Perspectives on Cambodian Constitutional Law

NUM Research Series | August 2020



Edited by
HOR Peng
KONG Phallack
SOTH Sang Bonn

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RECTOR'S REMARKS

This NUM Research Series is composed of academic articles about perspectives on Cambodian constitutional law. It attempts to promote research activities among Cambodian scholars, professors, lawyers and policy makers who are strongly committed to writing and sharing their views of the constitution from different perspectives. This NUM Research Series is the academic research platform established for the publication of all articles on topics related to the development of Cambodian law. Authors are responsible for the contents of their own articles. A uniform citation and referencing system are not taken into consideration for this publication, but in future NUM will work together with this group of scholars to develop a Cambodian legal citation and referencing system. In this regard, authors are free to use their own referencing styles in this NUM Research Series.

There is no doubt that research is critically important for the development of the society and particularly for the legal sector due to the limited research culture, lack of resources and textbooks written by Cambodians in this country. For this reason, NUM together with this distinguished group of authors wish to create a research culture in Cambodia and we welcome all papers for the next NUM Research Series.

Finally, I would like to take this opportunity to thank all authors for their efforts and contributions despite their busy schedules. I hope that this book will add to the stock of general knowledge and provide greater insights in the area of legal development and reform of the country.

HOR Peng
Rector, National University of Management
03 August 2020

PREFACE

The Perspectives on Cambodian Constitutional Law is a joint effort of Cambodian and foreign authors who provide their respective views on their particular interests in the provisions enshrined in the Cambodian Constitution. The papers in this book do not necessarily reflect the views of the editorial team, but of authors from different angles. As human beings, none is perfect, therefore we welcome all constructive feedbacks for the improvement of next edition.

The publication is comprised of 10 papers written by 9 Cambodians and one foreigner. Each chapter is summarized as follows:

CHAPTER 1: THE FOUR FUNDAMENTAL PRINCIPLES OF THE CAMBODIAN CONSTITUTION AND THE FUTURE PERSPECTIVES FOR MODERN CAMBODIA. This chapter gives an overview on key points in each chapter of the Cambodian Constitution and elaborate the four fundamental principles of the constitution which are used for the basis for the development of the legal and judicial reform in Cambodia. This chapter neither provides any analysis nor assesses the implementation of the provisions of the constitution but walks readers through the key points highlighted in each chapter of the constitution to build a basis for reader to read the following chapters written by different authors and further researches and also set the light for understanding of arguable concepts of liberal democracy, rule of law, separation of powers and individual rights and the future perspective for modern Cambodia.

CHAPTER 2: THE DEVELOPMENT OF THE CONSTITUTIONAL LAW OF THE KINGDOM OF CAMBODIA. The chapter intends to observe Cambodia's constitutional evolution and its general trends. It also serves as general knowledge for public understanding of our constitutional State. A constitutional State is the State functioning in according with the Constitution and existing laws.

CHAPTER 3: THE CONSTITUTION OF CAMBODIA: THE PREAMBLE IN CONSTITUTIONAL QUESTIONS. The paper is a work focused on the preamble of the constitution of 1993 of the Kingdom of Cambodia. It is made in the attempt at trying to answer some questions concerning to the preamble of Cambodian Constitution, which are rarely raised for academic debate in Cambodia.

The readers of this article may find new knowledge on the constitutional values of the constitutional preamble with a focus on some key questions (i) what is the preamble to a constitution? (ii) what does the preamble talk about? (iii) why does Cambodia enshrine such written preamble? (iv) what are roles of the preamble in a constitutional design?, and (v) does the preamble has constitutional values?

CHAPTER 4: RIGHTS TO HEALTH: LEGAL AND REGULATORY ASSESSMENT OF PRIVATE SECTOR PROVISIONS OF HIV/AIDS SERVICE IN CAMBODIA. The study also examines legal framework of countries in the region. The study finds that provision of HIV services by private providers is not restricted but also not specified in current laws and ministerial regulations. However, private sector providers can require clear guidance to deliver comprehensive HIV services that are appropriately managed and adhere to regulations, guidelines, and reporting requirements. The overall recommendation is that the Ministry of Health should amend existing, or develop new, guidelines to explicitly regulate HIV service provision in the private sector.

CHAPTER 5: PROMOTING ECONOMIC RIGHTS FOR INDIGENOUS PEOPLE IN CAMBODIA. This paper will be in five parts that include, 1) introduction; 2) legal protection on economic rights of indigenous people in Cambodia; 3) Institutional protection; 4) Gaps and Impacts; and 5) Conclusion and recommendation.

CHAPTER 6: CONSTITUTIONAL RIGHT: A VIEW OF LAND RIGHTS IN CAMBODIA. This paper had the main purpose to check how land rights in Cambodia have been protected in the real practice. The research covered registration of both state land and private land the territory of Cambodia. Methodically, the collection of data of land registration from the Ministry of Land, Urban Planning and Construction was used for showing the statistical analysis. The research result showed that decentralizing the power of competent authority to with regard to land administration is a way to ensure the protection of land rights. The research suggested speeding up land registration for the whole country so that landholders are able to make use of their land rights effectively to fulfill the economic needs and also reduce land disputes.

CHAPTER 7: THE SUPREME COURT AND CAMBODIAN

CONSTITUTIONAL COUNCIL AS GUARDIAN OF THE CONSTITUTION: SOME PRELIMINARY REMARKS. This paper looked into some key decisions of the Constitutional Council and judgments of the Supreme Court, finding out that these organs have directly or indirectly upheld those principles in their decisions or judgments although without detailed reasoning. This is partially positive development. The paper recommended those texts to be regularly published more widely for the sake of further researches.

CHAPTER 8: THE PROTECTION OF PRIVATE OWNERSHIP UNDER CAMBODIAN CONSTITUTION: INTERSECTION OF TRADEMARK LAW AND CONSTITUTIONAL LAW. This Paper attempts to examine the intersection of the trademark and constitutional law aiming to address whether or not trademark rights could be considered as a type of private ownership recognized and protected under Article 44 of the Constitution and whether or not any expropriation of the ownership of the trademark right should be constitutionally protected the same as other private ownership over land and real rights. This Paper then will examine some trademark cases and assess whether or not the principles of Article 44 of the Constitution could be applied to address issues arisen out of those trademark cases. The ultimate objective of this Paper is to suggest a legal solution to the problem that adheres not only to the protection of trademark rights under the trademark law but also the protection of private ownership under the Constitution.

CHAPTER 9: THE IMPLICATION OF JUDICIAL REFORM IN CAMBODIA FROM PERSPECTIVE OF CONSTITUTIONAL PRINCIPLES AND INTERNATIONAL STANDARD OF HUMAN RIGHT. The paper will analyze the implication of current judicial reform in Cambodia through the enactment and enforcement of the three main organic laws pertaining to judiciary in response to the constitutional principles of democracy such as separation of power and independence of judiciary and also see how they fulfill the international standard of human right such as right to fair trial.

CHAPTER 10: DEVELOPMENT ASSISTANCES AND THE RULES OF EVOLUTION: A CASE STUDY ON THE ATTEMPT TO BRING DEMOCRACY AND RULE OF LAW TO CAMBODIA. The paper examines a mainstream assumption in western development aid policies regards the lack of democracy and

the rule of law as the key reason for the worst problems in developing countries. Hence, it is concluded a substantial part of the attention of development assistance must be dedicated to the attempt to introduce democratic institutions and a western-style legal system in these countries. This study is going to explain by the example of Cambodia, why these attempts have frequently failed.

The editors thank authors, Vice Rector Ly Sok Heng, Mrs. POK Phearoun and others for the strong and patient support of this project. Despite other obligations, they spent their valuable time and energy to write their chapters.

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THE FOUR FUNDAMENTAL PRINCIPLES OF THE CAMBODIAN CONSTITUTION AND THE FUTURE PERSPECTIVES FOR MODERN CAMBODIA

Prof. KONG Phallack[*]

ABSTRACT

This chapter gives an overview on key points in each chapter of the Cambodian Constitution and elaborate the four fundamental principles of the constitution which are used for the basis for the development of the legal and judicial reform in Cambodia. This chapter neither provides any analysis nor assesses the implementation of the provisions of the constitution but walks readers through the key points highlighted in each chapter of the constitution to build a basis for reader to read the following chapters written by different authors and further researches and also set the light for understanding of arguable concepts of liberal democracy, rule of law, separation of powers and individual rights and the future perspective for modern Cambodia.

I. INTRODUCTION

The constitution of the Kingdom of Cambodia was adopted on September 21, 1993 and came into force on September 24, 1993. The present constitution is the supreme law of the nation. All laws and decisions of all state institutions must be absolutely in conformity with the Constitution.[2]

The present constitution composes of a preamble, 17 chapters and 160 articles and it has been amended 8 times.[3] In addition to the 1993 constitution and the 8 amendments, there is Law on Additional Constitutional Law tending to ensure the regular function of the state institutions and it was promulgated via the Royal

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[2] Constitution, Art.152

[3] The 1st amendment ((Royal Kram dated 14 July, 1994) the 2nd amendment (Royal Kram No. NS/RKM/0399/01 dated 8 March, 1999), the 3rd amendment (Royal Kram No. NS/RKM/0701/11 dated 28 July, 2001), the 4thamendment (Royal Kram No. NS/RKM/0605/018 dated 19 June, 2005), the 5th amendment (Royal Kram No. NS/RKM/0306/00 dated 9 March, 2006), the 6th amendment (Royal Kram No. NS/RKM/0208/008 dated 19 February, 2008), the 7th amendment (Royal Kram No. NS/RKM/1014/022 dated 23 October, 2014) and the 8thamendment (Royal Kram No. NS/RKM/0218/002 dated 27 February, 2018)

Kram No. NS/RKM/0704/001 dated 13 July, 2004. Constitutional scholars and experts debated whether the additional constitutional law is a new constitution or an amendment of the constitution. However, the Constitutional Council of the Kingdom of Cambodia interprets that "*Whereas the Constitutional Council has examined the constitutionality of many laws, but has never examined the constitutionality of a law having the quality of a constitution such as this Additional Constitutional Law. Furthermore, the Additional Constitutional Law is a supreme law stipulating the objectives of the law containing separate articles, and having a hierarchy equal to that of the 1993 Constitution; therefore, this Additional Constitutional Law is the Constitution of which the constitutionality cannot be examined*".[4]

II. PREAMBLE

The Preamble of the constitution recalls the glorious time of Khmer civilization as prosperous nation with large territory; a terrifying decades of civil wars, and unforgettable suffering and disaster of the nation; and a burst of consciousness, rising up with the resolute determination in order to reunite, to strengthen the national unity, to defend the territory, to preserve the sovereignty and the marvelous civilization of Angkor, to rebuild a country and become once again an " Oasis of Peace" based on the system of liberal multiple-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.

III. SOVEREIGNTY

Chapter I of the constitution[5] stipulates the Sovereignty of the Kingdom of Cambodia where the King shall fulfill his functions according to the constitution and the principles of liberal multi-party democracy. It declares that the Kingdom of Cambodia is an independent state, sovereign, peaceful, permanently neutral and non-aligned state. According to the constitution, the Kingdom of Cambodia is an indivisible state and the territorial integrity of Cambodia is absolutely inviolable within its borders as defined in 1/100,000 scale map made between the years 1933-1953 and internationally recognized between the years 1963-1969. Khmer

[4] Constitutional Council (2004), the Decision nº 060/002/2004 CC.D of September 02, 2004: Request of the 21 Members of the National Assembly for the examination of the constitutionality of the Additional Constitutional Law to guarantee the regular functioning of the National Institutions. It can be retried from https://www.ccc.gov.kh/detail_info_en.php?_txtID=422

[5] Constitution, Chapter I: Art 1-6

is an official language and scripts of the nation and Phnom Penh is the Capital of Cambodia. This chapter has been brought to the discussion among political scientists, politicians, civil societies organizations about the principles of liberal multi-party democracy and territory of Cambodia and their implementation.

IV. THE KING

Chapter II of the constitution enshrines the king and his roles as a head of state; a 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. The King assumes his role as a supreme arbiter to ensure the regular execution of public powers. The King is the Supreme Commander of the Royal Khmer Armed Forces, the President of the Supreme Council of the National Defense. Under the constitution, the King is the head of state for life and inviolable. He incarnates the symbol of the national unity and continuity. In case when the national faces danger, the King will make a public proclamation placing a country in state of emergency after a unanimous agreement from the Prime Minister, the President of the National Assembly and the President of the Senate. Additionally, the king appoints a Prime Ministers, signs promulgation of the constitution, treaties and conventions, laws after their approval by the National Assembly and the Senate and also sign royal decrees and performs other duties stipulated in the constitution.[6]

V. RIGHTS AND DUTIES OF KHMER CITIZENS

Chapter III of the constitution 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.[7]

[6] Constitution, Chapter II: Art 7-30

[7] Constitution, Chapter III: Art 31-50

VI. THE POLITICAL REGIME

Chapter IV of the constitution adopts a policy of liberal multi-party democracy, the powers of Khmer and the separation of power. The constitution declares that Kingdom of Cambodia maintains resolutely a policy of permanent neutrality and non-alignment. The Kingdom of Cambodia coexists peacefully with its neighbors and with all other countries throughout the world and 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. Furthermore, the constitution states that any treaty and agreement incompatible with the independence, sovereignty, territorial integrity, neutrality and national unity of the Kingdom of Cambodia shall be abrogated.[8]

VII. THE ECONOMY

Chapter V of the constitution determines the market economy system; the monetary management and the financial system; taxation; national budget; and the state property of Cambodia. The constitution states the state's obligations to 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; preserve and protect the environment and the balance of natural resources, and to regulating the markets in order to secure a suitable living standard for the citizens.

According to the constitution, Khmer citizens have the right to choose professions. 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. Furthermore, the constitution empowers the State to forbid and punish individuals to import, manufacture or sell illicit drugs, counterfeit products, expired goods harmful to the consumers' health and life.[9]

VIII. THE EDUCATION, THE CULTURE AND THE SOCIAL AFFAIRS

Chapter VI of the constitution stipulate obligations of the state to provide quality of education, preserve and develop national culture; protect and develop the Khmer language according to the needs and preserve and protect the ancient monuments, antiques, and to restore the historical sites; and guarantee health

[8] Constitution, Chapter IV: Art 51-55

[9] Constitution, Chapter V: Art 56-64

of people by giving full consideration to disease prevention and medical cares, According to the constitution, poor people shall receive free medical consultations in public hospitals, infirmaries and maternities. Furthermore, the constitution provides that 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; provide assistance to the disabled persons and to the families of combatants who sacrificed their lives for the nation; and establish a social security regime for workers and employees.[10]

IX. THE NATIONAL ASSEMBLY, THE SENATE AND THE CONGRESS OF THE NATIONAL ASSEMBLY AND THE SENATE

Chapter VII[11] and Chapter VIII new[12] of the constitution respectively enshrines the lower house and the upper house of the Cambodian Parliament. The lower house is called the National Assembly and the upper house is called the Senate. The National Assembly comprises 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. The Senate is composed of appointed members and members elected at restricted suffrage, aged 40 years at least and having Khmer nationality by birth. According to the Constitution, number of the Senators must not exceed half of the total number of the National Assembly's Members. The legislature of the Senate is of 6 years. Organization and functioning of the two houses are regulated in the constitution, and their respective internal regulations. According to the Chapter IX new of the constitution, in case of necessity to resolve the important issues of the country the National Assembly and the Senate hold a joint session which is called the National Assembly and the Senate Congress.[13]

X. THE ROYAL GOVERNMENT

Chapter X new of the constitution defines the Council of Ministers is the

[10] Constitution, Chapter VI: Art 65-75

[11] Constitution, Chapter VII: Art 76-98-new

[12] Constitution, Chapter VIII-new: Art 99-new -115-new

[13] Constitution, Chapter IX new, Art 116 new-117 new

Royal Government of the Kingdom of Cambodia and it is led by the Prime Minister, assisted by Deputy Prime Ministers as well by Senior Ministers, Ministers and Secretaries of State as members. The Prime Minister and his cabinet members are appointed by the King upon the vote of confidence by the National Assembly and the whole cabinet shall take an oath before taking an office. All the Members of the Royal Government are collectively responsible to the National Assembly for the general policy of the Royal Government. The Members of the Royal Government cannot resort to a written or verbal order from whomever to decline their own responsibility. While holding position in the Royal Government, each member of the Council of Ministers cannot perform any professional activity in the field of trade or industry. He or she is individually responsible to the Prime Minister and to the National Assembly for his/her own actions and 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.[14]

XI. THE JUDICIARY

Chapter XI new of the constitution prescribes the independent power of judiciary as the guarantor of impartiality and the protector of the citizens' rights and liberties. The King is the Guarantor of the independence of the Judiciary. The Supreme Council of Magistracy assists the King in this task. The judicial power covering all litigations, including administrative litigation and it is entrusted to the Supreme Court and to the Jurisdictions of the various categories and at all the degrees. According to the Constitution, the Magistrates are irremovable. However, the Supreme Council of Magistracy shall pronounce disciplinary sanctions against the Magistrates committing misdeeds.[15]

XII. THE CONSTITUTIONAL COUNCIL

Chapter XII new of the constitution sets up the Constitutional Council composing 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

[14] Constitution, Chapter X new, Art 118 new- Art 127 new

[15] Constitution, Chapter XI new, Art 128 new- Art 135 new

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. According to the Constitution, the Constitutional Council has 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. According to the Constitution, 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. The decision of the Constitutional Council is final without recourse.[16]

XIII. THE ADMINISTRATIVE ORGANIZATION

Chapter XIII new of the constitution divides the territory of the Kingdom of Cambodia into Reach Theany (Capital), Khet (Province) Krong (municipalities), Srok (districts), Khan (arrondissements), Khum (communes) and Sangkat (quarters). Reach Theany, Khet, Krong, Srok, Khan, Khum and Sangkat are administered according to the conditions provided by their respective organic law.[17]

XIV. THE NATIONAL CONGRESS

Chapter XIV new of the constitution determines the National Congress and rights of Khmer citizens to participate in the National Congress. According to the constitution, 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. The National Congress shall meet once a year, in early month of December upon the convening by the Prime Minister and shall be proceeded under the High Presidency of the King. Any suggestions adopted during the National Congress shall be submitted to the Senate, the National Assembly and the State authorities for consideration.[18]

XV. THE ELECTION BODY

Chapter XV new (two) of the constitution enshrines the National Election Committee (NEC), its competence, mandate, composition and their autonomous budget for operation. According to the Constitution, the NEC is composed of nine members whose mandate is five years. Four members are elected by the political

[16] Constitution, Chapter XII new, Art 136 new- Art 144 new

[17] Constitution, Chapter XIII, Art 145 new- Art 146 new

[18] Constitution, Chapter XIV, Art 147 new- Art 149 new

party leading the Royal government, four members are elected by political parties won seats in the National Assembly not in coalition with the Royal Government and the other one is elected with the consents of all political parties won having seats in the National Assembly. The NEC is entrusted to organize, regulate and administer elections of members of the Senate and the National Assembly and other elections determined by law and 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.[19]

XVI. THE EFFECT, THE REVISION AND THE AMENDMENT OF THE CONSTITUTION

Chapter XVI new (two) of the constitution states that 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. 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. The revision or the amendment of the Constitution cannot be done, if affecting the liberal multi-party democracy system and the constitutional monarchy regime and it is also prohibited when the nation is in a state of emergency. According to the constitution, only the King, the Prime Minister and the President of the National Assembly can initiate the revision or the amendment of the Constitution on the proposal from one-fourth of all the National Assembly's Members.[20]

XVII. TRANSITIONAL PROVISIONS

Chapter XVII new of the constitution stipulates the immediate entry into force of the constitution, the birth of the National Assembly and its rules and procedures, the election of the new King, the mandate and members of the senate, the congress of the National Assembly and the Senate to be held under the chairmanship of their co-presidents, and the validity of existing laws and normative acts in Cambodia that guarantee the State properties, the rights, the liberties and legal properties of private persons and that are in conformity with the national interest except provisions contrary to the spirit of the present constitution.[21]

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[19] Constitution, Chapter XV Art 150 new (two)- Art 151 new (two)

[20] Constitution, Chapter XVI new (two), Art 152 new (two)- Art 155 new (two)

[21] Constitution, Chapter XVII new, Art 156 new (two)- Art 160 new (two)

XVIII. THE FOUR FUNDAMENTAL PRINCIPLES OF THE CONSTITUTION

In 2003, The Royal Government of Cambodia adopted the legal and judicial reform strategies in Cambodia.[22] The adoption found the basis on the interpretation of the four fundamental concepts in the constitution namely (i) liberal democracy; (ii) rule of law; (iii) separation of powers; and (iv) individual rights. According to the Legal and Judicial Reform strategies, these four fundamental concepts can be briefly explained as follows:

The Liberal Democracy Principle. The principle of Liberal Democracy in Cambodia is designed based on four (4) values including (a) representation; (b) decentralization of powers; (c) promoting a free market economy; and (d) provision of public services.[23] These elements are the basis for further study on analysis and assessment of Cambodian liberal democracy from the Cambodian context and how the system should be engineered and reshaped for this young democratic country. Changing the mindsets and attitudes of all citizens from different walks of lives can be the departure for strong, stable and sustainable Cambodia. Experiencing the war, regaining the peace, and redeveloping the country from barehand in recent decades should be the lessons learnt for Cambodians. The mindsets, the attitude change and national unity should be the foundation for Cambodia future liberal democracy in the new era of multi-polar system in the international politics.

The Rule of Law Principle: The concept of rule of law is broadly defined but in the context of Cambodia it is determined based on six (6) values comprise of (a) the hierarchy of laws; (b) predictability; (c) transparency; (d) accountability; (e) due process; and (f) enforcement.[24] Therefore, any assessment of the rule of law in Cambodia on how law is made, implemented and enforced shall be based on the six (6) values. The sub-elements of each values should be developed and justified based on the constitution and core principles of international instruments ratified by Cambodia which are in line with local customs and practice. The pool of legal experts in different fields are needed for the countries. The currently-hybrid legal system should be assessed and distinguished the local elements and the borrowed or transplanted foreign elements of the law whether they work for Cambodian, and we have sufficient competent human capital for this sector starting from the

[22] Council for Legal and Judicial Reform, Legal and Judicial Reform Strategies, 2003, p.7. The four basic concepts/principles from the 1993 constitution namely: (i) Liberal Democracy; (ii) Rule of Law; (iii) Separation of Powers; and (iv) Individual Rights.

[23] Joerg MENZEL, Hor Peng, Kong Phallack, Introduction to Cambodian law, KAS, 2012, pp.18-19

[24] Joerg MENZEL, Hor Peng, Kong Phallack, Introduction to Cambodian law, KAS, 2012, pp.18-19

law making till the implementational and enforcement. A strong rule of law of the country should start from the strong legal education, from the general education to higher education, professional education and continued legal education. In addition to that the study of Law and technologies are crucial in the era of digital economy because it is the global trend.

The Separation of Powers Principle: The constitution provides that Cambodians are master of the countries and all powers belong to Khmer citizens and citizens excise their powers through the three branches of the government. For this reasons, the Separation of Powers Principle in the context of Cambodia is architected based on three (3) values constitute (a) division of functions between the legislative power (National Assembly and the Senate), the executive power (the Royal Government of Cambodia), the Judicial Power (Supreme Court, Appeal Courts and Courts of First Instance). three branches of government; (b) checks and balances between the three powers; and (c) the independence of the judiciary[25] as well as quasi-judicial bodies, arbitration bodies as well as ombudsman mechanisms are important to make sure the law is properly implemented and due process of law is guaranteed and people can exercise their rights to all grievance mechanisms when their rights are violated or they cannot freely exercise their rights according to the law.

The Rights of Individual Principles or Principles of Individual Rights. Rights of individual is guaranteed under the constitution. To insure people can exercise their rights, five (5) values are introduced into the legal and judicial reform strategies. These five values constitute in the Principles of Individual Rights are (a) personal freedoms and rights; (b) property rights; (c) participation; (d) access to justice and the right of appeal; and (e) access to information.[26] This suggests that all policies, laws both primary law (laws passed by the Parliament) and secondary legislation or implementing regulations derived from the primary law or established by the executive branch and decision of the judiciary, quasi-judicial bodies, arbitration bodies as well as ombudsman mechanisms shall respect the Principles of Individual Rights.

Deriving from the four fundamental concepts and values responding to each concept, 63 interventions were determined and sub-divided roughly into nine component areas in the reform document such as a i) legal reform program; ii) laws pertaining to the functions of the justice sector; iii) implementation of certain

[25] Joerg MENZEL, Hor Peng, Kong Phallack, Introduction to Cambodian law, KAS, 2012, pp.18-19

[26] Joerg MENZEL, Hor Peng, Kong Phallack, Introduction to Cambodian law, KAS, 2012, pp.18-19

laws pertaining to the functions of justice sector institutions; iv) implementation of certain laws pertaining to the independence of the judiciary; v) implementation of certain laws pertaining to the administration of justice; vi) implementation of certain laws pertaining to enforcement; vii) implementation of certain laws pertaining to accountability; viii) legal education and training; and viii) transparency and information.[27] In order to achieve 63 intervention, seven strategic objectives were determined namely i) Improve the protection of personal rights and freedoms (Strategic objective 1); ii) Modernization of the legislative framework (Strategic objective 2); iii) Provide better access to legal and judicial information (Strategic objective 3); iv) Enhance quality of legal processes and related services (Strategic objective 4); v) Strengthen judicial services i.e. the judicial power and prosecutorial services (Strategic objective 5); vi) Introduce alternative dispute resolution methods (Strategic objective 6); and vii) Strengthen legal and judicial sector institutions to fulfill their mandates (Strategic objective 7).[28]

In order to implement these said seven strategic objectives, 29 April 2005, the Council of Ministers formally adopted the Plan of Action comprising of 97 priority actions corresponding interventions for each of the strategic objectives and they are clustered into short, medium and long-term priorities.[29] The priorities action plan of the Legal and judicial reform strategies are currently in the implementation phase, but there is no comprehensive study yet on the progress, impacts and challenges yet since the implementation in 2009. However, in 2016, the briefing note of the National Assembly Commission No.6 on Legislation and Justice, concluded that *"the legal and justice system has been steadily improved through legal and judicial reforms. After the development of the legal and justice strategy and the Plan of Action for the strategy, the RCG has, to date, accomplished significant achievements with the plan. However, issues and challenges remain and they require constant actions and additional policies to ensure a transparent legal and judicial system in Cambodia. These actions and policies may include: increasing the number of judges, systematically recording data related to the legal and justice system, increasing salary and benefits for judges, prosecutors and budget for courts and, improving the ethics of judges and prosecutors through continuous training and law enforcement. Efforts in promoting the use of alternative dispute resolution should be increased in order to avoid overloading provincial/municipal courts and*

[27] Joerg MENZEL, Hor Peng, Kong Phallack, Introduction to Cambodian law, KAS, 2012, pp.19-20

[28] Joerg MENZEL, Hor Peng, Kong Phallack, Introduction to Cambodian law, KAS, 2012, p.20

[29] Joerg MENZEL, Hor Peng, Kong Phallack, Introduction to Cambodian law, KAS, 2012, p.20

thereby decreasing the backlog of cases currently awaiting trials. Alternative dispute resolution should also bring down the number of prisoners, who are overcrowding many of the prisons across the country. By bringing down the number of prisoners, the state can also save on its prison budget for other important purposes." [30]

To date of writing, the author cannot access to any progress report on how the 97 priority actions have been implemented. Since the country is committed to the justice reform, the author recommends the Ministry of Justice to conduct a comprehensive assessment on implementation of the 97 priority actions to measure the progress, and challenges of implementation of the legal and judicial reform deriving from the four fundamental principles above. They assessment can help the government to reshape the second phase of legal and judicial reform for Cambodia and set the road-map for building Cambodia in the new century of globalization/ fragmental globalization, emerging multiple players in the new geo-politics as well as a trend of global crisis facing by all nations due to the Covid19 pandemic and it also the test for the leadership of all leaders in the world and in particular in Cambodia.

In conclusion, within the knowledge of Cambodia, the constitution is the only legal document that has been amended 8 times plus an additional constitutional law. The amendment is made due to the politics of the country and the reform processes. The study of Cambodian constitution should not rely on the texts of the constitution and its amendments, but also the decisions of the Constitutional Council because its decision is final and biding which is part of the supreme law as well despite there are critics of decisions on qualities and detail explanation with reasons. But this is the law and practice of Cambodia. Young scholars and researchers should foresee the future, revisit the past experience, think of the current development of digital economy and internet of things, and build a new future of Cambodian legal system based on the four fundamental principles under the constitution which create a roadmap for social engineering and architecture of modern Cambodia in the new century.

END

[30] Ms. Vann Nary, Legal and Judicial Reform in Cambodia (Briefing Note), 2016, The Parliamentary Institute of Cambodia, PIC, p.11, retrieved from https://www.pic.org.kh/images/2016Research/20170505_Legal_Judicial_Reform_Eng.pdf

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THE DEVELOPMENT OF THE CONSTITUTIONAL LAW OF THE KINGDOM OF CAMBODIA

HOR Peng [*]

ABSTRACT

This article is the study of the development of the current Cambodian written constitutional law which has been implemented for 25 years. The study focuses on both constitutional doctrine and general trend through carefully examining on the constitutional amendments, interpretations and newly enacted laws.

I. INTRODUCTION

On the occasion of the 25th Anniversary of the Constitution of the Kingdom of Cambodia, as an academics, I would like to say a few words on constitutionalism. I am proud to be a Khmer citizen because Cambodia is an old nation in Southeast Asia which achieved a great civilization as a sovereign State. Cambodia today has emerged as a stable democratic State with a growing free market economy. I really appreciate our constitutional founders who were politically committed to the current Constitution that brought Cambodia into full peace and economic development. In this paper, I try to observe Cambodia's constitutional evolution and its general trends. It also serves as general knowledge for public understanding of our constitutional State. A constitutional State is the State functioning in according with the Constitution and existing laws.

II. HISTORICAL CONTEXT AND CONSTITUTIONAL DOCTRINES

Cambodia's Constitutional law today is based on a written Constitution. Its modern historical roots started since 1947.[2] However, throughout 72 years of its application, Cambodia went through six written constitutional changes (political regime changes) and the current Constitution is the latest written Constitution

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[2] *See* Hor Peng, The Modern Era of Cambodian Constitutionalism: Constitutional Analysis of Historical and Contemporary Development, *in* Hor Peng, Kong Phallack and Jorg Menzel (Eds), Introduction to Cambodia Law (KAS, 2012, pp.23-69).

which came into effect on September 24th, 1993.[3] The current written Constitution orders to establish both traditional and modern constitutionalism in order to re-create a modern constitutional state and until recently its applicable *enforcement* went through nine amendments and many constitutional interpretations.[4] In this sense, Cambodian constitutionalism is soft flexible and dynamic. It looks good in the situation of the constitutional development. There is, however, a legal boundary in making revisions or amendments of the Constitution, if affecting the liberal multiparty democracy system and the constitutional monarchy regime.[5] The State is bound by constitutional order. Cambodia's current constitutional State is evolutionally derived from traditional constitutionalism -Angkor Civilization (Kingship, Religion, Royal Officers/Oknar and Citizen). These traditional values created the current national motto (Nation, Buddhism, & Kingship). The Nation in Khmer image is referred to as the national soul or the public spirit of Khmer society including People, Territories, Culture, Arts, Temples, Historical Places, and the State (Government and Institutions). The Buddhism currently is the religion of the State and the people. It is not separated as the western countries have done. Khmer people believe in Buddhism as a mostly practical way of daily life, and it serves as Khmer morality and virtues for all aspects of Khmer culture and customs. However, Cambodia today fully respects all citizen's rights to belief. The Kingship (Monarchy) in traditional belief was represented by the State, the God and to be the highest Ruler of the country playing basic roles as guarantor and the protector of the nation, religion, and the State.[6] In this sense, the current Constitution obligates the State and Citizen to protect, promote and respect Khmer traditional dignity and modern values.

On the other hand, the modern constitutional values-based democracy, human rights and rule of law were accepted as crucial important part in Cambodian current modern politics. This basic concept re-introduced to Cambodia by King

[3] *See* Jörg Menzel, Cambodia From Civil War to a Constitution to Constitutionalism (pp.7-39), *see* also Hor Peng, the Constitution of the Kingdom of Cambodia: The Evolution of Constitutional Theories and Interpretation (pp.43-51) and *see* also Yan Vandeluxe, t*he Historical Development of Cambodia's Constitutions* (pp.55-67). These three academic articles were published *in* Hor Peng, Kong Phallack and Jorg Menzel (Eds) Cambodian Constitutional Law (KAS, 2016). *See* also Hor Peng, the Modern Era of Cambodian Constitutionalism, Constitutional Analysis of Historical and Contemporary Development (p.23-69) *in* Hor Peng, Kong Phallack and Jorg Menzel (Eds), Introduction to Cambodia Law (KAS, 2012, pp.23-69).

[4] There were 9 times of constitutional amendments and many interpretations of constitutional provisions which were published in official website of Constitutional Council, www.cc.org.

[5] *See* Article 155 new-two of the current written Constitution of Kingdom of Cambodia 1993

[6] *See* Hor Peng, The King of Kingdom of Cambodia: A Brief Account of Constitutional Roles of the King *in* Hor Peng, Kong Phallack, jog Menzel, Cambodian Constitutional Law (KAS, 2016, pp.107-110).

Sihanouk and Prime Minister Hun Sen's initiatives and then it was fully supported by conflict parties and accepted by the people as a whole by election.[7] Democracy in Cambodian refers to the people as the master of the country and all State's powers are belonging to the people; and the people use their powers through democratic elections and their representatives, executive, legislative and judicial branch.[8] It transformed Cambodia into a modern political system based on parliamentary democracy which elections and political parties are great importance in the current modern politics. In Cambodia, all politicians have to be passed by the party system-based elections otherwise it is unlawful. This tendency is global trend of parliamentary democracy.

The basic concept of human rights in Cambodia is mostly similar with the basic concept of the universal declaration of human rights or international treaties and conventions in regards to human rights or civil liberty. The constitutional rights are the basic rights and freedom of Khmer citizens to participate actively in the political, economic, social and cultural life of the nation. 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 origins, social status, wealth or other situations. The exercise of such rights and liberties shall be in accordance to written law. In this regard, human rights in practical reality is safeguarded under the rule of law. Theoretically Cambodia is a democratic State based rule of law to safeguard liberal multi-party democracy and full respect of basic human rights. In its constitutional application, the principle of separation of powers (three branches of government) and judicial independence are mostly important to uphold democracy and human rights, and thus it is necessary to be fully respected. However, due to government system is based on parliamentary democracy, the parliamentary stability with a strong executive is very important than enforcement of checks and balances. In theory, the doctrine of check and balance is applied to prevent abuse of powers and safeguarding civil liberty. However, lesson learn from the past experience in Cambodia showed that the modern western system of checks and balances in parliamentary system created political controversies for an unstable government and led to political instability as a whole.

[7] Both national elites tried to meet each other since 1986 and then paved the way for possible political negotiation meetings amongst involved Khmer parties and International Community in oder to reach a political settlement by Paris Peace Agreement in 1991.

[8] *See* Article 51 of the current written Constitution 1993

III. CONSTITUTIONAL APPLICATION AND DEVELOPMENT

In the last 25 years since the adoption of the Constitution in 1993, Cambodia today is at full peace, a stable nation with high economic growth. Despite existing practical challenge, the Constitution has brought a fundamental change in political, economic and social conditions. Democracy, human right and rule of law have been gradually emerged as core values of Cambodian political culture. Regular elections, fast economic growth and social welfare (life, freedom and property) have been justified and adjudged to meet political socio-economic conditions.

(1) In kingship, the King reigns but does not govern. The King fulfills a representative function as the Head of State in respecting to the people's sovereignty. It has thoroughly transformed political powers to people as the master of the nation, and then to elected representative bodies such as the legislative, the executive, and the judiciary. As a matter of fact, the King of Cambodia's role in politics is very similar with the role of the British Queen or the Emperor of Japan. The kingship in democratic society is playing a dignity role to upheld his/her popular sovereignty; in Cambodia today, the traditional values of constitutionalism (nation, religion and King), are coherent as one with modern values of democracy, human rights and rule of law.

(2) In application of doctrine of liberal multiparty democracy, multiparty elections, and institutional decentralization have been well developed under the spirit of the rule of law. Cambodia is not a dictatorial State as someone claimed, but a democratic State because there have been existing regular elections, multiparty system, and separation of powers. Democratic elections have been conducted regularly, orderly and fairly. In democracy, an election is primarily important because it upholds the people's sovereignty in politics. It authorizes the people with a final say in current politics of the government. In Cambodian election, the people have been going to vote to choose not only party politics but also a prime minister candidate as well. In Cambodia, the party system is multiparty. In practice it has emerged as one predominant party system. This way of Cambodian practicality is different from British and US democracy which is based on a two-party system, but it tends to the Japan and Singapore party system - a predominant party system. As a matter of fact, a predominant party system is just a political phenomenon that often takes place in modern democratic societies where the people have a final say in party politics by election and on the other hand, the ruling party has a wider potential appeal to more voters than its oppositions. A predominant party system is not the same as a single party system but it is a system emerging in multiparty system where

one party often regularly wins enough parliamentary seats to control government on its own.[9] In Cambodia's politics, the result of parliamentary elections in 2018, the CPP won all seats in the National Assembly (125 seats). Some people commented negatively on democracy in Cambodia claiming that multiparty democracy has ended. I disagreed because it is not regarding to the existing multiparty system but it is the people's right in election and on the other hand it is also a failure of the opposition themselves. The opposition parties are still legal but they just don't win in the election.[10]

In the Cambodian situation, there are some reasons that rivals parties lost seats.

(a). In 2018, CNRP was legally dissolved by the Supreme Court and some were banned from politics because the Court found that their political activities had been involved with the color revolution to overthrow the legitimate government against the spirit of the Constitution and the Law on Political Parties. This abolishment of CNRP was not a means for prohibiting any opposition or any free view, but it was a kind of enforcement of existing law to safeguard a democratic basic order. The justice and freedom are not about utility, free will, reasoning, fairness or purpose, but it is under the rule of law, applying democracy and freedom, without the rule of law is anarchy.

(b). The 2018 election (the 6th term of National Assembly's election), there were 20 political parties registering to run in the election, however the CPP won total seats, and other political parties didn't obtain any seats but they just gained only the votes. As a matter of fact, the rival's parties which lost were mostly new, small and passive; the party structures were undemocratically organized, relying mostly on personalized individuals; and they had virtually no political activities at the local grassroots level; they also faced lack of their own human and financial resources. On the other hand, the CPP has been emerging as a potential political party which has been democratically structured and systematically organized. On the other hand, they approach to stay closely with the people at the local grassroots level to help and to solve local people's daily problems. In party politics of democracy, to be closer to the people to be more chance to get re-elected.

(c). Cambodia adopted the parliamentary election system based on proportional representation within 25 provincial constituencies with a total of 225

[9] Cf Patrick Dunleavy, Rethinking Dominant Party System, 2010, pp.2, (this vision available at http://eprint.lse.ac.uk).

[10] *Cf* Bryan Caplan, Democracy in Singapore: How is One-Party Rule Possible? It is available at http://www.econlib.org/archives/2008/11/democracy_in_si.htm

seats. In Cambodia's election system, legally the independent candidate is not allowed, but it is open all official registered party candidates. The seats are fixedly divided to provincial constituencies in accordance with the population. On the other hand, the election law adopted formulas of the *highest average* of seat distribution. Technically this formula fairly reflects people's will into national politics by seats if compare with the other formulas, however it tends to promote big vote parties but restrain the small votes parties. In this case, in order to win the seats in election, it is required to adopt a strong party system, and a strong party system requires to apply a democratic structure.

(d). Democratization based elections in Cambodia are applied to both national and local levels. The state's powers are divided into three branches, legislative (the National Assembly and the Senate), executive (Royal Government of Cambodia), and judiciary (the Supreme Court and the Constitutional Council). Amongst these branches, only the legislative is required to be democratically elected by general election with a limited 5 years term because of a government based parliamentary system. On the other hand, the territory of Cambodia is officially divided into Reach Theany (Royal Capital City), Khat (Provinces), Krong (Municipalities), Srok (Districts), Khan (arrondissements), Khum (communes) and Sangkat (quarters). Amongst these administrations, democratization under the principle of decentralization and concentration have been applied to all levels by election with a 5 years limited term. The election of Commune-Sangkat level have been regularly conducted well and it has been peacefully accepted by all political parties. In this view, local democratization by election has been successfully with public confidence.

IV. CHALLENGES AND TRENDS

If a constitutional State is a State functioning in accordance to a Constitution and all existing laws. If a democratic State is the State based constitutional democracy by plebiscite, I can then say that Cambodia is a democratic State, not a dictator State.

1. Rule of Law (the state based legal reasoning)

We all understand that the Constitution is the supreme law of the country, and all existing laws must be in compliance with the Constitution, otherwise it will be null. The Constitutional Council fulfills a role to safeguard the Constitution within the power to review the constitutionality of the law as well as the power of constitutional interpretation. On the other hand, the court system is independent in

fulfilling their role to decide all lawsuits in safeguarding justice and freedom under the law. In this view point, Cambodian approaches to State based rule of law, it means the principle of justice and freedom is guaranteed under the existing law. When there is any dispute or any infringement which negatively affects individual basic rights, legal institutional mechanism is the right option in cases where there is not any reasonable solution. The basic elements of the development of the rule of law, first is the development of the written law (both substantives and procedures), second is the development of the institutional mechanism (effective law enforceable authorities), the third is a good court (good judgments), and the fourth is public understanding, public awareness and public confidentiality. These basic elements have evolved traditionally to modernity.

In ancient tradition, Cambodia was the State of Religion. The King was a real God (the head of state and religion). Buddhism became the rule of life in Cambodia's belief system. It created virtue and moral social norms for all. There was no written law by the State but customary enforcement of virtue and moral social norms was important, it was taught and interpreted by Buddhist Monks for the way of better life. The concept of written law was first developed by some Buddhist scholars based on virtue and social norms poems. However, the western concept of modern written law (both substantive and procedures) has been developed by state institutions during French colonization. The law was not the way of religious sanction but it is an expression of national will. It is created not only to recognize and respect basic rights and freedom of every citizen, but also to legitimize public powers of state institutions.

The State based legal reasoning (Rule of Law) is quite different from the State based religious belief. Law enforcement is more objective without mind and heart, but religious law is much more subjective within mind and heart. The duty and function of public institutions are binding with rule of law, and its legal mechanism is based on legal reasoning. In this sense the rule of law is developed to require both sides (citizens and officers) to cooperate and provide support for law enforcement. On the other hand, law enforcement by court decisions (good judgment) is also very important because it is considered as merit of rule of law as well as public confidence. To build up the rule of law in Cambodia, it must take time from generation by generation until its basic elements have been well developed, well understood and well accepted by all.

2. Democracy

Democracy was firstly introduced in Cambodia's modern politics since

1946. At that time, national elections and a multiparty system were very important in the political process. However, it was a little success because there occurred six constitutional changes within civil war and Khmer Rouge's genocide. In 1993, after the Paris Peace Agreement 1992, democratic election was held by UNTAC, a new Constitution was adopted to re-introduce a liberal multiparty democracy, human rights and rule of law. Throughout 25 years of its constitutional application, Cambodia's democracy based national election and multiparty system have been developed and broadened even if there are practical challenges. There are four constituent levels which are required to form based election within a limited term in office, National Assembly, Senate, Commune/Sangkat Council, Provincial and District Council. Regular elections and stable multiparty system have been moving in the right direction in the context of enforcement of democratic orders. There also emerges new tendencies of interested groups such as international, national and local NGOs (civil society), religious groups (Buddhist, Christian and Islamic), professional associations (lawyers, business, workers unions), and foreign donor partners. The trend of democracy has been moving forward with the right direction because there emerges civic pluralism in society and it has been binding with rule of law and state sovereignty.

The process of constitutional amendments and interpretation in responding to practical challenges tended to support democratization and democratic values. For example, the constitutional amendment to create the Senate in 1999 was to promote political participation as well as checks and balances in the process of lawmaking. In the case of the additional constitutional making in 2004 (package vote) was to safeguard and stabilize the democratic institutions. The constitutional amendment in 2006 in order to revise a cabinet formula (2/3 vote) to (50% +1) was to protect majority democracy.[11] The constitutional amendment which negatively affects the constitutional monarchy system and liberal multiparty democracy are not allowed and prohibited. In my view, the trend of democracy in Cambodia today is very similar with the Singapore and Japan way of parliamentary democracy, mostly multiparty system with one predominantly party system.[12] This fact situation is not bad for liberal democracy because the opposition parties remain lawfully freely to be organized with fair equality of opportunity, however the people has a final say in election. The opposition parties failed to provide a better choice for the voters, they

[11] *See* Taing Rathana, Kuong Teily, Hor Peng, Thierry-Serge Renoux, Rodolphe Prom (Eds) The Annotated Cambodian Constitution (Destination Justice, 2017).

[12] *See* Gerald Curtis, Japanese Parties: Ideals and Reality *in* RIETI Discussion Paper Series 04E-005, (it is available at http://www.rieti.go.jp/en/).

have mostly acted as rebellion and personalization causing into political crime. On the other hand, the ruling party seems to have successfully brought prosperity of political, economic and social conditions. The general trend of liberal democracy-based party politics, the stronger effective party politics, the more chance of winning in the election, and the CPP has done it.

3. Human Rights

The western concept of human rights has been introduced in the Cambodian legal system since French colonization following with the modernization of the State administration. The criminal code and criminal procedure (1911), the civil code and civil procedure (1920) were formally codified in order to protect life, freedom and property.[13] However, the process of legal renovation to achieve legal modernization and internationalization have been developed through three important periods, colonization (1900-1953), post-independence (1953-1970), and post-civil war (1993-present).

The current written Constitution declares to fully recognize and respect human rights as enshrined in the UN Charter, Universal Declaration of Human Rights and all treaties and conventions related to human rights, women rights and children's rights. However, the foundational human rights are also determined by Constitution and law.[14] 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 origins, social status, wealth or other situations. The exercise of personal rights and liberties by any individual shall not adversely affect the rights and freedoms of others. The exercise of such rights and liberties shall be in accordance with the law. As the matter of principle, to protect human rights, we have to make sure that state power has been functionally separated into the legislative, executive and judicial branches with the power of checks and balances. On the other hand, the effective law enforcement by all public authorities is also of paramount importance. In Cambodia, the court and the constitutional council are key legal institutions to safeguard and protect rule of law, democracy and human rights because they have a final say.

As a matter of fact, the court and the constitutional council have been playing important roles for fair law enforcement. The court has been dealing with

[13] *See* Hor Peng, the Development of Legal Education in Cambodia *in* NUM Research Series, Special Edition (December 2015, p.26-30). *See* also Soth Sang Bonn, Teaching Constitutional Law *in* Hor Peng, Kong Phallack, Jorg Menzel (Eds), Cambodian Constitutional Law (KAS, 2016, pp.89-104).

[14] *See* Article 31 of the current Constitution 1993. *See* also Meas Bora, the 1993 Cambodian Constitution and international Law: A Normative Perspective *in* Hor Peng, Kong Phallack and Jorg Menzel (Eds) Cambodian Constitutional Law, (KAS 2016, pp.71-85).

criminal, civil and administrative cases, while the constitutional council has been dealing with constitutional review of law, constitutional interpretation, and election disputes.

V. CONCLUDING REMARKS

Cambodia today is a constitutional State. The current written Constitution has thoroughly brought fundamental evolution in Cambodia's current political culture. Its current political process based on democratic election and a multiparty system tends to be regularized as foundation of a democratic society although the multiparty system has recently emerged as a predominant party system.

This emerged trend is general in liberal democracy when the opposition parties are not ready for popular supports. A liberal multiparty system is crucial important for modern democracy because it has brought political stability base rule of law. It is an apparent need to conduct a further research in the context of our own historical and institutional reality as well as in comparative views about modern party system.

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THE CONSTITUTION OF CAMBODIA: THE PREAMBLE IN CONSTITUTIONAL QUESTIONS

TAING Ratana [*]

ABSTRACT

This paper is a work focused on the preamble of the constitution of 1993 of the Kingdom of Cambodia. It is made in the attempt at trying to answer some questions concerning to the preamble of Cambodian Constitution, which are rarely raised for academic debate in Cambodia. The readers of this article may find new knowledge on the constitutional values of the constitutional preamble with a focus on some key questions (i) what is the preamble to a constitution? (ii) what does the preamble talk about? (iii) why does Cambodia enshrine such written preamble? (iv) what are roles of the preamble in a constitutional design?, and (v) does the preamble has constitutional values?

I. INTRODUCTION

Most of the constitutions of the modern states generally come with *a Preamble,* which is the common constitutional feature. It seems to be simple for readers of a constitution once they found the first page of the constitution is the preamble. However, there may have some discussion among who interest in deep understanding of the values of this preamble.

Liav Orgrad's study provides that analysis of a nonrepresentative sample of fifty democratic countries revealed that most have included a formal preamble in their constitutions: thirty-seven countries have a preamble (74 percent) while thirteen countries do not (26 percent). Countries that do not have a formal preamble often include introductory articles that may be regarded, in substantive terms, as a

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preamble[2]. The Cambodian constitution of 1993 also consists of a preamble, which is the most important part in this constitution and it should be aware in deep among key actors and citizen of this kingdom. There are some questions with this preamble (a) What is the preamble to a constitution (b) Why does Cambodia enshrine such preamble? (c) What are the roles of the preamble in constitutional design? and (d) Does the preamble has constitutional values? Those are the main topics to be answered in this paper.

Here is the preamble of the constitution of the Kingdom of Cambodia[3]:

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 […]

II. WHAT IS THE PREAMBLE TO A CONSTITUTION?

Liav Orgrad described that a preamble constitutes the introduction to the constitution and usually bears the formal heading "Preamble" or some alternative, equivalent title, while in other cases it appears without a heading. The formal classification provides a simple and technical identification of a preamble. Alongside a formal classification, it is possible to identify a preamble through its content. In substantive terms, a preamble does not require a specific location in the constitution but, rather, specific content. It presents the history behind the constitution's

[2] Liav Orgrad (2010), The Preamble in the Constitutional interpretation

[3] The Constitutional Council (2018), The Constitution of the Kingdom of Cambodia,

enactment, as well as the nation's core principles and values[4].

Similarly, to what *Liav Orgrad'*s aforesaid explanation, the author of this article, a preamble is a collection of philosophy or ideology for guiding a constitutional design as a whole. The Preamble is an ideation paved the way for stating the specific rules in a constitutional architecture. Or otherwise, it is the core values constituting the spirit of one nation by expending the political, economic, social, and cultural values of that nation. Thus, the preamble shall be the most attractive color in a constitutional environment.

III. THE PREAMBLE IN DESCRIPTION

The aforesaid preamble to Cambodian constitution consists of five main noble parts, which shall be classified into categories as follows:

The Sovereign power*:* sovereign power rests with "*We, The Khmer People*,". This is a relatively term with which *Khmer*, most main group of the population resided in this Kingdom, can usually identify. The term *Khmer* is widely used to identify nationality for who are living in Cambodia with holding Khmer ID card. Cambodian people and language are known as 'Khmer', which means people who are living in Cambodia (Chuon Nath, *Khmer dictionary*). Khmer is also called *Khemara*. After the collapse of Angkor Empire, group of Khmer people and territory are divided into 3 parts (i) *Khmer Loeu*[5], group of Khmer people whose lands once belonged to Khmer empire, but now become part of today Thailand (ii) *Khmer Kandal*[6], group of Khmer people, who are living in today Cambodia, and (iii) *Khmer Krom*[7], group of Khmer people whose territory lost to today southern part of Vietnam. The country of *Khmer Kandal* is known as today Cambodia (*Kampuchea*). Thus, whether the term *Khmer* in preamble could cover all aforementioned groups of *Khmer*? This question can be answered with two separated perspectives (i) *perspective of nationalism*: the term *Khmer* in preamble could cover all *Khmer* people in every corner of the world, and (ii) *perspective of legalism*: the term *Khmer* in preamble could only cover *Khmer Kandal*, people who are recently living in today territory of Cambodia, and who are holding *Khmer* nationality under the jurisdiction of current

[4] Liav Orgrad (2010), The Preamble in the Constitutional interpretation, page 716

[5] *Khmer Loeu* means Khmer people who are living in upper land, which is plateau ranges up to *Dangrek* mountain

[6] *Khmer Kandal* means Khmer people, who are living in middle land, which is territory of today Cambodia

[7] *Khmer Krom* means Khmer people, who are living in lower land (down to the sea), which is now South Vietnam.

constitution including those *Khmer* people living abroad. For *Khmer* people who are now living in other countries and invested no more Khmer nationality, term *Khmer* in this preamble is not able to cover them.

Historical Narratives: preamble includes, typically, historical narratives of Cambodia, telling specific stories that are prosperous and declined period. These stories shape the identity "*Accustomed to having a grand civilization*" and "*Having fallen into a terrifying decay for the two last decades*". It is the reference to past events that Cambodia has experienced during Khmer Empire period and after the collapse of Khmer Empire.

Supreme Consciousness: preamble outlines the fundamental goals of *Khmer* people. It is the strong intention to a specific objectives, such as 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.

Unshakable Will: preamble outlines what *Khmer* people are going to enshrine in the constitution and to be strong respected by using phrase "*We inscribe in the Constitution of the Kingdom of Cambodia, as followed […]*". In accordance with this will, after eight amendments, *Khmer* people designed the constitution with 160 Articles in 17 chapters, one additional constitutional law, and seven annexes.

IV. THE ROLES OF THE PREAMBLE IN CONSTITUTIONAL DESIGN

The preamble to the constitution of Cambodia plays very crucial roles in designing all 17 Chapters of the constitution as a whole. Thus, its roles should be classified into roles concerning to designing the political system, economic system, socio-cultural values, and the rule of law and administration.

Role concerning to designing political system: Preamble to the constitution of Cambodia states clearly the political will of the Cambodian citizen, who strongly intent to build their nation once again an "*Oasis of Peace*" based on the system of a liberal multi-party democracy. This statement in the preamble leads to designing of many crucial Articles in the constitution such as the provisions concerning to the King in Chapter II, the political regime in Chapter IV, the National Assembly in chapter VII, the Senate in chapter VIII, Congress of the National Assembly and the Senate as stated in Chapter IX (new), the Royal Government in chapter X (new),

National congress as stated in Chapter XIV (new).

Role concerning to designing economic system: Even though there is term "*free market economic system*" found in the preamble, but the statement of term *liberal multi-party democracy* should be enough in designing the free market economic system in the constitution of Cambodia as stated in Articles of Chapter V.

Role concerning to designing socio-cultural value: the statement of " *In a burst of consciousness,[…] to preserve the precious sovereignty and the marvelous civilization of ANGKOR […], to guarantee human rights, […]"* expresses the intention of Khmer citizen to set up the rights and duties of Khmer citizens as stated in chapter III; and the education, the culture, and the social affairs; as stated in chapter VI.

Role concerning to designing the rule of law and administration: Statement of *"[…] to unite, to strengthen the national unity, to defend the Cambodian territory, to ensure the respect of law, to be highly responsible for the destiny of the nation forever evolving toward progress, development and prosperity […]"* guides the writing of the National Sovereignty as stated in Chapter I, the Judiciary as stated in Chapter XI (new), the Constitutional Council as stated in Chapter XII (new), the Administrative organization as stated in Chapter XIII (new), Election body as stated in Chapter XV new (two), the Effect and the Revision and Amendment of the Constitution and stated in Chapter XVI new (two), and the Transitional provision as stated in Chapter XVII new.

As result, all key terms stated in the preamble expresses their important roles in making Chapters and Articles in the Constitution.

V. WHY DOES CAMBODIA ENSHRINE SUCH PREAMBLE?

Only the writers of 1993 Cambodian Constitution can tell the exact reason of composing this preamble. Unluckily, the author has no chance to hear from those respective personalities. However, the author[8] could recall a quote from the speech of H.E. *Chhour Leang Hourt*, former member of the Constitutional Council, made in 2007 during the 9 years anniversary of the Constitutional Council in While Building of *Chamcar Mon State Palace*[9], who provided that

'*[…] that preamble was written by heart of Khmer people through*

[8] The author by that time was the official of the Bureau of Litigation of Secretariat General of the Constitutional Council, who also attended that anniversary.

[9] Parts of this palace are now reserved for different state institutions (i) The Senate (ii) The Supreme Council of Magistracy. Particularly, While Building; which used to be the royal residence of Queen *Monineath Sihanouk*, is now reserved for the Constitutional Council.

their representatives because Khmer people has lost their statuses as real masters of their country's destiny for centuries since after the collapse of Angkor Empire. Thus, the whole meaning of preamble fully describes what Khmer people really need for their today nation […] '

As result, one can see that aforesaid respective points are the shared common goals adopted by Cambodia in creating following provisions of the Constitution. All aforesaid values stated in preamble are considered as the state ideology of the Kingdom of Cambodia and of Khmer people as a whole. This ideation is priceless for all person in this kingdom.

Since the collapse of Angkor Empire in 15th century, Cambodia had been broken into war and suffered. Cambodia was known as a place of power competition by using weapons and violence, hence national unity has broken for centuries until late 20th century (1998). For this reason, the ideation of first 'TO' was used in the preamble.

Cambodia had lost large scale of territory of its for many times through out the history. The rich resource of this land is one among other reasons of territory aggression. Thus, in order to protect today remain land, second 'TO' was formed as common value in this constitution.

The sovereignty and civilization of Cambodia had been faced suffering and destruction for many times in its history. French colonization (1863-1953) was one among those examples. During 17th and 18th century, this land almost disappeared from the world map due to the invasion of neighbored states. This history awakes Khmer people to to enshrine third 'TO' into its preamble.

Cambodia was declared by the former King *Norodom Sihanouk* in 1955 in Bandung of Indonesia, to be non-aligned state along with other states in Asia and Africa, hence this status of Cambodia prevented the spreading of Vietnam War into this land. It was a great opportunity during that period for Cambodia to develop its economy. Within 15 years of its neutrality, Cambodia occupied the status of 'Oasis of Peace' in Southeast Asia. Unfortunately, the Coup of 1970 by General *Lon Nol* broke the peace and development in Cambodia, and led this country into the war and internal conflict for more than two decades. The trail of this history may be another reason to put fourth 'TO' into constitution.

When Khmer Rouge ruled Cambodia from 1975 to 1979; Khmer people were living in a place in which was called '9th level of deep hell', where their rights and freedom were totally uprooted. During the period of 3 years 8 months and 20 days under Khmer Rouge Administration, more than millions of lives were

killed. In preventing Cambodia relapses into such situation, fifth and sixth 'TO' in the preamble was made in order to remind Khmer people to pay highly respect the human rights and rule of law.

Last 'TO' to highly responsible for the destiny of the nation […] that is consistent with the provision of last paragraph of Article 52 (new) 'Khmer citizens are the masters of their Country's destiny'. This provision is among the priceless provisions to be highly regarded in Cambodian constitution. This provision seem to establish two main purposes for all Khmer citizens to (i) recall the history of Cambodia during last five centuries, where Khmer citizen were in small scale to be real master of their country's destiny (ii) to awaken today Khmer citizen to stand up and to strengthen themselves for being the real master of Cambodia in time of present and future with following strong virtues (1) to guarantee independence, sovereignty, national integrity, and national unity (2) do not, totally, allow whom need to interfere into internal affairs of Cambodia, or to order national policy or international policy of Cambodia, and (3) do not, absolutely, serve for foreign benefit to destroy the benefit of Khmer and national benefit of Cambodia.

VI. THE PREAMBLE HAS THE CONSTITUTIONAL VALUES?

There are several questions to this topic (a) Can the preamble of Cambodian constitution be amended? (b) Does the preamble have constitutional values equally to other articles in this constitution?

(a) Can the preamble of Cambodian constitution be amended?

It seems to be hard in finding the experience of other countries in making preamble change. The American constitution's experience may be a good example in this context. The current preamble of the American constitution is different from the original text made in 1787 at the Philadelphia Convention. The original preamble did not include the famous phrase "*We the people of the United States*" but, rather, designated the states as the source of authority; also, it did not specify the Constitution's objectives. The original preamble stated, simply, that: "*We the people of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity*." The text was changed by the Committee of Style, whose members were William Samuel Johnson, Alexander Hamilton, Gouverneur

Morris, James Madison, and Rufus King[10].

This experience can be a good answer to the question concerning to the Cambodian context. Even though, there has not been any proposal to amend the preamble of the constitution of Cambodia, but the trace has been found as aforementioned experience. Thus, the preamble of the constitution of Cambodia can be a subject to the amendment, just in case of necessity of political will. Then the American experience can be a good example of preamble change. However, the possibility of amending this preamble remains a crucial question concerning to its procedure. Does the procedure of the constitutional amendment provided in following articles of the Constitution: Article 143 New (Former Article 124), Article 153 new two (former Article 151 new), Article 154 new-two (former Article 152 new), and Article 155 new-two (former Article 153 new); will be applied to any proposal to amend the preamble of Cambodian constitution?

Article 143 New (Former Article 124) of the Constitution provided that the King consults the Constitutional Council on all proposals to amend the Constitution. Article 153 (New-two, Article 151 New) of the Constitution provides that the initiative to revise or to amend the Constitution shall be the prerogative of the King, the Prime Minister, and the President of the National Assembly at the proposal of one fourth of all its members. And the revision and the amendment of the Constitution shall be made in form of one Constitutional Law at two-third-majority vote of all members of the National Assembly. Article 154 new-two (former Article 152 new) provided that 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. And Article 155 new-two (former Article 153 new) provided that the revision or the amendment of the Constitution cannot be done, if affecting the liberal multi-party democracy system and the constitutional monarchy regime.

According to those aforementioned provisions, only the King who can consult directly and officially with the Constitutional Council on all the proposals to revise and amend the Constitution. The Prime Minister and the President of the National Assembly cannot do so, but only at the request to the King. The Council shall notify the King whether or not amendment of the Constitution can be done. In short, the revision or the amendment of the constitution shall be involved directly and indirectly by four key actors as prescribed in below figure (i) Prime Minister (ii) President of the National Assembly (ii) the King, and (iv) the Constitutional Council. However, there are conditions prohibited from doing constitutional

[10] Liav Orgrad (2010), The Preamble in the Constitutional interpretation, page 718

amendment, which can be found in Article 154 new-two (former Article 152 new) and (ii) Article 155 new-two.

As result, the preamble of the constitution can be a subject to an amendment or not, it shall be the total jurisdiction of the Constitutional Council, who is competent to decide on this concerning case. But just in case, the preamble can be possibly amended, hence that amendment shall not delete phrase *" [...] based on the system of a liberal multi-party democracy [...]"* as prohibited by Article 155 new-two (former Article 153 new) and it also shall be made once Cambodia is in the normal situation as provided by Article 154 new-two (former Article 152 new). One noted point, the term *constitutional monarchy* is not found in current preamble. It is good if the preamble can be amended, hence that amendment in the future should include the term *constitutional monarchy* in new preamble; hence it will be smooth consistent with the provisions of the constitution as prohibited by Article 155 new-two (former Article 153 new).

(b) Does the preamble have constitutional values equally to other Articles of the constitution?

If the procedure applied for the preamble amendment follows the constitutional procedure as prescribe above, hence this preamble shall have constitutional values equally to those Articles of the constitution. But in case, the preamble will be amended by a committee as what was made with the American preamble, hence the preamble of constitution of Cambodia should not considered of having constitutional values as same as Articles of the constitution.

From the perspective of academic debate, in one hand, the preamble of the constitution of Cambodia shall be invested the constitutional values by two reasons (a) *Invisibility*: this preamble cannot be separated from the constitutional text because of its structure and legality. This preamble is an important introduction to the constitution of 1993, which linked to the following part of the constitution from Article 1 onwards. (b) *Core values*: the preamble of Cambodian constitution is considered as the core values or otherwise the spirit to the constitution of Cambodia. It is the main conception to be prescribed in detail in all concerned Articles enshrined as a whole.

On another hand, the efficacy of preamble of the constitution should be taken into consideration on its constitutional values. The concerning questions shall be addressed (a) Whether or not the Constitutional Council can use the provisions in preamble as a basis of examination of the constitutionality of laws? (b) Can the Constitutional Council declare one law to be inconsistent with the preamble? Until

to day practice, the Constitutional Council of Cambodia has yet experienced such constitutional issues. But it may happen in the future discussion of the Council.

However, there was an unofficial answer found regarding to this issue made by a delegate of the Constitutional Council in responding to a question concerning to the legality of the preamble, which was raised by a participant in a workshop organized by the Constitutional Council, that is:

> *"The preamble is not the constitutional provision or a legal text, but it is a reminding of the history, culture, and civilization of Khmer in the past time. It states some notable events occurred in this country and at the end of its text expresses the unshakable will of Khmer people. The Preamble is a collection of principle concepts of the constitution. In the article of Maurice Guillard concludes that the preamble is just a part shown of the intention of Khmer people, who need to establish a constitution with the following meanings. For conclusion, the preamble has legal values, but not like that of the Articles in the constitution*."[11]

The aforementioned short answer is just a personal point of view, which does not express the official conclusion of the Constitutional Council. The constitutional question concerning the values of the preamble is a big question. In case there will have any proposal to clarify this constitutional issue, hence the Constitutional Council will independently interpret it. The consideration of the constitutional values of that preamble is the jurisdiction of the Council, who is and independent and neutral institution. As practice, the Constitutional Council works very carefully on all proposals submitted in consistent with the provisions provided by the Constitution and laws. Thus, the aforesaid referring to academia's works such as *Maurice Guillard'*s is just an academic way of response. The Constitutional council may work on this question in case there will have proposal come to it, if so, this issue will become a very interesting constitutional jurisprudence made by the Council.

VII. CONCLUDING REMARKS

In short, the preamble of the constitution of Cambodia is a crucial part of this constitution and plays very important roles for designing the whole part of the constitution. It is considered as a set of collection of key terms, which characterize the constitutional philosophy and historical narratives of this Kingdom. There are many crucial points to be understood in detail in this preamble and also questions

[11] Secretariat General (2017), Compilation of Questions-Answers concerning to the Constitution, Phnom Penh

remain. Meanwhile, the constitutional questions concerning the amendment of preamble or the constitutional values of the preamble shall be officially determined by the Constitutional Council, who is competent in notifying the King in all proposal to amend the constitution. It is a better choice to wait for the future decision of the Constitutional Council on those constitutional issues.

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RIGHTS TO HEALTH: LEGAL AND REGULATORY ASSESSMENT OF PRIVATE SECTOR PROVISIONS OF HIV/AIDS SERVICE IN CAMBODIA

Prof. KONG Phallack, BHAVESH Jain, and Dr. SREY Mony[*]

ABSTRACT

Right to health is the obligation of the state under the 1993 constitution of the kingdom of Cambodia. The Cambodian Constitution provides that health of the people shall be guaranteed and the state shall give full consideration to disease prevention and medical cares. Poor people shall receive free medical consultation in public hospitals, infirmaries and maternities[2]. This paper aims at reviewing the existing legal framework governing health sector with the purpose to explore options for private sector participation in provisions of HIV/AIDS services and choices for clients too. The study also examines legal framework of countries in the region. The study finds that provision of HIV services by private providers is not restricted but also not specified in current laws and ministerial regulations. However, private sector providers can require clear guidance to deliver comprehensive HIV services that are appropriately managed and adhere to regulations, guidelines, and reporting requirements. The overall recommendation is that the Ministry of Health should amend existing, or develop new, guidelines to explicitly regulate HIV service provision in the private sector.

I. INTRODUCTION

1. Background of Study

Cambodia's response to its HIV epidemic is characterized by three phases in accordance to the Strategic Plan for HIV/AIDS and STI Prevention and Control in the Health Sector 2016-2020 (HSSP-HIV). The first phase is from 1991-2000 which is known as "Cambodia 1.0". In this phase, HIV prevalence among adults peaked at 1.7% with more than an estimated 20,000 incident cases and it focused on brothel-based HIV prevention, Voluntary, Confidential Counselling and Testing (VCCT), provision of home-based care services, and People Living with HIV

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[2] Constitution 1993 as amended 2018 (Cambodia), Article 72

(PLHIV) support groups.[3] The second phase is from 2001-2011. During this period, Law on Prevention and Control of HIV/AIDS (hereafter it is referred to HIV/AIDS Law) was promulgated[4] and number of operational guidelines on HIV/AIDS were developed and implemented. Consequently, there was a significant decline in adult HIV prevalence as well as concurrent declines in mortality due to the overall health system was strengthened, ART coverage reached more than 75% of PLHIV, the Continuum of Care (COC) approach was institutionalized, and HIV programming was linked with tuberculosis and maternal and child health services. Prevention activities were broadened to focus on key populations - Female Entertainment Workers (FEW - direct and indirect sex workers), Men who have Sex with Men (MSM), Transgender individuals (TG) as well HIV and harm reduction services for People Who Inject Drugs (PWID) undertaken in collaboration with the MOH Department of Mental Health and Substance Abuse (DMHSA) and NGO partners. And the third phase or in other word called "Cambodia 3.0" is from 2012-2020. This phase aims to achieve the 90-90-90 global targets - 'Three Zeros' and 'Treatment 2.0' - for intensifying efforts to eliminate new HIV infections by 2025.[5]

Based on the above concrete plan and development, Cambodia has performed a remarkable job and it is one of the few countries in the world to have successfully reversed its HIV epidemic and is approaching the universal access to HIV treatment.[6] The HIV prevalence in the country is decreased from 1.7% in 1998 to 0.5% in 2018 among the population aging from 15 to 49 years old.[7] However, the implementation of treatment and prevention of HIV /AIDS programs are mainly financed by external foreign funding which is a concern for sustainability of the programs since there is a possible reduction in the Official Development Aid (ODA) commitment due to the rising of the Gross Domestic Product (GDP) in Cambodia of 7.2% since 2011[8] and a pressure from development partners for an increased

[3] Ministry of Health NCHADS (2016), Strategic Plan for HIV/AIDS and STI Prevention and Control in the Health Sector 2016-2020 (HSSP-HIV), pp.2-3

[4] Royal Kram No. NS/RKM/0702/015 dated on July 26, 2002 promulgating Law on Prevention and Control of HIV/AIDS (Cambodia)

[5] Ministry of Health NCHADS (2016), Strategic Plan for HIV/AIDS and STI Prevention and Control in the Health Sector 2016-2020 (HSSP-HIV), p.3

[6] NCHADS, Strategic Plan for HIV/AIDS and STI Prevention and Control in the Health Sector 2016-2020 (HSSP-HIV), Oct 2016, p.2

[7] https://www.unaids.org/en/regionscountries/countries/cambodia accessed on March 2, 2020

[8] Ministry of Health NCHADS (2016), Strategic Plan for HIV/AIDS and STI Prevention and Control in the Health Sector 2016-2020 (HSSP-HIV), p.1

contribution from domestic sources.[9] For this reason, looking for an alternative options with the current legal and policy framework is a must which reflect the right to health of citizens guaranteed under the constitution.

2. Objectives

This study aims at reviewing the existing legal framework governing health sector with the purpose to explore options for private sector engagement in provision of HIV/AIDS services. The study also examines legal framework of countries in the region.

3. Methodologies

The methodologies used in this study are desk review, key information interview and a consultation workshop. The desk review is conducted based existing legal framework and practices related to health sector in particular those related to HIV/AIDS. The interviews are conducted with judges of the Supreme Court, the Appeal Court and the Phnom Penh Court of First Instance; Members of Council of Jurists of the Office of the Council of Ministers; Lawyers of the Bar Association of the Kingdom of Cambodia; Doctors and officials from the Ministry of Health (MOH), the National Aid Authority (NAA), National Center for HIV/AIDS, Dermatology and STDS (NACHADS), Institut Pasteur de Cambodge (IPC); and representatives from development partners, NGOs, a private legal clinic and a private insurance company. And a consultative workshop with stakeholders involved in HIV/AIDs Services and activities on was held on.

4. Limitations

This study does not examine the private sector's engagement in non-health care services of HIV/AIDS.

II. LEGAL AND REGULATORY ANALYSIS OF RIGHT TO HEALTH

1. Regulating Health Care Services in Cambodia

1.1. Right to Health and State's obligation

The Cambodian Constitution provides that health of the people shall be guaranteed and the state shall give full consideration to disease prevention and medical cares. Poor people shall receive free-of-charge medical consultation in public hospitals, infirmaries and maternities[10]. Based on this provision, the state has an obligation to provide health care services for the Cambodian citizens within

[9] Ministry of Health NCHADS (2016), Strategic Plan for HIV/AIDS and STI Prevention and Control in the Health Sector 2016-2020 (HSSP-HIV), p.2

[10] Constitution 1993 as amended 2018 (Cambodia), Article 72

the public health facilities. Furthermore, Article 31 of the Cambodia Constitution forms a basis of right to health for the Cambodian citizens since the article states that the Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations Charter, the Universal Declaration of Human Rights (UDHR) and all the treaties and conventions related to human rights, women's rights and children's rights.[11]

Article 25 of the UDHR recognizes the rights to health and this right is restated in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and it is clarified under the General comment No. 14 (2000) on the rights to health adopted by the Committee on Economic, Social and Cultural Rights in 2000. Besides these provisions, there were a political commitment of all heads of states enshrined in the Resolution no 55/13 of the UN General Assembly.[12],

At regional level, the right to health is stated in the ASEAN Declaration of the commitment in 2011[13] and the ASEAN Human Right Declaration (AHRD) which was adopted in Phnom Penh ASEAN Summit in 2012. Article 29 of AHRD recognizes the right to health and the commitment of ASEAN Member states to create a positive environment in overcoming stigma, silence, denials and discrimination in the prevention, treatment, care and support for people suffering from the communicable diseases, including HIV/AIDS.[14] Based on these provisions, one can conclude that right to health of Cambodia citizens are constitutional rights and the state has an obligation to respect, protect and fulfil the right to health, including HIV/AIDS, of its citizens.

1.2. Cambodian Health System and Institutional Arrangement

Cambodia Health System comprises both public and private sector (including for profit and non-profit health organizations). The public sector is the prominent providers of preventive services and inpatient admissions, whereas the private sector tends to dominate provision of outpatient curative consultation.[15]

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[11] Constitution 1993 as amended 2018 (Cambodia), Article 31, para 1

[12] UN General Assembly, Resolution 55/13(2000), Fifty-fifth session on Review of the problem of human immunodeficiency virus/acquired immunodeficiency syndrome in all its aspects. Retried from http://data.unaids.org/publications/external-documents/un_res5513_en.html

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[14] ASEAN, ASEAN Human Right Declaration (2012), Article 29, para 2. Retried from https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf

[15] Ministry of Health (2016), The Third Health Strategic Plan 2016-2020 (HSP3), p.21

According to the Third Health Strategic Plan 2016-2020 (HSP3), the Public Health Sector (PHS) are structured into three levels namely the Central level, Provincial Level and the District Level and roles and responsibilities of each level are clearly defined. The Central or National Level comprises of the Ministry of Health's departments, Training Institutions, National Centers and National Hospitals. The Provincial Level comprises of Provincial Health Departments, Regional Training Centers, and Provincial Referral Hospitals. And the District Level comprises of Operational District Offices, Referral Hospitals, Health Centers and Health Posts.[16] The National/Central Level is in charge of developing policies, legislations, and strategic plans; providing training and support to provinces and districts; coordinating with other ministries and external aid; mobilizing resources; and conducting evaluation. The Provincial level is responsible for implementing the health strategic plan through annual operational plans; allocating and using available resources effectively; and linking the central level with district levels. And the District level (Operational Districts) is responsible for delivering effective and comprehensive health services and implementing national policies and provincial health strategies.[17]

The Private Health Sector is composed of both Private-for-profit sector and Private nonprofit sector. According to the MOH's Health Strategic Plan 2016-2020, the private health care is dominantly used for ambulatory treatment of illness, but less dominant for impatient treatments and limited for delivery of preventive care services and this sector according for the largest share of total care spending.[18] The Private-for-profit sector comprises of the private Health Care Providers which are categorized based on type of services provided such as i) Nursing Care Room, ii) Pregnancy Care Room, iii) Physiotherapy Room, iii) Consultation Cabinet, iv) Dental Consultation, v) Dental Clinic, vi) Esthetic/Beauty Center, vii) Medical Laboratory, viii) Maternity, ix) Clinic, xi) Polyclinic and xii) Hospital. Whereas, the Private non-for-profit sector comprises of local and International non-governmental organizations and most of them work at district and community level in collaboration with Provincial Health Departments (PHDs) and Operational Districts (ODs) including Referral Hospitals (RHs) and Health Centers (HCs). They provide a range of services such as support service delivery, community-

[16] Ministry of Health (2016), The Third Health Strategic Plan 2016-2020 (HSP3), p.22, Figure 3

[17] Kouland Thin (December 2016), Health Care Financing Reforms in Cambodia: Challenges and Options for Achieving Universal Health Coverage Under Financial Constraint, p.40

[18] Ministry of Health (2016), The Third Health Strategic Plan 2016-2020 (HSP3), p.27

based health network, health education and promotion activities, encouragement of community participation in health, etc.[19]

According to the Health Strategic Plan 2016-2020, the Ministry of Health has implemented the health sector reform since 1994 and the main objective of the reform is to "improve and extend primary health care through the implementation of a district-based health system approach" and places emphasis on people's essential health needs.[20]

The Ministry of Health (MoH) is empowered to lead and manage the health sector in the Kingdom of Cambodia.[21] The MoH is led by a minister and may be assisted by the Secretaries of State and/ or the Undersecretaries of State if necessary.[22] According to the Law on the Organization and Functioning of the Council of Ministers, the health minister is authorized to issue Prakas, Decisions, Circulars and Guidelines. However, Prakas, Decisions, Circulars or Guidelines of the ministry cannot stipulate tasks outside the jurisdiction of the ministry and they cannot contrary to legal instruments of the government.[23] The roles and duties of the MoH are to determine the health policies based on the programs of the government aiming at promoting the health and well-being of the citizens; develop strategies for health sector; develop laws and regulations to ensure the maximum of public and private health quality; manage health production, business and distribute drug and medical and paramedical equipment to all public and private units; and monitor, remind administer and evaluate technical and administrative works of health units in accordance with the laws and regulations which have been officially promulgated for the implementation.[24]

The Department of Communicable Disease Control (DCDC) is structed under the Technical Directorate General of Health. Under the sub-decree, the DCDC is in charge of prepare and put in practice of policies and guidelines for the implementation of activities aiming to reduce all kinds of communicable

[19] Ministry of Health (2016), The Third Health Strategic Plan 2016-2020 (HSP3), p.28

[20] Ministry of Health (2016), The Third Health Strategic Plan 2016-2020 (HSP3), p.21

[21] Royal Kram No. NS/RK/0196/06 dated January 31, 1996 on the Promulgation of Law on the Establishment of the Ministry of Health (Cambodia), Article 2

[22] Royal Kram No. NS/RK/0618/06 dated January 31, 1996 on the Promulgation of Law on the Establishment of the Ministry of Health (Cambodia), Article 3

[23] Royal Kram No. NS/RK/0196/012 dated 28 June 2018 on the Promulgation of Law on the Establishment of the Ministry of Health (Cambodia), Article 47

[24] Sub-decree No. 67 ANKr.MK dated October 27, 1997 on the Organization and Functioning of the Ministry of Health (Cambodia) , Article 3

diseases, monitor and evaluate activities of medical survey and conduct research on communicable diseases, and prepare and put into practice of national plan for controlling of all kinds of communicable diseases.[25]

The institutions with the rank equivalent to the department that are under the supervision of the Ministry include Preah Norodom Sihanouk Hospital, Preah Kossamak Hospital, Preah Angdoung Hospital, Kunthak Bopha Hospital, National Pediatric Hospital, National Center for Health Promotion, National Maternal and Child Health Center, National Center for Tuberculosis and Leprosy Control, National Center for HIV/AIDS, Dermatology and STDS (NCHADS), National Center for Parasitology, Entomology and Malaria Control, National Blood Transfusion Center, Central Drug Store, Laboratory for Drug Quality Control, Traditional Medicine Research Center and the National Institute of Public Health.[26]

1.3. HIV/AIDS Governance, Strategic Plans and Guidelines

The Royal Government of Cambodia established the National AIDS Program in 1993 and its was upgraded to be the National Centre for HIV/AIDS Dermatology and STDs (NCHADS) in 1998.[27] NCHADS is an operational unit of the Ministry of Health. with primary purpose is to respond to the HIV/AIDS epidemic through the implementation of HIV/AIDS Strategic Plans. It provides health sector policy development for HIV/AIDS and STDs, program management, provincial support, coordination with other partners in the health sector, guideline development for HIV/AIDS components, national health sector plan evaluation and dissemination of epidemiology, behavior and effective STD/HIV/AIDS prevention and care information. It conforms to the coordinating strategy of the National AIDS Authority (NAA) and works in partnership with other Government Ministries, development partners and civil society organizations (CSO) and Provincial Health Departments. The Centre manages the disbursement of program and government funds according to previously approved work plans, under its Strategic Plan. At capital and provincial level, HIV/AIDS program is under the responsibility of the Provincial AIDS and STI Program (PASP), a sub-unit within the Disease Control Unit, under the Technical Bureau, in the Provincial Health Department.[28]

[25] Sub-decree No. 67 ANKr.MK dated October 27, 1997 on the Organization and Functioning of the Ministry of Health (Cambodia), Article 19

[26] Sub-decree No. 67 ANKr.BK dated October 27, 1997 on the Organization and Functioning of the Ministry of Health (Cambodia), Article 4 (1.2)

[27] Ministry of Health, NCHADS (2004) Strategic Plan for HIV/AIDS and STD Prevention and Care 2004-2007 (Second edition), p.5

[28] About NCHADS, https://www.nchads.org/index.php?id=25

In 1999, another state's high-level agency called the National Aid Authority (NAA) was established under by a Sub-decree, but it is not part of the structure of the Ministry of Health. The NAA is as an autonomous administration[29] established with a purpose of combating and preventing HIV/AIDS[30] and has duties to coordinate, cooperate the development and implementation of policies, strategic plans, programs with relevant governmental institutions, international organizations, non-governmental organizations and private organizations. According to the Sub-decree No. 02 ANKr. BK dated January 11, 1999 on the Establishment of the National AIDS Authority and the Law on Control and Prevention of HIV/AIDS (2002), the NAA is established to lead and implement the prevention activities and control HIV/AIDS epidemic in the Kingdom of Cambodia[31] and is chaired by the Prime Minister or his representative in case he is not able to perform this role by himself.[32] In performing its mission, the NAA is empowered to issue various legal instruments/standards on HIV/AIDS sector either general or specifically on persons that authorities at all levels must implement them.[33]

In term of budget for the operation, according to Law on Prevention and Control of HIV/AIDs, the state shall give HIV/AIDS a priority action and its budgets shall include budget for the relevant ministries and provinces and municipalities throughout the Kingdom of Cambodia and shall be classified as a priority budget as an annexed budget of the Ministry of Health.[34]

Based on the review, the study finds out the strategic plans, standard operating procedures (SOP) and guidelines on HIV/AIDS described above, have been developed for the implementation within the public health sector facilities such as Health Post, Health Center, District Referral Hospital, Provincial Referral Hospital and National Hospital. However, there are no specific provisions for

[29] Sub-decree No. 02 ANKr.BK dated January 11, 1999 on the Establishment of the National Aids Authority (Cambodia) , Article 2

[30] Sub-decree No. 02 ANKr.BK dated January 11, 1999 on the Establishment of the National Aids Authority (Cambodia) , Article 3

[31] Royal Kram No. NS/RKM/0702/015 dated on July 26, 2002 promulgating Law on Prevention and Control of HIV/AIDS (Cambodia), Article 43

[32] Royal Kram No. NS/RKM/0702/015 dated on July 26, 2002 promulgating Law on Prevention and Control of HIV/AIDS (Cambodia), Article 44 and Sub-decree No. 02 ANKr.BK dated January 11, 1999 on the Establishment of the National Aids Authority (Cambodia), Article 6

[33] Sub-decree No. 02 ANKr.BK dated January 11, 1999 on the Establishment of the National Aids Authority (Cambodia), Article 9

[34] Royal Kram No. NS/RKM/0702/015 dated on July 26, 2002 promulgating Law on Prevention and Control of HIV/AIDS (Cambodia), Article 46

the private sector providers to follow or reporting mechanism in these SOPs or guidelines or national plans'

1.4. Regulatory and Legal Review on Private Sector Provision on HIV/ AIDS Services

As finding above, the strategic plans, s SOP and guidelines on HIV/AIDS have been developed for the implementation within the public health sector only. Therefore, the study examines provisions of the HIV/AIDS Law), which was promulgated in 2002. [35] The HIV/AIDS Law has been implemented for 17 years. It is the proposed Law initiated by the members of the National Assembly and not the draft law prepared by the MoH/RGC. It is very rare case in the history of law-making processes in Cambodian that more than 99% of the laws enforced prepared by the government.[36]

The provisions of the HIV/AIDS Law provide legal protection to PLHIV such as protection from discrimination in employment, education and access to health care and other services; protection from breach of the confidentiality and protection from coerced or non-consensual HIV testing.

Based on the review of HIV/AIDS Law, there is one article related to the private sector's participation in HIV/AIDS services. Article 26 states that "The state shall ensure that all persons with HIV/AIDS shall receive primary health care services for free of charge from public health networks and encourage the participation from the private sector". [37] Thus the article is ambiguous for readers and provides rooms for interpretations of the term "primary health care", "the private sector" and the absence of detail rules on encouraging private sector to participate in providing HIV/ AIDS services.

LINKAGES Project implemented by FHI 360 and funded by USAID, carried out an assessment on HIV/AIDS services provided by private practitioners and laboratories in 2018. In that survey, 18 private health practitioners shared information about their providing HIV/AIDS services to clients. The services include antiretroviral therapy (ART), counseling, post-exposure prophylaxis (PEP) and pre-exposure prophylaxis (PrEP). The counseling mainly focuses on

[35] Royal Kram No. NS/RKM/0702/015 dated on July 26, 2002 promulgating Law on Prevention and Control of HIV/AIDS (Cambodia)

[36] Constitution 1993 as amended 2018 (Cambodia), Article 91-new
Article 91-new states the senators, the National Assembly's members and the Prime Minister have the power to initiate the law

[37] Royal Kram No. NS/RKM/0702/015 dated on July 26, 2002 promulgating Law on Prevention and Control of HIV/AIDS (Cambodia), Article 26.

antiretroviral drug (ARV) side effects and adherence before and after initiating ART. This is kind of ART adherence counseling. The counseling in HIV is more on voluntary confidential counseling and testing (VCCT) approach, meaning pre-HIV testing counseling and post-testing counseling. The post-exposure prophylaxis (PEP) is provided to mostly men who had experienced of broken condoms during sexual intercourse, and the pre-exposure prophylaxis (PrEP) is provided to mostly serodiscordant couples who were willing to have babies.[38] The report indicates that the private practitioners also send HIV patients' sample (blood) for testing to private laboratories.[39] The services performed by private laboratories include HIV testing, Confirmatory Testing, Counseling, Viral Load (VL) Testing and CD4 testing.[40]

The report presents that there were 262 ART patients are being under the care and treatment of private practitioners. Among them, 217 ART patients or 83% of private services are provided in Phnom Penh, 10 ART patients or 4% are provided in Siem Reap, 23 ART patients or 9% are provided in Banteay Meanchey and 12 ART patients or 4% in Battambang.[41] Among the 262 HIV patients, 194 patients or 73%) of them have had their Viral Load (VL) testing done in which 134 patients have their VL testing in the Institut Pasteur du Cambodge, 47 at NCHADS laboratories and 9 patients have their VL testing outside Cambodia.[42]

As for compliance with the Opportunistic Infection (OI) and ART Clinical Management Guidelines, the report shows that private practitioners apply the five criteria of the guidelines include screening OI and TB before initiation of ART, performing CD4 baseline test, provide Cotrimoxazole (CTX), providing fluconazole prophylaxis if CD4<100 and performing VL testing is required. The report shows that most (16 of 18) private practitioners received training from NCHADS on OI

[38] Dr. Chel Sarim, Nhim Dalen, Dr. Steve Wignall, John Macom, Dr. Ly Porsun (March 2018), Rapid Landscape Assessment on HIV/AIDS Services Supplied by Private Practitioners and Laboratories, Linkages Project, p.5

[39] Dr. Chel Sarim, Nhim Dalen, Dr. Steve Wignall, John Macom, Dr. Ly Porsun (March 2018), Rapid Landscape Assessment on HIV/AIDS Services Supplied by Private Practitioners and Laboratories, March 2018, Linkages Project, p.6

[40] Dr. Chel Sarim, Nhim Dalen, Dr. Steve Wignall, John Macom, Dr. Ly Porsun (March 2018), Rapid Landscape Assessment on HIV/AIDS Services Supplied by Private Practitioners and Laboratories, March 2018, Linkages Project, p.9

[41] Dr. Chel Sarim, Nhim Dalen, Dr. Steve Wignall, John Macom, Dr. Ly Porsun (March 2018), Rapid Landscape Assessment on HIV/AIDS Services Supplied by Private Practitioners and Laboratories, March 2018, Linkages Project, p.6

[42] Dr. Chel Sarim, Nhim Dalen, Dr. Steve Wignall, John Macom, Dr. Ly Porsun (March 2018), Rapid Landscape Assessment on HIV/AIDS Services Supplied by Private Practitioners and Laboratories, March 2018, Linkages Project, p.8

and ART HIV Clinical Management.[43] However, none of laboratories 'staff receive training from NCHADS.[44] On reporting, the report shows that private practitioners never report their HIV patients to NCHADS and they are so reluctant to do so and in addition NCHADs has never request them to do so.[45]

1.5. The Health Care Insurance Scheme under National Social Security Fund

This section examines laws and regulations related to health care insurance for workers working for both public and private sectors. The review finds out that in 2016, the health care scheme for via the Sub-decree No.01. ANkr.BK dated 06 January, 2016 on the Establishment on Health Care for Persons Defined by the Provisions of the Labor Law. The sub-decree aims at setting up a mechanism providing members of the National Social Security Fund (NSSF) with health care prevention and benefits.[46] The Health care scheme is a contribution system that employers and workers have an obligation to pay contribution to the (NSSF).[47] However, in 2017, the Royal Government of Cambodia amended Article 7 of the Sub-decree No.01. ANkr.BK dated 06 January, 2016 on the Establishment on Health Care for Persons Defined by the Provisions of the Labor Law and requires only the employer to pay contribution for health care of their workers.[48]

The health care scheme for public sector workers was created by the Sub-decree No.134. ANkr.BK dated 27 August 2017 on the Conditions, Formalities and Procedures of benefits provisions of Social Security Schemes on Occupational Risks for Public Employees and on Health Care Scheme for Public Employees, Former Civil Servants and Veterans. According to the Sub-decree, health care

[43] Dr. Chel Sarim, Nhim Dalen, Dr. Steve Wignall, John Macom, Dr. Ly Porsun (March 2018), Rapid Landscape Assessment on HIV/AIDS Services Supplied by Private Practitioners and Laboratories, March 2018, Linkages Project, p.9

[44] Dr. Chel Sarim, Nhim Dalen, Dr. Steve Wignall, John Macom, Dr. Ly Porsun (March 2018), Rapid Landscape Assessment on HIV/AIDS Services Supplied by Private Practitioners and Laboratories, March 2018, Linkages Project, p.10

[45] Dr. Chel Sarim, Nhim Dalen, Dr. Steve Wignall, John Macom, Dr. Ly Porsun (March 2018), Rapid Landscape Assessment on HIV/AIDS Services Supplied by Private Practitioners and Laboratories, March 2018, Linkages Project, p.12

[46] Sub-decree No.01. ANkr.BK dated 06 January, 2016 on the Establishment on Health Care for Persons Defined by the Provisions of the Labor Law (Cambodia), Article 1-Article 2

[47] Sub-decree No.01. ANkr.BK dated 06 January, 2016 on the Establishment on Health Care for Persons Defined by the Provisions of the Labor Law (Cambodia), Article 7

[48] Sub-decree No.140. ANkr.BK dated 26 August, 2017 on the Amendment of the Sub-decree No.01. ANkr.BK dated 06 January, 2016 on the Establishment on Health Care for Persons Defined by the Provisions of the Labor Law (Cambodia), Article 7-new

services for Public Employees, Former Civil Servants and Veterans are the same as health prevention program for health care scheme for persons defined by provisions of the Labor Law.[49]

The compulsory contribution to the heath Care Scheme of the (NSSF) by the employers and workers are reestablished under the new Draft Law on Social Security Fund in 2019. The new draft law was passed by the Council of Ministers on August 2, 2019. According to the draft law the Health Insurance Scheme for public sector employees shall be a compulsory contribution in which the state and public sector employees, former civil servants and veterans have obligation to co-contribute and the Health Insurance Scheme for persons defined by the provisions of the Labor Law including personnel serving in the air and maritime transportation, and household servants shall be a compulsory contribution in which the employers and persons defined by the provisions of the Labor Law including personnel serving in the air and maritime transportation, domestic or household servants have obligation to co-contribute. The new draft Law also states about the Health Insurance Scheme for the self-employed, but this health insurance scheme is a voluntary contribution. [50]

To implement this health care scheme for persons defined by provisions of Labor Law, public employees, former public employees and veterans, the Ministry of Labor and Vocational Training and the Ministry of Health issued an Inter-Ministerial Prakas No.291 KB/Br.K on Agreement on Health Services Consumption and Provisions of Health Care Between The (NSSF) and public? Health Facility. The Inter-Ministerial Prakas requires both public and private health facilities to sign agreement with the (NSSF) in order to provide health care services for members of the (NSSF). The public health facility includes heath center, referral hospital level 1 and level 2 and the National Hospital. For private health facilities are those that is licensed and recognized by the Ministry of Health.[51]

Despite having health care scheme for workers who are members of the NSSF, the health prevention and medical care services currently regulated excludes free services as stipulated in the public health policy[52] which one of them is HIV/

[49] Sub-decree No.134. ANkr.BK dated 27 August 2017 on the Conditions, Formalities and Procedures of benefits provisions of Social Security Schemes on Occupational Risks for Public Employees and on Health Care Scheme for Public Employees, Former Civil Servants and Veterans (Cambodia), Article 16

[50] Draft Law on Social Security 2019(Cambodia), Article 6

[51] Inter-Ministerial Prakas No.291 KB/Br.K on Agreement on Health Services Consumption and Provisions of Health Care Between The National Social Security Fund and Health Facility (Cambodia), Article 3

[52] Prakas No.109 KB/Br.K dated March 17, 2016 on Health Care Benefits (Cambodia) , Article 4(1)

AIDS from the knowledge of public health and the HIV/AIDS Law. On April 25, 2018, the scope of coverage of health care prevention and medical services was additionally provided based on the Prakas No. 184 KB/Br.K.B.S.S dated April 25, 2018 on Revision of Article 2,4, 5, 6,7,8 and 10 of Prakas No. 109 KB/Br.k dated March 17, 2016 on Health Care Benefits, but HIV/AIDs are still not included.[53]

In conclusion, currently the NSSF is not required to cover free of charge services, including HIV services provided in both the public health sector and private providers.

1.6. Regulating Private Sector's Health Care Services, Health Practitioners and Pharmaceuticals

This section examines laws and regulation related to the private health sector's health care services. At present, private sector's health care services and health practitioners are regulated by Law on the Management of Private Medical, Paramedical and Medical Aids Professions (2000); Law on Regulating Health Practitioners (2016) and Law on Compulsory Licensing for Public Health (2018), Law on the Management of Pharmaceuticals (1996) and its Amendments (2007) and MOH's relevant Prakas and other legal instruments in Cambodia.

1.6.1. Management of Private Medical, Paramedical and Medical Aid Professions and Services

The Law on the Management of Medical, Paramedical and Medical Aid Professions aims at defining procedures and conditions of functioning for the management of private Medical, Paramedical and Medical Aid Professions who operate a private Medical, Paramedical and Medical Aid services.[54] Medical professionals and Paramedical professionals are those of physicians, pharmacist, dentist and midwife; and The medical aide professionals are nurses, laboratory specialist, physical therapist, dental specialist, and similar professional practitioners.[55]

The opening or Closure or Transformation or Relocation of Private Medical, Paramedical and Medical Aid Services and other private medical aid practice are

[53] the Prakas No. 184 KB/Br.K.B.S.S dated April 25, 2018 on Revision of Article 2,4, 5, 6,7,8 and 10 of Prakas No. 109 KB/Br.k dated March 17, 2016 on Health Care Benefits Cambodia), Article 4-new

[54] Royal Kram No. NS/RKM/1100/10 dated November 22, 2000 on the Promulgation of The Law on the Management of Medical, Paramedical and Medical Aid Professions (Cambodia), Article 1

[55] Royal Kram No. NS/RKM/1100/10 dated November 22, 2000 on the Promulgation of The Law on the Management of Medical, Paramedical and Medical Aid Professions (Cambodia), Article 3

regulated by a Prakas on the Ministry of Health.[56] Prakas No.020/01 ABS/MP dated September 7, 2001 on The Procedure and Technical Conditions Set in the Request to Open or Close Transform or Relocate Private Medical Paramedical and Medical Aid Services provides nine (9) categories of Private Medical, Paramedical and Medical Aid Services[57] such as follows:

i) A Medical Consultation Cabinet (MCC) which shall be managed by a doctor or a physician assistant,

ii) A Dental Consultation Cabinet (DCC) which shall be managed by a dental doctor or a dentist or a specialized physician in the field of dentistry,

iii) A Prenatal Consultation Cabinet (PCC) which shall be managed by a secondary midwife

iv) Kinesitherapy Cabinet (KC) which shall be managed by a Kinesitherapist

v) An Ophthalmology Consultation Cabinet (OCC) which shall be managed by a doctor who works or specializes in the field of ophthalmology,

vi) An Aesthetic Surgery Cabinet (ASC) which shall be managed by a doctor who specializes in aesthetic surgery,

vii) A Medical Laboratory (ML) which shall be managed by a doctor, a doctor of pharmacy or a senior pharmacist who holds a Specialization Certificate in the field of medical laboratory or has served the laboratory at least 5 years. The manager must be a retiree or suspend his public employment without obtaining salary or resigns from the public sector employment and shall be regularly present.

viii) An Obstetrics and Gynecology Cabinet (OGC) which shall be managed by retired doctor or a doctor who suspend his public employment without pay and specializes or has worked in the fields of obstetrics and gynecology for five years and must be regularly present.

ix) A Clinic or Polyclinic (CP) which shall be managed by a retired doctor or a doctor who suspends his/her public employment without

[56] Royal Kram No. NS/RKM/1100/10 dated November 22, 2000 on the Promulgation of The Law on the Management of Medical, Paramedical and Medical Aid Professions (Cambodia), Article 6

[57] Prakas No.020/01 ABS/MP dated September 7, 2001 on Procedures and Technical Conditions for the Request to Open or Close or Transform or Relocate of Private Medical, Paramedical and Medical Aid Services (Cambodia) , Article 1

pay or terminates his/her public employment and must have at least a 5-year experience and must be regularly present.

Based on Prakas No.20/01 ABS/MP above, all nine (9) categories of Private Medical, Paramedical and Medical Aid Services must be managed by health professionals and obtained a permission from the Ministry of Health and fulfill all legal requirements to get permission.[58] During the operation, all licensed medical, paramedical and medical aid services are required to send the patient treatment report quarterly to the Ministry of Health (the Hospital Department). In case of failure to provide the report, the Ministry of health will not renew the license.[59] Besides 9 types of Private Medical, Paramedical and Medical Aid Services, there is provisions related to HIV/AIDS service stipulated in the Prakas No.20/01 ABS/MP. Therefore, they should be able to provide HIV/AIDS services if there is a demand from clients and those Medical, Paramedical and Medical Aid Professionals are trained and have knowledge on HIV/AIDS services.

Besides compliance with the Law on the Management of Medical, Paramedical and Medical Aid Professions and related Prakas required by the law, all health practitioners shall comply with rules and procedures for regulating health practitioners and the practice of their profession stated in the Law on Regulating Health Practitioners, which is required all Health Professionals who wish to practice a health profession must register with the their respective health profession councils and have the health practitioner license; comply with professional codes of conducts, standards and norms; and follow the scope of practice determined within the health profession.[60] The professional codes of conducts, standards and norms of each health professional are regulated in the a respective sub-decree[61] and managed

[58] Prakas No.020/01 ABS/MP dated September 7, 2001 on Procedures and Technical Conditions for the Request to Open or Close or Transform or Relocate of Private Medical, Paramedical and Medical Aid Services (Cambodia), Art.2, Article 4

[59] Prakas No.020/01 ABS/MP dated September 7, 2001 on Procedures and Technical Conditions for the Request to Open or Close or Transform or Relocate of Private Medical, Paramedical and Medical Aid Services (Cambodia), Art.2, Art 23

[60] Royal Kram No. NS/RKM/1116/014 dated November 19, 2016, on the promulgation of Law on Regulating Health Practitioners, Art 7

[61] i) Sub-decree No.61ANKr.BK dated 28 August 2008 on the Code of Conducts of Doctors, ii) Sub-decree No.156 ANKr.BK dated 26 September 2009 on the Code of Conducts of Dentists, iii) Sub-decree No.33ANKr.BK dated 20 January 2014 on the Code of Conducts of Pharmacists, iv) Sub-decree No.24A NKr.BK dated 18 January 2013 on the Code of Conducts of Midwives, and v) Sub-decree No.59 ANKr.BK dated 11 February 2013 on the Code of Conducts of Nurses,

by a respective council, namely the Medical Council of Cambodia[62], Dental Council of Cambodia[63], Pharmacy Council of Cambodia[64], Cambodian Midwives Council[65], and Cambodian Council for Nurses.[66]

Despite having those laws and regulations, quality of health care services is a concern because there is no law regulating it yet. Currently, the MoH has prepared a draft Law on Health Care Services Management. The draft law aims at ensure and promote the quality of health services provided by both public and private health facilities. The Health care services shall be delivered though the health facilities with permission from the MoH. While this law is in the drafting stage, specific health care services such as HIV/AIDS shall be regulated either in the law or in the secondary legislation such as a Prakas of the MoH.

1.6.2. Pharmaceuticals Management and Compulsory Licensing for Public Health

The Law on the Management of Pharmaceuticals aims at governing all pharmaceuticals in the kingdom of Cambodia.[67] According to Article 4 of the law, only pharmacist(s) who has the following qualification as stated below may have rights to manufacture pharmaceuticals, import and export of pharmaceuticals and conduct a pharmaceutical business: i) Cambodian (Khmer) nationality, ii) Hold a pharmaceutical Diploma accredited by the Ministry of Health, iii) Have never been convicted of any criminal offence, and iv) Have good health to carry out the job.[68] The law requires to obtain a permission from the MoH regarding pharmaceutical Manufacturing establishment, the production, import, export and trade pharmaceuticals The formalities and conditions for production, import, export

[62] Royal Decree No. NS/RKT/0200/396 dated on 1 February 2000 on the Establishment of the Medical Council of Cambodia

[63] Royal Decree No. NS/RKT/0905/039 dated on 2 November 2005 on the Establishment of the Dental Council of Cambodia

[64] Royal Decree No. NS/RKT/0210/162 dated on 16 February 2010 on the Establishment of the Pharmacist Council of Cambodia (Cambodia)

[65] Royal Decree No. NS/RKT/0906/389 dated on 18 September 2006 on the Establishment of the Midwives Council of Cambodia (Cambodia)

[66] Royal Decree No. NS/RKT/0807/3723 dated on 17 August 2007 on the Establishment of the Nurse Council of Cambodia (Cambodia)

[67] Royal Kram No. CS/RKM/0696/02 dated 17 November, 1996 on the promulgation of Law on the Management of Pharmaceuticals, Article 1(Cambodia)

[68] Royal Kram No. CS/RKM/0696/02 dated 17 November, 1996 on the promulgation of Law on the Management of Pharmaceuticals, Article 4 (Cambodia)

and trade pharmaceuticals are regulated by a Prakas of the MoH.[69] Furthermore, all kinds of medicines produced locally or imported from overseas can be displayed for sale only if they are registered with visa numbers approved by the MoH.[70] Based on this requirement, if any import of HIV/AIDS medicines into the kingdom of Cambodia, this requirement must be fulfilled.

In relation to HIV/AIDS, in 2018, the Law on Compulsory Licensing for Public Health was adopted and promulgated. This law aims at promoting right to access to drugs for the public health through the provision of compulsory license for production, export and import of drugs during the circumstance or emergency or the most urgency such as HIV/AIDS, Tuberculosis, malaria and other diseases or the public use having no commercial characteristic or public health situation determined by the MoH.[71] According to the Law on Compulsory Licensing for Public Health, the MoH is representing the Cambodian Government and is empowered to manage, direct and supervision of the compulsory licensing in accordance with the provisions of the law.[72] The applicant for a compulsory licensing for public health can be a public entities, private entities, local NGOs and International/ Foreign NGOs recognized by the MoH and are permitted to produce, or import, export or distribute pharmaceuticals.[73] This law will enablable persons with HIV/ AIDs continue to receive free drugs or get a cheaper drugs when the law is fully implemented. In short, one can conclude that this law enables private sector to participate in provision of HIV/AIDS services

2. Key Informants' Views on Private Health Sector's Participation in HIV/AIDS Services

This section sums up the key informants' views on the private health sector's participation in provision of HIV/AIDS services as follows:

2.1. Views on Article 26 of HIV/AIDS Law

Based on the interview of key informants, there are two schools of thought.

[69] Royal Kram No. CS/RKM/0696/02 dated 17 November, 1996 on the promulgation of Law on the Management of Pharmaceuticals (Cambodia), Article 7

[70] Sub-decree No.44 ANkr dated 10 August 1994 on Visa- Registration of Medicines (Cambodia), Article 1 and 2

[71] Royal Kram No. CS/RKM/0418/006 dated 27 April, 2018 on the promulgation of Law on the Law on Compulsory Licensing for Public Health (Cambodia) , Article 1 and Article 4 (2 and 3)

[72] Royal Kram No. CS/RKM/0418/006 dated 27 April, 2018 on the promulgation of Law on the Law on Compulsory Licensing for Public Health (Cambodia) , Article 5

[73] Royal Kram No. CS/RKM/0418/006 dated 27 April, 2018 on the promulgation of Law on the Law on Compulsory Licensing for Public Health (Cambodia), Article 4(5)

The first one said this article states the state's obligation to provide primary health care service to persons with HIV/AIDS for free of charge because it is the right to health care of Cambodian citizens guaranteed by the Cambodian Constitution. Since it is the obligation of the state, so only the state can provide primary health care services to persons with HIV/AIDS. That means provision of HIV/AIDS health care services must be provided for free of charge through the public health facilities such as Health Post, Health Center, District Referral Hospital, Provincial Referral Hospital and National Hospital only. Private health sector facilities cannot provide health care services to persons with HIV/AIDS if no permission from the state and when the state encourage them to participate.

The second school of thought said that the article 26 of HIV/AIDS Law states not only the state's obligation to provide primary health care service for free of charge to persons with HIV/AIDS but also the state's obligation to encourage the participation from the private sector in provision of HIV/AIDS services. That means besides providing primary health care services to persons with HIV/AIDS for free of charge within the public health facilities, the state shall encourage the private health providers to participate in provision of HIV/AIDS health care services and the state shall not prevent or restrict the private health sector facilities to provide HIV/AIDS if their services are provided in line with the SOP and Clinical Guidelines related to HIV prevention and treatment of the country. The reason for this because the private health sector's participation in provision of HIV/AIDS Services creates options/choices of services for persons in need to choose health care service providers that they like, prefer, can afford, and that are close to their residence. In addition to this, it is a civic obligation for Cambodian health professionals/ practitioners to participate in combating communicable diseases from the public health point of view. When the private health sector participates in provision of HIV/AIDS services, an access to health care services are broader and can reduce burden of the state from the budget point of view because those who can afford may seek to get services from the private health care facilities or providers. When this group of population gets services from the private health care facilities, it creates more rooms for the poor who cannot afford to pay, can continue to seek services from the public health facilities for free of charge or from the private health sector facilities/providers trusted by the state to provide free of charge services to the poor through the public private partnership mechanism.

Despite two school of thoughts on article 26, all key informants from the legal sector such as the spokesperson of the Ministry of Justice; the former President

of the Bar Association; Lawyers of who are members of the Council of Jurists; Judges of the Supreme Court, the Appeal Court, and the Phnom Penh Court of First Instance said that article 26 states the obligation of the state to provide the primary health care service for free of charge from the public health facilities and does not prevent private sector from participating in providing HIV/AIDS service. In addition, this article requires the state to encourage them to participate in provision of HIV/AIDS Services. However, the article does not restrict private sector to provide HIV/AIDS services.

2.2. Views on Primary Health Care Services

When asked about the views on the term" Primary Health Care Services" for HIV/AIDS, there are different views. One said the services provided to persons with HIV/AIDS at Health Center, and the other said about basic health services people in needs in particular for PHLIV ranging from counseling to blood test and treatment, care and support.

2.3. Views on health providers of HIV/AIDS Services

When asked about who can provide HIV/AIDS services, the response to this question is both public health providers and private health providers. The study finds out that health providers for HIV/AIDS services include both the public health providers, and private health provider such as private sector for-profit (Medical Polyclinic) and private sector for non-profit such as Chhouk Sar Clinic and Institut Pasteur du Cambodge.

The private medical polyclinic licensed by the MoH to provide health care services and one of the services is operated by their foreign partner is HIV/AIDS service. The author respects the right to the informant who requested to be anonymous at this stage. Chouk Sar Clinic is an NGO. It provides HIV Counseling and testing, HIV/AIDs continuum care support and treatment and also PrEP.[74]

Institut Pasteur du Cambodge (IPC) is a research and public utility institute under the patronage of the Ministry of Health and it belongs to the International Network of Pasteur Institute.[75] On the bases of the interview, IPC provides services related to HIV/AIDS such as counseling, HIV blood testing, Viral Load testing and confirmed test referred by the private laboratory or NGOs or public health facilities. Currently IPC provides HIV services with free of charge and service with fee charge when there is request to put the name for client for official use such as marriage or job. IPC complies with SOP and Clinical Guidelines of NCHADS and

[74] About Chhouksar. Available at https://chhouksarclinic.com/service/2

[75] About Institut Pasteur du Cambodge, Available at http://www.pasteur-kh.org/home/about-us/

also their own guidelines because IPC is a high-tech based institute supported by France and receives an ISO.

Chhouk Sar Clinic and Institut Pasteur Institute have worked closely with the MoH and NCHADS and they report their patients and other required data/ information to the MoH and NCHADS regularly.

Besides private clinics provides HIV/AID services, the study also finds out that a private company is permitted to register its imported HIV medicines and make them available in the market.

2.4. Views on Type of Private Health Providers providing services for person with HIV/AIDS

When asked about type of private health providers providing services for PLHIV, the response is that all private health providers obtained licensed from the MoH should allow to provide HIV/AIDS services but they must have knowledge on HIV/AIDS and receive proper training.

2.5 Views on whether the government should encourage private provision of HIV/AID services

When asked whether the government should encourage private provision of HIV/AIDS services, all informants agreed that private provision of HIV/AIDS services shall be permitted because people trust the private health providers than the public and in addition, they are close to citizen's residence. But what is the concern is high price.

2.6. Views on conditions for private provisions of HIV/AIDS services

When asked about the conditions set for private provisions of HIV/AIDS services, the response is that any private health provider is permitted to provide HIV/AIDS services, the medical professionals in charge shall obtaining a proper training and certification for Health practitioners and providers on HIV/AIDS, Compliance with HIV/AIDS Law, operational and Clinical Guidelines on HIV/ AIDS of NCHADS, NAA and the MoH, Compliance with Laws and regulations related to Health sector and code of conducts of respective health profession and Reporting Obligation to NCHAD, NAA and Ministry of Health on HIV/AIDS case.

2.7. Views on services provided by the private health providers

When asked about what kinds of services shall be provided by the private health providers, the response is that any HIV/AIDS services provided by the public health facilities shall be provided by the private health providers as well. The reason for this because private health services are easy to access because it is closed to citizens' residence., the services is friendly and facility is better. In addition, they

can keep privacy.

2.8 Views on Incentives for private provision of HIV/AIDS

When asked about the incentives for private provision of HIV/AIDS, the responses include training, taxes exemption for the services, national recognition and reward on HIV/AIDS services etc.

2.9. Views on Models or forms of private sector provision of HIV/AIDS services

When asked about the models or forms of private sector provision of HIV/AIDS services, the responses are as follows:

- Non-Profit HIV/AIDs Clinic run by NGO with financial support from donors and/or state so HIV/AIDS patients can receive free drug and free services
- For Profit- HIV/AID Private health facilities run by private professionals. They charge counseling service from HIV patients and can prescribe and sell HIV medicines to HIV patients with reasonable price that patients can afford.
- For Profit-HIV/AIDS Private health facilities run by private professionals. They charge only counseling service from HIV patients and can prescribe and provide HIV medicines to HIV patients for free of charge but the state provides HIV medicines and other commodities to those health facilities.
- Inclusion of HIV/AIDS service into the health care scheme of the (NSSF). Through this model, the employer and workers' pay contribution
- Introduce HIV/AIDS services into the private insurance

3. Regulating Health Care Service for Infectious Diseases in the Region

This section examines the practice of selected countries in the region on how their legislation regulating the control of the infectious disease such as HIV/AIDs in particular related to private sector from the view of public health.

3.1. Singapore

In Singapore for the purpose of control of infectious disease within Singapore, Under the Infectious Disease Act (IDA), every medical practitioners who has reason to believe or suspect that any person attended or treated by him is suffering from a prescribed infection diseases or is carrier of that disease shall notify the Director of Medical Services and this requirement is also applied to every person in charge of a laboratory used for the diagnosis of disease who become aware of the existence of a prescribed infection disease in the course of his work.[76]

[76] Infectious Disease Act 1975 as amended in 2019 (Singapore) Part III, Article 6. Retrieved from https://sso.agc.gov.sg/Act/IDA1976

Besides, IDA, in Singapore, there is also the National Registry of Disease Act aiming at compilation of information on the incidence of certain diseases for use as a basis for the direction of programs for disease prevention and control. This act requires the manager of the healthcare institution to notify the Registrar of reportable diseases.[77] The term "Health care institutions include any private hospital, medical clinic, clinical laboratory or healthcare establishment licensed under the Private Hospitals and Medical Clinics Act.[78]

3.2. Australia

In Australia, medical practitioners are required to take HIV s100 Prescriber Course to be accredited prescribers of s100 HIV before they are admitted to provide prescription on HIV drug, according to the interview with an Australian medical practitioner in Phnom Penh and Australian Society for HIV Medicines (ASHM).[79] That means all practitioners are required to take the course on the National Standards for the HIV s100 Community Prescriber Program.[80]

3.3. Private Health Sector Engagement in HIV/AIDS Service Delivery in the region

The approaches to private health sector involvement in providing HIV related cares varies depending on country. The Study finds out the following 8 models of private health sector involvement in providing HIV services such as i) Fee for service, ii) Leverage Provider Networks, iii) Decentralized National ARV Program, iv) Output-based Aid, v) Insurance, vi) Company-Sponsored Clinics, vii) Workplace Initiatives, and viii) Regional Business Coalition.[81]

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[77] National Registry of Disease Act 2007 (Singapore), Part III, Article 6. Retrieved from https://sso.agc.gov.sg/Act/NRDA2007

[78] Private Hospitals and Medical Clinics Act 1980 (Singapore, Article 2. Retrieved from https://sso.agc.gov.sg/Act/PHMCA1980

[79] How to Become a HIV s100 Community Prescriber. Retrieved from https://www.ashm.org.au/HIV/prescriber-programs/how-to-become-hiv-prescriber/

[80] National Standards for HIV Training and Accreditation, Retrieved from https://www.ashm.org.au/HIV/prescriber-programs/how-to-become-hiv-prescriber/National%20Standards%20for%20the%20HIV%20s100%20Prescriber%20Program_2019.pdf

[81] Sargent, John, J. Johnson, M. Majorowski, N. Friedman, and C. Blazer. 2009. *Private Sector Involvement in HIV Service Pro- vision*. Arlington,VA: USAID | AIDSTAR-One Project,Task Order 1 pp.2-11. Retrieved from https://www.jsi.com/JSIInternet/Inc/Common/_download_pub.cfm?id=11211&lid=3

Table 1: Models of Private Sector Involvement in HIV Service Provision (adapted from Feeley, Connelly, and Rosen 2007)

	Model	Description	Funding Source	Funding Direction	Implementation Considerations	Example	Country
A.	**Fee for Service**	Fees are paid for services rendered.	Individual	Individual pays private providers or clinics.	Assumes a patient population that can pay. Quality control requires regulatory agency.	N/A	
B.	**Leveraged Provider Networks**	Donor sponsors HIV services delivered by network of providers.	Donor Government Individual	Donor funding can subsidize health services/products, administrative costs, provider training, member hotlines. Individual may pay negotiated rate for health services/products.	Complex implementation requires a fairly sophisticated health system. Dedicated manager is needed to facilitate players, funding, and quality control. Must consider funding sustainability.	BroadReach Healthcare	South Africa
						Gold Star Network	Kenya
C.	**Decentral-ized National ARV Program**	Government decentralizes ARV program and supplies "free" ARVs to private providers.	Donor Government	Donors supply drugs. Government procures drugs for private providers.	Requires an established health system. Dedicated management is needed to coordinate partners, medicines, and supply systems. Consider financing sustainability. Must have human resources and data management system for forecasting and quality control.	Decentralization of ARV program	Uganda
D.	**Output-Based Aid**	Donors purchase outputs for patients delivered by public and private providers.	Donor	Donor funding purchases health services/products, and covers administrative costs.	Consider sustainability due to high administrative cost. Useful to partner with community organizations when focusing on high-risk populations. Must have quality control mechanism.	Instituto Centroameri-cano de la Salud (ICAS) voucher program	Nicaragua
E.	**Insurance**	Insurance policies pool the health risks and costs of a group of people subscribing to the policy.	Individual Company	Individual and/or employer pays a periodic fee to the insurer for health coverage at the time of an event.	Difficult to reach individuals not in the formal employment sector. Employers may see an increase in spending on fringe benefits, though may also see an increase in productivity.	Diamond Health Services	Namibia
F.	**Company-Sponsored Clinics**	Donor aids company in expanding services to community.	Donor Company Individual	Donor provides technical assistance, training, medical supplies, equipment, health products, and communication materials. Company provides services at workplace clinic.	Funding sustainability. Leverages existing health care infrastructure and business organizations. Cost to companies must be reasonable. Assumes existing accreditation body.	Health Initiatives for the Private Sector (HIPS) program	Uganda
G.	**Workplace Initiatives**	Company develops HIV prevention, treatment, education, and support program.	Company	Company contributes human and financial resources to HIV intervention program at the workplace.	Consider funding sustainability. Ensure monitoring and evaluation (M&E) program is in place to provide feedback. Keep senior-level players involved. Useful to partner with other companies to share ideas and pool resources.	Mercedes-Benz South Africa (MBSA)	South Africa
H.	**Regional Business Coalition**	Nonprofit coalition of dues-paying businesses works with companies, other nongovernmental organizations (NGOs), and the public sector to create or expand workplace interventions.	Company Donor Government	Company dedicates human and financial resources to program. Donor contributes commodities or funding. Government provides expertise.	Cost to companies must be reasonable. Possible subsidies for small businesses. May require grant for start-up costs, with short-term goal of self-sufficiency. Useful to partner with other NGOs and business groups for expertise.	Thailand Business Coalition against AIDS	Thailand

Source: AIDSTAR-One Project (December 2009)

III. CONCLUDING ASSESSMENT AND ANALYSIS

Based on the above two schools of thought, the authors of this report and the key informants from the legal sector agree with the second school of thought that article 26 of the HIV/AIDS Law does not prevent the private health sector from participating in providing HIV/AIDS services. This article states the obligation of the state to provide the primary health care service for free of charge within the public health facilities, and to encourage private health sector to participate in provision of HIV/AIDS Service. Based on the above finding, though there are an absence of guided rules and procedures particularly for private health sector to participate in HIV/AIDS services, the practice exists and private health services for HIV/AIDS clients are available, but they are not integrated and cannot be measured.

The above finding shows that although article 26 of HIV/AIDS Law does not provide definition of the term "private sector". The term "private health sector" was already defined under the health strategic plan described above as it comprises of both private health sector for profit and private sector for non-for profit. Therefore, this term is unanimously agreed that the term private sector include both private sector for profit and private sector for non-for profit. However, the term "primary health care services "is still an issue and it is not yet clearly defined.

According to the World Health Organization (WHO), the concept of primary health care has been repeatedly reinterpreted and redefined. It refers to the provision of ambulatory or first-level of personal health care services, or a set of priority health interventions for low-income populations (also called selective primary health care) or an essential component of human development, focusing on the economic, social and political aspects. However, WHO has developed a cohesive definition of primary health care based on three elements: i) meeting people's health needs through comprehensive promotive, protective, preventive, curative, rehabilitative, and palliative care throughout the life course, strategically prioritizing key health care services aimed at individuals and families through primary care and the population through public health functions as the central elements of integrated health services; ii) systematically addressing the broader determinants of health (including social, economic, environmental, as well as people's characteristics and behaviors) through evidence-informed public policies and actions across all sectors; and iii) empowering individuals, families, and communities to optimize their health, as advocates for policies that promote and protect health and well-being, as co-developers of health and social services, and as self-cares and care-givers to others. In short, it is a whole-of-society approach to health and well-being

centered on the needs and preferences of individuals, families and communities. It addresses the broader determinants of health and focuses on the comprehensive and interrelated aspects of physical, mental and social health and wellbeing. [82]

Based on the above definition, the question is raised whether the term "primary health care" should be broadly or specifically defined in Cambodian context. If the term is broadly defined, the state shall involve the private sector to render HIV/AIDS services because it is the obligation of the state under the Constitution. Involving private sector is just to create an alternative option and accessibility for PLHIV and also persons without HIV who just seek HIV testing or counseling to receive services which are close to them instead of travelling further to the public health facilities which are farther from their residence and cost them more. If the term is specifically defined and the scope of primary health care services is determined for free of charge from the public health facilities, the involvement of private health providers will enable them to officially charge the fee from their client based on the market price of competitive economy.

primary health care for Cambodian citizens is the obligation of the state. For this reason, definition of primary health care defined by WHO requires Cambodia to develop laws and policies on a comprehensive health care system which includes both public health sector and private health sector in order to provide health care services for the citizens including persons with HIV/AIDS.

In relation to the comprehensive health care system for HIV/AIDS, the Cambodian government has achieved its 90-90-90 on providing HIV/AIDS services through the public health facilities for free of charge. But these services and activities are co-financed by external funding. However, to achieve its elimination targets of 95-95-95 by the end of 2025, the engagement of the private health sector reporting of HIV cases will become key

In conclusion, the study concludes that there is no legal barrier for private health sector providing HIV/AIDS services in Cambodia. The term "private sector" includes both for-profit and non-for profit. There already are private sector provisions of HIV/AIDS Services but there is uncertainty of formal recognition. The private sector is required to follow all laws and regulations related to health sector. However, there is no specific guidance, rules and procedures for private sector HIV/AIDS services. There is a legal requirement for all health practitioners who are licensed to operate a Private Medical, Paramedical, and Medical Aids Services have an obligation to report their clients and treatment related activities to

[82] WHO (February 27, 2019), "Primary Health Care defined" Retrieved from https://www.who.int/news-room/fact-sheets/detail/primary-health-care

the Ministry of health. If they do not report, the Ministry of Health will not renew their license. In addition, HIV/AIDS medicines are legally registered and imported by the private companies

IV. RECOMMENDATIONS

Based on the above finding and conclusion, there is a need to formally recognize the HIV care and treatment by private health care providers. The study suggests the National AIDS Authority, the MoH and NCHADS to consider to amend the HIV/AIDS Law or develop a secondary legislation such as a Prakas regulating the provision of HIV/AIDS services of private health sector providers.

Based on the above finding and conclusion, there is no legal barrier for private health sector providing HIV/AIDS services, but there is a need to formally recognize the private health sector involvement in provision of HIV/AIDS services. The study suggests to developing a specific Guideline on SOP for private health sector provisions of HIV/AIDS services to provide and report to the Government. NCHAD can develop a new Guidelines on SOP for private health sector provisions of HIV/AIDS services or amending a currently used SOP for public health facilities and requires for private health sector provisions of HIV/AIDS services. However, the government can develop an overall policy to encourage the private sector to engage in achieving its overall health goals and achieve universal health coverage

All Cambodian and foreign health practitioners are required to join technical training provided by NCHADS or any educational institutions recognized by the Ministry of Health to ensure quality care of HIV/AIDS services and report to the government ensuring confidentiality of information. The experience from Australia is recommended for the training. Training and continued education are conditioned for licensing and renewal of license.

Furthermore, there needs for better enforcement of regulations related to health sector and reporting of the private sector. The experience from Singapore is recommended for the reporting from the point of view of public health policy and control of communicable diseases.

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Annex: Questionnaires and Key Informants

A. Questionnaires

1. Do agree with the following services as the primary health care services for people living with HIV/AIDS (PLHIV)?
2. Do you know who provides HIV andAIDS Primary Health Services in Cambodia?
3. What do you understand by the wording "encourage the participation from the private sector" under article 26 of HIV/AIDS Law mentioned below?
4. Do you know what are the type of private health facilities providing HIV/AIDS services?
5. While the government continues to provide HIV/AIDS services for free. should the government encourage the private sector providers (both for profit and not for profit) to provide HIV/AIDS services, And why?
6. What should be the conditions for private provision of HIV/AIDS services?

7. What kinds of health care services can private health facilities provide to people living with HIV/AIDS?
8. Should the state provide incentives to private health facilities to encourage them participate in providing health care services for people living with HIV/AIDS? and Why?
9. What model should the government engage with the private sector to provide HIV/AIDS services?
10. Do you have any other comments or recommendations?

B. **Key Informants (All views are personal opinions and they are requested to be anonymous)**

No	Key Informants and Institutions
1	Judge of the Supreme Court
2	Judge of the Appeal Court
3	Judge of Phnom Penh Capital Court
4	Under Secretary of State of the Ministry of Justice
5	Deputy Chairman of the Council of Jurists
6	Former President of the Bar Association
7	Lawyers and Members of Council of Jurists and Members of the Bar Association of the Kingdom of Cambodia
8	Officials from the Ministries of Health
9	Official from National Aid Authority
10	Officials from National Centers for HIV/AIDS, Dermatology and STD (NCHADS)
11	Officials from Institut Pasteur du Cambodge (IPC)
12	Doctors working for Development Partners
13	Doctors and Staff of Private Insurance Company
14	Personnel of Civil Societies working on HIV/AIDS Project
15	An HIV/AIDS service provider from Private Clinic
16	A Manager of Private Pharmaceuticals Company

PROMOTING ECONOMIC RIGHTS OF INDENGENOUS PEOPLE IN CAMBODIA

SOTH Sang Bonn [*]

ABSTRACT

This article presents the protection of economic rights of indigenous people in Cambodia, especially rights to land ownership in contemporary Cambodian context. Article 44 of the Cambodian Constitution recognizes rights to individual or collective ownerships; however, it does not explicitly provide protection for indigenous people. This vagueness poses great gaps in realization of economic rights as they are vulnerable group. The article will examine to what extend can indigenous people enjoy economic rights in contemporary Cambodian context? It sets light on how the rights is guaranteed in international and national levels, how much effort made by state and non-state actors to promote the rights. It also highlights the gaps and recommendations to be considered for enforcement or future researchers.

Scope of the Paper:

Article 31 of the Cambodian Constitution provided that Cambodian citizens are equal before law, no discrimination against race, complexity, religion, sex, language, belief, political tendency or social status. This means that there is no discrimination against minorities, especially against indigenous people. Article 44 of this Constitution recognizes rights to individual or collective ownerships and obliges State to act in accordance with law, provide fair and just compensation in advance should the real property is expropriated for the public interest.

The author of this paper aims to explore to what extend can indigenous people in Cambodia being free from discrimination, thus, enjoy equal rights, especially their economic rights? This research will focus mainly on desk review of existing literatures, human rights principles, existing laws and regulations relevant to protection and promotion of economic rights for indigenous people in Cambodia.

What Are Economic Rights?

There is no normative agreement on definition of "Economic Rights" in the international community and among scholars. However, the term **"Economic Rights"** seeks to include the rights to acquire, own, use and inherit property protected by laws; rights to work, rights to education, freedom to establish business

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domestically and internationally; and others rights.[2]

The outline of this paper will be in five parts that include, 1) introduction; 2) legal protection on economic rights of indigenous people in Cambodia; 3) Institutional protection; 4) Gaps and Impacts; and 5) Conclusion and recommendation.

I. INTRODUCTION

Indigenous peoples are those with tradition-based cultures who were politically autonomous before colonization and who, in the aftermath of colonization and/or de-colonization, continue to struggle for the preservation of their cultural integrity, economic self-reliance, and political independence by resisting the assimilation policies of nation-states.[3] Similarly, Heinz Kleger defined indigenous peoples as mainly those peoples whose homelands have been overrun by settlers, colonists, or conquerors and who have been involuntarily incorporated into states run by people whom they regard as foreigners.[4]

Instead of defining the term "Indigenous people", Cambodian Land Law of 2001 defines "Indigenous community" in Article 23 as a group of people that resides in the territory of the Kingdom of Cambodia whose member manifest ethnic, social, cultural, and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use.

There seems no current official update on number of indigenous people in Cambodia until recently. However, some scholars and government existing sources suggested that more than 17 ethnic groups, with a total number that range from 1% to 1.4% or around 120,000 to 190,000 indigenous people, living more or less in 24 provinces of the Kingdom of Cambodia.[5] Until recently, there are 458 indigenous communities, but there are only 18 communities have received collective land tittle.[6]

Indigenous people are among vulnerable groups that required special protection because they are minorities and cannot protect themselves properly.

[2] Asbjorn Eide, Economic, Social and Cultural Rights, Martinus Nijhoff Publishers, London, 1995, pg.21-40

[3] Franke Wilmer, The Indigenous Voice in the World Politics pg. 97 (1993)

[4] Heinz Kleger, The Theory of Multiculturalism and Cultural Diversity in Cambodia, pg. 15 (2004)

[5] Soth Sang Bonn, SOTH Sang. 2012. "Rights of indigenous people in Cambodia." In *Introduction to Cambodian Law*, by Kong Phallack, Joer Menzel Hor Penh, 403. Phnom Penh: Konrad-Adenauer-Stiftung. Tessier, Jade. 2016. "Indigenous Peoples' Initiative for Land Rights Recognition in Cambodia." *Asia Indigenous People Pack (AIPP)*, 18.

[6] (Aug 25, 2018, 10:05pm) https://cchrcambodia.org/index_old.php?url=media/media.php&p=newsletter_detail.php&nsid=59&id=5

Proper protection of indigenous people means beyond protection of minority group, but it means to protect environment and identity of Cambodian, too.[7]

Despite government's continuous efforts to promote rights of indigenous people, cases on either direct or indirect discrimination against indigenous people in Cambodia still exist in different forms as in practice their rights are not systematically protected yet. For instance, once there is a case of abuse caused by business activities, an individual may claim damage on economic benefit directly basing on applicable laws.[8] In contrast to the majority people, this might not be a case for indigenous people because the complaint mechanism is not friendly to indigenous people, most of them don't know law, cannot effort legal service, they mostly live in remote areas and they don't speak Khmer language.[9]

As far as the research is concerned, there are many factors to be considered in order to ensure non-discrimination and equal rights for indigenous people in Cambodia. However, the author of this article will look into two main factors which have not been properly addressed. The two factors include education that is the ground to sustain economic benefit, and registration of collective ownership/land title for indigenous people in Cambodia.

The author of this paper aims to explore to what extend can indigenous people in Cambodia enjoy their economic rights over their ownership? This research will focus mainly on desk review of existing literatures, human rights principles, existing laws and regulations relevant to protection and promotion of economic rights of indigenous people in Cambodia.

II. LEGAL PROTECTION

1. Protection from International Law

From international legal perspective, the protection of economic rights derives from second generation of rights through the International Covenant on Economic, Social and Cultural Rights (ICESCR). This covenant was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1988 and it entered into force on 3 January 1976.[10] Cambodia is a state party to this covenant since 26 May 1992.

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[7] Ibid, SOTH Sang Bonn, pg. 404-405

[8] Cambodian Const 1993, art. 39; See also UN Economic Council, E/C.12 GC/24, 10 Aug 2017, par. 4.

[9] UN Economic Council, E/C.12 GC/24, 10 Aug 2017, par. 4-9.

[10] International Covenant on Economic, Social and Cultural Rights, Art. 27.

The (ICESCR) is different from International Covenant on Civil and Political Rights (ICCPR). The ICCPR provides basic needs to guarantee rights to life and integrity of human beings to live a life differently from animal. Thus, it obliges state party to put utmost efforts and resources to ensure immediate realization of rights as guaranteed in ICCPR. In contrast to ICCPR, ICESCR required quality of life and obliged state party to indicate progressive development to ensure proper exercise of rights as guaranteed in ICESCR. For instance, Article 2(1) ICESCR provides that: "*Each State Party to the present Covenant undertakes 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*."

The ICESCR covers a wide range of topics including rights to housing, food, self- determination, work, employment, social security, family, protection and assistance, adequate standard of living, gender equality, health (physical mental, reproductive and sexual health), education and cultural life.

State party to this covenant is bound by article 16 and 17 to act in conformity with the content of the covenant and shall submit regular report to the Committee on Economic, Social and Cultural Rights on how the rights are being implemented including the measures which they have adopted and the progress made in achieving the observance of the rights.

As Cambodia is a State party to ICESCR, it owes obligation as imposed by Article 16 and as required by Article 17 to furnish reports in stages to comply with program to be established by the Economic and Social Council within one year of the entry into force of the covenant.

Cambodia put a lot of efforts to ensure enjoyment of economic, social and cultural rights of its citizen since its accession to the covenant in May 1992. It is supposed to submit initial report within two years of accepting the Covenant and thereafter every five years to the Committee on Economic, Social and Cultural Rights to examine each report and addresses its concerns and recommendations for Cambodia in the form of "concluding observations". Unfortunately, Cambodia made 14-year delay in its submission of the initial, the first; and the second report.[11]

The Committee on Economic, Social and Cultural Rights is the body composed of 18 independent experts who are persons of high moral character and recognized competence in the field of human rights with a 4-year mandate

[11] UN Concluding observation of Economic and social of 42nd session, May4-22, 2009, pg. 2.

to monitor implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties.[12] The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.

In addition to this mechanism, international community has established many international instruments relevant to the protection and promotion of indigenous people. However, those international instruments could not be applied directly because Cambodia is a dualism State, a State that regards international and national laws are two separate systems. This means that application of international law cannot be applied directly despite reaffirmation made by the constitutional council in its decision made in 2007.[13] Instead, international instruments which Cambodia ratified have to be incorporated in domestic law before they can be enforced in Cambodia.

As far as the research is concerned, Cambodia is a State-party to international instruments below that contain more or less relevant provisions to promote economic rights of indigenous people.

1. International Covenant on the Elimination of All Forms of Racial Discrimination

   This Covenant was adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. It was entered into force on 4 January 1969. Cambodia has ratified this covenant on 28 November 1983;

2. Convention concerning the Protection of the World Cultural and Natural Heritage

   This convention was adopted by the General Conference at its seventeenth session in Paris on 16 November 1972. Cambodia has accessed to this convention since 28 November 1991;

3. International Covenant on Civil and Political Rights

   This covenant was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force since 23 March 1976, in accordance with Article 49 and Cambodia has accessed to this covenant on 26 May 1992;

[12] (August 26, 2018, 10:25pm), https://www.ohchr.org/en/hrbodies/cescr/pages/membership.aspx.

[13] Constitutional Council of the Kingdom of Cambodia, Decision No.092/003/2007 (10 July 2007). This decision requires trial judge to consider "laws" including national and international law when hearing a case instead of basing on the a specific law at stake.

4. International Covenant on Economic, Social and Cultural Rights

   This Covenant was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, and entered into force since 3 January 1976, in accordance with Article 27. Cambodia has accessed to this covenant since 26 May 1992;

5. Convention on the Elimination of All Forms of Discrimination Against Women

   This covenant was adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 and entered into force since 3 September 1981, in accordance with Article 27(1). Cambodia has accessed to this covenant since on 15 October 1992;

6. Convention on the Rights of the Child

   This convention was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force since 2 September 1990, in accordance with Article 49. Cambodia accessed to this convention since on 15 October 1992;

7. Convention on Biological Diversity

   The convention was opened for signature at the Earth Summit in Rio de Janeiro on 5 June 1992 and entered into force since 29 December 1993. Cambodia has accessed to this convention on 9 February 1995;

8. Convention on Wetlands of International Importance especially as Waterfowl Habitat (Accession on 23 June 1999);
9. Convention for the Safeguarding of the Intangible Cultural Heritage (Ratification on 13 June 2006);
10. Convention on Protection and Promotion of the Diversity of Cultural Expression (Accession on 19 September 2007);
11. Convention on the Protection of the Underwater Cultural Heritage (Ratification on 24 November 2007);
12. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.

Although the above instruments aim at promoting and protecting the rights of indigenous people in general, this article will focus more on economic rights, especially on aspects of education and registration of collective land tittle/ ownership of properties of indigenous people in Cambodia. Most importantly,

the author of this article examines how State incorporates concept of the above instruments in domestic policies, laws and regulations; and how much indigenous people in Cambodia enjoy economic benefits over the ownership in practical level.

Although Cambodia is a State party to the above-mentioned legal instruments, it is noted that UNDRIP is significant and most relevant for the promotion and protection of indigenous people. UNDRIP is a universal and inspirational legal instrument contains 24 points in its preamble along with 46 articles that was adopted by the United Nations General Assembly by a resolution No. 61/295 in its 107th plenary meeting on 13 September 2007 after over two decade's negotiation. The declaration addresses not only land ownership of individual and collective rights, but also requires State to recognize its obliterations and rights as stipulated therewith to constitute the minimum standards for the survival, dignity and well-being of the indigenous people of the world.

The UNDRIP aims at providing a mechanism to protect the individual and collective ownership rights of Indigenous peoples, as well as their rights to culture, identity, language, employment, health, education, protection of traditional lands, as well as other issues. The Declaration includes many provisions that relate to the rights of Indigenous peoples to participate in decision-making.

With reference to ownership of lands either for economic, social or cultural purposes, Article 26 states "Indigenous peoples have the rights to own, use, develop and control the lands, territories and resources they possess by reason of traditional occupation or use, as well as those which they have otherwise acquired." These rights include the relationship to coastal seas and waters, and protecting them for future generations.

UNDRIP is an international instrument among others that contains provisions relevant to the promotion and protection of indigenous people's rights, unfortunately, it is only a soft law that lacks of enforcement mechanisms. However, this declaration reflects continuous efforts of international community and commitment of states in upholding rights and interests of indigenous people in a dynamic way.[14]

Another important international instrument that offers concrete legal protection for indigenous people is ILO's Convention No. 169 on Indigenous and Tribal People, which was adopted in Geneva at 76th International Law Commission session on 27 June 1989. This Convention contains key principles of self-management, protecting indigenous peoples' cultures and communities, and

[14] Cambodian Center for Human Rights, Report on Access to collective land tittles for indigenous people Communities in Cambodia, pg. 8. (February 2016)

the rights to traditional land and resources, and encouraging equal treatment and access to State services. Most importantly, it requires participation and consultation of indigenous peoples on issues that affect them particularly development issues. Unfortunately, Cambodia does not ratify this convention yet, which creates skepticisms if enough efforts have been put to give absolute legal protection and promotion rights of indigenous people.[15]

As Cambodia owes obligation through the above international instruments, how does Cambodia integrate international concepts and principles in domestic law and how much can indigenous people realize their economic rights in practice?

2. Protection from National Laws and Regulations

Until recently, there are many policies, laws and legal regulations relevant to the protection and promotion of the economic benefit of indigenous people, which can be listed chronologically below. Concepts and principles of international law have more or less been integrated in the existing national legal instruments below which reflect the commitment of Cambodia to comply with international obligations in which they are bound to.

2.1. Cambodian Constitution, 1993

The Constitution expresses its recognition international law and commits to respect international instruments ranges from the Universal Declaration of Human Rights (UDHR), the covenants and conventions related to human rights.[16] This Constitution is a political product which is the result of political agreement reached by all main political parties with the support of international community to end a two-decade civil war (1970-1993). Article 44 of this Constitution recognizes rights to individual or collective ownerships and obliges State to act in accordance with law, provide fair and just compensation in advance should the real property is expropriated for the public interest.

2.2. Land Law, 2001

The Cambodian Land Law 2001 is a modern legal framework to recognize land rights of indigenous communities. Articles 23 and 24 of this law respectively provide identity and criteria of indigenous communities. In addition to this, Article 25 specifies that the lands of indigenous communities include not only lands actually cultivated, but also includes reserved necessary for the shifting of cultivation which is required by the agricultural methods they currently practice and which are recognized by the administrative authorities. Article 26 allows

[15] Ibid.

[16] Ibid, Const 1993, Article 31.

collective ownership under condition that they need to register as an indigenous community and to be recognized by the Ministry of Interior (MoI). Article 27 of this law allows indigenous members to freely leave the group and may enjoy the rights to individual ownership, while Article 28 obliges authority inside the community the rights to manage the property of indigenous people.

The Land Law 2001 provides not only opportunity for indigenous people to have collective and individual ownership, but it also penalizes against actions that hamper the realization of the rights as provided under Article 248 and imposes different punishments as provided from Article 249 to Article 266.

Article 256 of the Land Law 2001 imposes punishment against authorities who infringes land rights of indigenous communities, especially in the zone under their management authorities. Although, there is such punishment provision, there neither a report nor a scholarly article ever mentions about any case of punishment against authorities who abused land rights of indigenous community, despite cases of abuses have been widely reported.

In Cambodian context, the authority that knows well on the land use of indigenous community are the Commune/Sangkat council and the community protected areas or the so called the community forest. The Commune/Sangkat council is a body to safeguard citizens' interests including the interests of indigenous people. Depending on its demography and geography, this body is composed of 5 to 11 councilors who were elected through a proportional system for a mandate of five years.[17]

2.3. Forest Law, 2002

Although Law on Forestry deals more on the forest, and the management of Cambodian forest, it also provides some provisions concerning the protection of economic rights of indigenous people. For instance, Articles 11, 15, 16, 37, 40 are relevant articles that guarantee and recognize the rights of indigenous peoples to continue the use and access to certain forest areas which these groups traditionally use and to practice their ways of living in term of enjoyment of benefits from the forest.

Particularly, Article 15 of this law restricts concessionary contract from interfering the customary user rights on the land of indigenous community that is registered in accordance with law. Furthermore, it also requires the concession agreement to respect the legitimate rights of indigenous community forest or

[17] Law on Commune/Sangkat Administrative Management, (Preach Reach Kram NS/RKM/0301/05), art. 9-12, (March 19, 2001)

community property areas.[18] These provisions are evidences of effort to promote and protect economic rights of indigenous people because the indigenous communities depend largely on the products and sub-products of the forest for their livelihoods.

2.4. Interim Paper on Strategy of Land Policy Framework, 2002

The effort to promote and protect economic rights of the indigenous people in Cambodia is not a new phenomenon for the Royal Government of Cambodia. Evidently, there was a commitment to establish mechanisms for the award of long-term tenure rights to concessionaires to minimize economic impacts of the local communities, indigenous people and other target groups.[19] The concessionaires, who were awarded rights to manage lands where indigenous communities situated, were required to adhere to strict standards.[20]

Scholars and experts who are dealing in the field of protection of indigenous people's rights are convinced that a standard that minimize impacts on indigenous communities is principle of Free, Prior and Informed Consent (FPIC), a specific right that pertains to indigenous peoples, which is recognized under UNDRIP. It allows indigenous people to give or withhold consent to a project that may affect them or their territories through having their representatives to participate in decision-making in matters which would affect their rights.[21] In Cambodian context, the principle has been embedded in various legal instruments including the Constitution, the law on expropriation and others. However, it is skeptical if it were property applied in practical work, thus, issues related to land rights of indigenous people are remained.[22]

2.5. Other Relevant Laws and Regulations

Domestic laws and regulations below are also more or less relevant to the promotion, protection of indigenous people.

1. Law on Commune/Sangkat, 2002 (brief and reflect only article relevant to IP)
2. Sub-decree No.97 on Community Forestry, 2003 entitling local communities the rights to use the local resources.

[18] Law on forestry 2002, art. 16.

[19] International Monitory Fund: *Enhanced Structural Adjustment Facility Medium-Term Economic and Financial Policy Framework Paper 1999–2002,* point 19, (October 6, 1999); See also: (Aug 23, 2018, 10:45pm) http://www.imf.org/external/np/pfp/1999/cambodia/#IIIG.

[20] Ibid.

[21] UNDRIP 2007, art. 18.

[22] LIM Sovannara, Indigenous People: Political Rights, Culture, Education and Health Care, (Parliamentary Institute of Cambodia), pg. 9 (November 2015)

3. Sub-decree on State Land Management, 2005
4. Sub-decree on procedure, Establishment, Classification and Registration of Permanent Forest Estate, 2005
5. Prakas on Identification and Mapping of State Land and State Land Classification, 2006
6. Prakas on Guideline for Community Forestry, 2006
7. Prakas on Guideline for Community Protected Area, 2006
8. Law on Natural Protected Area, 2008
9. Law on Tourism, 2009
10. National Policy on Indigenous peoples' Development in Cambodia, 2009
11. Sub-decree on Procedure of Commune Land Use Planning Process, 2009
12. Implementation Manual on Commune Land Use Planning, 2009

From the legal perspective, the indigenous people and their communities receives exceptional privilege and protection on the rights to use land and natural resources even inside and around the protected area, including their safe access to traditionally used land, respect for their customs, belief and religions on family scale.[23] Further to this privilege, it also bestows the power to Ministry of Environment to produce guidelines on the procedures and process of establishment of the community protected area. Article 25 of this law impliedly regarded indigenous communities as the community of protected area, thus, they are allowed to use some parts of sustainable use zone in accordance with an agreement up to fifteen years or the agreement could be revoked accordingly if those communities fails to comply strictly with the agreement.[24]

The above list of policies, laws and legal regulations are not exhaustive; however, they are more or less relevant to the promotion and protection of economic rights of indigenous people in Cambodia. For instance, rights to own property are very fundamental and are economic rights.[25] The property ownership rights derive from Article 17 of the Universal Declaration on Human Rights (UDHR), Articles 26 and 27 of the United Nations Declaration on the Rights of Indigenous People (UNDRIP). These provisions have been incorporated in the Constitution of 1993, and in other domestic laws.[26] In addition to this, Article 25 of the UDHR also

[23] Law on protected area 2008, art. 22.

[24] The above agreement refers to the agreement to be concluded between the Nature Conservation and Protection Administration of the Ministry of Environment and the concerned community protected area.

[25] Universal Declaration on Human Rights (UDHR), 1948, Art.17.

[26] Constitution of Cambodia, Art. 31, 44 and See also land law 2001.

guarantees the rights to adequate housing.

Although there are many relevant policies, laws and legal regulations, they may only be tiger papers if there is no effective system or mechanism to enforce them; and they will not serve the purpose to promote or protect rights if there is no institution, human and financial resources to enforce them. For this reason, it is important to identify who are main actors or institutions accountable to enforce the above policies, laws and regulations to promote and protect Economic Rights of indigenous people in Cambodia?

III. INSTITUTIONAL PROTECTION

As far as the research is concerned, there are at least three main institutions involving in ensuring that indigenous communities collectively and legally own property. Those ministries are: Ministry of Rural Development, Ministry of Interior and Ministry of Land Management, Urban Planning and Construction.

Brief roles of each institution and involvement of other stakeholders, processes and stages to obtain collective land title/ownership are illustrated below:

The process of land registration for collective land tittle is complicated and time consuming. According to Sub-decree No.83 on Procedure of Registration of Land of Indigenous Communities, the process is required in three main stages excluding various steps in each stage that can be summarized hereinafter:

Stage 1: Self-identification and registration for recognition at the Ministry of Rural Development (MRD). In this stage, each indigenous community traditional representative needs to work with the community members to obtain formal self-identification recognition as a "traditional culture" by the Ministry of Rural Development.

In stage 1, if self-identification and recognition by the MRD are milestones, the indigenous community is required to undertake other complicated steps in order to achieve those milestones. Firstly, the representative need to educate and convince the community member the importance of collective tittle, and prepare necessary documents for registration. Secondly, the community needs to have a consensus among them in order to declare ethnic group they belong to. Thirdly, they need to wait for an appraisal of identification to be made by MRD. Fourthly, they need to prepare by-law including a list of traditional authorities and practices; and finally, they need to seek consultations and preparation of document for MRD. The above steps require capable and at least fairly literate representative to undertake the whole process which at least takes two weeks to process.

From the side of MRD, relevant officials may need to work with supporting partner and undertake various steps, too that include selection of indigenous community target and supporting partners; capacity and consensus building in the community; deciding on identity appraisal and issuing identity letter for the community; and finally developing internal rule on Land Use and Management. The above steps are also time-consuming, too.

Stage 2: Indigenous Community shall then get recognition as a "legal entity" by the Ministry of Interior. In this stage, indigenous community needs to apply through the commune council and provincial governor's office. The community, then requests permission from the provincial governor to hold community plenary meeting to review, finalize and approve the community by-law before it is submitted to the provincial governor's office.

The governor's office establishes a provincial working group that is supported by District Cadastral Administration (DCA) to conduct survey and undertake measurement and adjudication. The DCA requests technical support from the National Department of Geography and Cadastral to conduct Global Positioning System (GPS) survey, investigate of all available evidences and document possible land disputes in the community area. After that, DCA prepares adjudication documents consisting of land and survey form, map of community land, confirmation letter of status of indigenous community to be registered and approval of community by-laws for public display for 30 days.

During public display, any conflicting parties claiming the community land being registered are allowed to file a complaint to DCA, and finally, after expiration of the public display, DCA prepares a sporadic index map and forwards all document to Provincial Cadastral Administration (PCA). The community then waits for certification notice after expiration of the 30 days public posting to be notified by the Ministry of Interior.

Stage 3: The community has to submit a collective land registration request to the Ministry of Land Management, Urban Planning and Construction to be granted a Community Land Tittle. In this stage, the community may continue to have consultation with members and neighboring communities on boundary if there are still some conflicts. When the conflicts are completely settled, PCA verifies completeness of documents and send all the documents to the Central Cadastral Administration before Official Collective Land Titling to be granted for the community.[27]

[27] Ibid, (Tessier 2016), pg. 20.

In practical life, most indigenous people do not know the above three institutions because they may not care about the registration of collective land tittle\ ownership, but their daily livings. In fact, as they are marginalized and vulnerable groups, they deserve special protections from the above institutions, and other institutions so that they can enjoy rights like others. Unlike an ordinary citizen that may file a complaint to the court directly against those who abused his/her property rights, the indigenous people may not know law, and mostly are illiterate, thus, they don't know which institution can help address their concerns.

IV. GAPS AND IMPACTS

Although there are above institutions to register or issue land tittle for indigenous people, there are still gaps in understanding duties, principles, gaps in laws, policies and in practical levels.

1. Gaps in Understanding Duty and Principles

The duty of State to respect, protect and fulfill has less been known among Cambodian official. Despite continuous efforts have been put by the government, especially efforts to promote economic rights of indigenous people, officials in enforcement levels fail to perform properly due to the lack understanding of their duties and principles. The duty to respect in this context means that State and other stakeholders shall not interfere with indigenous people when they exercise their rights as recognized by laws. For promoting and protecting, State needs to have policies, laws, regulations to protect them against human rights abuses by third parties, including business enterprises.[28] For fulfilling, State shall have various necessary policies, laws and regulations to safeguard interests of indigenous people including establishment of reliable complaint mechanisms within judicial and outside judicial system to effectively remedy their disputes.

Business enterprise also owes a duty to respect human rights, especially the rights of indigenous people through principle of corporate responsibility, which means that they should act with due diligence to minimize impacts and properly address problems arises out of their business activities.

A proper adherence to principle of Free, Prior and Informed Consent (FPIC) is also an option to ensure realization of economic rights for indigenous people. According to this principle, "Free" means free from force, intimidation, manipulation, coercion or pressure by any government or company. "Prior" means

[28] The United Nations High Commissioner for Human Rights-Cambodia (OHCHR Cambodia) in collaboration with the Indigenous Community Support Organization (ICSO): A Guide on Business and Human Rights 2013, pg.44.

prior to government allocating land for particular land uses and prior to approval of specific project. This means that the indigenous communities are given enough time to have consultation and to decide. "Informed" means that they are given reliable relevant information to be made by government, independent experts or by the project in a language that can easily understand to make their decision whether or not to agree to the project. Whereas "Consent" requires that the people involved in the project to allow indigenous communities to say "Yes" or "No" to the project at each stage according to decision of the communities.[29]

2. Gaps in Policies, Laws and Regulations and Impacts

So far, there are policies to guarantee economic rights of indigenous people; however, those policies were made in an "Opt In" mode, meaning that they need to agree and comply with some complex preconditions to be entitled to a collective land title. This mode is unfriendly for indigenous people and their communities as the processes are complex, and they are mostly illiterates. A supportive or friendly policy for indigenous people could be the one that is widely inclusive or an "Opt Out" policy. This means that it includes and care about the best interest of indigenous people except those who wish to leave the community, they may opt out accordingly. For example, a policy that contains a provision here: "Indigenous people and their communities are entitled to collective land ownership which is administered by State's Administration". Any member who wishes to leave the Community may request in accordance with law to be entitled with individual ownership.

The above example of the "Opt Out" policy includes all indigenous people and their communities. It imposes fewer simple burdens for the members and their communities knowing that they are vulnerable group and less literate. Instead, it creates more burdens and responsibilities for State to ensure that the indigenous people and their communities really enjoy economic rights in practice.

In short, if the policies, laws and regulations are unclear and providing complex stages and processes those complexities along with the lack of resources and arbitrary restrictions like in Sub-Decree No. 83, it counters against the Land Law, thus, could be barriers to hamper economic rights of indigenous and causing real impact on daily life of indigenous people.

3. Gaps in Domestic Laws and Impacts

A loophole in the law is also another gap in upholding economic rights of indigenous people. This means that there are laws related to promotion of economic rights of indigenous people, however, the laws fail to provide procedures or

[29] Christina Hill, Serena Lillywhite and Michael Simon, Guideline to Free, Prior and Informed Consent, Oxfam Australia, June 2010, pg. 8.

mechanisms that are friendly for indigenous people. Sometimes, it fails to provide in the Constitution which is the supreme law of the State, thus it does not impose clear obligation or responsibility for State. For example, Article 44 of Cambodian Constitution guarantees property rights or economic rights for all citizens, but not specifically for indigenous people, despite they need special protection. In contrast to Cambodian Constitution, Peru's Constitution of 1993, under Article 2, recognizes and protects the ethnic and cultural plurality of the nation, makes the indigenous language official under Article 48 and guarantees the rights to communal property under Article 88, and under Article 149 allows authorities of the native community to adjudicate cases of indigenous people within their territory in accordance with their customary law.[30]

Clear guarantee in the Constitution imposes strong obligation and responsibility for State. If State assumes more responsibilities to ensure realization of economic rights of indigenous people in practice, it reflects commitment of State in fulfilling its principle obligations to respect, promote/protect and fulfill. In contrast, if there is no clear obligation imposed by the Constitution, there will be no proper enforcement; thus, indigenous people will never enjoy their economic rights in real life. The absence of clear and direct guarantee of the economic rights of indigenous people in the constitution cases impact not only livelihood of indigenous people, but also jeopardizes the rule of law in Cambodia.

4. Gaps in Enforcement and Impacts

Gaps in enforcement ranges from lack of capacity official in implementing policies, laws and regulations to lack of human and financial resources, thus, causing delay in providing quality services to indigenous people who are in need. For instance, when we talk about institution dealing with land disputes, there are at least 3 main institutions involved namely the court, the Cadastral Commission and the National Authority for Land Dispute Resolutions.

The courts normally have jurisdiction over titled land; illegal development contracts and other disputes as provided by law on the organization and the functioning of the court of the Kingdom of Cambodia. However, how many judges, prosecutors, lawyers or court clerks who speak the language and understand the culture of indigenous people? Has interpretation to be provided for them and has information to be made available in their languages?[31]

[30] International Human Rights Internship Program, Circle of Rights: Economic, Social & Cultural Rights Activism: A training Resource 2000, pg. 130.

[31] Similar questions have been raised by Questions by the Rapporteur in connection with the consideration of the eighth to thirteenth periodic reports of Cambodia (CERD/C/KHM/8–13), para 13, (2010)

In contrast to the court, the Cadastral Commission is to settle untitled land disputes.[32] This means that either ordinary citizens or indigenous people are to bring cases on titled land disputes before courts, whereas untitled land disputed before the Cadastral Commission. In addition to this, it is also noted that the National Authority for Land Dispute Resolutions is bestowed with special jurisdiction to provide dispute resolutions to cases which are "beyond the jurisdiction" of the Cadastral Commission.[33]

As far as the above provisions are concerned, there seem to be unclear scope of the two institutions, the National Authority for Land Dispute Resolution and the Cadastral Commission. Question could be raised as what kind of cases are "beyond the jurisdiction" of the Cadastral Commission? This vagueness creates great gaps in enforcement levels. For instance, if there is a case of land grabbing by a powerful individual on the untitled indigenous community land, where can they bring the case to? This is a hard case for indigenous people; thus, they rarely bring cases to court or to the Cadastral Commission.[34]

5. Data Gaps and Impacts

It is hard for scholars and researchers to get a reliable data on indigenous people in Cambodia. This is because there is no reliable updated data to be made available by State's institution yet. According to law, the National Institute of Statistic (NIS) of the Ministry of Planning (MoP), shall collaboratively work with the Ministry of Rural Development (MRD) and Ministry of Interior (MoI) to have a reliable update of statistic of indigenous people in Cambodia. However, this has not been properly addressed yet until recently.[35]

The absence of official and reliable data in Cambodia sometimes creates misunderstanding or misinterpreting efforts of the Royal Government. For example, the report of the Ministry of Land Management, Urban Planning and Construction as of 24 March 2016, specifies that the ministry has been undertaking the registration a total 25 indigenous communities, under which 11 communities have been

[32] Sub-decree 47, (Aug 21, 2002), and Prakas on the Guideline and Procedure of the Cadastral Commission, #112 DNS/Brk, art. 3.

[33] Royal Decree NS/RTK/0206/697, art.3.

[34] Similar questions have been raised by the rapporteur in connection with the consideration of the eighth to thirteenth periodic reports of Cambodia (CERD/C/KHM/8–13), para 21, (2010)

[35] Moul Phath and Seng Sovathana, Country Technical Notes on Indigenous Peoples' Issues, IFAD (2012). The government also recognized this challenge in its initial reports submitted by States parties under articles 16 and 17 of the ICESCR, par 508, Nov 10, 2008.

completely registered,[36] while other publication made in the same year specified that 15 indigenous communities in three provinces (Ratanakiri, Mondulkiri and Kompong Thom) got their approved Community Land Tittle.[37] An issue is whether the approved community land tittle is a land title which is issued by the Ministry of Land Management, Urban Planning and Construction or it is an approval for proceeding of a community land tittle?

In short, the absence of official and reliable data creates not only misunderstanding; misinterpretation among scholars, but it also discredits the effort of the royal government. This may cause political impact as criticisms could be raised on quality work of the government.

V. CONCLUDING REMARKS

As far as the research is concerned, the promotion of economic rights for indigenous people is not a new phenomenon in Cambodia. This could be traced back to the accession of ICESCR in 1992 and integration of the protection in the Constitution of 1993 to the development of land law 2001 and other domestic laws and regulations.

Cambodia owes obligation to promote economic rights for all citizens, especially, for indigenous people as they are vulnerable group. The obligations of the Royal Government are not only to respect promote\protect and fulfill, but it also required submitting a report on status of the implementation of ICESCR for a periodic review. Despite various efforts have been put to promote economic rights of indigenous people and their communities, skepticisms have been raised if the Royal Government put enough effort, and if so, why does the Royal government fails to ratify ILO No.169, an international instrument providing more detail provisions to promote and protect the rights of indigenous people.

Effort to promote economic rights of indigenous people would be more realistic providing that an indigenous people friendly policy to be made in an "Opt out" mode that requires simple procedure for indigenous people and their communities to attain their economic rights knowing that they are vulnerable with low rate of literacy. In addition to an "Opt out" policy, consideration in providing economic rights of indigenous people directly in the constitution would require authorities to take it seriously in enforcement level. Furthermore, providing clear

[36] Ministry of Land Management, Urban Planning and Construction: Annual Report of 2015-2016, pg. 8. (Mar 24, 2016).

[37] Jade Tessier, Prabindra Shakya, Joan Carling and Patricia Wattimena, Indigenous People Initiative for Land Recognition in Asia, *(*Asia Indigenous Peoples Pact (AIPP) Foundation, Thailand) pg. 20. (2016)

legal provisions, clear scope of authority for relevant institutions along with simple procedure for registration of collective land title would be an option to consider guaranteeing the benefit for indigenous people.

Whilst quality education is the key to promote economic rights, consideration to provide equal opportunity to access to quality education for indigenous people is a priority. In similar regards, acknowledging the uniqueness of livelihood of indigenous people by trying to adhere to the FPIC principle, promote their language, culture and ensuring effective dispute resolutions in accordance with their culture, and providing sufficient training on the protection of indigenous people for judges, prosecutors and lawyers could be ideal solution for the future.

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CONSTITUTIONAL RIGHT: A VIEW OF LAND RIGHTS IN CAMBODIA

HAP Phalthy [*]

ABSTRACT

After the collapse of Khmer Rouge, Cambodia has tried hard to revitalize all sectors. Constitutional rights have been developed greatly. This paper had the main purpose to check how land rights in Cambodia have been protected in the real practice. The research covered registration of both state land and private land the territory of Cambodia. Methodically, the collection of data of land registration from the Ministry of Land, Urban Planning and Construction was used for showing the statistical analysis. The research result showed that decentralizing the power of competent authority to with regard to land administration is a way to ensure the protection of land rights. The research suggested speeding up land registration for the whole country so that landholders are able to make use of their land rights effectively to fulfill the economic needs and also reduce land disputes.

I. INTRODUCTION

After passing hard time of civil wars, Cambodia turned into a democratic society in 1993. According to the Constitution, "all persons, individually or collectively, shall have the right to ownership" [2] and the legal private ownership is protected by law. The right to confiscate properties from any person is exercised only in the public interest as provided for under the law with fair and just compensation in advance.[3] However, in the real situation, the application may be somehow different. In the late 1990s, people who had lived along the area which would be required to build Kizuna Bridge, a support from the Japanese government, claimed for the compensation of their houses and land affected by the bridge construction project. At first, the government just proposed the unreasonable compensation to the landholders without considering the land market price. Hence, the landholders used their rights against the unfair compensation from the government and lastly,

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[2] The 1993 Cambodian Constitution, Art. 44.

[3] The 2001 Land Law, Art. 5; The 2010 Cambodian Expropriation Law, Art. 19(1).

they won.[4]

This paper is divided into five parts. Part 1 introduces the whole idea of the paper while part 2 elaborates how Cambodian land was privatized after the fall of solidarity group for farming policy. Part 3 argues that intention to get perfect land registration faced challenges while human resources, technical knowledge and budget are in shortage. Part 4 analyzes the impact of land dispute resolution mechanisms. Last part concludes the whole paper.

II. LAND PRIVATIZATION

The rebuilding of the Cambodian property system began with the Instruction on the Implementation of Land Use and Management Policy dated June 3, 1989, under which the state recognized two proprietary rights: rights of ownership over residential land; and possession rights over agricultural land. The distinction between these substantive rights at that time was that possession rights were conditioned on continuation of actual use, while ownership was not subject to such a restriction.[5]

The restriction of land size granted in 1989 was interestingly remarkable. Ownership right was given over only residential land of no more than 2,000 square meters while possessory right was granted over agricultural land of no more than 5 hectares.[6] The application policy required all landholders to register their land from June 1989 to December 31, 1989 otherwise the land was considered to be vacant. This period witnessed the shortage of time for landholders and cadastral officers to deal with the policy, and then there would be an expansion period to June 1990.[7] However, the continuance of land application reception was made without limitation.[8] For more convenient understanding, please refer to figure 1 below.

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[4] In the late 1990s, a large number of people whose lands were required to move out for building Kizuna Bridge which was supported by the Japanese Government complained for the unfair compensation although they were happily supporting the bridge construction. The bridge connects the west to the east of Mekong River that is across Kampong Cham Town and Tonle Bet.

[5] Instruction on the Implementation of Land Use and Management Policy, No.03SNN, June 03, 1989.

[6] Instruction on the Implementation of Land Use and Management Policy, No.03SNN, June 03, 1989.

[7] Letter of the Office of the Council of Ministers on the Request to Delay the Acceptance of Land Applications, No.94SCN/KS, January 17, 1990; and Letter of Ministry of Agriculture on the Delay of Acceptance of Land Applications, No.485KSK/M/RB, January 29, 1990.

[8] Notification on the Acceptance of Land Applications and Subsequent Measures, No.3451KSK/SCN, July 21, 1990.

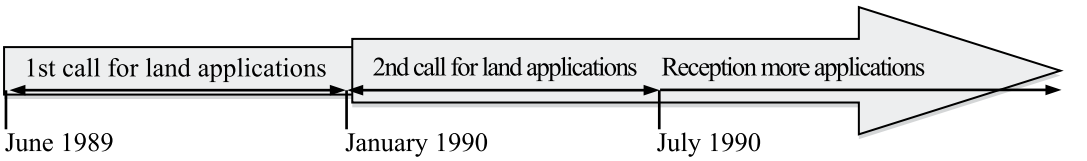


Figure 1: Calls for land applications in Cambodia in 1989 and onward

The first Land Law, which was stipulated on October 13, 1992, also marked the restriction of land rights to Cambodian citizens. The idea of granting land ownership and land possession continued from the 1989 Instruction. Yet, the restriction of land size was silent thereby leading to unambiguous understanding among the competent authorities. Registration of land was compulsory in a sense that the government allowed landholders to registration within the period only 5 years meaning after October 1997, the land which was not registered with this period was considered to be state land.[9] The important thing to this requirement is that the dissemination of this law is made effectively nationwide or not. If landholders did not know their obligation, the land registration may not happen as expected.

1. Responsible Institutions for Land Registration

It is necessary to understand the whole picture of responsible competent authorities to register land. Since the inception of land privatization in 1989, the Department of Cadastre which was formed under the Ministry of Agriculture. After the existence of the coalition government in 1993, there was discussion of the ministry to supervise the Department of Cadastre. Ministry of Economy and Finance was then the apparent ministry to intent to supervise this department.[10] However, the government Sub-decree decided to move the Department of Cadastre to be under the supervision of the Council of Minister until the Ministry of Land Management, Urban Planning and Construction was established in 1999. The whole evolvement of the institutional reform for land management in Cambodia is described in the below figure.

[9] Land Law of Cambodia, No.100K, October 13, 1992, Arts. 18 & 224.

[10] Interview with Voan Lim, former General Secretary of the General Department of Cadastre and Geography of Ministry of Land Management, Urban Planning and Construction (December 20, 2012).

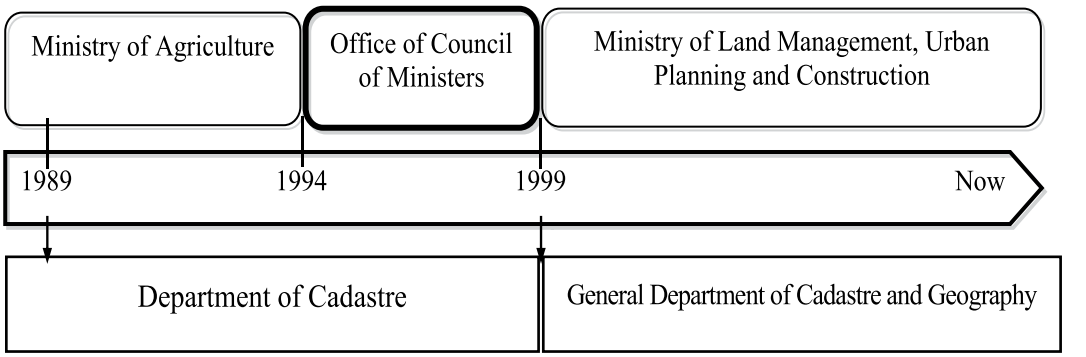


Figure 2: Institutional Reform for Land Management in Cambodia

2. Centralized Power and Decentralized Power of Land Registration

In Cambodia currently, branches of the Ministry of Land Management, Urban Planning and Construction at district and provincial levels serve a secretarial function for the central ministry office, in terms of land management and administration. For example, at the district level, District Office of Land Management, Urban Planning, Construction, and Land is responsible for performing cadastral work such as demarcation, survey and adjudication in case of sporadic land registration. When all cadastral work is completed and land parcels are recorded with a sporadic index map, all land documents have to be sent to the Provincial Department of Land Management, Urban Planning, Construction and Cadastre for more examination and record of land parcels in land registers. The provincial authorities who received signature delegation from the Ministry of Land Management, Urban Planning and Construction are able to issue sporadic registration certificates while the General Department of Cadastre and Geography of the ministry issues sporadic registration certificates in provinces which have not received signature delegation from the ministry. Since July 2010, all provincial authorities throughout Cambodia have been entitled to issue land certificates in their territorial province. It is important to recognize the year that provincial governor of each province has received the signature delegation to sign the land certificates. For more information, please refer to the table below.

Table 1: Date of Signature Delegation from the Ministry of Land Management, Urban Planning, and Construction to Provincial Offices to Issues Land Certificates

No	Provinces/Capital	Date of Receiving Signature Delegation
1	Kandal	July 18, 2000
2	Phnom Penh	July 18, 2000
3	Sihanoukville	August 12, 2002
4	Kampot	August 12, 2002
5	Kampong Thom	August 12, 2002
6	Takeo	August 12, 2002
7	Prey Veng	December 23, 2003
8	Kampong Cham	December 23, 2003
9	Battambang	April 25, 2005
10	Siem Reap	October 13, 2005
11	Kampong Speu	October 13, 2005
12	Svay Rieng	August 13, 2007
13	Kep	August 13, 2007
14	Kratie	September 5, 2007
15	Oddar Meanchey	September 5, 2007
16	Banteay Meanchey	September 5, 2007
17	Pursat	September 5, 2007
18	Kampong Chhnang	September 5, 2007
19	Koh Kong	October 1, 2009
20	Preah Vihear	October 1, 2009
21	Stung Treng	October 1, 2009
22	Ratanak Kiri	October 1, 2009
23	Mundul Kiri	July 1, 2010
24	Pailin	July 1, 2010

(Source: Letter of signature delegation from Ministry of Land Management, Urban Planning and Construction, 2000-2010)

III. THE EMERGENCE OF THE INTENTION OF PERFECT LAND REGISTRATION

Cambodian Government has been trying to improve the security of land tenure by conducting various strategies. Land registration has commenced since 1989 with sporadic land registration and then systematic land registration. On

August 30, 2001, Cambodia just made efforts to fulfill the 1993 Constitution by stipulating the second Land Law, hereinafter called the 2001 Land Law. Following this law, land registration system was open in detailed regulations which provide two options for landholders to obtain land certificates through whether systematic land registration or sporadic land registration.

Land registration serves several important purposes, and is particularly important to a young land system such as that in Cambodia. Registered land certificates foster trust and stability in land transactions. They provide a basis for national and local taxation to support the costs of government. In a nation recovering basic legal and administrative institutions, registered rights in land are also an important channel for dissemination of legal consciousness and expertise.

Unfortunately, the registration process in Cambodia has not been fully successful. During the period of one year in the early stage of land privatization, each individual landholder was required to apply for land possession and ownership within a given period of time.[11] As a result, from June 1989 to June 1990, 3.7 million land applications for land possession or ownership were filed.[12] This overwhelmed human resources at the local level, and most of those applying received only application receipts; most of these newly recognized interests did not find their way into a land register. Therefore, it remains questions that how the landholders can fully benefit from such rights.

Since 1992, sporadic land registration had continued from the 1989 instruction provided that landholders were required to registered within the period of 5 years. Apparently 448,277 sporadic registration certificates were issued from 1989 to 1995.[13] This number had increased to 518,357 certificates until 2000.[14] According to the 1992 Land Law, the land parcels which were not registered by 1997 would become state land.[15] The 2001 Land Law however provides more flexible land registration options. The systematic land registration is compulsory and while sporadic land registration is optional. It is noted that those who failed to

[11] Instruction on the Implementation of Land Use and Management Policy, No.03SNN, June 03, 1989.

[12] Joint Instruction in Addition to the Implementation of Joint Circular No. 006PK/KSK-00KHV and No.354PK/KSK-012/SNN-007KHV, October 18, 1990.

[13] Sophal Chan et al., Land Tenure in Cambodia: A Date Update 30 (Phnom Penh: Cambodia Development Resource Institute, Working Paper No. 19, October 2001).

[14] Sophal Chan et al., Land Tenure in Cambodia: A Date Update 30 (Phnom Penh: Cambodia Development Resource Institute, Working Paper No. 19, October 2001).

[15] Land Law of Cambodia, No.100K, October 13, 1992, Arts. 18 & 224.

register their legally possessed land before 2001 are still protected by law.[16] The figure below shows how land registration has been developed.

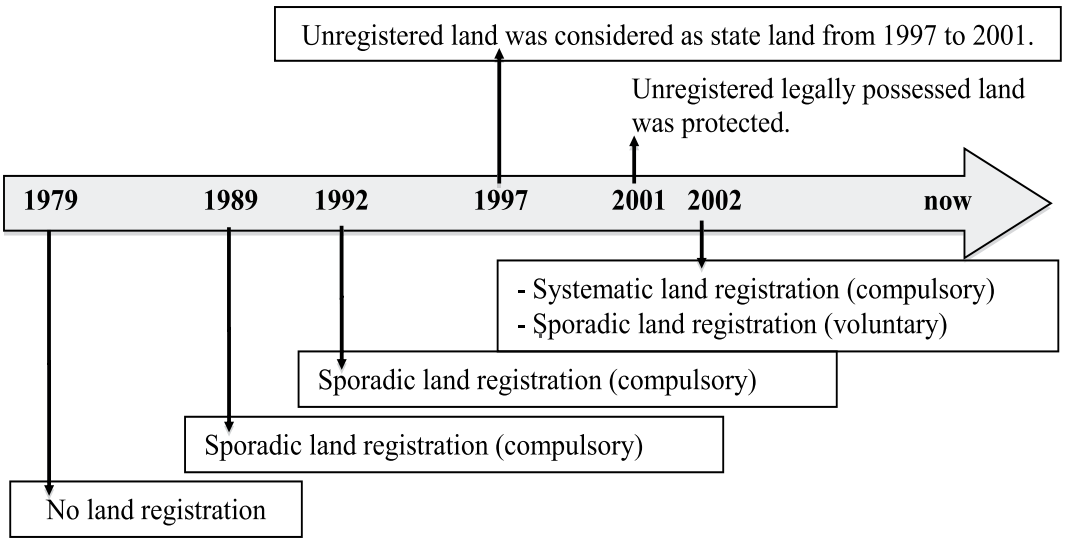


Figure 3: Evolvement of land registration policy

1. Systematic Land Registration

It is unforgettable that financial and technical support from international donors involving in land issues has considerably contributed to Cambodian land system. Apparently, a lack of legal tools to identify landholders is bound to have widespread social ramifications of land disputes. This is a great impetus to motivate international donors to focus on land management and administration project encompassing the systematic land titling program since 1995.[17] In March 2000, an outcome resulted from the international support led to the Sub-decree on the Procedure of Establishing Cadastral Index Maps and Land Registers aimed at registering land through systematic land registration.[18] The 2001 Land Law requires this sub-decree to be slightly amended. Consequently, the newly amended sub-decree was made on May 31, 2002.[19] Regarding land disputes which cannot be

[16] Land Law of Cambodia. No. NS/RKM/0801/14, August 30, 2001, Art. 42 (hereinafter called the 2001 Land Law).

[17] Setha Sek, "Land Registration to Improve Security, Transparency, Governance and Sustainable Resource Management" (presented at regional workshop on land issues in Asia, Phnom Penh, Cambodia, 4-6 June 2002).

[18] Sub-decree on the Procedure of Establishing Cadastral Index Maps and Land Registers, No.46ANK/BK, May 31, 2002, art. 12.

[19] Sub-decree on the Procedure to Establish Cadastral Index Maps and Land Registers, No.11ANK/BK, March 22, 2000, art. 12.

resolved by administration commission, the newly amended sub-decree requires that the cases be submitted to the national cadastral commission while the old one to the court. Therefore, it is necessary to know how the new sub-decree directs the procedure of systematic land registration and how the project under the support of the international donors works. Challenges arising from systematic land registration are also necessarily discussed.

The Sub-decree on the Procedure of Establishing Cadastral Index Maps and Land Registers describes the procedure of systematic land registration clearly. Unlike sporadic land registration, systematic land registration requires that the action be made by the government's side. It also requires highly technical equipment and technical staff to conduct land registration in the areas which are determined by provincial governors. Consequently, the support from international donors is very much needed in order to proceed with systematic land registration well. Yet, the cooperation of landholders in the determined areas for systematic land registration is also very necessary. The systematic land registration provides landowners and land possessors with trustworthy land certificates which are registered in land registers. The simplified chart of systematic land registration is shown in figure 3 below.

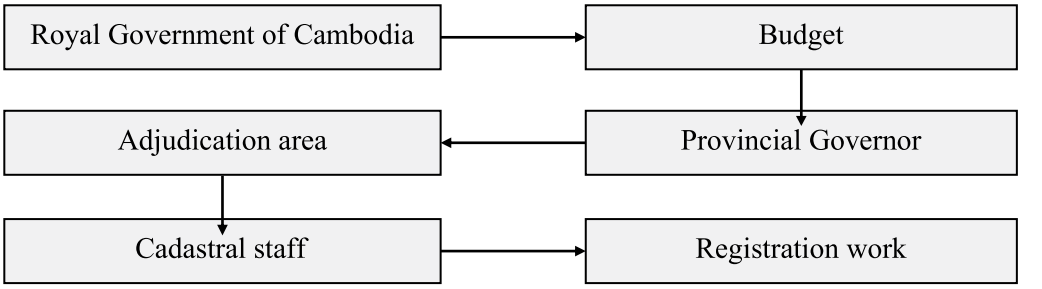


Figure 4: Brief systematic land registration process

Systematic land registration witnessed the cooperation of international donors in Land Management and Administration Project (LMAP) as a remarkable Cambodian land history in this twenty first century. Since 2002, four partners including the Royal Government of Cambodia, World Bank, German and Finnish Governments made a 15 year project for conducting systematic land registration. With financial support of 100 million US dollars from the World Bank, the project would work in 3 phases in which each phase tends to achieve 1 million land parcels to be registered with the limited budget approximately 34 million US dollars.[20] It is

[20] Vanna Siek, Chief of the Department of Land Registration, in the interview with the author on December 3, 2008.

noted that the assumption of the number of total land parcels was only 6 million but in fact the actual number of land parcels may reach approximately 10 million. In the aftermath of this project, as of September 2008, only 902,968 systematic registration certificates were issued and distributed to the landowners.[21] The project has so far focused on 11 provinces out of 24 provinces with approximately 700 cadastral staff. In 2009, however, this project would extend to other 4 provinces required approximately 100 cadastral staff. It is therefore expected that within the second phase, 2007-2012, the number of registered land parcels will remarkably increase. However, the fact has shown that the registration pace is still slow. As a result of systematic land registration, until the end of 2017, the systematic land registration projects have issued 3,626,158 land certificates excluding youth volunteer for land registration.[22]

Until 2009, although international donor cooperation contributed to a great result of systematic land registration, challenges could exist. Difficulties in receiving budget in order to run the project were complained by the Cambodian side. Moreover, cadastral staff's allowance was limited with a strict condition that if the work was done more slowly than the project's plan, the allowance was reduced to half of the total amount per month.[23] When extending to other 4 provinces, the project would lack more technical staff. Technical knowledge remained also one of the major problems in systematic land registration. Furthermore, unclear commune territorial boundary makes it more difficult to adjudicate in each unit of systematic land registration which covers one commune.[24]

The first ever policy from the Prime Minister with regard to land registration happened in June 2012.[25] This policy was originally planned for one year in order to fasten land registration attempting to calm down land disputes which were affected by the economic land concessions. The Prime Minister decided to introduce a youth volunteer for land registration. The youth were mainly included on-going students

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[21] *Report of the Outcome of Land Registration System from the Start until September 2008,* by Land Management and Administration Project, No.0894 LMAP (Phnom Penh: Land Management and Administration Project, Ministry of Land Management, Urban Planning and Construction).

[22] Sophara Chea, Report on the Outputs of Work in 2017 and the Work Plan 2018 of the Ministry of Land Management, Urban Planning and Construction (January 12, 2018), 7.

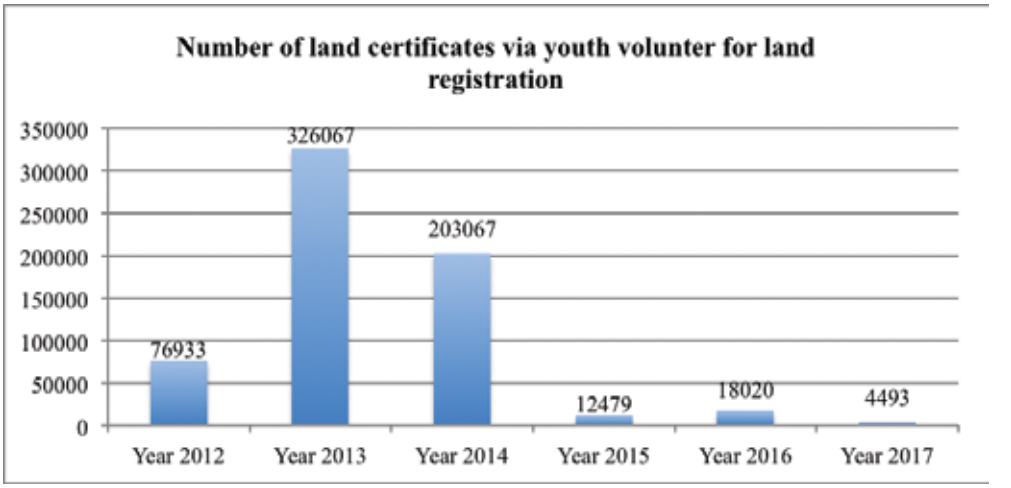
[23] Vanna Siek, in the interview with the author on December 3, 2008, said that each staff received USD180 per month. If the work is done slowly, the allowance is reduced to USD 90 per month.

[24] One unit of systematic land registration previously covered one village.

[25] This policy is the consequence of the Prime Minister Order on the Measures of Strengthening and Improving Efficiency of Economic Land Concession Management, No.01BB, May 7, 2012.

from universities throughout Cambodia. However, students from the Faculty of Land Management of the Royal University of Agriculture were required to join the project.[26] The project used the Prime Minister's budget to offer the allowance to the youth approximately 225 dollars per person. There were two stages of the project in which one stage consisted around 2000 people with the period of 6 months.

Despite the completion of the youth volunteer for land registration policy in June 2013, the work of issuing land certificates has continued. Also, the complaints arising therefrom have to go to local competent authorities to resolve. Figure below show that as of 2017, the total number of land certificates through youth volunteer for land registration is 641,059[27] among which only in 2013, the registration peaked up to 326,067 land certificates.



(Source: Reports from the Ministry of Land Management, Urban Planning and Construction 2012-2017)

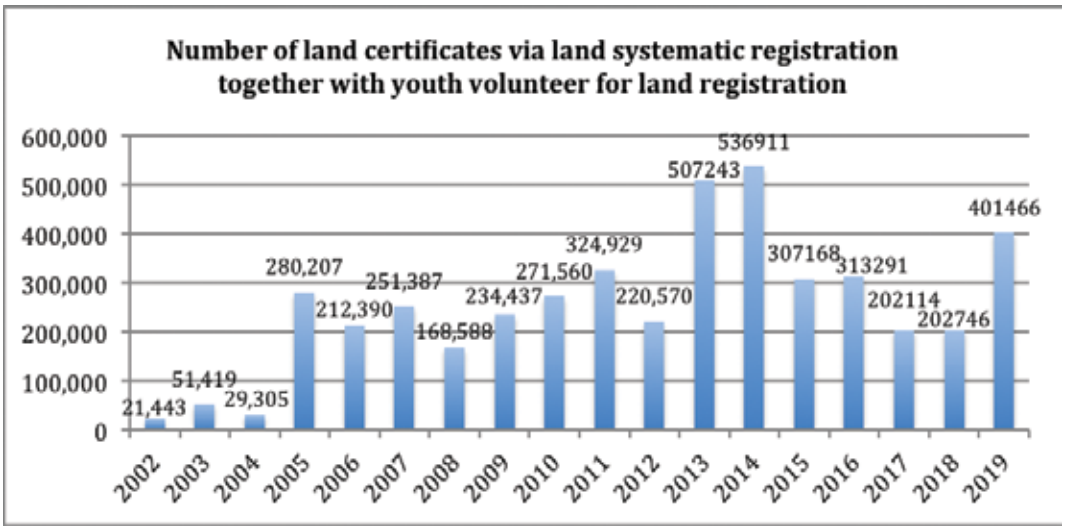
Figure 5: The number of land certificates via youth volunteer for land registration from 2012 to 2017

The government has made a big effort to register the land via systematic land registration. After the completion of the implementation of youth volunteer for land registration policy in June 2013, systematic land registration has continued actively. Figure 6 below the number of land certificates issued via systematic land

[26] An interview with a student of Faculty of Land Management of the Royal University of Agriculture in December 2017. The author reserved the right to show the student anonymously.

[27] Saphan Chhann, The report from the Ministry of Land Management, Urban Planning and Construction from 2012 to 2016, No. 006DNS/RBa/ORB; Sophara Chea, Report on the Outputs of Work in 2017 and the Work Plan 2018 of the Ministry of Land Management, Urban Planning and Construction, No. 002DNS/ORB/NRB/RBa, (January 12, 2018), saying that the total number of land certificates from 2012 to 2017 is 641,623.

registration together with youth volunteer for land registration since 2002 until 2019.



(Source: Annual report of Ministry of Land Management, Urban Planning and Construction 2002-2019.)

Figure 6: The number of land certificates per year from 2002 to 2019 via systematic land registration together with youth volunteer for land registration

2. Sporadic Land Registration

Before studying how sporadic land registration in Cambodia works, one should understand the meaning of this technical term. In Cambodian land system, the term "sporadic land registration" was firstly found in the 2001 Land Law and then subsequent legal regulations. Although it is so, there is no real definition of this term. However, it was nationwide understood that sporadic land registration means voluntary land registration in which each landholder applies for a land certificate when he or she needs it. With this regard, from the inception of land privatization in 1989, sporadic land registration has been available. As of November 2008, only 589,827 land certificates have been issued through sporadic land registration.[28] This number shows a slow pace of sporadic land registration. Therefore, it is necessary to know clearly how sporadic land registration procedure works and what advantages result from such a registration. It is necessary to study the defect of sporadic land registration which may discourage landholders from registering their land through sporadic land registration. However, it is vital that the government provide a

[28] Vanna Siek, Chief Department of Land Registration, Summary of the Result of Sporadic Land Registration from 1989 to November 25, 2008, (Phnom Penh: General Department of Cadastre and Geography, Department of Land Registration, November 25, 2008).

possible way to successfully motivate landholders to voluntarily register their land.

It is necessary to understand the actual change the land registration nature from the beginning of land privatization in 1989 to present. It was obligatory for landholders to apply for land certificates within a total fixed period of 1 year after June 1989. Each landholder submitted land applications to the district authority through the commune authority and village authority. There was no detailed procedure determining the number of days that the applicants could receive land certificates from the date of filing applications. Consequently, huge number of landholders applied for land certificates making it difficult for the responsible authorities to issue the certificates. As of 2000, approximately 518,258 sporadic registration certificates equivalent to about 12 percent of the total 4.5 million land applications were issued.[29] This number has unremarkably increased to 589,827 until 2008.[30] This slow pace of registration has resulted in a great deal of uncertain land tenure since most of landholders do not have land certificates. Remarkably, after May 2002, a detailed procedure of sporadic land registration was available allowing any landholder who intends to receive a land certificate can apply for.

Sporadic land registration has several advantages. For those who wish to have their land certificates can apply for the certificates at any time. Although the state does not oblige landholders to apply for land certificates, landholders realize the importance of right to land which is registered, for registered land is fully protected by law. More importantly, it is necessary for those who want to transact their land if they have land certificates. If landholders apply for land certificates through sporadic land registration, cadastral service fees obtained therefrom will increase state income. Furthermore, the procedure of sporadic land registration which requires that land disputes be resolved before issuing land certificates makes it clear that the areas where all landholders have land certificates will not have land disputes.

Although advantages arising from sporadic land registration exist, the defect thereof is necessary to be taken into consideration. It is noted that the attempt

[29] Sophal Chan et al., Land Tenure in Cambodia: A Date Update 30 (Phnom Penh: Cambodia Development Resource Institute, Working Paper No. 19, October 2001).

[30] Vanna Siek, Chief Department of Land Registration, Summary of the Result of Sporadic Land Registration from 1989 to November 25, 2008, (Phnom Penh: General Department of Cadastre and Geography, Department of Land Registration, November 25, 2008).

to fasten the cadastral work has been made,[31] the actual days of completing land registration has not been reached accordingly. For example, the legal regulation determines only the period from the date of collecting data to the date of issuing land certificates, but it fails to mention how much time the cadastral administration has to respond to land applicants from the date of filing applications.[32] The decision also fails to mention the punishment provisions if period stated in the decision is not followed. This flaw in law may result in corruption especially in the case that landholders who want to receive their land certificates within a short period of time may bribe cadastral staff. Therefore, it is necessary that sporadic land registration include the available period of time for its whole procedure and open complaint processes.

Albeit imperfect recognition of land certificates through sporadic land registration,[33] landholders should be encouraged to register their land through sporadic land registration. An attempt of the 2001 Land Law is to provide a definitive certificate of land ownership which cannot be contested if there is no refusal when creating a land register.[34] As such, only systematic land registration, in which cadastral index maps and land registers are included, can provide such a definitive certificate known as an owner certificate for immovable property equalizing a certificate of ownership hereinafter called a systematic registration certificate. On the other hand, sporadic land registration can usually provide a certificate of immovable property equalizing a possessory certificate hereinafter named sporadic registration certificate.[35] Since the systematic land registration takes more efforts from the government including budget and costly and modern technical equipment, it is therefore necessary that landholders register their land through sporadic land registration within the set period of time. So, when the systematic land registration

[31] Sub-decree on Sporadic Land Registration, No. 48ANK/BK, May 31, 2002 saying that "District governor shall issue the announcement on the date of demarcation land boundary to land applicants and post it publicly at least 14 days before the demarcation starts" while the Amendment of this Sub-decree dated on June 9, 2016 reducing the number of 14 days to 7 days; also Joint Proclamation on Providing Public Services of the Ministry of Land Management, Urban Planning and Construction, No.995SHV/PK, December 28, 2012 fixes the period of days for registration work.

[32] Decision on Providing Cadastral Services, No.51SSR, December 21, 2006.

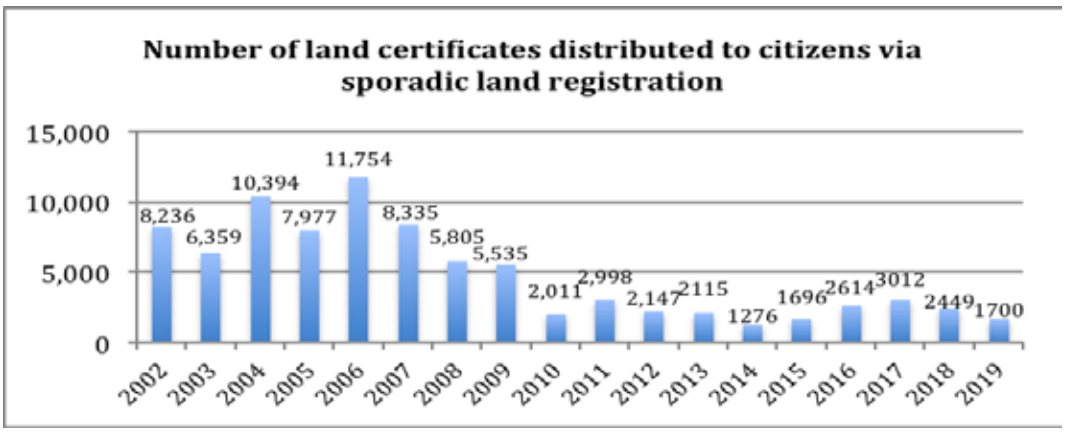
[33] The chief of Department of Land Registration under the General Department of Cadastre and Geography of the Ministry of Land Management, Urban Planning and Construction said that land certificates issued through sporadic land registration are not 100 percent recognized, but just around 90 percent (my interview on December 3, 2008).

[34] The 2001 Land Law, art. 40.

[35] Sub-decree on Sporadic Land Registration, No.48ANK/BK, May 31, 2002, art. 11.

project happens at their areas, certificates, the possessory certificate is just to be changed to certificate of ownership with free of charge.

The output of sporadic land registration has been remarkably low achieving only 86,413 sporadic registration certificates from 2002 to 2019 as shown in the figure below.[36] This inefficient cadastral work has consequently resulted in several drawbacks although the systematic land registration can now be a main task of the government to speed up more registration. However, areas where systemic land registration projects are not available, disadvantages to unregistered land may exist in case landholders wish to get some loans for business purposes.



(Source: Annual report of Ministry of Land Management, Urban Planning and Construction 2002-2019.)

Figure 6: Number of land certificates distributed to citizens from 2002 to 2019 via sporadic land registration

It is importantly noted that the output of land registration has resulted in a remarkable number after some donation was stopped. The systematic land registration has kept a stable data despite the disconnection with World Bank support in September 2009. Since then the government has tried to invest much systematic land registration while in 2009, the government spent only 600 thousand to 2 million dollars making the systematic land registration output stable as shown in table 1 below. The table proves that in 2009, while the government received support from World Bank, the number of systematic land registration certificates was 234,437 while in 2010, the number reached 271,560.

[36] Annual report of Ministry of Land Management, Urban Planning and Construction 2002-2019.

Table 2: Statistics of systematic land registration certificates 2009-2011

Year	Systematic land registration certificates
2009	234,437
2010	271,560
2011	324,020

(Sources: The reports of Ministry of Land Management, Urban Planning and Construction in 2009, 2010 & 2011)

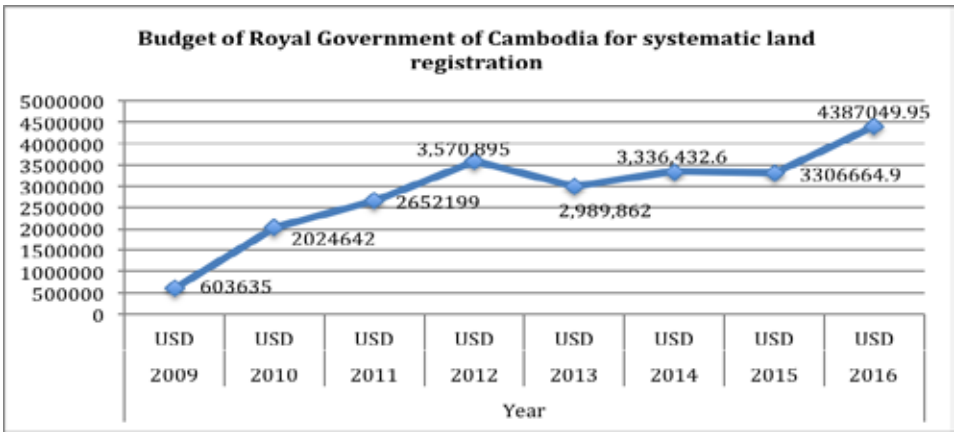
Until 2009, although international donor cooperation contributed to a great result of systematic land registration, challenges could exist. Difficulties in receiving budget in order to run the project were complained by the Cambodian side. Moreover, cadastral staff's allowance was limited with a strict condition that if the work was done more slowly than the project's plan, the allowance was reduced to half of the total amount per month.[37] When extending to other 4 provinces, the project would lack more technical staff. Technical knowledge remained also one of the major problems in systematic land registration. Furthermore, unclear commune territorial boundary makes it more difficult to adjudicate in each unit of systematic land registration which covers one commune.[38]

It is noted that the cooperation between the government and the World Bank was drastically disconnected in September 2009. The systematic land registration projects started earlier largely depended on the World Bank budget of 100 million US dollars. The disconnection of the cooperation has remained curious among the public. Since then the government increased the national budget for systematic land registration remarkably from approximately USD 603,635 US dollars in 2009 to USD 2,024,642 in 2010. The government budget for systematic land registration continued to grow to USD 2,652,199 in 2011. For the government budget invested in systematic land registration from 2006 to 2011 is shown the figure below.[39]

[37] Vanna Siek, in the interview with the author on December 3, 2008, said that each staff received USD180 per month. If the work is done slowly, the allowance is reduced to USD 90 per month.

[38] One unit of systematic land registration previously covered one village.

[39] Letter from LMAP, No.0321LMAP dated March 28, 2007; Letter from LMAP, No.0389LMAP dated May 5, 2008; Letter from LMAP, No.0501LMAP dated March 23, 2010; Letter from LMAP, No.0271LMAP dated April 29, 2011; Letter from LMAP, No.210LMAP dated March 16, 2012.



(Sources: Letter of Land Administration Sub-sector Project, 2009-2016)

Figure 7: Budget of Cambodian Government for systematic land registration 2009-2016

The figure above shows efforts of the government to spend on systematic land registration while stopping fund from the World Bank. The drastic increase in government's budget between 2009 and 2010 has reflected the political commitment when the government tried to show the financial independence for systematic land registration.

IV. LAND DISPUTE RESOLUTION MECHANISM

Efforts to resolve land disputes through establishing the mechanisms of dispute resolutions have been available since the effect of the 2001 Land Law. In 2002, the cadastral commission has been formed. In the early 2006, the national authority for land dispute resolutions was formed to be mainly responsible for preventing and reducing land disputes. Yet people have been still afflicted with the insecure land tenure. With this regard, the Prime Minister of Cambodia also recognized that land is a hot issue and is an important element in the reform process with a nature of revolution.[40] Squatters could be one of huge factors which leads to aggravate the situation. In 2006, the eviction of squatters from the central parts of the cities has provided a bad environmental impact of tourism as well as donor countries. Hence it may affect the government's development scheme. The development, in this sense, requires that the squatter areas be developed or improved in an acceptable way but the expulsion of people away from those areas seems to have more influence on government policies.

[40] Sen Hun, Prime Minister of the Kingdom of Cambodia, in his speech on April 11, 2002 on Intensive Cultivation, Land Management, Logging Ban—Areas of Attention in Agriculture, Fisheries and Forestry

Although Article 30 of the 2001 Cambodian Land Law tries to protect legal landholders who have legally possessed the land for no less than five years. However, having failed to prevent people from illegal occupation causes a bad impact when development is needed. Looking at the people of group 78 who were living in Village 14, Tonle Bassac Commune of Chamkarmon District, Phnom Penh were forced to move out from their place although they were recognized as permanent residents. The Phnom Penh Municipal Cadastral Office had issued the house statistic receipts for them since 1992 and they also have family record books and identity cards. When their location became a targeted development area, their right was suddenly restricted.[41] As a result, a large number of squatters who have stayed in their land for more than five years and have relevant documents recognized by the authorities have been suffered from the eviction. For instance, in Phnom Penh Municipality, the areas of 569 communities in which several hundred families per community have been the targets for the city development.[42] Then disputes arose in a difficult pace of resolutions.

Article 44 of the Law on Commune/Sangkat Administration and Management, a Commune/Sangkat is required to deal with local affairs in the interests of the Commune/Sangkat and its citizens. But eviction of people to other communes must be under the control of province/municipality. The province/municipality is required to serve the interest of its citizens. Therefore, the Phnom Penh municipality has tried to solve problems in a harmonious way whenever they want to develop some areas. The municipality had discussed with the companies to find a reasonable solution, and also bought some pieces of land in outskirts of the city to distribute to the squatters. Yet most of squatters always get hurt from the eviction done by the municipality.[43] Because of no infrastructure in the new areas, the squatters have been dissatisfactory to move there. More apparently 7,714 families of squatters in Phnom Penh have been faced with their settlements for the

[41] Community Legal Education Center, Legal memo: Group 78, Tonle Bassac Commune, Chamkarmon District, Phnom Penh City (April 4, 2006).

[42] Chuktema Kep, Report on the management and development of community of Phnom Penh Municipality, No. 609 RBK.Kr, August 8, 2006.

[43] A personal interview was conducted in 2008 with the squatters who were evicted in 2006 from Group 78, Village 14, Tonle Bassac Commune of Chamkarmon District. They looked very troublesome since the authority had forced them to move out from their old areas. They faced almost everything, such as no settlements, no food, especially no schools for their children. Another most important thing is that they lost their job because they are from the central city where they often sold small goods which could help them to support their everyday life.

reason of city development.[44] More remarkably, in 2006 when squatters protested, they also faced not only eviction but also the arrest. For example, 8 people were arrested as a result of forced eviction of 300 families from Borei Keila in Phnom Penh.[45] In the aftermath of the municipality commitment, the welfare of people became more deteriorated. Thus a lot of criticisms from the civil society as well as citizens have come into existence.

1. Cadastral Commission

Having realized the land disputes have arisen from unregistered land, the government attempts to establish cadastral commission. Following the 2001 Land Law,[46] formation of cadastral commission existed in 2002[47] although the full function of this commission was available in 2003. Three levels of cadastral commission are available since then. District Cadastral Commission is the first commission which is allowed to compromise and facilitate the disputants only.[48] Similarly, Provincial Cadastral Commission was firstly allowed to also facilitate the cases[49] but from January 2010 was given right to decide the case. This Provincial Cadastral Commission decision permits the failing party to continue the case the National Cadastral Commission within 30 working days.[50] The last level of commission is the National Cadastral Commission which has full power to decide the case allowing a chance to the party who are not satisfactory to the decision to continue to the court.[51]

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[44] Community Legal Education Center, Legal memo: Group 78, Tonle Bassac Commune, Chamkarmon District, Phnom Penh City (April 4, 2006).

[45] LICADHO, Attacks & Threats Against Human Rights Defenders in Cambodia 2010-2012 (December 2012), 54.

[46] The 2001 Land Law, Art. 47.

[47] Sub-decree on the Organization and Functioning of the Cadastral Commission, No.47ANK/BK, May 31, 2002.

[48] Sub-decree on the Organization and Functioning of the Cadastral Commission, No.47ANK/BK, May 31, 2002, Arts. 7-11.

[49] Sub-decree on the Organization and Functioning of the Cadastral Commission, No.47ANK/BK, May 31, 2002, Arts. 15-16.

[50] Proclamation on the Function Delegation to Governors of Municipal-Provincial Boards of Governors and The President of the Municipal-Provincial Cadastral Commission in order to Decide the Land Dispute Cases in the Cadastral Commission Mechanism, No.032PK/DNS/KSC, January 21, 2010; and Instructive Circular on the Implementation of the Process of Land Dispute Decision Making of Capital-Provincial Cadastral Commission in the Cadastral Commission Mechanism, No.01DNS/SRNN, January 21, 2010.

[51] Sub-decree on the Organization and Functioning of the Cadastral Commission, No.47ANK/BK, May 31, 2002, Arts. 20-23.

An attempt to establish cadastral commission has not been made through a need analysis. One of the reasons may be the court has received too many land disputes in which unregistered land disputes are the majority. However, the practice may be different. In November 2003, the Ministry of Justice and Ministry of Land Management, Urban Planning and Construction forbid the court from receiving cases relating to unregistered land disputes.[52] This has witnessed that court still received unregistered land disputes thereby reflecting that the court did not face with a large number of unregistered land disputes. For the brief idea of how land disputes are resolved, please see the figure below.

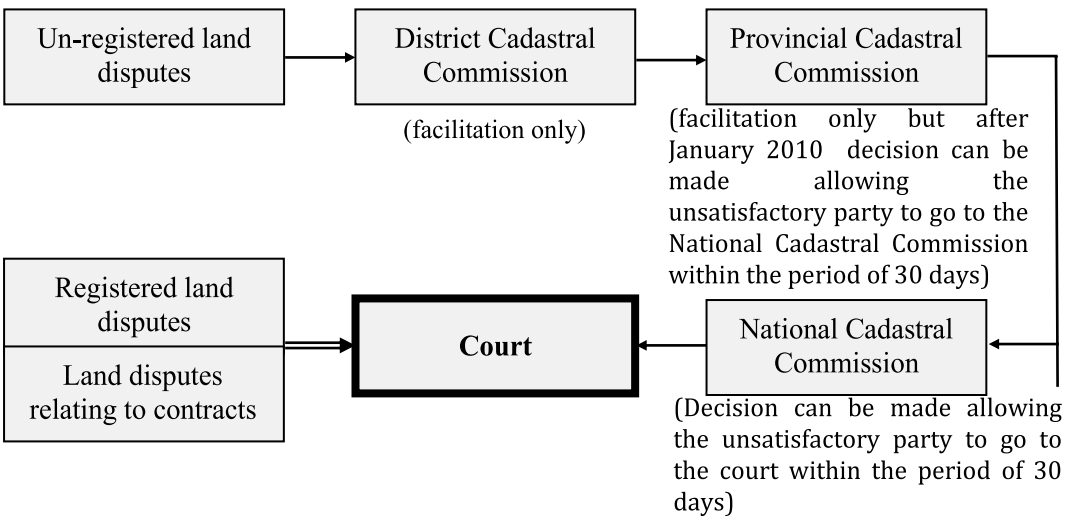


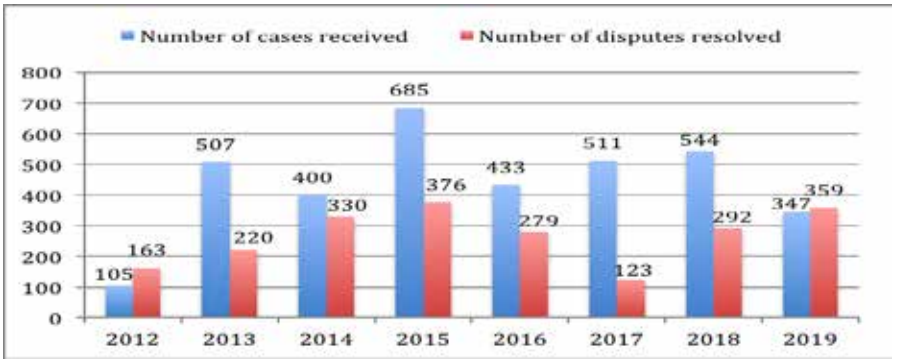
Figure 8: Land dispute resolution mechanism

The number of land disputes resolved by the Cadastral Commission remained limited. The number of land disputes which were sent to the Cadastral Commission increased drastically from 2012 to 2019. Yet, the land disputes which were resolved consist of only 60.7% of the land disputes received.[53] As of December 31, 2016, the among the total of 7,676 land disputes received from 2002 to 2016, the total of

[52] Inter-ministerial Proclamation on the Determination of Competence of the Court and Cadastral Commission Regarding Land Disputes, No.02PKN/03, November 26, 2003.

[53] Saphan Chhann, Report on the 5 Year Main Outcomes (2012-2016) of the Ministry of Land Management, Urban Planning and Construction, No. 006DNS/RBa/ORB, February 17, 2017; Sophara Chea, Report on the Outputs of Work in 2017 and the Work Plan 2018 of the Ministry of Land Management, Urban Planning and Construction, No. 002DNS/ORB/NRB/RBa, (January 12, 2018); Sophara Chea, Report on the Outputs of Work in 2018 and the Work Plan 2019 of the Ministry of Land Management, Urban Planning and Construction, No. 012DNS//ORB/NRB/RBa, February 7, 2019; Sophara Chea, Report on the Outputs of Work in 2019 and the Work Plan 2020 of the Ministry of Land Management, Urban Planning and Construction, No. 005DNS//ORB/NRB/RBa, January 10, 2020).

land disputes which were resolved by the Cadastral Commission consist of 47.1% accounting to 3,614 land disputes.[54] For more detailed land disputes received from 2012 to 2017 and the resolution number, please see the figure below.



(Source: Saphan Chhann, Report on the 6 Year Main Outcomes 2012-2019)

Figure 9: Land disputes received and resolved by the cadastral commission 2012-2019

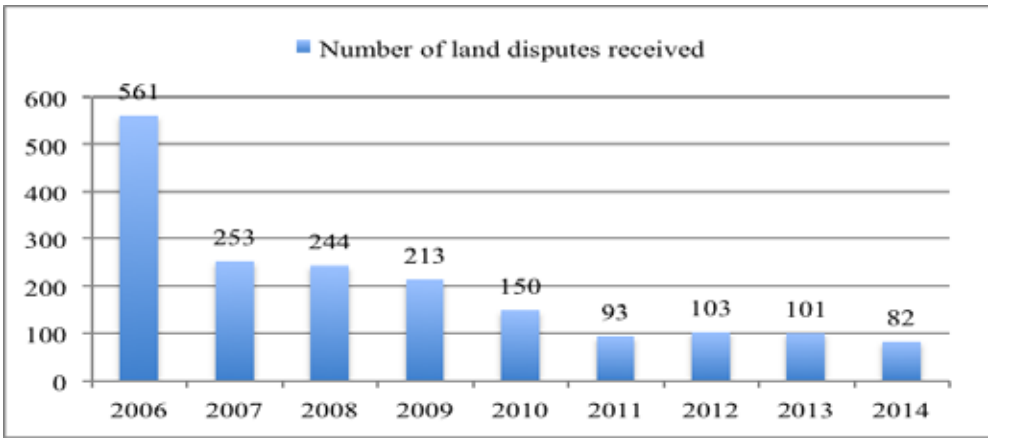
2. National Authority for Land Dispute Resolutions

The hope of establishing of cadastral commission to fight against unregistered land disputes has not remarkably fulfilled. Political compromise in early 2016 has pushed to the establishment of the National Authority for Land Dispute Resolutions. The main purpose of this authority is to resolve land disputes beyond the capacity of National Cadastral Commission.[55] The total number of land disputes received by the National Authority for Land Dispute Resolutions from 2006 to 2014 was 1,800 cases.[56] See the figure below for more detailed.

[54] Saphan Chhann, Report on the 5 Year Main Outcomes (2012-2016) of the Ministry of Land Management, Urban Planning and Construction, No. 006DNS/RBa/ORB, February 17, 2017.

[55] Royal Decree on the Establishment of the National Authority for Land Dispute Resolution, NS/RKT/0206/097, February 26, 2006, Art. 3.

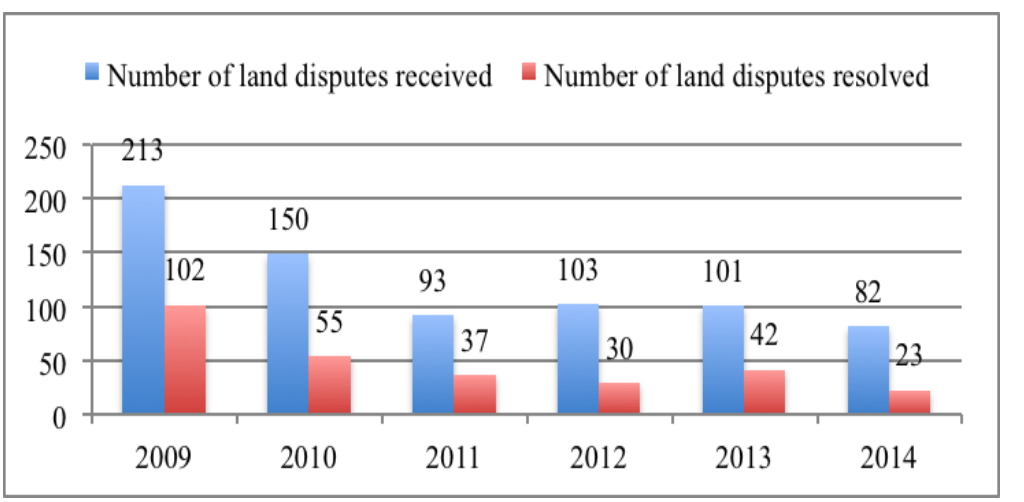
[56] Reports from the National Authority of Land Dispute Resolution 2009-2012, 2014.



(Source: Reports from National Authority for Land Dispute Resolutions 2009-2012, 2014)

Figure 10: The number of land disputes received by the National Authority for Land Dispute Resolutions 2006-2014

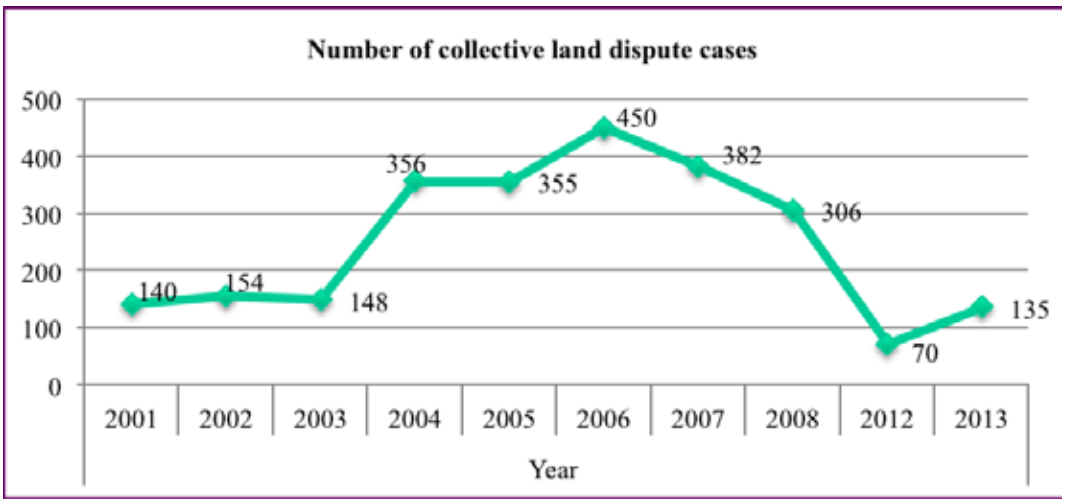
There is no clear report of the number of land disputes resolved by the National Authority for Land Dispute Resolutions since the beginning. However, the report has shown the number of land disputes resolved from 2009 to 2014. Only 38.9% of land disputes accounting to 289 cases was resolved by the National Authority for Land Dispute Resolutions. Figure below shows the yearly resolved land disputes by the authority from 2009 to 2014.



(Source: Reports from National Authority for Land Dispute Resolutions 2009-2012, 2014)

Figure 11: The number of land disputes received and resolved by the National Authority for Land Dispute Resolutions 2009-2014

It is remarkably noted that land disputes involving groups of people have been still a main concern. Groups of people who are not satisfactory with the resolutions of competent authorities, then they looked for Non-governmental organizations to help proceed with any necessary procedures to the court. For example, land disputes which were sent to the ADHOC from 2001 to 2013 are still a large number. See the figure below for more detailed information.



(Source: ADHOC reports, 2001-2008, 2012-2013)

Figure 12: Number of collective land disputes sent to ADHOC for further process

V. CONCLUDING REMARKS

Land privatization has made a tremendous change of land administration in Cambodia. Solidarity group for farming policy witnessed a big failure of using land in the form of solidarity after 10 years of trial. Landholders made every effort to apply for land occupancy and use following the government instruction in June 1989. The government tried to establish the Department of Cadastral despite the limited human resources. The local authority at the district and provincial level played an important role to grant possessory right and ownership right respectively. The knowledge of land administration of the local authority is needed to make land privatization successful. In reality, however, limited technical knowledge involving land administration among the local authority was very challenging.

Speeding up systematic land registration is a way to reduce human resource constraint. As discussed earlier, Cadastral Commission was established in 2002 to resolve unregistered land disputes. When all land is registered, there will be no unregistered land disputes. As such, the cadastral commission will not exist. Officials of this commission will be able to focus on cadastral work more effectively.

Slow pace of land registration will cause land disputes. As discussed in part 4, cadastral commission still received a large number of unregistered land disputes although the data are fluctuated. Also, the National Authority for Land Dispute Resolutions, which is the top authority to fight against with unregistered land disputes which are beyond the capacity of the cadastral commission, the number still witnessed a big concern of land disputes. Demonstrations also happen from land disputes will cause a bad impact on Cambodian society as a whole both nationally and internationally.

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THE SUPREME COURT AND CAMBODIAN CONSTITUTIONAL COUNCIL AS GUARDIAN OF THE CONSTITUTION: SOME PRELIMINARY REMARKS

MEAS Bora *

ABSTRACT

The Kingdom of Cambodia has the 1993 Constitution in which key principles are included, such as separation of power and protection of rights and freedoms. This paper looked into some key decisions of the Constitutional Council and judgments of the Supreme Court, finding out that these organs have directly or indirectly upheld those principles in their decisions or judgments although without detailed reasoning. This is partially positive development. The paper recommended those texts to be regularly published more widely for the sake of further researches.

I. INTRODUCTION

It is almost 25 years from 1993 that the Constitution of the Kingdom of Cambodia was adopted. The Constitution contains many principles, including concept of rights, rule of law and democracy. Furthermore, generally as the supreme law of the State, it stipulates about main organs of the State, such as judiciary, including Supreme Court (SC) and the Constitutional Council of Cambodia (CCC). These bodies are strongly expected to protect the Constitution through legal construction, giving value to provisions of the Constitution.

Public, researchers and other organs are so far doubtful about roles of SC and CC as regards guardian of the Constitution. It is because that, as civil law country, judgements or decisions of the courts, are not required to publish or, if published only in limited numbers; thus, accession is hard that researchers do not know to what extent these main organs help protection principles in the Constitution.

The article is planned to reveal some role plays of SC and CC in promotion and protection of human rights. It found that several judgements or decisions, especially ones of the SC, conveyed, repeated and clarified those principles in the Constitution and deserved to be praised. Those *dicta* should be cited by lower courts and relevant institutions. The text recommends that SC and CC should publish more extensively those decisions and judgements.

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II. SOME PRINCIPLES IN THE CONSTITUTION

There are several provisions on rights and freedom mentioned in the 1993 Constitution of the Kingdom of Cambodia. Thus, it deserves to be quoted partly or whole the provisions in which relevant principles are stipulated for later reflection in next section discussion.

> 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 32*: Every citizen of Cambodia shall have the right to life, liberty and security of the person. Capital punishment shall be abolished.*
>
> Article 38: *the law guarantees there shall be no physical abuse against any individual. 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 provisions of 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. Confessions 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. Anyone accused shall be considered innocent until the court has rendered final judgment in the case. Everyone shall enjoy the right to defend themselves or be defended through the proper judicial process.*

Article 31 is a main text on relations between national law and treaties to which Cambodia is party, and as well contains one of key principles of human rights, such as the principle of non-discrimination. The article, except the United Nations Charter, refers to human rights conventions and covenants, especially one on women and children rights. Furthermore, the article should be construed to include, not limited to human rights treaties, but others in different disciplines.

After the 1993 Constitution, many treaties of different fields were ratified by the Kingdom of Cambodia.[2] The Article 32 of the 1993 Constitution as well abolishes death penalty and makes maximum imprisonment sentence is life imprisonment.[3] This is contrary to 1956 Criminal Code, still being into force, provides dead penalty for third-degree crime.[4]

Both reference to women, children and abolition of death penalty (capital punishment) is not accidental. It is partially response to past historical phenomena, such as rooted stereotype perspective on women which needs to positively address. Likewise, abolition of death penalty is a response to 1,7 million killed or died as result of or crimes committed during the 1975-1979 Regime of Democratic Kampuchea.[5]

Article 38 deals much with criminal justice. It provides right to personal liberty; its deprivation shall be in accordance to law. In this connection, torture shall be prohibited.[6] Confession via torture does not have value of evidence on which judge shall not base for prosecution of any person. According to provisions of criminal procedural code of Cambodia, torture tainted evidence might be removed from the casefile through motion for annulment by any party to such criminal proceeding.[7] Furthermore, suspect is presumed to be innocent, indirectly prohibiting self-incrimination, and in case of doubt, it will be in favor of suspect. Finally, suspect has right to defend him/herself or legal representation in his choice.

Immediate preceding paragraphs are much theories, and were already applied in concrete cases highlighted in next session where we can see at least two ways by the SC and SCC: 1. just repetition or reference to such principle to confirm their findings, and 2. Clarification of nature and scope of the principles or dictate

[2] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 3 September 2019] (ICCPR).

[3] 1993 Cambodian Constitution, Article 32.

[4] 1956 Criminal Code of Cambodia, Article 500.

[5] ECCC, D6.1.197, Dr. Ewa Tabeau and They Kheam, Khmer Rouge Victims in Cambodia, April 1975 – January 1979. A Critical Assessment of Major Estimates, 2009, p. 18 (English), *available* at www.eccc.gov.kh.

[6] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Cambodia is a party on 14 November 1992.

[7] Article 38 of the 1993 Constitution of the Kingdom of Cambodia (1993 Constitution); Article 321 of the Criminal Procedural Code of Cambodia, 2007; ECCC, Supreme Court Chamber, Decision on Objections to Document Lists (Full Reasons), F26/12, 31 December 2015; ECCC, Pre-Trial Chamber, Decision on Admissibility of the Appeal against Co-Investigating Judges' Order on Use of Statements Which Were or May Have Been Obtained by Torture, E130/10/12, 27 January 2010; ECCC, Trial Chamber, Decision on Evidence Obtained Through Torture, E350/8, 5 February 2016.

remedies for violations of relevant norms by the SC and SCC as guardians of the Constitution.

III. KEY DECISIONS AND JUDGMENTS IN BRIEF

1. Right to Personal Liberty and Extension of Provisional Detention Period

Suspects of crimes committed during the 1975-1979 Democratic Kampuchea Regime were arrested and detained. National Assembly adopted a law on Provisional Detention Period in 1999 with the purpose to extend period of detention for crime genocide, war crime and crime against humanity up to 3 years in total[8]. With doubt about consistency between this law and Article 38 of the constitution, 13 members of the National Assembly had filed a request to the CCC to examine whether this law has constitutionality.

The top constitutional body referred to the Convention against Genocide to which Cambodia is party in 1950, and Decree Law No. 1 dated on 15 of July 1979 on Establishment of People Revolutionary People. The CCC pronounced very interesting and significant *dicta* as follow:

> *"provisional detention, lasting for any period, if set forth in law and follow due process on the provisional detention, did not run against article 38(7) of the Constitution*. Furthermore, the body asserted that it is because…. [suspect] *shall not consider as convicted during those period, court only does full investigation before reaching trial to decide whether he or she is guilty*."[9]

2. Extension of Statutory Period for Prosecution and Non-Retroaction of Laws

The Government of the Kingdom of Cambodia made law on Extraordinary Chambers in the Courts of Cambodia (ECCC). There are two constitutionality issues on death penalty, and extension of 30 years in addition 10 year statute of limitation prosecution of torture or murder offense in the 1956 Criminal Code of Cambodia (in total 40 years). The CCC was requested to decide on these constitutionality challenges.

This principle of non-retroaction of law was recognized before 1975 and after 1978 by Cambodia and other civilized countries. However, this principle was not provided in the Constitution or its preamble. Although it was mentioned,

[8] Law on Temporary Detention Period with Royal Decree 1999, Royal Kram No. CS/RKM/0899/09.

[9] CCC, Decision No. 13, 25 August 1999, p.2.

two components shall be taken into account: rule and exception. Both of them are equally treated. Key principles of criminal law have their exception[10].

New law abolished any offence or reduced penalty for any offense, commission of any crimes before the law shall not be with liability or its sentence is mitigated provided that the punishment is not final yet. The ECCC fulfils these requirements by reducing from death penalty to life imprisonment; imprisonment with forced labor or forced imprisonment or confinement reduced to normal imprisonment. This respects for strict interpretation of criminal law and specific nature of the ECCC law. Furthermore, the ECCC added more strict conditions…into the existing 1956 Code (limited suspect, serious crimes, and temporal jurisdiction from 1975-1979). So, articles 9 to 32 are constitutional.[11] Article 40 prohibiting Royal government of the Cambodia to request pardon or amnesty does not affect constitutionality because article 27 of the constitution referred to King not the Royal Government.

> *Is of the opinion that Paragraph 2, Article 3 of this Law extends for an additional 20 years the statute of limitations stipulated at 10 years in Article 109 of the 1956 Penal Code. This Paragraph unquestionably affects a fundamental principle, "the non-retroactivity of any new law over offences committed in the past", which Cambodia, as other civilized countries, recognized both before 1975 and after 1978, including the transitional period of the Supreme National Council.*
>
> *"Cambodia has not ruled that this fundamental principle is of equal value with its Constitution, and therefore the Constitutional Assembly,…was not bound by this principle in inscribing any article of the Constitution or its Preamble. Furthermore, whatever value this principle may have, and whether or not it has been inscribed, they had also to respect another principle, namely "every principle has its counterweight: every rule has its exception". Whatever value a rule has, its exception will have equal value. Non-retroactivity, which is not mentioned in the Constitution, is found in the 1956 Penal Code. The fundamental principles of the 1956 Penal Code also have exceptions. Paragraph 2 of Article 6 stipulates "but if a new law annuls any offence or reduces the penalty for any offence, offences committed prior*

[10] The Extension of Statute of Limitation was issue before the Trial Chamber of the ECCC, see ECCC, Trial Chamber, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, E187, 26 July 2010 (public), para. 37; ECCC, Trial Chamber, Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), E122, 22 September 2011.

[11] CCC, Decision No. 40/002/2001, p. 3.

to such law shall not be prosecuted, or the reduced penalty shall be applied, unless the sentence has been completely served". "[12]

3. Right to Life and Death Penalty

The Government of the Kingdom of Cambodia made law on the Establishment of ECCC, in article 3, referred national crimes, such as torture or murder, of 1956 Criminal Code, with punishment of death penalty, subject to its jurisdiction.[13] Again, given the 1993 Constitution, article 32 eliminate capital punishment, request for the review of the constitutionality was made. In 2001, the CCC had taken into account Decision of the Constitutional Council 040/002/2001 KBDH.C of 12 February 2001 stating that:

> *"the Law on the Establishment of Extraordinary Chambers within Cambodian Courts for Prosecution of Crimes committed during Democratic Kampuchea is hereby declared to be in accordance with the Constitution, except for any mention of 'third-degree criminal penalty' (which is the death sentence) in Articles 209, 500, 506 and 507 of the 1956 Penal Code, referred to in Article 3 of this Law."*

CCC decided that the law has constitutionality. This decision is final, subject to no further appeal, bind all the authorities, and it shall be published in Royal Gazette.[14]

Based on the above consideration, Article 3 of ECCC, the National Assembly approved of regularization on 11 August 2001 in its sixth session, second legislature, and then reviewed by the Senate on its entire form, is declared constitutional (Council Decision On Regularized On The Extraordinary Chambers Law 2001 Decision No. 043/005/2001 KBT.DH).[15]

4. Application of International Norms in Cambodia Legal System

National Assembly adopted Law on Aggravating Circumstances of Crime. The law provides aggravating for crimes committed by anybody even by children. This raises possible doubt on conflict with the Convention on the Rights of Child which provides that measures applicable to children are educational rather than punishment, let alone severe punishment due to aggravating factors. With this in mind, the King sent the request to CCC for checking constitutionality of article 8.

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[12] *Id.,* pp.2-3.

[13] The Law on the Extraordinary Chambers in the Courts of Cambodia, Article 3 (new), 2004.

[14] CCC, Decision No. 43, 7 August 2001, p.2.

[15] CCC, Decision no. 43/005/2001, dated 7 August 2001.p. 2.

Article 3 of this law was adopted in June 2007. Article 8 made amendment to Article 70[16] of Provisions relating to Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period: *for crime and crime with forced labor, judge shall not consider mitigating factors or reduce sentence below minimum sentence period or suspend sentence. For misdemeanor does not affect public order severely, [judge] might suspend whole or partial sentence. In this case, offender shall not observe whole sentence if he or she does not commit any offence indicated in previous provisions during 5 years after prosecution[17]*.

CCC found that the Article 8 did not affect rights and interest of child, it is constitutional. The body pronounced every remarkable and interesting *dicta* regarding human rights in legal system of Cambodia*:*

> *In principle, in trial, judge shall not only follow article 8 of the aggravating law for sentencing criminal, but judge shall follow law. The term "law" is national law including constitution-supreme law of the law-other laws are into enforce as well as international law to which Cambodia already recognized, especially the Convention on the Rights of Child*.[18]

5. Right Not to Self-Incrimination and Forced Confession

There are several cases in which the SC confirmed key principles in the 1993 Constitution.[19] One of which deserves to be summed up for matter of later discussion. It was case of murder and illegal weapon happed involved by two suspects in January 2004. Accused were detained on 31 January 2004. First, the investigating judge dismissed due to lack of sufficient evidence.[20] Upon appeal by the Court of First Instance prosecutor[21], the Appellate Chamber decided to charge both of them, and sent the case back to original court for merit.[22] This court

[16] Imprisonment sentence, not sentence of forced labor, generally can be suspended whole or partially. In this case, offender shall not observe whole sentence if he or she does not commit any offence indicated in previous provisions during 5 years after prosecution.

[17] CCC, No. 92/003/2007, 10 July 2007, pp.1-2.

[18] *Id*., p.2.

[19] SC, Judgement No. 75 of 14 September 2005.

[20] Closing Order of the Investigating Judge to Dismiss No. 2157, 1 March 2004, *see* SC, Criminal Judgement No. 239, 25 September, 2013, p.6 (SC Judgement No. 239).

[21] Appeal against Closing Order of the Investigating Judge to Dismiss No. 2157, 22 March 2004, *see* SC Judgement No. 239, *supra* note 19, p.6.

[22] Appellate Court Criminal Judgement No. 42 dated on 1 July, 2004, *see* SC Judgement No. 239, *supra* note 19, p.7.

sentenced each accused 20 years from the date of detention.[23] Appellate Court (AC) decided to retain the judgement against accused.[24] Accused filed appeal to the Supreme Court, and as the court of point of law, for the first appeal, the SC decided to send back the case to the AC for retrial and conducting investigation. SC released both accused with required obligations to be fulfilled.[25] After a while, AC conducted further investigation as demanded by the SC[26], and retained its first judgement. Furthermore, it ordered to re-detain both accused.[27] Lastly after almost 9 years from the date of crime commission, upon the second appeal by the accused, the SC decided both facts and law, rejected second judgement of the AC, dismissing both accused on the ground of lack of evidence. The Court ordered the release of the accused, and prosecutor to open investigation against real suspect.[28]

Since this case is landmark case from the point of view of this author, some wordings deserve to be quoted a whole:

> *Confession is not main inculpatory evidence…According to Article 14 (g) of the International Covenant on Civil and Political Rights, recognized in the Article 31 of the Constitution, stipulating that every accused has right to not self-incrimination or not forced to confess.* The confession is not consistent with origin of evidence and likely to affect integrity of proceeding. Furthermore, referring to the article 69 of the Rome Statute, said that: … *such a confession shall not have value of evidence.*[29]

The Court also referred to the decision of the CCC whose brief summary is included in this text as well. The SC seemed much focus one evidence, saying that image of suspect was technically drawn without clear technique and procedure.

[23] Phnom Penh Court, Judgement No. 111 of 1 August 2005, *see* SC Judgement No. 239, *supra* note 19, p.7.

[24] Appellate Court, Judgement No. 64 of 12 April 2007, *see* SC Judgement No. 239, *supra* note 19, p.8.

[25] SC, Judgement No. 105 of 31 December 2008, *see* SC Judgement No. 239, *supra* note 19, p.9.

[26] Appellate Court, No. 1 of 17 August 2009, *see* SC Judgement No. 239, *supra* note 19, p.9.

[27] Appellate Court, No. 114 of 27 December 2012, *see* SC Judgement No. 239, *supra* note 19, p.10.

[28] SC Judgement No. 239, *supra* note 19, p.18.

[29] SC Judgement No. 239, *supra* note 19, p.18; Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings, Article 69 of Rome Statute of the International Criminal Court, http://www.refworld.org/docid/3ae6b3a84.html. At least there are three similar jurisprudence where the SC found that interview in the case of crime were not conducted with the presence of lawyer, thus records were not admitted as evidence, SC, criminal Judgement No. 17 dated 28 July 1999; SC, criminal judgement no. 32 dated 13 October 1999; criminal judgement no. 39 dated 3 December 1999; SC, criminal judgement no. 6 dated 3 March 1999.

Policy record (weapon confiscation) was not made immediately and not wrote down what found, affecting rights of accused, causing defect which shall not be evidence. The confession was not strong beyond reasonable doubt; level of inculpatory evidence was doubtful. Therefore, pursuant to Article 31, 38, Article 11 (1) of the Universal Declaration of Human Rights, Article 14 of the ICCPR, and Article 351 of the Code of Criminal Procedure, *accused shall benefit from doubt.*

IV. REMARKS

1. Relations between International Law and Cambodian Law

Treaties bind State Parties after they have been ratified by government without or with involvement of the legislative in advance. For the former instance, treaties bind internationally with no domestic force. This is according to the dualist doctrine of international law.[30] As well, it was argued that international law and national law come from different source of law; thus, application of international law domestically needs their transformation or incorporation to make them part of national legal system.[31] Many national constitutions often prescribe the relationship between these two types of laws.[32]

Article 31 of the 1993 pronounces the relevance of the international law to national legal system. In theory, regardless of terminologies used, norms of international law, including human rights shall be given practical effect domestically. There are many questions related to the Article 31: whether Article 31 applies only to human rights treaties? Are all treaties mentioned in the article self-executing ones? What is the status of customary international law? If the article 31 incorporated human rights treaties, what is the status of unincorporated treaties? Are the decisions of international bodies directly applied in the courts of Cambodia?

So far, although many decisions or judgement of these bodies were issued, a few is relevant to norms of international law. CCC especially just referred to convention or treaties that Cambodia recognized, such as the Rome Statute of the ICC, the International Covenant on Civil and Political Rights. Furthermore, decision in 2007 implied that international law recognized is a law. It is a positive *dicta*, besides repeating partly the Article 31 said, demanding courts to take into

[30] David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev.1, 2002, p. 9.

[31] David Sloss, Ed., Role of Domestic Courts in Treaty Enforcement, A Comparative Study, 2009, p. 17.

[32] Laws and Practices Concerning the Conclusion of Treaties, UN Legislative Series, 1953, contained quotations of provisions of Constitutions of States.

account when courts decide cases; however, at the same time, decision triggers more questions in the absence of further clarifications. For instance, does it mean that are all recognized treaties directly applied or does it simply mean that it is just taking account of international law and not beyond this.

In the sense of ensuring right to effective remedy or realising of rights or international norms, roles of the courts should go beyond this, by consideration of invoked provision of treaties, and indicated remedy if found violations of any norm. Trial Chamber of the ECCC gave 7-year imprisonment reduction imprisonment term to accused *Duch* for illegal detention by military court prior to the detention at the ECCC is one of examples of role of courts in upholding norms of international law.

> *"The Chamber considers that a reduction in the above sentence of* ***5 years*** *is appropriate given the violation of the Accused's rights occasioned by his illegal detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007*."[33]

National law provision might conflict with one of recognized treaties. Moreover, provisions of the latter might conflict each other as well. Legal construction might help clarification. Several approaches are applied, such as *lex specialis* v. *lex generalis*[34], supremacy of the constitution under which normal laws are placed. Furthermore, in the field of human rights, scholars have referred to so called: 'constitutional rights[35]' that are rights mentioned in the constitution having such a status; therefore, they will prevail over other rights. However, this view might not be correct in all cases since it forgets nature of the rights. Not all rights has higher value despite their existences found in the constitution. Anyway, interestingly, CCC confirmed such constitutional status.[36] Despite of this, there are remaining questions posed above demand answers in relation to place and application of treaties in Cambodian legal system.

2. Right to Personal Liberty and Remedy

Right to personal liberty was provided in the International Covenant on Civil

[33] ECCC, Case 001, Trial Chamber, Judgement, E188, 26 July 2010, para. 632.

[34] Nuclear Weapons Legality, 1996 I.C.J. 226, para.25; Alejandro Lorite Escorihuela, *Humanitarian Law and Human Rights Law: the Politics of Distinction*, 19(2) Michigan State Journal of International Law, 2011, p. 366.

[35] Constitutional rights are enshrined in the Constitution itself, see https://www.quora.com/What-is-the-difference-between-constitutional-rights-and-statutory-rights (visited on 21 June 2018).

[36] CCC, Decision No. 40, *supra* note 10, pp.1-2.

and Political Rights[37] and in Article 38 of the 1993 Cambodian Constitution[38]. This right is related to the detention since it deprives rights of liberty and movement. Therefore, detention shall be necessary and last resort keeping in mind of the presumption of liberty.[39] Furthermore, it shall be followed by due process and set forth in existing laws.[40] Jurisprudence and laws demand regular review of ground for detention, and if without more reasons or grounds, detainee shall be released but not at expense of appearance in case courts calling to join proceedings. Long detention without justification would let to presumption of guilt offending the prohibition of presumption of innocence.[41]

Right to personal liberty links to prohibition of torture. Torture might be employed to get confession basing on which judges will prosecute accused. Such confession offends right not to self-incriminate or right to silence.[42] In country where crime investigation method is not much effective, resort to torture for confession is well-known report.[43] Therefore, forced confession is widely prohibited internationally and domestically and denied as evidence.[44] In case of right to personal liberty is violated, remedy to victim is legally required, such as release or in serious case, such as inflicting of torture, criminal proceeding against accused victim is stayed forever.[45]

SC and CCC address these issues in many cases indirectly. In response to request of opinion whether law on detention is constitutional, CCC asserted that nature of crime and maintaining the status of suspect justifies prolong pretrial

[37] ICCPR, *supra* note 1, Article 9.

[38] The 1993 Constitution, *supra* note 6, Article 38.

[39] Douglas G. Smith, *Does The Constitution Embody a "Presumption of Liberty*"?, 1 University of Illinois Law Review, 2005, p. 328; Donna Cline*, Deprivation of Liberty: Has the European Court of Human Rights Recognized a "Public Safety" Exception*?, 29(76) International and European Law, 2013, p. 36; ECHR, *Michalko v. Slovakia*, App No. 35377/05, 12 December 2010, para. 145.

[40] European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, 1953, Article 5.

[41] Shima Baradaran, *Restoring Presumption of Innocence*, 72(4) Ohio State Law Journal, 2011, p. 729; ECHR, *Michalko v. Slovakia*, *supra* note 38, para. 149.

[42] Open Society Justice Initiative, Case Digests: European Standards on Criminal Defence Rights, 2013, p. 35.

[43] Amnesty International, No End in Sight, Torture and Forced Confessions in China, 2015, p. 9.

[44] Convention against torture and other Cruel, inhuman or degrading Treatment or Punishment, 1984, UN Treaty Series, Vol. 1465, p. 85, Article 15.

[45] ECCC, OCIJ, Provisional Detention Order, C3/10, 31 July 2007, para. 17.

detention.[46] Differently, it might offend the principle of presumption of innocence. It is since long detention without justification might construe to treat a suspect as guilt person.[47]

SC considered that forced confession does not have valued of evidence. Likewise, statement of suspect of crime without presence of lawyer is not accepted as evidence since the proceeding is of defect violating laws and subject to invalidation.[48] Both forced confession and defected statement lead to actual release of criminal suspect.[49] It is a strongly welcome pronouncement although there is not clear if victim suspect is entitled to make complaint, demanding compensation for act of abuse of process.[50] However, in spite of absence of such pronouncement, it will be wrong to construe that SC did not recognize or allow right to get compensation for human right violation.

3. Application of Principle of Non-Retroaction of Law

Laws prohibit retroactivity of application of law. It is a general rule and exception in the case that legislature makes clear on retroactivity in relevant laws. The prohibition is strict in the field of criminal law. The principle is one of core elements of democracy to refrain the executive from abusively applying laws retroactively to opponents.[51] It was framed in order to protect rights of people. Law and actions might affect this prohibition directly or indirectly, for example, extension of statute of limitation by new law leading to prosecution of crimes whose statute of limitation is expired under old law.

Non-retroactivity demands that laws are generally applied for future cases. However, favor shall be provided to accused in the case that new substantive law and sentence is favor or reduced.[52] Several questions might be raised, one of which when is a new reduced sentence applied? CCC helped clarify this, by saying that: *reduced sentence from new law is applicable when pronounced sentence is not yet*

[46] CCC, Decision No. 13, *supra* note 8, p.2.

[47] *Id*.,

[48] SC Criminal Judgement no. 6 Dated on 3 March 1999.

[49] SC Judgement No. 239, *supra* note 19.

[50] *Id.*

[51] It is expected that offenses are prescribed in laws in clear language to avoid abuse of legal construction, Bruch Chen, *the principle of legality: Issues of Rationale and Application*, 41(2) Monsah University Law Review, 2015, p. 333, see also, Bruce Chen, the French Court and the Principle of Legality, 41(2) UNSW Law Journal, 2018.

[52] The ICCPR, *supra* note1, Article 15.

final.[53] This body asserted that the non-retroactivity principle is substantive norm.[54]

4. Legal Construction Method

It is naturally that laws cannot be devoid of loopholes since members of national assembly making law are human being. This demands legal constructions basing on law or regulations adopted by each country. Internationally, there is Vienna Convention on the Law of Treaties (VCLT) governing rules on interpretation of treaties[55]. They are considered having status of customary international law bound automatically State despite they did not ratify this treaty.[56] According to the texts, treaty shall be interpreted pursuant to ordinary meaning of words in the context as a whole and purpose of treaty it serves.[57] Other factors, such circumstances during the time of treaty adoption and subsequent State practice might be as well taken into account.[58] Finally, report to drafting record of treaty discussion should be made to support textual outcome of interpretation.[59] It might be said that the construction method in the VCLT support broad legal construction.

Neither constitution nor laws provide method of legal construction. It is expected to have such law in future or alternatively instruction from the SC which is highest body of the judicial structure in Cambodia. However, there is not yet as such. Reviewing of some judgements and decisions of the CCC and SC yields some results deserve to be mentioned. To sustain strong reasoning for dispositions, bodies consider positions and laws of other states, international treaties, balanced of interest and principles (quoted in p. 6). Although, they did not look into details or directly applied norms of international law, it did not mean that they will not do. It is a holistic approach, focusing on purposes of laws and their contexts.

V. CONCLUDING REMARKS

The review of some of the CCC and SC decisions or judgements, at least ten documents repeated, referred and clarified some principles mentioned in the 1993

[53] CCC, Decision no.40/002/2001, *supra* note 10, p.3.

[54] *Id*., p.2.

[55] The Vienna Convention on the Law of Treaties, 1969, UN Treaty Series, Vol 1155, p. 331, Articles 31-33 (VCLT, 1969).

[56] Ulf Linderfalk, On the Interpretation of Treaties: the Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties, 2007, p.2.

[57] VCLT, 1969, *supra* note 54, Article 31.

[58] *Id*., Articles 31-32.

[59] *Id*., Article 32.

Constitution. The bodies confirmed strict interpretation of criminal law, deprivation of right to personal liberty shall be according to law; otherwise, violation or treating suspect as guilt one would offend the principle of presumption of innocence. Remarkably, forced confession does not have values as evidence, raising doubt which is construed in favour of suspect, as result, he shall be released. These all indirectly enforced promotion and protection of human rights.

Finding shows positive and welcoming development of legal jurisprudence, and SC and CCC are partially guardians of the Constitution. Lower court and institutions should refer to and support this position, keeping in mind that offending or violation of constitution might lead to invalidate relevant acts. More publication of important judgements or decisions should be continued and sustained.

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THE PROTECTION OF PRIVATE OWNERSHIP UNDER CAMBODIAN CONSTITUTION: INTERSECTION OF TRADEMARK AND CONSTITUTIONAL LAW

PHIN Sovath [*]

ABSTRACT

This Paper attempts to examine the intersection of the trademark and constitutional law aiming to address whether or not trademark rights could be considered as a type of private ownership recognized and protected under Article 44 of the Constitution and whether or not any expropriation of the ownership of the trademark right should be constitutionally protected the same as other private ownership over land and real rights. This Paper then will examine some trademark cases and assess whether or not the principles of Article 44 of the Constitution could be applied to address issues arisen out of those trademark cases. The ultimate objective of this Paper is to suggest a legal solution to the problem that adheres not only to the protection of trademark rights under the trademark law but also the protection of private ownership under the Constitution.

I. INTRODUCTION

Expropriation of private ownership of immovable property such as land and real rights attached to the land has been widely discussed among scholars in Cambodia.[2] The main focus of those discussions has been related to Article 44 of the Constitution concerning the protection of private ownership and the expropriation of the private ownership for the purpose of serving public interests. Those scholarly works have shed light on our understating of key terms and principles set forth under the Constitution as well as the intersection between property law and constitution law. However, there has been no academic discussion on whether or not Article 44 of the Constitution is also applicable to intangible property such as patents, copyrights and trademarks, in particular in relation to the scope of protection and the limitations set forth under the same article.

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[2] For key literature on this topic, *see* Nhean So Munin and Pat Baars, Immovable property law of Cambodia: an overview 347-402 (East-West Management Institute 2012); Hem Sros, *Understanding the Law of Takings: Considerable Points for Exercising and Resolving Disputes*, 1 Cambodian J. Int. Stud. 17-30 (2016); Kuong Teilee, *Economic Rights and the National Economic System*, *in* Cambodian Constitutional Law 491, 507 (Hor Peng et al., eds. Konrad-Adenauer-Stiftung 2016).

This Paper attempts to examine the intersection of the trademark and constitutional law aiming to address whether or not trademark rights could be considered as a type of private ownership protected under the Constitution and whether or not any expropriation of the ownership of the trademark right should be constitutionally protected the same as other private ownership over land and real rights. This Paper then will examine and analyze some trademark cases to assess whether or not Article 44 of the Constitution could be used and applied to address any case of expropriation of the private ownership of trademarks. The ultimate objective of this Paper is to provide a theoretical discussion on this topic and suggest a legal solution to the trademark expropriation problem that adheres not only to the protection of trademark rights under the trademark law but also the protection of private ownership under the Constitution.

To reach this ultimate objective, this Paper, in Section II, will provide background of the relevant provisions of the Constitution to understand the meaning and scope of "private ownership," in particular what types of private ownership are recognized and protected under the Constitution. In Section III, this Paper will discuss and analyze whether trademarks could be considered as a type of the private ownership protected under the Constitution and whether the expropriation of the private ownership of a trademark or any element of a trademark could be considered as the expropriation of the private ownership under the Constitution. In light of findings under Section III, Section IV will examine some trademark cases and discuss how Article 44 of the Constitution may be applied to solve the problem of expropriating the private ownership of the trademark. In this Section IV, this Paper will also identify challenges and solutions which will produce the most desired outcome that balance the interests of protecting the trademark rights under the Trademark Law and the interest of protecting the private ownership under the Constitution. Final conclusions will be made in Section V.

II. PRIVATE OWNERSHIP AND EXPROPRIATION OF PRIVATE OWNERSHIP UNDER CAMBODIAN CONSTITUTION

1. Private Ownership under the Constitution

Throughout the history of Cambodian Constitutions, private ownership was recognized and protected during the first Kingdom of Cambodia through the 1947 Constitution and the Khmer Republic through the 1972 Constitution. However, from 1975 until 1992 during the Democratic Kampuchea, the People's Republic of Kampuchea, as well as the State of Cambodia, the private ownership was abolished

completely or partially and all immovable property was the "collective property of the people's State and the common property of the people's collective."[3] In October 1992, a new land law was adopted and defined the term "ownership" as the right to enjoy and dispose of property. This 1992 land law marked the return of private ownership under the Cambodian legal system.[4]

In 1993, a new Constitution of the second Kingdom of Cambodia was adopted by the Constituent Assembly and the private ownership is recognized and protected under Article 44 of the Constitution as follows:

> 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 interest demands in the cases stipulated by the law and if prior appropriate and fair compensation is granted.[5]

Recognition and protection of the private ownership is a key and fundamental right in the free market economy. Such private ownership is provided to both individual person or collective organization. In respect of the land, only natural persons or legal entities of Khmer nationality shall have the rights to own land.[6]

The 1993 Constitution defines neither the term "private ownership" nor the scope of the private ownership. No case law or decision issued by the Constitutional Council of Cambodia defining the meaning or the scope of the private ownership set forth under the Constitution.[7] However, the term "ownership" was defined under Article 19 of the 1992 land law as "the right to manage absolutely and solely any property, provided that is not prohibited by law." This 1992 land law was repealed

[3] *See* Matthew Rendall et al., Land Law of Cambodia: a Study and Research Manual 22 (EWMI 2003).

[4] *Id.*, p. 23-24.

[5] 1993 Const., art. 44.

[6] *Id.*, para. 1.

[7] There is a decision regarding the constitutionality of the law on expropriation, but no explanation nor guideline was provided in relation to the term "private ownership," see Decision No 108/001/2010, dated 04 Feb. 2010, Constitutional Council of Cambodia (2010).

and replaced by a new land law in 2001. Under Article 85 of the 2001 land law, an owner has "the exclusive and extensive right to use, enjoy and dispose of his property, except in a manner that is prohibited by the law." Later, the term "ownership" was confirmed under Article 2 of the Civil Code[8] and was defined under Article 138 of the same code as "the right of an owner to freely use, receive income and benefits from and dispose of the thing owned to an extent permitted by law."[9] The key feature of the right to ownership is its exclusiveness and absoluteness over an owned thing.[10]

In addition, the term "thing" under the Civil Code includes both "movables" and "immovables."[11] A movable is anything that is not an immovable.[12] An immovable comprises land or anything immovably fixed to land, such as a building or structure, crops and timber.[13]

Therefore, it is generally understood that the private ownership is an exclusive right to use, receive income and benefits from and dispose of owned things including immovables and movables and such private ownership must be exercised to an extent which is permitted by law.[14] In addition, the exercise of the private ownership is also subject to certain limitations or restrictions stipulated in laws.[15] However, our understanding of the definition and scope of ownership is mainly derived from what has been defined or stipulated by the land laws or the Civil Code and there remains a question of whether the definition and scope of ownership under the Constitution should be limited to the definition and scope of ownership under these land laws and the Civil Code or should go further than the definition and scope of the ownership under these land laws and the Civil Code to

[8] Article 2 of the Civil Code, stipulating that: "This Code gives concrete embodiment to the concepts of the dignity of the individual, the equality of the sexes and the guarantee of property rights provided in the Constitution."

[9] Article 138 of the Civil Code.

[10] *See* Kork Boren, Cambodian Private Law: A Snapshot 71, 79-80, *in* Introduction To Cambodian Laws (Jörg Menzel et al., ed. 2011).

[11] Articles 119 and 120 of the Civil Code, defining thing as "a corporeal object or substance comprising a gas, liquid or solid" and things are divided into "movables and immovables."

[12] *Id.*

[13] *Id.*

[14] *See* Sou Socheat et al., Vithisastre Kiteyuth: Nite Kampuchea in Khmer and Methodologie Juridique: Droit Cambodgien In French (Legal Method: Cambodian Law) 146 (Association Pour le Droit Cambodgien 2006).

[15] *Id., p. 146-147. See* also Kuong Teilee, *Economic Rights and the National Economic System*, *in* Cambodian Constitutional Law 491, 499-501 (Hor Peng et al., eds. Konrad-Adenauer-Stiftung 2016).

include other rights which have economic value such as intellectual property rights. In the absence of case law or decision by the Constitutional Council of Cambodia, this theoretical question deserves further studies and researches.

2. Expropriation of Private Ownership under the Constitution

Although the private ownership is exclusive and inviolable, there are certain situations/circumstances where public interests outweigh the interests of private ownership and the State shall have the power to expropriate the private ownership by paying fair and just compensation. However, the exercise of such power is subject to limitations set forth under the Constitution. Paragraph 3 of Article 44 of the Constitution imposes limitations as follows: "Expropriation of ownership from any person shall be exercised only in the public interest as provided for by law and shall require fair and just compensation in advance." Under this Article, any expropriation of the private ownership shall meet the following four requirements:

1. The expropriation must be for the purpose of public interests only;
2. The expropriation must be provided for by law;
3. The expropriation must provide fair and just compensation; and
4. The fair and just compensation must be paid in advance or prior to the exercise of the expropriation of the private ownership.

Besides this Article 44, there is no other provisions of the Constitution which provide further definition or explanation on these four requirements. In the absence of further definition or explanation, the application of these requirements to expropriation cases had been problematic and unsettled until a new law on expropriation was adopted in 2010, governing an expropriation involving in public physical infrastructure projects in Cambodia.[16]

The law on expropriation provides a definition of the term "expropriation" as "confiscation of ownership of, with fair and just compensation in advance, immovable property or the real right to immovable property of a physical person or legal entity or legal public entity, which includes land, buildings, and cultivated plants, and for construction, for rehabilitation or for expansion of public physical infrastructure which is in the national and public interests."[17] By definition, an expropriation refers to an act of "confiscation of ownership of immovable property or the real right to immovable property." Therefore, a government action even without physical expropriation may amount to an expropriation in a constitutional sense. However, there have been so far no test or guideline on how to assess whether

[16] For comprehensive discussion on this law, please See Nhean So Munin and Pat Baars, *Supra* Note 2.

[17] Art. 4 of the Law on Expropriation (2010).

a government action may be considered as an expropriation stipulated under the Constitution. For example, if the government intentionally harms the property of an individual, there is a question of whether such action may amount to the expropriation of the private ownership.[18]

In addition, the law on expropriation also defines the terms "public or general interests" as "the use of land or property by the general public or agents or state or public institutions."[19] A very good example of public interest use would be the building of roads or bridges or other public infrastructures such as water and electricity system, schools, hospitals or airports.

In respect of the fair and just compensation, the law on expropriation stipulates the key principle as follows:

> The amount of compensation to be paid to the owner of and/or holder of real right to the immovable property shall be based on the market price or replacement cost as of the date of the issuance of the declaration on the expropriation project. The market price or the replacement cost shall be determined by an independent committee or agent appointed by the Expropriation Committee.[20]

In sum, the law on expropriation aims to provide further definitions, guidelines and explanations of Article 44 of the Constitution by defining the principles, mechanisms, procedures of expropriation, and fair and just compensation for any public physical infrastructure construction, rehabilitation, and expansion project for the public interests, national interests and development of Cambodia. Nevertheless, this law on expropriation covers only immovable property or the real right to immovable property of a physical person or legal entity or legal public entity. Therefore, it is not applicable when the subject matter of the expropriation is intellectual property including trademarks. Section III below will discuss whether trademark rights could be considered as a type of private ownership under Article 44 of the Constitution and therefore, whether any expropriation of ownership of trademark could be considered as an expropriation of private ownership under the Constitution.

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[18] In the United States of America, "non-acquisitive governmental action may amount to a Taking in a constitutional sense," *see* John E. Nowak and Ronald D. Rotunda, Principles of Constitutional Law 264-265 (West, a Thomson Business 2nd ed., 2005)

[19] Article 4 of the Law on Expropriation (2010).

[20] Article 22 of the Law on Expropriation (2010).

III. TRADEMARK RIGHTS AND PRIVATE OWNERSHIP UNDER ARTICLE 44 OF THE CONSTITUTION

As explained in Section II, it is very clear that the private ownership is recognized and protected under the Constitution. It also has no dispute that the private ownership under the Constitution covers both immovable and movable property. However, there is a question of whether this private ownership could also be extended to trademarks. In other words, there are two related questions. The first question is whether the private ownership of the trademarks could be recognized and protected under the Constitution. The second question is, if the private ownership of trademark is recognized and protected, whether any expropriation of the private ownership of the trademark must meet all four requirements set forth under Article 44 of the Constitution. Section A and Section B below will discuss and analyze the two issues respectively. This Paper suggests that the term "private ownership" under Article 44 of the Constitution should be broadly interpreted to include trademark rights and the private ownership of the trademark should be recognized and protected under the Constitution. This Paper also suggests that any expropriation of the ownership of the trademark should also be considered as expropriation of private ownership under the Constitution and therefore should meet the four requirements set forth under the Constitution before exercising any expropriation of the private ownership of the trademark.

1. Whether trademark rights could be considered as private ownership under the Constitution?

Although the Constitution does not provide the definition and scope of the private ownership, it is generally understood from the existing land laws and Civil Code that the private ownership covers both immovable property and movable property.[21] However, there seems to be no discussion or interpretation which has been made so far to determine whether the private ownership includes both tangible property and intangible property including the trademark.[22] There was an attempt by one author to include intellectual property as an example of movable property within the scope of Article 44 of the Constitution, but there is no further explanation.[23] There

[21] *See* Kuong Teilee, *Supra* Note 2, p. 506; and Sou Socheat et al., *Supra* Note 14, p. 146.

[22] For literature on intellectual property in Khmer, see Ny Vichet, Cambodian Intellectual Property Law (Royal University of Law and Economics 2013); En Yoeun and Ouk Vannaroth, Intellectual Property Law (2013); Kham Somakara, Intellectual Property Law (Cambodia Business Association 2011); and Kan Sothpolin, Intellectual Property Law (Royal University of Law and Economics 2013).

[23] *See* Nhean So Munin and Pat Baars, *Supra* Note 2.

is also no case law or decision made by any court in respect of this interpretation.[24] Therefore, this Paper attempts to provide a theoretical discussion on this issue and suggest a preliminary conclusion that the private ownership under Article 44 of the Constitution should cover trademark rights.

Cambodia enacted a Law on Marks, Trade Names, and Acts of Unfair Competition (the "Trademark Law") in 2002 and subsequently a Sub-Decree for implementing the Trademark Law in 2006. Prior to the enactment of the Trademark Law, trademarks were registered under a regulation issued in 1997 by the Ministry of Commerce regarding the procedure of the Intellectual Property Department. Trademark or mark was defined as "any visible sign capable of distinguishing the goods (trademark) or service (service mark) of an enterprise."[25] Thus, a mark must be distinctive, serving to distinguish the goods or services of one or more enterprises from those of the other enterprises. In the case of goods, a mark will be called "trademark" and in case of service, it will be called "service mark." Both trademarks and service marks are classified as marks.

An application for a trademark registration and protection shall be filed with the Intellectual Property Department of the Ministry of Commerce. A mark will be registered and protected under the Trademark Law if it is distinctive and does not fall into any category set out under Article 4 of the Trademark Law. After registration, the trademark holder will be entitled to exclude others from using the registered marks without their authorization.[26] The first period of registration and protection will be ten years and subject to renewal for consecutive periods of ten years.[27] During the protection period, the registered owner of the mark can institute court proceedings against any person who infringes the mark by using it without the owner's authorization. The owner may also transfer or assign, either exclusive or non-exclusive, his or her rights to other parties.[28] In addition to this right, provisional measures and border measures as set out under Chapters 9 and 10 of the Trademark

[24] There was a decision of the Constitutional Council of Cambodia examining the constitutionality of the law on expropriation, but this decision does not touch on whether the term "property" include both tangible property and intangible property, see Decision of the Constitutional Council of Cambodia, *Supra* Note 7.

[25] Article 3 of the Trademark Law.

[26] Article 11 of the Trademark Law.

[27] Article 12 of the Trademark Law.

[28] Articles 19 & 52 of the Trademark Law.

Law are also available for the trademark owner.[29]

Based on the principles of the Trademark Law explained above, trademark rights may be considered by analogical interpretation as one type of private ownership protected under the Constitution for a number of reasons.[30] First, upon registration the trademark owner will be able to exclude others from using his or her registered trademark without his or her consent or authorization. Second, the trademark owner may also license or assign his or her trademark rights to other parties. Third, the first period of registration and protection will be ten years and subject to renewal for consecutive periods of ten years. Fourth, during the protection period, the registered owner of the mark can take border measures or institute court proceedings against any person who infringes the trademark rights by using it without the owner's authorization. Based on these four grounds, trademark rights have similar meaning and scope to the private ownership through analogical interpretation; i.e., the rights to use, enjoy the benefits and dispose of such trademark.

Such analogical interpretation is also in line with approaches taken by courts and scholars in other jurisdictions outside Cambodia. For example, in Germany, the property rights under Article 14 of the German Constitution also extends to trademarks.[31] In Japan, trademark rights are considered property rights.[32] In the United States of America, whether trademark rights are secured under the eminent

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[29] For additional explanation on the Trademark Law, *see* Phin Sovath, *Economic Law: Intellectual Property Rights*, *in* Introduction To Cambodian Laws (Jörg Menzel et al., ed. 2011), and Phin Sovath et al., *Trademark System in Cambodia*, *in* International Intellectual Property and the ASEAN Way: Pathway to Interoperability (Elizabeth Siew-Kuan Ng and Graeme W. Austin, eds., Cambridge University Press, 2017).

[30] For literature discussing this issue in the United States, *see* Dustin Marlan, T*rademark Takings: Trademarks as Constitutional Property Under the Fifth Amendment Takings Clause*, 15 U. Pa. J. Const. L. 1581 (2013) (claiming that "trademarks are—in addition to private property—constitutional property for purposes of the Fifth Amendment"); Susan Eisenberg, Note: Intangible Takings, 60 Vand. L. Rev. 667 (2007) (proposing that "in order to receive protection under the Takings Clause, an intangible interest must (1) be a well-defined asset, that (2) contains exclusionary rights, and (3) carries an expectation of protection based on the enduring nature of the interest"); and Mitchell Diles, *Condemning Clothes: The Constitutionality of Taking Trademarks in the Professional Sports Franchise Context*, 73 Wash. & Lee L. Rev. Online 1 (2016) (contending that "trademarks should be considered constitutionally protected private property"). In Germany, See Christian Bumke and Andreas Vosskuhle, German Constitutional Law: Introduction, Cases, and Principles 273-277 (Oxford University Press, 2019).

[31] *See* Christian Bumke and Andreas Vosskuhle, *id.*, 277 (citing that "when the trademark creates something of economic value, then it is consistent with the constitutional purpose of the institutional guarantee of property rights to extend protection to it" and "it would be inconsistent with the role of fundamental rights in guaranteeing the rule of law if the state saw itself as permitted to simply eliminate a trademark without offering any kind of substitute.")

[32] *See* Shoen Ono, Overview of Japanese Trademark Law, Chapter 7, p. 2 (Yuhikaku 2nd ed. 1999), available online at < https://iip.or.jp/e/translation/pdf/ono/ch7.pdf> (Last visited on 5 Jun. 2020) (arguing that "a trademark right is not a personal right connected to the specific status of an individual though it does have proprietary value. It may also be transferred or assigned. As a result, it is considered a 'property right'.")

domain or Taking clause has not been examined thoroughly, but there are some scholars who have proposed that trademarks should be considered as property and the trademark rights should also be protected under the Constitution.[33]

In conclusion, by analogical interpretation, trademark rights should be considered as one type of the private ownership protected under the Constitution.

2. Expropriation of ownership of trademark and expropriation of private ownership under the Constitution

In case that the trademark rights could be considered as a type of the private ownership under the Constitution, any expropriation of the ownership of the trademark should also be considered as the expropriation of the private ownership as safeguarded under the Constitution; therefore, such expropriation must meet the four requirements set forth under the Constitution. This Paper proposes this claim on the following grounds. First, trademark rights through its registration are grants from the government that give the owner the right to exclude others from use without consent or authorization from the owner or the right holder. Second, there is no provision under the Constitution separating between private ownership for tangible property and private ownership for intangible property. Third, there is no limitation or prohibition on the intangible property under the Constitution. Thus, the expropriation of the ownership of the trademark should be treated the same as the expropriation of the private ownership as safeguarded by the Constitution.

However, application of Article 44 of the Constitution to the expropriation of the ownership of the trademark will face some doctrinal challenges as to how the four requirements are satisfied in the case of trademark. To the contrary of the expropriation of the immovable property and real rights where all of the four requirements have been defined and explained further in the law on expropriation, the current Trademark Law does not provide any definition or explanation in the case of expropriation of the ownership of the trademark. In other words, the four requirements defined or explained further in the law on expropriation are not applicable to the case of trademark; for example, the definitions of "expropriation" or "public and national interests" does not really fit at all for the case of trademark. Nevertheless, these four requirements can be used as model provisions for developing new rules or guidelines to be applied for the case of trademark. Alternatively, the four requirements under the Constitution should be used as a starting point for the application or interpretation when there is a case of expropriation of trademarks in the absence of any specific law addressing the expropriation of the private

[33] See Dustin Marlan, *Supra* Note 30; and Mitchell Diles, *Supra* Note 30.

ownership of the trademark.

IV. POTENTIAL APPLICATIONS, CHALLENGES AND SOLUTIONS

After reviewing the intersection of the trademark and constitutional law, this Section will examine some potential trademark cases where the application of Article 44 of the Constitution may be considered and applied and at the same time identify challenges in applying this Article 44 to those cases. The cases were involved with a government order to remove an element of trademark or to modify a trademark to avoid public confusion between private institutions and public institutions in a banking and financial sector. These trademark cases were not brought to any competent court, but for the purpose of discussion in this Paper, these trademark cases are used to test if Article 44 of the Constitution may be applied and how it can solve the issues arisen out of these cases.

On 17 February 2017, the Cambodian government issued a press release whereby a ministry in charge of trademark ("Ministry of Commerce") is assigned to urgently work with one of the largest commercial banks to change its logo within three weeks by removing a mythological golden bird insignia (the "bird insignia") arguing that "*the bird insignia was State property being used by another ministry and such continuous use has caused confusion*."[34] On the same day, the commercial bank issued a press release confirming its agreement to remove the bird insignia.[35] Consequently, this commercial bank has dropped the logo on all of its 259 locations in Cambodia, 41 branches in Laos and one in Myanmar and changed the logo on additional 353 billboards across the region and all 1.7 million bank cards that this commercial bank has issued to its customers.[36] The rebranding operation costs approximately USD3.5 million, or about 3 percent of the commercial bank's 2016 net profit.[37]

On 21 February 2017, the National Bank of Cambodia issued a letter requesting all banking and financial institutions and microfinance operators that has logos similar to logos of public ministries and institutions in particular the bird insignia or Khmer Riel currency symbol to change their logos to avoid any

[34] Press Release, the Outcome of the Plenary Meeting of Council of Ministers, Office of Council of Ministers (17 Feb. 2017) (on file with author).

[35] Press Release, the Change of Logo of Acleda Bank Plc. (17 Feb. 2017) (on file with author).

[36] Hor Kimsay, *Bank Ordered to Replace Its Logo*, Phnom Penh Post, 21 Feb. 2017.

[37] *Id.*

confusion among the general public that they were State institutions.[38] A day after on 22 February 2017, the Ministry of Commerce issued an announcement requiring all commercial banks, private banks, specialized banks and microfinance institutions that have used its marks confusingly similar to logos of the Ministry of Economy and Finance and the National Bank of Cambodia to modify their marks in a manner to avoid any confusion.[39] Such modification must be done by 10 March 2017.[40]

On the same day, another microfinance institution was ordered to change its logo which used the symbol for Khmer Riel currency. In this case, the microfinance institution borne an estimated cost of USD1 million[41] and promised to stop using the symbol for Khmer Riel currency on the ground that the Khmer Riel currency symbol is the symbol of the National Bank of Cambodia.[42] Later in November 2017, another commercial bank changed its logo to remove a lion symbol from its existing logo.[43] This new logo had come at a cost of USD2 million, a figure that includes changing signs associated with the bank's branding in all 168 branches across the country.[44] In this last case, there was no direct order from the government, but it has changed to indirectly comply with the request of the National Bank of Cambodia that any banking and financial institution or microfinance operator changes its logos if using a similar symbol such as Khmer Riel currency symbol or bird insignia to avoid confusion among the general public.

The main ground of the government order was to avoid confusion by and among the general public between private institutions and public institutions.[45] According to local visits by the National Bank of Cambodia, the majority of the general public thought that staff or personnel of the private banking and financial institution or microfinance operator were staff or personnel of the State.[46] Such

[38] Letter from the National Bank of Cambodia to Banking and Financial Institutions and Microfinance Operators, Re: Request to Change Logos of Banking and Financial Institutions and Microfinance Operators, 20 Feb. 2017 (one file with author).

[39] Announcement No. 0705 of Ministry of Commerce (22 Feb. 2017) (on file with author).

[40] *Id.*

[41] Kali Kotoski, *Banks Roll Out Cards with New Logos*, Phnom Penh Post, 22 Jun. 2017.

[42] Press Release, Ministry of Commerce, 22 Feb. 2017.

[43] Hor Kimsay, *Sathapana Bank Proceeds with Logo Change*, Phnom Penh Post, 13 Mar. 2017.

[44] Sok Chan, *Sathapana Reveals New Branding*, Khmer Time, 28 Nov. 2017.

[45] *See* Letter from the National Bank of Cambodia, *Supra* Note 38.

[46] *Id.*

confusion may have negative impact on the private banking and financial institutions or microfinance operators because the general public, in particular those who have taken loans from the private institutions, would think that even though they do not repay the loans, there is no issue at all as the institutions belong to the State.[47] Such non-payment will definitely cause losses to the private institutions as well as systematic risks to other private institutions.[48] Therefore, it may be argued that compliance with the government order is necessary to serve the public interest.

On the other hand, the government order creates four issues which are commonly arisen from these trademark cases. First, those trademarks have been properly registered with the government, still valid in the trademark registry of the Ministry of Commerce, and legally owned by each of those banking and financial institutions and microfinance operators. Second, those trademarks have been used for many years in the business and the relevant owners have made a lot of investment in their advertising and promotion activities to build up their branding. Third, the government order provides very short notice to modify or change their logos. Fourth, no fair and just compensation was provided to the owners for the losses or damages they suffered in order to comply directly or indirectly with the government order. Therefore, the government order has also produced negative impacts on the legal private ownership of the trademark of those private financial and banking institutions and microfinance operators.

In light of the above facts, there is a need to find a novel solution which can address these issues and at the same time to balance the interests of protecting trademark rights under the Trademark Law and the private ownership under the Constitution and the interests of serving the public interest safeguarded by the Constitution.

As mentioned in Section III, trademark rights may be considered as one type of private ownership protected under Article 44 of the Constitution and any expropriation of the ownership of the trademark should satisfy the four requirements stipulated under the Constitution:

1. The expropriation must be for the purpose of public interests only;
2. The expropriation must be provided for by law;
3. The expropriation must provide fair and just compensation; and
4. The fair and just compensation must be paid in advance or prior to the exercise of the expropriation of the private ownership.

[47] *Id.*

[48] *Id.*

In the above trademark cases, there is no dispute that the trademark rights are lawfully registered and protected under the Trademark Law. Thus, the trademark rights are legal private ownership under the Constitution. However, there is a question of whether or not the government order meets the public interest requirement. The underlying purpose for the government to issue the order is to avoid confusion among the general public between private institutions and public institutions; therefore, the main question is whether to avoid public confusion serves the public interest set forth under the Constitution. This is subject to interpretation as the public interest is not defined under the Constitution. Although the government order may satisfy the public interest requirement, the government order is not a law, and even if the government order is to implement a law, currently there is no law specifically stipulating the expropriation of the ownership of the trademark.

In addition, fair and just compensation is not defined in the Constitution or the Trademark Law. Thus, there is a question of what standard should be used to determine a fair and just compensation. In the above trademark cases, there was no fair and just compensation but the trademark owners did not even claim for compensation. Instead, they borne their own costs for removing or changing their logos to comply with the government order. Thus, the third, fourth and fifth requirements were not satisfied in these trademark cases. To apply the principle of the expropriation of the ownership of the private ownership to these trademark cases, the government order would be considered as unconstitutional because the requirements of being provided for by a specific law, fair and just compensation and payment in advance were not fulfilled although the public interest requirement is satisfied.

However, the issue whether the government order, in itself, is unconstitutional is distinct from the issue of whether the government order is an act of expropriation. If the government order is not an act of expropriation, there is no necessity to examine whether or not such government order is unconstitutional. Nevertheless, the Constitution does not define the term "expropriation" and even though the law on expropriation provides a definition, it is not applicable to the case of trademark. In these trademark cases, there is a question of whether the government order, requiring all banking and financial institutions and microfinance operators that has logos similar to logos of public ministries and institutions in particular the bird insignia or Khmer Riel currency symbol to remove such elements or to change their logos to avoid any confusion among the general public, would amount to the act of expropriation in the constitutional sense.

The answer to this question would depend on how to define or interpret the term "expropriation" under the Constitution. If broadly interpreted, the requirement to remove the element of the relevant logo or to change the logo would amount to the act of expropriation even though there is no physical expropriation involved in the trademark cases. However, if narrowly interpreted, the requirement to remove the element of the relevant logo or to change the logo would not amount to the act of expropriation as the trademark owners are still the owners of their logos and only one element considered as State property was removed from those logos. Therefore, it is necessary to provide definition or interpretation of the term "expropriation" to apply Article 44 of the Constitution to the expropriation of the private ownership of the trademark.[49]

Therefore, there is a possibility to apply the principles of Article 44 of the Constitution to the trademarks but there will be some doctrinal challenges or obstacles due to the facts that any of the four requirements will need further interpretation, a specific law is required to apply it, and definition or interpretation of the term "expropriation" is required.

In respect of the specific law requirement, it can be done in a form of either a completely new law on expropriation of trademarks or an amendment to the current existing Trademark Law. In such a case, the new law should determine rules, procedures and standards for expropriation of ownership of trademarks to comply with the four requirements of the Constitution. First, the new law should reconfirm the recognition of the legal private ownership of the trademark. Second, the new law should define the key terms such as "expropriation" and "public interests" in case of expropriation of ownership of trademark. Third, the new law will serve a specific law as required under the Constitution. Fourth, the new law should specify which standard will be used to determine the fair and just compensation. Fifth and last, the new law should determine procedures of how to make the payment in advance. However, preparing and adopting a new law will take time and costly and would require a lot of advocacy throughout the process of drafting law. Alternatively, Cambodia may consider between adopting a completely new law or an amendment of the Trademark Law by incorporating all the four requirements into the amendment.

[49] In the United States of America in relation to the taking of property, Courts will look into three factors: (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered with distinct investment-backed expectation, and (3) the character of the governmental action; *see* John E. Nowak and Ronald D. Rotunda, *Supra* Note 18, p. 267.

V. CONCLUSIONS

Trademark rights may be considered through analogical interpretation as a type of the private ownership recognized and protected under the Constitution. Any expropriation of private ownership of a sign registered as a trademark, similar to the expropriation of other private ownership, should be constitutionally accepted only when such expropriation is made through a specific law for the public interest purpose with fair and just compensation in advance to respective owners of such trademark. However, the application of the expropriation clause of the Constitution to the trademark cases will face some doctrinal challenges or obstacles which must be addressed through further interpretation of the four requirements, the introduction of a specific law, and the definition or interpretation of the certain key terms such as "expropriation" and "public interests." Therefore, the four requirements under the Constitution should be clearly clarified in the legislation either through the existing Trademark Law by its amendment or a completely new law. Alternatively, they can be clarified through a decision of a Constitutional Council of Cambodia when a case is brought before it.

Due to space constraint, this Paper focuses mainly the intersection of the trademark and constitutional law and does not review other intellectual property laws such as law on copyrights and related rights and law on patents, utility models and industry designs. In addition, this Paper does not explore other solutions such as investment or business laws where trademark may be treated as part of an investment and any expropriation of such investment should be subject to prohibition or restriction under those laws. In addition, a comparative law or international law is also not comprehensively reviewed or presented in this Paper. Finally, this Paper may be used as a preliminary study for future additional researches and publications that should be conducted focusing on these relevant national and international laws as well as foreign laws in order to explore other solutions for Cambodia.

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THE IMPLICATION OF JUDICIAL REFORM IN CAMBODIA FROM PERSPECTIVE OF CONSTITUTIONAL PRINCIPLES AND INTERNATIONAL STANDARD OF HUMAN RIGHT

CHIN Malin

ABSTRACT

The paper will analyze the implication of current judicial reform in Cambodia through the enactment and enforcement of the three main organic laws pertaining to judiciary in response to the constitutional principles of democracy such as separation of power and independence of judiciary and also see how they fulfill the international standard of human right such as right to fair trial.

The government has established three fundamental laws pertaining to judiciary and there are lots of critics as well from civil society that these laws cannot guarantee the independence of judiciary and violate the constitution and international standard of human right, particularly right to fair trial.

Therefore, this paper will do analysis by looking from internal and external view, the critics from civil society and the perception from government as the drafter of the laws and compare it with international practice and international legal instruments concerning with human right as the guideline for a comprehensive analysis.

Following the analysis on this current judicial reform, the paper will provide some recommendations to the government on some possibilities for amendment of the three fundamental laws to make it better, more effective and more responsive to the constitutional principles of democracy and international standard of human right in the future as no law is perfect and some critics from civil society may not be acceptable as well due to their political interest and affiliation.

I. JUDICIAL AND JUSTICE SYSTEM OF CAMBODIA

1. The Justice System

In 1993 the justice system was ruin and there were only 5 judges and prosecutors all over the country. Massive change has been reflected and in the legal and institutional system and ways of thinking about how justice is and how it is to be achieved. In 2011, there were 396 trained judges and 92 prosecutors.[1] Cambodia now has 24 Courts of first instance in the provinces and municipality, one Appeal

[1] Phun Vidjia "Cambodia" In HRRC Rule of Law Baseline Study. Citing the website of the Royal Academy for Judicial Professions.

Court with other three regional appeal courts that will be functioning on April 01, 2020 and one Supreme Court as well as one military court and a hybrid court (ECCC). There is a training institution for judges, prosecutors, clerks and bailiffs as well as a Supreme Council of Magistracy (SCM). There are also improvements compared to the ground zero situation 40 year ago.

Providing justice to resolve the dispute in society is the public service, which must be guaranteed by the state and involves many other branches of the state as well. The legislature passes the laws pertaining to judiciary and approves the budget for judiciary. The executive, primarily the Ministry of Justice, develops policies and administers or co-administers judiciary like in many other democratic states.

King safeguards the independence of judiciary and is assisted by Supreme Council of Magistracy (SCM) in fulfilling this duty (Art. 132 New of Constitution of Cambodia - CC). The same institution can be found in France, with the only difference that France does not have King, but President. SCM is independent from government and oversees disciplinary matters involving judges and prosecutors (Art. 134 New of CC). It also makes request to the king to appoint judge. The new law on the SCM outlines in more detail the composition and function of the SCM.

The institutional governance structure provided by CC as well as subsequent legislation is that Ministry of Justice - MoJ is a key player responsible for policies, implementing regulations, standards, supervision, etc. MoJ administers the judiciary in term of budget and personnel administration and Judges are co-administered together with SCM.

Adjudicative Functions: is the core function of judicial independence and is exercised through Judges. Independence of judiciary means primarily not to influence the process how a judge arrives at the decision and prohibits contesting a judge's decision other than a formal appeal by the parties. The CC, Law on Judges and Prosecutors and Law on SCM safeguard judicial independence and protect judge, in theory, against political interference.

Administrative Functions: the MoJ has the overall responsibility for administering the judicial system of Cambodia. MoJ sets policy framework, drafts statutory law, enacts su-ordinate legislation, and oversees implementation of laws and regulations, 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 court clerks.

The CC and the Law on the Functioning of the Ministry of Justice assigns the responsibility for overseeing all aspects of administrative and organizational

matters to the MoJ, except appointment of judges and disciplinary measures. This is the same in many other democratic states such as France and Germany in which the ministry of justice controls the administration of the judiciary through policy, decision making and overview. There are some other states, 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 power to determine its own budget, manage its own staffs, and set its own rules. However, this governance structure is not the model outlined in the CC and subsequent laws of Cambodia.

2. The Court System

The arrival of the UNTAC in 1992 brought fundamental changes to the court system of Cambodia. The Appeal Court was created, resulting in a three – tier court system:

-Municipal & Provincial Court	(first instance)
-Appeal Court	(second instance)
-Supreme Court	(third and final instance)

Court of First Instance: is the lowest court which includes the provincial, municipal and military courts. Each court jurisdiction covers a particular geographical area where the court is located. An exception to this is Military Court which has jurisdiction over the entire territory of Cambodia. At this instance, only a single judge conducts the proceeding and makes the judgment. The judge has to collect the facts and evidences and must then apply the law to the facts. This whole proceeding has to follow the principles of a fair trial. The new Law on the Organization of Court (2014)[2] organizes courts according to specialized areas of law such as civil courts, criminal courts, commercial courts and labor courts and also introduces regional appeal courts in some regions.

Military Court: is located in Phnom Penh and is a court of first instance that has exclusive jurisdiction over cases committed by military personnel involving military offenses (violation of military duties, misconduct, etc.) and any offenses affecting the property of the armed forces. Ordinary offenses (such as murder, robbery, etc.) committed by military personnel are under the regular jurisdiction of the provincial and municipal courts. The military court is administratively, financially and logistically under the control of the Ministry of Defense.

Second Instance - Appeal Court: The jurisdiction of Appeal Court covers

[2] Cited from Law Compilation /Translation of the Three Laws Pertaining to Judiciary including the Law on the Organization of Court, Law on the Status of Judges and Prosecutors, and Law on the Organization and Functioning of SCM (2014) published by the Ministry of Justice and CIM.

the whole territory of Cambodia. This court is currently located in Phnom Penh and hears all cases appealed from a court of first instance – municipal, provincial and military court. The Appeal Court reviews both questions of law and of fact. The Appeal Court uses trial procedure similar to those of the court of first instance; the only difference is that the case is heard by three judges, called "Trial Council", and an additional investigation may be conducted to resolve the factor gaps left by the lower court. The new Law on the Organization of Court (2014) introduced the regional appeal courts in some regions and each appeal court will have the jurisdiction over the appealed cases from the courts in the region they are located. According to this law, two regional appeal courts at Battamborng and Tbongkhmum have been functioning from April 01, 2020 and another one at Prasihanuk will be functioning soon later due to the delay of building construction.

Third Instance - The Supreme Court: is located in Phnom Penh and is the highest court of appeals in the country and its jurisdiction covers the whole territory of Cambodia. Since 1994 the Supreme Court with a bench of 5 judges has adjudicated questions of law for cases appealed from the Appeal Court. Upon the second appeal from the Appeal Court, where the court does not follow the judgment of Supreme Court then by bench of 9 judges tries both question of fact and law. The Supreme Court has no power to review legislative acts, executive regulations or to make its own case law. It can only apply laws made by the legislature.

II. CONSTITUTIONAL PRINCIPLES OF JUDICIARY

1. Separation of Power

The separation of power principle constitutes the judiciary as the third power which is separated from legislative and executive power (Article 51 of CC). Legislative, Executive and Judicial power are vested in different institutions:

-Legislative: National Assembly and Senate

-Executive: Royal Government of Cambodia or Council of Ministers

-Judiciary: Court

Montesquieu introduced the term separation of power with regards to the separation of judiciary from the other two powers.[3] This principle is reinforced in Article 51, 128 New of CC, which state that the three powers should be separated. Art. 128 New of CC further clarifies that the power of judiciary is vested in the court; or more specifically to the judge, who has the only right to adjudicate (Art.129 New of CC). This means that the judicial power is vested in Judges exercised through

[3] Charles de Montesquieu, *De l'esprit des lois* (1748) bk XI, ch 3.

court.

The judge through courts is independent from the legislative and executive in his or her adjudicative function. This definition of the scope of independence is important as the CC itself is not very clear and what part of judiciary is separated from other powers. For example, chapter XI New of CC, is in so far misleading as it regulates different elements of the judicial system: courts, judges, but also prosecutors, the king, the SCM. The king, SCM and prosecutors are in their specific function part of judicial system, but they do not fall under the separation of power principle as none of them adjudicate; example, apply the law to specific case). The function of SCM is to appoint and discipline judges, the king is more a symbolic figure, which safeguards 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 above can claim that they are protected by judicial independence. The only person who is truly protected is the judge. Art.129 New of CC can only be interpreted that judicial authority is reserved only 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 principles leads to the following underlying definition:

2. Independence of Judiciary

Constitution protects independence of judiciary in his adjudicative function through substantive as well as personal independence.

Substantive Independence: Art 129 New of CC provides substantive independence by stating that the adjudicative function of the judge is independent and the judge should strictly (only) respect the law. Substantive independence means that judges are not subject to order and instructions by anybody else, but is only bound by laws, sub-ordinate law, international law, customary law, etc. The legislature, of course, can enact the law, 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 Supreme Council of Magistracy protect the personal independence of judges. Appointed judges shall be removed, suspended, transferred, retired against their will only pursuant to the decision of the SCM and only on the grounds of law. Grounds for removal are mainly related to disciplinary action as a result of violation of official

duties.

Other aspects of judicial independence: Judicial independence is a highly abstract term and has many facets. Therefore, Joerg Menzel[4] 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. 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 branch, 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 such as family.

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 judiciary and administration through the ministry of justice. In most countries, one can find a mix between the two, and systems are characterized whether the judiciary is more or less administered either by a self-regulating body or ministry of justice. It seems fair to conclude that in most countries' justice is co-administered and the judicial independence does not include the right to self- administration of judiciary. It would be naïve to think that a fully-fledged "self-administration" does automatically provide better guarantee with respect to the adjudicative function.

3. Relation of Judiciary to Other Powers

The role of judiciary and its relation to other powers can only be understood if it is clear why those powers are needed. The answer to this question is: Human beings are neither 100% good nor 100% bad. Everyone can make mistakes. Therefore, human beings need power that executes these laws (Executive) and also power which controls whether the application and execution of laws was correct or not (Judiciary). As a fourth power, the media, finally carefully monitors the performance of these three powers and critically comments it.

But these institutions themselves are run by human beings who can make mistakes and can exceed their powers. So, each institution itself needs control and limitation. Therefore, the different powers have not only to be clearly separated by have to control and balance each other. This is called "Principle of Checks and Balances" of the different powers. This principle has to be kept in mind when

[4] Menzel, Joerg, *Judicial Independence, Integrity, Administration of Courts: International and Comparative Perspective for the Cambodian Context* (2014), (Unpublished) Background Report for the National Conference Disseminating the Three Laws Pertaining to Judiciary.

looking at the relation of the judiciary to other powers. One clear rule about this relation is that no other power shall take over the role of the judiciary. Art 129 New of CC states that "Only judges shall have the right to adjudicate. A judge shall fulfill this duty with respect for the laws, wholeheartedly, and conscientiously." Art 130 New states that "Judicial power shall not be granted to the legislative or executive branches." Art 131 New states that "Only the Department of Public Prosecution shall have the right to file criminal suits."

Principle of check and balance: On the one hand the judiciary influences the other powers but on the other hand at the same time these powers influence the judiciary as the following process:

Courts ask the constitutional council to check constitutionality of laws.[5] Legislation checks judiciary by binding it through all adopted laws.[6] Legislation also makes specific laws about the role and function of the judiciary. Judiciary checks acts of executive and administration. Government members can be punished by criminal courts.[7] Executive check judiciary through the execution of judgment and sending one member of ministry of justice to the Supreme Council of Magistracy and it also initiates legislation on the judiciary.[8] Judiciary checks the media by application of Press Law, Civil Law, for example libel law suit and defamation cases. Media checks judiciary by attending public court hearing, reporting about the judiciary's performance.[9]

4. Principles for Judicial Procedure

The Constitution provisions determine judicial procedure such as Impartiality, Aspect of Integrity, Equality, Procedural Right in Criminal Cases and Procedural Right in Administrative Cases.

Impartiality: In particular, judges shall fulfill his duty without favor, bias or prejudice and disqualify himself / herself where impartiality is not possible or appears to be in doubt according to article 128 New of CC.

Aspect of Integrity: The aspect of integrity in article 129 New of CC means "Fulfill duty wholeheartedly and consciously.

[5] Article 19 of Law on the Constitutional Council and article 136 of Cambodian Constitution.

[6] Article 129 of Cambodia Constitution, Law on the Statute of Judge and Prosecutor and Law on the Organization of Court.

[7] Article 39 and 126 of Cambodian Constitution.

[8] Article 91 of Cambodian Constitution and Law on the Organization and Functioning of Supreme Council of Magistracy.

[9] Article 41 of Cambodian Constitution and Article 19 of ICCPR.

Equality: According to article 31 of CC, a judge shall be aware of, and understand, diversity in society and difference 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." This means that everyone should be treated equal, regardless of being rich and powerful, or poor and vulnerable.

Procedural rights in criminal cases: According to article 38 of CC, procedural rights in criminal cases includes the rights of a fair trial, in particular the "benefit of reasonable doubt" and the right "presumption of innocent."

Procedural rights in administrative cases: Article 39 of CC guarantees judicial review of administrative actions whose rights are infringed by public authority. This provision is the heart and the cornerstone of judicial review of administrative action.

III. INTERNATIONAL LAW AND STANDARD OF JUDICIARY

The most important law principle, independence of judiciary, is stated in Universal Declaration of Human Right (UDHR) article 10 and International Covenant on Civil and Political Rights (ICCPR) article 14. Other international treaties such as the Child Right Convention article 37 refer and depend on the prerequisite of an independent court. The ASEAN Declaration of Human Right, which Cambodia adopted, states every person should be trailed by independent and impartial tribunal (article 20.) Other areas of international law such the fight against corruption stress the important of independence of judiciary, such as UNCAC article 11.

One important international standard should be mentioned, the Bangalor Principles of Good Judicial Conduct.[10] They not only include "independence", but also other judicial principles enshrined in Cambodian Constitution. The set of principles as well as their implementation measures contain information on how to interpret these principles and can provide the first step in understanding these principles. The Bangalore Principles of Judicial Conduct (2002) promote six judicial core principles: 1) independence, 2) impartiality, 3) integrity, 4) propriety, 5) equality, 6) competence and diligence. In addition, "Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct" were adopted.

[10] Available at: http://www.unrol.org/files/publications_unodc_commentary-e[1].pdf.

The document formulates 1) responsibility for the judiciary[11] and 2) responsibility for the State.[12] Some of these responsibilities are either reflected in code of conducts and / or the laws on judges.

The Universal Declaration of Human Right (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) which have been adopted by Cambodia and thus are part of the national law of Cambodia (Article 31 of Cambodia Constitution) state that every human being has a right to an effective remedy granted by an independent judicial body in case of a violation of his / her rights. Article 8 of UDHR states that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 10 of UDHR states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. According to article 14 of ICCPR, all persons shall be equal before the court and tribunals. In the determination of any criminal 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.

It is obligation of every signatory state to establish a judicial system which is able to fulfill the peoples' right to judicial control. This right also explicitly includes a right to judicial control of acts of administrative officials. Article 2 of ICCPR states that each state party to the present covenant undertakes a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that he violation has been committed by persons acting in an official capacity; b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibility of judicial remedy; c) To ensure that the competent authorities shall enforce such remedies when granted.

The Cambodian Constitution also explicitly acknowledges that basic right to a judicial protection against all kinds of violations of rights no matter if the right is violated by third parties or by the government. Article 38 of CC states

[11] Responsibility of 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.

[12] Responsibility 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 Judiciary.

that every Khmer citizen shall enjoy the right to defense through judicial recourse and article 39 of CC states 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. The settlement of complaints and claims shall be the competence of the courts.

To ensure such judicial protection by an independent body the Cambodian Constitution guarantees an independent judiciary. Article 128 New of CC states the judicial power shall be an independent power. The judiciary shall guarantee and uphold impartiality and protect the right and freedom of the citizens. The judiciary shall cover all lawsuits including administrative ones.

IV. IMPLICATION OF JUDICIAL REFORM

1. Legal and Policy Framework

The reform process is outlined in the Legal and Judicial Reform Strategy / Plan of Action and includes among other priority actions[13] the development of the following three laws:

- Law on the Organization and Functioning of Supreme Council of Magistracy
- Law on Status of Judges and Prosecutors
- Law on the Organization of the Courts

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 process. If the implementation process is completed the judiciary in Cambodia will be very different from the judiciary we know.

The 1993 Constitution provides the blueprint for rebuilding legal and judicial systems in Cambodia and introduces guiding principles for legal and judicial reform, such as respect for law, the separation of power, the introduction of a comprehensive administrative law system or the establishment of independent judiciary. A number of policy documents, such as Rectangular Strategy, the National Strategic Development Plan, and the Legal and Judicial Reform Strategy operationalized these principles.

Until the year 2014, Cambodia had no comprehensive statuary framework

[13] Council for Legal and Judicial Reform, *Plan of Action* (adopted by the Council of Ministers in 2005) and Legal and Judicial Strategy (adopted by the Council of Ministers in 2003); both documents published in 2007.

for the judiciary,[14] but was mostly governed through government regulations and informal policies. Thus Basil Fernando wrote in 1993 that "The influence of Ministry is often exercised through circulars, which have the effect of law."[15] Due to the lack of an effective legal and institutional framework oversight, standards, management of human and financial resources as well as court organization and management were more exercised on an ad-hoc basis. Besides their adjudicative function, judges with support of the clerks hat also 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 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 transparence as well as accountability. Through these laws, the Ministry of Justice 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 three laws also address the 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 be only gradually replaced. The Law on the Organization of the Court will have the biggest impact in terms access to justice and

[14] Except Law on the Organization of the Court in 1993, which was revised and replaced by the new Law on the Organization of the Court in 2014.

[15] Basil, Fernando *Problems facing the Cambodian Legal System,* (1998).

overall performance. Compared to that, the other two laws have only a small effect on the overall governance structure.

The Law on the Organization of the Court regulates court administration and management. Court administration and management are often regarded as factors of achieving a certain standard in the quality of justice and deals with process how a case / dispute is being processed. The law has to work 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 law: The scope of law includes: 1) the organization of the national court system defining the jurisdiction for each court, 2) the organization and functioning of the prosecution, 3) the organization and functioning court of 1st instance (general jurisdiction court and special jurisdiction court), court of appeal and supreme court, 4) the incompatibility of judges, 5) budget allocation, 6) inter-provisions.

Court organization: the two major changes in court organization are the introduction of regional appeal courts as well as specialized court or commercial and labor dispute. 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 the court: a) adjudicative function and b) administrative function. The new system outlines in the law strictly separate 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 Ministry of Justice, which provides the legal framework for court administration, as well as standards. The MoJ has 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 and the prosecution. This means that judges will only be responsible for resolving dispute (adjudicative function.) Clerks will support judges. The court president is primarily responsible for the adjudicative function of the court and has limited supervisory power 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 were responsible for both adjudicative as well as

administrative matters.

V. CONCLUDING REMARKS

The Constitutional Principles governing judiciary reflects international law and international standard and share similar principles of other modern constitutions. At the moment, it seems fair to conclude that Cambodia, for the first time, has a comprehensive legal framework governing the judiciary.

However, some critics were overblown and biased sometimes. 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 purification, reaction was overwhelmingly negative claiming that independence of judiciary was under attack. The perception was based on the misguided view that the judiciary should be self-administered and that Ministry of Justice should not be involved in the administration of justice. This critic ignored the fact that the CC actually assigns MoJ a significant role administering the justice system. The CC follows a middle path, which for simplicity was called co-administered and not self- administration.

The other point of critic was that the Cambodian government did not include stakeholders in the legal drafting process. This critic creates a wrong impression, because it suggested that stakeholder participation is mandatory. In Cambodia neither the Constitution nor statues require the RGC 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 no means a mandatory requirement.

Laws are not perfect and often are work in progress. They need to be discussed, revisited, amended, re-evaluated, and adapted to developments within society. Thus, there will be always imperfections. Some of these imperfections were mentioned and are briefly summarized:

- The composition of Supreme Council of Magistracy should be broadened. The appointment of SCM members should not be based on the political appointment, but based on objective criteria; the process should be unbiased and also reflect different forces of society. The SCM represents members from Judiciary, Executive and Legislative. It seems that only one member from the National Assembly as well as the Senate is represented in the SCM. This cannot be enough to represent the opposition and other force of society such as academia. Thus, the

increase of the composition of SCM from other force of society and number of members in NA as well as Senate could be considered.

- The Law on the Organization of the Court does not regulate the judicial processes in administrative matters. The Constitution, on the other hand, requires that every Khmer citizen have the right to settle his or hers claim against government actions in the court. As for civil and criminal cases, specific litigation procedures are required. For administrative case, an administrative 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.

In conclusion, the benefits of the new legal and institutional framework will outweigh the imperfection. Latter should be addressed, and the significant developments and opportunities embraced.

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DEVELOPMENT ASSISTANCES AND THE RULES OF EVOLUTION: A CASE STUDY ON THE ATTEMPT TO BRING DEMOCRACY AND RULE OF LAW TO CAMBODIA

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ABSTRACT

A mainstream assumption in western development aid policies regards the lack of democracy and a reliable legal system as a core problem in developing countries. Hence, a substantial part of development assistance is dedicated to the attempt to introduce western-style democratic institutions and the rule of law in these countries. This study raises the question, whether these attempts can be successful. In Cambodia, the legitimacy of authority to govern still rests basically in cultural patterns, dating back to the Khmer empire. According to the distinction of Max Weber, this kind of legitimacy is characterized as traditional and patrimonial. In contrast, in a modern democracy, legitimacy is based on legal-rational domination. Therefore, fundamental changes of the existing social order are required. But all attempts of development projects to support this process and to lay the ground for democracy and a modern legal framework have resulted only in a transition from the old patrimonial to a neo-patrimonial system. Due to the lack of progress, the donor community is increasingly frustrated and frequently criticizes the Cambodian government for poor democratic and legal standards. The study shows that the process of state-building and the creation of a legal system is a product of random evolution, and this evolution process in Europe has been quite unique and was caused by very exceptional circumstances. Cambodia has taken a totally different way, and the gap between the different results, evolution has produced over the course of about 1000 years, cannot simply be bridged by the promulgation of a new constitution or some new laws. On the contrary, the western concept is mostly not compatible with the existing social and political order in Cambodia. However, the country was able to establish a stabile state in the last two decades. Globalization and a rapid economic growth have triggered fundamental changes – with all their up and downsides of course. All this happened – in opposition to other places – without violence or civil war. The study concludes that Cambodia must go its own way, and therefore evolution has Cambodians equipped better than foreign experts to develop a government system, matching with the needs of their society.

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What this study is going to say was outlined in a beautiful story, told by a colleague from Kenia, Elísio Macamo, professor for Africa studies at the University Basel, during a conference to a German auditorium that was going to discuss about development aid. He said, a monkey, walking along the banks of a river, spotted a fish floundering in the water. The monkey jumped in the river and quickly pulled out the fish. But after laying in the grass for some minutes the fish died. The monkey was desperate and said, "What a pity! Would I only have been a few moments earlier at the spot I would have saved its life."

I. INTRODUCTION

The idea of nowadays development aid came up after the Second World War, following the idea of the US "Marshall"-plan, which has helped to rebuild the war-torn countries in Europe. At the outset, poverty alleviation was the central goal of development assistance. Western development aid strategies changed over the course of time repeatedly its direction as the expected effects remained missing, but generally followed economic modernization theories.[2] According to these theories, it was believed that development is based on two factors – capital and skills – and so western development agencies granted loans and subsidies and have been engaged in capacity building activities. But in the 1980th things started to change with the rise of rational choice and institution theories.[3] The latter postulates, it's the "rules of the game in a society" and therefore the institutions (both "formal" rules such as constitutions and laws enforced by the government, and "informal" constraints such as "codes of conduct, norms of behavior, and conventions) that matters and makes the difference in regard to prosperity and wealth of a country.[4] In 1989 the study „Sub-Saharan Africa: From Crisis to Sustainable Growth"[5], commissioned by the World Bank, was published. The study concluded that the problems of Africa

[2] Probably most famous is Walt Whitman Rostow's theory about the stages of economic growth. His model postulates that economic growth occurs in five basic stages, of varying length: 1. Traditional society 2. The Pre-Conditions of take-off 3. Take-off 4. Drive to technological maturity 5. High mass consumption. (Rostow, W. W. [1960] The Stages of Economic Growth: A Non-Communist Manifesto. Cambridge: Cambridge University Press).

[3] *North*, D. C. (1990). Institutions, Institutional Change and Economic Performance. Cambridge: Cambridge University Press.

[4] *Acemoglu*, D., & *Robinson*, J. A. (2012). Why Nations Fail. The origin of power, prosperity and poverty. Crown Publishers, New York.

[5] World bank (1989). From Crisis to Sustainable Groth-Sub-Saharan Africa: A long-term Perspective Study. Washington D.C.: World Bank.

were caused by a "Crisis of Governance", particularly by overpowering elites, corruption, abuse of power and violent conflict resolutions. It was the first time that governments have been identified as the cause for the poor state of development of their countries and not just external factors. This triggered the call for a "capable state". In 1997 the chief economist of the World Bank, Josef Stiglitz, stated that it was insufficient if the government keeps inflation low and leaves the economic development process to the forces of the market. Rather, the government must make markets possible by clear rules and ensure their functionality.[6]

When in the 1990th the collapse of the former Soviet empire ended the cold war, western democracies remained the only and uncontested financier of development aid and their governments had not to fear anymore, Third World countries would move on to the communistic camp if their political leaders were criticized for mismanagement. This became the natal hour of the concept of good governance as part of the toolbox of development assistance. In the waves of the Millenniums Summit in 2000 and the Paris Declaration in 2005, it became obligatory for the political elites in developing counties to promise democratic reforms and the introduction of the rule of law in exchange for development aid. In the trade sector, the participation in the "Everything but Arms" program of the European Union,[7] that offers enormous trade advantages, or the membership in the "WTO club" required good governance, a stable legal framework, and a reliable court system, too.

As a result, Cambodia – like other recipient countries – decided to work on fundamental legal reforms.

The foundation was already laid by a modern constitution, which was enacted as a result of the Paris Peace Accord in 1993. Under this constitution the Cambodian state was (re-)constructed as a constitutional monarchy with a two-chamber system (National Assembly and since 1999 the Senate as the upper house), which forms the legislative branch of the government. The National Assembly elects the government[8] and supervises the executive branch. The king is head of state but

[6] S. *Niggli*, P. (2008). Der Streit um die Entwicklungshilfe: Mehr tun - aber das Richtige! Zürich: Rotpunktverlag, S. 140.

[7] Everything but Arms (EBA) is an initiative of the European Union under which all imports to the EU from the Least Developed Countries are duty-free and quota-free, except for armaments. EBA entered into force on 5 March 2001. The EBA is part of the EU Generalized System of Preferences (GSP). The scheme aims to encourage the development of the world's poorest countries (for more details go to http://ec.europa.eu/trade/policy/policy-making/sustainable-development/)

[8] According to Art. 119 Sec. 2 of the Constitution the National Assembly passes a vote of confidence on the Royal Government according to a procedure stipulated in Sec. 1, and the King shall issue a Royal decree appointing the entire Council of Ministers.

has mainly ceremonial functions. According to the principle of separation of power, the judiciary is supposed to be staffed by independent judges, and a constitutional council is also in place to solve constitutional conflicts. Since then Cambodia – with the support and sometimes under pressure of foreign donors – has enacted public laws in all important areas. At least on paper, the legal framework incurred is not very different from Western democracies.

However, most observers will not seriously deny that the gap between was is supposed to be the law according to the books and the reality is considerably larger than in western countries. This has caused constant complaints from the side of western governments, international organizations like the UNHRC, the World Bank, the European Union and many NGOs about the poor status of the rule of law in the country. But the Cambodian government has mostly vehement dismissed these complaints as unjustified and stated that western observers don't properly understand the situation in the country.[9]

This study is not going to answer the question of whether these complaints are correct or not. The question which will be discussed instead is, whether it is possible at all to install a western-style government system – in other words, a modern bureaucratic, respectively a rational-legal rule in terms of Max Weber – in a country with a past like Cambodia. (Even the model of Max Weber doesn't address explicitly the principles of democracy and the rule of law, we will see this is its fundament.) For this purpose, in the following part of this study, I will refer at first to the three ideal types of political leadership (alternatively referred to as three types of domination, legitimization or authority) according to Weber. Then I will talk about, how the key element of Weber's bureaucracy – the formal law – came to Europe. Finally, I will show why it is unlikely that the same thing will happen in Cambodia, at least not in the foreseeable future. For this purpose, I will refer to the current findings of theories regarding the evolution of politics.

[9] As present examples: The Phnom Penh Post, 4.7.18 "Interior joins in slamming rights report" and 25.12.18: "Government responds to UN human rights concerns".

II. THE THREE IDEAL TYPES OF POLITICAL LEADERSHIP ACCORDING TO MAX WEBER AND THE RULE OF LAW

For the German sociologist philosopher, jurist, and political economist Max Weber (1864-1920),[10] **power** *(Macht)* is the "probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests." **Authority** *(Herrschaft)*, for its part, is the "probability that a command with a given content will be obeyed by a given group of persons."[11] The major difference between power and authority rests in the fact that power is essentially tied to the personal characteristics of individuals or groups, whereas authority is always tied to social positions or roles. Each type of authority is legitimate since it involves both, explicit and implicit consent of the governed group members. Weber distinguished the following three ideal types of political leadership/domination according to their type of **legitimacy**:

- **charismatic** domination (supernatural, religious),
- **traditional** domination (patriarchs, patrimonialism, feudalism) and
- **legal** domination (modern law and state, bureaucracy).

Charismatic authority can be defined as the power legitimized by exceptional, unusual, and extraordinary personal abilities that inspire devotion and obedience. Charismatic leaders are believed to be magical by employing various tactics. This kind of belief is often rooted in religion. But secular leaders like Napoleon or Adolf Hitler have based their power on it, too.

In contrast, traditional authority can be defined as the power legitimized by respect for long-established cultural patterns. It comes from unwritten rules that are maintained over time. Leaders in traditional authority are individuals who depend on an established order or tradition. The leader is a dominant personality, and the existing order in the society entrusts him the mandate to rule. According to Max Weber – besides feudalism and monarchy-bureaucracy – one of the forms of traditional domination is **patrimonialism**. Patrimonialism was initially centered on family structures, particularly on the authority of fathers within families, in other words, patriarchy. Patrimonial monarchies and similar forms of government are regarded as projections of the rule of the father within the family onto a broader set of social relationships.

[10] His best-known work "Economy and Society" was published posthumously in 1922 by his wife Marianne (Wirtschaft und Gesellschaft, Grundrisse der Sozialökonomik (1922) Tübingen, Mohr, [WuG]; English version: Economy and Society. An outline of interpretive sociology, edited by Guenther Roth and Claus Wittich, 2nd ed. (1978), University of California Press, Berkeley [EaS]). Other famous works of Max Weber are "The Protestant Ethic" and "The Spirit of Capitalism."

[11] *Weber*, M. (Fn. 9), p. 28.

According to Weber's analysis of traditional authority, there are two main forms of patrimonialism. Both forms are characterized by a top-down structure. However, in the first model the emperor rules based on his legitimate authority through traditional officials (personal servants). The second model portrays the European feudalism with aristocrats, holding legitimate power outside of the central ruler's authority. This feudal form of patrimonialism eventually evolved – how we will later see – via cooperative states *(Ständestaaten)* into constitutional monarchies with a parliament, representing the citizens.

In the last type of political leadership, legitimacy is based on legality and therefore rational legitimacy.[12] In a **legal-rational system,** power is legitimized by rules, and regulations are enacted in a predeterminate procedure. For Weber **bureaucratization** is the key part of the rational-legal authority and modern bureaucracy "[…] is based on the general principle of precisely defined and organized across-the-board competencies of the various offices. These competencies are underpinned by rules, laws, or administrative regulations."[13]

Therefore, the core governance tool is the law understood as a set of abstract and general regulations. Not the freehanded order of the emperor in an individual case is the way of ruling anymore but stipulations, composed of in advance defined legal criterions and consequences, which apply to an indefinite number of cases. Particularly, this kind of law has even a binding effect on the lawmaker himself. In a legal-rational political leadership, therefore, the principle of the rule of law must apply (but doesn't say anything about justice and the quality of the law in the first instance).

In reality, none of these three ideal types of political leadership Max Weber has proposed exists in pure form. All existing political systems are more or less only a mixture. But it is obvious that the legitimacy of western democracies is based on legal-rational domination. In contrast, in countries like Cambodia, the ideas of traditional domination and patrimony are still prevailing. So, to transform the latter into democracies based on the rule of law – as western development aid donors push for – is not only to change the formal government system and introduce free and fair elections. The challenge is much bigger: Changing the underlying mode of legitimacy from traditional to legal-rational domination. If this doesn't happen, all institutional reforms will lead nowhere. But to make this happen one thing is essential: The law must become the central tool of governance.

[12] In the literature, legitimacy based on legality is widely called "legal-rational," rather than simply legal.

[13] *Weber*, M. (EaS, Fn. 9), p. 76

III. DEVELOPMENT OF THE RULE OF LAW IN EUROPE

The for mentioned kind of law can come into being in different ways, but there are two main development lines regarding the rule of law in Europe. In the Common Law system, it is mainly the task of the courts, based on a long row of precedents, to formulate general legal principles and built up in this way a framework of predictable and binding rules, deriving from single cases brought before the judges. In Civil Law countries the system works vice versa. A special lawmaking body (in former times the king and the representatives of the different classes *[Stände],* nowadays parliaments) enacts abstract and general rules which are later "executed" by the administrations or are applied to decide disputes by the courts. Particularly in a democratic system with its separation of power, the only way how the legislative branch can exert its authority is by enacting formal law. We are going to explore in a first step whether they are suitable to be a model for counties like Cambodia.

1. Common Law Development

The first of them is the Common Law which dates back to the Battle of Hastings in 1066, and the beginning of the Norman rule of England by William I. He set up the *Curia Regis*, or King's Court, to stand side by side with the feudal courts, ecclesiastic and custom law courts, and would travel with the king within the realm, to hear petitions of his subjects, before he would rule. Over time a split of the *Curia Regis* occurred. One part was the "Justices in Eyre", itinerant judges, who traveled to various regions of the country, known as "circuits", to resolve disputes on behalf of the king and would apply the law consistently. The idea of this was to replace the local courts with authoritative courts of the king that were accessible by the people. Two other courts were the Court of Exchequer, which was primarily set up of advisors to hear disputes of a financial nature, and secondly the Kings Bench who was the king's direct advisors, responsible for business affecting the king. Thus, the three common law courts had developed, all empowered by the king, and all operated by professional judges who were knowledgeable in the law and able to dispense with the same (common) law across the realm. And, notably, the decisions (not the reasoning) of all these courts were recorded.[14] This centralization of the courts enabled a small group of legal individuals to flourish, developing a legal procedure that was repeatable and controllable, empowered initially by the king.

In the late seventeenth century, following the Glorious Revolution, the next major development occurred when parliament took over from the monarchs as being

[14] *Van Caenegem,* R.C. (1992) The Birth of the English Common Law, 2nd ed, Cambridge University Press, p. 22.

the legitimate power source of law. This is to state that the parliament, through the power installed in it by the people, could now enact laws. From the eighteenth century the parliament replaced the old court system by the High Court and the Court of Appeal, notably returning the courts to a clearly hierarchical system where the common law jurisdictions could be centrally administered, with the House of Lords (the first Chamber of Parliament) maintaining its importance as the highest court of appeal in the land. Perhaps the most important point in the Common Law system, that was made possible by recording all court decisions, was the birth of "stare decisis", or that each case should be treated alike, and as its tool, the doctrine of precedent. These doctrines were fostered by the hierarchical nature of the courts where a reason for a decision in a court higher in the hierarchy is binding.

When the US-Supreme Court in 1803 in the Marbury v. Madison case[15] for the first time struck down statutory law, announcing that American courts have the power to invalidate laws that they find to violate the constitution, it became clear that even the legislative branch of the government is bound to the law. In this way, over time not only a very dense framework of predictable legal stipulations developed but it became clear that the law possesses supreme authority and has to be obeyed without exception.

Of course, this kind of legal order with its binding precedents and unwritten principles is unique as it came into being only over the course of several centuries. Therefore, it is hardly a suitable blueprint for replication in other countries.

2. Development in Civil Law countries

The other available option to buy in an advanced legal system, that has already proved to stand the test of time, is the Civil Law. Civil Law – in contrast to Common Law – is a system where a legislator or a legislation body sets the rules by will through a formal decision-making process. The law is usually codified and mostly laid down in precisely formulated legal texts. These texts can be translated in other languages and therefore it seems that the whole "body" can be easily conveyed to other countries. And indeed, the legislation of the European Union, available in all member-languages, is a good example of how this process can work. However, in contrast to Cambodia, the members of the European Union have a common history regarding their legal systems.[16] The way, how the law has developed in

[15] In the case of Marbury v. Madison - 5 U.S. (1 Cranch) 137 (1803) - the U.S. Supreme Court has established the principle of judicial review, meaning that American courts have the power to strike down laws, statutes, and some government actions that contravene the U.S. Constitution.

[16] Seemingly, one of the reasons why the British never warmed to the EU, can be found in the different perspectives of Common and Civil Law systems.

continental Europe is of course too complex to be outlined in this article. But there have been some key factors that can be used as an indicator for its transferability or replicability in societies with a different cultural and social development and background like in Cambodia. Needless to say, all these factors are characterized on the top by complex correlations and interdependencies, difficult to describe in a nutshell.

Roman Law and the role of the Catholic Church

The "Civil Law thread" of the development of the principle of the rule of law is rooted in the Roman law, particularly in the *codex iuris civile,* enacted by the east roman emperor Justinian in the middle of the 6th century. With the decay of the Roman Empire, this codex has vanished from general awareness, too, but has been re-discovered and spread by universities that emerged about 800 years later in North Italy, but soon mushroomed in the north of the Alpes, too.

At the same time, the Catholic Church made its way to a powerful organization, dominating large parts of Europe. To hold this organization together required not only missionary zeal but also a well-working administration. So, at a very early stage, formal rules and regulation have been drafted and corresponding application techniques have been hammered out by the Catholic Church by the canon law *(jus canonicum)*[17]. In doing so the profession of trained lawyers came in to being. When in the Renaissance city-states emerged and started to draft own town charters, these clergy lawyers have been employed, who then formed a caste of legal specialists. In this way, not only legal principles, but also legal techniques in formulating, interpreting, and applying formal law came in use in the secular sector, too.

Codification of the law

The invention of modern letterpress in 1450 didn't just help to disseminate the Luther-bible but also promoted the codification of the law. But as the essay in Prussian failed to cover all legal questions exhaustingly in a law that encompassed about 19.000 Articles (*Allgemeines Preußisches Landrecht*, enacted 1794), it became clear that casuistic[18] was a deadlock. To cover all occurring constellations life can provide, formal law must be made up in an abstract and general way. The judge could not be only regarded as the "mouthpiece of the law".[19] His function

[17] The current version of the *Codex Iuris Canonici* was promulgated in 1893 by Pope Ioannis Pauli II (s. http://www.intratext.com/X/LAT0010.HTM)

[18] The term of "casuistic" refers in this context to the attempt to provide a special legal regulation for every single case that can occur in life instead of general and abstract stipulations.

[19] *Montesquieu* in postulated in 1777 in "L'esprit des lois": "Le juge est la bouche de la loi."

grew instead into an independent interpreter and enforcer of general and abstract rules in the individual case brought before him. This development caused a lot of further questions, and at the end of the 19th century, sophisticated techniques and methodologies to compose and interpret legal texts became the standard for legislation bodies, courts, and government agencies.

Emerging of modern states

But not only the legal language and the techniques for drafting precise stipulation have advanced. Modern law is the product of the legislative function of the government and therefore requires the existence of a modern state as a political and legal sovereign entity. Until the end of the Middle Ages "states" didn't exist. Rulers, aristocrats, and their subjects had bound only by personal relationships based on a set of feudal rules, and it was assumed that the law was unchangeable due to its divine roots[20]. Therefore, the law was regarded as a phenome that exists independent from the will of the ruler. Instead, legally binding rules among people required consensus and therefore were used to be implemented by so-called oath confederations *(lat: coniuratio, German: Schwureinigungen)* in very cumbersome procedures.

The end of the Thirty-years-war in 1648 marks a shift of these perceptions and the emergence of sovereign modern states in Europe. The scientific fundament has been prepared already (among others) by Jean Bodin (1530–1596)[21]. He believed in the sovereignty of the monarch, who is the sole judge of divine and natural law. Johannes Althusius (1577–1638) concluded that in every state Bodinian sovereignty reposed inalienably in the community as a whole and that rulers and magistrates were mere delegates of the people. Even the question was disputed, whether sovereignty rests in the monarch or in the people, the idea of a state as a political and legal entity that rules over a certain territory and its people and is the only legitime source of authority was established. Consequently, this entity was entitled to pass legislation for all aspects of human life. However, this comprehensive authority of the state caused the question of limits and restraints of its power.

[20] Thomas *Aquinas* (1225–1274) distinguished in Question 90, Article Four of the Second Part of the Summa Theologica between law and acts of force (which can allow men to depose tyrants). He stated that all law comes from the eternal law of Divine Reason that governs the universe *(lex aeterna)* but is surpassing in parts the understanding of human beings. The part human beings can grasp is dictated through revelation *(lex divina)*. The natural law *(lex naturalis)* means the participation of all reasonable creatures in the eternal law. The human law *(lex humana)*, dictated by reason, has already existed in his perception but was in principle limited to prohibition acts.

[21] Les six livres de la République (1576).

The idea of fundamental and individual rights

Triggered by religious disputes caused by the Luther-reformation, people were suddenly forced to decide whether they wanted to follow Catholic or Protestant believes, a very serious decision at this time. However, they could be forced against their conviction to become Protestants or remain Catholics by their feudal rulers, or, alternatively, to leave their homeland.[22] It is believed that the call for freedom of religion has substantially contributed to the development of the idea of human rights and the existence of individual rights in general.

As the bible states in Genesis 1:27: "God created man in His own image" is was furthermore concluded that God created all men equal. James Locke described in his[23] the state of nature of men as a state of perfect freedom and equality[24] and concluded that the function of government is to protect the life, freedom, and property of the citizens. The French Revolution and the Declaration of Independence of the USA with their human rights declarations brought the huge breakthrough for these perceptions. The ideas of the French Revolution have been spread across Europe on the waves of Napoleon's successful military campaigns at the beginning of the 19th century. The cooperative state (*Ständestaat*) was abolished, and the power of the Catholic Church diminished as most of its assets were transferred to secular rulers. Particularly in Germany, monarchs were forced to enact constitutions and to share legislative power to a certain degree with parliaments composed by representatives of the citizens (which at this time represented only a thin layer of upper-class people and intellectuals, of course).

The fight of the *citoyens* for the legislative power in Europe

By shifts of techniques of warfare the knights – the spin of the feudal system – lost their importance and have been replaced by mercenaries. Moreover this, the knightly aristocrats have been challenged by a new class of well-educated

[22] The principle of *cuius regio, illius religio* (whose realm, his religion) was introduced with the Peace of Augsburg of 1555.

[23] Two Treatises of Government: In the Former, The False Principles, and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown. The Latter Is an Essay Concerning The True Original, Extent, and End of Civil Government; published anonymously in 1689.

[24] "To properly understand political power and trace its origins, we must consider the state that all people are in naturally. That is a state of perfect freedom of acting and disposing of their own possessions and persons as they think fit within the bounds of the law of nature. People in this state do not have to ask permission to act or depend on the will of others to arrange matters on their behalf. The natural state is also one of equality in which all power and jurisdiction is reciprocal and no one has more than another. It is evident that all human beings—as creatures belonging to the same species and rank and born indiscriminately with all the same natural advantages and faculties—are equal amongst themselves. They have no relationship of subordination or subjection unless God (the lord and master of them all) had clearly set one person above another and conferred on him an undoubted right to dominion and sovereignty."

bourgeoise citizens (*citoyens*[25]) that emerged as a result of the Industrial Revolution. As they were to amass a huge fortune from their business activities and grew to an economically powerful group, they did not only call for protection of life, freedom of the person, commercial freedom and the guaranty of property rights but also for civil rights (the right of political participation). The perception of the sovereignty of the people instead of the sovereignty of the monarch won more and more ground and ended up in Germany in the March Revolution of 1848 and the "Paulskirchen"-Constitution (which however never materialized). But the fights led to a compromise between the two camps. The monarchs have been able to defend their position to remain the real "sovereign" but, by promulgating constitutions, they have been forced to share their sovereignty rights with elected parliaments. The monarch remained head of state and chief of the executive branch, but now he could not enact legislation anymore without the approval of the parliament. In this context, the role of the monarch as supreme legal authority was abolished, and the judiciary became independent. So, the law became the central tool to limit the power of the monarch and to protect the rights important to the bourgeoise class, namely liberty and property rights (even full political participation was not achieved at this stage).

Priority and reservation of the law

To avoid that the monarch will bypass the legislative power of the parliament by ordinances or other forms of the executive law, the principle of the priority and reservation of the law *(Vorrang und Vorbehalt des Gesetzes)* was established. As every encroachment of liberty and property rights by the government now required a precise legal base in statutory law (principle of the rule of law) and statutory law needed the approval of the representatives of the citizens in parliament, the bourgeoisie could be satisfied by and large with the status achieved. After all, a bureaucracy based on legal-rational legitimacy in terms of Max Weber has been given birth.

Legal positivism instead of natural law

Due to the shared legislative power between two competing political forces – the monarch and the parliament – it was assumed that legislation could not impose a threat to the liberty, property and civil rights and therefore limits or another check of the legislative bodies were seemingly not required. Particularly legal positivists[26]

[25] In contrast to the term "bourgeoise", which referred only to people with a certain cultural and financial capital, the term "citoyen" is understood as the class of people with own political rights.

[26] *Kelsen*, H. (1934) Reine Rechtslehre – English version: Pure Theory of Law, translation by Max Knight, Clark, New Jersey.

who emphasized the conventional nature of law, believed that if a bill comes into law in a procedurally correct way it would produce automatically a reasonable result. An ethical justification for the substance of the law was no longer needed.

The transfer of sovereignty from the monarch to the people – the final breakthrough of democracy: example Germany

However, most of the people, particularly the steadily growing class of workers, were not or not sufficiently represented in the parliament. They didn't benefit from the liberty or property rights but became their victims. Other groups, like the Catholics, also have been seeking better representation. This led in Germany in the middle of the 19th century to the establishment of a multi-party system and subsequently the franchise was opened to the entire population. At the end of the First World War, in 1918, the monarchy was abolished in Germany and replaced by the Weimar Republic, a liberal and democratic government system. The sovereignty now clearly rested in the people. All Germans over the age of 21 years (for the first time including the female population) were allowed to elect the parliament and the president. The government, led by a chancellor, was appointed by the president but reported to the parliament and the chancellor or his ministers could be overthrown. The former legal system with the principle of the rule of law, the independent judiciary system, and the professionally working administrative body remained widely untouched.

The setback under the rule of Adolf Hitler and the National Socialist party

Even the constitution was very liberal, the president was equipped with extraordinary power in the case of state emergency. The Weimar Republic was riddled by severe political and economic crises from the outset and never won the acceptance of the majority of the population. This led finally to the rise of the National Socialists under Adolf Hitler.[27] He managed in 1933 with the support of the aged President Hindenburg, a former general, and royalist, that the parliament turned over the legislative power to the executive branch. The National Socialists quickly removed all constraints to the power of the executive and when Hindenburg passed away in 1934, Hitler united the position of the president and the chancellor in one person. As the *"Führer"* (leader) he was able to exert absolute power to every aspect of life in Germany. The *"Dritte Reich"* under Hitler was a so-called "dual-

[27] A similar development happened at the same time under Benito Mussolini in Italy and under Francisco Franco in Spain, and already in 1926 General Piłsudski staged in Poland the "May Coup", a military overthrow of the civilian government.

state" *(Doppelstaat)*[28] marked on the one side by the lack of any legal protection and non-acceptance even of the most basic human rights. But on the other side, the regime maintained to legalize its atrocities at least formally by law, as the ethnic laws, intended to discriminate the Jewish part of the population shows.[29] The conviction that even such an act of disrespect for human dignity must be signed into formal law was deeply rooted in German society.

The new guardian of the constitution

In 1949, four years after the defeat of the *"Dritten Reich"* in the Second World War, in the western part of Germany a new liberal and democratic constitution was drafted. One question was in the center of all deliberations: What can be done to avoid that the democratic system and human rights, protected by the new constitution, will be abolished again, and how to avoid that the law can be used as a weapon to fight political opponents? The new constitution, the *"Grundgesetz"* (basic law), has tried to achieve this goal in many ways. But one institutional arrangement is worthwhile to emphasis in this context: the creation of the *"Bundesverfassungsgericht"* (Federal Constitutional Court). This court, that receives most of its cases by submission proceedings of lower courts and by constitutional complaints files by common citizens, possesses the authority to strike down statutory law. The resulting decisions have the same legal effect as statutory law (§ 31 Sec. 2 BVerfGG). This kind of authority has brought the court in the position of a "negative" legislator. The court is the most trusted institution in the German government system and has managed to be perceived as politically neutral, even almost all of the politically most disputed questions made their way to "Karlsruhe", the city where the court is located. The court follows the principle of political restraint and avoids intervening in the day-to-day operations of the judiciary system. Nevertheless, practically every case can become "constitutionally relevant" if needed. As a result, even lawmakers are well aware that they may have to justify their decisions one day in the courtroom. Therefore, constitutional restraints are check precisely before a bill is signed into law. By these means, the check of the power of the parliament as a legislative body by a neutral power, what was the role

[28] The term was formed by the title of a book written the German Lawyer Ernst *Fraenkel*, who emigrated for political reason in 1938 from Germany to the USA (*Fraenkel*, E. [1946] The Dual State, Oxford University Press).

[29] The *Nürnberger Gesetze* (Nuremberg Laws), enacted on September 15, 1935, encompassed two kinds of regulations. The Law for the Protection of German Blood and German Honour forbade marriages and extramarital intercourse between Jews and Germans and the employment of German females under 45 in Jewish households; and the Reich Citizenship Law declared that only those of German or related blood were eligible to be Reich citizens.

of the *"Kaiser*" (monarch) in former times, has been reintroduced differently.

The principle of "juridical review", where a court examines, and if needed, strikes down statutory law, is no German invention. As mentioned, it is settled law in the USA, already since 1803.[30] But with the institution of the *"Bundesverfassungsgericht"* a totally new and very effective and efficient procedure has been introduced.[31] This model was later adopted in many western democracies and by the EU. Therefore, nowadays it can be regarded as a standard model in Civil Law countries.

Impacts of social and cultural development on the substance of the law

The philosophy of the law in Europe is coined by Christian perceptions. Probably the most important achievement was that it broke up the former unity between state and religious where religion has been subject and tool to serve the ruler. Due to this secularization process, Christian religion instead became a check of the power of the European secular rulers.[32] Regarding the substance of the law, the doctrine of creation and salvation established the concept of the dignity of man and laid the ground for Human Rights. Equality before God has triggered the idea of equality before the law and paved finally the way for democracy.[33]

With the rise of natural science in the aftermath of the Renaissance the world lost most of its mystique, and in this context, lawmaking became a rational and academic process to solve the problems in society. Forced by the Industrial Revolution, people had to leave their remote communities and to settle down in the fast-growing industrial hubs. In the new complex world, they got in touch with totally different habits and perceptions, calling hitherto unchallenged moral and legal values into question and demanding a much higher degree of tolerance. Hence, moral was separated from the law.

The growing complexity of society led to a "functional differentiation", where all functions within the social system become ascribed to a particular unit or site and turned not only the old feudal-patrimonial political system into a legal-

[30] S. Fn. 14.

[31] However, the idea of a specialized constitutional court goes back to Hans *Kelsen* and was introduced in Austria in 1919/20 (s. Ewald *Wiederin*: Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht. In: Thomas Simon/Johannes *Kalwoda* (2014): Schutz der Verfassung. Normen, Institutionen, Höchst und Verfassungsgerichte. Tagung der Vereinigung für Verfassungsgeschichte in Hofgeismar vom 12. bis 14. März 2012 [Beihefte zu „Der Staat". Band 22], Berlin, p. 283–315.

[32] S. *Isensee*, J. KAS Themenportal Europa, Nr. 461 · April 2008, p. 19 et seq.

[33] S. *de Tocqueville*, A. De la démocratie en Amérique (1835-40). English version: Democracy in America, Translator: Henry Reeve, 2002, The Pennsylvania State University, p. 16.

rational political system but made rationality the only game in town.

Due to the process of functional differentiation, a huge number of new social groups with particular interests and goals came in to being (frequently label as "pluralism"). These social groups started to institutionalize and finally formed a civil society as an important layer between the government and the individual citizen. In western societies law, therefore, appears mostly as a compromise at the end of bargaining among these different social groups in the society.[34] The government-system (inclusive the parliament), therefore, can be seen as the tool to facilitate this negotiation process and to put the results into wording and legally binding forms. Hence, the legal system which is visible in the books is at best the tip of the iceberg. The most parts of the system are concealed by the waters of the social and historical context.

IV. THE CHALLENGE TO TURN CAMBODIA INTO A WESTERN-STYLE RATIONAL-LEGAL GOVERNMENT SYSTEM AND A LIBERAL DEMOCRACY

As we have seen, the Common Law system is no blueprint for counties on the way to a rational-legal system with its liberal democracies and the rule of law. But the other option, the continental Civil Law system, which consists of a set of codified law (and therefore principally is suitable for "copy-pasting"), is the result of a very complex and unique process. Particularly the "underwater" part of the iceberg is impossible to copy. Rousseau in his work, the "The Social Contract", has stated,[35] "[...] in every climate there are natural causes that determine which form of government would be best for it; […] and citing Montesquieu, who has said in his book "The Spirit of the law", "Liberty isn't a fruit of every climate, so it isn't within the reach of every people." This leads to the question, whether a similar model as in Europe will emerge in a country like Cambodia which possesses a very different social, cultural, religious and economic background, and whether a western-style government system can serve the people of Cambodia under the current circumstances. To find the foundation for judgment on this question, we will take a brief look at the history of law and social order in Cambodia that has led to the current system.

[34] S. *Roschmann*, C. (2003). Recht, Gerechtigkeit und ökonomisches Handlungsmodell. Baden-Baden: Nomos.

[35] *Rousseau*, J.J. (1762). Contrat Social, Book 2 chap. 8; English version: The Social Contract, translation by Jonathan Bennett, 2017.

V. DEVELOPMENT OF LAW AND SOCIETY IN CAMBODIA

1. Historical Setting

Nowadays Cambodia has its roots in the Angkor Civilization. The Khmer people were among the first in Southeast Asia to adopt religious ideas and political institutions partly from India and to establish centralized kingdoms, which controlled large areas of modern Cambodia, Vietnam, Laos, and Thailand (Siam). The golden age of Khmer civilization was the period from the ninth to the thirteenth century, when the kingdom of Kambuja, which gave Kampuchea, or Cambodia, its name, ruled large territories from its capital in the region of Angkor in western Cambodia. From the end of the 13th century onwards Kambuja experienced a gradual decline. The Angkorian monarchy survived until 1431 when the Thai captured Angkor Thom and the Cambodian king fled to the southern part of his country. The Thai conquest of the new capital at Lovek in 1594 marked a further downturn in the country‘s fortunes and Cambodia became a pawn in power struggles between its two increasingly powerful neighbors, Siam and Vietnam. In 1863 the Cambodian king asked France to protect his kingdom. But despite protection, the protectorate developed into a full-scale colonial relationship that the king had not foreseen. Cambodia regained its independence from France in 1953 under King Sihanouk, who developed very soon an autocratic regime,[36] which lasted until 1970 and was followed after a military coup by a republic under General Lon Nol. In 1975 the Khmer Rouge (Red Khmers) seized power and a Maoist-inspired regime sought to achieve total communism. However, the regime became publicly known only for the “killing fields” and the genocide, it committed. Triggered by attacks of the Khmer Rouge, Vietnam, by supporting the Kampuchean United Front for National Salvation, defeated the forces of the Pol-Pot regime, liberated Phnom Penh in 1979 and established a protectorate that lasted for 10 years. Under a peace agreement, signed in Paris in 1991, Cambodia came under United Nations protection for a time in preparation for general elections that were held in 1993. Since then, Cambodia has been a constitutional monarchy ruled by different governments, largely dominated by the Cambodia People Party (CPP) with Prime Minister Hun Sen at the top.

2. Development of the Law and Formal Legal System

As everywhere else, the legal system has evolved from unwritten customary law to statutory law. Beside some general aspects of the legal system in the old

[36] King Sihanouk is cited to have said in 1954 to French government officials: „[…] [T]hose following democracy in Cambodia are either bourgeois or princes. [...] The Cambodian people are children. They know nothing about politics. And they care less.“ (s. *Chandler*, D. (2008). A History of Cambodia. Chiang Mai: Silkworm Books. p. 72).

days, e.g. that the king was considered to be vested by divine (and therefore uncheckable) power and that courts or tribunals have been in place,[37] we possess only little knowledge about the substance of the law.[38] The first codification of laws dates back to 1336, but the documents perished when the Khmer capital of Lovek was conquered by Thai troops. In 1631 King Chey has undertaken the last essay to establish a codified law *(Kram Preas nor ba)*, that covered particularly the areas of criminal, family and heritage law.[39] But the legal system declined with the decay of the Khmer empire. What remained was a patchwork of about 200 local aristocrats (*Oknya* or *Oknha*) that at best, followed chains of commands and orders of the king but never general and abstract rules. These *Oknya* reigning mostly from small fortified settlements along the rivers (*kampong*). They had to be loyal to the king but, due to insufficient oversight and a lack of physical access to remote areas, they have been able to rule mainly according to their own pleasure. However, their influence was mostly limited to the surroundings of their *kampong,* too, and therefore a large part of the country was not governed at all. In this situation of insecurity, the peasants have been forced to turn to local strongmen for protection. This has created a strong patrimonial relationship.

When the French arrived in the 19th century, they tried in parts to introduce the French legal system in Cambodia, particularly property law to enable French companies to gain ownership over land. The Civil Code went into law on February 25, 1920, and the Criminal Code was enacted on August 25, 1924. Both laws have been promulgated in French, which was spoken only by a small number of government officials in Phnom Penh. This reflects the fact that the average Khmer people have not been considered to be subject to these regulations.[40] French colonial rule that effectively affected the population, was limited to tax regulations and administrative organization rules.

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[37] S. *Menzel*, J. (2008) Kambodscha und der Kampf ums Recht Eine Fallstudie zu „Recht und Entwicklung“ Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America
Vol. 41, No. 3, pp. 387-406 [387].

[38] Besides the temple inscriptions, the main source of our knowledge is the report of the Chinese envoy *Zhou Daguan*, who visited Cambodia in 1296/97. His report was translated into English by Peter *Harris* under the title „A Record of Cambodia – The Land and its People“ (Silkworm Books, Chiang Mai, 2007).

[39] Vgl. *Leclère*, A. (1898). Code de Cambodgien (Bd. 1). Paris: Ernst Leroux, Bibliothèque numérique: http://gallica.bnf.fr1898, p. 21.

[40] To which extent at least the Criminal Code was applied to the population in the countryside could not be verified as court documents vanished during the Khmer Rouge period. However, it seems to be very unlikely due to the gap in the language.

On the other side, in 1891, the Court of the King promulgated twenty-nine legal stipulations in Khmer language. However, these texts had to be published in handwriting as printing machines with Khmer script seemingly didn't exist.[41] The degree of dissemination and application was accordingly, and whether or not this law was ever enforced, is unknown. A formal court system didn't exist. Instead, the jurisdiction laid in the hands of the *Chaoyang srok*, (province governors) who, according to Vietnamese sources, have not been inclined to follow the orders of the king.[42]

In 1947 the first Cambodian Constitution was enacted. The king remained head of state, but a National Assembly was installed as a legislative body. However, the sole noteworthy legislation in the Sihanouk period was a revision of the existing Civil Code and the promulgation of a new Commercial Code, intended to control foreign trade by the king. Again, the law was nothing that affected the vast majority of the Cambodian population. Things didn't change when Cambodia became a republic in 1970 under the US-back government of General Lon Nol. Hence, the traditional patrimonial system remained in place until the Khmer rouge sized power in 1975.

The Khmer Rouge under the leadership of Pol Pot abolished all characteristics of a modern state, like schools, hospitals, police, judiciary, money, and banks and installed a kind of "stone age" communistic system. Even though they enacted a constitution, of which they claimed, it was written "directly by the people", a legal system didn't exist any longer. Under the succeeding Vietnamese protectorate, government functions have been re-installed and a new constitution was promulgated. But typical for a socialistic regime, western-style legal regulations have been considered as an instrument of oppression by the bourgeoisie. Instead, a kind of soviet system with a hierarchy of committees has been established.

The fifth and insofar last constitution was enacted in 1993 as an outcome of the 1991 Paris Peace Accord. Since then, frequent general elections were held. Large infusions of foreign aid flew into the country intending to install and uphold democracy, human rights, and the rule of the law. In the meantime, Cambodia has enacted a wide range of statutory law, which covers – at least in theory – most of

[41] Compilation by *Leclère*, A. (1894) The original documents in Khmer are available at the National Archive of Cambodia, Box 445).

[42] S. Chandler, (Fn. 35), p. 150.

the aspects of life.[43]

3. Neo-patrimonialism Instead of Legal-rational Domination

But as my research, conducted in 2012/13 has revealed,[44] in reality, the statutory law does not mean anything to the people and even the most basic regulations are not common currency among average Cambodians. Only a very limited number of citizens have an idea, how the government system is working and how legal regulations come into being. The vast majority does not rely on the judiciary system and would not take a dispute to the court. The same applies to the commercial sector, where companies prefer to agree on arbitration proceedings at the chamber of commerce in Singapore or elsewhere abroad instead of litigating in Cambodian courts.

Instead, the traditional patrimonial system is still in place behind the facade of the formal legal framework. Only the former aristocratic patrons have been replaced by powerful men, connected to government or the sector of politics. Even if they hold a public office as an elected representative of the state, their authority mainly doesn't spring from this public office but their position as a patron. This means, government institutions like the National Assembly, the Senate or the Constitutional Counsel are already in place, but the real power follows different channels of authority. These findings should not take us by surprise, as there is no straight way from patrimonialism to a full functioning legal-rational dominated system. Like Francis Fukuyama has explained extensively,[45] even in the United States in the 19th-century clientelisms emerged in the first stage under the new constitution. Even the USA is regarded as a "democracy ruled by law" from the first hour of its existence, by nowadays standards we have to admit, it was only an exclusive government of the white protestant elites.[46] In this clientelist environment, however, democratic political parties could grow out of the entourages of political strongmen over time and leveraged finally real democracy and the rule of law. Therefore, it is nothing unusual that even Cambodia possesses a comprehensive

[43] S. *Kong*, P. (2012), Overview of the Cambodian Legal and Judicial System and Recent Efforts at Legal and Judicial Reform. In: Introduction to Cambodian Law. *Hor Peng, Kong Phallack, Jörg Menzel* (Eds.), Konrad-Adenauer-Stiftung, p. 5-22.

[44] *Becker*, P. (2014) Armutsminderung durch Dezentralisierung in Kambodscha Anspruch und Wirklichkeit ambitiöser Entwicklungsvorhaben, Berlin, p. 341 et seq.

[45] *Fukuyama*, F. (2014) Political Order and Political Decay: From the Industrial Revolution to the Globalisation of Democracy, London.

[46] In the early history of the U.S., most states allowed only white male adult property owners to vote. (s. "Expansion of Rights and Liberties - The Right of Suffrage". Online Exhibit: The Charters of Freedom. National Archives. Archived from the original on July 6, 2016. Retrieved April 21, 2015).

legal system, the law doesn't truely rule, at least not yet. By enacting modern public laws during the last couple of years, Cambodia has done what has been predictable – advanced from a patrimonial to a neo-patrimonial dominated country where the legitimacy of the power of the government is still based on tradition and rarely on legal-rational reasoning. So, the more important question is, is the next stage the development has taken in the USA – a fully functioning democracy ruled by law – already waiting at the door?

4. The Hurdles to Make Democracy And the Rule of Law Working in Cambodia

The findings from above give us already a hint to explain, why good governance, democratization and rule of law projects – despite of the huge amount of foreign aid[47] and technical assistance, granted for more than a quarter of a century mostly failed to achieve the expected results. Probably it is not, as western donors often believe, just the unwillingness of the government and the political elites in Cambodia but our impatience with the nature of human beings and the underlying process of cultural evolution. It seems more likely that 25 years are simply not enough time for changing the social order at a crucial point. But we also have to ask the question whether a western-style democracy and rule of law is a concept that simply does not fit to Cambodia and the country has to go its separate way; in other words, is the whole attempt to introduce western concepts a "mission impossible"?

As we have learned before, western democracy requires an advanced legal system in which the law is effectively enforced and applies to everybody in the same way. Otherwise, a parliament, elected democratically by the people, lacks the means to make binding decisions. To find an answer to the question, whether a western-style legal system will likely prevail in Cambodia soon, let's compare in a first step some essential features of the Cambodian story of law with the story in western countries, laid out above in Chapter III.

a) Formal legal system

Let's have at first a look at aspects directly related to the "production" of formal law.

First of all, a modern state with a comprehensive government system didn't come into being in Cambodia before the end of the 20th century. Despite the constitution from 1947 and the independence from France in 1953, until 1970 the king was the only bracket who kept the country together and not an institutionalized

[47] The annual amount of ODA to Cambodia totaled in 2014: 715, in 2015: 679 and in 2017: 717 million USD (OECD, Development Aid at a Glance Statistics by Region, p. 7; http://www.oecd.org/ dac/financing-sustainable-development/development-finance-data/Asia-Development-Aid-at-a-Glance-2018.pdf)

government system with agencies and courts. Structures of a modern state started to emerge only after the constitution from 1993.

As we have seen, the lack of a modern state corresponds with a lack of historical experience with formal regulations. The fact that in the 14th - 19th century (at least in theory) codified law was not completely unknown in Cambodia does not mean that this law was comparable with the type of law which has developed in Europe and later on in the states arising from European settler colonies, like the USA. Instead, over centuries there was no tradition in the use of formal law at all. And even if a certain customary law may have existed under the *Chaoyang srok* or other *Oknay* in their *kampong,* it was never reported and systematized as it was in the history of the Common Law.

The problem goes on, as the Khmer language is very contextual, and therefore not well equipped to formulate precise general and abstract stipulations. Due to its history, it goes without saying that Khmer language until recent didn't develop a matching vocabulary even for even very basic modern legal terms.[48] New inventive word creations, known only to a small circle of legal experts who have to draft statutory law, are the result. An experiment with staff of the research division at the Senate in Phnom Penh, conducted in 2012, showed that test persons have been easily able to get the meaning of a legal text written in English, but they struggled when it comes to understanding the same regulation in Khmer language. As a result of these circumstances legal drafting and application techniques, which are the characteristic feature of modern legal systems, didn't develop. Even nowadays, the way, how to determinate the substance of legal regulations by interpretation of the factual preconditions, to apply the result to the factual and legal evidence of the case (subsumption), and to draw the matching legal consequences, is seemingly an operation not very familiar to many Cambodian lawyers.

Furthermore, Cambodia has been until recently a country with an economy based on agriculture with dispossessed peasants, never in possession of civil rights. Industrial production and commerce played at best only a marginal role. Therefore, neither a complex legal system nor a bureaucratic government system was required in the old days. Of course, like in every society, all kinds of disputes between individuals or between individuals and the government may have arisen in Cambodia, too. But these disputes have never been regarded as "legal" problems, expected to be solved by the means of the law and in the courtroom. For these

[48] For example the term *"sang kum"*, what stands for society, was introduced only in the 1930th from Thai language and the meaning of "pol rot", what stand for citizen, is only a combination of the word group *(pol)* and state *(pot)*. It doesn't include a connotation to political participation, like citizen or *citoyen*.

reasons we can conclude that, up until very recently, there was simply no need for a European style legal system.

Only the strong surge of the economy since the early 2000th made this gap visible. Suddenly a formal legal system was required to make foreign traders and investors willing to become engaged in Cambodia. The Cambodian government didn't hesitate to meet these expectations, well aware of the fact that formal law doesn't mean very much toward the own population. As the effects of the Land Law[49], the Anticorruption Law[50], the defamation clause in the Criminal Code[51] and similar regulations can easily demonstrate, formal law tends to be used to legitimize questionable government practices, instead. This is linked to the fact that the government agency in charge of the implementation of a certain law and not independent courts are frequently seen as the only source of authority for the interpretation of the law. Carl Schmitt has explained already a century ago that, as long as the execution and the final interpretation of the law is in the hands of the same body of the government, the law is missing its function.[52] Besides the question of the independence of the judiciary and corruption, it is obvious that the court system with the Constitutional Council at the top under the given circumstances is not in the position to grow into the position of the "guardian of the constitution", comparable with role of the courts and the *Bundesverfassungsgericht* in Germany or in other western democracies.

Moreover this, as can be observed in daily live habits (most visible in the compliance of traffic rules), there seems to be a certain aversion against legal restrictions among Cambodians, or how Raoul Marc Jennar once put it, "[…] in Cambodia there is a tradition that when a rule constrains anyone, the custom is to prevent this constraint by any means. To get around the rules is the most common way to respect those rules."

b) Substance of the law

Regarding the substance of the law, in Asia, individual rights and the idea of equality of men have never developed in the same way as in Europe. Here is not the place to compare Christian and Buddhist or Hindu principles of belief. But due

[49] Land Law, 30.0.2001, NS/RKM/0801/14.

[50] Law on Anti-Corruption, 17.4.2010, NS/RKM/0410/004.

[51] Art. 305 Cambodian Criminal Code 2010, s. CCHR Briefing Note – May 2014 The criminalization of defamation and freedom of expression in Cambodia (https://cchrcambodia.org/admin/media/analysis/ analysis/ english/2014_05_27_CCHR_Briefing_Note_Defamation_in_Cambodia_(ENG).pdf)

[52] *Schmitt*, C. (1928) Verfassungslehre, 8th ed. 1991, p. 151 et seq.

to the Buddhist beliefs in Karma and a never-ending circle of reincarnation, your current life is the result of your behavior in your former one. Consequently, the beggar has brought himself in his pitiful situation and cannot claim compassion or equal rights. Instead, he has to stand his current life to collect "good" Karma and, by doing so, he can look forward to a better life in the next circle. It is self-explaining that "rights" are pointless under these premises.

As mentioned before, unlike in Europe, where monarchs never could claim absolute power but had to share authority with the church and with feudal aristocrats, the authority of Cambodian kings, backed by beliefs of divine filiation, was never thrown in question. Medieval peasant's wars and wars about religions freedom, where people at the grass-root level for the first time claimed to have certain rights towards their feudal rulers, never occurred in Cambodia. This applies also to the struggle for liberty, equality and political participation, first fought by the bourgeoise citizens, later by other social groups. All these fights and struggles with monarchs, feudal rulers and the setbacks under totalitarian regimes never happened in Cambodia. When the 1993 constitution was drafted – besides a very small group of intellectuals – nobody was calling for liberty, equality, and political participation. Even nowadays, most of the Cambodians do not really identify themselves as citizens in the meaning of "*citoyens*".[53] As already mentioned, the Khmer language doesn't provide even a proper word for "citizen".[54] The constitution of Cambodia contains stipulations on the rights and duties of Khmer citizens and refers in Art. 31 explicitly to 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, and Chapter III contains a complete set of basic rights. But in reality, theses stipulations resemble in parts window dressing and are at best a promise for a distant future.

5. How will changes happen?

The mechanism of changes in society in a nutshell

In principle, two different models to explain the development of the social and political order are in use:

a) Political science, on the one hand, is used to regard the development of political systems (and therefore also of legal systems) from the perspective of economics. The economic concept of sources, distribution, growth or dissipation of wealth has been used to explain sources, expansion, distribution, and dissipation

[53] *Becker*, P. (Fn. 43), p. 245.

[54] Ibid, (Fn. 47).

of power and authority in the political sector.[55] These models focus on rational actors and put the individual choice-making process in the center. According to this perception, an existing political system is the choice of political actors and can be changed by will at any time and in any direction.

b) On the other hand, in 19th-century scientists like Hegel, Marx and Durkheim started to consider political systems as the result of a comprehensive deep history *(Weltgeschichte)* and tried to discover the rules driving this history. Even as the initial idea of an underlying "progress" – first understood as a process of permanent improvements – has been dropped, the similarities between the mechanism of biologic and political development became more and more obvious.[56] It has been discovered, that besides economic and geographic factors the growing complexity of society is one of the most important drivers for political development. Hannes Wimmer stated in his comprehensive study about the evolution of politics,[57] that a "takeoff of democracy" will only happen, when the society in question has achieved a certain level of complexity. Furthermore, the fact that direct democracy in ancient Athens (5th to 4th century B.C.), the theory of atoms of Demokrit (5th century B.C.) or the invention of the steam machine by Hero from Alexandria (130 B.C.) have fallen in the deep sleep and woke up more than 2.000 years later indicates, an idea will not take place in a society as long as the social environment is not receptive enough. Whether a society develops complex structures and becomes receptive for political innovations, is – besides (hard) environmental factors – a process that follows the rule of cybernetics and therefore is widely out of reach of human will.

Like in biologic evolution, social order and political systems are developing according to the rules of **variation**, **selection**, and **re-stabilization**. The variation of political systems is triggered by competing claims of social groups and actors, the selection process by the power that different actors possess at a certain moment of history. But the re-stabilization process, following cybernetic rules, is the real challenge. Only if a variation provides (under the given circumstance at a specific

[55] *Rapoport*, A. Vorwort: Wissenschaftstheoretische Überlegungen in: Hannes *Wimmer*, Evolution der Politik – Von der Stammesgesellschaft zur modernen Demokratie, WUV-Universitätsverlag, 1996, p. 7 et seq.

[56] For ex. *Parsons*, T. (Jun.,1964). Evolutionary Universals in Society, American Sociological Review, Vol. 29, No. 3, pp. 339-357.

[57] S. Fn. 54.

time and place in history) a higher degree of fitness[58] for the society in question, it will last. The evolution of politics, therefore, follows also the path of trial and error, and therefore the process of development takes its time. There is only little space for shortcuts.

In wrapping up the results from rational choice theories and evolution theories, we can conclude that political actors by their daily operations can turn around things only at the surface of history. You can compare this phenome with the terms of weather and climate in metrology. A single snowstorm in Rome doesn't mean the Mediterranean climate has changed. But as we all know, over the course of time climate is changing, too. Hence, political actors (like the snowstorm) can do good or bad things. But by the means on their deposal, they can influence the underlying evolution of the society (the climate) only within a very tiny corridor.[59] Take an example: Hitler, Mussolini, and Franco have erected dictatorships and fought wars in the first half of the 20th century. However, exactly these dictatorships and wars have been the essential cause for the establishment of democracy and peace under the rule of the European Union after hundreds of years of violent conflicts. So, the outcome has been quite different from what they had intended.

What does this mean for the implementation of a western-style model of democracy and the rule of law in Cambodia?

In the past, complex social structures never arose in Cambodia as the existing patrimonial systems provided a sufficient degree of social order.[60] There was never a need for a western-style legal system, what is – as explained above – a precondition for parliamentarian democracy. Hence, this kind of "variation" in the evolution of politics didn't appear in the Cambodian development process. The source of legitimacy of the ruler, therefore, has always been a tradition and of course neither the Khmer Rouge tyranny, nor the Vietnamese protectorate, nor the constitution of 1993 – all coming for an outside world – have been able to cause a lasting impact

[58] The problem is of course to define criteria for higher fitness. In terms of biologic evolution the only fact that matters is the reproduction rate. Regarding the evolution in the sector of politics it's more complex, but finally also linked to hard facts of physical existence. Hence, a more sophisticated government system is not already a sign of higher fitness. It has to provide real advantages in comparison to competing systems, too.

[59] S. *Becker,* P. p. 141 et seq.

[60] Seanglim *Bit* wrote in 1991: „It is noteworthy that Cambodian Culture has not developed any other social institutions or groups beyond the family structure which might facilitate the concept of collective social responsibility. Cambodia does not have a tradition of associations, volunteer groups, trade unions, or other network composed of people who come together for a common purpose. […] Opportunities for exchanging experience, cooperation, or identifying with a larger group are restricted to groups which already forms the basis for social identity, namely family and village." (*Bit*, S. (1991). The Warrior Heritage. A Psychological Perspective of Cambodian Trauma. El Cerrtio.)

on the gentle working evolution process. With the former king – for the second time head of state – and patrons, coming from the new political elites, Hun Sen's CPP has been able to carry on to rule based on the traditional legitimacy pattern of the past with only a few adjustments. And undeniable this kind of government has led at least to a long period of peace, stability and amazing economic growth.

However, exactly this economic growth and the strong suction of a globalizing world has changed the environment for the political system in Cambodia within a couple of years and laid the ground for new evolutionary "variations". But even observers who are not familiar with development theories should not have expected now seriously that the existing social order, ingrained in the society over centuries, will turn around within one or two generations. Even Germany, a country with 1000 years of common history that was divided for only 40 years in a western democracy and a socialistic republic, is still fighting to overcome the gap caused by this short period of separation.

In context to the discussion, whether the EU should withdraw Cambodia's access to its preferential Everything But Arms (EBA) agreement, which allows least developed countries duty- and tariff-free imports into the 28-nation bloc, already cited Raoul Jennar,[61] came in a similar conclusion and said: "The EU should understand rather than judge. Political pluralism is a novelty in Cambodia. It did not exist before French colonization or during or after, only after 1993. And it is not enough to have a beautiful Constitution and elections to make a genuine democracy. The general level of education is still low and provides a fertile ground for demagogues. There is no national consensus on key issues. The division factors are multiple. The EU could do a useful job, for example, by helping Cambodians to better understand the historical realities that are often disguised for political reasons, by providing technical assistance in the functioning of a representative democracy that is respectful of people and institutions."[62]

The shift from a patrimonial to a neo-patrimonial instead of to a legal-rational system was predictable. And this basic perception regarding the legitimacy of the government (not of the rule of certain persons of course) will not change for the foreseeable future. Even in the face of technical and economic progress combined with a strong encounter with values from other parts of the world, the Cambodian society cannot undergo the process of functional differentiation and

[61] Jennar in a French academics and longtime Cambodia expert. He holds a Ph.D. in political science and Khmer studies from the Institut National des Langues et Civilisations Orientales in Paris.

[62] Interview with Niem Chheng, Phnom Penh Post, 25.1.19. with the title: The EU should understand rather than judge,' says academic Dr Jennar.

become receptive to the concept of law and parliamentarianism within a short period.

The current state of human rights and the completely uneven spread of wealth across society in Cambodia is in part a disgraceful consequence. But events in former Yugoslavia, Iraq, the "Arab Spring", democratization experiments in Central Africa or elsewhere have demonstrated what frequently happens in the short run, when rulers are overthrown who have kept together their countries in an autocratic way based on traditional domination: Civil war is more likely to appear than a legal-rational based political system.

VI. CONCLUDING REMARKS

An answer to the question, what would have happened to Cambodia without all the ups and downsides of the political regime under Hun Sen is just speculation and therefore not subject to science. But one thing should become clear after all: Even in case of a basic change of the current government, Cambodia cannot overcome for sudden the traditional base of the legitimacy of the government and move to Max Weber's model of bureaucracy. This step is simply too huge. Even the most benevolent leader will not be able to turn the county around but will have to retain the neo-patrimonial system to avoid chaos. And further steps have to be triggered by "variations" rooted in the evolution of politics in Cambodia. Cambodians must find their own ways to form a political and legal system that fits the needs of their society and matches their values.

In the context of development aid, western donors may explain Cambodians the big advantages of democracy, the rule of the law, and a well-working bureaucracy, which their own countries have experienced in the past and led them to peace and prosperity. And of course, they have the right to criticize the Cambodian government for the violation of basic human rights. But donor-driven approaches, particularly in the sector of amending the political and legal system, are mostly not only pointless but in reality dangerous or even harmful for average Cambodians.[63] Therefore, the strategy of pushing countries like Cambodia via good governance project to introduce bureaucracy in terms of Max Weber, and consequently to move from a patrimonial to a legal-rational based political regime, may lead to what donor organizations are used to call "impacts" – unfortunately in the most cases to

[63] Regarding the donor support in the sector of Land Law for example: *Fforde* A. and *Seidel* K. (2010), Donor Playground Cambodia? What a look at aid and development in Cambodia confirms and what it may imply. Heinrich-Böll-Stiftung, Berlin, p. 11 et seq.; Cambodian Human Rights Action Committee (2009), Losing Ground: Forced Evictions and Intimidation in Cambodia, Phnom Penh.

completely unintended ones. Therefore, dear donors, better let the fish floundering in the river.

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