom enjoys an advisory role. According to the initial form of the Constitution of 1947, the Council gives advice on the texts of the laws adopted by the National Assembly. In case of amendments or rejections, the National Assembly will adopt the texts in the last resort. This power was slightly modified by the constitutional amendment in 1956, which created a shuttle between the two chambers. In the event of proposed amendments or partial rejections by the Council of Kingdom, the National Assembly must reach a decision on the proposed modifications and send them back to the Council. However, the final say still falls to the National Assembly. In the event that the Council of Kingdom completely rejected an adopted text, a period of reflection was instituted, according to which the National Assembly could not make any decisions during an initial period of two months.

3 In the initial form of the Cambodian Constitution from 1947, two members of the Council of the Kingdom were appointed by the King from within the monarchy; two were elected by the National Assembly; eight by the population of the regions (or provinces) and the capital of Phnom Penh; eight were chosen to represent the socio-professional groups; and four were elected by civil servants of Cambodia.

Regarding its oversight function, the Council of Kingdom was deprived of the power to dissolve the government in the Constitution of 1947 and the revised version of 1956. The government is solely answerable to the National Assembly, whose vote of confidence is necessary for its creation. As a consequence, unlike the first chamber, the Council is excluded from dissolution. This way, the right of interpellation by addressing members of the government either orally or in writing was granted solely to the National Assembly, depriving the Council of Kingdom of this important right.

Even though the Council of Kingdom was deprived of some key oversight rights, it was nonetheless allowed by its internal rule to create "*special commissions*" to gather information on current national issues. Furthermore, its permanent commissions were granted the right to be informed of issues surrounding the texts submitted to them within the legislative process.

The most visible advantage of the second chamber was its role as the chamber of moderation and regulation. This is demonstrated by the higher age of the councilors (who must be at least 40 years old while members of National Assembly must be at least 25 years old) and the fact that it cannot be dissolved before the end of its mandate. Its other function, an unusual feature of Cambodian bicameralism, is that of combatting corruption. In this regard, the two chambers were granted the right to clean up the public administration of the Kingdom.

The second phase of bicameralism emerged in the context of the political rupture during the Khmer Republic. This regime was established after the overthrow of Prince *Sihanouk* as Head of State[4] in March 18, 1970. Cambodia's second written Constitution, introduced in 1972, was this time republican, and established a parliament comprising two chambers. According to this Constitution, the National Assembly is directly elected by the people, while the Senate, which took over the role of the Council of the Republic – which transformed from the Council of Kingdom of the previous *Sangkum Reastr Nyum* regime – is partially elected by the regions of the country, by the civil servants and by the Council of Armed Forces. More precisely, the Senate comprises a small number of members – between 28 to 40 – of which three-fifth represent the different regions of the country, one-fifth represent civil servants and one-fifth represent the Council of Armed Forces.

More importantly, the parliamentary functions of the Senate of the Khmer Republic were increased. The texts of laws could be submitted to either chamber for first adoption, with the exception of the budget law, which had to be submitted first to the National Assembly. The Constitution of 1972 instituted a shuttle procedure between the two chambers. In case of disagreement between them, the two chambers were convened for a joint meeting, in the form of a parliamentary congress. The bicameralism of the Khmer

4 Head of State is a position established by the constitutional amendment in 1960 following the death the King *Suramarith*, the father of Prince Sihanouk. The Head of State is a prominent personality elected by the two chambers, reunited in Congress.

Republic was therefore an equal bicameral parliament. However, since the members of the National Assembly are more important than those of the Senate, it is indisputable that supremacy belongs to the first chamber.

The National Assembly of the Khmer Republic enjoyed a more important oversight function. It voted on the general political platform of the government before its creation, and could remove individual members or the government as a whole by way of "*recommendations*"[5]. The right of interpellation also amounted to a remarkable advancement for the second chamber. In this way, the Constitution recognized the right of both chambers to pose questions to the government, in spoken or in written form.

Finally, like its predecessor, the Senate of the Khmer Republic played the role of the political moderator. As with the Council of Kingdom, the minimum age of senators was 40 years old, higher than that of the National Assembly. The President of the Senate acted as an interim Head of State in the case of the absence of the President and Vice-President. The Senate assured the continuity of state institutions, as its mandate was 6 years (two years longer than that of the National Assembly) and half of the senators are reelected every three years.

Since the collapse of the Khmer Republic, the successive communist regimes of the Democratic Kampuchea and the Social Republic of Kampuchea adopted a mono-chamber parliament in accordance with their traditional style of political regime, in which the sovereignty of people is unified and concentrated within a single chamber that could not be divided. It was only with the Constitution of 1993 that bicameralism was re-inscribed.

It should be noted that the original text of the current Cambodian Constitution specifies a unicameral parliament. The National Assembly is the only chamber of the parliament. This option could be explained by its simplicity, and the limited resource of the state budget[6]. However, the Senate was reinstated in 1999 following a political crisis. The result of the 2nd mandate of the National Assembly failed to confer any political party a two-thirds majority, a requirement of the Constitution at that time for the formation of a single-party government[7]. Therefore, a coalition government was necessary, but the FUNCINPEC and SRP, who came second and third in the election respectively, disputed the result, and initially proclaimed that it was their intention to stay together. This led to a crisis regarding the creation of a government.

5 One-fifth of National Assembly members can initiate a motion of censure in form of a "recommendation" against one member or the government as a whole, and submit it to a vote in the chamber. If an absolute majority of members of the chamber adopts the motion, it will be sent to the President to take action. If this is rejected by the President, the chamber can adopt a second recommendation by a two-thirds majority. In this case, the member of government or the government as a whole will be removed from their function.

6 These two reasons are generally advanced by partisans of unicameralism. They claim that bicameralism makes the parliamentary procedure more complicated and is a waste of the state budget.

7 According to the result proclaimed by the National Election Committee (NEC) on August 6th, 1998, the ruling CPP obtained 64 seats, the coalition party FUNCINPEC 43 seats, and the opposition party SRP 15 seats.

Following a long period of stalemate, a political solution was agreed on November 13th, 1998, by the ruling CPP and FUNCINPEC, thanks to the reconciliatory efforts of former King Norodom Sihanouk. The political compromise announced, in an abrupt move, a vast constitutional modification, leading to the creation of a second chamber, called the Senate. The constitutional modification was finally adopted on March 4th, 1999, and the law was promulgated by the King on March 8th, 1999[8].

This context shows that the creation of the Senate was a response to a specific political deadlock at that time. It did not have a conceptual or philosophical basis, nor was it the result of a process of reflection. Cambodia is not the only example of such institutional compromise. In other countries in the world, especially those in Africa marred by political and ethnic conflicts, the same solution was adopted; namely the creation of a second chamber in which all conflicting parties could sit and talk. As such, the Republic of Madagascar, Morocco, Burundi, the Republic of Congo and the Republic of Cameroon adopted their second chambers by way of national compromise. However, the price for it should not be ignored; it is the state budget, and ultimately the Cambodian people, which paid the price of such compromise.

III. Organization and Functioning of the Senate: A Clear Imitation of the National Assembly

In accordance with the Constitution, the National Assembly is larger than the Senate. The second paragraph of article 99 provides that the number of members of the Senate could not exceed half that of the members of the National Assembly. The second chamber thus cannot organize its members in accordance with their electorate, but must follow the lead of the first chamber. This is the first clear imitation of the first chamber. Moreover, regarding the organization and functioning, both chambers follow exactly the same model. The supreme direction organ of the parliament is the Permanent Committee. The Permanent Committee comprises 13 members; its President is the president of the Assembly, and it further comprises two Vice-Presidents of the Assembly (also vice-presidents of the Assembly) and the 10 Presidents of the Permanent Commissions. The

8 10 of the 14 chapters of the Constitution were amended, two new chapters were added, and 34 of 137 articles were amended to a greater or lesser extent. Therefore the post-modification Constitution contains 16 chapters and 158 articles.

main duties of the Permanent Committee are to direct and decide upon all administrative and financial affairs within the Assembly. Moreover, it is the only organ to set the agenda of the meetings of the Assembly[9].

The two chambers have various Permanent Commissions[10], each specialized in specific fields. Usually considered as mini-assemblies, the Commissions play an important role in the law adoption process and in gathering information for the Assembly meetings. Like the National Assembly, the Senate had nine such Commissions in their previous mandates, and this has now been increased to ten. The ten Permanent Commissions of both chambers have the same appellation, which are:

1. The Commission on Human Rights, Complaints and Investigation;
2. The Commission on Economy, Finance, Banking and Auditing;
3. The Commission on Planning, Investment, Agriculture, Rural Development, Environment and Water Resources;
4. The Commission on Interior, National Defense and Civil Service Administration;
5. The Commission on Foreign Affairs, International Cooperation, Media and Information;
6. The Commission on Legislation and Justice;
7. The Commission on Education, Youth, Sport, Religious Affairs, Culture and Tourism;
8. The Commission on Health, Social and Veterans' Affairs, Youth Rehabilitation, Labor, Vocational Training and Women's Affairs;
9. The Commission on Public Works, Transport, Telecommunication, Post, Industry, Commerce, Land Management, Urban Planning and Construction; and
10. The Commission on Investigation and Anti-Corruption.

Moreover, both the National Assembly and the Senate could create a *"Special Commission"*. This is not elaborated more precisely in the internal rules of either chamber. It is generally understood in the parliamentary system that a parliament can, in addition to their Permanent Commissions, create any necessary *ad hoc* commission to make inquiries or to obtain information on any specific issues. Such enquiries must not concern the secret information of the state, nor can they affect any case that is already pending in the courts process. As such, a Special Commission has to be understood as an inquiry or information commission that can be created on an *ad hoc* basis. That is also the sense

9 It is a crucial right in the parliamentary system. On a purely theoretical level, when the government is deprived of the right to determine the agenda of parliamentary meetings, it has to be subordinated to the parliament so as to achieve its political platform through laws. However, it seems that in practice, this rule is not followed, as the Head of Government is a dominant personality of the political party which itself enjoys great domination of its parliamentary members.

10 They are called Committees in some countries, especially in countries following the Westminster system.

of the internal rules of both chambers which leave the size of such commission open, allowing for more or fewer members according to circumstances (art. 11 IR National Assembly and art. 19 IR Senate).

The members of the National Assembly and Senate are gathered into *"groups"* (art. 48 IR National Assembly and art. 38 IR Senate). A group could be created by at least ten members with a political affiliation. Each member could belong to only one group. However, there is an exception to this in the Senate, where members appointed by the King, who are supposed to be neutral, are allowed to join any group they wish. This is intended to assist in the arrangement of seats within the parliament. Nevertheless, one important role the groups play within the parliamentary procedure is the right of speech on the floor. The right of speech belongs only to groups, and not to members of the Assembly as individuals. This means that members that do not belong to any group cannot speak on the floor[11]. Unlike in some parliamentary systems, this organization results more from administrative considerations than political grounds. Hence, France's parliament allows for political groups *(les groupes politiques)* which contain more or fewer members according to their political affiliation. In principle, the ruling parties create one group while the opposing parties create one or more groups[12]. However, in the 5th mandate of the National Assembly, there was a remarkable evolution of the parliamentary system toward a more comprehensive political organization of the groups in the National Assembly. In a decision from 2015, the President of the National Assembly recognized the existence of an opposition group and a ruling group which contribute to dialogues on a regular basis[13]. The Senate is still organized according to its own parliamentary groups.

IV. Representation of the Senate: an affirmation of its identity

Unlike first chambers, which are generally directly elected by the citizenry, second chambers are characterized by varying modes of representation throughout the world. Three models of bicameralism can be distinguished. The first of these takes the form of non-elected second chambers. Their members are appointed either by hereditary modes of

11 That was the complaint of members of the National Assembly from the Human Rights Party during the 4th mandate of the National Assembly. Holding only two seats, they didn't belong to any groups, and were, thus, silenced for the whole mandate.

12 Each group, at the beginning of each mandate, makes a political declaration stating their political position, saying whether they support or oppose the government's political platform.

13 Sam Rainsy, President of the Cambodian National Rescue Party (CNRP), is recognized as the leader of the opposition party, followed by the Vice-President of CNRP Kem Sokha as Deputy Leader and by Yim Sovann as Secretary of the group. The ruling parliamentary group is led by Sar Kheng, member of the Permanent Committee of the ruling Cambodian People's Party (CPP)and Vice-Prime Minister in charge of the Ministry of the Interior, followed by Keat Chhun and Men Sam-Orn, both members of the Permanent Committee of the CPP and deputy Prime Ministers.

representation[14] or by appointment[15]. The second is federal bicameralism, in which the second chamber represents the entities composing the federal state[16]. In the third model, which is found in unitary states undergoing a decentralization process, the second chamber represents the various decentralized entities[17].

The Senate of the Kingdom of Cambodia, created in 1999, was initially an appointed chamber. With the exception of two members who were appointed by the King, and two others appointed by the National Assembly, senators were appointed by the political parties in proportion to their number of seats in the National Assembly. This similarity between the houses led to severe criticism from the public. Facing such criticism, the Senate was, in accordance to the Constitution providing for its election, in search of its identity. Following two postponements of its mandate, each lasting a year, the official reason for which being a lack of electoral law, the Senate finally went through an election. A law concerning Senate elections was adopted on June, 30th 2005. According to the Constitution, the draft law had to be submitted to the National Assembly for the first review. This meant that the National Assembly could amend or orient the Senate election according to its will.

The law on the election of senators provides that, aside from the two senators appointed by the King and the two others assigned by the National Assembly, senators would be elected by an electorate comprising the communal councilors and members of the National Assembly in function.

From the legal point of view, this law complies with the second paragraph of article 99 of the Constitution, which states that *"some senators are appointed and others elected by a non-universal suffrage"*. In accordance with this, two senators were appointed by the King. The article does not precisely provide that the candidates come from within the royal family. De facto, the two senators appointed were not members of the royal family. The other two were assigned by the National Assembly by an absolute majority vote from its members. The 57 other senators were elected by the communal councilors and the members of the National Assembly.

The election of senators is a form of non-universal suffrage, as provided for in the Constitution. According to Professor Philippe Foillard, suffrage is non-universal when *"the right of vote is reserved for individuals fulfilling certain conditions"* other than those required for the universal suffrage[18]. Non-universal suffrage always requires more conditions which go beyond the minimal conditions of nationality, age and civil rights reserved for universal suffrage. Historically, two further conditions were also specified. The first was based on fortune or on property; e.g. the right to vote was conditional on the payment of

14 E.g. the House of Lords of the UK.
15 E.g. the Senate of Canada.
16 E.g. the Senate of the United States or the *Bundesrat* of Germany.
17 E.g. the Senate of France or second chambers of Italia or Spain.
18 Philippe Foillard, *Droit constitutionnel et Institutions politiques (Constitutional law and political institutions)*, Centre de publications universitaires, 1999-2000, p. 63.

taxes. The second was based on the capacity of the citizens, who were required to have an acceptable level of education such as a high diploma etc. Hence, the election of senators imposes a new condition that does not exist for National Assembly elections, specifying a particular quality of its electorate. Since the commune councilors and members of the National Assembly are citizens who receive a particular mandate from the people, this mandate can be considered as a further special condition for the election of senators. Therefore, there is no ambiguity regarding the non-universality of senatorial suffrage.

Since the implementation of the law on June 30th, 2005, the Senate has frequently proclaimed itself the *"chamber representing the communal councils"*. It is indisputable that the main electoral bodies of senators are the communal councilors. But claiming that the Senate represents the communal councils is restrictive, as it ignores members of the National Assembly and the senators appointed by the King who are a part of the senatorial electorate. Concretely, the Senate must be considered to have mixed representation. It represents the monarchic element, as demonstrated by the presence of two members appointed by the King; the parliamentary element, in the form of two members elected by an absolute majority vote of the members of the National Assembly; and finally, the local administration of the country in the form of votes by commune councilors, who constitute a majority of the electorate.

As such, senatorial representation combines traditional and modern elements. The traditional elements take the form of senators being appointed by the King and elected by the National Assembly as practiced during the Constitution of 1947 as the modern one constitutes the representation of local governments, which enfranchises the decentralized entities of the country.

Even though the presence of the traditional style of royal representation seems to contradict the democratic principle, it is by no means unique to Cambodia. Indeed, it is practiced by many bicameral parliaments throughout the world. In Italy, the President of the Republic can nominate six dignitaries to sit in the second chamber. It seems paradoxical that such appointments should persist within a democratic system. Nonetheless, it can have advantages: Jean Grange has shown that the presence of appointed members within the second chamber of Ireland serves to *"avoid eventual political discordance between the two chambers and to avoid excessive similarity between them"*[19]. Therefore, the appointment allows the state authority to choose members independently from the pressure of the people. It also amounts to a diversification of the representation of the second chamber, whose existence depends upon its difference from the first chamber.

In the case of the elections of senators by the commune councilors, this mode of representation corresponds to a general tendency of bicameralism in unitray states in which the second chamber represents decentralized entities. Without such specificity of

19 Jean Grange, *Irlande : le Sénat (Seanad Eireann)*, Les secondes chambres du Parlement en Europe occidentale (Senates of the Parliament in western Europe), Paris, Economica, 1987, p. 299-3000.

the second chamber, bicameralism is condemned to extinction. Indeed, this has already happened in Nordic countries such as Denmark or Sweden, which abolished their second chambers on the grounds of malfunctioning and perceived superfluousness.

To avoid this kind of negative outcome, many unitary states choose to devolve their second chambers as chambers representing decentralization. Examples of this include the Senate of Italy, a typical example of a unitary state granting substantial autonomy to its decentralized entities; and the Senate of France, which also represents decentralized local entities. It is well known that Italy is a country which grants significant powers to its local governments. Directly elected by their own inhabitants, Italian regions enjoy their own cultural and linguistic specificity as well as many powers conferred on them by the central government. The Senate of Italy is the most suitable institution to ensure national unity, allowing for the expression of opinions through elections conducted on a regional basis in proportion to the size of each region. This is the same in France, which practices a moderate form of decentralization. Article 29 of the French Constitution clearly recognizes that the Senate of France represents the territorial collectivities *(Les collectivités locales)*, whereas the National Assembly (the first chamber) represents the French people as a whole. However, it should be noted that the representation of specific territories means the representation of the people of those territories[20]. This is the key characteristic of second chambers, which pay attention to the concerns of their electorate during the legislative process by allowing them, for example, to examine the first reading draft of proposed laws relating to the life of the local entities.

Beside these classical parliamentary functions, the Senate of the Kingdom of Cambodia also plays a mediating role between the National Assembly and the government which has never been applied in practice.

V. Legislative function as a perfect expression of an unequal bicameralism

The most important function of the second chamber and of the parliament as a whole is its legislative function. To qualify as a bicameral parliament, the second chamber cannot merely act as a consultative chamber occasionally intervening to give advice according

20 A territory cannot be represented without people living in it. The representation of a territory implies the representation of the people living in it.

to the needs of the government[21]. Rather, the second chamber has to take part in the legislative process as determined by the Constitution. However, the form of consultative bicameralism is not excluded[22].

In this regard, two separate chapters of the Cambodian Constitution, namely chapters 7 and 8, specify two institutions which take part in the adoption of laws: the National Assembly and the Senate[23]. Articles 90 and 99 of the Constitution provide that the National Assembly and the Senate are organs that *"have legislative powers which shall fulfil [their] function[s] as stipulated in the Constitution and laws in force"*. According to this provision, the bicameral nature of the Cambodian parliament seems to be indisputable.

The main article, which expresses the legislative power of the second chamber, is article 113 of the Constitution. The first paragraph of the article provides that *"the Senate shall examine and give its advices on draft law or on proposed law adopted by the National Assembly in its first reading, as well as other questions submitted by the National Assembly, within a period not exceeding one month"*. Therefore, the legislative function of the Senate as provided for by article 99 of the Constitution is reduced to a consultative role, as the term "advice" is the exact terminology used and chosen.

Article 113 specifies the conditions of Senate interventions during the law adoption process:

First, it set a principle period of one month, reduced to five days in case of urgency, for the Senate to examine and give advice on the draft or proposed law.

Second, if the advice is favorable without any need for amendments, the law should be adopted and sent to the King for promulgation.

Third, if the Senate is silent during the determined period of time, this abstention should be considered as favorable to the draft or proposed law, and the latter shall be considered as adopted and sent to the King for promulgation.

Fourth, if the Senate proposes amendments, the National Assembly must consider them *"immediately"* and send them back to the Senate. If the National Assembly follows the proposed amendments, the draft or proposed law shall be considered as adopted and sent to the King for promulgation. On the contrary, if the amendments are not accepted, the draft or proposed law shall be sent back to the Senate; in this case, the shuttle between the two chambers can last for a maximum of one month for all draft or proposed laws and for ten days for draft budget laws, reduced to two days in case of urgency. If the dissension between the two chambers still persists, the draft or proposed law shall be promulgated in the terms last adopted by the National Assembly.

21 E.g. councils which play a role in giving advice when the government requires such. For example, the Social and Economic Council of France is not a parliamentary chamber. Such councils are not considered to be parliamentary chambers.

22 E.g. the Council of the Republic of the French 4th Republic, the Council of Kingdom of the first Cambodian Constitution or the second chamber of Ireland.

23 This was also the case in the first Cambodian Constitution. Bicameralism is more precisely specified by the Constitution, which integrated the two chambers into one chapter.

Fifth, if the Senate rejects outright the draft or proposed law adopted on the first reading by the National Assembly, the latter cannot reexamine it within a period of one month, reduced to fifteen days for draft or proposed budget laws and to four days in case of urgency. The second reading of the National Assembly is considered final, after which the draft proposed law shall be sent to the King for promulgation.

On the basis of this constitutional provision, some remarks can be drawn. First, the period of time set out in the Constitution for the Senate review seems too short, outdated[24], and not practical in the current parliamentary procedure, which is becoming ever more complicated. As such, it should be reviewed to allow the Senate enough time to fulfill its function correctly[25]. Second, the final say is given to the National Assembly. In case of amendments proposed by the Senate, it is the text as adopted by the National Assembly that is sent for royal promulgation. The Senate, as provided for in the Constitution, is thus a purely consultative chamber without any capacity for resistance. The only way of obstruction is to reject a law *"purely and simply"*, and even this can only postpone and not obstruct the procedure.

Therefore, Cambodian bicameralism is rather unequal, with an indisputable dominance on the part of the first chamber.

VI. Oversight function: the supremacy of the first chamber

The oversight function is as important as the legislative function in a representative democracy. The oversight function could be defined as the ability of parliament to overthrow the government. This definition is a restrictive one. From a broader point of view, the oversight function is a legal or non-legal means used by the Assembly to hold the government accountable for its decisions or actions. From the latter perspective, the oversight function could be exercised either by the Assembly itself or by its Commissions.

The Cambodian Constitution recognizes in the final paragraph of article 90 stating that *"the National Assembly must give the government a vote of confidence by an absolute majority"*. In the parliamentary system of government, the equivalent of the vote of confidence is the vote of censure. This is why article 98 of the Constitution clearly recognizes the right of the Assembly to withdraw its confidence through a vote on a motion of censure by the same majority. These rights are not granted to the Senate. Therefore, the latter is deprived of this important mechanism of political control.

24 This is merely copied from the Cambodian Constitution of 1947, in which the parliament is smaller, and the parliamentary procedure is less complicated.

25 This is also a recommendation of the self-evaluation report carried out by the Senate itself; See *Self-evaluation of the Senate of the Kingdom of Cambodia after 10 years of functioning and development,* ed. Konrad Adenauer Stiftung, December 2009.

The other form of the oversight function is posing questions to government. As a body representative of the people, the parliament has to check constantly the actions of government, and holds it accountable. The purpose of questions to the government is to avoid sanctions, but it could also lead to sanctions if any irregularities are found. The questions could be written or oral. In this area, the Constitution grants the Assembly and its ten Specialized Commissions the right to ask questions, whether in written or oral form, to the government. No such provision is made for the Senate. At first glance, the second chamber should be deprived of this right. However, the internal rule of the Senate granted the Specialized Commissions the right to seek information within the scope of their work for the government. Therefore, the Senate Commissions enjoy the same privileges as their counterparts in the National Assembly.

Furthermore, the role of the Commissions of both chambers is not only to seek necessary information, but also to conduct inquiries where this is deemed necessary. This is why the Commission on Human Rights, Complaints and Investigation was created in both assemblies. This function does not belong solely to this Commission, as the other Commissions can also concur in exercising it.

In practice, after a long period of inaction, Commissions of the National Assembly are now more active in holding the government accountable[26]. The role of the Commissions of the Senate remains tentative at present.

VII. The ambiguity of the regulatory function of the Senate

Article 112 of the Constitution provides for an unusual function of the Senate, allowing it *"to coordinate works between the National Assembly and the government"*. The Constitution does not further elaborate on what this coordination function amounts to.

At the requested of the President of the Senate, the Constitutional Council had the opportunity to specify this function more clearly. The decision of the Council dated November 8th, 2000, stated that it is *"the political role of the Senate"* as the second chamber to intervene in order to prevent a crisis. Furthermore the decision of the Council stated, that the role of the Senate *"could not be limited by any text or law"*. This is why no implementation law has been adopted so far. The Council stipulated that the National Assembly and the Senate are not obliged to adhere to the intervention of the Senate. Such interventions are considered successful when the crisis is eased or resolved; otherwise, it will have been in vain. Even though the Constitutional Council did not specify the substance of this right of intervention more clearly, the procedural role should be clarified. It serves to determine how the Senate intervenes, whether through its President or whether

26 The five Commissions chaired by the opposition party, CNRP, are more active in their oversight function than those presided over by the CPP.

through a vote. This is why this provision has never been applied since its establishment in 1999, even in face of the crisis between the National Assembly and government over the new state legislative and executive branches. Hence, the Senate was absent during the 2003 election crisis, which was caused by a deadlock when none of the political parties obtained the two-thirds majority required to form a single-party government.

This regulatory function of the second chamber is amplified by its role in regulating state institutions. The President and two Vice-Presidents of the Senate, together with their counterparts from the National Assembly, the Prime Minister and the Supreme Chiefs of the Buddhist Order of Mohanikay and Thammayut, elect the King of Cambodia (art. 13 Const.); The President of the Senate or one-fourth of senators can make a request to the Constitutional Council to examine the constitutionality of a law adopted (art. 140 and 141 Const.); the agreement of the President of the Senate, along with that of the President of the National Assembly and the Prime Minister, is necessary before the King can proclaim a state of emergency (art. 22 Const.); and the agreement of the Senate's President is necessary for the declaration of war (art. 24 Const.). However, this regulatory function is only partial, and is not completely granted to the Senate. Hence, the latter is absent during the composition of the Constitutional Council[27]; the Senate is not consulted before the dissolution of the National Assembly; and the role of the Senate is not recognized during constitutional amendments[28].

Finally, the last regulatory function of the Senate comes in the form of its role in the Parliamentary Congress.

Chapter IX of the Constitution provides that *"in case of necessity, the National Assembly and Senate can convene in Congress to resolve important national issues"* (art. 116). Article 117 adds that *"important national issues, as provided in article 116, as well as the organization and functioning of the Congress shall be specified by a law"*. In lieu of a law on constitutional implementation, known as the Organic Law, a transitional provision of the Constitution states that for the first mandate of the Senate, the Congress shall be presided over by the co-chairs of the Presidents of the Senate and the National Assembly (art. 157). In this regard, Baufumé claims that this provision is evidence of "an equal bicameralism"[29].

Following a long delay, the Organic Law on the organization and functioning of the Congress was finally adopted and promulgated by the Kram on February 19th, 2011. As required by the Constitution, the law specifies in a non-exhaustive manner what constitutes an *"important national issue"*. Article 3 of the law describes them as *"serious threats to the independence, the sovereignty and territorial integrity of the Nation"* and

27 The Constitutional Council is composed of three members assigned by the King, three elected by the National Assembly and three from the Supreme Council of Magistracy.

28 Art. 151 provides that *"the revision or amendment of the Constitution must be carried out by means of a constitutional law adopted by the National Assembly with a two-thirds majority of all its members"*.

29 Bruno Baufume, *Senate of Cambodia, from marginality to normality,* (*Le Sénat cambodgien, de la marginalité à la normalité),* Politeia, N. 16, 2009, p. 483.

"the force majeure causing serious damages to the nation and the people". Article 3 nonetheless leaves it open to the Committee of the Congress to determine further issues that might be considered to be of national importance. This provision is an expression of the sovereignty of parliament in implementing the Constitution.

The law on parliamentary congress thus determines the organization and functioning of the Congress. Contrary to the transitional provision of the Constitution, the presidency of the Congress is conferred on the President of the Senate and not the Co-Chairs, as was the case during the transitional period. The President of Congress is seconded by the President of the National Assembly, who acts as Vice-President of the Congress. This is the only case in which the supremacy of the Cambodian Senate is affirmed. In case of the absence of the Senate's President, the President of the National Assembly will preside over the meeting, and the interim is structured in a hierarchical manner by the First Vice-President of the Senate, the First Vice-President of the National Assembly, the Second Vice-President of the Senate and the Second Vice-President of the National Assembly. The agenda of the Congress meeting is determined by a Committee of the Congress, composed of six members[30] and presided over by the President of the Senate, seconded by the President of the National Assembly.

Congress can be convened on the initiative of the King, the President of the Senate, the President of the National Assembly or the Prime Minister. A quorum of half of the Senate's members and half of members of the National Assembly is required to make the meeting of Congress valid. The Congress adopts a resolution by an absolute majority of all Congress members. Resolutions of Congress are considered by the law to be the *"most sovereign"* decisions of the nation. However, the real biding force of the resolution is unclear.

The Congress meets in the National Assembly compound, or in another place to be specified by the Congress. Responsibility for the secretariat as well as the budget for the functioning of the Congress falls to the National Assembly.

In practice, the parliamentary Congress is convened only once to adopt its own internal rule.

30 Three from the Senate (its President and two Vice-Presidents) and three from the National Assembly (its President and two Vice-Presidents).

VIII. Conclusion

Bicameralism is inscribed within the Cambodian political tradition. It has been present since the beginnings of Cambodia's first written Constitution. Although this tradition was interrupted due to political regime changes, bicameralism remains in the current Constitution.

The return of the second chamber, the Senate, was initially an answer to a political deadlock that could have led to national instability. As such, it is considered to be the result of a compromise. Its democratic legitimacy was later recognized as a representative chamber for the lowest decentralized administrations of Cambodia. However, it also contains a mixture of traditional elements, in the form of the presence of senators elected by royal appointment and by the parliament.

The Senate enjoys the same functions as the first chamber, that is, the adoption of laws and the overseeing of government actions. However, Cambodian bicameralism is unequal, as the second chamber merely takes part in the legislative process that provides the final say to the first chamber, and it is deprived of some fundamental oversight functions, such as the right to question the executive in Senate plenary meetings.

This disadvantage was compensated for by the moderation function granted to the Senate, allowing it to regulate state institutions, even if this function remains partial. The most remarkable, albeit not the most effective function of the Senate is the function of coordinating between the first chamber and the executive or the parliamentary Congress, allowing the two chambers to make important decisions for the nation.

Even though progress had been made, the second chamber still requires further institutional reform, including reform of the legislative procedure and the moderation function, as well as a broader representative function.

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THE CONSTITUTIONAL ROLES AND POWERS OF THE ROYAL GOVERNMENT

Hisham MOUSAR

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THE CONSTITUTIONAL ROLES AND POWERS OF THE ROYAL GOVERNMENT

Hisham MOUSAR *

ABSTRACT

This article presents and highlights the role and powers that the Cambodian Constitution assigns to the government. This endeavor also seeks to contextualize this study within the social, political and geopolitical history and environment of the country. Additionally, this paper places the role and powers of the government vis-à-vis other constitutional bodies, particularly the Cambodian legislative and judicial branch of power, in order to better evaluate them.

The Constitution commands the Royal Government of Cambodia to perform missions that will briefly be reviewed here, to understand its objectives. This article will then analyze the means available, using an unorthodox approach that is to present the Royal Government not only as a law and decision enforcing body but also as a modern government based on the western and liberal model, adopted in many countries worldwide.

Finally, it should be noted that this study is preliminary and a basis, allowing and encouraging future studies and the development of the Cambodian Constitution to consider and provide answers to further questions.

I. Introduction

Article 52 of the Constitution of 21 September 1993 sets out missions assigned to the government. As each constitution expressing priorities dictated by history[1], this key provision drafted in the post-conflict context of the 80s and Paris Peace Agreements of 23

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1 By comparison, in France, the Constitution of 4 October 1958 has in a very concise way that the role of the government is "to determine and conduct the policy of the nation". This brevity is explained by the will of General de Gaulle, with its authority granted by history, to reduce the areas where the government intervenes in favor of the President of the Republic, which will characterize the French political system to the present day. De Gaulle wanted indeed a sharing of power of the executive branch between the government and the President of the Republic. It stated that the government's role is to support the "contingencies" (economic, social, conflict of public services, etc.), while the role of the President of the Republic is to ensure the place of France on the international stage, her defense and basic choices involving its future.

October 1991 summarizes the constitutional framework within which the framers of the constitutional text were determined to place the action of public authorities[2], integrating a constitutional construction providing their functioning and the ways they cooperate.

This abridged paper focuses on the government's role and jurisdiction empowered by the Cambodian constitution. Does the executive branch of power have sufficient constitutional resource to fulfill the tasks assigned to it? How does the fundamental law organize government's relations with the other constitutional powers to achieve its objectives? The scope of regulatory power is one useful indicator amongst others to answer these questions and then will be considered.

The Cambodian Constitution, like many other modern constitutions[3], does not define the regulatory power. This may suggest that this power remains confined to the traditional role of law enforcement[4]. This void or this inaccuracy nevertheless enables also to defend the idea that a self-regulatory power can exist or is authorized by the Cambodian fundamental law. In many countries with a liberal and democratic constitutional system, such power is indeed recognized for the government and its administration, including the independent administrative authorities[5]. Such power would enable the Cambodian government to fully accomplish the missions that the Constitution assigns to it, especially if the legislative branch of power does not follow the same objectives. For instance, it is in fact conceivable that all parliamentarians do not necessarily consider the national recon-

2 MOUSAR Hisham, "Le cadre constitutionnel cambodgien", *Bibliothèque de l'Association Henri Capitant des amis de la culture juridique française*, Lextenso éd., Paris, 2015, 10 p.

3 Constitutions of the United States of America, Canada, etc. The French Constitution, in contrast, defines the area of law adopted by parliament and established an autonomous regulatory power, that is to say, with legislative value.

4 The idea that the regulatory text is under the law was systematized by Hans Kelsen, see KELSEN Hans, Reine Rechtslehre, 2nd edition, re-printing from the original edition in 1960, Vienna, Deuticke, 1976, 498 pages (translated in French under the title "Théorie pure du droit", 2nd edition, translation: EISENMANN Charles, Paris, Dalloz, 1962, 496 pages). This legal doctrine is still defended today, see PAOUR Raphael, "The legal constraints of hierarchy of norms" Revus [Online], 21 | 2013, Online since 10 December 2013, connection on 06 August 2014. URL: http://revus.revues.org/2755.

5 Article 72 of the 2011 Moroccan Constitution states that "*[t] he matters other than those which are the domain of the law belong to the regulatory domain"* (« [l]es matières autres que celles qui sont du domaine de la loi appartiennent au domaine réglementaire ») following the mechanism of Articles 34 and 37 of the French Constitution of 4 October 1958 setting up an independent regulatory power for the executive branch. In the United States, "*[t] he President shall implement the laws. To do so he has regulatory power for enforcement. It is, however, considered that this power for law enforcement also underlies implicitly autonomous regulatory power, inherent in its duty to "ensure that the laws be faithfully executed." (…) As it is his responsibility to protect the Constitution and with it, the republican form of government, in accordance with the spirit of the text, the US President may go beyond the letter of the Fundamental Charter"(* « [l]e président exécute les lois. Pour ce faire, il dispose donc d'un pouvoir réglementaire d'application. On considère toutefois que ce pouvoir d'exécution des lois sous-tend également un pouvoir implicite, réglementaire autonome, inhérent à son devoir de "s'assurer que les lois seront fidèlement exécutées". (…) Parce qu'il est de sa responsabilité de protéger la Constitution et, avec elle, la forme républicaine de gouvernement, conformément à l'esprit du texte, le président peut aller au-delà de la lettre de la Charte fondamentale ») (VALLET Élisabeth, La Présidence des Etats-Unis, Presses de l'Université du Québec, p. 75) (VALLET Elizabeth, The US Presidency, Presses de l'Université du Québec, p. 75).

ciliation as a priority today, thirty-five years after the fall of the Khmer Rouge regime or more than twenty years after the Paris Peace Agreements, while others may continue to believe that it remains crucial to keep this in mind as a priority for the country, because a lasting peace can only be built gradually and over several generations. A strict reading of the Constitution makes the reader understand that the government has the right to seek the means necessary to achieve the objectives assigned in Article 52, and it can find with a self-regulatory power the means to not be prevented by parliament to fulfill its constitutional duties.

This paper is an analytical study of the government's role and powers with a presentation of its constitutional missions set out in a post-conflict context (part I), its forming process shaped by the parliamentarianism requirements (part II), its procedure prescribed by a liberal and democratic model (part III), and its regal power as well as regulatory and normative powers (part IV) as designed in the Constitution.

II. The Constitutional Mission of the Government

The Constitution establishes the roles of the Royal Government of Cambodia in specific provisions. In addition, there are other provisions that provide with more detail for the government to ensure an effective implementation of its duties. Alongside the main mission of the Royal Government to strengthen and protect the national independence, the sovereignty and the territorial integrity of the country[6], the government is also required to adopt a policy of national reconciliation in order to ensure and strengthen the national unity, protect the good mores and custom[7].

Furthermore and as usual, the maintenance of peace, security, stability and public order as well as the preservation and protection of legality are also considered as its constitutional roles[8]. Finally, the State[9] shall recognize and provide a priority to improving the welfare and standard of living of citizens[10].

6 See the Cambodian Constitution of 21 September 1993, art. 52.
7 *Ibid*.
8 *Ibid*.
9 It brings a question on the word "State" which was used in the last sentence of the article 52 of the constitution. Whether it refers to only the Royal Government or all State institutions?
10 See the aforementioned constitution, art. 52. In order to develop and maintain good living conditions and welfare of citizens, the Constitution provides several and broad duties for the State (as noted above, it brings a question whether the word "State" refers to only the Royal Government or all State institutions) to carry out. According to the Constitution, the State shall:
– provide opportunities and support to women especially for those living in rural areas in order to ensure that they can receive medical care, obtain employment and send their children to school (art., 46, par. 3);
– prevent children from any form of dangerous labor which can cause injury to their health, welfare and education (art., 48, par. 2);
– maintain and promote economic development in all sectors (art., 61);

In addition, its missions also can be specified in the official documents from the Royal Government to clarify its strategy such as the "Rectangular Strategy – phase 3" (hereinafter called "Rectangular Strategy") and its "Political Platform for the Fifth Legislation of the National Assembly" (hereinafter called "Political Platform") which are complied with what have been stated in the Constitution.

Whereas these missions, except the one for national reconciliation, are usual in most countries, some need to be contextualized.

1. Preservation and Defense of Independence, Sovereignty and Territorial Integrity

As in most constitutions, there are no provisions in the Cambodian Constitution specifying in detail how the government can defend independence, sovereignty and territorial integrity. The Political Platform and Rectangular Strategy only provide that the government shall ensure all kinds of reforms on armed forces in order to achieve high standards of professionalism and efficient performance of their duties through material and capacity building support[11].

The Political Platform recalls clearly the priority of the government to fulfill this mission, which relates to very deep rooted post-conflict crises and the nation's geopolitical location[12].

– develop the means of production, protect the price of products and seek marketplace for the products of farmers and crafters (art., 62);
– concentrate on the market for improving the living standard of citizens (art., 63);
– prohibit the importation, manufacture and sale of illicit drugs, fake and expired goods that affect the health and life of consumers as well as to enforce the punishment of perpetrators of such illegal activities (art., 64);
– improve the welfare of all Khmer citizens through the promotion of physical education and sports (art., 65);
– prevent diseases, provide medical treatment and establish infirmaries, public hospitals and maternity clinics in rural areas, and provide free medical consultation and treatment to the poor people (art., 72).

Given the scope of these ambitious objectives, the subsequent documents from the government clarify its action. For instance, the Rectangular Strategy specifies that the Royal Government is continuing to implement and update on the "Health Sector Strategic Plan" (2008-2015) in order to ensure the equitable and sustainable development of the health sector (Royal Government of Cambodia, Rectangular Strategy Phase III, 2013, p. 43). It also encourages the contribution of local health services in an efficient way to the poor and the vulnerable including women and children (Royal Government of Cambodia, Political Platform of the Royal Government of Cambodia for the Third Legislation of National Assembly, 2013, p. 15-16).

11 The Royal Government of Cambodia, Political Platform of Royal Government of Cambodia for the Third Legislation of National Assembly, 2013, p. 7.

12 From the speech of General de Gaulle, on 1 September 1966 in Phnom Penh: "*On both sides, a history with glories and pains, a perfect culture and arts, a fertile soil, vulnerable borders, surrounded by foreign ambitions and above which the risk is constantly suspended*" («De part et d'autre, une histoire chargée de gloires et de douleurs, une culture et un art exemplaires, terre féconde, aux

2. National Reconciliation

The mission of the government to adopt a policy of national reconciliation is also a result of the previous conflicts and political crisis which can be seen as having prevented the development of the country for many years. The Khmer Rouge trials of the Extraordinary Chambers in the Courts of Cambodia, the frequent political compromises and alliances just after the elections organized by the United Nations Transitional Authority for Cambodia between FUNCINPEC[13] and CPP[14], and currently between the CNRP[15] and CPP, and the large-scale presence of civil society organizations in the country[16] seem to confirm that the government is concerned by national reconciliation.

3. Protection of Good Mores and Customs of the Nation

According to the Constitution, the Royal Government shall promote, preserve and develop national culture[17], Buddhist education and *Pali* schools[18] as well as take into consideration on all types of requests from citizens in relation to the right to participate actively in the cultural life of the nation and provide a proper settlement on such requests[19]. In addition, the Political Platform of the government also states the necessity of promoting, improving and protecting ancient temples, historical resorts, cultural legacy, language, customs and traditions by strengthening the dissemination, implementation and enforcement of laws protecting these values[20].

The different ethnic minorities and various religions present on Cambodian territory do not seem to be part of the national culture as defined by the Constitution, which provides that the national language is Khmer[21] and the religion of the State is Buddhism (*Theravada*)[22]. However, the co-existence of these heterogeneous cultural elements needs

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frontières vulnérables, entourées d'ambitions étrangères et au-dessus de laquelle le péril est sans cesse suspendu») (DE GAULLE (Ch), Discours et messages, Paris, Plon, 1971, tome V, p. 74).

13 National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia (*Front uni national pour un Cambodge indépendant, neutre, pacifique, et coopératif*).

14 Cambodian People's Party.

15 Cambodian National Rescue Party.

16 See footnote 42.

17 See the aforementioned Constitution, art. 69.

18 See the aforementioned Constitution, art. 68.

19 See the aforementioned Constitution, art. 35.

20 Royal Government of Cambodia, *Political Platform of the Royal Government of Cambodia for the Third Legislation of National Assembly*, 2013, p. 17-18.

21 See the aforementioned Constitution, art. 5.

22 See the aforementioned Constitution, art. 43(3) and art. 52.

to be addressed to comply with the right of belief provided in the Constitution and ensure public order as well as national reconciliation, which are also, for the latter, part of the constitutional mission of the government[23].

Considering that the culture, customs and traditions were devastated by the Khmer Rouge revolution, this mission ensures that national reconciliation is addressed by rebuilding Khmer cultural ground around strong and ancestral values of the Cambodian monarchy, which crystallizes the religion and language of the Khmer population as it has developed over centuries[24]. It also ensures that the government pursues a policy of openness and strong support towards other major religions of Cambodian citizens and ethnic minorities living on the nation's territory.

4. Defense of Legality

State institutions shall ensure that all their regulations and decisions are in compliance with the provisions of the Constitution, otherwise they must be null and void[25] since the rule of law is regarded as the fundamental principle of democracy and a condition for the sustainability of the government and its institutions[26]. The remarkable decline in political violence and the increase in recourse to the courts for political disputes since 2005 proceeded as a result[27].

23 FISHER Rano, HENG Nida, *Diaspora of Ethnic Minorities and Religious Composition in Modern Cambodian Society*, Parliamentary Institute of Cambodia, January 2015, 11 p. See also: CHEA Malika, TOP Davy, *Procedure of religious structures in Cambodia*, Parliamentary Institute of Cambodia, July 2015, 6 p. (available only in Khmer). See also: Cambodian Constitution, art. 43(2), which provides that although the State is obligated to provide a guarantee on the freedom of belief and religious worship, it also has to ensure that the freedom does not affect or violate public order or security of the country.

24 Khmer monarchs, since King Ang Duong, have gradually rebuilt the nation-state focusing on Buddhism. The King "[Ang Duong] encouraged public education by forcing monks to multiply pagoda schools" ("[Ang Duong] encouragea l'instruction publique en obligeant les bonzes à multiplier les écoles de pagoda"); see: KHING Hoc Dy, "Ang Duong", in SAKOU Samoth, Hommes et histoire du Cambodge, p. 8 (last accessed 29 July 2015 from http://camdevel.free.fr/pages/HOMMES-HISTOIRE%20DU%20CAMBODGE.pdf). The Buddhist Institute, created in 1930 under the reign of King Sisowath Monivong to counter political influence from the Siamese, published the first Cambodian dictionary in 1938; see: MIKAELIAN Grégory, "La langue et la littérature khmères", in http://www.clio.fr/bibliotheque/la_langue_et_la_litterature_khmeres.asp (last accessed 29 July 2015). Following this tentative approach towards Khmer language normalization, King Norodom Sihanouk proceeded in the 1960s to fully "khmerizen" national education, siding with proponents of cultural independence in Cambodia; see: KHIN Sok, "La khmérisation de l'enseignement et l'indépendance culturelle au Cambodge", in *Bulletin de l'Ecole française d'Extrême-Orient*, 1999, vol. 89, pp. 293-319.

25 See the aforementioned Constitution, art., 150.

26 The Political Platform of the Royal Government of Cambodia for the Third Legislation of the National Assembly stated that, although all men are born free and equal, they have to respect the law in order to maintain justice, harmony, national interest and social sustainability. See: Royal Government of Cambodia, *Political Platform of the Royal Government of Cambodia for the Third Legislation of National Assembly*, 2013, p. 3-4.

27 Cambodian Human Rights and Development Association (ADHOC), Human Right Reports since 2005.

This is based on the principle of legality from which the government develops its deconcentration and decentralization policy[28]. This is also observed in government involvement in the recent judicial system reform, with the expectation to address the constitutional obligation for the courts to be independent, honest and trustworthy, when it drafted and proposed three major laws on the Organization and Functioning of the Supreme Council of Magistracy, on the Organization of the Courts and on the Statutes of Judges and Prosecutors, which were adopted by parliament[29].

It should be noted that according to the Political Platform, reforms can only be achieved through cooperation between the Parliament, Government, Constitutional Council, Supreme Council of Magistracy and the courts, which promotes functional cooperation between the three constitutional bodies – instead of a strict separation of powers. This requirement proceeds from the working procedures of the government, which will be elaborated below[30].

5. Ensuring Public Order and Security

As usual, the government is in charge to ensure public order and national security. However, there is no clear definition of public order in the Constitution - as in many constitutions. Nevertheless, in most developed countries with an independent judicial branch, public order is defined and limited by the court.

For more than 20 years, taking advantage of the lack of precise legislation for non-governmental organizations (NGOs)[31], a strong civil society with a large number of NGOs[32] and significant funding from various international donors, has not facilitated the clarification and limitation of the definition of public order.

As seen above, the Royal Government of Cambodia attempts to include its missions in the Constitution and subsequent documents. However, while some objectives are very ambitious, some can affect the achievement of others. The government's action then requires sufficient resources and a subtle use of its powers to achieve an acceptable balance in the implementation of all its assignments.

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28 UNG Nary, TOP Davy, *The Implementation and Oversight of the Budget at the Sub-national Level in the Context of Decentralization and Deconcentration*, Parliamentary Institute of Cambodia, February 2014, 13 p.

29 The royal decree NS/RKM/0714/015 promulgated on July 16, 2014 the law on the organization of the courts; the royal decree NS/RKM/0714/016 promulgated on July 16, 2014 the law on the statutes of judges and prosecutors; the royal decree NS/RKM/0714/017 promulgated on July 16, 2014 the law on the organization and functioning of the supreme council of magistracy.

30 See *infra* Part III.

31 A law on associations and non-governmental organizations has recently been adopted.

32 1591 local NGO, 508 international NGO (2099 NGO), census conducted by the Cooperation Committee of Cambodia in 2015 (http://www.observatoire-volontariat.org/IMG/pdf/ETUDE_VOLONTARIAT_CAMBODGE_2013_Synthese.pdf, last accessed 29 July 2015).

III. The Process of Forming the Royal Government

The Cambodian Constitution vests executive power to the Royal Government of Cambodia[33]. The appointment of government members is under the general provision stated in article 119 of the Constitution.

The process of appointing members is a subtle mechanism which fulfils requirements of parliamentarianism. These requirements lead the composition of the government to reflect the majority of the members of the National Assembly, who adopt laws and vote on a motion of censure[34].

The reason why the Prime Minister is selected among the members of the National Assembly from the party, which won the elections - to form the Royal Government and choose members of the government among the members of the National Assembly – is that the Royal Government is only collectively responsible on its overall policy to the lower house[35].

A historical reason can explain this exclusive responsibility of the National Assembly, as after the general elections organized by the United Nations in 1993, Cambodia has adopted a constitutional system with the National Assembly as the only parliamentary

33 Under previous constitutions, this was not necessarily the case. Executive power used to be carried out by the President of the Republic following a liberal democracy with a republic system from 1972 to 1975 (Constitution of the Khmer Republic adopted in 1972, art. 23), while all powers belonged to the people in accordance with the Constitution of the People's Republic of Kampuchea from 1981 to 1989 (art. 2.) and the Constitution of the State of Cambodia from 1989 to 1993 (art. 2).

34 According to article 119 of the Constitution, the King shall select a high ranking personality among the members of the National Assembly from the majority party to establish the Royal Government. This shall be in accordance with the request from the President and with the agreement of both Vice-Presidents of the National Assembly (the definition of "high ranking personality" is open to different interpretations). For instance; article 138 of the 1993 Constitution defines a high ranking personality to be eligible to become a member of the Constitutional Council if he/she "hold[s] high diplomas in law, administration, diplomacy or economics and ha[s] extensive professional experience", while article 19 of the Law on Audit states: "The candidates for an appointment to be Auditor-General and Deputy Auditor-General must be dignitaries who have: Cambodian nationality at birth; at least forty (40) years of age; degree of higher education or equivalent degree accounting or economic or finance or law or commerce with a proper certification; professional or working experience at least ten years and no position in the governing body of any political party."). The dignitary together with his collaborators, who are members of the National Assembly or from political parties represented in this chamber, can be assigned for certain positions within the Royal Government. This dignitary with his collaborators has to ask for the trust from the National Assembly in order to establish the Royal Government. Once the National Assembly has voted in confidence, the King issues the royal decree for establishing the Council of Ministers (the aforementioned Constitution, art., 118-New states: "The Council of Ministers is the Royal Government of the Kingdom of Cambodia") and all members have to take an oath before taking position. The organization and functioning of the Council of Ministers is governed by the law dated July 20, 1994.

35 See the aforementioned Constitution, art., 121(1)-New. The law on organization and functioning of the Council of Ministers dated July 20, 1994 also provides that the governement has the duty to determine the policy of the nation (art. 1).

chamber[36]. Therefore, the Constitution gave the National Assembly the competence to pass the vote of confidence for forming the government as well as to dismiss any members of the government as a whole by adopting a motion of censure (art. 90 new and 98 new of the Constitution)[37].

After the legislative elections in July 2013, His Majesty the King, Norodom Sihamoni, appointed *Samdech* Hun Sen as Prime Minister of Cambodia for the fifth mandate[38] in order to form the new government on September 23, 2013 and the members of the fifth and current Council of Ministers were sworn in on 24 September 2014[39].

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36 The creation of the Senate was just a way out of the political crisis in 1998 after the parliamentary elections in the second legislature. The disagreement between the two main parties at that time, namely the Cambodian People's Party (CPP) and Funcinpec, and their issues of power sharing has indeed been solved by the creation of the Senate. See the Cambodian Senate's official website, *the History of the Senate*, last accessed 10 September 2014 from: http://www.senate.gov.kh/home/index.php?option=com_content&view=article&id=59&Itemid=175&lang=en
In most countries with a parliamentary system and bicameral parliament, only the lower house has the prerogative to remove or cause the dissolution of the government. E.g.: in France (National Assembly), in Germany (Bundestag) as well as in Australia (House of Representatives) or in the United Kingdom (House of Commons).
However, as a government is formed by the group or party with majority support of the lower house (the House of Commons in the UK and House of Representatives in Australia), and coalition governments are rare in these countries (the UK's current withstanding), it is exceedingly unlikely that a party would first vote for a non-confidence vote, and then vote against itself, causing the head of state (the Queen or her representative, the Governor General) to appoint a new government or dissolve the chamber and call for an election. A new government can be appointed by the head of state if it loses support of the majority. Over the last century, there have been two prominent examples of actions from within the lower house leading to a government's dissolution in either country. The first being the end of the UK's WWII unity government due to the Labour Party's departure from the ruling coalition, which denied the government its necessary house majority and led to elections. The second being Australia's 1975 Constitutional Crisis, when the Governor General dismissed Prime Minister Whitlam on the controversial grounds that he lacked the support of an effective majority of the parliament (p. 103 of Australia: The State of Democracy offers a very brief overview/citation https://books.google.com.kh/books?id=F09pc74M9NMC&pg=PA103&lpg=PA103&dq=australian+constitutional+crisis+norman+abjorensen&source=bl&ots=jCM4GtSKll&sig=rOsROE9l1gp4CajDyKoDb-2eStXU&hl=en&sa=X&ei=k0-iVObiKdPi8AWJ8IGgBg&ved=0CDQQ6AEwBQ#v=onepage&q=australian%20constitutional%20crisis%20norman%20abjorensen&f=false; here is a more detailed source: http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/platparl/c04).

37 Furthermore, in the same vein, the National Assembly also has exclusive rights to propose a question to the government in order to: oversee government policies and invite any minister if there is a need for clarifications to ensure the check and balance principle (art. 96 and 97 of the Constitution); file charges against a member of government in a competent court when he or she commits a serious crime (art. 126 of the Constitution); vote the state budget.

38 Royal Decree No 0913/902 on appointment of prime minister dated September 23, 2013, art. 1.

39 Royal Decree No 0913/902 on appointment of prime minister dated September 23, 2013, art. 2. The forming of government within the mandate has become an interesting topic since the citizens urge to see the result after the reshuffle of the composition, see: Cambodian Internet Newspaper, "The King Appointed Mr. Hun Sen to Form a Royal Government of New Mandate", Phnom Penh, September 23, 2013, last accessed on August 28, 2014 from: http://www.camnews.org/2013/09/23/%E1%9E%96%E1%9F%92%E1%9E%9A%E1%9F%87%E1%9E%98%E1%9E%A0%E1%9E%B6%E1%9E%80%E1%9F%92%E1%9E%9F%E1%9E%8F%E1%9F%92%E1%9E%9A%E2%80%8B%E2%80%8B%E1%9E%85%E1%9E%B6%E1%9E%8F%E1%9F%8B%E1%9E%8F%E1%9E%B6%E1%9F%86/. After the result of the election had been released, the Prime Minister started to reshuffle the composition of the government through the

The one year boycott of the National Assembly by the Cambodian National Rescue Party (CNRP), which began on July 28, 2013, the date of the last legislative election, brings a question on the right interpretation of article 119..

A first reading of the provision can lead to the conclusion that the establishment of the government takes place after the result of the legislative election since the provision states that the Prime Minister has to be selected among the members of National Assembly from the *elections* winning party[40].

However, in case a motion of censure is voted to remove the whole government from office according to article 98 of the Constitution, what is the due procedure for the new government re-composition in such a situation? It seems that two scenarios are conceivable: the first one is that the King dissolves the National Assembly in order to proceed as provided for in article 119, but he will face the problem that he can only dissolve the government upon request of the Prime Minister[41] who will have already been removed from office; the second option is that the monarch selects another high ranking personality among the members of the National Assembly from the elections winning party to (re)become Prime Minister. However, if the election had been held many years ago, questions would remain on how to proceed.

Lastly, professional activities in the trade or industrial sector and any position in the public service sector are incompatible with the status as member of the Royal Government to limit the possible pressure resulting from private interests[42]. The functions as a member of the government are also incompatible with the functions as a member of the Constitutional Council[43]. However, it is not prohibited for a minister to exercise, together with his ministerial duties, a parliamentary mandate[44], and this possibility does not affect the unity of the government as well as its independence vis-à-vis the parliament. To the contrary to what happened during the Third and Fourth French Republics, the Cambodian government's composition did not experience chronic instability[45]. In addition,

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nomination of new ministers and the reshuffle of some secretaries of state. However, the reshuffling still faces criticism, see: Cambodian Internet Newspaper, "New Mandate Council of Minister of Mr. Hun Sen has a little Difference from the Previous Mandate", Phnom Penh, September 25, 2013, last accessed on August 28, 2014 from: http://www.camnews.org/2013/09/23/%E1%9E%96%E1%9F%92%E1%9E%9A%E1%9F%87%E1%9E%98%E1%9E%A0%E1%9E%B6%E1%9E%80%E1%9F%92%E1%9E%9F%E1%9E%8F%E1%9F%92%E1%9E%9A%E2%80%8B%E2%80%8B%E1%9E%85%E1%9E%B6%E1%9E%8F%E1%9F%8B%E1%9E%8F%E1%9E%B6%E1%9F%86/.

40 See the aforementioned Constitution

41 See the aforementioned Constitution, art., 78.

42 See the aforementioned Constitution, art., 120-New.

43 See the aforementioned Constitution, art., 139-New

44 Article 79 of the Constitution clearly allows it, but it limits the exercise of the functions as Member of Parliament, as members of the Royal Government "must have no position in the standing committee and in the different commissions of the National Assembly".

45 In contrast, the French Constitution prohibits ministers to exercise a parliamentary mandate. General de Gaulle holds that the possibility of combining a parliamentary mandate and functions of government did not provide sufficient unity for the government or independence vis-à-vis the parliament. Indeed,

other incompatibilities provided by the Law on the Common Statute of Civil Servants do not govern the members of government and it seems there is no law or regulation that prescribes incompatibility of member of government besides the Constitution.

IV. The Organization of the Government and its Procedure

1. Organization

The Royal Government of Cambodia is the cabinet in charge of the overall execution of national policies and programs. It consists of both armed forces and civil administration[46]. In practice, the power of the government is very wide-spread as it consists of twenty eight (28) line ministries. To ensure the efficiency of the executive branch's work, power is delegated to ministers and administrative bodies to relieve the government's workload as well as speed up its work[47]. In order to better deliver public services, a minister has the power to issue any proclamation and circular to coordinate and enlighten the work of its ministry[48].

The structure of the Cambodian government, which is also called the Council of Ministers, includes the Prime Minister, who is the head of the Royal Government, the twenty eight (28) ministries, and one (1) Secretariat of State which are led by Deputy Prime Ministers, Senior Ministers, Ministers, and Secretaries of State[49] who are appointed in accordance with the Royal Decree on Appointment of Government by the King of Cambodia dated September 24, 2013[50].

The government has a very large amount of human resources with two hundred thirty-two (232) members of the Royal Government (including the Prime Minister): nine (9) Deputy Prime Ministers; fifteen (15) Senior Ministers; thirty-one (31) ministers; and one hundred seventy-eight (178) Secretaries of State.

By comparison, in France, there are thirty four (34) members of government (including the Prime Minister): sixteen (16) ministers for sixteen (16) ministries and seventeen (17) secretaries of state.

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any minister was certain to find his/her parliamentary office on resignation from the Government, which contributed to ministerial instability.

46 DPADM & DESA, "Kingdom of Cambodia: Public Administration Country profile", 2004, 6.

47 "The Separation of Powers under the Cambodian Constitution", accessed September 26, 2013, http://cambodia.ahrchk.net/mainfile.php/19980314/61/.

48 Law on Organization and Functioning of the Council of Ministers, art. 29.

49 Royal Decree No 903 issued on September 24, 2013 on the Appointment of Government of the Kingdom of Cambodia.

50 The 28 Ministries are led by 5 Deputy Prime Ministers, 4 Senior Ministers, and 18 Ministers. The Secretariat of State is led by one Secretary of State.

2. Procedure

As in most countries, Cambodia's state is composed of at least three branches, the executive, the legislative and the judiciary. Since Cambodia adopts the form of a liberal pluralist democratic regime[51] with a system of check and balance of powers[52], these three branches are designed, on the one hand, to be independent in exercising their constitutional powers without any interference from other branches; on the other hand, the check and balance process makes them cooperative as they must work together, although they are organically strictly separated.

a.) Functions

As just mentioned, the rationale of the check and balance system commands that the three branches are interconnected[53]. The courts have the power to rule on minor or major indictable offences committed by government members[54].

Nevertheless, the independence of the judiciary depends on the Supreme Council of the Magistracy (SCM)[55] in which the Minister of Justice is a key member. While the Minister of Justice is one of the eleven (11) members of the SCM, he chooses another member among the prosecutors. It should be recalled that the SCM proposes administrative measures and disciplinary actions against judges and prosecutors to the King[56]. It shall also deliver its opinion on the promotion of grades and steps for all judges and prosecutors[57]. The Minister of Justice shall submit a draft of a royal decree for the appointment of members of the SCM to the King[58]. He shall organize the election of the SCM members[59]. The Minister of Justice shall be the representative of the SCM in its relations with private or public individual persons and has the responsibility to manage all administrative affairs

51 Cambodian Constitution, 1993, Art., 51-New.

52 Statistics from the Committee for Free and Fair Elections (COMFREL), "Cambodian Democracy, Elections and Reform: 2009 Report", 2010, 2, accessed September 09, 2013, http://www.comfrel.org/images/others/1265785063Comfrel-Cambodia%20Democratic%20Reform%202009-En-Final.pdf.

53 CHANTEBOUT Bernard, *Droit constitutionnel*, Sirey, 2014, 656 p.

54 The Cambodian Constitution, 1993, art. 126-New.

55 The Cambodian Constitution, 1993, art., 132-New.

56 According to article 18 of the Law on the Organization and Functioning of the Supreme Council of Magistracy dated July 16, 2014, the SCM decides and proposes to His Majesty the King the appointment, transfer, suspension, lay-off status and removal from the roll as judge and, at the request of the Minister of Justice, it proposes to His Majesty the King the appointment, transfer, suspension, lay-off status and removal from the roll as prosecutor.

57 Abovementioned art. 18.

58 Abovementioned Law on the Organization and Functioning of the Supreme Council of Magistracy, art. 4.

59 The modalities and procedures of the first election shall be determined by Prakas of the Minister of Justice (article 28 of the abovementioned Law on the Organization and Functioning of the Supreme Council of Magistracy).

of the SCM with the staff of the general secretariat of the SCM[60]. The Secretary General and Deputy Secretary General shall be appointed by a royal decree upon the request of the Minister of Justice[61]. The Minister of Justice may be appointed as a royal representative to act as the Chair of the SCM[62]. Moreover, the Minister of Justice is responsible for the preparation of the exam for selecting judges by determining the number of judges to be selected[63] and the procedure of the exam[64].

In the same vein, the interrelation between the Constitutional Council and the SCM should also be noted since three (3) members of the Constitutional Council are appointed by the SCM[65].

All this indicates that the government and courts are interrelated[66].

Lastly, the interrelated functioning of the National Assembly and the government can be observed through the oversight function exercised by the National Assembly over the Royal Government by addressing policy questions[67] or by inviting, through its commissions, any ministers to give clarifications on issues related to its responsibility[68], as the government is collectively responsible before the lower house (as mentioned above). On the other hand, the Prime Minister can propose to dissolve the National Assembly[69] to the King. As will be elaborated below[70], the government has also a normative power and contributes with the legislative to the law making process.

60 Abovementioned Law on the Organization and Functioning of the Supreme Council of Magistracy, art. 13.

61 Abovementioned Law on the Organization and Functioning of the Supreme Council of Magistracy, art. 8.

62 Abovementioned Law on the Organization and Functioning of the Supreme Council of Magistracy, art. 7.

63 Law on the Status of Judges and Prosecutors dated July 16, 2014, art. 20.

64 Abovementioned law on the Status of Judges and Prosecutors, art. 22. According to article 21 of the abovementioned Law, the organization and functioning of vocational training of the candidates are determined by the Minister of Justice.

65 The Cambodian Constitution, 1993, art. 137-New.

66 There is also a co-relation in the law making process between the judiciary and the legislative. The court, as the law interpreter (art. 129 new of the Constitution), has the power to uphold or overturn the legislative act by referring it to the Constitutional Council for review (art. 141 new). From another perspective, the Parliament can direct the judiciary through binding laws (art. 134 and 135 of the Constitution) particularly with laws related to the role and function of the judiciary (article 134 new of the Constitution states that the SCM shall be created by an organic law which determines its composition and attributions. The abovementioned Law on the Organization and Functioning of the SCM, article 19, provides that all draft laws relating to the organization and functioning of the judiciary require consultation with the SCM).

67 The Cambodian Constitution, 1993, art. 96.

68 Ibid., art. 97.

69 The Cambodian Constitution, 1993, art. 78.

70 See *infra*, Part IV.

b.) Budget and Operation

One other aspect of interrelated functioning of the legislative and the executive branches is their very strong relation in term of operation and budget for their institutions. For instance and as mentioned above, the National Assembly has the power to vote a motion of censure to dismiss a member of the Royal Government or even remove the whole government from office[71]. This prerogative of the lower house has been reinforced by a constitutional amendment in March 2006 which allows the motion of censure by absolute majority instead of a two third (2/3) majority, making this process easier for parliamentarians[72].

The members of the Royal Government continue in office as long as they enjoy the confidence of the majority of members in the National Assembly. Furthermore, the national budget is adopted by the Parliament[73]; the National Assembly as well as the Senate shall have an autonomous budget for their functioning[74]. However, the executive branch collects taxes and carries out the national budget, while the government enforces the law[75], which makes the legislative branch dependent on the proper implementation of the executive branch.

The Parliament oversees the implementation of the national budget and approves the administrative account[76]. However, such power is limited as amendments to the law by the National Assembly are not admissible if it tends to reduce public income or increases the burden on citizens to ensure the efficiency of state actions and avoid a default[77].

V. The Constitutional Power of the Government

The Royal Government of Cambodia has the monopoly of the regal power. Such prerogatives are the commandment and use of military and police forces as well as the administration to implement its action[78]. The administration includes state institutions, among which are powerful administrative authorities[79].

71 Ibid., art., 98. "The National Assembly can dismiss a Member of the Royal Government or remove the Royal Government from office by voting a motion of censure at the absolute majority of all its Members."

72 See: https://www.cambodiadaily.com/archives/50-plus-one-amendment-is-approved-52834/ (last accessed 1 September 2015).

73 Ibid., art., 51. "and also proposes amendment on draft budget proposed by the government".

74 The Cambodian Constitution, 1993, art. 81 and 105 new.

75 The Cambodian Constitution, 1993, art. 52. It is the responsibility of the government to collect taxes adopted by the law as well as to implement monetary management and a financial system as determined by the law (art. 57 of the Constitution).

76 The Cambodian Constitution, 1993, art. 90.

77 The Cambodian Constitution, 1993, art. 91.

78 Except those that are under the jurisdiction of the Legislature and the Judiciary (Law on Organization and Functioning of the Council of Ministers, 1994, art. 1, par. 2 and art. 2).

79 Law on Organization and Functioning of the Council of Ministers, 1994, art., 1(1).

The government classically, as a usual executive body, ensures the implementation of laws and governs state affairs[80]. Even if its jurisdiction is delimited by the competencies of the legislative and the judiciary branch, the domain for state affairs however, remains vast. Attempts to define the boundaries of this field of interventions could succeed through the understanding of the actual regulatory power of the executive branch.

Lastly, as part of the inherent cooperation between the executive and legislative branch, the government is allowed to propose draft laws for the lawmakers to adopt[81]. In fact, most of the laws adopted by the parliament are drafted by the executive branch, which contributes considerably to increase the normative power of the government.

1. The Regal Power of the Government

According to the law, there are some specific powers, which are only held by the central government as these powers shall not transfer to the sub-national administrations. They include national defense, national security, monetary policy, post and telecommunication[82], foreign policy, fiscal policy, forestry[83] and other fields prescribed in laws[84].

80 Including the delivery of public services and maintaining public security. See also: HOK Siem, SAN Sokprapey, *New Competences of Subnational Level in Delivering Public Services*, Parliamentary Institute of Cambodia, June 2014, 48 p.

81 The Cambodian Constitution, 1993, art. 91.

82 In regard to the management and regulations in the postal and telecommunication sector, the Ministry of Post and Telecommunication was created. See: Law No NS-RKT-0196/20 dated January 24, 1996 on the Establishment of the Ministry of Post and Telecommunication, art. 1. See also: Sub-decree No 39 ANK/BK dated January 28, 2014 on the Organization and Functioning of the Ministry of Post and Telecommunication, art. 4(1). See also: Sub-decree No 39 ANK/BK dated January 28, 2014 on the Organization and Functioning of the Ministry of Post and Telecommunication, art. 4(2). There are some specific roles and functions (aforementioned sub-decree, art. 5.) which the ministry has to fulfill such as:

- play a role as the signatory and representative of the government in international cooperation on the postal and telecommunication sector;
- organize, implement and inspect laws, national policies and regulations in relation to the postal and telecommunication sector;
- conduct and prepare the policy for facilitation and encourage the competition - by providing postal and telecommunication services - to use universal services;
- cooperate with other relevant ministries and institutions in order to lead and participate in the organization and implementation of the Rectangular Strategy of government on international cooperation.

83 The Forestry Administration has been created as a governmental authority, which is under the Ministry of Agriculture, Forestry and Fishery. It is responsible for the management of forestry in compliance with the forestry laws and policies: Law No RKM/0802/016 dated July 30, 2002 on Forestry, art. 6. See also: Kram No NS/RKT/0196/13 dated January 24, 1996 on the Establishment of the Ministry of Agriculture, Forestry and Fishery, Art. 1 & 2.

84 Law on the Administrative Management of Commune/Sangkat 2001, art. 45.

In order to perform and manage national defense, the government delegated specific powers to the Ministry of Defense[85]. The Ministry is responsible for supervising and managing national security[86] and the Royal Cambodian Armed Forces (RCAF), which are responsible to ensure and protect public safety, State sovereignty and territorial integrity[87]. The three branches of the RCAF are the Royal Gendarmerie, the Royal Air Force and the Royal Navy Forces[88].

The mission to maintain order and country security as well as public order and the safety for people are, as usual, delegated to the Ministry of Interior[89]. The Ministry manages, supervises and monitors the national police and all levels of provincial administrative authorities[90].

Alongside the Ministry of Economy and Finance[91], it should be noted that the National Bank of Cambodia (NBC)[92], the National Treasury[93] and the General Department of Taxation are involved in the management and the proper implementation of monetary policy.

85 Law No NS/RKT/0196/07 dated January 24, 1996 on the Establishment of the Ministry of Defense, art. 1 & 2.

86 Law on the Management of Weapons, Explosives and Ammunition dated April 26, 2005, art. 9-11.

87 Law No CS/RKM/1197/005 dated November 16, 1997 on the General Statute of Military Personnel of the Royal Cambodian Armed Forces, art. 1.

88 Law No CS/RKM/1197/005 dated November 16, 1997 on the General Statute of Military Personnel of the Royal Cambodian Armed Forces, art. 3.

89 Law No NS/RKT/0196/08 dated January 24, 1996 on the Establishment of the Ministry of Interior, art. 1.

90 Law No NS/RKT/0196/08 dated January 24, 1996 on the Establishment of the Ministry of Interior, art. 2. Furthermore, the Ministry is also responsible for registration, supplying, managing and controlling of weapons, explosives and ammunition as well as issuance of authorization to the national police, official and civilian population (Law on the Management of Weapons, Explosives and Ammunition dated April 26, 2005, art. 9-11). The national police forces are also governed by the declaration no006 of the MOI on the discipline of the national police force. The main functions of the national police include (ASEANPOL official website, Cambodian National Police, last accessed 4 September 2014 from: http://www.aseanapol.org/information/cambodia-national-police):

- to protect hostile activities that can damage internal harmony, national solidarity and peaceful existence of neighboring countries;
- to maintain political stability, social security and public order by preventing the terrorist activities or any activities that can lead to war and destruction from happening;
- to combat crime activities, drug abuse, human trafficking and other activities;
- to rescue victims and protect the people and their properties.
- the national police shall act in compliance with the laws and regulations through strict appliance of the fairness and justice principles (Ministry of Interior, Declaration No 006 dated November 26, 1995 on the Discipline of the National Police Forces, art. 1).

91 Sub-decree No 04/ANK/BK dated June 20, 2000 of the Royal Government of Cambodia on the Organization and Functioning of the Ministry of Economy and Finance, art. 2.

92 The National Bank of Cambodia's official website, *the History of NBC*, last accessed 3 September 2014 from: http://www.nbc.org.kh/english/about_the_bank/history_of_nbc.php

93 The National Treasury has been established in 1990 and begun its operation in 1991. See the General Department of National Treasury's official website, last accessed 3 September 2014 from: http://www.treasury.gov.kh/demo/index.php/en/2014-04-21-02-15-25/law-regulation/viewcategory/4-law-regulation

NBC's role and function is mainly to determine monetary policy objectives in order to comply with the government's objectives: to organize, implement and oversee monetary and exchange policies, to form and submit regular results, proposals and measures of economic monetary analysis to the government, and to play its role as the only issuer of the national currency[94].

The National Treasury, as the cashier and public accountant of the government, also plays an important role in the implementation of monetary policy. Recently, it has been upgraded to the General Department of National Treasury by the government[95]. The National Treasury has performed certain functions including the preparation of the budget execution laws, participation in the orientation on currency policy and management of funds and special accounts of the Treasury of the State[96]. Additionally, the National Treasury prepares requests on the issuance of new monetary notes[97]and submits these to the government. It is the General Department of Taxation, which also operates under the Ministry of Economy and Finance[98], that performs and improves programs for overseeing tax documents, calculating and collecting taxes as well as forming a basis of taxation for taxable persons, proposing and improving tax draft laws, regulations and policies, to implementing disciplinary measures of the law on taxable persons, and foreseeing national and international cooperation on taxation.

These three administrative bodies constitute strong support to the Ministry of Economy and Finance. As they are part of the executive branch and contribute remarkably to strengthen government's powers, their kind will be further elaborated in section IV-4. below.

94 Law No NSIRKM/O-0196/20 dated January 26, 1996 as amended in 2006 on Organization and Functioning of the National Bank of Cambodia, art. 7.

95 The General Department of National Treasury official's website, last accessed 3 September 2014 from: http://www.treasury.gov.kh/demo/index.php/en/2014-04-21-02-15-25/law-regulation/viewcategory/4-law-regulation

96 Sub-decree No 04/ANK/BK dated June 20, 2000 of the Royal Government of Cambodia on the Organization and Functioning of the Ministry of Economy and Finance, art. 10.

97 As an example the Sub-decree No ANK/BK 51 dated May 12, 2008 on the issuance of the new symbol of 20000 Riel monetary note.

98 Sub-decree No 04/ANK/BK dated June 20, 2000 of the Royal Government of Cambodia on the Organization and Functioning of the Ministry of Economy and Finance, art. 8. There are some line departments which cooperate with the General Department of Taxation such as the Department of Personnel Admin-Finance, Department of Law Litigation-Statistics, Department of Taxpayer Services and Tax Arrears, Department of Controlling, Department of Information Technology, Department of Large Taxpayers and Department of Enterprise Audit (The General Department of Taxation's official website, the Organization Structure, last accessed 28 July 2015 from: http://www.tax.gov.kh/files/structureen.png and http://www.tax.gov.kh/en/aboutus.php). In addition, the Custom and Tax Office also plays a role as a mechanism of the Ministry in order to manage and control the custom and tax authorities regarding the exports and imports (Sub-decree No 04/ANK/BK dated June 20, 2000 of the Royal Government of Cambodia on the Organization and Functioning of the Ministry of Economy and Finance, art. 9).

2. The Regulatory Power of the Government

a.) Presentation of Government Regulations

Definition of Government Regulations

Understanding what the *material* law means helps to understand how regulations created by the executive branch impact on the legal framework. Regulations set by the government are part of the *material* law – what the French call "*droit*" –, which can be defined as legal norms, which are general and impersonal, within a formal law, a government regulation or jurisprudence; this is the substantive definition. Unlike regulations, a formal law – what the French call "*loi*" – proceeds from the legislative authority and is also a legal norm. In fact, the loi is more commonly known by this understanding as such; this is the organic definition of the law (or the formal definition).

The regulatory act is then defined as an act of government authorities exercising their *normative* power, containing general and impersonal rules (*material* law*)[99] while the individual administrative act, which is also set by the executive branch, does not contain any legal norms in its material meaning and it is a unilateral administrative act – and not a contractual one – concerning a person or a group of designated persons.

Attention should be drawn to the meaning of hybrid texts that the executive branch can create. These texts are an individual act which is initially conceived for not including any *material* law, but practice from the administration used to include general and impersonal norms. The most famous example of a hybrid text in France is the circular ("Sarachôr" in Khmer): it can be regulatory or non-regulatory. In 1954 the French State Council (which is the Supreme Court reviewing administrative law), in its decision "Institution Notre-Dame du Kreisker", raised awareness to the fundamental distinction between interpretative circulars and regulatory circulars. A circular that only interprets, comments, and explains how to implement an existing regulation cannot be challenged in court. But a circular that in fact creates new rights or obligations, and thus changes the legal system, can be challenged before court, because it contains material law.

Hierarchy of Norms (in Cambodia – and most Countries)

The failed pyramidal system

Hans Kelsen, a prominent Austrian philosopher, promoted the "normativism" theory, which affirms that the legal framework is organized as a pyramid with a hierarchy of norms. This school impacted severely on the prior, common understanding of the 19th century. The French experimentation on what they call "rationalized parliamentarianism" challenged

99 Cambodian government regulations are royal decrees (Preah Reach Kret), sub-decrees (Anukret), ministerial orders (Prakhas), orders by provincial governors (Deyka), orders by heads of municipalities and districts, regulatory circulars (Sarachôr) and decisions (Sechdey Samrach).

the pyramidal system, and highlighted a distributive system organized by the Constitution as the supreme source of *material* law. The founders of the French Constitution of 1958 carried out a rationalization of parliamentarianism to enable the government to effectively exercise its powers and end the reign of several political parties, which did not allow the government to work properly due to their high numbers – it was regularly crippled.

The idea that people are sovereign and State institutions exist only to serve them, is part of the theory of popular sovereignty defended by Jean-Jacques Rousseau and Robespierre against absolute monarchy. This theory has led to the idea that the legislative branch is superior to the executive one as the former represents the direct result of the will of the people, while the latter derives indirectly from them. The government's responsibility before the National Assembly was thus justified. According to this theory, the law passed by the parliament takes on a central role in the legal system and the regulations made by the government are considered to be subjects to this law.

French history has shown that the reign of the legislative power (during the Third and Fourth Republic) could result in inaction of State institutions. This is precisely what the Fifth Republic has attempted to combat by streamlining the effects of "absolute parliamentarianism". Article 3 of the French Constitution should be considered in the light of these circumstances when it states that "the national sovereignty belongs to the people who exercise it through their representatives"[100]. In fact, France adopted a mixed concept between popular sovereignty and national sovereignty, which was developed by Sieyès and is defined by the principle that the supreme organs of the State, established by the Constitution, shall exercise their powers as they represent the nation.

Remarkably, the Cambodian Constitution adopts the same mixed sovereignty. According to article 51, "all powers shall belong to the *citizens* [however the] citizens shall exercise their powers *through* the National Assembly, the Senate, the Royal Government and the Jurisdictions"[101]. Thus, the Cambodian Constitution clearly expressed its choice to detach the fundamental legal framework from the consequences of the implementation of the popular sovereignty concept.

Section IV-2b will discuss the question whether the Cambodian Constitution shares power more equally between the legislative and executive branch of government and whether it contributes to the understanding of real normative power of the Cambodian government.

Example of the French distribution of normative power

The distribution of normative power is addressed by the French Constitution in article 34 and 37 which delineate a clear border of the normative competencies for the legislative and executive branch. Article 34 provides an exhaustive list of areas such as civil rights, nationality, determination of crimes, offences and penalties, electoral issues, taxes, es-

100 Unofficial translation; emphasis added
101 Unofficial translation; emphasis added

tablishment of public institutions, and basic principles of the organization of national defense, or which the parliament determines the rules and the government is responsible for implementing them.

However, according to article 37, it is the government, which sets the rules for all other areas not mentioned in the list of article 34 and the parliament has no competencies in these fields[102]. This particular power is also known as *autonomous* normative power of the executive branch (in French: "pouvoir réglementaire autonome"). The regulations enacted under this autonomous normative power may be amended by other regulations from the executive branch only.

Section IV-2b will consider this question of distribution of normative power in the Cambodian Constitution.

The hierarchy among various regulations

The distribution of power between ministries will determine how to resolve conflicts of regulations[103]. If a ministry issues regulations containing a regulatory norm within the jurisdiction of another ministry that conflicts with a norm taken by the latter, it is the regulatory norm set by the competent ministry that prevails.

The organization of public entities also determines the supervisory authority and so allows to resolve conflict of regulations when a regulation made by a subordinate authority - that is under the supervision of a higher authority - is in conflict with regulations set by its supervisory authority. Thus the norm adopted by the supervisory authority prevails.

However, this conflict resolution rule does not apply in cases of decentralized authorities when they set regulations that are contrary to the deconcentrated supervisory authority, as they benefit from autonomous powers characterized by decentralization.

102 The French constitutional court, in its decision "Avenir de l'école" (decision n° 2005-512 DC dated 21 April, 2005), is engaged in the control of the legal nature of the provisions contained in the text of a law, according to the definition determined by Art. 34 of the Constitution,. In this case, the constitutional court proceeds with the requalification of a number of provisions of the law into provisions with regulatory nature. See: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2005/2005-512-dc/decision-n-2005-512-dc-du-21-avril-2005.965.html. For a complete synthesis of the jurisdictional treatment of the "quality of law", see the briefing note prepared by the Legal Service of the Senate: Sénat, note de synthèse du service juridique n°3, 2007-2008, October 1, 2007, available at the Senate's website: www.senat.fr/ej/ej03/ej03_mono.html # fnref1.

103 See aforementioned Law on Organization and Functioning of the Council of Ministers dated July 20, 1994.

b.) The Areas of the Royal Government to Set Rules through Autonomous Regulations

The Cambodian Constitution confers negative competencies to the executive branch to challenge the parliament in its law-making power if independence, sovereignty, territorial integrity, and national unity are undermined[104]. Nevertheless, the use of this constitutional prerogative is not easy politically speaking, as strong criticism from the civil society and the international community may result[105].

Similarly to the French Constitution, article 90 of the Cambodian Constitution provides a list of areas for which the norms need to be adopted by the parliament. However, it is not exhaustive as the Constitution contains a number of other, more specific articles, which determine other areas for the legislative branch to enact in[106].

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104 Art. 52 and 92 of the Constitution.

105 The border issues are a continuous sensitive topic in political debates since the Sangkum Reast Niyum regime and the definition of public order in Cambodia is not clearly defined and limited. The last national election shows that the government used armed forces claiming that public order was breached and national unity was threatened. This led to widespread criticism from the civil society and international community.

106 These areas are as follows:
- the organization and functioning of the Crown Council (Art. 13 of the Constitution);
- the exercise of rights and liberties (Art. 31);
- the acquisition of Khmer nationality (Art. 33);
- provisions restricting the right to vote and the right to stand as candidates for the elections (Art. 34);
- the right to enjoy social security and other social benefits (Art. 36);
- the organization and functioning of trade unions (ibid.);
- the right to strike and to organize peaceful demonstrations (Art. 37);
- the law forbids any physical abuse against any individual (Art. 38);
- the law protects the life, honor and dignity of citizens (ibid.);
- the condition for prosecution, arrest, police custody or detention of any person (ibid.);
- persons of acts of coercion, physical punishment or any other treatment aggravating the penalty of detainees or prisoners shall be punished according to the law (ibid.);
- search of residences, properties and body search (Art. 40);
- the regime of the media (Art. 41);
- the right to create associations and political parties (Art. 42);
- legal private ownership shall be protected by law (Art. 44);
- conditions of expropriation (ibid.);
- conditions of marriage (Art. 45);
- national defense obligations (Art. 49);
- the organization and functioning of the market economy system (Art. 56);
- only the law authorizes the collection of tax (Art. 57);
- the national budget (ibid.);
- the monetary management and financial system (ibid.);
- the administration, utilization and assignment of State properties (Art. 58);
- the conditions for selling products to the State or the appropriation, even temporarily, of properties by the State (Art. 60);
- the organization in charge of preparing the elections, their modalities and functioning (Art. 76);
- the modalities of the organization and functioning of the appointment and the election of senators as well as the determination of voters, electoral colleges and electoral constituencies (Art. 101);
- the important issues of the country, the Congress of the National Assembly and the Senate has to resolve, as well as the organization and functioning of this Congress (Art. 117);

Does this scattered list of areas, in where a law adopted by the parliament is required by the Constitution, mean that the areas, which are not mentioned in the constitutional text, can be addressed by an autonomous enactment from the executive branch or are there common competencies for both the parliament and the government together? In the latter case, is there a hierarchy between laws and regulations? The Constitution does not provide any clarification on these points and the Constitutional Council has not yet given any precisions.

Another practical question is whether the government can enact a regulatory text, in case there has no law been adopted yet in a legislative branch authorized area. By way of comparison, the French Supreme Court has decided that, in case the Constitution requires a law adopted by parliament and there has no law been adopted yet, the government will address the issue by enacting proper regulatory texts[107].

Further decisions by the Constitutional Council or amendments to the Constitution can determine whether the Royal Government has a positive competence to enact autonomous regulations. In case constitutional clarification will deny such autonomous regulatory power to the executive branch, it would be necessary to clarify the hierarchy of norms between laws and regulations.

c.) The Limitations of the Autonomous Regulation Making Power

It should be noted that even if an autonomous regulatory power will be clearly recognized in the future, the parliament will continue to oversee government activities, as it is for both houses one of their core functions and as the Royal Government is collectively responsible before the National Assembly for its general policy[108]. Thus, this autonomous regulatory power needs to be implemented as an instrument for the government to carry out its public policy objectives.

Another limitation can be the jurisdiction of the Constitutional Council over the regulatory texts set by the government in lieu of the parliament for the reserved domain of the legislative branch, as the Constitutional Council has the power to interpret the law which shall be adopted by the parliament according to the Constitution[109].

– the organization and functioning of the Council of Ministers (according to article 118 of the Constitution, the Council of Ministers is the Royal Government of the Kingdom of Cambodia) (Art. 127);
– the statutes of judges and public prosecutors and the judicial organization (Art. 135);
– the organization and functioning of the National Congress (Art. 149).

107 Paragraph 7 of the Preamble to the French Constitution of 27 October 1946 states that "the right to strike is exercised under the terms of the law which regulates it ("Le droit de grève s'exerce dans le cadre des lois qui le réglementent") but no law has been adopted yet. The Council of State, by a decision dated July 7, 1950 and called "Dehaene", has then declared that in the absence of an applicable law, it is for the administration to regulate the right to strike.

108 Art. 121 of the Constitution.

109 Art. 136 of the Constitution.

d.) Preponderance of Regulations

It should also be pointed out that it is the usual to have an ascendency of regulations set by the government over the laws adopted by parliament[110]. According to the statistics from the official Cambodian legal and regulatory database of the Ministry of Justice, laws represent only 4.23% of the total number of the legal texts adopted by parliament or set by government, compared to 65.82% for sub-decrees and ministerial decisions[111].

These figures indicate that most legal texts in Cambodia are regulatory texts set by the executive branch. Further studies are necessary to specify whether and how much the regulatory texts implement the laws adopted by parliament related to the authorized areas by the Constitution and whether they intervene with autonomous regulations.

3. The Power to Draft Laws

According to article 91 of the Constitution, the Prime Minister, the senators and the National Assembly members can initiate laws. It allows the government to propose draft laws for the parliament to adopt[112].

Although there are no data available, which specify the proportion of the draft law prepared by the government, it is remarkable that the government's human resources and administrations are much more than those of the parliament. As already mentioned above,

110 For example, in France, 2006, 9,720 laws had been adopted by parliament and 129,000 decrees had been set by the government. In other words, the number of laws represents only 7.5% of the total number of decrees in 2006. See: Council of State, Public Report 2006, "Legal certainty and complexity of the law", Studies and Reports No. 57, French Documentation, p. 273 (official reference in French: Conseil d'Etat, Rapport public 2006, "Sécurité juridique et complexité du droit", Etudes et documents no 57, Documentation française, p. 273).

111 "Legicambodia" project implemented by the Henri Capitant Association of Friends of the civil law tradition in Cambodia, Royal University of Law and Economics and the Ministry of Justice.

112 The drafting process for laws and legal instruments initiated by the government in Cambodia is set out in the Guidelines of the Council of Ministers on procedures and rules of the composition of draft laws and other legal instruments (adopted by the Council of Ministers of Cambodia during the plenary session held on May 10, 2013). The drafting role is given to the legislation unit within each ministry. These units receive technical information and expertise from relevant units within the ministry to help them draft the legislation.
There are two phases in the drafting process. In the first phase, the legislation unit may consult with civil society organizations and the private sector, including concerned public institutions at the provincial level, depending on the necessity, nature and scope of involvement of the law or the legal instrument. In the second phase further consultations on the draft may take place with concerned institutions and stakeholders. After reviewing and modifying the draft as a result of the consultations, a draft of the legislation, minutes of the consultation and a statement/justification (in Khmer: សេចក្តីថ្លែងហេតុ) or brief explanation/statement (in Khmer: កំណត់មូលហេតុសង្ខេប) regarding the changes are produced. This includes all arguments, opinions, suggestions, etc. Finally, all documents, including a report, are sent to the Council of Ministers with the signature of the head of the concerned institution for scrutiny. These documents are:
– a.) A draft of the legislation and
– b.) A statement/justification (for the draft that needs to be passed by legislative power) or a brief explanation/statement (for the draft that needs to be sent to the King for advice or to the Head of State for approval).

the current government consists of 232 members (Prime Minister, ministers and secretaries of state) with 28 ministries, 9 deputy ministers, 15 senior ministers, 31 ministers, and 178 secretaries of state. While the National Assembly and the Senate have only 10 commissions each. This necessarily has an impact on the range of capacity for drafting laws.

4. The Normative Power of the Executive Branch Increased Through Autonomous Regulatory Bodies

In addition to the inherent powers of the government given by the Constitution, the legislative branch contributes to expanding it by creating administrative authorities such as the Authority for the Protection and Management of Angkor and the Region of Siem Reap (APSARA), Phnom Penh Water Supply Authority (PPSWA), the Security and Exchange Commission of Cambodia (CSEC), the Anti-Corruption Unit (ACU), the Electricity Authority of Cambodia (EAC), and the Cambodian National Petroleum Authority (CNPA)[113].

Some are just separate structures within an administration[114], and some have an industrial and commercial mission[115]. Should some of these regulatory authorities be considered as independent or under the government?

a.) Brief Comparative Studies

What are these authorities?

In developed countries, they are part of the executive branch but not under the hierarchical authority of the government: they are not subject to instructions from the government even though they are one major component. The independence is usually the result of a fixed term and irrevocable mandate for the head of the regulatory authorities and the members of the board. These authorities are a part of the executive branch but perform legislative functions (in the material sense), sometimes with oversight from the legislative branch; and they make decisions that would normally be judicial decisions. The independent regulatory authorities' actions are generally open to judicial review as if they were part of the executive branch. They exercise authority mostly in the area of administrative law but can also intervene in industrial and commercial sectors.

If they have regulatory power, they have some prerogatives such as prescribing general and impersonal norms, adjudicating prerogatives and/or licensing and imposing sanctions.

113 Other such authorities are: the National Bank of Cambodia, the National Election Committee (NEC), Cambodia National Tourism Authority, National AIDS Authority (NAA), National Information Communications Technology Development Authority (NiDA), National Audit Authority (NAA), etc.

114 Such as CNPA.

115 Such as APSARA or Electricté du Cambodge.

They are various and different. They can have multiple roles:

- monitoring markets through central banks with monetary policies and currency markets or monitoring fair competition, financial markets and bank and insurance industries;
- regulating deregulated industries such as network industries, telecommunications, railways, power and water;
- ensuring public safety such as, food safety and security, consumer protection, nuclear safety, public health, pharmaceutical industry, pollution, national disasters;
- protecting democratic rights such as, elections, human rights, protection of privacy, media, broadcasting, discrimination, advertising, access to administrative documents, access to classified documents, tax and penalties.

Who can create these authorities?

The establishment of an independent regulatory body at the American federal level and in European countries results from the legislative. But in most cases, lawmakers do so upon request of governments.

Why do government and lawmakers create independent regulatory bodies?

The main reasons are as follows:

- independent regulatory authorities are supposed to keep political interference and elected politicians at bay. They maintain continuity of action in spite of political uncertainty;
- they avoid conflict of interest when the state is the owner or one of the shareholders of a deregulated activity;
- in some countries, they allow to circumvent the distrust towards state and justice;
- they are better equipped to deal with the complexity of certain regulatory and supervisory tasks that require expertise not available as civil service.

All of that explains why there are so many independent regulatory bodies in the field of democratic rights, safety regulations, etc. in order to escape politics, government and the traditional jurisdictional system[116].

116 Currently, 42 independent regulatory bodies exist in France, 500 in the UK and 200 in the US. The last wave of independent regulatory bodies creation is the outcome of deregulation policies to ensure credibility of regulations in a deregulated context (deregulation does not mean no regulation or less regulation; deregulation is the regulatory framework that is deemed necessary in liberal democratic countries to support privatization, liberalization, or opening up new markets to competition). Independent regulatory authorities are one of the tools used to install "regulatory capitalism" with regulated markets and without State intervention (in democratic countries, independent regulatory bodies are created because people believe that policies are too important to be left to politics; this belief is pervasive especially within E.U. institutions; the European Commission is an independent regulatory body and the result of a technocratic process insulated by pressures from domestic politicians). These authorities aim to increase the credibility of regulations.

In many cases, governments accept the transfer of powers to independent regulatory bodies because they do not have much choice. European Union (EU) countries have to comply with EU regulations[117]. In developing countries, governments have to comply with requirements of the World Bank, the International Monetary Fund (IMF) or international donors. In Thailand, the IMF's privatization strategy, that is specified in Thailand's letter of intent (1998), provides for the development of an "*effective regulatory framework for the public utilities to be applicable to the private sector operators, especially in water, power, and telecommunications, to promote competition and regulate monopolies*", and "*the establishment of regulatory capacity for water and transport sectors*".

b.) The Autonomous Regulatory Authorities in Cambodia

As mentioned above, there are many administrative authorities in Cambodia. However, according to experts, based on the three criteria below, they are not all independent:

- fixed term and irrevocable mandate;
- judicial review (or jurisdictional control);
- established practice of making independent decisions irrespective of holder of executive power's interest.

While the question of independence of these regulatory authorities remains, many of them seem to be autonomous as they have their own budget. The establishment of some major autonomous regulatory bodies in Cambodia is likely the result of the willingness to distribute power and a tentative adaptation of international practices[118].

117 Gambling/betting, used to be a State or local government monopoly in many E.U. countries. France resisted the opening-up to competition within the gambling industry for five years. Eventually, France complied and has now "une Autorité de régulation des jeux en ligne" (an independent online gambling regulatory authority), and the E.U. closed the infringement procedure against France for not opening its gambling market. The same applies for the opening-up of the railway sector to the competition: France has now: "une Autorité de regulation des activités ferroviaires" (the railways' independent regulatory authority).

118 For instance: The National Audit Authority (NAA) and the Anti-Corruption Unit (ACU).

VI. Conclusion

After very deep-rooted conflicts endured by Cambodian people at the end of the last century, the mission for the government to promote and preserve national reconciliation upon the ancestral foundation of Khmer traditions and customs shall be fulfilled while ensuring public order. The principle of legality is defended and used by the government to implement its policies and reforms required by the modernization process of the country, as well as to resolve political threats to public order. It should then be noted that the mission of the government to defend the legality does not necessary mean that it fulfills the objective of achieving the rule of law, which requires an effective judicial review of its activities by courts.

The constitutional power of the government is designed to be strong. It can challenge the legislative branch of power[119] and has the potential to be a strong regulatory power. In addition, this regulatory power can be strengthened with plenty of regulatory authorities.

Lastly, although the process of forming a government reflects the logic of a parliamentary system and makes the government responsible before the lower house, the mechanisms provided by the Constitution for establishing the government seem in need for clarification in cases where the National Assembly challenges it[120].

119 As mentioned in section III-2a, the Minister of Justice is a key member of the SCM which appoints a third of the members of the Constitutional Council (article 137), and this supreme council has the power to pronounce the nullity of any adoption by the National Assembly contrary to the administrative management of the nation (article 92 of the Constitution).

120 The situation of a motion of censure, mentioned in part II, should not only be considered as case study since the Cambodian National Assembly overthrew Prince Sihanouk in 1970; The Constitution on May 6th, 1947 was not able to address this situation as the monarchical form of the State was not allowed to be revised by the Constitution (article 115).

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CONSTITUTIONAL COUNCIL: ELECTION, STRUCTURE, PROCEDURE, AND COMPETENCIES

TAING Ratana

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CONSTITUTIONAL COUNCIL: ELECTION, STRUCTURE, PROCEDURE, AND COMPETENCIES

TAING Ratana *

ABSTRACT

The main objective of this chapter is to provide a basic understanding about the Constitutional Council of the Kingdom of Cambodia. Besides providing insights into the legal hierarchy, duties, procedures and achievements of the Constitutional Council, this chapter will also provide examples concerning the procedures and competencies of the Constitutional Council in order to explain the operation of this institution in more detail.

I. Introduction

The Kingdom of Cambodia has had six Constitutions in its history. The first Constitution came into effect in 1947 and established a constitutional monarchy in Cambodia. The current Constitution was established in 1993 under the political conflict resolution mechanism of the Paris Peace Agreement. The Constitutional Council was created by the current Constitution.

Prior to the creation of the Constitutional Council, there were no clear examination mechanisms to determine the constitutionality of legislation or government action in the history of the Cambodian legal system. Article 119 of the 1947 Constitution stated that the

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authority to interpret constitutional texts in the last resort belonged to the National Assembly.[1] However, the Article was concerned with constitutional interpretation, but did not provide a method to examine the constitutionality of laws.

The Constitution of the Khmer Republic of 1972 established an examination mechanism for constitutionality through the process of the Constitutional Court.[2] The last paragraph of Article 95 of this Constitution provided that a law declared unconstitutional by the court may not be promulgated or enforced. However, the court never functioned during the Khmer Republic prior to Cambodia's government being seized by the Khmer Rouge on 17th of April 1975. A communist-based political system replaced the Khmer Republic through the creation of Democratic Kampuchea by the Khmer Rouge. The Constitution of Democratic Kampuchea was imposed in 1976. However, there were not any provisions regarding a process of constitutional review in this Constitution and the human rights of the Cambodian people were not protected under this Constitution. Instead, they faced the suffering of genocide.

After the collapse of the Democratic Kampuchea regime in 1979, the People's Republic of Cambodia was created with a new Constitution that granted the authority to interpret the law to the State Council. In the course of the political evolution in Cambodia during that time, the People's Republic of Cambodia was transformed into the State of Cambodia. Hence, another new Constitution was issued in 1989. The Permanent Committee of the National Assembly of the State of Cambodia was invested with the power to interpret the laws. However, mechanisms for constitutional interpretation and examining the constitutionality of laws were not contained in the 1989 Constitution.

The current Constitution of Cambodia is one of the best results of the long peace negotiations that ended roughly two decades of conflict in Cambodia. Therefore, it is considered as a "Legal Expression of the Common Will" of the Cambodian people. The Constitution restored the constitutional monarchy and democracy in Cambodia. Interestingly, it established, for the first time in Cambodian history, a Constitutional Council, which has the competency to rule on constitutional issues and other related electoral issues. This Council has become a crucial organ in today's Cambodian legal and political system.

1 Raoul M. Jennar, the Cambodian Constitutions (1953-1993), White Lotus.

2 The Constitutional Court of the Khmer Republic was created under the provisions of Articles 93-96 of Chapter VIII of the 1972 Constitution. The court was to be composed of six members whose term of office was to be six years. One half of the court was to be replaced every three years. The members of the court were to be chosen from among distinguished Khmer individuals known for their wide knowledge of judicial, economic or administrative matters or for their experience in the affairs of state.

II. The Constitutional Council at a Glance

The Constitutional Council is a supreme, neutral, and independent institution created by the 1993 Cambodian Constitution. However, the Council had its first meeting on 15th of June 1998 in the Red Building[3] of Chamcar Mon State Palace. Therefore, the Constitutional Council considers the 15th of June 1998 as its date of creation. A representation of Brahma, a major deity in Hinduism, in *Bayon* style, was used as the coat of arms of the Constitutional Council. It is not a coincidence that this deity was selected as the Council's symbol. Brahma is the Hindu deity of creation and symbolizes wisdom and power. Hinduism, of course, is intimately involved with Cambodia's long history of art and culture, including its legal concepts.

1. Composition

The Constitutional Council consists of one President[4] and eight members. The President is elected by the nine members of the Council by absolute majority vote. The President of the Council has the equal rank and prerogatives as the President of the National Assembly. Members of the Council have the equal rank and prerogatives to those of the Vice-President of the National Assembly. The normal term of the members of the Council is nine years. Every three years, three members of the Council are replaced. In order to ensure the staggered terms where one-third of members are replaced every three years,

3 It is now served as the Hall of the Senate.

4 The President of the Constitutional Council is elected every three years after the replacement of one-third of the members. The President is appointed by Royal Decree and is eligible for re-appointment.

during the first mandate in 1998, one-third of the members were appointed and elected for terms of three, six and nine years respectively. This exceptional method was used in order to maintain the continuity of the Council. Three members of the Council are appointed by His Majesty the King, while the National Assembly and the Supreme Council of Magistracy elect three members each. Before taking office, all *appointed* and elected members of the Council must take an oath.[5]

The members elected by the National Assembly and by the Supreme Council of Magistracy are not always chosen among the members of the National Assembly or the ranks of judges. Every three years, these two institutions make an announcement to the public regarding the election of a new member of the Constitutional Council. Any qualified candidate may apply for this position and the National Assembly and the Supreme Council of Magistracy process the election of that member.

2. Qualification of Members

According to provisions in the Constitution and relevant laws, the members of the Constitutional Council are to be selected from among "the high personalities", must be of Khmer nationality by birth, at least 45 years old, a graduate of a higher education program in the field of law, administration, diplomacy, or economics as well as have at least 15 years of professional experience in at least one of those fields.[6] There is a small issue of concern regarding the qualifications for members of the Constitutional Council. There is no definition for the term "high personalities". It is not known what "high personality" means in particular, but given the other qualifications, it seems that "respected and knowledgeable" persons are in view here.

3. Incompatibility

During their term on the Constitutional Council, the members of the Constitutional Council may not simultaneously hold other governmental positions or non-governmental positions that may result in a conflict of interest, such as: senator, member of the National Assembly, member of the Royal Government, President or Vice-President of a political party, President or Vice-President of a trade union or a judge. The members of the Constitutional Council must also refrain from other work or profession during their mandates, with the exception of academic roles, such as professor or lecturer or as a guest speaker invited by academic institutions.

5 Normally, the oath will be taken in the *Mohaprasat Deveavinichbhay*, the Throne Hall of the Royal Palace.

6 Article 3 (new), Law on the Organization and Functioning of the Constitutional Council.

4. Immunity, Revocation, and Retirement Pension

Immunity: The members of the Constitutional Council may not be held responsible for civil or penal sanctions during the fulfillment of their functions during their mandate. They enjoy immunity during their whole term as Council member.

Resignation and Revocation: Members of the Constitutional Council may, at any time, resign from their position by submitting a written letter of resignation to the President of the Council. Members of the Council may be dismissed from their positions for the following reasons: (i) incompatibility with the position; (ii) failure to take the oath before assuming office; (iii) three absences without permission; (iv) becoming mentally or physically incapable; or (v) being prosecuted for a misdemeanor or felony. The vote for a resignation or dismissal of a member of the Council must be a two-thirds vote. In case of a resignation or dismissal of a member of the Council, a new member will be appointed or elected for replacement within 30 days.

Retirement Pension: Retired members of the Constitutional Council are entitled to a monthly retirement pension consistent with the conditions and calculation method of the retirement pension provided to retired members of the National Assembly.

5. Types of Council Decisions

There are two types of decisions issued by the Constitutional Council:
(i) **Notification** *(Sech Kdey Choun Damneung)*: This is essentially a refusal to hear a case or a pronouncement on a proposed constitutional amendment. It is issued in response to any case that the Council considers as not within its jurisdiction. This type of decision is usually issued during election periods when the Council decides not to hold a public hearing in a particular case.
(ii) **Judgment** *(Sech Kdey Samrach)*: This is the decision of the Council issued for cases within the Council's jurisdiction. In such cases the Council will conduct a plenary session to consider the interpretation of constitutional provisions and examine the constitutionality of a particular law or a public hearing for electoral litigation matters.

The process of issuing a judgment is obviously a longer and more complicated process than that used in issuing a notification. The Council must be very careful in processing both types of decisions. The Council normally bases either type of decision on relevant laws because the refusal to hear and issue a judgment in particular cases opens the Council to criticism by the parties to the cases. The one who petitions to the Council is obviously seeking a judgment rather than a notification because a judgment from the Council has legal value and is legally enforceable. Indeed, judgments of the Council are constitutional jurisprudence, which may provide guidance for future cases.

III. The Legal Hierarchy of the Constitutional Council

The legal hierarchy of the Constitutional Council is quite often discussed among students and researchers. Most of them assume that the Constitutional Council should be a part of the judicial branch and be placed over the Supreme Court, or be another part of the legislative branch. In fact, the Council is established by Chapter XII (new) and the judiciary is established by Chapter XI (new) of the Constitution. None of the provisions in either chapter address the hierarchical position of the Constitutional Council within the judiciary. Therefore, we can conclude that the Council is not a part of the judicial power. The Constitutional Council is concerned with constitutional matters, but not with cases concerning administrative, civil, or criminal issues. Therefore, the Constitutional Council is the sole government body that is not included within the legislative, executive or judicial power, as described in the Constitution. However, the Council plays a very important role as a regulating body by maintaining the regular functions of the three branches of government.

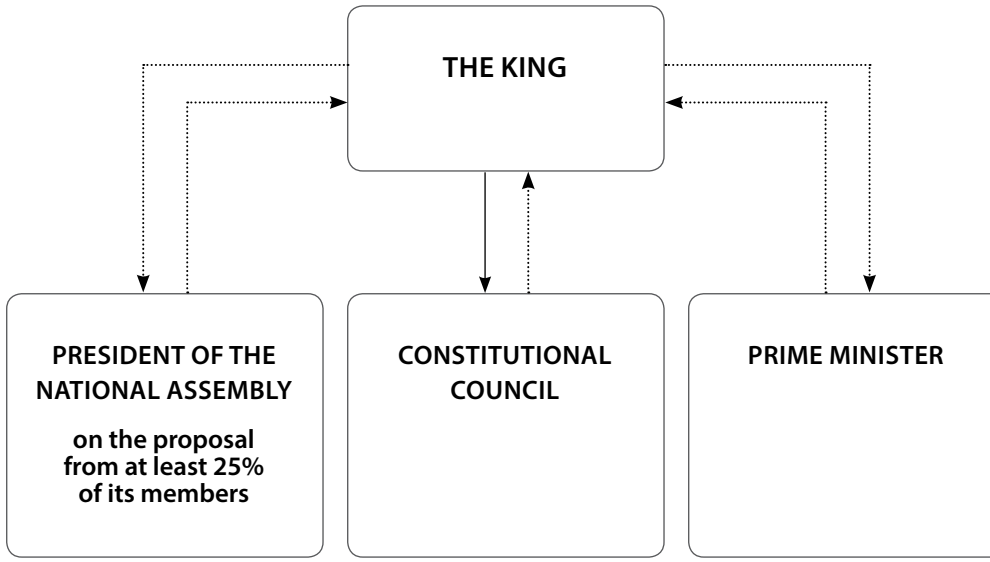
IV. The Duties of the Constitutional Council

According to Article 136 (new) of the Constitution and Chapter 2 of the Law on the Organization and Functioning of the Constitutional Council, the Council has three main duties:

1. Duty to Notify His Majesty the King on Proposals to Amend the Constitution

Article 143 new (former Article 124) of the Constitution provides that the King should consult the Constitutional Council on all proposals to amend the Constitution. The initiative to revise or to amend the Constitution is the prerogative of the King, the Prime Minister and the President of the National Assembly upon the proposal of an amendment by one-fourth of the members of the National Assembly.[7] According to this provision, only the King is able to consult directly and officially with the Constitutional Council on any proposals to revise and amend the Constitution. The Prime Minister and the President of the National Assembly can do so only by means of a request to the King. The Council is required to notify the King regarding whether or not the revision/amendment of the Constitution may be made and, if so, the King will then inform the Prime Minister or the President of the National Assembly.

7 Article 151 new (former Article 132) of the Constitution.



(Source: Constitutional Council Booklet)

For instance, on 8th of August 2014 the King wrote a letter seeking consultation with the Constitutional Council regarding the proposal to revise and amend Article 76 and other Articles of Chapter 15 (new) and Chapter 16 (new) of the Constitution. This proposal was a result of and mirrored the political agreement[8] between the Cambodian People's Party (CPP) and the Cambodian National Recue Party (CNRP) on 22nd July 2014, which ended a nearly one-year political deadlock. The main points of this agreement were: to establish The National Election Committee (NEC) as a constitutional body (Article 2), to reschedule the date for the next election (Article 3), to create a 10th Commission (committee) in the National Assembly (Article 4), to reconsider the composition of a leading committee in the Senate (Article 5) and to reform and to strengthen other independent institutions of the state.

The King's letter was sent after a request from the President of the National Assembly, *Samdach* Heng Samrin, through a letter to the King on 7th of August 2014. *Samdach* Heng Samrin wrote in his letter:

> *"I, on behalf of the President of the National Assembly, received a proposed amendment of the Constitution from 85 Members of the National Assembly aiming at amending Article 76 and other Articles of Chapter 15 (new) to Chapter 16 (new) of the Constitution. This proposed amendment of the Constitution was made in conformity with Article 151 new (former Article 132) of the Constitution. And according to Article 143 new (former*

8 This agreement was made in the main hall of Chamcar Mon State Palace, the Senate.

Article 124) of the Constitution, I would like to forward this proposed amendment of the Constitution from those singed-representatives to His Majesty for highly consulting the Constitutional Council [...].”

After considering this request for an amendment, the Constitutional Council found in Notification No. 058/04/2014 CC that:

“ […] the proposed amendment of Article 76 and other Articles of Chapter 15 (new) to Chapter 16 (new) of the Constitution of the Kingdom of Cambodia was made in consistency with the context of social development, the principle of the liberal multi-party democracy, rule of law, facilitating the election arrangement organ in fulfilling its functions with independence and neutrality, guaranteeing the election to be free and just; hence the creation of a new chapter on the competent organ for arranging the election is crucial.”

According to Article 152 new (former Article 133), which states, “[t]*he revision or the amendment of the Constitution is prohibited when the nation is in a state of emergency, as provided in the Article 86” and* Article 153 new (former Article 134), which states, “*[t]he revision or the amendment of the Constitution cannot be done, if affecting the liberal multi-party democracy system and the constitutional monarchy regime*” the Constitutional Council made a conclusion notifying His Majesty the King:

“[…] the proposed amendment of Article 76 and other Articles of Chapter 15 (new) to Chapter 16 (new) of the Constitution of the Kingdom of Cambodia was found not to be effecting the liberal multi-party democracy system and the constitutional monarchy regime […]. Thus, the Constitutional Council found that this proposed amendment […] can be done […].”

Notice that Article 152 new (former Article 133) and Article 153 new (former Article 134) are the main basic principles that the Council uses to rule on proposals to revise or amend the Constitution. We can conclude from this that there are three circumstances, in which revision or amendment of the Constitution is absolutely prohibited:

(i) Cambodia is declared to be in a state of emergency
(ii) Effects on the liberal multi-party democracy system or
(iii) Effects on the regime of constitutional monarchy

Since the 1993 Cambodian Constitution entered into force, the Constitution has been amended seven times and one Additional Constitutional Law has been passed in order to regulate the political deadlocks and facilitate the administration of the country. The first amendment to the Constitution was made in 1994, while the last one took place in 2014.

Special Case Study Related to Preliminary Session Opening Ceremony of the Third Legislature of the National Assembly in 2003 *(Case relating to the question of the august presence of His Majesty the King in the preliminary session of the National Assembly)*

This case falls within the duty of the Constitutional Council to notify the King regarding proposals to amend the Constitution, as provided in Article 143 new (former Article 124) of the Constitution. In addition to proposals to revise or amend the Constitution, the King consults, in special cases, the Constitutional Council regarding questions about his royal person and how it relates to the Constitution. A notable case was a question related to the presence of His Majesty the King in the opening ceremony to the preliminary session of the third legislature of the National Assembly.

This case was not concerned with a proposal to amend the Constitution or a proposal to interpret the Constitution made by the King, but it seemed to be a constitutional question related to Article 82 (new) of the Constitution. The first paragraph of the Article states:

> *"The preliminary session of the National Assembly shall open sixty days at the latest after the election, upon the convening from the King."*

a.) Background

After the NEC announced the official result of the national election of the third legislature of the National Assembly (2003-2008), FUNCINPEC and the Sam Rainsy Party (SRP) refused to acknowledge the results of the election and pleaded for new elections.

H.E. Sam Rainsy, President of the SRP, wrote a letter on 15th of September 2003 to His Majesty, King Norodom Sihanouk. His letter criticized the NEC and the Constitutional Council regarding their decisions in the electoral litigation ruling during the election and informed His Majesty the King that his party would not attend the preliminary session of the National Assembly that would be held in late September 2003.

On the same day, His Majesty the King sent a royal letter to H.E. Sam Rainsy stating that he will not preside over the preliminary session of the National Assembly if the SRP decides not to attend the session. On 16th September 2003, a day later, His Majesty the King sent a royal letter declaring publicly to the people of Cambodia that:

> *"[…] I would like to clearly declare to my nation that in case there will be one or two political parties among the three winning parties, which sovereign citizen voted for in the election on July 27, 2003, which will not come to the National Assembly; hence I, King Norodom Sihanouk, will also not go to the National Assembly […]."*
>
> *(Royal Letter sent on 16th September 2003)*

After this royal declaration, *Samdach* Hun Sen, on 17th of September 2003 at six o'clock in the evening, went to the Royal Palace and humbly informed His Majesty the King that the Royal Cambodian Armed Forces (RCAF), national police, government officials at all levels and most of the Cambodian people humbly request that His Majesty the King preside over the opening ceremony for the preliminary session of the third legislature of the National Assembly on 27th of September 2003. This event was seen as putting political pressure on His Majesty the King.

b.) Conflict of Interpretation Regarding Article 82 (New)

By that time, there were two different opinions regarding the interpretation of the provisions of paragraph 1 of Article 82 (new) of the Constitution as described above, which led to a political deadlock. FUNCINPEC and SRP interpreted the provision "*It shall be the rights (optional) of His Majesty the King in presiding over the preliminary session of the National Assembly*" to mean that the King's presence was not mandatory at the preliminary session of the National Assembly. However, the CPP claimed that the provisions should be interpreted as mandating the King's presence: "*It shall be the obligation (compulsory) of His Majesty the King in presiding over this event*". The conflict of interpretations regarding the terms "should" or "shall" for His Majesty the King's presence at the opening ceremony presented an obstacle for the new National Assembly session after the election.

Avoiding criticism from the parties in conflict, His Majesty the King sent a royal letter on 17th September 2003 to the Constitutional Council informing them of the circumstances and requesting their assistance in this matter:

> *"This afternoon at 18:00 o'clock, Samdach Hun Sen, head of the royal government of Cambodia came to see me. During this occasion, Samdach, head of the royal government told me that the Royal Cambodian Armed Forces (RCAF), national police, government officials of all levels, and most of Cambodian people would like to ask me to preside over the session of the third legislature of the National Assembly on September 27, 2003. I would like to ask all Your Excellencies, the members of the Constitutional Council, please notify me with a short note replying to my concerned question: I, the King Norodom Sihanouk, shall come to open the National Assembly of third legislature or shall I not?"*
>
> *(Royal Letter sent on 17th September 2003)*

c.) First Notification of the Council to The King

On 18th September 2003 at 9:00 am, the Constitutional Council called a meeting of the Council in order to review and discuss the King's letter in the White Building of Chamcar Mon State Palace, under the chairmanship of H.E. Bin Chhin, the President of the Council, along with another six members:[9] H.E. Chan Sok, H.E. Say Bory, H.E. Son Soubert, H.E. Yang Sem, H.E. Prak Sok, and H.E. Top Sam.

The decision from the discussion regarding the King's question was made in form of a Notification on 18th September 2003, which notified His Majesty the King as follows:

> *"[…] The august presence of Your Majesty in the preliminary session is very crucial for the whole nation and for this institution. Normally, Your Majesty always offers such great honour to this institution by going to preside over the preliminary session of the National Assembly. As result, we all humbly notify that* **Your Majesty shall go** *to open the National Assembly of this third legislature […]."*
>
> *(Notification No. 19 of 2003.CC on 18th September 2003)*

After having seen this Notification from the Council, His Majesty the King, on 19th September 2003, sent another royal letter publicly informing the whole nation as follows:

> *"[…] The problem occurred for the National Assembly of this third legislature is very much complicated, hence I would like to decide that I the King will not go to open the National Assembly of this legislature. I would like to delegate to Samdach Chea Sim, the President of the Senate, to represent me in opening the session at the National Assembly […]."*
>
> *(Royal Letter sent on 19th September 2003)*

Having heard the public declaration from His Majesty the King, *Samdach Krompreah* Norodom Ranariddh sent a four-page letter to His Majesty the King on 20th September 2003, highlighting the following key points:

(i.) The King should reject the Notification of 18th September 2003 from the Constitutional Council.[10]

(ii.) Convening the opening of the National Assembly is the rights of His Majesty the King.

(iii.) Concern that Samdach Chea Sim will represent his Majesty the King on that occasion because if one takes notice of the role of Samdach Chea Sim and the Constitutional Council's Notification, they are in conflict because the Notification as well as the Constitution itself only mention the august presence of His Majesty the King.

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9 The other two members: *Samdach* Chao Sen Cosal Chhum and H.E. Tho Pengleat were absent as they were out of the country at the time.

10 He stressed that the answer of the Council was not related to the constitutionality of His Majesty the King's proposal.

(iv.) Having a quorum for opening the National Assembly may be an issue if the members of the SRP do not attend based on paragraph 1 of Article 76, which requires the National Assembly to be comprised of at least 120 members.

This consultation created an unclear and uncomfortable situation for His Majesty the King. Therefore, His Majesty the King sent a second royal letter on 20th September 2003, with *Samdach Krompreah* Norodom Ranariddh's letter attached, to the Constitutional Council and asked again for a detailed opinion by the Council regarding these issues.

d.) Second Notification of the Council to The King

The Constitutional Council, after a second discussion, notified His Majesty the King by asserting that the Council has no jurisdiction to interpret the political views found in *Samdach Krompreah*'s letter. However, the Council stated that it would humbly give its point of view on the legal context as follows:

(i) The Jurisdiction of the Constitutional Council

The interpretation of the Constitution and of the laws shall be the absolute jurisdiction of the Constitutional Council.[11] The Notification of the Constitutional Council on 18th September 2003 was made within the legal bounds of its jurisdiction.

According to the jurisprudence of the Council since 1998, only dignitaries noted in Article 141 (new) are qualified to request the Council to interpret the Constitution and laws, His Majesty the King being the first of those dignitaries. When he was President of the National Assembly, *Samdach Krompreah* Norodom Ranariddh, has also asked the Council to interpret the Constitution and laws in addition to the proposal to examine the constitutionality of a law.

(ii) Article 82 (new) of the Constitution

In its response to His Majesty the King, the Constitutional Council used Article 82 (new) of the Constitution as the basis for clarifying the issue concerning whether the King should convene the opening session or not. Regarding the issue concerning the royal presence, the Council stated that it did not mean by its Notification that: "*Your Majesty the King must go to open the National Assembly of this third legislature.*" Instead, the Council maintained in its second reply that:

"Your Majesty the King suggested the Constitutional Council for a short response to the following question: 'I, the King Norodom Sihanouk, shall come to open the National Assembly of third legislature or shall I not?', so the Council humbly responded with a

11 Article 136 (new) and Article 142 (new) of the Constitution; and Article 1, Article 15, Article 23 of the Law on the Organization and Functioning of the Constitutional Council.

short answer as required, by using the term stated in the royal letter of Your Majesty 'shall go', and avoiding to use the term 'must go', which can be in form of 'force' for Your Majesty."

(iii) Number of Representatives for the Preliminary Session

Regarding the question of the number of members of the National Assembly required for the preliminary session, the Constitutional Council clearly stated that the requirement of at least 120 members of the National Assembly is only a condition required for preparation of each election in order to establish the National Assembly of each legislature. After the official results are announced by the NEC, the requirement that the National Assembly must consist of at least 120 members was then already met. However, there are other procedures that the National Assembly needs to follow under the Constitution and its own Rules of Procedure. The Council also stated that Article 82 (new) of the Constitution, which is part of this procedure, does not determine the quorum for each preliminary session of the National Assembly. In addition, Article 5 of the Rules of Procedure of the National Assembly also does not determine the quorum for this session, and only notes the number of members required after the opening of National Assembly.

The Council clarified additional details in its Notification concerning:
(i) *The Place for Preliminary Sessions:* Only in exigent circumstances that prevent the National Assembly from meeting in its regular building will meetings be held elsewhere. In the absence of exigent circumstances, any purported National Assembly meeting held at another place will be considered null (Article 85 of the Constitution).
(ii) *The Oath:* According to the provisions of Annex 5 of the Constitution, the Oath shall be taken in front of the King, the Supreme Patriarch of Buddhism and of the *Deva of Swedachhatr* (God of the White Umbrella).
(iii) T*he Royal Representative*: The King has the full right to assign a representative. This principle is inviolable.
The circumstances noted above presented an obstacle for the proceeding of the preliminary session of the National Assembly. However, the preliminary session was organized as planned on 17th November 2003 under the presidency of *Samdach* Chea Sim, who was the King's representative for the preliminary session. There was one more small wrinkle after someone informed His Majesty the King on the day of the opening ceremony for the preliminary session that the other two political parties, FUNCINPEC and SRP would attend the session after all. Upon hearing this, His Majesty the King planned to attend the session. While travelling to the National Assembly, the King was informed that both parties remained absent and, therefore, the King returned to the Palace. As a result, the name of the King was immediately replaced by *Samdach*

Chea Sim's name on the backdrop in the session hall of the National Assembly building. Therefore, the preliminary session of the National Assembly was held only for the members from the CPP.

This event produced constitutional jurisprudence for the preliminary session of the National Assembly, which can be conducted:

(i) Without the august presence of His Majesty the King, but with the presence of the King's representative.

(ii) Without all members from the winning political parties, which have seats in the National Assembly, but with members only from one party.

The provisions in the Council's Notification regarding this issue became the constitutional jurisprudence, which can be applied to similar cases for future legislatures. For instance, in the case of the political deadlock in 2013 with the fifth legislature of the National Assembly, all members of the CNRP decided not to attend the preliminary session. However, the preliminary session of the fifth legislature was successfully conducted under the august presidency of His Majesty the King with only CPP members present.

2. The Duty to Guarantee Respect for the Constitution

This duty is based on paragraph 1 of Article 136 (new) of the Constitution and Chapter 2 of the Law on the Organization and Functioning of the Constitutional Council. In order to guarantee the respect for the Constitution, the Constitutional Council has two crucial mandates:

(i.) To interpret the Constitution and laws adopted by the National Assembly and reviewed by the Senate.

(ii.) To examine the constitutionality of a law.

a.) The Interpretation of the Constitution and Law

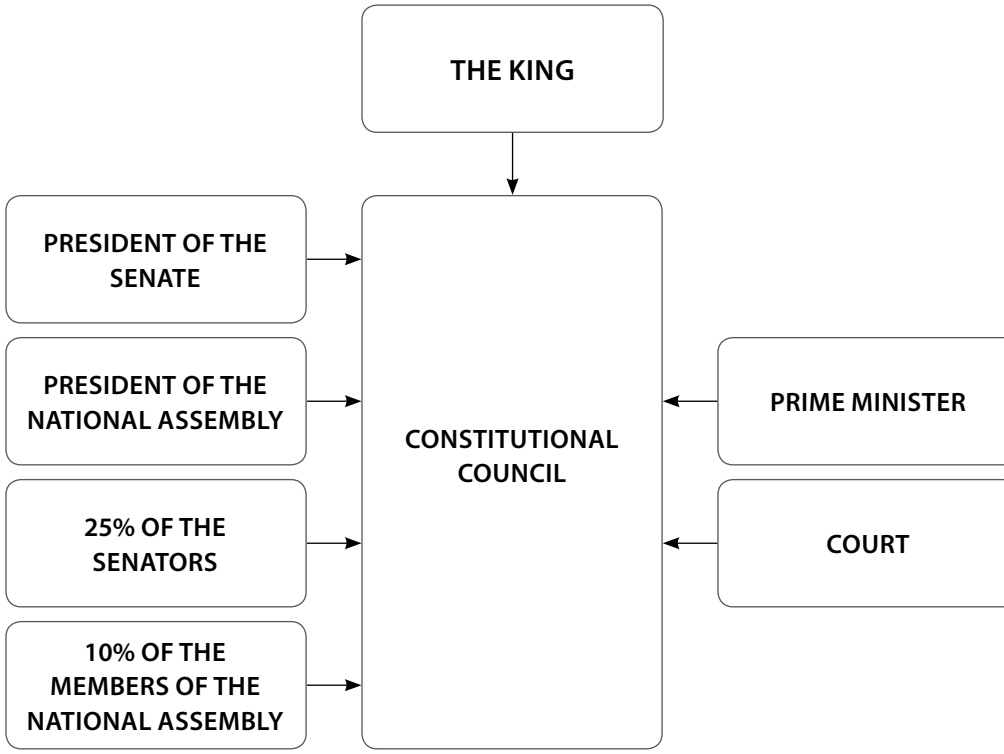
Why is interpretation necessary? Why do the dignitaries and lawmakers sometimes request interpretation of a particular constitutional or legal provision? Should we understand such questions as lack of knowledge of the legislature? Is the interpretation of the Constitutional Council without flaws? Such questions are often raised. Ambiguity in the provision of a particular law or of a conflict of ideas regarding an interpretation is the basic reason that interpretation is sometimes necessary. Every person has his or her own understanding of texts or ideas. That is why different interpretations of the same text or idea occur frequently.

Requesting the Constitutional Council to interpret a particular provision does not mean that dignitaries, including lawmakers, do not understand the meaning of the provisions submitted for interpretation. Rather, interpretation is necessary because there is a debate regarding the meaning, which can lead to a conflict of opinions. However, even though

those dignitaries may have *the right* to interpret provisions in the Constitution as well as the law, they do not have *the jurisdiction* to do so in the Cambodian constitutional framework. Only the Constitutional Council has the jurisdiction to interpret the Constitution and law within that framework. The interpretation of the Council in a particular case may not satisfy all concerned parties, but in the Cambodian constitutional framework, the Council's interpretation is considered "*final and without recourse*". In other words, there must be an arbiter to decide on the meaning of a constitutional or legal provision in order to overcome conflicts of opinion and to ensure the proper execution of the Constitution and law. Under the Constitution, this role is given to the Constitutional Council.

The duty of the Council in interpreting the Constitution and law is enshrined in in Article 136 (new) of the Constitution and Article 15 (new) of the Law on the Organization and Functioning of the Constitutional Council. However, the question remains: *Who is authorized to ask the Council to interpret the Constitution or law?* Neither the Constitution nor the Law on the Organization and Functioning of the Constitutional Council includes an article that clearly states who is entitled to request interpretation by the Council. The provisions of paragraph 2 of Article 18 (new) of the Law on the Organization and Functioning of the Constitutional Council states that the people have the right to raise questions regarding the constitutionality of any law or request an interpretation of any law[12] to the Constitutional Council through the President of the National Assembly, members of the National Assembly, the President of the Senate or senators. Article 15 (new) establishes that the Constitutional Council interprets the Constitution as well as the constitutionality of laws within the Cambodian constitutional framework.

12 This provision concerns only the interpretation of the law but does not mention the interpretation of the Constitution. Therefore, it is not clear whether or not a citizen can make a request for interpreting the Constitution through the noted dignitaries.



(Source: Constitutional Council Booklet)

It will be helpful for our understanding to observe the actual practice of the Council on the issue of interpretation. For instance, Case No.169/007/2009 of 16th December 2009, submitted by the President of the National Assembly, who requested that the Constitutional Council interpret Articles 4 and 43 of the Constitution. The Chief of the Bureau of Legal Affairs notified the President of the Council that:

> *"[...] According to Article 136 (new), Article 141 (new) of the Constitution; Article 15 (new), and Article 18 (new) of the Law on the Organization and the Functioning of the Constitutional Council; this request can be examined by the Constitutional Council […]."*[13]

Besides the aforementioned case, there are other cases concerning the interpretation of the Constitution and of laws, which were submitted by (i) the President of the Senate (Case No. 35/007/2000; 18th October 2000) concerning the interpretation of Article 112 (new) of the Constitution, (ii) the Prime Minister (Case No. 164/002/2009; 19th February

13 Case No. 169/007/2009, letter of notification sent on December 16, 2009 to the President of the Council by the Chief of the Bureau of Legal Affairs.

2009) concerning the interpretation of Articles 17 and 18 of the Law on the Election of Capital City, Provincial, Municipal, District, and Khan Council, and (iii) one-tenth of the members of the National Assembly (Case No. 4/9; 6th April 1999) concerning the interpretation of Article 33 of the Constitution. Thus far, there have been no proposals to interpret the Constitution and laws submitted to the Constitutional Council by the King or by one-fourth of the senators.

Therefore, the dignitaries, who are authorized to ask the Council to examine the constitutionality of laws, are also authorized to request the Council to interpret the Constitution and the law. These cases are the jurisprudence of the Council, which are dependent on the authorized dignitaries for initiation.

Citizen parties to legal proceedings may also raise questions regarding the constitutionality of laws or decisions of state institutions, such as: Royal Decrees, Sub-Decrees, Proclamations (*Prakas*) and other administrative decisions. Lower courts submit these complaints to the Supreme Court. If the Supreme Court finds the complaint valid, it forwards the complaint to the Constitutional Council. Questions regarding the constitutionality of a law or regulation raised at trial are called an *interlocutory question*. When valid interlocutory questions are raised the court in charge of the trial should suspend the case until the constitutional question(s) can be resolved by the Constitutional Council. This way, the Constitutional Council determines the constitutionality of a particular law directly for the people.[14]

b.) Examining the Constitutionality of a Law

All laws and decisions of the state (regulations) in Cambodia must be consistent with the Constitution according to Article 150 (new) of the Constitution. Consistency with the Constitution means that laws and regulations should not contain conflicts with the principles of the Constitution. It does not mean that laws and regulations must copy the provisions of the Constitution. Consistency with the Constitution is a crucial means of guaranteeing respect for the Constitution as required by Article 136 (new). The Constitutional Council is the sole body with jurisdiction to determine the constitutionality of laws or regulations. Therefore, all questions concerning the constitutionality of a law or regulation must be submitted to the Council.

Under the Constitution, the Constitutional Council cannot examine any matter on its own initiative. The Constitutional Council can examine the constitutionality of laws before their promulgation (*a priori*) or after their promulgation (*a posteriori).*

14 Constitutional Council Booklet.

Who is authorized to request an a priori examination of a law or regulation?

According to the provisions of Article 140 (new) of the Constitution, the King, the Prime Minister, the President of the National Assembly, one-tenth of the National Assembly members, the President of the Senate or one-fourth of the senators, may send the laws adopted by the National Assembly to the Constitutional Council for examination prior to promulgation.

The Rules of Procedure of the National Assembly[15], the Rules of Procedure of the Senate[16] and all organic laws[17] must be submitted to the Constitutional Council for examination before their promulgation. The Constitutional Council, upon receiving laws or rules of procedure, must determine within 30 days whether such laws or rules are in conformity with the Constitution.

Who is authorized to request an a posteriori examination of a law or regulation?

According to the provisions of Article 141 (new) of the Constitution, the King, the President of the Senate, the President of the National Assembly, the Prime Minister, one-fourth of the senators, one-tenth of the National Assembly members or the courts can request that the Council examines the constitutionality of a law after its promulgation. Any citizen has the right to raise the issue of constitutionality of laws through the National Assembly members, the President of the National Assembly, the senators or the President of the Senate.

3. The Duty to Hear and Rule on Electoral Litigation Matters

This duty is stated in chapter 3 of the Law on the Organization and Functioning of the Constitutional Council. The Constitutional Council has the authority to hear and rule on litigation matters related to the election of the members of the National Assembly and the election of the senators.[18]

a.) Types of Complaints for Electoral Litigation

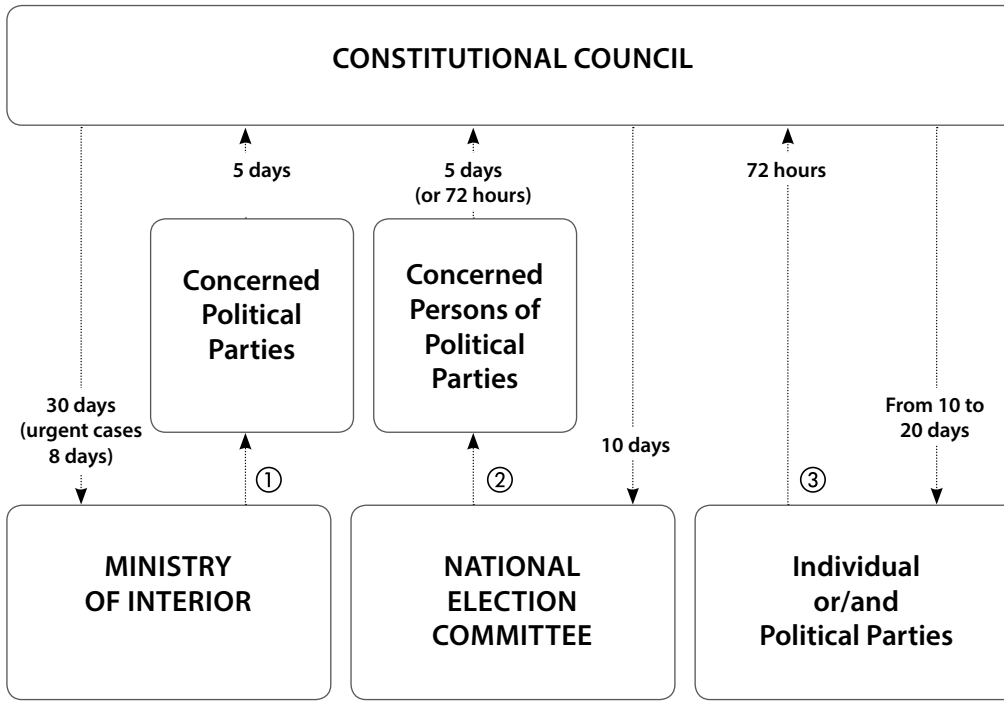
There are three types of complaints used in electoral litigation matters, which the Constitutional Council can rule on if any party to the case does not accept the decision of the NEC and of the Ministry of Interior (MoI) in a particular election:

(i) The Constitutional Council hears and rules on complaints by a political party regarding the refusal of the MoI to register that party. This type of complaint must be made within five days of the rejection of the registration application and the Constitutional Council must make a decision within 30 days, or eight days in case of emergency.

15 It must be submitted to the Constitutional Council by the President of the National Assembly.
16 It must be submitted to the Constitutional Council by the President of the Senate.
17 It must be submitted to the Constitutional Council by the President of the National Assembly.
18 Article 136 (new) of the Constitution

(ii) During the elections of the members of the National Assembly and of the Senate, the Constitutional Council hears and rules on direct complaints from any political party within 72 hours after the proclamation of the provisional results of the elections or on appellate complaints from political parties contesting the decisions of the NEC.

(iii) The Constitutional Council has the duty to rule on litigation matters related to elections of members of the National Assembly and senators, on complaints concerning the initial electoral rolls at the time of the elector's registration and on complaints occurring during the election campaigns. In these cases, the Constitutional Council acts as a court.



① Complaints of political parties whose registrations are rejected by the MoI.

② Appeal contesting the decision of the National Election Committee.

③ Direct complaints to the Constitutional Council contesting the provisional results of the elections proclaimed by the National Election Committee..

(Source: Constitutional Council Booklet)

b.) The Submission of Complaints

All concerned parties who wish to file complaints to the Constitutional Council must go to the Department of Legal Affairs and Litigation located in the White Building of Chamcar Mon State Palace. The complaints must contain several important details required by law, including:

(i.) The name of individual or of the political party filing the complaint;
(ii.) The legal status of the plaintiff;
(iii.) The name of the party against which the complaint is being filed;
(iv.) The name of the individual or political party declared to be the winner in the election; and
(v.) Other supporting documents and evidence.

c.) The Complaint Process

After receiving a complaint, the Chief of the Bureau of Legal Affairs and Litigation shall notify the President of the Council through the Director of the Department and the Secretary General. The President of the Council shall appoint one of the Council's members to be the *Rapporteur* for the case. The Rapporteur has the duty to draft a report for the Council. If the Council finds that a particular complaint is not within its jurisdiction, the Council will notify the concerned party by means of a *Notification*, stating the reasons for its decision. In such a case, there will be no hearing. If a complaint is within its jurisdiction, the Council will process this case under its interpretation authority or examine the constitutionality of a law. In such cases, a public hearing will be conducted. Under either type of these cases the Council acts as a *Jurisdictional Council* (*Krom Breuksa Chumnum Chumras*) and will process the case the same way a court would.

Pre-Trial Process

The Rapporteur, with assistance from expert officials, will collect relevant evidence for the case. The investigation may also be conducted by a group of expert officials under the supervision of the Rapporteur. These officials have the authority to investigate the site of the conflict in order to collect all relevant data and information. This process must be completed within the timeframe determined by law. The Rapporteur may also require the parties to the case or other concerned persons to appear for an inquiry. In practice, separate inquiry sessions are held for the plaintiff and defendant. Inquiry sessions are chaired by the Rapporteur and also involve two other members of the Council assisted by at least two expert officials. Minutes are taken at these hearings and the plaintiff and defendant are required to provide a thumbprint certifying that the minutes are correct.

After his or her investigation is complete, the Rapporteur will draft a report and submit it to a group session, which is composed of three members, prior to submitting the case to the preliminary trial of the Council. The preliminary trial is the Council's internal discussion of the Rapporteur's report.

Trial Process

The trial process at the Council is held as a public hearing. The Council announces this hearing to the public beforehand and provides the exact date and time for the hearing. The plaintiff and the defendant (usually the NEC) receive summons noting the time, date and place of the hearing. Other concerned persons or evidence, such as witnesses and supporting documents may be brought to this hearing. Internal regulations for the parties and for the audience are announced prior to the hearing. Telephones, guns as well as other weapons are prohibited.

Preliminary Hearing Procedures: When the Secretary General of the Council, who serves as Chair of the Secretary Council, which assists with the administration of such hearings, announces "*The Jurisdictional Council*" all attendants in the hearing hall are required to stand to show their respect. Then, the nine members of the Council take their seats. The President of the Council then asks the attendants to be seated and verifies the presence of a quorum of the members and the Secretary Council.

Initiating the Hearing: The President of the Council will review relevant legal provisions, including the Constitution, the Law on the Organization and Functioning of the Constitutional Council, its amendments and the Law on Elections of the Members of the National Assembly and its amendments. It will further state the case number and the names of the parties to the case.

The President will then ask the Chair of the Secretary Council whether the plaintiff and defendant are present. If the Chair of the Secretary Council informs him or her that either the plaintiff or defendant is absent, the President will ask whether the parties received their summonses. If the Chair of the Secretary Council confirms the presence of the plaintiff and defendant, the President of the Council will declare the lawful composition of the Jurisdictional Council and the Secretary Council.

The President of the Council will then order the plaintiff to stand before the Council to answer following preliminary questions:

(i.) What is your name?
(ii.) What is your date of birth?
(iii.) What is your nationality?
(iv.) What is your vocation?
(v.) What is your place of residence?
(vi.) What is your father's name? Is he alive?
(vii.) What is your mother's name? Is she alive?

Such questions will also be addressed to the defendant (NEC). The President of the Council will then order both parties to return to their seats.

Mode of Inquiry: The President of the Council again orders the plaintiff to stand before the Council and asks him or her the following question: "Was the complaint submitted by you on [date]?" If the response is "yes" the President then orders the Secretary General to read the complaint. After the reading, the President will ask the plaintiff whether he or

she has anything to add to the complaint. At this time, the President may raise additional questions regarding the complaint and may provide an opportunity for other members to ask questions. At the end of this session, the President asks the Chair of the Secretary Council whether or not the plaintiff has any witnesses to call at the hearing. If the plaintiff would like to call witnesses, the President asks if the witnesses have already taken the oath to testify. If they have taken the oath, the President orders the witnesses to provide testimony. This process is then repeated for the defendant (NEC).

Post-Inquiry Procedure: After finishing the inquiry session, the Council returns to its chambers to make their decision in secret. In chambers, the Council's members discuss the case. The youngest member of the Council is appointed as Secretary as the Secretary Council is not allowed to participate in this session.

Announcement of the Decision: After the meeting, the Jurisdictional Council returns to the hearing hall, which the Chair of the Secretary Council marks by ringing a bell three times. The President then orders both parties to stand before the Council and orders all attendants to stand up. The President reads the entire decision of the Council aloud. The hearing is brought to an end by the strike of a gavel and the declaration "*Close the Hearing*" made by the President.

Post-Trial Process

The decision of the Constitutional Council in these cases is final and binding. There is no opportunity for appeal. Decisions are sent to the King, the President of the Senate, the President of the National Assembly, the Prime Minister as well as the President of the Supreme Court. Moreover, they are published in the Royal Gazette.[19]

After receiving a Decision:

(i.) The President of the Senate will inform all members of the Senate;

(ii.) The President of the National Assembly will inform all members of the National Assembly;

(iii.) The Prime Minister will inform all members of the Royal Government; and

(iv.) The President of the Supreme Court will inform the relevant courts.

Anyone who does not respect a decision of the Constitutional Council or interrupts the operation of the Constitutional Council may be imprisoned from one month to up to one year and will be fined from 100,000 *Riel* to up to 600,000 *Riel*.[20]

19 Article 34 (new), Law on the Amendment of Law on the Organization and Functioning of the Constitutional Council.

20 Article 36, Law on the Amendment of Law on the Organization and Functioning of the Constitutional Council.

4. Duty to Nullify Certain Laws and Regulations

Besides the aforementioned crucial roles, the Constitutional Council has the power to nullify any law or regulation, which is not consistent with the national benefit. Article 92 of the Constitution provides that any law passed by the National Assembly, which is contrary to the principles of safeguarding the independence, the sovereignty and the territorial integrity of the Kingdom of Cambodia and affects the political unity or the administrative management of the nation shall be annulled. The Constitutional Council is the sole body competent to nullify laws and regulations in such cases.

V. The Procedure of the Constitutional Council

1. Quorum

According to Article 14 (new) of the Law on the Organization and Functioning of the Constitutional Council, a session of the Council is not valid unless there are five members in attendance. These five members, which constitute a forum, must be present when convened by the President of the Council or the eldest member in attendance if the President is absent. The convening and chairing of the preliminary session of the Constitutional Council is then performed by the eldest member present, who has already taken the oath.

2. Rules Of Procedure

The Constitutional Council created its Rules of Procedure as required by Article 12 (new) of the Law on the Organization and Functioning of the Constitutional Council. The Rules of Procedure of the Council were signed on 26th June 1998 by the first President of the Council, H.E. Mr. Chan Sok. These rules contain 32 articles organized into ten chapters.

3. The Sessions Of The Constitutional Council

Once a case is brought before the Constitutional Council, it must pass through three main sessions, namely the group session, the preliminary session and the plenary session. The reason for requiring separate meetings at each stage are to provide confidence in the process of the Council´s decision-making and to provide *checks and balances* within the process, which is crucial to ensure the neutrality and impartiality of the Council.

a.) The Group Session

The Council's members are divided into three groups. One group consists of three members. The three members of each group are appointed by different institutions, one each by the King, the National Assembly and the Supreme Council of Magistracy. As noted above, a member within a group is appointed as the Rapporteur for a case and has the duty to draft a report for the Council regarding the case. The Rapporteur convenes a group session of three members in order to discuss the draft report. The other two members besides the Rapporteur have the prerogative to share their points of view regarding the facts and legal rationale of the case. This session is usually accompanied by a secretary, who is tasked with taking minutes and providing other assistance as needed. The report is the foundation for the Council´s decision-making. After discussing the draft report, a draft decision will be prepared for the preliminary session, which is scheduled by the President of the Council.

b.) The Preliminary Session

This session is convened by the President of the Council and all members are invited to the session. A representative of the Secretary Council also attends this session. The purpose of this session is to provide all members of the Council with the opportunity to take part in the discussion regarding the draft report of a particular group and to frame the draft of the decision. This session involves debate and exchange of viewpoints, but does not adopt a decision. The results of this session are crucial for the final decision-making process of the Council in the plenary session.

c.) The Plenary Session

The plenary session is the last step. This session is held in public as stipulated by law. All members of the Council are invited to this session, which is scheduled by the President. The draft decision is discussed during this session and the members of the Council will adopt a decision by majority vote. Normally, this session is attended by a representative of the Secretary Council, which is chaired by the Secretary General or Under-Secretary General. For cases concerning the election of members of the National Assembly or the Senate, this session will be conducted as a public hearing and all members of the Council will sit as the *Hearing Council*.

VI. The Achievements of the Constitutional Council

The Constitutional Council, from 1998 to the present, has fulfilled its functions in accordance with the Constitution, Law on the Organization and Functioning of the Constitutional Council and other relevant legal provisions. After more than 15 years in existence, the Constitutional Council has achieved the following:

1. Notifications to the King: 12
2. Electoral litigation matters: 91
3. Interpretations of the Constitution and laws: 21
4. Examining the constitutionality of laws: 66
5. Rejection of matters for lack of jurisdiction or legal compliance: 48

(Source: Department of Legal Affairs and Litigation - Figures up to August 2014)

In addition to these key achievements, the Constitutional Council organizes various workshops to provide information regarding the Constitutional Council's duties and increase knowledge on the Constitution for individuals in both private and public institutions. This project is beneficial for promoting a fundamental understanding of the Constitution among the population.

In the international arena, the Constitutional Council has been a member of the Association of Constitutional Courts Using the French Language (A.C.C.P.U.F.) since 1998.

VII. The Secretariat General

The Secretariat General of the Constitutional Council is the administrative body of the Council, created by Sub-Decree No.42 ANK (2nd July 1998) on the Creation of the Secretariat General of the Constitutional Council and Sub-Decree No.43 ANK (7th March 2005) on the Amendment of Sub Decree No.42 ANK.

The Secretariat General is led by a Secretary General, whose rank is equal to that of a Secretary of State and is assisted by an Under-Secretary General, whose rank is equal to that of an Under-Secretary of State. Both are appointed by Royal Decree through a proposal from the President of the Council and after consultation with the Council's members.[21] The Secretary General directly leads the administrative work of the Council.

21 Article 3 (new) of Sub-Decree No.43 ANK.

The Secretariat General of the Constitutional Council is responsible for the following tasks:[22]

(i.) Preparing all cases submitted to the Council;

(ii.) Taking minutes and other notes during sessions of the Council;

(iii.) Being responsible for the administrative work of the Council by guaranteeing the continuity of workflow, management, and cooperation with other departments;

(iv.) Maintaining case files, minutes and other documents in good order and strict confidence, unless given permission by the President to share with individuals outside the Council; and

(v.) Providing service to Council members and fulfilling other tasks assigned by the President.

The Secretariat General of the Constitutional Council is composed of six specialized departments:

1. Department of Administration
2. Department of Finance and Personnel
3. Department of Legal Affairs and Litigation
4. Department of Information Technology and Language Translation
5. Department of Research, Archives, and Library
6. Department of Internal Audit

Each department is divided into bureaus. Each bureau is divided into sections. The roles and functions of each bureau and section are determined according to the decision of the Council.

Though the Constitutional Council is not an organ of the legislative power, all officials working within the Secretariat General are governed by the Common Statute of the Legislative Officials.[23] The recruitment of officials at the Constitutional Council is conducted by a national examination. Since the Constitutional Council began operating in 1998, with the exception of the officials appointed in 1998, there have been three national examinations for recruitment of new officials. The first national examination was offered in 2005, the second in 2006 and the third in 2009.

22 Article 1 of the Decision on the Amendment of the Roles, Duties and the Structures of the Secretariat General of the Constitutional Council.

23 This Common Statute includes the officials of the National Assembly, the Senate and the Constitutional Council.

VIII. Conclusion

For more than 16 years, the Constitutional Council has fulfilled its functions consistent with the Constitution and laws. It has strengthened its neutrality, independence and impartiality in order to support and promote the rule of law in Cambodia. However, this Council has faced challenges in terms of limited roles in the ruling process and some criticism regarding its neutrality, independence and impartiality.

Indeed, criticism regarding the Council's neutrality, independence and impartiality are often raised around and during election periods, by politicians, citizens belonging to different political parties and by civil society organizations. These political disputes, mainly the election litigation matters, have placed the Constitutional Council in the middle of both national and international media. Such criticism may negatively impact on the Council's reputation and legitimacy.

In summary, though the Council fulfils its functions in accordance with the Constitution and laws, the Council's decisions cannot please all concerned parties, especially in political disputes over elections. As a result, further exploration of these issues with a view towards improving the Council and its important work is essential.

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THE CONSTITUTIONAL ROLE OF THE JUDICIARY IN CAMBODIA: INTERNATIONAL COMPARISON AND IMPLICATION FOR REFORM

Kai HAUERSTEIN

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THE CONSTITUTIONAL ROLE OF THE JUDICIARY IN CAMBODIA: INTERNATIONAL COMPARISON AND IMPLICATION FOR REFORM

Kai HAUERSTEIN *

ABSTRACT

This chapter identifies and explains the constitutional principles governing the judiciary in Cambodia, compares them to international standards and the German Constitution, and outlines how this comparison as well as the constitutional mandate can be used as a starting point for reform.

Constitutional principles governing the judiciary such as independence, or the presumption of innocence are significant elements of the modern constitutionalist state. The first chapter identifies and explains these principles in the Cambodian Constitution (1993). It concludes that the 1993 Constitution (i) separates and protects the judiciary from the other powers of the government, (ii) guarantees access to a lawful judge, and (iii) provides judicial procedural rights. These principles are – in theory – reflected in the current justice system as well as on court level.

How do these principles, which have been identified in Section One, compare with international standards and other countries? Section Two points out that the independence of the judiciary is the only binding principle codified in international law. Other international standards, which have been developed by various bodies, are not binding, but provide an important reference point on how judicial standards can be interpreted and applied. The German case study highlights the similarities and the universal character of these principles. Many judicial principles outlined in the Cambodian Constitution are reflected in the German Constitution (Basic Law) as well as in international standards. Other more implicit aspects, such as the self-perception of judges or the budget for the judiciary, fall behind. This leads to the key issue. There is a difference between what is written on paper, for example in the Constitution, and how these principles are put into practice. Even the most advanced Constitution and high-flying principles will be cosmetics, if key-players decide to circumvent them.

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Section Three addresses how these constitutional principles can be a starting point for reforming the judiciary in Cambodia. Policy documents such as the Legal and Judicial Reform Strategy outline very specifically, which legal and institutional framework needs to be established to comply with constitutional and international standards. In the past, this process was lacking behind, leaving the reputation of the judiciary at an all-time low. However, there appears to be a change. With the new laws governing the judiciary, the legal system in Cambodia has made another step in a direction towards a comprehensive framework, which could improve the work of the courts and access to justice. The task is now to change the underlying mindset and put a system in practice that fulfills the promises and the mandate of the Constitution and addresses the challenges.

I. Constitutional Role of the Judiciary in Cambodia[1]

Constitutional principles governing the judiciary such as independence, or procedural principles such as the presumption of innocence are significant concepts of the modern constitutional state. This chapter identifies judicial principles in the Cambodian Constitution (CC) (1993) and explains them.

1. Constitutional Principles

a.) Separation of Powers Principle

The separation of powers principle constitutes the judiciary as the third power exercised through the people (Id. at Art. 51[4][2]) by determining that legislative, executive, and judicial powers be vested in different institutions:

- Legislative = National Assembly (NA) and Senate,
- Executive = Royal Government, and
- Judiciary = Courts.

Division of State Power: Montesquieu introduced the term "separation of powers" with regard to the separation of the judiciary from the other two powers.[3] This principle is reinforced in Art. 51[5] and 128[1], which state that the three powers should be separate. Art. 128[4] further clarifies that the power of the judiciary is vested in the courts; or more specifically to the judge, who has the only right to adjudicate (Id. at Art. 129[3]). This means that the judicial power is vested in judges exercised through courts.

1 This chapter refers to the English Translation of the 1993 Constitution of the Kingdom of Cambodia, published by the Senate, Konrad Adenauer Stiftung, and CIM.

2 Articles of the CC are cited as follows: Art. 51[4]1 for Article 54, paragraph 4, sentence 1. Articles without references are Articles of the 1993 Constitution.

3 Charles de Montesquieu, *De l'esprit des lois* (1748) bk XI, ch 3.

"Who" Is Separate from "Whom" in "What" Aspect? The answer is: the judge through courts is independent from the legislative and executive in his/her adjudicative function. This definition of the scope of independence is important as the CC itself is not very clear about what part of the judiciary is separate from the other powers. For example, Chapter XI is in so far misleading as it regulates different elements of the judicial system: courts, judges, but also prosecutors, the King, and the Supreme Council of Magistracy (SCM).[4] The King, the SCM, and prosecutors are in their specific function part of the judicial system, but they do not fall under the separation of power principle as none of them adjudicate, i.e. apply the law to a specific case. The function of the SCM is to appoint and discipline judges, the King is more of a symbolic figure safeguarding independence, and the prosecutor has a specific role in criminal justice, presenting a case against the accused for breaking criminal law.

Even though each institution plays a role in the judicial system, they all support only the main function of the judiciary, which is to adjudicate a dispute.

It follows that none of the above can claim that they are protected by judicial independence. The only person who is truly protected is the judge. Art. 129[2] can only be interpreted in the way that judicial authority is reserved solely for judges. Only judicial authority, respectively the adjudicative function, is protected by the separation of power principle. This basic understanding of the separation of power principle leads to the following underlying definitions, which will be relevant for this chapter.

Underlying Definitions

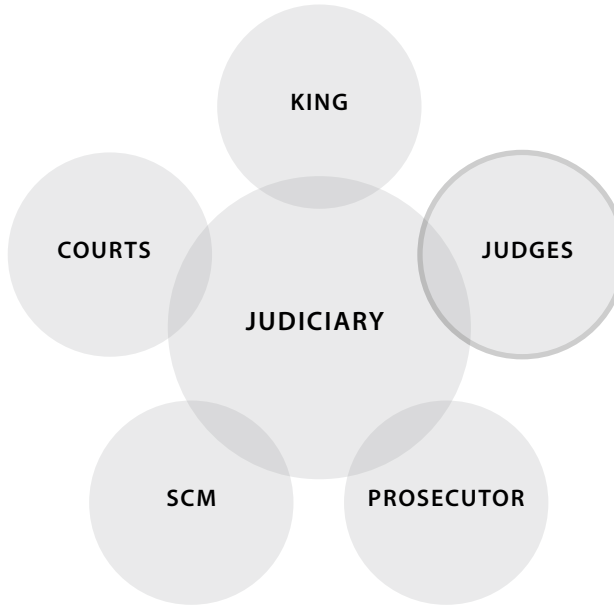
Adjudication, Judicial Power: What defines judicial authority/adjudication? As with many abstract legal terms such as democracy, administration etc., judicial authority is difficult to describe. One definition focuses on the application of law to concrete facts.[5] But, also the administration applies the law to concrete facts and arrives at a decision. Another definition focuses on the aspect of conflict resolution. This is true if one also considers criminal justice as a conflict between the state and the accused. Due to the lack of a comprehensive definition, both definitions can be combined in stating that adjudication/judicial power is the application of law to concrete facts to solve a conflict. In a way judicial power works like a referee who decides in a conflict between two people (or one person and the state).

4 See Figure 1.

5 Heun, Werner *The Constitution of Germany, A Contextual Analysis* (2011), Oxford Portland Oregon, p. 160.

Judiciary: The judiciary provides a mechanism or a system for the resolution of disputes **or the violation of rights**, mainly to maintain social peace. It provides an independent system, which allows law to be applied in the name of the state. This system is outlined in the CC (Chapter XI) and includes (i) courts, (ii) judges and prosecutors[6], (iii) the King, and (iv) the Supreme Council of Magistracy (SCM).

Figure 1: Judiciary as a system



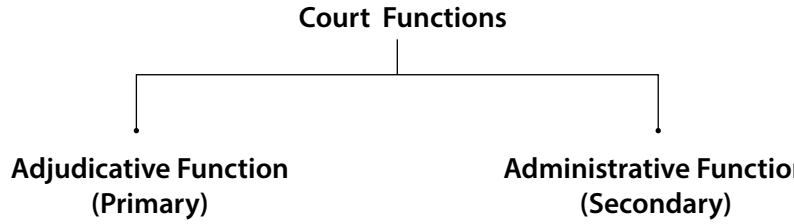
Judge: Is the person, who interprets and applies the law to resolve a dispute. The judge resolves a dispute between persons (civil dispute) or a dispute between a person and the government (public dispute). A public dispute includes criminal or administrative disputes. Thus, the main function of a judge is to resolve a civil or a public dispute, which is called adjudicative function. This core-function is expressed in Art. 129[2], which states that only judges have the right to adjudicate.

Supreme Council of Magistracy: The SCM is a self-governing body of the judiciary, which appoints judges and conducts disciplinary measures.

6 The prosecutor is a legal party responsible for presenting a case in criminal trial against an individual accused of breaking (criminal) law. The prosecution, strictly speaking, is neither part of the court system nor part of the judiciary as he/she does not adjudicate. The prosecutor occupies a position between the courts and the police. Like a defense lawyer, he/she is part of the criminal justice system, but not part of the judiciary.

Court: The Court is an assigned place where the judge administers justice or, in other words, resolves a public or a private dispute (adjudication). Thus, the primary function of the court is to provide a space for a judge to exercise his/her judicial power/adjudication. The secondary function of the court is to support the adjudicative function, which is called administrative function**.** The administrative function includes for example the management of the court facility, budget, and court planning. These are organizational aspects, which are not directly related to resolving a dispute, but are nonetheless essential to resolve a dispute.

Figure 2: Court Functions



Relationship of the Judiciary to Other Branches of the State

Under the doctrine of the separation of powers, the judiciary does not make law (which is the responsibility of the legislature) or enforce law (which is the responsibility of the executive), but rather interprets law and applies it to the facts of each case. However, the separation of power principle is not absolute.

Exemptions from the Separation of Powers Doctrine: Legislative and executive institutions are in many ways intertwined and exercise joint cooperative state leadership. In fact, the legislative and executive are institutionally, functionally, and personally strongly interconnected. For example, the Prime Minister as well as his ministers are members of the parliament, the largest number of seats in the NA forms the Royal Government, and the Royal Government proposes laws and even enacts subordinate legislation. But even the judiciary is not totally separate from the executive. In many countries, such as Germany, the executive, or more precisely the Ministry of Justice, has the power to administer the judicial system. This includes, but is not limited to, the responsibility for defining policies, issuing implementing regulations, providing service standards and overseeing the implementation of laws and regulations, and providing the budget. Some Constitutions delegate administrative powers to a separate body such as the appointment of judges. For example, in Cambodia or in France the Supreme Council of Magistracy appoints judges and conducts disciplinary actions.

Because of the overlapping of powers and countless exemptions, some scholars even claim that the separation of power principle only protects the core of each power.[7] Point is that one has to look and define very carefully what to include in the definition. With regard to the judiciary, it is clear that the core of adjudicative power is protected.

Aspects of Judicial Independence

The CC protects the judge in his/her adjudicative function through substantive as well as personal independence.[8]

Substantive Independence: Art. 129[2] provides for substantive independence by stating that (i) the adjudicative function of the judge is independent and (ii) that the judge should strictly (only) respect the law. Substantive independence means that judges are not subject to order and instructions by anybody else, but are only bound by laws (=substance).[9] The only standard of review should be laws, including statuary laws, sub-ordinate law, international law, customary law, etc. The legislature, of course, can enact new laws, and thus give instructions to apply a new law. But, the judge remains independent to interpret the law.

Personal Independence: The substantive independence is supplemented and enforced by the guarantee of personal independence. The King and the Supreme Council of Magistracy protect the personal independence of judges. Id. at Art. 133, 134. Appointed judges may be removed, suspended, transferred, and retired against their will only pursuant to a decision of the SCM and only on the grounds of a law.[10] Grounds for removal are mainly related to disciplinary action as a result of violation of official duties (see also below).

Other Aspects of Judicial Independence: Judicial Independence is a highly abstract term and has many facets. Therefore, Jörg Menzel[11] asks; what actually is the content and how it is best achieved? He concludes that there is no catchy definition and that a negative definition is often easier to grasp; i.e., it is easier to see when the judiciary is not independent. He concludes that in its core judicial independence is a condition for a judge to decide according to the law only, without undue outside influence from the executive or legislative branches, from within the judicial system, from the parties of the case, from any powerful forces within society and even from his or her own social environment (family etc.).

7 Ibid. Heun, p.160.
8 Ibid. p. 161.
9 Ibid. p. 161.
10 For the latter see Art. 134[1].
11 Menzel, Jörg *Judicial Independence, Integrity, Administration of Courts: International and Comparative Perspectives for the Cambodian Context* (2014), (Unpublished) Background Report for the National Conference Disseminating the Three Laws Pertaining to the Judiciary, p. 11.

The application note to the Bangalore Principles[12] reflects these different aspects as they state:

> *The duty to exercise the judicial freedom independently; independence in relation to society and the parties of a dispute; freedom from inappropriate connections to the executive and legislative branches and appearance to be free insofar; independence from judicial colleagues; encouragement and upholding of safeguards for the discharge of judicial duties; keeping the high standards of judicial conduct.*

A Tricky Balance: Providing justice is a public service, which needs to be administered by the state. The necessity of administration on the one side and the boundaries of judicial independence on the other side have to be balanced. There are two basic systems on each side of the spectrum: self-administration of the judiciary and administration through the Ministry of Justice. In most countries one can find a mix between the two, and systems are characterized by whether the judiciary is more or less administered either by a self-regulating body or the Ministry of Justice. It seems fair to conclude that in most countries justice is co-administered. Exceptions to the rule are for example Italy and Japan. But the rule is that judicial independence does not include the right to self-administration of the judiciary. Jörg Menzel responds to these advocates that it would be naïve to think that a fully-fledged "self-administration" automatically provides better guarantees with respect to the adjudicating function.[13]

b.) Principles Governing the Structure of the Judiciary

The structure of the Judiciary is also determined by the Constitution. Art. 128[3] states that the judiciary shall consider all cases, including administrative cases. The CC clearly opts for courts of general jurisdiction where all types of cases are handled, similar to Common Law countries such as America or some Civil Law countries such as Japan.

General Jurisdiction: As a rule, courts shall consider all cases (civil and criminal) including administrative cases. General jurisdiction courts fall into three categories: Supreme Court (1), Appeal Court (1), and Courts of 1st Instance (25), one in each province/municipality.

Exclusive jurisdiction: There are however exceptions to the rule. The military court of 1st Instance is not part of the regular court system as well as the Extraordinary Chambers in the Courts of Cambodia (ECCC; exclusive jurisdiction).

12 Available at: http://www.unrol.org/files/publications_unodc_commentary-e[1].pdf.
13 Ibid. Menzel, p. 14.

There are several levels of jurisdiction outlined in Art. 128[4] mentioning courts of level and sector:

- **Substantive Jurisdiction:** First, jurisdiction by "sector" means substantive jurisdiction in those cases listed in Art. 128[3]. Substantive jurisdiction or "sectors" were expanded in the new Law on the Organization of Courts and include, in addition to civil, criminal, and administrative disputes, also labor and commercial disputes.
- **Instance Jurisdiction:** Second, there is the jurisdiction of level/instance indicated in Art. 128[4] stating that the Supreme Court is the apex. It follows the old Law on the Organization of Courts (1993) and the new law, which replaced the old one. Its levels include: Court of 1st Instance, Court of 2nd Instance (Appeal Court) and Court of 3rd Instance (Supreme Court).
- **Appellate Jurisdiction:** The court of the 1st instance (lower court) has original jurisdiction, meaning that it has the power to hear all cases originally – when they first go to court. The other, higher courts have appellate jurisdiction, which means they have the power to hear those cases of general and special jurisdiction, when they are appealed.
- **Territorial Jurisdiction:** The Law on the Organization of Courts and the specific Criminal and Civil Procedure Code regulate the substantive and territorial jurisdiction for each instance.
- **Administrative Jurisdiction** – at this point – is not sufficiently regulated. Administrative cases are the disputes mentioned in Art. 39 CC, such as complaints against unlawful/wrongful government actions as well as claims for respective compensation (state liability). Administrative jurisdiction is mentioned in Art. 128 CC as well as Art. 4 and 87 of the Law on the Organization of Courts. But, whereas the Law on the Organization of Courts defines the jurisdiction for civil, criminal, commercial, and labor courts, the jurisdiction of administrative court remains unregulated. The inter-provisions indicate that administrative jurisdiction will be regulated in the future. As a consequence, it is unlikely that – for the moment – administrative cases can and will be adjudicated, because processes and procedures are not place to adjudicate an administrative dispute.
- **Jurisdiction of a Specific Judge**: The jurisdiction of each judge in each individual court is determined by internal distribution plans, which in theory should be prepared in advanced and cannot be altered. The constitutional requirements for the organization of court have another constitutional claim: the claim to a lawful judge. This claim is mentioned in Art. 128[2] as well as in Art. 38[7]. Art. 128[2] states that the judiciary shall protect the rights and freedom of citizens. Art. 38[7] states that everybody shall have the right to defend him/herself through the judicial system. These provisions imply that everyone should have access to his/her lawful judge. The provisions also imply that the jurisdictions of courts have to be fixed in advance.

c.) Principles for Judicial Procedure

Constitutional provisions determine judicial procedures such as:

- Impartiality (Id. at Art. 128[2]),
- Aspects of Integrity (Id. at 129 [2]),
- Equality (Id. at Art. 31[2]),
- Procedural rights in criminal cases (Id. at Art. 38), and
- Procedural rights in administrative cases (Id. at Art. 39).

Impartiality: As with many legal terms, neither the CC nor explanatory notes define them. Due to the lack of commentaries, many legal terms referred to in this chapter are therefore defined from an international understanding/background. The following terms are, for example, defined in the Bangalore Principles (see below) and their respective application notes. For example, impartiality:

> *"Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made."*

Five application notes are added to the principle of impartiality. In particular, the judge shall fulfill his/her duty without favor, bias or prejudice (2.1) and disqualify him-/herself where impartiality is not possible or appears to be in doubt (2.5).

Aspects of Integrity: The meaning of integrity aspects in Art. 129[2] - fulfill duty wholeheartedly and consciously - is not really clear. The Bangalore Principles are not very precise either as they describe integrity as "essential to the proper discharge of the judicial office".

Equality: The Bangalore Principles state, "ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office." Five application notes are added to the principle. The main application note is the first one, "A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, color, sex, religion, national origin, case, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds")". This means in essence that everyone should be treated equal, regardless of being rich and powerful, or poor and vulnerable.

Procedural Rights in Criminal Cases: The procedural rights in criminal cases include the rights to a fair trial, in particular the "benefit of any reasonable doubt" and the right "presumed to be innocent". Id. at Art. 38.

Procedural Rights in Administrative Cases: In addition, Art. 39 guarantees judicial review of administrative action in the case of an infringement of rights by public authority. This provision is the heart and the cornerstone of judicial review of administrative action. With regard to the issue whether this right can be exercised, see above.

2. The Justice System

In 1993 the justice system was in ruins; there were only 5 judges and prosecutors. Massive changes have been reflected in the legal and institutional system and ways of thinking about what justice is and how it is to be achieved. As of 2011, Cambodia had 396 trained judges and 92 prosecutors.[14] Cambodia now has 25 Courts of 1st Instance (provincial courts), one Appeal Court, and one Supreme Court; as well as a military court and a hybrid (national/international) court (ECCC). It has a training institution for judges, prosecutors, clerks, and bailiffs as well as a Supreme Council of Magistracy (SCM). These are significant improvements compared to the Ground Zero situation 20 years ago.

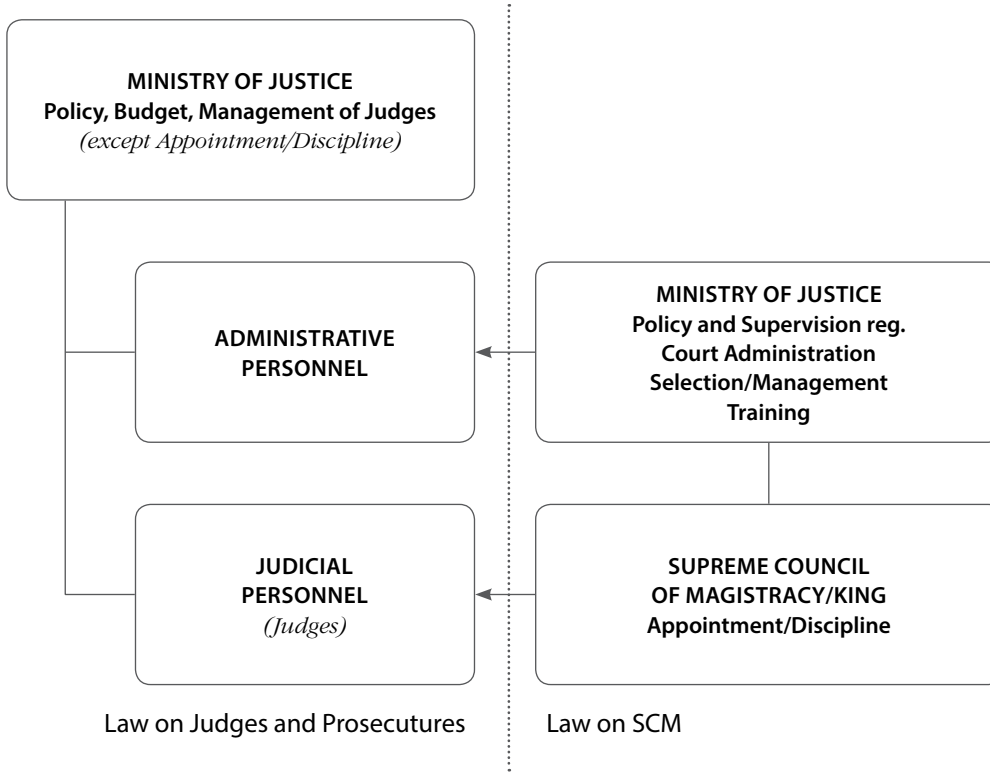
Providing justice, i.e. to resolve disputes within society, is a public service provided by the state, which involves not only the judiciary, but also the other branches of the state. The legislature passes laws pertaining to the judiciary, and approves the budget for the judiciary. The executive, primarily the Ministry of Justice (MoJ), develops policies and (in most countries) administers or co-administers the judiciary.

The King safeguards the independence of the judiciary. The Supreme Council of Magistracy (SCM) assists the King in fulfilling this duty (Art. 132 CC). The same institutional set-up can be found in France, with the only difference that France does not have a King, but a President. The SCM functions independently from the government/executive and oversees disciplinary matters involving judges and prosecutors (Art. 134 CC). It also makes requests to the King to appoint judges (ibid.). The new law on the SCM outlines the composition and function of the SCM in more detail.

The institutional governance structure provided by the CC as well as subsequent legislation is outlined in the figure below. Key player in this model is the MoJ, which is responsible for policies, implementing regulations, standards, supervision, etc. The MoJ administers the judiciary in terms of budget, and manages administrative personnel and (within limits) judicial personnel. Judges are co-administered together with the SCM.

14 Phun Vidjia *Cambodia,* in: HRRC Rule of Law Baseline Study. Citing the website of the Royal Academy for Judicial Professions.

Figure 3: Governance Structure National System Level



a.) Adjudicative Function

As seen above, the adjudicative function is the core function of judicial independence and is exercised through judges. Independence of the judiciary means primarily not to influence the process of how a judge arrives at decisions and prohibits contesting a judge's decision by means other than a formal appeal by the parties. The CC, the Law on Judges and Prosecutors, and the Law on the SCM safeguard judicial independence and protect the judge, in theory, against political interference.

b.) Administrative Function

The Ministry of Justice has the overall responsibility for administering the judicial system in Cambodia. The MoJ sets the policy framework, drafts statuary law, enacts sub-ordinate legislation, and oversees the implementation of laws and regulation, trains judges and non-judicial personnel, manages the budget, and plays a key role in appointing administrative officers, which are responsible for the administration of justice such as clerks.

The CC and the Law on the Functioning of the Ministry of Justice assign the responsibility for overseeing all aspects of administrative and organizational matters to the MoJ (except appointment of judges and disciplinary measures). Thus, the CC follows countries such as France and Germany, in which the MoJ controls the administration of the judiciary through policy, decision-making and overview. There are other, mostly Anglo-Saxon countries, which follow another model for managing the administrative function. In these models the judiciary is more self-sufficient and may have the power to determine its own budget, manage its own staff, and set its own rules. However, this governance structure is not the model outlined in the CC and subsequent laws.

3. The Court System: National and Court Level

National Court System: The court system is the organization of the judiciary/courts within a country. The basic structure as outlined in the CC was further outlined in the 1993 Law on the Organization of Courts. On a very basic level the organization includes a hierarchical relationship among courts: Courts of 1st Instance, an Appellate Court, and a Revision Court. The new Law on the Organization of Courts (2014)[15] organizes courts according to specialized areas of law such as civil and criminal courts and introduces appeal courts for each province. The following figure summarizes the different types of jurisdictions and puts them in order according to level and sector (see above).

15 This Chapter refers and cites the Law Compilation/Translation of the Three Laws Pertaining to the Judiciary including the Law on the Organization of Courts, the Law on Status of Judges and Prosecutors, and the Law on the Organization and Functioning of the SCM (2014) published by the Ministry of Justice and CIM.

Figure 4: Organization of Courts [16]

3	**Supreme Court (1)** *Court of Final Appeal in general, special, exclusive jurisdiction*	
2	**Court of Appeal (1)** *Court of Appeal of general jurisdiction, special, and exclusive jurisdiction courts*	
1	**Court of 1st Instance (23)** *(General jurisdiction)*	**Military Court** *(Exclusive jurisdiction)*

Court Level System: The court level system regulates the functioning of each court. Currently a judge supported by a clerk executes both functions of a court, administrative and adjudicative. The organizational set-up of a Court of 1st Instance in the figure below repeats itself on higher-level courts. This model is the current system in Cambodia. The traditional court manager is a chief judge who directs the daily operations of the court in addition to judging. These tasks include creating the roster of judges, allocating cases, and overseeing all staff and their functions. However, as courts grow in size and complexity, the burden on judges administering courts often results in organizational mismanagement and misuse of judicial talent and time. The imperfection of this traditional arrangement was the starting point for the reform process, and the introduction of the new law on the Organization of Courts (see below). By freeing the judge from administrative micromanagement and replacing clerks from a "judicial housekeeping function" the new law hopes to enhance the efficiency of courts.

Figure 5: Court Organization 1st Instance (current/pre-reform)

	President/Chief Clerk	
Judge/Clerk	Administrative Staff	Judge/Clerk

The post-reform model will be outlined in Section Three.

16 To keep it simple, the figure does not include the ECCC, which is a hybrid court system, with an even more complex jurisdictional set-up.

II. International Comparison

Many of the constitutional principles governing the judiciary are reflected in international law and international standards as well as national constitutions.

1. International Law and Standards

International Law: The most important law principle, the independence of the judiciary, is stated in the Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14).

Other international treaties, such as the Child Rights Convention (Art. 37), refer and depend on the prerequisite of an independent court.

The ASEAN Declaration of Human Rights, which Cambodia adopted, states that every person should be tried by independent and impartial tribunals (Art. 20[1] ASEAN Declaration of Human Rights).

Other areas of international law, such as the fight against corruption, stress the importance of the independence of the judiciary, such as UNCAC, Art. 11.

International Standards: In addition, there are international standards, developed by various bodies for the global or regional level, which for their part define and outline judicial independence. Jörg Menzel states, "it would fill pages to only list all the documents and declarations which have been produced. They mostly cover a very similar list of topics and they all are not binding international treaties."[17]

It is not the intention to fill the pages of this chapter with these references, but more to highlight the international importance of an independent judiciary as well as to point out that the CC as well as various policy documents and the most recent legal reform acknowledge and recognize the importance and incorporate independence in the legal and judicial framework. Whether beyond a "de-jure" also a "de-facto" compliance has been achieved will be discussed later.

Bangalore Principles: One important international standard should be mentioned; the Bangalore Principles of Good Judicial Conduct. They not only include independence, but also other judicial principles enshrined in the Cambodian Constitution (see above). The set of principles as well as their implementation measures contain information on how to interpret and provide a first step in understanding these principles.

The Bangalore Principles of Judicial Conduct (2002) promote six judicial core principles: (i) independence, (ii) impartiality, (iii) integrity, (iv) propriety, (v) equality, (vi) competence and diligence.

17 Ibid. Menzel, p. 5.

In addition, "Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct" were adopted. The document formulates (i) responsibilities for the judiciary[18] and (ii) responsibilities for the state[19]. Some of these responsibilities are either reflected in code of conducts and/or the laws on judges.

2. German Case Study

A direct comparison with Germany is only of limited use, because of its complexity, decentralization, and specialization of the judiciary. Germany is characterized by its extremely differentiated court system.[20] The German system is divided in three different types of courts: the Constitutional Court, federal courts, and the courts of the German States. In addition, Germany has five different judicial branches (civil, criminal, social, fiscal, and administrative), all headed by different federal courts. Furthermore, there are special courts for certain fields of law such as industrial property rights or disciplinary measures. In comparison, the Cambodian system is fairly simple. It has no Constitutional Court, no federal court, and only one general jurisdiction. However, a comparison with Germany is in so far interesting, as it illustrates that the German Constitution reflects the same judicial principles as the Cambodian Constitution.

a.) Some Constitutional Principles and a Comparative View

The German Basic Law[21], enacted after the total defeat in World War II and the experience of genocidal dictatorship, has become a model for other constitutions worldwide. In so far Cambodia shares a similar historic fate and its Constitution can be seen as a mechanism to prevent dictatorship and crimes against humanity. Because of the similar historic background, both constitutions share structural principles such as the rule of law, fundamental rights, and democracy as well as principles governing the judiciary.

Separation of Power Principle: The separation of power principle is outlined in Art. 20[2] Basic Law (BL) and enforced by Art. 92 BL, which states that the judicial power is vested in judges. This understanding goes back to Montesquieu and raises the question, what the judicial power or the power to adjudicate is. To answer the question, we can refer back to Section 1.1 of this chapter. In Germany, "judicial" powers are in parts exercised by the

18 Responsibilities of the Judiciary: Formulation of a Statement of Principles of Judicial Conduct. Application and Enforcement of Principles of Judicial Conduct. Assignment of Cases. Court Administration. Access to Justice. Transparency in the Exercise of Judicial Office. Judicial Training. Advisory Opinions. Immunity of Judges.

19 Responsibilities of the State: Constitutional Guarantee of Judicial Independence. Qualifications for Judicial Office. Appointment of Judges. Tenure of Judges. Remuneration of Judges. Discipline of Judges. Removal of Judges from Office. Budget of the Judiciary.

20 Foster, Nigel/Sule, Satish *Legal System and Laws* (2011), 4th edition, Oxford, p. 80.

21 Basic Law is the German Constitution. The name reflects the particularities of the post-war division in western and an eastern part.

administration in handling civil or administrative offences, such as traffic violations. This is justified because it unburdens the judiciary and because they are not criminal offences. Otherwise, no legislative and administrative power can exercise judicial functions. The separation of power principle requires sufficient protection from the other branches. The BL protects judges in their personal and substantive independence (see above). The salary of judges must adequate to ensure an appropriate standard of living and may not be left to executive discretion or manipulation. This follows among others from the principle of judicial independence. In Germany judges recently have complained that they are underpaid[22], receiving only 12 Euro/hour (net). In May 2015 the German Constitutional Court has indeed decided that the salary of some judges were inappropriate. As in most constitutions, it is understood that judicial independence does not mean total freedom. As independence must be balanced with matters of organization and administration, independence must also be balanced with the principle of democratic legitimation or in other words with accountability. Only Constitutional Court judges are elected; half by the Bundestag (Parliament) and half by the Bundesrat (legislative body representing the German States). A Committee of Judges and the Minister of Justice elect the judges of the five supreme courts. However, the majority of judges are selected, appointed and employed by justice ministries of the German States. The selection and appointment process is only one part of the administrative function. In addition, the Justice Ministries of the German States are responsible for managing all other technical and managerial aspects e.g. the career of a judge such as appointment, transfer, retirement, policy development, and budget.

In comparison, the German system appears to be much more dependent on the executive as for example Cambodia, or other countries, which have a self-governing body such as the Supreme Council of Magistracy. And, if one applied the Bangalore Principles, Germany would most likely receive a low ranking. On the other hand, it would be superficial to think that "self-administration" or "co-administration" actually guaranteed judicial independence. A more independent system, where the judiciary (in parts or completely) administers itself, appears to provide less opportunities to influence a judge's decision. However, self-administration can be political, too. Whatever the system-choice is, the truth will be the practice or what is called "de-facto independence"[23]. Whatever system, the core concept of judicial independence must be accepted and respected by the decision makers within the state.

Self-Perception of Judges: The perception of independence and asserting independence is another important aspect, particularly in Germany, where the ministries of justice exercise the administrative function of the judiciary. In this sense, independence of the judge is

22 Janisch, Wolfgang *Weniger als das Gesetz erlaubt* (2014), Süddeutsche Zeitung, 3.12.2014, http://www.sueddeutsche.de/politik/richterbezuege-weniger-als-das-gesetz-erlaubt-1.2250549.

23 This term was first introduced by Hayo, Bernd and Voigt, Stefan, *Explaining Constitutional Change: The Case of Judicial Independence* (2007), Joint Discussion Paper, Series in Economics by the Universities of Aachen, Gießen, Göttingen, Kassel, Marburg, and Siegen.

an obligation of the judge him-/herself that he/she shall not subject him-/herself to pressure due to inappropriate behavior and external influence.[24] This relates to the question how a judge sees his/her role as being part of the administration and providing public services as well as being an independent part. How can a judge withstand attempts to be manipulated? What defines his professional pride and integrity? This self-perception of a German judge is an important element, which developed over centuries and allowed the judge develop an own sense of autonomy and which is also secured by the strict application of the Law on Judges.

Claim to Lawful Judge: Art. 101[1] BL grants the individual the right that no one may be removed from the jurisdiction of his/her judge. The claim of a lawful judge is interpreted as a central norm for the impartiality and objectivity of the courts. On a more general level, this means that the jurisdiction as well as procedures for processing a case within this jurisdiction have to be established, so that everyone is de facto able to submit a claim to his/her lawful judge.

There should generally be no discretion for any administrative body (be it the Ministry, the President of a court or a court manager) to freely decide on the allocation of cases to judges in deviation of such work distribution plans.[25] The allocation of cases should not provide an opportunity for influencing the decision in a case by allocating it to a specific judge for inappropriate reasons. The same principle is also reflected in the Cambodian Constitution. Id. at Art. 128[3]. However, other than in Germany, Cambodian citizens have no institutional as well as procedural way to complain against administrative measures. Id. at Art. 39. Another aspect which is embedded in the claim to a lawful judge is that everyone has the right to a competent judge in advance.[26] In Germany, this means that the jurisdiction of each individual judge within a court is determined by internal business distribution plans, which have to be prepared in advance and may only in rare cases be altered once they have been established. A special self-governing body within each court prepares the plan in advance for one calendar year. The plan is published and can be consulted by every citizen. In comparison to Cambodia, this principle is strictly observed.

Judges and Government Spending: Judges in Germany are career judges, which are appointed after they completed their university studies (ca. 5 years) and a two-year internship. In contrast to many Common Law countries they are not elected and enter the courts directly after their two-year internship in their late twenties/early thirties. The total number of judges is high, 20.382 judges in 2012.[27] This accounts for approximately 20 judges per 100.000 inhabitants in Germany; one of highest number/capita in the world. In comparison, Cambodia only employs 2.5 judges per 100.000 inhabitants. This is also reflected in

24 Ibid. Menzel, p. 2.
25 Ibid. Heun, p.164.
26 Ibid. Heun, p.164.
27 Statistisches Bundesamt, Gerichte und Personal (2015).

the judicial system expenditure (as percentage of GDP). In 2004, Germany spent 0.3 % of its GDP on its judicial system.[28] In 2012, Cambodia only spent 0.0008 % of its GDP on its judicial system.[29] As these are not absolute numbers, these findings do not suggest that Germany is a "rich" country, rather, they suggest a matter of priority.

III. Implication for Reform

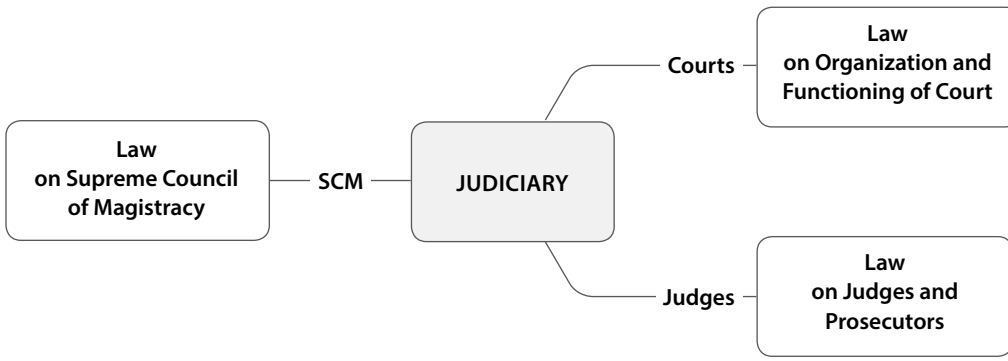
Legal and judicial institutions ultimately promote economic development and safeguard human rights. The CC, the revised Rectangular Strategy (Phase III), the updated National Strategic Development Plan (2014-2018) and Cambodia's international commitment including the ASEAN integration process reflect this underlying assumption.

The reform process is outlined in the Legal and Judicial Reform Strategy/Plan of Action and includes among other priority actions[30] the development of the following three laws:

Law on the Amendments to the 1994 Law on the Organization of Supreme Council of Magistracy,

- Law on the Status of Judges and Prosecutors, and
- Law on the Organization of the Courts.

Figure 6: New Legal Framework Governing the Judiciary



28 Netherlands Council for the Judiciary, Benchmarking in an International Perspective: An International Comparison of Mechanism and Performance of the Judiciary System (2004).

29 According to the Budget Law Data Base 2000_2013_updated_130622, published by the NGO Forum on Cambodia, www.cambodianbudget.org/budget_database.php, the Ministry of Justice spent 11,078,000 USD. In the same year Cambodia's GDP was around 14 Billion USD.

30 Council for Legal and Judicial Reform *Plan of Action* (adopted by the Council of Ministers in 2005) and *Legal and Judicial Reform Strategy* (adopted by the Council of Ministers in 2003); both documents published in 2007.

The three laws finally came into effect on July 16th 2014. Now, for the first time, Cambodia has a comprehensive legal framework governing the judiciary. Because the above-mentioned laws are (only) framework laws, they cannot be applied directly. Until then, a number of implementing regulations are necessary to outline technical details and processes. Once the implementation process is completed, the judiciary in Cambodia will be very different from the judiciary we know.

1. The Road Towards Juridification

Policy Framework: The 1993 Constitution (CC) provides the blueprint for rebuilding legal and judicial systems in Cambodia and introduces guiding principles for legal and judicial reform, such as the respect for law (Preamble of the CC), the separation of powers (Art. 51 III of the CC), the introduction of a comprehensive administrative law system (Art. 39 of the CC) or the establishment of an independent judiciary (Chapter XI of the CC). A number of policy documents, such as the Rectangular Strategy, the National Strategic Development Plan, and the Legal and Judicial Reform Strategy operationalize these principles. In 2013/'14 these documents were updated. The revised Rectangular Strategy (Phase III) confirms reform areas, such as the Legal and Judicial Reform, within the core of its Good Governance approach. The National Strategic Development Plan (2014-2018) (NSDP) provides a five-year work plan for the newly elected Cambodian government to achieve these objectives. The NSDP, for example, includes for the Legal and Judicial Reform the following activities: the enhancement of litigation solutions, institution management, and legal knowledge. In theory, the NSDP should reflect sector strategies such as the Judicial Reform Strategy (2003) and its corresponding Action Plan (2005-2009).

The Road Towards Juridification: Until the year 2014, Cambodia had no comprehensive statuary framework for the judiciary[31], but was governed mostly through government regulations and informal practices. Thus, Basil Fernando wrote in 1998: "The influence of the Ministry is often exercised through circulars, which have the effect of law".[32] The Cambodian Constitution (CC) as well as the functional assignment outlined in the Law on the MoJ authorize the MoJ to administer the judiciary (with some exceptions), and in practice allowed the MoJ to control it. The MoJ has done so through (mostly unpublished) implementing regulations, as well as through unofficial rules and practices/customs. This practice has been justified on the basis of the lack of statuary law. Consequently, the MoJ controlled the judiciary as it not only administered the operation of courts, but also exercised power over the education, the selection, and the career of judges as well as non-judicial personnel. As the 1994 Law on the Supreme Council of Magistracy was not applied, the SCM was ineffective, sidelining constitutional requirements. Due to the

31 Except for the Law on the Organization of Courts (1993), which was revised and replaced by the new Law on Court Administration.

32 Basil, Fernando *Problems facing the Cambodian Legal System* (1998).

lack of an effective legal and institutional framework, oversight, standards, management of human and financial resources as well as court organization and management were exercised rather on an ad-hoc basis. Besides their adjudicative function, judges (with the support of clerks) also had to fulfill administrative functions, which led to backlogs of cases and delay of justice.

Basil Fernando's statement was true until the year 2014. The three laws pertaining to the judiciary address the above-mentioned concerns. Their main advantage is that they will regulate an area, which was previously unregulated. This alone will create more transparency as well as accountability. Through these laws, the MoJ will lose some of its powers created by the current ambiguity as the three laws will shine more light on a previous blind spot. Informal practices and customs must be adapted to the new legal framework. This will provide more opportunities for internal and external scrutiny.

The new laws also address long-time concerns introducing oversight, standards, management of human and financial resources as well as a fundamental overhaul of court organization and management. For example, the new Law on Court Organization calls for an administrative office within the court set-up. The administrative office provides a centralized service and supports judicial personnel as well as the prosecution. The shift from the existing model, where the judge is the sole court administrator to a professional court management by non-judicial personnel, is a significant change. The administrative function within the courts could have a positive impact on case management, thus reducing backlogs and improving the access to justice. Finally, the Law on the Organization of Courts introduces a special jurisdiction on labor and commercial disputes.

2. Adapting the Judiciary to the New Legal Framework

Adapting the current system to the new legal framework will be a herculean task, in terms of providing personal and financial resources as well as infrastructure and developing and applying necessary skills and systems. Change will not come overnight and the existing system will only gradually be replaced. The Law on the Organization of Courts will have the biggest impact in terms of access to justice and overall performance. Compared to that, the other two laws have only a small effect on the overall governance structure. Public interest however, was high as they address and regulate the independence of the judiciary. Considering the overall impact, this section will focus on the Law on the Organization of Courts and what needs to be done to adapt it to the new legal framework.

The Law on the Organization and Functioning of Courts regulates court administration and management. Court administration and management are often regarded as factors for achieving a certain standard in the quality of justice and deals with how a case/dispute is being processed. Those who are seeking to organize the administration of justice and the management of courts come up against the principle of the independence

of the judiciary. The Law has to work as a mechanism for improving the quality of justice by regulating judicial administration and management, while establishing safeguards to protect the independence of the judiciary.

Scope of the Law: The scope of the Law includes: (i) the organization of the national court system defining the jurisdiction for each court, (ii) the organization and functioning of the prosecution (iii) the organization and functioning of Courts of the 1st Instance (general jurisdiction courts and special jurisdiction courts), Court of Appeal, and Supreme Court, (iv) the incompatibility of judges, (v) budget allocation, and (vi) inter-provisions.

Court Organization: Court Organization includes two organizational aspects, the

- structure of the court system as a whole (national level administration) according to "specialization" and "level"; and the
- organization of the court itself (court level administration), which outlines "Who" does "What" when a case is processed from the beginning to the end.

The national level court organization was already outlined above. The two major changes are: the introduction of provincial appeal courts as well as specialized courts for commercial and labor disputes.

The new law also regulates the functioning of each court. The underlying purpose is to provide a system, which defines "Who" does "What" in processing a case from the beginning to the end. The generic term is court organization, which includes the two functions of a court: a) adjudicative function and b) administrative function. The new system outlined in the law strictly separates these two functions.

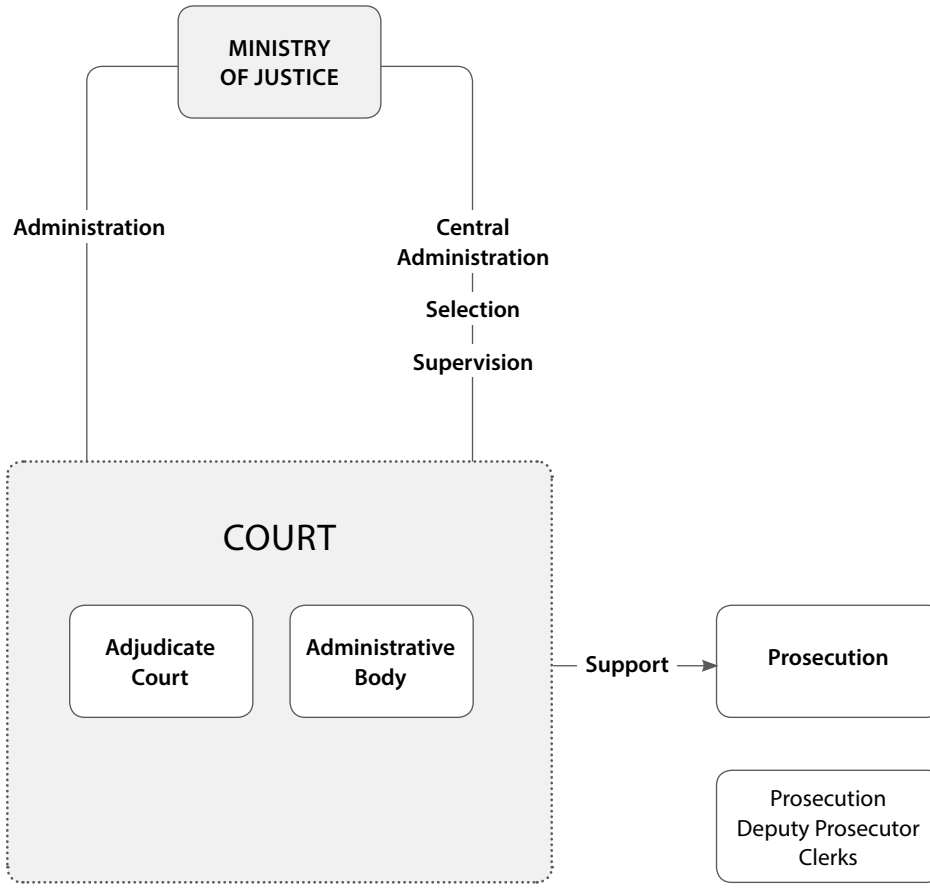
New Court Level Organization: An administrative unit will be responsible for all administrative matters, including case management. The administrative body is under the direct control of the MoJ, which provides the legal framework for court administration as well as standards. The MoJ recently established a new Department for Court Administration, which is responsible for court administration such as policy development, training, appointment, and supervision of administrative personnel.

The new administrative body supports both the court as well as the prosecution. This means that judges will only be responsible for resolving disputes (adjudicative function). Clerks will support the judges. The court president is primarily responsible for the adjudicative function of the court and has limited supervisory powers over the administrative function of the court.

The most significant change will be that judges/clerks will have no or very limited influence on the administrative matters of the court, whereas previously they were responsible for both adjudicative as well as administrative matters.

The figure below illustrates the new organizational set-up. The change is quite obvious if compared to figure 5. Whereas under the previous system, the judge was primarily responsible for the administrative and the adjudicative function, the new law assigns the administrative function to administrative and legal officers. It is planned to staff each court with additional 15 administrative officers to handle this new task.

Figure 7: New Court Level Organization



IV. Summary

The international comparison of this chapter illustrated that constitutional principles governing the judiciary reflect international law, international standards and share similar principles of other modern constitutions, such as the German Basic Law. These principles must be put to action through legal and institutional frameworks. The three new laws governing the judiciary are a huge step in this direction. At the moment, it seems fair to conclude that Cambodia, for the first time, has a comprehensive legal framework governing the judiciary.

One would think that this fact alone would lead to positive reviews and an overall favorable assessment. However, the opposite is the case. The judiciary has a negative image. The recent National Integrity Assessment 2014 published by Transparency International concludes that the judiciary and the law enforcement agencies emerge as the two weakest pillars.33

So why is there a gap between public perception and the principles and systems outlined in the CC and the new legal framework? The answer is that truth will always be revealed in practice. A modern constitution and an advanced legal framework will always be cosmetics, if decision makers or key players in the judiciary agree not to apply rules or to circumvent them. In many countries, there is a gap between what the constitution says and what is actually done. It is substance that matters (and not cosmetics). Two terms, introduced by Bernd Hayo and Stefan Voigt, summarize this concern. They differentiated between "de-jure" and "de-facto" independence of the judiciary and conclude that de-jure independence did not yield development gains.34

Substance, or commitment, is also expressed by how much a government invests in the judiciary. 0.0003 % of the GDP is clearly not enough to express commitment in the sector. The overall low remuneration of judges is one aspect of low commitment and often stated as a reason for the perceived corruption in the sector. From a constitutional point, particularly with regards to personal independence, a judge should be remunerated in a way that should not interfere with his/her decision making.

Other critique, however, was overblown and biased. A good example provides the public reaction after the adoption of the "three laws". Instead of heralding the "three laws" as an important first step towards juridification, reaction was overwhelmingly negative, claiming that independence of the judiciary was under attack. The perception was based on the (misguided) view that the judiciary should be self-administered and that the MoJ should not be involved in the administration of justice. This critique ignored the fact that

33 Transparency International Cambodia, C*orruption and Cambodia's Governance System, The Need for Reform* (2014).

34 Ibid, Hayo and Voigt, p. 2.

the CC actually assigns the MoJ a significant role administering the justice system (except appointment and disciplining). The CC follows a middle path, which for simplicity was called co-administration and not self-administration.

The other point of critique was that the Cambodian government did not include stakeholders in the legal drafting process. This critique created a wrong impression, because it suggested that stakeholder participation is mandatory. In Cambodia neither the Constitution nor statutes require the government to involve stakeholders in drafting legislation. Only best practices suggest that technical feedback from experts improve the quality of legislation. From this point of view, additional technical expertise could have improved the overall quality of the three laws, but it was by no means a mandatory requirement.

Laws are not perfect and often work in progress. They need to be discussed, revisited, amended, re-evaluated, and adapted to developments within society. Thus, there always will be imperfections. Some of these imperfections were mentioned and are briefly summarized:

- **Concerns Regarding Composition of the Supreme Council of Magistracy:** There seems to be a widespread perception that the ruling party dominates the judiciary and the Supreme Council of Magistracy. As mentioned above, political appointment of judges can be found in many modern constitutions and in this case, the independence of the judiciary needs to be balanced against the democracy principle. However, the core of judicial independence should never be affected, meaning that political appointment shall be the exception and not the rule. However, where appointments are not based on political appointment, but based on objective criteria, the process should be unbiased and also reflect different forces of society. This ideal was clearly envisaged by the Law on Supreme Council of Magistracy, which outlines a system for the composition of the SCM. The SCM represents members from the judiciary, executive, and the legislative. It seems that only one member from the NA as well as the Senate is represented in the SCM. This cannot be enough to represent the opposition forces as well. Thus, an increase of the number of members of the NA as well as the Senate could be considered.
- **Concerns Regarding the Principle of a Legal Judge:** Sometimes the problem is not what is regulated in a law, but what is not regulated. The Law on the Organization and Functioning of Courts does not regulate the judicial processes in administrative (public) matters. The CC, on the other hand, requires that every Khmer citizen has the right to settle his/her claim against government actions in court. Id. at Art. 39. This requires a procedure, which allows for an independent judicial review of administrative actions, including a standardized complaint mechanism as well as an administrative court.[35] Art. 87 of the Law on the Organization of Courts generally defines the jurisdiction in administrative matters and assigns jurisdiction in these matters to the Civil Court.

35 Hauerstein, Kai/Menzel, Jörg (Eds.) *The Development of Cambodian Administrative Law* (2014), p. 53.

> This general reference does not comply with the principle of a legal judge as for civil and criminal cases specific litigation procedures are required. For administrative cases an Administrative Litigation Procedure Code should be prepared. As for the other "specialized" courts, specific competence to process and adjudicate an administrative case is required. These very basic requirements for adjudicating an administrative case have not yet been developed. As a metaphor the Law on the Organization of Courts only provides an address for a house without having built the house. If this should not remain a farce, a "house" should be built to accommodate the requirement of a legal judge in administrative matters.

In sum, however, the benefits of the new legal and institutional framework will outweigh the imperfections. Latter should be addressed, and the significant developments and opportunities embraced.

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ADMINISTRATION: THE CONSTITUTION AS A GUIDING FRAMEWORK FOR ADMINISTRATIVE LAW

THENG Chan-Sangvar

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ADMINISTRATION: THE CONSTITUTION AS A GUIDING FRAMEWORK FOR ADMINISTRATIVE LAW

THENG Chan-Sangvar *

ABSTRACT

Over the past twenty years, administrative law has become, in many countries, one of the most active, far-reaching areas of law, affecting the rights of individuals, the public as a whole and businesses, vis-à-vis the government, the administrative bureaucracy and an array of official and semi-official agencies. Administrative law is also at the cutting edge of the defense of democratic rights against the state. It can also play an important role in protecting basic rights and entitlements against encroachment by the government. As in other countries, the Cambodian Constitution contains only principles, not particular rules. The fundamental text does not resolve all questions necessary for governance. Other sources and development of constitutional principles are necessary to provide for the effective organization and functioning of state administration.

I. Overview

Constitutional laws are often considered to be second order rule-making or rules for making rules for the exercise of power. A Constitution governs the relationships between the judiciary, the legislature and the executive as well as subordinate bodies under their authority. One of the key tasks of a Constitution within this context is to indicate the structures and relationships of power. For example, in a unitary state, the Constitution will vest ultimate authority in one central administration, legislature and judiciary, though there is usually a delegation of power or authority to local or municipal authorities. As part of the civil law tradition, Cambodian constitutional law has been evolving since the adoption of the current Constitution on 24 September 1993.[1]

Administrative law, on the other hand, centers on challenging official power. It is concerned with defining the powers of the state as well as protecting or limiting the rights and liberties of citizens. It allows citizens to challenge a government or official agency

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1 The Constitution has been amended eight times since 1993.

regarding whether it has the legal authority to do what it has purported to do. State decision-making needs to be overseen by a critical eye, but it has been difficult to equip and encourage the Cambodian people to play this important role.

Administrative law is primarily an area of public law that regulates the relationship between the citizen and the state. Interpreting and applying administrative law, however, is concerned with more than ensuring that an administrative body acts within the law. It involves understanding the way governments operate, the nature of administrative power and process, the function of those who work in government and the practices, procedures, manuals, guidelines and other internal policies or rules, which may influence the way government officials behave. It also requires a keen sensitivity to the various impacts that commercial, economic and political pressures have on governments, administrators, tribunals and courts. As the fundamental law of a nation, a Constitution helps lay the foundation for all of these crucial issues.

Over the past twenty years, administrative law has become, in many countries, one of the most active, far-reaching areas of law, affecting the rights of individuals, the public as a whole and businesses, vis-à-vis the government, the administrative bureaucracy and an array of official and semi-official agencies. Administrative law is also at the cutting edge of the defense of democratic rights against the state. It can also play an important role in protecting basic rights and entitlements against encroachment by the government. As in other countries, the Cambodian Constitution contains only principles, not particular rules. The fundamental text does not resolve all questions necessary for governance. Other sources and development of constitutional principles are necessary to provide for the effective organization and functioning of state administration.

II. The Constitution: Foundation of Administrative Law

The Constitution of 1993 was promulgated after a democratic election organized by the United Nations, which took place after two decades of civil war in Cambodia. The main purpose of this supreme law is not merely to establish a political regime to govern the Kingdom, but to reorganize the country's administration, formerly organized under a communist state. This is one reason for why the text of the Constitution contains many principles, which are the crucial foundation for a modern and democratic administration. In addition to the reorganization of state administration, two crucial aims of the 1993 Constitution are the reestablishment of a democratic state and the rule of law in Cambodia. One of the critical components necessary to reach those aims is the principle of judicial review, which was absent for decades in Cambodia.

1. Foundation of Administration

a.) The Functioning of State Administration

The Constitution sets forth at least three levels of guiding principles for the administration of the nation. First, it determines the principles governing the *general functioning of the administration*. This is the principle of legality, which is found in various articles of the fundamental law.[2] For example, Article 39 of the Constitution stipulates that *"Khmer citizens shall have the right to denounce, make complaints or file claims against any breach of the law by state and social organs or by members of such organs committed during the course of their duties [...]"*. This means that the state administration is bound to act legally or with legality, i.e., its actions should possess the quality or state of being in accordance with the law.

Secondly, the Constitution determines the most important principle governing the *relationship between the state administration and the people*. Those principles tend essentially toward the protection of human and individual rights, such as the right to life, liberty and security of person[3] as well as prohibitions against the deprivation of nationality, exile, arrest and extradition,[4] the right to enjoy social security,[5] the right to strike or organize peaceful demonstrations,[6] the freedom to travel,[7] the freedom of expression,[8] the rights to create associations,[9] the freedom of religion[10] and rights to private ownership.[11] These principles are the limit of the policing power of all administrative authorities.

Last but not least, the Constitution imposes positive duties not just on individuals, but on the state as well.[12] Those positive duties and rights tend essentially toward protecting and promoting women, children and disabled persons:[13] safeguarding legality, public order and security;[14] giving priority to the improvement of the living conditions and welfare of citizens[15] and securing their suitable living standards;[16] preserving and protecting the

2 Beside this principle, additional principles also govern the Cambodian administration: Khmer is the official language (Article 5); Buddhism is the state's religion (Article 43, §3); and the principle of equality before the law (Article 31, §2).
3 Article 32.
4 Article 33.
5 Article 36, §4.
6 Article 37.
7 Article 40.
8 Article 41.
9 Article 42.
10 Article 43, §1.
11 Article 44.
12 These positive duties and rights of the state are believed to be legacy concepts from the socialist people's democracy period in Cambodia (1979 to 1993), when economic, social and cultural rights were guaranteed through the positive actions and collective rights of the state.
13 Articles 46, 48 and 74.
14 Article 52.
15 Article 52.
16 Article 63.

natural environment;[17] promoting economic development;[18] protecting prices and products for farmers and handicrafts makers and finding markets for their products;[19] protecting and promoting the quality of education;[20] and establishing a social security system.[21]

These state duties make Cambodia a constitutional *welfare state* in which the government is obliged to undertake primary responsibility for providing social and economic security to its population, usually through unemployment insurance, old-age pensions, and other social-security measures. In order to achieve these tasks imposed by the fundamental law, at least two constitutional methods are available. First, the discretion granted by the constituent to the legislator in Cambodia is considerable. To implement those obligations, statutes may be adopted to accomplish constitutional goals in each field of action. Secondly, the Constitution provides the government with a wealth of material resources to fulfill its mission.[22]

b.) The Powers of the State Administration and the Relationships Among its Authorities

Article 51, §3 of the Constitution states that government powers must be divided into the legislative power, the executive power and the judicial power. To explain this *principle of separation of powers*, the Constitution provides four consecutive chapters outlining the structures of the legislative power,[23] the executive power[24] and the judicial power.[25] This principle is also reinforced by a provision that prohibits the imposition of any kind of imperative mandate upon the National Assembly,[26] which nullifies any mandate imposed upon the National Assembly and the Senate, which is incompatible with the exercise of any public function of the legislature or the constitutional functions of other state institutions[27] as well as any mandate that interferes with the independence of the judicial power.[28] By these provisions, the Constitution proclaims the principles of popular sovereignty, a representative democratic government and a separation of powers within the system of a parliamentary government.[29]

17 Article 59.
18 Article 61.
19 Article 62.
20 Articles 65, 67 and 68.
21 Article 75.
22 For instance, Article 58, §1 stipulates that: "*State property notably comprises land, mineral resources, mountains, sea, underwater, continental shelf, coastline, airspace, islands, rivers, canals, streams, lakes, forests, natural resources, economic and cultural centers, bases for national defense and other facilities determined as State property.*"
23 Chapter VII and Chapter VIII (new).
24 Chapter X (new).
25 Chapter XI (new).
26 Article 77, §2.
27 Articles 79 and 103 (new). There is only one exception: National Assembly members are allowed to exercise their powers in the Council of Ministers.
28 Article 128 (new), §1.
29 Article 51.

Though the Constitution vests executive power in the Council of Ministers, it provides a clear division according to which the legislative power is the sole province of the Parliament, i. e., the National Assembly and the Senate.[30] Prior to the Amendment of 1999, Article 90 was even more precise: *"The National Assembly shall be the only organ to hold legislative power. This power shall not be transferable to any other organ or any individual."*[31] Unlike with legal systems in some countries, the executive power has no authority to issue an *autonomous* regulation, i. e., all regulations must be issued by authorities under the delegation of the legislative power.[32]

The Council of Ministers (or the Royal Government of Cambodia) is made up of the Prime Minister, who is assisted by Deputy Prime Ministers, Senior Ministers, Ministers and Secretaries of State.[33] The Council of Ministers determines the structure of some of its regulatory power, but not all. In other words, the Council has some discretion over how it is organized and operates, but most of these aspects of the Council are governed the laws and the Constitution. Indeed, the fundamental law calls for the promulgation of an organic law in order to determine the organization and the functioning of the Council of Ministers.[34] However, the Constitution directly enumerates only the rules governing the delegation of powers from the Prime Minister to the Deputy Prime Minister(s) or other members of the Royal Government[35] and the rule regarding the Prime Minister's temporary vacancy.[36]

The Constitution seems to be more precise regarding the regulatory power of the King. As the Head of State, for instance, the King has the authority to sign proposals by the Council of Ministers, decrees appointing, transferring or terminating the office of high civil and military officials, Ambassadors and Envoys Extraordinary and Plenipotentiary.[37] When the nation faces danger, the King, with the agreement of the Prime Minister, the President of the National Assembly and the President of the Senate, may also make a proclamation to the people that declares the existence of a state of emergency in the country.[38] The King, upon a proposal by the Council of Ministers, may also create and confer national medals, civil and military ranks.[39]

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30 Articles 90 (new) and 99 (new).

31 The Constitutional Law (8th March 1999) eliminated the last sentence of former Article 90, thereby allowing the legislative power to be transferred to other government institutions or officials.

32 This is the reason why the Royal Government always makes reference at least to a statute law when issuing a regulation. In other words, a written regulation, which has no reference to a statute law, will be deemed null.

33 Article 118.

34 Article 127 (new) and the Law on the Organization and Functioning of the Council of Ministers (20 July 1994).

35 Article 123 (new), §2 (to delegate the chairmanship of working sessions to a Deputy Prime Minister) and Article 124 (new) (to delegate powers to a member of the Royal Government).

36 In this case, a Prime Minister *ad interim* may be provisionally appointed (Article 125 (new)).

37 Article 21.

38 Article 22.

39 Article 29.

2. Judicial Review of Administrative Acts

a.) The Concept of Administrative Litigation

A major purpose of the Constitution is to ensure the establishment of a Cambodian state based on the principle of the rule of law. Although this principle is not explicitly expressed, the fundamental law contains many of the basic components for creating a limited government under the rule of law, such as the principle of constitutional supremacy within a system of judicial review,[40] the principle of equality before the law,[41] the principle of constitutional restraints on legislative power,[42] the obligation of the people to respect the Constitution and laws,[43] the principle of separation of powers[44] and the principle of judicial independence and impartiality.[45]

Article 128 (new) §3 states that the judicial power "*covers all litigations, including administrative ones*". Article 128 (new) §4 adds that *"this power is entrusted to the Supreme Court and to the Jurisdictions of the various categories and at all the degrees".* According to these provisions, private as well as administrative litigation will be conducted in the "ordinary courts", that is, the provincial/municipal courts, the Appeal Court, and the Supreme Court. There is therefore no dual court system as was used in the past in Cambodia.[46]

40 Articles 136, 142 and 150.
41 Article 31, §3.
42 Articles 17, 91, 92, 152 and 153.
43 Article 49.
44 Article 51.
45 Article 128.
46 Under the Cambodia-France Treaty of 1863, the French protectorate conducted a series of legal reforms. Included in these reforms was the creation, by the French administration, of a dual judicial system with judicial courts that were separate from administrative courts. After Cambodia gained independence, the dual court system was maintained for a while before being abolished in 1968. This dual court system reappeared in 1993 in a different form.
After gaining independence, Cambodia retained the existing French court system with some minor changes. The Administrative Courts dealt "*with any conflict related with the rights and obligations of the civil servant; with the administrative decision which obliges the debtor of the public person having Cambodian nationality; and with the prejudice caused by the administrative activities*" (Royal Act No. 399NS (09 January 1948) and Royal Act No. 825NS (26 October 1953)). In Phnom Penh, the *Kromviveat* was the Administrative Court of first instance, consisting of a judge as the president and two administrative officials as assistants. A royal attorney played the role of the public prosecutor. In 1933, an appeal against the Administrative Courts' decision was appealed to the Council of Ministers (the government). In 1948, this appellate function was transferred to a special section of the Council of the Kingdom, equivalent to today's Senate. In 1953, the Administrative Court of Appeal was created. The president of this court was nominated by royal decree thanks to his/her knowledge and experience in administrative law. There were four other judges in the court. Two were judges from the Supreme Court (*Salavinichbay)* and two judges were appointed by the Council of Ministers from amongst senior administrative officials. This administrative Court of Appeal also played the role of conflict tribunal, deciding on questions of competence between the judicial courts and administrative courts.

First, these constitutional provisions mean that the Constitution recognizes two types of lawsuits: *private lawsuits* and *administrative lawsuits,* which differ from each other. Secondly, they provide constitutional grounds for the division of Cambodian law into two main categories of law: private law and public or administrative law.

The Constitution provides that the same courts have competence to adjudicate both categories of lawsuit. Cambodian courts, then, have to apply two separate sets of law: private law or administrative law, according to the nature of the lawsuits brought before them. However, a crucial issue remains unresolved: the incompleteness and imprecision of administrative law, procedure and practice in Cambodia.[47] The court has a very important role in "fleshing out" the law, procedure and practice in this area of law.

The provisions in the Constitution providing for a single court system to adjudicate both private and administrative lawsuits were probably a necessary result of the circumstances in Cambodia after the Paris Peace Agreement of 1991. The court system in Cambodia has not been fully responsive to the needs of Cambodia's quickly evolving society. The hearing of administrative case in provincial/municipal courts has seriously reduced the efficiency of administrative justice and the judicial review process. There are two main reasons for this lack of efficiency.

The first reason is that the people have lost confidence in the courts in general. When the people have no confidence in the courts, they will not trust that the courts are an effective means of redress against the state administration. Because of this lack of trust, the people seek alternative means of redress.

Another reason is that because the Constitution provides for administrative lawsuits to be heard by ordinary courts, administrative cases are not distinguished from private law cases. Indeed, ordinary courts typically use "*common*" law, i.e., the private law, to adjudicate private litigation. The administrative court, which deals with administrative actions on the other hand, must use administrative law and procedure, or at least a specialized law which contains principles different from private law. Adhering strictly to the Constitution, all judges in Cambodian courts ought to have specialized knowledge in both private and public law. The author believes that it is very unlikely that current judges have had specialized training in both areas of law.

47 In Cambodian law schools, it is generally accepted that the study of law ought to be separated into private and public law or at least these are offered as specializations for students. However, the differences between these two types of law in terms of basic concepts and their applications are rarely taught. This is due to the fact that, in general, the courts have not yet fulfilled their mandate to create rules for and provide credible resolutions of administrative litigation cases. According to the provisions of the 1993 Constitution, administrative law constitutes a truly distinct branch of law from private law and, therefore it is incumbent on courts to complete the procedural rules for administrative cases and adjudicate effectively in this area.

The recent Law on the Organization of the Courts exacerbates this issue further.[48] Article 21 confers the authority upon *civil tribunals* to handle civil litigation as well as all other types of litigation that are not under the aegis any specific tribunal. It also grants the civil tribunals power over the implementation of the provisions of the Civil Procedure Code.[49] Because of this, administrative litigation will automatically fall under the jurisdiction of the civil tribunal, which is obliged to use civil procedure rules in the cases it hears. The danger is that, when hearing administrative litigation cases, the civil judge could be easily tempted to forget the rules and principles governing relations between the state administration and the people it governs and use the established rules of the civil law instead.

b.) Judicial Review under the Constitution

Article 128 (new) §3 of the Constitution contains a fundamental principle of the rule of law, which is the submission of state administration to the law. It also establishes the constitutional basis for *judicial review* of administrative action. Unfortunately, there are no additional constitutional provisions or organic statutes prescribing the procedures for such review, which would provide clearer guidelines for the process of judicial review of administrative action.

In general, the Constitution does not contain many provisions regarding how public authorities should be held accountable as they carry their duties or ensuring that they are *punished* if they illegally cause harm to private individuals. There are, in fact, insufficient legal means to accomplish what lawyers call "*ensuring the rule of law*". The most efficient way to ensure adherence to the rule of law is to maintain tribunals with the authority to pronounce sanctions against any state agency or any regulatory officials that commit mistakes. However, in order to have such a system of judicial review that works properly, there needs to be a set of *procedural rules* according to which complaints can be filed in a transparent and efficient manner.

Under the present system, when there is a contradiction between the Constitution and statute law, the latter will prevail by virtue of the constitutional principle of separation of powers. An Administrative Court cannot currently determine whether a statute conforms to the Constitution, since doing so will interfere with the jurisdiction of the Constitutional Council, which has the sole authority to safeguard respect for the Constitution as well as interpret constitutional provisions and determine whether laws, adopted by the National Assembly and reviewed by the Senate, conform to the Constitution.[50] In other words, Cambodian administrative judges would be required to reject any complaints based on

48 This Law entered into force on 16 July 2014.

49 According to Article 14 of this Law, the *civil tribunal* is one of the four tribunals of the municipal or provincial courts of first instance.

50 Article 136, §1.

the unconstitutionality of an administrative decision, because such a complaint would necessarily entail ruling upon the constitutionality of the statute, which is the exclusive right of the Constitutional Council.

The Cambodian Constitution recognizes two categories of international treaty law. The first category is composed of those that are related to the protection of human rights as stipulated in Article 31.[51] These international acts are already embedded in the fundamental law and, therefore, have equal value as other constitutional provisions. The legislature may not adopt any law contrary to these provisions, because such a law is necessarily unconstitutional. The second category refers to other international treaties, which are not included in the Constitution. Such treaties are typically approved by the Parliament[52] and ratified by the King[53] as long as they are not incompatible with the independence, sovereignty, territorial integrity, neutrality and national unity of the Kingdom of Cambodia.[54]

In case of a contradiction between the Constitution and an international treaty, the Constitution will prevail. This guiding principle for judicial review is set forth in Article 150, §2, which stipulates that: "*Laws and decisions by the State institutions shall have to be in strict conformity with the Constitution*". "Laws" in this article include not only statutes, but all international treaties in the second category noted above.[55]

III. The Limits of the Constitution in the Field of Administrative Law

In the modern era, Cambodia's state administration must deal with a variety of complicated issues involving various actors and fields of activities. The constitutional text does not resolve all of these questions. To complete the overall organization of Cambodia's administrative state and ensure its proper functioning, current administrative law needs to be developed further and additional laws must be created where the Constitution is silent.

51 *"The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights."*

52 Article 90 (new).

53 Article 26 (new): *"The King shall sign and ratify international treaties and conventions after a vote of approval by the National Assembly and the Senate."*

54 Article 55.

55 There are at least two convincing arguments for this proposition: 1) Like an ordinary statute, an international treaty is adopted by a simple majority of the members of the National Assembly without being reviewed by the Constitutional Council. 2) An international treaty can be enforced only after its promulgation by the King. In the promulgation act, the term "*law on the ratification of the treaty*" is used. This suggests that an ordinary statute law and an *ordinary* international treaty are legally equivalent in regard to their relationship to the Constitution.

1. The Necessity of Developing Administrative Law

a.) "Making Reference" to Separate Statutes

Although Article 51 (new) uses the term "executive power" as one of the branches into which power is to be divided under the principle of separation of power, it does not allocate this power to any of the institutions stipulated in the Constitution. Indeed, the whole of Chapter IV, concerning the Royal Government, is unclear in this respect. Article 124 (new) uses also the term "*powers*", but does not provide a precise definition. To resolve this issue, Article 127 (new) states that the organization and functioning of the Council of Ministers will be governed by a separate ordinary law.[56]

The Law on the Organization and Functioning of the Council of Ministers (20 July 1994) notes in Article 1 that: "*The Royal Government of the Kingdom of Cambodia is the executive body having the role to determine and execute the State's policy according to the principles prescribed by the Constitution. The Royal Government guarantees the implementation of law and leads the general affairs of the State except those under the competence of the legislative body and the courts*" and in Article 2 that: "*The Royal Government manages, orders, uses the army, the police and the other armed forces and the Administration in fulfilling its mission*".

The Constitution also contains a few brief rules regarding administrative organization. Article 145 states simply: "*The territory of the Kingdom of Cambodia shall be divided into capital, provinces, districts and communes*" and Article 146 (new) merely makes reference to a separate organic law to determine how these administrative areas will be administered. Even the concept of *decentralization* or *deconcentration* is recognized in Cambodian constitutional law.[57] However, the principles governing the state decentralization/deconcentration system in Cambodia are governed by a statute, which has been in effect since 24 May 2008. According to this law, decentralized territories possess administrative autonomy, but remain executing agencies for decisions by the country's central administration. In other words, they are bound to comply with and carry out relevant decisions by the country's central administration. Since these administrative subdivisions receive no direct political authority from the text of the Constitution, they remain "*subnational administrative agencies*" rather than "*local governments*".

Many other concepts or principles which serve the essential role of governing the relationship between the state administration and the people are mentioned, but the Constitution makes reference in these cases to separate statutes to provide the specific details of how these concepts and principles are to work in practice, thereby leaving a large margin of discretion to the legislature. This is the case with, for example, the acquisition

56 Law on the Organization and Functioning of the Council of Ministers.

57 The Constitutional Law in force since 15 February 2008 replaces the term "Krong" (City) with the term "Reach Theany" (Royal Capital).

of Khmer nationality,[58] the rights to strike and organize peaceful demonstrations,[59] the regime of the media,[60] the right to create associations,[61] the public utility,[62] the organization and the functioning of the economic system,[63] the management of the monetary and financial system,[64] or the control, use and management of state properties.[65]

Additional concepts frequently found in administrative law are simply missing from the text of the Constitution. The *"public establishment"*, for example, has not been referred to in the Constitution nor made subject of any specific law. This institution is inspired by the French administrative concept of "*établissement public*" and has helped, the Cambodian central administration, to some extent, to decentralize some of their authority to an autonomous body. The legal framework for this autonomous body, called *the public establishment*, is governed by a simple royal decree.[66]

Another example is related to the field of education. Though the Constitution commissions the state to oversee public and private educational establishments and courses at all levels, it does not provide a constitutional framework for those establishments, i.e., primary school, high school or university, nor does it refer to a separate organic law.[67] The Constitution itself only mentions a few requirements for the state administration of education in the Kingdom, such as nine years of guaranteed schooling[68] and free primary and secondary education at public schools.[69] Instead, the Law on Education (08 December 2007) provides the legal principles and rules governing the field of education.

Another area where the Constitution is silent is the field of state-run companies. Such companies are governed by the Law on the General Status of Public Enterprises (17 June 1996).

The practice of making reference to ordinary law may sometimes threaten the effectiveness of the referring constitutional provision. The reference made to law on the courts,[70] for example, does not necessarily ensure the rapid adoption of a law on administrative procedure, which is not mentioned in the Constitution, even though the concept of an administrative litigation complaint is mentioned in Article 39.

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58 Article 33, §3.
59 Article 37.
60 Article 41, §2.
61 Article 42.
62 Article 44, §3.
63 Article 56.
64 Article 57, §2.
65 Article 58, §2.
66 Royal Decree on the Legal Status of the Public Establishment (31 December 1997).
67 However, a Law on Education was promulgated on 08 December 2007.
68 Article 68, §2.
69 Article 68, §1.
70 Article 135 (new) stipulates that the laws regarding judges, public prosecutors and *court organization* must be separate laws.

b.) The Important Role of Regulation

If the Constitution and statute laws provide the core principles for the organization and the functioning of the state administration, regulations, acts adopted by the executive power, play an event more important role in Cambodia as they determine the day to day practical work of state administration, both at the central and sub-national levels. The daily functions of government administration are too numerous to be detailed in ordinary statues. Instead, the power to legislate the details regarding these daily affairs of state has been delegated to executive agencies to determine the policies necessary to regulate state activities.

Regulating in such a manner is usually beneficial and provides the state administration with some discretion to adopt regulations that permit efficient governance. However, such a delegation of power has the potential to be dangerously overused to the point that it poses a threat to legal certainty. A government invested with such power may be tempted to change regulations repeatedly without oversight. This can even lead to an infringement of the legislative power's authority. The executive power, in such a case, adopts, by Royal Decree, what are called "transitional provisions," but which completely contradict the statute laws they were designed to provide the details of.[71]

Regulations in Cambodia are divided into two categories: national regulations and sub-national regulations. National/central regulations consist of Royal Decrees, Sub-Decrees, Government Decisions and Ministerial Decisions (Prakas). Sub-national regulations consist of Provincial/Municipal Regulations (Deka Khet/Deka Reach Theany), District Regulations (Deka Srok/Deka Krong/Deka Khan) and Commune Regulations (Deka Khum/Deka Sangkat).

The R*oyal Decree* is the highest executive regulation in Cambodia. It is used either to implement a law or to execute a Sub-Decree[72] or another Royal Decree, when those acts specifically anticipate such implementation. The Royal Decree is used to organize the functioning of a public institution, to create a new governmental body or to appoint officials to a certain position or rank. It can also be used to confer distinctions or honorific titles. The Royal Decree is an act of the government, even though it is signed by the King or the acting Head of State.[73]

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71 As an illustration, we can look at Royal Decree No. 339 on the Principles and Transitional Provisions of the Declassification of Public Land of the State and of other Public Legal Persons (3 August 2006). Article 5 of this regulation, since it allows the government to change the classification of public land by Sub-Decree, goes completely against Article 16, §4 of the Land Law (30 August 2001), which requires passage of a law by Parliament in order to reclassify state public land.

72 For example, a Sub-Decree creating a public university may anticipate that the rector will be appointed by a Royal Decree.

73 The question logically arises as to when a Royal Decree can be used outside of those instances in which it is explicitly provided for and its use anticipated in a law or regulation. In practice, the government chooses the type of regulation according to the degree of importance of the act to be undertaken. The procedure for adoption of a Royal Decree is the same as that of a Sub-Decree, except that the Royal Decree is sent to the King for his signature.

The S*ub-Decree* is the most common form of governmental regulation. It is signed by the Prime Minister or the acting Prime Minister, and used to implement a law or a Royal Decree[74]. The central administration consists of two main sub-categories. The ministries and institutions represent the core agencies empowered to implement government policy and to execute legislation. The second sub-category called a "public establishment" is legally created by the first one, but is given certain autonomy and the responsibility to fulfill certain tasks. Both sub-categories are determined by Sub-Decree. The Sub-Decree on the Organization and Functioning of the Ministries and State Secretariats (30 April 1996) provides the common principle for the overall organization of the Central Administration, General Directorate, General Inspectorate and the Minister's Cabinet. Each ministry/institution or public establishment has its own Sub-Decree.

A D*ecision of the Government* is an act usually issued to implement a Royal Decree or Sub-Decree. It is used for a temporary purpose, for example to create a commission to deal with a particular issue. A Decision is not a permanent regulation. Once the purpose of the Decision is achieved, it is no longer in force. Any ministry or institution may propose a draft Decision to the government for adoption. Decisions are also signed by the Prime Minister.[75]

A M*inisterial Regulation*, known as a "P*rakas"* (literally: "a declaration"), is the highest regulatory act that can be issued by a government agency with regulatory power. It is signed by the Minister in charge of the agency and must be in strict compliance with the Royal Decree and Sub-Decree governing that Ministry or area of administration. A Ministerial Regulation is normally used for at least two different purposes. First, it provides an organizational plan for the Ministry/institution's central offices and provincial departments. Secondly, it provides regulations in the specific area of administration under the auspices of that Ministry/institution.

Local administrations also issue R*egulatory Decisions*. They are called "D*eka*". A Deka is usually proposed by a chief of commune and the district/provincial governor and adopted by the relevant Council. Some types of *Deka* can be adopted by the chief of commune or the district/provincial governor alone, when they are fulfilling their duties as a

74 There is no official procedure as far as adoption of a Sub-Decree is concerned. In practice, a Sub-Decree can be adopted through four different procedures. First, a Sub-Decree can be drafted by the Prime Minister's Cabinet, who will immediately submit it to the Prime Minister for his/her signature. In the second procedure, a draft is proposed to the government by a relevant government agency, most commonly a ministry or, on rare occasions, an authority. The Office of the Council of Ministers convenes a consultation meeting of the Council of Jurists and the Economic, Social and Cultural Council to discuss the draft before submitting it to the Prime Minister for signature. This meeting is known as the First Meeting. In the third procedure, the Office of the Council of Ministers convenes, in addition to the First Meeting, an inter-ministerial meeting to discuss the draft before submitting it to the Prime Minister for his/her signature. The fourth procedure is the one most commonly used to adopt a Sub-Decree. It consists of all steps of the third procedure plus a Cabinet meeting before the Prime Minister signs the Sub-Decree.

75 Even though it is not anticipated by any law or regulation, a Ministry or institution may also adopt "Decisions", which are called by the same name as a government Decisions.

representative or agent of the state. Even though these local regulatory decisions have very limited effect, they contribute to the effectiveness of the administrative law for the whole country, particularly in terms of nominating government employees, as when the Royal Government has recently decided to delegate the power to nominate provincial officials to the elected local councils rather than particular ministers.[76]

2. The Necessity of Developing Additional Sources of Administrative Law

a.) The Need for Improvement in the Process of Constitutional Interpretation

Though the Constitution contains the important principles of administrative law, there remains a process of clarification for many of these principles. The duty of constitutional interpretation belongs to the Constitutional Council. Article 136 (new) states: "*The Constitutional Council shall have the duty to safeguard the respect of the constitution, interpret the Constitution and laws adopted by the National Assembly and reviewed completely by the Senate*". Article 144 (new) adds: *"An organic law shall specify the organization and operation of the Constitutional Council*".[77]

In practice, however, the Constitutional Council has been, since its creation, less active in the field of administrative law than in the fields of constitutional and election law. Most of the complaints submitted to the Council are related to election litigation many of the remaining cases involve the organic laws adopted to "flesh out" constitutional provisions.[78] Those organic laws are mostly concerned with the political institutions anticipated by the Constitution. Within these cases, the only laws that have any bearing on administrative law are those that dealt with human rights and those that created ministries or organized the administration. The Constitutional Council is sometimes asked to interpret a currently enforced law[79] and sometimes to undertake constitutional review of a law before its promulgation.[80]

Though there are some principles set forth in the Constitution to be respected by the legislature in the field of human rights, there seems to be less interest in the field of administrative organization. This is due to the fact that in the later area, the Constitution, though it makes reference to "laws" that will determine the working out of a particular

76 Sub-Decree No. 497 (6 November 2013).

77 Law on the Organization and Functioning of the Constitutional Council (08 April 1998) and the Law on the Amendment of the Law on the Organization and Functioning of the Constitutional Council (31 January 2006).

78 According to Article 140 (new) of the Constitution, they must be sent to the Constitutional Council for review before promulgation by the King.

79 Constitutional Council Decision of 4 October 2004 regarding the Constitutionality of the Law on Demonstrations (27 December 1991).

80 Constitutional Council Decision of 8 May 2008 regarding the Constitutionality of the Law on the Administrative Management of Reach Theany, Khet, Krong, Srok, Khan (24 May 2008).

administrative constitutional provision, does not set parameters that bind the legislature in these provisions. In many situations, the organization and functioning of state administration seem to be under the total discretion of the legislature.

The Constitution contains principles rather than strict rules. If the fundamental law falls short of providing sufficient principles governing the organization and operation of state administration, it is the task of the Constitutional Council to at least provide clarity regarding the working out of those principles in practice. In recent years, however, the Constitutional Council has not completely fulfilled this role, leaving many questions unresolved.

Article 39, for example, enshrines Khmer citizens' rights to denounce, make complaints or file claims against any breaches of the law by the state and its bodies or by members of such bodies that have been committed during the course of their duties. This means that the state administration is bound to act legally or with legality, i.e. according to a set of rules, which is the foundation of the rule of law. However, the legal limits under which the state administration should act are presently very unclear in Cambodian constitutional law.

The concept of legality is also linked to another concept in administrative law, which is the *hierarchy* of legal instruments. The Constitution mentions only a few types of legal acts, such as the Constitution itself, treaties, statute laws as well as Royal Decrees, but does not clearly specify their places in the hierarchy of Cambodian law. Other kinds of legal acts, lower regulations, which are commonly used by state administration are completely absent from the Constitution.

The concept of "*public* or *general interest*" stipulated in Article 44 (new) of the Constitution also needs to be defined. For example, Section 3 of Article 44 (new) states: "*The right to confiscate properties from any person shall be exercised only in the public interest as provided for under the law and shall require fair and just compensation in advance*". Since 1993, many statutes have used the term "public interest" mimicking the Constitution, but provided no definition.[81] However, defining this concept is crucial for determining the legality of an administrative decision, since an administrative act will be deemed illegal if it does not serve the public or general interest.

There is a need for a precise constitutional rule in the field of administrative law, but, as noted above, the Constitution provides only general principles rather than detailed rules. There is then a necessity to adopt rules for administrative law in line with constitutional principles. Judicial precedent is very important in administrative law in this respect because constitutional provisions can be "fleshed out" by the administrative court precedents.

81 For example, the Labor Code (13 March 1997), the Law on Electricity (02 February 2001), Article 5, §2; the Land Law (30 August 2001), Article 16, §4; the Law on Forests (31 August 2002), Article 12; the Law on the Management of Water Resources (29 June 2007), Article 8, §3; the Law on Concessions (19 October 2007), Article 1; the Law on Expropriation (26 February 2010), Article 1; the Law on Roads (04 May 2014), Article 33, §2; the Law on the Organization of the Courts (16 July 2014), Article 19, §2; or the Law on Associations and NGOs (12 August 2015), Article 1.

However, Cambodia needs a closer link between the Constitution and administrative law, which can be implemented through dialogue between the Constitutional Council and the Supreme Court. Such a dialogue would contribute to the unity of the field of Cambodian public law.

b.) The Need for Judicial Engagement in Defining Administrative Law Concepts

The absence of an administrative procedure code is one of the main reasons that people avoid the court system in Cambodia. As a result, court decisions in administrative cases are scarce, leaving many questions unanswered. There are at least three core administrative law concepts that need to be defined.

The first is the concept of *general interest*, which has been mentioned previously. If the Constitutional Council remains silent regarding the definition of this critical term, ordinary courts have the authority to define the substance of this concept when applying statute laws to the facts of a particular case. Unfortunately, we have found no decision that relates to the issue of "general" or "public" interest or defines that term.

The second concept involves the *policing power* of administrative authorities. Several laws already exist and regulations empowering administrative authorities with clear administrative policing powers.[82] *General administrative policing power* refers to the decision-making power wielded by an official in the absence of specific legislation granting such powers to another authority. Officials possessing general administrative policing powers can make decisions whenever they deem it appropriate or whenever the situation requires it. Some laws or regulations provide *special administrative policing power*, i.e., the decision-making power to maintain public order in a particular field of activities, to a specific authority. However, two main issues remain unresolved. First, the seemingly unlimited scope of those powers is usually the subject of criticism because it threatens the exercise of essential freedoms and there remains no legal principle, which sets limits to these powers. Second, there are no specific rules regarding how the two powers, the *general administrative policing power* and the *special administrative policing power* interact. Because these areas could easily overlap or conflict, lack of specific rules could lead to inefficient public service or worse.

The third concept is that of the *public service* itself. This concept is the reason for the existence of the administrative law. The term "public service" is not contained in the Constitution, but it is mentioned in several laws and regulations.[83] The Cambodian Constitution sets up a welfare state as in addition to devoting two entire chapters to pro-

82 These laws and regulations vest the administrative authorities with policing power at two levels: national and sub-national. At the national level, the Prime Minister possesses a general administrative policing power and ministers possess a special administrative policing power. At the sub-national level, the governor (of the capital, the provinces and the districts) and the commune chiefs are vested with a general administrative policing power.

83 For example, the Law on Roads (04 May 2014), Article 20 or the Law on Tourism (10 June 2008), Article 12.

viding for the establishment and development of a market economy,[84] it also sets out a series of state responsibilities in the fields of education, culture and social affairs.[85] The only way to fulfill these enormous responsibilities is for the state administration to provide public services.

The French-inspired concept of public service was not well-known in Cambodia until the 5th of May 2006, when the Council of Ministers adopted a policy paper on public services, entitled "*Serving the People Better*". The paper defines public service as: "*an activity done by a competent institution and an institution receiving competence aiming at serving the public interest*". Unfortunately, there exists no official law or regulation to provide a legal distinction between the different types of public services. The RGC's policy paper on public services does not provide any clear indication as to the difference in terms of law. It attempts to classify the various activities of state administration into seven categories.[86] The only distinctions in the law are contained in the legal texts regarding the legal regime of the administrative public establishment[87] and of the economic public establishment.[88] According to these two texts, the activities of state administration, or those of agents to which the state delegates power, can be either administrative or economic. These activities are conducted by administrative public agencies and economic public agencies, respectively. Therefore, we can divide public services into activities that are either administrative or economic.

An *administrative* public service consists of activities related to the administration of various non-economic areas: social, health, cultural, scientific and technical affairs.[89] These public services are normally freely provided to the general public. An *economic* public service consists of producing goods and providing services to the market.[90] These activities are no different from private activities conducted in the economy. An *economic* public service covers not just goods or services provided by state administration, but, in this era of globalization, the government regularly delegates responsibility to deliver such services to the private sector.[91]

84 Chapter 5, Articles 56-64.

85 Chapter 6, Articles 65-75.

86 They are 1) services related to the state's sovereignty; 2) services related to security, public order and social safety; 3) services related to justice and arbitration; 4) services related to the promotion of trade, SMEs, the investment environment, and the participation of the private sector in developing and maintaining physical infrastructure; 5) services related to social, cultural and women's affairs; 6) services related to the development of physical infrastructure; and 7) services related to the state's income collection, expansion and cash flow.

87 Royal Decree on the Legal Status of the Administrative Public Establishment (8 August 2015).

88 Law on the General Status of Public Enterprises (17 June 1996).

89 Article 4 of the Royal Decree (08 August 2015) on the Legal Status of the Administrative Public Establishment.

90 Article 26 of the Law on the General Status of Public Enterprises (17 June 1996).

91 That should be one of the reasons of the development of the *regulator* established to control specific economic activities which are offered jointly by the administration and the private sector.

Even though the outlines of some of these concepts can be gleaned from the texts of existing laws and regulations, several questions remain. First, questions involving the nature of law which should govern the relationship between service providers and recipients or between providers and suppliers. Secondly, questions involving which court is competent to handle litigation, are likely arise in these areas. Third, since there are so many categories of public services, questions remain concerning the common principles that govern the operation and functioning of the public service itself.

Another concept that bears mentioning is *administrative liability*. Though Article 39 of the Constitution notes that the state or its agents are liable for their wrongdoing, there exists no clear legal rules governing state liability. Considering Article 39 the question remains as to whether state administrative liability is based on actual damages or exclusively on breach of the law alone.

Since the beginning of the reconstruction of Cambodian law in 1993, a vast number of rules have been adopted for the purpose of organizing state administrative institutions and activities as well as to provide power to enact regulations for effective governance. Unfortunately, there are very few rules that help to protect the people against administrative abuse. This is another reason that judicial engagement is so important when dealing with administrative liability issues.

IV. Conclusion

All of the concepts examined above suggest that Cambodia has at its disposal a myriad of rules regulating relations between public authorities as well as between public authorities and private individuals, designed to guarantee the rights of citizens as enshrined in the Constitution. The role of the Constitution in this process is no doubt crucial for effective operation of state administration. However, the fundamental law has its limits and statute laws are commonly used to fill constitutional gaps.

Judicial precedents regarding state administration, in the absence of legal texts, created a body of law different from private law and marked by its focus on the powers exercised by public authorities. Given the specialized nature of laws governing public authorities, it is necessary that specialized administrative courts are established, so that administrative judges may continue the work of building a strong foundation for Cambodian administrative law.

Commitments to improve the legal and judicial system have been expressed since the adoption of the new Constitution in 1993, but today, the general assessment is that the system remains widely dysfunctional. Some researchers have characterized the current Constitution as "*a head without a body*". The problem is not simply a matter of "incompetence" and, therefore, cannot be solved by further training or waiting for better-educated

personnel. Some steps have been taken to address these problems, for instance, a significant increase in the official salaries of judges and the establishment of a *Royal School for Judges and Prosecutors*, but further work is necessary.

In addition, the recent Law on the Organization of the Courts (16 July 2014) contains the term "administrative litigation",[92] and explicitly mentions an "*administrative tribunal*" or "*administrative court,*"[93] demonstrating the willingness of the Royal Government to move towards improving this area of law.

However, there remains a lack of procedural rules governing legal actions against public authorities. This can be rectified through the adoption of a code of administrative procedure. Once these rules are enacted, people shall be encouraged to use courts for redress of abuses of their rights by public authorities and awareness may also be raised among public authorities regarding public liability.

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92 Article 4.
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STATE FINANCE MANAGEMENT OF CAMBODIA

LONG Atichbora

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STATE FINANCE MANAGEMENT OF CAMBODIA

LONG Atichbora *

ABSTRACT

The management of national financial resources is the responsibility of the Royal Government of Cambodia to assure that all revenue is collected effectively and legally and that every dollar spent is of benefit to the country and its citizens. In this regard, the legislative branch plays an important role to oversee the Royal Government in implementing national budget and the use of resources. This chapter focuses on the implementation of the state's financial management as prescribed in Article 57 and 58 of the Constitution of the Kingdom of Cambodia. The implementation of state finance management in Cambodia is currently under the process of Public Financial Management Reform Program (PFMRP) of the Royal Government of Cambodia. Up to now, the government has achieved remarkable progress in terms of state finance management such as tax and customs modernization, the establishment of a public accounting system and a public financial management information system (PFMIS), land management, enforcement of law to combat corruption, etc. However, some significant improvements, especially related to the participation of monitoring bodies and citizens in the state finance management process, should be made.

I. Introduction

The state finance management of the Royal Government of Cambodia is a very important issue, since the public and private sectors as well as the general populace have an interest in how well the Royal Government manages its annual budget, especially concerning the collection of revenue, the allocation of funds for expenditure, and state property management.

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Every year, the Royal Government of Cambodia collects billions of US dollars in revenue from various sources, and spends funds to pay for governmental operations such as civil servants' salaries, administrative support work, the construction of roads and irrigation systems, defense and security, health, education, etc.

The management of national resources and the control of expenditure are the responsibility of the executive arms of government, which assure that all revenue is collected effectively and legally and that every dollar spent is of benefit to the country and its citizens. By contrast, the legislative branch fulfills the task of overseeing the Royal Government in the implementation of the national budget and the use of resources. These issues are addressed in Chapter V of the Constitution of the Kingdom of Cambodia, which deals with economic management. Articles 57 and 58 of Chapter V make specific prescriptions concerning tax collection and state property management.[1]

This chapter addresses the question of Cambodia's state finance, as specified in Article 57 and 58 of the Constitution of the Kingdom of Cambodia. Article 57 of the Constitution states that: "[t]ax collection shall be in accordance with the law. The national budget shall be determined by law. Management of the monetary and financial system shall be defined by law." Furthermore, Article 58 of the Constitution states that: "[s]tate property notably comprises land, mineral resources, mountains, seas, underwater areas, continental shelf, coastline, airspace, islands, rivers, canals, streams, lakes, forests, natural resources, economic and cultural centers, bases for national defense and other facilities determined as State property. The control, use and management of State properties shall be determined by law."

As such, this chapter will analyze whether Articles 57 and 58 of Cambodia's Constitution have been properly implemented by the executive arms of government, and what mechanisms and governing laws have been established to sufficiently implement state finance and state property management.

The chapter will address (1) governing laws relevant to state finance, (2) tax revenues, (3) state property and non-tax revenue management, (4) state expenditure process and (4) state finance control bodies.

II. Governing Laws relevant to State Finance Management

To manage and execute state finance in accordance with Articles 57 and 58 of the Constitution, the Royal Government of Cambodia created the Law on Public Finance System, which was first enacted in 1993, and amended in 2008 to adapt to national developments. The Law on Public Finance System is an organic law intended to establish fundamental principles for the management of the overall financial system and to develop the Law on

1 Constitution of the Kingdom of Cambodia (1993)

Finance, which sets out each step of preparation, adoption, and implementation of the state budget. Furthermore, it served to establish a review process for budget performance, to identify the roles and responsibilities of the different state departments, and to specify the consequences of wrongdoing in public financial management of ministries, institutions, similar public entities, public establishments, and sub-national administrations.

The Law on Public Finance System indicates that the Minister of Economy and Finance is responsible for managing revenue, expenditure, borrowing, lending, and guarantees of the state as authorized by law. The Minister of Economy and Finance is the executor of the Royal Government in the preparation, implementation, monitoring, and management of the medium and long-term macro-economic framework and public financial policies of the Kingdom of Cambodia. The law also requires that the Minister of Economy and Finance reports to the National Assembly and the Senate on the macro-economic and public financial policies of the Royal Government and the current economic and public financial situation and medium term forecasts. The Minister of Economy and Finance takes the lead in maintaining public finance discipline, drafting the Law on Finance, preparing the medium-term expenditure framework, complying with the Law on Finance, and maintains constant oversight over budget management.[2]

The Law on Public Finance System specifies that the process of state budget management operates via the Law on Annual Finance Management, the Amendment of the Law on Annual Finance Management and the Law on General State Budget Settlement.[3] The Law on Annual Finance Management determines the resources that the government can collect and the allocation of burdens and expenses. It allows for assets and liabilities to be spent by the state each year to serve the policy agenda of the Royal Government for socio-economic development by taking into account the maintenance of macro-economic stability and financial and monetary equilibrium, especially through the assurance of the budget balance.[4] If the Royal Government needs to increase expenditure by more than is planned for in the annual budget, an amended Annual Finance Law will be introduced in the middle of the year. Such cases are rare, as the government always makes legal adjustments to allow for over-budget expenses in the Law on General State Budget Settlement.

Every fiscal year, upon completion of the execution of the budget, the government must prepare a draft law on budget settlement, the so-called Consolidated Financial Statement of Government, to be submitted to parliament for approval within 9 months of the end of the current fiscal year, and concurrently sent to the National Audit Authority of

2 Law on Public Finance System (2008), Article 34, 35, 36 and 37
3 Ibid., Article 8
4 Ibid., Article 9

Cambodia, which conducts an external audit.[5] Since 2002, the National Audit Authority of Cambodia has conducted external audits on the draft law on budget settlement for every fiscal year and has given a qualified audit opinion on the budget settlement law.[6]

Parliament has adopted several laws for the purpose of state finance management and the collection of tax revenue and non-tax revenue, including the Law on Annual Finance Management, the Law on General State Budget Settlement, the Law on Taxation, the Law on Customs, the Law on Sub-national Budget, the Law on Public Procurement, etc.

The annual state budget is prepared in line with administrative classifications based on the administrative management structure, economic classifications by types of expenditure, and functional classifications according to objective and program classifications. The annual state budget consists of the permanent resources of the state and the permanent obligations of the state. The permanent resources of the state include current and capital revenue. The permanent obligations of the state consist of recurrent and capital expenditure.

The management of all state property prescribed in Article 58 of the Constitution is controlled by the Ministry of Economy and Finance and other relevant ministries. Many laws have been established to control and manage state property, such as the Law on Sub-national Fiscal Regime and Property Management, the Law on Land, the Law on Land Management, Urbanization and Construction, the Law on Environment Protection and Management of Natural Resources, the Law on Management and Exploitation of Mining Resources, the Law on Forestry Management, etc.

III. Tax Revenues Management

In Cambodia, tax revenue is obtained from international trade taxes and excise duties, so-called custom taxes, and from domestic taxes. According to data from the Ministry of Economy and Finance, the total revenue of Cambodia for the year 2013 was approximately 2.38 billion USD, of which tax revenue collection amounted 2.07 billion USD, equal to 86 percent of total revenue, and non-tax revenue of 351 million USD, equal to 14 per cent of the total revenue.[7]

Customs tax revenue is collected from import and export tax in accordance with the Law on Customs implemented by the General Department of Customs and Excise. The Ministry of Economy and Finance has set up custom tariff books for determining tax and excise rates on imported and exported goods. These custom tariffs will be updated every year to adapt to changes of goods and government policies in the custom sector.

5 Law on Audit of the Kingdom of Cambodia (2000), Article 23
6 National Audit Authority, Strategic Development Plan 2012-2016, page 25
7 www.mef.gov.kh, retrieved 15-03-2015

According to the Law on Customs, the General Department of Customs and Excise has obligations to manage and control all import and export taxes, and also has the responsibility for the prevention, investigation, surveillance and suppression of smuggling and other customs offenses including drug trafficking, dumping of hazardous wastes, etc.

Import duties are levied on any imported goods before releasing them from Customs, except for goods exempted from duties and taxes due to qualifying for special treatment according to laws and regulations. There are three types of duties and taxes that any importer has to pay before imported goods are released from Customs: Customs Import Duties with an ad-valorem rate; a Special Tax for certain goods; and Value Added Tax (VAT). In Cambodia, VAT is applied at a flat rate of 10%, which all imported goods are subjected to.[8]

Exported goods are subject to taxes depending on the goods that are being exported. Here are some examples of tax rates applied to Cambodia's major export products:

- A duty rate of 2%, 5% and 10% for natural rubber (Cambodia has temporarily applied cascading rates for this product);
- A duty rate of 5% and 10% for processed wood (depending on the level and type of processing);
- A duty rate of 10% for fish and other aquatic products, and for uncut precious stones;
- Other duty rates are determined according to the export duty tariffs.[9]

Domestic tax revenue is collected by the General Department of Taxation, which has the following functions, as specified by the law on taxation:

- Developing tax policies and collecting all types of taxes for the national budget;
- Drafting laws and regulations on taxation, determining other necessary legal documents which taxpayers or withholding agents need to retain and submit to the tax administration;
- Determining tax bases for taxpayers and withholding agents based on cross-checking;
- Calculating and collecting taxes, additional fees and other revenues;
- Establishing programs and performing tax audits;
- Being responsible for international cooperation in the tax sector;
- Applying penalties for taxpayers and withholding agents in breach of the law;
- Participating in the preparation of the national annual budget plan for drafting the financial law of annual management.

There are many types of domestic taxes such as profit tax, minimum tax, salary tax, withholding tax, value-added tax, prepayment of profit tax, turnover tax, tax on property rental, unused land tax, stamp tax, registration tax, slaughter tax, tax on means and transporta-

8 www.customs.gov.kh, retrieved 13-03-2015
9 www.customs.gov.kh, retrieved 13-03-2015

tion, accommodation tax, public lighting tax and property tax, as well as specific taxes on certain merchandise. Some domestic tax revenues are regarded as national revenue, while other taxes collected are regarded as capital and provincial revenue.

Table1: Cambodia's Tax Revenue Collection From 2009-2014
Unit: USD Million

Type of Tax/Year	2009	2010	2011	2012	2013	2014
International Trading Tax	266.0	298.6	301.5	333.3	373.0	470.8
Domestic Tax	774.6	900.7	1024.0	1277.0	1448.0	1863.2
Total	**1040.6**	**1190.3**	**1325.5**	**1610.3**	**1821.0**	**2334.0**

Based on the table above, the tax revenues collected by the Royal Government from 2009 until 2014 has increased remarkably because the Government has made some significant reforms such as:

- Fully implementing ad-valorem customs tax rates;
- Changing special tax rates for specific items;
- Increasing export tax on goods producing from natural resources;
- Reinforcing tax payers' obligation on tax registration and simplifying tax registration;
- Improving services to taxpayers;
- Using information technology to collect tax data;
- Accepting bank transfers of all kinds of tax revenues;
- Strengthening transportation and stamp taxes;
- Strengthening audit on enterprises and debt repayment.[10]

Although the Royal Government has made strong efforts and reforms, there are many challenges for both the General Department of Customs and Excise and the General Department of Taxation, which need to be overcome to increase tax revenues. Some of these challenges are:

- Increased smuggling;
- Untrue tax declarations on invoices by importers;
- Reduced customs tariff to comply with regulations of free trade agreements;
- Lack of data management;
- Limitation of implementation on Law on Taxation;
- Tax evasion;
- Lack of competence of tax officers.

10 Rectangular Strategy of Royal Government Phase III, 2013, page 12

However, the Royal Government of Cambodia is improving its governance system on tax collections through the establishment of the Public Financial Management Reform, whose measures include: (i) macroeconomic policy framework management, (ii) improving the budget system and public procurement, (iii) modernization of the tax system, (iv) improving the public accounting system, (v) developing the audit system and inspections, (vi) privatizing public enterprises, and (vii) strengthening state property management.[11] The Royal Government continues to implement the Public Financial Management Reform in order to improve tax revenue collection.

IV. State Property and Non-Tax Revenue Management

State property can be divided into state private property and state public property. State property notably includes land, mineral resources, mountains, sea, underwater areas, the continental shelf, coastline, airspace, islands, rivers, canals, streams, lakes, forests, natural resources, economic and cultural centers, bases for national defense and various other facilities.[12]

The Ministry of Economy and Finance is the executive agency of the Royal Government, and is responsible for supervising the selling, leasing, transferring, and agreement of arrangements with regard to state property. It is also responsible for granting various state concessions, and undertaking inventories. All contracts on the management of state properties and the granting of state concessions related to public finance are subject to the review and approval of the Minister of Economy and Finance. Revenue resulting from the operations and management of state property is regarded as non-tax revenue and is paid into the Treasury Single Account of the state budget at the National Treasury. This revenue cannot be used directly to offset any expenses.[13]

Non-tax state revenue is obtained from forestry exploitation, land concession, tourism services, leasing and selling properties, mining rights and exploration, profit of state enterprises, aviation licensing and services, telecommunication and postal services, cultural services, land and construction services, plate licensing fees, product quality control fees, radio and television fees, proceeds from penalties and fines, subsidies, financial donations, etc.

The management and regulation of all non-tax revenues from national resources are carried out directly by line ministries in cooperation with the Ministry of Economy and Finance. Some of the main state properties managed by various ministries are as follows:

- **Land management:** Cambodia still has a high rural poverty rate, land concentration and ongoing problems with illegal land possession, the illegal claiming of state land and

11 Ministry of Economy and Finance (2004), Public Financial Management Program, page 20
12 Law on Public Financial System (2008), Article 17
13 Law on Public Financial System (2008), Article 17

protected areas owned privately, and unlawful logging.[14] Land management in Cambodia is governed by the Land Law and the Law on Land Management, Urban Planning and Constructions. The management of the cadastral administration of immovable property belonging to the state and the competence to issue titles related to immovable property throughout the Kingdom of Cambodia are the responsibility of the Ministry of Land Management, Urban Planning and Construction. The state is the owner of the property of the Cambodian territory enumerated in Article 58 of the 1993 Constitution and of all property that is disinherited, that is voluntarily given to the state, that has not been subject of due and private appropriation or that is not presently privately occupied in accordance with existing laws. Article 16 of the Law on Land states that state public property is inalienable and ownership of this property is not subject to transferal. When state public properties cease to be of public use, they can be listed as private properties of the state according to the law.[15] Currently, the Royal Government frequently issues sub-decrees to transfer public state property to individuals and private companies, which then becomes their private property. However, the enforcement of the law on land and other relevant laws is not effective enough, and there are ongoing conflicts surrounding property in almost every province and city in Cambodia. The preparation of the land inventory including agricultural land, forestry land and other types of land controlled by the state has yet to be implemented by the relevant ministries.

- **Mineral resources:** Mines, such gold mines, stone mines, metal and coal mines are regulated and managed by the Ministry of Mining and Energy. By November, 2013, the former Ministry of Industry, Mining and Energy had issued licenses to 106 domestic and foreign companies to search for mining locations.[16] While the revenue from mining exploration has yet to be collected, other revenue was nonetheless generated through licensing fees. Mineral resources are governed by the Law on Mineral Resource Management and Exploitation. The purpose of this law is to oversee the management and exploitation of mineral resources, and to regulate mines and all activities relating to mining in the Kingdom of Cambodia. All mineral resources in, on or underneath land, mountains, plateaus, territorial water and oceanic islands, and in or on the seabed within the territorial integrity of the Kingdom of Cambodia, are considered to be the property of the state.[17]
- **Forestry and agricultural land concession:** Forest resources are under the control of the Ministry of Agriculture, Forestry and Fisheries and governed by the Law on Forestry. Some forest areas have been transferred by economic land concessions to private companies to plant agricultural and industrial crops. By 2012, land concessions had

14 Royal Government of Cambodia, Rectangular Strategy II, 2008, page. 6
15 Law on Land (2001), Article 15 and 16
16 www.mme.gov.com, retrieved 29-02-2015
17 Law on Mineral Resource Management and Exploitation (2001), Article 2

been granted to 117 investment companies, totaling 1,181,522 hectares of land.[18] The sub-decree on economic land concession has been used to regulate all economic and social land concessions. Despite having some regulation, revenue from forestry and land concessions is very low in relation to the impact such practices have on the country. But the Royal Government makes efforts to enhance the agricultural sector which is stated in the Rectangular Strategy Phase III.

- **Petroleum:** The Cambodian National Petroleum Authority (CNPA) was formed in 1998 as the key governmental agency for overseeing upstream and downstream petroleum activities in Cambodia. The CNPA currently administers six undisputed offshore Blocks (A to F) in the Gulf of Thailand and nineteen onshore Blocks (I to XIX).[19] The principal law that applies to the upstream oil and gas industry in Cambodia is set out in the Petroleum Regulations of 1991, amended in 1998 and 1999. The Royal Government of Cambodia and the CNPA are currently working to further develop and enhance the regulatory framework for the exploration and exploitation of petroleum, as well as the country's performance in compliance and inspections of petroleum operations. The government has yet to collect revenue from petroleum exploitation, and it will take a few more years before it are able to do so.

Table2: Non-Tax Revenues From 2009-2014[20]
Unit: USD Million

Year	2009	2010	2011	2012	2013	2014
Non-Tax Revenues	118.2	159.1	164.9	204.2	354.1	373.2

V. State Expenditure Process

The annual budget of the Royal Government consists of revenues and expenditure. As discussed above, state revenue consists of both tax revenue, non-tax revenue and capital revenues.[21] All state revenue is used to cover government expenditure. The state budget expenditure is carried out through the National Treasury and outside National Treasury[22]. State expenditure is divided into two main groups: current expenditure and capital ex-

18 www.maff.gov.kh, retrieved 10-03-2015
19 www.mme.gov.kh, retrieved 09-03-2015
20 Law on General State Budget Settlement for the Year 2009, 2010, 2011, 2012, 2013, and 2014 and figures were converted to USD with average exchange rate 1 USD=4000 Riel.
21 Capital revenues are revenues from domestic and oversea loans and grants.
22 Expenditures carried out through the National Treasury were fully recorded by the National Treasury, whereas expenditures outside the National Treasury were not recorded by it.

penditure. Current expenditure includes expenditure on services, financial obligations, public interventions, and other expenses. Capital expenditure includes investment expenses such as road construction, irrigation, principal debt payment etc.

Government expenses are divided into petty cash expenses and procurement expenses. A large proportion of budget expenses fall under the latter category, and are regulated by the Law on Procurement. The expense process is very complicated and the procedure for withdrawing money from the National Treasury takes a long time.

Some ministries face difficulties with the current national budget expense mechanisms, especially since every transaction must be pre-approved by the Ministry of Economy and Finance. Also, the Ministry of Economy and Finance has implemented a post-expenditure audit of all ministries and institutions. This control process means that the cycle of expense procedures is very long and complicated. Some financial control institutions are mentioned below.

The government allocates its national budget based on four main sectors namely: the general administration sector; defense, security and public order sector; social sector and economy sector. According to the Law on Annual Finance Management for 2015, the Government allocated 38 per cent of its total current expenditure to the social sector: Ministry of Health, Ministry of Education, Ministry of Labor and Vocational Training, and Ministry of Social Affairs, Veterans and Youth Rehabilitation.

Table3: Implementation of State Budget Expenditure through the National Treasury from 2009 to 2014
Unit: USD Million

Expense/Year	2009	2010	2011	2012	2013	2014
Current Expenditure	1189.2	1263.1	1446.1	1669.3	1820.5	2051.1
Capital Expenditure	305.0	366.1	376.8	349.3	375.5	405.7
Total	**1492.2**	**1629.2**	**1822.9**	**2018.7**	**2196.0**	**2456.8**

VI. State Finance Control Bodies (Financial Control Mechanism)

In Cambodia, there are several bodies which play similar roles in regulating and inspecting state revenue and expenditure. These include the Inspectorate General of the Ministry of Economy and Finance, the Ministry of National Assembly and Senate Relations and Inspection, the Internal Audit Units, the Anti-Corruption Unit and the National Audit Authority of Cambodia. The function of these financial control bodies is as follows:

INSPECTORATE GENERAL OF MINISTRY OF ECONOMY AND FINANCE

The Inspectorate General is a body subordinate to the Ministry of Economy and Finance, whose duties include the inspection, control, monitoring, investigation, evaluation and analysis of all activities related to the management of national revenue and expenditure throughout all public institutions. The Inspectorate General reports its results on irregularities or malfeasance to the Ministry of Economy and Finance. In addition, under the Ministry of Economy and Finance, there are two similar inspection units namely the General Department of Procurement and Financial Controllers, which audits and controls expenditures of the ministries. The Ministry of Economy and Finance reports its results to the Prime Minister.[23]

MINISTRY OF NATIONAL ASSEMBLY-SENATE RELATIONS AND INSPECTION

The Ministry of National Assembly Senate Relations and Inspection of the Royal Government of Cambodia manages all facilitation work, communicates with the National Assembly and the Senate, and inspects all public sectors in the Kingdom of Cambodia in order to fight corruption, irregularities and other problems. The Ministry reports its results to the Prime Minister for actions on fraud and irregularities found in the reports.

INTERNAL AUDIT DEPARTMENTS OF MINISTRIES

Internal Audit Departments have been established within each ministry, as well as in state enterprises in the public sector. Internal Audit Departments report to the heads of the respective ministries, institutions and public enterprises and submit their reports and conclusions to the National Audit Authority. These departments are responsible for two independent operations; evaluating activities and assisting the heads of institutions, ministries and the boards of public enterprises. The internal audit is intended to help each department within the institutions, ministries and public enterprises to effectively fulfill their responsibilities related to revenue and expenditure.[24]

23 www.mef.gov.kh, retrieved 11-03-2015

24 Sub-degree No.40 on organization and function of internal audits within ministries and institutions, 2005

ANTI-CORRUPTION UNIT

The Anti-Corruption Unit was created in 2010 in accordance with the Law on Anti-Corruption. Its task is to promote effectiveness of all forms of service and to strengthen good governance and the rule of law in leadership and state governance, as well as to maintain the integrity and justice that is of fundamental importance for social development and poverty reduction. Furthermore, this body is tasked with combatting corruption through education and prevention and legal measures against corrupt practices. It enjoys public support and participation, and further benefits from international cooperation. Since its establishment, the Anti-Corruption Unit has started operations to crack down on some corruption cases related to public finance management, state property management and the judicial system.[25]

NATIONAL AUDIT AUTHORITY OF CAMBODIA

The National Audit Authority of Cambodia was established in 2000 in accordance with the Law on Audit of the Kingdom of Cambodia, which was approved by the National Assembly in 2000. It operates as an independent institution, and is responsible for carrying out an external audit of the government. This audit is an examination or review of the accounting records, systems, operations and controls of government institutions, in accordance with both generally accepted auditing standards and government auditing standards.[26] The National Audit Authority has obligation to audit all revenues and expenditure implemented by the Royal Government and report audit results to the National Assembly and the Senate. The Commission on Economy, Finance, Bank and Audit of the Parliament is in charge of pushing audited ministries to follow audit recommendations of the National Audit Authority of Cambodia.

Currently there are many control mechanisms on Cambodian state finance that help improve good governance and accountability of the government. This causes overlapping responsibilities resulting in burdens for ministries and institutions to implement and record revenues and expenditures.

25 www.acu.gov.kh, retrieved 04-03-2015
26 Law on audit of the Kingdom of Cambodia, Article 2

VII. Conclusion

State finance management in Cambodia as stated in the Constitution is implemented through the Law on Public Financial System, the Law on Annual Finance Management and the Law on Annual General Budget Settlement. These laws determine revenues and expenditures of the state to be collected and allocated legally.

The implementation of state finance system in Cambodia is currently undergoing a reform process, called the Public Financial Management Reform Program (PFMRP). The PFMRP aims to achieve four stages of reforms, namely more credible budget, effective financial accountability, fully affordable policy agenda through policy-budget linkage and effective program performance accountability.[27] To implement all stages of the PFMRP, the reform will last until 2025. Up until now, the government successfully completed stage one on credible budget. Currently, the government involves in stage two of the reform to achieve effective financial accountability in Cambodia.

Through the PFMRP, the government has achieved remarkable progress in some important areas such as strengthening budget system management, including budget planning, budget execution and reporting, tax modernization, establishment of a public accounting system and a public financial information management system (PFMIS), customs modernization, payroll system reform, enforcement of the Law on Anti-Corruption, etc. As a result, the GDP of Cambodia increased to 6% in 2010, 7.1% in 2011, 7.3% in 2012 and 7.4% in 2013. The GDP per capita in 2013 was 1043 USD.[28]

However, there are some challenges and constraints on efforts to improve tax and non-tax revenue collection that the government needs to overcome in order to fulfill its obligations as stated in Article 57 of the Constitution. Efforts should be made to improve legal frameworks and regulations related to tax and non-tax revenue collection, strengthen human resources, improve taxpayer registration, combat smuggling, increase transparency in customs procedures, improve records and management of state properties, strengthen external audit of the government and combat corruption.

In addition, opportunities for participation from oversight bodies, civil society organizations, media and the broader public in matters of state finance implementation are low. Therefore, to manage state and public finance according to Article 57 and 58 of the Constitution, public access to budget information, public participation in budget decision-making and strong independent oversight bodies are crucial and need to be included in the Constitution and the Law on Public Financial System.

27 Ministry of Economy and Finance (2004), Public Financial Management Program, page 10
28 www.mef.gov.kh, retrieved 01-03-2015

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PRINCIPLES OF ELECTION LAW: LIBERAL MULTI-PARTY DEMOCRACY

KHUN Chandara

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PRINCIPLES OF ELECTION LAW: LIBERAL MULTI-PARTY DEMOCRACY

KHUN Chandara *

ABSTRACT

Despite its introduction into the Kingdom for nearly a century ago, Cambodia's representative democracy has retained the "restrictive" characteristics of the first constitutional monarchy in the current, second regime of constitutional monarchy. While constitutional frameworks have often been used to legitimate the possession of exclusive state power by an individual or a dominant state institution, the source of power has moved from the state to the people. Interestingly, the principle of "liberal multi-party democracy", as an integral part of the 1991 Paris Peace Accords, was integrated into the 1993 Constitution as one of the permanent and untouchable constitutional norms. In other words, any change to the fundamental rules governing the relationship between the state and the people must occur within the limits of this principle. This chapter aims to provide an insight into the concept and constitutional framework of this principle through which state power and citizens' rights and freedoms are exercised, to discuss the current practices of state organs in compliance with this constitutional norm and attempts to analyze how this principle may be enhanced to build up state institutions as the only legitimate mechanism for achieving the ideal of liberal democracy and assuring the representativeness and responsiveness of the government.

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I. Introduction

In the 21st century, the concept and practice of liberal democracy are at a critical stage of its long and difficult journey towards a representative and inclusive government. This principle continues to evolve over time within particular contexts and is shaped by people living in liberal democratic nations. As Kofi Annan has noted: "[N]o one is born a good citizen, no nation is born a democracy. Both are processes that evolve over a lifetime."[1] This means that the structure and components of a particular society interact and intertwine with its governmental system. Thus, Cambodia is no exception.

If democracy is defined as the existence of a written Constitution and regular universal elections, Cambodia's democracy may date back as far as 1947. Even before independence, the country already had its own Constitution, which was modeled after the French Constitution of the 4th Republic promulgated by the Constituent Assembly, whose members were elected by the people.[2] Yet, at that time, popular sovereignty remained subject to national sovereignty, or more precisely, subject to the King since *"[...All] power emanates from the King"*.[3] Although there was a separation of functions among state institutions, a separation of power among legislative, executive and judicial branches did not exist, for all powers were exercised in the name of the monarch..[4]

Liberal democracy was incorporated into the Kingdom's Constitution in 1993. Under the 1991 Paris Peace Accords, Cambodia was obliged to implement a system of "liberal democracy on the basis of pluralism".[5] As a result, the 1993 Constitution solemnly declares that Cambodia's governmental system adheres to the principle of liberal multi-party democracy.[6] Under the plain meaning of the text itself, the term means 'a democracy on the

1 Kofi Annan is a former UN Secretary-General and a Nobel laureate. This quote was captured from a post on his personal Facebook profile, May 12, 2015. (Accessed May 13, 2015. https://www.facebook.com/pages/Kofi-Annan/228449696042).

2 Raoul M. Jennar. *The Cambodian Constitutions (1953-1993)*. White Lotus: Bangkok/Cheney, 1995, p. 35.

3 The 1947 Constitution, Article 21. Ibid, Raoul M. Jennar, at supra note 2, p. 40. See also, Constitutional Council of Cambodia, "Laws and Regulation Relative to the Constitutional Council: Constitution Compendium of Cambodia," p.8. download: http://www.ccc.gov.kh/khmer/basic_text/Constitutions%20of%20Cambodia%201947-1993%20.pdf

4 The 1947 Constitution, Articles 22-24. Ibid, Raoul M. Jennar, at supra note 2, p. 40. See also, Ibid, supra note 3, Constitutional Council of Cambodia, pp. 8-9.

5 Article 23, of the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, which was adopted by the final meeting of the Paris Conference on 23 October 1991. This article made a direct reference to Annex 5 of the Agreement titled "Principles for a New Constitution for Cambodia".

6 Constitution, Article 51 new (1993 as amended in 1999).

basis of liberalism and pluralism'.[7] This conception of liberal democracy, with its pluralistic character, requires Cambodia to respect and protect fundamental human rights, especially civil and political rights, the principles of separation of power and the rule of law.[8]

Unlike its 1947 predecessor, the 1993 Constitution[9] limits the monarch's power to a nearly like symbolic role as the head of state[10] but largely recognizes the rights and freedoms of people[11]. While "*all power belongs to the citizens, the citizens exercise their power through the National Assembly, the Senate, the Royal Government and the Judiciary*"[12]. Although Cambodia's parliamentary system is based on bicameralism, the National Assembly is more powerful when compared to the Senate[13], partly due to the fact that, in addition to its constitutional authority, it receives a direct mandate from the people through national elections.[14]

However, despite its prominence and importance, the principle of liberal multi-party democracy has never been explored and discussed in the Cambodian context in depth until now.[15] Since the incorporation of this principle in the 1993 Constitution, questions are often raised in the election period on whether it is effectively implemented,[16] still there is no any in-depth analysis of the principle of liberal multi-party democracy by scholars, politicians or civil society organizations. This lack of scholarship may be partly attributed to a belief that, considering the country's socio-cultural conditions, it might

7 Hor Peng. "The Modern Era of Cambodian Constitutionalism". In Introduction to Cambodian Law, Hor Peng, Kong Phallack and Jörg Menzel (eds.). Konrad-Adenauer-Stiftung: Phnom Penh, 2012, p. 41.

8 See, The Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, or The Paris Peace Agreement of 1991, Annex 5. See also, Constitution, Article 51 new, Article 56, Article 78 and Article 98 new (1993 as amended in 1999).

9 Constitution of the Kingdom of Cambodia, September 24, 1993, last amended on October 23, 2014 [hereinafter Constitution].

10 Constitution, Chapter II.

11 Constitution, Chapter III.

12 Constitution, Article 51 new (1993 as amended in 1999).

13 Constitution, Chapter VIII.

14 Constitution, Chapter VII.

15 Studies on this theme remain scarce since the first publication of a local well-known textbook on constitutional law does not elaborate on it. In the past, Hor Peng, an expert on constitutional law, attempted to provide a definition of the term without studying the principle in depth. See, Chhorn Sopheap et al. *Cambodian Constitutional Law* (University Press of Cambodia: Phnom Penh, 2005). See also, Hor Peng. at supra note 7, pp. 23-69.

16 Questions regarding the validity of the National Assembly's mandate, and, in turn, that of the government were raised twice, in 2003 and 2013, among politicians, political analysts and policy makers as well as national and international observers, since only one of the two wining political parties appeared in the preliminary and the first sessions of the National Assembly.
Khuon Narim and Kuch Naren, "Rainsy urges King to delay Parliament meeting until November", The Cambodia Daily, September 21, 2013. (Accessed May 9, 2015, https://www.cambodiadaily.com/elections/rainsy-urges-king-to-delay-parliament-meeting-until-november-42864/); Zsombor Peter and Hul Reaksmey, "With just one party present, King convenes new Parliament", The Cambodia Daily, September 24, 2013. (Accessed May 9, 2015, https://www.cambodiadaily.com/elections/with-just-one-party-present-king-convenes-new-parliament-43033/).

not be the right time to carefully consider the issue.[17] Rather, the issues of free and fair elections have almost always been the focus of most reports by local and international election observers, including the United Nations Special Rapporteur for Cambodia, since the first election in 1993 up until the most recent one in 2013.[18]

With the recent changes in the socio-economic and political landscapes,[19] an in-depth study into Cambodia's liberal multi-party democracy has become essential. Professor Dr. Hor Peng makes the point that the outward characteristics of Cambodia's liberal democracy do not necessarily matter but that *"the morality of political justice"* and the *"different approaches"* for its achievement by individual leaders are of utmost significance.[20] His claim may well reflect recent eruption of collective violence in the aftermath of the 2013 national election, as well as in consecutive political crises in the previous elections. This phenomenon of a struggle between the government and its own people can be explained, in Kofi Annan's words, by the fact that *"[W]hen leaders fail to lead, people take charge and leaders then have to follow."*[21] As a consequence, these periods of unrests and political crises led some scholars and researchers to reflect on whether this constitutionally-designed framework remains effective and responsive as a just method for governing the relationship between the people and the government.

The chapter aims to provide an insight into the concept of constitutional frameworks surrounding the principle of liberal multi-party democracy, through which state power and citizens' rights and freedom are exercised. In addition, the author will discuss the current practices of state institutions in respect of this constitutional norm and attempt to analyze how this principle may be enhanced to strengthen the state institutions as the only legitimate mechanism, and make the ideal of liberal democracy more likely achievable in a reality. Since Cambodia's government functions in accordance with a parliamentary system, studying and analyzing the principle of liberal multi-party democracy in the context of local elections and administration is not the focus of this chapter.

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17 Historians and legal experts seem to be more pessimistic of pluralism in Cambodia and identify the socio-cultural and political situations of the country as the main barriers for both political participation of the people and the progress of realizing pluralism. Ibid, see Chhorn Sopheap et al., at supra note 11, pp. 238-239.

18 COMFREL. *2013 Annual Report: Democracy, Elections and Reform in Cambodia*. (COMFREL: Phnom Penh, April 2014), pp. 15 and 18-19.

19 Over a decade of economic growth and especially a demographic shift from an elderly to a young population, most of whom are not only under 30 years old but also have better education compared to their parents. For the details, see Khun Chandara. *Cambodian Youth in Creating More Liberal Democracy* (thesis). University of Canterbury: Christchurch, March 2014. Download: https://www.academia.edu/6871079/CAMBODIAN_YOUTH_IN_CREATING_MORE_LIBERAL_DEMOCRACY

20 See Hor Peng, at supra note 7, p. 43.

21 This sentence is quoted from an exclusive interview between Kofi Annan and Subhabrata Guha of the Times of India, which was published in the Times of India on February 6, 2014. See "If leaders fail, people will lead", The Elders. (Accessed March 2, 2014. www.theelders.org/article/if-leaders-fail-people-will-lead).

II. 'Liberal Multi-Party Democracy': Its Meaning and Essence

Up until the present, "liberal multi-party democracy" has not been defined in Cambodian law. The principle appears twice in the 1993 Constitution in Article 51 (new) and Article 153 (new) as well as in national laws governing elections. However, besides a few attempts by some scholars to define the term[22], the decisions and notifications of the Constitutional Council may help shedding light on some of the major components of this principle. This investigation is necessary as a failure to comply with this constitutional norm may have negative implications for the validity of the National Assembly and, in turn, that of the government.

In addition to the protection of individual rights, the principle of liberal multi-party democracy aims to encourage the participation of more political parties in elections and in Parliament. The principle may be more effectively realized when free and fair elections are arranged regularly, the proportional electoral system favors smaller parties, voices within the Parliament become more diverse and minority voices are represented and protected. In this sense, whenever the admirable goals of this principle are under threat, the legitimacy of either the Parliament or the Royal Government of Cambodia, the cabinet, as a whole becomes questionable. Thus, with the exception of the issues in the election process itself, we will discuss all the issues.

As the concept of liberal pluralism encourages more political participation by both big and small parties in elections and the National Assembly[23], many observers believe that the "proportional" electoral system satisfies the goal of *pluralism of the political parties.*[24] Yet, since the term is not defined by any law, still there are questions on whether the objective of the principle is actually fulfilled by the participation of more political parties in elections, their presence in the Parliament or both.

The participation of more political parties in elections may be constrained by strict legal requirements for registration of a political party at the Ministry of Interior. Registered parties may participate in the national or sub-national elections if they choose. Among the requirements imposed by the Law on the Political Party, a party must have at least 4,000 members and deposit a particular sum at the National Bank of Cambodia. Such require-

22 The term "*liberal multi-party democracy*" is defined as "a government rules by the elected representatives of the people with granting every much respect to political and civil rights of the people." See, Hor Peng , at supra note 7, p. 42.

23 The original spirit of the 1991 Paris Peace Agreement.

24 Law on the Election of the National Assembly Members, promulgated by Kram No NS/RKM/0315/003 (March 26, 2015), Articles 2 and 5. Law on Election of Senate Members, promulgated by Kram No NS/RKM/0605/020 (June 20, 2005), Article 8. Law on the Election of Capital/Provincial, Municipality/District/Khan Councils, promulgated by Kram No NS/RKM/0508/017 (May 22, 2008), Article 13. Law on Election of Commune/Sangkat Councils, promulgated by Kram No NS/RKM/0301/04 (March 19, 2001), and amended by Kram No NS/RKM/0711/012 (June 27, 2006), Article 5.

ments may prevent smaller parties from engaging in the political process[25] and make a mockery of the concept of pluralism. Another consequence of these rules is that no independent political candidate is possible under Cambodia's current proportional system.

The presence of more political parties in the National Assembly may be perceived as a constitutional requirement depending on case by case: the establishment, the validity and functioning of the National Assembly in its mandate. The Constitutional Council of Cambodia has made it clear that at least 120 National Assembly members is "the necessary condition of the election for the establishment of the National Assembly in each mandate, but not for the functioning of the National Assembly."[26] In this sense, the total number of at least 120 National Assembly members is not required for either the validity of the National Assembly or that of each cabinet's mandate as well.

The 2013 national election was different from the 2003 national election in terms of the required number of the members of Parliament necessary to legally convene the preliminary session and carry out the business of the National Assembly. Before the 2005 constitutional amendment of Articles 88 and 111 (new)[27], winning political parties were required to have at least a two-thirds majority of the 123 National Assembly seats, or 82 seats, which made holding the *preliminary session*[28] of the National Assembly impossible until a year after the election. However, based on the Constitutional Council's interpretation in 2003 and Article 82 (new) of the 1993 Constitution, the ruling Cambodian People's Party (CPP) argued that 63 seats of the National Assembly (the relative/simple majority) are clearly sufficient for either the validity or functioning of the National Assembly as well as for the establishment of the Royal Government of Cambodia, the Council of Ministers, in each mandate.[29]

Pluralism within the National Assembly might be desirable either for its form or its content. This desire can be understood by referring to the original spirit of the 1993 Constitution's drafters. The 1991 Paris Peace Accords, whereby many of Cambodia's constitutional provisions are modeled from, was the fruit of the peace talks among the disputing parties in Cambodia's civil war who may have wished for both participation in the national elections and the Parliament. However, how this principle protects smaller parties in the legislature is unclear.

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25 Law on Political Parties, promulgated by Kram CS/RKM/ 1197/07 (November 18, 1998), Article 20.

26 The Constitutional Council, CASE No 069/013/2003 (July 14, 2003), Decision No 054/005/2003 CC.D (July 22, 2003), and Notification No 20/2003 CC (September 22, 2003).

27 For the original text of the 1993 Constitution without later amendments, see Ibid, supra note 3, Constitutional Council of Cambodia, pp. 234-326.

28 The preliminary session of the National Assembly is convened by the King within 60 days after the election of the National Assembly members. This session may not only be necessary for the validity of the establishment of that particular National Assembly and validation of its mandate, but may pave the way for the functioning of the Assembly.

29 Hul Reaksmey and Zsombor Peter, "Hun Sen's Cabinet Approves $3.5 B Draft Budget", The Cambodia Daily, October 28, 2013. (Accessed on April 16, 2015, https://www.cambodiadaily.com/archives/hun-sens-cabinet-approves-3-5b-draft-budget-45985/).

In recent years, the quality of political participation by non-ruling parties has been improved through their contributions to government policy and checks and balances on the executive power. In order to speak in parliamentary sessions, a representative group of 10 parliamentarians is required, so that every member of each group may raise their ideas with the prior approval of the presidents of each chamber, either the National Assembly or the Senate.[30] After the Constitutional Council's decision regarding its constitutionality[31], the new Internal Rules of the National Assembly[32] permitted the opposition party, which holds at least 25 percent of the Assembly's total seats, to designate a "Minority Leader" as a *dialogue partner* with the "Majority Leader"[33] from the ruling party.[34] Nevertheless, the principle of liberal pluralism is likely infringed if the smaller parties' voices are not heard and only those with at least 10 or 31 seats in either the National Assembly or the Senate, respectively, may have their concerns aired in the Parliament.

III. Controversy over the Validity of the Government's and National Assembly's Mandates

In the aftermath of the 2013 election result, the opposition party boycotted the preliminary session of the National Assembly, convened by the King, and claimed serious electoral irregularities as the reason for their boycott. Such a political turmoil is not a new phenomenon in Cambodia. Yet, there are no clear provisions, in either the Constitution or the Internal Rules of the Parliament, governing such a boycott. Thus, it is logical for jurists, researchers and election watchdogs to question the validity of the National Assembly's mandate and the Royal Government of Cambodia, the cabinet, for members of the Assembly in the controversial requisite number were not present when the National Assembly was convened, due to the opposition's boycott. However, in 2003, the Consti-

30 Internal Rules of the National Assembly, Article 55 (new) and Article 48 (new) (2). Internal Rules of the Senate, Articles 38, 49 and 51.

31 Constitutional Council of Cambodia, CASE No 253/010/2014 (December 19, 2014), Decision No 152/006/2014 CC.D (December 26, 2014).

32 Internal Rules of the National Assembly, Article 48 (new) (3). See National Assembly of Cambodia, "The 6th Commission of the National Assembly met with signatories of the Cambodian People's Party and the Cambodia National Rescue Party", December 16, 2014. (Accessed on April 16, 2015, http://www.nac.org.kh/article/715#.VS97Fi7CvZc).

33 Meas Sokchea, "Sar Kheng to be National Assembly majority leader", The Phnom Penh Post, January 22, 2015, (Accessed on April 16, 2015, http://www.phnompenhpost.com/national/sar-kheng-be-natl-assembly-majority-leader).

34 While the "culture of dialogue" remains a concern among scholars, researchers and civil society organizations, it is claimed to have played a crucial role in making Cambodia a 'peaceful and truly democratic' country. Men Kimseng. "Cambodian Politics at a 'Turning Point', Opposition Leader Says." Voice of America Khmer, May 14, 2015, (Accessed May 15, 2015, http://www.voacambodia.com/content/cambodian-politics-at-a-turning-point-opposition-leader-says/2767398.html).

tutional Council of Cambodia made it clear that the presence of at least 120 National Assembly's members is not a necessary condition for validating the mandates of either the Assembly or the Council of Ministers.[35]

However, despite the Council's earlier decision, Cambodia's Prime Minister Hun Sen sought reconciliation between the majority CPP and the opposition, the Cambodian National Rescue Party (CNRP). This political move may seem to suggest that questions of legitimacy can challenge the legality of government. The presence of National Assembly's members from the opposition does not have any bearing on the validity of the mandates of either the Assembly or the government but may affect perceptions as to who the "legitimate" mandate holder of the state in the parliamentary system is, which is why the Prime Minister, though under no legal obligation to do so, reached out to the opposition.

Following this outreach, a political dialogue was pushed forward through concessions by the ruling and opposition parties in the National Assembly. Positions in the Special Commissions in the National Assembly and in the National Election Committee – the national body in charge of overseeing elections – were proportionally allocated between the CPP, the ruling party, and the CNRP, the opposition. Many efforts such as this have been made in order to restore the government's legitimacy and to avoid such a gridlock in the future. However, another opposition boycott appears likely unavoidable after the 2018 national elections and for the same reasons of perceived interference with the implementation and execution of "free, fair and just elections". Indeed, the controversy in the new Election Law makes this prediction very probable.

As a result of the political agreements between the CPP and CNRP on July 27, a new election law was promulgated in early 2015, to replace the previous law in 1997 and its consecutive amendment laws. While the 1997 Election Law recognized the invalidity of the National Assembly members' mandates and a loss of their qualification only if the political parties in the Assembly "*announce a dismissal of their seats*"[36], the 2015 Election Law stipulates three cases of the boycotts whereby it will be deemed as an *"implicitly assumed"* dismissal of their seats: "the preliminary session", "the plenary session" of the National Assembly, or the oath-taking ceremony administered prior to taking the office.[37]

These provisions in the 2015 Election Law clearly reflect the contradictory political and legal approaches of the ruling and the opposition parties. The CNRP would have liked these provisions applied only if "the organization and functioning of the elections

35 Constitutional Council, CASE No 069/013/2003 (July 14, 2003), Decision No 054/005/2003 CC.D (July 22, 2003) and Notification No 20/2003 (September 22, 2003).

36 Law on the Election of the National Assembly Members, promulgated by Kram No NS/RKM/1297-06 (December 26, 1997) and amended four times by Kram No NS/KRM/0902/017, Kram No. NS/KRM/0606/019, Kram No. NS/KRM/0107/007, and Kram No. NS/KRM/0711/013 in 2002, 2006, 2007 and in 2011 respectively, Article 118 (new). See The National election Committee, "Law list: Law on Election of National Assembly Members". (Accessed May 9, 2015, http://www.necelect.org.kh/nec_khmer/index.php? option=com_content&view=article&id=102&Itemid=216).

37 Ibid, supra note 23, Law on Election of the National Assembly Members, Article 138.

are free, fair and just in accordance with the Constitution, Law on the Organization and Functioning of the Constitutional Council, Law on the Organization and Functioning of the National Election Committee, and Law on the Election of Members of the National Assembly". On the contrary, the CPP intends for the three boycott situations to be seen as the "implicitly assumed" dismissal of the seats in the Assembly by smaller political parties, especially the CNRP, regardless of questions on the election process.[38] In light of the liberal multi-party principle, some have questioned the constitutionality of Article 138 of the 2015 Election Law, which imposes "constructive dismissal" of the seats under the three boycott scenarios outlined above. However, this law has already been reviewed and found to comply with the Constitution by the Constitutional Council.[39]

IV. The Relationship of People and State within Frameworks of the Principle

A discussion on the liberal multi-party democracy is crucial for understanding what means the people can use to make their voice heard and their government more accountable and responsive. American political theorist Benjamin Barber has called representative democracy "thin democracy" and compared it to what he calls "politics as zookeeping", where he characterizes interactions between the state and the people as similar to interactions between zoo keepers and animals in the zoo.[40] In this regard, Professor Dr. Hor Peng gave his impressions regarding the quality and success of Cambodia's liberal democracy based on its adherence to "universal and modern constitutional characteristics" and the approaches chosen by individual political leaders for achieving political justice in a moral manner.[41] Given his argument, it is necessary to discuss the bases upon which Cambodia's parliamentary system is founded and to note how it functions in practices.

38 Ibid.

39 Constitutional Council of Cambodia, CASE No 255/002/2015 (March 23, 2015), Decision No 154/002/2015 (March 24, 2015).

40 Benjamin Barber. *Strong Democracy: Participator Politics for a New Age* (Berkeley, California: University of California Press, 1984); cited in Frederick Powell, *The Politics of Civil Society: Neoliberalism or Social Left?* (Great Britain: University of Bristol, 2007, p. 16).

41 Ibid, Hor Peng, at supra note 7, pp. 39 and 43.

According to IRI opinion polls in early and late 2013, people appeared to be less optimistic regarding the direction and leadership of the country and seemed to insist that poverty and inequality are the core of this lack of optimism.[42] In another recent study, by emphasizing on persistent issues of land grabs as "continuing human rights concerns", the Cambodian Institute for Cooperation and Peace (CICP) found that insecurity over land ownership exacerbated the existing hardships faced by rural Cambodians, who already suffered from the growing inequality within the country.[43] Most importantly, regarding people's means of access to the government through the state institutions for addressing their grievances, the post 2013 election reforms appear likely to increase dissatisfaction as they have further restricted the availability of public spaces, where people are able to engage with the state and express discontent with the government's performance.[44]

1. The False Promises Inherent in the Governmental System

Cambodia's new governmental system, including its frameworks in the 1993 Constitution, focuses on the people, especially with regard to their socio-economic and political rights. However, despite this apparent triumph for the Cambodian people, the Constitution drafters appear to impose some constraints on how the people's rights and freedoms may be exercised through the legitimate mechanisms of the country's representative democracy. As a consequence, other mechanisms or practices are not only illegitimate but otherwise discouraged.

The 1993 Constituent Assembly integrated international instruments directly into the Constitution in order to solemnly commit Cambodia to achieve international standards for the protection of human rights. The United Nations Charter and the Universal Declaration of Human Rights as well as other conventions and covenants regarding women and children's rights become an integral part of Article 31 in the new Constitution. Under this Article, the Cambodian people are recognized to possess the rights and freedom

42 IRI, *Survey of Cambodian Public Opinion: January 12-February 2, 2013*. IRI: Phnom Penh, 2013, pp. 4-6. See IRI, "IRI Cambodia Survey Finds High Interest in National Elections," May 24, 2013, (Accessed April 18, 2015, http://www.iri.org/resource/iri-cambodia-survey-finds-high-interest-national-elections). See also IRI, *Survey of Cambodian Public Opinion: October 28-November 10, 2013*. IRI: Phnom Penh, 2014, pp. 4-6. See IRI, "IRI Cambodia Survey: Declining Optimism on Country's Direction; Strong Support for Democratic Reforms", January 23, 2014, (Accessed April 18, 2015, http://www.iri.org/resource/iri-cambodia-survey-declining-optimism-country%E2%80%99s-direction-strong-support-democratic).

43 Alice Beban and Pou Sovachana. *Human Security & Land Rights in Cambodia*. Cambodian Institute for Cooperation and Peace (CICP): Phnom Penh, 2014, pp. iii-iv, (Accessed April 18, 2015, http://www.cicp.org.kh/pub/Publications/4/22/22).

44 Silas Everett and Tim Meisburger. *Democracy in Cambodia—2014: A Survey of the Cambodian Electorate*. The Asia Foundation: Phnom Penh, 2015, pp. 3-6, (Accessed April 18, 2015, http://asiafoundation.org/publications/pdf/1446). See also, COMFREL. *Democracy, Elections and Reform in Cambodia: 2014 Annual Report*. COMFREL: Phnom Penh, March 2015, pp. 4-7, (Accessed April 18, 2015, http://www.comfrel.org/eng/index.php?option=com_mypublications&catid=193&view=list&Itemid=1088).

to vote, assemble, to own private property and have access to a fair and just trial, if to name just a few of the enumerated rights.[45] However, the people must exercise these rights and freedoms "through the National Assembly, the Senate, the government and the courts".[46] While it is normal for people in a representative democracy country to exercise their rights through state institutions, Article 51 (new) of the Constitution appears to either contradict the remainder of the Constitution, or to provides leverage for the government in each mandate to define individual approaches to performance, leaving questions on the morality of political justice to the state itself.

In principle, the National Assembly of Cambodia is the most powerful state organ. This legislative body has at least 120 members who are directly elected by Cambodian citizens[47], yet the Senate and the government are not. The National Assembly must vote on and approve any draft legislation introduced by parliamentarians or the executive. The Senate does not have the final say in the legislative powers[48] whereas the cabinet, including its individual members, may be held responsible before the Assembly.[49] However, Cambodia has adopted a "parliamentary regime",[50] whereby the executive and the legislative cooperate and rely on each other.[51]

As a direct consequence of the parliamentary system and liberal multi-party democracy[52], the promises of liberal democracy may be difficult to achieve in Cambodia. "Any imperative mandate shall be nullified",[53] so every parliamentarian owes loyalty to his or her political party.[54] Based on Cambodia's "proportional electoral system",[55] parliamentarians owe their loyalty to their political parties and are dependent on their parties for their mandates.[56] This means that their status as Members of Parliament exists only if they

45 Political rights are mainly stipulated in Chapter 3 (Articles 31-50), while socio-economic and cultural rights are enumerated in Chapter 5 (Articles 56-64) and Chapter 6 (Articles 65-75), of the Constitution.
46 Constitution, Article 51 (new) (1993 as amended in 1999).
47 Constitution, Articles 76, 99 (new) and 119 (new) (1993 as amended in 1999).
48 Constitution, Article 113 (new) (1993 as amended in 1999).
49 Constitution, Articles 96-98 (new), 121 (new) and 126 (new) (1993 as amended in 1999).
50 In the meeting minutes of the Constituent Assembly, the term "parliamentary regime" was discussed and a suggestion was made that it would be inserted into the draft 1993 Constitution. However, it was decided against as the Constituent Assembly itself agreed that a parliamentary regime was already implied by the text itself. Secretariat General of the National Assembly (SGNA). *Detailed Minutes on the Second Plenary Session of the Constituent Assembly from 15 to 19 September 1993*. SGNA: Phnom Penh, 1993, pp. 201-205.
51 Ibid, supra note 11, Chhorn Sopheap et al., pp. 115 and 191-205.
52 Constitution, Article 51 (new) (1993 as amended in 1999). Ibid, *supra note* 23, Law on Election of the National Assembly Members, Article 2.
53 Constitution, Article 77.
54 Ibid supra note 11, Chhorn Sopheap, et al., p. 119.
55 Ibid, *supra note* 23, Law on Election of the National Assembly Members, Article 5. Law on Elections of Senate Members, Article 8. Law on the Election of Capital/Provincial, Municipality/District/Khan Councils, Article 13. Law on Election of Commune/Sangkat Councils, Article 5.
56 Constitution, Article 95.

remain members of their political parties.[57] Lastly, despite the "motion of censure", other means for making the government more accountable and responsive through the Assembly may be less effective due to the absence of enforcement measures and mechanisms.[58]

2. Mutual Dependency between Parliamentarians and Political Parties

Given the structure of Cambodia's representative democracy, in general, and the proportional electoral system, in particular, both members of the National Assembly and the Senate appear more likely to owe their loyalty to the political parties rather than to their constituents. Each Assembly's member and Senator have a mandate of five and six years respectively, and exercise their mandate until the Parliament in the next legislature takes office.[59] *Under this system, how can the voters ensure that their representatives or the winning political parties keep the promises once they take office in the post-election period?*

In terms of representation and accountability, there may be a slight difference between members of the National Assembly and the Senators due to their method of election, which is direct and indirect respectively. Although the former is elected by Khmer citizens in their particular provinces, most of the latter is indirectly elected by members of the Commune Councils and the remaining seats in the Senate are nominated by the King and the National Assembly. Nevertheless, despite their different election mechanisms, the abolishment of the imperative mandate is applicable to any member in both chambers of Parliament.[60]

As noted earlier, each parliamentarian's mandate is dependent on his or her membership in a political party. In other words, if members of the National Assembly lose their membership in the political party, their mandates as parliamentarians also ceases. Within this mutually dependent relationship, it is necessary to study three scenarios in which a parliamentarian's mandate may cease: 1. the withdrawal of his or her candidacy from the Assembly with or without his or her consent[61], 2. a loss of his or her membership in a political party[62] and 3. an annulment of his or her political party's registration validity.[63]

57 Constitutional Council of Cambodia, CASE No 176/007/2010 (July 16, 2010), Decision No 111/004/2010 (August 04, 2010).

58 Hor Peng has argued that, due to parliamentary stability, the system of checks and balances in Cambodia's parliamentary government may be used very infrequently. However, that does not mean that it will never prove necessary. Given free and fair elections and a changing political landscape, such measures may become necessary. See, Hor Peng, at supra note 7, p.53.

59 Constitution, Articles 78 and 102 (new).

60 Constitution, Article 77.

61 Constitution, Article 95.

62 Law on the Political Party, promulgated by Kram N. CHS/RKM/1197/07 (18 November 1998), Article 16.

63 Ibid, Article 36.

Most often the members of the National Assembly resign from their position after national elections and also sometimes during their mandates.[64] In some cases, parliamentarians' mandates may also end when they are no longer members of the parties that win seats in the National Assembly. Finally, in rare cases, they may also lose their mandates as the representatives of their constituents when their winning parties are eliminated from political party lists at the Ministry of Interior for reasons, such as the dissolution of a political party or a merger of two or more parties.[65]

Despite their dependency on membership in a political party for their mandate, parliamentarians cannot be held responsible by their constituents during the term of their mandates. In other words, their constituents or the Cambodian people as a whole have no power to recall a member during his or her five-year mandate since any imperative mandate is nullified.[66] However, this situation may only occur in two rare and exceptional cases. . First, while the National Assembly is banned from dissolving the government twice in twelve months, such an attempted dissolution leads to the dissolution of the Assembly as well.[67] Secondly, parliamentarians' mandates may be threatened by any criminal charges determined by a plenary session of the National Assembly.[68]

Parliament's members generally have immunity from criminal prosecution while they are carrying out their duties. Given the current political order, suspension or withdrawal of such immunity is unlikely since it requires a vote of a "two-thirds majority of all members of the National Assembly" to take effects. Such hurdles to dissolution of the government or loss of qualified immunity make a parliamentarian's dismissal unlikely in the above two cases, especially when compared to a loss of membership within a party.[69] From the above, it shows that the Cambodian electorate has no means of addressing concerns and demands before their representatives, but must merely accept the constitutional design of the framework within the country's parliamentary system and liberal multi-party democracy.

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64 The issues surrounding the resignation of the National Assembly members have been heavily criticized by some local election watchdogs due to the absence of any clear and transparent processes. Political parties have more power to decide on these issues, although members of the National Assembly receive their mandates from their constituents and represent Cambodia as a whole. COMFREL. *Parliament Watch: Report for the First Year of the Fifth Mandate*. COMFREL: Phnom Penh, January 2015, p. 1, (Accessed April 19, 2015, http://www.comfrel.org/index.php?option=com_mypublications&view=list&catid=116&Itemid=1141).

65 Constitutional Council of Cambodia, CASE No 176/007/2010 (July 16, 2010), Decision No 111/004/2010 (August 04, 2010).

66 Constitution, Article 77.

67 Constitution, Article 78.

68 Constitution, Article 80.

69 Constitution, Article 95. Ibid, supra note 54, Law on Political Party, Article 12. Ibid, supra note 23, Law on the Election of the National Assembly Members, Article 24.

3. Accountability of the Government to the Assembly: Checks and Balances between the Executive and the Legislative

The Royal Government of Cambodia is in charge of initiating and implementing national policy. The prime minister and members of the cabinet must be members of the winning political party that holds the largest number of seats in the National Assembly and that wins a vote of confidence from the latter.[70] In turn, this executive body is responsible to the National Assembly, either individually or collectively.[71] Therefore, through the National Assembly – the representative body of citizens nationwide – every Cambodians may express discontent, make demands and hold the government or its members accountable though national policy and their performance in the office.[72]

The public may take requests or complaints to individual members or a particular Special Commission of the National Assembly.[73] After receiving a petition from the public, and through the President of the Assembly, the individual parliamentarians or Special Commission may ask for an explanation from any minister or the government, by either verbal or written replies.[74] In the case of a verbal reply, the President may decide whether to open the floor for debates or not.[75] However, doubts remain on how effective these constitutional provisions might be in regards with the implementation of checks and balances between the legislative and the executive, since there is no accessible record on the number and content of the National Assembly's debates occurring as a result of citizen complaints.[76]

A motion of censure, which is another means of making the government accountable and responsive to the National Assembly and, ultimately, the citizenry, has never been used. A motion of censure is a procedure by which any member of the Royal Government of Cambodia, including the Prime Minister or the entire cabinet, may be dismissed by a vote of the National Assembly. Throughout the history of Cambodia's second constitutional monarchy, this mechanism has never been used, even though the voting requirement for this process was lowered from a two-thirds majority to an absolute majority of

70 Constitution, Art. 119 (new) (previously Article 100 as amended in 1999).

71 Constitution, Article 121 (new) (1993 as amended in 1999).

72 Constitution, Article 51 (new) (1993 as amended in 1999).

73 With the 2014 Amendment creating the Anti-Corruption Commission, the total number of Special Commissions in the National Assembly has increased from 9 to 10. The Internal Rules of the National Assembly, adopted in the fifth mandate, and amended on August 8, 2014, Article 6 (new) (two). See also, Constitutional Council of Cambodia, CASE No250/007/2014 (August 08, 2014), Decision No 150/004/2014 (August 14, 2014).

74 Constitution, Articles 96 and 97. See also, Ibid, the Internal Rules of the National Assembly in the fifth mandate, Articles 33 (new) and 34.

75 Constitution, Article 96. Internal Rules of the National Assembly in the fifth mandate, Article 32.

76 For details regarding the records of the National Assembly, see NICFEC (Neutral and Impartial Committee for Free and Fair Elections in Cambodia) at https://nicfec.wordpress.com/ , and COMFREL (Committee for Free and Fair Elections in Cambodia) at http://www.comfrel.org/.

all the members of the National Assembly.[77] Nevertheless, this does not means that the mechanism will never be employed since it is possible for any winning party to hold less than a half of the total seats in the Assembly. Therefore, smaller parties can band together to form a simple majority for the purpose of censuring any parties in the government.[78]

V. Concluding Remarks

In 1947, a liberal democracy was introduced in Cambodia. As a result of universal suffrage in 1947, the Kingdom promulgated its first Constitution and replaced the traditional political system of absolute monarchy with a constitutional monarchy. However, the king remained powerful since he was still considered as the source of all political power. With the promulgation of the sixth Constitution in 1993, Cambodia's second constitutional monarchy was established. Within this constitutional framework, Cambodian democracy is maturing and the Cambodian people are increasingly engaging with government affairs as the masters of their destiny and the source of all power.

The current Constitution enshrines the principle of liberal multi-party democracy. Under this principle, Cambodian citizens are the masters of their motherland and future, while the government receives its mandate through free and fair elections. As a direct consequence of this principle, the proportional electoral system has become the source of legitimacy for election-related laws aiming to promote more political participation and diversity, as well as the presence of smaller political parties in the elections and in the legislative and executive branches of government. In this sense, the establishment of the National Assembly and the cabinet in each mandate owes its legitimacy to this principle.

However, while the rights and freedoms of Cambodians are recognized in the Constitution, the means of exercising these rights and freedoms are constitutionally determined. Their civil and political rights are mainly enumerated in Chapter 3 of the Constitution. However, the exercise of many of these rights may only be accomplished through the state institutions such as the cabinet, the parliament and the courts.[79] Regarding the political institutions, after members of the National Assembly have received their mandates from their constituents, the people seem to be disconnected from their respective representatives and no longer have any influence over them. Any imperative mandate is considered as null by the Constitution.[80]

77 Constitution, Article 98 (new) (1993 as amended in 2006).

78 Within Cambodia's recent political landscape, public opinions towards the country's direction and preference for a particular political party seem to be more polarized than ever. This polarization was evident in the 2013 national election results and after the election. While both the ruling and opposition party appear to be fragile, perhaps due to polarizing strategies and agendas, smaller parties are expected to emerge at the grassroots level.

79 Constitution, Articles 35 and 51 (new) (1993 as amended in 1999).

80 Constitution, Article 77.

This type of constitutional framework appears to have two main consequences. First, Cambodian people are obliged to exercise their rights through the traditional political framework of the state. In other words, informal political platforms, such as the rights and freedoms of assembly, of demonstrations and protests[81]– including associations, NGOs[82] and unions[83]– and of expression – through traditional and social media[84]– are discouraged and restricted, if not made completely illegal. The current political climate and trends in the country might have already proven this point.

Secondly, state institutions are not always responsive and accountable towards the people, hence the latter may be struggling to find other alternative ways to air their grievances. Indeed, informal political structures may gradually replace some functions of state institutions by challenging the latter for more means to have their concerns heard and issues addressed. All in all, this may threaten the country's stability and make expose the society more vulnerable to some forms of collective violence. Such a volatile situation within the Cambodian society is made even more critical when both the formal and informal political structures governing the relationship of the people and the government are becoming increasingly restricted.

Professor Dr. Surya P. Subedi, the outgoing United Nations Special Rapporteur in charge of the human rights situations in Cambodia, recommended that the government and the opposition take steps to make Cambodia's liberal multi-party democracy "real".[85] This can potentially be accomplished either by extending the existing constitutional framework or leaving more space for alternatives to state institutions. In other words, it is a matter of rebalancing the system of state governance, given that the executive seems bent upon narrowing down existing public spaces for the exercise of rights. If the governing system remains unbalanced, a future situation is worrisome and may be compared to a steam that is building up in a hot boiling pot.

81 Ouch Sony and George Wright. "Preah Vihear Villagers Staying at Pagoda March to National Assembly", The Cambodia Daily, November 18, 2015 (Accessed May 15, 2015, https://www.cambodiadaily.com/news/preah-vihear-villagers-staying-at-pagoda-march-to-assembly-72512/).

82 Zsombor Peter. "Secret Draft of NGO Law Arrives at Council of Minister". The Cambodia Daily, May 8, 2015 (Accessed May 15, 2015, https://www.cambodiadaily.com/news/secret-draft-of-ngo-law-arrives-at-council-of-ministers-83402/).

83 Pech Sotheary and Sean Teehan. "Pass the union law: Hun Sen." The Phnom Penh Post, April 21, 2015 (Accessed May 15th, 2015, http://www.phnompenhpost.com/national/pass-union-law-hun-sen).

84 Charles Rollet. "Overseas Cambodians told cyber law applies." The Phnom Penh Post, November 7, 2014 (Accessed May 15, 2015, http://www.phnompenhpost.com/national/overseas-cambodians-told-cyber-law-applies).

85 UN News Center. "Outgoing UN rights expert advises Cambodian leaders to address democratic deficit." UN New Center, April 30, 2015 (Accessed May 15, 2015, http://www.un.org/apps/news/story.asp?NewsID=50743#.VVW5UC7CvZd).

When the political behaviors of the major political parties, especially the ruling party, are considered thoroughly, it seems that the freedoms of association and assembly may not be priorities in the agendas of either political parties or within the national policy. Given it is the case, the existing constitutional framework, such as the National Congress and the Congress of the National Assembly and the Senate in Chapter XIV and Chapter IX (new) of the Constitution respectively, may potentially be considered for revitalization and enhancement of a well-balanced representative democracy. Therefore, further studies into these issues become more interesting.

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FUNCTIONS, RIGHTS AND DUTIES OF POLITICAL PARTIES: A COMPARATIVE LEGAL ANALYSIS OF CAMBODIAN POLITICAL PARTY LAW

Denis SCHREY & Nathalie LAUER

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ABSTRACT

The existence of political parties is a key element in democracies today. The core of each democracy is the participation of the people. In constitutional and parliamentary monarchies as well as parliamentary democracies, the citizens' main avenue of participation is through electing members of Parliament. Candidates in elections are often selected, trained and presented as candidates by political parties. Political parties and their candidates compete for the citizens' votes via differing party platforms. The main function of political parties is to create a link between the citizens and the state. This link not only exists during elections, but between elections, when they develop their platforms as well as create and influence public opinion. This article aims to: (A) Briefly describe the functions of political parties in democracies; (B) Analyze the point of origin of political parties in Cambodia and its Constitution in light of the principle of multi-party democracy; (C) Clearly define the political party under Cambodian law; and (D) Examine the regulatory framework of political parties in Cambodian constitutional law and ordinary law, describing the right to and the process of establishment of political parties, their main rights and the legal limits to their activities. As Cambodia is a young democracy, it seems appropriate to compare the legal situation of political parties in Cambodia with the situation in other countries. We do not attempt to give a complete analysis of other legislation but highlight some main differences and similarities. Our conclusion (E) summarizes the results of this analysis and gives some recommendations for legal action.

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I. Introduction – Political Parties in Modern Democracies: Status and Functions

Political parties play an essential role in modern democracies. They fulfill a variety of functions in political life. National legislation on political parties varies greatly from country-to-country, for example, in presidential systems versus parliamentary systems.[1]

However, one can carve out two distinct functions of political parties common to modern democracies, the first involving the relationship between the state and society and the second governmental or state functions.[2]

The first function of political parties is creating a link between citizens and the political system. This link works in two directions: On the one hand, parties encourage citizens to participate in political life and make their opinions known to the political system's institutions. On the other hand, they explain decisions and actions by the state and other stakeholders to the citizens. Through both methods, political parties participate strongly in public opinion-making. They articulate and aggregate the interests of different social groups.

Political parties integrate various interests into a general political project and transform it into a political platform. They campaign on these platforms in order to receive the consent and support of the majority. They also recruit political personnel. That means they choose suitable persons as candidates and form the future generation of politicians. Finally, political parties participate in elections with their platforms and candidates.

After an election, political parties begin to fulfill their state and governmental functions as the party/coalition in power and the opposition parties. They organize the government in the narrow sense, *i.e.*, the cabinet and the ministries and the work in Parliament, *e.g.*, by forming political groups in Parliaments at national and local levels.

II. The Point of Origin: The System of Multi-Party Democracy in Cambodian Constitutional Law

The Kingdom of Cambodia is still a young democracy with a young Constitution, dating from 1993, which introduces the system of multi-party democracy. The Constitution of 1993 realized the guidelines given by the Paris Peace Agreements of 1991.[3] Annex 5 to the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict provided, inter alia, that the future Constitution of Cambodia would contain the freedom of asso-

1 Hallermann/Kaim, Parteien im internationalen Vergleich, p. 11 ff.

2 Cf. Hofmeister/Grabow, Political Parties – Functions and Organisation in Democratic Societies, p. 16.

3 Marks, in: Laurel E. Miller (ed.), Framing the State in Times of Transition: Case Studies in Constitution Making, p. 207, 211 ff. describes the Constitution of 1993 on the whole as more of a reversion to and combination of the elements of the 1947 and 1989 Constitutions than a new structure founded on Annex 5 of the Paris Peace Agreements.

ciation, including the freedom to form political parties, and "that Cambodia will follow a system of liberal democracy, on the basis of pluralism".[4] Those guidelines are well-known from other internationalized constitution-making processes[5] and the principle of multi-party democracy constitutes the radical opposite of the single-party system established by the socialist Constitution of 1981 during the occupation of Cambodia by Vietnam.[6]

In the preamble to the Cambodian Constitution of 1993, the Cambodian people expressed their will to restore a multi-party liberal democratic regime in Cambodia. The principle of liberal multi-party democracy is established in the first paragraph of Article 1 of the Cambodian Constitution. In Article 50 of the Cambodian Constitution, the principle of liberal multi-party democracy is strengthened and protected as it stipulates the obligation of all Khmer citizens to respect this principle. Its prominent position in the preamble and in Article 1 of the Cambodian Constitution as well as the special protection provided for in Article 50, demonstrates the importance of the principle of multi-party democracy in the Cambodian system of government.

III. The Notion of a Political Party

But, what exactly is a political party?

Under a comparative perspective, one notes a certain restraint by national-constitutional and ordinary legislators to provide a precise definition of what constitutes a political party.[7] In some countries, such as the United Kingdom and the Netherlands, there are no special constitutional or legal requirements for political parties.[8] Considering the special rights, obligations and functions of political parties, it seems necessary to specify more precisely what a political party is, especially in order to distinguish a political party from other political associations like action groups, etc.

One can find both structural and functional aspects in European legislation regarding political parties.

4 The text of the Paris Peace Agreements is available at: http://www.cambodia.org/facts/?page=1991+Paris+Peace+Agreements#agreement (last accessed: 2014/10/28).

5 They were used in Namibia in 1982 and in Bosnia-Herzegovina in the early 1990s, see Marks, in: Laurel E. Miller (ed.), Framing the State in Times of Transition: Case Studies in Constitution Making, p. 207, 229; Menzel, in: Hill/Menzel (eds.), Constitutionalism in Southeast Asia, Volume 2, p. 39 (48).

6 Menzel, in: Hill/Menzel (eds.), Constitutionalism in Southeast Asia, Volume 2, p. 39 (45 f.)

7 Schefold/Tsatsos/Morlok, in: Tsatsos/Schefold/Schneider (eds.), Parteienrecht im europäischen Vergleich, p. 737, 761.

8 Smith, in: Tsatsos/Schefold/Schneider (eds.), Parteienrecht im europäischen Vergleich, p. 301, 318; Elzinga, in: Tsatsos/Schefold/Schneider (eds.), Parteienrecht im europäischen Vergleich, p. 499, 528.

Structural elements of political parties can be found, for example, in § 2 para. 1 of the German Law on Political Parties and Article 3 of the Portuguese Law on Political Parties. Both provisions require a permanent structure to a certain degree. In contrast, legislation in France and Spain is less elaborate on this point.[9]

Functional elements are linked with the goals of political parties. One of the main goals of political parties is a result of the link between political parties and the Parliament in parliamentarian systems. Political parties seek to participate in elections.[10] In many countries, the goal of participating in elections is the main criterion of what constitutes a political party in contrast to other political or social groups. Another function that is used to describe political parties is the creation and influence of public opinion, both before and after elections.[11]

The Cambodian Constitution does not define political parties, but does presuppose their existence. Nevertheless, political parties are recognized and protected under Cambodian Constitutional Law. Article 42, para. 1 of the Cambodian Constitution establishes the right of Khmer citizens to associate in political parties and empowers the Cambodian legislature to determine the specifics of this right through legislation. This article is, at the same time, the mandate for the legislator to create a definition for political parties. In compliance with this mandate, the legislature created the Cambodian Law on Political Parties[12], which contains this definition in Article 2:

> *"A "political party" is a group of persons who have the same ideas and willingness and who voluntarily join together through a contract, to form a permanent and autonomous organization in order to participate in the national political life in accordance with liberal democratic and pluralism regime through free and fair elections as determined by the Constitution of the Kingdom of Cambodia and relevant laws in vigor."*

9 Schefold/Tsatsos/Morlok, in: Tsatsos/Schefold/Schneider (eds.), Parteienrecht im europäischen Vergleich, p. 737, 765 with further references. This statement on the Spanish Law on Political Parties of 2002 remains valid.

10 § 2 of the German Law on Political Parties, Art. 1 § 1 of the Portuguese Law on Political Parties, Article 4, sentence 1 of the French Constitution. Cf. Article 6 of the Spanish Constitution "Expression of the Will of the People." For additional details on these provisions, see: Schefold/Tsatsos/Morlok, in: Tsatsos/Schefold/Schneider (eds.), Parteienrecht im europäischen Vergleich, p. 737, 764 f. with further references.

11 E.g., Article 21, para. 1 of the German Basic Law and Article 6 of the Spanish Constitution.

12 An English version is available at: http://test.ahrchk.net/countries/cambodia/cambodian-laws/political_parties_law/political_parties (last downloaded 2014/10/28).

This definition of a political party contains three objective criteria and two subjective criteria:

A political party is a group of persons. Cambodian law has not failed to define the number of persons necessary: To establish a political party, 80 people are necessary[13] and to apply for registration as a political party, 4,000 people are necessary[14].[15]

That the members of this group must have the same ideas and intentions is the reason why the members form a political party rather than a real criterion. Moreover, consensus among party members may be more or less pronounced in one political party versus another and within one political party concerning different issues. Nevertheless, the shared ideas and intentions of a political party's membership in practice find their expression in the political party's platform, which they must provide along with their application to register as a political party.[16]

Under Cambodian law, the formation of a political party must be voluntary. Article 2 of the Cambodian Law on Political Parties excludes political parties that are formed by coercing members to join. Normally, such coercive membership requirements only exist in a single-party state, which is also prohibited by the Cambodian Constitution.[17] Moreover, Article 2 of the Cambodian Law on Political Parties provides that non-state actors may not violate the right of Khmer citizens to choose by prohibiting the use of force by such actors to compel membership in a political party.[18]

The first subjective criterion is the will of a political party's membership to form a permanent and autonomous organization. The requirement of permanence excludes, for example, ad-hoc organizations such as single-issue action groups. The autonomy of a political party is necessary to guarantee the fulfillment of the above described functions. Only a group that is autonomous – especially from the state – can freely develop a political program with alternative solutions concerning social and political issues. Moreover, autonomy is a precondition to realize pluralism in political life. A political party's positions have to be developed from within, which means by the citizens who are members of the political party.

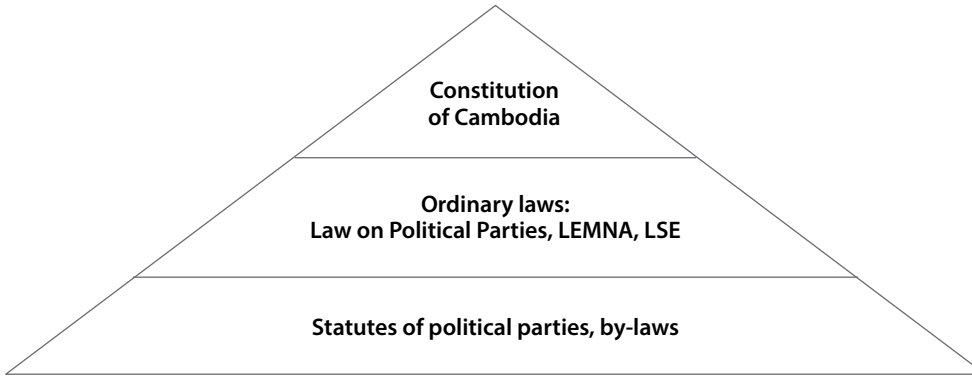
A political party's membership also needs the will to participate in the national political life through free and fair elections, which is the second subjective criterion outlined in Article 2 of the Law on Political Parties. This refers to one of the main tasks for a political party in a democratic system of government. By participating in elections, political parties build the link between citizens on the one hand and the state on the other, as political parties seek to win seats in Parliament and form the government.

13 Article 9 of the Cambodian Law on Political Parties.
14 Article 19 of the Cambodian Law on Political Parties.
15 For details concerning the processes of establishment and registration, see below D.I.3.
16 Article 20 clause 6 of the Cambodian Law on Political Parties.
17 The preamble as well as Articles 1 and 42 of the Cambodian Constitution.
18 Article 42 of the Cambodian Constitution.

IV. The Regulatory Framework for Political Parties

The regulatory framework for political parties in Cambodia is formed by the Cambodian Constitution as the supreme law, and within the limits set by ordinary law, especially the Law on Political Parties and electoral law, mainly the Law on Election of Members of the National Assembly and the Law on Senate Election. Under this framework, political parties are obliged[19] to establish a party statute (by-law) that includes, inter alia, rules concerning the relationship between the political party and its members and the internal organization of the party.[20]

All ordinary laws, including those under discussion here, must conform to the Cambodian Constitution as the supreme law[21], whereas party by-laws, as non-legislative regulations, must respect ordinary laws, especially the Law on Political Parties as well as the Constitution. This results in the following hierarchy of norms:



1. Freedom to Establish Political Parties in Article 42 of the Cambodian Constitution

One of the main differences between a multi-party system and a system with a single political party is the freedom to establish political parties. The Cambodian Constitution enshrines that freedom in Article 42.

a.) Beneficiaries of the Freedom of Establishment

Article 42 of the Cambodian Constitution assigns the right to establish a political party to all Khmer citizens. First and foremost, therefore, Article 42 is an individual right.

19 Article 10 of the Law on Political Parties.
20 Article 10 lit. a n° 1-13 of the Law on Political Parties.
21 Article 150 of the Cambodian Constitution.

Moreover, the political party itself is a holder of this right. This interpretation results from an examination of the objectives of Article 42, a teleological interpretation, and from the principle of a multi-party system itself.

First, Article 42 aims at protecting and realizing a multi-party system and, therefore, necessarily protects the political parties themselves. Secondly, the principle of multi-party democracy requires political parties to serve as stakeholders of Cambodian constitutional law.

Effectively protecting their existence and role in the Cambodian system of government necessitates a political party's right to free association. Conferring the right of free association only to the members individually and not to the political party as a whole is incongruent with their role in the multi-party system and would weaken the political parties' position within that system.[22]

b.) Scope

The freedom of establishment does not merely confer the right to establish a political party, but enshrines the right to join an already existing political party as well. The text of Article 42 of the Cambodian Constitution, however, mentions only the right to establish political parties. It follows that this right includes the less extensive right to join an already existing political party. This right is not absolute and meets its limits in the political party's right to refuse membership to an interested citizen. A political party is not obliged to accept the membership of anyone. For example, a party is not required to accept the membership of someone who publicly opposes the party or the party's platform or by other means tries to harm the political party.

The right to free association has a positive and a negative aspect: the right to establish a political party and the right to refrain from doing so. The negative dimension of the right to free association is more important concerning a citizen's right to avoid membership in a political party. In other words, no citizen can be obliged to join any political party or prevented from leaving one.

Freedom of association not only protects citizens from formal prohibitions against establishing or joining a political party, Article 42 takes factual obstacles to exercising this freedom into account as well. The scopes of Article 42 and Article 31 para. 2 of the Cambodian Constitution overlap with each other in this area. If the state imposes disadvantages on citizens because they are a member of a political party, such treatment violates a citizen's right to be treated equally regardless of his or her political views. If the disadvantage imposed is especially severe, this may also constitute an infringement of Article 42 because a citizen may, in light of the disadvantages expected, refrain from

22 The German Constitutional Court also takes this position with regard to the ordinary freedom of association (Article 9 para. 1 of the German Basic Law) without citing Article 19 para. 3 of German Basic Law that extends the scope of some citizen rights to legal persons, see BVerfGE 13, 174 (175); Jarass/Pieroth, Grundgesetz für die Bundesrepublik Deutschland – Kommentar, Article 9/11.

joining a political party. For example, in the case of a state refusing to appoint a citizen as an official due to the mere fact that this citizen is a member of a certain political party, the refusal infringes upon the citizen's right to be treated equally regardless of his or her political views under Article 31 para. 2 of the Cambodian Constitution. Moreover, such discriminatory state practice may force the citizen to resign from a political party to improve his or her career prospects or deter other citizens from joining or expressing support for a political party. This "chilling effect" violates the freedoms guaranteed by Article 42 of the Cambodian Constitution.

c.) Establishment of a Political Party

Article 42 of the Cambodian Constitution as well as the principle of multi-party democracy enshrined in the preamble and Article 1 of the Cambodian Constitution, guarantee the free establishment of political parties. The Constitution, therefore, sets boundaries for any subsequent law regulating the establishment of political parties in Cambodia. Such law must not contravene the right of free establishment. For example, such a law may not take into account a political party's platform when determining whether a party will be permitted to form.

Under German Constitutional Law, the right to free association even prohibits requiring political parties to register in order to be legally recognized[23], while other countries such as Finland, Greece, Portugal and Poland provide for constitutive registration through a formal process.[24] Even if there are good reasons for a process of registration, as for example the need for formal recognition of an association[25], such processes should not be used in a way to hinder the free establishment of political parties.

A group of persons that complies with the legal requirements for forming a political party has a right to be recognized as a party. There is no room for discretion in such a decision by any authority because that would endanger the principle of multi-party democracy as well as the right of free establishment.

23 Roellecke, in: Umbach (ed), Grundgesetz – Mitarbeiterkommentar und Handbuch, Article 21/66 with further references.

24 Dilek Emek, Parteiverbote und Europäische Menschenrechtskonvention p. 155.

25 European Commission for Democracy through Law (Venice Commission), Report on the Establishment, Organisation and Activities of Political Parties, CDL-AD(2004)004, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282004%29004-e (last downloaded 2014/10/28), p. 6.

The Cambodian Law on Political Parties distinguishes between two phases at the outset of a political party's existence: The establishment of a political party regulated by Articles 9 through 11[26] and the registration of a party regulated by Articles 19 and following. The terms used in the Law on Political Parties are slightly different than those used in the Constitution. "Establishment" in the sense used in Article 42 of the Cambodian Constitution is broader than "establishment" in the sense used in Article 9 of the Law on Political Parties. The term in Article 42 contains not only "establishment" in the sense of ordinary law, but the "registration" of political parties as in Articles 19 ff. of the Cambodian Constitution as well. Both senses together comprise the meaning of establishment in the constitutional sense.

Article 9 of the Cambodian Law on Political Parties sets fairly modest requirements for citizens who want to associate as a political party. Those citizens must be Khmer (Cambodian) citizens, at least 18 years old, residing in the Kingdom of Cambodia and number at least 80. They can form a political party merely by sending a letter of notice to the Ministry of Interior. As it is a letter of notice and not an application, the Ministry of Interior does not have any right or ability to deny formation of a political party. In fact, the Ministry is obliged to respond within 15 days, and, if it fails to do so, the fact of the political party's formation is not affected.

Up to this point, the Cambodian Law on Political Parties conforms to the Cambodian Constitution, especially Articles 1 and 42 as well as the preamble. The minimum number of 80 members for establishment of a party seems to be a quite reasonable regulation for formation.

Article 9 para. 2 of the Cambodian Law on Political Parties refers to Chapter V of that same law as containing the regulations for the registration of political parties. Political parties have "[…] to apply for registration in the political party register as determined in Chapter V of this Law, in order to obtain validity". The mere fact that political parties have to apply to register and that registration is necessary to obtain validity is at the very least problematic under the right to free association. This right is even further compromised by the conditions set out later in Chapter V: Article 19 of the Cambodian Law on Political Parties states that a political party must have at least 4000 members from several different provinces/municipalities to be considered for registration.

26 Article 10 of the Cambodian Law on Political Parties obliges the political party to establish by-laws and contains basic minimum provisions that the by-laws must include. It does not, however, prescribe the content of these provisions in the political party's by-laws. By-laws are not a condition for establishment but are for registration (Article 20 lit. 4 Cambodian Law on Political Parties). Article 11 of the Cambodian Law on Political Parties sets out the regulations regarding name, abbreviation and logo of the political party in order to avoid confusion among parties and prohibit religious or national references.

According to Article 19 of the Cambodian Law on Political Parties, a prospective political party has to provide, inter alia, the following information with the application for registration:

- the party's main policies and political platform
- a statement of the political party regarding its commitment to respect the Constitution, the Law on Political Parties and other relevant legal provisions in force, the principle of liberal multi-party democracy and human rights
- a summary of the personal history of either the President or at least 3 founding members (including photo(s))
- a copy of the receipt of payment of the registration fee

The Ministry of Interior must render its decision for approval[27] or rejection[28] of a registration application within 30 days[29] of receiving the complete application. During this time, the Ministry examines whether the documents provided are complete and whether they are in conformity with the Constitution, the Law on Political Parties and other relevant laws in effect.[30]

The conditions established for registration, and therefore for "obtaining validity," are much stricter than those for the establishment of a political party. The requirement of 4000 members constitutes quite a high barrier, if one considers the total population of the Kingdom of Cambodia as well as the much lower barriers in other countries. In Germany, for example, following a German Constitutional Court's decision, 400 members are sufficient to establish a political party.[31] Nevertheless, the minimum number required by the Cambodian Law on Political Parties remains appropriate, as a political party needs about 4000 votes to win a seat in a local council in Cambodia.

It is more problematic that the Ministry of Interior is entitled to examine the documents provided by the political party along with its registration application not merely for completeness but regarding their conformity with the Constitution, the Law on Political Parties and other laws in effect. This broad power exercised by the Ministry severely infringes the right to free association guaranteed in Article 42 of the Cambodian Constitution and the principle of liberal multi-party democracy (preamble, Article 1 of the Cambodian Constitution) as in a multi-party system, there should not be an elaborate examination of a political party's positions before it can obtain validity. On the contrary,

27 Article 23 of the Cambodian Law on Political Parties.
28 Article 24 of the Cambodian Law on Political Parties.
29 Article 22 para. 2 of the Cambodian Law on Political Parties.
30 Articles 23 and 24 of the Cambodian Law on Political Parties.
31 BVerfGE 24, 300 (320, 332).

a liberal multi-party system should be open to political parties that take positions different from the law in effect. An exception should be only concerning laws enshrining the highest values, for example, the Constitution, human rights, ius cogens,[32] etc.

For example, in France political parties are obliged to respect the principles of national sovereignty and democracy.[33] In Germany, political parties have to be organized in conformity to democratic principles and may not seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany.[34] Nevertheless, according to the German Constitutional Court, the loyalty of a political party to the German Basic Law is not a constitutive criterion of that political party.[35] A political party with unconstitutional goals remains a legally-recognized political party as long as it is not outlawed by the German Constitutional Court, according to Article 21 para. 2 sentence 2 of the Basic Law.

The justification for such infringement of a political party's freedom is the high value of such basic principles. Even if the principles of liberal multi-party democracy and freedom of association are part of Cambodian Constitutional Law, according to Article 150 of the Cambodian Constitution, as well part of the Supreme Law along with other constitutional principles, a conflict between the freedom of association and equality of opportunity, which contains the right to adopt even critical positions, on one hand, and vital constitutional principles, for example the principles of democracy or human rights, on the other, can be resolved in favor of the latter.

On the contrary, "conformity […] to other laws in vigor [force]" should not refer to a political party's platform and positions aiming at changing the laws in force, because the freedom of association takes precedence[36] over ordinary laws. This simply refers to a political party's actions and commitments as they are – as every Khmer citizen is – bound by the laws in effect.

Nevertheless, in practice the process of registering political parties in Cambodia seems to be more of a formality than a means of outlawing parties based on their views. There have been no known cases of rejection of an application due to questions regarding a political party's positions or the personal history of its leader or founding members. On

32 Ius cogens is a term of art used in international law. It describes absolute standards that are non-negotiable and bind all states.

33 Article 4 of the French Constitution of 1958.

34 Article 21 para. 1 sentence 3 and para. 2 of the German Basic Law.

35 BVerfGE 47, 198 (223); Dilek Emek, Parteiverbote und Europäische Menschenrechtskonvention p. 155.

36 Article 150 of the Cambodian Constitution.

the contrary, the considerable number of political parties participating in elections[37] and registered at the Ministry of Interior[38] suggests that the Ministry of Interior's practice in the registration process is not restrictive.

Political parties are, for example, obliged to provide a "summary of the personal history", or biography, of the president or three founding members of the party. However, the Ministry of Interior has no mandate defined in the Law of Political Parties to examine such personal histories or even to reject an application for registration. Hence, the Ministry of Interior is required to examine whether the personal history summary is provided, but has no right to examine the contents.

Moreover, a political party can easily amend its political platform after registration according to Article 26 of the Cambodian Law on Political Parties and according to the party's by-laws. To amend its platform, a party needs only the Ministry of Interior of the amendment(s), but the Ministry is not entitled to examine the content of any amendment(s) submitted. Therefore, a political party can submit a basic political platform during the registration process and flesh out the details through the amendment process afterwards, which is one method for a party to adopt positions challenging the current legal situation without jeopardizing its registration application.

Only a strict interpretation of Articles 19 ff. of the Cambodian Law on Political Parties, treating the examination of political parties' applications as a mere formality, conforms to the provisions of the Cambodian Constitution.

2. Freedom of Action of Political Parties

The freedom to establish political parties enshrined in Article 42 of the Cambodian Constitution would be worthless without the ability of political parties to exercise their right to free action. Therefore, Cambodian political parties have a constitutional right to operate as political parties and be active in society. We will consider the implications and limitations on this right in the sections below. The right contains, inter alia:

1. the right to establish and freely amend their platforms,
2. to choose or reject applications for membership and to dismiss existing members as well as
3. the right to free competition and
4. state funding.[39]

37 In 1998, 39 political parties participated in national elections; In 2003, the number decreased to 23. The reason for the decrease seems to be the consolidation of the political system (Köppinger/Karbaum, Die dritten Parlamentswahlen nach dem Neubeginn in Kambodscha, p. 67) rather than more restrictive practices by the Ministry of Interior concerning the registration of political parties.

38 In 2013, a total of 43 political parties had been registered at the Ministry of Interior, Khan. Four political parties registered at NEC, AKP, 30th April 2013.

39 Ipsen, in: Sachs (ed.), Grundgesetz Kommentar, Article 21/32; Streinz, in: von Mangoldt/Klein/Starck (eds.), GG Kommentar, Article 21 para. 1/107 both concerning the right to free activities (Betätigungsfreiheit) under German Constitutional Law.

5. Nevertheless, political parties are not free from any state interference in their operations and, especially during their participation in the competition for votes, i.e., limits on their activities may be justified.
6. Further, the state may be justified in ordering a halt to particular party activities or even dissolving a party in some situations.

a.) Change of Platforms

The cornerstone of a political party's operations is its platform. Using its platform, a political party competes for votes, develops and proposes solutions for social problems and – in case of opposition parties – offers an alternative to the governing party. As a political platform should be free from any outside interference (especially from public authorities) during the establishment of a political party[40], changing the platform of an already existing political party must therefore be possible and should be free from any outside interference as well.

The Cambodian Law on Political Parties confirms this fundamental right of political parties, subjecting the process of amendment only to a political party's statute, which is established by the political party itself.[41] A political party is obliged to notify the Ministry of Interior in writing after having changed its platform. The Ministry of Interior has no right to control or interfere in this amendment process and is only involved in the passive role of receiving the amendment(s).

b.) Relationship between a Political Party and its Members

A political party is, in general, free to accept new members. It is not obliged to accept a person with aims or opinions that do not comport with the political party's aims or opinions. Article 10 lit. a n° 4 of the Law on Political Parties consequently entitles political parties to set their own rules regarding the admission of party members in their statutes.

Only by means of this freedom can a political party protect its views and therefore realize its freedom concerning its platform and aims. A political party's right not to accept every applicant as a member prevails over the individual's right to join to a political party, a right guaranteed by Article 42 para. 1 of the Cambodian Constitution and confirmed by Article 12 of the Cambodian Law on Political Parties. In addition to the political party's right to a particular viewpoint, one can argue that an individual has the right to establish his or her own political party with other interested individuals. Moreover, Article 15 para. 1 of the Cambodian Law on Political Parties confirms the concept that a political party's views and platform may be protected: No one may be a member of more than one political party at any one time.

40 See above D.I.3.
41 Article 26 sentence 1 of the Law on Political Parties.

Nevertheless, a political party's decision not to accept an individual as a new member may have a significant impact on that individual's ability to participate in political life. Considering the fact that political parties have the exclusive right to nominate candidates for election[42], combined with the political parties' right to reject applicants for membership, a political party can effectively exclude an interested Khmer citizen from participating passively in elections. Given this potential negative impact, a political party should keep the democratic rights of the applicant in mind when it decides whether to admit or reject him or her. A party must, therefore, not arbitrarily reject an application for membership. Moreover, Article 10 lit. a n° 4 of the Law on Political Parties obliges political parties to make rules regarding the admission of new members in its statute and thereby guarantees a certain degree of transparency and equal treatment, which helps reduce the likelihood of arbitrary rejections.

In practice of course, this problem is of minor importance because the political parties are generally interested in gaining new members and will rarely reject any interested citizen applicants.

The above principles apply in a similar manner to the dismissal of members from a political party with the difference being that in the statute's rules[43] and in the final decision regarding the dismissal, the political party will weigh the other members trust in his or her status as a member and the services he or she has rendered for the party in the past.

The rights and duties of the members of a party are subject to the party's statute as well.[44] The rights of a member are, inter alia, the right to participate in internal elections and votes, sessions, etc. The duties of a member are to pay the membership fee, to do no intentional harm to the party, etc.

c.) Right to Free Competition

A political party developing political ideas and policy alternatives must be able to communicate and present them in order to achieve votes in an election and gain the ability to put those ideas and policy alternatives into practice.[45]

Therefore, parties do not only benefit from their members' citizen rights to free communication, as guaranteed by Articles 37 and 41 of the Cambodian Constitution. Indeed, the political parties are also themselves a guardian of such citizen rights by protecting the communication that is absolutely necessary for political parties and their operation. This interpretation appears to go beyond the texts enshrining those citizen rights because a political party is not a natural person and, therefore, not a Khmer citizen in the narrow sense. Under such a strict interpretation, such rights to free communication apply directly

42 For further details on this topic see below D.III.1.
43 Article 10 lit. a n° 4 of the Law on Political Parties.
44 Article 10 lit. a n°5 of the Law on Political Parties.
45 Streinz, in: von Mangoldt/Klein/Starck (eds.), GG Kommentar, Article 21 para. 1/111 concerning the right to free competition of political parties in Germany.

only to individuals.[46] An expansive interpretation of those provisions and their application to political parties is justified, however, by the fact that these communication rights are essential for political parties to exercise their right to free competition as a part of their freedom of action. When public authorities infringe these fundamental party rights, they must consider the fact that they are infringing a party's right to free competition at the same time. Therefore, public authorities must be even more reluctant and careful in restricting the rights of political parties than those of individual Khmer citizens.

d.) Political Party Funding

Political parties need sufficient financial means to fulfill their functions in society and therefore, their freedoms of association and action include the freedoms to earn and collect money on one hand, and to decide on what purposes to spend their funds on the other. In light of the public functions parties fulfill, one has to state clearly the correct starting point regarding a party's freedom to raise and spend funds:

As private organizations uniting a large group of persons, membership fees often constitute a large part of parties' finances.[47] Being a member of a political party is one important way to participate in political life. Therefore, the membership fees fixed by a political party's by-laws must not be too high and a waiver in cases of financial hardship should be contained in the party's by-laws because otherwise citizens could be prevented from becoming a member of the party.

Moreover, private contributions to and some types of private activities by political parties are susceptible to having an undue influence on the party's decision-making process and – if the party is successful in an election and participates in government – the government. Private contributions may involve corruption and distort the political process. From a comparative perspective, one can find different solutions to this danger such as transparency, prohibitions of certain kinds of contributions as well as contribution limits. Many countries prohibit anonymous contributions, at least when they exceed a certain amount[48], along with contributions from foreigners.[49]

46 Article 31 para. 3 sentence 1 of the Cambodian Constitution: "[t]he exercise of personal rights and freedom by any individual".

47 For example in Germany and the Netherlands membership fees are a very important source for political parties' finances.

48 E.g. Germany, § 25 para. 2 lit. 6 of the German Law on Political Parties, the Philippines, Section 98 of the Omnibus Election Code of the Philippines, and the United States, via the disclosure rules of § 434 (b) (3) (F) US Federal Election Campaign Act, see also § 441f Federal Election Campaign Act: "no donations in the name of another person".

49 E.g. Cambodia, article 27 lit. 4 of the Cambodian Law on Political Parties, Germany, § 25 (2) Lit. 3 of the German Law on Political Parties, France, article 11-4 of the French Law No. 88-227, the Philippines, Article 11 Section 95 (h) of the Omnibus Election Code of the Philippines and the United States, § 441e of the US Federal Election Campaign Act.

Finally, it is a good idea to prohibit contributions made by public entities or public enterprises, because otherwise the government could easily finance the governing political party or influence political parties in its favor.[50] Of course, a neutral and appropriate system of public funding is a justified exception to this rule and exists in a majority of countries worldwide.[51] Public funding may also be necessary to mitigate the risk that political parties may not be able to raise enough funds to fulfill their functions and minimize the danger of corruption posed by such fundraising shortfalls.

The Cambodian Constitution does not specify any rules regarding party finances, but the Cambodian Law on Political Parties, in Article 27, list the legally-permissible income streams for a political party: e.g., contributions or levies from members, income from the party's own lawful business activities, private contributions of Khmer citizens and enterprises, etc. Article 29 contains a list of prohibited contribution sources: e.g., contributions from governmental and public institutions, associations, NGOs, foreign firms, etc. Article 28 establishes a system of public campaign funding based on the principle of (absolute) equality with a minimum threshold for funding of 3% or one seat in Parliament. However, Article 28 leaves this system to the state's discretion ("[t]he State could allocate […]"), therefore, it has in practice never been established.[52]

e.) Limits on Political Party Action

The Cambodian Constitution does not expressly mention limits to political parties' freedoms and activities. Therefore, infringements on their right to action are only possible when there are other constitutional principles or other constitutional rights or the rights of other people at stake. In view of the predominant position of the principle of multi-party democracy and the importance of political parties for the democratic process in Cambodian constitutional law, one must choose a broad approach to the parties' right to action.

First of all, political parties are – as is every Khmer citizen under Article 49 para. 1 of the Cambodian Constitution – bound by general, ordinary law, especially criminal laws aiming at protecting other people's or the state's rights.[53] In applying this general law, e.g. during demonstrations, public authorities have to consider the fact that political parties enjoy special constitutional protection and are holders of special rights and freedoms.

50 Such prohibitions exist for example in Cambodia, Article 29 of the Cambodian Law on Political Parties, Germany, § 25 (2) lit. 1 and 5 of the German Law on Political Parties, and the Philippines, Section 95 (a) (b) (b) (e) (f) (g) of the Omnibus Election Code of the Philippines; section 4 (a) (b) (f) (g) of the Resolution No. 8944 Commission on Elections.

51 See http://www.idea.int/political-finance/question.cfm?id=270 (last downloaded 2014/10/28).

52 Ohman, Political Finance Regulations in Cambodia, p. 12.

53 See, concerning the legal situation in Germany, Sannwald, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.), GG Kommentar zum Grundgesetz, article 21/43, 49; Streinz, in: von Mangoldt/Klein/Starck (eds.), GG Kommentar, article 21 para. 1/118.

In addition, specific limits are certainly possible. With regard to the special status of political parties and in order to guarantee the equal treatment of all political parties[54], specific limits on political parties' activities must be strictly and clearly defined in law. Any limits must aim at protecting a principle or right of the same or higher value than the political party's freedoms.

Article 6 of the Cambodian Law on Political Parties specifies such specific limits and prohibits political parties from the following activities:

> *"1- Make up an autonomous zone which may harm to the national unity and territorial integrity;*
> *2- Conduct of subversive actions against the liberal democratic and pluralism regime by the use of violent means in a purpose of seizing the power;*
> *3- Organizing armed forces."*

All of these prohibitions aim at protecting other core constitutional values and principles.

Article 6 lit. 1 of the Cambodian Law on Political Parties aims to protect national unity and territorial integrity. This includes the sovereignty of the Kingdom of Cambodia vis a vis other countries.

Those values are also included in the preamble of the Cambodian Constitution. The people of Cambodia:

> *"[…] stood up with a resolute determination to strengthen the national unity, to preserve and defend Cambodia's territory and its precious sovereignty."*

Article 1 para. 2 of the Cambodian Constitution identifies the country's sovereignty as one of its main characteristics.

Article 6 lit. 2 of the Cambodian Law on Political Parties protects the liberal democratic and pluralistic regime established by the Cambodian Constitution and also enshrined in Article 1 para. 2 of the Cambodian Constitution. Indeed, this principle of a liberal democratic and pluralist regime runs like a golden thread through the Cambodian Constitution.

The Cambodian Law on Political Parties is, insofar as it goes, very tolerant towards political parties opposing the Constitution's main principle and thereby, realizes the principle of pluralism. It does not prohibit political parties from taking positions against the principle of liberal and pluralist democracy. Such a position is only prohibited when the political party uses violent means and tries to seize power. Attempts to obtain power through the democratic system itself for the purpose of abolishing the liberal and pluralist democracy is not prohibited by Article 6 lit. 2 of the Cambodian Law on Political Parties.

54 See below D.IV.

This restriction against violent seizure of power and tolerance towards even anti-constitutional positions is similar to the situation in German constitutional law as interpreted by the German Constitutional Court. Article 21 para. 2 of the German Basic Law declares that political parties who by reason of their aims or the behavior of their members seek to undermine or abolish the free democratic basic order of the Federal Republic of Germany are unconstitutional. However, the German Constitutional Court interprets this provision strictly: The mere position of a political party or its members to undermine the free democratic basic order is not sufficient to render a political party unconstitutional. Only political parties that take an active stance and evince militant aggressive attitude may be ruled unconstitutional.[55]

Such tolerance towards even anti-democratic political parties is courageous and a good example of applied pluralism. It is necessary to protect political parties from arbitrary interference by the state. If the mere taking of an anti-pluralist or anti-democratic or anti-liberal position justified state actions against a political party, the authorities would be able to interpret the law expansively or even arbitrarily and take actions against political parties with such views, thereby circumventing the principle of equal opportunity for that political party. Let us consider a political party proposing to introduce a zero immigration policy or another political party proposing to nationalize an entire economic sector. One could argue whether or not such positions are anti-liberal in the sense of Article 6 lit. 2 of the Cambodian Law on Political Parties. But, even if state authorities claim that such positions are anti-liberal, such a claim will not be sufficient for an application of Article 6 lit. 2 of the Cambodian Law on Political Parties. This article does not prohibit the mere expression of such ideas by political parties, but rather requires the use of violent means. Therefore, it protects pluralism among political parties.

Finally, Article 6 lit. 3 of the Cambodian Law on Political Parties prohibits parties from organizing armed forces. This limit to party action is likely to be of minor importance in practice. Like the other prohibitions in Article 6 of the Cambodian Law on Political Parties, it aims to protect constitutional values. First of all in a state ruled by law,[56] only the state is allowed to use force (monopoly of the legitimate use of physical force). Therefore, only the state is allowed to organize armed forces. Article 23 of the Cambodian Constitution names the King as the Supreme Commander of the Royal Khmer Armed Forces – the only armed forces in Cambodia. Moreover, Article 6 lit. 3 of the Cambodian Law on Political Parties applies to an earlier stage of party preparations to commit actions against Article 6 lit. 1 and 2 of the Cambodian Law on Political Parties. Political parties that want to establish an autonomous zone within Cambodian territory or want to seize power by violent means will very probably organize armed forces to pursue these goals.

55 BVerfGE 5, 85 (141).

56 Such as Cambodia, see, e.g., the preamble to the Cambodian Constitution: "respect of law".

Persons violating Article 6 of the Cambodian Law on Political Parties are subject to punishment.[57] The Cambodian Law on Political Parties does not provide for any administrative or other sanctions against the political party itself for a violation of Article 6.

f.) Cease Orders and Dissolutions of Political Parties Against their Will

The dissolution or prohibition of a political party against its will is the most serious infringement of a party's rights because it terminates the existence of the political party, which is the precondition for the possession and exercise of all of the other rights of a political party. A cease order against a political party is an order by a public authority that obliges a political party to cease its activities for a certain time.

Cease orders are extreme infringements of political parties' rights to conduct its activities. They are almost as extreme as a prohibition or dissolution of a political party, as the political party under a cease order must halt all of its activities and cannot participate in the competition for votes and or other aspects of political life anymore. The main difference between a cease order and a prohibition or dissolution of the political party against its will is the temporary nature of a cease order and the fact that the political party continues to exist. Nevertheless, a cease order as well as a prohibition or a dissolution order against a party will have significant consequences, considering its extreme nature and the negative effect on the principle of proportionality, and should only be applied as an ultima ratio.[58]

A comparative examination shows, in general, two different approaches. While Germany and Spain have a special constitutional or legal procedure to prohibit political parties[59], most European legislations treat political parties as ordinary associations and apply the rules on the prohibition of associations to political parties.[60] But even in these countries, the prohibition of political parties is, with a view to the seriousness of such a measure, rarely used.[61] Political parties that are prohibited by states that are members of the European Convention on Human Rights[62] can bring legal action before the European Court of Human Rights. The European Convention on Human Rights does not expressly mention political parties. Nevertheless, the European Court of Human Rights recognizes the foundational role political parties play "in ensuring pluralism and the proper func-

57 Article 42 of the Cambodian Law on Political Parties and the Cambodian Penal Law, e.g., Articles 451, 456 and 463 of the Cambodian Criminal Code.

58 "Ultima ratio" means that such measures may only be taken in the last resort.

59 Article 21 para. 2 German Basic Law; Article 10 of the Spanish Law on Political Parties.

60 E.g., Denmark, France, Ireland, the Netherlands and the United Kingdom, see Schefold/Tsatsos/Morlok, in: Tsatsos/Schefold/Schneider (eds.), Parteienrecht im europäischen Vergleich, p. 737, 826.

61 Schefold/Tsatsos/Morlok, in: Tsatsos/Schefold/Schneider (eds.), Parteienrecht im europäischen Vergleich, p. 737, 827.

62 The text of the European Convention on Human Rights is available under http://www.echr.coe.int/Documents/Convention_ENG.pdf (last downloaded 2014/10/28).

tioning of democracy"[63] and applies Article 11 of the European Convention of Human Rights – freedom of association – to the establishment and existence of political parties.[64] Restrictions of this freedom have to be prescribed by law and must be necessary, in a democratic society, to protect one of the legal interests mentioned in Article 11 para. 2 of the European Convention of Human Rights.[65] Restrictions are only permissible in a democratic society when they meet a "pressing social need" and are "proportionate to the legitimate aim[s] pursued".[66] The European Court of Human Rights interprets these conditions very strictly because of the essential role of political parties in democratic regimes and circumscribes the scope of action in this area by contracting states.[67] For example, a state may dissolve a party because of a threat to democracy, when there is (1) "plausible evidence that the risk to democracy […is] sufficiently and reasonably imminent", (2) the acts and speeches of the political party's members referred to are imputable to the political party as a whole and (3) these acts and speeches create "a clear picture of a model of society […which is] incompatible with the concept of a 'democratic society'".[68]

The Cambodian Law on Political Parties provides for cease orders against political parties in the following situations (Articles 38 and 39):

- A political party which repeatedly fails to send its annual report according to Article 31 of the Cambodian Law on Political Parties to the Ministry of Interior and the Ministry of Economy and Finance.
- A political party which repeatedly receives funds in violation of Article 29 of the Cambodian Law on Political Parties (e.g. contributions of NGOs, associations, public means outside a system or legal public funding).
- A political party which repeatedly violates Article 7 of the Cambodian Law on Political Parties, the prohibition of any form of subordination under foreign parties or governments.

63 ECHR, United Communist Party of Turkey and others ./. Turkey, Judgment of 30 January 1998, para. 43.

64 ECHR, United Communist Party of Turkey and others ./. Turkey, Judgment of 30 January 1998, para. 25.

65 E.g., national security or public safety, the prevention of disorder or crime, the protection of rights or freedoms of others.

66 ECHR, Socialist Party and others ./. Turkey, Judgment of 25 May 1998, para. 49; ECHR, Herri Batasuna and Batasuna ./. Spain, Judgment of 30 June 2009, para. 83 and 84 – for further references see Molenaar, The Development of European Standards on Political Parties and their Regulation, Working Paper Series on the Legal Regulation of Political Parties No. 4, p. 10 with footnote 5 and appendix 2.

67 ECHR, United Communist Party of Turkey and others ./. Turkey, Judgment of 30 January 1998, para. 46; ECHR, Socialist Party and others ./. Turkey, Judgment of 25 May 1998, para. 50; ECHR, Refah Partisi (the Welfare Party) and others ./. Turkey, Judgment of 13 February 2003, para. 100; ECHR, Herri Batasuna and Batasuna ./. Spain, Judgment of 30 June 2009, para. 77.

68 ECHR, Refah Partisi (the Welfare Party) and others ./. Turkey, judgment of 13 February 2003, para. 104; see ECHR, Herri Batasuna and Batasuna ./. Spain, judgment of 30 June 2009, para. 83.

The Cambodian Law on Political Parties considers the extreme effects of cease orders on political parties and therefore, permits their use only in circumstances that will rarely arise and only in case of repeated violations. The application of a cease order is within the competent authority's discretion and in addition to a fine. Thus, the authority must treat the case of a political party with due care, with regard to the individual circumstances of the particular case as well as strictly apply the principle of proportionality. These limits on state action respect the importance of political parties' functions and activities as well as their constitutional value.

Nevertheless, these provisions are ripe for criticism. First of all, the legislator failed to include a maximum duration for a cease order. This oversight is difficult to understand as the law sets the maximum fines that may be imposed in such cases. Moreover, the lack of a timeframe for suspension of a party' activities permits authorities to order a suspension for an uncertainly long period of time, which very probably violates the principle of proportionality and blurs the difference between a temporary cease order and a complete prohibition of a political party. This lack of precision contravenes the very concept of the Cambodian Law on Political Parties as not providing an arbitrary means for the prohibition or dissolution of a political party as a sanction for violations by the political parties.[69] Secondly, the system of sanctions introduced by the law appears incoherent. Even if the obligations of political parties set out in Articles 7, 29 and 31 of the Cambodian Law on Political Parties are important, they are considerably less important than the prohibitions in Article 6 of the Law on Political Parties. In the case of infringement of these latter provisions, the law does not provide for any sanction against the political party itself.[70]

Moreover, it also seems incoherent that a cease order is possible in the case of repeated receipt of illegal funds – even in minor cases – on the one hand, but is not possible against a political party in the case of repeated and serious violations of Article 6 of the Cambodian Law on Political Parties (e.g., by creating an autonomous zone within the territory of Cambodia).

The dissolution of a political party against its will is an even more serious intervention and should only be possible in extraordinary and exceptional cases in order to protect other rights and values prevailing over the political party's right to exist and to exercise its freedoms. The conditions for the prohibition of a political party or for dissolution against its will must be clearly specified in law to prevent such a decision being made for political or arbitrary reasons. Moreover, legal precision ensures legal certainty and the equal application of the law, thereby ensuring the political party's fundamental right for equal chances. The decision to dissolve a party must be made by an independent body,

69 Under Cambodian law, the dissolution of a political party against its will is only contemplated in the case of that party's bankruptcy, for details see below D.II.6.

70 Criminal sanctions against the acting individuals are possible, see above D.II.5.

e.g., a court, rather than a political one. Alternatively, or in the case of dissolution by a governmental authority, the political party dissolved must have effective redress against such a decision.

In Cambodia, there is only one situation in which a political party may be dissolved against its will. Article 34 of the Cambodian Law on Political Parties clearly states that no authority has the right to dissolve any political party except in the case of a final judgment or final appeal judgment of a court that declares a party bankrupt. Under the criteria developed above, the formal approach of this provision is appropriate. In the event of bankruptcy, a political party loses the capability to fulfill its role, to be active in society and to fulfill its obligations towards other private or public actors. This provision does not provide any room for arbitrary assessment or political discrimination. Moreover, a court renders judgment therefore, an independent institution makes the decision regarding bankruptcy.

However there is significant legal uncertainty concerning the authority to dissolve. Article 34 of the Cambodian Law on Political Parties does not state which authority is able to make the decision regarding dissolution. Following the text, the dissolution is not made effective by the judgment of bankruptcy itself, but the right to dissolve the political party emerges with the court's judgment. Considering the legal situation in Cambodian corporate law, which clearly separates the notions of bankruptcy and dissolution, it seems quite logical that a similar separation applies to political parties, under a holistic-consistent approach to interpreting a nation's laws. Therefore, a judgment rendering a political party bankrupt does not automatically dissolve that party. This approach raises further questions: Did the national legislator mean to empower the Ministry of Interior as the competent authority in other political party related issues, e.g., concerning the process of registration of political parties under Article 22 ff. of the Cambodian Law on Political Parties or after the dissolution of a political party according to Article 33 Cambodian Law on Political Parties? Or, is the authority to make a decision regarding dissolution granted to another authority? What other authority? Is such a decision discretionary?

3. Political Parties in the Democratic Process

Political parties play a key role in the Cambodian parliamentary system.[71]

a.) Political Parties during Elections

This role cannot be seen in Article 76 of the Cambodian Constitution, which sets forth the principles for National Assembly elections, but does not mention political parties. For details on election rules, including preparation and process, Article 76 of the Cambodian Constitution refers to an Electoral Law.

Rather, it is Article 119 of the Cambodian Constitution that reflects the important role political parties play during elections. Under Article 119, the King designates a dignitary to form the royal government. This dignitary must be a representative of the winning party. He or she will form the royal government with a view towards the majority in the National Assembly, as he or she requires its vote of confidence to form the government. This constitutional process demonstrates that the political parties compete during the elections for the National Assembly and that the royal government must be approved by the elected members of Parliament. That process is one of the main characteristics of multi-party systems.

Consequently, the Law on the Election of Members of the National Assembly emphasizes the political parties' role in the electoral process. Every candidate for a seat in the National Assembly must be nominated by a registered political party.[72] Thus, registered political parties have the exclusive right to organize elections and to present candidates for the National Assembly. This political influence on the elections raises questions as to whether this precision in the electoral process for the National Assembly is in conformity with the Cambodian Constitution as the supreme law.[73]

The German Constitutional Court has ruled that such a monopoly by political parties in the democratic process violates the principle of universality, equality and freedom of elections guaranteed by Article 38 of the German Basic Law.[74]

The principles of universality, equality and freedom of democratic participation are guaranteed by Article 76 of the Cambodian Constitution as well. The principles of universality and equality protect the equality of every citizen to vote (active democratic participation) and to stand for election (passive democratic participation).

Indeed, the exclusion of candidates who are independent of political parties infringes on the passive aspect of universality: a candidate who is not part of a political party has no ability to stand for election.

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71 This section will focus on the role of political parties in regard to the elections for National Assembly.
72 Article 33 lit. 5 of the Law on the Election of Members of the National Assembly.
73 Article 150 of the Cambodian Constitution.
74 BVerfGE 41, 399 (417); 47, 253 (282); Jarass/Pieroth, Grundgesetz für die Bundesrepublik Deutschland – Kommentar, Article 38/22a.

The freedom of elections guarantees that the citizen as elector is free from state, political, economic or other pressure concerning his or her vote and protects not only the free elector's choice between several candidates, but the freedom to nominate and propose a candidate.[75] This freedom is severely violated by a monopoly of political parties over the nomination of candidates for elections. Under the provisions of Article 33 lit. 5 of the Law on the Election of Members of the National Assembly, a citizen will only be able to influence the nomination of candidates if he or she is a member of a political party and able to influence the democratic decision-making process within that party.

b.) Political Parties in the National Assembly

In multi-party democracies, parliamentary work is largely shaped by the political parties represented in Parliament. In general, members of Parliament, who are members of one political party or who at least have similar political ideas and goals, form a political group in Parliament. Often, the Constitution itself does not provide details about how political groups are formed and what rights they hold. For example, the German Basic Law only notes the existence of political groups in Article 53a para. 1 sentence 2 without providing any further details; a similar provision is found in the Austrian Federal Constitution in Article 30 para. 5.

In some countries, political groups are recognized and determined by law[76] or by internal regulations the Parliament itself establishes on a general constitutional basis[77] or a special constitutional basis.[78] But even in countries where legal provisions do not expressly recognize them, political groups exist and work on a more informal basis (e.g., in the United Kingdom).[79]

The rationale for the creation of political groups is that they help to facilitate and share the work in Parliament. The members of a political group can focus on certain topics and inform other members about those topics, ongoing projects in a particular area as well as the respective commissions.

Therefore a political group can hold special rights, for example, the right to choose the members of individual parliamentarian committees. Moreover, political groups can exercise rights deriving from its members' rights as members of Parliament, obtain rights that are only granted to a select number of parliamentarians or receive extra funding for parliamentary work.

75 The principle of freedom of elections is guaranteed by Article 38 para. 1 sentence 1 German Basic Law Kretschmer, in: Schmidt-Bleibtreu/Hofmann/Hopfauf (eds.), Grundgesetz – Kommentar, Article 38/18 f.

76 E.g., the Austrian Federal Law on the Internal Regulations of the National Assembly.

77 E.g., Article 40 para. 1 sentence 2 German Basic Law.

78 E.g., Article 51-1 of the French Constitution.

79 Tran-Sam, Work and Life of a Political Group, in: Advisory Papers – Guidelines for Political Parties in Cambodia (forthcoming), p. 3.

In the Cambodian Constitution, the role of political parties in the National Assembly is not expressly regulated by the Cambodian Constitution itself.

Article 94 sentence 2 of the Cambodian Constitution entitles the National Assembly itself to determine the organization and functioning of the National Assembly through the Internal Rules of Procedure of the National Assembly. The Internal Regulations the National Assembly adopted during the first meeting of its first session in 1993 also do not contain any details regarding political groups. The same applies to the role of the political parties represented in Parliament. This is rather surprising since Cambodian law does not provide any possibility for parliamentary candidates who are not members of a political party.[80] Therefore, the strong position of political parties in the electoral process is not reflected in a position of similar importance after the elections with regard to the work of the National Assembly.

In contrast, the Cambodian Constitution emphasizes the freedom of individual members of Parliament. According to Article 77 para. 1 of the Cambodian Constitution, a member represents the entire Khmer people and Article 77 para. 2 of the Cambodian Constitution expressly prohibits the imperative mandate. These provisions mean that the member is free to make decisions in the Assembly and cannot be obliged by anyone, especially not by his or her political party or parliamentary group, to vote for or against proposals for parliamentary decisions. However, the prohibition of the imperative mandate only prohibits the use of legal constraints to influence the member of Parliament. In practice, one cannot prevent political or other pressure from being exerted by the political party or the parliamentary group.[81] Indeed, a political party will probably have serious reservations regarding re-nominating an elected representative, who regularly deviates from the political party's opinion, for the next election. Moreover, under Cambodian law, a member of Parliament loses his or her seat in Parliament when he or she is no longer a member of his or her political party.[82] These provisions are highly problematic from a democratic point of view as members of Parliament, once elected, represent the people as a whole – not a particular political party – and should be primarily accountable to the people rather than the political party of which they are members.[83] In practice, these provisions can easily be used to introduce a de facto imperative mandate. First, political

80 See above D.II.1.

81 Kretschmer, in: Schmidt-Bleibtreu/Hofmann/Hopfauf (eds.), Grundgesetz – Kommentar, article 38/61 on the member of Parliament's free mandate in German Constitutional Law.

82 For the ´members of the National Assembly, see Article 120 para. 1 5th indent of the Law on Election of Members of the National Assembly: "Members of the National Assembly shall lose his/her membership in the following events: […] – Loss of Membership from his/her political party"; for the Members of the Senate, see Article 30 para. 1 5th indent of the Law on Election of the Senate.

83 The Venice Commission therefore considers similar provisions as obviously contradicting democratic standards, European Commission for Democracy through Law (Venice Commission), Report on the Imperative Mandate and Similar Practices, CDL-AD(2009)027, available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282009%29027-e (last downloaded 2014/10/28), p. 7 para. 21.

parties have the ability to exclude a member (for example, when the member repeatedly breaches his obligations).[84] Secondly, one political party in Cambodia has found an even easier way to realize an imperative mandate: it has requested undated letters of resignation from all of its parliamentary candidates.[85] This practice violates Article 77 para. 2 of the Cambodian Constitution.

One has to admit that absolute freedom during the member's mandate is not possible in practice and would severely complicate parliamentary work. Nevertheless, it is very important to find a balance between the necessary influence of a political party or parliamentary group on its members in Parliament to secure its efforts in Parliament, on the one hand, and the constitutional guarantee of the free mandate on the other.

Moreover, the Cambodian Constitution contains several provisions protecting the members of the National Assembly[86] and grants authority to the National Assembly to exercise several checks on the power of the Royal Government[87] or the majority in Parliament[88]. Those provisions protect or empower the opposition party(ies) under the logical extension of the protection or entitlement of party members in their individual capacity.

4. Principle of Equal Opportunity

In a multi-party democracy, all political parties compete for votes in elections. They develop programs and try to convince the citizens to vote for them in the elections. Thus, the constitutional principle of multi-party democracy presupposes a fair competition between all political parties, especially before and during elections. Fair competition between the political parties is only possible, where political parties are treated equally without regard to their political platform, to the fact of being in opposition to the government, etc.

a.) Constitutional Basis

However, the Cambodian Constitution only confers the right of equal treatment to Khmer citizens[89], while political parties are not expressly mentioned in this context. As the right to equal treatment includes the right to equal treatment regardless of one's political tendency, a member of a political party must not be discriminated against because of his or her membership in one political party. This right to equal treatment, enshrined in Article 31 of the Cambodian Constitution, of course applies to all members of one political party, but one has to distinguish between individual rights and a group right. Even if one adds

84 Concerning the dismissal of members of a political party and the obligations of members of political parties, see above D.II.2.
85 Karbaum, Cambodia before the parliamentary elections: Leave nothing to chance or the voters.
86 Article 80 of the Cambodian Constitution.
87 Articles 96 and 97 of the Cambodian Constitution.
88 Articles 140 and 141 of the Cambodian Constitution.
89 Article 31 of the Cambodian Constitution.

all of those individual rights together, they do not constitute the proper right of the political party itself. The protection of the political party under Article 31 of the Cambodian Constitution is only the extension of the protections of its members.

Nevertheless, the Cambodian Constitution and its principle of multi-party liberalism presume the equal treatment of political parties and equal opportunity for political parties, as these principles are inherent to each multi-party system[90] and constitute the main difference between liberal systems and dictatorships or single-party systems. The right of political parties to be treated equally is moreover, a consequence of Article 76 para. 2 of the Cambodian Constitution, guaranteeing free and equal elections to the National Assembly. As participating in elections is one of the main tasks of political parties in the Cambodian system of government, any discrimination against one political party affects its ability to compete for votes and therefore falls under the scope of Article 76 para. 2 of the Cambodian Constitution.[91]

b.) Scope

The principle of equal treatment and equal opportunity applies to the whole "life" of a political party. This means the association of the political party, the activities of the political party, especially its activities during election campaigns, as well as its mere existence.[92] The access to media during election campaigns may be taken as an example of the application of the principle of equal treatment. This access is critical in the competition for votes during election campaigns for the competing political parties because it is especially through the use of mass media that political parties can reach a large number of voters. The constitutional principle of equal opportunity obliges the public as well as private media to treat political parties equally. Thus, if they grant media time or space to one political party, they have to grant media time or space to other political parties as well.

Whether media time or space is granted following the principle of (absolute) equality or the principle of equity, i.e. granting media time/space to political parties corresponding to their importance and role in society, is not expressly regulated by Cambodian constitutional law, especially the principle of equal opportunity. Therefore, the details regarding such matters must be determined by ordinary law. Article 16 lit. 18 of the Law on Election of Members of the National Assembly details the constitutional principle of equal opportunity. According to this provision, the National Election Committee may take measures to ensure equal access to public media. Art. 75 of the same law provides that political messages will be publicized "based on equal principle and an orderly 'first come

90 Concerning the German multi-party system BVerfGE 6, 273 (280); 47, 198 (225); 82, 322 (337); Grupp, Der Status der politischen Parteien in Deutschland, II. 2 b.

91 The German Constitutional Court interprets the corresponding provision of Article 38 para. 1 sentence 1 that the equality of political parties is a strict and formal equality, BVerfGE 51, 222 (234); 78, 350 (357 f.); 82, 322 (337).

92 Concerning the process of establishment and registration of political parties see above D.I.3; concerning its activities see above D.II.

first serve' basis". As the "first come first serve" criterion is the only criterion mentioned to differentiate between the political parties, access to media has to be provided absolutely equally to all political parties at their request. These provisions have been interpreted in this way by the National Election Committee in the past.[93]

5. Related Citizen Rights

The principles described above should be considered along with other fundamental rights guaranteed by the Cambodian Constitution[94], which may reinforce the protective effects of political parties' rights or restrict political parties' freedom.

In the first place, one must mention the fundamental rights of communication: the right to demonstrate, guaranteed by Article 37 of the Cambodian Constitution, and the freedom of expression, press, publication and assembly guaranteed by Article 41 of the Cambodian Constitution. As laid out above[95], political parties may exercise those rights during their competition for votes. Indeed, the ability to communicate is the major method political parties use to reach the people. The political party's right to communication is strengthened by and an extension of the individual citizen rights of its members, who are the primary holders of these rights.

The same consideration applies to Article 35 of the Cambodian Constitution granting all Khmer citizens the right to participate in the political life of the nation. Any public authority infringing on the political parties' right to compete for votes would, at the same time, affect this individual right of the party's members. A political party dismissing one of its members or rejecting an application for membership must consider the citizen's right to participate in political life under Article 35. The political party itself is not directly obliged by Article 35 of the Cambodian Constitution, but this provision implies the indirect negative effects that lack of party membership may entail for the exercise of the right to participate.

Finally, a political party's right to equal treatment is an extension of its members' right to be treated equally, regardless of their political views including their membership in/adherence to a political party, guaranteed by Article 31 para. 2 of the Cambodian Constitution.[96]

93 Ohman, Political Finance Regulations in Cambodia, p.13.

94 The following list is not exhaustive, but intended to note only the most important citizen rights to political parties.

95 See D.II.3.

96 For details on the right to equal treatment of political parties, see above D.IV.

6. Enforcement of Rights

The ability to enforce their rights is a keystone in the system of protection of political parties. Without effective remedies, constitutional guarantees are seriously weakened. As the political party itself is the holder of many rights, it is the political party – and not only the sum of its members – which has the right to file claims against alleged infringements. Article 39 of the Cambodian Constitution enshrines the right of all Khmer citizens to file claims against any breach of the law by state or its organs. Following the text itself, this provision does not apply to the political party itself as it is not an individual person and therefore, not a Khmer citizen. However, the principle of the rule of law guaranteed by the Cambodian Constitution as well as the preeminent position of political parties in the constitutional architecture, justify the application of Article 39 of the Cambodian Constitution to a political party as well, at least when a violation of its fundamental rights is concerned.

There is much to suggest that the relevant national legislation interprets Article 39 in this way as well. Article 25 of the Cambodian Law on Political Parties grants a political party, in the process of registration, the right to file an action before the Constitutional Council if it receives a letter of notice of rejection from the Ministry of Interior. This special provision is necessary because a political party does not yet even exist at this stage[97] and because the Constitutional Council has the authority to decide upon such a request rather than the ordinary courts as foreseen by Article 39 sentence 2 of the Cambodian Constitution.

V. Conclusion

The Cambodian Constitution establishes a system of multi-party democracy. The Cambodian system of government emphasizes the role of political parties during elections. Article 33 lit. 5 of the Law on the Election of Members of the National Assembly even exceeds the framework established by the Cambodian Constitution in favor of political parties and grants an exclusive right to political parties to present candidates in elections. This violates Article 76 of the Cambodian Constitution and the principle of a universal, equal and free vote.

Even if participation in elections is the main task of political parties worldwide, the Cambodian legal and constitutional regime stops there and treats political parties more or less as simple institutions with preparing for elections as their only task. Other party functions are overlooked or remain unregulated in Cambodian constitutional law or in the Cambodian Law on Political Parties. After the election and the establishment of the

97 cf. Article 19 of the Cambodian Law on Political Parties.

royal government, political parties do not play an important role. For example, there is no recognition of political groups in the National Assembly's Internal Regulations. Experience from other countries demonstrates the extremely important and useful role that political groups in Parliament play, especially regarding professionalism in parliamentary work. Nevertheless, the role of political parties in Parliament is limited by the free mandate of elected members, which is guaranteed by Article 77 paras. 1 and 2 of the Cambodian Constitution. This provision constitutes a cornerstone of democracy and is threatened by Article 120 of the Law on Election of the Members of the National Assembly, Article 31 of the Law on Senate Election and an abusive application by political parties in practice.

The Cambodian system underestimates the role of political parties outside of Parliament as well. After an election campaign has ended, there are no more legal tasks for Cambodian political parties. They have, due to their structure and their knowledge, the capacity to create and influence public opinion and political decisions at all levels (national and subnational) in between elections. Moreover, working permanently and not only during election campaigns will help political parties to create quality platforms, motivate other citizens to become active in political life and recruit and educate future competent politicians.

However, one must recognize that political parties will need more reliable financial means to fulfill those additional tasks, which is why a realistic system of public party funding with strong anti-corruption safeguards and reporting and monitoring requirements would be an important step if Cambodian parties were to undertake additional roles. The protection of political parties' rights in the Cambodian Constitution is quite complete. The Constitution guarantees the freedom of establishment to Khmer citizens as well as to the political party itself. Moreover, political parties in Cambodia enjoy the freedom of action and the right of equal opportunity. All these rights apply during and out of elections. The limits Cambodian ordinary law sets on those rights are circumspect and respect those constitutional principles. To guarantee that the law in practice maintains the standards set out in the law as written, an effective system of enforcement is necessary, which implies the development of internal and external complaint mechanisms.[98]

98 See Khlok, in: Hauerstein/Menzel (eds.), The Development of Cambodian Administrative Law, pp. 145 ff. on administrative complaint mechanisms in Cambodia.

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FUNDAMENTAL RIGHTS PROTECTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE

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FUNDAMENTAL RIGHTS PROTECTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE

Daniel HEILMANN *

ABSTRACT

For many centuries governments used to deal with people under their jurisdiction as they deemed appropriate. They resisted criticism by claiming that human rights were a matter of domestic jurisdiction and the responsibility of each state alone. This view changed only about seventy years ago, when the broad acceptance of the universality of human rights gained crucial momentum. This paper gives an overview over the current state of human rights in international law with a focus on the core principles underlying international human rights law and the procedures of integrating international human rights treaties into the domestic legal framework. Commonly, a tension exists in autocratically governed states between the governance structures that favor unequal social and political entitlements on the one hand, and the idea of human rights on the other hand. In this context, the paper takes a look at Cambodia and the relevant legal instruments. Ultimately, the paper argues that all international human rights treaties which Cambodia has ratified are part of Cambodian law and that they are therefore directly applicable and invocable in the domestic courts.

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Any views expressed in this paper are those of the author in his private capacity only.

I. Introduction

Human rights are a legitimate matter of international concern. This has not always been the case. Only in 1945, the United Nations Charter, in its Arts. 55 and 56, established human rights obligations for its member states. Art. 55 UN Charter declares that the United Nations promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Art. 56 UN Charter clarifies that all members "take joint and separate action […] for the achievement of the purposes set forth in Article 55". Accordingly, the concept of human rights has steadily been institutionalized in bureaucratic structures on the international level and human rights are no longer exclusively matters within the domestic jurisdiction of states.[1]

The conclusion of human rights conventions by the members of the international community sharpens the profile and substance of particular rights. Once entered into force, human rights treaties require the state parties to respect and ensure respect of the rights which are enshrined in the respective treaty. Some treaties go even further than guaranteeing respect for a right. For example, Art. 2, para. 2 of the ICCPR states that each state party undertakes to "adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant".

Cambodia as a member of the international community has ratified the most important human rights treaties[2], including:

- International Covenant on Civil and Political Rights;
- International Covenant on Social, Cultural and Economic Rights;
- Convention on the Elimination of all Forms of Discrimination Against Women;
- Convention on the Rights of the Child;
- Convention on the Prevention and Punishment of the Crime of Genocide;
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention on the Elimination of All Forms of Racial Discrimination.

Fundamental rights are protected under the above-mentioned instruments. The rights guaranteed in these instruments include, inter alia, such important rights as the right to life, the right to property, the freedom of speech. This paper, however, is not concerned with particular rights or with the substance of these rights in the Cambodian context. These issues are extensively covered by other authors in this volume. Rather this article gives an overview over the concept of human rights in international law (II); the core principles underlying international human rights law (III), and the process of integration of international human rights treaties into domestic law (IV).

1 See Buergenthal at para. 7.

2 Buergenthal identifies the mentioned treaties as the core international human rights treaties, see Buergenthal, at para. 11.

II. Universality of Human Rights

For many centuries (and unfortunately in some regions of the world to this day) governments used to deal with people under their jurisdiction as they deemed appropriate. They resisted criticism by claiming that human rights were a matter of domestic jurisdiction and the responsibility of each state alone. The broad acceptance of the concept of universality of international law has changed this view. Firstly, states have accepted international law as the system governing their relationships. The universality of international law refers to international law as a global system of law, which is of global validity and is binding on all states. It reflects the conviction that there is, or should be, a common value system that governs all humankind.[3] This substantive meaning of universality has in part been translated into positive international law. That holds particularly true for human rights, which before codification were part of customary international law.[4] Therefore, the conception of human rights includes that every individual has legitimate claims upon his or her society for defined freedoms and benefits.[5]

So, what are fundamental rights then? An authoritative catalogue is set forth in the Universal Declaration of Human Rights. It seems fair to say that the rights included in the Universal Declaration are the cornerstone elements of human rights law. The Universal Declaration – as a General Assembly Resolution – is not binding on states. But the broad acceptance of the Universal Declaration by all states has certainly given its principles legal status and the International Court of Justice has repeatedly relied on the Universal Declaration as a source for fundamental human rights.[6] Despite not establishing binding obligations, the rights enshrined in the Universal Declaration are nevertheless the core essence of international human rights law.[7]

In the Cambodian context, the universality of human rights is acknowledged in the Constitution. Art. 31 states that "the Kingdom of Cambodia recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women's rights and children's rights". The clarity of the Cambodian Constitution is exemplary.

However, the universality of human rights is not always readily accepted. Much has been said about "Asian Values" which, as argued by some, may be opposed to the notion of universality of human rights. Basically, the argument behind "Asian Values" is that

3 Nollkämper, para. 5.
4 Nollkämper, para. 6.
5 Henkin, p. 10.
6 See Charlesworth, paras. 13 and 14.
7 Arguably, they are also customary international law, and as such binding on all states (be they UN members or not – the only exception would be a persistent objector, but no persistent objector exists in the context of the Universal Declaration of Human Rights). So even for states or territorial entities that are not members of the United Nations core respect for human rights as spelled out in the Universal Declaration is a binding obligation – because they form part of customary international law.

human rights practices are "Western" and thus not suitable for the Asian context because of different traditions, culture and religion.[8] It has also been claimed that the violation of human rights can be necessary, and thus justifiable, to achieve economic development.[9]

People all over the world have appropriated ideas about rights and they have shaped them in light of their own culture and experiences. Thus, the core human rights treaties are shaped by long and tough negotiation processes between states from different regions, religions and cultures. In the end, they represent undeniably a legally binding consensus.

It is also important to note that the concept of universality as such is not at odds with the existence of different regional and sub-regional traditions and cultures. However, one cannot deny that human rights – as enshrined in the Universal Declaration of Human Rights – are compatible only with a limited range of practices. They are not – and cannot be – neutral with respect to all political forms or cultural traditions.[10] Obviously, totalitarian regimes such as Nazi Germany, or cultural traditions such as female genital mutilation, are not compatible with the concept of human rights that has been the consensus since the inception of the United Nations. Consequently, where traditional values conflict with internationally accepted human rights law, they must give way. No government in the world is absolved from the requirement to implement international human rights because of its traditional conceptions of social order.[11]

Whether the international consensus approach to human rights is best for every contemporary society is of course a matter of philosophical debate, but from a legal point of view this is not relevant. States have binding obligations through customary international law, and additionally through their respective treaty obligations. All states have explicitly accepted the international approach to human rights as enshrined in the UN Charter and they have, over and over again, vowed to act accordingly.

For example, the 1993 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights[12] explicitly affirms the "commitment of all States to fulfil their obligations to promote universal respect for and observance and protection of all human rights and fundamental freedoms for all […] The universal nature of these rights and freedoms is beyond question".[13] The Vienna Declaration clarifies that while regional particularities must be taken into account, this does not conflict with the universality of human rights. The Vienna Declaration emphasizes that "all human rights are universal, indivisible and interdependent and interrelated […]" and that "while the significance of national and regional particularities and various historical, cultural and

8 For an in-depth analysis of the debate see Davis.
9 For an analysis of these claims see Donnelly, p. 72 et seq.
10 Donnelly, p. 68.
11 Donnelly, p. 83.
12 Attended by 171 states.
13 Vienna Declaration and Programme of Action, para. I. 1., available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx.

religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".[14]

The debate over regional values has lost – at least from the legal standpoint – all its vigor. Taking into account the consensus expressed on many occasions, one must conclude that the respect for, and enforcement of, human rights is a binding obligation on all states.

Therefore, the idea that international law gives individuals rights against the state is a permanent premise. Moreover, the concept of human rights is firmly established as a distinct branch of international law and it is universally applicable. Human rights are globalized in the sense that they operate beyond borders and state mechanisms. This does not mean that the substance and content of each right would be readily agreed upon by all states and stakeholders. As has been pointed out, customs, religion and culture do play a role when interpreting rights. But the bottom line is that a broad agreement exists on fundamental rights to which each individual is entitled. These fundamental rights are spelled out in the Universal Declaration.[15] Despite the heterogeneity of international actors, the variety of preferences and objectives they have, and the differences in their cultural and historical backgrounds, a limited universal law has proved possible.[16] Human rights protection is part of this universal law.

III. General Principles Regarding the Protection of Human Rights

The term "human rights" implies that all human beings hold these rights equally. Every person, by being human, is a rightholder. But against whom are those rights directed and exercised? One can make the argument that each individual has human rights obligations towards every other individual. This is, however, not how the concept of human rights is constructed. Human rights are rather directed against the state and society as a whole.[17] They require the state to protect individuals and to provide a certain treatment. As a consequence, states (and their governments) are legitimate only insofar as they fur-

14 Vienna Declaration and Programme of Action, para. I. 5., available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx.

15 When it comes to states' duty of honoring obligations that arise from human rights, the implementation of those human rights are very closely linked to the role of the judiciary. Courts play a central role in the domestic context to ensure that citizens obtain effective protection against abuses and that violations of their rights are brought to justice. Lack of access to justice is one of the most significant impediments to proper implementation of international human rights guarantees. The Cambodian Constitution explicitly spells out human rights guarantees for Cambodian citizens, and, to safeguard these rights, it establishes a constitutional review system.

16 Nollkämper, para. 34.

17 Donnelly, p. 61.

ther effective enjoyment of human rights by their citizens.[18] The interaction of the state, as an abstract entity, and its individual citizens follows certain universal principles. Human rights are no different in this respect than constitutional law or administrative law, which themselves rely on human rights.[19] However, the enjoyment of human rights is not without limitations. Under certain circumstances, it can become necessary to limit the exercise of individual rights, for example for reasons of national security or public health. This is generally acceptable as long as the state follows clear and transparent rules when limiting individual rights.

That being said, each legal system has its own rules for the limitation of human rights through laws. However, it is important that the spirit of the relevant right is not neglected by repressive legislation. Therefore, the domestic legal order must take into account international standards, because ultimately the state is bound by its universal obligation to respect human rights. This obligation must not be undermined through a repressive limitation of the respective rights.

A look at some generally accepted principles provides an overview of how public authority may lawfully limit individual rights.[20]

1. Principle of Proportionality

Courts and administrative agencies all over the world apply the principle of proportionality for guaranteeing the full respect of human rights. The principle is applied, for example, in countries such as the United States, Argentina, Germany, Great Britain, Spain, Italy, France, Belgium, Denmark, Ireland, Portugal, and Switzerland. Important regional courts such as the European Court of Human Rights, the Inter-American Court of Human Rights and the European Court of Justice apply the principle.[21]

In a nutshell, the principle prescribes that all acts of public authority must be proportionate and reasonable. The principle of proportionality consists of a four-component test that assesses whether (a) the intended act is legitimate (pursues an acceptable goal); (b) the act that interferes with a right is suitable for achieving its objective, (c) the act is necessary (= the mildest option available) for that purpose, and (d) the act burdens the addressee excessively compared with the benefits it aims to secure (= proportionality stricto sensu).[22]

18 Donnelly, p. 63.

19 For the relationship between human rights, constitutional law and administrative law see Hauerstein, pp. 26-27.

20 For a discussion on what constitutes the exercise of public authority see House of Lords House of Commons Joint Committee on Human Rights, "The Meaning of Public Authority under the Human Rights Act", Seventh Report of Session 2003-2004, Doc. HL Paper 39 (3 March 2004).

21 See also Menzel p. 89; for the similar three-pronged test in the U.S. legal system see Cinciardo (with further references).

22 Tsakyrakis, p. 474.

The first component of the test merely determines whether the measure pursues a lawful goal. The second component determines suitability and scrutinizes whether the state action which affects a human right is able to achieve the purpose (or at least promote the envisioned goal). That is to say, it must be verified that the means employed is capable of achieving the sought-after end. The third component looks at whether the means chosen to obtain the desired result is the one which is the least restrictive or intrusive of individual human rights. In other words, the state action will only pass the test of necessity if the means employed is the least restrictive one. Finally, the fourth component of the proportionality test is to determine if the action is proportional stricto sensu; in other words: whether the act is reasonable and appropriate.[23]

Therefore, if the hypothetical benefits of an action are high, but the way in which individual rights are affected is expected to be high too, this can still be acceptable if the state action is proportional.[24] Cincirdo rightfully warns that if the principle of proportionality were just a balance between the "weight" of the right and that of the reasons that have led the state to decide to restrict such right, ultimately, the human right could lose its characteristic of an impassable barrier for the state because the invocation of a more or less convincing raison d'état could justify the sacrifice of a human right.[25] Therefore, proportionality alone is not sufficient to limit individual rights. There must be more than just a weighting of competing interests if fundamental human rights of the citizens are to be meaningfully protected.

In addition to proportionality, it must also be ensured that the action does not touch the essential core (Wesensgehalt) of the human right. For example, under German constitutional doctrine, in case that an action by public authority violates the essential core of a human right, the action is deemed to be in violation of the right. The German Constitutional Court emphasized the absolute protection of the core essence of a fundamental human right.[26] As a consequence, the action is null and void. However, what exactly constitutes the "essential core" of a right is debatable and will have to be determined on a case by case basis. But taken together, the principles of proportionality and of inviolability of the essential core of fundamental rights afford a reasonable degree of protection against arbitrary state action that unduly limits individuals' human rights.

23 An example on the application of the principle of proportionality (in the administrative law context) is given by Menzel, p. 89.

24 See Cinciardo, p. 4.

25 Cinciardo, p. 5.

26 See German Constitutional Court Judgments (BVerfGE, Vol. 7), p. 441.

2. Reservation of Statutory Powers (*Gesetzesvorbehalt*)

Most constitutions[27] guarantee fundamental rights and freedoms. Usually, some rights are guaranteed without restrictions, for example fair trial rights or the prohibition of torture. However, most rights are not guaranteed limitlessly. There are absolute rights, which may not be limited, and relative rights, which may be limited under certain circumstances.

Relative rights can generally be limited by ordinary laws. Usually the Constitution will include a clause which states that only a law (as opposed to an executive order) may limit the respective right. As has already been stated above, the state may have legitimate reasons for restricting the exercise of constitutionally guaranteed rights because of requirements of public order, public security or public health. It is the state's duty to limit individual rights when this appears necessary in the context of broader public policy considerations.

For example, the Cambodian Constitution, in Art. 34 concerning the right to vote, states that "provisions restricting the right to vote and the right to stand as candidates for the elections shall be determined by the Electoral Law". Clearly, the Constitution allows for the political right to vote to be specified. The right to vote is a relative right. However, this does not open the door for abuse or arbitrary decisions by the government. Art. 34, para. 5 of the Constitution makes clear that only a legislative act by parliament may spell out the circumstances under which the right to vote can be limited. Another example of a reservation of statutory powers is Art. 37 of the Cambodian Constitution, which states that "the rights to strike and to organize peaceful demonstrations shall be exercised within the framework of law".

Statutory reservation clauses are an important safeguard. They clarify that a right can only be restricted through a law and not by simple action (e.g. executive decree) of the government or the administration. Every action of the administration must be based on a parliamentary law when individual rights are restricted through the action. Sometimes a general statutory reservation clause may be too abstract and more detail may be needed to make sure that the power to limit a right is not abused by irrelevant considerations. The Constitution may then spell out certain conditions under which only the right may be lawfully restricted (so-called *qualifizierter Gesetzesvorbehalt*).

27 In some instances, separate organic laws or a bill of rights include human rights catalogues, see e.g. the UK.

3. Practical Concordance

Even if the Constitution as the supreme law of the country does not provide for statutory limitation clauses, individual human rights can still be lawfully limited. The interrelation between competing rights logically leads to the limitation of rights. The right of one person ceases where the right of another person begins.

The aforementioned principles of proportionality and of statutory reservation apply to the relationship between the individual and the state. The state is bound by these principles when limiting individual rights through administrative action or through law. But the situation is different when the rights of two rightholders clash. Both may have a valid claim to the protection of their rights.[28]

The European Court of Human Rights routinely balances human rights against each other and in many countries balancing of competing rights is a basic constitutional principle.[29] Balancing is necessary – and unavoidable – when two equal rights collide. According to German Constitutional Court judge Konrad Hesse "the principle of the constitution's unity requires the optimisation of values in conflict: both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values". Proportionality is an integral part of practical concordance and indicates how to adequately balance rights. However, practical concordance goes beyond mere proportionality. Practical concordance strives for optimal balancing of two conflicting but equal rights.

Of course, different states (i.e. their judicial and executive bodies) may weight particular rights differently.[30] This is acceptable and does not contradict the universality of human rights. It rather reflects different cultures, religions and traditions around the world. For example, in some countries the integrity of the family may weigh heavier than the protection of the right to work (or vice versa). But value judgments should not influence the legal process and the essential core of human rights. Practical concordance is, just as the principle of proportionality, a legal tool to ensure that the rule of law prevails. What is ultimately important is that fundamental rights are in a universally acceptable balance and are protected from undue interference by the state.

28 The Cambodian Constitution seems to acknowledge this in Art. 31 (para. 2, sentence 2) of the Constitution which states that "The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedoms of others".

29 For France see Conseil Constitutionnel, Décision No. 94-352 (18 January 1995); for Germany see for example German Constitutional Court Judgments (BVerfGE, Vol. 83 pp. 130, or Vol. 77 pp. 240).

30 Donnelly, p. 84.

IV. Implementation of Human Rights Treaties into Domestic Law

As has been demonstrated, states are bound by human rights obligations derived from international law. Paradoxically, while they are bound by international law there is no explicitly stated duty to incorporate or transform these obligations into domestic law.[31] One cannot conclude, however, that states are not required to properly reflect the agreed upon standards in their domestic legal orders. Quite to the opposite: states must comply with international obligations, otherwise the rules on state responsibility may kick in on the international plane.[32] However, states are free to choose the means by which they internally ensure compliance with international obligations, and, more specifically, those arising from human rights treaties. The question is not so much whether a state must honor its obligations under international law, but rather how the state undertakes to do so.

States must perform the treaties they enter into in good faith.[33] But different legal systems follow different concepts. The way separate legal systems absorb and transform international treaties differs from jurisdiction to jurisdiction. Two main categories exist: states either follow a monist system or dualist system. In a monist country, international treaties become directly part of domestic law with ratification, while in a dualist country an additional act of transformation is required.[34]

Despite differences of transformation, it is important to reiterate that the supremacy of international law indicates very clearly that a state must honor its international obligations. A state cannot plead the condition of its domestic law by way of absolution.[35] This is spelled out in Art. 27 of the Vienna Convention on the Law of Treaties, which states that states cannot invoke their domestic law for a failure to perform their international obligations.[36] Ergo, the inability to comply with international human rights treaties because of conflicting domestic constitutional law does not free the state from its obligations under those human rights treaties.

31 Stabebrock, para. 14.

32 The non-binding regime on state responsibility cannot be discussed here in detail, it suffices to say that the rules on state responsibility are applicable when a state commits an internationally wrongful act. For more details see Crawford "The International Law Commission's Articles on State Responsibility".

33 See Art. 26 (Pacta sunt servanda) of the Vienna Convention on the Law of Treaties: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

34 Staberock, para. 15.

35 Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", reprinted in D.J. Harris, "Cases and Materials on International Law", p. 68.

36 See Art. 27 of the Vienna Convention on the Law of Treaties: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

1. Monism / Dualism

The categories of monism and dualism relate to the incorporation of international treaty obligations into the domestic legal order.[37] Legal concepts concerning the domestic incorporation are necessary, because treaties will seldom stipulate how a state should implement treaty provisions. International treaties tend to leave it to each state to decide on their domestic execution. This seems wise, because different cultural and traditional backgrounds may require different choices and different measures to be applied. The freedom to choose the methods of implementation is, for example, guaranteed in Art. 2 of the International Covenant on Civil and Political Rights, which states that "where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant".

Accordingly, the transformation of human rights treaties into domestic law varies from country to country. Not two systems in the world are exactly the same. In some countries international human rights treaties become part of national law right after ratification. As soon as the state has ratified (or acceded to) an international human rights instrument, it becomes automatically national law. In other countries international human rights treaties do not automatically form part of the national law after ratification, but additional steps must be taken for the provisions of the treaty to become enforceable.[38]

The relationship between international law and domestic law rests on two principal schools of thought.[39] The dualist school of thought regards international law and domestic law as separate.[40] Domestic law can apply international law only indirectly - when it has been transformed into domestic law. Incorporation and transformation of the treaty will usually result from an act of parliament or another form of legislative act. On the other hand, the monist school of thought regards international law and domestic law as parts of a single legal system.[41] Monist systems tend to have fewer problems with a view to the potential dichotomy between domestic legislation and international obligations. The Netherlands are an example of a monist legal system. International law operates auto-

37 See Taing, pp. 124.
38 International law in these countries can never be self-executing, i.e. it does not have the force of law without the passage of additional national legislation.
39 For a detailed discussion see Staberock.
40 Taing, p. 125.
41 Taing, p. 124.

matically, as such, within the national legal system.[42] The Dutch Constitution even states that international treaties supersede conflicting domestic laws, including the Constitution itself, if the treaty is approved by a two-third majority in parliament.[43]

Most countries operate systems between the outlined two poles of the monist/dualist models. Roughly four ways how to implement international human rights treaties into domestic law can be differentiated:

- Incorporation of rights into domestic laws to give effect to the rights recognised in the human rights treaty;
- Incorporation of rights recognised in the human rights treaty into a bill of rights in the constitution;
- Indirect incorporation through interpretation of domestic laws (by the administration and courts) in the light of international human rights obligations;
- Direct applicability of international human rights in the national legal order.

2. Direct Applicability of Human Rights Treaties

The question whether a human rights treaty is directly applicable is different from that of its incorporation into domestic law. Jackson notes that "direct application of a treaty generally seems to mean that courts in the system (as well as other government bodies) will look to the treaty language itself as a source of law, analogously to the way they look at constitutions, statutes or other instruments of domestic law".[44] Human rights treaties gain in weight, it is suggested, if they are directly applied by courts or executive agencies and do not depend on implementation procedures that may depart from the precise wording of the treaty.

Furthermore, direct applicability of human rights treaties must be distinguished from their domestic validity and from their invocability. Domestic validity is a prerequisite to direct applicability. A treaty is domestically valid, once its provisions have acquired the status of domestic law.[45] Invocability means that a human rights treaty can be relied upon by a party before a court or executive agencies. A directly applicable treaty is invocable if it creates sufficiently precise and detailed rights for the party that wishes to invoke it.[46]

42 Of course only after ratification of the treaty.
43 Art. 91, para. 3 of the Dutch Constitution: "Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the House of the States General only if at least two-thirds of the votes cast are in favour", see also Ginsberg/Chernikh/Elkins at p. 204.
44 Jackson, p. 321.
45 Kaiser, para. 9.
46 Kaiser, para. 2.

3. The Cambodian Context

Human rights are of fundamental importance in the constitutional structure of most countries. Cambodia is no different in that regard. Art. 31 of the Cambodian Constitution states that "the Kingdom of Cambodia recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women's rights and children's rights". This article is silent on the process of transformation of international human rights into a domestically binding legal commitment. The legal relevance of Art. 31 is unclear because the wording of Art. 31 blurs the line between monism and dualism - both concepts seem possible.

Art. 26 of the Constitution states that "the King signs and ratifies international treaties and conventions after their approval by the National Assembly and the Senate". Taing concludes that "this article shows clearly that all the international instruments shall be included in national laws of Cambodia after the ratification from the king".[47] If interpreted this way, Art. 26 in conjunction with Art. 31 would imply that the Cambodian Constitution follows a monist approach, because the legislature by its involvement in the ratification process incorporates the international human rights treaty into domestic law – without further transformation being required.[48] One can agree with this interpretation, because treaty obligations seem to become effective in the international sphere and in the domestic sphere simultaneously. A further act of transformation seems not required.

Ultimately, however, the wording of the Constitution is ambiguous. The Cambodian Constitution stops shortly before declaring that international treaties are part of Cambodian law. Whether Cambodia adopts the monist or dualist approach is a question that is not resolved by the constitutional text.

The Cambodian government in its 1997 Report to the UN Committee on the International Convention on the Elimination of all Forms of Racial Discrimination took the standpoint that international human rights treaties are not directly applicable in Cambodia. In the report, the government stated that "these covenants and conventions may not be directly invoked before the courts or administrative authorities".[49] However, this interpretation of the Constitution seems to be at odds with an obiter dictum on that issue by the Constitutional Council.

47 Taing, p. 125.
48 Taing, pp. 124 and 125.
49 UN Doc. CERD/C/292/Add.2, p. 7, the report states that "however, they provide a basis for the development of national legislation, such as that pertaining to the observance an protection of human rights […]".

In its decision of July 10th 2007[50], the Constitutional Council clarified that ratified international treaties form part of domestic law.[51] The Constitutional Council stated that "the Constitutional Council […] understands that at case trial, in principle, a judge […] relies on the law. The term "the law" here refers to the national law including the Constitution which is the supreme law and other applicable laws as well as the international conventions that Cambodia has recognized, especially the Convention on the Rights of the Child." The Constitutional Council importantly clarifies that "national law" includes international conventions that Cambodia has recognized. [52] The Constitutional Council does not speak of international conventions that have been transformed into domestic law, but of international conventions themselves being national law.[53]

Furthermore, the Constitutional Council did not only clarify that ratified human rights treaties are domestic law, but also that they are directly applicable. In the above cited paragraph, the Constitutional Council points out that judges must include in their decision-making process all national laws – which according to the Constitutional Council encompass human rights treaties that Cambodia has recognized. If judges are urged to directly rely on these treaties, it follows that they must be invocable by the parties to a dispute. But an international treaty (or its provisions) is only invocable if the treaty is sufficiently concrete and precise. This is, however, usually the case with human rights treaties. Ergo, human rights treaties are not only directly applicable in the Cambodian context, but they are also invocable by the parties before Cambodian courts. The Cambodian government in the above-mentioned 1997 report to the Committee on the Elimination of Racial Discrimination had already stated that "[i]n practice, Cambodia grants the provisions of international conventions precedence over domestic legislation […] Accordingly, in performing their respective tasks, courts and administrative authorities at all levels refer to them in the absence of national legislation".[54] Not only in absence of domestic law, but rather in

50 Constitutional Council Dec. No. 092/003/2007.

51 Background of the decision was a petition from civil society organizations with the aim of reducing custodial sentences for persons under the age of 18. The Law on Aggravating Circumstances for Felonies allegedly was in violation not only of the Cambodian Constitution but also the Convention on the Rights of the Child. The Constitutional Council upheld the respective law, but the Constitutional Council also ruled that it could not have been the legislature's intention to violate the Convention on the Rights of the Child.

52 The Constitutional Council decision clarifies the status of human rights treaties as part of Cambodian national law. It does, however, not clarify the status of customary international law in the domestic legal hierarchy. Menzel concludes that the Cambodian Constitution also intends a general respect for customary international law because of its openness towards international law in general; see Menzel, p. 77.

53 This seems also in line with Art. 26 of the Constitution, which can be interpreted in a way that parliamentary approval and the King's ratification is sufficient to make international treaties domestic law.

54 UN Doc. CERD/C/292/Add.2, p. 9.

general do Cambodian courts and administrative authorities have to refer to international conventions – because, as the Constitutional Council has clarified, ratified international conventions are domestic law themselves.

V. Concluding Remarks

There is always tension between systems of rule that favour unequal social and political entitlements and the idea of human rights. In autocratic societies, the idea of human rights calls into question traditional practices, and oftentimes human rights challenge the main proponents of existing regimes. However, the concept of universal human rights represents the international community's best effort to define the parameters of mutually agreed standards with a view to life in human society. The theory behind the concept may be complex, sometimes even confusing. But Reisman is right when he states that "no one is entitled to complain that things are getting too complicated. If complexity of decision is the price for increased human dignity on the planet, it is worth it. Those who yearn for 'the good old days' … do more than commit an anachronism. They undermine human rights".[55]

International human rights treaties are a part of Cambodian law. This includes their invocability in domestic courts. But this alone is not enough to protect citizens from human rights abuses. Often a discrepancy between rights and their actual protection and enforcement exists. Courts, prosecutors and law enforcement agencies must be trained and must be willing to investigate abuses and protect victims against abuses. The rule of law must not only be written down in the laws but also be entrenched in the legal culture. Only then can human rights unfold their power and bring additional freedom and liberties to the people.

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INSTITUTIONAL PROTECTION OF BASIC HUMAN RIGHTS IN CAMBODIA

SOK Socheat

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INSTITUTIONAL PROTECTION OF BASIC HUMAN RIGHTS IN CAMBODIA

SOK Socheat *

ABSTRACT

Major specific legal provisions for ensuring respect for human rights in Cambodia were first included in the 1991 Paris Peace Agreements (PPAs), the purpose of which was to end the civil war in Cambodia.

The PPAs are very important foundational documents, which paved the way for the establishment of international human rights agencies and provided for the incorporation of a Declaration of Fundamental Human Rights (DFHR) and other international human rights instruments in the 1993 Cambodian Constitution.

To comply with the terms of the PPAs, a field office of the Office of United Nations High Commissioner for Human Rights (OHCHR) was established to monitor the human rights situation in Cambodia. Its function is currently fulfilled by a Special Representative of the Secretary–General of the UN in accordance with its mandate. The 1993 Constitution of Cambodia also includes clauses, which form a Declaration of Fundamental Human Rights in Chapter III: The Rights and Obligations of Citizens of Cambodia.

Cambodia has also ratified and become a party to twelve core international human rights treaties. Under the terms of these treaties, Cambodia is obliged to firmly adhere to the human rights protections contained in those treaties and make periodic reports on human rights to international human rights agencies. In addition, the Constitution recognizes these treaties not only as international laws, but also as a part of Cambodian national law. As such, the terms of these treaties have been directly applied and considered by Cambodian courts in human rights cases.

Currently, besides the constitutional institutions, which play a role in protecting human rights, such as the Constitutional Council and the judiciary, Cambodia has a number of human rights institutions carrying out missions related to protecting human rights, such as: the Senate Commission on Human Rights, Reception of Complaints and Investigations, the National Assembly Commission on Human Rights, Reception of Complaints, Investigation and Senate-National Assembly Relations, the Cambodian Government Commission

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on Human Rights along with human rights advocacy groups, such as LICADO, ADHOC, CHRAC, etc. The purpose of all of these institutions and organizations is to promote and protect human rights in Cambodia.

Even though there are many human rights organizations operating in Cambodia, these organizations do not usually work together or issue joint statements regarding the human rights situation in Cambodia.

Once, there were mechanisms in place and a trend towards the establishment of a National Institute for Human Rights in Cambodia as a member of the ASEAN Institute for Human Rights in accordance with the ASEAN Charter (Article 14). Among the members of the ASEAN community, six countries have already established and currently operate such National Institutes for Human Rights: Malaysia, Indonesia, Singapore, the Philippines, Thailand and Myanmar.

I. Introduction

Promoting human rights and fundamental freedoms is a key objective of the United Nations, which has adopted a policy of integrating human rights considerations into the mission of all UN agencies and other bodies. Accordingly, in addition to the United Nations Human Rights Council, which is the main UN human rights body, a steady, but growing number of specialized agencies, programs and funds have been established for human rights promotion and protection activities.

At the Vienna World Conference on Human Rights in 1993 and in subsequent resolutions of the General Assembly and the United Nations Human Rights Council, there were calls for the United Nations to make certain assistance programs available at the request of the governments of the member states. These calls for action were aimed at the reform of national legislation and the establishment and/or strengthening of national institutions and related structures for the purpose of upholding: human rights, the rule of law and democracy, electoral fairness as well as the promotion of human rights awareness through training, teaching, education, popular participation and the involvement of a vibrant civil society.[1]

Essentially, the Secretary-General, in the United Nations Secretary General's 2002 Report, encouraged member states to establish and strengthen national human rights promotion and protection systems, consistent with international human rights norms and principles.[2]

In Cambodia, human rights for everyone should be fully protected by Cambodian laws under the Constitution and in accordance with the rule of law. The 1991 Paris Peace Accords permit the United Nations to continue to monitor the human rights situation

1 The Human Rights Handbook for Parliamentarians.

2 See paragraph 50 of Strengthening of the United Nations: an agenda for further change.

in Cambodia after the transitional period, a function currently undertaken by the Special Representative of the Secretary-General in accordance with a mandate of the Human Rights Council. The Office of the United Nations Commissioner for Human Rights (OHCHR) has maintained a country office in Cambodia since 1993 with the agreement of the Royal Government of Cambodia.[3]

II. Legal Framework: Human Rights Norms and the Legal Bases for the Establishment of Human Rights Institutions in Cambodia

1. Paris Peace Agreements (1991)

a.) The Paris Peace Agreements were considered as a temporary Constitution for the transitional government of the Supreme National Council of Cambodia (SNC), which governed Cambodia from 1991-1993:

On October 23 1991, the Agreements on a Comprehensive Political Settlement of the Cambodia Conflict were signed by Cambodia and 18 other nations in the presence of the United Nations Secretary-General. These instruments were signed by the twelve members of the SNC, which was the unique body and source of authority enshrining the sovereignty, independence and unity of Cambodia.[4] The Paris Peace Accords became a Constitution for the SNC government and a portion of which was called a Declaration on the Rehabilitation and Reconstruction of Cambodia.[5] Article 1 provided that: "The primary objective of the reconstruction of Cambodia should be the advancement of the Cambodian nation and people, without discrimination or prejudice, and with full respect for human rights and fundamental freedom for all. The achievement of this objective requires the full implementation of the comprehensive political settlement." The Agreement also included a specific commitment to ratify international human rights treaties. The SNC subsequently ratified and Cambodia became a party to three international human rights treaties:[6] the International Covenant on Economic, Social and Cultural Rights (ICESCR) (26 August 1992), the International Covenant on Civil and Political Rights (ICCPR) (26 August 1992), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (14 November 1992).

3 The Declaration of Human Rights in the Cambodian Constitution, p. 8 published by OHCHR.
4 The Paris Peace Accords, Section III.
5 This Declaration was signed by all concerned parties to the Paris Conference on Cambodia and endorsed by the Security Council in 1991.
6 The Declaration of Human Rights in the Cambodian Constitution, p. 7.

b.) The Paris Peace Agreements as a fundamental human rights norm

The concerned parties committed themselves to promote and encourage respect for the observance of human rights and fundamental freedoms in Cambodia, as embodied in the relevant international instruments and the relevant resolutions of the United Nations General Assembly, in order to prevent the recurrence of human rights abuses.

Under Article 15 of the Paris Peace Accords:

"1. All persons in Cambodia and all Cambodian refugees and displaced persons shall enjoy the rights and freedom embodied in Universal Declaration of Human Rights and other relevant international human rights instruments."

"2. To this end, Cambodia undertakes:[7]

– To ensure respect for and observance of human rights and fundamental freedoms in Cambodia;

– To support the rights of Cambodian citizens to undertake activities which would promote and protect human rights and fundamental freedom;

– To take effective measures to ensure that the policies and practices of the past shall never return;

– To adhere to relevant international human rights instruments."

Overall, the Agreements recalled Cambodia's tragic history and required the implementation of special measures to ensure the promotion and protection of human rights and prevent a return to the policies and practices of the past.

c.) The Paris Peace Agreements as a legal basis for the establishment of human rights institutions in Cambodia

Article 17 of the Paris Peace Accords states:

"After the end of the transitional period, the United Nations Commission on Human Rights shall continue to monitor closely the human rights situations in Cambodia, including, if necessary, by the appointment of a Special Rapporteur who would report his findings annually to the Commission and to the General Assembly."

The presence of the OHCHR in Cambodia comes as result of the provisions of several international instruments: the Paris Peace Accords, as mentioned above, the World Conference on Human Rights[8] (Vienna, 1993) and the Resolution No. 48/141, adopted by the General Assembly on 20 December 1993, creating the post of the United Nations Office

7 The Paris Peace Accords, Article 15, Section V.

8 Human Rights Hand Book for Parliamentarians, page 8.

of High Commissioner for Human Rights (UNOHCHR), with the rank of Under-Secretary-General, as the United Nations official with principle responsibility for United Nations Human Rights activities. The UNOHCHR's responsibilities will be discussed in detail later on.

The UN Human Rights Council, in Resolution No. 24/29, decided: "to extend by one year the mandate of the special procedure on the situation of human rights in Cambodia through the appointment of a Special Rapporteur to carry out the former functions of the Special Representative to the Secretary-General, and request[ed] the Special Rapporteur to report on the implementation of his/her mandate to the Council at its twelfth session and to engage in constructive manner with the Government of Cambodia for further improvement of human rights in the country." Therefore, the presence of the Special Rapporteur on Human Rights in Cambodia as an independent expert appointed by the United Nations Human Rights Council to follow and report on the human rights situation in Cambodia derives from Article 17 of the Paris Peace Accords and Resolution 24/29 of the UN Human Rights Council.[9]

It should be noted that "before 2008, the Cambodia mandate was held by Special Representative of the Secretary-General for Human Rights in Cambodia (SRSG). The mandate-holder was appointed by the Secretary-General of the United Nations, although he still reported to the Human Rights Council. The name was changed in 2008 in line with standardization of Special Rapporteur name."[10]

d.) The Paris Peace Agreements are the foundation for the new Constitution for the Kingdom of Cambodia (1993)

> *"This act marked the beginning of the transitional period in Cambodia, running up to the formation of a new Cambodian government following free and fair elections."*[11] *The Security Council expressed its full support for this Agreement on 31 October in Resolution No. 718."*[12]

The Agreements consist of three main instruments covering the following topics: 1. The mandate for the UNTAC, military matters, elections, repatriation of Cambodian refugees and displaced persons, and the principles for **a new Cambodian Constitution**, 2. The Agreement Concerning the Sovereignty, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia and 3. The Declaration on the Rehabilitation and Reconstruction of Cambodia.[13]

9 Special Rapporteur on the situation of human rights in Cambodia, OHCHR.
10 Ibid.
11 The Paris Peace Accords, Chapter 1.
12 Ibid.
13 The Paris Peace Accords.

The "basic principles for a new Constitution, including those regarding human rights and fundamental freedom as well as regarding Cambodia's status of neutrality, which the new Cambodian Constitution will incorporate, are set forth in Annex 5 of the Paris Peace Agreement."[14]

2. Treaties and Conventions on Human Rights

"

There are ten core international human rights instruments. Each of these instruments (nine human rights treaties and one Optional Protocol to the CAT) has established a committee of experts to monitor implementation of the treaty provisions by its States parties. Some of the treaties are supplemented by optional protocol dealing with specific concerns."[15]

Cambodia ratified and became a party to those ten[16] core international human rights instruments, which means that Cambodia is obliged to apply those treaties and make periodic reports on the human rights situation within Cambodia to international human rights bodies, especially the committees established by those treaties. The relevant Committees are as follows:

1.) International Covenant on Civil and Political Rights (ICCPR): This Convention entered into force in 1966 and spells out in more detail the civil and political rights enumerated earlier in the UDHR and is legally binding on those countries that have ratified it, which are currently 168.[17] Cambodia, under the SNC, ratified it on 26 August 1992. The ICCPR provides the following human rights protection mechanisms:

- The Covenant establishes a "Human Rights Committee" (HRC) which consists of 18 members to monitor its implementation by considering periodic reports from state parties.[18]
- In certain circumstances, the HRC may consider complaints from other countries that have ratified the Covenant.[19]
- Individuals, who believe that rights under the Convention have been violated, may also make complaints to the HRC.[20]
- The HRC may also formulate General Comments (GC) that may help to clarify what countries must do to comply with the ICCPR.

14 The Paris Peace Accords, Article 23.
15 The Core International Human Rights Instruments and their monitoring bodies, OHCHR.
16 Cambodian Human Rights Law, OHCHR, 2012.
17 Critical Legal Thinking: A Study Textbook, Part I: Human Rights by Wilhelm Treiber, Andrea Beam and Hout Sotheavy.
18 ICCPR, Article 28.
19 ICCPR, Article 41.
20 The Optional Protocol of the ICCPR, Article 1.

2.) International Covenant on Economic, Social and Culture Rights (ICESCR): This Covenant entered into force in 1976.[21] It provides more details on the economic, social and cultural rights enumerated earlier in the UDHR. It is legally binding on those countries that have ratified it. Cambodia ratified it on 26 August 1992. The ICESCR provided only one human rights protection mechanism, which is the reporting obligation of each state party. The main objective is to ensure that the state party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction.

> *"The state parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measure which they have adopted and the progress made in achieving the observance of the rights recognized herein."*[22]

3.) Convention on the Elimination of all Forms of Discrimination against Women (CEDAW): This Convention, which entered into force in 1981 and was ratified by Cambodia on 15 October 1992, "is the only human rights treaty which affirms the [reproductive] rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. […] [It] provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life including the rights to vote and to stand for election as well as education, health and employment."[23]

"For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee […] [within CEDAW consisting] of 23 experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by the states parties from among their nationals and shall serve in their personal capacity, consideration being giving to equitable geographical distribution and to the representation of the different forms of civilization as well as the principle legal systems."[24]

State parties are obliged to submit national reports related to the legislative or administrative, at least every four years,[25] or on other measures they have taken to comply with their treaty obligations. Individuals cannot file a complaint.

21 Critical Legal Thinking: A Study Textbook, Part I: Human Rights by Wilhelm Treiber, Andrea Beam and Hout Sotheavy.
22 ICESCR, Article 16.
23 CEDAW, Article 1.
24 CEDAW, Article 17.
25 CEDAW, Article 18.

4.) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): Cambodia ratified this Convention on 15th October 1992. The purpose of this Convention is to increase the efficiency of the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world. The CAT declares in Article 2 that: "No exceptional circumstances whatsoever, whatever a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture […]."

The Convention calls for the establishment of "a Committee against Torture, which consists of 10 experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the state parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some person having legal experiences."[26]

Individuals can file a complaint under the CAT. "A state party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communication from or on behalf of individual subject to its jurisdiction who claim to be victims of the violation by a state party of the provision of the Convention."[27]

"The main objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."[28]

"The Subcommittee on Prevention shall: (a) visit the places referred to in Article 4 and make recommendation to states parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment; […] [and[cooperate, for the prevention of torture in general, with relevant United Nations organs and mechanisms as well as with international, regional and national institutions or organizations working towards the strengthening of protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment."[29]

3. Cambodian Constitution

a.) International human rights treaties were deemed as Cambodian local laws

In Cambodia, the close link between international human rights treaties and domestic laws is provided for clearly in the Cambodian Constitution and has been reaffirmed by a decision of the Constitutional Council.

26 CAT, Article 17.
27 CAT, Article 22.
28 The Optional Protocol to CAT, Article 1.
29 The Optional Protocol to CAT, Article 11.

Cambodia has signed the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, the Convention on the Rights of Persons with Disabilities and the Optional Protocol to that treaty as well as the Optional Protocols to both the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women, all of which include individual complaint procedures.

Article 31 of the Cambodian Constitution enshrines each of these treaties as part of Cambodian domestic law and Article 48 also commits the Royal Government of Cambodia to the protections contained in the Convention on the Rights of Child.

According to Decision No: 092/003/2007 (10 July 2007), the Constitutional Council, the body created to safeguard respect for the Constitution, reaffirmed the application of international human rights treaties in Cambodian law and reminded judges that, in deciding cases, they are obliged to consider all Cambodian law, including the Constitution, which is the supreme law, and other applicable laws as well as the international conventions that Cambodia has recognized.[30]

As a result, the human rights of everyone in Cambodia should be fully protected by Cambodian law under the Constitution in accordance with the rule of law.

b.) Fundamental human rights concepts reflected in the Cambodian Constitution

Right to equality before the law: Everyone has equal rights before the courts and tribunals. "[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[31]

Article 31, Paragraph 2 of the Cambodian Constitution provides that "Every citizen of Cambodia shall have equality before the law, enjoying the same rights and freedom and fulfilling the same obligations without discrimination as to race, color, sex, […]". This provision has the same meaning as Article 26 of ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." By protecting the exercise of this right: "The law guarantees that there shall be no physical abuse against any individual and the law shall protect the life, honor and dignity of the citizens. The prosecution, arrest, or detention of any person shall not be done except in accordance with the law. Coercion, physical ill-treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner shall be prohibited. Persons who commit, participate or conspire in such acts shall be punished according to the law.

30 See the statement in the fourth point of acknowledgement in Decision No. 092/003/2007 of the Constitutional Council of Cambodia.

31 See also ICCPR, Article 14.

Confession obtained by physical or mental coercion shall not be admissible as evidence of guilt. Any case of doubt shall be resolved in favor of the accused. The accused shall be considered innocent until the court has rendered final judgment in the case [...]."[32]

Right to be free from the death penalty: This right is protected and guaranteed by law. The term "execution" is clearly defined in the ICCPR and the Cambodian Constitution. The death penalty is prohibited by Cambodian law. Paragraph 2 of Article 32 of the Cambodian Constitution states that "capital punishment shall be abolished". This provision seemed to have been copied from an article of the ICCPR, which Cambodia is a party to. Article 6 of the ICCPR prescribes that: "every human being has the inherent right to life [...]. No one shall arbitrarily deprive of his [or her] life [...]. In countries which have not abolished the penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime ant not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the crime of Genocide [...]".

Right to freedom of movement, liberty and security: The Cambodian Constitution recognizes the freedom of Cambodian citizens to freely move in and out of the country and to his/her residence. "Everyone shall be free to leave any country, including his [or her] own country [...] No one shall be arbitrarily deprived of the right to enter his [or her] own country."[33]

Right to take part in political life: Cambodia promotes and protects its citizens' rights to join in political affairs, the rights to form and to be members of a political party and, especially, the rights to vote and to be a candidate for elections. Every citizen shall have the rights and the opportunity "to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." Restrictions on the right to vote and to stand as candidates in the election shall be determined by the election law.[34]

Right to take part in social and cultural life: Beside the participation in political life, Cambodian people have the "right to participate actively in the [...] social and cultural life of the nation. Any suggestions from citizens shall be given full consideration by the organs of the state."[35]

Right to have an adequate standard of living: Cambodian people have the right to have a proper occupation in accordance with their own abilities and capacities by choosing any employment appropriate to their ability and in accordance with the needs of society. They have also "the right to form and to be a member of trade unions." Cambodian people of either sex have the right to equal pay for equal work. Work undertaken by a housewife in the home has the same value and benefits as work outside the home.[36]

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32 Cambodian Constitution, Article 38.
33 Cambodian Constitution, Article 33 and ICCPR, Article 12.
34 Cambodian Constitution, Article 34 and ICCPR, Article 25.
35 Cambodian Constitution, Article 35.
36 Cambodian Constitution, Article 36.

Rights to the highest attainable standard of health and education: The state shall establish a comprehensive and standardized educational system throughout the country which shall guarantee the principle of freedom to operate educational institutions and equal access to education in order to ensure that all Cambodian people have an equal opportunity to earn a living. "The state shall provide [free] primary and secondary education to all citizens in public schools." Citizens shall receive education for at least 9 years.[37]

"The health of people shall be guaranteed. The state shall pay attention to disease prevention and medical treatment. Poor people shall receive free medical consultations in public hospitalities, infirmaries and maternity clinics."[38] "The state shall pay attention to children and mothers. The state shall establish nurseries and help support women who have numerous children and have inadequate support."[39]

Right to equality within marriage: Men and women have equal rights in all aspects, especially in marriages and matters of the family. Marriage shall be conducted according to conditions determined by law based on the principle of mutual consent and monogamy.[40]

Right to privacy: Citizens have the rights "to the inviolability of the home and to privacy of correspondence by mail, telegram, fax, and telephone shall be guaranteed."[41]

Rights to form and join trade unions: "Cambodian people have the right to establish associations and political parties. These rights shall be determined by law. All citizens of Cambodia may participate in mass organizations for their mutual benefit to protect national achievements and social order."[42]

Right to strike and non-violent demonstration: Cambodian people have the right "to strike and to non-violent demonstration in compliance with the framework of law."[43]

Rights to freedom of expression and freedom of opinion: Cambodian people have the rights "to freedom of expression, freedom of press, freedom of publication and freedom of assembly. No one shall exercise this right to harm the honor of others, to affect the good traditions of society… The regime of the media shall be determined by law."[44]

37 Cambodian Constitution, Article 68.
38 Cambodian Constitution, Article 72.
39 Cambodian Constitution, Article 73.
40 Cambodian Constitution, Article 45.
41 Cambodian Constitution, Article 40.
42 Cambodian Constitution, Article 42.
43 Cambodian Constitution, Article 37.
44 Cambodian Constitution, Article 41.

4. Other Laws

a.) Main principles of the Criminal Code and Criminal Procedure Code for the promotion and protection human rights:

The principle of legality: Only the act constituting an offence that is provided in the criminal provisions in force gives rise to criminal punishment.[45]

The principle of individual criminal responsibility: Each person is responsible for his/her actions only.[46]

The principle of intention to commit an offence: There is no offence if there is no intention to commit a crime.[47]

The principle of interpretation of criminal law: In a criminal case, the law is strictly interpreted. The judge can neither broaden its sphere of application nor attempt to do so by means of an analogy.[48]

The principle of pronouncement of sentence: No sentence can be executed if it has not been pronounced by a court.[49]

The principle of condition for application of domestic and international laws: In criminal cases, the field of application of Cambodian laws in a particular place is determined by the provisions of this Code, except otherwise stated in international treaties.[50]

The principle of absence of impunity in serious offences in relation to international humanitarian law: The provisions of this Code may not constitute a condition for denial of justice for the victims of serious offences provided in a separate law in relation to violation of international humanitarian law, international practices, or international conventions recognized by the Kingdom of Cambodia.[51]

The principle of application of less severe law: The new provisions which abolish an offence are immediately applicable. The acts committed before their effective date can no longer be prosecuted. The legal proceedings in progress must be terminated.[52]

The principle of criminal action: Criminal actions apply to all persons or legal entities regardless of race, nationality, color, language, creed, political tendency, national origin, social status, resources or other status.[53]

45 Criminal Code, Article 3.
46 Criminal Code, Article 4.
47 Criminal Code, Article 5.
48 Criminal Code, Article 6.
49 Criminal Code, Article 7.
50 Criminal Code, Article 8.
51 Criminal Code, Article 9.
52 Criminal Code, Article 10.
53 Criminal Code, Article 2.

The principle of res judicata: In applying the principle of res judicata, any person who has been finally acquitted by a court judgment cannot be prosecuted once again for the same act, even if such act is subject to different legal qualification.[54]

b.) Fundamental human rights ideas reflected in laws governing the judiciary

Right to public hearing: Everyone has the right to have his/her quilt or innocence determined in a public trial, except in certain exceptional circumstances.[55] The right to a public hearing involves a number of elements: trials should generally be open to the public and conducted orally; information on the venue and the date of trial should be made available to the public; and there should be adequate facilities for public attendance.[56]

Article 316 of the Criminal Code provides that "trial hearings should be conducted in public. However, a court may order a complete or partial in-camera hearing, if it considers that a public hearing will cause a significant danger to the public order or morality […]."

Rights to liberty and to be tried without undue delay: In principle, the charged person shall remain at liberty.[57] Exceptionally, the charged person may be provisionally detained under the condition stated in Article 205 of the Criminal Code. Essentially, the legal limits of provisional detention are prescribed clearly in Articles 208 to 214 of the Criminal Code regarding the situations of offenders (adult/juvenile) and the scope of offenses.[58]

Provision regarding a closing order in relation to provision detention and judicial supervision: A court must take any actions to bring any criminal case in relation to the legal limits of pre-detention to trial without delay. If the charged person is not called to appear before the court within the time limit, which according to statutory provisions is four months, the detainee must be automatically released.[59]

Article 249 of the Criminal Code provides that "the decision to keep the charged person in pre-detention ceases being effective after four months, if the charged person is not called to appear before the trial within these four months, the charged person shall be automatically released […]".

Right to understand the nature of the charge and an explanation of one's rights: Accused persons have the right to understand the nature of the offense with which they are being in charged.[60] The court must provide a detailed explanation of the reasons for the charge(s) against the accused in a language which he/she understands.[61]

54 Criminal Code, Article 12.
55 Criminal Code, Article 136.
56 Fifth Bi-Annual Report: "Fair Trial Rights in Cambodia", CCHR.
57 Criminal Code, Article 203.
58 See Criminal Code, Articles 208-214, which provide the legal limits for provisional detention.
59 Criminal Code, Article 249.
60 Criminal Code, Article 325.
61 Criminal Code, Article 330.

Right to legal representation: Legal procedures and the court process can be complex and daunting to those accused of an offense. To enable a fair trial it is vital to ensure that the accused person has the opportunity to employ an expert advocate with the ability to explain the charge(s) against him/her, guide him/her through the trial process and defend his/her interests in court.[62]

The accused person shall appear in person during the hearing at the court. The accused person may be assisted by a lawyer chosen by him/her. He/she may also make a request to have a lawyer appointed for him/her in accordance with the Law on the Bar.[63] The assistance of a lawyer is compulsory if the case involves a felony or the accused is a minor.[64]

Presumption of innocence: The presumption of innocence is a fundamental fair trial right that is recognized universally.[65] Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law.[66] The accused shall be considered innocent until the court has judged in the case.[67]

Right to call and examine witnesses (evidence rights): As the court is required to make its decision based on evidence alone, all parties must have equal opportunity to present evidence in support of their case. Evidence is usually provided in one of three ways, by: (1) witness testimony, (2) presentation of documents and/or (3) physical evidence.[68]

The investigating judge may request any person to appear before the court, whose response is deemed useful to the revelation of the truth. Any person who has been summoned by the investigating judge as a witness must appear. In the case of refusal to appear, the investigating judge may ask the public police force to force the witness to appear.[69]

All questions shall be asked with the authorization of the presiding judge, except for questions asked by the royal prosecutor and the lawyer. In case of objection to a question, the presiding judge decides whether the question should be asked.[70]

62 Fifth Bi-Annual Report: "Fair Trial Rights in Cambodia", CCHR.
63 Criminal Code, Article 330.
64 Criminal Code, Article 331.
65 Fifth Bi-Annual Report: "Fair Trial Rights in Cambodia", CCHR.
66 ICCPR, Article 14.
67 Cambodian Constitution, Article 38.
68 Criminal Code, Article 324.
69 Criminal Code, Article 153.
70 Criminal Code, Article 326.

III. Human Rights Institutions in Cambodia

1. Human Rights Protections by the Judiciary

a.) Judiciary

Cambodia has adopted a liberal, multi-party democratic policy. The legislative, executive, and judicial powers are separated. "All powers belong to people. The people exercise these powers through the" legislative, executive and judicial branch.[71]

The judiciary is an independent power,[72] which is guaranteed by the King[73] and it should not be granted to legislative and executive bodies.[74] The judiciary shall be neutral and shall protect the rights and freedom of the people. Trials shall be conducted in the name of the Cambodian people in accordance with legal procedures and laws in force.[75] The judiciary shall consider all legal cases, including cases that are the subject of administrative law.[76]

b.) Key Judiciary Actors

Royal Prosecutor: The Royal Prosecutor has a vital role in criminal cases. Only the Royal Prosecutor can file criminal complaints. Therefore, the Royal Prosecutor is the person who brings the criminal charges against a charged person in court and must prove the evidence supporting those charges before the court. The Royal Prosecutor has territorial competence:[77] 1- At the site where the offense was committed. 2- In the place of residence of a person who is suspected of committing an offense. 3- In the territory the person suspected of committing an offense is arrested. The scope of the territorial competence of the Royal Prosecutor involved in cases before the court of first instance is limited to the municipal or provincial territory in which the court of first instance is located. The territorial competence of the General Royal Prosecutor involved in cases before the Supreme Court or the Court of Appeal is the whole territory of the country. The Royal Prosecutor considers written complaints that have been received or have been submitted by judicial police officials. A file can be held without processing or a criminal proceeding can be conducted against the suspects upon the decision of the Royal Prosecutor. A prosecutor may also conduct a preliminary investigation or order supplemental investigations to be conducted in a case.[78]

71 Cambodian Constitution, Article 15 (new).
72 Cambodian Constitution, Article 138 (new).
73 Cambodian Constitution, Article 132 (new).
74 Cambodian Constitution, Article 130 (new).
75 Cambodian Constitution, Article 129 (new).
76 Cambodian Constitution, Article 128 (new).
77 Criminal Code, Article 38.
78 Criminal Code, Article 39.

Judicial Police: There are three kinds of Judicial Police (JP) with different roles and authorities:

1. **Judicial Police Officials (JPOs):** JPOs have the duty of receiving complaints and to make a record of these. They have to conduct a preliminary investigation into the crime, identify and arrest offenders, and collect evidence.[79] JPOs may also summon and interrogate any suspects or persons who may have relevant information in relation to an offense.[80] With the permission of the Royal Prosecutor, JOPs can remand charged persons into police custody for interrogation if the charged person refuses to provide information, but only for a maximum period of 48 hours. In exceptional cases, this period may be extended an additional 24 hours. JPOs cannot detain minors under the age of 14.[81]
2. **Judicial Police Agents (JPAs):** JPAs have the role of investigating petty offenses and assisting JPOs in the performance of their duties in investigating offenses and making records. Those records are only for information.[82]
3. **Civil Servants and Public Agents who are authorized by separate laws to be involved in investigating offenses within the scope of their jurisdictions:** The formality and procedure of authorization are defined in special laws, decrees, sub-decrees or Prakas of the Ministry of Justice or of other concerned Ministries. These officials are working in environment, forestry, fishery, health and tax issues at the relevant Ministries.[83]

   Investigating Judge: The Investigating Judge conducts an investigation after receiving an initial submission by the Royal Prosecutor or a complaint from a plaintiff in a civil case. The Investigating Judge has an obligation to collect evidence which is favorable to the defendants during an investigation.[84] The Investigating Judge makes a decision after the investigations whether to indict suspects and send the case to the Trial Judge or to close the investigations and drop the charges against the suspects.[85]

   Trial Judge: The Trial Judge oversees a hearing. The Trial Judge must remain neutral throughout the case. The Trial Judge supervises the hearing process, including: questioning of the parties and the witnesses by the Royal Prosecutor and the Lawyer of an accused person in a criminal matter and the Lawyer of a civil party in a civil matter; confrontation between the accused and the victim and the admission of evidence. However, the presiding Judge may exclude from a hearing everything he/she deems

79 Criminal Code, Article 56.
80 Criminal Code, Article 114.
81 Criminal Code, Article 96.
82 Criminal Code, Article 78.
83 Criminal Code, Article 82.
84 Criminal Code, Article 127.
85 Criminal Code, Article 246.

will delay a trial hearing without being conducive to ascertaining the truth, such as repeated questions from the Royal Prosecutor and Lawyer and any questions that are not related to the case.[86]

Lawyer: The practice of law is considered a free profession. However, the complaints of clients or others may be submitted to the Bar Association of the Kingdom of Cambodia, which can take disciplinary action against any Lawyer who breaches their code of conduct. All Lawyers practicing in Cambodia are required to be members of this Association.[87]

Generally, a Lawyer is never neutral. He/she acts on behalf of his/her client. A Lawyer can either assist by or representing a plaintiff or a defendant in a civil matter or representing a suspect/charged/accused person (defense counsel) or a victim (victim's counsel) in a criminal matter.

1. **Lawyer acting as Defense Counsel:**[88] A suspect held in police custody for a period of 24 hours can request to speak for 30 minutes with a Lawyer or any other person selected by the detainee, provided that the person selected is not involved in the same offense. A Lawyer or any other person the detainee chooses to speak to must be informed of the detainee's request immediately and by all reasonable means available. If a court tries an adult in a felony case or the accused is a minor, the court president may appoint a Lawyer on the court's initiative, if the accused has not selected his/her own Lawyer.[89] If the court tries an adult for a felony crime or a minor for any crime without the presence of a Lawyer, the decision is invalid and subject to dismissal by the Appellate Court. An Investigating Judge will inform the charged person of his/her rights to a Lawyer.[90] In principle, the charged person is interrogated in the presence of his/her Lawyer.[91] With the permission of the Investigating Judge, a Lawyer may also ask questions during the interrogation.[92] The charged person who is in detention may freely communicate with his/her Lawyer and their conversations are confidential and cannot be listened to or recorded.[93]
2. **Lawyer acting as Victim's Counsel:** If a victim is represented by a Lawyer with a mandate, she/he must be interviewed in the presence of the Lawyer.[94] With the permission of the Investigating Judge, a Lawyer may also ask questions during the interrogation.[95]

86 Criminal Code, Article 318.
87 Lawyer Statue, Article 4.
88 Criminal Code, Article 98.
89 Criminal Code, Article 330.
90 Criminal Code, Article 146.
91 Criminal Code, Article 145.
92 Criminal Code, Article 146.
93 Criminal Code, Article 149.
94 Criminal Code, Article 150.
95 Criminal Code, Article 151.

2. Human Rights Protection by the Constitutional Council

The Constitutional Council was established under the Constitution to review the laws enacted by parliament (the Senate and the National Assembly) to ascertain their constitutionality, to interpret laws where necessary and to examine and make decisions regarding disputes related to elections.[96] The decisions of the Constitutional Council are final.[97]

The Constitutional Council is composed of one President and eight members who are appointed for nine-year terms.[98] The Council cannot examine or review any matters concerning the constitutionality of a promulgated law on its own initiative, however. Only the King, the President of the Senate, the President of the National Assembly, the Prime Minister, one quarter of the Senators, one tenth of the members of the National Assembly or the Supreme Court can request the Council to review the constitutionality of a law.[99] However, the Council may directly examine and review laws as well as the internal regulations of the Senate and the National Assembly prior to promulgation when such are submitted to the Council by the appropriate body.[100]

Judges should not be dismissed without cause. The Supreme Council of the Magistracy (SCM) may take disciplinary action against any Judge who abuses his/her authority or otherwise acts unethically. When deciding on a disciplinary measure against a Judge or Prosecutor, the SCM shall meet to discuss the matter. This meeting is presided over by the SCM President or the General Prosecutor of the Supreme Court depending on whether the case involves the misconduct of a Judge or Prosecutor.[101]

Individuals may not challenge the constitutionality of a law directly before the Council, but they can request[102] that their elected representatives (one-tenth of the members or the President of the National Assembly or one-tenth of Senators or the President of the Senate) exercise this right on their behalf.

A private citizen whose case is involved in a legal proceeding before a court may request the interpretation of or a determination of constitutionality of any law or portion of a law, which has an impact on his/her legal position. This request is made to the Supreme Court, which has ten days to review the law or provision in question. If the Supreme Court is not able to interpret the or undetermined its constitutionality, the court should forward the question to the Constitutional Council, which must issue a decision within 15 days of receiving the request from the Supreme Court.[103]

96 Cambodian Constitution, Article 136 (new).
97 Cambodian Constitution, Article 142 (new).
98 Cambodian Constitution, Article 137 (new).
99 Cambodian Constitution, Article 141 (new).
100 Cambodian Constitution, Article 140 (new).
101 Cambodian Constitution, Article 134 (new).
102 Cambodian Constitution, Article 141 (new), paragraph 2.
103 Law on the Organization and Functioning of the Constitutional Council, Article 19 (new).

The Council has exercised its review power on a few occasions, notably in a Decision on the Law on Aggravating Circumstance for Felonies, passed in 2002, which was requested by a court. In 2007, the Council ruled that the law was constitutional and determined that international human rights treaties (e.g, The Convention on the Rights of the Child) to which Cambodia was a party and are also a part of domestic law is directly applicable by Judges in the courts.[104]

3. Human Rights Protection through petitions to the Senate, the National Assembly and the Royal Government (Human Rights Commissions)

The Cambodian parliament is bicameral, consisting of the Senate and the National Assembly. Parliamentary activities range from legislating to overseeing the executive branch of government in many areas, especially human rights. With a view toward promoting human rights issues, the Senate and the National Assembly have each established a Commission for rights issues called the "Commission on Human Rights" in both the Senate and the National Assembly. The Royal Government of Cambodia has also established a committee to promote and protect human rights in Cambodia called the Cambodian Committee on Human Rights (CCHR).

a.) The Senate's Commission on Human Rights, Reception of Complaints and Investigation (SCHRI)

The SCHRI has key roles in promoting and protecting every citizen's right to live in dignity and equality, which are the foundations of freedom, justice and peace in society, the region and the world as a whole. It also monitors the implementation of human rights laws and regulations in Cambodia for compliance with the Constitution of Cambodia, the Universal Declaration of Human Rights and other international legal instruments related to human rights, which have been ratified by the Kingdom of Cambodia.

According to Decision No: 020/0912/SN/D (06 September 2012) on the Roles, Duties and Competence of the First Commission, issued by the Permanent Committee of the Senate of Cambodia, the SCHRI has assumed these main roles:

104 Decision No: 092/003/2007 (10 July 2007).

I.) Review the draft laws:

The SCHRI reviews draft laws for human rights compliance and makes comments to express concerns regarding human rights issues[105] to relevant figures like Senators, the law's drafter and members of other Senate Commissions. This review and comment process is conducted as according to the following procedures:

- Upon receipt of a draft law, proposed law or other policy document from the Standing Committee of the Senate, the Commission may assign a member of the Commission to be responsible for drafting a report. The report will make a request for comments from Senators in an attached letter, which includes remarks and/or recommendations regarding the impact on human rights that the draft laws, proposed laws or other policy documents may have.
- The Senators must submit their comments to the SCHRI within three days of receiving the report. The Commission then meets to consider these comments and invites the drafter or sponsor of the law to respond. The Commission may also consult with civil society, human rights groups or stakeholders at this stage as well.
- A consultation is conducted following each proposed recommendation or in relation to human right matters raised in advance. The remaining issues on any draft provisions related to human rights will be recorded in the minutes and the report is then submitted to the Commission for a decision.[106]
- Upon receiving the report, the Commission will convene a meeting to review and discuss the report. The chairman or another representative of the other Specialized Commissions will also participate in this meeting. After finishing the review of a draft law, proposed law, any other policy document or proposed change, the Chairperson of the Commission writes a letter to the President of the Permanent Committee to place the draft law, proposed law, or any other policy document into the Order of Business of the Senate Session and reports the Commission's comments to the Permanent Committee and plenary session of the Senate.[107]

II.) Complaints:[108]

1. **Receiving complaints:**

   The SCHRI may receive complaints on general issues from individuals, representatives, groups, organizations or associations.

2. **Reviewing the subject matter of complaints in terms of human rights abuses:**
   - Land conflicts between people and authorities.[109]
   - Motions from people against any decisions issued by competent authorities and courts.

105 Decision No: 020/0912/SN/D (06 September 2012), Article 3.
106 Internal Regulations of the Senate, points F and G, Article 18.
107 Internal Regulations of the Senate, points F and G, Article 33.
108 Decision No: 020/0912/SN/D (06 September 2012), Article 3.
109 SCHRI's Internal Guidelines for Processing Complaints.

3. Making decisions regarding whether complaints are actionable:[110]

- Make a decision whether to forward the complaints to the concerned authorities or a court or;
- Hold the complaints if the Commission finds that the matter is being properly handled by the competent authorities or a court.

4. Investigating complaints:[111]

- Interviewing the complainant to ask for more details and any relevant supporting documents.
- Writing letters requesting that the competent authorities seek legal resolution of the issues raised by the complaints.
- If there is no response to the first letter within one month, a second letter will be sent to remind the authority or court of the need for a resolution and response.
- Inform complainant of any actions related to his/her complaint(s) taken by the SCHRI.

5. Carry out missions:

According to the annual schedule of the SCHRI, issued in 2012, the SCHRI has a duty to conduct missions to provinces and cities, to meet with civil authorities, soldiers, police, international and national human rights NGO's and to survey the general status of human rights in each locality and the nation as a whole.

On its regular missions, the SCHRI visits inmates and examines conditions in provincial prisons. The SCHRI also collects complaints regarding unusual or cruel treatment against prisoners by prison officials. In addition, the Commission provides advice regarding prisoners' rights to prison officials in person and also collects suggestions from and records concerns expressed by such officials.

If there is an urgent case of human rights abuse, the SCHRI will ask permission from the Senate leadership to immediately carry out an investigatory mission[112] regarding the complaints at the scene. During such an investigation, the SCHRI may also assist with negotiations between the complainants and the accused authorities. Its activities can be divided into three steps:[113]

- **Step 1- Prior to the mission:** a. Brief existing information about the case; b. Determine the objectives of the mission; c. Select the complaints/cases to be investigated further; d. Set targets; and e. Hold a pre-departure meeting with technical groups and other experts.
- **Step 2- During the mission:** a. Field trip to the scenes of alleged abuse; b. Investigate scenes of alleged abuse; c. Monitor the status of the prisons; d. Discuss status and complaints with concerned authorities, such as police officials, prison officials, judges, prosecutors, and the leadership of provinces where the complaints were made; e.

110 Ibid.
111 SCHRI's Internal Guidelines for Processing Complaints.
112 Decision No: 020/0912/SN/D (06 September 2012), Article 3.
113 SCHRI's Internal Guidelines for Processing Complaints.

Provide comments and recommendations to resolve the complaints; and f. Assist with negotiations between the complainants and the authorities accused to help them resolve the underlying issues.

- **Step 3- After the mission:** a. Make a report to the President of the Senate regarding the case(s); b. Report human rights and other concerns s involved in the case(s) to the plenary session of the Senate and issue public statement(s); and c. Monitor any actions taken by the concerned authorities regarding the complaints.

According to an SCHRI report, in 2013 the SCHRI took several paid missions to a number of the provinces to monitor the status of juvenile and adult correctional centers and their implementation of the Law on the Management of Prisons and Prisoner's Rights. Another purpose of the missions was to monitor the exercise of rights by indigenous people and their welfare in areas such as: access to education, access to health services political inclusion and land rights. At the end of the 2013 missions, the SCHRI raised several concerns regarding the rights of juvenile prisoners and the rights of indigenous people, which were reflected in its report along with comments for promoting citizens' rights to the Permanent Committee, the Senate and the Royal Government.

During fact-finding missions to the provinces, the SCHRI also handled some complaints regarding provincial leadership.

III.) Cooperation:

Cooperation with national and international institutes, in both private and public sectors, is essential for the SCHRI in order to understand human rights issues and to seek financial and material assistance from many sources to improve the human rights situation in Cambodia and effectively investigate complaints regarding human rights violations.

The Commission has worked with several partners[114] such as: the Commission on Human Rights in the National Assembly, the Commission on Human Rights of the Royal Government as well as with several local NGOs, including: LICADO, ADHOC, CHRAC, and OHCHR on several human rights issues, such as: human trafficking, domestic violence, land conflicts, detention policy, rape, murder, and allegations of human rights violations by courts and other authorities.

114 SCHRI 2013 Annual Report.

b.) The National Assembly's Commission on Human Rights, Reception of Complaints, Investigation and Senate-National Assembly Relations (NACHRIR)

The National Assembly of Cambodia maintains ten Special Commissions to deal with matters of national policy. The Commission on Human Rights, Reception of Complaints, Investigation and Senate-National Assembly Relations (NACHRIR) is one of these Special Commissions.[115]

The NACHRIR was established to advise the other Special Commissions and the National Assembly as a whole on human right issues, as well as assessing whether draft laws/proposed laws or other legislation conforms to existing human rights obligations. The Commission also has a duty to receive group or individual petitions regarding human rights issues.

The NACHRIR assumes the following roles and the duties:[116]

I.) Reviewing draft laws:[117]

- Review draft laws/proposed laws related to human rights as referred by the Permanent Committee.
- Liaise with other Commissions of the National Assembly, the Senate, the Royal Government and other relevant institutions to examine key provisions of draft laws/proposed laws or policies for compliance with human rights obligations.
- Invite representatives of the Royal Government and authors of draft laws or amendments to Commission meetings to discuss human rights issues.
- Monitor the implementation of human rights protections in Cambodia for compliance with the Constitution of Cambodia, the Universal Declaration of Human Rights and other international legal instruments related to human rights, which have been ratified or acceded to by the Kingdom Of Cambodia.

II.) Receiving complaints:[118]

- Receive complaints on human rights issues from individuals, groups, representatives or communities.
- Review complaints and intervene in disputes to encourage resolution. Resolution is encouraged by liaising with the relevant authorities by means of letters sent by the National Assembly leadership.

115 National Assembly's Internal Regulations, Article 6 (new).
116 Decision No. 001 RS (09 Jan 2014).
117 Decision No. 001 RS (09 Jan 2014), Article 2 and 3.
118 Decision No. 001 RS (09 Jan 2014), Article 3.

- Following up on the complaints in which the Commission intervened, reviewing issues that affect citizen rights and listening to concerns raised at the grassroots level as well as making reports on fact-finding missions and submitting them to the President of the National Assembly.

III.) Education and dissemination of legal information:[119]

- Involved in the "legal awareness program," which provides education regarding human rights and disseminates laws concerning local authorities to all citizens.
- Organizes workshops or public consultations by cooperating with civil society in order to raise awareness among the citizens regarding their rights to live in dignity and equality and to educate them about human rights protection mechanisms, international treaties and conventions on human rights, especially the UN Declaration on Human Rights.

IV.) International and national cooperation:[120]

- Cooperate with international and national institutions and civil society organizations for mutual awareness of their areas of competence in human rights matters.
- Strengthen and extend relationships among international and national development partners and parliaments regionally and around the world through the study visits and exchange programs.

c.) The Cambodian Government's Committee on Human Rights:

The Cambodian Committee on Human Rights (CCHR) was established, in 2000, by the Royal Government of Cambodia, to promote and protect human rights in Cambodia in compliance with the Constitution of Cambodia.[121]

This Committee consisted of 12 members in 2000 and increased to 19[122] in 2009.

1. Obligations:

The CCHR has assists the Royal Government of Cambodia:[123]

- To protect and develop human rights and democracy in Cambodia, and to examine all forms of human rights violations and receive complaints related to those cases.

119 Decision No. 001 RS (09 Jan 2014), Article 3.
120 Decision No. 001 RS (09 Jan 2014), Article 3.
121 Royal Decree No. NS/RKT/0100/008 (2000), Article 1.
122 Royal Decree No. NS/RKT/0209/163 (2009).
123 Royal Decree No. NS/RKT/0100/008 (2000), Article 1.

- To conduct investigations in human rights cases or assess the results of investigations of human rights violations conducted by other competent authorities. In addition, the CCHR cooperates with concerned authorities to publish joint human rights case profiles for public consumption as well as for the Prime Minister, the courts and other concerned officials.
- To conduct missions to areas, where human rights violations may be occurring in order to assess such situations and advise people on human rights issues.
- To make comments and recommendations to the Royal Government on the actual situation regarding human rights protection or violations in order to improve protections or take action in accordance with national and international human rights instruments.
- To cooperate with the National Council for Children and with the Ministry of Women's Affairs, which are the institutions that have the primary responsibility for promoting the rights of children and women.

2. Sub-Committees:

The CCHR created several sub-committees to assist the Committee in its work is various areas, including:[124]

- **Sub-Committee on Law and Research:** This sub-committee is in charge of technical work related to research, collecting data and information, providing legal and technical assistance as well as drafting country reports, initial reports or periodic reports on human rights issues required by treaties or conventions on behalf of the Royal Government of Cambodia and submitting those to treaty monitoring agencies.
- **Sub-Committee on Education and Information Dissemination:** This sub-committee is responsible for providing education and disseminating information on human rights laws as well as organizing public hearings to give citizens the opportunity to raise their concerns freely.
- **Sub-Committee on Public Relations:** This sub-committee is responsible for public relations, receiving complaints, setting up human rights monitoring networks and finding resolution for human rights disputes by encouraging the use of alternative dispute resolution methods.

3. Meeting Sessions:[125]

CCHR members meet every six months in order to evaluate progress in human rights issues and to plan future efforts. The CCHR conducts a Biennial Review Meeting every two years to evaluate the human rights situation in the country and to collect constructive comments and ideas for improvement. The reports regarding the Review Meetings are available to the public.

124 Royal Decree No. NS/RKT/0100/008 (2000), Article 5.
125 Royal Decree No. NS/RKT/0100/008 (2000), Article 4.

4. Human Rights Protections through Local Human Right Groups (NGOs)

a.) Human Right Groups operating in Cambodia

The many civil society organizations operating in Cambodia focused on various areas, including health care, human rights, advocacy, etc.

Civil Society and Non-Governmental Organizations (NGOs) recognize that more could be done with better coordination and targeting of activities. Most organizations work hard to raise funds and resource limitations place constraints on time and activities. These various groups, especially those with primary focus on human rights, continue to be a creative and positive force for the promotion and protection of human rights in Cambodia. Many of these groups engage with and are supported by international and regional human rights groups, including the OHCHR field office, the UN Special Rapporteur, the CHRAC[126] and other stakeholders.

b.) Cambodian Human Right Action Committee (CHRAC)

CHRAC, which brings together representatives of local human rights groups to present united stands on key issues, was created on 02 August 1994 by a group of human rights, liberal democracy, and development organizations in Cambodia. Currently, the coalition has 21 member NGOs and associations, all of them being independent, impartial, non-political organizations operating in the areas of human rights, democracy and legal aid in Cambodia.

Since its establishment in 1994, CHRAC has focused on human rights abuses and other issues of national interest. CHRAC's mission is to reduce the number of serious violations of human rights in Cambodia. One of the best ways to ensure that human rights are protected is for victims of human rights violations to have the ability to take action through state institutions such as SCHRI, NACHRIR, the Commission on Human Rights of Royal Government of Cambodia as well as the court system in order to seek justice and receive appropriate compensation. CHRAC's main activities are in the following areas:

Monitoring/investigation: Only in cases that are considered serious violations of human rights, as defined in the Statute of CHRAC, will the Sub-Committee on Investigation carry out monitoring or investigation activities. Most of the cases that CHRAC monitors and investigates involve serious violations of human rights and land rights.

Legislation: CHRAC's Sub-Committee on Legislation was created:

- To review and discuss relevant draft laws and draft sub-decrees.
- To prepare comments or reports and submit those documents to the government or relevant legislative bodies for consideration.

126 Human Rights in Action: Developing Partnership between Government and Civil Society by Kassie Neou (2000).

- To cooperate with other civil society organizations to strengthen advocacy strategies.
- To meet and discuss with relevant government officials as well as other local and international NGOs to ensure that their comments are welcomed and included in the draft laws.

Advocacy: Advocacy and legal actions are indispensable to the reduction of human rights violations in Cambodia. Therefore, CHRAC issues regular, critical press releases on pressing human rights issues in order to draw the attention of the government and other national and international actors to such issues. Advocacy strategies include: holding press conferences, arranging meetings with senior government and judicial officials as well as organizing public hearings and other events to raise awareness among the public.

5. Human Right Protections through International Institutions, Treaties or Conventions

a.) Treaty-Monitoring Agencies

Compliance of state parties with their respective obligations under the seven United Nations core international human rights treaties[127] is monitored by seven expert organizations, which are known as treaty-monitoring agencies:[128]

- The Human Rights Committee (CCPR);
- The Committee on Economic, Social and Cultural Rights (CESCR);
- The Committee on the Elimination of Racial Discrimination (CERD);
- The Committee on the Elimination of Discrimination against Women (CEDAW);
- The Committee against Torture, and its Sub-Committee on Prevention (CAT);
- The Committee on Child Rights (CRC);
- The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW).

b.) Membership and Functions[129]

According to the provisions of all seven treaties, the Committees for the CCPR, CESCR, CERD and CRC consist of 18 members each, 10 members each for the CMW and CAT and the CEDAW Committee consists of 23 experts. Their members are elected by the state parties to the respective treaties with due regard for equitable geographic distribution. Otherwise, the members of the CESRC Committee are selected by the Economic and Cultural Council. The CCPR and CRC Committees meet three times a year, the CMW Committee meets once and other Committees (CESCR, CERD, and CAT) meet twice. All of these treaties are overseen by the OHCHR from its headquarters in Geneva, with the

127 See point 2-2-Treaties and Conventions on Human Rights.
128 Human Rights Handbook for Parliamentarians issued by the Inter-Parliamentary Union (2005).
129 Ibid.

exception of the CEDAW Committee, which is overseen by the United Nations Division for the Advancement of Women (UNDAW), which is part of the Department of Economic and Social Affairs of the United Nations at its headquarter in New York.

c.) Reporting Procedure

Obligations of the states:[130]

The state reporting procedure is the only mandatory procedure common to all seven core international human rights treaties. Member governments have an obligation to submit an initial report to each treaty-monitoring agency, followed by periodic reports. The treaty agencies provide states with guidelines aimed at assisting them in the preparation of these reports. The reports are expected to provide, at a minimum, the following information:

- All measures adopted by the government to give effect to the rights provided for in the treaty;
- Progress made in the enjoyment of those rights;
- Relevant empirical information, including statistical data;
- Any problems or difficulties affecting the domestic implementation of the treaties.

In Cambodia, the Cambodian Governmental Committee on Human Rights (CCHR) and the Cambodian National Council for Women (CNCW) received their mandate from the Royal Government of Cambodia to draft and prepare the initial report and periodic reports to the treaty-monitoring agencies. However, the contents of separate reports prepared by relevant non-governmental organizations (NGOs) and civil society organizations (CSOs) are also permitted. For instance, every four years the CNCW acting as the government's representative submits a national report on the implementation of CEDAW in Cambodia to the Secretary-General of the United Nations for consideration by the CEDAW Committee.

Examination of state reports:[131]

1- State reports are analyzed and discussed in public. 2- State representatives should be confronted with serious and critical questions as well as remarks formulated by the Committee members. 3- State reports include: observations, comments and recommendations. They are released at the end of the session and then are published in the agencies' annual reports. 4- States are expected to accept and implement those recommendations and to provide updates in those areas in future reports.

130 Ibid.
131 Ibid.

The role of NGOs and other organizations:[132]

1- International and domestic NGOs are allowed to comment on the examination of state reports and provide relevant information or even shadow reports to the agencies. 2- NGOs are allowed to play a relatively active role in this area as well as to take the floor in special meetings and present directly to United Nations specialized agencies, such as the ILO and UNESCO, and are invited to be monitors by other United Nations agencies.

General comments issued by the treaty-monitoring agencies:[133]

Treaty agencies adopt and publish general comments and recommendations concerning the provisions and obligations contained in their respective treaties. These documents reflect the Committee's experience in the reporting procedure and constitute an authoritative source of interpretations on human rights instruments.

IV. Conclusions

There are a number of national norms and international instruments on human rights and there are also human rights agencies and organizations operating in Cambodia. Those organizations represent the public and civil society sectors. Some were established by constitutional institutions, such as the Commissions on Human Rights in the Senate and the National Assembly. Some were created to comply with Cambodia's obligations under international human rights treaties, like the OHCHR and international treaty monitoring agencies for human rights. Moreover, Cambodia has several active human rights organizations, such as: ADHOC, LICADO and CHRAC.

Cambodia has not established any national human rights institutions (NHRIs), which are national government human rights agencies whose function is to implement and ensure compliance with human rights standards. This lack of NHRIs is particularly troubling considering that they are included in the Paris Principles relating to the Status of National Institutions which was adopted by the United Nations General Assembly on 20 December 1993.

Formerly, there existed a momentum towards the establishment of a National Institute for Human Rights in Cambodia as a member of the ASEAN Institute for Human Rights in accordance with the ASEAN Charter (Article 14). Six countries among the members of ASEAN have already established a National Institute for Human Rights: Malaysia, Indonesia, Singapore, the Philippines, Thailand and Myanmar.

132 Ibid.
133 Ibid.

Furthermore, Cambodia also has not established a Human Rights Ombudsman - a national institution found in many countries. Only an Ombudsman with a specific human rights mandate can be considered a national human rights institution.

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FREEDOM OF RELIGION IN CAMBODIA

KONG Phallack

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FREEDOM OF RELIGION IN CAMBODIA[1]

KONG Phallack *

ABSTRACT

This article comprises freedom of religion in Cambodia as stated in the 1993 Constitution and discusses whether freedom of religion is largely protected in Cambodia. The article aims to explore the following: overview of religious freedom, historical influence and administration of religious activities, legislative and policy framework, the religious freedom and harmony policy and practice, redress mechanisms and interpretation of religious freedom, trends in religious freedom and contributing factors and surrounding circumstances.

I. Introduction

Cambodia has a unitary system of government. It is a constitutional monarchy, with a Prime Minister who is head of government and a King who is head of state. Legislative power is vested in two Chambers of Parliament, the National Assembly (Lower House) and the Senate (Upper House). Acts of religious groups are however overseen by the Ministry of Cults and Religions. Citizens are free to choose their religion and belief. Article 43 of the Constitution states that "Khmer[2] citizens of either sex shall have the right to freedom of

1 This article is extracted from HRRC's publication titled Keeping the Faith: A Study of Religious Freedom in ASEAN.

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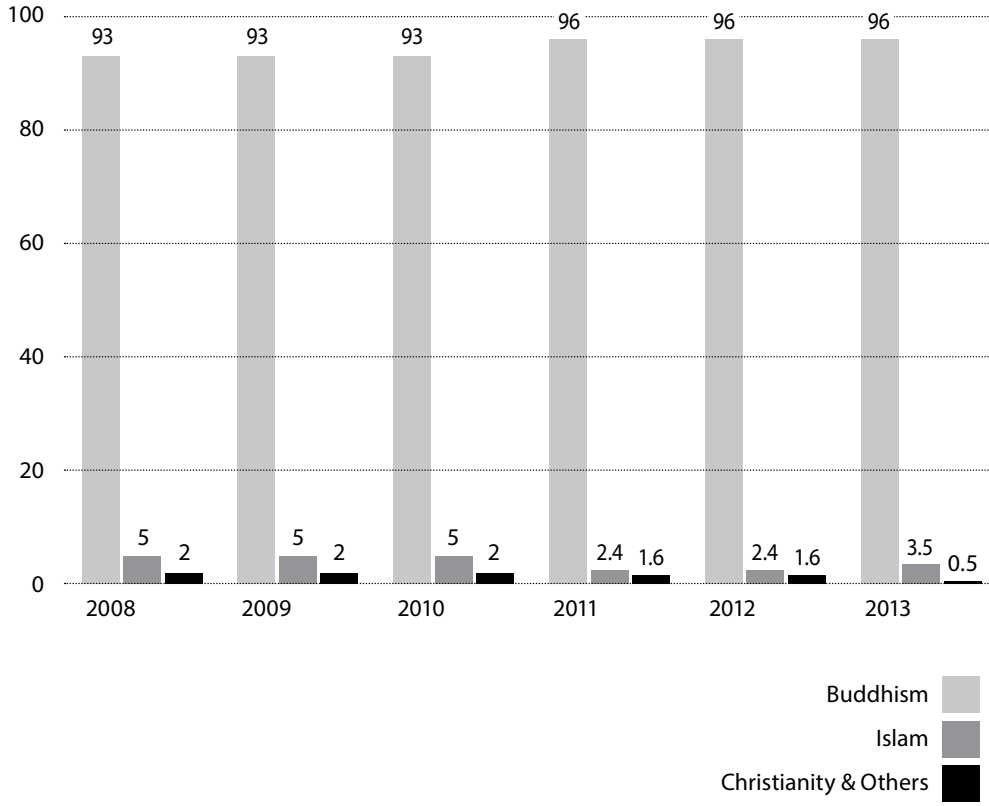
2 The Khmer word "Khmer" can refer to the Khmer ethnic group or to Cambodian citizens. "Cambodian" might be the more accurate interpretation in this context. It should be noted that only the Khmer version of the Constitution is the "authentic" one and translations into English and French do not have an official character. *See* Oum Sarit, Secretary General, "Foreword" to English translation of the Constitution of the Kingdom of Cambodia, available at http://www.crrt-cambodia.org/wp-content/uploads/2011/01/Constitution-of-the-kingdom-of-Cambodia-EN.pdf accessed 1 October 2014.

belief. Freedom of belief and religious worship shall be guaranteed by the State on the condition that such freedom does not affect other beliefs and religions or violate public order and security. Buddhism is the religion of the State."[3]

According to the statistic, the population of Cambodia is 15,458,332 (July 2014 est.).[4] Among them, 96% are Buddhists, 3.5% are Muslims, and 0.5% are Bahai, Jewish, Vietnamese Cao Dai, and Christians.[5]

Table 1: Statistics of Religions from 2008-2013 (in per cent)



Source: US Department of State International Religious Freedom Reports (2008-2013)

3 Art. 43, Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).

4 Central Intelligence Agency, *The World Factbook*. n.d. Webpage. https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html accessed 14 September 2014.

5 Bureau of Human Rights, Democracy, and Labor, U.S. Department of State, "Cambodia 2013 International Religious Freedom Report," (28 July 2014), *U.S. Department of State*. http://www.state.gov/j/drl/rls/irf/2013/eap/222121.htm accessed 14 September 2014. No official statistics from the Ministry of Cults and Religions was found.

As seen in the chart above, the most recent US Department of State Reports show a decrease in numbers of the Bahai, Jewish, Vietnamese Cao Dai, and Christians from two per cent in 2008 to half a per cent in 2013. There is, however, no indication in the report that this decrease is due to suppression of religious freedom, and, in fact, the 2013 report notes that "the government generally respected religious freedom."[6]

As stated in the Cambodian Constitution freedom of belief is explicitly guaranteed and its practice to be limited only when it affects other beliefs and religions, or violates public order and security.[7] While observers note the low representation of religious minorities, particularly of the Cham Muslims, in business and the government and "their perceived institutional and cultural barriers to full integration in society,"[8] reports are overall positive. They generally note that respect for freedom of religion and worship is observed in practice.[9] Sun Kim Hun, Secretary of State at the Ministry of Cults and Religions, attributed Cambodia's success in protecting and promoting freedom of worship to the tolerant character of Buddhism, Cambodia's state religion. "The enduring goal of Buddhism is peaceful and 'Buddha says conquer anger with love."[10]

The government, nonetheless, openly favours Buddhism, the declared official religion of Cambodia, and promotes it through observance of holidays, training and education of Monks and others, and support for research and publication of materials on Khmer culture and Buddhist traditions.[11] Religion is one of three elements of the national motto identified in the Cambodian Constitution, "Nation, Religion, King".[12] Thus, appreciation of and respect for Buddhism (along with Nation and King) is also included in the National Anthem of the Kingdom of Cambodia.

According to the Ministry of Cults and Religions, there are three major religions in Cambodia: Buddhism, Islam and Christianity. However, the vast majority of Cambodians are Buddhists,[13] and there is "a close association between Buddhism and Khmer cultural traditions, identity, and daily life". [14] In fact, the US Department of State International Religious Freedom Reports indicate that the number of Buddhists in Cambodia increased from 93% to 96% in the last six years (2008-2013).

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6 Ibid.
7 Ibid.
8 Bureau of Human Rights, Democracy, and Labor, U.S. Department of State. "Cambodia 2012 International Religious Freedom Report," (n.d.), *U.S. Department of State*. http://www.state.gov/documents/organization/208432.pdf accessed 14 September 2014.
9 U.S. Department of State, "Cambodia 2013 International Religious Freedom Report."
10 Ibid.
11 Ibid.
12 Art. 4, Constitution of the Kingdom of Cambodia (As Amended), (Cambodia). *See also* Constitutional Council, Decision No. 107/003/2009 CC.D Of December 23, 2009, 2.
13 Mekong, "Cambodia has three major religion," *Ministry of Cults and Religions*. http://www.mocar.gov.kh/index.php/2011-02-16-02-24-50/2011-02-16-02-25-36/254-2014-03-27-08-13-32 accessed 14 September 2014.
14 U.S. Department of State, "Cambodia 2013 International Religious Freedom Report."

The following data from Cambodia's Ministry of Cults and Religions, published in 2013, shows the number of places of worship, followers, schools, and associations of the different religions in the country.[15] The available statistics from the Ministry appear to be incomplete, for instance there are no statistics on the number of citizens who have changed religions, nor the total number of followers of Theravada Buddhism. This may be due to the fact that there is no requirement for individuals to register their individual belief or religion.

Table 2: Statistics of Religions Being Practised in Cambodia, 2013

RELIGIONS	PLACES OF WORSHIP	FOLLOWERS	SCHOOLS	ASSOCIATIONS & NGOS, OFFICES
THERAVADA BUDDHISM	**4,688** pagodas **270** ashrams	**54,103** Monks *(Data did not include lay followers.)*	**775** Buddhist primary schools **35** Buddhist junior high schools **17** Buddhist high schools, **3** Buddhist universities	
ISLAM	**439** mosques **475** suravs[16]	**342,970**	**304**	**39**
CHRISTIANITY	**55** Catholic churches **504** Protestant churches	**82,717**	**43** Catholic schools **504** Protestant schools	**30** Catholic offices **947** Protestant offices **95** Associations & NGOs
MAHAYANA	**160** temples **16** places of worships	**24,353**	**10**	
BAHAI	**25**	**6,168**	**1**	
CAO DAI	**3**	**1,777**	**1**	**1**

16Source: Ministry of Cults and Religions, 7 February 2013

15 H.E. Min Khin, Minister of Cults and Religion, "Compilation of Statistics of Pagodas, Temples, Schools and Religious Students," 2013.

16 Suravs are meeting places that have congregations of up to 40 persons and do not have a minbar (pulpit) from which Friday sermons are given. Bureau of Human Rights, Democracy, and Labor, U.S. Department of State. "Cambodia 2010 International Religious Freedom Report," (17 November 2010), *U.S. Department of State*. http://www.state.gov/j/drl/rls/irf/2010/148861.htm accessed 14 September 2014.

II. Historical Influences on Religious Practice and Administration

As indicated, a vast majority of Cambodian citizens are followers of Buddhism, specifically of the Theravada school. Historians trace the presence of Buddhism in Cambodia, with strong influences of Hinduism, to the time the Funan, the first significant polity in the Mekong region, was established.[17] Two images of Buddha, dating from the fifth to sixth centuries were found in Oc Eo and the other in Angkor Borei.[18] In the 13th century, Theravada Buddhism, as reintroduced from Sri Lanka, had spread throughout Cambodia, causing Hinduism and Mahayana Buddhism to disappear.[19]

Theravada Buddhism continued to thrive during Cambodia's French colonization (1863-1941) and Japanese occupation (1941-1945). A form of Thai-based and reformed monastic fraternity, the Dhammayutika Nikàya or Thammayute kaknikay, meaning "the group who hold to the teachings [of the Buddha]", however emerged in the country.[20] In 1854, on King Ang Duong's invitation, Monks from Thailand brought some 80 bundles of sacred Thammayute kaknikay writings to Udong and the Thammayute kaknikay was established under royal patronage. The unreformed majority became known as the Mahànikàya (also referred to as Mohanikay) or "order of long-standing habit".[21]

After the re-imposition of French rule in 1945, a new Constitution was promulgated in 1947. For the first time, Buddhism was established as the state religion and freedom of religion was guaranteed, provided that this freedom did not adversely affect public order. [22]

Buddhism has since remained the state religion, except for the period when Cambodia was under the control of the Khmer Rouge (1975-1979). The Constitution issued in 1976 terminated Buddhism's status as the religion of the state, although it maintained that Cambodians had freedom of religion and belief:[23]

> *"Every citizen of Kampuchea has the right to worship according to any religion and the right not to worship according to any religion.*
> *Reactionary religion, which is detrimental to Democratic Kampuchea and Kampuchean people, is absolutely forbidden."*[24]

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17 Ian Harris, *Cambodian Buddhism: History and Practice* (Honolulu: University of Hawai'i Press, 2005), 4-7.
18 Ibid, 4.
19 Asian Studies Center, Michigan State University, "Cambodia - Religion," *Windows on Asia,* (n.d.). http://asia.isp.msu.edu/wbwoa/southeast_asia/cambodia/religion.htm accessed 14 September 2014.
20 Ian Harris, Cambodian Buddhism: History and Practice, 84.
21 Ibid, xii and 84-85.
22 Ibid, 142-143, *citing* Preschez (1961).
23 Ibid, 174.
24 Article 20, Democratic Kampuchea (DK) Constitution, 1976, (Cambodia).

Despite this proclamation, religious practice suffered severely during this period. Accounts narrate the execution of senior Buddhist Monks, defrocking and evacuation of Monks from their home monasteries to be put on hard labour along with the rest of the population, and execution of some of the country's highest Muslim dignitaries.[25]

Today, Theravada Buddhism in Cambodia is subdivided into the Orders of Theravada Buddhism Mohanikay and Theravada Buddhism Thammayute kaknikay. The Mohanikay continues to have more adherents than the Thammayute kaknikay. Because Buddhism is the state religion, the Chief Monks of the two Orders of Theravada Buddhism (Mohanikay and Thammayute kaknikay) are members of the Throne Council that is mandated to select the King.[26] The Constitution does not require the King to be Buddhist. However, traditionally, all members of the Royal Family have been Buddhist and there are no reports of any conversion from Buddhism of any member of the Royal Family.

The Muslims in Cambodia, who are predominantly ethnic Chams, typically follow any of the following four branches of Islam: the Malay-influenced Shafi'i branch, practiced by as many as 90% of Muslims; the Saudi-Kuwaiti-influenced Salafi (Wahhabi) branch; the indigenous Iman-San branch; and the Kadiani branch.[27] Islam is said to have arrived in the old kingdom of Champa in as early as the 9th century. Beginning in the 14th century, Islam became a part of the beliefs and religions of the Champa people.[28] Presently, Islamic religious institutions, from mosques to Islamic schools, are found in practically all the provinces in Cambodia.[29]

Even though Christianity came late to Cambodia, a number of Cambodians have in the past years converted to Christianity.[30] According to the Phnom Penh Post, the first Protestant missionary arrived in 1923, translated the New Testament into Khmer by 1933 and published the whole Bible in 1953. By the 1970s, there were about 20,000 Christians in the country.[31] Based on the statistics of the Ministry of Cults and Religions, there were 82,717 Christians in Cambodia in 2013.

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25 Ian Harris, Cambodian Buddhism: History and Practice, 174-181.

26 Article 13-new (As amended March 1999), Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).

27 U.S. Department of State, "Cambodia 2013 International Religious Freedom Report."

28 Mohamad Zain Bin Musa, "Dynamics of Faith: Imam Musa in the Revival of Islamic Teaching in Cambodia," in Omar Farouk and Hiroyuki Yamamoto (ed), *CIAS Discussion Paper No. 3: Islam at the Margins: The Muslims of Indochina*, (Kyoto: Center for Integrated Area Studies, Kyoto University, 2008), 59-60.

29 Omar Farouk, "The Re-organization of Islam in Cambodia and Laos," in Omar Farouk and Hiroyuki Yamamoto (ed), *CIAS Discussion Paper No. 3: Islam at the Margins: The Muslims of Indochina*, (Kyoto: Center for Integrated Area Studies, Kyoto University, 2008), 72.

30 Sivuthin Chum and Sok Chan, "Christ in Cambodia," *The Phnom Penh Post*, 5 May 2010. http://www.phnompenhpost.com/lift/christ-cambodia accessed 30 September 2014.

31 Ibid.

Administratively, the King is the head of state for life, who shall rule according to the Constitution and the principles of liberal democracy and pluralism.[32] The Prime Minister is the head of the Royal Government of Cambodia (also known as the Council of Ministers). The Ministry of Cults and Religions[33] was established to direct and manage religious matters at all levels.[34] Ministers and Secretaries of State, including the Minister of Cults and Religions, have a five-year mandate, similar to members of the National Assembly.

The territory of the Kingdom of Cambodia is administratively divided into the Capital, Provinces, Municipalities, Districts (Srok or khan), and Communes (Khum or Sangkat).[35] The local units of the Ministry of Cults and Religions in the Capital and Provinces are called Departments of Cults and Religions. Those located in the Municipalities, Districts (Srok or Khan) and Communes (Khum or Sangkat) are called Offices of Cults and Religions.[36] The Departments and Offices of Cults and Religions direct and manage religious matters at their respective areas on behalf of the Ministry of Cults and Religions.

III. Legislative and Policy Framework

1. International Obligations

Article 31 of the Constitution states that,

> *"The Kingdom of Cambodia recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women's rights and children's rights."*

32 Articles 1 and 7, Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).
33 Royal Kram NS/RKM/0156/15 on the Promulgation of Law on the Establishment of Ministry of Cults and Religions, 24 January 1996 (Cambodia).
34 Article 4, Sub-decree No 154 ANKr/BK, 11 July 2011 (Cambodia).
35 Article 145-New (as amended in January 2008), Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).
36 Article 23, Sub-decree No 154 ANKr/BK, 11 July 2011 (Cambodia).

Cambodia has ratified the following international human rights treaties, which have relevance to the freedom of thought, conscience, and religion:[37]

INTERNATIONAL DOCUMENT	Year of Signature	Year of Ratification or Accession (a)	Reservations Declarations
Convention on the Prevention and Punishment of the Crimes of Genocide		1950 (a)	
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	1966	1983	None
International Covenant on Civil and Political Rights (ICCPR)	1980	1992	None
International Covenant on Economic, Social and Cultural Rights (ICESCR)	1980	1992	None
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	1980	1992	None
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)		1992 (a)	None
Convention on the Rights of the Child (CRC)		1992 (a)	None
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)	2004		None
International Convention for the Protection of All Persons from Enforced Disappearance (CPED)		2013 (a)	None
Convention on the Rights of Persons with Disabilities (CRPD)	2007	2012	None
Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-AC)	2000	2004	None
Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP-CRC-SC)	2000	2002	None
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)	2005	2007	None

37 United Nations, *United Nations Treaty Collection*, n.d., Website, https://treaties.un.org/ accessed 14 September 2014.

As mentioned above, the Constitution recognizes "covenants and conventions related to human rights".[38] Additionally, according to a 2007 decision of the Constitutional Council, international law is considered a source of Cambodian Law.[39] However, the Constitution also provides that "[t]he National Assembly shall approve or repeal international treaties and conventions".[40] Further, it says that "the King shall sign and ratify international treaties and conventions after they have been approved by the National Assembly and the Senate".[41]

The Constitution does not declare whether Cambodia follows a monist or dualist approach. In practice, in the absence of enabling legislation, courts are said to refuse to entertain claims that are directly based on international laws.[42] This is consistent with the government's preference for dualism, as expressed in its 1997 Report to the Committee on the Elimination of Racial Discrimination: "These covenants and conventions may not be directly invoked before the courts or administrative authorities. However, they provide a basis for the development of national legislation [...]."[43]

38 Article 31, Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).

39 Constitutional Council, CASE N°131/003/2007 of June 26, 2007, Decision N° 092/003/2007 CC.D of July 10, 2007.

40 Article 90 - New (Two) (As amended March 2006), Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).

41 Ibid, Article 26 - New (As amended March 1999).

42 Suzannah Linton, "Putting Cambodia's Extraordinary Chambers into Context," (2007) 11 *SYBIL*, 195–25, at 203.

43 Ibid, 204, citing UN Doc. CERD/C/292/Add.2, 5 May 1997. *See* UN Committee on the Elimination of Racial Discrimination (CERD), UN Committee on the Elimination of Racial Discrimination: State Party Report, Cambodia, 5 May 1997, CERD/C/292/Add.2, Paragraph 19. Available at: http://www.refworld.org/docid/3ae6af468.html accessed 1 October 2014.

2. Domestic Laws and Policies

Policies on religion and belief are derived from the various sources of law in Cambodia.[44] The following are examples of laws and policies related to freedom of religion:

Constitution

The Constitution guarantees its citizens equal rights, regardless of religious belief, saying that:

> *"Khmer citizens shall be equal before the law, enjoying the same rights and freedom and obligations regardless of race, colour, sex, language, religious belief, political tendency, national origin, social status, wealth or other status. The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and freedom shall be in accordance with the law."*[45]

It further states that Cambodian citizens of either sex shall have the right to freedom of belief. "Freedom of belief and religious worship shall be guaranteed by the State on the condition that such freedom does not affect other beliefs and religions or violate public order and security."[46]

Law on the Establishment of the Ministry of Cults and Religions

The Ministry of Cults and Religions was established in 1996 by Royal Kram No. NS/RKM/0196/19, promulgating the Law on the Establishment of Ministry of Cults and Religions, dated 24 January 1996. The Minister, a Secretary of State, and several Undersecretaries of State as necessary to head the ministry.[47] The Ministry of Cults and Religions is under the Royal Government of Cambodia and is tasked with directing and managing all cults and religions in Cambodia.[48]

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44 These sources include the Constitution; Laws (Chbab) adopted by the National Assembly and the Senate, and promulgated by the King or the acting Head of State; Royal Decrees (Preah Reach Kret) proposed by the Council of Ministers and signed by the King or the acting Head of State; Sub-Decrees (Anu-Kret) or executive regulations prepared by relevant ministries, adopted by the Council of Ministers and signed by the Prime Minister; Proclamations (Prakas) or executive regulation issued at the ministerial levels and signed by the relevant ministers; Decisions (Sech Kdei Samrach) or executive regulations made by the Prime Minister and relevant ministers; Circulars (Sarachor) or administrative instructions used to clarify works and affairs of the ministries which are signed by the Prime Minister and relevant ministers; and Bylaws (Deika) which are legal rules approved by the Councils of Sub-National Levels (Capital Council, Provincial Councils, Municipal Councils, Districts Councils, Khans Councils, Sangkat Councils and Commune Councils).

45 Article 31, Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).

46 Ibid, Article 43.

47 Article 3, Law on the Establishment of the Ministry of Cults and Religions (Cambodia).

48 Ibid, Articles 1 and 2.

Sub-decree No 154 ANKr.BK on the Organization and Functioning of the Ministry of Cults and Religions

This sub-decree, dated 11 July 2011, provides a framework of administration of religious practice in Cambodia. The Ministry of Cults and Religions is structured according to three main units: Central Unit, Local Unit, and General Inspectorate of National Buddhist Studies.[49]

Within the Central Unit is the General Department of Religious Affairs (GDRA),[50] which in turn is sub-divided into the Department of Buddhist Affairs, Department of External Religions, Department of Research and Dissemination of Buddhism and Society, Department of Receiving Complaint and Settlement of Religious Disputes, and Buddhist Institute. The GDRA is mandated to perform a wide range of roles and duties, as follows:

- **i)** Administer cults and matters related to Buddhism and External Religions,
- **ii)** Manage, check and follow up activities of units under GDRA,
- **iii)** Seek reasonable approaches to disseminate morals and prevent negative acts towards religions,
- **iv)** Prepare policies for organization and functioning of all religions in Cambodia,
- **v)** Organize, prepare and cooperate to research, education, and dissemination of Buddhism and preaches,
- **vi)** Receive complaints and settlement of disputes related to religions,
- **vii)** Prepare and implement action plans and programs on religions,
- **viii)** Prepare and organize dissemination of Buddhism program related to society and bulletins of the ministry,
- **ix)** Direct the Khmer Tradition Working Group,
- **x)** Research and compare religious theories and religious linguistics,
- **xi)** Strengthen and expand library, publish previous works, disseminate via journals and website,
- **xii)** Encourage all religions to participate in social and economic development,
- **xiii)** Promote the use of pagodas, temples, churches and mosques of all religions to become the centres for education of minds, morals, culture and society,
- **xiv)** Maintain harmonization and freedom of all religions,
- **xv)** Prepare a study and promote understanding of religions,
- **xvi)** Prepare meetings of all national and international religions and promote interreligious network,
- **xvii)** Coordinate aids and supports from national and international religious organizations,
- **xviii)** Initiate laws and regulations related to management of religions by cooperation with relevant units and institutions,

49 Article 6, Sub-decree No 154 ANKr.BK on the Organization and Functioning of the Ministry of Cults and Religions, 11 July 2011 (Cambodia).

50 Ibid, Article 6(1).

xix) Make reports as required and technical reports to the management of the ministry, and
xx) Implement other tasks required by the ministry.[51]

The Local Unit is sub-divided according to the administrative divisions in Cambodia as described above. It performs the roles and duties of the Ministry of Cults and Religions at the capital, provincial, district, and khan levels.[52]

The General Inspectorate of Buddhist Studies has a separate resource from the national budget pursuant to an annual budget plan of the Ministry. It is sub-divided into a Unit on Buddhist Studies and Dhamma Primary School, a Unit on Buddhist High School, a Unit on Higher and Post-Higher Buddhist Education, and an Administrative and Accounting Unit.[53]

National Strategic Development Plan 2014-2018

According to the National Strategic Development Plan 2014-2018 (NSDP 2014-2018), the Ministry of Cults and Religions will continue to actively promote the role of the family and adherence to the traditional religious values of the Kingdom.[54]

The NSDP 2014-2018 says that the Ministry has established a programme, "Buddhism and Society", which invites religious scholars to give sermons every Buddhist-saint day (four times a month) with the purpose of mainstreaming Buddhism to raise the "awareness of morality value" and "avoiding the use of drug, domestic violence, pornography, sexual trafficking, and teenager violence". Such programmes have been aired on 22 state-run and private radio and television stations. At the same time, the Ministry also encouraged other religions to provide morality education through their own religious services so as to contribute to the development of the nation.

Section 4.34 of the NSDP 2014-2018 states that, in the Fifth Legislature, the Ministry of Cults and Religions will "respect the freedom of holding other beliefs and practicing other religions and will improve Buddhism which is a State religion". This will be done through "renewal of strengthening and expanding all levels of Buddhist schools, publication of religious texts, annotated texts, rules, and Dhamma discipline practice".

Equally, the Strategic Plan aims to impart a culture of peace and states that the Ministry of Cults and Religions "[s]upports other religions' activities in the society, strengthens the harmonization amongst all religious holders of all religion, fight against any discrimination or split amongst the people arising from their different religious views".

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51 Ibid, Article 8.
52 Ibid, Article 23.
53 Ibid.
54 Section 4.33 National Strategic Development Plan 2014-2018 (Cambodia). Available at http://www.mop.gov.kh/Home/NSDP/NSDP20142018/tabid/216/Default.aspx accessed 16 December 2014. *See also* Sec 354, National Strategic Development Plan 2009-2013 (NSDP 2009-2013) (Cambodia).

1997 Labour Law

The 1997 Labour Law prohibits discrimination on the basis of creed or religion in making decisions on hiring, defining and assigning work, vocational training, advancement, promotion, remuneration, granting of social benefits, discipline or termination of the employment contract.[55]

2011 Criminal Code

The 2011 Criminal Code prohibits and penalises acts that constitute "Infringement on State Religion".[56] This includes provisions penalising:

1. *Offences against Buddhism* – This offence includes celebration of Buddhist ceremony without authorization, theft of object dedicated to Buddhism, and damaging religious premises or dedicated objects.[57]
2. *Offences against Buddhist Monks and nuns and or laymen* – This provision penalises intentional violence or insults inflicted on Monks and nuns and or laymen.[58]

The Criminal Code also criminalises discrimination on the basis of a "person's belonging to or not belonging to a specified religion" committed through:

1. Acts of Refusing to Supply Goods or Service,[59]
2. Conditional Provision of Goods or Service,[60]
3. Acts of Refusing to Hire a Person,[61]
4. Acts of Refusing Employment of a Person,[62]
5. Dismissal or Discharge based on Discrimination,[63]
6. Discrimination and Denial of Rights by Civil Servants.[64]

Legal entities may be held criminally responsible for the offences of Acts of Refusing to Supply Goods or Service, and Dismissal or Discharge based on Discrimination.[65]

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55 Article 12, Labour Law (Cambodia).
56 Chapter 5 (Offense against State Religion: Article 508-515), Criminal Code (Cambodia).
57 Ibid, Articles 508-512.
58 Ibid, Articles 513-516.
59 Ibid, Article 265.
60 Ibid, Article 266.
61 Ibid, Article 267.
62 Ibid, Article 268.
63 Ibid, Article 269.
64 Ibid, Article 270.
65 Ibid, Article 273.

The Code of Criminal Procedures

The Code of Criminal Procedures states that

> *"Criminal actions apply to all natural persons or legal entities regardless of race, nationality, colour, sex, language, creed, religion, political tendency, national origin, social status, resources or other status".*[66]

The Code of Criminal Procedures allows witnesses and parties concerned with the criminal case to take an oath according to their own religion and belief. For example, translators/interpreters of written records of complaints received by judicial police officers swear according to his/her belief or religion that he/she will translate the written record accurately.[67]

Similar provisions indicating respect of the concerned person's freedom of religion and belief are also made in other steps of the proceeding, such as during a scientific or technological examination,[68] record of interrogation (Preliminary Inquiry),[69] assistance of interpreter or translator,[70] oath of witnesses,[71] assistance by experts listed in the national list of experts,[72] rules for interrogation by Judicial Police Officer,[73] and use of translators to assist deaf and mute persons[74].

IV. The Religious Freedom and Harmony Policy and Practice

The Cambodian government, as can be seen in its Constitution, has adopted a policy of religious freedom and harmony. Consequently, people are able to practice a number of religions in addition to the traditional Theravada Buddhism. Despite the various religions and beliefs, only three main religions have played crucial roles in Cambodian society, namely Buddhism, Islam, and Christianity. At the time of writing this report, there is no on-going religious dispute in Cambodia.

An author has commented that the constitutional guarantee of freedom of religion and parliamentary democracy, as well as the electoral strength of the Muslims, has "enabled the re-organization of Islam to take place to give it a more tangible, public and positive role within the new Cambodia."[75] There are no reports to indicate the overall impact of Cambodian Christians and their potential to shape the direction of Cambodian society.

66 Article 3, Code of Criminal Procedures (Cambodia).
67 Ibid, Article 72 (Police Record).
68 Ibid, Article 95.
69 Ibid, Article 115.
70 Ibid, Articles 144 and 330.
71 Ibid, Articles 154 and 328.
72 Ibid, Article 163.
73 Ibid, Article 179.
74 Ibid, Article 331.
75 Omar Farouk, "The Re-organization of Islam in Cambodia and Laos."

Nonetheless, a senior pastor of the Presbyterian Church in Phnom Penh said "Christianity has played an important role in changing people by educating their minds and changing their attitudes to live their lives in a better way."[76]

There are no laws defining or penalising atheism, non-religion, blasphemy, deviant behaviour or heresy. Literature is largely silent regarding the acceptance of persons with atheist or agnostic views in Cambodian society.

1. Freedom to adopt, change or renounce a religion or belief; and freedom from coercion

The Constitution guarantees the right to freedom of belief, and, in practice, persons are free to adopt, change or renounce their religion or belief without any coercion. There is no requirement for individuals to register their belief or religion, or any conversions or changes in their religion or belief. At the time of writing this report, there are no cases reported about Cambodian citizens who have been forced to convert their beliefs, whether to Buddhism or to any of the "external religions". In fact, the Pew Research Center's latest report on religious restrictions around the world during calendar year 2012 scored Cambodia a 0.00 for a specific indicator,[77] which signified that "[n]ational laws and policies provide for religious freedom, and the national government respects religious freedom in practice".[78]

2. Right to manifest one's religion or belief

a.) Freedom to worship

There is no restriction on freedom of worship in Cambodia for both Buddhism and external religions. A 2014 report indicated that the government does not interfere with worship or other religious practices.[79]

People have freedom to worship and they can decide where to worship, either at home or at any sacred place based on their tradition, culture and ethnicity. Belief and religious worship is protected by the Constitution, provided that this freedom does "not affect other beliefs and religions or violate public order and security".[80] The Constitutional Council said this means that:

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76 "Cambodians Turning to Christianity," *The Phnom Penh Post,* 23 March 2011. http://www.phnompenhpost.com/lift/cambodians-turning-christianity accessed 15 September 2914.

77 Said indicator, GRI.Q.3, asks the question, "Taken together, how do the constitution/basic law and other national laws and policies affect religious freedom?"

78 Pew Research Center, *Religious Hostilities Reach Six-Year High*, (January 2014), "Appendix 6: Results by Country," 4.

79 Ibid, "Appendix 6: Results by Country," 5.

80 Art. 43, Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).

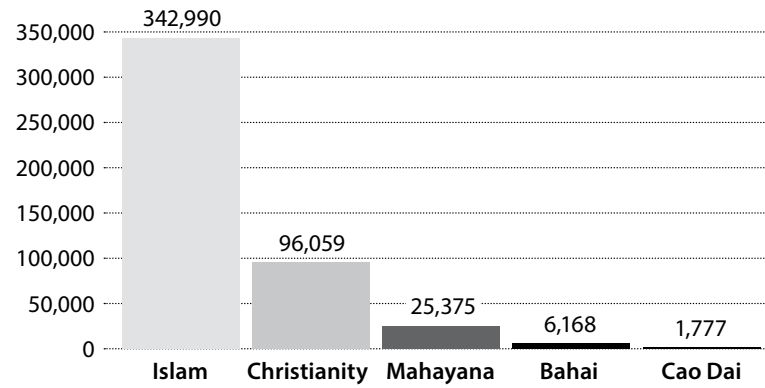
"[T]he State shall guarantee the freedom of belief and religious practice to be able to proceed as usual, but this freedom and worship shall also have limitation. The exercise of freedom and the practise of belief and religion must not impinge on other beliefs or religions, and must respect the freedom and the practice of beliefs or religions of other people as well. Furthermore, the exercise of freedom and the practise of belief and religion must not impinge on public order and security at all cost."[81]

The Ministry of Cults and Religions lists five external religions, particularly Islam, Christianity, Mahayana Buddhism, Bahai and Cao Dai. Islam and Christianity are ranked first and second respectively in terms of population of followers among the external religions (see charts below.)

Table 3: Statistics of External Religions in 2012-2013

External Religions	Total Population	Male	Female
Islam[82]	342,990	164,672	178,318
Christianity	96,059	40,625	55,434
Mahayana	25,375	12,288	13,087
Bahai	6,168	2,742	3,426
Cao Dai	1,777	1,021	756

Table 4: Population of Followers of "External Religions" in 2012-2013



Source: Ministry of Cults and Religions, 7 February 2013

81 Constitutional Council, Decision No. 107/003/2009 CC.D of December 23, 2009, 2.
82 Includes only Muslims above 15 years old.

b.) Places of worship

Currently, there is no restriction on the right to build, renovate and maintain places of worship for both Buddhism and external religions. However, permission from the government agencies, in particular the Ministry of Cults and Religions, is required.

The government distinguishes between "places of worship" and "offices of prayer".[83] The establishment of a place of worship requires that the founders own the building and the land on which it is located. The facility must have a minimum capacity of 200 persons, and the permit application requires the support of at least 100 congregants. An office of prayer, in contrast, can be located in rented facilities or on rented property and does not require a minimum capacity. The permit application for an office of prayer requires the support of only 20 congregants.[84]

Places of worship must be located at least two kilometres (1.2 miles) from each other and may not be used for political purposes or to house criminals or fugitives.[85] The distance requirement applies only to the construction of new places of worship and not to offices of religious organizations or prayer. The US Department of State notes that "[t]here are no documented cases in which the directive was used to bar a church or mosque from constructing a new facility".[86]

Specifically with regard to Buddhists, permission to build a new pagoda[87] or renovate a pagoda[88] is made by a decision of the Ministry of Cults and Religions. According to the current practice, the process to build or renovate a new pagoda comprises of the following steps: i) a request from the Management Committee of the pagoda or communities where a pagoda is built or renovated, ii) approval of the request by the District Governor, iii) approval from the Director of the Provincial Department of Cults and Religions, iv) approval from Governor of the province and v) decision of the Minister of Cults and Religion.[89]

Cambodian Land Law 2001 provides a concept of collective ownership of Buddhist monasteries. Immovable properties of land and structures existing within the premises of Buddhist monasteries are a patrimony allocated in perpetuity to the Buddhist religion and are available to its followers, under the care of the Pagoda Committee. Procedures to select the Pagoda Committee and its representatives to protect the pagoda's interest shall be determined by a Prakas (regulation) of the Ministry of Cults and Religions. According to the Land Law, immovable property of religious monasteries cannot be sold,

83 U.S. Department of State, "Cambodia 2013 International Religious Freedom Report."
84 Ibid.
85 Ibid.
86 Ibid.
87 Decision No 157-KTS-SR on Construction of a New Pagoda in Prey Veng Province, May 27, 2002.
88 Decision No 154-KTS-SR Renovation of a New Pagoda in Svay Reang Province, May 27, 2002.
89 See Decision No 157-KTS-SR, May 27, 2002, and Decision No 154-KTS-SR, May 27, 2002.

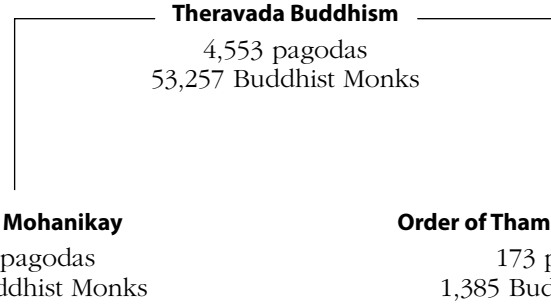
exchanged or donated and is not subject to prescription. However, immovable property of monasteries may be rented or sharecropped on condition that the income from such rental or sharecropping shall be used only for religious affairs.[90]

As regards non-Buddhists, the Land Law stipulates that their religious places and properties shall be managed by an association of persons of these religions created under the provisions of law and they are not subject to the regime of collective ownership of the Land Law like Buddhist monasteries.[91]

The following figures from the Ministry of Cults and Religions give the number of religious places in Cambodia:

RELIGIONS		Religious Places
THERAVADA BUDDHISM	4,688	Pagodas
	207	Ashram
ISLAM	439	Mosques
	475	Suravs
	914	Places of Worship
CHRISTIANITY	55	Catholic Churches
	430	Jehovah's Witnesses Churches (Yehova)
	1514	Christian Places of Worship
MAHAYANA BUDDHISM	30	Miloe Temples
	2	Khong Moeng Temples
	28	Kong Syim Temples
	18	Chinese Neak Ta Places
	1	Japanese Temple
	25	Vietnamese Temples
	56	Y Kvantav Temples
BAHAI	25	Bahai Temples
	25	Places of Worship
CAO DAI	3	Cao Dai Temples
	4	Places of Worship

90 Article 20-21, Land Law, 2001 (Cambodia).
91 Article 22, Land Law (2001) (Cambodia).



Source: Ministry of Cults and Religions, 7 February 2013

c.) Religious symbols

Each religion can have and use religious symbols. The wearing of religious symbols, such as head coverings for women, is not regulated by law or by any level of the government.[92] Buddhists can place their religious symbols at homes, pagodas, places of work, and at other places appropriate for their worship. Followers of external religions can exercise the same rights.

In 2008, Prime Minister Hun Sen made a public speech allowing Cambodian Muslim students to wear Islamic attire in class. Education regulations require male students to wear blue pants and a white shirt, and females to wear a blue skirt and white shirt. Despite contradiction with education regulations, civil society and opposition politicians supported this move because it enables more Islamic people to have access to education.[93]

d.) Observance of holidays and days of rest

Religious public holidays in Cambodia are Visak Bochea Day (Buddha's Birthday), Meak Bochea or Magha Puja Day (commemorating a meeting where Buddha ordained 1,250 disciples and announced his passing away), Chaul Chnam Thmey (Khmer New Year), Phchum Ben Day (Ancestors' Day), Water Festival, and Ploughing Festival. These official religious public holidays can be found in the Sub-decree on Annual Public Holiday of Civil Servants and Workers.[94]

92 Pew Research Center, *Religious Hostilities Reach Six-Year High*, "Appendix 6: Results by Country," 11.

93 Nguon Sovan and Khouth Sophak Chakrya, "Muslims allowed to wear traditional clothes at school," *The Phnom Penh Post*, 15 May 2008. http://www.phnompenhpost.com/national/muslims-allowed-wear-traditional-clothes-school accessed 30 September 2014.

94 *See* Sub-decree No 487 ANKr.BK on Annual Public Holiday for Civil Servants and Workers in 2014, October 16, 2013 (Cambodia).

Even though festivals of other religions are not official public holidays, the recent trend in Cambodia has shown that some employers and employees of public and private entities have practised those holidays without facing any punishment from the government. The Labour Law allows employees to use their annual leave during the Khmer New Year and permits both workers and employers to agree on the usage of their annual leave.

> *"In principle, annual leave is normally given for the Khmer New Year unless there is a different agreement between the employer and the worker. In this case, the employer must inform the Labour Inspector of this arrangement.*
> *In every case of the paid annual leave exceeding fifteen days, employers have the right to grant the remaining days off at another time of the year, except for the leave for children and apprentices less than eighteen years of age."*[95]

As a result, employers and workers have the flexibility to decide when to use an annual leave. For example, some private universities and companies allow their workers to take a leave during the Chinese New Year and Christmas holiday.

e.) Appointing clergy

Since Buddhism is the state religion, appointment of Buddhist Monk leaders is made by the Ministry of Cults and Religions. However, for the external religions, each religious group can appoint its respective leaders and then notify the Ministry of Cults and Religions. After receiving a letter of appointment, the Ministry of Cults and Religions issues a decision on the approval of the nomination of the religious leaders. There are no reports of objections by the Ministry to the nomination submitted by religious organizations. For instance, in 2003, the Ministry of Cults and Religions issued a decision to approve the nomination of four Vietnamese religious leaders of the Mahayana and the decision was made following a request from the Vietnamese Mahayana Monk Committee.[96] There are no reports about appointment of religious leaders of other external religions.

95 Article 170, Labour Law (Cambodia).

96 Decision No 342-KTS-SR on the Approval of Vietnamese Mahayana Monks Leaders, September 23, 2003.

As mentioned above, Theravada Buddhism in Cambodia is divided into two orders, Mohanikay and Thammayute kaknikay. Each Order is led by a Samdech Preh Moha Sanghareach, who is appointed by Royal Decree of the King.[97] The Chief of Monks (Preh Mekun) at the capital and provinces; Chief of Monks (Preh Anukun) at municipalities, districts and khans and Chief of Pagoda (Chao Athika) are respectively appointed by Preh Sangha Prakas of the Samdech Preh Moha Sanghareach of each order of Theravada Buddhism (Mohanikay and Thammayute kaknikay) and co-signed by the Minister of Cults and Religions.[98]

f.) Teaching and disseminating materials (including missionary activity)

The Constitution requires the state to establish a comprehensive and standardized educational system that guarantees the freedom to operate educational institutions and equal access to education to ensure that all citizens have an equal opportunity to earn a living.[99] In relation to religious education, Cambodia favours Buddhist teachings and the Constitution states that "[t]he State shall help promote and develop Pali schools and Buddhist institutes".[100] In fact, the General Department of Religious Affairs of the Ministry of Cults and Religions is mandated to "[o]rganize, prepare and cooperate to research, education, and dissemination of Buddhism and preaches".[101]

The standard curriculum on civic education, although focusing more on Buddhism, contains lessons on various faiths and includes a lesson on "Harmony of Religions". All students in public schools attend the lessons. Below is a summary of the religious teachings found in public school curriculums for Grades 7 to 12:

97 Royal Decree No. PS/RKT/0406/200 on the Appointment of Samdech Preh Moha Sanghareach of Order of Mohanikay of the Kingdom of Cambodia, April 29, 2006 (Cambodia); King's nomination letter of Samdech Preh Moha Sanghareach of Order of Thammayute kaknikay, December 7, 1991; Royal Decree No. NS/RKT/0506/207 on the Establishment of Kehnak Sangkha Neayok of the Kingdom of Cambodia and Appointment of Composition of Kehnak Sangkha Neayok of the Kingdom of Cambodia, May 4, 2006 (Cambodia).

98 Khot Thida, "Buddhism and Pearhira Sasana in Khmer Society after 1979 Liberation (1979-present)," 2012, 121-126.

99 Article 66, Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).

100 Ibid, Article 68.

101 Article 8, Sub-decree No 154 ANKr.BK on the Organization and Functioning of the Ministry of Cults and Religions, 11 July 2011 (Cambodia).

GRADES		CONTENTS OF TEACHING
7	**CHAPTER 6**	**RELIGIONS**[102]
	Lesson 1	Birth of Buddhism
	Lesson 2	Some main Teachings of Buddhism
	Lesson 3	Birth of Hinduism
	Lesson 4	Some main Teachings of Hinduism
8	**CHAPTER 4**	**BELIEFS**[103]
	Lesson 1	Christianity
	Lesson 2	Islam
9	**CHAPTER 1**	**INTER-RELATION WITH OTHERS**
	Lesson 3	Beliefs and Rituals in Khmer Culture[104]
10		(No Religious Teachings are Indicated for Grade 10)
11	**CHAPTER 2**	**CULTURE OF PEACE**[105]
	Lesson 1	History of Religions
	Lesson 2	Buddhist Monks and the State
	Lesson 3	Pagodas and Monks in Cambodia
	Lesson 4	Monkhood in Theravada Buddhism
	Lesson 5	Mahayana Buddhism
	Lesson 6	Priesthood in Christianity
	Lesson 7	Priesthood in Islam
	Lesson 8	Priesthood in Tao
	Lesson 9	Practice of religions in Cambodia
12	**CHAPTER 2**	**CULTURE OF PEACE**[106]
	Lesson 1	38 Happiness of Buddhism
	Lesson 2	Harmony of Religions
	Lesson 8	Human Rights in the View of Buddhism

102 Ministry of Education, Youth and Sport, *Civic Education Grade 7* (Publishing and Distribution House: Phnom Penh, 2009).

103 Ministry of Education, Youth and Sport, *Civic Education Grade 8* (Publishing and Distribution House: Phnom Penh, 2013).

104 Ministry of Education, Youth and Sport, *Civic Education Grade 9* (Publishing and Distribution House: Phnom Penh, 2012), 178-189.

105 Ministry of Education, Youth and Sport, *Morality Education Grade 11* (Publishing and Distribution House: Phnom Penh, 2013).

106 Ministry of Education, Youth and Sport, *Morality Education Grade 12* (Publishing and Distribution House: Phnom Penh, 2014).

Private institutions may provide non-Buddhist religious instructions. As can be seen in the chart below, a number of religious schools operate in Cambodia.

RELIGION	SCHOOLS
THERAVADA BUDDHISM	775 Buddhist primary schools 35 Buddhist junior high schools 17 Buddhist high schools, 3 Buddhist universities
ISLAM	304
CHRISTIANITY	43 Catholic schools 504 Protestant schools
MAHAYANA BUDDHISM	3 Miloe schools 1 Khong Moeng school 1 Kong Syim school 1 Vietnamese religious school 4 Y Kvantav schools
BAHAI	1
CAO DAI	1

Religious Schools in Cambodia[107]

The Pew report indicated that the government does not limit proselytization,[108] and that public preaching is also not limited by the government.[109] The report however indicated that religious literature or broadcasting are limited by the government.[110] This is possibly because, in June 2007, the Ministry of Cults and Religions had issued a directive banning people from door-to-door proselytizing because "it disturbs people's daily lives and affects security in society", limiting the distribution of religious literature to within religious institutions.[111] A ministry official said the directive was written in response to reports of Christians "tricking children and turning them against Buddhism" in some provinces. "If a religion forces people to convert through money or material goods or knocking on doors, it is wrong. It is disturbing the people and abusing people's privacy", Sun Kim Hun, Secretary of State at the Ministry of Cults and Religions, reportedly said.[112]

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107 H.E Min Khin, Minister of Cult and Religions, "Statistics of Pagodas and Buddhist Monks from Both Orders of Theravada Buddhism 2012-2013," 3-4.

108 Pew Research Center, *Religious Hostilities Reach Six-Year High*, "Appendix 6: Results by Country," 7.

109 Ibid, 6.

110 Ibid, 9.

111 Emily Lodish and Yun Samean, "Gov't Moves To Limit Activities of Christian Groups," *The Cambodia Daily,* 17 July 2007. http://www.cambodiadaily.com/archives/govt-moves-to-limit-activities-of-christian-groups-61265/ accessed 15 September 2014.

112 Ibid.

g.) The right of parents to ensure the religious and moral education of their children

The Constitution states that "[p]arents shall have the duty to take care of and educate their children to become good citizens".[113] Cambodian parents are able to oversee the religious and moral education of their children and, during religious festivals, children generally go to pagodas with their parents. Families whose religion is among the external religions teach their children according to their respective beliefs. No reports of children being forced by their parents to follow any religion, nor of parents being prohibited from overseeing the religious education of their children, were found.

h.) Registration

Administration of religions is the mandate of the Ministry of Cults and Religions. The Sub-decree on the Organization and Functioning of the Ministry of Cults and Religions provides that Buddhism is under the supervision of the Department of Buddhist Affairs,[114] whereas other religions are under the supervision of Department of External Religions Affairs.[115] Each department is in charge of all registration of religious organization, inventory of properties, religious schools, statistics of disciples, etc. Individuals, however, are not required to register his or her religion at the Ministry of Cults and Religions.

i.) Communicate with individuals and communities on religious matters at the national and international level

So long as acts of believers do not fall within the limitation set by the Constitution, they are not restricted from communicating with individuals and communities on religious matters. Each religious group can exercise their right to establish international cooperation with religious groups or organizations in other countries as long as they comply with the national laws.

j.) Establish and maintain charitable and humanitarian institutions/solicit and receive funding

The Cambodian Constitution states that Khmer citizens have the right to establish an association and this right is determined by law.[116] At the time of writing this report, the Law on NGOs and Association is still at the drafting stage. Therefore, requirements for establishing a charitable or a humanitarian organization are not yet clearly determined. In practice, charitable or humanitarian organizations are freely established and operate in the Kingdom of Cambodia. Based on the current practice, three ministries are in charge of religious organizations. The Ministry of Cults and Religions is the main ministry in

113 Article 47, Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).
114 Article 9, Sub-decree No 154 ANKr/BK, 11 July 2011, (Cambodia).
115 Ibid, Article 10.
116 Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).

charge of religious affairs. The Ministry of Interior is in charge of local religious non-governmental organizations or associations,[117] while the Ministry of Foreign Affairs and International Cooperation is in charge of international non-governmental organizations.[118]

k.) Conscientious objection

The Law on the General Statute of Military Personnel of the Royal Cambodian Armed Forces provides that all military personnel shall enjoy freedom of philosophical and religious belief as well as political conviction; but they shall not express publicly their ideas. The law says that this restriction shall not forbid the free practice of religion within the military premises and the vessels of the Navy.[119] There is currently no report related to conscientious objection in Cambodia that would demonstrate how this law is put into practice. The Law on Police in Cambodia is still in the drafting stage and it is too early to make a judgement on conscientious objection in the police services.

3. Freedom from intolerance and discrimination

The Cambodian Labour Law prohibits discrimination on the basis of religion.[120] It forbids employers from taking into account the religious beliefs of individuals in making decisions on hiring, defining and assigning work, vocational training, advancement, promotion, remuneration, granting of social benefits, discipline or termination of employment contract.[121] An author notes that Cambodia is successful in protecting and promoting freedom of worship, in line with the tolerant character of Buddhism as "the enduring goal of Buddhism is peaceful" and "Buddha says conquer anger with love".[122]

A policy of the Cambodian government is to accommodate all religions, and for them to work together and live peacefully with each other in society. The Cambodian Press Law requires all associations of journalists to develop their own codes of conducts and comply with 10 basic principles, which includes religious principles. The Cambodian Press Law instructs journalists to avoid any publication that incites discrimination against race, colours, gender, language, beliefs, opinions or political tendency, birth, social status, wealth or other status.[123]

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117 Article 7, Draft Law on NGOs and Association (Cambodia), available at: http://www.sithi.org/admin/upload/law/Draft%20NGO%20Law%2028%20July%2011%20EN%20_3rd%20Draft_.pdf

118 Ibid, *see also* Article 28.

119 Article 10, Law on the General Statute of Military Personnel of the Royal Cambodian Armed Forces, 1997, (Cambodia).

120 Article 12, Labour Law (Cambodia).

121 Ibid, Article 12.

122 Douglas Gillison, "Cambodians Have Freedom of Religion: Report," *Cambodia Daily*, 18 September 2006. http://www.cambodiadaily.com/archives/cambodians-have-freedom-of-religion-report-54657/ accessed 30 September 2014.

123 Article 7, Law on Press, 1995 (Cambodia).

4. Right of vulnerable groups to freedom of religion and belief

There is no law restricting the freedom of religion and belief of vulnerable groups in Cambodia. Women, children, migrant workers, persons deprived of their liberty, and minorities are free to choose their religion and their choices are respected.

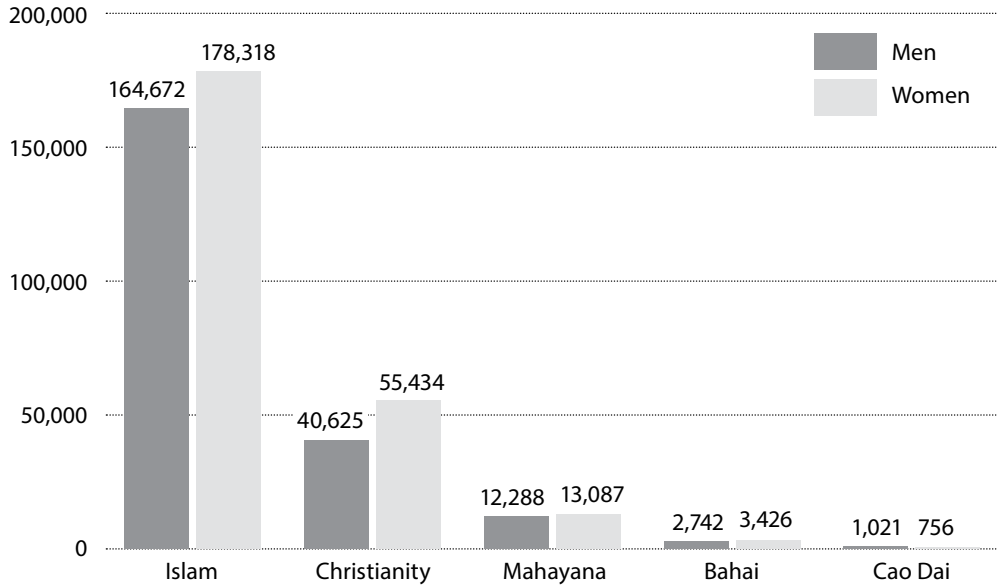
a.) Women

The Constitution of the Kingdom of Cambodia enshrines equal rights for women and men in all aspects of life, including the right to freedom of belief.[124] Consequently, the rights of women have been integrated into a number of national policies and legislations.[125] However, these policies and legislations are not specifically related to the exercise of religion or belief. At present, there are no statistics showing the ratio of female Buddhists to male Buddhists, but such information concerning followers of external religions is available and can be seen in the chart below.

124 Article 43, Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).

125 See *e.g.*, the Cambodian Millennium Development Goals (2000-2015); Rectangular Strategy for Growth, Employment, Equity and Efficiency Phase II (2009-2013); National Strategic Development Plan (2006-2010) and updated National Strategic Development Plan (2009-2013); Strategic Framework for Decentralization and De-concentration Reforms (2005); the National Program for Sub-National Democratic Development (2010-2019); Neary Rattanak III - Five Year Strategic Plan (2009-2013); Prakas on the Establishment and the Functioning of the Women's and Children's Consultative Committees at Capital Council, Provincial Councils, Municipal Councils, District Councils and Khan Councils (2009); Guideline on the Organization and Establishment of the Committee for Women and Children Commune/Sangkat (2007); Law on Commune/Sangkat Administrative Management (2001); and Law on Administrative Management of the Capital, Provinces, Municipalities, Districts and Khans (2008).

Table 5: Statistics of Female and Male Followers of External Religions, 2012-2013



Source: Ministry of Cults and Religions, 7 February 2013

b.) Children

Cambodia is a party to the Convention of the Rights of the Child and the Constitution requires parents to take care of and educate their children to be good citizens.[126] There is no specific law related to children's freedom of religion. Generally, children practise the same religion as their parents. There are no reported cases relating to the practice of religious freedom of children.

c.) Migrant workers

The Cambodian Immigration Law states that non-Khmer persons shall not be discriminated on the basis of nationality, belief, religion and or origin of birth.[127] Foreigners who legally enter and work in Cambodia as migrant workers enjoy freedom of religion like Cambodian citizens, as long as the practice does not violate Article 43 of the Constitution.

126 Article 47, Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).
127 Article 2, Law on Immigration, 1994, (Cambodia).

d.) Persons deprived of their liberty

For persons deprived of their liberty, Article 29 of Law on Prison (2011) states that detainees have rights to practise their religion and belief, and they shall not be forced to practise any religion. "Detainee" refers to an accused person, a guilty person, or a prisoner who was sent to be detained in the prison by the court.[128]

According to The Phnom Penh Post, in January 2014, detainees at Banteay Meanchey Provincial Prison joined forces with prison officials to pay for the construction of the first Buddhist worship hall in a Cambodian penitentiary. Buddhist Monks are allowed to visit the prison to preach the dharma and teach the prisoners about discipline in order for them to psychologically mature and to attempt to make peace with the crimes they had committed. This kind of initiative is supported by NGOs, who urge that the right to worship not be restricted to privileged groups of prisoners alone and that "measures should be put in place to ensure everyone has the opportunity to worship, this should include pre-trial detainees".[129]

e.) Refugees

There is no specific law regulating the rights of refugees in Cambodia, despite the country's ratification of the Convention relating to the Status of Refugees. Currently, there is no refugee camp in Cambodia. However, The Phnom Penh Post reported that the Cambodian government has "agreed in principle" to a controversial refugee resettlement scheme with Australia.[130]

f.) Minorities

Indigenous peoples in Cambodia enjoy the same guarantee of freedom of religion and belief stipulated in the 1993 Constitution. There are no particular legal provisions specifically protecting the freedom of religion of indigenous peoples. The Cambodian Land Law defines an indigenous community as a group of people who reside in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and practise a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use. Prior to the determination of their legal status under a law on communities, the groups currently existing shall continue to manage their community and immovable properties according to their traditional customs.[131]

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128 Article 4, Law on Prison, 2011, (Cambodia).

129 Khouth Sophak Chakrya, "Prison, prisoners join to build worship area," *The Phnom Penh Post*, 3 January 2014. http://www.phnompenhpost.com/national/prison-prisoners-join-build-worship-area accessed 30 September 2014.

130 Cheang Sokha, "Gov't agrees 'in principle' to Refugee Scheme with Oz," *The Phnom Penh Post*, April 29, 2014. http://www.phnompenhpost.com/national/govt-agrees-principle-refugee-scheme-oz accessed 30 September 2014.

131 Article 23, Land Law, 2001 (Cambodia).

As described above, Cham Muslims, Vietnamese, Chinese and Japanese in Cambodia are free to choose and practise their own religions and beliefs. While reports consistently indicate that minorities are not prevented from practicing their religion or belief, some commenters have nonetheless noted that the number of Cham Muslims who hold prominent positions in business and the government is proportionately low compared with those of other religious groups in the country.[132]

V. Redress Mechanisms and Interpretation of Religious Freedom

1. Judiciary

At present, the Cambodian judiciary consists of the Supreme Court, the Appellate Court,[133] the Capital Court, Provincial Courts, and the Military Court[134] as well as the hybrid court, which is known as the Extraordinary Chambers in the Courts of Cambodia (ECCC).[135] At the time of writing this article, three laws relating to the judiciary (Law on Court Organization, Law on Statute of Judges and Prosecutors and Law on Supreme Council of Magistracy) are tabled at the National Assembly.

In addition to these courts, there is a Constitutional Council,[136] which has the duty to safeguard and show respect for the Constitution, interpret the Constitution and laws adopted by the National Assembly (and reviewed completely by the Senate), and receive and decide on disputes concerning the election of members of the National Assembly and election of members of the Senate.[137] As mentioned above, the Constitutional Council decides cases related to freedom of religion and Buddhism as a state religion.

132 U.S. Department of State, "Cambodia 2013 International Religious Freedom Report."
133 Article 3, § 1, Law on the Organization and Activities of the Tribunal of the State of Cambodia (LOAT), 1993, (Cambodia).
134 Ibid, Article 2, § 1.
135 Law on the Establishment of the Extra Ordinary Chambers within the Court of Cambodia, 2004, (Cambodia).
136 *Constitutional Council of Cambodia, Website, at* http://www.ccc.gov.kh.
137 Articles 136, 137, and 141, Constitution of the Kingdom of Cambodia (As Amended), (Cambodia).

2. Administrative Bodies

Religious matters are under the supervision of the Ministry of Cults and Religions. Receipt of complaints and dispute resolution related to religion are under the Department of Receiving Complaint and Settlement of Religious Disputes within the Ministry of Cults and Religions.[138] This Department is responsible for:

- **i)** Receiving complaints and resolving disputes concerning other religions (see the discussion below on the Therak Saphea of Buddhism for resolution of disputes involving Buddhism);
- **ii)** Examining, coordinating and solving disputes within the framework of the Buddhist sector at the request of Theravada Sangha Assembly (Saphea Sangha) of the Kingdom of Cambodia;
- **iii)** Conducting examinations, investigations, monitoring and taking measures to prevent people from taking advantage of religion for their personal or group benefits or for any terrorist activities affecting the pure value of religions and society;
- **iv)** Conducting investigations and monitoring any conflict involving pagodas' immovable properties occurring inside or outside the temple, and to submit a report to the Ministry's leadership for appropriate legal actions;
- **v)** Preventing illegal grabbing of immovable properties, misappropriation of funds and other properties of a pagoda for personal possession; and
- **vi)** Performing other tasks as may from time to time be assigned by the General Department of Religious Affairs.

At the time of writing this report, no written record of resolved cases was readily available to that can be used as basis to analyse how this department functions.

3. Independent Bodies

National Human Rights Institution

The term "National Human Rights Institution" in Cambodia is comprised of the National Assembly Commission on Human Rights (NACHR), the Senate Commission on Human Rights (SCHR), and Cambodian Human Rights Committee (CHRC). Until now, no cases relating to religion have been handled by NACHR, SCHR, or CHRC, since the administration and management of religion is under the mandate of the Ministry of Cults and Religions.

138 Article 12, Sub-Decree No 154 ANKr.BK on the Organization and Functioning of the Ministry of Cults and Religions, 11 July 2011, (Cambodia).

Therak Saphea of Buddhism

The Therak Saphea of Buddhism of the Kingdom of Cambodia is the highest body created by sub-decree to solve all disputes relating to Buddhism in the country.[139] The Therak Saphea of Buddhism of the Kingdom of Cambodia is composed of nine members: a chairman, three vice chairmen, a secretary and four members. The Therak Saphea of Buddhism is comprised of appointed Buddhist Monks who hold high-ranking positions in the Buddhist Monk Cadre. There are Therak Saphea of Buddhism in the capital and provinces, as well as in the municipalities, districts and khans.[140]

Comparing this structure to that of the ordinary courts, the Therak Saphea of Buddhism of the Kingdom of Cambodia is equivalent to the Supreme Court; the Therak Saphea of Buddhism in the capital and provinces is equivalent to the Appeal Court; and the Therak Saphea of Buddhism in the municipalities, districts and khans is equivalent to the Courts of First Instance. There is, additionally, a body called Kenak Sangha Neayok of the Kingdom of Cambodia, with a rank lower than the Therak Saphea of Buddhism of the Kingdom of Cambodia but higher than the Therak Saphea of Buddhism in the capital and provinces.

The Therak Saphea of Buddhism of the Kingdom of Cambodia has jurisdiction throughout the country. It resolves disputes between Buddhist Monks, and also disputes between Buddhist Monks and laymen. It can mediate and make decisions based on Dharma Vinaya and the laws of the Kingdom of Cambodia.[141] It settles cases received from the Kenak Sangha Neayok of the Kingdom of Cambodia (which in turn receives cases from the Therak Saphea below it) and performs other duties assigned by Samdech Preh Moha Sangha Reach.[142]

Decisions of the Therak Saphea of Buddhism of the Kingdom of Cambodia are final and binding.[143] No timeframe is provided for the resolution of disputes before the Therak Saphea. Written records of cases settled by the Therak Saphea were not readily accessible at the time of writing of this report and, thus, no comprehensive assessment of the process could be made.

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139 Article 1, Sub-Decree No 576 ANKr.BK on the Creation of Therak Saphea of Buddhism of the Kingdom of Cambodia, 26 August 2006, (Cambodia).

140 Sub-Decree No 34 ANKr.BK on the Creation of Therak Saphea of the Capital, Provinces, Municipalities, Districts and Khans, 6 February 2009, (Cambodia).

141 Article 2, Sub-decree No 576 ANKr.BK on the Creation of Therak Saphea of Buddhism of the Kingdom of Cambodia, 26 August 2006, (Cambodia).

142 Ibid.

143 Article 2, Sub-decree No 34 ANKr.BK on the Creation of Therak Saphea of the Capital, Provinces, Municipalities, Districts and Khans, dated 6 February 2009, (Cambodia).

Table 6: Hierarchy of Dispute Resolution Processes

DISPUTES RESOLUTION PROCESS IN BUDDHISM	**DISPUTES RESOLUTION PROCESS FOR ALL RELIGIONS (Administrative Matters)**
Therak Saphea of Buddhism of the Kingdom of Cambodia	Ministry of Cults and Religion (Department of Receiving Complaint and Dispute Resolution)
Kenak Sangha Neayok of the Kingdom of Cambodia	Department of Cults and Religions in the Capital and Provinces
Therak Saphea of Buddhism of Capital and Provinces	Offices of Cults and Religion in Municipalities, Districts and Khans
Therak Sophea of Buddhism in the Municipalities, Districts and Khans	*Non-Religious Issues: Ordinary Courts*
When a Monk commits an offense, he is disciplined or disrobed by the Pagoda Committee.	

VI. Trends in Religious Freedom

1. Significant Changes in the Law

Literature indicates that the Royal Government of Cambodia has strengthened the Buddhist institution and promotes healthy relations between Buddhism and external religions. Recent changes in the law include the inclusion of offences against the state religion under the 2011 Criminal Code (see *Section III.2. Domestic Laws and Policies*), the creation of the Therak Saphea of Buddhism to settle disputes between Buddhist Monks, as well as those between Buddhist Monks and laymen, and the recent decision of the Constitution Council expounding on Buddhism as the state religion. The decision of the Constitutional Council clarifies the limits on freedom of religion, in that the exercise of the right to freedom of religion shall not affect other people's rights, national security and public order.[144]

As previously discussed, the Cambodian Criminal Code provides two types of offences against the state religion, namely 1) Offences against Buddhism[145] and 2) Offences against Buddhist Monks, nuns and laymen.[146] No actual cases involving these offenses were found during the course of research at the time of writing of this report.

2. Significant Changes in State Enforcement

In general, there have been no significant recent changes in the enforcement of laws and policies related to religion and belief in the country. The US Department of State International Religious Freedom Reports from 2008 to 2009 consistently said that the Constitution and other laws and policies protect religious freedom and the government generally respected religious freedom. The recent Pew report showed fairly steady Government Restriction Index (GRI), listing Cambodia as having a "moderate" GRI of 2.4 (with the range of 6.6-10.00 representing "Very High" levels of restrictions):

PEW GOVERNMENT RESTRICTION INDEX[147]

Baseline year, ending June 2007	Previous year, ending December 2011	Latest year, ending December 2012
2.9	2.4	2.4

144 Constitutional Council, Decision No. 107/003/2009 CC.D of December 23, 2009.
145 This offence includes celebration of Buddhist ceremony without authorization, theft of object dedicated to Buddhism, and damaging religious premises or dedicated objects.
146 This provision penalises intentional violence or insults inflicted on Monks and nuns and or laymen.
147 Pew Research Center, Religious Hostilities Reach Six-Year High, 62.

H.E. Min Khin, Cambodia's Minister of Cults and Religions, said that the government has made great efforts to respect the religious beliefs of all of its inhabitants, including the Cham Muslim minority. "For students who respect Islam, we offer the right for them to wear either their school uniform or their religious clothes." Furthermore, the government allowed Cham Muslims to broadcast religious programmes on radio and television in their own language. During an interview by The Phnom Penh Post, Sos Kamry, grand mufti of the High Commission of Islamic Affairs of Cambodia, said he had never experienced any pressure from the government to curb Islamic practices and contrasted the country's stance with that of Singapore, which forbids mosques from using loudspeakers to broadcast the daily calls to prayer.[148]

In relation to the application of the law by the courts, in 2004, the Cambodian court sentenced Jemaah Islamiyah operative Riduan Isamuddin, or Hambali, and five others to life in prison for planning to bomb the US and British embassies in Phnom Penh. Three of the accused, including Riduan Isamuddin, were tried in absentia. The court's verdict was welcomed by officials of the US and British embassies, who praised the Cambodian government's effort to participate in the international fight against terrorist groups.[149]

Aside from this trial, the government also puts an effort to punish Buddhist Monks who violate Buddhist rules. For instance, a Monk was arrested, defrocked and sent to Banteay Meanchey Court for brutally torturing a 9-year-old pagoda boy under his tutelage over a period of several months.[150] Authorities also raided the pagoda of Thean Vuthy, a man who reportedly claimed to be the fifth reincarnation of Buddha. The Ministry of Cults and Religions seized religious items that were on sale, including photographs and videos, and explained that Thean Vuthy used religion to cheat people and broke the religious code when he sat on the throne and allowed people to pay him their respects.[151]

148 Sam Rith and Sebastian Strangio, "US hails respect for faith," *The Phnom Penh Post,* November 10, 2009. http://www.phnompenhpost.com/national/us-hails-respect-faith/ accessed 30 September 2014.

149 Lee Berthiaume, "Three Life Sentences Given in Terrorism Trial," *The Cambodia Daily,* 30 December 2004. http://www.cambodiadaily.com/archives/three-life-sentences-given-in-terrorism-trial-45044/ accessed 30 September 2014.

150 Ouch Sony and Hay Pisey, "Monk Is Defrocked for Torture of Pagoda Boy," *The Cambodia Daily*, July 3, 2014. http://www.cambodiadaily.com/news/monk-is-defrocked-for-torture-of-pagoda-boy-63079/ accessed 30 September 2014.

151 Sek Odom, "Man Claiming to Be Buddha Under Pressure to Explain Himself," *The Cambodia Daily,* 2 August 2014. http://www.cambodiadaily.com/news/man-claiming-to-be-buddha-under-pressure-to-explain-himself-65573/ accessed 15 September 2014.

3. Significant Changes in Religious Claims

There are no significant religious claims being made by non-state actors. However, there was a controversial discussion on whether Buddhist Monks shall be neutral or participate in activities to support political parties. Does the participation in demonstrations organised by a political party violate Buddhism?

The Cambodian Law on Political Parties allows religious followers to be members of any political party, but they cannot perform activities in support of or against any political party.[152] The result of the 2013 National Election has led to the division of Buddhist Monks into two groups, one that supports the ruling party and the other that supports the opposition. Each group alleged the other of violating rules of Buddhism and Cambodian laws. This situation highlights an area that could produce religious disputes among Buddhists.

4. Significant Events of State Persecution of Religious Groups

Reports currently note that the present government generally respected religious freedom. However, there are allegations that crimes against religious freedom were committed during the Khmer Rouge Regime from 1975-1979. Accounts say that pagodas were destroyed, Buddhist Monks and nuns were disrobed, and some Monks were threatened or killed if they did not follow and put their faith in *Angkar* rather than in religion.[153] With respect to the Cham Muslims, some testimonies attest that the Khmer Rouge prohibited the Cham from practising their religion and imprisoned or killed Cham religious leaders and elders.[154]

In recent years, some Buddhist Monks have become involved in political activities and/or human rights advocacy, and there have been instances when the government restricted their rights. In 2009, the Khmer Kampuchea Krom Human Rights Association indicated in a stakeholders' submission to the Universal Periodic Review process that the authorities "crack[ed] down on Khmer Krom Buddhist Monks whenever they demonstrated to promote human rights for the Khmer Kampuchea Krom people."[155]

Related to this, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Representative of the Secretary-General on the situation of human rights defenders had written a communication to the government after they received information that, on 8 June 2007, the Ministry of Cults and Religion and the Buddhist patriarch Non Nget issued a directive forbidding all Monks

152 Article 15, Law on Political Parties, 1998 (Cambodia).

153 Office of the Co-Investigating Judges, Case File No.: 002/19-09-2007-ECCC-OCIJ, Closing Order, Paragraph 210.

154 Ibid, Paragraphs 211-212.

155 UN Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1 - Cambodia, 9 September 2009, A/HRC/WG.6/6/KHM/3, Paragraph 35. http://www.refworld.org/docid/4acc63f80.html , accessed 23 October 2014.

living in Cambodia from organizing or participating in any demonstration or strike or carrying out Buddhist marches that affect public order.[156] The decision also bars Monks from providing false information, which may affect Buddhist religion. The directive states that Monks who do not respect the instructions will be punished strictly in accordance with Buddhist norms and national law. The directive was reportedly adopted after Khmer Kampuchea Krom Monks carried out a series of peaceful demonstrations in Phnom Penh in February and April 2007 to advocate for the protection of the rights of the Khmer Krom, particularly in Vietnam, following the alleged defrocking and arrest of five Kampuchea Krom Monks in that country. The government did not respond to the communication.[157]

A more current example concerns Venerable Loun Sovath, the "multi-media Monk" who documented the struggle of land rights activists and ordinary citizens evicted from their homes in Cambodia.

> *"He has been detained several times, threatened by the authorities to be defrocked, and expelled from his monastery. He has received threatening phone calls, including death threats. On May 24th this year, he was arrested in front of Phnom Penh courthouse for demonstrating in support of the 13 women activists tried in the Boeung Kak Lake case. Authorities tried to force him to sign a document stating that he would no longer continue his advocacy efforts. He refused and was later released."*[158]

While it is important to note that motivation for such government actions appear to be political rather than religious, the Cambodian Center for Human Rights has said that the government should not restrict religious freedom, "including when such actions stem from a wish to restrict political or civil rather than religious rights".[159]

156 UN Human Rights Council, Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir: addendum: Summary of cases transmitted to Governments and replies received, 28 February 2008, A/HRC/7/10/Add.1, Paragraphs 11-12. http://www.igfm.de/fileadmin/igfm.de/pdf/UNO/UN-SBE-Religionsfreiheit-2008-1.pdf accessed 23 October 2014.

157 Ibid.

158 International Federation for Human Rights (FIDH), "Venerable Loun Sovath Awarded the 2012 Martin Ennals Award," *FIDH,* 4 October 2012. http://www.fidh.org/en/asia/cambodia/Venerable-Loun-Sovath-Awarded-the-12249 accessed 15 September 2014.

159 Cambodian Center for Human Rights, "Factsheet: Fundamental Freedoms Series: Freedom of Religion in Cambodia," *CCHR Fundamental Freedoms Series,* February 2012, 2. http://www.cchrcambodia.org/admin/media/factsheet/factsheet/english/2012_02_10_CCHR_Fundamental_Freedoms_Fact_Sheet%20_%20Freedom%20of_Religion(ENG).pdf accessed 15 September 2014.

5. Significant Events of Non-State Persecution of Religious Groups

The 2013 US Department of State report says that that "there are no reports of societal abuses or discrimination based on religious affiliation, belief, or practice".

The recent Pew report cites Cambodia as one of seven countries that registered a marked decrease in social hostilities, saying that "[i]n Cambodia, for instance, violent conflict over land surrounding the ancient Hindu temple of Preah Vihear occurred during the first half of 2011, but no violence was reported in 2012". Thus, Cambodia moved positively from an index of 1.5, which is classified as "moderate," to 0.6, a "low" index.

PEW SOCIAL HOSTILITIES INDEX[160]

Baseline year, ending June 2007	Previous year, ending December 2011	Latest year, ending December 2012
0.8	1.5	0.6

6. Significant Events of Inter-Religious persecution

While there are no reports of current interreligious disputes, some conflicts have occurred between Buddhist and Christian followers in the past. In July 2003, there was the first-ever outbreak of religious conflict between Buddhists and Christians in Svay Rieng Province. A mob of 200 persons demonstrated on a Christian place of worship, and around 20 protesters, some armed with hammers, took part in the destruction of the church. "The villagers were very angry over the drought. The villagers blamed the church on the lack of rain in that village for three years".[161] In 2004, a church in Prey Veng province was burned down by unknown arsonists.[162]

In 2006, a Buddhist mob destroyed an unfinished church in Kandal Province. "Hundreds of villagers chanted 'long live Buddhism' and 'down with Christianity' as around 20 people knocked down and burned an unfinished Christian church being built in their

160 Pew Research Center, Religious Hostilities Reach Six-Year High, 62.

161 Thet Sambath and Kevin Doyle, "Christian Church Ransacked in Svay Rieng Province," *The Cambodia Daily*, July 15, 2003.

162 Ethan Plaut and Pin Sisovann, "Some Buddhists See Danger in Christianity," *The Cambodia Daily,* 5 May 2006. http://www.cambodiadaily.com/archives/some-buddhists-see-danger-in-christianity-53992/ accessed 15 September 2014.

village on Friday".[163] Villagers had supposedly become angry that the Christian community was building a second church in a commune that had only one pagoda. Some villagers said the tension went beyond building permits and the concern was that Christians were converting people and "[s]o villagers worry that Buddhism will die, and [they] have to fight against Christianity".[164]

No reports of conflict between Buddhist followers with those of other external religions were found. Particularly with regard to the relations between Buddhists and Muslims, The Phnom Penh Post reported that, until now, relations have generally been harmonious, with Muslims and Buddhists living side by side in villages.[165]

7. Significant Events of Terrorism and/or Terrorist Threats

Neither the government nor non-governmental organisations have linked domestic disputes to terrorist groups. However, in 2003, there were arrests and deportations of foreign Muslim teachers of Om Al Qura's schools, which highlighted the potential terrorist threat in Cambodia.[166] These events culminated in the conviction of Riduan Isamuddin, or Hambali, and five others, who were suspected of planning to bomb the US and British embassies in Phnom Penh.[167] Additionally, in 2011, the court sentenced two Bangladeshi men and a Nepalese man under the Anti-Terrorism Law.[168] The accused were suspected of sending letters to the US, British and Australian embassies which claimed that al-Qaida-linked terrorists in Phnom Penh intended to bomb the embassies.[169]

Muslim leaders in Cambodia nonetheless agree that there are no extremist movements in Cambodia. Responding to a 2014 video, "There's No Life Without Jihad," in which fighters affiliated with the Islamic State of Iraq and the Levant (ISIL) claimed that they have "brothers" from Cambodia, Kamaruddin Yusof (also referred to as Sos Kamry), the

163 Pin Sisovann and Ethan Plaut, "Buddhist Mob Razes Unfinished Christian Church," *The Cambodia Daily,* 2 May 2006. http://www.cambodiadaily.com/archives/buddhist-mob-razes-unfinished-christian-church-53905/ accessed 15 September 2014.

164 Ethan Plaut and Pin Sisovann, "No Arrests Planned in Attack on Christian Building," *The Cambodia Daily,* 3 May 2006. http://www.cambodiadaily.com/archives/no-arrests-planned-in-attack-on-christian-building-53924/ accessed 15 September 2014.

165 Bjørn Blengsli, "Trends in the Islamic Community," *The Phnom Penh Post,* June 6, 2003. http://www.phnompenhpost.com/national/trends-islamic-community accessed 15 September 2014.

166 Ibid.

167 Lee Berthiaume, "Three Life Sentences Given in Terrorism Trial," *The Cambodia Daily,* 30 December 2004. http://www.cambodiadaily.com/archives/three-life-sentences-given-in-terrorism-trial-45044/ accessed 30 September 2014.

168 Alma Mistry, "Cambodia terror trial sentences criticised," *ABC News,* 18 February 2011. http://www.abc.net.au/news/2011-02-18/cambodia-terror-trial-sentences-criticised/1949024 accessed 30 September 2014.

169 Khy Sovuthy, "Terrorism Trial of Nepalese Man And Two Bangladeshis Begins," *The Cambodia Daily,* 12 January 2011. http://www.cambodiadaily.com/archives/terrorism-trial-of-nepalese-man-and-two-bangladeshis-begins-65018/ accessed 30 September 2014.

grand mufti of Cambodia commented that "[t]here is no relationship between Cambodian Muslims and those in the Middle East. In Cambodia, we don't have extremists". Ahmad Yahya, president of the Cambodian Muslim Community Development Organisation said: "This is strange information for me. In the past, our people were never involved with any fighting. We know ourselves; we don't do that".[170]

8. Significant Cross-Border Incidents

Currently there is no cross-border religious dispute between Cambodia and its neighbouring countries, Laos, Thailand and Vietnam.

Parenthetically, Cambodia recently was in a territorial conflict with Thailand over an area that contained a Hindu temple. In April 2011, Cambodia had requested the International Court of Justice to interpret a 1962 ICJ Judgment. Cambodia argued that while Thailand recognised Cambodia's sovereignty over the temple itself, it did not appear to recognize the sovereignty of Cambodia over the vicinity of the temple. On 11 November 2013, the ICJ ruled that Cambodia has sovereignty over the whole territory of the Preah Vihear temple, and that Thailand is obligated to withdraw its military personnel from the area.[171]

9. Governmental Response

The Cambodian government has adopted a harmonious religious policy to promote peaceful relations among religious groups. Under Phase III of the Rectangular Strategy, the Cambodian government is set to promote the role of religion in education, especially Buddhism which is the state religion, to contribute to inculcating ethical, moral and behavioural values in students and ensuring harmony in Cambodian society.[172]

In his public speeches from 2000 till 2014, Prime Minister Hun Sen has addressed the issue of religious harmony and encouraged all religious believers to love each other and work together despite their different beliefs.[173] Muslims have been appointed as high-ranking officers in the Ministry of Cults and Religions and some sit in the National Assembly. Aside from the Constitution and relevant laws adopted and put into practice, the Ministry of Cults and Religions has encouraged all religious groups to work with the state to promote awareness on HIV/AIDS[174] and to protect the rights of the child.

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170 Alice Cuddy, "Cambodian jihadists among us: ISIS video," *The Phnom Penh Post,* 23 June 2014. http://www.phnompenhpost.com/national/cambodian-jihadists-among-us-isis-video accessed 30 September 2014.

171 "UN court rules for Cambodia in Preah Vihear temple dispute with Thailand," *UN News Centre*, 11 November 2013. http://www.un.org/apps/news/story.asp?NewsID=46461&Cr=court+of+justice&Cr1=#.VCt9hSmSw01 accessed 1 October 2014.

172 Royal Government of Cambodia, Rectangular Strategy Phase III, September 2013, Paragraph 119.6.

173 *Cambodia New Vision* from 2000-2014 (Issues 25-193), available at: http://www.cnv.org.kh/.

174 Article 10, Law on HIV/AIDs, 2002, (Cambodia).

According to Prime Minister Hun Sen, the political platform of the ruling party covers all religions. He called religion the drug of the believer.[175] In 2004, Prime Minister Hun Sen made a public speech during the inauguration of the Buddhist Assembly Building in Kampong Cham Province and said:

> *"[F]or us religion cannot be a barrier to solidarity between people and people at all. Religions – Buddhism, Christianity or Islam -- instruct people to believe and to act in good faith. It is in this sense that we will not let the different beliefs be a hindrance to our march for development."*[176]

In conclusion, the Cambodian government has consistently and publicly affirmed its respect for religious freedom in the country.

10. Developments in Advancing Religious Freedom, Dialogue, and Conflict Mediation

As described above, religious freedom in Cambodia has developed positively. Religious groups can work and live together under a harmonious religious policy of the government. Religious disputes are mediated and settled by the Ministry of Cults and Religions and the Therak Saphea.

There are also some organizations that advocate understanding and non-violence among persons of different faiths, such as the Cambodian Inter-Religious Council, which was formed in October 2002 with the aim of addressing issues related to Cambodia's development, including education, democracy and human rights. The Council is comprised of leaders of Buddhist, Muslim and Christian communities.[177]

11. Analysing the trends

Although Buddhism is the state religion and has a very strong influence in the country, the Constitution guarantees freedom of religion and belief, and the Cambodian government adopts a harmonious religious policy. Christian followers are gradually increasing. The growing influence of Christianity in Cambodia has resulted from international religious organisations that operate in Cambodia in various sectors and in different parts of the country. In addition to Christianity, the number of followers in other religions could in the future increase as well, considering the various humanitarian services and investments coming into the country. Thus, a long-term strategy and approach for managing

175 *Cambodia New Vision,* Issue 182, April 2013, 1.
176 *Cambodia New Vision,* Issue 82, November 2004, 8.
177 Kuch Naren, " Religious Leaders Call for Peaceful Elections," *The Cambodia Daily,* 9 July 2003. http://www.cambodiadaily.com/archives/religious-leaders-call-for-peaceful-elections-38691/ accessed 30 September 2014.

the various religions and beliefs within the framework of the international human rights instruments Cambodia is a party to may become necessary to maintain the identity of Cambodia and prevent religious conflicts.

VII. Contributing Factors and Surrounding Circumstances

1. Negative Contributing Factors

Despite the government policy on religious harmony, there are a few negative factors that may contribute to religious conflicts and violence in the future. One contributing factor is how some Buddhist followers see the presence of external religions (Christianity, Islam and other religions) as a threat to their identity and to traditional Buddhism in Cambodian society. For instance, as mentioned earlier, there were attacks on Christian churches in 2003, 2004, and 2006.

The second negative factor affecting the practice of freedom religion is the tendency for politics to at times be intertwined with religion, such as when politicians use religion as a tool to gain votes from religious groups and consequently dividing society and prompting disputes.

Additionally, in the past few years, more Monks have become involved in politics. Currently, Monks also play an active role in demonstrations to demand for higher wages for workers in the garment industries.[178] Most of the demonstrations have turned violent. An example is the riot that took place on the day of the Cambodian General Election in 2013, when concerns over ballot fraud and names being left off the vote list arose.[179] The riot took place at the polling station next to Stung Meanchey Pagoda and the scene descended into anarchy when a man allegedly attacked a Monk who was among the protesters.[180] The teachings of Buddha prohibit lay people from getting involved in politics and in power-seeking.[181] The relation between Buddhism and politics, as well as the position for the state to take in this regard in order to balance the interests of public order, national security and freedom of religion and belief, would thus be a good subject for further study.

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178 May Titthara & Sean Teehan, "Strike violence erupts," *The Phnom Penh Post*, 3 January 2014. http://www.phnompenhpost.com/national/strike-violence-erupts accessed 22 May 2014.

179 Daniel de Carteret, "Angry voters riot in Stung Meanchey," *The Phnom Penh Post*, 28 July 2013. http://www.phnompenhpost.com/national/angry-voters-riot-stung-meanchey accessed 22 May 2014

180 Hul Reaksmey & Dene-Hern Chen, "Phnom Penh Chief Monk Visits Scene of Election Violence," *The Cambodia Daily*, 31 July 2013. http://www.cambodiadaily.com/elections/phnom-penhs-chief-monk-visits-scene-of-election-violence-37661/ accessed 22 May 2014.

181 Monychenda Heng, "Buddhism and the Making of Democracy in Cambodia," *Cambosastra*, October 9, 2010. http://www.cambosastra.org/buddhism-and-the-making-of-democracy-in-cambodia/ accessed 20 May 2014.

2. Positive Contributing Factors

Cambodia explicitly acknowledges the role of religion in nation-building, thus it has incorporated religion in its motto, "Nation, Religion, King".[182] Prime Minister Hun Sen has said that religion contributes to development and peace of the whole society because, for instance, it teaches honesty, justice, and good deeds. For this reason, the Prime Minister said that the Royal Government has put efforts to encourage and support all religious followers in Cambodia to continue their practices, following the rule of their respective religious bibles "with mutual understanding and tolerance".[183]

As mentioned earlier, another factor that has been attributed to contribute to the peaceful relations among religions is that the teachings of the dominant religion, Buddhism, endorse tolerance.

VIII. Conclusion

In conclusion, freedom of religion is largely protected in Cambodia. People are free to adopt, change, and practice their belief, as well as form religious organizations or charitable or humanitarian foundations under the harmonious religious policy of the Cambodian government. Nonetheless, there have been occasions of disputes and/or acts of violence among religious followers.

To date, the Cambodian government and political parties have not exacerbated religious conflicts or tensions. Instead, the government protects religious freedom and redresses religious issues to maintain public order. However, this does not guarantee that Cambodia will not face any major religious tensions or violence in the future. Current religious transnational movements and trends, such as the recent Islamic State of Iraq and Levant video clip, illustrate a possible concern. Additionally, the reaction of some Cambodian people to Christian missionaries could indicate potential tensions. Thus, a review of the strategies in administering and managing the different groups, as well as responses to future disputes that may arise, might prove beneficial.

182 "Keynote Address at the Opening of International Conference on '2008 Dialogue in Inter-Religious Cooperation for Peace and Harmony in Phnom Penh,'" *Cambodia New Vision*, 03 April 2018. http://cnv.org.kh/en/?p=3238 accessed 22 May 2014.

183 Ibid.

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FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION: A COMPARATIVE PERSPECTIVE

Raymond LEOS

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FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION: A COMPARATIVE PERSPECTIVE

Raymond LEOS *

ABSTRACT

The principle of freedom of expression has a long history that predates modern international human rights instruments. Yet, despite it being generally considered as one of the linchpins of modern liberal democracy, freedom of expression is a fluid legal concept and its interpretation is often impacted by political, economic, social, historical, cultural and even technological forces.

I. Historical Overview

Concepts of tolerance for political and religious ideas have their roots in civilizations that have emerged throughout history. Around 2,500 years ago, ethical systems emerged in China, India and Greece. Religious tolerance also began to emerge in the Roman Empire around the 4th century AD and in the Islamic Empire in the 5th century AD.

In China, the philosopher Confucius taught that human institutions should respect what he called the "ideal society", which is based on respect for others and the individual's sense of duty towards the society. Confucius supported the idea of a strong central government authority, but he also believed that such authority must be "virtuous" and subject to principles of natural morality. Later interpretations of his teachings by the Chinese philosopher and Confucian scholar Mencius support the overthrow of a leader or king if he loses the "mandate of heaven" by taking unwise action.[1] In the Confucian view, the primary purpose of government is to protect human welfare. In one of his aphorisms, Confucius observed that: *"The wise man does not promote a person for what he says, but neither does he undervalue what is said because of the person who says it."*

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1 A.T. Nuyen, "The "Mandate of Heaven: Mencius and the Divine Command Theory of Political Legitimacy", Philosophy East and West, University of Hawaii Press (U.S.A.) Vol. 63, No. 2. April 2013.

As the contemporary Chinese legal scholar Gu Chunde notes:

> *From this we can see that Confucianism protects freedom of ideology and speech, allowing the independent existence of speech, whether it is right or wrong. It encourages people to criticize the government. The concept of religious tolerance is also inherent in Confucian teaching, and probably influenced European Enlightenment thinkers when the "Life and Works of Confucius" was widely circulated in Europe in 1687.*[2]

Similar ideas and practices can be found in the teachings of the Buddha (563-483 BC), particularly in the precepts of the Eightfold Path to relieve human suffering. These include: right understanding, right thought, right speech, right action, right livelihood, right effort, right mindfulness, and right concentration. "Right speech" involves avoiding falsehoods and idle chatter as well as using divisive or abusive speech. Several hundred years later, the Indian emperor Ashoka (273-232 BC), who adhered to Buddhist teachings, issued edicts promoting religious tolerance and Buddhist ideas of compassion and social justice. Ashoka believed that good could be achieved through different methods.

As for religious tolerance, Ashoka noted that:

> *All [religions] have as their root restraint in speech, that is, not praising one's own religion, or condemning the religion of others without good cause. If there is cause for criticism, it should be done in a mild way. But it is better to honor other religions for this reason: By so doing, one's own religion benefits, and so do other religions, while doing otherwise harms one's own religion and the religions of others. Whoever praises his own religion, due to excessive devotion, and condemns others with the thought 'Let me glorify my own religion,' only harms his own religion.*[3]

In Islamic teaching, notions of freedom of expression are also rooted in the concept of religious tolerance. This tolerance is specifically mentioned in the Charter of Medina in 622 AD, which formed the constitutional basis for the first Islamic state. Drafted by the prophet Mohammed in order to reconcile warring factions of Arabs and Jews, the Charter of Medina proclaimed that non-Muslims have the same political and cultural rights as Muslims, and that non-Muslims also have the right to autonomy and religious freedom. The concept of religious tolerance is also found in the Koran, which states: "Whosoever will, let him believe and whosoever will, let him disbelieve."[4]

2 Gu Chunde, "Confucian Human Rights Ideas and Their Influence in Modern Human Rights Thought", China Society for Human Rights Studies; available at http://www.humanrights.cn/zt/magazine/200402004827111009.htm.

3 See: The Edicts of King Ashoka, The Fourteen Rock Edicts, Edict 12; available at: http://www.cs.colostate.edu/~malaiya/ashoka.html.

4 Koran, Chapter 18, Verse 29.

In the classical Western tradition, notions of tolerance and freedom of speech were recognized in the ancient civilizations of Greece and Rome. The Greek philosopher Socrates (470-399 BC), an outspoken critic of Athenian society, was accused by the authorities of corrupting the youth of Athens by this teaching. He was given a choice by the authorities to either live in exile or die by drinking hemlock. He chose to die by drinking hemlock, and became one of history's most famous martyrs. Despite this, Socrates lived during a time when the ancient Greek civilization supported ideas of freedom and tolerance. During the "Golden Age" of the Athenian leader Pericles (443-429 BC), the right to unrestricted free speech *(parrhesia)*, was highly respected.

Later, during the early years of the Roman Empire, citizens were given some measure of civil political freedoms, including freedom of expression. Gradually these freedoms disappeared, particularly with the creation of a "censor office" and then later during the reign of Julius Caesar (47-44 BC) in which most domestic political rights were abolished. By contrast, in foreign affairs, Roman policy emphasized tolerance in the conquered territories, allowing local cultures and leaders to remain in place after conquest, and allowing tolerance for free expression (as long as the Roman authority was not questioned). However, this tolerance did not apply to early Christians, who were considered by Roman authorities to be a threat to the state. The persecution of Christians continued until the conversion of the Emperor Constantine to Christianity and the proclamation of the Edict of Milan in 313 AD which enshrined religious tolerance in the entire empire.

Concepts of liberty continued to develop during the Middle Ages in Europe. In the English speaking tradition, basic guarantees of liberty were enshrined in the Magna Carta (1215). Although this document recognized such fundamental rights as trial by jury and due process of law, it did not recognize concepts of religious freedom and tolerance for diverse views. For example, in 1275, just 60 years of the signing of the Magna Carta, the English Parliament prohibited "any slanderous News [...] or false news or tales where by discord or slander may grow between the King and the people."[5]

The watershed moment in the development of the concept of free expression came in 1450, with the invention of the printing press by the German printer Johannes Gutenberg. Before the invention of the printing press, a writing, once created, could only be copied by hand. Not only was this manual copying process time consuming, it was also prone to errors. Until the invention of the printing press, no organized censorship system existed on the European continent. Those entrusted with writing or reproducing books, pamphlets, or documents were mainly monks or others associated with the Roman Catholic Church.

5 See: Statute of Westminster of 1275, Chapter 34, Slanderous Reports Act.

The impact of the printing press on the zeitgeist of post-Middle Ages Europe was both immediate and profound. The printing process allowed for multiple exact copies of a work, which led to a rapid and widespread circulation of ideas and information. Fearing this and considering many of these new ideas to be heresies to religious doctrine, the Church quickly acted to impose censorship. At first, the attempt to censor was done indirectly through the use of licensing and regulation of printers (which later became the basis of copyright law). In 1501 Pope Alexander VI issued an edict prohibiting the unlicensed printing of books, while in 1559 the Church first published its "List of Prohibited Books" *(Index Expurgatoriu)*. The list, which was administered by the Roman Inquisition and eventually went through 300 editions, included books which contained ideas and opinions that the Church considered heretical.[6]

In the mid 17th century, the English writer John Milton was an active proponent of the principle of freedom of expression and the importance of dissent. In his book "Areopagitica", Milton argued that a person's right to freely express views was the most important freedom of all. He called for society and government to tolerate dissent, asking to "(g)ive me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

By the 18th century, the concept of freedom of speech or expression had become the subject of much discussion among philosophers, political theorists, and legal scholars. The English political economist and philosopher John Stuart Mill argued that allowing "human freedom" was a necessary prerequisite to scientific, legal and political development. And, according to Mill, "human freedom" cannot exist without free discussion of opinion. Mill's "On Liberty", published in 1859, is his seminal work on the topic. In the book, Mill argues that in the end truth always triumphs over falsity, and, therefore, free expression of ideas, whether they be true or false, should never be feared. Mill also argued that free discussion is necessary to prevent the "deep slumber of a decided opinion" and to force adherents of a particular viewpoint to actively, logically and effectively defend their opinions. Discussion and robust debate help bring about "the onwards march of truth", in which the truth is tested, reaffirmed and strengthened. In Mill's view, speech can only be suppressed in order to prevent harm from a "clear or direct threat" to the society. However, Mill did not believe that a negative economic or moral impact of a speech would constitute a "clear or direct threat".

Specific provisions referring to freedom of expression also began to be included in early human rights instruments. The English Bill of Rights (1689) provided for free speech in the halls of Parliament, while the French Declaration of the Rights of Man and of the Citizen (1789) recognized freedom of speech as a fundamental right.

6 Banned or censored books included those written by René Descartes, Giordano Bruno, Galileo, David Hume, John Locke, Jean-Jacques Rousseau and Voltaire. See: Anastasia Castill, *Banned Books: Censorship in Eighteenth-Century England*, GRIN Verlag, 2010; p. 12. ISBN 9783640716883.

Article 11 of the Declaration states:

> *The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.*

The First Amendment to the United States Constitution (1791), now commonly referred to as part of the U.S. "Bill of Rights", also recognized the freedoms of speech and assembly.

The post-World War II years of the mid 20th century saw the establishment of the United Nations and the creation of numerous fundamental human rights instruments. This was accompanied by a growing international consensus that the right to freedom of expression constituted a basic human right. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I), which proclaimed: "Freedom of information is a fundamental human right and [...] the touchstone of all the freedoms to which the United Nations is consecrated." Two years later, the General Assembly adopted the Universal Declaration of Human Rights (UDHR), a statement of fundamental human rights principles recognized by the United Nations. Although the UDHR is not directly binding on states, portions of it, including Article 19 are now generally regarded as part of customary international law.[7]

Article 19 of the UDHR states:

> *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.*

The International Covenant on Civil and Political Rights (ICCPR), unlike the UDHR, is a binding legal treaty with 167 state parties (including Cambodia). Article 19 of the ICCPR guarantees the freedom of expression and information, using language similar to 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.*

7 Gudmundur Alfredsson and Asbjorn Eide (eds.), The Universal Declaration of Human Rights: A Common Standard of Achievement, New York: Springer Publishers, 1999; p. 321.

International courts and human rights bodies have repeatedly cited the fundamental importance of freedom of expression and its standing as a basic human right. The UN Human Rights Committee has stated that: "The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification."[8]

II. Freedom of Expression Recognition: Some Comparisons

1. United States

In the United States, freedom of speech is not only guaranteed by the Constitution's First Amendment, but also by state constitutions and state and federal laws. The First Amendment's legal protections include some of the broadest protections provided by any nation in the world. It is also perhaps the most important and controversial principle of the American legal system and jurisprudence.

The First Amendment states:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

Although the wording of the Amendment expressly prohibits only the United States Congress from enacting laws that limit the freedom of speech, the United States Supreme Court has also extended this prohibition to state legislatures.[9]

2. European Union

In Europe, Article 10 of the European Convention on Human Rights (ECHR) entitles all citizens to free expression. Similar to the language of the UDHR, the article provides that:

> *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

8 Report of the Human Rights Committee, Vol. 1, Sessions 85-87, Case 1009 /2001 Shchetko vs. Belarus, United Nations General Assembly; p. 100.

9 Gitlow v. New York, 268 U.S. 652(1925).

3. United Kingdom

United Kingdom citizens have rights to freedom of expression under the common law. Under the Human Rights Act, enacted in 1998, the U.K incorporated the European Convention on Human Rights into domestic law, including the guarantees contained in the ECHR's Article 10.[10]

4. Germany

In Germany, freedom of expression is granted by Article 5 of the Basic Law for the Federal Republic of Germany, which includes a specific prohibition on censorship. However, the Basic Law also states that freedom of expression is not unlimited, and may in some cases be restricted by law.[11]

5. France

French law on freedom of expression is guided by the principles set forth in Article 11 of the Declaration of the Rights of Man and of the Citizen. France also adheres to the European Convention on Human Rights, including Article 10, and accepts the jurisdiction of the European Court of Human Rights on freedom of expression cases. French law also prohibits any use of preliminary government censorship (also known as prior restraint), and any censorship or free expression case must be litigated in the courts.[12]

6. Africa

In Africa, most constitutions include legal protections for freedom of speech. However, these rights are implemented inconsistently or not at all. South Africa is probably the most liberal in its protection of freedom of speech. This right is protected and limited by a section in the South African Bill of Rights, which comprises chapter 2 of the Constitution of the Republic of South Africa. In addition, in 2004 the African Commission on Human and People's Rights established the Office of a Special Rapporteur on Freedom of Expression and Access to Information, which would regularly report to the African Commission on issues related to compliance with free expression standards on the continent. This Rapporteur would also "make public interventions where violations of the right of freedom

10 See Human Rights Act 1998; available at http://www.legislation.gov.uk/ukpga/1998/42/contents.

11 Basic Law for the Federal Republic of Germany, Article 5 (1) and (2); available at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0030.

12 Press Law of 1881 (Law of 29 July 1881); available in French at http://archive.equal-jus.bispecialist.net/160/1/Loi_du_29_juillet_1881_fr.pdf.

of expression have been brought to his/her attention; keep a proper record of violations of the right of freedom of expression and publish this in his/her reports submitted to the African Commission."[13]

7. Latin America

Nearly all the national constitutions in Latin America recognize freedom of expression. During the Second Summit of the Americas in 1998, Heads of State attending the summit recognized the importance of the principle of freedom of expression, and supported the creation of an Office of Special Rapporteur for Free Expression. At the Third Summit of the Americas in 2001, the Heads of State officially ratified the mandate of the Office of the Special Rapporteur. The Special Rapporteur was given the general mandate to carry out activities for the protection and promotion of the right to freedom of thought and expression. This included investigation of possible freedom of expression restrictions in countries of the region and the publication of regular reports to the Inter American Commission on Human Rights (IACHR) and the Organization of American States (OAS).[14]

8. Asian Region

Several Asian countries provide formal legal guarantees of freedom of speech to their citizens. These are not, however, implemented in practice in some countries. Restrictions on freedom of speech are common and greatly vary among ASEAN nations. Overall, there is no clear correlation between legal and constitutional guarantees of freedom of speech and actual practices among Asian nations.

9. India

In India, the Constitution guarantees freedom of speech to every citizen. The Indian Supreme Court has affirmed this freedom in several landmark cases related to press freedom. The Court has ruled that Indian citizens are free to criticize politics, politicians, bureaucracy and policies. The nature and scope of these freedoms are similar to those recognized in the United States and Western European democracies.

13 See African Commission on Human and People's Rights; available at http://www.achpr.org/mechanisms/freedom-of-expression/.

14 See Organization of American States; available at http://www.oas.org/en/iachr/expression/index.asp.

10. Japan

In Japan, freedom of expression is guaranteed by Chapter III, Article 21 of the Japanese Constitution. Exceptions and/or limitations to this right are few, and a very broad diversity of opinion is generally tolerated by the media and governmental authorities, including political debate.

Article 21 states:

> *Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.*

11. China

China officially recognizes freedom of expression in Article 35 of the Constitution of the People's Republic of China. It proclaims that "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration." In fact, however, there is very strong government interference in the media, with many of the largest media organizations being run by the government. References to certain sensitive political topics or anything questioning the authority and legitimacy of the ruling Communist Party are censored or blocked on the internet.

12. South Korea

The Constitution of the Republic of Korea guarantees freedom of speech, press, petition and assembly for its nationals. However, demonstrations or speeches in favor of the North Korean regime or communism in general can be punished by the country's National Security. However, in recent years, prosecutions under the law have been rare. Under the Election Law, which takes effect just before election day, speech that either supports or criticizes a specific candidate or party, is prohibited.[15]

13. Cambodia

The current Cambodian Constitution provides a legal framework creating a specific hierarchy of law, starting with the Constitution as the supreme law, then international law and treaties ratified or acceded to (which would include the ICCPR and specifically Article

15 See OpenNet Initiative, Freedom of Expression, South Korea; available at https://opennet.net/research/profiles/south-korea.

19 protecting freedom of opinion and expression), and finally, domestic law.[16] Article 41 of the Constitution states that, "Khmer citizens shall have freedom of expression, press, publication and assembly". Article 37 also grants the right to strike and "to non-violent demonstration".

III. Limitations on Speech: Philosophical Underpinnings and Some Country Examples

Most societies and legal systems recognize that free expression is not an unlimited right, and can be subject to reasonable restrictions, particularly if it conflicts with other fundamental rights. These limitations follow either the "harm principle" advocated by John Stuart Mill or the modern "offense principle" proposed in 1985 by the American political and legal philosopher Joel Feinberg. Although Mill argued for a broad interpretation of freedom of speech, he conceded that sometimes limitations over human freedoms were occasionally necessary. With respect to these limitations, Mill wrote that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others".[17]

Feinberg on the other hand, proposed what he called "the offense principle" by arguing that some forms of expression can be prohibited by law because they are very offensive. However, Feinberg distinguished between merely offending or insulting someone and offensive speech causing specific harm, and that legal penalties should be higher for doing harm. Of course some people may be more sensitive to offensive speech than others, and Feinberg suggested that several factors should be considered when applying the offense principle. This could include the length and social value of the speech, whether it can be avoided by using other less offensive types of speech, the motives of the speaker, the number of people offended, and the general interest of the society at large.[18]

Defining harm and offense limitations to freedom of expression is often affected by a country's existing cultural and political environment. For instance, in Russia, the harm and offense principles have been used as a basis for Russia's anti-gay propaganda law, which restricts speech in support of gay rights issues. In Denmark in 2008, cartoonist Kurt Westergaard created a controversial cartoon of the Islamic prophet Muhammad wearing a bomb in his turban. Though his publication of the cartoon was protected under Danish law, Westergaard's drawing was met by strong condemnation and even violent reactions from many Muslim fundamentalists worldwide, including those in Western countries. Even many non-Muslims in Denmark objected to the cartoon.

16 As affirmed by the July 10, 2007 decision of the Constitutional Council.
17 See John Stuart Mill, On Liberty, Chapter 1, Introductory.
18 See Joel Feinberg, Offense to Others, New York: Oxford University Press, 1985.

1. Germany

In Germany, the press is regulated by both the national law of Germany and by each of the 16 States of Germany. The Criminal Code contains most of the important limitations on speech and on the press. For example, so-called "hate speech" can be punished under Section 130 if (1) it is directed against a specific group in the population and (2) in a manner "that is capable of disturbing the public peace". This would include racism and anti-Semitism. Other provisions include punishment for public denial of the Holocaust and the banning of certain political symbols and flags related to banned political organizations, such as the use of the swastika symbol associated with Nazism. With regards to the right of assembly, German law prohibits assemblies or demonstrations at public memorial sites and public gatherings of certain banned political movements or parties.

2. Cambodia

Although Article 41 of the Constitution recognizes the right of freedom of expression, it also states: "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." Over the past 20 years, no amendment has been enacted nor has there been any ruling from the country's Constitutional Council to clarify these restrictions.

The Penal Code, which came into force in 2010, contains provisions prohibiting defamation and public insult (Articles 305 and 307) which subjects the offender to criminal prosecution and punished by fines. Malicious defamation and incitement (Articles 311, 312, 495 and 496) can also subject the offender to possible imprisonment in addition to fines. Other relevant provisions in the Penal Code that can subject the offender to imprisonment include insult of public officials (Article 502), discrediting judicial decisions (Article 523) and false denunciation (Article 524). The Khmer Rouge Crimes Denial Law enacted in 2008 provides for fines and possible imprisonment for denying or for refusing to recognize crimes committed by the Khmer Rouge. In addition there is a Press Law which governs conduct of the press and provides separate penalties. With respect to regulating freedom of assembly, the Law on Peaceful Demonstrations was enacted in 2009. The law attempts to define the characteristics of a "peaceful" demonstration and includes a specific set of procedures for not notifying governmental authorities.

3. United States

Exceptions to freedom of expression are regarded as limitations on the U.S. Constitution's First Amendment. These exceptions have been developed in case law by the U.S. Supreme Court over the years, and are based on (1) the type of speech and expression and (2) the different contexts in which they can occur.

Speech that incites "imminent lawless action" is prohibited under the 1969 Supreme Court decision of **Brandenburg vs. Ohio**.[19] The Brandenburg case involved the prosecution and conviction of the leader of the Ku Klux Klan organization for leading a public demonstration, in which several speakers made racist and anti-Semitic speeches. In overturning the lower court conviction, the Court made the distinction between two kinds of violent speech, one that incites immediate violence, such as for example, "let's go right now and burn down this building" or "let's go right now and kill these people or destroy this property" and another kind of speech in which immediate violence is not encouraged. Although the defendant Brandenburg and the other Klan speakers spoke about seeking "revenge" or taking violent action some day, their words were not specific enough, and though the Supreme Court certainly did not agree with the racist speeches, it felt that they were protected by the First Amendment. However, in a subsequent decision the Supreme Court defined "inflammatory" speech or "fighting words" as those words that can cause injury to the victim, or could cause the hearer to immediately retaliate against the speaker or disturb the peace, and ruled that these words were not protected by the First Amendment.[20]

U.S. courts have also ruled that governments, subject to certain restrictions, may regulate the time, place, and manner of the speech, which is particularly relevant in cases of public assemblies or demonstrations. In a 1989 decision, the U.S. Supreme Court ruled that time, place and manner restrictions must satisfy the following:[21]

1. Be content neutral
2. Be narrow in scope
3. Serve a significant governmental interest
4. Leave open ample alternative channels for communication

Commercial speech, which is defined by U.S. courts as speech that "proposes a commercial transaction", (such as advertising) can be more easily restricted as opposed to other kinds of speech. In these types of cases, the Supreme Court has used a lesser standard of scrutiny when assessing commercial speech restriction. In the 1980 case of *Central*

19 Brandenburg v. Ohio, 395 US 444(1969).
20 Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
21 Ward v. Rock Against Racism, 491 U.S. 781 (1989).

Hudson Gas & Electric Corporation vs. Public Service Commission, the Supreme Court formulated a four-part test to determine the constitutionality of a restriction.[22] If this test is satisfied, the law will be upheld. The four step test is as follows:

1. The speech regulated is fraudulent, misleading, or proposes an illegal transaction; or
2. All of the following elements are present:
   a. The government's interest in regulating the speech is substantial;
   b. The restriction directly advances the government's interest; and
   c. The restriction is no more extensive than necessary to advance the government interest.

In cases related to national security and defense, the gathering and dissemination of national security information is subject to higher level of scrutiny by U.S. courts. Information related to "national defense", and particularly classified military information is normally protected from disclosure, even when harm to national security is not likely to be caused by its release. However, non-military information carries a lower level of scrutiny by courts. The government must prove that the disclosing party purposely intended to disclose the information or knew the potential harm caused by its release.[23]

IV. The Right of Access to Information: International and Legislative Developments

The right to access information held by public bodies is also referred to as 'freedom of information' or 'right to information', and has been recognized in international law as a fundamental human right. This right is now generally recognized as part of the fundamental right of freedom of expression, which includes the right to seek, receive, and impart information and ideas, as set forth by Article 19 of the Universal Declaration of Human Rights (UDHR):

> *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. (Emphasis added)*

22 Central Electric Gas & Electric Corp. vs. Public Service Commission (1980) 447 U.S. 567

23 See United States Congress, Congressional Research Service, "Protection of National Security Information", http://fas.org/sgp/crs/secrecy/RL33502.pdf; pp. 1-12.

Although the UDHR is not directly binding on states, portions of it, including Article 19, are now generally regarded as part of customary international law.[24] However, the ICCPR, which is a formally binding legal treaty endorsed by over 160 countries, including Cambodia, also guarantees the freedom of expression and information, using language similar to the UDHR.[25]

The growing consensus in the international community is that states have an obligation to enact access to information (A2I) laws. Since the mid-1990s, the United Nations Special Rapporteur on Freedom of Opinion and Expression has repeatedly called on nations to adopt and implement A2I legislation.

In 1997, the U.N. Special Rapporteur stated:

> *The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large […] is to be strongly checked.*[26]

The UN Commissioner on Human Rights then invited the Special Rapporteur to "develop further his commentary on the right to seek and receive information on his observations and recommendations arising from communications".[27]

In a 1998 report to the U.N., the Special Rapporteur clearly enunciated his position on the issue, arguing that the right to information includes the right to access government or state-held information:

> *[T]he right to seek, receive, and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems[…].*[28]

In 1999, the Special Rapporteur was joined by his two regional counterparts – the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe, and the Special Rapporteur on Freedom of Expression of the Organization of American States – in a Joint Declaration calling for legal recognition of the right to information access.

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24 Filartiga v Pena 630 F.2d 876 (1980) United States Court of Appeal, 2nd Circuit.

25 UN General Assembly Resolution 2200 (XXI), Dec. 15, 1966, entered into force, March 23, 1976; International Covenant for Civil and Political Rights (ICCPR), Article 19.

26 Report of the Special Rapporteur, "Promotion and Protection of the Right to Freedom of Opinion and Expression", February 9, 1997, U.N. Doc. E/CN. 4/1997/31.

27 United Nations Commission on Human Rights Resolution 1997/27 April 11, 1997.

28 Report of the Special Rapporteur, "Promotion and protection of the right to freedom of opinion and expression", Jan. 28, 1998, UN Doc. E/Cn.4/1998/40, para. 14.

Their call was reiterated in a 2004 Joint Declaration:

> *The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.*[29]

Access to information is also regarded as a key requirement for state parties to the 2005 U.N. Convention on Corruption (acceded to by Cambodia in September 2007). Article 13 of the Convention requires that states should "[ensure] that the public has effective access to information".[30]

The past two decades have seen the adoption of an increasing number of A2I laws worldwide. As of September 2014, exactly 100 nations had enacted national A2I laws or related administrative regulations, compared with just 13 in 1990.[31] Since the mid-1990s, A2I legislation or regulations have been enacted in Azerbaijan, Belize, Chile, Germany, Jamaica, Peru, South Africa, Trinidad and Tobago, the United Kingdom, as well as in most of the former Soviet satellite states of Central and Eastern Europe. Countries in the Asia Pacific regions include Australia, Bangladesh, China, Cook Islands, India, Indonesia, Japan, Kyrgyzstan, Mongolia, Nepal, New Zealand, Pakistan, South Korea, Taiwan, Tajikistan, Thailand, and Uzbekistan. These nations joined a number of other states which have enacted A2I laws, such as Sweden, France, the United States, Finland, the Netherlands, Australia, and Canada. Sweden's Freedom of the Press Act, which was passed in 1766, is generally thought to be the oldest A2I law in existence.[32] In Asia, national A2I legislation is also under current review in the Philippines, Vietnam, and Sri Lanka. Although there is currently no national A2I law in Malaysia, the two state governments Selangor and Penang have enacted local A2I laws.[33]

Following the example of these nations, a growing number of inter-governmental and international institutions, such as the European Union, UNDP, the World Bank, and the Asian Development Bank (ADB) have also adopted freedom of information policies.

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29 Joint Declaration adopted on December 6, 2004.

30 U.N. General Assembly Resolution 58/4, October 31, 2033, in force, December 14, 2005.

31 See: "93 Countries Have FOI Regimes, Most Experts Agree", Freedominfo.org Report, October 19, 2012; http://www.freedominfo.org/2012/10/93-countries-have-foi-regimes-most-tallies-agree/; Also see UNESCO note on Freedom of Information, http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/.
Paraguay became the 100th nation when it enacted its national access to information law on 18 September 2014. See: http://www.freedominfo.org/2014/09/reaching-100-foi-laws-movement-looks-future/.

32 See: "Wobbing Europe: World's Oldest Access Law Will Remain", http://www.wobbing.eu/news/worlds-oldest-access-law-will-remain.

33 See Freedominfo.org, November 28, 2011; www.freedominfo.org/2011/11/second-malaysian-state-approves-foi-legislation/ and April 1, 2011; http://www.freedominfo.org/2011/04/selangor-passes-foi-bill-first-in-malaysia/

1. Access to Information in Cambodia: A Brief Overview

Although there is currently no specific A2I law in Cambodia, the Royal Government of Cambodia (RGC), with the encouragement and support of donor countries, has recognized the need for a national access to information policy and legislative framework. In 2004, the Royal Government formally acknowledged the need for an A2I law, "in order to create transparent government, reduce corruption, and promote confidence in the government by the citizens of Cambodia".[34] A target was set (with donor approval) to develop a clear policy framework on access to information, which would lead to an eventual drafting and adoption of an applicable law.

After three years of public workshops and conferences involving government officials, members of civil society, local and international NGOs, as well as members of the general public, the Council of Ministers assigned the Ministry of National Assembly Senate Relations and Inspections (MoNASRI) to formulate a government Draft Policy Paper on Access to Information, which would precede the drafting of a national A2I law.

The Draft Policy Paper on Freedom of Information was completed in late August 2007. The Draft currently sits at the Ministry of National Assembly Senate Relations (MoNASRI). To date, it was not been forwarded to the Council of Ministers for review.

In December 2010, the opposition Sam Rainsy Party (SRP) submitted a Draft Law on Access to Information to the National Assembly. The proposed law, which was drafted in consultation with the London-based international NGO Article 19, requires that any exemptions to disclosure must meet a public interest test (Article 40), and includes provisions on proactive disclosure (Articles 6 to 16), detailed provisions on the institutional framework to support the right to information (Articles 41 to 67), and the protection of whistleblowers (Articles 68 to 69). There are also provisions regarding the creation of an independent oversight body (Chapters Six and Seven) and an Information Disclosure Tribunal (Chapter Eight). Later, in March 2012, opposition party parliamentarian Son Chhay sent an amended version of the Draft Freedom of Information Law to the National Assembly. Also during March, 2012, legal consultants with the Advocacy and Policy Institute drafted their own version of an A2I law. This draft was discussed and considered in meetings with the Cambodia A2I Civil Society Working Group later that year.

In May 2013, the Embassy of Sweden, in conjunction with the UNESCO, sponsored a "National Conference on Access to Information" which included the participation of civil society groups, government officials, local authorities, and legal experts. Then in Novem-

34 Access to Information: A Clear Policy Framework for Cambodia", July 22, 2007, Draft Policy submitted to Ministry of National Assembly and Senate Relations (MoNASRI), Royal Government of Cambodia; p. 7.

ber 2013 Prime Minister Hun Sen expressed the government's commitment to have a Law on Access to Information adopted in his new mandate. The Ministry of Information was tasked with leading efforts to develop a draft law with assistance from donor countries.

On May 30, 2014, UNESCO signed an agreement with the Ministry of Information and Swedish International Development Agency (SIDA) to cooperate on a 3 year, 1 million USD project, which would lead to the drafting of a national access to information law. In addition to the law drafting, the project would develop dialogues with state and civil society groups, as well as the general public. However the project as yet contains no provision for promoting dialogue or consultations with the private sector, particularly the foreign business/investment community.

V. Freedom of Expression and the Internet

Issues related to freedom of expression have also emerged in situations involving state censorship, monitoring and surveillance of the internet. According to the Paris based organization Reporters without Borders, some of the states currently engaging in extensive internet censorship include China, Cuba, Iran, Myanmar, North Korea, Saudi Arabia and Vietnam.[35]

Currently, the most widely debated form of internet censorship is the so-called "Great Firewall of China", a nationwide network firewall block to certain online material from being accessed by users. This internet censorship is based on both Chinese law and administrative regulations. Over 60 laws and administrative regulations have been enacted by the central Chinese government, and these regulations are implemented by provincial branches of state-owned internet service providers (ISP), private companies, and non-profit community organizations.[36]

The debate over internet censorship includes not only issues of political speech or criticisms of governments, but also so-called internet "hate speech". In 2013, Najat Vallaud-Bekacem, the French government's Minister of Woman's Rights, proposed that the government forces Twitter, the popular social media platform, to block out hate speech

35 See "Enemies of the Internet 2014: entities at the heart of censorship and surveillance", Reporters Without Borders, 2014 report; available at http://12mars.rsf.org/2014-en/.

36 Human Rights Watch, "How Censorship Works in China: A Brief Overview"; available at http://www.hrw.org/reports/2006/china0806/3.htm.

that is illegal under French law (such as racist or homophobic public comments, speeches, or statements). Needless to say, her comments provoked a strong response from some civil libertarians.[37]

1. Cambodia and the Internet

Compared to many of its regional neighbors, Cambodia, at least at present, enjoys more internet freedom with respect to government censorship and restrictions.[38] However, in some instances, politically sensitive blogs and websites have been blocked by some internet service providers. Officially, there is no government restriction on internet access and there is no national firewall, like in China. Despite this, several civil society organizations have recently expressed concern about possible internet restrictions being implemented by the government in the future. In 2012, the Cambodian government published two circulars, which required internet cafes to install surveillance cameras and restrict their operations to certain locations. It also specifically banned these cafes from operating near schools.[39]

Also in 2012, the government announced that it was drafting a cybercrime law, with the purpose to stop "online crimes" in order to "protect formal, private and copy-righted data from hacking, or the destruction of users' formal data, especially banks and related institutions."[40] In April 2014, the London-based freedom of expression NGO Article 19, obtained and then leaked a copy of a purported draft cybercrime law, which contained several provisions that elicited grave concern among civil society and freedom of expression experts.[41]

37 See: "The French Lurch Towards Social Media Censorship," Eanmanmallie.com, January 14, 2013; available at http://eamonnmallie.com/2013/01/the-french-lurch-towards-social-media-censorship/. See also: "French censorship demands to Twitter are more dangerous than hate speech", The Guardian, January 2, 2013; available at http://www.theguardian.com/commentisfree/2013/jan/02/free-speech-twitter-france.

38 Freedom House Report on Freedom on the Net, 2013; available at http://www.freedomhouse.org/report/freedom-net/2013/cambodia#.VEi-3FdRxdg.

39 Ibid.

40 "As the Internet Raises Civic Voices in Cambodia, a Struggle Brews over Net Control", Techpresident, March 27, 2013; available at http://techpresident.com/news/wegov/23659/internet-civic-voices-cambodia-struggle-net-control.

41 "Information Expert Breaks Down Cambodia's 'Cybercrime' Law," VOA News, July 18, 2014; available at http://www.voacambodia.com/content/information-expert-breaks-down-cambodia-cybercrime-law/1960021.html.
See also: "Cybercrime Law's Status Uncertain", Phnom Penh Post, October 20, 2014; available at http://www.phnompenhpost.com/national/cybercrime-law%E2%80%99s-status-uncertain.

VI. Conclusion

The philosophical and legal bases of freedom of expression as a human right predate modern international human rights instruments. However, we see that they are fluid concepts shaped by diverse factors. Today, most legal systems recognize freedom of expression as a fundamental legal right. However, there is confusion and often strong disagreement among these legal systems as to what this right specifically entails, as well as the extent to which government may limit or protect it.

As we have seen in the historical development of human rights law, concepts of human rights are never static but instead are subject to the dynamism inherent in a potpourri of forces – be they political, economic, social, historical, cultural, or even technological. This is especially true in this era of globalization and the information age, in which this dynamism has been facilitated in large part by the explosive growth of the internet. Through an ever increasing array of digital media platforms, more information than ever before is now available to be accessed and disseminated across the globe, reaching billions of people. How governments and legal systems respond to these developments will have profound implications, and will also present challenges to legal experts for many years to come.

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FUNDAMENTAL RIGHTS IN CAMBODIAN CRIMINAL LAW

Jeudy OEUNG & Sophary NOY

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FUNDAMENTAL RIGHTS IN CAMBODIAN CRIMINAL LAW

Jeudy OEUNG * *& Sophary NOY* **

ABSTRACT

The Cambodian legal system has evolved over time, from the ancient Asian model of community-based, non-adversarial dispute resolution and conciliation to a more modern legal system, influenced by the French civil law tradition. The Paris Peace Agreement was signed in 1991 to end the protracted civil war among several Cambodian factions, resulting in a general election organized in 1993 by the United Nations Transitional Authority in Cambodia (UNTAC). The election's outcome created a new window of opportunity for Cambodia, which had been through many years of internal conflict and destruction, and resulted in the drafting of a new Constitution in which a constitutional monarchy, the principle of liberal pluralism within a democracy, human rights and the separation of powers are clearly established.

A new Constitution adopted by the Constituent Assembly, formed by Members of Parliament, opened a new chapter in Cambodian history by incorporating key elements of democracy, human rights and the rule of law. New criminal laws were created, namely, the Code of Criminal Procedure and the Penal Code adopted in 2007 and in 2009 respec-

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The co-authors write this paper in their personal capacity and the views expressed herein are of the authors and do not necessarily reflect their respective institutions.

tively, by the Cambodian Parliament to replace the 1992 UNTAC Codes.[1] A large number of key human rights principles have been incorporated into these Codes. However, as a transitional society, Cambodia has inevitably faced a number of challenges and limitations in implementing and enforcing these new criminal laws as well as ensuring rights to fair trial. These include a lack of resources, judicial independence and genuine political will as well as limited capacity in the application of the Codes. Despite these challenges and limitations, Cambodia currently has more opportunities for improved protection of basic human rights through a number of means, not the least of which is the ongoing capacity-building occurring in the Extraordinary Chambers in the Courts of Cambodia (ECCC) as well as in-depth judicial and legal reforms that can be drawn from the best practices of the ECCC and transferred to local practice.

Arguably, Cambodia has already built a good foundation for its criminal legal system, which is a key element of the rule of law, with ongoing international technical assistance and legislative reforms. Nevertheless, there is a need to ensure that political will and support, especially of the Cambodian government and the political parties, are maintained, so that the constitutional rights of Cambodians are respected.

I. Introduction

A criminal justice system in a democratic society adhering to the rule of law has to balance different and sometimes conflicting interests: 1. The legitimate interest of the state in the observance of the laws, the fight against crime and the maintenance of national security; 2. The interests of the victims of crime and abuse; and 3. The rights of the accused as well as the rights of the convicted and sentenced offender. International human rights law acknowledges the need to balance state power and individual liberties and sets out the minimum guarantees that states must observe throughout their criminal justice processes.[2]

This article will first provide a brief summary of the development of the Cambodian legal system since French colonialism, whose civil law tradition has greatly influenced the Cambodian system. We will also discuss the fundamental rights contained in criminal law, which are essential if Cambodia is to strive for the rule of law. The examination of these rights in the Cambodian legal system is important not just because they mirror the rights stipulated in the Constitution and the international human rights treaties that Cambodia has ratified, but to identify and correct gaps in the criminal law in practice.

1 Prior to the adoption of these two Codes, Cambodian criminal law was based on the 1992 UNTAC Criminal Law and the 1993 Criminal Procedure Law, which contained a limited number of crimes and procedures, until the new, more comprehensive criminal codes came into force.

2 Prof. Dr. Manfred Nowark, United Nations Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment, at Asia-Europe Meeting on: "*Human Rights in Criminal Justice System*", February 2009, France.

The main questions that this chapter seeks to address are: 1. Does Cambodian criminal law provide adequate procedural and substantive rights to citizens?; 2. How are these rights contained in the criminal law?; 3. To what extent does the application of criminal law affect these rights in practice?

II. Context and Development of Cambodian Criminal Law

The discussion of the Cambodian criminal law system cannot be properly understood outside of the context of Cambodia's political history and regime changes. The Cambodian legal system derives from the ancient Asian model of community-based non-adversarial dispute resolution through conciliation.[3] The French, after arriving in Cambodia in 1863, imposed a French-style formal legislative and judicial system on the pre-existing Khmer conciliation-based system. Despite their influence on the Cambodian legal system, only the French and other foreigners were subject to French laws. Indigenous Cambodian laws continued to be applied in cases involving Cambodians until 1915 when the French substituted a court system modelled after France's for the existing Cambodian judiciary. The French replaced indigenous Cambodian laws five years later with French laws and the French legal system. In 1920, the French created a provincial court of first instance and a court of appeal on the basis of Cambodian law. A supreme court was also established in the following year. The formal French criminal law system[4] was introduced and based on the fundamental principle that every citizen should know the potential legal consequences of their actions with a reasonable degree of certainty.[5]

After independence from France in 1953, the Cambodian legal system has continued to reflect its French civil law roots. A Cambodian Penal Code was promulgated in 1956 and a Code of Criminal Procedure in 1964. Both were in force in Cambodia when the

3 Dolores, A. Donovan: "*Cambodia: Building a Legal System from Scratch,*" (Journal of International Lawyer, 1993), p. 446. The word "conciliation" in this chapter is the English translation of the French word "reconcilier", used by French-speaking Khmer to describe the form of alternative dispute resolution characteristic of Khmer society. English-speaking Khmer use the English words "conciliation" and "to reconcile" to describe the Khmer form of alternative dispute resolution. The Khmer word for the process by which a person in authority resolves a dispute is, phonetically rendered in Latin script as: "kar phsas phsar".

4 For key concepts concerning the French criminal law, see Catherine, Elliott: French Criminal Law, (Willan Publishing, 2001).

5 Marie, Montesano: Current International Efforts in Cambodia: Developing a Court System to Protect Human Rights, (Journal of Law and Social Challenges, Volume 11, 2009), p. 77.

Khmer Rouge took control of Cambodia.[6] The first Constitution of Cambodia was adopted by the National Assembly and assented to by the King on 6 May 1947 and remained in force until the end of the Sihanouk regime in 1970. That Constitution contained provisions concerning the freedoms and rights of Cambodians. The Constitution also recognized key principles of criminal law, including the principles of the presumption of innocence, the prevention of torture, and a prohibition on the retroactive application of criminal law. That Constitution also provided for the separation of power into three branches: the executive, the legislative and the judicial.[7]

In March 1970, Prince Sihanouk was overthrown as the Head of State by a coup led by General Lon Nol. The National Assembly was convened immediately after the coup and voted to grant Lon Nol emergency powers as Prime Minister. He transformed the royalist regime into the "Khmer Republic", a constitutional, presidential regime which promised a lot, but did not offer better human rights protections than the previous regime. In May 1972, Lon Nol promulgated a new Constitution, which established a presidential regime and provided for a "modern European-style constitutional court empowered to rule on the constitutionality of laws." However, this provision did not protect the rights of individuals in practice.[8]

During their cruel reign from 1975 to 1979, the Khmer Rouge destroyed almost everything in the country, including the legal and judicial system remaining from the previous regimes. Schools, hospitals and libraries were shut down. Money and market exchange were abolished. Neither courts nor other state institutions were functional during this period. The fundamental rights of the people were seriously and regularly violated, with the end result being an estimated death toll of between 1.7 to 2 million people during the Khmer Rouge regime.[9]

After the collapse of the Khmer Rouge in 1979, a Vietnamese-backed government called the People's Republic of Kampuchea began to rebuild a formal legal and judicial system. Unfortunately, those efforts were hampered by lack of resources and by conflict between liberal reformers and those resistant to change. As a result of this lack of resources and conflicting ideas, Cambodia's legal system is, even today, the least developed aspect of its political and economic structure. On 23 October 1991, four Cambodian factions – the State of Cambodia, FUNCINPEC, the People's National Liberation Front (KPNLF) and the

6 ECCC Trial Chamber: "*Decision on Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes,*" 26 July 2010. The *1956 Penal Code* was discussed by the ECCC Trial Chamber judges with regard to the statute of limitations over the domestic crimes of murder, homicide and religious persecution provided by Article 3 *new* of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) 2004. The Chamber agreed that during the Khmer Rouge regime the judicial system was absent, but also that the Khmer Rouge had never nullified the 1956 Penal Code.

7 The 1947 Constitution of Cambodia.

8 Marie, p. 80.

9 For detailed information regarding the Khmer Rouge period, please see relevant publications by David Chandler, Ben Kiernan, Alex Hinton, Philip Short and others.

Khmer Rouge – agreed to sign the Paris Peace Agreements to put an end to the civil war in Cambodia with the assistance of the five permanent members of the United Nations Security Council.[10] The Paris Accords noted the need to restore the country's legitimacy and credibility and called for the establishment of a liberal, democratic political regime that includes a market economy, a multi-party political system, an independent judiciary and protection for basic individual human rights.[11] After the UN-brokered end to conflict in 1991, a United Nations mission was deployed to help Cambodia organize general elections in 1993 and to ensure that such elections were free and fair. During the transition period, UNTAC (the United Nations Transitional Authority in Cambodia) helped develop a Criminal Code and a Criminal Procedure Code to enforce provisions of the Paris Peace Agreements and attempted to re-establish the legal and judicial system that had been destroyed by the Communist Khmer Rouge regime.

The current Constitution of the Kingdom of Cambodia, which was crafted by the Cambodian Constituent Assembly that had been elected in the 1993 elections, also recognizes the need to promote the principle of separation of powers and clearly delineates three distinct branches of government: the legislative, the executive and the judicial.[12] With regard to the concept of human rights, the Constitution – the supreme law of the nation – clearly stipulates in Article 31 that:

> *"The Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations Charter, the Universal Declaration of Human Rights and all other treaties and conventions related to human rights, women's rights and children's rights. Khmer citizens are equal before the law, enjoying the same rights, liberties and duties regardless of race, color, sex, language, beliefs, religions, political tendencies, birth origin, social status, wealth or other situations. The exercise of personal rights and liberties by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and liberties shall be in accordance with the law."*

This chapter will look at current Cambodian criminal laws, which are in force and the product of previous criminal codes, in order to analyse certain key aspects of basic principles of human rights containing in these laws. Furthermore, since Cambodia recognizes and respects international human rights treaties and conventions, as clearly stated in the Constitution, relevant conventions, for example the International Covenant on Civil and Political Rights (ICCPR) to which Cambodia is a state party through ratification in 1992, they form part of Cambodian law. This interpretation of the Constitution is supported by

10 Dolores, p. 447.
11 Provision spelled out in the Paris Peace Agreement (1991).
12 Article 51 *new* of the Cambodian Constitution, available at: www.ccc.gov.kh/english/CONSTITUTIONEng.pdf.

the decision by the Constitutional Council of the Kingdom of Cambodia concerning the interpretation of the application of international human rights treaties in Cambodian law.[13] Therefore, the relevant provisions concerning fair trial rights contained in the Covenant are useful and will also be examined in this chapter.

III. Fundamental Rights in the Cambodian Code of Criminal Procedure

This section focuses on key fundamental principles regarding the due process of law and legality in Cambodian criminal law. We will discuss briefly the sources of the fundamental rights contained in the Cambodian Constitution, the ICCPR and the Code of Criminal Procedure (CCP). The CCP outlines the procedures for investigating and prosecuting crime in Cambodia as well as the rights of victims and those charged with offences. Adopted in 2009, the Penal Code sets out classes of offences, principles of criminal responsibility and sentencing, the territorial jurisdiction of the courts and numerous new offences. Both of these pieces of domestic legislation set out a number of procedural and substantive rights, aimed at ensuring fair trials, to be applied by judicial officials and legal practitioners in Cambodia.[14] The following fundamental rights will be discussed in this section: The right to a public hearing, the right to be presumed innocent, the right to be tried in front of an impartial and independent tribunal, the right to understand the nature of the charge and reason for detention, the right to a legal representation, the right to remain silent, the right to adequate time and facilities to prepare for defence, the right to have equality in presenting evidence, the right to not be tried twice for the same offence, the right to make a closing statement, the right to appeal, the right to a reasoned judgement, the right to participation as well as the right to reparations.

1. Due Process of Law and Principle of Legality

The principle of legality, also referred to as *nullum crimen sine lege* ("no crime without law"), holds that no one can be found guilty of a criminal offence for an act or omission that did not constitute a criminal offence at the time that the act or omission was com-

13 The Constitutional Council, Case N°131/003/2007 (June 26, 2007) and Decision N° 092/003/2007 CC.D (July 10, 2007), *"…Understands that at case trial, in principle, a judge shall not only rely on Article 8 of the Law on Aggravating Circumstances for felonies, but also relies on the law. The term "the Law" here refers to the national law including the Constitution, which is the supreme law and other applicable laws as well as the international conventions that Cambodia has recognized, especially the Convention on the Rights of the Child…."* See also: Phallack Kong, *Overview of Cambodian Legal and Judicial System and Recent Efforts at Legal and Judicial Reform*, in Peng Hor et al: *Introduction to Cambodian Law*, (Konrad-Adenauer Stiftung, Phnom Penh, 2012), p. 8.

14 Joint NGO Submission to the UN Universal Periodic Review of Cambodia's Human Rights Obligations on "*Fair Trial Rights and Due Process in the Cambodian Legal System"* (June 2013), p. 33.

mitted. It also mandates that a penalty heavier than the one applicable at the time of the alleged offence cannot be imposed. This principle is enshrined in Article 11(2) of the Universal Declaration of Human Rights (UDHR) and Article 15 of the ICCPR.

In any jurisdiction, the principle of fairness is critical to evaluating many aspects of a criminal trial. Fairness will never be achieved in circumstances where there is no "equality of arms" between the prosecution and defence in criminal proceedings. A lack of such equality is evident where, for example, expert witnesses are not neutral, but are effectively a member of the prosecutor's team, the defence does not have full access to the case file and the prosecution can make submissions at the court of first instance or on appeal to which the defence cannot respond.[15]

2. The Fair Trial Rights of a Person Accused of or Charged with a Crime

This section will discuss the fundamental rights of a person accused of or charged with a crime, who is one of the key actors in criminal proceedings. Under the Constitution and Cambodian law, the rights of the accused must be protected and respected by courts of law. Article 38 of the Constitution enshrines many of the rights of Khmer[16] citizens accused of crime, including the right to a fair trial. The CCP, adopted in 2007, provides in detail the due process of law for an accused person as well as sets out the roles and responsibilities of judges, prosecutors and defence attorneys from the initial stage until the final stage of a criminal proceeding. Furthermore, the Penal Code, in force since 2010, details the classes of offences, principles of criminal responsibility and principles of sentencing. In addition to these codes, the 2003 Strategy for Legal and Judicial Reform, which was adopted by the Council of Ministers of the Royal Government of Cambodia, identifies four main principles to guide legal and judicial reform: the rights of individuals, liberal democracy, separation of powers and the rule of law.[17]

a.) The Right to a Public Hearing

As stipulated in Article 316 of the CCP and Article 14(1) of the ICCPR, every accused person has the right to a public hearing, which is comprised of several elements: trials should be open to the public and conducted orally; information regarding the location of the venue and date of the hearing should be made available to the public; and it is

15 McBride, Jeremy, *Human Rights and Criminal Procedure: The Case Law of the European Court of Human Rights, Council of Europe Publishing* (2009), p. 14.

16 The word "Khmer" in this text refers to all people in Cambodia or "Cambodian citizens" without any distinction as to race or ethnicity.

17 Council for Legal and Judicial Reform produced a *Legal and Judicial Reform Strategy*. It was adopted by the Cambodian government at the plenary session on 20 June 2003.

important that adequate facilities for public attendance are provided.[18] In the event that a public hearing would cause significant danger to public order or morality, the courts have been granted discretion to conduct hearings completely or partially in camera.[19] This exception is often used in rape cases, where the victim requests a private hearing, or in cases involving child victims, witnesses or perpetrators. Otherwise, it is generally the case that hearings remain open and accessible to the public.

b.) The Right to Liberty and Trial Without Undue Delay

The right to liberty requires that any prosecution, arrest or detention of an individual be done in accordance with the law. The right to liberty is important because this right is related to the right to be presumed innocent. This right is guaranteed in both the Constitution and the CCP.[20] Articles 9(3) and 203 of the ICCPR establish a presumption against detention for those awaiting trial, indicating that such detention should only be required when necessary and in the exceptional circumstances outlined in Article 205 of the CCP. Furthermore, one of the reasons for upholding this right is to reduce the possibility of a miscarriage of justice by ensuring that innocent people who are charged with crimes are not subjected to prolonged periods of imprisonment for crimes they did not commit or they were not responsible for.

Despite the fact that both the CCP and ICCPR stipulate that accused persons are, in general, to remain at liberty, pre-trial detention and/or detention in police custody occurs in many, if not most, criminal cases. Judicial supervision by Cambodian courts remains an underutilized alternative to pre-trial detention, but it is only used occasionally for petty offences and misdemeanors. In principle, pre-trial detention can only be ordered, where one or more of the conditions outlined in Article 205 of the CCP are fulfilled. When asked for reasons for ordering pre-trial detention, judges often cite factors such as the case being complicated or that the accused was charged with a felony the primary reasons for such decisions. Nonetheless, such considerations do not fall within the conditions outlined in Article 205 and, as such, are insufficient reasons for ordering provisional detention. However, both the police and judiciary have, in recent years, improved this situation somewhat by ensuring that the duration of police custody or detention at least does not extend beyond the statutory limits outlined in the CCP.[21]

Notwithstanding this improvement, there remain reports of persons held in police custody or pre-trial detention for periods longer than those permitted by the law. In particular, such problems were noted in the provinces where investigating judges serve on rotation, which can result in significant delays in proceeding to a hearing of a case be-

18 United Nations Human Rights Committee, Communication No. 213/1986, *Van Meurs v The Netherlands*, para. 6.2.

19 See Article 316 of the CCP.

20 See Article 38 of the Constitution; Articles 203 and 205 of the CPC.

21 See Articles 208-214 of the CCP.

cause judges leave their province in the middle of an investigation. Further, once a case has proceeded to trial, there is no limit as to the number of times a case may be returned to an investigative judge by the court, contributing to detention periods extending beyond the statutory limits. In accordance with the provisions of the CCP, if a charged person is not brought to trial within the statutory period of four months, he or she must be automatically released.[22]

c.) The Right to Be Presumed Innocent

It is a fundamental principle of criminal justice that an accused person has the right to be presumed innocent until proven guilty. This right is applied throughout the period of criminal investigation and trial proceedings up to and including the exhaustion of the final appeal.[23] Article 38 of the Constitution provides that: "The accused shall be considered innocent until the court has judged finally on the case." Furthermore, the ICCPR also guarantees this right in Article 14(2), which provides that: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law." This presumption means that the burden of proof lies with the prosecution only, not the accused, and that the court must be satisfied that the evidence presented has proven the accused person's guilt beyond a reasonable doubt. Therefore, the accused is not required to present evidence to prove his or her innocence, though, of course the accused will introduce whatever exculpatory evidence he or she might possess in order to rebut the prosecution's charges.

d.) The Right to be Tried Before an Impartial and Independent Tribunal

Supporting and maintaining the independence of the judiciary has been a key goal of the legal and judicial reform measures pursued by the Cambodian government, as noted in the National Strategic Development Plan (NSDP).[24] The focus on and recognition of this goal is laudable and progress continues to be made in this direction. Article 38 of the Constitution recognizes that any individual has the right to his or her own "defence through the judicial system." Article 128 states that: "[t]he judicial power shall be an independent power" and that: "[t]he judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens." Moreover, Article 14(1) of the ICCPR, to which Cambodia is a state party, stipulates that: "In the determination of any criminal

22 See Article 249 of the CCP.

23 Office of the High Commissioner for Human Rights in Cambodia, *The Right to a Fair Trial Part I*, Chapter 6, p. 219.

24 NSDP is normally developed by the Cambodian Government. It combines all sectors and plans of actions to be achieved during the five year period 2014-2018. One of the targets set out in the NSDP is legal and judicial reform, which is meant to strengthen the rule of law and build trust in the Cambodian legal system in the eyes of the Cambodian public as well as the international community. The goal set forth in the legal and judicial reform section of the NSDP is "to establish a credible and stable legal and judicial sector in Cambodia."

charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." This is a fundamental right of all persons who are tried by a competent and independent court.

e.) The Right to Understand the Nature of the Charge and Reasons for Detention

Under Cambodian and international law, any persons charged with a crime have the right to understand the nature of the charge against them and, if they are detained, the reasons for the detention.[25] This right additionally imposes obligations on the state to provide interpreters or other forms of accommodation, if such measures are necessary in order to communicate with the accused. The provision of interpreters for those who speak a different language or are deaf varies according to location and court resources. While in urban centres, such as Phnom Penh, interpreters are generally readily available for an accused person who speaks Vietnamese, Chinese, or English or uses sign language, there are reports of trials in the provinces being delayed where an interpreter was needed but not available. Moreover, a lack of court resources means that the accused are sometimes required to find and pay for their own interpreter, despite the guarantee of free assistance provided in Article 14(3)(f) of the ICCPR. Accommodation services for the mentally ill or disabled are also lacking. While efforts are usually made to find a family member who can interpret for a mentally ill or disabled accused person, if no family member is found, no further efforts are made to ensure that the accused understands the charges against them or the reasons for their detention. Understanding the nature of the charge against him or her and the reasons for detention are essential for the accused to prepare an adequate defence.

f.) The Right to Legal Representation of a Charged or Accused Person

The right to legal representation for a charged or an accused person is constitutionally guaranteed in Cambodia.[26] A detainee may request to speak to a lawyer after 24 hours of being in police custody,[27] an initial appearance before the prosecution[28] and, in the event where the detainee is a minor or the accused has been charged with a felony, the assistance of a lawyer is mandatory.[29] Article 145 of CCP provides that any interrogation by an investigating judge must be made in the presence of the charged person's lawyer, except when the charged person waives his or her right to legal representation or when his or her lawyer cannot be present. Article 300 of the CCP further states that the accused

25 These rights can are enshrined in Articles 9(3), 14(3)(a) and 14(3)(f) of the ICCPR, and Articles 97, 322, 235, 330, and 331 of the CCP.
26 See Article 38 of the Constitution.
27 See Article 98 of the CCP.
28 See Article 48 of the CCP.
29 See Article 301 of the CCP.

must appear in person during the hearings at the court. The accused may be assisted by a lawyer chosen by himself or herself. He or she may also make a request to have a lawyer be appointed for him or her in accordance with the Law on the Bar Association.[30]

Given the complexity of legal procedures, when someone is charged with a criminal offence, it is critically important that individuals have the opportunity to retain legal representation as soon as possible. The right to be legally represented by a lawyer can ensure that the accused has an opportunity to obtain professional legal advice, including: an explanation regarding the nature of the charge(s) against him or her, an explanation of all other rights as well as guidance for him or her throughout the trial proceedings and representation of his or her interests in the courtroom. Furthermore, the right to legal representation is also closely linked with the right to confidential communication between a client and his or her defence lawyer. This means that all communications between the lawyer and the charged person must be treated as confidential and must not be recorded by others. The charged person who is in detention can freely communicate with his or her lawyer.[31]

g.) The Right to Remain Silent and the Right Not to Be Compelled to Confess Guilt

The right not to be compelled to confess guilt is guaranteed under Article 14(3) of the ICCPR and Article 38 of the Constitution. The constitutional provision protecting this right derived from the prohibition against torture and inhumane treatment outlined in the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment (CAT), to which Cambodia is a party. This prohibition means that the investigating or judicial authorities cannot use physical or psychological pressure to extract an admission of guilt from a suspect. If the judge finds any evidence presented during the trial of an accused person that indicates the suspect was tortured, then the judge must take this into account when determining what weight to give the evidence. It is also the duty of the defence lawyer to point out any evidence of torture to the court. The right of the accused not to be compelled to confess guilt is also linked with his or her right to remain silent during the interrogation stage as well as during the trial stage. This right is also guaranteed under the Constitution, the ICCPR[32] and the CCP.[33]

30 Article 29 of the Law on the Bar Association states that "…All lawyers are obliged to defend poor people according the same procedures and internal rules and in the same manner as the defense of their own clients." Furthermore, Rule 6 of the Internal Rules of the Bar Association provides that the President of the Bar will appoint a lawyer to represent a client who needs legal assistance and representation, acknowledging he or she is poor and cannot afford to pay the lawyer's fee.

31 See Article 145 of the CCP.

32 See Article 14(3)(g) of the ICCPCR: "*In the determination of any criminal charge against him, everyone shall be entitled not be compelled to testify against himself or to confess guilt.*"

33 See Article 143 of the CCP.

h.) The Right to Adequate Time and Facilities to Prepare a Defence

In order to ensure the proper administration of justice, it is important that any charged person or person accused of a crime has adequate time and facilities to prepare his or her defence against the prosecution. This is necessary to ensure fairness or an "equality of arms" between the accused and the prosecution. Under international and Cambodian law, an accused person is entitled to have adequate time and facilities to prepare a defence, preferably with the assistance of a lawyer.[34] The length of time that is considered "adequate" will mostly depend on the nature and the complexity of the charge, the number of charges and the evidence concerning the charge among other factors. It is commonly considered that the necessary facilities to prepare a defence will include access to the case file(s),[35] and the opportunity to examine (both inculpatory and exculpatory) evidence, so that the accused is fully aware of the charge(s) brought against him or her, and therefore, he or she will then be able to provide informed instructions or comments to his or her defence lawyer. In relation to access to the case file(s), this right also includes the accused's right to access the written judgments and the transcripts of the trial proceedings, so that he or she can prepare his or her case adequately. The right to adequate time and facilities to prepare a defence is enshrined in Article 14(3)(b) of the ICCPR[36] and Article 48, 98, 145, 259 and 319 of the CCP.

i.) The Right to an Equal Opportunity to Present Evidence (Evidentiary Right) and the Right to Confront Witnesses

In order to equitably adjudicate a case, all parties must have the opportunity to present evidence to the court to support their arguments. This includes the right to call and examine witnesses before the court, as well as the right to provide documentary evidence.[37] Article 14(3)(e) of the ICCPR states that:

> *"In the determination of any criminal charge against him, everyone shall be entitled to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."*

Article 326 of the CCP allows for the presiding judge of the court to listen to the statements of civil parties, victims, witnesses and experts in the order which he or she deems useful. Then, the prosecutor, lawyers and all the parties may be authorized by the presiding judge

34 See Article 14(3)(b) of the ICCPR and Articles 98 and 319 of the CCP.

35 See Article 259, 319 of the CCP.

36 See Article 14(3)(b) of the ICCPR: "*In the determination of any criminal charge against him, everyone shall be entitled to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choice*."

37 This right has informed Article 14(3)(e) of the ICCPR, and Articles 153, 298, 324, 326 and 334 of the CCP.

to ask questions. The accused also has the right to request investigative action, including the interrogation of a civil party or a confrontation with his or her accuser(s) or visit a site at any time during the investigation stage.[38] Moreover, during the investigative stage, the charged person has the right to present evidence to the investigative chamber as well.[39]

This right is important for all the parties to the proceedings, especially the accused, because all decisions by the court must be solely based upon the evidence presented during the trial proceedings. Therefore, it is crucial that each party has the opportunity to prepare their evidence and witnesses in order to present a well-supported case to the court. It is equally important that each party has the opportunity to cross-examine witnesses and to challenge evidence that he or she does not accept.[40] The Criminal Code contains a provision regarding a rule of evidence, but does not necessarily define the scope and type of evidence that should be legally admissible by the court. Article 321 of the CCP stipulates that: "Unless it is provided otherwise by law, in criminal cases, all evidence is admissible. The court has to consider the value of the evidence submitted for its examination, following the judge's intimate conviction. The judgment of the court may be based on evidence included in the case file or which has been presented at the hearing. A confession shall be considered by the court in the same manner as other evidence. Declaration[s] given under the physical or mental duress shall have no evidentiary value."

j.) Res Judicata or Double Jeopardy Principle

Res judicata also known as the *double jeopardy* principle is a principle that recognizes the right of a person to be legally protected from being tried for the same crime or action more than once. It provides that a final judgment of a court, be it acquittal or conviction of the accused, acts as a bar to any further prosecution for the same act. The prohibition against double jeopardy is stated in Article 14(7) of the ICCPR, Article 12 of CCP and Article 23 of the Penal Code. Article 12 of the CCP provides that: "In applying the principle of *res judicata*, any person who has been finally acquitted by a court judgment cannot be prosecuted once again for the same act, even if such act is subject to different legal qualification." Therefore, this is another fundamental right of the charged or accused person in criminal proceedings.

38 See Article 133 of the CCP.

39 See Article 260 of the CCP.

40 See also ECCC Internal Rule 87. This rule is similar to Article 321 in stating that, unless provided otherwise by law, all evidence is admissible. However, unlike Article 321, Internal Rule 87 specifies several reasons that a chamber may refuse to admit evidence, such as where it finds the material to be irrelevant or repetitious, impossible to obtain within a reasonable time, not suitable to prove the facts it purports to prove, not allowed under the law, intended to prolong proceeding or frivolous.

k.) The Right to Make A Closing Statement (applies to both the accused as well as civil parties)

The right to make a short closing statement at the conclusion of a hearing is allowed by judges for the accused, the civil party and their lawyers.[41] This right is important because it gives the opportunity to all parties to raise issues that might have been overlooked in the arguments. All statements made by the parties will be recorded in the hearing record and in the judgment.

l.) The Right to Appeal (provisional detention, appeals to higher court)

The charged or accused person's right to appeal during the pre-trial stage concerning provisional detention is recognized in CCP Article 307 and ICCPR Article 14(5). If any party to the criminal proceeding, including the prosecutor, the accused or a civil party, is not satisfied with the court's decisions up to that point, either by the investigating judge during the pre-trial stage[42] or the judgment made by the judges of the Court of the First Instance, the party[43] may file an appeal and/or opposition motion against that judgment to a higher court, namely the Appeals Court[44] and the Supreme Court.[45] The accused may file an appeal for release from provisional detention verbally or in writing, through his legal counsel.[46]

m.) The Right to a Reasoned Judgment

The right to a reasoned judgment or verdict is inherent to the right to a fair trial, which includes a right to a public judgment. A convicted person is entitled to have access to a written judgment within a reasonable timeframe, duly reasoned, according to international standards, for all instances of appeal in order to enjoy the effective exercise of the right to have his or her conviction and sentence reviewed at a higher tribunal according to the law. Article 317 of the CCP stipulates that: "In all cases, the court shall announce the judgment during a public session." A reasoned judgment must include arguments surrounding the facts and applicable laws and a conclusive decision by a judge.[47] Similarly to this provision, Article 14(1) of ICCPR reads:

> *"[…] but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."*

41 See Article 335 of the CCP.
42 See Article 267 of the CCP.
43 Article 418 of the CCP states which persons are entitled to make a request for a cassation judgment from the Supreme Court.
44 See Articles 365 and 409 of the CCP.
45 See Article 418 of the CCP.
46 See Article 307 of the CCP.
47 See Article 357 of CCP.

3. Victims' Rights to Participation, Representation and Reparations

There are a variety of rights subsumed under the concept of fair trial rights. Not just for the accused, however. Fair trial rights are also important and must be recognized for the victim acting as *civil party* – a party to the criminal proceeding recognized by Cambodian criminal law. The participation of a civil party in Cambodian criminal proceedings goes beyond merely acting as a "witness" in the case. He or she plays an active role in a criminal trial and his or her rights must be respected by a court of law.

Equally important, Cambodian criminal law recognizes the role and rights of the victims of an offence as well. The rights of victims are considered when they apply as a "civil party" to the criminal proceeding. A civil party has the role of another party to the case who supports the prosecution during the pre-trial phase before the investigating judge.[48] The civil party's fundamental rights are the right to participate in a criminal proceeding as a party, the right to legal representation and the right to reparations. Similar to the French civil law system, the CCP recognizes that a victim can file a civil action for a felony or misdemeanor charge as a civil party before the investigating judge of the court.[49] Having filed a complaint as a civil party in the criminal proceeding, he or she can be legally represented by a lawyer, who represents his or her interests in the case.[50] A civil party may make claims for compensation for the physical, material and moral harms resulting from a crime committed by a defendant.[51] There are also additional procedural rights, similar to the accused's, not the least of which are: the right to access the case file(s),[52] the right to ask for investigative action, question witnesses and review evidence,[53] right to appeal against investigating judge's decision,[54] and right to appeal against the default judgment.[55]

48 See Articles 137 and 138 of the CCP.
49 See Articles 5 and 13 of the CCP.
50 See Articles 15, 150 of the CCP.
51 See Article 14 of the CCP.
52 See Articles 259 and 319 of the CCP.
53 See Article 134 of the CCP; Article 327 notes the right of the prosecutor, parties or lawyers to object to witnesses.
54 See Article 268 of the CCP.
55 See Article 372 of the CCP.

IV. Application of Fundamental Rights in Practice

Although the Cambodian Constitution and the CCP recognize a wide range of basic rights, especially for the defendant in criminal proceedings, there are still a number of limitations in practice as noted by legal practitioners and some local NGOs,[56] who monitored trial proceedings after the new CCP and the new Penal Code came into existence. These limitations and constraints can, however, be remedied by the use of best practices developed at the ECCC, popularly known as the Khmer Rouge Tribunal.

1. Limitations and Constraints

There are certain limitations and constraints facing the Cambodian judiciary, which prevent the effective exercise of its role and function under the Constitution and laws. These limitations and constraints include: the inadequate application and enforcement of the laws; restrictive provisions in the criminal laws; lack of independence of the judiciary; and the lack of resources needed for ensuring an effective and fully-functioning judiciary.

a.) Inadequate Application and Enforcement of the Laws

Certain provisions in the Constitution, CCP and ICCPR are not strictly applied by courts and judicial officials as the application of the laws continues to be uneven. For example, the rules guaranteeing the rights to a public hearing and to be present during the trial are not consistently applied by all courts in Cambodia. For example, while courtrooms remain open to the public, it has been noted by trial observers that hearing notifications, through a public notice board or other means, are posted inconsistently by some courts or not posted at all by others.[57]

Despite the fact that the right to be presumed innocent enjoys protection both in the Constitution and ICCPR in Cambodia, there are inconsistencies as to the degree to which it is respected in practice. Many detainees continue to appear before the court in prison uniforms rather than plain clothes, which substantively violates the right of a defendant to be presumed innocent, although improvements have been noted in some jurisdictions as a result of NGO advocacy. There have also been reports of judges making remarks about the guilt of the accused prior to rendering a decision, raising the possibility that they have pre-judged a case prior to receiving all of the evidence. Additionally, there have been instances where the silence of the accused has appeared to be taken as an admis-

56 These NGOs include, but are not limited to: the Cambodian Center for Human Rights (CCHR), the Cambodian Human Rights and Development Association (ADHOC), the Cambodian League for Promotion and Defense of Human Rights (LICADHO), Legal Aid of Cambodia (LAC) and the Cambodian Defenders Project (CDP). These are prominent human rights NGOs in Cambodia whose work focuses on the judiciary and the application of fair trial rights.

57 See, for example, Cambodian Center for Human Rights, "*Fifth Bi-annual Report: Fair Trial Rights in Cambodia*," November 2012, pp. 20-21.

sion of guilt rather than an exercise of the right against self-incrimination. At the police level, it is often noted that law enforcement officers seem to collect evidence based on the assumption that a suspect is guilty, rather than fully investigating a crime. A lack of resources, low salaries and poor training contribute to a high level of corruption and inefficiency in the judicial branch and the government does not make provisions for due process.[58] It has been recommended that law enforcement officers be issued cards outlining an accused person's rights that can be given or read to accused persons to ensure that they are informed of their rights upon arrest.[59]

Concerning the right to a free interpreter for an accused person, no adequate provisions have been made for the exercise of this right in court, given the minimal complete absence of resources allocated by the Ministry of Justice for provision of translators when an accused person speaking Vietnamese, Chinese or other languages is being tried.[60] Similarly, the right to legal representation in a felony case or where the accused is a minor is mandatory, access to legal representation for some accused or charged persons is lacking. While most accused persons in urban centres, such as Phnom Penh are aware of their right to legal representation, many of those who live in rural areas or who have not had the opportunity to pursue education, are often not aware of this right. Sometimes, even though an accused person is aware of his or her right to legal representation, he or she may not be aware of the availability of legal aid and opt to represent him or herself because they believe that legal services will be too expensive for them. Though the court should appoint a lawyer on its own initiative in such cases, many, if not most, fail to do so. In addition, assigning a lawyer at the later stages of a case often makes it difficult for the lawyer to properly and adequately prepare a defence in the best interests of his or her client. Some NGOs that provide legal aid have begun refusing to take on clients referred to them by a court if they have not been provided with adequate time to prepare. Moreover, the Bar Association of the Kingdom of Cambodia has also issued directives as an attempt to prevent judges from trying to assign lawyers to clients on the

58 US Department of State, Cambodia 2013 Human Rights Report, p. 8 available at: http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dlid=220185#wrapper.

59 Modelled after a program first piloted by the Office of the High Commissioner for Human Rights in Cambodia. See Human Rights Council, *The Role 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: Report of the Secretary-General*, September 20, 2013 (A/HRC/21/35), p. 14.

60 CHRAC, Compilation of the Reports submitted by Civil Society Organizations to the United Nations Human Rights Council during the 18th Session of the Universal Periodic Review of the Kingdom of Cambodia, June 2013. Page 37. Link: http://www.chrac.org/en/pdf/07_01_2013_UPR_Report_Compilation_in_English.pdf

day of a hearing. An NGO watchdog organization, the Cambodian Center for Human Rights (CCHR) reported that the accused in 33% of 204 misdemeanor appeal cases were not represented by a lawyer.[61]

Furthermore, while it appears that, procedurally, this right to present witnesses on your behalf is respected in Cambodian courtrooms, legal aid NGOs report that continued distrust of the justice system and practical difficulties in transporting and providing for witnesses to attend court mean that the defence is often not able to present all of the evidence that may be available. As a result, while the defence may be afforded the opportunity to present evidence in court, in reality, the difficulties associated with gathering evidence in order to mount a defence - difficulties not necessarily experienced by the prosecution - result in an uneven playing field. Although defendants are entitled by law to the presumption of innocence and the right to appeal, pervasive corruption in the judicial system means that they are often expected to bribe judges to secure a favourable judgment.[62]

In the absence of a legal aid policy, the constitutional legal aid provisions for affording counsel to defendants in need, especially the accused poor, remains an impediment to realizing the right to legal counsel in practice.[63] Another issue that constrains the exercise of a citizen's right to be present at an appeal hearing is the difficulty of transferring prisoners from provincial prisons to the Appeals Court in Phnom Penh. Consequently, more than half of all appeals were heard without the defendant being present.[64] The lack of legal reasoning in decisions made by judges is also complained of by many parties to legal proceedings. In many cases, the judgment itself does not sufficiently provide a legal basis as to why the judge arrived at a particular conclusion or decision. This is especially true of politically-motivated cases.[65]

b.) Restrictive Provisions in the Penal Code

Certain provisions in the Penal Code prohibit and limit the full exercise and application of human rights and freedoms guaranteed by the Constitution. Most controversies arise when the court is applying the definitions of certain crimes stipulated in the Penal Code in politically-sensitive cases. These crimes involve public order and security or government leaders and their definition or application by courts can have a negative effect on an individual's freedom to express his or her views on certain societal issues. For ex-

61 Cambodian Center for Human Rights: *Fair Trial Rights in Cambodia: Monitoring at the Court of Appeal*, (Phnom Penh, June 2014), p. 12.

62 US Department of State, Cambodia 2013 Human Rights Report, p. 8, available at: http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dlid=220185#wrapper.

63 CHRAC, *Compilation of the Reports submitted by Civil Society Organisations to the United Nations' Human Rights Council during the 18th Session of the Universal Periodic Review of the Kingdom of Cambodia*, June 2013, p. 28.

64 US Department of State, Cambodia 2013 Human Rights Report, p. 8, available at: http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dlid=220185#wrapper

65 Observations by legal practitioners in the domestic courts and NGOs monitoring the trials.

ample, Article 522 of the Penal Code prohibits any publication of official information regarding court cases prior to the final decision of the court. This provision has been read to include any commentaries aiming to pressure the court or influence its decision. This application of Article 522 has had the effect of restricting freedom of expression, even when such information is a matter of public interest. Additionally, Article 523 prohibits "any act of criticizing a letter or a court decision aiming at creating disturbance of public orders or endangering institutions […]" This application of the provision has had the effect of restricting the exercise of the freedom of speech by NGOs, parties to court proceedings, the press freedom and the general public, even when such information is a matter of national interest. Some provisions in the Penal Code[66] remain a major hurdle to the exercise of human rights, especially freedom of expression, and are an ongoing concern for many human rights and legal aid NGOs in Cambodia, especially when it comes to politically-sensitive cases. Apart from the limitations imposed by the Penal Code, other laws, such as the Press Law and the Peaceful Assembly Law, also stipulate punishments that have been or may be used to prevent or discourage the exercise of rights and freedoms by individuals and groups.

c.) Lack of Judicial Independence

The issue of independence of the judiciary has publicly and politically been criticized, even though the Cambodian Constitution clearly states the principle of separation of powers. Recognizing this as a key concern, the Cambodian government has made a lot of efforts to rebuild its legal and judicial system in establishing the rule of law through a variety of reform programs.[67] Accordingly three fundamental laws have been enacted – the Law on Organization and Functioning of the Courts and Prosecution, the Amendment of the Law on the Supreme Council of Magistracy and the Law on Status of Judges and Prosecutors. In 2004, the Cambodian government promised to its development partners to adapt these laws as they are key to restore the independence of the judiciary and to enhance the public trust in the Cambodian justice system. . The adoption of these three fundamental laws that safeguard the full function of the judiciary and its independence is commendable. It is also noted that despite the Government's effort to adopt these laws, their content and the way in which they were passed in July 2014, namely by the rul-

66 Some of the most troubling provisions are contained in the following articles: Article 305 (defamation), Article 307 (public insult), Articles 311 & 312 (malicious denunciation), Article 495 (incitement to commit felony), Article 496 (incitement to discriminate), Article 505 (insult of public official), Article 523 (discrediting judicial decision) and Article 524 (false denunciation to judicial authority).

67 For detail discussion on "judicial independence", see Report of the Special Rapporteur on the situation of human rights in Cambodia, 2010, p. 11, available at: http://cambodia.ohchr.org/sites/default/files/Annual-reports/A_HRC_CMB16092010E.pdf, and also, see: Cambodia National Report submitted to the 2nd session of Universal Periodic Review at the UN Human Rights Council, p. 18, and also see Comments from the Government of Cambodia to the Special Rapporteur Report 17 September 2014, 2014, p. 1, available at: http://cambodia.ohchr.org/sites/default/files/Annual-reports/Comments_from_the_Govt_of_Cambodia_to_the_SR_Report-17Sept2014.pdf

ing party-led parliament, raised serious concerns and has been criticized by the United Nations Special Rapporteur, the opposition party and NGOs.[68] For example, before the enactment of these draft laws by the parliament, the United Nations Special Rapporteur on the situation of human rights in Cambodia expressed his concern about certain provisions in these laws that are detrimental to the independence of the judiciary and to the doctrine of separation of powers. For instance, in the law regarding the Supreme Council of Magistracy, there is a provision permitting the executive branch of government to have undue influence over the Supreme Council of Magistracy, a body entrusted with the overall supervision and management of the judiciary. The Special Rapporteur was also concerned about a number of provisions which give undue influence to the Ministry of Justice in matters relating to other activities of the judiciary.[69]

Despite many criticisms that the judiciary lacks independence, it is too early to make a conclusion that this issue cannot be improved because the fundamental laws, which are supposed to safeguard the justice system and build trust among the public, were just in place for two years.

d.) Lack of Human and Financial Resources and Facilities

Although the current situation has seen some improvement in the legal and judicial system in Cambodia since the Khmer Rouge regime collapse, the progress has been slow. The lack of highly-trained individuals to work in the justice sector continues to be a major concern. In addition, Cambodia needs more time and resource investment to further develop the capacity of judicial officials and lawyers. Currently, there are at least 319 judges and prosecutors working at 24 municipal/principal courts as well as at the Appeal Court and Supreme Court of the country.[70] These numbers include the officials recently trained at the Royal Academy for Judicial Professions, who will replace retired judges and prosecutors in the future. Likewise, according to the Bar Association's 2013 statistics, there are currently 857 lawyers, 60% of whom work in the private sector and government institutions. There is a large gap in legal aid and legal representation, especially in the provinces. The ratio of lawyers per inhabitant is still comparatively low in Cambodia and most of the existing and potential legal assistance providers are concentrated in urban areas or in private practice, so that the poor or others in need may not be able to obtain representation.

68 For almost one year after the July 2013 election, only 68 members of parliament from the Cambodian People's Party (CCP) have taken their seats. The remaining 55 members of the opposing Cambodian National Rescue Party (CNRP) boycotted the election results claiming irregularities and fraud. While the laws were quickly debated and passed by the 68 CPP legislators in the National Assembly without revision of the original texts proposed by the CPP-led government, no public consultations were made nor were official drafts shared with the civil society or other stakeholders.

69 Statement by the United Nations Special Rapporteur on the situation of human rights in Cambodia, Phnom Penh, 24 June 2014.

70 The number of judges and prosecutors changes every year. This number is the latest update from 2011, issued by the Cambodian Bar Association. See http://www.bakc.org.kh/km/2011-09-12-08-55-34.

This is one reason why increases in the training of new lawyers by the Lawyer Training Center, which trains lawyers in practical matters and provides legal assistance, is badly needed. The approximately 50 lawyers currently enrolled at the LTC is roughly ten times less than the annual number of graduates from Cambodian law schools.[71]

Due to the need to meet the growing demands for improvements in the justice sector, in 2005 the Cambodian government formed the Council for Legal and Judicial Reform to deal with the legal and judicial reform issues. The Council developed a strategy and an action plan for implementing reforms with financial support from various donors. The goals of the Council are: to improve the justice sector, build confidence in the justice system among the Cambodian people and ensure that the human rights and freedoms of individuals are properly respected.[72]

Another important aspect of this is the relatively small national budget allocation for the justice sector and, in particular, the lack of funds set aside for legal and judicial reform efforts, including the modernization of the law and public educational outreach. Of the total USD $3,023 billion national budget, only 12.74% was allocated for the justice sector in 2013 and only a small percentage of that was earmarked for the judiciary.[73] Prosecutors, judges and judicial officers received a relatively low salary equal to that of government officials. It is estimated that the salary of a judge is in between USD $400 and USD $1,200 per month or USD $4,800 and USD $14,400 per year, which represents a large gap between a judicial official's salary at the ordinary courts and the salaries of judicial officials at the ECCC.[74] Given the current lack of resources, low salaries for judges and prosecutors and poor facilities at the courts, it is difficult to ensure that the judiciary can function impartially, independently and ethically. Some improvements are occurring, however. In response to concerns regarding the difficulty of defendants in criminal cases filing appeals to the Appeal Court, the government decided to set aside part of the 2014 national budget in order to construct new Appeal Courts outside Phnom Penh and to provide free housing services for judicial officers, so that they could properly perform their work on a rotating basis in the provinces, which may help contributing to a reduction of corruption due to low wages.[75] Apart from passing laws guaranteeing a fully independent and effective judiciary, the government should: coordinate with other stakeholders to provide additional training to strengthen the capacity of judges, prosecutors, court clerks

71 Christoph, Sperfeldt et al, *Legal Aid Service in Cambodia: Report of Survey among Legal Aid Providers*, (CHRAC, 2010), p. 14.

72 Council for Legal and Judicial Reform, *2003 Strategy and 2005 Action Plans.*

73 Statistics of national budget approved in 2013.

74 Vidjia, Phun & Holligan, Jennifer, *Cambodia*, in Rule of Law for Human Rights in the ASEAN Region: A Baseline Study (eds.), p. 70.

75 The Cambodia Daily, *Government to Spend 13.7 M USD on Appeal Courts*, 12 November 2013, available at: http://www.cambodiadaily.com/archives/government-to-spend-13-7m-on-appeal-courts-46853/.

and law enforcement officials in implementing the law; disseminate information on laws and rights to citizens; provide legal aid; promote the use of alternative dispute resolution mechanisms; and expand judicial services.[76]

Although training services and the provision of resources to the justice sector have improved somewhat, little has changed regarding the susceptibility of judicial officers to bribery and political pressure. The procedural and legal safeguards outlined in the Cambodian State Report are often ignored or only given cursory attention by the courts, especially in highly politicized cases.[77] As a result of this combination of a lack of adequate resources, organizational and institutional shortcomings, a lack of full awareness of the relevant human rights standards and external interference, financial or otherwise, in the work of the judiciary, the justice system in Cambodia remains an institution that does not command the confidence of the people, regardless of their place in society.[78]

2. Opportunities to Promote Rights in Criminal Proceedings: Some Lessons Learned from the ECCC

Given the fact that the CCP was passed relatively recently and the ECCC's potential to influence Cambodia's justice system in a positive way, some have proposed that the application of laws and rules at the tribunal serve as a model to supplement what is missing in the ordinary court system. Many expectations and hopes have been placed on the ECCC as leaving a positive legacy for Cambodia in the domestic justice sector, some of them unfounded. However, even from a more realistic point of view, there are many areas to which the ECCC could contribute positively. Although the central aim of the ECCC is to prosecute senior leaders and those most responsible for the atrocities committed during the Khmer Rouge regime, it has also been promoted by both the United Nations and the Cambodian government as a model for Cambodia's domestic criminal courts.[79]

As a model for domestic courts, the ECCC is considered to have set many good precedents for domestic courts and these should be taken into consideration by the Cambodian Council for Legal and Judicial Reform in developing a long-term reform vision. Many commentators agree that the positive legacies of the ECCC include: jurisprudence, a judicial legacy with regard to civil party participation, fair trials with trial monitoring, outreach, creation and archiving of ECCC documents, witness support, forensic psycho-

76 Royal Government of Cambodia, *National Strategic Development Plan Update 2009-2013: For Growth, Equity and Efficiency to Meet Cambodia Millennium Development Goals*, November 2009.

77 FIDH & LICADHO, Report for the Human Rights Committee's Task Force for the adoption of list of issues on Cambodia, p. 10.

78 Surya P. Subedi, Situation Report on Human Rights in Cambodia, 2010, available at: http://cambodia.ohchr.org/EN/PagesFiles/Reports/SR-SRSG-Reports.htm.

79 Speeches delivered by Deputy Prime Minister Sok An of the Royal Government of Cambodia and by the UN Secretary-General Ban Ki-moon during Ban's visit to Cambodia and the ECCC premises, on 27 October 2010.

logical assessment and access to justice for women.[80] Furthermore, the standard courtroom configuration of the ECCC is also an important example for domestic courts and should be adopted by the courts throughout the country. The design reflects the equality of the parties (prosecutor, defence and civil parties) with a logical placement of the trial judge bench necessary to express the principle of equality before the law. The judges, prosecutors and lawyers practicing at the ECCC can also be a role model for the national courts and their experience in criminal law and human rights should be applied in national courts as well. The interplay between international law incorporated into the Constitution and domestic law in Cambodia demonstrates that the ECCC's jurisprudence is applicable in domestic courts because international law as incorporated through the Constitution is also domestic law. Cambodia is a dualist as opposed to monist system in its approach to implementing international law in its domestic legal order.[81]

Aside from the Tribunal, several initiatives have been undertaken by NGOs and the Office of the High Commissioner for Human Rights in Cambodia (OHCHR). For example, OHCHR produced an Annotated Criminal Procedure Code of the Kingdom of Cambodia by using ECCC jurisprudence to illuminate and suggest reforms to current practices by judicial officials and lawyers in the domestic court system.[82] Furthermore, OHCHR has organized a number of judicial roundtables involving judicial officials and established a fair trial rights club by which law students and graduates can build their knowledge of fair trial rights using the best practices and jurisprudence from the ECCC.[83] Another practical example of the ECCC's positive influence is the increase in reasoned decisions and judgments issued by judicial officers and court chambers in the determination of crimes, legal arguments and criminal responsibility of a charged or accused person.

80 See more in the whole Conference Report "*Hybrid Perspectives on the Legacies of the ECCC*", available at: http://www.chrac.org/eng/CHRAC%20Documents/Conference%20Report%20on%20Legacies%20of%20the%20ECCC_English_FINAL.pdf.

81 Karnavas, Michael G, *Bringing Domestic Cambodian Cases into Compliance with International Standards*, in Cambodian Law and Policy Journal, Issue I, January 2014 (eds.) p. 53.

82 Jeudy, Oeung, *Expectations, Challenges and Opportunities at the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, 2014, p. 13. See also, the full *Annotated Code of the Cambodian Criminal Procedures* prepared by OHCHR Cambodia Office, available at: http://cambodia.ohchr.org/WebDOCs/DocProgrammes/Annotated_Cambodian_Code_of_Criminal_Procedure_Eng.pdf.

83 See more information about the OHCHR's Legacy Project at: http://cambodia.ohchr.org/EN/PagesFiles/ECCC_legacy_program.htm.

V. Conclusion

Cambodia has recognized many international human rights treaties and conventions and incorporated them into its Constitution. These international instruments were the foundation of the new Code of Criminal Procedure and Penal Code of the Kingdom, which were passed in 2007 and in 2009. These laws are new to Cambodian legal practitioners, judges and prosecutors and, therefore, more time and investment in training and outreach to these officials by the Ministry of Justice is necessary in addition to in-kind assistance from NGOs. Further, incorporation and teaching of international human rights law into the legal curriculum at universities, the Royal Academy for the Judicial Profession and Lawyer Training Center is timely and a very important contribution to upholding fair trial rights, improving the rule of law and building trust in the Cambodian judiciary. Continued outreach to all practicing judicial officials and judicial police regarding these criminal codes must be a priority for the Cambodian government. Furthermore, the government needs to increase its commitment of financial resources and facilities for the courts and for the Supreme Council of Magistracy in order to ensure effective law enforcement and implementation.

The concept of fundamental rights is already contained in the criminal laws of the country. However, they are not properly applied and/or adequately enforced by the courts and law enforcement due to various limitations and shortcomings in their professional understanding in addition to other reasons such as corruption, a lack of independence and political interference by the executive branch of government. Without a proper and well-functioning judiciary, the fundamental rights of individuals guaranteed by the Constitution and stipulated in the criminal law will not be fully upheld and protected.

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ECONOMIC RIGHTS AND THE NATIONAL ECONOMIC SYSTEM

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ECONOMIC RIGHTS AND THE NATIONAL ECONOMIC SYSTEM

KUONG Teilee *

ABSTRACT

The chapter examines the development of economic rights as a constitutional concept evolving in the context of market economy initiated by the 1993 Constitution. It reviews various conceptual changes in the state's economic governance throughout Cambodia's modern constitutional history and identifies the ultimate emergence of specific economic rights within the broader Cambodian legal and economic context at the current stage of transition towards an operational market economy. Economic rights in Cambodia, which are still less developed in economic and social terms, should therefore be considered to include not only the rights of property owners to own and dispose of property but also the very basic rights of all individuals to work and to enjoy a decent livelihood. A liberalist agenda alone may not be the right approach to the promotion of economic rights in Cambodia. Some features of state interventionism are necessary in the formation of a viable market economy at this juncture. Just how to keep the best balance is the hardest question to answer. The chapter therefore proposes an analytical framework that would ultimately distinguish what is deemed to be constitutionally protected core economic rights from other forms of economic privileges, which should rather be based on legislated state policies, despite being stipulated by the Constitution.

I. Introduction

Economic rights have different practical implications for different societies, families and individuals. There is not yet a complete universally-accepted list of economic rights[1] and sometimes it is unclear whether some rights should be considered economic or social

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1 The most universally accepted categorization may have been the one incorporated in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. While most of the rights incorporated therein may be considered basic rights accepted at the universal level, they by no means constitute a complete list. Varieties can be detected in the many regional human rights declarations and treaties and national constitutional bills of rights.

rights.[2] This chapter does not pretend to argue that there is a universally accepted definition for economic rights nor does it try to suggest any hint towards that end. However, it seems necessary to establish a useful referential framework in which economic rights can be discussed in a way reflective of the realities and needs of a particular social and historical context. In a general sense, economic rights may be about property rights including ownership, the right to choose a profession or a business, the right to have access to resources, especially common resources.[3] From a liberal economic perspective, economic rights guarantee the free participation of individuals in the wealth making process, with minimum or no state intervention which may distort the process of wealth accumulation and distribution.[4] But from a socio-economic perspective, economic rights are not only about the State's non-interference into private economic activities, but also the State's obligation to put in place a system of reciprocity between individuals and the society in which they belong, such as through the establishment, or facilitation of the establishment, of some sort of social safety net that may help a significant part of the population who failed in the competition for wealth accumulation and redistribution to survive their economic hardships and to have a decent living condition.[5] In the case of a developing country such as Cambodia, where a proper market with all the necessary fundamental rules for its operation and settlement of disputes is just being established and the presence of a social safety net is not yet sufficiently felt across the country, a discourse of constitutional economic rights should not be confined to the narrow scope of protection of property rights. Fundamental constitutional economic rights in this context should be for the interests of both the privileged and the underprivileged in an emerging market economy, the haves and the have-nots alike, the potential winners and losers in the continuously changing waves of competition for wealth accumulation and distribution.

2 One may think of the examples of the right to work and other work-related rights or the right to adequate standard of living as suggested in the first paragraph of Art. 25 of the Universal Declaration of Human Rights, which reads: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services…". While a clear-cut definition of economic rights may serve definitional and some specific analytical purposes, any attempt to classify some rights as exclusively economic and others social may indeed have ideological implications and may not be practically relevant. It is therefore more common and helpful to consider economic rights within the broader category of economic and social rights.

3 Carmine Gorga, "Toward the Definition of Economic Rights", *Journal of Markets and Morality*, vol. 2, no. 1, 1999, pp. 88-101.

4 Tom Allen, "The Right to Property in Asia", in Rosalind Dixon and Tom Ginsburg (eds.), *Comparative Constitutional Law in Asia*, Edward Elgar, USA, 2014, pp. 251-255.

5 Tom Allen, *ibid.,* pp. 252-253 and Ross Cranston, "Rights in Practice", in C.J.G. Sampford and D.J. Galligan (eds.), *Law, Rights and the Welfare State*, Croom Helm, Australia, 1986, pp. 1-12.

1. Objectives

This chapter will review Cambodian constitutional provisions related to the promotion and protection of economic rights, not only by looking into those articles specifically regarding property rights but also examining the legal and technical interrelationship between them and other related provisions, including social rights provisions, so as to identify the functions of these constitutional provisions in safeguarding the basic economic rights of the population, and its juxtaposition with other related provisions, in the developing history of constitutional law and politics in Cambodia.

Another task, which this chapter aims to fulfill, is to draw a theoretically based separation between "economic rights" as part of the constitutionally defined fundamental rights and some forms of "economic entitlements" derived from national economic policy set down by the Cambodian Constitution. Making this distinction in the context of a transitional and emerging market economy may be necessary in order to develop discussions which will, in the long term, contribute to the drawing of reasonable theoretical boundaries separating elements of fundamental "economic rights" from those that are merely details of an economic policy more easily subjected to change and reforms in the due course.

This chapter will mainly look at the constitutional principles and norms. There is no attempt to evaluate, in abstract, the practical significance of these provisions. The analyses are therefore not so much to indicate how these provisions are or ought to be implemented in practice. Rather, they are intended to explore some possible explanations about the logics behind these constitutional provisions and the mutual relationship between them, as can be discernable from the historical and philosophical contexts of the post-conflict constitutional making in Cambodia. These analyses will provide scholars and researchers interested in the relationship between the Cambodian Constitution and the development of the national economic system with some thought-provoking exercises to carefully look into the constitutional economic provisions to understand the kind of economic system envisaged therein. This study also hopes to assist policy makers who are in a position to design the detailed implementation of Cambodia's national economic policy in conformity with the Constitution; or to offer options to judges in elaborating upon the principles and norms of the Constitution when they have to interpret the relevant constitutional provisions in order to solve concrete disputes related to economic interests or distribution of wealth, particularly when the question of proportional exercise of public power is involved. The analyses will offer these policy-makers and judges some initial logical references to develop a historically and theoretically consistent course of constitutional interpretation and application that can better satisfy the quest for legality and the rule of law in dealing with economic problems or disputes. Like many other constitutions, the vagueness of these economic provisions in the Cambodian Constitution will likely give

rise to multiple possibilities in interpretation. The tension between technical views proposed by the "Scientific Policymakers" and the reasoning held by the "Ordinary Observers" will probably be something not too alien for Cambodia in the future.[6]

2. Scopes and Limitations

This chapter examines economic rights provisions and the nature of the national economy of Cambodia under the 1993 Constitution. This Constitution is unique in the Cambodian history of modern constitutional law, particularly with regard to its attempt to introduce explicitly the concept of "market economy" into the national economic system. The approach used in this chapter is confined to a reading of the relevant constitutional and some symbolic legislative provisions. This is by no means sufficient as an effective methodology to describe the level of market development or private autonomy within the limits of the constitutionally proclaimed market economy. More detailed studies are necessary at the micro level, such as from the perspective of specific laws that define the scope of autonomy to be exercised by private entities or of intervention by public power at different levels to safeguard, promote or regulate the economic and commercial interactions which emerged as a result of that autonomy.[7] It may also be necessary to trace the overall nature of the Cambodian economic system by referring to the many international economic treaties to which the country is a member and to the way the government is implementing them. These may include the comprehensive multilateral and plurilateral trade agreements, which Cambodia has acceded to within the framework of the World Trade Organization, and some less comprehensive but specific ones, such as several regional or bilateral treaties on different economic issues. All these treaties constitute the emerging international legal-economic obligations, which Cambodia has to fulfill in exchange for its participation in the expanding global market space. Unfortunately, due to the need to exclusively focus on constitutional provisions, an analytical look into the status of Cambodia's international obligations under the existing economic and commercial treaties is not intended in this chapter. However, since these international treaties are, at least in theory, not to be implemented in violation of the constitutional provisions, accession to these international treaties and their implementation in Cambodia should not be

6 Bruce A. Ackerman created the two main ideal types for his analyses of the compensation clause in the context of protection of private property under the Fifth Amendment of the US Constitution. He defines these two ideal types as follows: "… a Scientific Policymaker is an analyst who (a) manipulates technical legal concepts so as to illuminate (b) the relationship between disputed legal rules and the Comprehensive View he understands to govern the legal system. In contrast, an Ordinary Observer is an analyst who (a) elaborates the concepts of nonlegal conversation so as to illuminate (b) the relationship between disputed legal rules and the structure of social expectations he understands to prevail in dominant institutional practice." Bruce A. Ackerman, *Private Property and the Constitution*, New Haven and London, Yale University Press, 1977, p. 15.

7 These may include laws and other subordinate regulations in the field of civil matter, competition, investment incentives, industrial promotion, suppression of economic crimes, etc.

deemed in general as a deviation from the scopes permitted by the Constitution itself, unless concrete cases of unconstitutionality have been found to exist. A review of concrete cases of treaty implementation may indeed also clarify the practical scope of flexibility permitted by the Constitution for the nation to set its economic policies to respond to the expanding economic and social needs, and therefore to the pressure of globalization. But by leaving these specific reviews to future studies on economic laws of Cambodia, this chapter will now be confined merely to an overall review of the constitutional principles and norms related to fundamental economic rights of citizens and the identification of an emerging post-conflict national economic system.

II. The "Market Economy" in Context

The 1993 Constitution explicitly introduced the system of a market economy to be determined by legislation.[8] This constitutional provision on "market economy" is the first of its kind to appear in Cambodia since the country adopted the modern Western-oriented form of Constitution in 1947. Although this is not a unique phenomenon in post-Cold War constitution-making in the 1990s, there has not necessarily been a uniform definition or easy description of "market economy" in the constitutional context. It is an ideological concept with particular underlying philosophical, economic and political agendas. A market economy can take many different forms in practice, ranging from the economic order advocated by "capitalist" economic liberalism of the 18th century to that promoted by the later proponents of "neo-classical" economic theorists in the latter half of the 20th century. It can also include the kind of economic order based on autonomous advancement of private interests but accompanied by the State's duties to secure social justice and equal distribution, as that proposed by social democrats and "welfare state" theorists in a number of countries in the 20th century Europe,[9] or to some extent the kind of economic system adopted by "developmental states" in the second half of the 20th century. Asian countries too, allow for active State intervention by way of economic regulations in order to lead or to regulate autonomous operations of the market and to serve a particular cause of economic development for their nations.[10] Perhaps the main feature common among these different systems is the acknowledgement that something vaguely known as the "market" exists side-by-side with, but separately from, the "State";

8 Art. 56 of the Constitution states: "The Kingdom of Cambodia implements the market economy system. The organization and functioning of this system shall be determined by law".

9 For a brief introduction to these different constitutional types in connection to political economic systems, see Dieter Grimm, "Types of Constitutions" in Michel Rosenfeld and Andras Sajo (eds.) *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, pp. 115-128.

10 Arun Thiruvengadam and Gedion T. Hessebon, "Constitutionalism and Impoverishment: A Complex Dynamic" in Michel Rosenfeld and Andras Sajo (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, pp. 153-159.

and that the market is created by and operates only on the basis of autonomous private entities interacting economically and commercially on their own voluntary will.[11] Therefore from the constitutional perspective, these regime differences are manifested in the extent to which the "market-based" economic order[12] is subjected to constitutional or legal regulations, and in the way the exercise of public power is demarcated to allow for or to facilitate the "space" for autonomous private economic or commercial transactions. In other words, it is a question of proportional relationship, to be regulated by constitutional rules, between the exercise of public power necessary for the operation of State functions and the guarantee of private autonomy in the market space created within or without the physical confines of the State.

Acknowledging property right as a fundamental human right is a common value and a basic principle embedded in different economic systems affiliated with the ideological concept of market economy. Accompanying this acknowledgement is the State's commitment to respect private autonomy as the legitimate and effective means by which individuals may fully exercise their fundamental economic rights.[13] Wealth is believed to emerge from different forms of transaction involving the firmly safeguarded private property on this basis.[14] But more often than not, the wealth accumulated this way may end up only benefiting a limited group of population,[15] marginalizing others who cannot successfully join in this process of wealth accumulation. Depending on the particular constitutional philosophy of each nation and the social norms of each society, the constitutional functions of the State may require different levels of State intervention or regulation for the sake of securing more equitable distribution of wealth; or for the cause of national development which may also be interpreted sometimes as a form of wealth redistribution; or,

11 Given the nature of the Constitution of socialist/communist regimes, which in general dismisses the existence of market economy, it may be the only constitutional setting in which a market economy can hardly function. However, some contemporary forms of socialist constitutions, such as those of China and Vietnam, are rather open to the operations of a market economy.

12 "Market economy" in highly simplified economic terms may mean an economy that follows the rules of "demand and supply". "Market-based economic order" here is therefore a reference to the particular type of economic system defined by constitutional and national policy provisions based on rules of "demand and supply" instead of being based on a pre-determined plan of inputs and outcomes.

13 William H. Riker, "Civil Rights and Property Rights", in Ellen Frankel Paul and Howard Dickman (eds.), *Liberty, Property, and the Future of Constitutional Development*, State University of New York Press, 1990, pp. 49-64.

14 Cass R. Sunstein, *The Second Bill of Rights – FDR's Unfinished Revolution and Why We Need It More Than Ever*, Basic Books, New York, 2004, pp. 20-25.

15 For some related arguments, cf. Dieter Grimm, "Types of Constitutions" in Michel Rosenfeld and Andras Sajo (eds.) *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, p. 124 onwards.

in some cases, for other non-market purposes such as protection of the environment[16] and prevention of other externality caused by uncontrolled accumulation of wealth by private parties.[17]

III. State Protection of Economic Rights

1. Property Rights

In the Khmer legal terminology, it is hardly possible to distinguish the difference between "ownership"[18] and "property rights".[19] Whereas ownership is obviously part of property rights of a natural or legal entity, some other kinds of property right, such as easement, profits, mortgages, etc., are not necessarily synonymous to the concept of ownership in the legal sense. They are sometimes referred to as property right(s) in English,[20] but an accurate Khmer equivalent to this concept of "property rights" is yet to be established. What is of direct concern to this chapter is the translation of the Khmer expression "kamseth" into English, when comparing the provisions of the previous and the current constitutions. The expression "kamseth" which appeared in the 1969 Constitution (Art. 7) seems to have a similar meaning to the same expression that appears in the current Constitution but may not be similar to the one written in the 1989 Constitution (Art. 18*bis*). In the former cases, "kamseth" may be interpreted as including freehold ownership and other types of property rights derived thereof, whereas in the latter, "kamseth" must not be interpreted as ownership (particularly of land) but as property rights other than land ownership. Therefore, in the context of the previous and current constitutions, the expression "kamseth" has been used both in the narrow literal sense of a "freehold ownership" and the broader sense of "property rights" in general. It is therefore neces-

16 Richard Pipes raises examples in the US where some laws were enacted for the sake of environmental protection but affected private use of land. Among them are the Clean Air Act of 1970, the Federal Water Pollution Control Act of 1972, etc. Cf. Richard Pipes, *Property and Freedom*, Vintage Books, New York, 1999, pp. 248-253.

17 This may include regulating or delegalizing some trades which are considered to cause undesirable harms to the society, such as regulating trades in cigarettes or criminalizing trades in narcotic drugs or human persons, etc.

18 This seems to be the most preferable translation of the Khmer word "kamseth" as can be found in the current Civil Code (2007), for example, in Chapter 2 of Book 3.

19 "Property right" is generally translated as "kamseth" in Khmer, an apparently overlapping wording with the Khmer translation for "ownership". Even though the word "property" (troap or troap sambath) exists in the Khmer terminology to refer to the owned assets, "seth leu troap" or "seth leu troap sambath" is not recognized as a legal concept equivalent to the expression "property right" in English. In the old Cambodian Civil Code, however, the word "troap" was used legally to mean "objects" or "things", instead of "property".

20 Susan Bright, "Of Estate and Interests: A Tale of Ownership and Property Rights", in Susan Bright and John Dewar (eds.), *Land Law – Themes and Perspectives*, Oxford University Press, UK, 1998, pp. 529-546.

sary to read between the lines to grasp the real meaning of the Khmer expression in each context. For this reason, the English expressions of "ownership" and "property rights" as possible translations for "kamseth" are used contextually in this chapter, unless a different explanation is specified otherwise.

Constitutionally protected economic rights in the liberalist intellectual tradition serve the purpose of guaranteeing the fullest exercise of private autonomy in the conduct of economic activities.[21] They logically consist of the rights to possess, use and dispose of legally owned property and the principle of supremacy of contractual freedom. The Constitution features these basic provisions and renders the State to refrain from intervening into the autonomous realm of private individuals in the marketplace. From this basic concept of economic liberalism, constitutional economic rights may be expanded beyond the guarantee of property rights to include the right or freedom to choose a business or profession, considering that the actual practices of business and professions may be regulated by legislation, as provided by Article 12 of the Basic Law of the Federal Republic of Germany.[22] But in the history of constitutional law development, when social justice became an important constitutional consideration, particularly in the face of an economic order that blocked a smooth market function to distribute or redistribute essential resources, some socially friendly constitutions emerged that would count some labor-related rights and social and economic rights as constitutionally protected rights or would accept State courts that interpret constitutional provisions on economic rights in a more socially friendly direction.[23]

The 1993 Cambodian Constitution provides for the right to own property and the resulting legal private ownership over land to be protected by law. These are included in the provisions related to economic rights as stipulated in the Chapter on Rights and Obligations of Citizens. Legal effects of this constitutional protection of ownership or property rights is clarified by the last paragraph of Article 44, which limits expropriation to the purpose of securing public interest as provided for by law and on the condition that "fair and just" compensation is made in advance. Personal property is also protected

21 Richard H. Fallon, Jr., *The Dynamic Constitution – An Introduction to American Constitutional Law*, Cambridge University Press, 2004, pp. 75-90. Renata Uitz, "Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Not? – An Introduction", in Andras Sajo & Renata Uitz (eds.), *The Constitution in Private Relations – Expanding Constitutionalism*, Eleven International Publishing, 2005, pp. 18-20.

22 Art. 12 of the Basic Law of the Federal Republic of Germany promulgated on 23 May 1949.

23 This phenomenon emerged in Latin America in the 19th century constitution- making and arguably formed the backbone of the American New Deal in the early to mid-20th century. See Allan R. Brewer-Caliaz, *Constitutional Protection of Human Rights in Latin America – A Comparative Study of Amparo Proceedings*, Cambridge University Press, 2009, pp. 11-18; Cass R. Sunstein, *The Second Bill of Rights – FDR's Unfinished Revolution and Why We Need It More Than Ever*, Basic Books, New York, 2004, pp. 35-59; and, Albie Sachs, "The Judicial Enforcement of Socio-Economic Rights: *The Grootboom* Case", in Andras Sajo & Renata Uitz (eds.), *The Constitution in Private Relations – Expanding Constitutionalism*, Eleven International Publishing, 2005, pp. 79-97.

against illegal search by the public authority. Such search for any justifiable reason can be done only "in accordance with the law" (Article 40). Article 39 also provides that, if any exercise of power by an institution of the State is in breach of the law and causes damage to the citizens, "Khmer citizens" have the right to claim for "reparation of damage" by filing complaints to the court. Even though there is not yet any jurisprudence in Cambodia to define the scope of "damage" in Article 39 of the Constitution, any substantial damage directly resulting from an administrative action infringing upon the constitutionally protected right of the citizen to ownership should be considered as within the scope of this provision.

There is no separate explicit provision on the protection of the right or freedom to do business. But the provision on a "market economy" may offer a broad based constitutional ground to argue for strong protection of the right to do business[24] and the principle of freedom of contract.[25] However, since these rights are not elaborated in the chapter on fundamental rights and freedom, it remains an open technical question whether Cambodian constitutional jurisprudence in the future will have to clarify this issue, particularly when there is conflict between the full exercise of these economic rights and other fundamental rights.[26]

At the same time, exercise of private economic rights is limited by some constitutional provisions. The Constitution seems to exclude certain specific types of property, such as islands, lakes or seabed from private ownership of any individual and confines ownership over land to Khmer citizens only.[27] However, it may be argued that these exclusions do not share the same level of constitutional sanctions. Limitation of ownership over land to

24 Something that comes quite close to this is Article 36 of the Constitution, the first clause of which states "Khmer citizens of either sex shall have the right to choose their occupation according to their capacity and the needs of the society" (*Translated by author)*. However, the qualification of "Khmer citizens" and "according to their capacity in conformity with the needs of the society" may mean something quite different from the principle of a free choice to be subjected to necessary qualifications and conditions determined by law.

25 The principle of supremacy of contractual freedom is implied by Art. 3 of the 2007 Civil Code on the principle of private autonomy, arguably on the basis of its implementation of the constitutionally guaranteed market economy.

26 The "Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework", endorsed by the Human Rights Council on 16 June 2011 present guidance on the nature of such conflicts and possible solutions, but they are nonetheless nonbinding principles, which individual states and their institutions have yet to translate into concrete national measures. See also the arguments and hypothetical scenarios suggested by Michel Troer, "Who Needs a Third Party Effect Doctrine? – The Case of France", in Andras Sajo & Renata Uitz (eds.), *The Constitution in Private Relations – Expanding Constitutionalism*, Eleven International Publishing, 2005, pp. 115-128.

27 The relevant constitutional provisions are quite ambiguous in this matter. It is not clear at this stage whether land should constitute only habitable territories and hills, but not inhabitable seabed or high mountains or whether it could be interpreted to cover also other geographical areas. Article 58 merely provides that "State property notably consists of land, underground, mountains, sea, seabed, undersea-bed, coastline, airspace, islands, rivers, canals, streams, lakes, forests, natural resources, economic and cultural centers, national defense bases and other building facilities belonging to the State". It does not clarify whether these geographical areas are exclusively state properties.

Khmer citizens is stated in Article 44, which belongs to the Chapter on Rights and Obligations of Khmer Citizens, whereas the assignment of some types of real property to the possession of the State is provided for in Article 58, which is part of the Chapter defining the economic policy of the nation. In other words, although the 1993 Constitution recognizes the right to ownership over land as a fundamental "economic right" of Khmer citizens, as opposed to foreign investors for instance, it nonetheless reserves certain categories of objects that are subjected to State ownership for certain economic policy reasons. The Constitution does not specify exactly what these underlying reasons are that can justify such reservation. But there are two possible explanations.

First, historically, Article 58 is a slightly modified reproduction of Article 14 of the previous 1981 and 1989 Constitutions. A comparison of these provisions clearly presents close similarities. In addition to "land, forests, sea, river, lake, natural resources, economic-cultural centers, national defense bases, and other buildings of the State" stipulated in the previous constitutions, the 1993 Constitution includes "underground, mountains, seabed, under-sea-bed, sea coasts, air, islands, streams, and buildings designated as belonging to the State" primarily as property of the State. These added items further clarify the categories and subcategories of areas to be considered State property. At the same time, they also seem to set a very important policy definition for the scope and limits of a new land and property market. Given the fact that official book-keeping of land ownership had been lost or destroyed in bulk since the mid-1970s and the subsequent nationalization of all land by the socialists, a sudden privatization of un-occupied land or natural assets, such as waters, mountains, forests and islands, would most likely lead to serious conflicts between parallel claims and complete removal of the hitherto vast amount of property away from State ownership inherited from previous political regimes.

Secondly, Article 58 is immediately followed by Article 59 that defines the duty of the State to protect the environment, balanced natural assets, ecology, etc. To put these resources and unoccupied land, which contains these resources, under the control of the State is a convenient way of protecting them and regulating their uses. Although it is a convenient way, it should by no means be the only way. The State can also exercise this duty by means of regulating the use and disposal of these resources, while admitting some level of private property rights over these geographical areas. To use this second reason as a justification may be a bit weak to exclude these areas from any form of private ownership. As a matter of practice, some of these areas have been contracted to private entities in the form of economic concessions for investment and development purposes.

The 1993 Constitution also implicitly classifies property interests into private economic interests and public non-economic interests (Article 44). In case of a conflict between these two interests, the Constitution gives priority to the realization of public interests by allowing the State to claim substantive control over the specific property concerned. However,

private economic interests in the property subject to expropriation are protected by the constitutional requirement of the State to render "just and fair" compensation in advance to the private party who is subjected to being deprived of their control over the property.

This is different from the otherwise similar provisions in the Fifth Amendment of the US Constitution, which explicitly prohibits public taking of private ownership without just compensation. The difference between these two constitutional provisions is that whereas the US Constitution prohibits public taking unless there is just compensation, the Cambodian Constitution of 1993 allows for expropriation for public purposes but just and fair compensation must be paid in advance. Given the fact that at the end of the day, expropriation is possible and tolerated by the Constitution, this difference may have more of a philosophical than practical sense.

But, despite this possible difference, Bruce Ackerman's description of the ambiguity in interpreting the relevant provision of the Fifth Amendment should equally be applicable to the interpretation of this Cambodian constitutional provision. There are no easy answers to the questions of under what condition an economic interest can be considered private property,[28] under what condition the State is appropriating private ownership; and, what "fair and just" compensation means when it comes to the method of calculations.[29] Other features of the Cambodian Constitution that distinguish it from the US Constitution are many other provisions that define the economic regime and regulate the State's relationship with the market. Equivalent provisions simply do not exist in the US Constitution.

2. Related Rights

Another important aspect of economic rights in the post-socialist Constitution is the emergence of provisions concerning the protection of labor rights.[30] This category of rights is also considered social rights in a majority of jurisdictions, especially in the context of labor rights not simply being about the right to work, but about the right to work in decent working conditions. However, for a large part of low-income societies, recognition

28 It is necessary to note that the doctrine of takings in Cambodia is yet to develop. It is mainly confined to physical acquisition of private property by the government. Regulatory takings remain irrelevant in the current discourse in Cambodia. For some details on the development of this doctrine in the US, see Holly Doremus, "Takings and Transitions", *Journal of Land Use*, vol. 19, 2003, pp. 1-46.

29 Ackerman argues that "At best, these words set out a number of basic questions that must be answered: when does an interest qualify as private property? Under what conditions should the state be said to have "taken" the interest? When does justice demand compensation and how is the adequacy of payment to be assessed? It should be plain that there are many different ways of answering these questions – staring at the text will not assist one in choosing among them." Bruce A. Ackerman, *Private Property and the Constitution*, New Haven and London, Yale University Press, 1977, p. 6.

30 This trend started quite early on in the 19th century and continued to develop after the end of the Cold War. For some examples, see K.D. Ewing, "Economic Rights", in Michel Rosenfeld and Andras Sajo (eds.) *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, pp. 1036-1053.

of its nature as being part of economic rights is significant for a good segment of the labor population. For this chapter it suffices here to only introduce the level of protection rendered by the 1993 Constitution and a brief review of the development of relevant provisions in the recent constitutional development of the country.

Articles 33 and 34 of the 1989 Constitution provided for the right of Cambodian citizens to have the freedom to choose a profession suitable to their capacity and responding to the needs of the society, and the right to be paid proportionally to the quantity and quality of work rendered. There was no particular provision on the issue of minimum wage. Considering labor rights as a matter of economic rights within the context of a market economy has to pay due attention to the constitutional principle of equality between both sexes and the fact that all professions are subject to evaluation in the framework of demand and supply in a market setting.[31] Article 36 of the 1993 Constitution therefore substantially retains the protections stipulated by the 1989 Constitution with regard to equal protection for man and woman in receiving equal pay for equal work and the right to choose a job suitable to his/her ability and responding to the needs of the society. Maiden and housework is also mentioned by the same Article as equal to work that is done outside someone's home. No similar provisions existed in the pre-socialist constitutions.

Although gender sensitivity and related issues remain high on the reform agenda for Cambodia today, these provisions on equal labor rights for both sexes in the constitutions of the 1980s were nonetheless a significant change from previous constitutions. Ideally, they seek to secure equal protection of labor rights as part of economic rights for both man and woman in the labor market. From a legal historical viewpoint, continuous revolutions and modernization of Cambodian politics and society since the 1970s, the progressive trends in international labor norm-making throughout the 20th century, and perhaps more importantly a combination of these two evolving elements with the active engagement of women's groups in constitution-making during the transitional period in the 1990s, may have contributed to the current status of guarantee for women's economic roles and rights under the Cambodian Constitution of 1993.[32] These labor right provisions also incorporate social rights protection standards, such as the right to organize trade unions (Art. 36), the right to strike (Art. 37), as important mechanisms to facilitate safeguarding of labor rights of individuals, including men and women.

31 This seems to promote a sort of developmentalist agenda with regard to freedom to choose a profession/occupation, but does not sufficiently amount to the freedom to choose a profession/occupation in the liberalist viewpoint. The liberalist view may rather leave the judgment on social needs to those individuals who are in a position to choose the profession or occupation. The liberalist view may logically argue that a person's choice of profession/occupation in response to the needs of the society should not be made a constitutional provision. Whether a choice responds correctly or not to the needs of the society/market is a matter of real results, not a legitimate issue of constitutional concern.

32 See Steven Marks, "The Process of Creating a New Constitution in Cambodia", in Laurel E. Miller (ed.) with Louis Aucoin, *Framing the State in Times of Transition: Case studies in Constitution-Making*, Washington, D.C.: United States Institute of Peace, 2010, pp. 207-244.

These social economic right provisions pay much attention to the exercise of economic rights of women and children as members of a vulnerable group, particularly in the post-conflict Cambodian context. In a liberal labor market, the unbalanced economic position between the employer and the employee often results in labor contracts being concluded in favor of the former and detrimental to the dignity and well-being of the latter. This disparity in power relationship is especially eminent in cases of vulnerable groups, who are ready to accept any job offer with no position to bargain. The Constitution confers on the State a seemingly paternalistic mandate to ban certain income-generating patterns of recruitment or employment with regard to women and children as potential employees. These may be conceived as necessary provisions to secure a platform for women and children to exercise their fundamental economic rights with dignity in the emerging, and at times unruly, Cambodian market system. Specifically, women are to be protected against "human trafficking", "exploitation of prostitution" and "obscenities" (Art. 46), whereas children are protected from economic or sexual exploitation and from all kind of labor that may be detrimental to their education, schooling, health or welfare (Art. 48).

Other provisions on social rights protection that would have direct effects on improving economic rights of the vulnerable population include those related to the granting of maternity leave with full pay, promotion opportunity and social benefits for expecting woman, and clauses that require the State and the society to provide underprivileged women in the rural areas with "opportunities to benefit from assistance for a profession, for medical cares, for their children's schooling and for decent living conditions" (Art. 46).

With particular relevance to the social and economic context of Cambodia, Article 47 imposes a constitutional obligation on parents to take care of their children, bring them up, and educate them to enable them to "become good citizens". Vice versa, under the same article, children have the duty to attend to the needs of their aged parents and to take good care of them "in accordance with Khmer custom". Here again is an example of constitutional regulations on private and social relationships, going deep into the arena of a family culture. Evoking the concepts of a "good citizen" and "Khmer custom" is a cultural and ideological attempt. It is not clear yet to what extent these concepts convincingly suggest an obvious and direct connection to the objective of protecting the social and economic rights of individuals. However, constitutional provisions requiring private individuals to take care of their children and parents is a Weimarian approach to constitutionalism,[33] giving the State a constitutional mandate that goes beyond the conventional concept of regulating the relationship between the governing and the governed but extends its reach into the area of social relationships among individuals. This chapter

33 Articles 199-122 of the Constitution of the Weimar Republic, August 11, 1919, English translation available in Herbert Kraus, *The Crisis of German Democracy – A Study of the Spirit of the Constitution of Weimar*, Princeton, 1932, Appendix. See also K.D. Ewing, "Economic Rights", in Michel Rosenfeld and Andras Sajo (eds.) *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, pp. 1036-1053.

does not intend to go further than these short comments, but points to the importance of these provisions in securing some economic resources for under-aged children and senior population, who do not usually enjoy sufficient social benefits in the current social welfare schemes in Cambodia.

IV. National Economic Policy

The 1993 Constitution contains a whole chapter on economic policy which does not appear in most liberal democratic constitutions. Similar chapters did not exist in the previous constitutions under the Sangkum Reas Niym period led by Prince Norodom Sihanouk, and other subsequent constitutions before the 1980s.

The 1981 Constitution of the People's Republic of Kampuchea included a chapter on economic regime and sociocultural policies. This chapter was later modified slightly to become chapter 2 of the 1989 Constitution of the State of Cambodia. Being constitutions of a socialist regime, neither of these two previous constitutions provided for the right to ownership as a category of "rights" of the citizen to be protected by the State. However, the 1989 Constitution, in its chapter on economic regime and cultural and social welfare policies, reintroduced the concept of expropriation of private property for public interests to be permissible with prior consideration.[34] Comparing some articles of the chapter on economic regime of the 1989 Constitution to those of the 1993 Constitution gives an interesting guide to the degree of economic policy shift accompanying the launch of a market economy in the Cambodian context. One noticeable change was the removal of the provision on property rights/ownership ("kamseth") away from the chapter on policies to the chapter on rights and obligations under the 1993 Constitution. This is obviously an effort to bring back the pre-1970 constitutional order modeling after the modern constitutional law of the time, and to reconfirm the right to ownership, and perhaps property right in a broader sense, as one of the fundamental rights of citizens in a constitutional democracy. This is an important political commitment in the transition towards a market economy. Unlike the status of property rights which constituted only one specific feature of the economic regime under the previous socialist constitutions and were, at least theoretically, subject to change at the policy or institutional level, the 1993 provision on ownership is a recognition of ownership, or property rights, as a fundamental constitutional right.

34 Art.18bis of the 1989 Constitution of the State of Cambodia. However, it is important to bear in mind that this Constitution did not explicitly consider land as an object for private ownership. Whereas the 1981 Constitution provides for legal protection of property rights (*kamseth*), "consideration" whether prior or *ex poste*, was not required in case of expropriation or temporary disposal of private ownership for public interests. See Articles 18 and 20 of the 1981 Constitution.

The transition to a market economy is also manifested in the efforts to separate economic policy from social and cultural policies of the State. What was a single chapter on economic regime and cultural and social welfare policies is now divided into two different chapters. One contains provisions on economic policy and the other on education, culture and social welfare. A comparison between the provisions of chapter 2 of the 1989 Constitution and those of chapter 5 of the 1993 Constitution also presents some other interesting changes in the state-market relationship. Whereas the previous Constitution referred to a national economy led by the State, the 1993 Constitution proclaims the adoption of a market economy whose organization and operation "shall be determined by laws".[35] The chapter on economic policy of the 1993 Constitution also contains several articles on the roles of the State in promoting agricultural markets, industrial development and opportunities for handicrafts. However, it does not permit the State to compel citizens to sell their products to the State, nor to nationalize the use of private products or property even for a short period of time, unless for special circumstances permitted by law (Art. 60). A similar provision could be found in previous constitutions which stated that "the obligation to sell to the State or to place private property under temporary use by the State may be allowed only when permitted by law."[36] In this particular context, literal difference between the current and previous constitutions appears rather subtle, but the significance is both obvious and substantial. It is obvious because the difference is in an extra condition that has been added as a legal requirement under the 1993 Constitution to check not only whether any law permits the State to compel individuals to sell to or place under temporary use of the State their private property, but also whether there is any special circumstance to justify such legislative measure. This extra condition of a "special circumstance" offers an additional check over the legitimacy of any relevant law that may permit the exercise of this State power.

Substantially, the term "private property (troap sambath ekchun)"[37] appearing in the 1993 Constitution is different from the term "private property (troap sambath ekchun)" referred to by the previous constitutions. The 1981 Constitution recognized citizens' right to use and inherit land assigned by the State to build a residence, garden or plantation. No one had the right to buy, sell, mortgage or rent land.[38] The language of these articles was slightly modified in the 1989 Constitution to allow for use of land for business. However, this business was not to be interpreted to include real estate business or other kinds of business in the form of speculation.[39] The 1993 Constitution gets rid of all these provisions and permits Khmer citizens to own land as part of their private property. Article

35 Translation by author. It is hard to tell whether the Khmer text actually refers to "law" or "laws", as the language does not usually distinguish a noun in the singular from that in the plural form.
36 Art. 20 of the 1981 and 1989 Constitutions.
37 "Products" did not appear in the Art. 20 of the previous constitutions.
38 Arts. 15 and 17 first paragraph of the 1981 Constitution.
39 Art. 16 of the 1989 Constitution.

44 limits ownership over land only to natural or legal persons of Khmer nationality. To apply the fundamental concept of ownership as including the right to own, to use and to dispose of the property, one may conclude that neither the 1981 nor the 1989 Constitution allowed for the full exercise of property rights when it came to land as a source of wealth. Land could be possessed and used only in a limited way for inheritance but not for other direct commercial purposes. It could not be disposed of at the will of the occupant. In contrast, the 1993 Constitution fully incorporates land into the scope of "property", which the private owner has the full right to possess, to use and to dispose of. As a result of these changes, Article 60 of this Constitution stands out from the previous ones in banning nationalization, however temporary, of all forms of private property, consisting of movable and non-movable, also including land.

The State is also given the constitutional mandate to focus its economic policy on the improvement of the economic situation and profits of farmers or other small entrepreneurs trading in traditional skills. Giving this pro-poor policy-making power a constitutional status is significant in the context of market economy in Cambodia. However, nomination of specific fields and skills for special protection may point to a broader agenda that the economic policy intends to serve than the simple developmental one. A national and cultural implication can hardly be ignored here. The constitutional status of these policy-making powers will theoretically, at least, bind any future government to this constitutional mandate. In a way, market economy under this 1993 Constitution is therefore not only serving the economic agenda of the nation but is coated in a highly cultural and nationalistic setting. Neither pure capitalism nor the diverse models of social democracy suffices to explain this feature. In a way, "market economy" according to the analyses suggested here possesses a developmentalist agenda but filled with some level of bias towards the sustenance, commercialization and promotion of selected traditional skills and cultural identities of the people.

V. Legislation, Implementation and Challenges

Pursuant to Article 56 of the 1993 Constitution, laws need be enacted to govern the arrangements and operations of the economic system. This should technically mean the enactment of laws that define contractual relationships, ownership over things, transfer of the ownership, and most important of all, delimit the State's roles in interfering with the interactions between supply and demand aspects of the economy. It is the variations in each of these elements that generally define the different types of market economy or economic systems pursued by different states based on their respective political constitutional philosophy and other more realistic social and economic needs. The Cambodian Civil Code adopted in 2007 fulfils most of these functions. It replaces some previous laws and decrees adopted by previous political regimes before the constitutional transition to

a full market economy started in 1993. There are also specific laws to govern many relevant details of a market economy, such as the Land Law, the Law on Expropriation, etc. Detailed introduction to the substance of each law is not intended in this chapter. But it is important to describe the general feature of these laws in protecting fundamental economic rights and upholding the principles of a market economy defined by the Constitution.

All these laws set a barometer for defining and measuring the scope and changes in the constitutional conception of a market economy in the Cambodian context. They also reflect the direction to which the economic policy of this country is heading in response to the challenges in real economic and political life of the nation. If a market economy is an economic system that relies heavily on private autonomy and voluntary will of individuals in making their economic decisions with regard to acquisition, uses and disposal of property in the marketplace, the role and significance of a notarial document to validate an immovable sales contract pursuant to Article 336 of the Civil Code is one of the examples that need to be understood properly in order to accurately reflect the nature of a market economy in the Cambodian context. Although notarial authentication is a necessary process to better ensure the validity of documentation relating to immovable or other transactions which mean a lot for individuals engaging in the business, its imposition as a legal requirement for the validity of sale contracts on immovable in all cases substantially add up to the conclusion that voluntary wills explicitly expressed by individual parties in a deal are not sufficient elements to verify a transaction of immovable properties in the marketplace. In other words, exercise of private autonomy of individual actors in this market deal is legally limited and its validity needs to be supported by an external element, namely the act of authenticity to be granted by the notary public.

In a different context, an accurate understanding of the concept of "public interest" and "the need for national interests" in the Law on Expropriation, not only through the interpretation of the legal text but also by reviewing the implementation of the relevant provisions of the law, will also be an important key to figuring out the scope of limitation on the exercise of private immovable property rights in some exceptional circumstances. A definition of the concept of public and national interests to allow for broader application of these interests to justify stronger state intervention by expropriating private properties, albeit with advance compensation for damages, has a negative proportional relationship with the absoluteness of private ownership over immovable properties. Without attempting to dispute the importance of this provision for expropriation in particular cases, for the sake of public or national interests, appropriate attention to the exact level of this state power to intervene will clarify the scope of legal protection for voluntary will to possess, use and dispose of private immovable properties. Advance or posterior compensation of damages is only the second best option to protect private ownership, by making sure that the actual value of the property is secured, but it can by no means substitute the many other functions and meanings of property in a less interventionist economic policy context.

This being said, it is however important to add a clarification at this point. There is neither the need to immediately condemn the interventionalist attitude of the State within the constitutional or legal limits, nor the reluctance in confessing that market economy in a country context is modified to better respond to the unique challenges and demands of the State, society or market concerned. The most crucial part is the accurate evaluation of balances taken in adjusting the relationship between State guarantee of and State intervention into private autonomy in the management and operation of the market economy, and whether the intervention is taking place on a fair and reasonable basis.

VI. Conclusions

The constitutional transition that started in 1993 in Cambodia suggests several important barometers to be used in defining the future economic life of the nation. This chapter focuses on the economic life of the new Kingdom of Cambodia emerging from this constitutional transition. The Constitution separates economic rights of individuals as a matter of fundamental rights guaranteed by the Constitution, from particular economic entitlements created by the Constitution, for specific economic policy purposes. On the principle of separation of powers, through which the legislative and executive branches are given the ultimate power to adopt national economic policies to respond to the changing economic facts and circumstances, it is arguable that economic entitlements related to national economic policy making is more easily subject to change, whereas economic rights defined under Chapter 3 of the Constitution are supposed to be more stable and sustainable.

Another constitutional question with regard to economic rights and system relates to the definition of a market economy in the Cambodian constitutional context, particularly within the broader framework of liberal democracy explicitly provided for by the 1993 Constitution. In a general sense, private autonomy of individuals sustained by the constitutionally protected basic rights and fundamental freedoms is a decisive factor for the proper functioning of the market economy. This decisive factor needs further elaboration and definition by means of specific legislative projects in the economic field. There is no doubt that the elaboration and definition is being presented, constructed, adapted and confirmed after each grand legislative project is concluded in the field of economic rights and policies. Further studies in the development of relevant legislation in this field are therefore indispensable for understanding and accurate assessment of the meaning, scopes and limits of the market economy introduced by the 1993 Constitution.

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LABOR RIGHTS AND TRADE UNIONS

CHEA Sophal

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LABOR RIGHTS AND TRADE UNIONS

CHEA Sophal *

ABSTRACT

Cambodian labor movements and labor rights are guaranteed by Cambodian laws. The Constitution of the Kingdom of Cambodia grants basic labor rights such as the right to choose employment, the right to form and join trade unions and the right to strike and engage in non-violent demonstrations. The Cambodian garment and footwear industry, which represents a large share of the country's gross domestic product (GDP), experienced tremendous growth over the last two decades. The union movement also witnessed a rapid growth, starting with just a few union federations registered with the Ministry of Labor in the late 1990s to a more complex structure of enterprise-level unions, union federations, and union alliances with different affiliations. This chapter aims to provide an analytical introduction to labor rights and trade unions in Cambodia, particularly in the garment and footwear sectors. It will also look into the legal framework of the trade union movement, the draft Trade Union Law, and constitutional framework of labor rights and trade unions. It examines the situation on the respect of labor rights and labor compliance for certain provisions.

The research methodology is based on desk and literature such as the Constitution of the Kingdom of Cambodia, the Cambodian Labor Law, and ministerial regulations. Providing a review on literature, laws, and regulations, the chapter could potentially con-

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Mr. Chea was the key contributor in a number of researches such as: Political Economy of the Cambodian Transition (2003) by Caroline Hughes, Impunity in Cambodia: How Human Rights Offenders Escape Justice (2001) by Human Rights Watch/Asia, Study on the Restoration of Ten Historical Bridges (1999) by Oriental Consultant for the Work Bank, and Less than a Human Torture (1999) by Torture Centre/Rehabilitation of Licadho. Some of the recent paper work includes Labor Rights and Human Rights: Minimum Wage in Cambodian Garment and Footwear Industry (2015), and Labor Rights in Cambodia (2016).

tribute to the understanding of basic labor rights and the respect of labor provisions in Cambodia. It will further enhance the knowledge on the differences among labor rights, as for example the right to strike, the right to collective bargaining, the right to choose employment and the right to form and join trade unions. Once the knowledge of relevant stakeholders and the public on these concepts is solid, labor disputes could mitigate and prevent them from turning into violent escalations, such as those that took place in later 2013 and 2014, which led to the death of workers and protesters. Having respect for the concepts and practices of labor rights would enhance the harmonization of industrial relations through social dialogue between trade unions and employers.

I. Introduction

This article provides an analytical introduction to labor rights and trade unions in Cambodia. It is an overview of the legal and constitutional framework governing trade unions and labor rights and provides analysis of the Trade Union Law within that context. It also provides background information on the current climate in Cambodia regarding respect for labor rights and freedom of association to give the reader an understanding of the various patterns that violations of labor rights in Cambodia tend to follow as well as examples of labor law compliance carried out by relevant industries, for instance, the garment and footwear industry.

II. Labor Rights and Trade Unions

This section provides an overview of the legal framework for labor rights and unions in Cambodia as well as the current realities regarding protection of these rights in Cambodia.

1. Labor Rights in Cambodia

The Constitution of the Kingdom of Cambodia provides the basis for labor rights in Cambodia. Some of those labor rights include: "Khmer citizens shall enjoy the right to choose any employment according to their ability and needs of the society" and "Khmer citizens of either sex shall have the right to form and to be members of trade unions".[1] The Constitution also guarantees that Khmer citizens of either sex have the right to strike and

1 The Constitution of the Kingdom of Cambodia, Art. 36.

engage in non-violent demonstrations.[2] The following sections will look further at the labor rights covered by the existing law in Cambodia, such as the Cambodian Labor Law and the Constitution of the Kingdom of Cambodia.

a.) Right to Choose Employment

The right to choose employment is guaranteed by the Constitution. Khmer citizens of either sex are free to exercise their right to apply for a job or pursue any vocation based on their ability and the needs of society.[3] However, the current practice of short-term rotating contracts, like fixed duration contracts (FDC) for two, three or six months, provide disadvantages and employment insecurity for employees and their trades. Employers use short-term labor contracts for both trade unions and workers for two reasons, namely, to undermine workers' rights and to reduce workers' benefits. Both the Constitution and the Labor Law enshrine workers' rights to join and form unions freely. However, if workers are employed under short-term contracts, they potentially risk non-renewal of their contracts by joining a trade union that their employer is opposed to. In other cases, workers are forced to work overtime and comply out of fear of that their short-term contract will not be renewed.[4]

b.) Right to Enjoy Equal Pay for Equal Work

Under the Cambodian Constitution, women are to receive "equal pay for equal work". Khmer citizens of either sex are entitled to equal pay for equal work.[5] The Constitution also abolishes all forms of discrimination against women and provides that women are equal to men in other areas as well.[6]

The 1997 Labor Law also prohibits wage discrimination for reasons of gender, social origin (status) and age, among others.[7] Article 31 of the Constitution states that all people are "equal before the law, enjoying the same rights and freedoms and fulfilling the same obligations regardless of race, color, sex, language, religion, political affiliation, birth origin, social status, wealth or other status".[8]

2 Id., Art. 37.
3 Id., Art. 36.
4 ILO, ILO/Trade Union National Conference on Current Employment Contract Practices and the Need for its Challenges, 27-28 June 2012, http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/meetingdocument/wcms_185902.pdf (last visited 28 October 2014).
5 The Constitution of the Kingdom of Cambodia, Art. 36.
6 Id., Art. 45.
7 Cambodian Labor Law, Art. 12.
8 The Constitution of the Kingdom of Cambodia, Art. 31.

As part of its Transparency Database[9], Better Factories Cambodia (BFC) monitors the provision "equal pay for men and women" against relevant Cambodian national laws as well as the provisions of International Labor Organization (ILO) Convention 100. Based on the statistics in the BFC Transparency Database, none of the 233 factories monitored by the program was found to be non-compliant for not providing "equal pay for men and women".[10]

Cambodia ratified the ILO Convention 100 on "Equal Remuneration" on 23 August 1999. Article 2 of this Convention requires the member state to ensure the principle of equal remuneration for male and female workers for work of equal value through national laws or regulations, wage determination machinery, and collective agreement.

The Arbitration Council (AC) has handled two cases (Case#14/04 – June Textile and Case#185/12 – Win Singtex) in which workers demanded that factory management apply the principle of equal pay for the same work based on Article 106 of the Cambodian Labor Law, which states that "for work of equal conditions, professional skill and output, the wage shall be equal for all workers subject to this law, regardless of their origin, sex or age".

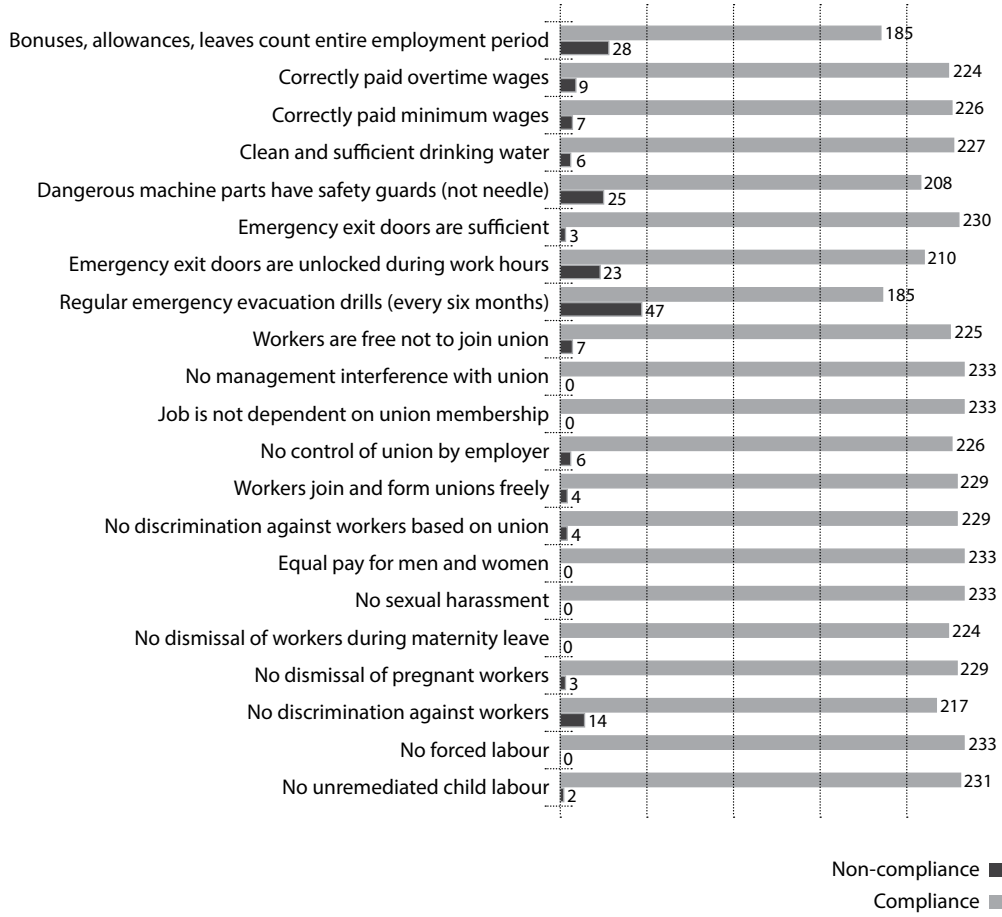
In both cases, the AC objected to the demands from the workers stating that the workers did not provide enough evidence to prove that they carried out the same work as their Chinese counterparts. Therefore, the AC decided that the employer was not obliged to increase the wages for the Khmer supervisor to the same level as the Chinese supervisor.[11]

9 The Transparency Database includes 21 critical issues such as:
- Fundamental rights: no un-remediated child labor; no forced labor; no discrimination against workers; no dismissal of pregnant workers; no dismissal of workers during maternity leave; no sexual harassment; equal pay for men and women; workers may join and form unions freely but are not required to; no control of unions by employers; no management interference with unions
- Occupational safety and health/emergency: regular emergency evacuation drills (every 6 months); emergency exit doors are unlocked during working hours, emergency exit doors are sufficient; dangerous machine parts have safety guards; clean and sufficient drinking water
- Wages: correctly paid minimum wages and correctly paid overtime wages
- Contracts: bonuses, allowances, leave counts for entire employment period

10 ILO/BFC, Better Factories Cambodia Transparency Database, 21 Critical Issues Compliance, http://betterfactories.org/transparency/en/issues/graph_view/critical_issues (last visited 5 November 2014)

11 The Arbitration Coucil¸14/04 — June Textile vs. Khmer Youth Federation of Trade Union in June Textile (5 Apr. 2004) and 185/12 — Win Singtex vs. CCAWDU Federation and CCAWDU Trade Union at Win Singtex (26 Oct. 2012)

Figure 1: 21 Critical Issue Compliance



BFC Transparency Database: 21 Critical Issues Compliance (2014)

c.) Right to Maternity Leave

The Constitution grants rights to maternity protection.[12] This means that all female employees are entitled to maternity leave and benefits if they have worked at that position for at least one year. The Constitution prohibits the termination of a woman's employment based on her pregnancy. However, the Constitution does not address pregnancy-based discrimination in hiring or the failure to renew a pregnant worker's contract. According to Article 46 of the Constitution: "A woman shall not lose her job because of pregnancy. Women shall have the right to take maternity leave with full pay and with no loss of seniority or other social benefits."

12 The Constitution of the Kingdom of Cambodia, Art. 46.

Both the Labor Law and the Cambodian Constitution prohibit employers to fire or give notice to female employees when they are on maternity leave.[13] However, problems arise when determining who is eligible for maternity leave and benefits. A problem arises when pregnant workers are employed on short-term (fixed-duration) contracts for 3 to 6 months. When they become pregnant and, especially, as they get closer to their delivery date, their short-term contracts are not renewed. Under the Labor Law and the Constitution, as we have seen, all women are entitled to maternity leave, so they can take time off to give birth and care for their child. However, under the Labor Law, they are only entitled to maternity leave benefits during this leave when they have worked an uninterrupted year at their workplace.

d.) Right to Obtain Social Security and Other Social Benefits

The Cambodian Constitution provides a fairly comprehensive baseline for social protection in Cambodia. A number of mandates for social assistance and social security are stipulated in the Constitution. Article 36 of the Constitution mentions that Cambodian citizens are entitled to obtain social security and other social benefits as determined by law. The Constitution draws attention to vulnerable groups that require special assistance, such as: poor women and children, people with disabilities and families of military veterans. The constitutional provisions regarding social security are as follows:

> *"Every Khmer citizen shall have the right to obtain social security and other social benefits as determined by law."* (Article 36)
> *"The State and society shall provide opportunities to women, especially to those living in rural areas without adequate social support, so they can get employment, medical care, and send their children to school, and to have decent living conditions."* (Article 46)
> *"The State shall give full consideration to children and mothers. The State shall establish nurseries, and help support women and children who have inadequate support."* (Article 73)
> *"The State shall assist the disabled and the families of combatants who sacrificed their lives for the nation."* (Article 74)
> *"The State shall establish a social security system for workers and employees."* (Article 75)

e.) Right to Form and Join Trade Unions

The Cambodian Constitution protects the right of citizens to form and join trade unions and stipulates that the organization and operation of trade unions will be determined by law.[14] Forming or joining trade unions is also guaranteed by the Labor Law, which provides that workers are free to join or not to join trade unions of their choice without prior authorization. Workers are also free to withdraw their membership from employee

13 Cambodian Labor Law, Art. 182.
14 The Constitution of the Kingdom of Cambodia, Art. 36.

organizations or trade unions, however, a few unions sometimes attempt to intimidate workers to prevent them from leaving. The organizers of a trade union are required to file an application and provide a list of union officers in order to register with the Ministry of Labor and Vocational Training. The Department of Labor Relations has the responsibility to facilitate union registrations and applications for "most representative" status. In addition to the constitutional provisions, the Royal Government of Cambodia has ratified the ILO Convention 87 (the Freedom of Association and Protection of the Right to Organize Convention) and Convention 98 (the Right to Organize and Collective Bargaining Convention). Among the factories monitored by and listed on BFC's Transparency Database, three trade unions have been cited for violations of the right of workers to join or choose not to join a union freely.[15]

The Trade Union Law allows workers and employers to establish and join professional organizations of their choice for the main purpose of researching workplace conditions, promoting the interests of the members and protecting their rights. However, it prohibits any worker unions or employer associations that include both employers and workers. This means that the workers' unions should not have management representatives as members of the union and vice versa.[16]

The Labor Law of Cambodia protects the rights of trade union actions, such as the right to establish collective labor agreements to determine working conditions and relations between employers and employees, freedom of association as well as strikes and lockouts. The right to form a trade union is defended in Article 266 of the Labor Law.

> *"Workers and employers have, without distinction whatsoever and prior authorization, the right to form professional organizations of their own choice for the exclusive purpose of studying, promoting the interests, and protecting the rights, as well as the moral and material interests, both collectively and individually, of the persons covered by the organization's statutes."*

The Global Union Column stated that Cambodia has an institutional surplus of unions combined with a decoupling of the international Corporate Social Responsibility (CSR) paradigm of labor rights monitored by workers and independent unions. Within the Cambodian garment and footwear industry, which faces an increasing frequency of strikes - many of which are led by 'real' unions - the ability to undertake industrial action has emerged, despite numerous obstacles.[17] The sector experienced over 800 total incidences

15 BFC, Better Factories Cambodia's Transparency Database, at http://betterfactories.org/transparency/ (last visited 13 Aug. 2014).

16 Law on Trade Union, Art. 5.

17 Dennis Arnold, Global Union Column Issue 155, November 2013: Better Work or 'Ethical Fix'? Lessons from Cambodia's Apparel Industry, at http://www.global-labor-university.org/fileadmin/GLU_Column/papers/no_155_Arnold.pdf (last visited Feb. 25, 2014).

of strikes from 2000 to 2010. There were 647,662 workers involved in those strikes resulting in 12,535,855 working days lost.[18] In 2012, the Free Trade Union of Workers of the Kingdom of Cambodia recorded strikes occurring at 101 factories involving 84,320 workers.[19]

For over a decade, the apparel manufacturing sector in Cambodia has been seen as having a competitive advantage in the international marketplace due to the relatively greater respect for labor rights compared to other garment-exporting countries in the region. The Minister of Labor noted in 2014 that Cambodia has around 3,000 factory worker unions and some factories have more than ten unions.[20]

f.) Labor Rights Violations

The Constitution of Cambodia provides the legal basis for labor rights in Cambodia, such as the right to choose any employment according to one's ability and the needs of society, the right to equal pay for the same work as well as the right to obtain social security and other social benefits.

Khmer citizens of either gender have the right to choose any employment according to their ability under the Constitution.[21] Employment practices in the garment and footwear industry have resulted in 90% of the workforce in these industries being composed of female workers and the remaining 10% being male. Because of the gender imbalance, male applicants seem to be discriminated against in the hiring practices of factory management. Among the 233 factories monitored by BFC, 14 were found to be discriminating against workers and three carried out dismissals of pregnant workers. Concerning the right of trade unions, four factories were found to be involved in discrimination against workers based on union membership, four factories were found guilty of controlling trade unions and seven factories were involved in interference with workers' rights to form or join trade unions freely.[22]

18 MoLVT, Department of labor Dispute: Strikes and Lockouts, at http://www.ilo.org (last visited 10 Aug. 2014).

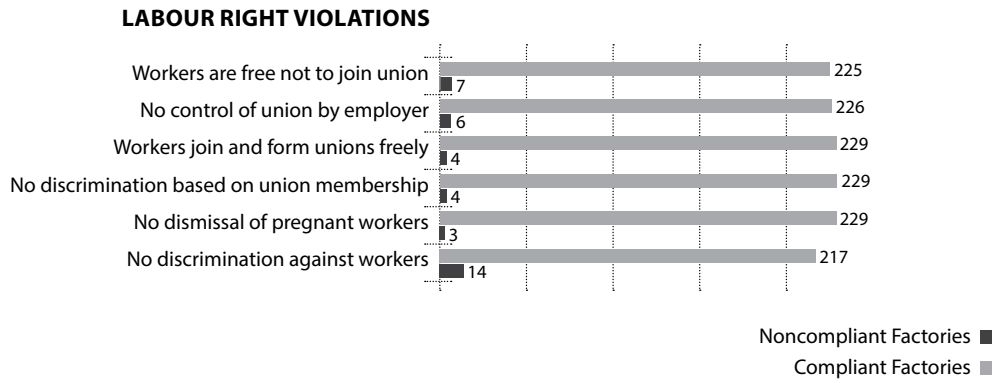
19 Free Trade Union of the Kingdom of Cambodia, Report on Strikes in 2012, at http://www.ftuwkc.net/userfiles/List%20Unions%202013.pdf (last visited 25 Aug. 2014).

20 Mom Chan Dara Soleil, AKP: Draft Trade Union Law Being Finalized, May.19, 2014 at http://www.akp.gov.kh/?p=45469 (last visited 29 May 2014).

21 The Constitution of the Kingdom of Cambodia, Art. 36.

22 ILO/BFC, Better Factories Cambodia Transparency Database, 21 Critical Issues Compliance, http://betterfactories.org/transparency/en/issues/graph_view/critical_issues (last visited November 5, 2014).

Figure 2: Labor Right Violation



Another issue involving labor right violations is related to employment contracts, which are governed by the Labor Law and Decree No. 38 on Contracts and Other Liabilities, and is one of the most essential labor rights for workers to understand, so that they can avoid some of the discriminatory practices that some employers use. There are two types of employment contracts under Cambodian law: Fixed Duration Contracts (FDC) and Unspecified Duration Contracts (UDC).[23] The example noted above, which is contained in the BFC Transparency Database, reveals an increase in the number of factories engaged in contract discrimination against workers by offering short-term rotating contracts to men and long-term, more secure contracts to female workers.[24]

The International Human Rights Clinic of Yale Law School issued a research report in 2011 called "Tearing Apart at the Seams – How Widespread Use of Fixed Duration Contracts Threatens Cambodian Workers and the Cambodian Garment Industry". The findings in this report show that there were negative effects on workers' rights, under both domestic and international law, due to the increased use of FDCs in Cambodia.

23 According to the 1997 Labor Law, an FDC is defined as a contract for labor of two years or less with precise starting and ending dates. It may be renewed one or more times, as long as each renewal does not exceed the maximum duration of two years. Any violation of this provision means that the contract will automatically be classified as a UDC under the law.

24 Id., p. 7.

According to the report, the move towards using FDCs has:[25]

- resulted in increased job insecurity;
- threatened the enforcement of workers' rights under national and international law;
- presented obstacles for increased labor productivity;
- jeopardized Cambodia's reputation as a country committed to improving conditions for workers; and
- increased the threat of a major breakdown of industrial relations and created a potential provocation for massive strikes.

2. Legal Framework for Unions in Cambodia

a.) Constitutional Framework

The Cambodian Constitution, which was promulgated in 1993, recognizes the right of workers to form or join trade unions.[26] The 1997 Labor Law also protects workers' rights to establish[27] and join trade unions[28] as well as the right to strike and the employers' right to a lockout[29]. The Labor Law also prohibits discrimination in employment.[30] Among the eight Core ILO Conventions[31] ratified by Cambodia in 1999, two are related to trade unions:[32] The Freedom of Association and Protection of the Right to Organize Convention (1948) and the Right to Organize and Collective Bargaining Convention (1949).

The Civil Society and Trade Union Support Group has voiced concerns that the proposed Trade Union Law contains many articles that would severely curtail trade union rights, make trade unions highly vulnerable to dissolution, de-registration and criminal

25 Allard K. Lowenstein International Human Rights Clinic, Yale Law School, Tearing Apart at the Seams: How Widespread Use of Fixed – Duration Contracts Threatens Cambodian Workers and the Cambodian Garment Industry (2011), p. 2.
26 Constitution of the Kingdom of Cambodia, Art. 36.
27 Cambodian Labor Law, Art. 266.
28 Id., Art. 271.
29 Id., Art. 318.
30 Id., Art. 320.
31 The eight Core ILO Conventions include the Forced Labor Convention, 1930 (No. 29), the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), the Equal Remuneration Convention, 1951 (No. 100), the Abolition of Forced Labor Convention, 1957 (No. 105), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labor Convention, 1999 (No. 182).
32 ILO, Ratifications of fundamental Conventions and Protocols by country, at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F (last visited 1 Jun. 2014).

sanctions as well as subject trade union rights to the arbitrary discretion of government authorities. They also pointed out that the current draft law would impose burdensome and discriminatory requirements on individuals seeking leadership positions in trade unions.[33]

In their joint legal analysis of Cambodia's Trade Union Law during drafting stage issued in September 2014, the Community Legal Education Center (CLEC) and the Cambodian League for the Promotion and Defense of Human Rights (LICADHO) concluded that the draft would severely restrict the ability of workers and unions to join with like-minded individuals and groups in order to protect their rights and demand the fair labor practices that are enshrined in the constitutional provisions protecting the freedom of association. In other words, the draft law fails to comply with the terms of the Cambodian Constitution guaranteeing the right to freedom of association.[34]

b.) Trade Union Law

The Trade Union Law was officially promulgated by the King on May 17, 2016 after the Constitutional Council reviewed and endorsed on the constitutionality of the Trade Union Law early May 2016[35]. It is too early to comment on the application of the Trade Union Law.

However, there were different views on the Trade Union Laws from different stakeholders such as the employers' association (CAMFEBA) and International Trade Union Confederation (ITUC) during the drafting stage. CAMFEBA indicated that the draft Trade Union Law was shared with all relevant stakeholders for comments and feedback in 2010 through Employers' Forum organized by CAMFEBA and workshop held by MOLVT[36]. However, ITUC rose that the Trade Union Law was pushed through, although there were objections by trade unions, the International Labor Organization and several global garment brands[37].

After the official promulgation of the Trade Union Law, the Ministry of Labour and Vocational Training (MOLVT) issued an announcement on taking effect of the Trade Union Law on 28 June 2016. The announcement states that the Ministry has the honor to inform workers, employers, and their respective professional organizations (Employers' Associations and Trade Unions) that the Trade Union Law was promulgated by Royal Code NS/RKM/0516/007 dated 17 May 2016. The announcement also asked both the employers

33 CLEC, Press Release: Trade Union Support Group on Proposed Cambodian Trade Union Law for General Release, 15 March 2011, http://www.clec.org.kh/clecnews.php?cnsID=30 (last visited 31 Dec. 2014).

34 CLEC and LICADHO, Legal Analysis: Cambodia's Draft Law on Unions of Enterprises, Sep. 2014, http://www.licadho-cambodia.org/reports/files/199JointBriefAnalysisDraftTradeUnionLaw2014-English.pdf (last visited 31 Dec. 2014).

35 Constitutional Council: *Announcement* #24/2016. Phnom Penh: Constitutional Council (2016, May 02).

36 CAMFEBA. (2010, April). CAMFEBA E-Newsletter Vol 2, Year 2010. Phnom Penh: CAMFEBA.

37 ITUC. (2016, August 09). *Cambodia: ITUC Deplores New Anti-Union Law*. Retrieved from International Trade Union Confederation: http://www.ituc-csi.org/cambodia-ituc-deplores-new-anti

and unions associations that are already registered or that are applying for registration to fulfil the conditions and duties duly stipulated in the Law on Trade Unions for the protection of the legal rights and interests of those covered by the Cambodian Labour Law.[38]

Before this announcement letter, the Labour Ministry issued a Prakas on Delegation of Functions in Implementing the Law on Trade Unions on 27 June 2016 delegating the functions (from MOLVT Labor Dispute Department) related to registering and maintaining the registrations of local trade unions in the provinces to the appointed Labor Inspector, Labor Governor, or Officer[39] who have been delegated the authority to take administrative actions outlined in Chapter 15 of the Law on Trade Unions.[40]

c.) Social Security Law

Besides the Cambodian Constitution that provides a very good foundation for social security protection in Cambodia through its Article 36, Cambodia also has laws and regulations on social security. In 2002, Cambodia adopted its first National Social Security Law outlining the establishment of subsequent sub-decrees and Prakas to stipulate the guiding principles of a mandatory social security system for private employees consisting of employment injury insurance, health insurance scheme, and pension scheme. Its National Social Security Fund (NSSF) was established in 2007 to cover the employment injury for the private sector from 2008 onwards. It is currently covering 3,288 enterprises but the specific number of its memberships is not available online. By the end of 2014, NSSF had 7,041 registered enterprises that employed around 1,021,588 people that became members of NSSF[41].

A number of laws and regulations put in place by the Royal Government of Cambodia covering the aspects of social security include:

- Cambodia Labor Law, 1997;
- The Insurance Law of the Kingdom of Cambodia, 20th June 2000;
- Law on Social Security Schemes for Persons Defined by the Provisions of the Labor Law, 25th September 2002;

38 MOLVT. (2016, June 28). Announcement on Taking Effect of Trade Union Law. *No. 217 K.B/S.Ch.N.* Phnom Penh: Ministry of Labour and Vocational Training. Retrieved September 01, 2016, from http://www.gmac-cambodia.org/doccument/data/2016/announcement/MOL/217/217-eng.pdf

39 MoLVT. (2016, June 27). Prakas Delegation of Functions in Implementing the Law on Trade Unions. *No. 250 K.B/Br.K.* Phnom Penh: Ministry of Labour and Vocational Training. Retrieved September 01, 2016, from http://www.gmac-cambodia.org/doccument/data/2016/prakas/MOL/250/250-eng.pdf

40 Chapter 15 of the Law on Trade Unions cover certain number of administrative actions such as administrative sanctions and penalties (Art. 76), failure to keep financial records (Art. 78), non-registered operations (Art. 80), and failure to maintain and update the name list of workers (Art. 85), etc.

41 NSSF. (2014). *Report on The Annual Achievements in 2014 and the Action Plan in 2015*. Phnom Penh: National Social Security Fund.

- Sub-Decree on the Establishment of National Social Security Fund, 02 March 2007; and
- Law on the Protection and Promotion of the Rights of People with Disabilities, 3 July 2009.

III. Trade Unions and the Freedom of Association

The Constitution of the Kingdom of Cambodia protects the freedom of association and the Royal Government has generally respected this right in practice. However, the Royal Government has not effectively enforced the freedom of association provisions in the law.

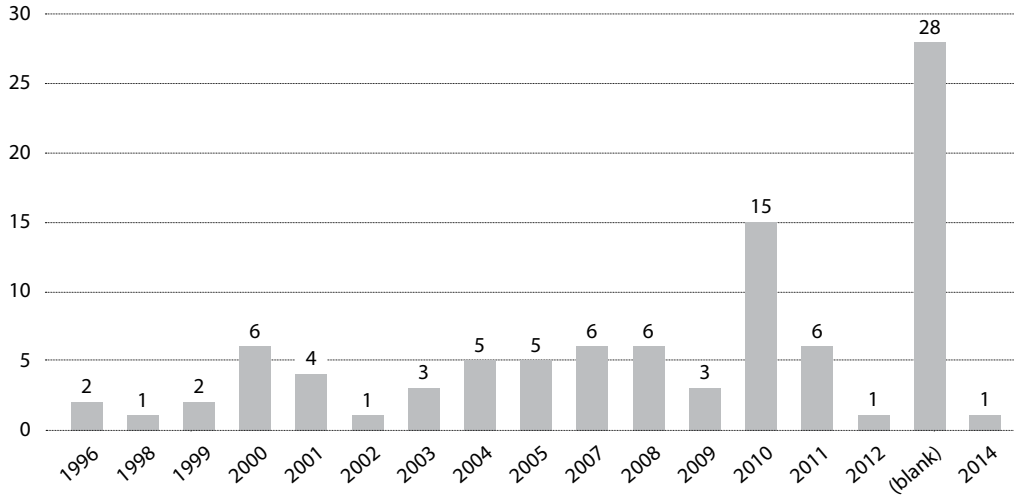
1. Cambodian Trade Unions and their Affiliates

The Constitution enshrines the right of citizens to establish associations.[42] The Constitution also protects the freedoms to assemble, demonstrate and strike. Cambodia witnessed a rapid growth of trade unions from 1997 after the Labor Law's recognition of the freedom of association. Labor unions have been organized at the individual shop level and also across workplaces and industries as union federations, union confederations and union alliances.[43] Cambodia ratified the ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organize) in August 1999.

The rights to organize and to bargain collectively are enabling rights that make it possible to exercise the freedom of association in the employment context. The promotion and realization of the freedom of association and the effective recognition of the right to organize are the heart of the ILO's mandate. These principles are essential to building individual trade unions and union federations and they can be classified as "civil rights" because they are an integral element of civil liberties and democracy.[44] This has been evident in the growth in the number of trade union federations and confederations established in Cambodia from 1996 to 2013. In total, there were 88 trade union federations established over a decade and a half: two in 1996 growing to 88 by mid-2013 with the biggest growth in 2010 with 15 federations.

42 Id., Art. 42.
43 International Labor Organization, Decent Work Country Program Cambodia 2011-2015 (2012), p. 17.
44 ILO, Freedom of Association in Practice: Lessons Learned, International Labor Office, Geneva, (2008), p. 77

Figure 3: Trade Union Federations Established from 1996 to 2013

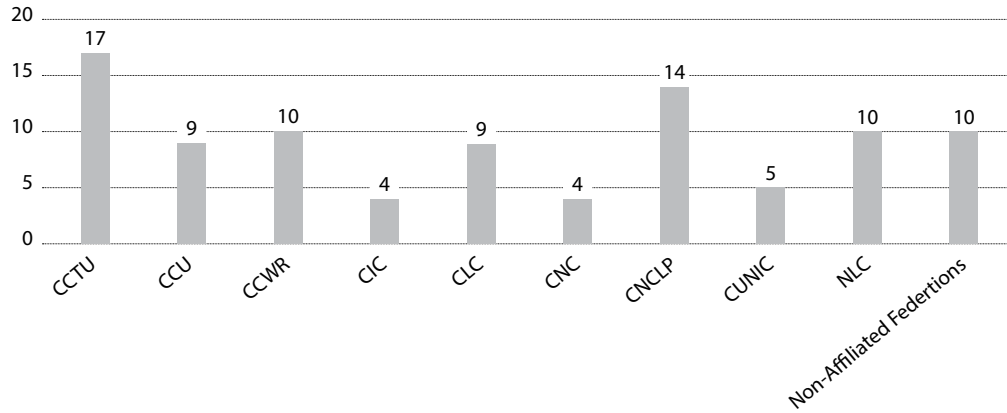


Source: Solidarity Centre, Cambodia (June 2013)

Those union federations are affiliated with nine different trade union confederations, such as the Cambodian Confederation of Unions (CCU), the Cambodian Labor Confederation (CLC), the Cambodian Confederation of Trade Unions (CCTU), the Cambodian Confederation for Workers' Rights (CCWR), the Cambodia Inheritance Confederation (CIC), the Confederation Union National Independent Cambodia (CUNIC), the Cambodian National Labor Confederation (CNC), the National Labor Confederation of Cambodia (NLC) and the Cambodian National Confederation for Laborers' Protection (CNCLP), which represent various sectors and target groups, such as: the garment, footwear, education, construction, and tourism sector and civil servants, students and teachers. The Cambodian labor movement reportedly claimed membership of over 489,516 workers and informal sector workers.[45]

45 Solidarity Center, Solidarity Center Synopsis of the Cambodian Labor Movement, (2012).

Figure 4: Trade Union Confederations Established 1996-2013



Source: Solidarity Centre, Cambodia (June 2013)

Union federations and confederations have played an important role in exercising the right to strike and conduct demonstrations on a large scale to demand better working conditions and pay. For example, there were 105 strikes in 2008 with 304,396 working days lost due to worker strikes.[46]

2. Union Activists

Over the past decade, the labor union movement in Cambodia has remained relatively strong thanks in part to an explicit linkage between labor protections and market access under the Cambodia-U.S. Multi-Fiber Arrangement (MFA). According to a World Bank survey in 2005 - which rated Cambodia's performance in relation to other countries on labor standards, tariff preferences and union rights - buyers consider Cambodia (3.65) to perform better than Bangladesh (2.35), Thailand (3.13), Vietnam (2.64) and China (2.87) in terms of labor standards.[47] However, progress has been severely undermined by a shift in the garment sector towards employing workers under short-term contracts as well as threats to and murders of union leaders/activists and the use of lethal force by the Royal Government in suppressing labor protests. The ILO notes that Cambodia is one of five countries (the others being: Argentina Ethiopia, Fiji and Peru), where serious violations of worker rights occur, even to the point of murder. The ILO Committee on Freedom of

46 Nuon Veasna & Serrano Melisa, Building Unions in Cambodia: History, Challenges, and Strategies, p. 32 (Friedrich-Ebert-Stiftung 2010).

47 Foreign Investment Advisory Service-a Joint Service of the International Finance Corporation and the World Bank, Cambodian Corporate Social Responsibility in the Apparel Sector and Potential Implications for Other Industry Sectors (World Bank, 2005), p. 15.

Association singled these five countries out as representing the "most serious and urgent cases" among the 32 countries examined in its annual meeting. Those cases involved violations of the rights to organize, negotiate through collective bargaining and engage in social dialogue.[48]

In addition to these violations, common tactics used by employers and the government to undermine union activists include: firing workers who are organizing; blacklisting; closing, reorganizing and relocating facilities; replacing independent unions with company-dominated unions; and accusing labor activists of crimes.[49] As noted above, the Cambodian Labor Law allows employers to employ workers under two types of contracts: Fixed Duration Contracts (FDC) and Unspecified Duration Contracts (UDC). Union activists are often employed under FDCs. FDCs are tactical contracts employers use to discourage employees from joining unions and bargaining collectively. The practice of using these contracts causes workers to fear being fired for unionizing. This is due to the fact that it is easier for employers to terminate or not renew workers' contracts because the employer has no obligation to renew a workers' contract after it has expired, if the worker is employed under an FDC. [50]

Union activists in Cambodia faced a number of challenges such as legal actions against their leaders and discrimination at the workplace. Their vulnerability to these threats is very high due to a lack of access to legal protection, the suddenness of some of the attacks and a lack of links to national and international partners.[51]

After the national strike late 2013 led by six union federations (the Coalition of Collective Unions of Movement of Workers (CUMW), the Cambodian Confederation of Unions (CCU), the Cambodia Apparel Workers Democratic Union (CCAWDU), the National Independent Federation of Textile Unions in Cambodia (NIFTUC), the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC) and the Cambodian Alliance of Trade Union (CATU).) for the minimum wage increase, the Labour Ministry issued a notice warning union leaders that the government would take legal action if the strike continue.[52] Some of these six union group leaders continued to face legal action after the Veng

48 ICNL, The International Centre for Not-for-Profit-Law, NGO Law Monitor: Cambodia, http://www.icnl.org/research/monitor/cambodia.html (last visited 15 Dec 14).

49 International Labor Rights Forum, Freedom at Work: Campaign Toolkit 2009, p. 9, at http://www.laborrights.org/sites/default/files/publications-and-resources/FAWToolKit.pdf (last visited on 25 Feb. 2014).

50 Labor Behind the Label, Cambodia: Over 200 trade union leaders suspended or illegally dismissed, at http://www.laborbehindthelabel.org/staff/item/896-cambodia-trade-union-dismiss (last visited on 25 Aug. 2014).

51 Cambodian Centre for Human Rights, Defending the Defenders: Security for Cambodian Human Rights Defenders, Country Report 2013, p. 41, at http://www.article19.org/data/files/medialibrary/37113/13-06-19-CR-cambodia.pdf (last visited on 25 Feb. 2014).

52 Kunthear, M., & Teehan, S. (2013, December 31). *Take it or leave it offer*. Retrieved from The Phnom Penh Post: http://www.phnompenhpost.com/national/take-it-or-leave-it-offer

Sreng incident which left five people dead and more than 20 with gunshot wounds[53]. The Municipal Court of Phnom Penh summoned two union leaders, Rong Chhun, President of CCU, and Yang Sophorn, Leader of CATU, for questioning over the alleged inciting violence and property damage at a garment worker protest in January 2014[54].

3. Trade Union Rights

The Cambodian Constitution protects the right of trade union workers to strike and to engage in non-violent demonstrations. It guarantees the equality of Khmer citizens before the law, prohibits discrimination against women and calls for equal pay for equal work regardless of gender.

The Trade Union Law protects fundamental trade union rights, such as the right to establish and join professional organizations.[55] Fundamental trade union rights include: the right to form a trade union,[56] as well as the freedoms to join or not to join a union,[57] recruit new members, request changes in wages and/or working conditions and take industrial action.[58] Trade unions in Cambodia often face frequent violations of labor and union rights, in particular, harassment and unfair dismissal of union leaders.[59] One of the most widespread issues is the misuse of contracts, resulting in non-renewal or termination of contracts for union activists. When workers become active in trade unions at their workplace, such as being elected as trade union leaders, their fixed duration contracts are oftentimes not renewed. Owners or managers of factories often employ such discriminatory tactics to discourage workers from becoming involved in trade union activities.

Workers also frequently face difficulties in exercising their right to form a trade union. After union members elect their representatives or trade union leaders, those representatives or leaders are often rejected by factory management, their contracts are not renewed or their positions are simply eliminated. These tactics are used in spite of the fact that the law clearly states that workers have the right to be a member of the union of their choice and employers may not force workers or employees to be a member of a union or refrain from becoming a member.[60]

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53 Pheap, A. & Zsombor, P. (2014, January 6). *GMAC Defends Use of Force Against Striking Workers*. Retrieved September 2, 2016, from The Cambodia Daily: https://www.cambodiadaily.com/archives/gmac-defends-use-of-force-against-striking-workers-50136/

54 Pheap, A. (2014, October 28). *Union Leaders Called to Court for Questioning*. Retrieved September 2, 2016, from The Cambodia Daily: https://www.cambodiadaily.com/archives/union-leaders-called-to-court-for-questioning-71123/

55 Trade Union Law, Art. 5.

56 Cambodian Labor Law, Art. 266.

57 Id., Art. 273.

58 Id., Arts. 320, 323-329.

59 ILO, Decent Work Country Programme Cambodia (2011-2015), at http://www.ilo.org/public/english/bureau/program/dwcp/download/cambodia.pdf (last visited 18 Aug. 2014), p. 24.

60 Cambodian Labor Law, Arts. 266 and 271.

Under the law, workers should be able to exercise their right or freedom to join or not join a union. Once a worker decides to join a union, he or she would then be able to vote for trade union officials who serve as leaders of the union and attend union meetings. Furthermore, he or she would be responsible for paying union membership dues. Workers have the option to authorize their employer in writing to deduct their union dues from their wages.[61]

When recruiting new members for a trade union, current members are not permitted to pressure workers or employees to join.

Workers and union members are also entitled to be informed about any change in wages or working conditions. The Labor Law requires enterprises to post the minimum wage notice and any changes in wages and working conditions at the workplace in a prominent place, such as a notice/information board.[62] For example, a recent Prakas issued by the Labor Ministry regarding the minimum wage increase to US$100 for regular workers and US$95 for probationary workers must be prominently displayed at all businesses affected by that regulation.[63] The Labor Law also requires the employer to take measures to inform their workers regarding their wages and benefits prior to beginning work or at any time that these terms change.[64]

According to the definition contained in the Labor Law, a strike is "work stoppage by group(s) of workers taking place in the enterprise with the purpose for obtaining the satisfaction for their demand from the employer as a condition for the return to work."[65] In this regard, trade unions usually exercise their right to take industrial actions, like strikes, to protect their members and promote decent working conditions. The Labor Law outlines four conditions under which trade unions or workers may strike:[66]

- When the Arbitration Council has not rendered any decision in a collective labor dispute;
- When the union deems that it has to exercise the right in order to enforce compliance with a collective bargaining agreement or with the law;
- To defend the economic and socio-occupational interests of workers; or
- When all peaceful methods for settling the dispute have failed.

61 Id., Art. 129.
62 Id., Art. 109.
63 Prakas #317/13: Prakas on Determination of Minimum Wage for Workers/Employees in the Textile, Garment and Footwear Industries.
64 Cambodia Labor Law, Art. 112.
65 Id., Art. 318.
66 Id., Art. 320.

Before going on strike, the trade union representing the workers must follow the procedures set out in the law, such as having its members approve the strike by secret ballot,[67] providing prior notice (seven working days) of the strike to the employer and to the Ministry of Labor.[68] Under the law, employers are not permitted to punish workers for participating in peaceful and lawful strikes.[69]

The ILO's BFC program introduced a transparency project early in 2014 to disclose factory-specific compliance information on 21 critical issues, 52 legal requirements for low-compliance factories and union compliance with the legal requirements for strikes, which are noted in the preceding paragraph. Among the 85 unions and union federations contained in the Transparency Database of ILO/BFC, there were 265 violations of the legal procedures for strikes. No reported strike met all the legal requirements. There were 436 striking days and 232,747 strikers. As a result of those strikes, 2,335,220 working days were lost.[70]

IV. Conclusion

As discussed in the above sections on labor and trade union rights, the Law on Trade Unions, Violations of Labor Rights, Trade Unions and the Freedom of Association, labor rights and trade unions are complex issues, which eventually interact with each other. Some issues of trade union abuse and Labor Law compliance require commitment from factory management, while others need extra care and effort by trade unions and their members, like meeting the legal requirements for conducting strikes.

We can draw a further conclusion that open channels of communication among employers, trade unions and the government can aid in the identification of problems and the evaluation of information in order to seek peaceful alternatives before exercising industrial action, like strikes and lockouts. In this way, Cambodia could avoid another violent incident, which led to the injury and death of workers and bystanders when the Royal Government decided to use force to end the strike.

67 Id., Art. 323.
68 Id., Art. 324.
69 Id., Art. 15.
70 ILO/BFC, Better Factories Cambodia: Union Compliance List http://www.betterfactories.org/transparency/en/factory_strikes/view (last visited 30 October 2014).

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LABOR RIGHTS OF WOMEN AND CHILDREN

LY Vichuta

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LABOR RIGHTS OF WOMEN AND CHILDREN

Ly Vichuta *

ABSTRACT

The integration of the ASEAN Economic Community can lead to an increased number of garment factories and informal sectors that create more movement among female workers. This integration process affects mostly young women, who are the backbone of the rural economy in Cambodia. In this process, young female workers still face discrimination and a lack of national legislation to effectively protect their rights.

This paper will focus on progressive measures that have been instituted and ratified by the Royal Government of Cambodia for the protection of female workers to comply with internationally recognized principles and fundamental rights by the United Nations and the International Labor Organization. In this regard, the paper will analyze the labor law and international instruments of the Cambodian legislation.

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I. Background

1. Attitude Towards Women and Girls in Cambodian Society

In traditional Khmer gender norms, strong emphasis is placed on the allocation of power and authority to men, with the expectation that they shall be responsible for the welfare of their families and communities.

A common Cambodian proverb is: "Waterfalls always flow from top to bottom and never from bottom to top". In other words, social hierarchy, which includes a lower status attributed to women, is the natural order of things and not to be challenged.[1] Hierarchy is reflected in the code of conduct for Khmer women called *Chbab Srey*, which expects girls and women to stay at home, look after the household, and be unobtrusive. The code discourages females from travelling or moving, staying single, or accepting jobs of status superior to their husbands. This is illustrated in the proverb: "Women don't dive deep or travel far".

There is a widespread belief, even among women, that girls do not need as much education as boys. This is particularly true in rural areas, where over 80 percent of the population lives. Elder daughters may face social and/or parental pressure to quit school to help their families, while their brothers continue their education to prepare for being the head of a household.[2]

While progress is being made, gender attitudes enshrined in *Chbab Srey* remain obstacles to achieving gender equality in all aspect of social, economic and political life. Perceptions of gender equality and women's rights are changing, particularly among younger women and in higher income groups and urban areas, influenced by initiatives from the government, media and civil society organizations.

2. Poverty

Economic opportunities are limited for the vast majority of women and poverty is greater among them than men across all economic groups. Women are often displaced both within Cambodia and to other countries as a pathway out of poverty for themselves and their families.[3]

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1 The hierarchy and code is discussed inter alia in: UNIFEM 2006, Cambodian Women Migrant Workers: Findings from a Migration Mapping Study; GADC. 2010*, Deoum Troung Pram Hath in Modern Cambodia: A Qualitatve Exploration of Gender Norms, Masculinity and Domestic Violence; Gourley, S. 2009, The Middle Way: Bridging the Gap Between Cambodian Culture and Children's Rights. GADC 2010*

2 *GOC 2010, National Strategic Development Update 2009-2013*

3 Most migration has been and continues to be spontaneous, short-term, unorganized and through irregular channels. (Oxfam GB, 2000, 8) (NIS, 2004)

Rural women play significant roles in the economic survival of their families. Despite traditional objections for women to travel and work, they are increasingly sent away from rural to urban areas and to cross borders to work as unskilled labor. They are recognized to improve the alleviation of poverty and contribute to the economy by money remittances used for food, housing, education and medical services.[4]

The 2013 Cambodia Inter-Censal Population Survey (CIPS) estimated Cambodia's population to be 14,676,591 with 7,555,083 women and 7,121,508 men. This is an increase of 433,575 women from the 2008 census. The percentage of the working population (aged 15-64 years) of Cambodia has also increased from 62% to 65.6%. The young working generation (aged 15-24 years) is expected to grow at an average annual rate of 3% and estimated 300,000 young people will enter into the labor market each year.[5]

The Government of Cambodia faces the challenge to supply employment for young people who lack specific job skills. Attractive wages offered for unskilled labor in the region has led many young Cambodians to leave the country to find better employment. The World Bank estimates that 348,710 Cambodians emigrate, representing 2.5% of their total population. The number of undocumented emigrating Cambodian workers, particularly those migrating to Thailand, is unknown.

II. Employment

1. Factory Workers

The garment industry is a critical component of the Cambodian economy, being the third biggest industry after agriculture and tourism. The sharp growth in the garment sector has had a profound impact on Cambodian women.

In 2010, 421 factories in Phnom Penh employed 243,062 workers, including 216,873 women.[6] An estimate of the total employment rate within the sector approximates 400,000 people[7], of which 90 percent are young single women (20-24) from rural areas.[8] Social networks promote migration to this sector and provide emotional and psychological support for young women, most of who travel and live away from their homes for the first time in their lives.

4 Ministry of Women Affairs 2011
5 Labour policies, Ministry of Labour and Vocational Training 2014
6 Ministry of Labour and Vocational Training, annual report 2011
7 Estimate by Asia Monitor Resource Centre, Cambodia, www.amrc.org.hk/node/1978 accessed April 22, 2011. AMRC. (2005). Hazards in Cambodian Garment Factory. Retrieved April 22, 2011, from www.amrc.org.hk/alu_special/ohs/hazards_in_cambodian_garment_factory
8 UNIFEM, 2006

Remittances to the countryside by these women have an important and substantial anti-poverty effect contributing directly to the sustainability of over one million Cambodians.[9]

The Cambodian Labor Law was passed in 1997, which gave the Ministry of Labour and Vocational Training the authority to set minimum wage levels for all working sectors, which then set the wage for garment workers at $50 a month in 2006. A study by the CIDS (2009) concluded that workers require at least $71.99 per month, of which $56.99 would cover the workers' basic needs and $15 would cover the basic needs of their dependents. The vast majority of Cambodia's garment workers are paid the minimum wage but it is not uncommon to be paid less.

An ILO study indicated that some women, who were laid off, had worked in the entertainment sector engaging in commercial sex in Phnom Penh out of financial necessity.[10]

Challenges faced by factory workers include the lack of considerations for women's needs, such as (proper bathrooms and cleaning facilities with adequate sanitation standards. Common problems for workers are low wages, pain, skin irritations due to chemicals, cuts, respiratory diseases due to dust, constant pressure to produce, compulsory overtime, abusive managers, lack of job security, lack of enforcement of the labor law and sexual harassment. The ILO has established *Better Factories Cambodia* aiming at improving working conditions and independent monitoring.[11]

2. Domestic Workers

A research by Human Rights Watchin 2006 confirms that domestic workers are among the most exploited and abused workers in the world, working in undervalued and often unregulated conditions. They are mainly women and girls and experience low pay, excessive hours of work, social exclusions and lack of benefits. They may also face physicial, psychological and sexual abuse, food deprivation, forced confinement, trafficking into forced labour and debt boundage.

In Cambodia, there are no reliable statistics on the number of Cambodian domestic workers, although there is evidence that women displaced from the villages work as domestic workers in Phnom Penh. The extent of this trend is unknown however. They are mostly young adults or even underaged women, do not attend school, are ignorant of risks, are unpaid, poorly paid or their swages is paid to their families. These girls and women are extremely vulnerable because they are often invisible, isolated, dependent

9 In 2006, the minimum wage for workers in the garment sector was set to be $50 a month by the MoI. The CIDS study on minimum wage for Cambodia's garment industry (2009) and the 2010 decision to raise the new minimum wage to $61 per month only resulted in a strike of 200,000 workers and an eventual increase to $95. In 2014, the minimum wage increased to $100 and to $128 in 2015.

10 Decent Work Country program, ILO 2011-2015

11 www.betterfactories.org

on their employers for food and shelter, and ignorant of their rights and risks of labor bondages. They have lack of control over their earnings, poor access to health services and curtailed freedom of movement and association.

III. International Convention

The International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the right to work, free choice of employment and just and favourable working conditions. State parties undertake to ensure the right to form and join trade unions and recognize the right to social security, including social insurance, an adequate standard of living, the highest attainable standard of physical and mental health, education (compulsory and free at primary level), part-taking in cultural life and benefits from scientific progress. ICESCR is aspirational in many respects, with state parties committing to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".[12]

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) includes a number of provisions applicable to protect women and girls, including but not limited to the elimination of sex role stereotyping[13], suppression of traffic in women and exploitation of prostitutes[14], and an end of discrimination in the field of employment[15]. The convention itself requires state parties to act to eliminate gender discrimination in rural areas.[16] Protection from such discrimination is important in helping to ensure that rural women are able to access their rights and employment opportunities.

Cambodia's international obligations to protect women and girls' rights are established in various UN agencies and treaty bodies. In addition to ratifying the International Covenant on Civil and Political Rights (ICCPR), Cambodia is also a state party to most of the principal international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Right of the Child (CRC). In addition, Cambodia has ratified the eight cores of ILO conventions, which require enforcement and should not be in conflict with domestic laws.

12 ICESCR, article 2
13 CEDAW, article 5
14 CEDAW, article 6
15 CEDAW, articles 3 and 11
16 CEDAW, article 14

IV. Employment and Economic Empowerment

1. Equal Rights

Under the ICCPR, states are required "to provide for equality between men and women in the enjoyment of all Covenant rights".[17] In General Comment No. 28, the Committee highlights the indivisibility of all human rights by declaring the 'important impact of this article on the enjoyment by women of the human rights protected under the Covenant". Furthermore, this Covenant requires parties to review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women and girls in all fields.[18]

In concert with this, the CEDAW Convention, which Cambodia ratified, provides that "states parties shall take all appropriate measures to eliminate and condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women".[19] The state obliges to "modify the social and cultural patterns of conduct of men and women, with a view of achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotypes roles for men and women".[20]

The Constitution of the Kingdom of Cambodia "recognize[s] and respect[s] human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights".[21] The Constitution also stated that "all forms of discrimination against women should be abolished".[22] Despite of that, the concluding observation on the fourth and fifth periodic report of Cambodia[23], commends "the State party for its efforts to revise school curricula and textbooks with a view to eliminating gender stereotypes, the Committee remain concerned that the *Chbab Srey,* the traditional code of conduct for Khmer women, is deeply rooted in Cambodian culture and continues to define everyday life in the society based on stereotypical roles of women and men in the family and in the society".[24] While the General Recommendation No. 25 explains that"[s]uch standards and norms prohibit discrimination on the grounds of sex and protect both men and women

17 ICCPR, article 3
18 ICCPR, article 26
19 CEDAW, article 2
20 CEDAW, article 5
21 Cambodian Constitution, article 31
22 Cambodian Constitution, article 45, par. 1
23 Adopted by the Committee at its fifty-sixth session (September 30 to October 18, 2013)
24 Concluding observations on the fourth and fifth periodic report of Cambodia (Par. 18)

from treatment based on arbitrary, unfair and/or unjustifiable distinctions, the Convention focuses on discrimination against women, emphasizing that women have suffered, and continue to suffer from various forms of discrimination because they are women".

2. Right to Employment

Labor rights, which are protected by the ICESCR are stated in Part III of the Covenant. "The right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts".[25] The Committee has furthermore included the right to enter employment and the right not to be unjustly deprived of employment. On the other hand, it "recognize[s] the right of everyone to the enjoyment of just and favorable conditions of work", the right to "equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence".[26] The right to access employment and the right to promotion opportunities are thus protected in the ICESCR, relating the principles of the Covenant.[27]

The equality principle provided for in the CEDAW is not limited to the rights included in its substantive provisions. Employment related rights do however enjoy special protection in Part III of the Convention. The Convention requires states to "take all appropriate measures to eliminate discrimination against women in the field of employment, in order to ensure the same rights in employment on a basis of equality of men and women" and "the right to the same employment opportunities"[28], including the application of the same criteria for employment selection.[29]

As agreed upon in the UN Charter, the International Labor Organization is one of the UN's Specialized Agencies.[30] Therefore, the contribution of the ILO will be discussed among the UN documents.

The Discrimination (Employment and Occupation) ILO Convention (No. 111) and Recommendation (No. 111) were adopted in 1958 in order to put the principle of non-discrimination of the ILO Constitution into effect. The Convention is among the most widely ratified conventions and has provided inspiration for subsequently adopted treaties regarding discrimination. It prohibits direct as well as indirect discrimination and must be applied in both public and private employment. Whereas the CEDAW concentrates on discrimination against women and girls in every field, the ILO Convention protects all persons but limits is scope to acts which affect equality of opportunity or treatment in the field of employment or occupation.

25 ICESCR, article 6
26 ICESCR, article 7 par. a-d
27 ICESCR, article 2 (2)
28 CEDAW, article 11 (1)
29 CEDAW, article 11 par. 2
30 UN Charter, articles 57 and 63

The Convention places emphasis on the positive aspect of equal treatment and opportunities and obliges member states to "declare and pursue a national policy designed to promote and practice such equality in respect of employment and occupation, with a view to the eliminating any discrimination in respect thereof" .[31] To this end, states are required "to seek the co-operation of employers' and workers' organizations" in implementing the policy, to enact legislation in support of such policy, to repeal and modify statutory provisions and administrative practices inconsistent with the policy, and to apply it to "employment under the direct control of a national authority".[32] The Convention's equality principle must, as noted earlier, be applied in both public and private employment. Although the assurance of immediate application only applies to employment under the direct control of a national authority, positive measures towards the attainment of equality of opportunity and treatment must be taken in both fields. The national policy designed for these purposes is to be pursued by methods appropriate to national conditions and practice. If legislation is among the appropriate methods in a field covered by the Convention, legislation should be enacted. Laws and traditions may be suitable methods for other matters.

Distinctions, exclusions or preferences based on the inherent requirements of a particular job are not considered discrimination within the meaning of the convention.[33] As an exception clause, the ILO supervisory bodies follow this provision strictly. In the assessment of whether a job requirement involves on grounds of discrimination is acknowledged as valid justification, each case will be considered individually to assess whether the limitation is proportionate to the aim pursued.[34] In spite of these criteria it remains difficult to estimate the exact extent to which limitations of this kind will be considered legitimate, as the standard may depend on the ground of discrimination involved.[35] Distinctions based on sex have been considered a legitimate ground for distinction, especially for employment activities, which involve a high degree of physical efforts. With increasing demand for equal opportunities and freedom to choose employment, such distinctions have been much debated and are declining. This is due to the fact that these measures may result in direct or indirect discrimination against women, as it has made many jobs inaccessible for women. The development in this field has been rapid[36] and the supervisory organs of the ILO have frequently drawn countries' attention to the need to review their justifications in their national legislation.

31 ILO Convention 111, article 2
32 ILO Convention 111, article 3
33 ILO Convention 111, article 1 (a)
34 The interpretation of article 1 (2) has been developed in the ILO case law. Most cases have related to political opinion and religion.
35 Nielsen H.K., The Concept Book, p. 846.
36 Rossillion C., ILO standard, p. 27

ILO Convention No. 111 and Recommendation No. 111 do not express the matter of affirmative action or positive preferences.[37] However, the supervisory organs of the ILO have indicated that they intend to examine the validity of these systems on a case-by-case basis. In doing so they will identify those which aim to ensure a fair degree of proportional representation and those which aim to promote the advancement of groups previously disadvantaged in certain activities.[38]

Domestic workers were traditionally invisible and undervalued, until the international community recognized them. In 2011, the ILO member states adopted Convention 189 "Concerning Decent Work for Domestic Workers (C189)", which is the first international convention to apply the same labor standards to domestic workers and other workers. C189 is a human rights convention that remedies the fact that domestic workers had been excluded from other labor conventions in the past. It is important to note, that Cambodia has not yet ratified C189.

The Cambodian Constitution guarantees equal rights and opportunities to both men and women in terms of employment.[39] In general, all employees in Cambodia are covered by Labour Codes. Nevertheless, the Labor Code of Cambodia (1997) in effect discriminates against women by excluding domestic workers from nearly all labor protections given to other workers[40].

However, domestic or household servants are exempt except from the formation of trade unions or where they are specifically included. There is no minimum wage for domestic workers. Knowledge and implementation of the law is critically lacking and domestic workers are de facto without protection[41].

3. Right to Maternity Leave

Pregnancy-related discrimination is a key concern for female workers in Cambodia.

The concept of men and women being subject to the same selection criteria has been criticized for failing to take into account relevant differences. As pregnancy or maternity status do not related to men they cannot be applied as a gender neutral criterion when hiring employees.

37 As opposed to the 1975 Declaration on Equality for Women Workers, which states: "Positive special treatment during a transitional period aimed at effective equality between the sexes shall not be regarded as discriminatory."

38 Rossillion C., ILO Standards, p. 32, referring to: Discrimination in respect of employment and occupation, Part Three of the report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 47th session, Geneva, 1963, par. 23.

39 Cambodian Constitution, article 36

40 Cambodian Labor Code, article 1 (e)

41 AMRC, 2008

These shortcomings bring up the question whether the Convention provides adequate protection against an employer's refusal to employ or promote women, deny their job applications or promotions during maternity leave or pregnancy. However, one must keep in mind that the aim of the Convention is to eliminate discrimination in the field of employment.[42] Furthermore, the scope of the Convention is not limited to the rights it explicitly recognizes. Employment rights clearly do not exclude the protection of related rights.[43] In this respect, the protection provided by CEDAW might therefore be stronger than the above criticism suggests, although its strength depend on the implementation mechanism provided in the end.

Furthermore, promotion and job assignments during maternity leave do not enjoy the same protection conferred upon seniority.[44] In the absence of explicit prohibition of discrimination on these grounds, the danger of using pregnancy or maternity as a pretext for gender discrimination may not be able to be avoided.[45]

Discrimination against pregnant workers takes various forms during different stages of the employment process - recruitment, promotion, and dismissal - and includes failures to make reasonable workplace accommodations to address the needs of pregnant workers. Cambodia's Constitution and the Labor Code forbid dismissals based on pregnancy.[46] The Labor Code also guarantees all pregnant workers a three-month maternity leave irrespective of the duration of service, during which a maternity pay of half their wage including benefits, will be paid by the employer.[47] However, women on maternity leave are eligible for wage benefits only when they have one year of uninterrupted service.[48] This results in remaining discrimination against women and restricts their access to rights and benefits.

4. Working Conditions

Another issue affecting women is sexual harassment at the workplace. Independent worker union representatives and labor rights activists confirmed that sexual harassment in garment factories is common. The ILO report found that one in five women surveyed reported that sexual harassment led to a threatening work environment.[49] The forms of sexual harassment that women recounted include sexual comments and advances, inappropriate touching, pinching, and bodily contact. Workers complained about both managers and male co-workers.

42 CEDAW, article 11
43 CEDAW, article 11 par. 2 (a to d)
44 CEDAW, article 11 par. 2 (b)
45 Meron, T., The Convention on the Elimination of All forms of Discrimination Against Women,
46 Cambodian Constitution, article 46, par. 2 and Cambodian Labor Code, article 182 par. 3
47 Cambodian Labor Code, article 183 par. 1
48 Cambodian Labor Code, article 183 par. 4
49 Working Condition Law, ILO report 2012

The gravity of the General Recommendation 19, which comments on the CEDAW, is a stark reminder that most of the world's working women continue to remain at the lower end of a segregated labor market and are concentrated in just a few occupations.[50].It begins by stating:

"Equality in employment can be seriously impaired when women are subjected to gender-specific violence such as sexual harassment in the work-place."

The General Recommendation 19's definition of sexual harassment broadly mirrors statutory definitions, which have been incorporated into existing sex discrimination acts in a number of State parties' national legislatures.[51]It states:

"Sexual harassment includes such unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment."

General Recommendation 19 is taken into account by the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Recommendation clarifies that gender based violence is a nullification of human rights and fundamental freedoms, which includes "the right to just and favorable conditions of work".[52]

"Gender based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or human rights conventions, is discrimination within the meaning of the Convention".[53]

The breadth of the CEDAW application, is underlined by emphasizing that discrimination under the Convention is not restricted to action by or on behalf of Governments[54]. For example, the CEDAW calls on State parties "to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise".[55] Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

State parties and private employers generally have a full legal defense if they can demonstrate that they have taken all practicable steps to prevent sexual harassment through active workplace policies and awareness strategies.

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50 UN stats report, page 1

51 General Recommendation 19, including Australia, Canada, US, UK, EU Community Law

52 General Recommendation 19, article 7 (h) ; 'The right to just and favourable conditions' is also incorporated into ILO Conventions, and appears in various forms in national legislatures, and State practices., Iit is a recognised principle of international customary law and its worth discussing whether it may be justiciable under the CEDAW Optional Protocol.

53 General Recommendation 19 , article 7

54 CEDAW, articles 2 (e and f), 5

55 CEDAW, article 2 (e)

The Cambodian Criminal and Labor Code prohibit sexual harassment but do not define it[56]. Nor do they define sexual harassment at the workplace, outline complaint procedures, or create channels for workers to secure a safe working environment.[57] However, the person who commits sexual harassment shall be punishable from six days to three months by imprisonment and may face fines from one hundred thousand to five hundred thousand Riel.

5. Trafficking and Labor Exploitation

In the late 1990s, the international community awakened to the threat posed by international organized crime and as a result, trafficking in human beings was criminalized internationally. A specific protocol on trafficking in persons was prepared to supplement the UN Convention against Transnational Organized Crime. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the so-called "Palermo Protocol") provides the first overarching, international definition of trafficking in human beings. According to the Palermo Protocol: "'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."[58] In line with this definition, trafficking in persons consists of three elements: the act, the means and the purpose. Forced labour is defined as one of the forms of exploitation in trafficking. However, the Protocol does not provide a definition of forced labour. The consent of the victim to the intended exploitation is considered irrelevant when any of the listed means have been used.[59] The Protocol applies to "offences [that] are transnational in nature and involve an organized criminal group".[60] The Protocol obliges its parties to prevent and combat trafficking in persons[61], assist and protect victims[62] and promote cooperation and information exchange[63]. Cambodia has ratified the Palermo Protocol.[64]

56 Cambodian Criminal Code, article 250
57 Cambodian Labor Code, article 172
58 UN Palermo Protocol, article 3 (a)
59 UN Palermo Protocol, article 3 (b)
60 UN Palermo Protocol, article 4
61 UN Palermo Protocol, article 9
62 UN Palermo Protocol, article 6
63 UN Palermo Protocol, article 10
64 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en

The 1930 ILO Convention No. 29 is the key international instrument concerning forced labor. It criminalizes the illegal exaction of forced or compulsory labor. The Convention came about at a time when slavery had officially ended, but exploitation of labor in oversea colonies and forced movement of people for labor purposes continued in practice.[65] According to the ILO Forced Labor Convention "'forced or compulsory labor' shall mean all work or service, which is exacted, from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".[66]

According to the Convention, "forced or compulsory labor shall not include […] work under compulsory military service laws for work of a purely military character; […] work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country; any work or service exacted from any person as a consequence of a conviction in a court of law […]; any work or service exacted in cases of emergency […] and minor communal services".[67]

ILO Convention No. 105 concerning the Abolition of Forced Labor of 1957 complements the earlier instrument. It obliges parties "to suppress […] any form of forced or compulsory labor [for instance] as a means of political coercion [or] as a means of racial […] discrimination".[68] Cambodia has ratified both Conventions.[69]

According to ILO Convention No. 182 of 1999 concerning the Worst Forms of Child Labor, the sale and trafficking of children, as well as forced or compulsory (child) labor are included in the worst forms of child labor.[70]

CEDAW committed to "suppress all forms of traffic in women [for which] State parties shall take all appropriate measures" to prevent such activities and protect women.[71]

The Cambodian Constitution prohibits the exploitation of women in employment.[72] The Law on Suppression of Human Trafficking and Sexual Exploitation had been adopted and came into force in 2008. The Law is the main legislation in Cambodia, based on the UN's Palermo Protocol definition that offers protection to all citizens against trafficking in persons.[73] The Law on Suppression of Human Trafficking and Sexual Exploitation provides punishment for all forms of detention and abduction of women. Soliciting another person in public for the purpose of prostitution is against the law and will be punished.[74] Acting as intermediary and procurer is also punishable.[75] Maintaining an establishment

65 ILO 2005b, par 3
66 ILO Convention No. 29, article 2
67 ILO Convention No. 29, article 2
68 ILO Convention No. 105, article 1
69 See status of ratification
70 ILO Convention No. 182, article 3
71 CEDAW, article 6
72 Cambodian Constitution, article 45
73 Law on Suppression of Human Trafficking and Sexual Exploitation, article 1
74 Law on Suppression of Human Trafficking and Sexual Exploitation, article 24
75 Cambodian Criminal Code, article 285

for prostitution and earning a living through prostitution are also offences punishable by Cambodian law.[76] However, the law fails to include victims, witness protection provisions and it lacks clear provisions related to debt-bondage and labor exploitation.

V. Child Labor

1. Minimum Age for Child Workers

The fundamental ILO Convention 138 sets the general minimum age for employment at 15 years (light work) and 18 years for hazardous work (16 under certain strict conditions). It provides the possibility of setting the general minimum age at 14 years (12 years for light work) where the economy and educational facilities are insufficiently developed.[77]

The basic legal minimum age at which children are authorized to work in Cambodia is 15 years.[78] For light work, which is not hazardous to their health or mental and physical development, the limit is fixed at 12 to 15 years.[79] Furthermore, it must "not affect their regular school attendance, their participation in guidance programs or vocational training approved by a competent authority".[80] Finally, for hazardous work, the limit is pushed up to 18 years.[81]

Certain activities may not consider as labour or exploitation. Activities, which simply involve helping parents to complete everyday family chores, to which children may dedicate a few hours a week and which allow them to earn some pocket money, are not considered child exploitation because they do not hinder their well being. However, if children under the age of 15 are deprived of their wellbeing, including food deprivation and activities harmful to the child's health, punishment under the Cambodian Criminal Code will result[82].

2. Worst Forms of Child Labor

The Worst Forms of Child Labor Convention No. 182 defines a child as a person under 18 years of age. It requires ratifying states to eliminate the worst forms of child labor, including "(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict"; (b) child prostitution

76 Cambodian Criminal Code, article 288
77 End Child Labour, ILO 2006
78 Cambodian Labor Code, article 177 par. 1
79 Cambodian Labor Code, article 177 par. 4
80 Cambodian Labor Code, article 177 par. 4 (b)
81 Cambodian Labor Code, article 177 par. 2
82 Cambodian Criminal Code, article 337-339

and pornography; "(c) using children for illicit activities, in particular for the production and trafficking of drugs"; and (d) work which "is likely to harm the health, safety or morals of children"[83]. The Convention requires ratifying states to "provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labor and for their rehabilitation and social integration"[84]. It also requires states to "ensure access to basic education and, wherever possible and appropriate, vocational training for children removed from the worst forms of child labor"[85].

This encompasses all forms of slavery or similar practices such as forced labour, trafficking and debt bondage. It also includes activities likely to endanger the safety, health, and morals of children, such as prostitution[86], pornography[87], forced or compulsory recruitment[88], etc.

83 Worst Forms of Child Labor Convention No. 182, article 3
84 Worst Forms of Child Labor Convention No. 182, article 7 (b)
85 Worst Forms of Child Labor Convention No. 182, article 7 (c)
86 The Suppression of Human Trafficking Law, article 34
87 The Suppression of Human Trafficking Law, article 39
88 The Suppression of Human Trafficking Law, article 8-12

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SOCIAL AND CULTURAL RIGHTS THEORY AND PRAXIS IN THE CAMBODIAN CONTEXT

Sang-Bonn SOTH

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SOCIAL AND CULTURAL RIGHTS THEORY AND PRAXIS IN THE CAMBODIAN CONTEXT

Sang-Bonn SOTH *

ABSTRACT

Cambodia ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 26th May 1992 and the International Covenant on Civil and Political Rights (ICCPR) on 26th August 1992 and also expressed recognition of the Universal Declaration of Human Rights (UDHR) and other international instruments relevant to human rights under its Constitution of 1993. This ratification is an expression to be bound and committed to promote human rights. However, due to the lack of understanding human rights and limited civic education, the realization of social and cultural rights is also limited.

This article examines two aspects of rights; social and cultural rights. It reflects standard of promotion and protection of these rights and efforts of the state to address problems from three perspectives, namely legal, institutional and practical perspectives.

Through the legal perspective, the author examines the Constitution, Law on Education and Law on the Prevention and Control of HIV/AIDS to identify loopholes, enforcement, challenges and solutions in practical life. Similarly, through the institutional and practical perspectives, the author examines whether social and cultural issues are addressed systematically through appropriate institutions, whether there is sufficient budget, proper monitoring systems and reliable complaint mechanisms to ensure dignity and integrity of citizens.

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I. General Introduction

Social and cultural rights are parts of the universal rights which are guaranteed under the International Covenant on Economic, Social and Cultural Rights (ICESCR). This Covenant was adopted by the General Assembly of the United Nations on 16 December 1966 and entered into force as international law on 13 January 1976. This Covenant and the International Covenant on Civil and Political Rights (ICCPR) are the two main international treaties to give legal effect to the 1948 Universal Declaration of Human Rights (UDHR).

Realizing that the UDHR has been soft by its nature and hardly enforceable, the international community at first wanted to adopt one international Covenant to give legal effect to the UDHR. However, due to political differences, the international community failed to reach an agreement in adopting one Covenant. Instead, the international community adopted the two documents in 1966 which have a similar format and many common provisions. The UDHR, the ICESCR and the ICCPR are generally referred to as the "International Bill of Human Rights", the bill that affirms the universality, interrelatedness and interdependence of all human rights.[1]

Cambodia ratified the ICESCR on 26 May 1992 and the ICCPR on 26 August 1992. It also recognized the UDHR and other international instruments relevant to human rights, under the Cambodian Constitution. These ratifications are an expression to be bound and committed to promote human rights. However, due to a lack of understanding of human rights and information about civic education, questions are asked even by supporters of social and cultural rights: "What do you mean by 'the right to housing', 'the right to education', 'the right to work' etc.? Do you mean that everyone must have a house, must be provided education even up to the university level, and must be provided work? Is the state responsible for providing all of this?" These simple, yet tough, questions have never been easy to answer by government officers, educators or human rights activists.

1. What are Social and Cultural Rights?

Social Rights are part of the second generation of rights that are necessary for full participation in the life of society. When we talk about social rights, we refer to the guarantee of equality and possibility to access to essential social and economic goods, services, and other opportunities in a society. Social rights are positive rights that include the right to housing, education, healthcare etc.

1 UNHCHR, International Covenant on Economic, Social and Cultural Rights and its Optional Protocol, Phnom Penh, January 2009, p 5 See also: http://cambodia.ohchr.org/WebDOCs/DocPublications/ICESCR/ICESCR-EN.pdf (retrieved 22 Sept 2014)

Cultural Rights are broad rights related to taste in fine arts, customary beliefs, humanities, social forms, material traits of racial, religious or social groups, and broad aspects of science as distinguished from vocational and technical skills. They are also related to human behavior which includes thought, speech, action, artifacts and the rights of minorities. Cultural rights are reflected in different provisions of international human rights law.[2]

2. Where do the Rights Derive from?

The origin of social and cultural rights derives from the UDHR, which forms a part of the International Bill of Human Rights, along with the ICCPR and the ICESCR. The early focus on social and cultural rights is provided under the UDHR. For instance, it declares among, other rights, that everyone has the right to social security, the right to work, the right to rest and leisure, the right to education, the right to freely participate in the cultural life of the community and the right to an adequate standard of living.[3]

Social and cultural rights are guaranteed by the ICESCR's principles. As for example the principle of self-determination and freedom to dispose of their natural resources for all people as provided in Article 1; the principle of non-discrimination in the exercise of Covenant rights and progressive realization as provided in Article 2; the principle of equality between men and women in the enjoyment of these rights provided in Article 3.

In addition to the above principles, the ICESCR also explicitly provides rights relevant to social and cultural aspects including the right to work, to just and favorable working conditions and leisure provided under Articles 6 and 7 respectively and the rights to form trade unions and to social security as provided in Articles 8 and 9. Furthermore, family rights, including marriage and the protection of women and children, are guaranteed under Article 10. Articles 11-15 of the Covenant provide rights to an adequate standard of living, including adequate food, clothing, housing and continuous improvement in living conditions with consideration of physical and mental health to be followed by the right to education including free compulsory primary education and cultural rights.

3. Why are Social and Cultural Rights Important?

Social and cultural rights are a part of human rights and are very important to ensure that every human being of all members of the human family live a human life. According to the UDHR, human beings are born with inherent dignity, equality and non-discrimination, indivisibility and interdependence of human rights.

2 Article 27 of UDHR, see also Article 15 of ICESCR adopted in 1966, Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, Article I of the UN Declaration on the Right to Development, Principle 2 of the Mexico City Declaration on Cultural Policies

3 Article 22-27 of the Universal Declaration of Human Rights, 1948

Practically, each society may not prioritize one aspect of human rights by ignoring other aspects. For instance, the government may have proper legal frameworks and mechanisms to promote women's participation in politics. However, the government may not achieve its goal and women may not enjoy their full rights in cases where most women live in poverty and degradation. Most are convinced that in such cases, action to promote decent standards of health, hygiene and housing are clearly more important for the women than any claim to freedom.

Secondly, it has been increasingly acknowledged that the two sets of rights, social and cultural rights, and other rights are integrally related. For instance, in order to have a proper job that allows you to earn sufficiently for your living, an individual needs to obtain a decent or high education. This means that you cannot obtain a good job to earn a decent living if rights to quality education are not fulfilled.

II. The Promotion and Protection System of Social and Cultural Rights in the Cambodian Context

International human rights law and most national human rights protections are instruments directed to the state. Generally, the state is legally responsible for protecting and promoting human rights. The state creates not only laws and regulations, but also institutions for the promotion and protection of human rights. However, there are numerous questions being asked in practical life, such as, what does a community do when the land on which it has historically relied on is sold by the state to a private owner? Where can workers turn to when the company for which they work provides wages far below those needed for a decent standard of living? What happens to the future of children who cannot afford the fees charged by privatized educational systems?

In response to the above questions, the author attempts to study the problems from three perspectives, the legal, institutional and practical perspective. From a legal perspective, there are a number of laws and regulations supporting social and cultural rights. Those laws and regulations range from the supreme law, the Constitution, to substantive laws, however, the author will make a reflection on two laws relevant to social rights and one relevant to cultural rights.

1. Social Rights

a.) Constitution

The Cambodian Constitution adopts the main principles of a constitutional monarchy, liberal democracy and pluralism. It also contains a core value of respecting fundamental rights, separation of powers, peace, independence and sovereignty. One aspect of the current Cambodian Constitution is the commitment to international values as the Constitution itself is a political product that has been jointly produced by the international community.[4] For instance, the Agreement on a Comprehensive Political Settlement of the Cambodian Conflict, the so called "Paris Peace Agreements" from October 1991, precisely provides not only the content, but also guidelines, the organizational process prior to the adoption of the Constitution by the Constituent Assembly as well as the state's commitment to fulfill obligations of international law and international human rights (Article 31).

The Cambodian Constitution allocates one whole chapter, Chapter VI, to education, culture and social affairs, in which most aspects of social and cultural rights are included starting from Article 65 from the guarantee to quality education at all levels to the guarantee of a social security system for workers and employees in Article 75. However, questions remain whether these guarantees could be translated into practice so that citizens could realize their full rights to social and cultural rights.

Generally, the guarantee in the Constitution alone may not lead to any practical result without adopting enforceable, substantive and procedural laws nailing down mechanisms and processes for implementation. In order to see to what extent Cambodia has put her efforts to promote social and cultural rights, the author would like to mention some laws and regulations relevant for the promotion and protection of social and cultural rights in addition to the constitutional law.

b.) Social Rights in Education – the Law on Education

The Law on Education contains 11 chapters and 55 articles. Education refers to the process of educational development or training for physical, mental and spiritual development through all activities that allow the learners to obtain a set of knowledge, skills, capacities and values to become individuals who are useful for themselves, their families, their communities, the nation and the world.[5]

4 There are eighteen signatory states to the Paris Peace Agreement: Australia Brunei, Canada, China, France, India, Indonesia, Japan, Laos, Malaysia, the Philippines, Singapore, Thailand, the USSR, the United Kingdom, the United States, Vietnam, and Yugoslavia. See also Laurel E. Miller (ed.) with Louis Aucoin, Framing the State in Times of Transition: Case studies in Constitution-Making, Washington, D.C.: United States Institute of Peace, 2010, pp. 207-244

5 Article 4 of the Law on Education of the Kingdom of Cambodia, promulgated by the Royal Decree No. NS/RKM/1207/032, 2007

The goal of having the Law on Education is to determine the national measures and criteria for establishing a comprehensive and uniform educational system ensuring the principle of freedom of studies in conformity with the Constitution. The objective of this law is very much relevant to the promotion and the protection of social and cultural rights. For instance, Article 2 of the Law on Education states: "The objective of this law is to develop the human resources of the nation by providing a lifelong education for the learners to acquire knowledge, skills, capacity, dignity, good moral behavior and characteristics, in order to push the learners to know, love and protect the nation identification, culture and language."

The Royal Government of the Kingdom of Cambodia provides education opportunities to all Cambodian children because the government also aims at reducing poverty and promoting socio-economic development. The government fully realizes that only quality education can produce qualified human resources who can later provide quality services and be qualified persons for the nation. General education attempts to turn children to become good citizens so that they live together peacefully. To meet this objective, the Royal Government developed an educational strategic plan 2009-2013 with the inclusion of a culture of peace, respect for the principles of freedom, democracy and respect for human rights and dignity, and which also introduced a culture against violence.[6]

Enforcement

The Educational System in Cambodia consists of preschool, primary school, general secondary school, higher education and non-formal education. The Ministry of Education Youth and Sport is the main institution to enforce the Law on Education. This ministry has Provisional/Municipal Offices of Education (POE) to help take care of 9,431 public schools and 223 private schools nationwide and is responsible for implementing educational policies, preparing and submitting plans for further development of education, and providing data and statistics of schools.[7]

The Royal Government of Cambodia put significant effort to improve both the quantity and quality of education in Cambodia. For instance, after working collaboratively with local communities and development partners, access to Early Childhood Education (ECE) was increased from 35 per cent in 2009 to 56.49 per cent in 2013. This achievement was the result of good collaborations among local communities and development partners in creating community-based preschools or kindergartens; kindergartens in public or private primary schools and creating the ECE Program for households.[8]

6 A law against domestic violence has been adopted in 2005

7 UNESCO, National Education Support Strategy: Cambodia 2010-2013, UNESCO Phnom Penh Office, May 2010, p 16

8 Ministry of Education: http://www.moeys.gov.kh/kh/early-childhood-education.html#.VCOPYsk6rbw (Retrieved 25 September 2014)

According to the Cambodian National Strategic Development Plan, 2014-2018, the Royal Government is committed to promote the quality and quantity of education not only for the primary level, but at all levels. For example: the number of primary schools for grades 1 to 6 will be increased from 6,916 in 2014 to 7,606 in 2018. Likewise, the number of lower secondary schools will be increased from 1,632 in 2014 to 1,672 in 2018. Furthermore, the number of upper secondary schools and the number of technical high schools will be increased from 442 to 668 and from 4 to 7 between 2014 and 2018 respectively.[9]

Challenge

Although there is a significant commitment stated in the strategic plan, there are a number of questions that could be raised on whether an increase in quantity, relevant to quality assurance, would contribute to promote social rights of people.

In general, promoting social rights requires not only laws, regulations and institutions, but proper human resources, facilities and sufficient financial resources as well. For the improvement of quality education, the Royal Government increased its budget allocation from 10 per cent to 20 per cent in its Education Strategic Plan (ESP) and for the Education Sector Support Program (ESSP) for a period of ten years (2003 to 2013). However, overall government spending on education as a percentage of GDP is less than 2 per cent.[10]

Due to this budget constraint, the Cambodian educational sector faces several challenges that could be summarized from the limited capacity of preschool teachers to the limited understanding of parents about the value of ECE: limited access to primary education in remote areas and for most disadvantaged groups; poor overall quality and relevance of classroom learning; poor access and quality of secondary and high education, especially for girls; limited non-formal education system, especially for indigenous people and for children out-of-school; lack of qualified teachers, sport facilities and core textbooks; poor education management and lack of hard and soft skills for the youth.[11]

Solution

For the educational sector, development partners and the Royal Government seem to agree that there is a need to increase budget for education for the betterment of educational physical infrastructure and building the capacity of human resources including teachers and management staff. Although a solution to increase access to early childhood development focused on providing nutrition and supporting food and healthcare for children, solutions to other educational challenges are addressed differently. For example, expanding bilingual education through non-formal education, providing scholarships and

9 The Royal Government of Cambodia, the National Strategic Development Plan, Phnom Penh, July 2014, p 13

10 Ibid, UNESCO, National Education Support Strategy, p 17; See also: UNICEF, Towards More Child-Focus Social Investment: Snapshot of Social Sector Public Budget Allocation and Spending in Myanmar, Yangon, 2013, p 36

11 The National Strategic Development Plan, p 89

school meal programs for disabled children, girls, and children of the most disadvantaged groups could be a solution to increase the access to primary and secondary schools for children in remote areas and for the most disadvantaged groups, especially for girls and indigenous people.

In order to improve the quality of primary and secondary education, there is a need to establish a national framework for quality insurances through regular classroom testing, other modes of assessments and the review of textbooks and curriculum from grade 3 to 8. Moreover, for the improvement of higher education, there should be a vision document that prioritizes specific skills like science, technology, engineering, arts and mathematics to meet ASEAN's standard.

The Royal Government is committed to review and improve resource management including the distribution and management of textbooks; and ensure a supply of new textbooks, curriculum and teacher-guides in remote areas. Likewise, it will deploy qualified teachers at the newly established upper and lower secondary schools, especially in remote areas, to ensure quality of education in those levels. There will be in-service trainings to raise the knowledge and skills of teachers and a systematic staff performance appraisal to motivate teachers.

As a solution to fill the gap of hard and soft skills for the youth, the government is committed in its strategic plan to increase the number of technical high schools by at least 5 every year from 2014 to 2018, and increase the enrollment in technical education, technology and science to support the youth for the regional integration in 2015.

c.) Social Rights Related to Healthcare

The guarantee of health for citizens is a social right. Citizens may not enjoy this right without proper and systematic support from the government. For this reason, Article 72 of the Cambodian Constitution obliges the state to pay attention to disease prevention and medical treatment. Poor people shall receive free medical consultations in public hospitals, infirmaries and maternity clinics. It also obliges the state to establish infirmaries and maternity clinics in rural areas. In addition to this provision, Article 73 also requires the state to pay attention to children and mothers by establishing nurseries and to help support women who have numerous children and who have inadequate support.

The Cambodian government recognizes its obligations as provided in the above articles. As a result, the Royal Government established the Ministry of Health in January 1996 to undertake healthcare and to manage the health sector within the Kingdom of Cambodia.[12] As of 2012, the Ministry of Health has 8 national hospitals, 82 referral hospitals, 1,024 health centers and 121 health posts nationwide to help take care of the Cambodian people's health problems.[13]

12 Article 2, Law on the Establishment of the Ministry of Health, promulgated in 1996 by the Royal Decree No. NS/RK/0196/06

13 Ministry of Health, Annual Health Financing Report 2012, Phnom Penh, March 2013, p 7

According to the annual report for health financing, the Royal Government of Cambodia increased its budget allocation annually for the health care sector, especially, over the last five years. The government increased from USD 564 million in 2008 to USD 763 million in 2012, representing more than 5 per cent of the GDP. Although budget allocation for the health care sector was increased annually, it was still inadequate as expenditure in this sector is relatively high. For instance, the total health care expenditure for 2012 was approximately USD 52 per capita, 24 per cent of which comes from government spending, 15 per cent from development partners, and the remaining 61 per cent from the household out-of-pocket spending.[14]

Currently, the Royal Government has nine important laws and other relevant regulations to manage the health care sector, one of which is the Law on the Prevention and the Control of HIV/AIDS promulgated in July 2002.[15]

d.) Law on the Prevention and Control of HIV/AIDS

How does the government promote social rights for Cambodian people through this law?

The Law on the Prevention and Control of HIV/AIDS was one of many laws made in response to the constitutional requirement obliging the state to pay attention to disease prevention. This law aims to provide a human rights-based legal framework for prevention, treatment, care and support to persons living with HIV/AIDS so that they could enjoy their social rights like others in the society. It also contributes to broader efforts to reduce stigma and discrimination by promoting non-discriminatory attitudes and practices in Cambodia.

The Law on the Prevention and Control of HIV/AIDS in Cambodia includes a wide aspect of human rights protection; however, relevant guarantees of social rights could be summarized as set out below.

Importantly, rights to equality and non-discrimination are guaranteed in this law. These guarantees allow people living with HIV/AIDS to continue to live without discrimination in society and at their workplace. For instance, Article 2 of the law states that the HIV epidemic requires a multi-sectoral response to prohibit all kinds of discrimination against people suspected or known to be infected or affected by HIV/AIDS. Other provisions such as Article 42 require equal treatment for persons living with HIV/AIDS and Article 36 provides that it is illegal to discriminate against a person or a member of their family based on their actual, perceived or suspected HIV/AIDS status when deciding who to recruit for a job, get promotion at work or allocate tasks to workers. Most importantly, it is illegal to dismiss a person from a job knowing or suspecting that s/he is a member from a family living with HIV/AIDS.

14 Annual Health Financing Report 2012, p 1

15 Law on the Prevention and control of HIV/AIDS was promulgated by the Royal Decree No. NS/RKM/0702/015, 2002

In addition to rights to equality and non-discrimination, rights to privacy and confidentiality as provided in Articles 19-25 and Article 35 require all health professionals, workers, employers, employment agencies, insurance companies, data encoders, custodians of medical records and people, who have other relevant duties that involve access to personal HIV/AIDS related information, handle HIV/AIDS information with confidentiality. Especially HIV testing and counselling results should not be disclosed to the national monitoring system.

In order to support the poor, especially women and children living with HIV/AIDS, Article 26 of the law obliges the state to ensure that all persons living with HIV/AIDS receive primary health care services free of charge, and it also encourages private sectors to participate and provide such treatment and care.

This law mandated the creation of the National AIDS Authority by the government to lead the multi-sectoral response with the Prime Minister as Chairman; obliged the state to timely disburse funds for the national AIDS program and required the state to raise public awareness on HIV/AIDS prevention. The awareness should be made available in education programs targeting women and girls. There should be HIV/AIDS education in schools or training programs to health care takers.

In order to help achieve its objective the law criminalizes anyone who is HIV positive and conducts any practice or act with the intention to transmit HIV to other people with a severe punishment of 10 to 15 years imprisonment.[16]

Enforcement

Efforts to support people living with HIV/AIDS have been seen since 2001 after the first case of HIV was detected in Cambodia in 1991 and the infection prevalence steady increased to a high of 2 per cent in 1998 with a slight decline in 2001. The government created networks and associations to support people living with HIV/AIDS and Reverset (RVT) medicine users and facilitate a service provider network of both doctors and nurses in 2003.

According to the Cambodian report to the Economic and Social Council of the UN, there were approximately 170,000 people who were infected by HIV/AIDS in 2003, which is equal to 3.3 per cent of the population.[17] During this period, HIV prevalence among the general population aged 15-49 was estimated at 1.3 per cent. However, according to the National Center for HIV/AIDS, Dermatology and STD (NCHADS) report "Estimations and Projections of HIV/AIDS in Cambodia, 2011-2015", the prevalence of HIV among the

16 Article 18 and 50 of the Law on Prevention and Control of HIV/AIDS

17 The United Nations, Implementation of the International Covenant on Economic, Social and Cultural Rights: Initial Report submitted by state parties under article 16 and 17 of the Covenant, Cambodia, January 2009, p 29

general population aged 15-49 years old had dropped significantly to a rate of 0.7 per cent in 2013. The prevalence continues to drop to as low as 0.6 per cent in 2014 for the same age group.[18]

The decline of the prevalence has been a great success for the government after identifying the right target groups and working collaboratively with development partners. The adoption of a '100 percent condom' policy, that enforced condom use in brothels, led to a substantial rise in condom use among sex workers and their clients and a drop in HIV infection levels among brothel-based sex workers. The use of condoms rose from 40 percent in 1997 to 99 percent in 2009; however HIV prevalence among sex workers remains high at 15 percent.[19]

Fighting against HIV/AIDS in Cambodia has drawn attention not only from government officials, the people and development partners, but also from parliamentarians. The Cambodian National Assembly proposed this law and received extensive training on HIV-related human rights issues. The Cambodian parliament has been an example of good practice for other states that took a lead in fighting against HIV/AIDS and developed a Parliamentary Handbook on HIV/AIDS. The Parliamentary Handbook encourages parliamentarians to play leadership roles in advocating implementation of Cambodia's HIV/AIDS law through discussions with provincial leaders and their communities.[20]

Cambodia's efforts and good cooperation between government officials, development partners and parliamentarians in reaching out to marginalized communities and the most vulnerable groups with relatively high HIV prevalence, such as sex workers and drug users, has been appreciated by the UNAIDS among China, India, Indonesia, Nepal and Vietnam.[21] Similarly, the Cambodian National AIDS Authority has also been appreciated for issuing detailed regulations and guidelines to clarify the detailed responsibilities of people and institutions to implement the national HIV law.[22]

Challenge

Although the government put forth great effort to promote social rights for persons living with HIV/AIDS and received much appreciation, the Ministry of Health recognizes that there are a number of constraints in offering quality health services, ranging from insufficient funding and inadequate management capacity to low staff remuneration and limited medical skills to some extent.[23]

18 The National AIDS Authority, Summary Report of Workshop on HIV/AIDS Risky Behaviors among Young People in Cambodia, Phnom Penh, August 2014, p 3
19 USAIDS, Global Report on the AIDS epidemic, 2012
20 John Godwin, Legal protections against HIV-related human rights violations: Experiences and lessons learned from national HIV laws in Asia and the Pacific, UNAIDS, Bankak, May 2013, p 52
21 Ibid, p 34
22 Ibid, p 46
23 Annual Health Financing Report 2012, p 4

According to the UNAIDS, there is not yet any practical and reliable mechanism to enable people living with HIV/AIDS to seek redress for HIV-related human rights violations. Although, in theory, violations of the law can be addressed through administrative or criminal law sanctions, to date, enforcement of the human rights provisions of the Law on the Prevention and Control of HIV/AIDS through the courts has not occurred.[24]

The Law on the Prevention and Control of HIV/AIDS imposes criminal penalties for HIV non-disclosure. Exposure or transmission are stigmatizing and may conflict with human rights principles of privacy, and allows for broad interpretation and controversial enforcement.

The high cost of medical treatment for people living with HIV/AIDS is a major barrier to treatment access. Especially the high costs of antiretroviral drugs are unaffordable to many governments, including Cambodia, without external support.

According to the country progress report, expenditure to combat against HIV/AIDS in Cambodia can be tracked since 2006 through the National AIDS Spending Assessments. Total spending showed a general trend of increasing funding for HIV/AIDS from 2006-2012. For instance, in 2006 total spending was USD 46.3 million and was increased to USD 53.3 million in 2007. The spending increased more or less by 5 million annually from 2008 to 2009 and reached its highest peak at USD 61.0 million in 2010 before it dropped to USD 50.8 million dollars in 2012.[25] Although the above spending was relatively high, the Cambodian national HIV/AIDS response still relies on external funding of almost 90 per cent. For instance, the government allocated USD 8.1 million in 2006 and decreased to USD 6.0 million, USD 5.3 million and to USD 4.6 million from 2007 to 2009 respectively. The budget was increased by more than 1 million in 2010 from USD 5.4 million to USD 6.3 million in 2011 and slightly dropped to USD 6.3 million in 2012.[26]

Solution

According to the National Strategic Development Plan of 2014-2018, the Royal Government aims at reducing the HIV prevalence rate from 0.6 in 2015 to less than 0.1 in 2018. At the same time, the government is committed to providing people living with HIV/AIDS anti-retroviral treatment survival after a 12-month treatment to up to 90 per cent from now until 2018.[27]

According to the progress report of the government it is proposed that Cambodia, as a low-income, high-burden country, will receive USD 75.3 million for HIV/AIDS for 3.5 years from the Global Fund. This works out to an average of USD 21.5 million per year for HIV/AIDS activities, which is roughly equivalent to the amount provided by Global Fund in the past few years. However, negotiations are underway which may reallocate

24 Ibid, p 66
25 Ibid, Annual Health Financing Report 2012, p 29
26 Ibid
27 NSDP 2014-2018, p 8

some of the Global Fund HIV/AIDS funding to other Global Fund areas (e.g. malaria, tuberculosis, health systems strengthening). Furthermore, funding from the US government, one of the major contributors to the country's HIV/AIDS response, is expected to decline significantly starting in 2014. As a result, Cambodia may need to find other sources of funding and/or try to allocate funding more efficiently.[28]

The Royal Government commits to mobilize and allocate more resources to respond to HIV/AIDS at both the national and sub-national levels and will increase coverage of effective interventions, care and support for people living with HIV/AIDS. Furthermore, it will increase more funding for the provision of HIV testing and anti-retroviral treatment services as well as other services.[29]

The Ministry of Health's current '3.0' strategy aims to achieve practically zero new infections by 2020, through implementing a 'linked approach', recognized as an international best practice. This strategy introduces HIV testing, education, treatment and counselling as a routine process within maternal healthcare. This has the dual advantage of preventing most mother-to-child transmissions, thus reducing the HIV rate, and as Cambodia expands its maternal health care services, it will eventually screen practically every mother and child for HIV and provide treatment if necessary.

2. Cultural Rights

Cultural Rights are broad rights related to taste in fine arts, language, customary beliefs, humanities, social forms, material traits of a racial, religious, or social group and broad aspects of science as distinguished from vocational and technical skills. Cultural rights are also related to human behavior which includes thought, speech, action, artifacts and the rights of minorities.

In this section, the author wishes to make a reflection only on the aspect of social form, language and religion of indigenous people in Cambodia. This section also intends to find out how much indigenous people are aware of their cultural rights in Cambodia.

28 Ibid, Annual Health Financing Report 2012, p 30
29 NSDP 2014-2018, pp 182-188

a.) Social Form of Indigenous People in Cambodia

Cambodia is home to approximately 200,000 indigenous people consisting of 20 different indigenous groups, which are estimated to make up between one and two per cent of the total population.[30] Indigenous people inhabit 15 of Cambodia's 25 provinces, with a greatest concentration in the northern provinces.[31] 71 per cent of Ratanakiri, and 66 per cent of Mondulkiri's population are indigenous, while Stung Treng and Kratie also have large indigenous populations.

The cultural practice and livelihoods of indigenous people are based on animal husbandry and rotational (shifting) cultivation. The main income for indigenous people is based mainly on the collection of non-timber forest products from the natural forest and weaving. Although their livelihood depends largely on forest products, they can manage without destroying the land and forest. Instead, they help preserve forests for their later generations and for their ancestors. They have strong unity and respect for their customary law, practices and religion that brings blessings of good health and high-yielding crops.

In addition to a number of international instruments, which Cambodia is a signatory to, the Cambodian Constitution provides the same formal rights for all Cambodians, regardless of ethnicity, and the 2001 Land Law allows for collective indigenous land titles.[32] However, the following research suggests that further work is needed in order to guarantee that Cambodian indigenous people enjoy the same privileges of citizenship as non-indigenous Cambodians.

b.) Promoting Indigenous Language in Cambodia

There are a number of existing laws and regulations below to promote the cultural rights of Cambodian indigenous people: The Constitution, the Land Law of 2001, the Education Law of 2007 (Article 24 allows the issuance of a Prakas for school teaching other languages rather than Khmer), the Education Policy reform of 2014, the Policy for Indigenous Peoples' Development adopted in April 2009 and other regulations.

Indigenous educational attainment is found to be significantly worse than the Cambodian average. However, for over a decade the Royal Government has been addressing this problem by developing a bilingual education program, which teaches in indigenous languages as well as Khmer, and has been delivering promising results. This program is now recognized as regional best practice for improving indigenous education rights.

30 Prasenjit Chakma, Integration of Indigenous Peoples' Perspective in Country Development Processes: Review of Selected CCAs and UNDAFs (New York: United Nations Permanent Forum on Indigenous Issues, 2008).p. 24

31 Moul Phath and Seng Sovathana, Country Technical Note on Indigenous People' Issues, Phnom Penh, November 2012

32 NGO Forum on Cambodia, Indigenous Peoples in Cambodia (Phnom Penh: NGO Forum on Cambodia, 2006).p. 3

Bilingual education (which involves teaching in indigenous languages first, and then in both Khmer and indigenous languages)[33] can help to bridge the gap between indigenous and non-indigenous communities in Cambodia.[34]

Article 24 of the Law on Education of 2007 allows the Ministry of Education, Youth and Sport to announce a Prakas which allows for schools to teach their fundamental curriculum in languages other than Khmer.[35] The Royal Government recognizes 25 languages spoken in Cambodia. The ability for ethnic minority groups, especially indigenous groups who are less likely to speak Khmer, to receive education in their vernacular language is recognized by the Ministry of Education as crucial for their economic development, improvement of their health status, as well as their harmonious integration into Cambodian society.[36]

Providing this bilingual education is very important as often only few persons in an indigenous community can speak, read or write Khmer.[37] By teaching in indigenous languages, not only educational outcomes are improved, but also indigenous communities' ability to contribute to, and benefit from Cambodia's economic development, and their ability to meet the literacy requirements necessary to sit on Commune Councils,[38] and contribute to Cambodia's stability through better political integration of their communities.[39]

These schools are run by local communities who adapt timetables and curricula to suit local needs, and provide local teaching staff, who are able to provide bilingual education.[40] This project identified the four major challenges to improving education among geographically remote ethnic minority communities as:

1. Lack of suitable infrastructure;
2. Lack of local support for education;
3. Lack of trained teachers from the community; and
4. Little to no suitable materials in the local language.[41]

The first two challenges were largely addressed through the project's community based approach. The reason for this is that because the village leaders who ran the school commanded significant respect and influence within the village, the communities were will-

33 Carol, Bilingual Education in Cambodia. p. 6
34 "Workshop on Multi-Languages Education in Cambodia," accessed March 3, 2014, http://www.moeys.gov.kh/en/minister-page/423.html
35 Kingdom of Cambodia, Education Law, NS/RKM/1207/032, 2007
36 "Workshop on Multi-Languages Education in Cambodia
37 Carol, Bilingual Education in Cambodia. p. 6
38 "Workshop on Multi-Languages Education in Cambodia
39 Noorlander, Interview on indigenous rights issues with CARE Cambodia's Programme Coordinator on Marginalised Ethic Minorities
40 Jorn Middleborg, Highland Children's Education Project: A Pilot Project on Bilingual Education in Cambodia (Bangkok: UNESCO, 2005). pp. 1-3
41 Ibid. pp.11-14

ing to provide the necessary infrastructure.[42] Similarly, the village leaders were able to both adapt the curriculum to local needs, and to encourage greater support for education within their communities. The third challenge was addressed by having prospective local teachers first take an intensive training course, and then undertake continuous on-the-job training. This is part of a long-term approach to establish regional teacher training colleges which specialize in bilingual teacher training.[43] The fourth major challenge was addressed by developing a written script, based on the Khmer script, for the indigenous languages which lacked a writing system.[44] This was accomplished by a special committee within the Ministry of Education, in collaboration with the publishers of Enthonolgue – the leading international language reference resource,[45] which adapted the Khmer script to the needs of indigenous languages.[46] The model envisaged 80 per cent of teaching to be conducted in the vernacular language in grade 1 and gradually transitioning to 100 per cent Khmer tuition in grade 4.[47]

Bilingual schools are currently run in Kratie, Mondulkiri, PreahVihear, Ratanakiri and Stung Treng, using five different indigenous languages.[48] The Ministry of Education, with technical assistance from CARE Cambodia, operates 52 such schools, with 207 indigenous teachers who teach approximately 4,000 students currently enrolled.[49] The Ministry of Education is in the process of developing plans to sustainably increase the number of provinces and languages in which bilingual education is available.[50]

c.) Promoting Indigenous Religion in Cambodia

Although the Land Law of 2001 allows indigenous people to have a collective land title, Cambodian indigenous' land rights are the most complicated issues covered. This is because indigenous communities view the preservation of forest as the most important factor in their culture's survival, while the Royal Government's Rectangular Policy requires more rural land to be converted to higher income plantation crops, in order to reduce rural poverty and increase Cambodia's economic development. While indigenous Cambodians have extensive land rights under the law, in practice the process of registering indigenous communities and obtaining collective land titles is often too slow when compared to the pace of economic development. However, the district of Pech Chreada in Mondulkiri offered a good example where indigenous communities were satisfied with their communal forests protected by the government, while at the same time there is

42 Ibid. p. 2
43 Ibid. p. 15
44 Ibid.
45 Ethnologue, published by SIL International, is the standard academic reference work for languages
46 Middleborg, Highland Children's Education Project. p. 3
47 Ibid. p. 27
48 Carol, Bilingual Education in Cambodia; Workshop on Multi-Languages Education in Cambodia.
49 Noorlander, Interview on indigenous rights issues with CARE Cambodia's Programme Coordinator on Marginalised Ethnic Minorities.
50 Ibid.

extensive economic development, such as rubber plantations, which is a core tenet of Cambodia's current development strategy. This situation appears to offer a compromise between local indigenous communities' interests and the wider economic development of the country, which may warrant further investigation.

For indigenous people, a success in maintaining forests means everything for them. This means that they can honor their ancestors, and continue to respect their culture and religious practices. They believe that the forest is the home of their ancestors.

d.) Main Findings

Indigenous Cambodian communities still have poorer educational attainments than the national average. However, this is a difficult, long-term problem to be addressed. The Royal Government's policy of bilingual education, with education being offered in both Khmer and various indigenous languages, in response to this issue is achieving promising results and has been recognized as regional best practice.

Indigenous Cambodians are still disadvantaged in terms of access to health care, however there is evidence that the situation has improved significantly over the last decade, and continues to do so. The continued improvement of basic infrastructure, resourcing of health clinics, and removal of up-front fees relating to health services are the biggest factors towards addressing this inequality.

Indigenous Cambodians' land rights are the most complicated issue covered. This is because indigenous communities view the preservation of forest as the most important factor in their culture's survival, while the Royal Government's Rectangular Policy requires more rural land to be converted to higher income plantation crops, in order to reduce rural poverty and increase Cambodia's economic development. While indigenous Cambodians have extensive land rights under the law, in practice the process of registering indigenous communities and obtaining collective land titles is often too slow, compared to the pace of economic development. However, the district of Pech Chreada in Mondulkiri offered a good example, where indigenous communities were satisfied with their communal forests protected by the government, while at the same time there is extensive economic development, such as rubber plantations, which is a core tenet of Cambodia's current development strategy. This situation appears to offer a compromise between local indigenous communities' interests and the wider economic development of the country, which may warrant further investigation.

III. Conclusion

Social and cultural rights are part of universal human rights. The guarantee of these rights in Cambodia has been very important for the state and for citizens. Cambodia recognizes these rights and integrated them into the Constitution as a part of legal protection. It also adopted substantive laws, procedures and created national institutions as well as allowing development partners and NGOs to work collaboratively with the government to promote these rights. Overall, the promotion of human rights in Cambodia has been systematic because the state created laws, institutions and other mechanisms to ensure a full exercise of human rights by the right holder and to make sure that duty bearer properly fulfil its duty for citizens.

In the recent years, the Royal Government seems to pay attention to promote social and cultural rights. The government increased its budget to improve the healthcare and education sector. The effort to raise quality education, especially education for indigenous children as well as efforts to reduce HIV prevalence has been appreciated and has been a model for some states in the region.

Although some achievements have been appreciated, there are a number of issues to be addressed to promote social and cultural rights in Cambodia. As far as the research is concerned, financial issues and other issues ranging from raising awareness to enforcement should first be addressed.

Unlike promoting civil and political rights, promoting social rights requires the state to put not only effort into law-making, but allocating sufficient funds for implementation so that citizens can enjoy social rights and live a life with integrity, dignity and non-discrimination as guaranteed under the Bill of Human Rights.

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RIGHT TO EDUCATION

HANG Chuon Naron

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RIGHT TO EDUCATION

HANG Chuon Naron *

ABSTRACT

Education1 has been recognized as public good and the State has the duty to regulate national education in a way that ensures the respect for the right to qualitative education, in accordance with provisions of the Cambodian Constitution (I). Relevant legal instruments related to education provide legal provisions on the rights to education2. To implement its constitutional guarantee of freedom to education and its obligation under international law, the Royal Government of Cambodia (RGC) has made serious strides to promote equitable access to education, which served as a platform to launch a broad reform program in the education sector (II) and to address the challenges that prevent Cambodia to achieve these objectives (III).

I. Legal Provisions on the Right to Education

Access to qualitative education is essential for a country's development. While education provides children, the youth and adults with the knowledge and skills to be active citizens and to fulfill themselves as individuals, literacy further contributes directly to poverty reduction. Education also contributes to sustainable economic growth and to more stable and accountable societies and governments. Yet, education cannot be seen in isolation: it is closely related to children's health, gender equality, human rights (particularly those of children and minorities) and employment opportunities. Peace is also a crucial factor

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1 Education involves: "[…] the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge" (UNESCO (1960), Convention Against Discrimination in Education).

2 Bieter, Klaus Dieter (2006), The Protection of the Right to Education by International Law, (Leiden: Martinus Nijhoff Publishers), 462-475.

for ensuring universal access to education. Recently, gender equality within the education sector has advanced as all developing regions have achieved or are close to achieving gender parity in education.

Therefore, the right to education constitutes a fundamental and inalienable right, which emphasizes inclusion and state obligations to ensure its effective implementation. The Constitution of the Kingdom of Cambodia, adopted in 1993, provides for fundamental rights and freedoms of persons and citizens. Outlined in Articles 65 to 68 it guarantees and characterizes education as a fundamental right[3].

The state has been entrusted with protecting and promoting this fundamental right. Article 65 of the Constitution stipulates that: "The State shall protect and upgrade citizens' rights to quality education at all levels and shall take necessary steps for quality education to reach all citizens. The State shall respect physical education and sports for the welfare of all the Khmer citizens." Article 66 stipulates that: "The State shall establish a comprehensive and standardized education system throughout the country that shall guarantee the principles of educational freedom and equality to ensure that all citizens have equal opportunity to earn a living."

Cambodia aims to guarantee free basic education for its citizens. Article 68 states that: "The State shall provide primary and secondary education to all citizens in public schools. The State shall disseminate and develop the Pali schools and the Buddhist Institutes."

Cultural matters are dealt with in Articles 69 and 70. The state has an obligation to preserve and promote national culture, including the Khmer language, ancient monuments and historic sites. Article 71 prohibits military activity in areas of heritage sites.

Cambodia is a member of a number of international legal instruments that recognize the right to education, such as (a) the 1948 Universal Declaration of Human Rights[4]; (b) the International Covenant on Economic Social and Cultural Rights[5]; (c) the Convention on the Rights of the Child[6]; and (d) the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[7]. It also supports the right to education in soft

3 The Constitution of the Kingdom of Cambodia. Unofficial Translation. Version supervised by the Constitutional Council. March 2010. Chapter VI. On Education, Culture and Social Affairs.

4 Article 26 proclaims that: "Everyone has the right to education".

5 Article 13 contains a general statement that everyone has the right to education and that education should contribute to the full development of the human personality.

6 Cambodia has ratified both of its optional protocols. Articles 28, 29 and 40 stipulate that primary education should be "compulsory and available for free to all". Article 28 states that school discipline should be administered in a manner consistent with human dignity. Article 29 stipulates that the education of the child shall be directed towards the development of the child's personality, talents, and mental and physical abilities to their fullest potential.

7 Article 10 establishes the obligation of the state parties to "take all appropriate measures to eliminate discrimination against women in order to ensure them equal rights with men in the field of education". Therefore Article 10 provides for equal access to career and vocational guidance and to studies at all educational levels; access to the same curricula and examinations; elimination of stereotyping in the roles of women and men; and the same opportunities to benefit from academic scholarships.

laws such as recommendations, declarations and frameworks for action, and especially in its Constitution. To this end, Cambodia enacted legal and regulatory frameworks to promote the rights to education.

To implement the provisions enshrined in the Constitution, Cambodia adopted the Law on Education in 2007, which guides the development of the education system. The first chapter in the Cambodian Law on Education provides for equal values as well as everyone's right to education. Students should be allowed to obtain knowledge, skills, dignity, good moral behavior and personality.

Article 9 mentions the control and evaluation system. According to this Article, the Ministry of Education, Youth and Sport (MoEYS) is responsible for the evaluation system and for controlling and formulating the mechanisms of monitoring, inspection and internal auditing of performances.

The level of quality and efficiency of education are mentioned in Chapter 5. Requirements regarding equipment, establishment of objectives, and schools working towards these objectives are described in this Chapter. It also states the requirement that schools should have self-assessment mechanisms to monitor and assess their quality of education. External mechanisms of assessment should be created in order to implement and fulfill the requirements according to education standards.

Chapter 6 mandates the Ministry to set up education policies, principles, plans and strategies. Educational rights and obligations are expressed in Chapter 7, which focuses on the rights of learners, parents and educational personnel. This Chapter contains the right for every citizen to access education. Article 37 defines the rights and obligations of educational personnel. The Education Law has provisions recognizing respect for political rights and socio-economic rights of all citizens by defining "educational rights and obligations". Article 31 stipulates that: "Every citizen has the rights to access quality education of at least 9 years in public schools free of charge". Article 32 requires parents to ensure the "enrolment of children for grade 1 of the formal general education program at the age of 6".

Learners have "the right to free expression of academic views, the right to freedom of study, the right to access quality education, the right to assemble as groups or clubs of learners for educational purposes, the right to examine and make their own note on education, the right to participate actively and fully in the development of educational standards, the right to be free from any form of torture or from physical and mental punishment" (Article 35).

The Law on Education requires the state to promote special education for disabled persons and outstanding learners. Regarding the right to educational information, Article 43 stipulates that: "Educational information of all educational establishments and institutions is the public information except information about natural persons. Educational establishments and institutions shall provide the information available to interested persons according to their requests."

Academic institution managers have the right to gather various legitimate resources from all areas to develop their institutions. The provision of resources should be on a voluntary and non-conditional basis. The MoEYS should ensure transparency and accountability in the management of financial support for education.

Cambodia has also made commitments to a number of global initiatives, known as soft laws, such as (i) the 2000 Dakar Education For All (EFA) Framework for Action[8]; (ii) the 2000 Millennium Development Goals (MDG), which aim to promote the policy of EFA; and (iii) the post 2015 EFA agenda[9].

To this end, Cambodia has made serious strides to meet the six EFA goals. Furthermore, the UN Millennium Development Goals (MDGs) also include goals to "achieve universal primary education" and "eliminate gender disparity in education" in order to "promote gender equality and empower women".

The post 2015 agenda will focus on education as fundamental human right, based on four principles: obligation of the state to provide education; universal access to education; inseparability – education is inseparable from human rights; and effective delivery, i.e. education in order to open the possibility of improving other human rights. Education is also linked to sustainable development. The Muscat Agreement[10] outlines an overarching goal and seven global targets for education post-2015. It reaffirms that education is a fundamental right for all children, young people and adults, and an essential condition for peace and inclusive and sustainable development. It reiterates the importance of education in promoting human rights, human development, gender equality, a culture of peace and non-violence, global citizenship, and appreciation of cultural diversity.

Therefore, the debate on education is designed to ensure that education plays a prominent role in the post-2015 development framework. Although intergovernmental negotiations have only just begun, the draft Sustainable Development Goals (SDGs) include the goal to "ensure inclusive and equitable quality education and promote life-long learning opportunities for all". This would follow up on the MDG commitment to universal education and gender parity, whilst also emphasizing quality education and teacher training,

8 The 1990 Jomtien Declaration of the World Conference on Education For All (EFA) proposed six dimensions against which countries would set their own target (Meeting Basic Learning Needs. Paris: UNESCO). As a result, many national EFA committees were formed and EFA action plans were formulated. The World Education Forum in Dakar proposed six goals in 2000: (i) Early childhood care and education (ECCE); (ii) Universal primary education; (iii) Learning and skills for young people and adults; (iv) Adult literacy; (v) Gender parity and equality; and (vi) Education quality. This led to more government and donor funding for education and greater participation of NGOs at all levels.

9 The post 2015 EFA agenda suggested a goal of "ensuring equitable and inclusive quality education and lifelong learning for all by 2013". Specific objectives relate to basic education (from ECCE to lower secondary education), post-basic education including tertiary, quality and relevant teaching and learning, youth and adult literacy, and skills for life and work. National EFA assessments of progress, regional preparatory conferences and the World Education Forum in Korea in 2015 will complete this process.

10 The agreement was reached at the Global Meeting on Education For All held in Oman on 12-14 May 2014.

technical skills oriented towards an employment generation, and lifelong learning. In the post-2015 context, there is a need to guarantee access to all levels of quality education, particularly for women and girls; to pay special attention to education in emergency situations; and to build "knowledge-based and innovative societies" for participatory citizenship.

II. The Implementation of the Right to Education by the Royal Government of Cambodia

Full peace was only restored in Cambodia after the last remnants of the Khmer Rouge were integrated into the RGC, while their political and military organization was dismantled in 1998. The education system in Cambodia is still recovering from decades of unrests and war.

To this end, with full peace being restored in 1998, Cambodia has undertaken a series of actions aimed at increasing its education budget. As part of a "New Social Policy Agenda", the RGC has been pursuing reforms within the education system in order to create a socially connected, educationally advanced, and culturally vibrant society in Cambodia.

The main policy instrument is the Education Strategic Plan, which aims to provide equitable access to education by ensuring that there is a connection between education policies and strategies, as well as between planning and budgeting. Apart from providing scholarship schemes for children from poor families, it focuses on providing allowances to remote school teachers, increasing budget for school facility development programs and giving more support for running costs of schools in remote areas. As a result, enrollment rates grew from 2001 to 2002 by 30 per cent, due to increased funding to schools and the removal of school fees. This increased access to schools for the poor, girls and ethnic minorities.

As a result of this policy, Cambodia has now broadly achieved universal primary education, with a net enrolment rate of 98% in the school year 2013/2014. Free breakfast and scholarships have been provided to poor students to increase access to primary education. The implementation of reading programs for Grade 1 to 3 has contributed to improved reading and writing.

To improve access to education, the MoEYS adopted the Policy for Child Friendly Schools in 2007 after a successful trial run for 14 years (1993-2006), and extended the targeted areas (ten provinces/municipalities – nationwide). The policy covers basic education in the country comprehensively. It is meant to ensure the respect for children's rights according to universally accepted standards; the improvement of quality and effectiveness of basic education; and decentralization of the education system.

The Policy for Child Friendly Schools presents effective strategies and implementation principles for basic education through six components:

1. Equity in schooling access;
2. Effectiveness of education:
3. Child protection;
4. Gender equity;
5. Child participation; and
6. National support.

The MoEYS has worked with numerous international organizations such as UNICEF and NGOs to effectively implement this policy.

Providing inclusive education programs for children with disabilities is another priority. Teachers are able to identify children with learning disabilities and provide them with necessary aid. Early screening of children with disabilities enabled the RGC and NGOs to target some 50,000 children aged 2 to 17 from 20,000 households.

Moreover, the MoEYS propels school directors and monitoring teams to fully implement a child friendly school policy, provide scholarships and school meal programs at primary schools, implement bilingual education, re-entry programs, accelerated learning programs, flexible timetables, etc. and support textbook provisions to ensure quality teaching and learning so that children acquire cognitive and problem solving skills.

To promote reading, the policy is geared towards providing equipment and libraries. Equal access has been expanded for Cambodian children to school services regardless of gender, race, religion, ethnicity or socio-economic status. To promote equitable access, the RGC has granted scholarships to poor students and provided dormitories to female students to promote gender equality in education.

Significant progress has also been made in secondary education. The gross enrolment rate at the lower and upper secondary education level recently reached 55% and 27% respectively. **Accelerated programs have been implemented to target young people, who are out of school, to provide them with vocational training.** To increase access and reduce dropout rates, scholarships were granted to some 54,000 students. School Resource Centers (SRS) have been created to provide education and improve the learning environment for student communities in order to build a strong foundation for knowledge and train high-quality human capital.

The curriculum and text books also include the principles of human rights, children's rights, women's rights, fight against child trafficking, inclusive education for children with disabilities, gender, democracy, respect for law and social participation. At the same time, basic life skills have been incorporated into the curriculum such as handicraft, agriculture, civics, general and food sanitation, sewing, cooking, animal breeding, carpentry,

environmental protection, fight against HIV/AIDS, drug and human trafficking, mine and UXOs, and indigenous languages. Pre-service and in-service training for teachers is a top priority.

Even though the youth literacy rate for those aged 15-24 reached 93 percent in 2014, the adult literacy rate (ages 15-45) was 80 percent. Cambodia has nearly eliminated gender disparity in its entire education system. At primary and secondary level, the enrollment rates for female students constitute half of the total. There is very little disparity in the present and projected numbers of male and female graduates at primary and secondary level, but the challenge remains at higher education levels. In order to meet the MDGs, more efforts and investments are required to implement non-formal education programs and to increase the adult literacy rate to 84.4 percent. The MoEYS, with the support of UNESCO, launched the 2015 Literacy Campaign to implement 3,685 literacy classes for 92,125 learners. To this end, some 2,558 primary school teachers have been offered orientation courses on conducting literacy classes to be organized in public schools. This is in addition to the trained 1,127 contracted literacy teachers. Some 660 core literacy trainers are trained to provide support to 3,685 literacy teachers.

Significant progress has also been made in the area of higher education. There are more than 100 Higher Education Institutions (HEI) in 2014/15, of which 45 are public and 67 private. These HEIs serve 15,635 associate degree students, 214,266 Bachelor's degree students, 18,010 Master's degree students and 1,181 Ph.D. students. In 2014/15, some 56,035 students graduated from these higher education levels. Around 500 students were sent overseas for trainings. At the same time, around 160 foreign students came to study in Cambodia. The challenge for Cambodia is its quality of higher education.

III. The Challenges that Affect the Right to Education

The education sector is faced with the following significant challenges: (i) late entry to primary school, (ii) low secondary completion and high dropout rates, (iii) high direct and indirect costs of education, (iv) high pupil-teacher ratios, and (v) low quality of education.

Late entry to primary school is pervasive in basic education. Trends in gross and net intake rates show that the intake of new students occurred among children older than six years of age. Vulnerable groups were much more likely to be over-aged. Age seven was the most common school entry age, and almost half of the children entered school at least two years behind schedule. To address the problem of late entry, attention has been given to Early Childhood Education (ECE), so that parents enroll their children at the age of 6. Within the last years, an expanding access to the ECE from a baseline of 40 percent in 2009/10 to 60 percent by 2013/14 has been witnessed.

The challenge that Cambodia faces is a high dropout rate at the lower secondary level (20%), principally because of high opportunity costs (child labor earnings), direct costs of education (books, uniforms, transportation and informal fees), farming seasons during the school term as well as physical distance to schools in rural areas and overcrowded schools in urban areas. The perceived low quality and relevance of education at the lower secondary level as well as frequent teacher absenteeism and high repetition rates also contribute to the low enrollment and high dropout at secondary schools. High migration between districts in Cambodia also contributes to a higher dropout rate.

To address this issue, there is a need to ensure an adequate deployment of qualified teachers in remote areas, to increase school operating budgets and to strengthen school support committees, to provide scholarships, textbooks and to implement re-entry programs, accelerate learning programs, flexible timetables, and to link all these with technical and vocational education.

Secondary education offers the best hope for the youth to develop necessary skills and give a fighting chance to good jobs. Observing dropout rates provides an 'early warning' so that preventive measures to reduce early dropouts can be established. The earlier the preventive measures begin the broader and less costly the target measures will be.

However, this means that the skills students have learned at school must be relevant to their needs and extend beyond subject knowledge – i.e. transferable skills to apply knowledge in real work situations, problem solving skills and effective communication skills. Thus, schools have an important role to play in promoting resilience by developing activities, classroom practices and modes of instruction that foster disadvantaged students' motivation and confidence in their abilities.

To this end, the MoEYS develops a comprehensive strategy to holistically address the dropout issue, based on lessons learnt from the dropout prevention pilot program, by providing scholarships, ensuring deployment of more qualified teachers in remote areas, reinforcing the implementation of child-friendly school policies at lower secondary level, integrating girl-friendly classes, toilets and materials and ensuring the implementation of actual teaching hours. In addition, the Ministry will work to reduce teacher absenteeism, provide remedial support for weaker learners, a flexible timetable and accelerated learning programs, and strengthen the relevance of a curriculum linked to technical and vocational training.

The provision of scholarships can have a strong impact on primary school completions, dropouts, repetitions and regional disparities. Moreover, an improvement of the abovementioned issues directly relates to a higher probability of school attendance of poor rural children.

The Ministry will continue to implement targeted scholarship schemes (for the poor, vulnerable and disabled as well as for ethnic minorities, girls and the rural population), while improving the management of scholarship schemes (transparency, timely disbursements, monitoring, auditing, etc.). The objectives are: 1) to reduce access barriers for

students and 2) to improve the quality and efficiency of education services in order to increase the passing rate between grade 7 to 9 and transition rates between grade 9 to10 and thus to assure equitable access to upper secondary education, especially in rural and disadvantaged areas.

Inclusive education is a key element to ensure "equitable access for all children in primary education, including marginalized groups such as children with disabilities, ethnic minorities, those engaged in child labor and so on"[11]. Providing bilingual education is crucial to ensure equitable access, as there are 24 ethnic minority groups with different languages in Cambodia. Bilingual education (mother-tongue based) is seen as a key strategy to achieve the Education Strategic Plan (ESP) goals and to ensure equitable access to primary education. Hence it is necessary to improve access and learning quality for children with other mother tongues than the official national language. In 2003, 6 bilingual schools with 278 students existed in Cambodia, while the country now offers bilingual education in 39 schools to about 2,800 students in 5 ethnic languages. However, in spite of the MoEYS' commitment and involvement in bilingual education programs, these are not largely funded by development partners.

Barriers to access also include factors on the demand side such as high direct and indirect costs. Household costs include uniforms, pocket money, transportation and supplementary tutoring.

The national average primary pupil to teacher ratio fluctuates from 48 to 50, despite an overall increase in the number of classrooms. The country's teacher capacity is generally weak, presenting the risk of declining educational quality and learning outcomes. Furthermore, teachers and school directors were not equitably deployed throughout Cambodia. This is a reality partly due to low salaries and a lack of sufficient incentives to draw teachers to rural and remote areas. Low salaries force teaching staff to seek alternative income-generating opportunities, which are hard to find in poorer areas.

With rapid privatization of higher education institutions, Cambodia faces a serious challenge of securing jobs for approximately 250,000 students. As the Cambodian economy starts to diversify, shifting from the garment and intensive agriculture sector toward manufacturing, electronics, IT-related, agro- and higher value-added services sectors, a mismatch of skills has emerged and poses serious challenges to the prospects of economic diversification.

To address the above challenges, the MoEYS has identified key measures to reform the education sector and strengthen Cambodia's competitiveness. The reform program focuses on the following priorities:

11 Primary Education Department of the MoEYS available at: http://www.moeys.gov.kh/en/ped/primary-education-department.html#.VnDTx0olh9B

1st Measure

Improving the quality of education at all levels: Good-quality education is an essential factor in the development of a country. Ensuring that education is of good quality and high standard is indispensable. Quality assurance activities will focus on enhancing the process that is used to create end results. For the Cambodian school system, this means that the children and students acquire knowledge, skills, capacities, dignity and good moral behavior and characteristics, which will in turn strengthen each individual's national pride. To this end, the teaching-learning approach should be shifted from a teacher-centered to a student-centered approach.

A well-functioning quality assurance system at local levels guarantees continuous activity improvements. Self-evaluation plays a very important role in the quality assurance system. Therefore, national inspections shall contribute to the development and implementation of routines for an effective self-assessment system at all schools.

School-inspection is a mechanism for controlling and monitoring the degree to which schools meet national requirements. The inspections assess whether the schools fulfill their responsibilities in relation to the regulations set out in the Education Law. The inspectors also evaluate how well educational activities and schools are functioning in relation to national objectives and the national curriculum.

Perhaps the most important task for inspectors is to check whether schools in fact have a self-assessment system and strategies for self-improvement. In addition, inspectors also help schools to implement such systems if they have not done so already. There are two types of inspections: internal inspection and external inspection.

Internal inspection is based on the school's self-assessment, performed by school-directors, teachers and students. It also focuses on the quality of internal work using local resources.

External inspection is exogenous to some degree. It points out areas that function well or are in need of further development and contributes therefore to improvements. When inspecting schools, two areas are given priority: (i) assessment of teachers and (ii) assessment of schools.

2nd Measure

Strengthening personnel management: Implementing a civil service reform, introducing performance-based promotions and personnel management based on staff experiences and capabilities will reduce discontentment among personnel. Teachers are the key of an education system. The quality and performance of education systems depend highly on the qualification of teachers and class contents. Such teacher development is of utmost importance for Cambodia.

Teachers are central to school reforms. Thus, the success of implementing child-friendly models will depend on the caliber of teachers within the system. As a high percentage of teachers lack the requisite level for teaching, training is needed to confront the challenges of current practices. Moreover, for many reasons, the morale and motivation of teachers are crucial. If a school reform is to succeed, it will be critical to establish well-designed training and mentoring programs that build competencies and strengthen the morale of teachers. This will include high quality pre-service and in-service training of teachers, enabling them to operate effectively within the challenging rights-based, child-centered and interactive pedagogy that is at the heart of the child-friendly school model.

A Teacher Development Master Plan 2010-2014 and a Teacher Policy was approved in 2011 and 2013 respectively. Recent positive developments for teachers include an increase in teacher salaries, operating budgets for training centers, and scholarships for trainees. To this end, the policy ensures the quality and relevance of pre-service and in-service teacher trainings, implements the Teacher Development Master Plan and the Teacher Policy, ensures a link between increased qualifications and promotion, and increases the number of new teachers recruited every year (including pre-school teachers). Measures will be implemented to address teacher shortages, due to retirement, transfer, resignation, death, etc. As a result of these shortages, double working shifts are implemented in a large number of schools nationwide and 14 percent of schools cannot offer all grades at primary level.

3rd Measure

Reforming the examination system: The new system shall enforcing four principles:

- law,
- justice,
- transparency, and
- acceptable results.

Eliminating cheating in exams will promote teachers' respect and honor and a qualitative education system.

4th Measure

Reforming higher education: A reform shall take place by improving the management of public and private higher education institutions, aimed at the development of human resources with high skills and competencies, in order to respond to economic development, i.e. linkage between universities, industries and public institutions.

5th Measure

Developing technical and soft skills for young people: This measure shall prepare the younger generation for the ASEAN Economic Community, responding to the needs of the labor market and increasing employment opportunities by organizing Career Forums for the youth. These Forums connect them with company representatives. The reform aims to provide technical and professional training in line with the need of the country's development. Lower secondary school extends and consolidates the basic skills learned in primary school and is identified as an important determinant of earnings. The idea is to provide skills for early employment whilst preparing others for further education. It is therefore inclusive of disadvantaged groups, which can gain access to good jobs on the basis of merit.

6th Measure

In-depth reform of the public financial management: Reforming public financial management by strengthening and using existing resources with high effectiveness and mobilizing additional external resources. The Ministry has introduced a budget entity to ensure that education policies are implemented efficiently with adequate human and financial resources. One of the major goals of the reform is to introduce full program budgeting in 2015 and to strengthen budget efficiency and transparency.

7th Measure

Creating an Education Research Council: This Council is a think-tank, whose members are university professors and professionals, with the aim to strengthen institutional capacities, to formulate and monitor the implementation of education policies and promote education and research activities.

IV. Conclusion

The government places education at the heart of its development agenda, and considers the education sector central to reducing poverty and increasing shared prosperity. The development strategy emphasizes the following policy actions: increasing quality and effectiveness of education services at all academic levels, in particular, technical and skill-based training for public and private institutions in accordance with international standards; meeting domestic development needs through 1) pre-service and in-service trainings, 2) curriculum improvements, 3) inspections and management capacities, 4) stimulation of teachers' motivation, 5) upgraded examinations at all academic levels, 6) encouragement

to study foreign languages, 7) improved learning environment, 7) expansion of libraries and science laboratories, 8) increased supply of learning materials as well as 9) inclusion of parents, guardians and communities.

The RGC has placed great importance on developing human resources in terms of knowledge, competence, entrepreneurship, skills, creativity and innovation in all sectors. As experiences of Cambodia's neighboring countries show, sustainable development requires high and intensive investments in education at all levels, particularly Technical and Vocational Education and Training (TVET) and higher education. In fact, the ESP 2014 – 2018 has been designed to respond to these demands with clearly stated relationships between national and education policies. The education reform is linked to broader governance, state building, and economic and social development. These broader linkages can optimize the development potential of education.

Therefore, the overarching goal and global targets of the post-2015 education agenda shall continue to focus on inclusive access for all, quality of learning, relevance of appropriate learning – skills for thinking and reasoning, technical skills and life-long learning, while taking into account the unique national, cultural and social context of the nation. Indeed, the 5 individual EFA goals proposed for 2030 certainly reflect Cambodia's existing education policies: (1) Ensuring equitable access for all to education services, (2) enhancing the quality and relevance of learning, and (3) ensuring effective leadership and management of education staff at all levels, needed to achieve national goals and visions.

Cambodia voices strong support for the post 2015 EFA agenda, including the Muscat Agreement. The post 2015 EFA agenda will focus on education as fundamental human right, based on four principles: obligation of the state to provide education; universal access to education; inseparability – education is inseparable from human rights; and effective delivery, i.e. education as pilot area to open the possibility to exercise human rights in other areas. Education is also linked to sustainable development. The Muscat Agreement outlines an overarching goal and seven global targets for education post-2015. It reaffirms that education is a fundamental right for all children, young people and adults, and that it is an essential condition for peace and inclusive and sustainable development. It reiterates the importance of education in promoting human rights, human development, gender equality, a culture of peace and non-violence, global citizenship, and appreciation of cultural diversity.

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THE INFLUENCE OF FRENCH LEGAL CONCEPTS ON THE CAMBODIAN CONSTITUTION OF 1993

Jean-Luc GREGORCZYK

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THE INFLUENCE OF FRENCH LEGAL CONCEPTS ON THE CAMBODIAN CONSTITUTION OF 1993

Jean-Luc GREGORCZYK *

ABSTRACT

Looking for the influence of the former colonial power in the drafting of the 1993 Constitution is obviously an intellectual temptation. Nobody can indeed ignore the special ties, which existed at that time between the King, some members of his family, even members of the constituent task force, and the French educational, intellectual and legal system. Are these ties sufficient to assume that the French constitutional principles have been transposed in the Cambodian Constitution?

Maurice Gaillard, in his French comment on the latest Cambodian Constitution[1], underlines the limits and risks of such an approach: "*The comparison between the Cambodian Constitution and legal traditions of its main foreign influences is attractive. But it would be very insufficient. Indeed, we must give credit to the constituent power to have sought primarily to fix original rules, in a country outgoing two decades of calling into question of its identity, even if it has accepted to refer to very western legal categories*".

The purpose of this article is not to evaluate how the sovereign constituent of Cambodia did fix these rules or adapt the western legal categories to the Cambodian reality but rather, starting from the French point of view, to analyze the wide range of "*legal categories*" this country was able to propose and possibly how they can be found in the 1993 Constitution.

This expression itself seems to indicate and to take for granted that the French constitutional system enshrines supra-principles that any person can easily list and, what is more disputable, that these principles did not evolve in France.

Between 1946 and 1993, the legal framework or the constitutional model that France could have transmitted to Cambodia can, indeed, vary from a pure parliamentary regime to a more presidential pattern.

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1 Maurice Gaillard, "Démocratie cambodgienne. La constitution du 24 septembre 1993" , L'Harmattan, 1994, p.12

I. Historical Background

The purpose of this preliminary brief reminder is not to review the drafting-process of 1993, but rather to focus on meaningful historical aspects highlighting the French – real or supposed – influence on this process.

1. The Determinant Will of Prince Sihanouk to Impose Western Legal Categories

According to Maurice Gaillard, the will to acknowledge some of the most prominent principles of western democracies in the 1993 Constitution stems from a strong personal position of Prince Sihanouk himself.

In a framework paper of 18th June 1993, he directly expressed his views for the future Constitution: "*Cambodia is a legal democracy of western style, with a parliamentary regime (and not a presidential one), a pluralist system, freedom of press (without any censorship), a free market economy based on entrepreneurial freedom of western style, a total respect of Human Rights as defined by the UN Charter, the Universal Declaration of Human Rights and several conventions on Human Rights, including women and children rights. Separation of powers (executive power, legislative power and the judiciary) must be strictly forbidden. The judiciary must be absolutely independent of the Government and from different parties*"[2].

This reference to a liberal democracy perfectly matches the formulation of the Paris Agreements, particularly its Annex V, which required the constituent assembly to produce a Constitution "*that shall declare that Cambodia will apply a liberal democracy, based on pluralism*".

According to Stephen P. Marks though, "*the term of liberal democracy has been attributed to Prince Sihanouk, who had called for Cambodia to be a liberal democratic state during earlier negotiations. It seems likely that he used this term in the context of the negotiations because he assumed it was what the U.S. representatives and other key participants in the Paris Conference wanted to hear. The concept certainly does not reflect the principles of government he applied when he was king or prime minister in the 1950s, and questions remain regarding the adaptability of the western political theory of liberalism to the conditions of a Buddhist, extremely poor, and agrarian society such as Cambodia*"[3].

This vision of Prince Sihanouk was all the more important as his influence over the subsequent elaboration process of the Constitution has been determinant. Though a twelve-member drafting committee has been appointed on June 30, 1993 to elaborate a

2 "La voix du Cambodge", n°3, août 1993, p.4

3 Stephen P. Marks, "The process of creating a new constitution in Cambodia" , in Laurel E. Miller, "Framing the state in times of transition: case studies in Constitution making", United States Institute of Peace, 2010, p. 209.

draft Constitution apart from the other 108 members of the constituent assembly, Prince Sihanouk had pronounced himself for the draft elaborated by FUNCINPEC tending to restore the monarchy, totally sidelining the drafting committee.

According to Milton Osborne, "*he is reported to have made many handwritten amendments to the monarchical constitution shown to him for his approval*"[4]. Considering this procedure, it appears that the choice of Prince Sihanouk to include western democratic principles in the 1993 Constitution result from a personal conception rather than any international pressure.

2. The Assumed Role of International Experts

The role of independent foreign lawyers or experts giving advice directly to the constituent power is often mentioned in different publications concerning the drafting of the 1993 Constitution. According to Stephen P. Marks, the role of foreign experts within the UNTAC "*appears to have been negligible*"[5].

Besides the UNTAC however, the question of the real role of Prof. Claude-Gilles Gour, from the University of Toulouse, is still unclear. According to Brown and Zasloff, he had an important role in drafting the version that was the closest to the one that was adopted: "*Sihanouk, through his son Ranariddh, himself a former professor of law at the University of Aix-en-Provence in France, had engaged Gour following the election to prepare a draft constitution. Gour worked in Phnom Penh until sometime in July 1993, and left the draft with Ranariddh before returning to France. One might assume that the draft conformed to the position of Prince Sihanouk and Ranariddh. According to a source who was closely following the drafting process in late July 1993, Ranariddh came before the drafting committee and said, in effect, 'here's the constitution. My father has agreed to it and so do I'. It was substantially Gour's draft. According to this account, Ranariddh expected that a draft endorsed by Prince Sihanouk and himself would be immediately accepted. Instead, the chairman of the committee calmly thanked Ranariddh and noted that the committee would consider it, along with the draft that it had been working hard to develop*"[6].

Later, he would explain how he conceives his own role: "*In principle, as an expert, I don't have to express myself in public. An expert is consulted by his employer on certain points; he can tell 'according to me, given the circumstances and your objectives, you should act this or this way'. But its role stops here. And moreover, the expert has one very obligation, which is to be discrete. Normally, in this matter, I should have been remained unknown*"[7].

4 Milton Osborne, "Sihanouk: prince of light, prince of darkness" , University of Hawaï, 1994.
5 Ibid, p. 226
6 MacAlister Brown and Joseph J. Zasloff, "Cambodia confounds the peacemakers, 1979-1998", Cornell University Press, 1998.
7 Cambodge nouveau, " La loi additive" , n° 219, 2004, p. 5

In the same interview, he explains his personal strong ties to Cambodia: "*I am used to going to Cambodia since 1961. That time, Queen Kossamak asked me to take care of the studies of her son Ranariddh. Since then, I keep emotional feeling towards him, which have nothing to do with politics. Some Cambodians have been deep friends to me*".

Was the French Government aware of the activities of the professor? A mission from the French Senate took place in March 1993: its report does not mention this activity nor the discussion on the drafting of a new Constitution[8].

However, Prof. Claude-Gilles Gour was awarded of the French *legion d'honneur* by the decree of July 13th, 1993[9], knowing that this kind of official distinction of the French Republic is scarcely granted without a thorough knowledge of the public and the private activities of the person rewarded.

Yet, the role of this expert, as well as two other U.S professors, must not be over-estimated; as Brown and Zasloff stated, "*as the above account suggests, there was an abundance of advice from foreign experts available to the key Cambodian actors in the constitution-writing process. They may have shaped the thinking of the participants with information, suggestions, and even draft of segments of the constitution. But it seems clear that the final version was a Cambodian product, shaped primarily by the interplay of the key Cambodians*"[10].

II. The Wide Range of Legal Categories of Reference

If we consider, as Maurice Gaillard does, that the 1993 Constitution was deeply influenced by the previous Constitutions of 1947 and 1953, the French "*legal categories*" of reference can automatically be sought in the French Constitutions of 1946 (organizing the 4th Republic) as well as in the one of 1958 (organizing the 5th Republic).

Last, the principles used in 1958 to ground the French Constitution have been subjected to deep criticism during the 80's after the accession to power of president Mitterrand and his left majority.

In order to organize a reform, this president appointed a Commission of Revision in 1992 under the direction of Prof. Georges Vedel; the report of this Commission was delivered to the president in February 1993, only several weeks before the election of the constituent assembly in Cambodia. The second chapter of this report proposed different solutions to upgrade the role of the Parliament in French institutions.

8 Rapport d'information fait au nom de la commission des affaires étrangères à la suite d'une mission effectuée au Cambodge et au Vietnam du 26 février au 9 mars 1993, enregistré à la présidence du Sénat le 21 avril 1993.

9 Decree of 13th July 1994 (JORF n° 161 du 14 juillet 1993, p. 9947).

10 Ibid, p. 196

1. The Legacy of the French Parliamentary Tradition

After World War II and the turmoil of the "*dark years*" of the Vichy regime –where an illegitimate authority engaged itself in a policy of collaboration with the occupying forces – the French Constitution of 1946 intended to reshape a strong parliamentary regime, restoring the importance of political parties and proclaiming a series of social rights. Paradoxically, one year later, the Cambodian Constitution of 1947 set up a very personal regime: according to Maurice Gaillard, the Constitution "*was only a dressing aiming at vesting legal power to the person of the King*"[11].

a.) Preamble with Historical References and Proclamation of Social Rights

The French Constitution of 1946 and the 1993 Cambodian Constitution share a detailed preamble, rich in references to the turmoil of recent history. The French Constitution states:

> *"In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights. They solemnly reaffirm the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged in the laws of the Republic".*

This reference can be compared with the Cambodian text:

> *"Having known a grand civilization of a prosperous, powerful, and glorious nation whose prestige radiates like a diamond, having endured sufferings and destructions and having experienced a tragic decline in the course of the two decades, awakened, stood up with a resolute determination to strengthen the national unity (…)".*

From the French point of view, this intention to anchor the declaration in recent history has completely disappeared in 1958, as if the new Constitution reflects the will of the whole people to turn a new page and, in some ways, to forget these difficult moments.

The preamble of 1946 is also famous for proclaiming a series of fundamental social rights:

- the equality of rights of men and women guaranteed by the law "*in all spheres*";
- the right of asylum in the Republic for any person persecuted in virtue of his action in favor of liberty;
- the duty to work and the right to employment;
- the right to join unions;
- the right to strike in the framework of the laws;

11 Ibid, p. 11

- the right for workers to determine, through their representatives, their conditions of work and to manage the work place;
- the protection of health, material security, rest and leisure;
- the right of equal access to instruction, vocational training and culture, in particular a free, public and secular education;
- the right to a normal family life.

Besides this limitative enumeration, the first paragraph of this Constitution refers more generally to the "*fundamental principles acknowledged in the laws of the Republic*"; this provision did not have any legal efficiency until a decision of the Constitutional Council of 1971, giving a constitutional reach to the freedom of association proclaimed in a separate law of 1901, but not in the Constitution of 1946. This decision has also offered to the constitutional judge the possibility to establish principles of constitutional level beyond the list established in the preamble, by reference, notably, to the French Declaration of Human rights (1789) or other important laws adopted between 1889 and 1940.

According to the interpretation appearing on the site of the Constitutional Council[12], "*social rights include conventional rights (right to strike and freedom of association), but also further* **rights to benefits** *from the community, said* **rights-debt** *(right to employment, right to health, material security, rest and leisure, the right to education, vocational training and culture, the right to equality and solidarity to the charges resulting from natural disasters, the right of the individual and family to enjoy the conditions required for their development) and* **rights-equity** *(employee participation in the collective determination of working conditions and the management of companies). They are recognized by the Preamble of 1946 as "social principles particularly necessary in our time" and completed in the same text by political and economic principles also considered as such (asylum, equality of women and men, nationalization of national public services and de facto monopolies). The rights - claims also benefit foreigners whose residence in France is stable and steady*".

Interestingly, many of these social rights are also proclaimed by the Cambodian Constitution of 1993, whereas they are almost totally absent from the Constitution of 1947:

- articles 34 to 36 proclaim equality between men and women but only in certain areas like eligibility, participation to political life and freedom of professional choice. Article 31 refers to international conventions concerning women's rights and their protection;
- article 37 recognizes the right to strike in the framework of the law and to join unions (article 36), without any reference to the right of organizing the work conditions at the level of each company neither from the right of association;

12 http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-de-1958-en-20-questions/la-constitution-en-20-questions-question-n-4.16623.html

- guarantee of health (article 72) and quality education (article 65) are recognized including free primary and secondary education (article 68) especially for children (article 48). No mention is made of the State's role after the secondary education, particularly at university level.

Legally speaking, these rights are not gathered in the preamble but constitute the third part of the 1993 Constitution, after the first part is dedicated to sovereignty and the second part to the King; this seems to indicate that these social rights were of prominent importance in the mind of the 1993 constituent; and the fact that they are acknowledged directly in the corps of the Constitution – and not in the preamble – avoids, in principle, any doubt about the legal reach of these provisions.

b.) The Balance of Power

Role and Composition of the Parliament

The prominent role of the Parliament under the Constitution of 1946 can be first deduced from its position in the Constitution: the part dedicated to its role immediately follows the first part devoted to sovereignty. In comparison, the second part of the Constitution of 1958 is dedicated to the president of the Republic.

Composed by the National Assembly and the "*Conseil de la République*", which became the Senate after 1958, the Parliament shares the initiative of the draft bill with the Government; nevertheless, article 13 of the 1946 Constitution stipulates that "the National Assembly alone votes the draft laws" whereas article 20 states that the second chamber only provides opinions on draft laws before transmission to the National Assembly. No mention is made of a special role of the second chamber in representing local constituencies. If the second chamber does not provide its consent on the draft law, the National Assembly will review the draft law once more, and shall examine the amendments proposed by the second chamber.

This role of the second chamber is very different from the one of the Senate after 1958, and apparently very close from the role of the Senate in the Constitution of 1993, as amended on 8th March 1999; the new article 113 stipulates:

> *"The Senate shall examine and give out opinion within no longer than one month, on draft laws and proposed bills which have already been firstly adopted by the National Assembly and on various issues submitted to it by the National Assembly. If it is urgent, the above period shall be reduced to only 5 days.*
> *If the Senate has given approval or none opinion, within the above specified period, the laws which were already adopted by the Assembly shall then be promulgated.*

If the Senate requests to rectify on that draft law or proposed bill, the Assembly shall immediately consider it for the second time. The National Assembly shall consider and decide only on any provision or any point that are requested to rectify by the Senate, by abrogating the whole text or retaining some of its parts".

The redaction of article 113 is strikingly close to article 20 of the French Constitution of 1946.

Relation with the Executive Power

The power of the Parliament in the French 4th Republic (1946-1958) lies in its relation to the executive power: the president of the Republic is elected by the Parliament for 7 years (article 29) and the Government shall be appointed by him only after validation of its political program by the National Assembly (article 45). The confidence of the National Assembly must be voted by a single majority; if not, the Government is dismissed.

This equilibrium between legislative and executive power is generally said to have caused, during the 4th Republic, a fundamental executive instability: the average length of a Government between 1946 and 1958 was around 9 months; some of them lasted not more than a few days. As a consequence, it has been largely abandoned in 1958 and such equilibrium can hardly be found in the spirit of the Cambodian Constitution.

2. The Presidential Regime of 1958

a.) A "Republican Monarchy"?

After the return to power of general de Gaulle in 1958, in the frame of an internal decolonization war in Algeria, Michel Debré, father of the current president of the Constitutional Council Jean-Louis Debré, has been appointed to shape a new Constitution with a few other specialists.

This Constitution had to put an end to the "regime of political parties" following the expression of the new president of the Republic, and to restore the authority of the State through the instauration of a "rationalized parliamentarism".

The preeminence of the president of the Republic can be noticed in the structure of the new Constitution itself: its second part is dedicated to the president of Republic and not to the Parliament anymore, as it was in the previous Constitution.

Its article 5 defines how the president shall guarantee the stability of institutions: "*The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State. He shall be the guarantor of national independence, territorial integrity and due respect for Treaties*".

This stability was initially illustrated by the election of the president for 7 years; the term was reduced to 5 years in 2000.

The subsequent articles set up a wide range of competences:

- Appointment of the prime minister and, on recommendation of him, of other members of the Government;
- Presidency of the Council of Ministers;

- Dissolution of the National Assembly after consultation with the prime minister and the president of the houses;
- Commandment of the armed forces, declaration of state of emergency and war.

In order to characterize these new powers, Maurice Duverger, jurist and professor of law, popularized the expression "republican monarchy". Is there any comparison to be made with the second part of the 1993 Cambodian Constitution identifying the powers of the King?

Following article 8 of the Constitution, the King is the symbol of unity of the nation and guarantor of the nation's independence, sovereignty and territorial integrity. Article 9 stipulates that he also ensures the faithful execution of public powers. Undoubtedly, these terms could have been used to characterize the French president.

He also appoints the prime minister and the Council of Ministers, following article 19 (upon proposal of the president of the National Assembly); he signs decrees appointing, transferring or ending missions of high civil and military officials, ambassadors and envoys extraordinary and plenipotentiaries, which is almost exactly the redaction of article 13 of the French Constitution. The King as well as the president can grant amnesty or declare a state of emergency.

In many respects, the power of the Cambodian King can be compared to those of the president.

But article 7 limits political powers of the King that can hardly be found in the French Constitution; the King shall reign "but not govern". Article 17 stipulates that this article shall not be amended.

This principle is declined in many other articles of the Cambodian Constitution. If the King can declare a state of emergency, he cannot use any special powers devoted to the president: in such circumstances, the president "*shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council" (article 16). The measures "shall be designed to provide the constitutional public authorities as swiftly as possible, with the means to carry out their duties. The Constitutional Council shall be consulted with regard to such measures*".

b.) The Preeminence of the Executive over the Legislative Power

Following article 20 of the French Constitution of 1998, the Government shall determine and conduct the policy of the nation, whereas the prime minister shall direct the action of the Government and shall be responsible for national defense. He shall ensure the implementation of legislation.

In France, this preeminence of the Government and the prime minister is mostly illustrated in the lawmaking process. If the power of initiative is shared between Government and Parliament, the agenda has been completely monitored by the Government from 1958 to 2008; in practice, members of Parliament propose a draft bill but the Government eventually decides if this proposition will be discussed.

Subsequently a monthly time sharing has been established without prejudice towards the consideration of finance bills and social security financing bills. For two weeks each month, the draft bills reviewed in public sittings are selected by members of Parliament, mainly through a process of selection controlled by political groups.

Furthermore, the Government disposes of many tools to impose its views in the lawmaking process: the possibility to engage its responsibility in order to have a draft voted without any debate (article 49 para. 3), the procedure of blocked votes scheduled by article 44 para.3, and the possibility to ask the Parliament to proceed to a second deliberation on a text or part of it (article 101 of the Internal Rules of the National Assembly without any constitutional basis).

The French Constitution also grants the prime minister the power to edict regulations in fields that are not reserved to the statutes by article 34 of the Constitution, except the decree signed by the president himself following article 13 of the Constitution (decrees deliberated upon in the Council of Ministers).

The spirit of these provisions can hardly be found in the Cambodian Constitution:

- the Constitution does not explicitly entrust the Government with the task to conduct the policy of the nation, even if its article 119 states that all members of the Royal Government are collectively responsible to the National Assembly for the general policy of the Royal Government;
- the Cambodian Constitution contains very few provisions concerning the legislative process: how many discussions before each chamber, what is the procedure in case of disagreement between the National Assembly and the Senate, or if the King refuses to promulgate the draft law. In addition, no procedure is foreseen if the Parliament decides to vote an amendment contrary to the Government's will.

As a consequence, it appears difficult to establish any comparison between the principle of the latest French Constitution and the Cambodian Constitution.

In many fields, the Cambodian Constitution of 1993 seems closer to the spirit of the French Constitution of 1946 than to the current Constitution of 1958. In particular, the balance of powers between the legislative and the executive allows the Parliament to take part in the legislative process and even impose its view on the Government.

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COMPARATIVE PERSPECTIVE FROM JAPAN: EMPHASIZING CONSTITUTIONAL IMPACT ON "PRIVATE LAW"

Hiroshi KIYOHARA

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COMPARATIVE PERSPECTIVE FROM JAPAN: EMPHASIZING CONSTITUTIONAL IMPACT ON "PRIVATE LAW"

Hiroshi KIYOHARA *

ABSTRACT

When the Second World War ended in 1945, the Constitution of Japan was promulgated in 1946. Following this new Constitution, Japan has experienced some major law reforms. One of the major reforms was the total amendment of family and succession law provisions of the Civil Code because the then-existing Civil Code was based on the idea of the superiority of men and the inferiority of women within a family. This traditional idea was clearly contradictory to the principle of gender equality guaranteed by the new Constitution of 1946. The Japanese government amended the family and succession law provisions in 1947, and these new provisions freed individuals from the dominance and control of "**ie (house)**", and eliminated unequal treatment of men and women in matrimonial and parental relationships as well as in succession. Today, no traces of the "ie (house)" can be found in Japanese law, and there is no doubt that the Japanese law has been entirely democratized in accordance with the constitutional principle of individual dignity as well as constitutionally-guaranteed equality of the sexes.

I. Introduction

This Article aims to contribute to the further development of Cambodia's constitutional principles and its jurisprudence by presenting and analyzing the Constitution of Japan and by emphasizing its constitutional impact on "Private Law", especially the Civil Code of Japan. As you will soon find in this Article, after the Second World War ended in 1945, Japan experienced major law reforms. One of these major reforms was the total amendment of family and succession law provisions of the Civil Code because of a clear conflict between the then-existing Civil Code and the new Constitution of 1946. Hopefully, Japan's experience can provide some lessons to be learned for Cambodia.

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II. The Constitution of Japan

The Constitution of Japan is the fundamental law of Japan, which was promulgated in 1946 as a new Constitution after the Second World War. In order to understand the constitutional impact on private law, it is essential to take a brief look at the historical development of the Japanese Constitution as well as fundamental principles underlying the Constitution.

1. Historical Background

a.) The Meiji Constitution

The first Constitution of Japan, which was called the "Meiji Constitution",[1] was promulgated by Emperor Meiji[2] on February 11, 1889. Based on the Prussia (German) model, this Constitution was an "Emperor-centered" Constitution.

The Meiji Constitution began by proclaiming that Japan should be reigned over and governed by the Emperor of Japan perpetually,[3] and that the Emperor should be sacred and inviolable.[4] Accordingly, the Emperor was the sovereign of Japan who actively ruled the country and exercised considerable political power in accordance with the provisions of the Constitution.[5]

The "Imperial Diet" (parliament) was established by the Meiji Constitution,[6] but its main function was solely to assist and support the Emperor. The Imperial Diet had authority to legislate laws,[7] but needed the Emperor's approval to effectuate such laws.[8]

Ministers of the "Cabinet", which was the top administrative organ of the Meiji government, were appointed by the Emperor[9] and the Imperial Diet had no right to object to his selection. Ministers were supposed to give their advice to the Emperor, and also were

1 The official name was "The Constitution of the Empire of Japan", but this Constitution is widely known as the Meiji Constitution.
2 Emperor Meiji (November 3, 1852 to July 30, 1912) was the 122nd Emperor of Japan. He reigned over Japan from February 3, 1867 until his death on July 30, 1912.
3 Article 1 of the Meiji Constitution provided "The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal."
4 Article 3 of the Meiji Constitution provided "The Emperor is sacred and inviolable."
5 Article 4 of the Meiji Constitution provided "The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution."
6 Article 33 of the Meiji Constitution provided "The Imperial Diet shall consist of two Houses, a House of Peers and a House of Representatives."
7 Article 37 of the Meiji Constitution provided "Every law requires the consent of the Imperial Diet."
8 Article 6 of the Meiji Constitution provided "The Emperor gives approvals to laws, and orders them to be promulgated and executed."
9 Article 10 of the Meiji Constitution provided "The Emperor determines the organization of the different branches of the administration, and salaries of all civil and military officers, and appoints and dismisses the same."

responsible to the Emperor,[10] not to the Imperial Diet. The Emperor was the supreme commander of the Army and Navy,[11] and this power of the Emperor was constitutionally kept outside the control of the Imperial Diet and the Cabinet.

The Meiji Constitution had a very limited list of civil rights for the people who were named "Japanese Subjects". These included freedom of residence,[12] right for secrecy of letters,[13] freedom of expression and association,[14] and so forth. However, such civil rights and freedoms were guaranteed merely "within the limits of law", which meant that the legislature was absolutely free to enact laws which restricted the rights and freedoms. For example, the "Law on Publication" of 1893[15] introduced a system of strict censorship which empowered the government to ban or shut down numerous publications.

b.) New Constitution of 1946 after the Second World War (the Current Constitution)

In 1945, shortly before the end of the Second World War, the United States, the United Kingdom, and the Republic of China jointly issued the "Potsdam Declaration" which called for Japan's unconditional surrender and its subsequent demilitarization and democratization. After Japan accepted the Potsdam Declaration on September 2, 1945, the Emperor of Japan was deprived of sovereignty by the Supreme Commander of the Allied Powers (SCAP), and the Meiji Constitution was suspended.

After its surrender, the Japanese government formed a committee to conduct research on amendments to the Meiji Constitution. This amendment was strongly demanded not only by external forces but also internal forces. The external forces to amend the Meiji Constitution came from the SCAP which had to implement the Potsdam Declaration. The internal forces came from the Japanese people's vigorous desire to realize a true democracy.

The committee discussed the various issues on the amendments to the Constitution and among such issues there were three main issues as follows:

(1.) Should Sovereignty Reside with the Emperor or the People?

When Japan signed and accepted the Potsdam Declaration, the Japanese government understood that the Potsdam Declaration would not include any demands for hindering the authority and privileges of the Emperor as a sovereign ruler. However, the Allied

10 Paragraph 1 of Article 55 of the Meiji Constitution provided "The respective Ministers of State shall give their advice to the Emperor, and be responsible for it."

11 Article 11 of the Meiji Constitution provided "The Emperor has the supreme command of the Army and Navy."

12 Article 22 of the Meiji Constitution provided "Japanese Subjects shall have the liberty of abode and of changing the same within the limits of the law."

13 Article 26 of the Meiji Constitution provided "Except in the cases mentioned in the law, the secrecy of the letters of every Japanese Subject shall remain inviolate."

14 Article 29 of the Meiji Constitution provided "Japanese Subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations."

15 Law No. 15 of 1893. This law was abolished in 1949.

Powers stated that the authority of the Emperor to rule the state should be subject to the SCAP and that the ultimate form of the government of Japan should be established by the freely expressed will of the Japanese people.

(2.) Renunciation of War

The Potsdam Declaration clearly demanded Japan's demilitarization, which required that Japan's militaristic leaders to be removed from power, its ability to make war to be dismantled, its military to be disarmed, and all military industries to be prohibited.

(3.) Extensive Guarantees for Fundamental Human Rights

The Meiji Constitution guaranteed a very limited list of civil rights, and the guarantees for civil rights were narrowed by the phrase "within the limits of law". The Potsdam Declaration described the necessity to expand the guarantees for fundamental human rights.

Among the three main issues mentioned above, the primary concern of the committee was to preserve the basic features of the Meiji Constitution, namely the status of the Emperor as a sovereign ruler. Guarantees for fundamental human rights were given little attention. The committee eventually prepared a draft amendment, which was essentially conservative, preserving the "Emperor-centered" system under the Meiji Constitution as much as possible.

The SCAP and the US legal advisors found this draft unsatisfactory in light of the demilitarization and democratization stipulated by the Potsdam Declaration. Therefore, the SCAP suggested guidelines for a new Constitution, and the Japanese government developed another draft in accordance with such guidelines. This draft was sent to the Imperial Diet, and was adopted in October 1946.[16] This Constitution remains in force to the present day. As you see above, the current Constitution of Japan was drafted and adopted under the strong influence of the US-style liberal democracy.

16 Later on, this new Constitution was promulgated on November 3, 1946 and enforced from May 3, 1947.

2. Fundamental Principles Underlying the Constitution

There are three fundamental principles set out in the current Constitution of Japan (i.e. the Constitution of 1946).

a.) Sovereignty of the People

Sovereign power of Japan currently resides with the people,[17] not the Emperor as it did under the Meiji Constitution. The Diet is regarded as the "highest organ of state power"[18] which is composed of elected members, namely representatives of all the people.[19] The Emperor, who was the sovereign before the end of the Second World War, now assumes only the function of a "symbol" of the state and the unity of the people.[20] The Emperor no longer has any political power.

b.) Renunciation of War

The Constitution of Japan is known world-wide as the "Peace Constitution" because of its most characteristic principle of pacifism. The Constitution has a famous clause which renounces "war as a sovereign right of the nation and the threat or use of force as means of settling international disputes".[21] It is also declared that "land, sea, and air forces, as well as other war potential, will never be maintained."[22]

c.) Guarantees for Fundamental Human Rights

Among the 103 articles contained in the Constitution of Japan, 31 articles are devoted to describing "Rights and Duties of the People" in considerable detail. This "Bill of Rights" is far more extensive than that of the Meiji Constitution. Fundamental rights guaranteed by

17 Article 1 of the Constitution of Japan provides "The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power."

18 Article 41 of the Constitution of Japan provides "The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State."

19 Paragraph 1 of Article 43 of the Constitution of Japan provides "Both Houses shall consist of elected members, representative of all the people."

20 Article 1 of the Constitution of Japan provides "The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power."

21 Paragraph 1 of Article 9 of the Constitution of Japan provides "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes."

22 Paragraph 2 of Article 9 of the Constitution of Japan provides "In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained."

the current Constitution are "conferred upon the people as eternal and inviolate rights"[23], which are merely subject to the "public welfare".[24] In order to safeguard these fundamental human rights, the courts are given a general power of "constitutional review".[25] Furthermore, actions of the government are widely subject to judicial review by the courts because they often affect constitutional rights or freedoms of the people. That is why the courts are empowered to decide all kinds of legal disputes, including administrative litigations.

III. Law Reforms after the Second World War

As mentioned above, the Second World War ended with the acceptance of the Potsdam Declaration in 1945. Japan was placed under the control of the SCAP. The occupation by the Allied Powers meant that the Japanese government was allowed to function under supervision by the SCAP. During the occupation by the Allied Powers, Japan adopted a new Constitution of 1946, which was in line with demilitarization and democratization as stated by the Potsdam Declaration.

Following the new Constitution, the Allied Powers recommended five major reforms as follows:

1. Equality of men and women;
2. Encouragement of trade unions;
3. Liberalization and democratization of education;
4. Liberation from autocratic rule, and,
5. Democratization of the economy.

Based on this recommendation, the Japanese government took significant measures to reform various laws, which led to a radical change of the then-existing political, economic, and social systems and almost amounted to a "revolution". For example, three major labor laws (i.e., the "Labor Union Act",[26] the "Labor Relations Adjustment Act",[27] and the "Labor Standards Act"[28]) which enhanced the rights of the workers were promulgated from 1945 to 1947. The educational system also underwent a significant change by enact-

23 Article 11 of the Constitution of Japan provides "The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights."
24 Article 13 of the Constitution of Japan provides "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."
25 Article 81 of the Constitution of Japan provides "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."
26 Law No. 51 of 1945. This law was fully amended in 1949 (Law No. 174 of 1949).
27 Law No. 25 of 1946
28 Law No. 49 of 1947

ing the "Fundamental Law on Education"[29] in 1947. Democratization of the economy was realized by the dissolution of business conglomerates which had dominated the economy. The "Anti-Monopoly Law"[30] was enacted in 1947 in order to prevent monopolization and maintain fair competition.

As for gender equality as mentioned in recommendation (1) above, women were given the right to vote for the first time in the election of 1946. Furthermore, parts of the Civil Code, which dealt with family and succession law, underwent a total revision in 1947 because the then-existing Civil Code was based on the idea of the superiority of men and the inferiority of women in family relations. This amendment of the Civil Code is the main point I would like to emphasize in this Article, as explained and discussed in the next chapter.

IV. Constitutional Impact on "Private Law"

1. In General

The Civil Code and the Commercial Code are the two pillars of Japanese private law. Both codes were enacted in the late 1890s, and are of European origin. This chapter will focus on the Civil Code because parts of the Civil Code, which deal with family and succession law, were completely amended after the Second World War in accordance with the new Constitution of 1946.

a.) The Civil Code of Japan

The Civil Code of Japan is a comprehensive code which covers property law, contract and tort law, and family and succession law. The Civil Code is divided into five books as follows:

1. Book One is the "General Provisions", which provides for the basic principles and rules of civil law;
2. Book Two is entitled "Real Rights" and covers property and real security rights;
3. Book Three is entitled "Claims", which provides the law of claims and obligations. Tort law is considered to be one of the sources from which an obligation emerges, and is therefore included in this book along with contract law;
4. Book Four deals with family relations; and,
5. Book Five concerns succession or inheritance.

29 Law No. 25 of 1947
30 Law No. 54 of 1947

The present Civil Code was enacted in 1896 (Books One to Three)[31] and in 1898 (Books Four and Five).[32] While Books One to Three have not been substantially amended since the enactment, Books Four and Five, which deal with family and succession law respectively, were almost totally amended in 1947 after the Second World War to democratize family relationships and ensure equality between the sexes.

2. Constitutional Impact on Family and Succession Law

a.) Family System under the Civil Code in Meiji Era

The Meiji Era refers to the 45-year reign of Emperor Meiji, from 1868 to 1912. During this time, the modernization of Japan's legal system, which was considered as incomplete by Western countries, was regarded as Japan's predominant task. Therefore, one of the first projects undertaken by the new government was the compilation of a Civil Code.

Many parts of the Civil Code enacted in 1890s were modelled by French law or German law, but the traditional Japanese legal views and customs were also taken into consideration, especially in the field of family and succession law. Books Four (Family) and Book Five (Succession) of the Civil Code had many provisions preserving Japan's traditional moral and value in family relations. The most characteristic feature of these two Books was establishment of the "*ie* family system" as the basic unit of the Japanese family and succession law.

First, I should explain the family system known as the Japanese word *ie*, which has existed for hundreds of years. In the Japanese language *ie* means "house", but it is very difficult to translate the precise meaning of this term into the English language.[33] The Civil Code regarded an "*ie* (house)" as the basic unit of society, and empowered the head of the "house", who was as a rule a male, to exercise vast authority over the lives of all other members of the "house".

Under the "*ie* family system", the family was dominated by the head of the "house". While authority was concentrated in the head of the "house", other members of the "house" were protected by the head, but had no formal rights against him. The head of the "house" had various powers, including but not limited to, the following:

1. Authority to designate the place where family members should live.[34] It was provided also that a minor child must reside at a place designated by his or her father or mother who had parental right,[35] and that such child (even after coming of age) as a member

31 Law No. 89 of 1896
32 Law No. 9 of 1898. This law was almost totally amended in 1947 (Law No. 222 of 1947).
33 Unlike in Western nations at that time, Japanese law and society were not based upon the principle of the individual, but on the "principle of *ie* (house)".
34 *See* Article 749 of the Civil Code (Law No. 9 of 1898)
35 *See* Article 880 of the Civil Code (Law No. 9 of 1898)

2. of the "house" could not select his or her place of residence contrary to the intention of the head of "house";[36]
3. Authority to control family members' choice of marriage-partner. The consent of a head of a "house" was always necessary for the marriage as well as adoption, divorce, or dissolution of an adoption of a "house" member,[37] since this usually meant a change of the membership of the "house". Thus, as a condition to effect marriage, a person as a member of a "house" must obtain the consent of the head of such "house" regardless of his or her age;
4. Authority to ultimately expel family members from the "house";[38] and
5. Authority to exclusively control the property of the "house".[39]

Family relationships were strictly hierarchical. Thus, children were subordinate to their father. Among children, only the eldest son was expected to succeed his father as head of the "house", and therefore enjoyed a privileged status.

Women (namely wives) were seen merely as bearers of male offspring who would succeed the position as head of the "house". Thus, female family members were considered inferior to males under the Civil Code and other laws. For example:

1. The wife had no legal capacity at all and was listed as an "incompetent" in the Civil Code;[40]
2. The Civil Code stated that the wife entered her husband's "house" upon marriage.[41] Upon marriage the husband acquired the right to the possession and management of his wife's property[42] and to the enjoyment of rents and profits,[43] although he did not acquire the title of ownership to his wife's property. The husband had the right to choose the family's place of residence.[44]
3. The Civil Code gave custody of the children principally to the father during marriage and also after a divorce.[45] No provisions on financial settlement after a divorce existed.
4. Succession to the headship of a "house"[46] usually commenced when a head of a "house"

36 *See* Paragraph 1 of Article 749 of the Civil Code (Law No. 9 of 1898)
37 *See* Paragraph 1 of Article 750 of the Civil Code (Law No. 9 of 1898)
38 *See* Paragraph 3 of Article 749 and Paragraph 2 of Article 750 of the Civil Code (Law No. 9 of 1898)
39 *See* Article 748 of the Civil Code (Law No. 9 of 1898)
40 *See* Article 14 to 18 of the Civil Code (Law No. 9 of 1898)
41 *See* Article 788 of the Civil Code (Law No. 9 of 1898)
42 *See* Article 801 of the Civil Code (Law No. 9 of 1898)
43 *See* Article 799 of the Civil Code (Law No. 9 of 1898)
44 *See* Article 789 of the Civil Code (Law No. 9 of 1898)
45 *See* Article 877 of the Civil Code (Law No. 9 of 1898)
46 A "house" had to have a head. The head of a "house" was its chief and director, and he had the duty to see and look after all affairs of the "house". There was no "house" without a head. The act of becoming a new head of a "house", and thus succeeding to all rights and duties of the headship, was called "Succession to the Headship of a 'House'", or in Japanese "*Katoku Sozoku*".

died.[47] Because of the importance of the head of a "house" for the continuity of the "house", the Civil Code provided a number of ways to find an heir for the position as head of a "house".[48] In reality, however, first priority was almost always given to the eldest son.

5. The Criminal Code had a provision punishing adultery which applied only to wives.[49]

It should be noted that this male-dominated hierarchical "house" was considered to reflect the entire social system, at the top of which reigned the Emperor. The idea that the Emperor was the kind-hearted father and head of the entire Japanese family, was promoted by the rulers in the Meiji era in order to ensure national unity.

b.) Post-War Reform of Family and Succession Law under a New Constitution of 1946

As mentioned above, after the Second World War, a new Constitution of Japan was promulgated on November 3, 1946 and enforced from May 3, 1947. This new Constitution was drafted in accordance with the demands of the Allied Powers, and the new Constitution made fundamental reforms of the then-existing legal system inevitable.

The reform of family and succession law became urgent in order to implement the new Constitution, because the "*ie* family system" in the pre-war period had helped to support the Emperor-centered political system.

Preparations for amending Book Four (Family) and Book Five (Succession) of the Civil Code began almost simultaneously with the drafting of the new Constitution. In April of 1946, when the Japanese government published the draft of the new Constitution, the problem of amending family and succession law became a priority, and began to be the subject of much discussion in various circles.

According to Article 98 of the Constitution,[50] no law, ordinance, or other act of government which is contrary to the Constitution, shall have legal force or validity. Also, Article 14 of the Constitution[51] provides for the general principle of equality, and Article 24 in particular provides for equality in family relations as follows:

1. Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the *equal rights of husband and wife* as a basis.

47 *See* Article 964 of the Civil Code (Law No. 9 of 1898)

48 *See* Article 970 of the Civil Code (Law No. 9 of 1898)

49 *See* Article 183 of the Criminal Code (Law No. 45 of 1907). Currently, this provision has been repealed.

50 Paragraph 1 of Article 98 of the Constitution of Japan provides "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity."

51 Paragraph 1 of Article 14 of the Constitution of Japan provides "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin."

2. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of *individual dignity* and the *essential equality of the sexes*.

Since Article 24 above clearly declares that provisions of the family and succession law must be based on the principle of individual dignity and the essential equality of the sexes, there were a couple follow-up questions: *Was the "ie family system" constitutional? Did it have to be abolished or not?* As you may have noticed, plenty of the then-existing provisions of the Civil Code were clearly contrary to the principle of individual dignity or incompatible with the principle of the essential equality of the sexes.

The reform of the family system did not proceed without opposition. Some Japanese conservatives who took part in the process of drafting amendments of the Civil Code defended the old "*ie* family system". Also, it was deemed difficult and impracticable to revise the Civil Code at the same time as the enforcement of the new Constitution for several reasons including the dissolution of the Diet and negotiations with the General Headquarters of the Occupation Forces (GHQ).

The Japanese government, in order to avoid conflict between the provisions of the new Constitution and those of the Civil Code, enacted the "Law on Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan"[52] on April 19, 1947 and enforced it on May 3, 1947 which was the same day as the enforcement of the new Constitution. Although this law consisted of only 10 articles, it contained almost all of the important aspects of the amendment of the Civil Code, such as:

1. No application of provisions of the Civil Code concerning the wife's legal incapacity;[53]
2. No application of provisions of the Civil Code concerning "*ie* (house)";[54]
3. Joint exercise of parental authority by married parents;[55]
4. No application of provisions of the Civil Code concerning succession to the headship of "*ie* (house)";[56] and
5. Recognition of a spouse's right to succession.[57]

52 Law No. 74 of 1947. This law became invalid on January 1, 1948, the same day as the enforcement of the amendment of the Civil Code (Law No. 222 of 1947).
53 *See* Article 2 of"Law on Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan".
54 *See* Article 3 of"Law on Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan".
55 *See* Paragraph 1 of Article 6 of"Law on Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan".
56 *See* Article 7 of"Law on Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan".
57 *See* Paragraph 2 of Article 8 of"Law on Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan".

Concerning the amendment of the Civil Code, many controversies took place in the Diet, [58] and several amendment plans were presented. However, a bill on amendment of Book Four (Family) and Book Five (Succession) of the Civil Code finally passed the Diet as Law No. 222 on December 22, 1947 and came into effect on January 1, 1948. The above mentioned law for temporary adjustments was repealed thereby.

c.) Family System under the Current Civil Code

Family and succession law as provided by this amended Civil Code are entirely different from those in the pre-war period. The main differences are as follows:

1. Family members are now treated as equals instead of being dominated by the head of the family. The old provisions of the Civil Code concerning the "*ie* (house)" and the headship of the "house" had been abolished.
2. Under the old "*ie* family system" consent of the head of the "house" was required for a marriage, whereas marriage under the present Civil Code is solely based upon the mutual consent of the parties.
3. The provisions regarding the lack of legal capacity of wives were deleted from the Civil Code.
4. The inequality between the sexes has changed. Husbands and wives, fathers and mothers now have equal rights to property as well as in the upbringing of children.
5. As to the effects of a divorce, the current Civil Code grants the right to demand a distribution of property,[59] and also states that the couple should agree on the custody of children, or if such agreement cannot be reached, the Family Court will decide.[60]

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58 Heated debates were initiated by the advocates of the "*ie* family system". At the 90th session of the Imperial Diet, which adopted the new Constitution, some Japanese conservatives who wanted to preserve the "*ie* family system" attempted to overthrow Article 24 of the Constitution. They argued that this provision would inevitably lead to the collapse of Japanese society, since the "house" and the state system were the fundamental structure of the social and political system "like two wheels", and considered Article 24 of the Constitution as an attack against the state itself. Thus Prime Minister Yoshida Shigeru tried to calm those fears by declaring that "the new Constitution does not negate the "*ie* family system". Japan's inheritance of the "house" headship is one of the "good ways and beautiful customs" peculiar to Japan. In the new Constitution, there is no particular provision which prohibits these Japanese customs". In short, the Prime Minister saw no contradiction between the "*ie* family system" and the principles of the new Constitution.
However, the "*ie* family system" was widely regarded by legal scholars as a major hindrance to social progress. Therefore, the committees in charge of the amendment strongly supported a revision of the Civil Code which would abolish the "*ie* family system". The drafters of the revised Code were not willing to compromise or adopt the interpretations of the Prime Minister. The opponents of the "*ie* family system" viewed this system as an obstacle to real democratization, and finally convinced the Justice Minister that an abolition of the "*ie* family system" was necessary for the realization of the constitutional principles. Suffice it to say that the decisive factor was the argument that the "*ie* family system" clearly violated the Constitution's principle of equality.

59 *See* Article 768 of the Civil Code (Law No. 222 of 1947).

60 *See* Article 766 of the Civil Code (Law No. 222 of 1947).

6. While the eldest son enjoyed privileges under the old "*ie* family system", the amended Civil Code provides for equality among children.
7. The succession law also underwent significant changes after the Second World War. In the pre-war period, the "house" and all the assets were inherited solely by the eldest son. The younger sons and all daughters had no rights whatsoever to the estate. This system was totally changed in the post-war reforms. Under the amended Civil Code, the exclusive inheritance by the eldest son was abolished, and now the estate is distributed among the spouse and all sons and daughters.[61] The basis for inheritance of family property has been changed from primogeniture to that of equal inheritance for all children.

V. Conclusion (Lessons to be Learned for Cambodia)

1. Law Changed, but Wide Gender Gaps Still Exist in Japan

The new family and succession law provisions of the 1947 amendment of the Civil Code freed individuals from the dominance and control of the "*ie* (house)", and eliminated unequal treatment of men and women in matrimonial and parental relationships, as well as in succession. Those thorough revisions were designed to remove conflict between the new Constitution of 1946 and the old Civil Code of 1898. Today, no traces of the "house" can be found in Japanese law, and there is no doubt that Japanese law has been entirely democratized in accordance with the constitutional principle of individual dignity as well as constitutionally-guaranteed equality of the sexes.

In addition to the abolition of laws concerning the "*ie* family system", this pre-war family system was also denied legitimacy as an ideology through the post-war educational reforms and democratic ideology. Thereafter, because of this combination of law with education, the "*ie* family system" has been gradually on its way to collapse in terms of family norms and customs.

However, even now there still exists a wide gap between men and women in Japan, which means that Japan has not broken out of its male-dominated hierarchical culture and tradition formed through the pre-war "*ie* family system". Some argue that women are still considered inferior and subordinate to their male counterparts in society.

61 *See* Articles 887 and 890 of the Civil Code (Law No. 222 of 1947)

For example, the *2013 Global Gender Gap Report*[62] released by the World Economic Forum, has revealed that Japan ranked 105th of 136 countries and that Japan has far lower gender equality than other developed countries. This low ranking of Japan was partly because the ratio of female legislators dropped to 8% in the last House of Representatives election in December of 2012, and partly because the country's percentage of female executives in private companies and the public sector is remarkably low (around 10%).[63]

Under the gender equality principle guaranteed by the new Constitution of 1946, Japanese women came to play an active part with men in various fields of the society. However, there still exists a wide gender gap, especially over wages or promotions in the workplace, which means that the recognition of women's right is still lower than men's. In order to make a change toward gender equality, the government currently aims to raise the proportion of women in leadership positions in both the public and private sectors to at least 30% by 2020. For example, on September 3, 2014, to help achieve this target, the incumbent Prime Minister Shinzo Abe appointed five women as ministers to his new Cabinet (18-member Cabinet) — increasing the percentage of female ministers to 26% up from 10%. Prime Minister Abe has repeatedly emphasized the importance of boosting women's social status.

2. Lessons to be Learned for Cambodia

When taking a look at Cambodian law and society in terms of family relations and gender equality, plenty of similarities can be seen between Cambodia and Japan.

First, the current Constitution of the Kingdom of Cambodia provides for the general principle of equality,[64] and Article 45 in particular provides for equality between men and women with respect to marriage and family matters as follows:

1. All forms of discrimination against women shall be abolished.
2. The exploitation of women in employment is prohibited.
3. Men and women are equal in all fields especially with respect to marriage and family matters.
4. Marriage shall be conducted according to law, based on the principle of mutual consent between one husband and one wife.

62 This report was introduced by the World Economic Forum in 2006. Its aim is to show gender-based disparities around the world. The gender gap is measured by economic, political, education- and health-based criteria. The report provides country rankings that allow for effective comparison across regions and income groups and over time.

63 According to the Japanese government, only one in 10 managers in Japan are women, compared with 31% in Singapore, 38% in Germany and 43% in the U.S.

64 Article 31, Paragraph 2 of the Constitution of the Kingdom of Cambodia provides "Khmer citizens shall be equal before the law, enjoying the same rights and freedom and obligations regardless of race, colour, sex, language, religious belief, political tendency, national origin, social status, wealth or other status".

Following these constitutional principles, the Civil Code of the Kingdom of Cambodia[65] declares the same fundamental concept in Article 2 as follows:

> *This Code embodies the tenets of individual dignity, principles of sexual equality and the guarantee of property rights set forth within the Constitution of the Kingdom of Cambodia.*

Then the Cambodian Civil Code has Book Seven (Relatives) and Book Eight (Succession) containing many family and inheritance law provisions which are based on the principle of individual dignity and the principles of gender equality as guaranteed by the Constitution.

It is safe to say that Cambodian law guarantees gender equality in family relations and succession, to almost the same extent as the current Japanese law. However, when observing the Cambodian society on a day to day basis, Cambodia still seems to be male-dominated, just like Japan. There can be seen wide gender gaps in Cambodia. To demonstrate this, according to the *2013 Global Gender Gap Report* cited above, Cambodia ranked 104th of 136 countries, which was only one ranking higher than Japan. As stated above, women are often ranked as inferiors in Japanese society; however, this is not because their sex is considered inferior, but because Japanese women rarely hold higher social status. This seems to be the same case in Cambodia.

Gender inequality often causes a major barrier to human development because disadvantages facing women and girls result in negative repercussions for development of their capabilities and their freedom of choice. Cambodia, as well as Japan, has to keep on making continuous efforts to design effective measures for reducing gender gaps in their own society.

65 The brief history of the current Cambodian Civil Code is as follows: since 1999, the Cambodian Ministry of Justice (MOJ) and the Japan International Cooperation Agency (JICA) had been cooperating in drafting a new Civil Code through the Legal and Judicial Development Project. The joint drafting team successfully completed the draft Civil Code and submitted it to the Minister of Justice of Cambodia in March 2003. Afterwards, both the National Assembly and the Senate passed the draft Civil Code in 2007, and the Civil Code was promulgated by the King on December 8, 2007.

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ESTONIAN EXPERIENCE: TRANSITION TO DEMOCRATIC CONSTITUTIONALISM

Tanel KERIKMÄE & Sandra SÄRAV

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Tanel KERIKMÄE * *& Sandra SÄRAV* **

ABSTRACT

The Constitution of the Republic of Estonia has undergone developments creating the Republic, changing the state regime to an authoritarian dictatorship and changing it to an independent and sovereign democratic republic wherein the supreme political authority is vested in the people, as it stands today. This paper provides insight to the initial progress of the establishment of the Constitution and the State. It also discusses the role of a country's Constitution within the legislative framework of the European Union, gives an overview of constitutional control mechanisms and case-laws that were relevant in forming the constitutional doctrine and provides suggestions.

I. Background: Development and Problems of the Constitutional Law before World War II

The Constitution of Estonia defines the country's statehood and is regarded as the most fundamental source document for independence.[1] The Constitution of the Republic of Estonia effective today was adopted in a referendum on 28 June 1992 on basis of the third Constitution – which came into force in 1938 – and its Article 1. 91,3 per cent of the votes favoured the new Constitution. The Preamble to the effective Constitution declares that Estonia is founded on liberty, justice and the rule of law, and the State has been cre-

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1 Narits, R. Eesti põhiseaduse aluspõhimõtted omariikluse garantiina. Juridica I/2011, p 3.

ated to protect peace and defend its people against aggression from outside, as well as to guarantee the preservation of the Estonian people, the Estonian language and the Estonian culture, whereas pursuant to §1 of the Constitution, the supreme political authority is vested in the people of the independent and sovereign democratic republic.[2] The current President of Estonia, in his speech on the 20th anniversary of the Constitution, stated that the Constitution is the foundation of an independent Estonia, and that it is not, nor should it be, an ordinary law that is changed too often, or with discussions revolving around its rewriting too frequent; however, the President also noted that at times, certain amendments might be essential without lessening the importance of Constitution, which has served the Republic so successfully.[3]

The first Constitution, adopted on 15 June 1920 after Estonia gained independence in 1918, effective from 21 December 1920 until 1933, formed a foundation for a democratic republic with the supreme power vested in its people. The citizens of the newly independent republic were granted the rights for public initiatives as well as referendums; and this kind of state order was rather unique for its time in Europe, providing uncommon democratic constitutional values. Moreover, the 1920 Constitution followed the national sovereignty principle of Rousseau and the separation of powers idea of Montesquieu; however, there was certain misbalance within the executive, legislative and judicial powers, insofar as the Parliament (in Estonia: *Riigikogu*) – the legislative branch, had the possibility to exercise total control over the other two branches and there was no presidential role presented in the Constitution. This created political instability and led to frequent changes of the government – being subordinate to the Parliament and exercising the special authority of the institution of a Head of State and the executive powers simultaneously – as well as arose issues regarding the independence of the Supreme Court, whose States Judges had been appointed by the Parliament. Some say that such vast democratic progress supported by the Constitution – which has been claimed to have been the most democratic in the world based on the constitutional law at the time – lost its efficacy due to extended democracy and had to be governed in a permanent state of defence thereby preventing the government from properly exercising its functions.[4]

The state order as laid down by the first Constitution proved to be ineffective – causing the citizens of Estonia to be dismayed by the democratic process and the authority of the Parliament to be in gradual decline – causing referendums to be held with the purpose of adopting a new Constitution. In 1932 two draft constitutions, seeking to create the role of the Head of State, proposing to restrict the power of popular representation

2 The Constitution of the Republic of Estonia. Available in English at: https://www.riigiteataja.ee/en/eli/530102013003/consolide

3 The Speech by the President of the Republic of Estonian on the 20th anniversary of the Constitution on 28 June 2012]. Only available in Estonian at: http://president.ee/et/ametitegevus/koned/7697-vabariigi-president-eesti-vabariigi-pohiseaduse-20-aastapaeeva-vastuvotul-kadriorus-roosiaias-28-juunil-2012/index.html

4 Nutt, M. The first Constitution of the Republic of Estonia (1920-1933). Estonica, 2005.

and increasing the power of government instead, were put to referendums and rejected. Instead, the second Constitution of the Republic of Estonia was adopted by a third referendum in 1933, and came into force on 24 January 1934. From a formal-juridical perspective, the new Constitution merely provided certain amendments to the 1920 Constitution and should not formally be referred to as a new Constitution. However, the proposed legal act put to referendum sought to establish a new authoritarian state order and as the content of the amendments touched upon the whole state order and its formation, the amendments in essence compiled a new Constitution.[5] If the previous Constitution had set forth that the Parliament should have 100 members, then the second Constitution reduced this number to 50 and limited its powers. The Constitution also introduced a new institution – the Head of State, who was also the Head of the executive branch; and as the representative of the people, the Head of State had the task of exercising the highest governing authority in Estonia and was granted the power of suspensive veto over the decisions of the Parliament. Therefore, by allowing the Head of State to appoint the government as well as the State Judges, and establishing him the right to govern by decrees – which had the effect of laws – despite the fact that the Parliament had the right to repeal or amend such decrees, the powers of the Head of State as well as the Head of Government were vested in one institution without allowing any control of such powers by the Parliament. As the third draft was set forth by the League of Veterans of the Estonian War of Independence, and the then Head of State wanted to prevent them from establishing an authoritarian state, he carried out a bloodless *coup d'etat* and governed pursuant to the authoritarian rule established by the Constitution. Therefore, as during that time the Parliament was not convened and Estonia had become a single-party state, which posed a severe risk to democracy, the Head of State started the preparations for a third Constitution.[6]

In 1934, the then Minister of Internal Affairs stated that the Constitution put forth by the League of Veterans of the Estonian War of Independence was too undemocratic and called for the need of a new Constitution, however, the project for its adoption did not start before 1936 and the third Constitution itself was only adopted on 1 January 1938. Although it was drafted with the purpose of reducing the authoritarian state order in the Republic of Estonia, it, in reality, further imposed restrictions on the democratic process, especially so since the drafting of the Constitution was led by the then Head of State together with lawyers, journalists and politicians supporting him. The third Constitution kept the institution of the Head of State as central character in the structure of the state power. He had the right to appoint and displace the government and its members, the right to veto the Parliament's legislative activity as well as the right to dismiss the Parliament and

5 Maruste, R. Konstitutsionalism ning põhiõiguste ja – vabaduste kaitse. Juura 2004, p 48.

6 Nutt, M. The second Constitution of the Republic of Estonia (1934-1937) and the coup d'etat of 1934. Estonia, 2010.

make laws with his decrees.[7] The third Constitution established a bicameral Parliament, comprised of the State Board with 80 members elected directly by the citizens based on principles of election of persons and the State Council, whose 40 members were elected without democratic basis and consisted of high officials, representatives of chambers and local governments, as well as were directly appointed by the Head of State at his own discretion. The Parliament established pursuant to the Constitution during the time, has later been called an obedient puppet Parliament.[8] The undemocratic characteristics of the third Constitution can further be illustrated by the fact that the right to public initiatives was dissolved, which meant that the democratic rights of the citizens were further limited and the powers of the Head of State further strengthened. Hence, if the first Constitution foresaw a very powerful Parliament, then the second and third Constitutions aimed at reducing such powers and created a strong institution of Head of State, which led to a mild form of authoritarian dictatorship (as compared to other authoritarian regimes in Europe at the time), a state order very different from what the first Constitution had sought to establish.[9] Herewith, the third Constitution of Estonia remained in force, *de facto*, until the Soviet Union's occupation on 16 June 1940, and, *de jure*, until the adoption of the fourth and effective Constitution of the Republic of Estonia on 28 June 1992.

II. The Fourth Constitution and its Position within the Estonian Legal System

As the 1940 occupation of Estonia was qualified as an aggression, a military occupation and annexation of Estonia by the Soviet Union, the forcible changing of the state order of Estonia had, in terms of international law, no effect, and hence, Estonia was legally seen as a state that was pursuing its (regaining of) independence. Deriving from the principles of *jus cogens*, the agreements that formed the basis for Estonian occupation and annexation, were void as they were contradicting international law; therefore, leading western states did not acknowledge the occupation and annexation. Hence Estonia only lost its independence *de facto*, while it still existed as a state *de jure*.[10] An Estonian politician, former judge and a notable jurisprudent has referred to the immediate period before the regaining of independence (last years of occupation: 1988-1991), as the period of "war of laws". He has emphasised that during this war, Estonia very effectively used the legal possibilities, that were left by the Soviet regime to demonstrate democracy, but which

7 Kuuli, O. Kas parlamendi võim või presidendi võim? [Does the power belong to the parliament or to the president?]. The History of Estonian Riigikogu. RiTo 3, 2001.

8 Nutt, M. The third Constitution of the Republic of Estonia (de facto 1938-1940, de jure 1938-1992). Estonia, 2005.

9 *Ibid*. Nutt, M. 2005.

10 Maruste, R. Konstitutsionalism ning põhiõiguste ja – vabaduste kaitse. Juura 2004, p 52.

were not, in reality, meant for using. Such possibilities opened a way for independent statehood, constitutionalism and democracy. By a Supreme Council decision "about Estonian national status" in March 1990, it was asserted that Estonia was in a status of an occupied state, whereas its legal continuity was ongoing *de jure*. By the aforementioned decision, a transition period that was supposed to culminate in creating a constitutional state had started. The referendum held a year later on whether to re-establish the national independence and sovereignty of Estonia, received 77.83 per cent of eligible votes in favour of Estonian independence from the Soviet Union. The *coup d'etat* attempt in Moscow in August 1991 created possibilities for Estonia to declare its independence on 20 August 1991. As the decision about Estonian national independence foresaw the composing of a Constitutional Assembly, whose only task was to develop a Constitution for the Republic of Estonia and to present it to Supreme Council, which received it on 18 February 1992, a new era for the statehood of an independent Estonia with its own legal system had begun.[11]

The Supreme Council decided on 20 April 1992 to put the newly formulated Constitution on a referendum which took place on 28 June 1992. The Constitution was put on a referendum as a single text, *in toto*. Therefore, the people had a choice of either voting for it – even if they did not like some parts of it – or to vote against it – even though some parts were clearly acceptable. Receiving 407.867 votes in favour and 36.147 votes against it (in total, 669.080 people had the right to vote, 446.708 participated in the voting[12]), the Constitution of the Republic of Estonia came into force on 29 June 1992. The fourth Constitution during the independence period restored liberal constitutionalism and a parliamentary state system in Estonia. Most important changes included the election of the Head of State by the legislative branch and a more balanced state power mechanism. One of the outputs of the new Constitution was the introduction of a constitutional judicial review system for the first time in the history of independent Estonia.[13]

The Constitution of the Republic of Estonia, as it stands today, is an indivisible legal document adopted by the people of Estonia on a referendum, and it has the supreme legal effect in the national legal system. The Estonian Constitution is comprised of a preamble, fifteen chapters with 168 articles and two supporting constitutional acts – the Constitution of the Republic of Estonia Amendment Act and the Constitution of the Republic of Estonia Implementation Act. The Constitution, with its fundamental principles, should not be amended or changed too often, and so there have been only four amendments since its adoption in 1992 – one of them being related to joining the European Union. Pursuant

11 See *Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne*. (*Constitution of the Republic of Estonia. Commented Publication)*. Editorial board: prof. Ülle Madise, mag. iur. Berit Aaviksoo, LL.M. Hent Kalmo, prof. Lauri Mälksoo, prof. Raul Narits, PhD Peep Pruks, Priit Vinkel. Juura, 2012. Only available in Estonian.

12 *Ibid*.

13 Maruste, R. Konstitutsionalism ning põhiõiguste ja – vabaduste kaitse. Juura 2004, p 58.

to its provisions, the Constitution in Estonia may only be amended by an Act which has been passed by: 1) a referendum; 2) two successive memberships of the *Riigikogu*; 3) the *Riigikogu*, as a matter of urgency. However, Chapter I (General Provisions) and Chapter XV (Amendment of the Constitution) may only be amended by referendum, whereas it is the *Riigikogu,* which decides the holding of a referendum. The right to initiate amendments to the Constitution rests with not less than one fifth of the members of the *Riigikogu* and with the President. It must be noted that amendments of the Constitution may not be initiated and the Constitution may not be amended during a state of emergency or state of war. The underlying principles of the effective Constitution, as referred to by an Estonian professor of Constitutional Law, are self-determination of the people, power of the people, democratic mode and national sustainability, and it is declared that the state is founded on liberty, justice and the rule of law, whereas the independence and sovereignty of Estonia are timeless and inalienable. The Estonian Constitution constitutes parliamentary democracy based on the principles of legality and the principles of rule of law that is based on the concepts of separation of powers, sovereignty of people, republicanism and unitary state.[14]

One of the fundamentals of a state based on the principles of rule of law is the principle of legality, which has been recurrent in all four Constitutions. §3 of the effective Constitution sets forth: "Governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith. Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system." The latter means foremost that the state authority, legislative, executive and judicial powers, is exercised only on the basis of the Constitution and other legal acts in accordance with it. For instance, the Constitution prescribes that the laws are passed in accordance with the Constitution (§102); it is the government of the Republic which issues regulations and directives on the basis of and for the implementation of laws (§87 6); the ministries issue regulations and administrative decrees on the basis and for the implementation of laws, and performs other duties assigned to him or her on the basis of and pursuant to a procedure provided by law (§94); and that the courts are independent in discharging their duties and administering justice in accordance with the Constitution and the laws (§146).[15]

Issues regarding the system of checks and balances, or the separation of powers, have been acute throughout the period of independent statehood of the Republic of Estonia. The critique over the first Constitution mostly derived from the fact that there was no actual separation of powers in terms of the government and the Parliament – the latter's powers clearly prevailed over the formers. The Constitution of 1938 shifted its balance to another extreme – the autocratic President had the greatest powers. However, the effective Constitution clearly constitutes the limits by laying down that the activities of the

14 Merusk, K., Narits, R. "Eesti Konstitutsiooniõigusest." Juura, 2008, p 11.
15 Merusk, K., Narits, R. "Eesti Konstitutsiooniõigusest." Juura, 2008, p 14.

Riigikogu, the President, the government of the Republic and the courts are organised in accordance with the principles of separation and balance of powers (§4). This means that based on the Constitution, there are three main authorities of the state – the legislative, executive and the judicial powers. Such authorities are separated from each other in terms of their functions and organisations. State powers are balanced, i.e., they are equal in exercising their powers and state authorities, despite their different functions and different organisation, are still interrelated.[16]

The sovereignty of the people is prescribed by §1 of the Constitution – "Estonia is an independent and sovereign democratic republic wherein supreme political authority is vested in the people." Above all, this means that based on constitutional order, the last legitimisation of any state powers is the will of the people. It is the people of the Republic of Estonia who have the constitutional powers (*pouvoir constituant)*. State powers can only emanate from the people; the people are and will be the medium of state powers, even if its execution is seated in the legislative, executive and judicial authorities.[17]

The republican form of government has been prescribed by all Constitutions of Estonia, meaning that the Estonian independent statehood has not applied any other governmental regimes. Pursuant to §1 of the effective Constitution, Estonia is a sovereign democratic republic (the previous Constitutions did not use the term *democratic*). In the context of the Constitution, a democratic republic can be referred to as the union of people and state powers, where state governing powers emanate from its people – forming state organs, controlling them and affecting their activities.[18] And lastly, by the principle of a unitary state and §2 of the Constitution, Estonia is, in terms of the organisation of its government, a unitary state, whose administrative division is provided by law; the land, territorial waters and airspace of Estonia constitute an inseparable and indivisible whole – this means that pursuant to the Constitution, there cannot be any autonomous national-territorial units within the Republic of Estonia.[19]

The fundamental principles of the Constitution of Estonia are the principles that should not, even when forming a part of the EU legal system, be compromised. The aforementioned fundamental principles form the basis for understanding the Estonian Constitution and evaluating the relationship between the European Union Law and Estonian National Law. The fundamental principles should be interpreted in the light of §1 of the Amendment Act – Estonia should not belong to the EU if it makes the effect of the fundamental principles of the Estonian Constitution redundant, or poses a threat to their effective functioning – therefore, §1 of the Amendment Act has been referred to as the protection clause of Estonian statehood. [20]

16 Merusk, K., Narits, R. "Eesti Konstitutsiooniõigusest." Juura, 2008, p 16-17.
17 Merusk, K., Narits, R. "Eesti Konstitutsiooniõigusest." Juura, 2008, p 22.
18 Merusk, K., Narits, R. "Eesti Konstitutsiooniõigusest." Juura, 2008, p 25.
19 Merusk, K., Narits, R. "Eesti Konstitutsiooniõigusest." Juura, 2008, p 25.
20 Narits, Eesti Põhiseaduse aluspõhimõtted. Juridica I/2011, pp 7-8

III. Positioning Estonian Constitutional Law within the Supranational European Union Legal System

The European Union, one of the most significant regional international community, leaves its candidate states the freedom to choose, when and how to change or modernise their Constitutional Law. Hence, the critique provided by the European Commission in the framework of the Progress Report did not, at the time of discussions over the accession, touch upon the issues related to the Constitution. Naturally, the Constitutional Law of the state has been and is taken into account when assessing its suitability for accession with the so called Copenhagen criteria. At the same time, neither the European Commission nor any other institution have referred to the fact that the Constitution of the Republic of Estonia does not (did not) comply with the criteria set forth. The call for pre-accession constitutional reforms in candidate states has ended with the assertion that it is not possible to create a so called "standard constitution"[21], the enactments of which could/should be simply copied in the future member state's Constitution, in order to be prepared for the accession. Therefore, it was up to Estonian constitutional experts to elaborate on the suitability of the Constitution of the Republic of Estonia for the European Union legal framework.

Even though experts had been engaged with the constitutional aspects of accession since 1996, the absolute necessity for amending the Constitution became apparent only in 2002. The amendment of the Constitution and holding a referendum were significant aspects of Estonia's future: firstly, because joining the EU formed a principal question regarding the Estonian statehood and its future; secondly, the Constitution adopted in the referendum of 1992 had stood unaltered for more than ten years and it had only been amended once by the Parliament; and thirdly, the last referendum in Estonia took place in June 1992 for the purpose of adopting a new Constitution. A famous Estonian politician, historian and writer has inferred in his work regarding the Estonian period of restoration of Independence that, "… the Estonian decision – namely to start from the Constitution, was the correct thing to do. Despite of some disputability, the Constitution formed a firm legal ground for the State, which in turn expedited following organisational work. The importance of written law and the suitability between different legal acts in terms of systematic reformation of the entire society (economic, administrative, ownership, as well as cultural and scientific aspects) must not be undervalued."[22] Hence, the question of suitability of the Constitution within the legal framework of the European Union gradually gained importance.

21 Czuczai, J. "Practical Implementation by the Acceeding Candidate Countries of the Constitutional Aquis of the EU. Problems and Challenges" in : "EU Enlargement. The Constitutional Impact at EU and National Level", Ed. By A.E. Kellermann, J.W. de Zwaan and J.Czuczai. T.M.C Asser Press, The Hague, 2001

22 Lauri Vahtre "Eesti rahva lugu", kirjastus ILO 2005, p 264

The first author of the current contribution has asserted that it is the people who decide over joining the EU and only after their favourable approach can the questions regarding possible changes to the enactments of the Constitution be elaborated on. Therefore, he did not see a direct need to change the Constitution after Estonia joined the EU. It would have been unnecessary to repeat the discussions that may undermine the legal certainty, and that were acute in Italy, for instance, where the conservative constitutional court changed their opinion by finding that the Community Law was superseding constitutional provisions. The latter also refers to the fact that changes (at least conceptual ones) in the Constitution are not necessary. Insofar as the objectives of the Republic of Estonia are, in fact, the principles set forth with the Constitution, they should be realised in a contemporary historical situation, by interpreting the provisions of the Constitution in accordance with the EU Primary Law as international treaties. At the same time, when it is found that the principles laid down in the Constitution are not (anymore) protectable by the EU it is possible, pursuant to the principles of international laws, to end the contractual relationship. Therefore, the standpoints that the existing Constitution would not have enabled Estonia to become a member state of the European Union, was illogical. The Constitution cannot be a *per se* restriction to the self-determination of the people. Simultaneously, it cannot be precluded that the implementation of such right can create the need to amend the Constitution.

Nevertheless, the exigency of amending the Constitution for accession was also apparent from several aspects: first of all, there was no provision in the Constitution of the Republic of Estonia that would have allowed the exercising of national competence at an international level by international/supranational organisations; second of all, even though §3 of the Constitution establishes that generally recognised principles and rules of international law are an inseparable part of the Estonian legal system, governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith; however, being a member state of the EU means that the state authorities must act pursuant and in accordance with EU laws; and lastly, the interpretation of independent and sovereign democracy apparent in §1 of the Constitution and focused on during the development of the Constitution, was also problematic.[23] For the purpose of amending the Constitution, a new referendum was also needed, as certain articles of the Constitution were to be amended that can only be changed by a referendum.

An Estonian jurisprudent from the first half of the 20th century claimed that sovereignty was a requirement for Estonia to remain an independent state, and not form a part of any other state; not even a federal state.[24] Independence means that Estonia should not subject itself to a situation whereby a foreign state or an international organisation would have the right to prescribe Estonia with obligations based on foreign legal acts. The 1920 and

23 Laffranque, Julia. Euroopa Liidu õigussüsteem ja Eesti õiguse koht selles. Juura 2006, pp. 68-75.
24 Artur-Tõeleid Kliimann. Eesti iseseisvuse areng. Õigus 1935, nr 2, pp 49-50.

the 1937 Constitutions prescribed in §1 that Estonia was an independent and sovereign republic; the Constitution adopted in 1992 and effective today, has a second section to §1, which lies down that the independence and sovereignty of Estonia are timeless and inalienable. The most important aspect of sovereignty to be changed after joining the EU, was apparent in §3 of the Constitution, setting forth that governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith; however, being a member state of the EU, in exercising such authority, the EU regulations and other directly applicable EU legal acts must also be taken into account pursuant to the case law of European Court of Justice, even if the relevant EU legal act is not in accordance with the Estonian Constitution. Therefore, changing the principles established in §3 of the Constitution was a precondition to joining the EU.[25]

The Association Agreement with the European Union is, in its nature, an international treaty. The issue of debate has been scope of interpretation of §123 of the Estonian Constitution.[26] The interpretation of given provision forms a basis for the claim that by ratifying international treaties, the latter become part of the Estonian national legal system, whereas they prevail over provisions of national law. §123 foresees a process of prior control for the purpose of determining possible conflict between the international treaty and the Constitution, however, it does not establish a system of follow-up control. By reference to the latter, in case of a ratified agreement, the Constitution must be interpreted favourably to the international treaty (and not vice versa). Pursuant to Article 46 of the Vienna Convention on the Law of Treaties, a state cannot invoke the provisions of its internal law to justify the non-compliance with its international commitments.

Deciding upon amending the Constitution, the following facets became decisive: decision regarding joining the EU, must be made separately, i.e., it would have been inexpedient to wait for possible amendments to other provisions, such as the direct election of the President. The amendments were meant to reflect the support for integration into the EU only, not other international organisations. Based on the aforementioned, Estonia chose an original solution, namely, to adopt a third constitutional act (the first being the Constitution itself, and the second, its implementation act) – The Constitution of the Republic of Estonia Amendment Act.[27] Hence, by the decision of the Estonian Parliament, the text of the initiated Constitution of the Republic of Estonia Amendment Act (consist-

25 See Eesti Vabariigi Põhseaduse täiendamise seadus. In *Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne*. (The Constitution of the Republic of Estonia Amendment Act. In *Constitution of the Republic of Estonia. Commented Publication)*. Editorial board: prof. Ülle Madise, mag. iur. Berit Aaviksoo, LL.M. Hent Kalmo, prof. Lauri Mälksoo, prof. Raul Narits, PhD Peep Pruks, Priit Vinkel. Juura, 2012.

26 § 123 of the Constitution of the Republic of Estonia sets forth the following: The Republic of Estonia may not enter into international treaties which are in conflict with the Constitution. When laws or other legislation of Estonia are in conflict with an international treaty ratified by the Riigikogu, provisions of the international treaty apply.

27 Laffranque, Julia. Euroopa Liidu õigussüsteem ja Eesti õiguse koht selles. Juura 2006, pp. 68-75

ing only of four articles) as well as the following question was put on the ballot paper: *Are You in favour of joining the European Union and passing of the Constitution of the Republic of Estonia Amendment Act?*

The referendum was held on 14 September 2003 and the Estonian people adopted the Amendment Cct, which since then defines the relations between Estonia and the EU and the conditions of Estonia for belonging to the EU – abidance by the Constitution and its fundamental principles, accepting the supremacy of the EU Law, as well as, in certain conditions, the direct applicability of the EU Law regarding Estonian National Law. In amending the Constitution, the principal idea was to change the existing Constitution in a way that Estonia could delegate governmental authority to EU institutions, based on the EU founding treaties, and on conditions that are not contravening the preamble of and the first Chapter of the Constitution of the Republic of Estonia, laying down the fundamental principles of the Estonian statehood. The Amendment Act can only be changed in a referendum which means that if the legal nature of the EU should cardinally change, or develop to become unacceptable for Estonia (or non-complying with the Amendment Act), it is possible to change the Amendment Act.[28]

Critique by legal professionals of the Expertise Commission towards the viewpoint of the absolute necessity of amendments provided that it had not taken into account the nature of the Constitution as "a living legal document". It seemed that the constitutional will can be interpreted in a way which presumes that the objectives of a state are more effectively achievable by being a member state of the European Union. The accession can be viewed as an international legal action (also referred as such by the aforementioned Expertise Commission report), the ground for which the right to self-determination of the people is the supreme political authority. In the light of the doctrine of self-determination, there is no room for a different interpretation of sovereignty: governmental authorities are the mediators between individuals and the European Union and the Constitution is the regulator determining the mediation activities. The theoretical question put forward prior to joining the EU – on what conditions and reasons the Constitution should be amended – was left without clear answers. The response can be found at two different levels – general questions (declaration of sovereignty) and specific questions. In cases of general questions, one may refer to the delegation of competence to international organizations, or more concretely, to the European Union. Even though theoretically, we can refer to the division of competence, it is, in practice, rather difficult to draw a definite line between the European Union and its member states. The most debated specific questions have been the passing of the legislative power from the Parliament to the government, which has the task to represent Estonia in transnational activities. A strong Parliament and its structural unit – the European Union Affairs Committee – may prove a solution. However, it must be admitted that the role of the people's representation is being changed

28 *Ibid*.

and is receded to the issue of how to ensure the legislative control over the executive power – now the main representative of the state in the European-wide decision-making process.[29] In order to compensate the partial transfer of legislative power, the Estonian Parliament changed the Riigikogu Procedure Act in March 2004. The amendments gave the Parliament the means to exercise parliamentary supervision over government actions at the EU level. It furthermore ensured the involvement of legislative power in the EU decision-making process and in national coordination mechanisms related to EU matters.[30]

In the eyes of the authors, the Constitution should be viewed as a "living instrument", the implementation of which (and if necessary, its amendment) is dependent on the self-determination of the people as the supreme political authority. Pursuant to the comprehension of contemporary society, the Constitution should be treated as a process, whereas the period purposes of the process are dependent on the "supreme political authority", as provided by the state organisation. Amongst other things, the Expertise Commission emphasised that there are two dimensions to sovereignty – inner and outer. Taking into account the principles of international law in our own legal system, it must be noted that such a division cannot be absolute. Let us take the binding decisions of the European Court of Human Rights (ECHR) into account. The European Convention on Human Rights is ratified as an international treaty, which forms an inseparable part of the national legal system, and only the ECHR can be the sole and final interpreter of that treaty. The interrelation between external commitments of a state and its national law is obvious.

In order to study the issue of competence in the context of the European Union membership, the delegation of sovereignty is different from the "terminal transfer" by having the possibility to reverse the process (by delegating the sovereignty back). The delegated powers can be withdrawn only to the extent of what was in fact delegated, i.e., the delegated competence can neither, without corresponding authorisation, be reduced nor increased. The emphasis should be on the interpretation of the Constitution. The authors presume that the EU Constitutional (Primary) Law protects the sovereignty of Estonia. A possible conflict or a collision between the two legal systems can be solved (nationally) by means of the Constitution. In case of uncertainty regarding the interpretation of the internal law, including the enactments of the Constitution, the judiciary ought to preferably use the interpretation that is in accord with the Primary Law of the EU – the international treaties to which Estonia is a party.

The limits to interpretation of the Constitution are formed by the will of the supreme political authority. It proves that such a will can be ascertained by a referendum. At the same time, the main author of this contribution did not support the proposal to amend the Constitution with the purpose of putting the accession treaty to a referendum. He

29 See Kerikmäe, T. "Eesti parlamendi roll pärast liitumist Euroopa Liiduga", Riigikogu Toimetised IV, 2001. Experiences of other member states of the EU can be found at Elspeth Deards, Sylvia Hargreaves, EU Law. Oxford University Press, pp 37-44.

30 See the website of the Parliament of Estonia – Riigikogu: http://www.riigikogu.ee/?lang=en

rather saw that the amendments to the Constitution are necessary only if it is not possible to interpret the Constitution pursuant to the purposes of the norms of its provisions. The mandate, i.e., limits to interpretation, is given by a referendum. It was proposed by him that not the accession treaty (after the amendments to the Constitution, that would set forth the right to put an international treaty to a referendum), but rather the question: *would you delegate to state authorities the competence to take the necessary steps that would lead to the EU membership?*, should have been submitted to a referendum.

The first author of the current contribution posed a question regarding the disappearance of the tradition of dualistic states. The question was – *can this paradigm modify the existing approach of Estonian Constitutional Law?* In other words: is the Amendment Act a constitutional act or merely an incorporation act of the accession treaty? The question on the application of dualistic method derived from the draft legislation of the Amendment Act, which lays down that after the passing of the law, the European Union Law would, to extent prescribed by the accession treaty, form a basis for interpreting and applying the Constitution of the Republic of Estonia. Even though the theory of dualism/monism does not carry a substantial value in terms of national application of the EU Law in relation to the laws of a member state, favouring dualism may contravene the Estonian Constitution (§3 and §123) as well as with existing case laws, by giving different legal subjects in Estonia grounds for demanding (thereinafter) further incorporation of the international law. At the same time, the Accession Treaty referred to in the draft of the Amendment Act itself is a certain (international) incorporation act, which does not leave decisions to the Estonian state. A mere referral to the Accession Treaty, should not, however, pose a threat to Estonian Constitutional Law traditions. Therefore, Professor Kerikmäe qualified the draft legislation. The Act, at national level, supports the implementation of the Constitution. A crucial question regarding the draft legislation was whether the situation incurred a referendum in the Accession Treaty, which would contradict with §106[31] of the Constitution. Professor Kerikmäe found that this was most likely not the case, since the text of the draft legislation did not *expressis verbis* refer to that. The emphasis was rather on the declaration "Estonia may join/will join the European Union".

A separate question refers to the necessity of reflecting the dynamic nature of the European Union. Even the Expert Commission saw in Estonia joining the EU, an accession to a "confederation". Putting aside the constitutional law future of the European Union, even back then, the analysis of EU history made clear that in the future, the delegated competences may be expanded. This is a legal problem to which it is difficult to find a proper solution. It is non-negotiable that in case of the EU, we are referring to an ambient notion, whereas the nature, extent and appropriateness (with the Constitution) of possible changes with the purposes of the Estonian state cannot be foreseen. The final opinion by one of the authors, Professor Kerikmäe, was that amending the text of the

31 According to §106, the ratification of an international treaty cannot be submitted to a referendum.

Constitution would not have been legally correct and would have involved political and judicial complications. Therefore, the passing of the Amending Act is seen by Professor Kerikmäe as a compromise between those seeking for amending the text of the Constitution itself and those deeming it unnecessary.

On 14 September 2003, the people of Estonia adopted on a referendum based on §162 of the Constitution of the Republic of Estonia, the following Act[32]:

§ 1. *Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected.*

§ 2. *When Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty.*

§ 3. *This Act may only be amended in a referendum.*

§ 4. *This Act enters into force three months after the date of its promulgation.*

The Act has been disputed only few times, lately in relation to the economic crisis and obligations of Estonia in taking financial obligations when reducing the debts of EU member states with dramatic economic difficulties.

IV. Constitutional Review and Developing Case-Law as Guarantee for Efficient Implementation

The system of judicial constitutional review in Estonia was created on the basis of the Constitution adopted in 1992. Pursuant to the Estonian Constitution, the highest court in Estonia, the Supreme Court[33]. The composition of the Supreme Court includes the Constitutional Review Chamber. The Supreme Court is the highest court in Estonia and reviews court judgements by way of cassation proceedings. The Supreme Court is also the Court of Constitutional Review. The sphere of competence of the Supreme Court includes the following:

- reviewing appeals in cassation and protests;
- hearing petitions for review filed against court judgments; hearing petitions for constitutional review;
- resolving certain matters pertaining to court administration.

32 The Constitution of the Republic of Estonia Amendment Act. Available in English at: https://www.riigiteataja.ee/en/eli/530102013005/consolide

33 Supreme Court of Estonia. Website accessible in English at: http://www.riigikohus.ee/?lang=en; see also See also Eesma, U. "PRACTICE OF THE CONSTITUTIONAL CHAMBER OF ESTONIA IN DRAFTING DECISIONS." Available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2014)010-e

There are 19 justices in the Supreme Court and the Court is composed of the Civil Chamber, Criminal Chamber, Administrative Law Chamber and the Constitutional Review Chamber. Appeals may also be heard by Special (*ad hoc*) Panels or by the Supreme Court *en banc*. The Supreme Court *en banc*, comprised all justices of the Supreme Court and is the highest body of the Court. The Estonian constitutional review process differs from that of the most of Europe insofar as the Constitutional Court is not separate from the rest of the judicial system. This approach has been referred to as advantageous as Estonian system contributes to the uniformity of judicial practice and eliminates conflicts regarding the interpretation of laws between the administrative and general court system and the Constitutional Court – in Estonia, members of the Constitutional Review Chamber are simultaneously members of other Chambers of the Supreme Court.[34]

The Constitutional Review Chamber of the Supreme Court reviews the constitutionality of laws and other legislation of general application. Every year, on the proposal of the Chief Justice, the general assembly of the Supreme Court appoints two new members to the Constitutional Review Chamber and releases two most senior members of their duties, taking into account the opinion of and bearing in mind, as much as possible, the equal representation of the Administrative Law, Criminal and Civil Chambers within the Constitutional Review Chamber. The Supreme Court adjudicates constitutional review cases either at the sessions of the Constitutional Review Chamber or sitting *en banc*.

The Constitutional Review Chamber reviews the constitutionality and legality of laws and resolutions adopted by the Riigikogu, which have entered into force; the constitutionality and legality of laws, which have not been promulgated by the President of the Republic and have not entered into force; the constitutionality of decrees issued by the President of the Republic, which have entered into force; the constitutionality of international treaties of the Republic of Estonia, which have not entered into force; constitutionality and legality of legislation of general application, issued by the executive and local governments, which have entered into force. The Supreme Court shall declare wholly or partly invalid any law or other legislation, if it is in conflict with the spirit or provisions of the Constitution.

Herewith, pursuant to Estonian Constitutional Review Court Procedure Act[35], the Supreme Court has the following jurisdictions:

- to adjudicate requests for reviewing the constitutionality of legislation of general application;
- adjudicate requests for reviewing the constitutionality of international treaties;
- adjudicate complaints filed against the resolutions of the Riigikogu;

34 Madise, L. Constitutional Review. Estonica. Encyclopaedia about Estonia.

35 Constitutional Review Court Procedure Act. Available in English at: https://www.riigiteataja.ee/en/eli/521012014004/consolide

- adjudicate complaints filed against the resolutions of the Board of the Riigikogu;
- adjudicate complaints filed against the decisions of the President of the Republic;
- adjudicate requests for declaring a member of the Riigikogu, the President of the Republic, the Legal Chancellor or the State Auditor is incapable of performing his or her duties for an extended period;
- adjudicate requests for termination of the authority of a member of the Riigikogu; decides on giving a consent to the Chairman of the Riigikogu, acting as President of the Republic, to declare extraordinary elections to the Riigikogu or to refuse to proclaim laws;
- adjudicate requests for termination of the activities of a political party; resolve complaints and protests filed against the decisions and acts of electoral committees.

Pursuant to the Constitution, everyone whose rights and freedoms have been violated has the right of recourse to the courts. Everyone is entitled to petition the court that hears his or her case to declare unconstitutional any law, other legislative instrument, administrative decision or measure which is relevant in the case. The courts observe the Constitution and declare unconstitutional any law, other legislative instrument, administrative decision or measure which violates any rights or freedoms provided in the Constitution or which otherwise contravenes the Constitution (§15). The right to propose the initiation of Constitutional Review Court proceedings belongs to the following:

- the President, if the Riigikogu passes, unamended, an Act which the President of the Republic refuses to proclaim;
- courts, if a court declares, in its judgment, an Act or other legislation of general application to be in conflict with the Constitution and does not apply such Act or legislation;
- the Legal Chancellor, if he or she finds that an Act is in conflict with the Constitution (or other legislation of general application is in conflict with the Constitution or an Act) and the body which passed the Act fails to bring the legislation into conformity with the Constitution, or if he or she finds that an international agreement of the Republic of Estonia, which has not yet entered into force, is in conflict with the Constitution (the Chancellor of Justice is a public official who scrutinises legislative instruments of the legislative and executive branch of government and of local authorities for conformity with the Constitution and the laws – §130 of the Constitution);
- an individual, if there are no other means of legal protection, if he or she finds that his or her rights have been violated by a resolution of the Riigikogu may submit a request to the Supreme Court to repeal the resolution of the Riigikogu. Estonian system practices both, ex-ante review and ex-post review.

The amendment of the Constitution is rather difficult; the reason for that is twofold: firstly, complicated amendment procedures contribute to its longevity, and secondly, to ensure its supremacy in the hierarchy of norms. The stability of the Constitution is necessary

for the political and public stability; therefore, we can refer to reciprocal effect, and there still are, from time to time, changes in the public and political order, that might require changing the Constitution. The Constitution may be changed in its entirety or there may simply be certain sphere-related amendments to it. There have been numerous proposals for amending the effective Constitution, only 21 draft Amendment Acts have been submitted, and only four of those reached the phase of formal amendments. Taking into account the difficult process of amending and changing the Constitution, the constitutional review process via the Supreme Court of Estonia[36] can also add some changes to it by the form of its decisions. The most influential changes are related to the EU accession (including the adoption of the Amendment Act).

On 12 July 2012, the Supreme Court made an *en banc* judgement, where the Court dismissed the application of the Chancellor of Justice to declare Article 4 (4) of the Treaty Establishing the European Stability Mechanism (ESM Treaty) to be in conflict with the Constitution. The Supreme Court believed that although the contested article restricts the financial competence of the Estonian Parliament, the principle of rule of law and the sovereignty of Estonia, the restriction is justified.[37] §223 of the judgment holds, "The Supreme Court *en banc* holds that §1 of the CREAA is to be considered as an authorisation to ratify the Accession Treaty as well as an authorisation which allows Estonia to be a part of the changing European Union. Provided the amendment of the founding treaties of the European Union or a new treaty is in accordance with the Constitution. At the same time, the Supreme Court *en banc* is of the opinion that the CREAA does not authorise the integration process of the European Union to be legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent. Therefore, it is primarily the *Riigikogu* which must, upon a change in any founding treaty of the European Union and also upon entry into a new treaty, deliberate separately and decide whether the amendment to the founding treaty the European Union or the new treaty

36 Estonian Supreme Court. Constitutional judgments. Available in English at: http://www.riigikohus.ee/?id=823

37 On 2 February 2012 the Government of the Republic adopted an order no. 60 "Approval of the Draft Treaty establishing the European Stability Mechanism and grant of authorisation". By the order the Draft Treaty was approved and the permanent representative of Estonia to the EU was authorised to sign it. On 2 February 2012 the representative of Estonia in Brussels signed the amended Treaty which the member states are required to ratify. The Treaty was planned to enter into force in July 2012. On 12 March 2012 the Chancellor of Justice had recourse to the Supreme Court, relying on § 6(1)4) of the Constitutional Review Court Procedure Act (CRCPA), with a request to declare Article 4(4) of the signed Treaty to be in conflict with the principle of parliamentary democracy arising from § 1(1) and § 10 of the Constitution, and with § 65 10) and § 115 of the Constitution. By a ruling of 22 March 2012 the Constitutional Review Chamber of the Supreme Court referred the case to the Supreme Court en banc. The Supreme Court en banc asked the opinion of experts on the constitutionality of Article 4(4) of the Treaty. Opinions were submitted to the Supreme Court en banc by Dr Anneli Albi, the Department of Economics of the Estonian Business School, the Tallinn University Law School, the Faculty of Social Sciences of the Tallinn University of Technology (Prof. Tanel Kerikmäe) and the Faculty of Law of the University of Tartu. See more: Constitutional Judgment 3-4-1-6-12. Available in English at: http://www.riigikohus.ee/?id=1347

leads to a deeper integration process of the European Union and thereby an additional delegation of the competence of Estonia to the European Union, and thus also a more extensive interference with the principles of the Constitution. If it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty of the European Union gives rise to a more extensive delegation of the competence of Estonia to the European Union and a more extensive interference with the Constitution, it is necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably amend the Constitution once again. These requirements are to be considered also if the Treaty leads to amendments to the TFEU and TEU."

V. Concluding Remarks and Suggestions

The Constitution has been referred to as the self-restraint act of (state) power, which stands firmly thanks to the trust of the people, whereas the transfer of power from the people to state authorities cannot be absolute, but is conditional. One of the virtues of the Constitution is its durability. During our periods of independence, Estonia has had four Constitutions, which is a remarkable number for such a short period of time. There is no harm in constant and profound analysis of the effectiveness of the Constitution and there are times during which amendments may be inevitable, but legal experts should remember that any decisions made with regard to possible amendments must be contemplated and precautious, so as to justify the trust of the people.[38] It has been criticised that even though all the Constitutions have referred to the state system as an independent and sovereign republic, where the supreme power has been vested in the people, such declaration is merely a political-legal postulation, since, in fact, everything depends on the type of authorisation the Constitution prescribes to the people for the purpose of exercising the supreme power. Such powers, however, are controversial – an Estonian legal scholar notes – when it came to protecting the sovereignty it was the people who fought for regaining independence, but at the time of independence, they are not given the right to directly elect the Head of State.[39] Referendums are referred to as the right of the people to exercise the supreme political authority in Estonia; however, pursuant to the Constitution, it is the Parliament which decides the holding of a referendum. The first President of Estonia after regaining independence, Lennart Meri, has claimed, "We do not need the European Union because of the Union itself. We need the Republic of Es-

38 Maruste, R. Presentation at the conference devoted to the fifth anniversary of the Constitution.

39 Schneider, Heinrich. 1992. Aasta Põhiseadus: Saamislugu ja Kontseptuaalsed probleemid. Kas vundament ikka kannab? In Taasiseseisvunud Eesti Riigi-ja Õigusteooria probleeme. Uurimustööde kogumik. Koostaja: Arno Almann. EBS Print. Tallinn 2005, p 158.

tonia. We need a state where Estonians would feel that the prerequisites for the increase in their standard of living and for education for their children are ensured. For the continuation of this Estonia, we need to accede to the European Union and not vice versa."[40]

In many jurisdictions, Constitution remains just a "holy text" that is interpreted only if there is a political need (rigid approach). By the innovative theory[41] the clear alternative is deliberativism. Cambodia, although having a very different history would take into account this differentiation to be able to follow the principle of rule of law also in conditions of globalisation and interrelations with emerging regional associations such as ASEAN.

a.) Relationship and communication between national and international/supranational law:

By passive positioning (rigid approach) communication is unilateral (*ex parte*). Supranational or international character of law is a sufficient basis for validating legal norms in domestic legal systems. Therefore, interaction of national and supranational legal systems is not supported. A member of any association (member of the EU in Europe, for example) acts under the principle of constitutional loyalty assuming that supranational interests take into account the national interests. On the contrary, proactive positioning (deliberativism) sees the legitimacy of any norm, e.g., international or supranational is analysed by a test composed of the constitutional principles and substantial, formal and procedural premises. A state attempts to generate an interactive dialogue (based on equilibrium and balanced interests) between *domain reservé* of national and supranational levels (reciprocity).

b.) Collision between national and supranational law:

By the rigid approach, a conflict is eliminated *ex ante* by disapplication of domestic legal norms. By deliberative approach, a conflict is possible or even assumed. A domestic legal norm is not applied until the just argument is adopted through interpretative *techniques*. Margin of appreciation is deriving from common constitutional values reflected by the associated member state's constitution.

c.) Status and relevance of the Constitution:

By passive approach, a Constitution is seen as a text to acknowledge the supreme position of any international/supranational law in general. The scope of the legal binding of the Constitution as independent legal text remains unframed. The continuous dynamics of international legal environment is not taken into account. By innovative deliberativism a Constitution is seen as a living instrument that safeguards the posi-

40 L Meri. Vabariigi Presidendi intervjuu ajakirjale Luup 22. detsembril 1997. http://vp1992-2001.president.ee/est/k6ned/Intervjuu.asp?ID=9614

41 Kerikmäe, T. (2010). Estonia as an EU state: lack of proactive constitutional dialogue. Kyriaki Topidi, Alexander H.E. Morawa (Toim.). Constitutional Evolution in Central and Eastern Europe Expansion and Integration in the EU (11-42). Farnham: Ashgate Publishing Ltd

tion of a member state in any international association or framework. The content and bindingness of the Constitution is not formally dependent on international law. The Constitution can be interpreted through "common constitutionalism" and "constitutional dialogue". Changing the legal environment is taken into account by analysing international developments, using constitutional dialogue and interpretative pluralism.

d.) Approach to the rule of law

By passive approach, rule of law is determined by international principles exclusively. For state authorities, it becomes rather an apologist construct in justifying interference of political and economic influences that prevail over the legal framework. The dependence from other member states is significant. By deliberativists, rule of law remains to be the most important criteria, which can be analysed independently from a socio-economic and political environment. The impact of other member states in domestic decision-making is minimized as much as possible.

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THE CONSTITUTION OF THE KINGDOM OF CAMBODIA

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PREAMBLE

WE, THE KHMER PEOPLE,

Accustomed to having a grand civilization, a prosperous nation, a very large territory, a prestige glittering like a diamond;

Having fallen into a terrifying decay for the two last decades, when we have been undergoing unspeakable, demeaning sufferings and disasters of the most regrettable way;

In a burst of consciousness, rising up with a resolute determination in order to unite, to strengthen the national unity, to defend the Cambodian territory, to preserve the precious sovereignty and the marvelous civilization of ANGKOR, to re-build the country and become once again an "Oasis of Peace" based on the system of a liberal multi-party democracy, to guarantee human rights, to ensure the respect of law, to be highly responsible for the destiny of the nation forever evolving toward progress, development and prosperity.

IN VIRTUE OF THIS UNSHAKEABLE WILL,

We inscribe in the Constitution of the Kingdom of Cambodia, as followed:

CHAPTER I
ON THE SOVEREIGNTY

Article 1.

Cambodia is a Kingdom where the King shall fulfill His functions according to the Constitution and the principles of liberal multi-party democracy.

The Kingdom of Cambodia is an independent, sovereign, peaceful, permanently neutral and non-aligned State.

Article 2.

The territorial integrity of the Kingdom of Cambodia shall be absolutely inviolable within its borders as defined in the 1/100,000 scale map made between the years 1933-1953, and internationally recognized between the years 1963-1969.

Article 3.

The Kingdom of Cambodia is an indivisible State.

Article 4.

The motto of the Kingdom of Cambodia is: Nation, Religion, King.

Article 5.

The official language and script are those in Khmer.

Article 6.

Phnom Penh is the capital city of the Kingdom of Cambodia.

The national flag, anthem and coat of arms are defined in Annexes 1, 2 and 3.

CHAPTER II
ON THE KING

Article 7.

The King of Cambodia shall reign, but not govern.

The King is the Head of State for life.

The Person of the King shall be inviolable.

Article 8.

The King shall incarnate the symbol of national unity and continuity.

The King shall be the guarantor of the national independence, the sovereignty and the territorial integrity of the Kingdom of Cambodia, and the guarantor for the respect of citizens' rights and freedom, and of international treaties.

Article 9.

The King shall assume the role as supreme arbiter to ensure the regular execution of public powers.

Article 10.

The Cambodian monarchy is an elective monarchy.

The King can not appoint His heir to the throne.

Article 11 *new*

In case the King can not as usual perform His duties of Head of State for being seriously ill, as certified by a team of specialized medical doctors chosen by the President of the Senate, the President of the National Assembly and the Prime Minister, the President of the Senate shall perform the duties of Head of State as Regent in His stead.

In case the President of the Senate can not perform his duties of Head of State in the stead of the King, acting as Regent, while the King is seriously ill as stipulated in the aforementioned paragraph, the President of the National Assembly shall perform these duties.

In the case stated in the aforementioned paragraph, other dignitaries in the following hierarchy can perform the role of Regent as Acting Head of State:

a – First Vice-President of the Senate
b – First Vice-President of the National Assembly
c – Second Vice-President of the Senate
d – Second Vice-President of the National Assembly

Article 12 *new*

At the decease of the King, the President of the Senate shall perform the role of Head of State ad interim in his capacity as Regent of the Kingdom of Cambodia.

In case the President of the Senate can not perform his duties of Head of State ad interim in his capacity as Regent, the paragraphs 2 and 3 of Article 11 *new* must be implemented.

Article 13 *new*

Within a period not exceeding seven days, the new King of Cambodia shall be elected by the Crown Council.

The membership of the Crown Council shall be composed of:

– The President of the Senate
– The President of the National Assembly
– The Prime Minister
– The Supreme Patriarchs of the two religious orders, Mahanikaya and Dhammayutikanikaya
– The First and Second Vice-Presidents of the Senate
– The First and Second Vice-Presidents of the National Assembly

The organization and functioning of the Crown Council shall be determined by law.

Article 14.

Shall be elected King of Cambodia, a member of the Royal family, aged at least 30 years, descendant of King Ang Duong or of King Norodom or also of King Sisowath.

Before ascending the throne, the King shall take oath as stipulated in Annex 4.

Article 15.

The Consort of the King shall have the title of Queen of Cambodia.

Article 16.

The Queen of Cambodia shall have no right to engage in politics, to assume a leading function in State or Government affairs, or to assume an administrative or political role.

The Queen of Cambodia shall devote herself in tasks of social, humanitarian, religious interests, and assist the King in protocol and diplomatic obligations.

Article 17.

The provision, in which the King shall reign but not govern, as stipulated in Article 7 paragraph 1 of this Constitution, can not in any case be modified.

Article 18 *new*

The King communicates with the Senate and the National Assembly through royal messages.

These royal messages can not be subject to debate at the Senate and the National Assembly.

Article 19 *new*

The King shall appoint the Prime Minister and the Council of Ministers in accordance with the procedures stipulated in Article 119 *new*.

Article 20.

The King grants official audiences twice a month to the Prime Minister and the Council of Ministers, who report on the situation of the country for His highest information.

Article 21.

Upon the request of the Council of Ministers, the King shall sign the Kret appointing, transferring or dismissing highranking civil and military officials, ambassadors and envoys

extraordinary and plenipotentiary from their position.

Upon the request of the Supreme Council of Magistracy, the King shall sign the Kret appointing, transferring or removing judicial judges from their position.

Article 22 *new*

When the nation faces danger, the King shall make a public proclamation placing the country in a state of emergency, after unanimous agreement from the Prime Minister, the President of the National Assembly and the President of the Senate.

Article 23.

The King is the Supreme Commander of the Royal Khmer Armed Forces. A Commander-in-Chief of the Royal Khmer Armed Forces shall be appointed to command the Armed Forces.

Article 24 *new*

The King is the President of the Supreme Council of National Defense which shall be created by a law.

The King declares war after the approval from the National Assembly and the Senate.

Article 25.

The King receives credentials from ambassadors or envoys extraordinary and plenipotentiary of foreign countries accredited to the Kingdom of Cambodia.

Article 26 *new*

The King signs and ratifies international treaties and conventions after their approval by the National Assembly and the Senate.

Article 27.

The King holds the right of commuting court's sentence and the power of pardon.

Article 28 *new*

The King signs the Kram promulgating the Constitution and the laws adopted by the National Assembly and thoroughly reviewed by the Senate, as well as the Kret upon the proposal from the Council of Ministers.

In case of illness and medical treatment abroad, the King can delegate His power of signing the Kram and the Kret to the Head of State *ad interim*. This delegation of signature is express.

Article 29 *new*

The King creates and confers national honorific distinctions.

The King decides on granting military and civilian grades and titles in the framework as determined by the law.

Article 30 *new*

During the absence of the King, the President of the Senate shall assume the duties of Head of State *ad interim*.

In case the President of the Senate can not perform the duties of Head of State *ad interim* during the absence of the King, these duties shall be assumed in conformity with paragraphs 2 and 3 of Article 11 *new*.

CHAPTER III
ON THE RIGHTS AND DUTIES OF KHMER CITIZENS

Article 31.

The Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations Charter, the Universal Declaration of Human rights and all the treaties and conventions related to human rights, women's rights and children's rights.

Khmer citizens are equal before the law, enjoying the same rights, liberties and duties regardless of race, color, sex, language, beliefs, religions, political tendencies, birth origin, social status, wealth or other situations. The exercise of personal rights and liberties by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and liberties shall be in accordance with the law.

Article 32.

Everyone has the right to life, liberty and security of person.

In any case, there shall be no death penalty.

Article 33.

Khmer citizen shall not be deprived of his/her nationality, exiled, or arrested to be extradited to a foreign country, except in case of mutual agreement.

Khmer citizen residing abroad enjoys the protection of the State.

The acquisition of Khmer nationality shall be determined by law.

Article 34 *new*

Khmer citizens of both sexes shall enjoy the right to vote and to stand as candidates for the election.

Khmer citizens of both sexes, at least eighteen years old, have the right to vote.

Khmer citizens of both sexes, at least twenty-five years old, have the right to stand as candidates for the elections of the members of the National Assembly.

Khmer citizens of both sexes, at least forty years old, have the right to stand as candidates for the elections of the members of the Senate.

Provisions restricting the right to vote and the right to stand as candidates for the elections shall be determined by the Electoral Law.

Article 35.

Khmer citizens of both sexes have the right to participate actively in the political, economic, social and cultural life of the nation.

All requests from citizens shall be given full consideration and resolution by the State's organizations.

Article 36.

Khmer citizens of both sexes have the right to choose any employment according to their ability and to the needs of the society.

Khmer citizens of both sexes shall receive equal pay for equal work.

The work of housewife at home shall have equal value as the remunerated work done outside the home.

Khmer citizens of both sexes shall have the right to enjoy social security and other social benefits as determined by law.

Khmer citizens of both sexes shall have the right to create trade unions and to participate as their members.

The organization and functioning of the trade unions shall be determined by law.

Article 37.

The rights to strike and to organize peaceful demonstrations shall be exercised within the framework of law.

Article 38.

The law forbids any physical abuse against any individual.

The law protects the life, the honour and the dignity of the citizens.

The prosecution, arrest, police custody or detention of any person shall not be done, except in accordance with the law.

The coercion, physical punishment or any other treatment aggravating the penalty of the detainee or prisoner shall be forbidden. The author of such acts, co-authors and accomplices shall be punished according to the law.

Confessions obtained by physical torture or mental pressure shall not be admissible as evidence of guilt.

The doubt shall benefit the accused.

Any accused is presumed innocent up to the final verdict of the court.

Any individual shall have the right to his/her own defense through the judicial system.

Article 39.

Khmer citizens have the right to denounce, make complaints, or file claims for reparations of damages caused by any breach of law by state and social organizations or by staff of those organizations. The settlement of complaints and the reparations of damages are of the competence of the courts.

Article 40.

Citizen's freedom to travel, far or near, and to legally settle down shall be respected.

Khmer citizen has the right to settle in abroad or to return home.

The protection of the rights to the inviolability of residence and to the confidentiality of correspondences by mail, telegram, telex, facsimile and telephone shall be guaranteed.

Search of residences, properties and body search shall be done in accordance with the legal stipulations.

Article 41.

Khmer citizens shall have the freedom to express their personal opinions, the freedom of press, of publication and of assembly. No one can take abusively advantage of these rights to impinge on dignity of others, to affect the good mores and custom of society, public order and national security.

The regime of the media shall be regulated by law.

Article 42.

Khmer citizens shall have the right to create associations and political parties. This right shall be determined by law.

Khmer citizens may participate in mass organizations meant for mutual assistance, protection of national realizations and social order.

Article 43.

Khmer citizens of both sexes shall have the full right of belief.

Freedom of belief and religious practice shall be guaranteed by the State, provided that such freedom and religious practice do not impinge on other beliefs or religions, on public order and security.

Buddhism is State's religion.

Article 44.

All persons, individually or collectively, shall have the right to ownership. Only natural person or legal entity of Khmer nationality shall have the right to land ownership.

Legal private ownership shall be protected by law.

Expropriation shall be possible only if public utility demands in the cases stipulated by the law and if prior appropriate and fair compensation is granted.

Article 45.

All forms of discrimination against women shall be abolished.

The exploitation of women's labour shall be prohibited.

Men and women have equal rights in all fields, especially with respect to those of marriage and family.

Marriage shall be done according to the conditions set by the law and based on the principles of mutual consent and monogamy.

Article 46.

Human trafficking, exploitation of prostitution and obscenities which affect the dignity of women shall be prohibited.

The dismissal of woman worker for reason of pregnancy shall be prohibited. Woman shall have the right to take maternity leave with full pay and with guarantee of her seniority in employment and of other social benefits.

The State and the society shall provide women, especially those underprivileged living in rural areas, with opportunities to benefit from assistance for a profession, for medical cares, for their children schooling and for decent living conditions.

Article 47.

Mother and father shall have the obligation to take care of their children, to bring them up and to educate them in order to become good citizens.

Children shall have the duty to attend to the needs of their aged parents and to take good care of them in accordance with Khmer custom.

Article 48.

The State shall assure the protection of children's rights as enshrined in the Convention on Children, especially, the right to life, the right to education, the right to protection during wartime and the right to protection from economic or sexual exploitation.

The State shall protect children from all kinds of labour that can be detrimental to their education and their schooling, or to their health or their welfare.

Article 49.

Every Khmer citizen shall respect the Constitution and the laws.

Every Khmer citizen has the obligation to participate in the national construction and to defend the motherland.

The obligation to defend the motherland shall be done in accordance with the provisions of the law.

Article 50.

Khmer citizens of both sexes shall respect the principles of national sovereignty and liberal multi-party democracy.

Khmer citizens of both sexes shall respect public property and legally acquired private property.

CHAPTER IV
ON THE POLITICAL REGIME

Article 51 *new*

The Kingdom of Cambodia adopts a policy of liberal multi-party democracy.

Khmer citizens are masters of their country's destiny.

All powers shall belong to the citizens. The citizens shall exercise their powers through the National Assembly, the Senate, the Royal Government and the Jurisdictions.

The powers shall be separated between the legislative power, the executive power and the judicial power.

Article 52.

The Royal Government of Cambodia shall commit itself resolutely to preserve and defend the independence, sovereignty, and territorial integrity of the Kingdom of Cambodia, implement a policy of national reconciliation to ensure national unity, and protect the good mores and custom of the nation.

The Royal Government of Cambodia shall defend legality and ensure public order and security. The State shall give priority to the improvement of the living conditions and welfare of citizens.

Article 53.

The Kingdom of Cambodia maintains resolutely a policy of permanent neutrality and non-alignment. The Kingdom of Cambodia coexists peacefully with its neighbours and with all other countries throughout the world.

The Kingdom of Cambodia shall never invade any country, nor interfere in any other country's internal affairs, directly or indirectly, and shall solve any problems peacefully with due respect for mutual interests.

The Kingdom of Cambodia shall not join in any military alliance, nor conclude any military agreement which is incompatible with its policy of neutrality.

The Kingdom of Cambodia shall not authorize any foreign military base on its territory, nor have its own military bases abroad, except within the framework of a United Nations request.

The Kingdom of Cambodia reserves the right to receive foreign assistance in military equipment, armaments, ammunition, in training of its armed forces, and other assistance for self-defense and for ensuring public order and security within its territory.

Article 54.

The manufacture, use and storage of nuclear, chemical or biological weapons shall be absolutely prohibited.

Article 55.

Any treaty and agreement incompatible with the independence, sovereignty, territorial integrity, neutrality and national unity of the Kingdom of Cambodia shall be abrogated.

CHAPTER V
ON THE ECONOMY

Article 56.

The Kingdom of Cambodia implements the market economy system.

The organization and the functioning of this economic system shall be determined by the law.

Article 57.

Tax can be collected only when it is authorized by a law.

The national budget shall be laid down and carried out in accordance with the law.

The monetary management and the financial system shall be determined by the law.

Article 58.

State property notably consists of land, underground, mountains, sea, sea-bed, undersea-bed, coastline, airspace, islands, rivers, canals, streams, lakes, forests, natural resources, economic and cultural centers, national defense bases, other building facilities belonging to the State.

The administration, the utilization and the assignment of State's properties shall be determined by the law.

Article 59.

The State shall preserve and protect the environment and the balance of natural resources, by organizing a precise planning for the management, especially of the land, water, atmosphere, air, geology, ecological systems, mines, energy, petroleum and gas, rocks, sand, gems, forests and forest by-products, wildlife, fish and aquatic resources.

Article 60.

Citizens have the right to freely sell and exchange their own products. The obligation to sell products to the State or the appropriation, even temporarily, of private riches or possessions by the State shall be prohibited, except under conditions specially authorized by the law.

Article 61.

The State shall promote economic development in all fields, especially in agriculture, handicraft, industry, to begin with the remotest areas, with concern for water policy, electricity, roads and means of transportation, modern techniques and credit system.

Article 62.

The State shall be concerned with resolving the means of production, sustaining the prices of agricultural and handicraft products, and helping find markets for these products to be sold.

Article 63.

The State shall attend to regulating the markets in order to secure a suitable living standard for the citizens.

Article 64.

The State shall forbid individuals to import, manufacture or sell illicit drugs, counterfeit products, expired goods harmful to the consumers' health and life, and shall severely punish them.

CHAPTER VI
ON THE EDUCATION, THE CULTURE AND THE SOCIAL AFFAIRS

Article 65.

The State shall protect and promote the right of the citizen to a quality education at all levels and shall take every measure to progressively make this education available to all the citizens.

The State shall put emphasis on the field of physical education and sports for the benefit of all the Khmer citizens' well-being.

Article 66.

The State shall establish a comprehensive and unified system of education throughout the country, capable of guaranteeing the principles of freedom of education and equal access to schooling, in order to offer each citizen the equal opportunity for the betterment of his/her living conditions.

Article 67.

The State implements a curriculum and modern pedagogic principles including the teaching of technology and foreign languages.

The State shall oversee public and private educational establishments and classes at all cycles.

Article 68.

The State shall ensure for all citizens free primary and secondary education at public schools.

Citizens shall receive schooling for at least nine years.

The State shall help propagate and promote the Pali schools and the Buddhist education.

Article 69.

The State has the obligation to preserve and develop national culture.

The State has the obligation to protect and develop the Khmer language according to the needs.

The State has the obligation to preserve and protect the ancient monuments, antiques, and to restore the historical sites.

Article 70.

Any offence affecting or relating to cultural heritage and artistic heritage shall be severely punished.

Article 71.

The perimeter of national heritage sites as well as of those classified as world heritage sites shall be considered as neutral zone forbidden to any military activity.

Article 72.

The health of the people shall be guaranteed. The State shall give full consideration to disease prevention and medical cares. Poor people shall receive free medical consultations in public hospitals, infirmaries and maternities.

The State shall establish infirmaries and maternities in rural areas.

Article 73.

The State shall give full consideration for children and mothers, by encouraging the creation of nurseries and by attending to women without support who have many children under their cares.

Article 74.

The State shall provide assistance to the disabled persons and to the families of combatants who sacrificed their lives for the nation.

Article 75.

The State shall establish a social security regime for workers and employees.

CHAPTER VII
ON THE NATIONAL ASSEMBLY

Article 76.

The National Assembly shall comprise at least 120 members.

The Members of the National Assembly shall be elected by a universal, free, equal, direct suffrage and secret ballot.

The National Assembly's Members are re-eligible.

Khmer citizens of both sexes, enjoying the right to vote, aged at least 25 years and having Khmer nationality by birth, have the right to be candidates to the National Assembly.

Article 76 *new*

The modalities and functioning of the elections shall be determined by the electoral law.

Article 77.

The Members of the National Assembly are the representatives of the whole Khmer Nation and not of the only citizens from their constituencies.

Any imperative mandate shall be considered as null.

Article 78.

The legislature of the National Assembly is of 5 years and shall terminate on the day of the new National Assembly entering in function. The National Assembly cannot be dissolved before the end of its mandate, except in the case of the Royal government being voted out twice within a period of 12 months.

In this case, the King shall, on the proposal from the Prime Minister and with the approval of the President of the National Assembly, dissolve the National Assembly.

The election of the new National Assembly shall take place at the latest within 60 days, counting from the date of dissolution of the National Assembly.

During this period, the Royal Government is only in charge of dispatching day-to-day affairs.

In time of war or in other exceptional circumstances when it is impossible to organize the elections, the National Assembly may, on the proposal from the King, declare the prorogation of its legislature for one year each time.

The declaration on the prorogation of the National Assembly's legislature must be adopted by at least two-third of all its Members.

Article 79.

The mandate of the National Assembly's Member is incompatible with actively exercising any public function and with the functions as member of any other institution stipulated in the Constitution, except those exercised in the Council of Ministers of the Royal Government.

In this case, the concerned Member of the National Assembly keeps the quality as an ordinary Member of the National Assembly, but he/she must have no position in the Standing Committee and in the different Commissions of the National Assembly.

Article 80.

Members of the National Assembly shall enjoy parliamentary immunity.

No National Assembly's Member can in any case be prosecuted, arrested, kept in police custody or detained because of his/her opinions or of the votes expressed during the exercise of his/her functions.

The prosecution against, the arrest, the police custody or the detention of any Member of the National Assembly is possible only when approved by the National Assembly or by the Standing Committee during the interval between

sessions, except in flagrante delicto case. In this last case, the competent ministry must urgently report to the National Assembly or to the Standing Committee for decision.

The decision of the National Assembly's Standing Committee must be submitted to the next session of the National Assembly for adoption by two-third majority of all its Members.

In all the aforementioned cases, the detention of, the prosecution against any National Assembly's Member shall be suspended, if the National Assembly so decided by three-forth majority of all its Members.

Article 81.

The National Assembly shall have an autonomous budget for its functioning.

The National Assembly's Members shall receive allowances.

Article 82 *new*

The first session of the National Assembly shall open sixty days at the latest after the elections, upon the convening by the King.

Before starting its works, the National Assembly shall declare the validity of each Member's mandate and shall vote separately to elect its President, its Vice-Presidents and all the Members of its various Commissions, by an absolute majority of all its Members.

The National Assembly shall adopt its Rules of Procedure by an absolute majority of all its Members.

Before taking office, all the National Assembly's Members shall take oath according to the text written in Annex 5 of the Constitution.

Article 83.

The National Assembly shall convene in ordinary session twice a year.

Each session shall last at least three months. Upon the request from the King or upon the proposal of the Prime Minister or of at least one-third of the National Assembly's Members, the Standing Committee of the National Assembly shall convene an extraordinary session of the National Assembly.

In this case, the precise agenda of the extraordinary session and the date of this session must be brought to the knowledge of the people.

Article 84.

During the interval between the Sessions of the National Assembly, its Standing Committee shall be in charge of the functioning of the National Assembly.

The Standing Committee shall be composed of the President of the National Assembly, the Vice-Presidents of the National Assembly, and the Presidents of all the Commissions of the National Assembly.

Article 85.

The sessions of the National Assembly shall take place in the Capital City of the Kingdom of Cambodia, at the National Assembly Meeting Hall, except a decision otherwise specified in the convening act for circumstantial reasons.

Apart from the aforementioned cases and apart from the location and the date specified in the convening act, any session of the National Assembly shall be considered illegal and null in its own full right.

Article 86.

Under the circumstances when the nation is in a state of emergency, the National Assembly shall convene everyday, in permanence. The National Assembly has the right to put an end to the aforementioned special circumstances, whenever the situation permits.

If the National Assembly can not convene for imperative reasons, notably in case of territorial occupation by foreign forces, the declaration of the state of emergency must be automatically extended.

During the period when the nation is in a state of emergency, the National Assembly can not in any case be dissolved.

Article 87.

The President of the National Assembly presides over the National Assembly sessions, takes cognizance of the laws and the resolutions adopted by the National Assembly, ensures the implementation of the Rules of Procedure and organizes the international relations of the National Assembly.

In case the President of the National Assembly is prevented from performing his/her duties for health reason, or for assuming his/her functions as Head of State ad interim or as Regent, or for being on mission abroad, a Vice-President shall replace him/her.

In case of resignation or decease of the President or of the Vice-Presidents, the National Assembly shall elect a new President or new Vice-Presidents.

Article 88 *new (two)*

The National Assembly sessions shall be public.

The National Assembly can convene in camera at the request of the President or of at least one-tenth of its Members, of the King or of the Prime Minister.

The session of the National Assembly is only valid, when there is:

a- the quorum of over two-third of all its Members for the votes requiring the majority of two-third of all its Members.

b- the quorum of over half of all its Members for the votes requiring the absolute majority of all its Members.

Article 89.

Upon the request from at least one-tenth of its Members, the National Assembly can invite a high ranking personality to come and clarify on issue of particular importance.

Article 90 *new (two)*

The National Assembly is an organ invested with legislative power which exercises its functions according to the provisions of the Constitution and the laws in force.

The National Assembly votes the national budget, the State planning, the borrowings, the lending, the various pledges of financial warranties, and the creation, modification or abolition of taxes.

The National Assembly approves the administrative account.

The National Assembly votes the amnesty law.

The National Assembly votes the approval or the abrogation of international treaties or conventions.

The National Assembly votes the law on war declaration.

The aforementioned votes must obtain the absolute majority of all the National Assembly's Members.

The National Assembly grants a vote of confidence to the Royal Government at the absolute majority of all its Members.

Article 91 *new*

The Senators, the National Assembly's Members and the Prime Minister have the initiative of laws.

The National Assembly's Members have the right to propose amendments to the laws, but this proposal is not admissible if that amendment tends to reduce public incomes or to increase the burden on the citizens.

Article 92.

Any adoption by the National Assembly contrary to the principles of safeguarding the independence, the sovereignty, the territorial integrity of the Kingdom of Cambodia, and affecting the political unity or the administrative management of the nation, is reputed to be null. The Constitutional Council is the sole organ competent to pronounce this nullity.

Article 93 *new*

The law voted by the National Assembly and definitely reviewed by the Senate, and being subject to promulgation by the King, shall come into force in the capital city of Phnom Penh within ten clear days counting from the date of promulgation, and throughout the country within twenty clear days

counting from the date of promulgation. However, if the law is declared urgent, it shall come immediately into force within the whole territory of the country as counting from the date of promulgation.

The law signed and promulgated by the King shall be published in the Royal Gazette and shall be circulated within the whole territory of the country in the time limit as set above.

Article 94.

The National Assembly creates various necessary commissions. The organization and the functioning of the National Assembly shall be stipulated in the National Assembly's Rules of Procedure.

Article 95.

In case of decease, resignation of a National Assembly's Member or loss of his/her membership which would take place at least six months before the end of the legislature, his/her replacement must proceed in the conditions set by the National Assembly's Rules of Procedure and by the Electoral Law.

Article 96.

The National Assembly's Members have the right to raise questions to the Royal Government. The questions must be put in writing and transmitted through the President of the National Assembly.

The answers shall be given by one or several ministers depending on whether the raised issue comes under the responsibility of one or several ministers. If the issue concerns the general policy of the Royal Government, the Prime Minister shall reply in person.

The answers by the minister or by the Prime Minister shall be verbal or written.

The above answers shall be given within seven days after receiving the questions.

In case of verbal answer, the President of the National Assembly can decide whether to open the debate or not. If he does not authorize the debate, the answers of the minister or the Prime Minister put an end to the raised questions.

If he authorizes the opening of a debate, the authors of the questions, the other orators, the concerned minister or the Prime Minister can discuss and exchange the points of view within a time-frame that can not exceed one meeting.

The National Assembly shall reserve one day a week for questions time.

The meetings reserved for the questions time can not in any case give place to voting.

Article 97.

The Commissions of the National Assembly can invite any minister to give clarifications on issue relating to his/her responsibility.

Article 98 *new*

The National Assembly can dismiss a Member of the Royal Government or remove the Royal Government from office by voting a motion of censure at the absolute majority of all its Members.

The motion of censure against the Royal Government must be submitted to the National Assembly by thirty of its Members before this motion of censure can be examined.

CHAPTER VIII *new*
ON THE SENATE

Article 99 *new*

The Senate is an organ invested with legislative power which exercises its functions according to the provisions of the Constitution and the laws in force.

The number of the Senators must not exceed half of the total number of the National Assembly's Members.

The Senate is composed of appointed members and members elected at restricted suffrage.

The Senators can be appointed anew or re-eligible. Can be candidates to the Senate the Khmer citizens of both sexes enjoying the right to vote, aged 40 years at least and having Khmer nationality by birth.

Article 100 *new*

Two Senators are appointed by the King.

Two Senators are elected by the National Assembly at a relative majority vote.

The other Senators are elected at a restricted suffrage.

Article 101 *new*

The modalities of the organization and the functioning of the appointment and the elections of the Senators as well as the determination of the voters, the electoral colleges and the electoral constituencies must be determined by a law.

Article 102 *new*

The legislature of the Senate is of 6 years and shall terminate on the day the new Senate enters in function.

In time of war or in other exceptional circumstances when it is impossible to organize the elections, the Senate may, on the proposal from the King, declare the prorogation of its legislature for one year each time.

The declaration of prorogation of the Senate's legislature must be adopted by at least two-third of all the Senators.

Under the aforementioned circumstances, the Senate shall convene everyday, in permanence. The Senate has the right to put an end to the aforementioned special circumstances, whenever the situation permits.

If the Senate can not convene for imperative reasons, notably in case of territorial occupation by foreign forces, the declaration of the state of emergency must be automatically extended.

Article 103 *new*

The Senator's mandate is incompatible with actively exercising any public function, with the functions as the National Assembly's Member and with those as member of another institution stipulated in the Constitution.

Article 104 *new*

The Senators shall enjoy parliamentary immunity.

No Senator can in any case be prosecuted, arrested, kept in police custody or detained because of his/her opinions or of the votes expressed during the exercise of his/her functions. The prosecution against, the arrest, the police custody or the detention of a Senator is possible only when approved by the Senate or by the Standing Committee during the interval between sessions, except in flagrante delicto case. In this last case, the competent ministry must urgently report to the Senate or to the Standing Committee for decision.

The decision of the Senate's Standing Committee must be submitted to the next session of the Senate for adoption by two-third majority of all the Senators.

In all the aforementioned cases, the detention of, the prosecution against any Senator shall be suspended, if the Senate so decides by three-forth majority of all the Senators.

Article 105 *new*

The Senate shall have an autonomous budget for its functioning.

The Senators shall receive allowances.

Article 106 *new (one)*

The first session of the Senate shall open sixty days at the latest after the elections, upon the convening by the King.

Before starting its works, the Senate shall declare the validity of each Senator's mandate and shall vote separately to elect its President, its Vice-Presidents and all the Members of its various Commissions, by an absolute majority of all the Senators.

Before taking office, all the Senators shall take oath according to the text written in Annex 7 of the Constitution.

Article 107 *new*

The Senate shall convene in ordinary sessions twice a year.

Each Session shall last at least three months. Upon the request from the King or upon the proposal of the Prime Minister or of at least one-third of the Senators, the Senate shall convene in an extraordinary session.

Article 108 *new*

During the interval between the Sessions of the Senate, its Standing Committee shall be in charge of the functioning of the Senate.

The Standing Committee shall be composed of the President of the Senate, the Vice-Presidents of the Senate and the Presidents of all the Commissions of the Senate.

Article 109 *new*

The sessions of the Senate shall take place in the Capital City of the Kingdom of Cambodia, at the Senate Meeting Hall, except a decision otherwise specified in the convening act for circumstantial reasons.

Apart from the aforementioned cases and apart from the location and the date specified in the convening act, any session of the Senate shall be considered illegal and null in its own full right.

Article 110 *new*

The President of the Senate presides over the Senate sessions, takes cognizance of the laws and the resolutions adopted by the Senate, ensures the implementation of the Rules of Procedure and organizes the international relations of the Senate.

In case the President of the Senate is prevented from performing his/her duties for health reason, or for assuming his/her functions as Head of State ad interim or as Regent, or for being on mission abroad, a Vice-President shall replace him/her.

In case of resignation or decease of the President or of the Vice-Presidents, the Senate shall elect a new President or new Vice-Presidents.

Article 111 *new (two)*

The Senate sessions shall be public.

The Senate can convene in camera at the request of the President or of at least one-tenth of its Members, at the request of the King, of the Prime Minister or of the President of the National Assembly.

The session of the Senate is only valid, when there is:

a- the quorum of over two-third of all its Members for the votes requiring the majority of two-third of all its Members.

b- the quorum of over half of all its Members for the votes requiring the relative or absolute majority of all its Members.

The number of votes required for the adoption by the National Assembly, as provided in this Constitution, shall also apply to the adoption by the Senate.

Article 112 *new*

The Senate has the attribution to coordinate the work between the National Assembly and the Government.

Article 113 *new*

The Senate shall examine and give its views on draft law or on proposed law adopted by the National Assembly in its first reading, as well as all the questions submitted by the National Assembly, within a period not exceeding one month. In case of urgency, this time frame shall be reduced to five days.

If the Senate gives a favourable view, or gives no view, within the provided time limits, the law already adopted by the National Assembly will be submitted for promulgation.

If the Senate proposes amendments to these draft laws or these proposed laws, the National Assembly shall immediately examine them in a second reading. The National Assembly shall decide on the sole amendments proposed by the Senate, either by accepting or rejecting them, in totality or in part.

A shuttle between the Senate and the National Assembly shall proceed within a limited time frame of one month. This time frame shall be reduced to ten days for the budgetary texts and the laws on finances, and to two days in case of urgency declaration.

If the National Assembly exceeds or extends the time frame at its disposal for examination, the time frame by principle allocated for agreement between the two Chambers is increased as much.

In case the Senate purely and simply rejects them, the draft laws or the proposed laws can not be examined by the National Assembly in a second reading, before a time frame of one month. This time frame is reduced to fifteen days for budgetary texts and the laws on finances, and to four days in case of urgency declaration.

When examining the draft laws or the proposed laws in a second reading, the National Assembly shall adopt them by open ballot and at the absolute majority of all its Members.

The draft laws or the proposed laws, once adopted according to aforementioned modalities, are submitted for promulgation.

Article 114 *new (one)*

The Senate creates various necessary commissions. The organization and the functioning of the Senate shall be stipulated in the Senate's Rules of Procedure. These Rules of Procedure are adopted by absolute majority of all its Members.

Article 115 *new*

In case of decease, resignation of a Senator or loss of his/her membership which would take place at least six months before the end of the legislature, his/her replacement must proceed in the conditions set by the Senate's Rules of Procedure and by the law pertaining to the appointment and the elections of the Senators.

CHAPTER IX *new*
ON THE CONGRESS OF THE NATIONAL ASSEMBLY AND THE SENATE

Article 116 *new*

In case of necessity, the National Assembly and the Senate can convene in Congress to resolve the important issues of the country.

Article 117 *new*

The important issues of the country as provided in the Article 116 new, as well as the organization and functioning of the Congress shall be determined by a law.

CHAPTER X *new*
ON THE ROYAL GOVERNMENT

Article 118 *new (former Article 99)*

The Council of Ministers is the Royal Government of the Kingdom of Cambodia.

The Council of Ministers shall be headed by a Prime Minister, assisted by Deputy Prime Ministers as well by Senior Ministers, Ministers and Secretaries of State as members.

Article 119 *new (former Article 100)*

Upon the proposal of the President of the National Assembly in agreement with the two Vice-Presidents, the King assigns a high ranking personality among the Members of National Assembly from the elections winning party, to form the Royal Government. This assigned high ranking personality, accompanied by his collaborators who are Members of the National Assembly or members of the parties represented at the National Assembly and who are in charge of

ministerial functions within the Royal Government, solicits the confidence from the National Assembly. Once the National Assembly has voted the confidence, the King signs the Kret appointing the whole Council of Ministers.

Before taking office, the Council of Ministers shall take oath according to the text written in Annex 6.

Article 120 *new (former Article 101)*

The function of Member of the Royal Government is incompatible with any professional activity in the field of trade or industry and with the holding of any position in the public function.

Article 121 *new (former Article 102)*

All the Members of the Royal Government are collectively responsible to the National Assembly for the general policy of the Royal Government.

Each Member of the Royal Government is individually responsible to the Prime Minister and to the National Assembly for his/her own actions.

Article 122 *new (former Article 103)*

The Members of the Royal Government can not resort to a written or verbal order from whomever to decline their own responsibility.

Article 123 *new (former Article 104)*

The Council of Ministers shall convene every week in plenary session or in working session.

The plenary session is chaired by the Prime Minister. The Prime Minister can delegate to a Deputy Prime Minister the chairmanship of the working sessions.

All the minutes of the Council of Ministers' sessions shall be submitted to the King for His highest Information.

Article 124 *new (former Article 105)*

The Prime Minister can delegate his/her powers to a Deputy Prime Minister or to a Member of the Royal Government.

Article 125 *new (former Article 106)*

In case of the definitive vacancy of Prime Minister's position, a new Council of Ministers shall be appointed under the conditions provided by the present Constitution. If the vacancy is temporary, a Prime Minister ad interim shall be provisionally assigned.

Article 126 *new (former Article 107)*

Each Member of the Royal Government holds penal responsibility for the major or minor indictable offences while performing his/her functions.

In this case and in the case of serious misdeeds committed by a Member of Royal Government while performing his/her functions, the National Assembly can decide to seize the competent jurisdictions.

The National Assembly shall decide on such matter in a secret ballot by an absolute majority of all its Members.

Article 127 *new (former Article 108)*

The organization and functioning of the Council of Ministers are stipulated by a law.

CHAPTER XI *new*
ON THE JUDICIARY

Article 128 *new (former Article 109)*

The Judicial power is an independent power.

The Judicial power is the guarantor of impartiality and the protector of the citizens' rights and liberties.

The Judicial power covers all litigations, including administrative litigation.

This power is entrusted to the Supreme Court and to the Jurisdictions of the various categories and at all the degrees.

Article 129 *new (former Article 110)*

Justice is rendered in the name of Khmer people in accordance with the legal procedures and the laws in force.

Only the judges are vested with the judicial function. The judges shall fulfill their duties in strict respect of the law, in all honesty and conscientiousness.

Article 130 *new (former Article 111)*

No organ of the Legislative Power or of the Executive Power can exercise any judicial power.

Article 131 *new (former Article 112)*

Only the public prosecution has the right to take public action.

Article 132 *new (former Article 113)*

The King is the Guarantor of the independence of the Judiciary. The Supreme Council of Magistracy assists the King in this task.

Article 133 *new (former Article 114)*

The Magistrates are irremovable. However, the Supreme Council of Magistracy shall pronounce disciplinary sanctions against the Magistrates committing misdeeds.

Article 134 *new (former Article 115)*

The Supreme Council of Magistracy shall be created by an Organic Law which determines its composition and attributions.

The Supreme Council of Magistracy is placed under the Presidency of the King. The King can designate His Representative to preside over the Supreme Council of Magistracy.

The Supreme Council of Magistracy submits to the King the proposal for appointment of judges and public prosecutors to all the Jurisdictions.

To decide disciplinary sanctions against the judges and the public prosecutors, the Supreme Council of Magistracy convenes under the presidency of the Supreme Court's President or of the General Public Prosecutor to the Supreme Court, whether the case relates to the judges or the public prosecutors.

Article 135 *new (former Article 116)*

The statutes of judges and public prosecutors and the judicial organization shall be stipulated in separate laws.

CHAPTER XII *new*
ON THE CONSTITUTIONAL COUNCIL

Article 136 *new*

The Constitutional Council shall have the competence to guarantee the respect of the Constitution, to interpret the Constitution and the Laws adopted by the National Assembly and definitively reviewed by the Senate.

The Constitutional Council has the right to examine and to decide on litigations related to the elections of the Members of the National Assembly and to the elections of the Senators.

Article 137 *new (former Article 118)*

The Constitutional Council is composed of nine Members whose mandate is limited to nine years. One-third of its Members shall be renewed every three years. Three Members shall be appointed by the King, three elected by the National Assembly and three others elected by the Supreme Council of Magistracy.

The President is elected by the Members of the Constitutional Council. In case of a tie in the voting, the voice of the President prevails.

Article 138 *new (former Article 119)*

The Members of the Constitutional Council shall be chosen among the high ranking personalities holding high diplomas in law, administration, diplomacy or economics and having extensive professional experience.

Article 139 *new*

The functions as member of the Constitutional Council are incompatible with the functions as senator, as member of the National Assembly, as member of the Royal Government, as incumbent magistrate, as personnel in the public function, as President or Vice-President of a political party or as President or Vice-President of a trade union.

Article 140 *new*

The King, the Prime Minister, the President of the National Assembly or one-tenth of the National Assembly's Members, the President of the Senate or one-fourth of the Senators, may send the laws adopted by the National Assembly to the Constitutional Council for examination before their promulgation.

The rules of procedure of the National Assembly, the rules of procedure of the Senate and the organic laws must be sent to the Constitutional Council for examination before their promulgation. The Constitutional Council shall

pronounce within the time frame of thirty (30) days at the latest, whether the laws, the rules of procedure of the National Assembly and those of the Senate are or not in conformity with the Constitution.

Article 141 *new*

After a law has been promulgated, the King, the President of the Senate, the President of the National Assembly, the Prime Minister, one-fourth of the Senators, one-tenth of the National Assembly's Members, or the Courts can request the Constitutional Council to examine the constitutionality of that law.

Any citizen has the right to raise the unconstitutionality of the laws through the intermediary of the National Assembly's Members or that of the President of the National Assembly or of the Senators or of the President of the Senate, as provided in the aforementioned paragraph.

Article 142 *new (former Article 123)*

A provision of any article, declared by the Constitutional Council not in conformity with the Constitution, can not be promulgated or implemented.

The decision of the Constitutional Council is final without recourse.

Article 143 *new (former Article 124)*

The King consults the Constitutional Council on any proposal aiming at amending the Constitution.

Article 144 *new (former Article 125)*

The organization and the functioning of the Constitutional Council are subject to an organic law.

CHAPTER XIII *new*
ON THE ADMINISTRATIVE ORGANIZATION

Article 145 *new (one)*

The territory of the Kingdom of Cambodia is divided into Reach Theany (Royal Capital City), Khet (provinces), Krong (municipalities), Srok (districts), Khan (arrondissements), Khum (communes) and Sangkat (quarters).

Article 146 *new (one)*

Reach Theany, Khet, Krong, Srok, Khan, Khum and Sangkat are administered according to the conditions provided by an organic law.

CHAPTER XIV *new*
ON THE NATIONAL CONGRESS

Article 147 *new (former Article 128)*

The National Congress allows the citizens to be directly informed on various affairs of national interest, to raise issues and to submit suggestions to the State authorities for a solution.

Khmer citizens of both sexes have the right to participate in the National Congress.

Article 148 *new (former Article 129)*

The National Congress shall meet once a year, in early month of December upon the convening by the Prime Minister.

The National Congress shall proceed under the High Presidency of the King.

Article 149 *new*

The National Congress shall adopt suggestions to be submitted to the Senate, the National Assembly and the State authorities for consideration.

The organization and the functioning of the National Congress shall be stipulated by a law.

CHAPTER XV *new (two)*
ON THE ELECTION BODY

Article 150 *new (two)*

The National Election Committee is the body which has the competence for organizing, regulating and administering the Elections of the Senators and the Elections of the Members of the National Assembly and other elections as determined by law.

The National Election Committee shall exercise its competence independently and impartially in order to ensure free, accurate and fair elections in accordance with the principles of liberal multi-party democracy.

The functions as the Members of the National Election Committee are incompatible with the positions in the public function and the function as the members of other institutions as stipulated in the present Constitution. The member of the National Election Committee cannot be the member of political party or president of the non-governmental organization, association, trade unions or any commercial company.

The National Election Committee shall have an autonomous budget for its operation.

Article 151 *new (two)*

The National Election Committee is composed of nine Members whose mandate is five years. Four members shall be elected by the political party leading the Royal Government; four shall be elected by the political parties that

won seats in the National Assembly, not in coalition with the Royal Government, and the other one shall be elected with the consent of all political parties having seats in the National Assembly.

The Standing Committee of the National Assembly shall organize an open and transparent election of the National Election Committee's members. The Standing Committee of the National Assembly shall prepare the list of the composition of the National Election Committee to submit to the National Assembly for an absolute majority vote of confidence of all the Members of the National Assembly.

Members of the National Election Committee shall be appointed by Royal Decree.

In case, any Member of the National Election Committee loses its membership, the Standing Committee of the National Assembly shall conduct the procedure to choose the new member within the period of 15 days at the latest from the date of the loss of the membership. Detailed procedures for choosing a new member for replacement shall be determined separately by law.

In case of failing to organize the composition of the National Election Committee, the existing Members of the National Election Committee shall remain in office and shall have competence to organize the election in accordance with the law.

The organization and the functioning of the National Election Committee shall be determined by law.

CHAPTER XVI new (two)
ON THE EFFECT, THE REVISION AND THE AMENDMENT OF THE CONSTITUTION

Article 152 *new-two (former Article 150 new)*

The present Constitution is the supreme law of the Kingdom of Cambodia.

All the laws and decisions of all the state institutions must be absolutely in conformity with the Constitution.

Article 153 *new-two (former Article 151 new)*

The initiative of the revision or the amendment of the Constitution belongs to the King, to the Prime Minister and to the President of the National Assembly on the proposal from one-fourth of all the National Assembly's Members.

The revision or the amendment of the Constitution must be carried out by a constitutional law adopted by the National Assembly at the two-third majority of all its Members.

Article 154 *new-two (former Article 152 new)*

The revision or the amendment of the Constitution is prohibited when the nation is in a state of emergency, as provided in the Article 86.

Article 155 *new-two (former Article 153 new)*

The revision or the amendment of the Constitution cannot be done, if affecting the liberal multi-party democracy system and the constitutional monarchy regime.

CHAPTER XVII *new*
ON THE TRANSITIONAL PROVISIONS

Article 156 *new-two (former Article 154 new)*

The present Constitution, once adopted, shall be promulgated by the King of Cambodia with immediate effect.

Article 157 *new-two (former Article 155 new)*

After the present Constitution comes into force, the Constituent Assembly becomes the National Assembly.

The Rules of Procedure of the National Assembly shall come into force after their adoption by the National Assembly.

In case the National Assembly cannot take its function, the President, the First and the Second Vice-Presidents of the Constituent Assembly fulfill their mission within the Crown Council, if so required by the situation of the country.

Article 158 *new-two (former Article 156 new)*

After the present Constitution comes into force, the King is elected under the conditions provided in the Articles 13 new and 14.

Article 159 *new-two (former Article 157 new)*

The duration of the first legislature of the Senate is five years and comes to an end when the new Senate assumes office.

For the first legislature of the Senate:

– the total number of Senators shall be sixty-one,

– the King shall appoint two Senators, as well as the President and the two Vice-Presidents of the Senate,

– the other Senators shall be appointed by the King among the members of the political parties having their seats at the National Assembly, on the proposal from the President of the National Assembly and the President of the Senate,

– the Congress of the National Assembly and the Senate shall be held under the chairmanship of the Co- Presidents.

Article 160 *new-two (former Article 158 new)*

Laws and normative acts in Cambodia that guarantee the State properties, the rights, the liberties and the legal properties of private persons and that are in conformity with the national interests, shall remain in force until the new texts are made to amend or to abrogate them, except the provisions contrary to the spirit of the present Constitution.

The present Constitution
is adopted by the Constituent Assembly
in Phnom Penh, on September 21, 1993
at its second plenary session
Phnom Penh, September 21, 1993
The President,
Signed : SON SANN

ADDITIONAL CONSTITUTIONAL LAW TENDING TO ENSURE THE REGULAR FUNCTIONING OF THE NATIONAL INSTITUTIONS

Article 1.

This Constitutional Law aims at ensuring, under all circumstances, the good functioning of the national institutions in respecting the basic principles of a liberal multi-party democracy, according to the state of necessity.

Article 2.

At the beginning of each legislature, the National Assembly under the presidency of its most senior member, before starting its works and after the validation of each member's mandate, can proceed to adopt the texts of constitutional or legislative nature within the objective stipulated in the aforementioned Article 1.

After their adoption by the National Assembly, the most senior member must immediately take cognizance of these texts in accordance with the procedure reserved for them, until their promulgation and coming into force.

Article 3.

In case when the procedures stipulated in the Articles 82 and 119 new of the Constitution can not be implemented, the National Assembly, on the proposal of the majority political party, can proceed with the package vote to elect its President and its Vice-Presidents as well as the Chairpersons and Vice-Chairpersons of the Commissions, and at the same time to grant the confidence to the Royal Government.

Article 4.

The elaboration of the candidate lists for the elections and for the vote of confidence shall be organized as followed:

- the list of the candidates for Presidency, Vice- Presidencies of the National Assembly, as well as of those for Chairmanship and Vice-Chairmanships of specialized Commissions, must be prepared and proposed by the political parties which agree to form a coalition government, then conveyed to the most senior member of the National Assembly;

- upon the proposal by the majority political party at the National Assembly, submitted through the most senior member, the King designates a high ranking personality among the members of the National Assembly from the elections winning political party to form the Royal Government. This designated high ranking personality prepares the attribution of the different ministerial posts within the Royal Government, then sends the list of all its members to the most senior member of the National Assembly;

- the most senior member of the National Assembly shall combine these lists into a single one, composed of the candidates for Presidency, Vice-Presidencies of the National Assembly, for the Chairmanships and Vice-Chairmanships of all the specialized Commissions of the National Assembly as well as for the posts of Prime Minister and members of the Royal Government, in order to submit it to the vote of the National Assembly.

Article 5.

No debate is possible during the proceedings of the package vote, neither any explanation is possible after the proclamation of this vote result.

The National Assembly's Members vote in favor of or against this single list, proposed by its most senior member. The vote is done by a show of hands.

Article 6 *new of the Additional Constitutional Law*

The package vote shall be done at the absolute majority of all the National Assembly's Members.

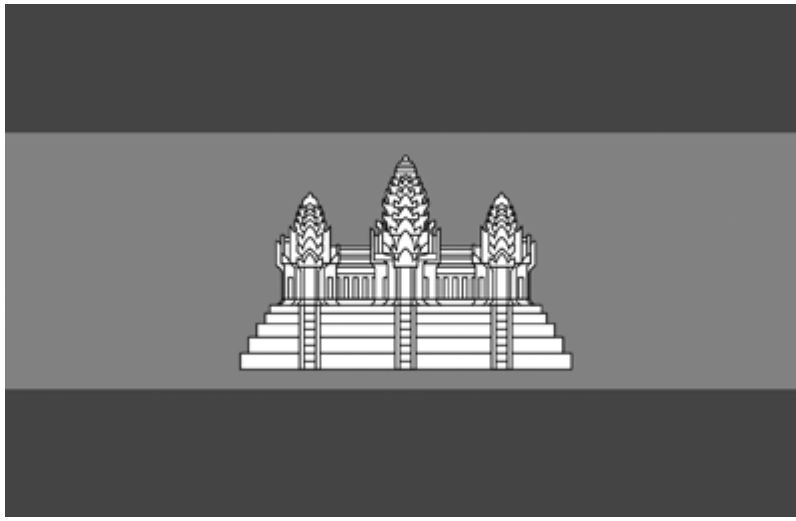
In case the vote at the first ballot is not decisive, the same procedure shall apply to the following ballots.

Article 7.

This Additional Constitutional Law is declared as urgent and comes into enforcement right from the beginning of the present legislature.

This Additional Constitutional Law is promulgated
by Kram No NS/RKM/0704/001 of July 13, 2004

NATIONAL FLAG



NATIONAL COAT OF ARMS

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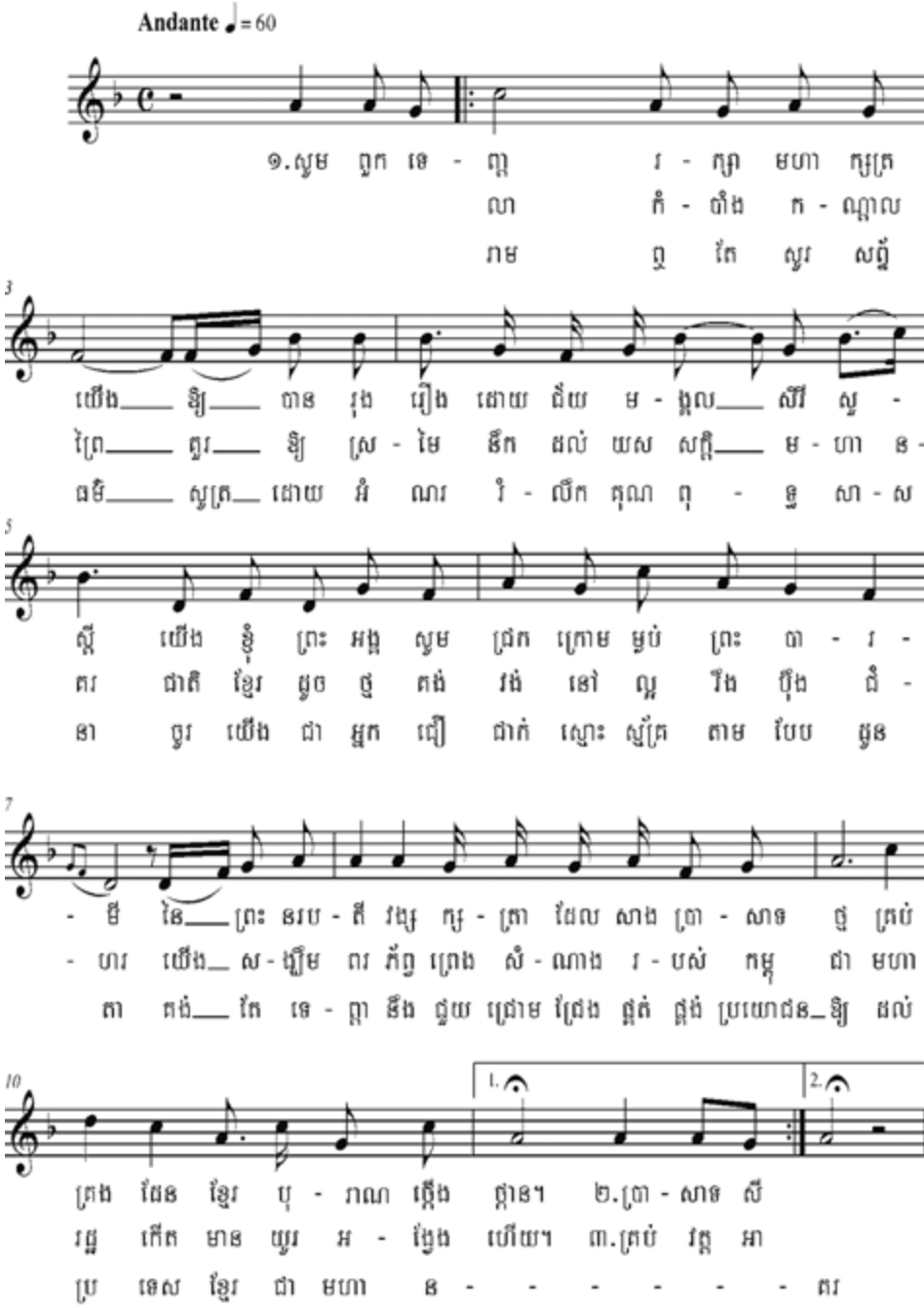
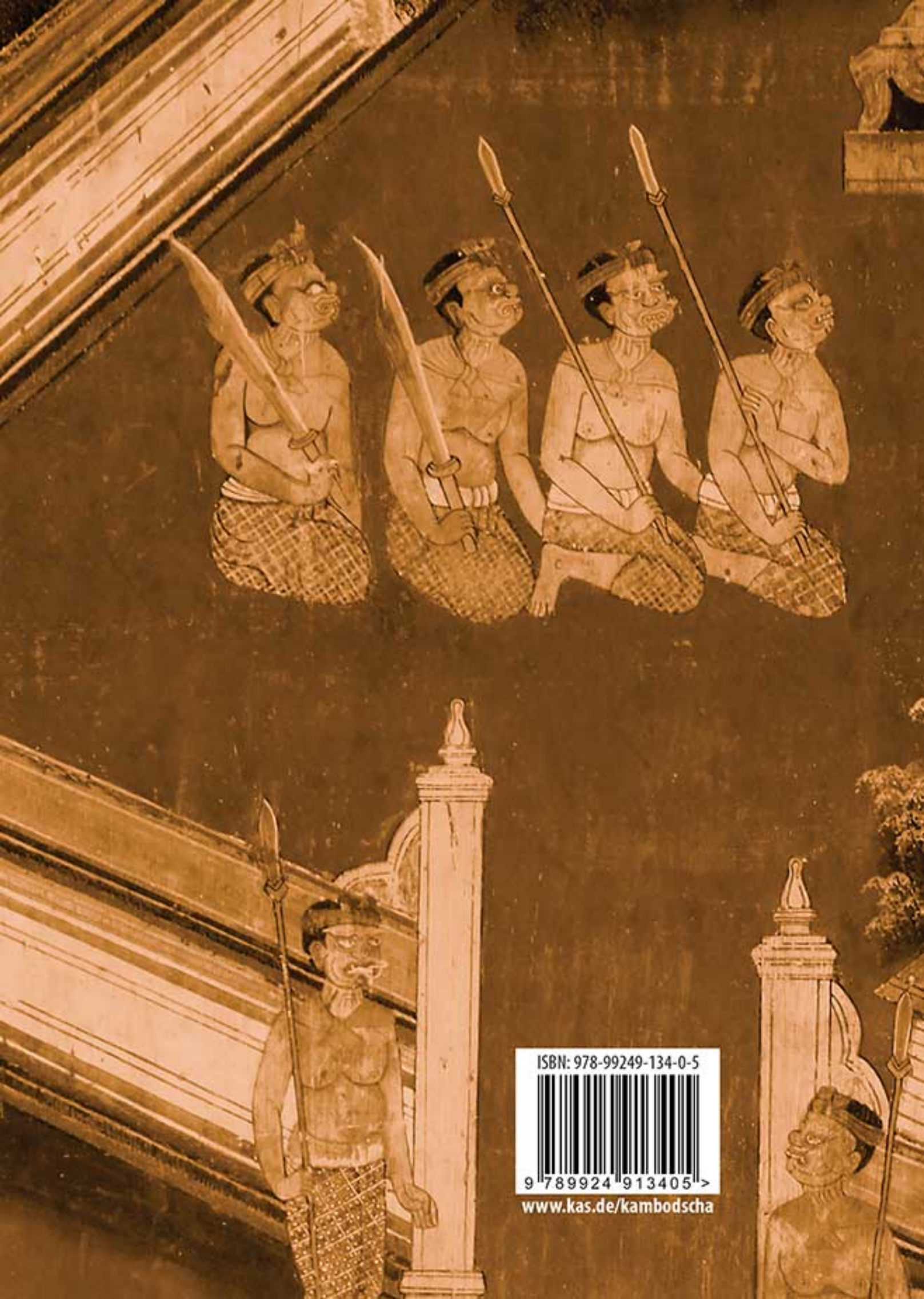

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