Introduction to the Special Edition 2015

A Few Words from Raoul Wallenberg Institute

It is with great pleasure I introduce the Special Edition 2015 of the Cambodian Yearbook of Comparative Legal Studies. This edition includes papers on a wide variety of human rights topics written by Cambodian researchers. This special edition is a result of a successful collaboration between the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI), the Centre for the Study of Humanitarian Law (CSHL) and the Cambodian Society of Comparative Law (CSCL) and is financially supported by Swedish Development Cooperation.

RWI is an independent academic institution, founded in 1984 at the Law Faculty at Lund University in Sweden. The mission of the Institute is to promote universal respect for human rights and humanitarian law, by means of research, academic education and institutional development programmes. Our vision is to be a centre of excellence promoting the development of societies based on a human rights culture. The Institute’s head office is located in Lund in the southern part of Sweden. The Institute also have offices in Beijing, Nairobi, Jakarta, Istanbul, Amman and Phnom Penh. For more information, please visit www.rwi.lu.se

RWI currently implements a Human Rights Capacity Development Programme in Cambodia 2013-2017. The main focus of the programme is to support human rights education and research at academic institutions in Cambodia. The Institute cooperates with a number of different universities and academic institutions, for example Pannasatra University of Cambodia (PUC) where the cooperation focuses on the development and implementation of a Master Programme in International Human Rights Law. RWI also provides instrumental support to CSHL at Royal University for Law and Economics. In addition, numerous other initiatives are developed and implemented as part of the programme, for example support to libraries, courses for human rights academics, research programmes, scholarships etc.

This special edition of the Yearbook grew out of a program designed by RWI to develop the research capacity of Cambodian academics and increase
the volume of Khmer-authored literature on human rights. This particular program sought to address the need for scientifically rigorous, systematic and accurate academic research within Cambodia.

The researchers have received intensive training and mentorship on human rights and research methodologies from RWI. They have participated in a research workshop in Lao PDR and in a roundtable meeting in Vietnam together with researchers from Laos and Vietnam. They have also received individual mentorship from experienced international academics. Thereafter, most researchers were accepted to present their research at the biennial South East Asian Human Rights Network (SEAHRN) conference in Kuala Lumpur in October 2014.

My thanks go CSCL for its willingness to issue a special human rights edition of the Yearbook. My thanks also goes to CSHL for the excellent cooperation in putting the special edition in place. Furthermore, thanks should go to the Swedish Embassy in Cambodia and Sida for their generous financial contribution to RWI’s Cambodia programme. Finally, many thanks to all researchers for their hard work and commitment to human rights. Without them, this publication would not have been possible.

All papers reflect the views of the authors alone in their academic capacity and do not necessarily reflect the views of RWI.

I wish you all good reading.

Andreas Ljungholm
Head of Cambodia Office
Raoul Wallenberg Institute
A Short Note from the Center for the Study of Humanitarian Law (CSHL)

The Center is delighted to contribute to this Special 2015 Edition of the Cambodian Yearbook of Comparative Legal Studies in collaboration with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) and the Cambodian Society of Comparative Law (CSCL).

This edition gathers a broad range of research papers drafted by Cambodian academics on topical human rights issues facing Cambodia today. In October 2015 the Center will take pleasure in hosting an academic conference in Phnom Penh in which these papers will be delivered in order to share the researchers findings with the wider legal community.

The Center was established in September 2014 and acts as Cambodia’s only academic institute conducting research on human rights, fair trial rights and international law. The Center is based at the Royal University of Law and Economics in Phnom Penh and is an integral part of the English Language Based Bachelor of Law Program (ELBBL) wherein our researchers teach courses in human rights, fair trial rights and international humanitarian law.

The driving force behind the Center is its full time Cambodian Researchers who through scholarly research and trainings seek to educate the Cambodian academic and professional legal community of international fair trial standards, human rights and international humanitarian law. This work is undertaken with the vision to promote and ensure that such principles are adopted and enforced throughout Cambodia and other ASEAN countries.

In line with our mandate to produce academic research on pertinent human rights issues in Cambodia, our researchers - Ratana LY and Kimsan SOY - have herein contributed to the special edition papers on the protection of the rights of Cambodian migrant workers and Cambodia’s judicial independence, respectively. Our researchers’ contributions to this special edition cannot be given credit without highlighting the invaluable support and training our Center receives from RWI. The same token of appreciation is extended to CSCL for its enthusiasm to produce this special edition and provide our researchers with a forum to publish their findings.
As the papers in this special edition demonstrate, there have been both advancements and regressions of Cambodia’s adherence to human rights law and principles in recent times. Without efforts and capacity committed to objectively pursue research into the causes of human rights abuses and the functionality of the institutions tasked with protecting its citizens from them, there would be a void in the ability to meaningfully generate discourse and eventual change around Cambodia’s human rights record.

We hope you enjoy reading the papers as much as we appreciated contributing to them.

Jenny Holligan
Director of the Center for the Study of Humanitarian Law
Royal University of Law and Economics
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Editorial Notes

Welcome to the Special Edition 2015 of the Cambodian Yearbook of Comparative Legal Studies!

Following the adoption of the ASEAN Human Rights Declaration at the Phnom Penh ASEAN Summit in 2012, human rights agendas for ASEAN Member States are no longer confined to the process of nationally incorporating or applying universal human rights norms, but also the duty to contribute to the development of ASEAN frameworks which may best respond to the needs and realities of nations and peoples in the region. It will be a joint mission in which all peoples will compete and collaborate to make the best intellectual and resourceful contributions to the formation of a genuine regional system. Efforts have to start both domestically and intra-regionally. Bringing the subjects of human rights into different levels of school education and academic research is logically a necessary step towards promoting domestic capacities and raising national voices in order to realize meaningful participation in this regional mission.

In a humble contribution, this Special Edition publishes seven papers which develop different approaches to timely topics related to human rights law in Cambodia. All papers have in one way or another applied four well-known methodologies in their analyses: (1) examination of the level of meaningful political participation by different social actors; (2) institutional comparison of national and international practices and norms to identify the most appropriate forms of judicial arrangement for human right protection; (3) analytical reviews of the level of national implementation of international norms with a view to enhancing human rights protection at home; and (4) examination of national human rights promotion endeavors through the lenses of reforms in the educational sector.

Specifically, Phun Vidjia’s paper looks into the incorporation of human rights subjects in the primary and secondary education in Cambodia. Soth Sangbonn’s and Chantevi’s papers focus on the issue of participation, one targeting the roles of stakeholders in legislative drafting while the other the roles of women in political life of the nation. Soy Kimsan’s review of the question of judicial independence points out some technical details relevant to the institutional aspect of the rule of law.
development involving the judiciary. The other three papers written by Hem Sambath, Sao Deluxe and Ly Ratana explore the issue of international norms in human rights protection and their domestic application or regional impacts in the fields of freedom of expression, the right to strike and the protection of the right of migrant workers in today’s Cambodia.

While related discussions have sometimes appeared at other forums on human rights dialogues, in the form of reports, commentaries or public statements issued by institutions working on human rights in Cambodia, the seven articles published in this volume have a rather different nature. They are the first to appear in this academic journal specifically in order to improve the quality of discussions in a scientific way. Due to this academic orientation, the papers are poised to attract constructive inputs from the readers and other scholars who are interested in proposing any further differences and challenges with regard to the topics and approaches presented herewith.

Being an academic publication committed to professional and academic research, exchange of ideas and information, the Cambodian Yearbook of Comparative Legal Studies takes no position in the substance of these discussions. Scholars and experts in the relevant fields are welcome to discuss with the authors on any issues of agreement and/or disagreement. The Yearbook stands ready to offer a neutral academic environment to facilitate the communications. Academic research and discussions are never-ending. They contribute to spiral cycles of initiating a view, inviting a counter-argument, discovering a new thesis, re-adjusting the differences and again initiating a newer view. And so continue the cycles! This process enables us to improve the way we think, act and seek for perfection. Sustainable development of human thoughts will be possible if this spiral process keeps rolling on.

The Yearbook therefore would like to take this opportunity to express its sincere gratitude to the Raoul Wallenberg Institute Office in Phnom Penh, the Center for the Study of Humanitarian Law, the Swedish Government, Sida, and all other supporting institutions and individuals for their financial and physical supports in making this Special Edition a reality and enabling the Yearbook to participate in this process to pursue our philosophy and thoughts on human rights law in Cambodia.

Editor-in-Chief
Nagoya, Japan
July, 2015.
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Human Rights Education in Cambodia

An analysis of public primary and secondary school’s textbook on social studies and civic education since 2009

Phun Vidjia¹

Abstract

This paper explores human rights issue in Cambodia by reviewing human rights education (HRE) in Cambodian public primary and secondary education through the Social Studies and Civic Education textbook. Since 1994, there had been numerous HRE activities initiated for public education, but thus far there is no concrete National Plans of Action for HRE. After the first phase of World Program on HRE (2004-2009) focusing on primary and secondary education, implementation in numerous countries has been completed and good practices have been shared, but there has been little investigation into human rights education in Cambodian public (state) primary and higher education.

Literature reviews suggest that the substance of the textbooks incorporating HRE are progressive, but what needs immediate research-based reform and committed implementation are associated challenges such as accessibility, availability, acceptability, and adaptability; living condition of teachers; teaching methodologies, plan and actuality; learning and teaching environments, etc.

Introduction

The earlier the exposure to the concept of human rights, the better chance children grow into human rights conscious persons. In that sense, public education curriculum from primary to high school level plays an integral part in human rights education: the earlier children learn human rights principles, the more successful human rights education should be.

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In Cambodia, the term “human rights” was barely used prior to early 1990s. After the Paris Agreement (October 1991) that sought to comprehensively settle conflict in Cambodia, the term and concept has steadily and increasingly grown in usage by different stakeholders notwithstanding diverse understanding/meanings of the term. As a matter of fact, human rights has been used as an advocacy tool employed by civil society and alleged victims to address alleged abuses of state power. Common understanding among the stakeholders would help facilitate dialogue among them and contribute to development of society for the benefit of all, based on human rights principles.

Despite the popularity of the term and concepts in contemporary Cambodia, no human rights education national plans of action have been officially developed and launched under the public education system in spite of the many initiatives undertaken since 1994 and despite the fact that UN is moving toward third phase of World Programme for Human Rights Education (WPHRE). The first phase focusing on primary and secondary school ran between 2005-2009 and the second phase was between 2010-2014, and third Phase (2015-2019) is now being actualised. As stated in the WPHRE and its associated guidelines, national plans of action have several advantages.

In 1996, 2003, and lately in 2009, the Cambodian Ministry of Education introduced new primary and secondary school curriculum, yet there was no curriculum specifically on human rights. Instead human rights concepts and values were incorporated into a number of courses including Social Studies (primary school) and Civic Education (high schools). There is little research as yet into human rights education in the public school system. At the international level, there are guides, compendium of good practices and action plans concerning human rights education that Cambodia can learn from and even adapt. Cambodia should be able to take advantage of these experiences in designing and implementing human rights education. One component of designing the program is the developing of a suitable textbook and that’s why this author is researching and analysing on the existing public school curriculum in connection with human rights education.

Using simple literature methods, the paper aims to analyse the extent to which the current textbooks (since 2009) incorporate and infuse human rights and human rights education. The focus of the research is human rights education at public primary and high school levels.

This paper is organised into three parts. Part 1 covers the definition, background and related concepts of HRE and WPHRE. Part 2 is about HRE in Cambodia and Part 3 includes findings and discussion as well as recommendations.
Definition, Background and Concept of HRE

Definition

The author is aware of criticism about the conceptual definition of human rights education (HRE) defined by the then United Nations Commission on Human Rights with critics calling it “declarationist” because of sole reliance on UN legal instruments such as UDHR, the twin covenants and other UN conventions for HRE’s definition (Keet 2010). However, for the purpose of this research paper the author will base the paper entirely on the definition set in the United Nations World Program on Human Rights Education (1995) Guidelines for National Plans of Action for HRE (NPA-HRE) (1997).

Human rights education can thus be defined as education, training and information aimed at building a universal culture of human rights. A comprehensive education in human rights not only provides knowledge about human rights and the mechanisms that protect them, but also imparts the skills needed to promote, defend and apply human rights in daily life. Human rights education fosters the attitudes and behaviour needed to uphold human rights for all members of society.

From the above succinct definition and the WPHRE, the following points are key to understanding:

- **Form**: Training, dissemination and information efforts (infers both formal and non-formal education by states, non-governmental organization)
- **Aim**: Cultivating universal culture of human rights and strengthening respect for human rights and fundamental freedoms
- **How**: Imparting of knowledge and skills and shaping attitudes
- **Outcome**: - Knowledge of human rights and its mechanism
  - Value, beliefs and attitude, which uphold human rights
  - Action to defend human rights and prevent human rights abuse
- **Purpose**: (a) Strengthening of respect for human rights & fundamental freedoms; (b) Full development of the human personality & sense of its dignity;
(c) Promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
(d) Enabling of all persons to participate effectively in a free society;
(e) Furtherance of the activities of the United Nations for the maintenance of peace

Background and Related Concepts of Human Rights Education

Increasingly, there is consensus that human rights education is crucial for preventing human rights violations as well as building a free, just and peaceful society. Proliferation of human rights education in the 1990s owes much to the many adoptions of human rights instruments by the United Nations because the instruments task HRE as one of its implementing/promotion mechanisms (Keet A. 2010, pp. 45-47). The Vienna Declaration and Programme of Action (1993), as a result of World Conference on Human Rights, stated the essence of human rights education as education for the promotion and attainment of stable and harmonious society fostering of mutual understanding, tolerance and peace. Moreover the Declaration and Programme of Action recommended elimination of illiteracy and full development of human personality, as well as strengthening of respect of human rights and fundamental freedom through inclusion of human rights education, among other subjects, in the curricula for all learning institutions in formal and non-formal settings (HREA n.d).

of Action (2005-2007), the focus of HRE during that period was primary and secondary education (NPA 2005).

**Key Elements of Human Rights Education**

Based on the above documents, HRE means both 1) human rights through education (components such as curricular, textbook, policies, etc. and process of education are conducive to the learning of human rights) and 2) human rights in education (ensuring human rights of all members of school community are respected) (see also Tomasevski K. 2004).

HRE activities should convey fundamental human rights principles, such as equality and non-discrimination, interdependence, indivisibility and universality. To be effective, activities should be practical – relating human rights to learner’s real life experience and enabling them to build on human rights principles found in their own cultural context. Learners are empowered to identify and address their human rights needs and to seek solutions consistent with human rights standards. Both what is taught and the way in which it is taught should reflect human rights values, encourage participation and foster a learning environment free from want and fear (NPA 2005).

Guidelines on NPA have the following objectives:

- Assessment of needs and formulation of strategies
- Building and strengthening human rights education programmes (at international, regional, national, local levels);
- Developing educational materials;
- Strengthening the mass media; and
- Global dissemination of the Universal Declaration of Human Rights.

Guidelines on NPA (2005, p. 4) suggest the following steps for realizing HRE:

- Step 1: Establishing a national committee for human rights education – *this step will focus on the current status with the state, where we are*
- Step 2: Conduct a baseline study – *this step will provide an evidential basis of the reality of where the state is at the beginning of the process*
- Step 3: Setting priorities and identifying groups in need – *this third step will establish where the state wants to go and how the state plans to achieve those goals*
• Step 4: Implementing the national plan – the fourth step is implementing the plan and thus making progress towards the goals set out, getting there
• Step 5: Reviewing and revising the national plan – the final step is evaluation or how the state got where it did and what success has been achieved

In order to realize human rights education, states must carefully consider their national plans. In particular, OHCHR and UNESCO (2006, pp.3-5) suggest consideration of the following when formulating national plans:

1. **Education Policies**: Statement of state’s commitment and formation of the policies and the like. This should be determined in a participatory manner with involvement of all stakeholders.

2. **Policy implementation**: consistent implementation strategy (priority, funding, coordination mechanism, coherence, monitoring, and accountability) at national level and sub-national level.

3. **Learning environment**: human rights are practiced and lived in the daily life of the whole school community.

4. **Teaching and learning**: Teaching and learning should reflect human rights values.

5. **Education and professional development of school personnel**: capacity development and enhancement of teachers and school administrators.

**HRE and Other forms of Education**

One of the governing principles of National Plans of Action for Human Rights Education recognises the importance of HRE for democracy, sustainable development, the rule of law, the environment and peace. As explained in Keet (2010, p. 209) HRE is “both the surrogate and umbrella of many forms of education disciplines”. In other words, absence of subjects titled “human rights” does not mean absence of human rights education in an education system, because the value and concept of human rights can be taught in other subjects and practiced within the system.

Following on from the definition and concepts of HRE as well as Keet’s research (2010, pp. 84, 207 and 209), the following themes/topics/subjcts/core messages can be identified and developed into lessons for human rights education at public school system:

- Anti-racist education
- Bilingual education
- Civic education
- Democracy
- Development or global education.
- Environment subject and education for sustainable development
- Equality and non-discrimination
- Ethnic and intergroup education
- Gender equality
- Harmony among people of different religions and nationalities
- Health, hygiene and sanitation education
- Human personality, sense of dignity, attitude promoting respect & protection for human rights
- Knowledge of human rights & protection mechanism and skills to defend oneself & others
- Multicultural education
- Peace and friendship among nations
- Prejudice reduction
- Technology
- Understanding and tolerance of differences
- Universality, interdependence, indivisibility of human rights

**HRE in Cambodia**

**Background of HRE in Cambodia**

From 1980-1994, human rights concepts were embedded in morality, traditional ethics, codes of conduct, rites and rituals, and religious principles taught in Khmer and social studies (Chin 1998, p. 41). After the UN-supervised election in 1993 and the adoption of Constitution enshrining liberal democracy and pluralism, HRE initiatives targeting the general public, government officials, including non-civil official, and schools were pioneered by NGOs such as LICADHO, ADHOC, and Cambodian Institute for Human Rights (CIHR) in collaboration with government entities such as through funding and technical support from various donors (HRC 2009, para. 22; Vann 2001; Fernando 2001; CIHR 1999; Leang 1998). CIHR in collaboration with Ministry of Education, Youth and Sport (MoEYS) completed the first Human Rights Education textbook in 1994 and executed an 8-year project (1994-2001) to instil human rights teaching into 70,000 teachers and 26 teacher-training institutes, and even intended to train 10,000 to 12,000 teachers every year from 1998-2002 (Leang 1998). By the time project ceased operation in
October 2011 due to internal management problems, 40,000 teachers had been trained (Yi 2003, p.63).

**Incorporating HRE in the Basic Education**

Cambodia’s basic education is divided into two stages, primary education (Grade 1 – Grade 6) and secondary education. Secondary education in turn consists of lower secondary (Grade 7-9) and upper secondary (Grade 10-12) (Chin 2009, p. 22).

In 1994, a reform of the curriculum was introduced. Numbers of learning hours and weeks were increased so were numbers of subjects (6 and 8 subjects at primary and secondary level respectively). Special activities were included to help build students’ social skills and personalities. Among other things, a learner-centred approach was also introduced. Subject areas included as many competencies as possible: human rights, tolerance, peace, hygiene, health, food, environment, tourism, economy, business, computer, AIDS, civics, etc. The concept of the curriculum was based on humanisation, localisation, regionalisation, and universalisation. Attention was paid to knowledge, skills, attitude, and values to create competent, dignified citizens, creative people, environmentalists, and other socially useful people (Chin 1998, pp. 39-40).

Introduction of new textbooks and teaching materials in 1996 signified the public the launch of the new curriculum. A few schools located in remote provinces, suburbs, and cities were selected to pilot the new curriculum before its formal adoption. Due to limited production of the learning materials, the curriculum was implemented year by year continuously, and a number of teachers were trained each year on implementation of the curriculum. Several ministries and national agencies as well as UNESCO, UNICEF, UNFPA, UNDP, teacher association, and non-governmental organization contributed ideas and funds to the development of the curriculum, textbook, and teaching materials in Cambodia (Chin 1998, p. 43). The 1994 education reform and 1996 curriculum were conducted during the time of UN Decade of HRE (1995-2004). Through workshops and funding, the curriculum was revised (Plantilla 2008, pp. 184-185), with the latest one in 2009.

National Policies Framework

Notwithstanding the above initiatives, there have been no national plans of actions for HRE in Cambodia. Cambodia initially supported the UN GA draft resolution on WPHRE, but didn’t sponsor it at the adoption of the final resolution of the General Assembly thereon- 59/113B (UNGA 2006, p.2). According to email communication between a technical staff member at Department of Pedagogy with a senior researcher of a regional human rights organisation, the HRE plan in Cambodia was adopted in 2005 (Plantilla 2008, pp. 184-185). Despite that, it is doubtful whether there has been real human rights education, because the document has never been readily available, on website of MoEYS like other education policies and laws and regulation documents, and there has been no mention of an HRE plan in the government’s UPR national report (2009 & 2014).

Cambodia has adopted many documents that support human rights, but there is yet National Plans of Action for HRE (OHCHR n.d). Due to time and space, a few provisions out of the following documents are extracted for their relevance to human rights education (Chin 2009, p. 23):

- Education Law 2007
- Royal Decree, Sub-Decree and Policy concerning Early Childhood Care and Development 2010 and 2013
- National Action Plan on Early Childhood Care and Development 2014-2018
- EMIS Master Plan 2009-2013 & 2014-2018
- Policy on Non-formal Education Equivalency Programme 2008
- Proclamation and Guidelines concerning Primary and Secondary Education Department and Support Committee 2012
- Policy for Child Friendly Schools 2007
- Policy for Education for Children with Disability 2008
- Educational Strategic Plan 2009-2013 & 2014-2018
- Policy for Gender (n.d)
- Policy and National Plan for Education for All (EFA) 2005-2015
- ICT in Education Policy 2004
- Policy on School Health 2008
- Non-Formal Education Policy 2008
- Policy on HIV and AIDS 2008

The 2007 Education Law provides for education based on human rights principles such as free access to schooling for nine years, the right to
equality in schooling access, the right to freedom of belief, freedom of expression and others. The Education Strategic Plan is morally connected to the education of culture of peace, respect for human rights, legal and democratic principles and justice by fighting against violence, drug use, children and women trafficking and all types of discrimination in society (Chin 2009, p. 25-26). Additionally, the Policy on Education For All emphasises equality of access to education (HRC [A] 2009, para. 57).

According to the Policy for Curriculum Development 2005-2009 (MoEYS 2004, p. 5), the curriculum encourages learners to, among other things:

- Have understanding and appreciation of differences such as cultures and histories leading to building respect for other’s rights and equality of people;
- Be active and informed citizen about social changes, Cambodian government and rule of law, and demonstrate a spirit of national pride, love of their nation, religion, and king;
- Appreciate and protect and preserve their natural, social and cultural environment.

Primary and Secondary Curriculum

To borrow the description used by other researchers, the HRE in the Cambodian primary and secondary context is an implicit human rights education, meaning that HRE is integrated in the textbook within the “life skill” teaching framework (GA 2010, para. 29), particularly in Social Studies and Moral-Civic Education. Other subjects also have links to HRE that Keet (2010, pp. 84, 207, 209) illustrated in his paper HRE and Other Forms of Education of part II. 2. Besides, these two main subjects, other subjects also have link to HRE such as Earth and Planet Study, Geography, History, Family/House Chores Studies, Khmer Language. Because of the limits of space, the paper chooses to focus only on the two main subjects above: Social Studies and Civic Education.

Chin (2009, pp. 29-32) wrote that the MoEYS published a Khmer translation of Human Rights Lesson Plans for Southeast Asian Schools to serve as training and resource material for teachers. Other training materials and textbooks were also being developed. Social Studies and Moral-Civic Curriculum 2009 include human rights concepts drawn from the CRC (Grades 1-9), UDHR, ICCPR, ICESCR and CEDAW (Grades 10 - 12), which are compulsory for Grades 1 – 10 and elective for Grades 11 and 12, as well as in extra-curricular activities. The Local Life Skills
Programme (LLSP) provides an opportunity to involve parents, local community and NGOs in assisting schools with extra-curricular activities.

From grade 1-3, HRE is embedded in the textbook on science-social studies; from grade 4-6, HRE is embedded in the textbook on Social Science which contains 4 chapters on safe and good behaviour and attitude and societies in the past and present times; from grade 7-10, HRE is embedded in the textbook on Social Science with 4 chapters on Geography, History, Moral-Civic and Family/House Chores; from grade 11-12, HRE is embedded in a specific textbook on Moral-Civic education containing three main chapters, namely Human Value and Worth, Culture of Peace and Participation in Development of Society. The subject of Social Science and Moral-Civic Education are taught usually over 2 hours per week.

In primary education, HRE is taught through several lessons for deeper understanding on personality development, namely learning in the framework of knowing oneself, the family and the community. Some relevant lessons in the curricula and textbooks are:

- How to respect school discipline (ban on playing with or bringing in any kind of weapon).
- Avoiding any act leading to danger.
- How to walk safely along the roadside.
- Accepting one’s own mistakes.
- Studying the danger of explosives.
- Avoiding gambling.
- Learning about Buddha’s five Buddhist precepts for laypeople.

In secondary education, human rights are taught through lessons strengthening students’ previous knowledge, emotion, and general skills using the framework of self, the family, the community, and the national and international communities. The following are some lesson titles from courses of Social Science and Moral-Civic Education:

- Human value: accountability, tolerance and forgiveness, non-violence, universal morality, social etiquette, gratitude, noble truth, independence, loving kindness, compassion, sympathy and empathy, equanimity, non-violence, justice, wisdom, will/commitment
- Culture of peace: Harmony among religions, peaceful mind, 38 righteousness
- Human rights: UDHR, ICCPR, ICESCR, Women rights, rights of
the child, human rights based on Buddhism; rights of other ethnicity in Cambodia; prosecution of genocide

- Democracy: state institutions, constitution, rule of law
- Laws (administrative law, labour law, family law, criminal code, civil code, land law, public administration, political parties, running for election and election)
- Others: global citizen and global environment including sustainability

Discussion and Recommendation

As indicated in the above section, the literature review suggests that there has been progress with regard to “human rights through education” (such as Cambodian Education law, policies, guidelines, curricular, textbook), but challenges remain to be overcome with regards to “human rights in education”, in which rights of all members of the school community are respected, remains challenges. There are many associated and systematic problems in that regard, but this paper cannot raise them all. In fact, problems raised about 10 years ago (Yi 2003) and countless contemporary literatures on education in Cambodia in general have found similar problems, but the contemporary ones are worse.

As stated above, the associated problems require immediate research-based reform and strong-will implementation of the reform otherwise HRE in Cambodia in particular, and education in Cambodia in general, will be even more regressive. The associated problems are accessibility, availability, acceptability, and adaptability (UN General Comment on Right to Education); living conditions of teachers; teaching methodologies, on-paper plan and actuality; learning and teaching environments.

For an education to be meaningful and in order to assess the quality of human rights education, the UN Former Special Rapporteur on the Rights to Education, Katarina Tomasevski, suggested a model of 4 “A”, in full form: Availability, Accessibility, Acceptability, and Adaptability (4 As). Right to Education Project (n.d) gives a good summary of the meaning of each of the 4 As, quoted as follows:

**Availability** – that education is free and government-funded and that there is adequate infrastructure and trained teachers able to support education delivery.

**Accessibility** – that the system is non-discriminatory and accessible to all, and that positive steps are taken to include the most marginalised.
**Acceptability** – that the content of education is relevant, non-discriminatory and culturally appropriate, and of quality; that the school itself is safe and teachers are professional.

**Adaptability** – that education can evolve with the changing needs of society and contribute to challenging inequalities, such as gender discrimination, and that it can be adapted locally to suit specific contexts.

Action Aid visualises the 4 As in a Circle Diagram, and that diagram include some of the considerable indicators as below:

Adapted from “Visualising the 4 As” [Available at http://r2e.gn.apc.org/node/231]

### 4 “As” model of Education

The report in 2003 (Chin 2003) claimed an improvement of textbook distribution within Cambodia, but a more recent report (VOA 2014) indicates a policy implementation failure in textbook delivery such as late delivery of textbook, paying fees to borrow textbooks or buy textbooks, and lack of access to school library. If the textbooks are available, another occurring problem is book-pupil ratio. Students have to share books with other students, so book-pupil ratio needs to be improved to a 1:1 ratio. Connected to textbooks is availability issue of teaching materials, teaching manual and school facilities. This requires injection of funding and careful
planning.

Another question about the textbook is whether the lessons are acceptable. One report suggests that lessons need revising as UNDP, UNICEF, UNFPA, CEDAW, and CESC express concerns about disseminating discriminatory and gender-stereotyping material such as Chhab Srey (HRC[B] 2009, para. 16) in the primary school curriculum (2009). Even though Buddhism is common among Cambodian population, another issue to determine is adaptability and acceptability of textbook by learners of faith other than Buddhism because currently the textbooks include lessons on the concept of Buddhism in relation to human rights. Further research needs to be conducted to determine whether the textbook is written in the languages/words/contexts that are easily understood by the pupil and relevant to their life experiences requiring adaptability to make the lesson practical. However, it is an encouraging sign that the new Strategic Education Plan (MoEYS 2014) takes into account the need to improve literacy and the habit of reading among Cambodian students. Learning directly from teachers is not sufficient, self-study, especially by reading the textbook, is so essential. And the overall literacy rate needs improving as it is reported to be as low as 37%. This was indicated in a report (HRC [B] 2009, para. 62).

Living Condition of teachers and Learning and Teaching Environment

This has been the same old story, but it is still relevant, because it obviously affects the quality of teaching of the teacher and learning of the students. A number of reports indicate corrupt practices in public education and that doesn’t set a good model for learners of HRE topics such as equality and integrity. Even the government issues circulars and orders to prohibit these practices, but they remain an issue at school, mainly because the living condition of the teachers has not improved to a level that guarantees their decent living. It is noted that this remains true even though their salary has been raised a number of times (Yi 2003). Students are often “forced” to take extra classes. They are made to pay for such extra lessons, and any refusal has an influence on their mark, regardless of their meritorious study or level of performance in the normal class. There are also a number of irregular fees that parents of the students need to shoulder, and that create a lot of burden for poor parents. This is one reason that contributes to the dropout level of pupils from school (for dropout see more under section “Other associated problems” below).
Teaching Methodologies in actuality

Due to the matter of living standard mentioned above, teaching methodology is also affected. Instead of utilizing a student-centred approach, a teacher-centred approach is more prevalent in education, because of lack of focus on preparing lesson plans and teaching material as well as the lack of teacher motivation to teach properly within normal classes. The teachers pay greater attention to extra classes. From personal observation and conversation with a learner at a public school, the teacher only promotes memory of the concepts but not the importance, the discussion, or the critical thinking. Students are taught first by being given the definition of difficult/key terms in lessons of Social Studies and Moral-Civic. Then the textbook/hand-out is read either by the teacher or students in the class, and at the end of the lesson, students are required to summarize the main points – making it shorter than the length of the distributed hand-outs. Student needs to pay to get the hand-outs. In short, teacher training on the textbooks and pedagogy to deliver the substance is still an issue.

Other associated problems

Despite an increase of schools, pupil enrolment and teaching staff, the dropout rate remains high (HRC [B] 2009, para. 61). Even though there is an increase in the number of schools, challenges in making them accessible within short distance still remain an issue. Moreover, the increase of schools doesn’t mean an increase of teaching facilities and materials. Overall quality of education is still low. In its report to Human Rights Council in 2009, the Cambodian government admitted that education at all levels (primary to tertiary) still remains low (HRC [A] 2009, para. 99). Indeed, the World Economic Forum’s World Competitiveness Report in 2013-2014 ranked Cambodia 9th in ASEAN and 106th (Primary education – score of 3.2/7.0) and 116th (Higher education – score of 3.1/7.0) out of 148 in the world in term of the education pillar (Klaus Schwab 2013, pp. 18, 33, 143-144).

Recommendations

In order to address these problems, the government needs to take concrete measure. The following recommendations are proposed:
The Cambodian government should conduct an assessment of its overall curriculum by formulating national plans of action on HRE and creating a national committee on human rights education. Cambodia should take advantages of the many experiences and resources of best practices to formulate these national plans and strategically implement them. The formulation and improvement of the national plan can be undertaken, as OHCHR and UNESCO (2006) suggest, by 1) establishing a national committee for human rights education, 2) conducting a baseline study, 3) setting priorities and identifying groups in need, 4) implementing the national plan, 5) reviewing and 6) finally revising the national plan.

Textbooks should be updated every 5 years to include lesson(s)/topic(s) that help address burning human rights issues/challenges occurring in society. There should be more emphasis on independence of judiciary and its importance in protection of rights, inclusion of anti-corruption education as it is very much related to human rights education in order to instil among learners value of honesty, faithfulness, and avoid discrimination and inequality through the power of money. It is commonly known that one factor contributing to many alleged human rights violations is irregular, non-transparent, and corrupt practices of government official, business communities, and general population.

The government must strive to make the living standard of teachers decent and provide continuing capacity building to improve their teaching methodologies in order to effectively deliver the core messages of the lessons with an appropriate emphasis on human rights. Teachers of other disciplines also should be trained on how to infuse/incorporate human rights in their discipline. The capacity building and strengthening project should be carefully planned and implemented. Sufficient study materials and teacher manuals should be provided to support this.

Moral-Civic education should be a compulsory subject because at grade 11 and 12 more direct and important concepts and instruments of human rights are contained in the lessons. The subjects should be in the national examination.

The government must inject more national budget for this underfunded sector for improving education (see for example – Peter 2013).
Conclusion

HRE in Cambodia has been progressive in term of contents of the textbooks on Social Studies and Moral-Civic education, because as indicated in the section above (Incorporating HRE in Basic Education), the topics or lessons included meet the many theme/topics of the WPHRE. However, there are numerous challenges that need to overcome such as availability and accessibility as well as acceptability and practicality of the textbooks. Quite importantly, the HRE requires further research to formulate national plans of action, implementing strategies, funding and capacity building of the teachers. The government also needs to tackle other associated problems such as corrupt practices, decent standard of living of teachers, teaching materials and facilities, and dropout rates that hinder HRE and create an environment that is not conducive to the teaching and learning of human rights.

Reference:


First Phase of UN World Program for Human Rights Education 2005-2009 (WPHRE)


Peter Z. et al. 2013. *Education Receive 20% Boost in 2014 Budget*. The Cambodia Daily, 29 October 2013. Also available online at:


Citizens and Stakeholders’ Participation Rights in the Law-Making Process in Cambodia

Sang-Bonn SOTH

Introduction

Cambodia is a country in South East Asia with a population of over 15 million people in 2014, an increase from 2013’s estimation of 14.9 million. The country adopts a political system of Constitutional Monarchy, Liberal Democracy and Pluralism. Cambodia was admitted as a member of the United Nations in December 14th, 1955 and expressed recognition of international laws with commitment to abide by them for the sake of the respect, promotion and protection of human rights.

A bi-cameral parliamentary system is a legislative body based representative democracy. The legislative power is vested in the two chambers of parliament, the National Assembly and the Senate. Executive power is exercised by the government.

Although legislative power is vested in the two chambers of the parliament, there have been only a few laws initiated and proposed by the legislative bodies (See table 1 below). In contrast, many laws have been initiated and drafted by the executive bodies over recent decades without proper involvement of citizens and stakeholders. According to the Inter-

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Parliamentary Union (IPU), citizens and relevant stakeholders should be involved in the law-making process.\textsuperscript{6} However, in practice, parliament and the Royal government fail to involve them properly in the process, thus allowing some laws to be adopted amid harsh criticism.

**Scope and structure of the Study**

Unlike the work of other scholars, for example, Un Sam An whose work focused on comparing the selection system of the members of the upper chamber, the constitutional recognitions on roles and powers, the structure and internal rules of the upper chamber\textsuperscript{7} and the work of Hor Peng on “The Modern Era of Cambodian Constitutionalism”\textsuperscript{8} that focused on the development of Constitution in Cambodia and partly mentioned about the role of parliaments, separation of powers and introduction of democracy in general, this paper aims at studying the extent of citizens and stakeholders’ involvement in law-making process in Cambodian parliaments with three main objectives. Firstly, this paper will review relevant existing laws and regulations ranging from international legal sources, to the Cambodian Constitution and substantive laws and regulations. Secondly, it will seek to clarify the organization and the functioning of Cambodian parliaments and the process of law-making, especially at the commission’s level. Lastly, this paper will look at the practice of each chamber on how they involve citizens and stakeholders’ participation in law-making processes to be followed by identification of some gaps and concluding remarks.

**Methodology**

This study combines information obtained through observation of the author who is well-informed of the Cambodian parliamentary work after more than ten years working for the parliament and information collected mostly from the Khmer versions of plenary session minutes, magazines, reports, journals and other publications on the Cambodian parliaments.

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\textsuperscript{7} Sam An Un, *Research on a better Senate for Cambodia: A Comparative Study of Bicameralism*, (Nagoya University, 2007).

\textsuperscript{8} Hor Peng, Kong Phallack, Jörg Menzel (eds.), *Introduction to Cambodian Law*, (Phnom Penh, 2012), pp. 23-75.
Right to Participation in a Democratic Parliament

Source of right to participation

The right to participation is a human right that derives from different sources of international instruments, either from a binding or a non-binding instrument. For instance, Article 21(1) and Article 21(3) of the Universal Declaration of Human Rights (UDHR) respectively reads “(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives...(3) The will of people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be done by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

In addition to the UDHR, Article 25 of the International Convention on Civil and Political Rights (ICCPR) reaffirms that “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions; (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors...”

According to a General Comment of the UN Human Rights Committee, the right to public participation extends to all exercises of political power, including the exercise of legislative power; with direct or indirect participation; through representatives; through public debate and dialogue with their representatives. This obliges states to make laws and other measures as may be necessary to ensure that citizens have effective opportunity to enjoy the right to take part in political process.10

Standard concept of democratic parliament

Despite difficulties in reaching a normative standard enforceable for every state, the Inter-Parliamentary Union (IPU), the global organization of parliaments that was formed in 1889 has been working with various

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partners to establish a benchmark for parliamentary democracy, peace and cooperation among peoples.\textsuperscript{11} Since 2004, IPU has been working on how a state should establish a firm representative democracy and how a democratic parliament should be. IPU has been working jointly with other key institutions like United Nations Development Programme (UNDP), National Democratic Institute for International Affairs, NDI, and the World Bank Institute (WBI) to improve the work of democratic parliament. Although the standard for democratic parliaments slightly differ from the Commonwealth Parliamentary Association (CPA), IPU, NDI, UNDP and the standard of democratic parliaments of other regions, the standard developed by IPU and UNDP stands to be the most practical that contain main schemes like the representativeness of parliament; parliamentary oversight over the executive; parliament’s legislative capacity; the transparency and accessibility of parliament; the accountability of parliament; and parliament's involvement in international policy.\textsuperscript{12}

A democratic parliament promotes the right to participation. This participation right is also found in regional instruments including the African Charter on Human and People’s Rights, the American Convention on Human Rights and other non-binding instruments such as guidelines for democratic parliaments.

The democratic parliament reflects the relationship between parliament and democracy. Although parliaments assume slightly different roles in different states and political regimes, democratic parliaments tend to raise the core value of democracy. For this reason, most scholars and states claim that parliament is the heart of democracy and they attribute it with different types of inputs to ensure an effectively functioning parliament.\textsuperscript{13}

According to the IPU, a democratic parliament should exhibit five key characteristics, which are representativeness; transparency; accessibility; accountability and effectiveness of parliament.\textsuperscript{14}

Although parliamentarians assume three main roles, legislative, representative and oversight roles\textsuperscript{15} in democratic parliament, their roles in many countries are little known for many reasons. First of all, there is a shortage of literature on the role of parliaments in upholding democracy. Secondly, until currently, there is yet a systematic inclusion of the role of

\textsuperscript{11} Article 1 of the Statutes of the Inter-Parliamentary Union adopted in 1976.
\textsuperscript{14} Ibid. p.8.
parliament in formal education. For instance, there is no school or university course on parliamentary work or on democratic parliaments domestically, regionally and globally. Knowledge on the role of democratic parliaments could only be gleaned through limited documents produced by some scholars and by the IPU; the Commonwealth Parliamentary Association, “CPA”; the Asian Inter-Parliamentary Assembly, “AIPA”; Assemblée Parlementaire de la Francophonie, “APF”; and others.

The IPU suggested that in order to promote democracy, parliamentarians, in general should have a deep understanding on their roles; namely, legislative, representative and oversight roles. Beyond this, they should note that a representative who represents social and political interests is committed to equal opportunity for his/her voters and entire citizens. Furthermore, a parliamentarian, as well as the parliament itself, should be transparent - that is open to his/her constituency and the public and transparent in the conduct of his/her work because his/her work represents interests of not only citizens of his/her constituency, but citizens in the whole country. Nonetheless, parliament should be accessible by the public with the involvement of the public including civil society and other people’s movements in the work of the parliament. Lastly, parliament should be accountable to their voters and the public. In other words, members of parliament should be accountable to the electorate for their performance in office and for the integrity of their conduct.

The IPU further suggests that parliament or parliamentarians should work systematically and effectively:

Firstly, parliament should be effective at all levels. This means that parliament should have mechanisms and resources to ensure the independence and autonomy of parliament, including parliamentary control of its budget; non-partisan professional staff separate from civil service; adequate unbiased research; information facilities for members; parliament’s own business committee; procedures for effective planning and scheduling of business; system for monitoring parliamentary performance; and opinion surveys among relevant groups on perceptions of performance.

Secondly, parliament should effectively perform legislative and scrutiny functions and should serve as a national forum for issues of common concern. To realize this, parliament is required to have a

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16 Article 77 of the Cambodian Constitution of 1993 confirm that the member of the National Assembly shall represent all the Khmer people, not only citizens for their constituencies.
systematic procedure for executive accountability; adequate powers and resources for committees. Furthermore, parliament is also required to establish mechanisms to ensure effective parliamentary engagement in the national budget process in all its stages, including subsequent auditing of accounts. Additionally, parliament should have the ability to address issues of major concern to society such as mediating in the event of tension and preventing violent conflict, as well as building trust with those public institutions that preserve the interests of the entire population.\textsuperscript{18}

Thirdly, parliament should maintain good relationship with the international communities. This requires parliament to be proactive in international affairs. The involvement of parliament in this regard requires the creation of better procedures for parliamentary monitoring and inputs into international negotiations as well as overseeing the positions adopted by the government. Moreover, parliament is required to have mechanisms to ensure compliance with international norms and the rule of law; inter-parliamentary cooperation and parliamentary diplomacy.

Lastly, the IPU also suggests that parliament should have proper relationships with the public and private sectors and the civil societies at the national and sub-national levels to ensure that national policy issues and decisions correspond to the needs of those concerned groups.\textsuperscript{19}

\section*{Recognition and Realization of Right to Participation in Cambodia}

Cambodia is a state party to most international instruments whether they are binding or non-binding. From a legal perspective, the expression of recognition has been clearly enshrined under the current Constitution, Article 31 of which reads: \textit{“The Kingdom of Cambodia recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights and the covenants and conventions related to human rights, women’s rights and children’s rights.”} The Constitution also provides right to participation in different aspects, particularly political participation allowing citizens of either sex to actively participate in political, economics, social and cultural life of the nation.\textsuperscript{20}

\begin{flushright}
\textsuperscript{18} Ibid.
\textsuperscript{19} Internal Regulations of the Senate of Cambodia, 2014 obliged chairpersons of each commission, among other obligations, to involve civil society to express opinion and provide technical advice on certain matters before the commission.
\textsuperscript{20} Articles 34-35 of the Cambodian Constitution, 1993.
\end{flushright}
The Constitution also bestows legislative power on the National Assembly and the Senate to initiate or propose amendments of substantive and procedural laws which promote human rights including the right to participation.\(^{21}\) For this reason, some laws have been adopted to promote participation rights. For instance, Law on political party; \(^{22}\) Law on peaceful demonstration; Law on Commune/Sangkat Administrative Management, \(^{23}\) and others.

From an institutional perspective, a number of institutions, in both sub-national and national levels have been established to promote participation, particularly to involve citizens and stakeholders in policy or decision-making. The commune which operates under a joint management of communal councilors is an example of an organ or an institution established at the sub-national level to allow citizens and stakeholders participation in policy or decision-making for communal development.

Governmental ministries are also institutions at national level that could involve citizens and stakeholders in different stages of law drafting process, for example, in impact assessment processes, in expert hearings or forums, in workshops or in seminars on particular draft bills.

Parliament is another important institution that could involve citizens and stakeholders in law-making process. For example: provision 18.g of the Internal Regulation of the 3\(^{rd}\) legislature of the Senate provided that each chairperson of commission shall represent his/her commission and shall attend the meeting of the permanent committee.\(^{24}\)

The chairperson shall convene a meeting within the commission on its respective issues and may involve other stakeholders that include representatives of the Royal Government of Cambodia (RGC) or members of the National Assembly (NA), or those who proposed draft bills to be questioned at the commission level, if it is necessary. Moreover, it is also required to invite relevant ministries, experts or representatives of civil societies to comment or contribute their ideas in the discussion within the commission’s debate as well. Otherwise, the chairperson may initiate workshops to gather opinions or to identify problems on a subject matter he/she finds necessary.\(^{25}\)

\(^{21}\) Articles 90-91 of the Cambodian Constitution, 1993.
\(^{22}\) Law on political parties was adopted in 1997 and promulgated by the Royal Kram No CHLS/Roy.kr/1197/07.
\(^{23}\) Article 64, Law on Commune/Sangkat Administrative Management promulgated in 2001 by the Royal Kram NS/Royal kr/0301/05.
\(^{24}\) Ibid, the Internal Regulations of the Senate of Cambodia, 2014.
\(^{25}\) The Internal Regulations of the Senate of the 3\(^{rd}\) legislature was adopted on July 18\(^{th}\), 2012.
Law-making process in Cambodia

Cambodia adopts civil law tradition, which means the law is to be made by parliament and promulgated by the King in a written\textsuperscript{26} and a systematic manner. Laws and regulations in Cambodia shall be in strict conformity with the Constitution.\textsuperscript{27} Moreover, although Cambodian citizens are the master of their own country and the owner of all powers, they are not allowed to exercise that power directly, but, only through the National Assembly, the Senate, the Royal Government and the Judiciary. The legislative, executive and judicial powers are separate.\textsuperscript{28}

There are three institutions, the National Assembly, the Senate and the Government, with mandate to initiate legislation in Cambodia. Each institution may initiate, draft or propose bills and may involve citizens and stakeholders in various ways including public hearings, expert hearings, workshops or seminars on particular issues. Law, as well as the process of drafting, is complex. However, if the government wants to initiate a draft law, it may use specialized ministries to draft it with the participation of citizens and other relevant stakeholders. The subsequent step involves the reviewing of the draft law by the Council of Jurists with comments to be submitted to the Council of Ministers for the adoption of the law prior to submission of the draft law to the Permanent Committee of the National Assembly.

In the event that either the National Assembly or the Senate initiates a proposed law, first they internally prepare within their respective commissions before submitting to the Permanent Committee of the (respective) chamber for adoption. The Constitution requires the Senate to provide recommendations on proposed or drafted laws adopted by the National Assembly before the King promulgates them. The Constitution strictly requires that Organic Law, the Internal Regulation of the National Assembly and the Internal Regulation of the Senate shall be reviewed by the Constitutional Council before promulgation.\textsuperscript{29}

The process of law-making is time consuming and requires the involvement of different institutions and relevant stakeholders to discuss and provide inputs on the draft laws. Furthermore, the idea behind this is to promote proper participation and discussions on the proposed or drafted law. In case a law was made without proper involvement of citizens and relevant stakeholders, and, if later found to be unconstitutional, people

\textsuperscript{26} Principle 21 of the Internal Regulations of the National Assembly, 1993.
\textsuperscript{27} Article 150, the Cambodian Constitution, 1993.
\textsuperscript{28} Article 51, the Cambodian Constitution, 1993.
\textsuperscript{29} Article 140, the Cambodian Constitution, 1993.
could bring a complaint for the constitutional review to the Constitutional Council.\textsuperscript{30}

\textbf{How parliaments involve citizens and stakeholders in law-making process}

Greater involvement of citizens and relevant stakeholders in law-making processes in parliament, especially in the Senate, is achieved in two ways, through out-reach; and through in-reach activities. Out-reach activities traditionally involved visits of the senators to their own constituencies. In-reach activities, in contrast, include meeting citizens and stakeholders in the Senate and in the specialized commissions.

Although the internal regulations of the Senate allow the Chairperson of the specialized commission to involve stakeholders in the law-making process, there is hardly any record found about their involvement or discussions. However, due to the current political development, the Senators of the 3\textsuperscript{rd} mandate tend to be more dynamic and more open to the public. By way of a current development, the Senate revised its internal regulations and is committed to involving citizens and stakeholders by increasing both out-reach and in-reach activities, creating the Women Senator Group (women caucuses) and other groups.

As far as the practice is concerned, there are some factors that cause difficulties for parliament to involve citizens and stakeholders in law-making process. Firstly, there is neither clear law nor clear mechanisms that allow citizens and stakeholders to participate in the law making processes. Although there are some relevant provisions in the Constitution or in internal regulations\textsuperscript{31} on involvement of citizens and stakeholders in the law-making process, a proper practice is missing due to different understanding and interpretations. Secondly, there is no budget allocation for the promotion or involvement of citizens and stakeholders in law-making process yet.\textsuperscript{32} And lastly, there is a lack of appropriate human resources to handle the task.

\textsuperscript{30} Article 141, the Cambodian Constitution, 1993.
\textsuperscript{31} Article 18, §7 of the internal rule of the Senate, 2012.
\textsuperscript{32} Article 15 of the Financial Principle of the Senate for the 3\textsuperscript{rd} mandate, 2015.
How the Senate involve citizens and stakeholders in law-making process

Before proceeding to an in-depth understanding of the structure, the organization, the functioning and involvement of citizens and stakeholders in law-making process in the present Senate, it is worth recalling that the Senate has existed for more than ten years. This institution was established in 1999 to solve a political crisis after the general election on July 26, 1998 for the National Assembly for a second mandate. The crisis arose when the newly formed National Assembly could not convene due to insufficient quorum of members, as required by the Constitution, to convene and form the Royal Government.

The result of the election in 1998 turned out that the Cambodian People’s Party (CPP) won 67 out of 122 seats. Meanwhile, FUNCINPEC won 43 seats while the Sam Rainsy Party (SRP) won 15 seats. However, the new parliament failed to convene because the two minority political parties neither accepted the result of the election nor joined a coalition government with CPP. The worse consequence of all this was that the two parties accused the National Election Committee of being under the control of CPP. They thus declined the opportunity to form a coalition with CPP, boycotted the parliamentary session and formed the Democratic Alliance instead.

This political deadlock lasted for three months until the former King Norodom Sihanouk came into play by convening a meeting on November 12-13, 1998 at the Royal Palace’s Khemrin Pavilion with the two main winning parties, namely the CPP and the FUNCINPEC that led to possible solutions, primarily addressing the issue of power sharing among the three winning parties. As the result, a coalition government under the premiership of the CPP was formed between the CPP and the FUNCINPEC leaving the SRP to be an opposition party. According to the agreement, former FUNCINPEC’s president, Prince Norodom Ranarit, assumed the role as the President of the National Assembly with the support of two Vice-Presidents from the CPP, while the composition of the Permanent Committee followed the formula of 4+4+1. (The formula meant that four commissions were under the CPP’s chairmanship, four under the FUNCINPEC and one the SRP). Additionally, it was also agreed that a new chamber, the Senate, was to be established under the presidency of the CPP and supported by two vice-presidents from the FUNCINPEC.

The sixty-one Senators, of which eleven were women, in the first legislature, were all appointed from amongst the political elites for a five-

33 Article 88.3 of the Cambodian Constitution, 1993.
Participation Rights in Law-Making Process

year mandate, and they comprised of thirty-one members from the CPP, twenty-one from the FUNCINPEC, seven from the SRP and another two appointed by the King. The first legislature of the Senate convened its first session on March 25, 1999. Since the legal frameworks governing this new institution were less precise and members were born out of appointment among the political elites, the existence of the Senate had been seen less relevant and it was meant for sharing political power.\textsuperscript{34} As a consequence, the Senate was subsequently subject to harsh critiques.\textsuperscript{35}

Despite the critiques, the Senate has so far put great efforts to gain recognition nationally, regionally and internationally. The second legislature of the Senate was established by a non-universal election on Sunday January 22, 2006 with a six-year term. Among the 61 senators, 57 were directly elected through a non-universal election, two were appointed by the National Assembly and two by His Majesty the King. The Senate of the second legislature convened its first session on March 20, 2006.

For the third legislature, the Senate election was held in January 2012 to select 57 senators, and the electorates were Members of Parliaments and commune councilors. As a result, the Cambodian People's Party (CPP) won 46 seats and Sam Rainsy Party (SRP), the country's main opposition party, gained the remaining 11 seats. In addition to the 57 elected senators, there are two senators to be nominated by the King and the other two by the National Assembly to make a total of 61 senators. King Norodom Sihamoni presided over the opening of the Senate’s third legislature on March 24, 2012.

Although there has not yet been a systematic record on the in-reach involvement of citizens and stakeholders in the commission level, the senate’s openness for citizens and stakeholders to visit the Senate’s facilities and to address questions and concerns to the Senators in the second legislature has been significant. For example, under coordination of the Human Resource Development Department\textsuperscript{36} with good collaboration of relevant units, 3560 visitors including students, commune councilors, government officers and ordinary people visited the Senate between 2011 and 2014.\textsuperscript{37}

The Senators also involved citizens and stakeholders in their out-reach activities. For example, in the first legislature, the nine specialized


\textsuperscript{36} The Human Resource Development Department of the Senate has been established at the end of 2012 to work on capacity building of staff members and senators.

commissions paid 143 visits to their own constituencies and organized forums in all eight regions\textsuperscript{38} nationwide and involved 2,276 people in which 1,110 were the commune councilors.\textsuperscript{39}

Although the power of the Senate remains unchanged in the Constitution, the practical function has slightly changed and tendency toward involvement of citizens and stakeholder has been remarkable. Table 1 below notes the development of the Senate through the three legislatures in terms of organizational structure, and involvement of citizens and stakeholders.

Table 1: Development in terms of organizational structure and involvement of citizens and stakeholders in law-making process of the three legislatures of the Senate since its first existence in 1999

<table>
<thead>
<tr>
<th>Characteristics and mandate</th>
<th>First Legislature</th>
<th>Second Legislature</th>
<th>Third Legislature</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Senators were appointed (1999-2004)</td>
<td>• Senators were elected via Non-Universal election for a six-year term (2006-2012)</td>
<td>• Members were elected via Non-Universal election for a six-year term (2012-2018)</td>
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<tr>
<td>• The term was extended twice (2004-2006)</td>
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<table>
<thead>
<tr>
<th>Composition</th>
<th>First Legislature</th>
<th>Second Legislature</th>
<th>Third Legislature</th>
</tr>
</thead>
<tbody>
<tr>
<td>• in total 61 senators</td>
<td>• In total 61 senators</td>
<td>• In total 61 senators</td>
<td></td>
</tr>
<tr>
<td>• 2 senators were appointed by the king</td>
<td>• 57\textsuperscript{41} members were non-universally elected by the Members of the national Assembly &amp; Commune/Sangkat Council members\textsuperscript{52} with closed list proportional representation</td>
<td>• 57\textsuperscript{41} members were non-universally elected by the deputies &amp; Commune/Sangkat Council members\textsuperscript{44} with closed list proportional representation</td>
<td></td>
</tr>
<tr>
<td>• 2 senators were elected (majority vote) by the National Assembly</td>
<td>• 2 senators were appointed by the king from among members of political parties</td>
<td>• 2 senators appointed by the king</td>
<td></td>
</tr>
<tr>
<td>• 57 senators were appointed by the king from among members of political parties</td>
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</tbody>
</table>

\textsuperscript{38} Article 9 of Law on the Senate Election, 2005: Cambodia is classified into 9 regions and they are regarded as the electoral constituencies of the Senate ever since second mandate starting from 2005. The nine regions are: 1\textsuperscript{st} region (Phnom Penh Capital), 2\textsuperscript{nd} region (Kampong Cham Province), 3\textsuperscript{rd} region (Kandal province), 4\textsuperscript{th} region (Battambang, Banteay Meanchey, Siem Reap, Oddor Meanchey and Paylin provinces), 5\textsuperscript{th} Takeo, Kompot and Kep provinces), 6\textsuperscript{th} Prey Veng and Svay Rieng provinces), 7\textsuperscript{th} Kampong Speu, Kampong Chhnang, Po sat, Koh Kong and Preah Sihanuk provinces), 8\textsuperscript{th} region (Kampong Thom, Preah Vihea, Kratie, Steung Treng, Rakanak Kiri and Mondul Kiri provinces).

Participation Rights in Law-Making Process

<table>
<thead>
<tr>
<th>which have seats in the National Assembly.</th>
<th>appointed by the king.</th>
<th>2 senators elected (majority vote) by the National Assembly</th>
</tr>
</thead>
</table>

**Organizational structure**

- The president to be supported by the two vice-presidents.
- The permanent committee composed of 12 members
- The nine specialized commissions
- The Special Commissions
- The Secretariat General
- 3 departments

- The president to be supported by the two vice-presidents.
- The permanent committee composed of 12 members
- The nine specialized commissions
- The Special Commissions
- The female senator’s group
- The Secretariat General
- 2 General Directorates
- 10 departments

- The presidents to be supported by the two vice-presidents.
- The permanent committee, composed of 13 members
- The ten specialized commissions
- The Special Commissions
- The senator’s group
- The senator’s group to territory
- The Secretariat General
- The 3 General Directorates
- 16 departments
- 4 units

---

40 CPP’s member: 45, FUN’s member: 10, SRP’s member: 2
41 There were 1621 Communes/sangkat and 11,353 councilors who turned up for the senate election in 2006
42 CPP’s member: 46, SRP’s member: 11
43 Since 2012 senate’s election, there were only 9 specialized commissions in both, the National Assembly and the Senate. However, a commission on Investigation, Public Function and Anti-corruption is newly formed in both houses in August 2014 as the result of political settlement over the opposition boycott one year after the election in July 2013.
44 Article 100-New, the Cambodian Constitution, 1993
45 Article 114- New, the Cambodian Constitution, 1993
46 Decision: number 042/1212/senate/dated 06/12/12
47 Decision: number 046/1212/senate/dated 06/12/12
48 The Senate created 6 Senator’s groups in its 3rd mandate to ensure effectiveness of the debate during plenary session of the Senate. This means that once a member comments or debates on a particular topic, he/she does it within a given timeframe and on behalf of the group. The senators’ group has been created by a decision number 046/1212/senate/dated 06/12/12
49 The senate of the 3rd mandate created female senator’s group composed of 10 members (7 members from CPP and 3 member from SRP) by a decision number 044/1212/senate/dated 06/12/12
Role

- Legislation
- Representation (represent constituencies and people nationwide)
- Oversight

Legislation
- Representation (Represent the King, the National Assembly and the commune councilors)
- Oversight

Laws and regulations relevant for involvement of citizens and stakeholders in law-making process

- Article 35, 90 and 91 of the Constitution
- Article 18 of the Internal Regulations of the Senate
- Article 35, 90 and 91 of the Constitution
- Article 18 of the Internal Regulations of the Senate

Laws proposed by parliament

- Internal Regulations of the National Assembly; and
- Law on the Election of the National Assembly
- Law on the prevention and control of HIV/AIDS
- Law on Monogamy
- Law on the Statute of Civil Servants of legislative bodies
- The Law on the Senate election
- Law on the Congress between the National Assembly and the Senate
- Law on the Statute of Parliamentarians

Note: The Senate has reviewed and provided recommendation to 312 laws among 340 laws submitted since 1999 to 2014

50 This law was proposed by the National Assembly and promulgated by the Royal Kram N0 NS/RKM/0702/015
51 This law was proposed by the National Assembly and promulgated by the Royal Kram N0 NS/RKM/1006/029
52 This law was proposed by the Senate and promulgated by the Royal Kram N0 NS/RKM/0203/007
53 This law was proposed by the Senate and promulgated by the Royal Kram N0 NS/RKM/0605/020
54 This law was proposed by the Senate and promulgated by the Royal Kram N0 NS/RKM/0211/005
55 This law was proposed by the National Assembly and promulgated by the Royal Kram N0 NS/RKM/1006/026
56 The Secretariat General of the Senate, Legislation Department, list of law 1999-2014, September 2014
What Have Been the Shortcomings?

Human resource factor

In order to properly involve citizens and stakeholders at different stages of the law drafting and reviewing processes, parliaments need to have a highly committed and capable chairperson for every commission and specialized persons/experts or departments to shape the ideas of democratic parliaments. This means that in each commission there should be an expert person who is well informed of the procedure to conduct public hearing or expert hearing. Until recently, the Cambodian parliaments, particularly the Senate, needed such expertise to ensure a proper involvement of stakeholders in the law-making and reviewing processes. The Secretariat General of the Senate has been working collaboratively with relevant development partners to build up capacity of staff-members, particularly, to capacitate those assistants attached to the secretariat to the commissions to be an expert in involving citizens/stakeholders in the law-making and reviewing processes.

Financial factor

Another factor to determine the success of proper involvement of citizens/stakeholders in the law-making and reviewing processes is very much relevant to the financial factor. Organizing public hearings or expert hearings requires not only physical or mental efforts, but also requires financial resources when it is organized outside the institution whether it is big or small setting with the participation of citizens within a constituency or with domestic experts or foreign experts. In short, parliaments need sufficient financial resource to exercise this function. For this reason, article 81 and article 105 of the Cambodian Constitution requires the National Assembly and the Senate to have an autonomous budget for the conduct of its functions respectively.

Nonetheless, article 31 of the new internal regulations of the Senate also affirms the financial resource of the Senate and bestows the Commission on Economy, Finance, Banking, and Auditing a duty to review and provide recommendations on the Senate’s draft Annual Budget Law prepared by the Secretariat General. In addition to article 31, there is also article 3 of the financial principle for the operation of the Senate of the 3rd mandate adopted as of March 5th, 2013, which provides that each expert commission is entitled to a budget allocation of 18 million Riels (approx. USD 4,500) as allowance and 10 million Riels, which is
approximately USD2.500 per month for its entire operation. Although there is no clear allocation of how much to be used for the purpose of public hearing or expert hearing, this could include, more or less, the allocation for involving stakeholders in law-making process. In the absence of a clear guideline on the usage of the budget allocation, proper management of the budget lies largely on the understanding and the commitment of chairperson of each expert commission itself and the coordination capacity of the assistants to the commission.

**Political factors**

Political factors could also be a critical barrier against the Cambodian Parliaments involving citizens and stakeholders in lawmaking processes. Some members of parliaments are politically sensitive on most topics, thus they are reluctant to involve citizens/stakeholders in the law-drafting and reviewing processes. Besides, the urgency of some law is also critical. For instance, Article 113 of the Constitution as amended March 1999 requires the Senate to examine and make recommendations on draft laws or proposed laws that have been adopted by the National Assembly not more than one month and in an emergency, this period shall be reduced to five days only. There is obviously limited opportunity for citizen involvement within such a timescale.

The same article requires that the process of sending the draft law or proposed law back and forth between the Senate and the National Assembly shall be completed within one month. This period shall be reduced to ten days in the case of the national budget and finance laws and to two days for an urgent law. According to this provision, while most laws are not made in a transparent way, citizens and other stakeholders are not well-informed, thus are unable to involve at different stages of the law drafting and reviewing processes.

In addition to the issue of urgency, failure to maintain proper involvement of stakeholders is also driven by ignorance of recommendations that have been made. This means that some recommendations are not taken into serious consideration or there is no further action to be taken although the problems are identified and recommendations for improvement are made by stakeholders at different stages.
Conclusion

Although citizens and stakeholders’ participation is a universal right guaranteed under the UDRH, ICCPR and other regional instruments, the realization of this right is limited by various factors like political, financial and human capital or human capacity.

Limitation of citizens and stakeholders’ participation in law-making process in Cambodia is caused not only by the above three factors, but also by the absence of a detailed procedure and supporting mechanisms. Citizens and other stakeholders are important actors in democratic society. They want to fully participate in the social, political or law-making processes because they want to contribute and share their concerns. They want participation because they need to learn about the government or parliaments’ operation, as they are also actors in the democratic society.

A proper involvement of citizens and stakeholders in law-making process could be achieved if legislators and government officials are collaborative. This means that legislators and other government officials need to welcome citizens’ input and provide constituents with information about policies under consideration. According to the current finding of the Indochina Research on Cambodian Youth Research, usage of mobiles and modern technology is increasing remarkably in Cambodia. Therefore, the use of technological advancements to promote right to participation could be considered. For instance, the government and the parliaments could create websites or make e-forum available or use email to seek their constituent’s opinion on specific issues. Once there are comments or opinions made by the citizens or stakeholders the legislature should take the issues, opinion or concerns into serious consideration and reflect them in the policy or legislation where it is feasible or necessary.

Women’s Participation in Politics in Cambodia

Chantevy Khourn

Introduction

Short Description of Cambodia

Cambodia has undergone a long history of civil war and the country was returned to the year of zero during Khmer rouge regime (1975-1979). About 1.7 million people were killed and died from starvation and diseases. After Vietnamese military left the country in 1989, the United Nations organized its first national election in 1993. Cambodia since then has opened as a democratic country with a free market economy and it has attracted foreign investments and aid. The country has been gradually developed. Cambodia is one of the least developed countries in South East Asia with the total population of about 15 million people of which slightly more than half are women with the majority of people living in the countryside (about 85%), most work in agricultural sectors. The population growth rate is 1.8% and the GDP per capita is $1006.8 (World Bank, 2013).

What is women’s participation in politics?

Women’s participation in politics in the context of this research refers to the political participation among Cambodian women in the national levels: primarily female representation in the National Assembly; and female participation in local level of politics (Commune/Sangkat Council). The paper addresses the roles of Cambodian women in society and their positions in politics. Young Cambodian women represent 33 percent of the country’s youth population, i.e. those aged from 15 to 30 years (Youth Resources Development Program, 2012). However very few females in the

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population are interested in politics. Mehrvar (2013) conducted a case study on young women’s political representation and participation in local governance in Cambodia and found there were three types of response among young female participants to question on the word “politic”. First, young women aged from 14 to 18 had no clue about the word “politic” and nothing was brought to their mind. This was due to the lack of awareness and limited interests and knowledge in politics. Second, older participants (20-35 years) who are garment factory workers or those who have higher level of education thought “politic” involved discussions about law, resources, the national minimum wage, employment, land and services. Third, the word “politic” was considered as related to money, power, particular groups (men), control, lies, corruption, and special interests. Young Cambodian women have a broad mistrust of politics, thinking that political parties do not address their interests and that they are powerless in relation to the political system (Mehrvar, 2013). Cambodian women often think that politics is not their jobs but it is a man’s job. These women have been living on the margins of the political sphere and are not given enough opportunities to fully contribute to politics and decision-making. The culture puts women into a lower status than men and they are confined with household responsibilities. Women are considered as in the shadows behind successful men. Moreover, the research will address the barriers that block Cambodian women from political participation. The study will also explain whether Khmer tradition still plays a role in discouraging women from political participation. Some suggest that young women in Cambodia are not entirely disconnected from political activities in their community but there is a narrow conception of politics and also a negative image. Women are sometimes reluctant to perceive their actions and engagement with their community as political activity (Mehrvar, 2013). This study also analyzes government policies used to promote women in politics. The research aims to discuss how much government and the ministry of women affairs can implement their policies or mechanisms on female empowerment with regard to political participation. The Royal Government of Cambodia (RGC) has publicly committed to increasing female representation at all levels of government in a number of documents, including the Rectangular Strategy for Growth, Employment, Equity and Efficiency, the National Strategic Development Plan and the Cambodian Millennium Development Goals (CMDGs). CMDGs set a target of 25% women’s representation at the Commune/Sangkat Council level and 30% female representatives in the National Assembly and Senate by 2015 (CCHR, 2013). However, the level of women’s representation at both the local and national levels remains low due to the lack of the implementation of government policies and the negative perspectives regarding women’s abilities in leadership roles. By investigating the roles
of Cambodian women in politics, explaining the barriers that confine women from joining politics, and analyzing government policies, the paper aims at contributing to the strengthening and promotion of women’s participation in politics.

Challenges in Women’s Participation in Politics

Women are elected in order to meet government quota, however in practice, they are only figureheads and lack power. It is common, during elections, for political parties to list female candidates towards the bottom of the ballot to ensure that they are not elected to positions with power (Cambodia CEDAW NGO’s Shadow report, 2013). Women remain underrepresented at all levels of political and public life as well as in the foreign and diplomatic service. There is a concern because the number of women deputies in the National Assembly decreased after the elections in July 2013 (Concluding Observation, 2013). This is as a result of a lack of commitment on the part of political decision makers at the national level in establishing an adequate legal framework or plan of action for promoting gender political empowerment and participation (COMFREL, 2011).

In addition there is a gender imbalance between, on the one hand, individual rights and freedoms and, on the other, state power. Cambodia faces a cultural imbalance between men and women. Most Cambodian politicians are men and there are fewer opportunities for women in the political fields. Part of this problem is a result of the conservative traditional norms within Khmer culture that place a lower value on women than men in all sectors of society. Moreover, poverty, illiteracy, discrimination, lack of encouragement and opportunity, and the absence of a specific policy on promoting and providing opportunities to women, are obstacles for women who want to participate in politics and social activities (COMFREL 2011). Low levels of education amongst Cambodian women have been attributed to the lack of female representation in politics; women feel they don’t have the skills, qualifications or experience to stand as candidates, represent their country and make decisions. A qualitative analysis conducted by Seithi (2013) finds that lower level of education results in the lack of self-belief amongst women. Around 30 percent of Cambodian women have reached undergraduate level but they are not able to use their capacity to engage in public office due to the strong prejudice and stereotype (Seithi 2013). There is a mindset that politics is a man’s role. Some people think that politics is not safe and thus women should not get involved. Women and Politics is also included in my gender studies course. I often asked my students “Do you think
politics is dangerous to women?” Not surprisingly about 95% of my students raise their hands thinking that politics was very dangerous. The perceived danger was not just for women as politics was considered very dangerous for both men and women. This creates pressure on young women who are interested in politics.

Another problem is politicians doubting women’s capability. Male politicians do not respect women (Seithi, 2013). They look down on women’s capacity both in terms of education and qualification. Women are considered physically and emotionally weaker than men. Additionally, the stereotyping of women’s roles within the home is deeply rooted in Cambodian society.

Cambodian Women’s family roles

Cambodia, along with many other nations, is a country where men and their activities are valued more than women and their tasks. Family is focused on a strong bond between a husband and a wife, who each has links with siblings outside the marital relationship. However, the strongest enduring relationship found in village social organization is that between parents and children. This means women’s roles as mothers are paramount, although their status also depends on how they behave as wives and sisters. The primary roles of wives and mothers demonstrate the importance of marriage and parenthood in Cambodian society (Surtees, 2003). Traditionally, Cambodian women are tasked with the care of the children, responsibility for the household, including its economic survival, and ultimately with ensuring the success of their husbands (Surtees, 2003). Women gain social respect and prestige from the status of being good mothers and ‘well-behaved’ wives. This contrasts highly with the position of men. Family responsibilities make it hard for women to participate in politics; many Cambodian women are faced with a ‘double burden’ as they spend time on income-generating activities, as well as caring for other family members and completing household duties (Seithi, 2013). Such a conception of the woman’s role in the family represents an obstacle for women wanting to actively engage in politics because they are always attached to and responsible for children in the family.

Husband’s Control

Cambodian culture upholds male dominance. For example, the 2005 Cambodia Demographic and Health Survey shows that almost half of
respondents (45%) agreed with the statement, “It is better to educate a son than a daughter;” 42% also agreed with, “A married women should not be allowed to work outside the home even if she wants to;” and 53% agreed that, “The important decisions in the family should be made by the men of the family.” (National Institute of Public Health, National Institute of Statistics and ORC Macro 2006; cited in Eng et al. 2009, p.238). Cambodian culture and gender inequality have placed women in a subordinate position, this is also a major risk factor for violence against women and discrimination against women.

HE Dr. Ing Kantha Phavi, Minister for Women’s Affairs has addressed some challenges in promotion and advancement of women status during her presentation to the Government Congress May 30-June 01, 2008. Those challenges include “(a) The changing of the social attitudes and behavior is a longterm process that needs strong commitment and support; (b) National and international financial resources are needed to implement existing and future gender mainstreaming policies and programs; (c) National Capacity at all level in MoWA, line ministries and related institutions for gender analysis, research and evidence based advocacy is still limited; (d) The coordination and communication with other line ministries and institutions for the effective implementation of gender mechanism and policies are still limited” (MoWA, 2008, p. 18)

**Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

Discrimination against women violates the equality of rights and respects for human dignity and is an obstacle to the participation of women on equal terms with men in the political, social, economic and cultural life of their countries. The United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979 which aims to eliminate any forms of discrimination against women and thereby promote women’s rights. Discrimination against women is defined in *Article 1 of CEDAW* as referring to “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other fields”. In order to promote women’s rights and women’s equal access to food, health, education, employment and justice and to ensure the equal rights of men and women to enjoy all economic, social, cultural,
civil and political rights, Cambodia ratified CEDAW in 1992. Accordingly Cambodia has agreed to implement its provisions.

Article 2 of CEDAW addresses policy measures: “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discriminations against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.”

Article 4 of CEDAW addresses contemporary special measures “(1) Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. (2) Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.”

Article 5 of CEDAW addresses sex role stereotyping and prejudice “States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it
being understood that the interest of the children is the primordial consideration in all cases.”

Article 7 of CEDAW addresses political and public life “States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.”

Article 8 of CEDAW addresses representation “States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their government at the international level and to participate in the work of international organizations.”

It is clear from these articles that Cambodia has accepted a number of obligations aimed at securing equality of women at all levels of society. More especially, Cambodia has agreed to take positive measures, in law and policy, to promote the rights of women. This can even mean, in terms of Article 4, adopting temporary special measures to promote women above men until such time as parity is achieved.

Cambodian Constitution

The Cambodian Constitution also reflects a commitment to equality between men and women and a desire to encourage the equal participation of women in politics.

Cambodian Constitution Article 31 provides “Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, color, sex, language, religious, belief, political tendency, birth origin, social status, wealth or other status.” (Rights and Freedom)

Cambodian Constitution Article 35 provides “Khmer citizens of either sex shall be given the right to participate actively in the political, economic, social and cultural life of nation.” (Political equality)
Government Policies

In order to move forward with CEDAW and the equality requirements of the Constitution, the Royal Government of Cambodia has undertaken a number of measures. The government established the Secretariat of State for Women’s Affairs in 1993, which was replaced by the Ministry of Women’s Affairs in January 1996, then the Ministry of Women’s and Veteran’s Affairs from 1999 to 2004 (MoWA 2004). When the new government was formed in July 2004, the Ministry again became the Ministry of Women’s Affairs (MoWA). In February 1999, the Ministry of Women’s and Veterans’ Affairs published its first Five Year Strategy Plan, Neary Rattanak (Women are Precious Gems). Neary Rattanak was aimed at creating “a new image of Cambodian women, moving from disadvantaged group to the nations’ invaluable asset and one with great social and economic potential” (MoWA, 2004).

**Neary Rattanak II (2004-2008)** focused on “Enhanced participation of women in economic development especially in micro and small enterprises, based on the principle of equitable distribution of economic resources including water, energy, land and information; Right to legal protection to enable women to avoid domestic violence, trafficking, rape and all other forms of violence; Women and girls’ rights to health care to address serious problems such as maternal and infant mortality, nutritional issues and HIV/AIDS; Women’s and girls’ rights to education, literacy and skills training; Substantive participation of women at all levels in the institutions of governance.” In order to promote Cambodian women in decision making, Neary Rattanak II set a goal to “develop the skills and confidence of women to make a greater contribution to decision making at all levels of governance.”
**Action Plan on Women in decision-making**

<table>
<thead>
<tr>
<th>Focus</th>
<th>Activities</th>
<th>Outputs, Targets &amp; Indicator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women in public service</td>
<td>Schedule of training in leadership and management, and other relevant skills</td>
<td>Women public servants skills in leadership, management and policy making</td>
</tr>
<tr>
<td></td>
<td>Work with Secretariat for Public Function and CAR to advocate for gender responsive recruitment and promotion policies and procedures</td>
<td>Increased proportion of women civil servants and promotion to higher levels of decision making</td>
</tr>
<tr>
<td></td>
<td>Advocate with political parties and Ministry of Interior to increase the number of women governors, deputy governors, district and village chiefs</td>
<td>Increased proportion of female Secretaries of State to 15% by 2010 (CDMG)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Increased proportion of female under Secretaries of State to 17% by 2010 (CDMG)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Increased proportion of female governors to 6% by 2010 (CDMG)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Female deputy governors to 8% by 2010 (CDMG)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Village chiefs to 15% by 2010 (CDMG)</td>
</tr>
<tr>
<td>Women in Commune Council</td>
<td>Preparation of prospective women candidates for 2007 commune election</td>
<td>Increased number of women elected in 2007 elections to 15% by 2010 (CDMG)</td>
</tr>
<tr>
<td></td>
<td>Advocacy with political parties</td>
<td>Women are two of the first five candidates on the party lists</td>
</tr>
<tr>
<td></td>
<td>Cooperate in training programs of new women members</td>
<td>Women members understand their roles and responsibilities and have skills to carry their work</td>
</tr>
<tr>
<td>Women in National Parliament</td>
<td>Preparation of prospective women candidates for 2008 national election</td>
<td>Increased number of women elected in 2008 elections to 24% (CDMG) (NPRS)</td>
</tr>
<tr>
<td></td>
<td>Advocacy with political parties</td>
<td>Women are one of the first three candidates on the party lists</td>
</tr>
</tbody>
</table>

Source: Neary Rattanak II (2004-2008)
The achievement of Neary Rattanak II on Women in Decision-making

Table 1: The number of seats held by women in National Assembly

<table>
<thead>
<tr>
<th>Mandate/Year</th>
<th>Members of Assembly</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td>1993</td>
<td>120</td>
<td>7 (5.83%)</td>
</tr>
<tr>
<td>1998</td>
<td>122</td>
<td>15 (12.29%)</td>
</tr>
<tr>
<td>2003</td>
<td>123</td>
<td>24 (19.51%)</td>
</tr>
<tr>
<td>2008</td>
<td>123</td>
<td>26 (21%)</td>
</tr>
<tr>
<td>2013</td>
<td>123</td>
<td>25 (20.32%)</td>
</tr>
</tbody>
</table>

Source: National Election Committees

The Ministry of Women’s Affairs has achieved a great change of women’s contribution to decision-making at all levels of governance. According to table 1, overall there is an increase in number of female representatives in the National Assembly of roughly 13% between 1993 and 2003. However, the increasing rate of female representation drops from 13% to about 3% from year 2003 (19.51%) to 2008 (21%). Even though the percentage of women in the National Assembly has steadily increased over the mandate, which is a positive sign, there is still a concern regarding the underrepresentation of women in the National Assembly. Cambodia has not yet achieved gender equality in political empowerment regarding elected officials. There are about 53% female eligible voters but female representatives make up only 21% of the fourth mandate (2008-2013). “According to UNDP’s Human Development Index 2009, Cambodia has one of the lowest ratings of gender empowerment in Asia; a gender development index of 0.588 and gender empowerment index of 0.427. This ranks Cambodia at 91st, with the worst ranked at 109th.” (COMFREL, 2011).

Disappointingly, during the national elections 2013, the number of female representation decreased about 1% between 2008 (21%) and 2013 (20.32%). This is concerning as Cambodia may not be able to reach CDMGs, which target 30% female representation in the National Assembly by 2015.
Table 2: Number of seats held by women in the commune/Sangkat elections

<table>
<thead>
<tr>
<th>Mandate/Year</th>
<th>Councils of Communes</th>
<th>Chief of Communes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>Women</td>
</tr>
<tr>
<td>2002</td>
<td>11,216</td>
<td>1,056 (9.4%)</td>
</tr>
<tr>
<td>2007</td>
<td>11,353</td>
<td>1,717 (15.5%)</td>
</tr>
<tr>
<td>2012</td>
<td>11,459</td>
<td>2,038 (17.78%)</td>
</tr>
</tbody>
</table>

Source: National Election Committee

There have been improvements in women’s political representation in commune/Sangkat councils. Overall, there is an increase in number of female councilors by 8% between the elections year 2002 (9.4%) and 2012 (17.78%). There is also a steady rise of female chiefs of the communes from 2.6% in 2002 to 4.1% in 2005. However, while these figures support the notion that women’s representation is increasing and are encouraging, levels of representation remain a far cry from the CMDG5 targets to which the RGC has committed itself. For instance, as only 17.78% of commune/sangkat council seats went to women in 2012, it will not be possible to achieve the 25% CMDG target by 2015. Women that are elected representatives are consistently being elected to relatively junior positions. During the commune/sangkat council elections in June 2012, 1,590 women received Member seats but 164 were elected to the position of Second Deputy, 189 to the position of First Deputy, and only 95 to the most senior seat of Commune Chief (CCHR 2013).

These figures show that Cambodia still faces challenges in reaching CMDGs, which projects that by 2015 women will hold 30% of the positions at the national level and 25% at the Commune/Sangkat level.

Quota Policies

Quota policies are globally considered as an effective way to increase female representation in politics. They are also acceptable in terms of international law through Article 4 of CEDAW, quoted above. Quota policies have been adopted in more than 100 countries and their adoption has resulted in the increase in number of female representation, with an average of 22% in contrast to the countries, which do not implement quota policies and only have 13% female representation (Seithi, 2013). RGC supports women in politics but do not set quota policies because RGC considers that it can be a form of discrimination against men. While this is arguably correct, such discrimination is justifiable under Article 4 of
CEDAW, as long as it is temporary and necessary to secure the goal of equal representation, or even just increased representation of women.

**Research Methodology**

The research has been conducted following the mentoring from the Raoul Wallenberg Institute. After finishing the initiative human rights research training in Thalat, Laos in February 2014, the research outline was finalised. A mixed research approach has been selected for the study including desk review and in-depth interviews. For the research, I conducted literature review from journals, textbooks, government’s policies and national action plans used to promote women’s participation in politics. To make the study more practical, four women who actively engage in Cambodian politics, leadership role, and human rights defending were interviewed. I conducted in-depth interview with the minister from the Cambodian ministry of women affairs for approximately 90 minutes. The interview was conducted in Khmer language and recorded with a smartphone recorder. The minister signed on the consent form and permitted the whole interview to be recorded and the minister agreed to be quoted as the minister of women affairs. The interview with the minister started with her personal experience as a woman who actively engages in Cambodian politics. This interview helped to analyze the women ministry’s work regarding the implementation of human rights of women in political participation. Also, the interview looked at the barriers to and challenges facing Cambodian women in political participation. The second participant of the research was a human rights defender from Licadho. Licadho is one of the main human rights organizations that aims to promote human rights in Cambodia. This interview was conducted in English and the participant has signed on the consent form and allowed the interview to be recorded. The participant agreed to be quoted as the human rights defender and the interview took about 90 minutes. Similar to the interview with the minister this interview looked at her personal experience in promoting human rights, analyzing women’s roles, and discussing whether Cambodian tradition still plays a role confining women from joining politics. The other two women are the women leaders in the local level from Kampong Cham province. Attempts to secure interviews with two other women who played very active roles in empowering Cambodian women in leadership and another female prominent politician from the opposition party were unsuccessful. Hence, this study was conducted with just four interviews. Since the study is based on a qualitative approach, with only four interviewees it cannot be used to
generalize and applied to Cambodian society as a whole. However, the research can be utilized as a way to explain the reasons behind lower participation among Cambodian women in politics. It is thus still of considerable academic value.

**Background of Women in Decision Making**

The research finds that women who hold positions in higher level of politics and decision making mostly come from a well-off and supportive family and have high education. For example, the Human Rights Defender (HRD) is a highly educated woman whose mother was the first female member elected in Cambodian parliamentary election during the Sangkum Rea Str Niyum (People’s Socialist Community). The HRD is a physician. She said her family fully supported her. The HRD and her family have helped bringing Cambodia into the peace agreement after a long history of civil wars. Similarly, the Minister of Women’s Affairs is also a highly educated person, though she never wished to be a politician at first. She is a doctor and has participated in politics in 1990s. She also claimed that her family supported her.

On the other hand, the two women leaders from the local level are not highly educated. Mrs. Chantha (given name), the director of Women’s Affairs Office in one of districts in Kampong Cham province, finished school in grade 9. She participated in politics and leadership roles in 1980s and her parents did not support her at the beginning of her path career. She decided to take leadership roles because she wanted to understand about women’s roles, promote women, and help to manage the family and the society. At the beginning, she did not receive any salary, her family was very poor, and she almost gave up her job. Her parents did not want her to work because they thought a woman like her should just stay at home and do farming. Interestingly, other people saw her differently. The villagers thought she looked cool and it was good to have a female leader. Her male counterparts, on the other hand, discriminated her. They think women cannot walk around the kitchen (Khmer proverb meaning women are supposed to take care of housework and they are not supposed to work outside) and cannot work like the men. She faces many challenges in her career. Her office did not have budget to help poor rural women. Mrs. Chantha mentioned that during the commune/council election, men only put their male team on the top of the list while women are put in the bottom list. Hence, there is less likely for women to be elected as the chief of the commune.
Similarly, Mrs. Maly (given name) is currently the chief of one of communes in Kang Meas District, Kampong Cham and she finished school in grade 9. Mrs. Maly became the member of commune council in 2002 and participated in the commune work by helping women who were the victims, elderly, orphans, and raised money from NGOs to support poor people. She said she never wished to be a politician or hold a high position in the higher position. She participated in the commune work because she wanted to learn and work. She saw people who worked in the offices dressed up nicely, while a pork seller like her poorly dressed up. She was elected to be the chief of the commune in 2007 but she refused to take the position due to the lack of self-confidence. She then was elected again in 2012 and decided to take the role because other people including provincial governors persuaded her to take the position. Villagers love her and want her to be their chief of the commune. The officials from her party told her that if she did not take the position, her party would lose trust and vote from the people. Mrs. Maly mentioned that she faced many challenges but she worked hard to solve them. She mentioned that she there was much work that she had to take care of after she became the chief of the commune. Her husband supports her but he is sick very often so she is both the chief of the commune and the leader of the family. She has to wake up at 3 am almost everyday to take care of her family business and children before she can go to work. Because she is married with children, it is very hard for her to go far away from home. For example, she was once invited to join a meeting in the Philippines but she rejected the invitation because of her family. Interestingly, she mentioned that she was not discriminated by her male counterparts. The male team supports her and she always discusses and seeks for advice from her team and the former chief of the commune. However, she is discriminated by her female leaders. She mentioned that those female leaders were jealous of her because many villagers loved and supported her. Those female leaders were afraid that Mrs. Maly would take their positions in the future as she did a lot of good work for her commune. She raised money to support the poor villagers and even built the road for the village.

Women’s Participation in Politics

There is still gender inequality in political participation in Cambodia. Even though there is decrease of discrimination against women in politics, gender stereotype still confines women’s ability to fully engage in politics. Responding to a question of Cambodian women’s situation in politics, the HRD pointed out that in the past there were very few women who were
interested in politics. She returned to Cambodia from France in 1989 and established LICADHO organization. At that time she wanted to have half female and half male staff working in LICADHO. She tried to convince women to work with her but they rejected her request. Those women said no because they had to stay at home and look after their children. The HRD said it was very difficult at that time because women only wanted to stay at home. She believed that Women Codes of Conducts (Chbab Srey) was the main obstacle for women. The HRD continued that older grandmothers or mothers or older sisters often told their younger female relatives not to go for higher education or enter politics. There was a stereotype that politics was the men’s job. There was progress of women’s participation in politics from 1993 to 2013.

**Progress and Change**

The HRD appreciated the progress of Cambodian women’s participation in politics even though she noted it changed very slowly. She recalled that during her first visit in Cambodia women were very reluctant to talk about politics and did not want to get involved. She stated that the Prime Minister has appointed one female deputy governor in each province and district. Also, there is an increase in women representation at the commune level. However, the HRD would like to see half female and half male governors in the 25 provinces and cities, not just female deputy governors. Cambodia has only one female deputy prime minister and recently it was announced that she would retire.

According to the HRD, it is very important for Cambodian women to join politics. About 52% of the population is female and if Cambodia uses all the economic forces [both men and women go to work], the country will develop tremendously. When women have higher education, good jobs, and independent financial resources, they tend to have fewer problems at home, she claimed. The country is developing because of the population. She expressed concern over reliance on foreign aid and continued that if all women could work they could share the men’s work and help grow the economics of Cambodia. She disagreed that it is only women who have to take care of the family and questioned why women work more than men. In her opinion, it is not fair to the women when men take all the higher positions in the country and women just stay at home.

“If a woman can take care of her family…she can take care of her community…her country the same way as her family…I see no obstacle that why women can or cannot participate in the development of the country…” said the HRD.
When she was asked about her opinion regarding quota policies, she explained that the policy was not a discrimination against men. Quota policy is considered as temporary special measures in terms of CEDAW and that is not discrimination in favor of women. More than 100 countries adopt quota policy and it is internationally accepted as a special measure. The special measure is just temporary and it shall be eliminated after it reaches equality. The HRD teases that failure to adopt quotas is because the government does not understand the convention.

“Government said they didn’t want to set quota because they didn’t have enough quality female candidates or not enough high education women…I said that was just an excuse…I asked do you think all male candidates have high education? …they didn’t answer to me…it’s because men only trust men…it’s the lack of political wills” said the HRD. She also mentions that if we look at those elected male candidates’ background, some of them do not have higher level education at all. When the government said they did not have enough qualified female candidates that were just an excuse. The lack of political will from government is the main problem. She believes that more advocacies have to be done in order to push them [government] in political women empowerment.

**Contradicting Points of View between the Government and Civil Society**

It is very interesting to find that there is a contradiction in opinion between the minister of women affairs and the human rights defender. The minister claims that the lack of education, financial resources and family support are the main problems behind lower participation of Cambodian women in politics. She said when men undertook political campaigns they received more financial support from both family and others. The minister did not say anything about the lack of political will on the part of the government. She explained that the government did not set quota because sometimes government did not have enough qualified female candidates and it was wrong and unfair to men in the office. According to the minister, the government uses “Special Measures” instead of quota policy. The Special Measures aim to empower women such as appointing one female deputy in each province or district. The minister also pointed that women did not have confidence in themselves when it came to politics. There are not many women who are interested in politics and those women who are interested in politics often do not receive much support or trust from female followers. She said that the female followers often vote for male candidates rather than for the female candidates. The minister also stated
that it is very difficult to empower women in politics due to the lack of trust from others. Hence, women have to work a lot harder to show that they are qualified to engage in politics. The minister also mentioned that family responsibility is another challenge. When men participate in politics, women will look after the family and children. However, when women participate in politics, there will be a question as to who will be responsible for the family? The minister does not really see tradition as the main problem, but she thinks that tradition is partially involved in lower participation of women in politics.

**Women Empowerment**

The study finds that there are some civil organizations, which are working to promote women in leadership and public services. For example, the Harpswell Foundation Dormitory and Leadership Training Center that has a mission to promote and nurture the younger female generation towards becoming leaders. The organization was founded by Dr. Alan Lightman in 2006. It provides free room and board to young female university students who have high potential and ambition to become female leaders in the future. The organization provides leadership training, critical thinking skills, debating skills focusing on politics and economics, advocacy skills, freedom of expression and opportunities for young women to empower themselves to become leaders.

More of the younger generations are interested in political participation. According to my observation, the social network opportunities (particularly Facebook) have provided broader discussion of politics in Cambodia. Not just that, female garment factory workers are more daring to speak their opinion and protest demanding more salary increases. Additionally, there are many female villagers who are victimized by land grabbing and come out and express their views asking for respect for their land ownership. This shows that there is a greater change among Cambodian women’s participation in politics and social affairs. Cambodian women are not really trapped in household responsibilities or traditions anymore, many women understand about their rights and roles in the society. Therefore, I expect there is a positive change and progress among the young female generation in expressing their voice and taking part in politics.
Conclusion

The research finds that there is an increase in number of female representatives in politics over the years 1993-2013. The Government has ratified CEDAW and set up CDMGs and Neary Rattanak Strategic Plans in order to promote women’s participation in politics. According to the minister of women’s affairs, the lack of education, financial support, family support, and tradition are the reasons behind lower women’s participation in politics. The Human Rights Defender accepts that women code of conduct, family, and lack of qualified female candidates are challenges but to her they are really excuses. Government has established CMDGs and many good national action plans, but failed to implement them fully. The lack of political will and the lack of concrete implementation of CEDAW, CDMGs, laws, and strategic plans are thus the major reasons behind lower participation of women in politics in Cambodia.

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Judicial Independence in Cambodia:
An Overview Analysis

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1. Introduction: Theoretical Framework

Judicial independence is unequivocally the backbone of the rule of law and democratic values.¹ It plays a crucial role to guarantee a number of important issues for a positive society, such as promoting human rights, good governance, economic growth, social justice, social harmony, political stability, transparency and fighting corruption. It has the power to ensure equality before the law, which safeguard the poor from the rich, the weak from the powerful, and the minority from the majority.

Although the notion of judicial independence is universally recognized² and supported, the concept itself continues to struggle for its certainty, and it varies from one country to another depending largely on values of jurisdiction of the country.³ Nonetheless, judicial independence simply means the freedom of judges to carry out judicial duties without any sort of interference or influence. It requires judges to dispense justice based on the law and their sense of justice without yielding to external pressure such as the executive and the legislative and internal pressure such as their superiors and associates in the judiciary.⁴ Moreover, judicial independence is an essential element of the principle of the separation of powers, providing that the power of the executive, the legislative and the judicial bodies must be balanced and independent from one another.⁵ It simply requires that no single body have more power or influence on one another.⁶

In addition, judicial independence is a multifaceted concept,⁷ with two important aspects: the individual independence of judges and the collective or institutional independence of the judiciary.⁸ Individual independence of judges means that judges should enjoy full freedom to conduct their judicial

⁸ Commentary on the Bangalore Principles, supra note 1, para. 23.
Judicial Independence in Cambodia

functions without any fear of retaliation, reprimand or reward. It requires judges to have the ability to make an impartial decision in a particular case based on an impartial and objective assessment of the facts and application of relevant laws, without any improper interference or influence directly or indirectly from any source or for any reason.

As for institutional independence of the judiciary with regard to the separation of powers, it is the ability of the judiciary as an independent body to operate and function effectively free from undue interference by other bodies, especially the executive government. The judiciary should be also equipped with sufficient power to resist external interference when adjudicating cases and to ensure that law enforcement actors comply with court judgments.

The concept of the institutional independence of the judiciary incorporates matters including court administration, as well as adjudicative functions of the court such as assignment of cases or judges, control over administrative personnel, maintenance of court buildings and arrangement of judicial budgets and resources. Although some institutional relations, especially with the executive, are inevitable and even necessary, such relations must not undermine freedom of the judiciary in adjudicating cases and in upholding the law of the country.

This study will provide an overview analysis on institutional independence of the judiciary in the context of Cambodia, with some reflections from international instruments and other jurisdictions on the independence of the judiciary. The study does not cover all the aspects of institutional independence of the judiciary, but is limited to key aspects such as judicial appointment, security of tenure and judicial accountability. It is also imperative to draw attention to the distinction between institutional independence and individual independence (i.e. the impartiality of judges).

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12 Beijing Statement, para. 36; Commentary on the Bangalore Principles, para. 26.
13 Commentary on the Bangalore Principles, para. 26, citing Valente v The Queen [1985] 2 SCR 673 (Supreme Court of Canada). For more detailed discussion of the concept of institutional independence, Valente v The Queen [1985] 2 SCR 673 at [47]-[52] (Supreme Court of Canada).
discussed in relation to the scope of this study. Both terms are used interchangeably throughout this study, due to the fact that they are inherently interlinked.

While institutional independence is essential for judicial independence, it is not sufficient to ensure overall judicial independence, which requires the impartiality of all judges in the judiciary. However, the institutional independence of the judiciary has a substantial effect on the individual independence of judges. Individual judges may not be able to perform their judicial duties independently, knowing that the judiciary is subject to external pressure from the executive or the legislature.¹⁴

The study essentially adopts legalistic and normative approaches to its assessment of judicial independence in Cambodia, due to the presumption that the government must comply with international minimum standards of judicial independence to maintain its legitimacy and credibility. Sources primarily used for this study include both binding and non-binding instruments of various international standards and practices for ensuring judicial independence to determine whether Cambodia’s domestic laws and practices reflect and adhere to those standards.

2. International Norms and Practices on Judicial Independence

The best practices and principles of judicial independence can be found in numerous international instruments, which are essentially identical to one another. Some of the more notable instruments are the 1985 United Nations Basic Principles on the Independence of the Judiciary (UN Principles), and other key complementing principles such as the 2002 Bangalore Principles of Judicial Conduct (Bangalore Principles) and the 1995 Beijing Statement of Principles of the Independence of the Judiciary (Beijing Statement).

These international instruments on judicial independence stipulate minimum standards for guaranteeing the independence of the judiciary, by representing contemporary consensus among states, international experts and international development practitioners, as well as consolidating best practices from various jurisdictions.¹⁵ The drafting history of Bangalore Principles epitomizes this process.¹⁶

¹⁴ Commentary on the Bangalore Principles, para. 23.
¹⁶ See generally, Commentary on the Bangalore Principles, §Drafting History.
Generally, each member state is expected to assure the independence of its judiciary in its constitution or supreme law of the country.\textsuperscript{17} According to \textit{UN Principles}, institutional independence of the judiciary should be “guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”\textsuperscript{18}

Although judicial independence seems to be an obvious essential element to any just and fair legal system, a precise definition of the scope of the principle and the overall question of how to attain it may be difficult in a world full of diversity in culture and legal systems.\textsuperscript{19} Nonetheless, although virtually no justice system in the world that complies with every provision of \textit{UN Principles}, some countries comply to a greater extent than others.\textsuperscript{20}

2.1. Judicial Appointment

Appointment of judges is one of the fundamental requirements for institutional guarantee of judicial independence. \textit{UN Principles} provides that “any method of judicial selection shall safeguard against judicial appointments for improper motives.”\textsuperscript{21} Simply stated, judicial appointments should ideally be made without any types of direct or indirect interferences or influence to recruit the best available persons for judicial office. In practice, however, this requirement may vary from one country to another depending on the social values of each jurisdiction.\textsuperscript{22} In any event, there is a broad consensus that appointment of judges should be devoid of political and personal considerations. In this regard, there are two main aspects for judicial appointment: the merit criteria for appointments and mechanisms for appointment.

2.1.1. Merits for Appointment

The merit criteria for appointment of judges is a broad concept that does not have specific components or tools used to evaluate what are the qualities required when appointing judges.\textsuperscript{23} However, experts from various

\begin{flushleft}
\textsuperscript{17} \textit{UN Principles}, Principle 1. \\
\textsuperscript{18} Ibid, Principle 2. \\
\textsuperscript{19} Kelly, \textit{supra note 3}, p.1. \\
\textsuperscript{20} Ibid, p. 3. \\
\textsuperscript{21} \textit{UN Principles}, Principle 10. \\
\textsuperscript{22} Kelly, \textit{supra note 3}, pp. 13-17. Discussion about models of judicial appointment in common law and civil law system. \\
\end{flushleft}
jurisdictions consider a range of elements to constitute the merit criteria. These can be classified into two aspects, personal qualities and professional skills. 24 Personal qualities include, among other things, independence, integrity, impartiality, and high moral character. Professional skills refer to legal knowledge and experience, intellectual ability and competence. 25

The international instruments acknowledge these two common elements of merit. For personal qualities, UN Principles stipulates that individuals appointed as judges should have “integrity and ability with appropriate training or qualifications in law.” 26 Beijing Statement states that judges should be selected “on the basis of proven competence, integrity and independence.” 27 Regarding professional skills, although Beijing Statement does not specifically mention legal skills and knowledge like UN Principles, it does insist on “the appointment of persons who are best qualified for judicial office.” 28

Without adequate professional qualifications including legal education, training and experience, it can be argued that judges are more likely to depend on the behaviors and decisions of their judicial superiors or peers in dealing with their own caseload. As a consequence, adequate professional competence of judges is therefore significant to enable judges to become more proactive and independent when deciding cases.

2.1.2. Mechanisms for Appointment

Mechanisms for judicial appointment are essential criteria in appointing judges. In any society, the process of judicial appointment contains formal and informal practices which vary from one country to another mainly due to their respective political cultures and social values. Although there are no standardized procedures governing judicial appointments, 29 the power to appoint judges should not be vested exclusively in the executive government. This is because there is always a risk that the executive will abuse its power of judicial appointment through personal consideration and political favoritism,

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25 Ibid.
26 UN Principles, Principle 10.
27 Beijing Statement, para. 11.
28 Ibid, para. 12.
which might undermine credibility of the judiciary. Judges appointed in this regard could be argued that they might be tempted to adjudicate cases in a way to serve the interests of their appointing authority, which may impair judicial independence.

An independent judicial body or a separate regulatory body to nominate candidates for judicial office is one desirable mechanism to reduce the exclusive power of the executive to appoint judges. Such bodies are assigned the task of choosing candidates, proposing a “recommendations only” shortlist, or providing a shortlist that require the executive to provide justified reasons when making decision on appointments of judges. The effectiveness of the selection body depends on its composition and the type of appointment system used. The body may be composed of senior judges, senior lawyers, senior prosecutors, distinguished legal academics, and even senior officials from the Ministry of Justice, as long as it is not under the exclusive control of the executive. Appointment mechanisms should be fair, participatory, and transparent.

Transparency requires that judicial vacancies should be publicly known through broad advertisement or announcement in order to reach as many potential applicants as possible and, more importantly, to gain public confidence in the appointment system. If not, there is great scope for manipulation of the requirement for appointment, and judges consequently might be appointed on the basis of personal or other considerations of the executive. Qualifications of the shortlisted candidates should be prepared in standard form curriculum vitae and published for public access and comment, especially academics and legal practitioners.

In addition, significant differences exist between the two main types of legal systems regarding judicial appointments. In common law system, most judges are selected from professionally experienced lawyers believed to have

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34 Malleson, supra note 23, p. 133.
37 Malleson, supra note 23, p. 128.
the requisite experience, competence, and personal traits best suited to the judiciary. For instance, in Canada, a lawyer with at least ten years of experience may apply for appointment as a judge to an independent federal committee who later provides the Federal Justice Minister with a list of the applicants they believed qualified. Those shortlisted applicants are generally recommended by an impartial committee of informed legal professionals. After consultation with political colleagues, the Minister then appoints judges mostly from supporters of the political party in power. Therefore, there are obviously some political considerations in the appointment process in common law systems.  

However, in European civil law systems as opposed to common law systems, judges are recruited without significant professional experience. In Sweden, for example, a person with a legal qualification may take a very competitive examination to become a law clerk for two years and then spend several years working to build up their professional experience in the court administration or as young judges in order to earn status as a permanent judge. Notably, they also can build their professional experiences outside the judiciary and still qualify to become a permanent judge. They can work in public administration serving as legal advisors or as a secretary of committees in government departments. As a consequence, the majority of judges are selected from those who have government experience. Therefore, it can be argued that judicial appointees in Sweden are selected through political considerations to some extent.

Similarly, in Germany, the State Justice Ministry has the ultimate power to decide on the appointment of judges. After passing the entry examination, law graduates are required to complete two years’ legal training in courts, prosecutors’ offices, administrative agencies and private practice. The appointment of judges by the Justice Ministry is aided by a judicial selection committee composed of legislative and executive officials as well as tenured judges and lawyers. Likewise, at the federal level, federal law provides for the creation in each state of a judicial appointment council composed of judges. This council provides advice as to the personal and professional aptitude of the candidates. The advice is not binding, although it has been suggested that it is usually followed.

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41 Ibid.
43 Ibid.
Italy appears to have the most transparent mode of judicial appointment. The Consiglio Superiore della Magistratura, a constitutional body responsible for judicial administration, is completely autonomous from the government and is primarily composed of judges who set public exams, with some assistance from the Ministry of Justice, and appoint candidates. Promotions to higher posts are based on years of service, which limits the opportunities for influence to be exerted by external pressures or dictated by politics.

Despite Italy’s apparently independent appointment structure, the 2014 World Justice Project, which assesses countries’ rule of law adherence, surprisingly ranked Italy globally at 26, Germany at 9, and Sweden 3, out of 99 countries. This statistic indicates that greater political interference in the appointment process does not necessarily jeopardize the independence of the judiciary, nor does it necessarily reduce respect for the judicial role.

From Germany’s point of view, it is argued that although the executive government is involved in the appointment of judges to a large extent, political interference is unlikely to be a serious concern because academic achievement and accomplishments in the traineeship period of the candidates are the main objective factors that are taken into consideration.

In the case of Sweden, the appointment of judges has always been considered an open process. Although the government has a final say on the appointment of permanent judges, it is bound to select from a list of candidates recommended by Domnarren, an independent committee composed of senior judges and lawyers.

The reality is that political intrusion in the appointment of judges is common in most jurisdictions. However, if appointments are based solely on political considerations or political services, the public will lose confidence in the judiciary. To maintain the balance between political considerations and public confidence, judges must be selected based on their merits, particularly professional skills and personal qualities such as integrity, efficiency, and sense of impartiality and independence rather than purely on political considerations. Moreover, the appointment process must also be entirely transparent and open to public scrutiny so that the publics are able to ascertain that judges are appointed based on their merits. It is argued that transparency in judicial appointment process is even more vital than the composition of the appointing authority.

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46 Ibid, supra note 40, p. 20.
48 Ibid.
49 USAID, supra note 36, p. 1.
2.2. Security of Tenure

Security of tenure for judges is another precondition of institutional independence of the judiciary. It is closely linked with judicial appointments as discussed above. When a person is appointed to judicial office, the next essential question is whether the tenure of their office is adequately secure or not. Without security of tenure, judicial powers will be undermined due to the fact that judges may conduct their judicial powers with a view to satisfy the authority that has the legitimate power to terminate their service without any reasonable grounds.  

UN Principles provides that “the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.”  

Similarly, Beijing Statement recommends that judges should be “appointed for a period to expire upon the attainment of a particular age.”  

Bangalore Principle provides that it does not matter whether a judge has life tenure or a fixed tenure, as long as it guarantees judicial independence from executive interference.  

The permanent tenure of judges may be fixed for life or for a fixed period of time to a certain retirement age so that judges feel more protected and confident in exercising their judicial duties fairly and impartially without fearing that the appointing authority will arbitrarily remove or replace them.  

In Sweden, there are interesting mechanisms along with the appointment process for judges to be entitled to a position as a permanent judge. Firstly, law clerks after passing the entry exam and serving as reporting clerks for 12 months are required to serve another two years as an assistant judge. Upon completion of this period, the assistant judge serves one more year as a judge in order to be qualified for a nomination as an associate judge. Both the assistant and associate judicial positions hold only a fixed-term tenure. At this stage, it is likely that they are tempted to adjudicate in a way that satisfy the appointing authority, which is the government in this case.  

The associate judge is further required to continue working either within or outside the judiciary in particular in governmental or administrative agencies until they are appointed as a permanent judge. Thus, judges in Sweden have to work their way through this meticulous process to earn a permanent status.

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50 Friedland, supra note 31, p. 2.  
51 UN Principles, Principles 11-12.  
52 Beijing Statement, para. 20.  
54 Adenitire, supra note 40, p. 7.  
55 Ibid, pp. 5-6.
However, having a life tenure is perhaps less desirable than a mandatory age of retirement tenure. A life tenure judge may eventually no longer properly discharge their duties due to ill health or old age. The physical condition of elderly judges naturally prevent them from properly discharging their duties, which can result in unnecessary inconvenience and delays in the judicial process. Malleson supports this argument by explaining that the introduction of a retirement age serves to uphold judicial independence because it minimizes the necessity to remove a judge for incapacity.\(^{56}\)

Although some may argue that life tenure may give impetus to judicial corruption, life tenure is in fact more likely to reduce judicial corruption. Life tenure gives a strong message to concerned parties that it is not easy to bribe judges who do not want to risk their secured job. A study on judicial independence in transitional countries found that judges without security of life tenure appear to submit to government demands more often than judges with life tenure.\(^{57}\)

A long-term tenure of judges sets a minimum retirement age for senior judges, which may have an adverse effect that jeopardizes judicial independence. Ill political motive, in particular by the government, may influence the body with the power of judicial appointment to take advantage of a long-term tenure when some senior judges are bound to retire from their positions despite their competence. However, the extension of judicial tenure is not a desirable solution either although it may be used to minimize the backlog of cases by using retired judges with rich experiences. The reason is that elderly judges who wish to continue their service may yield to the appointing authority or the government for the extension of their service. Such practice should be avoided.\(^{58}\)

In fact, the extension beyond retirement or re-employment of retired judges may adversely undermine judicial independence.\(^{59}\) In deciding cases, judges may be tempted to make decisions in a way that would help them be re-employed in the future.\(^{60}\) Accordingly, judges who view the executive government as their potential future employer might be tempted to appease the executive in exchange of favored treatment.\(^{61}\) Practically, it is inevitable that the executive government involves itself in some cases concerning its political interests. As a consequence, the general public may suspect that judges maybe be tempted to favor the government in deciding cases. This

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\(^{56}\) Malleson, supra note 23, p. 213.
\(^{57}\) Luu, supra note 35, p. 18.
\(^{58}\) Ibid, p. 19.
\(^{60}\) Friedland, supra note 31, p. 46.
situation undermines the independence of the judiciary and therefore, the practice of extension beyond retirement or employment of retired judges should be avoided.

Security of judicial tenure may also be endangered by changes of tenure, terms and other conditions of service. One potential risk to judicial tenure is that the executive government may be tempted to remove judges by reducing the tenure of judges in office. Another risk is that if the executive government does not like the existing judges’ decisions, it may reduce the judicial salary or change other conditions of service so that the judges give up their office with a view to earning more incomes in legal practice. Therefore, judicial independence requires that the tenure of judges and other terms and conditions of their service should not be changed to their disadvantage.

UN Principles provides that the “term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.”

Although it appears that UN Principles does not have an express provision preventing alterations or changes of terms and conditions of service, Beijing Statement provides that the tenure of judges “must not be altered to the disadvantage of the judge during their term of office.”

2.3. Disciplinary Measures

In the proper administration of justice, judicial conduct and the capacity to perform judicial duties are two important requirements for judges. The conduct and performance of a judge has a direct impact on the status and integrity of the judicial office, and therefore it is extremely significant to retain public confidence in the judiciary. In a democratic society, the publics expect their judges to maintain standards of judicial conduct and exercise judicial functions in accordance with legal norms and principles. Therefore, judges should be accountable for their inability to exercise judicial functions and for any breach of judicial conduct. This accountability can be ensured by way of disciplining judges or by the threat of removal from office due to incompetence.

62 UN Principles, Principle 11.
63 Beijing Statement, para. 21. It provides in more details that “Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.”
65 Malleson, supra note 23, p. 226.
Judicial accountability is generally aimed to ensure proper conduct and performance, which is closely connected with judicial independence. In general, judges are subject to disciplinary measures when they commit criminal offence, serious misconduct, or become incapable of carrying out their duties. Disciplinary measures normally include forced replacement or transfer, demotion, compulsory retirement and removal. Although these disciplinary measures have a direct influence on judicial tenure, both notions do not necessarily contradict to one another. Judicial discipline must be conducted through a fair and transparent procedure in accordance with the Constitution and laws of the country. It is important to note that judges cannot be disciplined for bona fide mistakes or holding different opinions regarding a particular interpretation of the law.

Without proper control over judicial conduct, the judiciary may do whatever it wishes, and abuse its power by, for example, taking bribes, performing poorly or committing crimes. The judiciary is also deemed as a privileged institution with high integrity and expectations of performance otherwise the public cannot rely on it for solving disputes and protecting their interests.

In every system of judicial disciplines there are two basic elements, causes for discipline and mechanisms for discipline.

2.3.1. Causes for Discipline

UN Principles and Beijing Statement provide two common causes for judicial discipline or removal: incapacity and misconduct or misbehavior. UN Principles provides that a judge may be subject to disciplinary action only for the causes of “incapacity or behavior” which make them unfit to perform judicial duties. Likewise, Beijing Statement states that judges may be removed from their office only for “proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge”.

The most common causes for discipline in all countries are incapacity and misconduct or misbehavior. Incapacity or incompetence of a judge can be

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66 Shetreet & Deschenes, supra note 7, p. 570.
68 Ibid.
70 UN Principles, Principle 18.
71 Beijing Statement, para. 22.
explained as a state of being unable or incompetent to perform the duties of judicial office. It may arise from the lack of physical, intellectual or mental ability. In this regard, the Federal Court of Australia held that incapacity could be relatively referred to “physical or mental incapacity.”

_Bangalore Principles_ in its commentary provides that competence in the performance of judicial duties requires legal knowledge, skill, thoroughness and preparation. Judicial competence may be diminished when a judge is incapacitated by drugs or alcohol, or is otherwise mentally or physically impaired. In a smaller number of cases, incompetence may be caused by inadequate experience, personality and temperament issues, or the appointment to judicial office of individuals who are unsuitable to exercise judicial tasks and exhibit that unsuitability in the discharge of judicial duties.

In addition, misconducts of judges relate to non-compliance with the standards of judicial conduct that should be complied with by a person holding judicial office. It refers to gross negligence or non-compliance with the standards that should be respected by judicial officers. If the standards of judicial conduct are not effectively maintained or respected, public confidence in the judiciary will be undermined. The question is what are these standards? Thomas explained that these standards derive from “perception of human duty,” which are one of the most rigorous regulated disciplines of professional conduct in the community.

_UN Principles_ and _Beijing Statement_ identically emphasize that disciplinary proceedings against judges should be determined in accordance with “established standards of judicial conduct.” However, none of the documents provide any specific standards of judicial conduct. It is to be noted that standards of judicial conduct can be found in domestic jurisdictions; for instance, in 2005 Cambodia adopted the _Code of Judicial Ethics_ to prescribe standards of judicial conduct for judges sitting before the Khmer Rouge tribunal.

In any society, judges are obliged to act or conduct themselves properly and they should always refrain from improper or wrongful conducts or acts. This is because the acts or conducts of judges, whether in their private

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72 Repatriation Commission v Moss [1982] 40 ALR 553 (Australia Law Reports), at [558].
73 Commentary on the Bangalore Principles, para. 192.
74 Ibid.
76 Ibid.
77 Ibid, pp. 10-11.
78 UN Principles, Principle 19; Beijing Statement, para. 27.
capacity or in office, have a great impact on public respect and confidence in the judiciary. Judges should refrain not only from acts or conducts which are apparently improper or wrongful, but also from acts or conducts which appear to be improper or wrongful. Any improper or wrongful acts or conducts of a judge would constitute judicial misconduct.

2.3.2. Mechanisms for Discipline

The effectiveness of judicial discipline systems relies on the characteristics of the mechanisms for discipline. For that reason, it is essential to establish appropriate disciplinary mechanisms for judges applied by the assigned authority to ensure their accountability. If the authority assigned with this task abuses its power through unnecessary or unsound interference, judicial independence is potentially threatened. Therefore, the power of judicial discipline should be vested in mechanisms that can balance the tension between judicial independence and accountability and can manage judicial disciplinary matters fairly and effectively.

Although UN Principles does not specifically mention the mechanisms for judicial discipline, it does indicate that the powers for judicial discipline may be vested in the judiciary or parliament. UN Principles emphasizes that judges subject to judicial discipline are entitled to an expeditious procedure and a fair hearing. UN Principles further provides that decisions in the proceedings for discipline or removal, except decisions taken by the highest court or the legislature, should be “subject to an independent review”. Beijing Statement recognizes that states may adopt different procedures of disciplinary measures due to their differences in history and culture. The Statement also recognizes that disciplinary procedures by parliamentary have been traditionally adopted in some countries, while these procedures may not be suitable in other countries. If parliamentary procedures are not considered appropriate, the Statement argues that “the procedures for the removal of judges must be under the control of the judiciary.” Like UN Principles, the

80 Thomas, supra note 75, p. 9.
81 Ibid, p. 15.
83 UN Principles, Principle 20.
84 Ibid, Principle 17.
85 Ibid.
86 Beijing Statement, para. 23.
87 Ibid, para. 24.
Statement emphasizes the right of judges to a fair hearing according to established standards of judicial conduct.\textsuperscript{88}

Judicial discipline systems by parliamentary procedures are found in most common law countries, such as Canada, England and the United State of America. Under such systems, disciplinary proceedings are conducted in a form of impeachment by parliament. For instance, Article II of the US Constitution indicates that only the Congress has the ultimate power to impeach judges for judicial misconducts.\textsuperscript{89}

Impeachment involves the trial of a judge by parliament, which enables the parliament to take disciplinary action against judges itself.\textsuperscript{90} Under this system, parliament acts as a mechanism to prevent the executive from exercising the power to discipline judges exclusively. It can therefore safeguard judges from arbitrary removal by the executive government.

Neither of UN Principles and Beijing Statement embraces the use of exclusive executive power in disciplining judges. If the executive has exclusive powers in respect of judicial discipline, judges may be placed in a position yielding to the executive.\textsuperscript{91} Thus, it is not desirable for the power to adjudicate disciplinary proceedings to be granted exclusively to the executive because it is arguably the most important power to uphold the rule or law and maintain the balance of separation of powers, in particular the executive.\textsuperscript{92}

In some cases, the executive is entrusted with the powers to carry out disciplinary measures, but in exercising such powers the executive may be required to consult senior judges.\textsuperscript{93} In this regard, it can be inferred that the judiciary has only consultative role and that the executive is not bound to take advice from senior judges.

Some judicial disciplinary models adopt an approach whereby the power to discipline judges is entrusted to the executive, but the power is limited subject to the recommendation of the judiciary. In this approach, the judiciary can instigate disciplinary investigations and proceedings in order to prepare recommendations for the executive regarding measures against judges. The executive then decides on appropriate disciplinary measures based on these recommendations.\textsuperscript{94}

\textsuperscript{88} Ibid, paras. 26-27.
\textsuperscript{92} Ibid.
\textsuperscript{93} Ibid.
\textsuperscript{94} Ibid.
Accordingly, the power to discipline judges should be preferably vested in a mechanism that is independent of executive control.\(^95\) However, to ensure judicial accountability, the disciplinary power should not be vested exclusively in the judiciary either.\(^96\)

Self-regulated judiciary can be found in some civil law countries like France and Italy. Under this system, a judicial council or commission is established and comprised of all or majority of senior judges. It is entrusted with the powers to oversee virtually all aspects of judicial affairs, especially judicial discipline.\(^97\) However, judicial independence is a complex phenomenon that judges may become subservient to senior judges who have the disciplining authority although they may be independent from the executive.\(^98\)

In short, independent bodies like a parliamentary and a judicial commission are considered as most capable of being independent and impartial in disciplining judges.\(^99\) However, their effectiveness depends largely on their compositions, powers and functions. In this regard, an open and transparent process is once again of the paramount importance in ensuring that the powers of these independent bodies are significant for limiting the exclusive executive power of disciplining judges. Even though the judiciary has only recommendation or consultative roles, transparency requires that judges’ advice or recommendation are published for the publics to scrutinize the executive’s decisions regarding the manner in which the executive deals with judicial discipline.\(^100\) For that reason, transparency enhances public confidence in the disciplinary system and harmonizes the tension between independence and accountability in disciplining judges.

3. Judiciary in Cambodia

3.1. Historical Background

Following the collapse of the Khmer Rouge regime, under which a quarter of Cambodia’s population perished,\(^101\) only six to twelve lawyers survived, out

\(^95\) Shetreet, *supra note 91*, p. 40.
\(^99\) Mollah, *supra note 69*, p. 68.
\(^100\) Shetreet, *supra note 91*, p. 40.
of an established 400 to 600 legal professionals prior to the regime. The Khmer Rouge mainly targeted professionals, intellectuals and educated people, as these people were deemed to be a major threat to the communist party. The regime abolished the judicial system completely, abolishing courts and removing the roles of judges, prosecutors and lawyers. Even though there was provision for a judicial system under the Khmer Rouge constitution, in reality, there were no courts or any procedural protections established. Instead, the regime turned what were once courthouses, law schools, and other judicial and legal institutions into military bases or detention centers.

After toppling the brutal regime, Vietnam took control of Cambodia as an occupying power and helped set up a legal system according to the Communist model in which courts were considered as agents of the state meant to protect the policies of the government. Due to the shortage of legal professionals to fill in the court office, Vietnam provided a legal training course for three months to a number of Communist Party members. It was not until 1993, following a peacekeeping mission of the United Nations Transitional Authority in Cambodia, that there have been more legal training projects, but these remains limited to ensuring a strong judiciary.

3.2. Legal Protection of Judicial Independence

3.2.1. Constitutional Protection

Article 128 of the Constitution clearly states that the judiciary shall be an independent authority that has a primary responsibility to guarantee the rights and freedoms of the citizens. Article 129 further articulates that the judiciary represents the citizens of Cambodia and has the exclusive right to adjudicate according to the laws and procedures in force. For this reason, the

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103 Ibid.
107 Ibid., p. 16.
108 Ibid., p. 17.
109 The Constitution of the Kingdom of Cambodia (the Constitution) entered into force 1993.
judiciary earns the public trust and should carry out their duties diligently, consistently, and wholeheartedly. Article 130 emphasizes the separation of powers, under which the judicial power is entirely independent from the executive and the legislative. In addition, Article 131 gives the Department of Public Prosecutions the exclusive duty for criminal prosecutions. Article 132 confers on the King the privileged role of guaranteeing judicial independence and requires the Supreme Council of Magistracy (SCM) to assist him in fulfilling this duty. Finally, the Constitution requires there to be separate laws regarding the statuses and specific roles of judges and prosecutors.110

3.2.2. Three Laws on the Judiciary111

The three draft laws on the judiciary are fundamentally important to ensure genuine independence of the courts, increasing the transparency and competency in the courts, and the proper functioning of the courts. Although the Constitution requires that there be separate laws governing judges and prosecutors, the process of drafting these laws has been prolonged.112 Eight years after the commencement of the Constitution in 1993, in 2001, the government declared to set a short-term and long-term action plan for legal and judicial reform.113 Subsequently, three judicial laws, namely the Law on the Statute of Judges and Prosecutors114 (Law on Judges and Prosecutors), the Law on the Organization and Functioning of the Supreme Council of the Magistracy115 (Law on SCM), and the Law on the Organization and

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110 The Constitution, Art. 135.
111 Despite the passing of these three judicial laws, these laws are yet to be officially available. Unofficial Translations (from Khmer to English) of these laws were distributed during Cambodia National Conference on the Dissemination of Three Laws Concerning the Justice Sector and Discussion in 16 December 2014 (The National Conference on Judicial Laws). At the time of writing these official translations had not been publicly released. Thus, this article is based on these Unofficial Translations for reference and analysis.
114 Law on the Statute of the Judges and Prosecutors, passed by the National Assembly on 23rd May 2014, reviewed by the Senate on 12th June 2014, and approved by the Constitutional Council in its decision N0 149/003/2014 KBTH.Ch on 2nd July 2014.
Functioning of the Courts 116 (Law on Court Organization), were drafted. However, the passing of these three draft judicial laws continued to be delayed between the Cabinet of Ministers and the Ministry of Justice (MoJ). 117 Twelve years later in 2013, Surya P. Subedi, United Nations Special Rapporteur on the Status of Human Rights in Cambodia, called on the government, in particular the MoJ, to release the three draft laws as soon as possible for public scrutiny. 118 In April 2014, the Cabinet of Ministers adopted the three draft laws. Later, Prime Minister Hun Sen publicly stated that the Cabinet of Ministers needed to forward the three draft laws to the National Assembly directly, without the need to seek any consultation from the opposition party and NGOs. 119 One month later, the three draft laws were unfortunately passed by the National Assembly and subsequently by the Senate. 120

The enactment of the three draft laws has been widely criticized by national and international rights groups and which consider that some provisions give excessive power to the executive, which may enable it to undermine the independence of the judiciary. 121 Further, the laws have been enacted unilaterally by the ruling party without any input or consultations from the opposition party, rights groups and other relevant stakeholders. 122 To


119 See the Agence Kampuchea Press (AKP news) Prime Minister: the Draft Laws concerning justice system will be adopted by the National Assembly, dated 28 April, 2014.

120 Cambodia Center for Human Rights (CCHR), 2014, Briefing Note: Judicial Reform, viewed 8 May 2015, http://www.cchrcambodia.org/admin/media/analysis/analysis/english/CCHR%20Briefing_Note_Judicial%20Reform_ENG_2014%E2%80%8B.pdf


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address such concerns, in mid-December 2014, the MoJ, with the support of the German and French embassies, organized a “National Conference on the Dissemination of Three Laws Concerning the Justice Sector and Discussion.” However, participation in this conference was limited to government and court officials, including lawyers, judges and clerk students, leaving academics and rights groups uninvited.

From the government’s perspective, the three laws on the judiciary provide Cambodia for the first time with a comprehensive legal framework governing the judiciary. The fact that three judicial laws share a single purpose in its first article to ensure the independence of the judiciary indicates a positive and collective commitment of the government to improve the justice system.

Law on Court Organization is expected to improve the efficiency and effectiveness of the judicial system by providing two more jurisdictions for the establishment of individual courts to deal with labor and commercial disputes. It offers a clear distinction between the administrative and adjudicative functions of the courts. Currently, Cambodia has only one appeal court, located in Phnom Penh, which hears all cases appealed from the courts of first instance. In this regard, the Law will also contribute enormously to the limited capacity of the Appeal Court by establishing more provincial appeal courts. Although it appears that the government is yet to assess resources available and needed to materialize the creation of regional appeal courts, it is important to have such provision in the law.

Law on Judges and Prosecutors is designated to establish a co-administration relationship between the SCM and the MoJ. Under this model, Law on SCM outlines the role of the SCM with respect to appointment and judicial discipline of judges and prosecutors, while the MoJ is vested

123 See generally agenda of the National Conference on Judicial Laws.
124 Law on Court Organization, Art. 1; Law on Judges and Prosecutor, Art. 1; Law on SCM, Art. 1.
127 Ibid, Article 6 states, “there is only the court which has power to adjudicate the case and to make a court decision.” Article 10 stipulates, “there is an administrative unit, at all levels of courts, which is under central administration of the Ministry of Justice for the support of court and prosecution operation.” Article 11 further provides that “the Ministry of Justice has power to control/review on administrative works of all courts with General Department of Court Administration as support unit.”
129 Law on Court Organization, Art. 35.
130 Law on Judges and Prosecutors, Art. 7.
131 Law on SCM, Arts. 18 & 20.
with the powers to control the administration of the judiciary both courts\(^{132}\) at all level and the SCM.\(^{133}\) Although it appears that the powers of the judiciary and the executive inevitably overlap, the ultimate goal of the Law is to guarantee impartial independence of judges to decide on cases to safeguard the constitutional rights of the judiciary.

### 3.3. Cambodian Perspectives on Judicial Independence

#### 3.3.1. Judicial Appointment

##### 3.3.1.1. Merit Criteria

As discussed above, the merit criteria for appointment of judges can be analyzed through personal qualities and professional skills. With regard to personal qualities, Article 4 of *Law on Judges and Prosecutors* provides that an individual selected to be a judge should be proven to have competency, honesty and good morality.\(^{134}\) Article 19 of the Law also further indicates that student candidates applying for entry exam to become a judge must not have any prior criminal offences, whether misdemeanors or felonies. However, the independence of judicial officers is provided for by *Law on Court Organization*, which requires judges to perform their duties independently, heartedly and consciously with strict obedience to the law.\(^{135}\)

As for the professional skills, although there is no specific provision for an individual to have a legal qualification to be qualified as a judge, there are rigorous mechanisms for the appointment of judges to ensure that an individual possesses high legal qualification when appointed to the judiciary (discussed in detail below).

##### 3.3.1.2. Mechanisms Criteria

According to Article 1 of *Law on SCM*, the SCM is an independent body, established to assist the King to guarantee the independence of the judiciary, as required under the Constitution.\(^{136}\) Accordingly, the SCM has the authority and primary responsibility for nominating judicial candidates and proposing to the King for the appointment, promotion and transfer of judges, as well as

\(^{132}\) *Law on Judges and Prosecutors*, Art. 7.

\(^{133}\) *Law on SCM*, Art. 10.

\(^{134}\) *Law on Judges and Prosecutors*, Art. 4.

\(^{135}\) *Law on Court Organization*, Art. 6.

\(^{136}\) *Law on SCM*, Art. 1; *The Constitution*, Art. 132.
any disciplinary action in relation to them.\textsuperscript{137} Article 4 of \textit{Law on SCM} provides for the composition of the SCM. The King chairs the SCM, along with 11 other members from the executive and legislative officials, as well as tenured judges and prosecutors.\textsuperscript{138} The appointment of judges is further regulated by \textit{Law on SCM} and \textit{Law on Judges and Prosecutors}, which provides for the relationship between the SCM and the MoJ in such matters.

Article 19 of \textit{Law on Judges and Prosecutors} provides for the recruitment of judges through public entry examinations. To be entitled to sit the examination, candidates must be born in Cambodia and be of Khmer nationality. Age restrictions also apply. Thus, candidates must be 35 years or under if they are students, or 40 years or under if they are public servants. Candidates must also hold a bachelor degree, at a minimum, have no prior criminal offences and be in good physical condition.\textsuperscript{139} There is also an internal exam for experienced lawyers, court officials and clerks, provided that they have at least bachelor degree of law and five years’ work experience in the legal field.\textsuperscript{140} Both the public and internal examination, including its rules and procedures, is managed exclusively by the MoJ.\textsuperscript{141} Candidates who pass the entry exam are required to undertake further training for at least two years, which is organized by the MoJ following consultation with the SCM.\textsuperscript{142}

Once they have successfully completed their training, student judges are then appointed as intern judges\textsuperscript{143} or considered as a judge on duty\textsuperscript{144} for another year. On completing this internship, the intern judge is officially included in judge’s cadre and designated as a subordinate judge. Those who fail to pass the internship test can request for an additional internship period, which is determined by the SCM.\textsuperscript{145}

The MoJ has the administrative authority to assign work to all judges and appoint them to work in the MoJ after receiving approval from the SCM.\textsuperscript{146} Judges also have the ability to engage in other work, as Article 31 of \textit{Law on Judges and Prosecutors} states that “judges who have been assigned to work in other institutions.”

Judges in Cambodia are primarily divided into three grades: (1) senior judges (\textit{Udom Chaokrom}), (2) intermediate judges (\textit{Vorak Chaokrom}), and (3)

\begin{itemize}
  \item \textsuperscript{137} \textit{Law on SCM}, Art. 18.
  \item \textsuperscript{138} \textit{Ibid}, Art. 4.
  \item \textsuperscript{139} \textit{Law on Judges and Prosecutors}, Art. 19.
  \item \textsuperscript{140} \textit{Ibid}, Art. 23.
  \item \textsuperscript{141} \textit{Ibid}, Arts. 22-23.
  \item \textsuperscript{142} \textit{Ibid}, Art. 23.
  \item \textsuperscript{143} \textit{Ibid}, Art. 24.
  \item \textsuperscript{144} \textit{Ibid}, Art. 47.
  \item \textsuperscript{145} \textit{Ibid}, Art. 25.
  \item \textsuperscript{146} \textit{Ibid}, Art. 7.
\end{itemize}
subordinate judges (Anuk Chaokrom). Each grade consists of a range of degrees that further designate the seniority of judges, which is determined by a separate Royal Decree. The President of the Supreme Court is the highest senior judge while the rest of the judges of the Supreme Court are senior judges. All judges of the Appeal Court except the President, who is deemed to be a senior judge, are either senior judges or intermediate judges. Likewise, the President of the Court of First Instance is an intermediate judge, while all others are intermediate judges or subordinate judges.

Judicial promotion occurs via promotion of an individual judge’s degree and grade, and is determined specially by a separate Royal Decree. Yet, Law on Judges and Prosecutors also enumerates some basic principles required for promotion of degrees and grades of judges, based on various factors, including their work ethic, compliance with judicial codes of conduct, work experience, job performance and further studies in law. Law on Judges and Prosecutors further emphasizes that promotion of judges is quantitatively determined by the needs of the judiciary and the availability within the national budget to fund such promotions.

Promotion of the degrees and grades of judges is conducted and assessed by their senior judges or the heads of state institutions where they work. Each judge has an individual bulletin, which their senior judges or supervisors at public institutions use to evaluate their performance and give them scores. In this regard, the appointment of judges requires some political considerations.

After having two years experience, any judge who wishes to be promoted can register in the list for promotion. Law on Judges and Prosecutors establishes a Commission (the Commission), which has the power to decide judicial promotions. That Commission is chaired by a Secretary of the State of the MoJ, along with three prosecutors, three judges and a Secretary General of the SCM. The MoJ can also appoint additional members to assist the work of the Commission. If any judge has the potential to be promoted but is not included in the list for promotion, they can file a complaint to the MoJ. At this point, it can be argued that the MoJ is likely to abuse its power by

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147 Ibid, Art. 10.
148 Ibid.
149 Ibid, Art. 49.
150 Ibid, Art. 27.
151 Ibid, Art. 28.
152 Ibid, Arts. 27-29.
154 Ibid.
155 Ibid, Art. 32.
156 Ibid, Art. 33.
157 Ibid, Art. 35.
blocking such a complaint from proceeding further without reasonable grounds if the complainer acts in a way which is against the interest of the government. The fact that there is no specific provision that allows judges to launch a complaint against how the MoJ deals with concerning issues in the complaint reinforces the argument. For this reason, an open and transparent process of this appeal mechanism may be a practical solution to balance the power of the MoJ.

Article 5 of Law on SCM does not prohibit members of the SCM from holding another position in other bodies during their terms of office. The possibility that a member of the SCM could hold multiple positions simultaneously creates the possibility of conflicts of interest arising. Further, members of the SCM who hold other positions are highly unlikely to be able to perform their tasks and responsibilities properly, due to the multiple demands on their time. As a result, they cannot oversee the judiciary effectively, and their backlogs become bigger, risking that matters may be transferred to a team working under the MoJ to deal with.\textsuperscript{158} As a consequence, all members of the Commission double their works, and their work with the Commission can become second priority compared to their first job.\textsuperscript{159}

Given all these provisions, it can be fairly concluded that the appointment of judges in Cambodia is strongly influenced by and through the MoJ. This raises the further question of politicization of the judiciary.

Although the judiciary alone has the exclusive right and power to adjudicate cases,\textsuperscript{160} the question is whether the MoJ’s administrative powers over the judiciary adversely affects the adjudicative power of the judiciary. If it does not, then the involvement of the MoJ at an administrative level does not matter. What really matters is the \textit{de facto} independence of the judiciary not the \textit{de jure} independence.\textsuperscript{161}

3.3.2. Security of Tenure

\textit{Law on Judges and Prosecutors} provides that retirement age of judges is 60, in most cases.\textsuperscript{162} Only judges of the Supreme Court can extend their retirement age to 65, and any further extension beyond 65 requires permission from the SCM upon a request of the concerned judge.\textsuperscript{163} The MoJ provides

\textsuperscript{160} \textit{Law on Court Organization}, Art. 6.
\textsuperscript{161} Remarks by Hauerstein, RK 2014, presented at the National Conference on Judicial Laws.
\textsuperscript{162} \textit{Law on Judges and Prosecutors}, Art. 62.
\textsuperscript{163} \textit{Ibid.}
administrative assistance to the SCM regarding this issue by preparing and submitting a draft Royal Degree to the King for signature for the request to be enforced.\footnote{Ibid.}

As discussed above, there are arguments for and against fixed tenure and life tenure of judges. However, Cambodia should adopt a more flexible and balanced approach regarding security of tenure of judges. Since judges of the Supreme Court are the most senior, requiring rich experience and great professional achievements, they should hold a life tenure. One of the main arguments against life tenure is that elderly judges can be a burden on the judicial system, requiring the devotion of time and resources to prove their incompetence, in order to require them to retire due to mental or physical fragility that is the result of old age. However, it can be fairly argued that there are far fewer cases at the Supreme Court than at lower levels, which indicates that judicial processes at the Supreme Court are unlikely to be delayed merely because judges have life tenure. While \textit{Law on Judges and Prosecutors} requires judges who cannot fulfill their judicial duties due to mental and physical incompetence to retire,\footnote{Ibid, Art. 66.} it reinforces the argument for a life tenure that competence of judges should be the greatest concern, rather than the mere age of judges.

Although the MoJ can initiate a report to the SCM regarding suspicious or apparent incompetence of judges, in order for the SCM to decide on retirement,\footnote{Ibid, Art. 67.} this does not necessarily mean that the MoJ can remove judges for improper reasons. This is because the MoJ must prove the alleged incompetency through authenticated documents from an expert doctor appointed by the Ministry of Health.\footnote{Ibid.} MoJ’s involvement in this process is limited to providing administrative assistance by investigating and documenting evidences to the SCM, so that the forcible retirement of allegedly incompetent judges has a legitimate basis.

\subsection*{3.3.3. Disciplinary Measures}

\textit{Law on Judges and Prosecutors} establishes grounds for disciplinary actions against judges while \textit{Law on SCM} addresses mechanisms for discipline.

Article 50 of \textit{Law on Judges and Prosecutors} briefly enumerates some of the key obligations and code of conducts expected of judges. The provision stipulates that judges must adhere to their code of conducts. Although the provision does not specify clearly what are those ethical behaviors in the

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\footnote{Ibid.}
judicial code of conduct, it may refer to a separate judicial code of conduct that has not yet been adopted generally, although one has been adopted in respect of the Khmer Rouge tribunal. Moreover, Article 50 prohibits judges from engaging in any activity in their private life which may affect their “prestige, dignity and reputation.” In dealing with political issue, the judge must be “absolutely neutral.” 168 It can be implied that judges are not prohibited from holding a particular political ideology. However, this provision is silent on whether or not judges can involve in political activity. Any breach under this provision can lead to disciplinary action.

Article 53 of Law on Judges and Prosecutors emphasizes the obligation of judges to maintain professional confidentiality by forbidding judges from expressing themselves to the public through “all means of texts, writing or other ideas related to their function” without prior approval from the SCM. However, general information relating to proceedings of a case is permissible. In his latest report, Surya P. Subedi, United Nations Special Rapporteur on the Status of Human Rights in Cambodia, expressed his deep concern regarding this strict restriction, providing that judges should not “be prevented from contributing to debates on matters of public interest relating to the law, the administration of justice and the judiciary.” 169

Article 20 of Law on SCM establishes a Disciplinary Council that is composed of all members of the SCM. The President of the Supreme Court acts as the president of the Council in disciplinary actions against judges. The General Prosecutor of the Supreme Court is president of the Council in disciplinary actions against prosecutors. Disciplinary actions concerning the President of the Supreme Court are presided over by the King or his royal representative.

It is argued that the President of the Supreme Court and the General Prosecutor of the Supreme Court should not automatically be Presidents of the Disciplinary Council. Members of the Disciplinary Council should be elected by all members of the SCM or by all judges and prosecutors. In order to avoid conflicts of interest, the initial stage of a disciplinary action should be addressed by the disciplinary commission whose members should be elected by all judges and prosecutors or an independent body. 170 In sum, the

168 Ibid, Art. 50.
169 Subedi, supra note 121, para. 38.
composition of this disciplinary commission should differ from the members of the SCM.171

Law on SCM also establishes an “Inspection Team” to assist the Disciplinary Council in investigating disciplinary matters.172 The Inspection Team is composed of co-leaders between a senior judge and a senior prosecutor.173 This composition is arguably satisfactory due to the fact that it is free from the MoJ. However, there is no specific provision to prevent them from holding other positions as a judge and a prosecutor. Again, it appears that they may occupy two positions simultaneously, raising doubts on effectiveness of their work performance.

The Inspection Team is also equipped with the power to summon any judges to be interviewed in relation to disciplinary issues. If the summoned judge fails to cooperate with the Team, such behavior is considered as a breach of judicial conducts.174 The Team is required to submit the result of their investigation to either the Secretariat General of SCM or the MoJ.175 After receiving the complaint, the MoJ can decide whether to undertake a preliminary investigation to establish a disciplinary case file before sending it to the Disciplinary Council.176 At this stage, the involvement of the MoJ in the accountability process of the judiciary may impair the independence of the judiciary.

A judge accused of committing judicial misconduct has the right to defend themselves personally, or through a legal representative, before the Disciplinary Council.177 However, the hearing concerning disciplinary matters is conducted in a private meeting and all attendees or persons involving in the hearing are required to maintain its confidentiality strictly.178

It is essential that disciplinary procedures against judges are fair and impartial, adhering to the principle of judicial independence. Accordingly, disciplinary procedures should define disciplinary faults clearly, operate

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172 Law on SCM, Art. 21.
173 Ibid.
174 Ibid, Art. 22.
175 Ibid, Art. 23.
176 Ibid, “disciplinary motion against the judges and prosecutors shall be submitted to the Secretariat General of the Supreme Council of Magistracy or to Ministry of Justice. The Ministry of Justice can decide for preliminarily examination and investigate this disciplinary motion in order to file the disciplinary case before the deciding to submit to the Disciplinary Council of the Supreme Council of Magistracy for further processing.
177 Ibid, Art. 25.
178 Ibid.
without any political pressure, and representatives of political authorities, such as the MoJ, should not be included in any disciplinary body. ¹⁷⁹

A hearing on professional misconduct of judges should be held in public to ensure transparency. An exception to this presumption may be made in the interest of justice, such as where public order or an individual’s privacy is at risk. The ultimate decision should be based on sound legal reasoning, in public; and the decision should be appealable or be able to be the subject of judicial review. ¹⁸⁰

4. Conclusion

The judiciary is widely perceived to enjoy limited independence in authoritarian regimes, where law and the judiciary are highly politicized and susceptible to the ruling party. ¹⁸¹ Under authoritarian regimes, politically significant cases are entrusted to regime-controlled courts to protect the regime’s interests. There are many reasons authoritarian governments attempt to control the judiciary, including to maintain the status quo by overseeing and disciplining local officials to ensure that they are obedient to the central government, to legitimize government economic policies or unpopular decisions irrespective of human rights and public concern, and to intimidate and silence dissenting voices through prosecutions and lawsuits. However, the courts also enjoy some measure of independence in private cases or non-political cases. ¹⁸² In this way, the authoritarian regime can legitimize itself, at least to some extent, depending on the regime’s ability to attract foreign investment. Relatively independent courts play a positive but limited role in protecting citizens’ rights and can be used by opposition groups as a forum for their grievances, since by going to court they can gain significant visibility if they receive an unfavorable result. ¹⁸³

Generally, the judiciary in Cambodia faces similar problems regarding its independence as those which are faced by courts in authoritarian countries. It is argued that, for the past twenty years of democratisation, the Cambodian government has actually retreated from the model of democratic governance,

¹⁷⁹ Opinion No. 10 of CCJE, supra note 171, para. 63.
¹⁸⁰ UN Principles, Principle. 20.
¹⁸² Ibid. p. 240.
¹⁸³ Ibid.
moving from an unstructured authoritarian regime to a structured authoritarian regime.\textsuperscript{184}

However, it is also clear that democracy is not a prerequisite for judicial independence, although judges in true democracies generally enjoy greater independence than their counterparts in authoritarian regimes.\textsuperscript{185}

This paper has attempted to demonstrate that the notion of judicial independence is a dynamic concept in which there is no one model of government that can automatically guarantee judicial independence. Comparisons with other jurisdictions also demonstrate that it is difficult to assess and determine which model is best.

Efforts to strengthen and promote the independence of the judiciary must take a holistic view, involving interrelated situations and changes in the political, social, economic and legal domains. Bearing in mind that Cambodia is still struggling to rebuild itself after the destructive Khmer Rouge Regime, it will take time and effort to address the wide range of issues adversely affecting its legal system. The resolution of one problem can cause problems in other ways, meaning that the path to judicial independence is an iterative process, dealt with in a piecemeal fashion. In this task, it is important to ensure that the judiciary does not carry the burden of resolving such complex issues alone. To do so would ignore the reality and complexity of the situation in Cambodia.


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**NEWS MEDIA**


Restrictions on Freedom of Expression
In
Social Media Networks within Cambodia

HEM Sambath 1

Abstract

This paper will address the Cambodian government’s restrictions on freedom of expression in social media networks. This paper will also focus on the types of law that the government uses to restrict freedom of expression in social media networks and the impact of using those laws.

Nowadays, social media networks such as Facebook are gaining popularity for sharing current social issues and even criticizing the government. Two incidents in particular in 2013 gave rise to much concern about the approach of local authorities towards social media posts in order to suppress freedom of expression online.

This paper will explain the international framework for regulating freedom of expression on the internet, particularly Article 19 ICCPR and the 2012 Human Rights Council’s acknowledgement of applicability of human rights online. Comparisons will be made with Cambodian national and constitutional laws to determine what gaps there may be in protecting human rights online.

I. Introduction

This paper will explore freedom of expression in Cambodia. However, it will focus only on freedom of expression in social media networks, something increasingly facing restriction by the Cambodian Government. Freedom of expression is a cornerstone of any functioning democracy.

1 I am working as a law lecturer at Cambodian Mekong University. Moreover, I finished the Master of Law in Human Rights at Cambodian Mekong University in 2014. As a law lecturer at this university, I teach many subjects such as Introduction to Human Rights Law, Introduction to Cambodian Law, Business Law, Civil Law, Civil Procedure Law, General Administrative Law, and Public Administrative Law.
Without the right to seek and impart information, to hold opinions and to engage in debate, citizens cannot meaningfully participate in the political lives of their nation. Freedom of expression is also an important guarantor of other rights; allowing citizens to express dissatisfaction when their other rights are violated, for example. In Cambodia, social media networks, such as Facebook, are gaining popularity and are increasingly used to share breaking news, current social issues, social advocacy, and to criticize the government. While traditional forms of media such as print media, radio and television in Cambodia are heavily censored and biased the internet has thus far remained relatively free in comparison. However, nowadays authorities are increasingly paying attention to internet activities and are keen to gain tighter control over what is said online. In May 2012, the government announced that it is drafting the first cyber law to protect and control the use of the internet. By way of example showing that the government tries to put heavy control on the internet, in November 2012, the Ministry of Posts and Telecommunication issued a circular regulating access to internet cafes in order to prevent school children from accessing online games and pornography. Had it been implemented, it would have resulted in the closure of almost all such establishments in Phnom Penh.

Furthermore, two incidents in 2013 of local authorities targeting social media posts in order to suppress freedom of expression online have increased fears that cyber censorship is creeping into Cambodia.

This paper will analyze whether the government is restricting freedom of expression or in fact its actions are justified as it is actually protecting the rights of citizens through protecting public security.

II. The Importance of Freedom of Expression

Freedom of expression has long been viewed as the cornerstone of democracy and fundamental freedoms. In addition, it allows for expression of opinion, exchange of ideas and dissemination of information, which are crucial in a democracy. Importantly free expression also enables victims to speak out when other rights or

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3 For details, see Kounila, Keo; ‘Cambodia Bans Internet Cafes Near Schools’ Global Voices (19 December 2012) http://bit.ly/1gF9FX
freedoms are violated. Freedom of expression is essential in any society to ensure transparency, accountability and good governance, which are in turn necessary for the protection and promotion of human rights for all. From a human rights perspective, freedom of expression may be regarded as important for three main reasons. First, it is a key right for ensuring individual dignity, it gives people autonomy to express themselves as they see appropriate and exchange ideas with others so as to obtain a better understanding of themselves and the society around them. Second, freedom of expression, as noted above, is essential to democracy. Without the ability to express their views freely, access information and assemble together to address issues of common concern, people are unable to influence government, participate in decision-making and hold government to account all of which are vital tenets of democracy. Without the ability to freely debate and express views or access information, voters are unable to make informed decisions about the best way in which their country should be governed, leaving them isolated from participating in the decision-making process. Freedom of expression also bolsters democracy by providing a tool for accountability. Scrutiny of the government, and the opposition, by the media, civil society actors and citizens is an important mechanism for curtailing corruption and dishonesty. Freedom of expression thus plays an essential role in improving democratic governance and is vital for the progressive development of democracy. Third, freedom of expression is not only important as a right in itself but it is the fundamental guarantor of all other human rights. Without the space to exercise freedom of expression it becomes increasingly difficult to protect and promote other human rights and bring to light violations of those rights.

6 Ibid., pp. 21 – 22.
7 Joint Submission (Check this. Supra note 3 does not mention anything about Joint Submission but only “Opinions...”). Need to clarify here. Editor’s suggestion: put the full title of the joint submission and the date of its submission or the website on which this document can be accessible, then delete indirect reference to note 3), supra note 3, p. 2.
III. The Protection of the Right to Freedom of Expression under Both International Law and Cambodia Law

The right to freedom of expression is defined and protected under both international law and Cambodian law. The right to freedom of expression is not absolute; both international law and Cambodian law recognize that in certain extraordinary situations, free expression must be constrained in order to protect other public interests. The circumstances in which, as well as the extent to which, freedom of expression can be limited are also defined under both international and Cambodian law.

Domestic Law

Cambodia’s domestic law entrenches the right to freedom of expression both expressly and through the incorporation of the relevant provisions of the UDHR and ICCPR into the Constitution. Pursuant to Article 31 of the Constitution: Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights ...\(^8\)

In a decision made by the Cambodian Constitutional Council, the body mandated to safeguard respect for the Constitution,\(^9\) dated 10 July 2007, it was confirmed that all human rights instruments to which Cambodia has acceded form part of the Constitution.\(^10\) It is firmly established through the provisions of the Constitution, read together with the decision of the Constitutional Council, that all organs of the State are bound to comply with these international human rights instruments.

Freedom of expression is additionally and separately guaranteed by Article 41 of the Constitution, which states that ‘Khmer citizens shall have freedom of expression, press, publication and assembly’.

Article 80 of the Constitution expressly protects the right to freedom of expression as exercised by members of the National Assembly. It states 'No assembly member shall be prosecuted, detained or arrested because of opinions expressed during the exercise of his (her) duties. The accusation, arrest, or detention of an assembly member shall be made only with the permission of the National Assembly or by the Standing Committee of the National Assembly between sessions, except in case of flagrante delicto. In

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\(^8\) Article 31 of the Constitution.
\(^9\) Article 136 of the Constitution.
\(^10\) The Constitutional Court of Cambodia, decision no. 092/003/2007.
that case, the competent authority shall immediately report to the National Assembly or to the Standing Committee for a decision.\textsuperscript{11}

Article 35 of the Constitution guarantees Cambodian people the right to speak and participate on issues that affect them, stating that ‘Khmer citizens of either sex shall have the right to participate actively in the political, economic, social and cultural life of the nation. Any suggestion by the people shall be given the full consideration by the grant of the State’.

Moreover, Article 39 gives Cambodians the right to ‘denounce, make complaints, or file claims against any breach of law by the state or social organs or by members of such organs committed during the course of their duties’.

The Constitution also guarantees the exercise of freedom of expression for Cambodian citizens in Article 37 in the form of ‘The right to strike and to non-violent demonstration’.

Article 2 of the Law on Peaceful Assembly 2009 (the “Demonstration Law”) reinforces the guarantee in the Constitution when it states that ‘The purpose of [the] law is to assure freedom of expression of Khmer citizens through peaceful assembly...’.

The Press Law 1995 (the “Press Law”) also contains a positive guarantee of freedom of expression for the press. Article 1 provides that ‘This law shall determine a regime for the Press and assure the freedom of press and freedom of publication in conformity with Articles 31 and 41 of the Constitution...’.

Article 20 of the Press Law further provides that ‘No person shall be arrested or subject to criminal charges as a result of expression of opinion’.

\section*{International Law}

\textit{Article 19 of the Universal Declaration of Human Rights (the “UDHR”) states that: ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’.}

The UDHR was adopted by the United Nations General Assembly (UNGA) and provides for human rights standards accepted by all member states of the United Nations (UN). Generally speaking, UNGA Resolutions, such as the UDHR, are not directly binding on States. However, much of the UDHR is widely regarded as having acquired

\footnotesize{\textsuperscript{11} Article 80(2) and (3) of the Constitution.}
customary international law status and is therefore widely considered to carry legal force.\textsuperscript{12} Furthermore, as will be discussed below, the UDHR has been incorporated into Cambodian law.

The International Covenant on Civil and Political Rights\textsuperscript{13} (the “ICCPR”), which Cambodia acceded to in 1992, also contains legal obligations on State Parties to respect freedom of expression. Article 19 contains a guarantee of freedom of expression in terms similar to the UDHR and provides that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

The right to freedom of expression, as provided for in the UDHR and ICCPR, can be exercised through statements or through conduct. It includes the right to make statements of opinion or express ideas, be it through speech, writing or art. The right also encompasses conduct that expresses opinion, for example, the wearing of certain clothes, marching or demonstrating. The right to freedom of expression is not simply the right to say what one knows or to express one’s opinion; it necessarily includes the right to access information in order to effectively exercise the right to “seek, receive and impart information and ideas”. As such, it places a duty on public bodies to both disseminate information of key public importance and to respond to requests for access to publicly held information. The right to freedom of expression is thus a right that belongs to the ‘speaker’ and to the ‘listener’ equally.

It is crucial to note that the obligation on the State regarding freedom of expression is not simply a ‘negative’ obligation to withhold from interfering with the right. The United Nations Human Rights Committee (HRC), the treaty body that oversees the ICCPR, in its general comments on the ICCPR states that a positive obligation exists on the State to not just refrain from interfering with the right but to take positive steps to ensure that an environment exists to encourage the exercise of free expression.\textsuperscript{14}

\textsuperscript{14} Article 2 of the ICCPR and HRC, ICCPR General Comment No. 3: Implementation at the National Level (adopted at thirteenth session, 1981), available at:
IV. The Restriction of the Right to Freedom of Expression under both International Law and Cambodia Law

The right to freedom of expression is not absolute and can be subject to restrictions as stipulated under Article 19 of the ICCPR. Nevertheless, these restrictions must be provided by law for the achievement of legitimate aims and must be necessary (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order, or of public health or morals. Any restriction on freedom of expression must be proportionate to the legitimate aim pursued by the government.

In Cambodia, the Constitution may provide significant protection to the right to freedom of expression in theory; however, there are several domestic laws that actively restrict freedom of expression and are therefore unconstitutional and contradictory to Cambodia’s obligations under international human rights law.  

Permissible Limitations under Domestic Law

As with the international human right instruments, the right to freedom of expression under domestic law is not absolute. Article 41 of the Constitution, which guarantees the right to freedom of expression and free press, provides ‘No one shall exercise this right to infringe upon the rights of others, to affect the good traditions of the society, to violate public law and order and national security’. The permitted limitations on the right to freedom of expression provided for in the Constitution must be limited in accordance with international law. The exceptions outlined in Article 41 have formed the legal basis for domestic legislation restricting freedom of expression, including the provisions of the law dealing with defamation and disinformation, as well as concerning restrictions on persons who speak out against the authorities.  


Restrictions on Freedom of Expression under the Penal Code

The Penal Code, which came into force in 2010, contains several provisions which unjustifiably restrict freedom of expression and compromise Cambodia’s obligations under international human rights law and the Constitution. These provisions usually relate to defamation and disinformation. Defamation laws are founded upon the need to preserve and uphold the right to freedom of expression whilst recognizing that there is also a need for certain, expressly defined, exceptions to this right – namely the protection of a person’s dignity and reputation. Disinformation laws similarly are founded upon protecting dignity and reputation by punishing the deliberate circulation of false information. However, the broadness of the provisions of criminal law coupled with an absence of definitions, opens them up to misuse or abuse. Below is the table explaining the application of some provisions restricting freedom of expression under the Penal Code.

<table>
<thead>
<tr>
<th>OFFENSE</th>
<th>ARTICLE</th>
<th>PENALTY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defamation</td>
<td>Article 305</td>
<td>Fine of 100,000 to 10 million riel</td>
</tr>
<tr>
<td>Public insult</td>
<td>Article 307</td>
<td>Fine of 100,000 to 10 million riel</td>
</tr>
<tr>
<td>Malicious denunciation</td>
<td>Articles 311 &amp; 312</td>
<td>Imprisonment of 1 month to 1 year, and a fine of 100,000 to 2 million riel</td>
</tr>
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</table>

V. The United Nations General Comment No. 34 on Freedom of Opinion and Expression

Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights. However, the exercise of the right to freedom of expression carries with it special duties and
responsibilities. It can be restricted because of two conditions such as respecting of the rights or reputation of others or to the protection of national security or of public order or of public health or morals. Moreover, the restriction must be “provided by law”. The laws must not violate the non-discrimination provisions of the Covenant.

More information can be gathered from the concluding observations of the Human Rights Committee, which oversees implementation of the International Covenant on Civil and Political Rights by states parties. Defamation laws must be crafted with care to ensure that they comply with paragraph 3 of article 19 of ICCPR, and that they do not serve, in practice, to stifle freedom of expression. All such law, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, by their nature, subject to verification. Moreover, state parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a state party to indict a person for criminal defamation but then not to proceed to trial expeditiously. Such practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.

VI. The 2012 Human Rights Council’s Acknowledgement of Applicability of Human Rights Online.

The 2012 Human Rights Council’s acknowledgement of applicability of human rights online affirms that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Moreover, it recognizes the global and open nature of the Internet as a driving force in accelerating progress towards development in its various forms. It also calls upon all States to promote and facilitate access to the Internet and international cooperation aimed at the development of media

17 Concluding observation on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6)
18 Concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2).
and information and communications facilities in all countries. It encourages special procedures to take these issues into account within their existing mandates, as applicable. Plus, it decides to continue its consideration of the promotion, protection and enjoyment of human rights, including the right to freedom of expression, on the Internet and in other technologies, as well as of how the Internet can be an important tool for development and for exercising human rights, in accordance with its programme of work.  

VII. Recent Attempts to Apply Defamation Clause in Cambodia

Through my research, I have found out that social media networks, such as Facebook, are gaining popularity and are increasingly used to share breaking news, current social issues, social advocacy, and to criticize the government. Two incidents in 2013 give rise to much concern about the approach of local authorities towards social media posts in order to suppress freedom of expression online. The first is the case of Phel Phearun, a teacher who was summoned and threatened with defamation charges because of his criticism of the police on his Facebook page in February 2013. The second is the case of Cheth Sovichea, who, in November 2013, was also arrested for a Facebook post critical of the police. He too was threatened with defamation charges. Although both cases were dropped and both men released after they were made to apologize to the authorities, these examples suggest that the Cambodian authorities are increasingly paying attention to online activity and are keen to gain tighter control over what is said on the internet. More recently, in early February 2014, TV presenter and salon owner Duong Zorida was convicted on charges of defamation – resulting in a fine of two million Riel and an order to pay seven million Riel in compensation to the plaintiffs – after another woman accused Zorida of publically complaining, on Facebook, that the plaintiff was luring Zorida’s employees to change employer and come to work at her shop. This case highlights the

20 Human Rights Council’s acknowledgement of applicability of human rights online, 29 June, 2012. (Do you refer to the Resolution? Need to identify the document in a more specific and accurate way.)
21 CCHR, ‘Case Study: Phel Phearun’ (Factsheet) (March 2013) http://bit.ly/1amOOAq
Cambodian courts’ willingness to consider and criminalize online content similarly to offline discourse.

VIII. Concluding Remarks

The three cases above show that the government tried to use the Cambodian Criminal Code to restrict the expression of the three people by accusing them of defamation. If we look back to the article 19 of ICCPR, paragraph 3 states only about the restriction on the exercise of the right to freedom of expression doesn’t state which law should be used. Nevertheless, the United Nations Human Rights Committee’s General Comment No. 34 on Freedom of Opinion and Expression states that the criminal code is used only with serious offenses. Defamation is not a serious offense that should be punished under the criminal code. The use of the criminal code to punish defamation can make people afraid to use their rights to criticize the government. Moreover, putting the defamation charge in the criminal code is not following the international standard. According to United Nations General Comment No. 34 of Freedom of Opinion and Expression, only serious offenses are put under the criminal code; defamation is not the serious offense. As a result, the criminal code does not follow the international standard if the government puts the defamation charge under this law.
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Reports and Publications


Right to Strike vs. Legitimate Use of Force
to Restore Public Order in Cambodia

Deluxe Sao¹

Introduction

In Cambodia, the garment industry sector has become the engine driving the national economy. This industry has been almost exclusively driven by foreign investments and remains virtually 100 percent foreign owned.² Even though it is foreign owned investment, there should be compliance with Cambodian labor law and labor standards. Some studies on violations of the Cambodian Labor Law in the garment industry affirm results of other studies including those of the International Labor Organization (hereinafter ILO) on the actual level of compliance of labor standards in the garment sector.³ Particular issues include minimum wage, overtime pay, freedom to association, and so on. Low compliance is however noted in respecting union rights including collective bargaining, and especially right to strike.

The right to strike has been in dispute between the trade unions and employer associations recently, especially in 2014. Legally, employees have the right to strike but the right to strike shall be conducted within the scope of laws.⁴ When one or more workers and their employers cannot resolve their labor dispute through alternative dispute resolution, namely negotiation or mediation or arbitration processes, one party may decide to

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³ Ibid, p.9
⁴ See, Article 37 of Constitution of the Kingdom of Cambodia, see also chapter 13 of the Labor Law of Cambodia.
take action to force the other party to compromise. Workers may take action by withholding their work. This is called a “strike”. However employers may also take action by closing all or part of the workplace so that the workers cannot come to work.

Significantly, there have been several strikes concerning increasing the minimum wage. Up to May 2014, there were 40 strikes, involving 38,299 workers.\(^5\) Though such strikes are often organized, not many workers understand their rights.

This paper will explain the differences between legal and illegal strikes from the perspective of right to strike. It also explores legal strikes and the legal enforcement of laws on strike and public order by the authorities. It will enable the worker to understand about his or her rights, especially right to strike. The use of force to disperse illegal strikes will also be discussed. This research paper will thus identify how to implement the right to strike, both legal strike and strikes staged without complying with legal procedure, while maintaining the public order. It will conclude with proposed guidelines on the limitation of the use of force by authorities, guidelines which comply with human rights standards. It thus explains the limits of proportionate use of force against illegal strikes to restore public order in Cambodia.

**Statement of Problem**

The citizens might have heard from the local news that some national roads were blocked by workers demanding benefits but they will most likely be unclear as to the legal background. However, in early 2014, after the Cambodian security forces fired on garment workers protesting to demand for higher wages in Phnom Penh, killing at least three people, this right to strike was brought to the attention of the public. The same is true for workers. Not all workers understand their right to strike, though workers in the garment sector understand more than others.\(^6\)

This research paper purports to deal with the fundamental right to strike by differentiating between legal strikes and strikes staged without complying with the applicable legal procedure, and then with the extent to which force can be used against each strike to restore public order. The paper will conclude with proposed guidelines on the limitation of the use of force by authorities, guidelines which ensure Cambodia complies with international human rights standards. The research is limited to the right to

\(^5\) See Arbitration Council Foundation, Report 2014

\(^6\) This information was quoted from an interview made in July 2014, with an arbitrator from the employee list.
Right to Strike vs. Legitimate Use of Force

strike from the Cambodian legal perspective; however the applicable international legal instruments are included as evidence of the general accepted standard, in particular those of the International Labor Organization. The paper will differentiate the legal and illegal strike or strike staged without complying with the legal procedure.

Professor M. Sornarajah, in his book on international law on foreign investment, noted, as part of the risk in foreign investment, which he believed that the burgeoning law on human rights and environmental protection creates instability in an area of law that was designed solely with the single objective of protecting foreign investment. The creation of competing objectives of protecting human rights and the environment from the abuse of the multinational corporate leads to a recognition of the regulatory right of the state to interfere in circumstances where the multinational corporate investor abuses human rights such as labor rights or causes environmental damage. The increasing recognition of such a regulatory right will undermine the aim of investment protection and require recognition that a state has the right to intervene in an investment that poses a danger to the environment or involves an abuse of human rights. Given the extent of foreign investment in, for example, the Cambodian garment industry, businesses are capable of violating all human rights and therefore all human rights must be ensured and respected in their operations, some human rights are of more relevance to businesses. Those rights are the right to freedom of assembly and association; the right to freedom of expression; the abolition of slavery and forced labor; the right to non-discrimination and so on.

Professor Jean Michel Servais, on his paper on the ILO Law and the freedom to strike, demonstrated that the right to strike is fundamental and has long been recognized by the ILO. His paper also includes material on lawful sanctions against the unlawful strikes. Professor Kong Phallack, in the Introduction to Cambodian Law, also mentioned strikes and the legal procedure of striking in Cambodia.

Mixed methodologies will be deployed to respond to the aforementioned issues in respect of strikes and the use of force. The legalistic analyses methodology will be used to examine the right to strike (both legal strikes and strikes staged without complying with legal procedure) and the use of force in both national and international law. Qualitative methodology will also be used to develop understanding of

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8 Jean Michel Servais, “ILO Law and the freedom to strike” see also http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Servais.pdf
9 Hor Peng, Kong Phallack, Jorg Menzel (eds), Introduction to Cambodian Law, Cambodian Labor and Employment Law, p 298-301, 2012, Konrad Adenauer Stiftung.
different perspective about those issues relevant to strike and the enforcement of the right to strike in Cambodia through semi-structured interviews; 7 questions were asked in April 2014 to arbitrators on the employee list and employer list.

**Right to Strike**

Through strikes and lockouts, one party to the dispute puts economic pressure on the other party to compromise. If the workers strike, the employer is not able to earn any money. If the employer locks workers out, the workers cannot earn any money. In either a strike or lockout, both parties are affected economically. The difference is who initiates the action - the workers or the employer.

The right of workers to withhold their work and the right of employers to suspend their business operation are arguably fundamental freedoms in a democratic society. In Cambodia, the Arbitration Council has a key role to play in each situation. Under the Cambodian legal system, workers must take certain steps before they can exercise their right to strike. Significantly, they must have exhausted all peaceful avenues of resolving the dispute before they hold the strike. In the circumstance of a collective labor dispute, this will usually include arbitration.

The right to strike can also be exercised if the Arbitration Council fails to make or submit its award within the time limits set by law. If one of the parties objects to a decision of the Arbitration Council, the award will be unenforceable. The aggrieved party may seek resolution through the court to settle disputes relating to rights under a contract, but not the interest disputes. The courts are given a specific jurisdiction to deal with labor disputes under Articles 385 -389 of the Labor Law though the aggrieved party is not compelled to go to court. Parties may also take actions such as strike and lockout to compel the other party to comply with a collective bargaining agreement (CBA) or with the law. In this case, the strike or lockout is being used as a tool to resolve rights dispute.
Strike

The General Recognition of the Right to Strike\(^\text{10}\)

ILO convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organize recognizes the rights of trade unions as organizations of workers set up to further and defend their occupation interest,\(^{11}\) to formulate union programs, and to organize union’s activities.\(^{12}\) The unions have the right to negotiate with employers and to express views concerning economic and social issues affecting the occupational interest of union members. This constitutes the legal basis that the right to strike is one of the legitimate and indeed essential, means available to workers for furthering and defending their interests.

From a Cambodian legal perspective, recognition of the right to strike is still in dispute. For example the statement released by the Garment Manufacturer Association of Cambodia (GMAC) suggests that their understanding is that the right to strike is not fundamental:\(^{13}\) “The right to strike is not provided for in ... C87 and was not intended to be.” GMAC’s notice says “Is the right to strike therefore a fundamental right? NO. The right to strike is NOT a fundamental right.” However, the Constitution of the Kingdom of Cambodia recognizes the right to strike as stipulated in Article 37.\(^{14}\) Following the provisions in the constitution, Article 319 of the 1997 Labor Law makes it clear that the right to strike is “guaranteed” in Cambodia. Nevertheless, although workers have a right to strike, it shall be exercised within the limitation and qualification provided for in this right.\(^{15}\)

\(^{10}\) The committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interest, see also the 1996 digest, para 474, and for example 302\textsuperscript{nd} report, case 1908, para 381.

\(^{11}\) Article 10, ILO Convention 87 Freedom of Association and Protection of the Right to Organize 1948, see also via the link: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232

\(^{12}\) Ibid.

\(^{13}\) See also: http://www.phnompenhpost.com/national/right-strike-%E2%80%98fundamental%E2%80%99.

\(^{14}\) Article 37 “employees have the right to strike but the right to strike shall be conducted within the scope of law.”, Constitution 1993.

\(^{15}\) See also Article 319-321 of Labor Law of Kingdom of Cambodia.
Definition of Strike

A strike is a concerted work stoppage by a group of workers that takes place within an enterprise or establishment for the purpose of obtaining satisfaction of their demand(s) from the employer as a condition of their return to work.\(^\text{16}\) If all the 3 conditions are met, that action is considered as strike.

This definition provides a clear indication that a group of workers act collectively. Generally, when unions call a strike, the action clearly is concerted although workers who do not belong to unions can also go on strike. The term “concerted work stoppage” is still vague and doesn’t provide any exact number of the workers who must stop work to meet the condition set forth in Article 302 on collective labor dispute.

Moreover, when the right to strike is guaranteed by national legislation as in Cambodia, the question frequently arises as to whether the action undertaken by workers constitutes a strike in terms of the law. Any work stoppage, brief and limited, may generally be considered as a strike. It is hard to determine work stoppages as such but forms of strike action such as slowdown in work which is so-called go slow strike, or when working rules are applied to the letter which is so-called work-to-rule are often just as paralyzing as a total work stoppage. In the arbitral award case 201/14 – M & V International (3) of the Arbitration Council in Cambodia, the Council considered that even when workers appeared inside the factory, but failed to perform their work within the working hours, this could be considered as strike action.\(^\text{17}\)

Generally, strikes are categorized depending upon the nature of the demand(s) pursued through strike action, for example occupational strikes seek to guarantee the workers’ working or living conditions or trade unions might seek to guarantee or develop the rights of the trade union organization and its leaders. The objective of a strike is divided into two main types: political strike; and sympathy strike.\(^\text{18}\) However, Cambodian Labor Law provides further on the purposes of strike. There are only two lawful purposes of strikes in Cambodia: to enforce compliance with a collective bargaining agreement or with the law; and to defend the economic and socio-occupational interests of workers. The first purpose relates to rights disputes concerning the unlawful labor practices by employer, not complying with a collective bargaining agreement or with the law. For such reasons, the union or group of workers strike to enforce

\(^{16}\) See Article 318 of Labor Law of the Kingdom of Cambodia.

\(^{17}\) See arbitral award case 20/14 – Genuine vs FUF & CWUF, issued on 06 March 2014.

the agreement or the law. The second purpose usually occurs during negotiations on collective bargaining agreements when employer refuses to grant worker demands for wage increase, reduced working hours, promotion policies and other working conditions. Strikes in demand of better policy and working conditions were often held before some special occasions, such as the New Year’s day, the Khmer New Year, the Chinese New Year, and especially before the elections. As a matter of fact, after strikes in early 2014 the government agreed to increase the minimum wage consecutively from 2013 to 2018 to reach 160 USD per month of minimum wage. Every year the unions start striking before the tripartite discussion\(^\text{19}\) so as to put pressure on the employer and ministry to agree upon their demand.

The labor law lists specific unlawful purposes of strikes: dispute on the interpretation of a law, regulation, collective bargaining agreement or arbitral award accepted by the parties; and to revise a collective bargaining agreement or arbitral award accepted by the parties and that has not yet expired.\(^\text{20}\) For instance, workers may not strike to protest an interpretation of the law contained in a binding award of the arbitration or a judgment of a court. The employer has no authority to disobey such interpretations of the law and thus, it is not proper for workers to strike in order to force them to do so.

**Legal Procedure of Strike**

There are three elements to be met:\(^\text{21}\) the purpose of a strike; the timing of a strike; and the accurate legal procedure. Purposes of strikes has already been addressed above, therefore this section will focus more on the right timing of the strike and the legal procedure for calling a strike.

Although workers may have a lawful reason to strike, the strike still may be unlawful on the basis of timing. Several provisions set forth in the Cambodian labor law related to lawful time of strike.\(^\text{22}\) This timing provided by labor law sets out two specific triggers which make a strike

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\(^\text{19}\) Article 107 of Cambodian Labor Law gives authority to the Ministry of Labor and Vocational Training to determine the minimum wage after receiving recommendations from the Labor Advisory Committee, a tripartite body consisting of representatives from the ministry, employer associations and trade unions to work on the assessment of the needs of workers including the cost of living, salary levels and comparative standards of living as well as consideration of economic factors like economic development, productivity and employment.

\(^\text{20}\) See Article 321 of Labor Law of the Kingdom of Cambodia.

\(^\text{21}\) See Article 323-325 and 327 of the Labor Law of the Kingdom of Cambodia.

\(^\text{22}\) See Article 318-321 of the Labor Law of the Kingdom of Cambodia.
lawful: when one of the disputed parties objects the arbitral award\textsuperscript{23} and when arbitral award has not been rendered within time limits provided by law.

Beside timing, a strike is unlawful unless the members of the union have approved the strike by secret ballot as to ensure that member of the union have democratic voice in the decision making process. After the secret ballot, the union is obliged to give seven working days’ notice\textsuperscript{24} of the strike to employer and to the Ministry of Labor and Vocational Training. If the strike affects an essential service for instance the hospital and so on, the notice period is 15 working days.\textsuperscript{25} During the notice period, the department of labor dispute will attempt a final conciliation. The mechanism purports to preserve the right to call a strike, but only as a last resort when all alternative efforts have failed, and plays a cooling off period which encourages the parties to reach a voluntary settlement. During this period, the disputed parties are required to participate in the conciliation meeting arranged.

**Illegal Strike or Strike Staged without Complying with Legal Procedure**

From international legal prospect, the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike. Penal responsibility should only be imposed where there are violations of strike prohibitions which are themselves in conformity with those principles. All penalties in respect of illegitimate actions linked to strikes should be proportionate to offence or fault committed.

Salary deductions for days of strike have given rise to no objection, except if they were higher than the amount corresponding to the period of stoppage. The payment should be neither required nor prohibited by statute, but left to the parties concerned. The obligation imposed by government to do overtime to compensate for the strike may in itself unduly influence its course.

From the Cambodian legal perspective, as a legal effect of the strike, the labor contracts are suspended.\textsuperscript{26} There are certain rules on the conduct of the workers and the employer during a strike for instance, non-violence,

\textsuperscript{23} See Article 319 of the Labor Law of the Kingdom of Cambodia.
\textsuperscript{24} Bernard Gernigon, Alberto Odero & Horacio Guido, Condition for exercising the right to strike, ILO principles concerning the right to strike, International Labor Officer, Geneva.
\textsuperscript{25} See Article 327 of the Labor Law of the Kingdom of Cambodia.
\textsuperscript{26} See Article 332 para 1 & Article 72 para 1, Cambodian Labor Law 1997; see also Arbitral award case 06/14 - Quality Textile vs. WUF.
no acts of serious misconduct and employers may not recruit new workers. However, during the strike to increase the minimum wage in early 2014, it was reported that the protesters threw rocks, used slingshots and made improvised barricades by amassing scrap in the middle of the road and setting it alight.

Responsibility for declaring a strike illegal should not lie with the government, but with an independent body. In the Cambodian legal context, only the court has the power to determine the legality of strikes. When a strike does not comply with the required legal procedure and/or there is a failure to act peacefully during a strike, this may also result in the strike being declared illegal. This reflected the situation in the 2014 strike to demand for higher wage.

The use of military, police, other armed force and requisitioning orders to break a strike over occupational demand is only acceptable when these actions aim at maintaining essential services in circumstances of the utmost gravity. Different is the situation where an essential public service such as traffic, like road or street is interrupted by an unlawful strike, the government may have then to resume the responsibility of ensuring its functioning in the interest of the community and, for this purpose, may consider to use armed force to perform their duties. After the bloody clash occurred in Phnom Penh, the United Nations Special Rapporteur on the situation of human right in Cambodian, Mr. Surya P. Subedi said from Geneva January 3 2014 “…any use of force by officials must be subject to the principles of legality, necessity and proportionality.”. This statement was released to call for attention from the law enforcement to make sure that the ground of legality, necessity and proportionality must be fulfilled before suppression on those workers.

While workers, federations, confederations and trade unions have an obligation to respect the domestic law, police intervention in the course of strike movement should be limited to the maintenance of law and order. The intervention should be in proportion to the threat to public order; governments should give adequate instructions so as to avoid the danger of

27 See Article 334 Cambodian Labor Law 1997; see also Arbitral award case 06/14 - Quality Textile vs. WUF.
28 See also http://edition.cnn.com/2014/01/03/world/asia/cambodia-protests/
29 Bernard Gernigon, Alberto Odero & Horacio Guido, Declaration of the illegality of a strike for failure to comply with legal requirements, ILO principles concerning the right to strike, International Labor Officer, Geneva.
30 See Article 337 of the Labor Law of the Kingdom of Cambodia “…the courts have sole jurisdiction to decide on the legality or illegality of a strike…”
excessive violence in trying to control the demonstrations that might undermine public order. Practical measures taken to enforce the execution of the court decision affecting the strikers should observe the elementary guarantees applicable in any system that respects fundamental public liberties. In the event of a strike, when the strikers prevent non-strikers from entering the factory to work for the employer, it is an infringement of the freedom of work of the non-strikers and of the management’s prerogative rights.

Findings/Results

After the strike demanding increases to the minimum wage held along Veng Sreng boulevard in early 2014, Ministry of Interior banned the gathering of people - more than 10 people was announced unlawful. This ban is unlawful and violates the domestic law. It is also connected to the practice of the right to strike. It is clear that the right to strike is not an absolute right and its exercise should be in line with the other fundamental rights of citizens and employers.

Abuses in the exercise of the right to strike may take different forms, such as its exercise by a group of workers who may be excluded from this right; failure to comply with reasonable legal requirements in declaring a strike; damaging or destroying the premises or property of the company; or even physical violence against persons. These kinds of abuses can result in dismissal or criminal sanction.

As the right to strike has increasingly come to attention of all stakeholders in Cambodia including government, employers and employees, an interview with an arbitrator from the employee’s list was undertaken to assess the general perception of workers towards the right to strike, legal procedure, and the proportionate use of force. The result of the interview indicated that the strike which occurred in January 2014 was not a legal strike since there was movement of people from the factories to the Veng Sreng Boulevard, and the act of violence as the clash between the military police and the workers happened. However, in the personal opinion and observation of the arbitrator, the use of force against the protestors was not proportionate.

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When analyzing strikes in the Cambodian context it is useful to examine data on the numbers of strikes, their cessation, the level of involvement in strikes and various measurements of strikes in the garment sector. And the tables below are the statistic from the Arbitration Council Foundation Report in 2014.

<table>
<thead>
<tr>
<th>Year</th>
<th># of strikes</th>
<th>% of strike cases complied with IRTWO</th>
<th># of workers involved in strike</th>
</tr>
</thead>
<tbody>
<tr>
<td>May 2003</td>
<td>2</td>
<td>100%</td>
<td>NA</td>
</tr>
<tr>
<td>2004</td>
<td>20</td>
<td>100%</td>
<td>NA</td>
</tr>
<tr>
<td>2005</td>
<td>12</td>
<td>100%</td>
<td>NA</td>
</tr>
<tr>
<td>2006</td>
<td>22</td>
<td>73%</td>
<td>1,575</td>
</tr>
<tr>
<td>2007</td>
<td>18</td>
<td>82%</td>
<td>9,504</td>
</tr>
<tr>
<td>2008</td>
<td>25</td>
<td>71%</td>
<td>18,790</td>
</tr>
<tr>
<td>2009</td>
<td>33</td>
<td>67%</td>
<td>34,449</td>
</tr>
<tr>
<td>2010</td>
<td>17</td>
<td>92%</td>
<td>6,498</td>
</tr>
<tr>
<td>2011</td>
<td>21</td>
<td>71%</td>
<td>16,596</td>
</tr>
<tr>
<td>2012</td>
<td>45</td>
<td>61%</td>
<td>30,172</td>
</tr>
<tr>
<td>2013</td>
<td>64</td>
<td>54%</td>
<td>48,477</td>
</tr>
<tr>
<td>May 2014</td>
<td>40</td>
<td>63%</td>
<td>38,299</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>319</strong></td>
<td><strong>71%</strong></td>
<td><strong>166,061</strong></td>
</tr>
</tbody>
</table>

Table 1: (Number of strike cases and percentage of cases complied with Interim Return-To-Work Order 2003-2014)
The two tables above indicated that there are an increasing number of strikes within 10 years from 55 in 2003 up to 147 in 2013. However, it is interesting to note that the trend of increasing cases follows the same general upward trajectory regarding the number of employees and active factories in the garment industry. When analyzed further, the same data shows that from 2008 until 2012, strikes per factory are decreasing—falling to their lowest level in a decade—as the arbitration council’s cases per factory are increasing. According to the data, instead of resorting to industrial action, worker and employers are increasingly taking their disputes to the Arbitration Council for resolution. Before and after the 2013 election, the number of strikes and the cases registered were increasing in the same flow as those strikes took place in late 2013 and early 2014, demanding for higher wage, and led to the use of force against illegal strikers.

The level of force used by military police in 2013/2014 gave rise to concern around the world. There were, for example, several recommendations made by the UN member states in Geneva during Cambodia’s second universal periodic review cycle interactive dialogue, held a few weeks after the fatal shootings in Cambodia. The force used...
was clearly deemed excessive by several states. Some states during interactive dialogue requested for credible investigation into the January 2014 shootings which indicated the excessive use of force and for the removal of the ban on peaceful assemblies.\textsuperscript{34} Furthermore the assurances that the authorities would not use the Criminal Code or violence to restrict that right,\textsuperscript{35} mistreatment of human rights defenders that affected trade union and civil society,\textsuperscript{36} and detention without access to legal counsel\textsuperscript{37} were also controversial issues as a result of this event. Regarding the ban on demonstrations and public assembly, the delegation responded that the ban was in line with the law on peaceful demonstrations and was very necessary in order to restore social order and stability and security for society at large.

Nevertheless, responding to questions raised on the suppression of recent demonstration the Cambodian delegation remarked that while it appreciates the importance of freedom of expression, it believes such a right must be exercised within the framework of national and international laws without infringing on the rights of others, such as right to security and to property. The Cambodian delegate stated “On the current ban on demonstration and public assembly, the delegation added that the ban was introduced temporarily until the situation has improved, and that it applies to public assembly. In this regard, the delegation flagged that the Government is also drafting a law on the access to information.” \textsuperscript{38}

**Conclusion**

It is perhaps remarkable that the right to strike subsequently became a fundamental right recognized by the large majority of state members of the ILO and the United Nations. From the Cambodian Constitution down to the circular of the ministry, Cambodia has recognized the right to strike as a fundamental right of the workers. However this right to strike must be exercised in compliance with the legal requirements stated in labor law. It is noticeable that, among all labor sectors, the garment workers have a


\textsuperscript{36} See Ireland and the Netherlands made the recommendation in the second cycle universal periodic review interactive dialogue, A/HRC/26/16, 27 March 2014

\textsuperscript{37} See Germany and Australia made the recommendation in the second cycle universal periodic review interactive dialogue, A/HRC/26/16, 27 March 2014

better understanding about the right to strike. As most other workers still have limited understanding about their rights, there should be a lot of room for improvement. Recently the better factories project was initiated to improve the labor condition, the workers’ knowledge in understanding about their right and duties under the law.

Through this research paper, some recommendations can be proposed on the proportionate use of force to disperse strikes staged without complying with the legal procedure. Prior to the use of force, there shall be precautionary action from the authorities preventing serious threats to social and public order.

However, the use of force is permitted if there is necessity, proportionality and imminent threat to social and public order. Moreover, legal and practical mechanisms shall be established by the executive body to limit the use of force as a response to strikes staged without complying with the legal procedure. This will help set a national standard for the legal enforcement personnel.

In case there was excessive use of force, there shall be an administrative penalty as well as a mechanism for bringing those legal enforcement personnel to justice, principally by imposing criminal responsibility as set forth in the article 7 of the UN principles on the use of force by law enforcement officials.\footnote{See Article 7, General Provision of the Principle on the Use of Force and Firearm by Law Enforcement Official, Hanava, 1990.} The criminal system must provide and enforce such a remedy.

As this paper shows, there is a difference between legal and illegal strikes in Cambodia. What is perhaps worrying is the lack of awareness amongst workers of the purpose, procedure and conduct for lawful strikes. Moreover, there is evidence that the use of force deployed by the government to counter strikes may exceed that strictly required by the situation. The right to strike is embedded in Cambodian law, but more work is required across workers, unions and employers to ensure all parties fully understand its nature and consequences. Only then will the rights of workers be able to be better protected in Cambodia.
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The Role of International Labor Organization Convention 189

In Strengthening Cambodia’s Negotiating Position with Malaysia When Finalizing the Memorandum of Understanding Concerning the Protection of Cambodian Migrant Domestic Workers

LY Ratana*

Abstract

This paper considers human rights protections afforded to Cambodian domestic workers both within Cambodia and in other countries, particularly Malaysia. The paper argues that existing Cambodian Labor Law offers inadequate protection to domestic workers, and needs to be amended in order for Cambodia to better respect the rights of such workers.

The paper assesses whether the International Labor Organization (ILO) Convention concerning Decent Work for Domestic Workers is an appropriate starting point from which the necessary amendments may be made. The paper concludes that the ILO Convention provides an effective framework for Cambodia to improve its laws and policies, in particular the Labor Law.

Finally, the paper argues that should Cambodia ratify this ILO Convention, Cambodia can not only protect the rights of domestic workers in Cambodia, but such an action will also act to strengthen Cambodia’s negotiating position when attempting to protect the human rights of Cambodian domestic workers in Malaysia and thereafter in other countries.

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** The author is grateful to those who volunteered their time and support for making this paper a completion. She would especially like to thank the interviewees for their participation and candor.
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Introduction

This study is inspired by stories of Cambodian domestic workers\(^1\) living in Malaysia who experienced serious violations of their rights ranging from physical and psychological violence and exploitation.\(^2\) The Cambodian government decided in October 2011 to ban domestic workers travelling to Malaysia.\(^3\) The Cambodian and Malaysian governments are now negotiating an end to the ban and are working on a “Memorandum of Understanding between the Government of Malaysia and the Government of Kingdom of Cambodia on the Recruitment and Placement of Cambodian Domestic Workers” (MoU), to govern Cambodian domestic workers undertaking work in Malaysia.\(^4\)

The struggle for protection of the rights of Cambodian domestic workers to be recognized has been challenging. Malaysia initially strongly objected to a proposal to include in the MoU a clause stating that employers\(^5\) should respect the basic rights of domestic workers, among

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\(^1\) The term “domestic worker” in this paper refers to a housekeeper.

\(^2\) Human Rights Watch, “They Deceived Us at Every Step” Abuse of Cambodian Domestic Workers Migrating to Malaysia, United States of America: Human Rights Watch, November 2011, p. 56.


\(^4\) See Memorandum of Understanding between the Government of Malaysia and the Government of Kingdom of Cambodia on the Recruitment and Placement of Cambodian Domestic Workers (Draft), November 2014.

\(^5\) The “employer” may refer to “member of the household...or an agency or enterprise” that hires domestic workers to work in households.
The Role of ILO Convention 189

The latest draft of the MoU affords domestic workers some protections, in that it provides domestic workers with training prior to going to Malaysia, protection of salary, and medical cover. Nevertheless, this latest draft appears to still leave significant opportunities for violations of rights to occur. As at April 2015, the Cambodian government has signed this latest draft of the MoU but the Malaysian government has not.

This paper argues that Cambodia is not in a strong position to negotiate the rights of its domestic workers in Malaysia, given the position of domestic workers in Cambodia itself. In doing this, the abuses suffered by Cambodian domestic workers in Malaysia are used as a starting point only. The paper examines how the Labor Law of the Kingdom of Cambodia (Labor Law) would apply if these potential abuses were to happen in Cambodia. The paper finds that the Labor Law does not adequately address human rights violations, nor does it provide adequate remedies for domestic workers suffering from violations. This indicates that Cambodia’s national human rights record appears likely to be exploited by Malaysia during negotiations for the MoU, thereby limiting the Cambodian government’s power to argue for the inclusion of protective terms and conditions for Cambodians travelling to take up domestic worker positions in Malaysia.

This paper also argues that if Cambodia strengthens its domestic laws and policies to better protect Cambodian domestic workers in Cambodia, it would be in a stronger position to negotiate the MoU with Malaysia and, by implication, with other countries. In support of this argument, the

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This paper, however, uses the word “employer” to refer to house-owner, and “agency” to refer to an enterprise, which provides housemaids to employer who is a house-owner.


8 See Memorandum of Understanding between the Government of Malaysia and the Government of Kingdom of Cambodia on the Recruitment and Placement of Cambodian Domestic Workers, supra note 4.


10 This view is not isolated. According to Mr. Ya Navuth, who is an executive director of the Coordination of Action Research on AIDS and Mobility (CARAM) Cambodia, Cambodia should be a “role model…we want to set conditions only when Cambodia [also]
The paper analyzes the 2011 International Labor Organization (ILO) Convention concerning Decent Work for Domestic Workers (C189) to determine the extent to which this Convention addresses various situations experienced by domestic workers in Cambodia.

The paper concludes that C189 offers an effective framework for improving national laws and policies to protect domestic workers. Thus, Cambodia should ratify and implement C189, despite any challenges it may encounter by doing this. In making this argument, the paper hopes to encourage a more sophisticated public debate regarding regulating the rights of domestic workers in Cambodian domestic laws and policies, as well as foster constructive debate regarding the ratification of C189.

The paper consists of three parts. Part 1 identifies the main human rights abuses claimed by Cambodian domestic workers in Malaysia, in light of international human rights standards. It does this through a review of a case study and relevant reports. Part 2 examines the legal position when similar violations occur in Cambodia, and considers whether the Labor Law sufficiently addresses these abuses. Finally, Part 3 discusses the possible role of C189 in rectifying the problems faced by domestic workers and outlines challenges in ratifying and implementing C189 in Cambodia.

**Part 1: Main Human Rights Abuses on Cambodian Domestic Workers in Malaysia**

The ban imposed by the Cambodian government on domestic workers travelling to Malaysia is both a curse and a blessing. Article 36(1) of the Constitution of the Kingdom of Cambodia (Constitution) provides that its citizens shall enjoy the “right to choose any employment”.11 Moreover, they shall enjoy the right to travel outside Cambodia.12 Thus, the ban could be disappointing for many domestic workers who wish to exercise their rights, as guaranteed under the Constitution, by choosing to work as domestic workers in Malaysia, in order to earn a decent salary.13

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11 Constitution of the Kingdom of Cambodia, 1993.
12 Ibid. Art. 40.
On the other hand, the ban is a blessing, in that it acts to prevent more Cambodian domestic workers from travelling to Malaysia to work, thereby preventing them from having their human rights violated in that country. Some Cambodian domestic workers in Malaysia suffer a range of human rights abuses, including food deprivation, excessive work demands, withheld salaries, physical violence, psychological abuse, physical confinement, and restrictions on their freedom of movement through passport confiscation. As Mr. Ya Navuth, whose work involves rescuing Cambodian domestic workers from Malaysia, asserts, “as long as there is no MoU or bilateral agreement which has a lot of protections for migrant workers, Cambodia should not send housemaids to work in Malaysia”. The ban cannot, however, prevent such abuses occurring to those Cambodian domestic workers already in Malaysia.

The experience of a female domestic worker, Neary, clearly demonstrates these. Despite the moratorium, Neary travelled from Cambodia to Malaysia, assisted by a broker. The broker had promised Neary that she would earn US$200 a month as a domestic worker and would be able to live with her aunt, who already lived in Malaysia. The reality was much different, however. Neary never lived with her aunt and returned to Cambodia after three months, having suffered a range of abuses of her human rights.

One such right was Neary’s right to adequate food. According to paragraph 8 of the General Comment No. 12 of the Committee on Economic, Social and Cultural Rights (CESCR) on the Right to Adequate Food (Art.11), the right to food refers to the “availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals…[and] accessibility of such food”. However, during her stay in Malaysia, the agency which the broker sent Neary to, generally provided Neary with one small meal a day; this malnutrition made her sick and caused her significant weight loss. Furthermore, Neary was under the almost total control of her employer and agency, to the extent that she was

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14 This paper does not generalize that all or most domestic workers have negative experiences in Malaysia. See Human Rights Watch, “They Deceived Us at Every Step” Abuse of Cambodian Domestic Workers Migrating to Malaysia, supra note 2, p. 56.
16 Navuth Ya, telephone interview with author, supra note 10.
17 The name has been changed in order to protect privacy.
18 Neary, interview with author, supra note 15.
19 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11), May 12, 1999.
not allowed to leave her employer’s house or the agency, nor did she receive any salary.\textsuperscript{20} This clearly means that she did not have the means to access food or any way in which to procure it for herself. Consequently, her right to food was blatantly violated.

In addition, Neary did not enjoy many key aspects of the right to work. Article 7 of International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that the right to work includes just and favorable working conditions. To ensure this right, workers must receive, among other things, fair remuneration for their appropriate number of working hours. They must also enjoy not only safe, but healthy working conditions.\textsuperscript{21} In contrast, in her employer’s house, she fell sick on her second day of work due to lack of sleep and overwork. Inside the agency itself, Neary, together with others, was made to clean the three-floor house, and sometimes perform tasks that were either unnecessary or had already been done. She was also required to learn the English words for household goods. As a result, Neary worked for approximately 17 hours a day with no rest day. Despite this demanding job, Neary did not receive any wages.\textsuperscript{22}

Moreover, agency workers used physical and psychological violence against domestic workers. In the case of Neary, the agency staff locked Neary for days inside a room on multiple occasions. This included when she wanted to meet her aunt and even when serious illness prevented her from working. Further, the agency withheld Neary’s passport.\textsuperscript{23} If Malaysian authorities had found Neary with no passport, she would have been deemed to be in breach of her visa obligations and at risk of deportation.

In short, Neary suffered from forced labor exploitation. Potentially, her situation also amounted to “modern” slavery.\textsuperscript{24} Forced labor refers to any work performed involuntarily by any person “under the menace of any penalty”,\textsuperscript{25} while Anti-Slavery International describes “modern” slavery as comprising four elements. Those elements are that a person is: (a) “forced to work” through threat; (b) “owned or controlled by an ‘employer’”; (c) “dehumanized, treated as a commodity”; and (d)

\begin{footnotesize}
\begin{enumerate}
\item Neary, interview with author, \textit{supra} note 15.
\item Neary, interview with author, \textit{supra} note 15.
\item \textit{Ibid.}
\item Convention concerning Forced or Compulsory Labour (No. 29), May 1, 1932, 39 U.N.T.S. 55, Art. 2.
\end{enumerate}
\end{footnotesize}
"physically constrained" or restricted on freedom of movement. Neary’s situation could clearly be classified as a form of “modern” slavery because she was made to work through threat, her working conditions were dehumanizing, and she was not allowed to leave that abusive situation.

It is acknowledged that the Malaysian government did not directly cause the violations outlined above; rather, they were the result of the actions of the Malaysian-based employer and agency. Nevertheless, this paper argues that Malaysian law should require employers and agencies to meet the threshold of human rights standards and ensure that domestic workers benefit from this higher standard.

Neary’s experience demonstrates that Cambodian domestic workers in Malaysia can suffer from violations of many human rights, including the right to food, various workers’ rights and the right to be free from forced labor and “modern” slavery. Thus, the fact that such breaches are allowed to occur means that it may be concluded that Malaysian law, or its application, is inadequate when it comes to protecting human rights of domestic workers.

**Part 2: Cambodian Labor Law on Protection of Domestic Workers**

This paper argues that for Cambodia to strengthen its position to conclude an MoU on Cambodian domestic workers, with Malaysia that is based on international human rights standards, it needs to adequately protect its own national domestic workers in Cambodia. This section examines the Labor Law to consider which provisions and remedies are available to domestic workers should the same abuses identified in Part 1 happen in Cambodia. Following this, the paper concludes that domestic work in Cambodia falls within the ILO’s finding that domestic work generally is “undervalued and poorly regulated”.

The Labor Law defines domestic workers as those who “take care of the home owner or of the owner’s property in return for remuneration”. Aside from a few provisions, the Labor Law generally excludes domestic workers from its application. Article 1(4)(e) clearly provides that the Labor Law does not apply to “domestics [sic] or household servants, unless

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otherwise expressly specified under this law”. 29 This effectively precludes domestic workers from being afforded many protections, including those regarding minimum wages.

In respect of wages, articles 10430 and 130 are the key provisions. Article 104 stipulates that a worker’s wage must be at least of an equal amount to the minimum wage, in order to ensure “every worker” of a decent living standard. 31 Article 104 mentions “every worker” which implies that every worker is entitled to the minimum wage. However, the effect of Article 1 is that unless an article is expressly said to apply to domestic workers, the article does not apply to such workers. As Article 104 does not expressly mention domestic workers, domestic workers do not appear to be entitled to the minimum wage and so do not enjoy a decent living. And even if Article 104 did apply to domestic workers, its practical effect may be limited because there is no minimum wage set for such workers at present.32

Article 130, which does apply to domestic workers, offers some protection to such workers. It provides that “the portion of wage that is less than or equal to the guaranteed minimum wage cannot be garnished or assigned”. 33 Thus, domestic workers may earn less than a minimum wage; if so, their wage can neither be garnished nor assigned. Even if domestic workers earn more than a minimum wage, that portion of their wage falling below the minimum wage cannot be garnished or assigned, thereby continuing to guarantee domestic workers a minimum wage that is not subject to being reduced through measures such as garnishing. However, without a stated minimum wage for domestic workers, whether this is of any practical benefit to such workers is questionable. Looking back at Neary’s example, it is unclear whether her salary was “garnished” or “assigned”, because she never received her salary at all.34

The Labor Law explicitly protects domestic workers from forced labor. Article 15 strongly forbids forced labor in relation to any worker, including domestic workers.35 According to the Labor Law, those who

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29 Ibid.
30 Art. 104 of the Labor Law provides, “the wage must be at least equal to the guaranteed minimum wage; this is, it must ensure every worker of a decent standard of living compatible with human dignity”. Ibid.
31 Ibid.
33 Ministry of Social Affairs, Labor and Veteran Affairs, Labor Law of the Kingdom of Cambodia, supra note 28, Art. 130(1).
34 Neary, interview with author, supra note 15.
35 Ministry of Social Affairs, Labor and Veteran Affairs, Labor Law of the Kingdom of Cambodia, supra note 28.
commit forced labor will be fined an amount calculated by 61 to 90 days of base daily wage or an imprisonment from six days to a month.\textsuperscript{36} Therefore, if Neary could prove a claim of forced labor, a possible remedy would be available under the Labor Law.

Many domestic workers live inside their employers’ houses and rely on employers to provide them food. The right to food is “indivisibly linked” to the dignity of every person and it acts as a foundation from which one can enjoy other rights.\textsuperscript{37} This requires states to act to ensure that individuals or enterprises do not deny anyone from accessing adequate food.\textsuperscript{38} However, the Labor Law contains no provision that reflects the reality of domestic workers’ reliance on their employers for adequate food. This paper considers that separate guidance should be adopted to explicitly extend this right to food to domestic workers.

Even if their rights are violated, domestic workers will find it extremely difficult to find a complaint mechanism in Cambodia. Article 36(5) of the Constitution provides that Khmer citizens shall have the “right to create trade unions and to participate as their members”.\textsuperscript{39} Article 1(4)(e) of the Labor Law echoes the Constitution by providing that “domestic or household servants are entitled to apply the provisions on freedom of union”.\textsuperscript{40} The freedom of union provision enables the formation of unions; thus the Labor Law clearly protects domestic workers’ rights to form unions.

However, while the Labor Law offers this protection to domestic workers, circumstances dictate that it has not been practicable for such workers to form a trade union at present. Instead, they created the Cambodia Domestic Worker Network (CDWN), aiming to protect their rights and freedom.\textsuperscript{41} The role of CDWN in dispute resolution is, however, limited. When a violation occurs in relation to a domestic worker who is a member of CDWN, CDWN visits the employer’s house to offer to conciliate the dispute between the employer and that domestic worker. If the dispute is not resolved, the CDWN refers the case to the court. For non-CDWN members, however, CDWN only produces a report condemning violations which have occurred.\textsuperscript{42}

\textsuperscript{36} \textit{Ibid.}, Art. 369.
\textsuperscript{37} UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11), \textit{supra} note 19, ¶ 4.
\textsuperscript{38} \textit{Ibid.}, ¶ 15.
\textsuperscript{39} Constitution of the Kingdom of Cambodia, \textit{supra} note 11.
\textsuperscript{40} Ministry of Social Affairs, Labor and Veteran Affairs, \textit{Labor Law of the Kingdom of Cambodia}, \textit{supra} note 28.
\textsuperscript{41} For further information on the Cambodia Domestic Worker Network, See http://www.dwscambodia.blogspot.hk.
\textsuperscript{42} Samphors Von, interview with author, on file with author, August 30, 2014.
In contrast, for many other types of workers, when their collective rights - including working conditions - are suspected of being violated, they have access to a Labor Inspector. In addition, they have the option of going to the Arbitration Council or going to court.

In short, domestic work receives almost no protection compared to other types of work under the present Labor Law. It is clear that the Labor Law does not adequately protect domestic workers against the various violations of human rights that occurred in Neary’s case, reinforcing the urgent need for Cambodia to amend its domestic laws to ensure adequate protection of its citizens’ human rights.

Part 3: ILO Convention 189 on Protection of Cambodian Domestic Workers

According to the 2014 International Trade Union Confederation (ITUC) Global Rights Index, Cambodia is one of the “worst countries in the world for workers to work in” in terms of failing to guarantee workers’ rights. As Part 2 demonstrates, the Labor Law poorly protects Cambodian domestic workers in Cambodia. Consequently, Cambodia is in a weak position to negotiate rights for Cambodian domestic workers in Malaysia. Thus, this paper supports the UN Committee on the Elimination of Discrimination Against Women’s recommendation that the Cambodian government “consider[s]” ratifying C189 and then gives effect to C189 in order to protect domestic workers in Cambodia. By taking these measures, Cambodia may be in a stronger position to persuade other countries to protect the rights of Cambodian domestic workers.

The subsection below analyzes the potential impact of C189 in addressing the rights mentioned in Part 1 and 2, and identifies some challenges to ratifying and implementing C189 in Cambodia.

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44 Ibid., Arts. 310, 385, 389.
45 Cambodia and Malaysia were rated “5”. Rate 1 – collective rights are “generally guaranteed”. Rate 2 – there are repetitions of rights violations. Rate 3 – there are regular rights violations. Rate 4 – there are systematic rights violations. Rate 5 – there is no guarantee of rights. Rate 5+ – there is no guarantee of rights due to the collapse of the rule of law. International Trade Union Confederation, ITUC Global Rights Index: The World’s Worst Countries for Workers, 2014, pp. 15, 18, 38.
Part 3.1: ILO Convention 189 on Addressing Various Rights of Domestic Workers

Cambodia’s support for human rights treaties has been far from consistent. It has ratified the eight fundamental ILO conventions on freedom of association, forced labor, discrimination, and child labor, which also cover domestic workers. Further, the Constitution states that Cambodia “recognizes and respects” treaties concerning human rights and women’s rights. However, in regards to domestic work, where women make up a majority of the workforce, Cambodia has not ratified C189.

Should Cambodia ratify C189, many of its provisions would have the capacity to protect the rights of domestic workers in Cambodia against violations of the rights outlined in Part 1 and 2. Article 6 of C189 stipulates that domestic workers must enjoy “fair terms of employment as well as decent working conditions”, and possibly decent living conditions should these workers live in their employers’ houses. To achieve this, domestic workers need to be informed of their working terms and conditions in an “appropriate, verifiable and easily understandable manner”. In addition, Article 10 specifies that domestic workers are entitled to the same treatment as other types of workers, including in respect of working hours, weekly rest and annual leave. Article 13 provides that domestic workers have the “right to a safe and healthy working environment”. Applying these articles means that Neary should have been aware of her contract of employment, working hours, food allowance and remuneration, among other things, prior to commencing...
work. In any event, she would have had a record of her roles, responsibilities and benefits.

Moreover, C189 addresses more than just working conditions. It calls on state parties to provide social security protection, covering protections such as maternity benefits to domestic workers, in consultation with relevant stakeholders, including the “most representative organizations of employers and workers”. 56 This is a particularly important issue for domestic workers as, since most domestic workers are women, protections for maternity benefits need to be appropriately available. In addition, domestic workers are currently excluded from the general insurance system for those who have work-related injuries, which is managed by the National Social Security Fund. 57

If Cambodia ratifies and implements C189, and then includes domestic workers in the Social Security Fund, the current Prakas (sub-decree) on Establishment of Health Insurance Scheme for Persons Defined by the Provisions of the Labor Law, will need to be amended because the health insurance scheme currently only applies to any enterprise or establishment having eight or more staff. 58 Yet many households have fewer than eight domestic workers, meaning that these domestic workers fall outside the scope of the Prakas. There is no reason, however, why these workers should not also be protected by the Social Security Fund.

Other relevant articles of C189 are Articles 16 and 17; these call for a dispute settlement mechanism and complaint mechanism respectively. 59 As discussed in Part 2, the existing Arbitration Council does not cover domestic workers. 60 Thus, the Arbitration Council’s mandate either needs to be broadened, or a special mechanism, in addition to court, needs to be created to deal with disputes and redress complaints that frequently involve domestic workers. These examples clearly demonstrate that Cambodian laws do not currently meet the standard required for compliance with C189.

Part 3.2: Challenges in Ratifying ILO Convention 189

56 Ibid., Art. 14.
57 Ministry of Social Affairs, Labor and Veteran Affairs, Labor Law of the Kingdom of Cambodia, supra note 28, Art. 256. (Employers are liable for work-related accidents occurring to domestic workers. Ibid., Arts. 248-249).
59 ILO, Convention concerning Decent Work for Domestic Workers (No. 189), supra note 48.
60 For further information on the Arbitration Council, See http://www.arbitrationcouncil.org.
Domestic workers “make up a large portion of the workforce, especially in developing countries”. In the case of Cambodia, it is estimated that by ending the moratorium and once again enabling domestic workers to go to Malaysia alone, the Cambodian economy could generate approximately US$120 million yearly. While there are obvious potential financial benefits stemming from domestic work, there is also a great need to regulate and protect domestic workers inside and outside Cambodia. In arguing for the introduction of protections for domestic workers into Cambodian national laws and policies, the paper foresees a few practical, but manageable, challenges.

There is pressure on the Cambodian government to urgently amend the existing Labor Law prior to ratifying C189. At the same time, Cambodia has a principle of supporting direct application for human rights treaties, so the government may also ratify C189 prior to amending the national law. According to the Constitutional Council of Cambodia, judicial officers must consider international treaties ratified by Cambodia when deciding a case. Thus, if ratified, C189 will apply irrespective of whether the Labor Law is amended. Nevertheless, even if Cambodia ratifies C189 prior to amending the law, it should implement C189 and amend the Labor Law soon after ratification, to reflect the rights of domestic workers.

A further challenge associated with ratifying C189 relates to entrenched social attitudes. Female domestic workers are mistakenly associated with “gender discrimination”, “poor economic value”, low social class and innate ability to perform domestic work. Moreover, “non-recognition of domestic work as work”, the “hidden nature of workplace”, the “informality of the employment relationship” between the worker and the employer would continue to breed “exploitation and abuse”. This indicates an urgent need to remove prejudices against domestic workers. The complete removal will take time, but this should not prevent the Cambodian government from ratifying C189 to protect domestic workers.

Another challenge is that the government must ensure it educates the employers and workers on Labor Law in order to respect the rights of

61 ILO, Decent Work for Domestic Workers, supra note 27, p. 1.
66 Ibid., p. 1.
domestic workers, including through education and media. This action will be costly, nevertheless in ratifying human rights treaties, the Cambodian government must not just respect and protect the rights embodied in such treaties, but also fulfill its treaty obligations by progressively raising awareness of these rights.

In short, the benefits of ratification appear to much outweigh the challenges regarding protecting the rights of domestic workers. Therefore, Cambodia should consider ratifying and giving effect to C189 to better protect domestic workers in Cambodia. After that, Cambodia would naturally be in a stronger position to take a more effective stance in demanding that the rights of Cambodian domestic workers be recognized by Malaysia and other countries, using its own record of offering protection to domestic workers as an example to follow.

Conclusion

Work undertaken by domestic workers may benefit the Cambodian economy, thereby assisting to reduce poverty in the country. However, irrespective of whether this is the case, Cambodia is legally and morally obliged to protect the rights of its domestic workers both within and outside the country.

As set out earlier in this paper, Cambodian domestic workers face a plethora of human rights abuses in Malaysia. These abuses could arguably constitute violations of the right to food, many aspects of the workers’ rights, forced labor and even “modern” slavery. Following repeated reports of such abuses, in 2011 the Cambodian government banned domestic workers from going to Malaysia, in an attempt to prevent more domestic workers from experiencing similar violations. At the same time, however, this ban negatively affects the earning capacity of Cambodians intending to engage in domestic work in Malaysia. Given this, a mechanism needs to be adopted that protects Cambodian domestic workers in Malaysia. Once this occurs, the ban may be lifted.

For many years now, Cambodia and Malaysia have been engaging in the process of drafting an MoU to govern Cambodian domestic workers taking up work in Malaysia. On a positive note, the latest draft of the MoU appears to offer noticeable protections to domestic workers. Yet, obvious gaps remain. While this is the case, violations of the rights of domestic workers in Malaysia will continue to be possible.

While the Cambodian government advocates for the protection of the human rights of Cambodian domestic workers in Malaysia, it fails to provide sufficient protections to the same workers within Cambodia. As
this paper has identified, domestic workers are largely excluded from the operation of Labor Law, and are therefore denied the benefit of its protections, despite the fact that most domestic workers are women and the rights of women are expressly recognized under the Constitution. For example, the provision on the minimum wage does not expressly include domestic workers. In addition, the Labor Inspector and Arbitration Council generally do not oversee disputes between domestic workers and their employers. Moreover, domestic workers have not formed a union at present; the absence of this may limit their power in demanding protection of their rights. In short, the Labor Law itself does not provide sufficient legal protection for domestic workers in Cambodia.

Clearly, in order to strengthen its negotiating position, Cambodia must improve its own human rights record and become a better role model in terms of protecting rights of domestic workers. C189 provides an effective framework for Cambodian laws and policies to protect domestic workers. This Convention protects various human rights of domestic workers, including their right to a minimum wage and to enjoy a safe and healthy working environment, among others. For this reason, Cambodia should ratify C189 and implement it in its domestic laws and policies, despite the fact that this may require the Labor Law to be amended. It may also require the government to educate the public about the rights of domestic workers, which will cost time and financial resources. These hurdles should not, however, be used by the government as an excuse to avoid fulfilling its human rights obligations.

In short, this paper considers that there should be a public debate on regulating the rights of domestic workers with the view to implementing C189. Ratifying and implementing C189 would undoubtedly be a crucial step forward in enabling Cambodia to better protect the rights of domestic workers in Cambodia. While such a step may not occur before Cambodia and Malaysia finalize the MoU, it would without question strengthen Cambodia’s position when negotiating any future MoUs which concern the protection of the rights of Cambodian domestic workers overseas.

Having an MoU which guarantees protections based on international human rights standards coupled with lifting the ban on travel to Malaysia will help to protect the fundamental human rights of domestic workers like Neary who chose to work abroad to better their lives financially. In Neary’s words:

“I want to go back to Malaysia again because if we [Cambodians] go, and they protect us well and allow us to work normally and provide us enough food, then I want to always work there”.

67 Neary, interview with author, supra note 15.
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