

Application of the Cambodian Constitution: An Assessment of the Constitutional Law-Making Process and the Right to Public Participation

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Abstract

Studies conducted on the constitutional law-making process have shown that public participation is a key element of the relationship between the government and its citizens beyond legitimating the whole process. This paper discusses the relationship between the people and the government on the basis of the Cambodian Constitution, both *de jure* and *de facto*. In doing so, the 1993 constitutional making process and the public's participation will be assessed. This paper aspires to answer the following questions: firstly, how the constitutional law-making process impacts the exercise of constitutional rights in Cambodia, and, secondly, to what extent does public participation play a role in public affairs, especially in the constitution and law-making processes. This paper further suggests that the concept of meaningful public consultation on constitutional law making should be incorporated in the Cambodian Constitution.

Keywords: *Constitutional Making Process, Right to Participate in Public Affairs, Constitutionalism, Cambodian Constitution, Meaningful Public Consultation*

I. INTRODUCTION

The constitutional law-making process is not only an indicator allowing to assess the legitimacy of a constitution it can also set the tone for the political atmosphere or influence the application of a constitution ideally adopted to protect the people. If the division of power is viewed as being far more important than the will and benefits of the people during the constitutional drafting period, it will result in poor promotion and protection of constitutional rights.

Public participation in the constitution and law-making process in Cambodia is a concern. Due to the lack of public belief in the importance of participating in the process, an individual might not understand the significance of their right to partake in public affairs. An individuals' participation can address societal issues and eventually conjure a solution from the government and their representatives.

The current Cambodian Constitution was adopted in 1993 during a time of transition after the atrocities of the Democratic Kampuchea (more commonly

known as the Khmer Rouge regime). After the collapse of the Khmer Rouge regime, the Paris Peace Agreements (Paris Agreements) were signed in 1991, authorizing the United Nations to arrange a national election and adopt a new constitution in Cambodia. The 1993 Constitution is the foundation for the legal and political process in current Cambodian society; it restored the monarchy, brought political dialogue, and built the legal system that eventually applied a liberal democracy based on pluralism.¹ From 1993 until March 2018, the Constitution has been amended seven times, and this is in addition to the adoption of Additional Provisions to the Constitution to ensure the regular process of the national institutions.² Each amendment was to cope with political crisis rather than to strengthen individual rights.³

This paper discusses the association between the people and the government on the basis of the Cambodian Constitution, both in legal text and practice. The assessments, in doing so, are the 1993 constitutional making process and the public's participation. The questions to be addressed in this paper are: firstly, how the constitutional law-making process impacts the exercise of constitutional rights in Cambodia, and, secondly, to what extent does public participation play a role in public affairs, particularly the constitution and law-making processes.

This paper is divided into two sections. First, it discusses the right to public participation in regard to the constitutional law-making process and describes the process which took place in Cambodia in 1993 (Part II). Second, it provides an overview on the existing principle of constitutionalism by studying the relationship between governmental institutions (the Legislative, Executive and Judiciary). Furthermore, the research analyzes the relationship between the government and the people as constitution and law-making processes are concerned (Part III). Lastly, this paper provides a summary with concluding remarks (Part IV).

II. CONSTITUTIONAL LAW-MAKING PROCESS

1. The Study of Constitutional Law-Making Process in General

Drafting a new constitution is different than making constitutional amendments or reforms. The process is needed in situations where a previous constitution is no longer functional and the people plea to have new one drafted, in situations where

¹ Peng Hor, *Introduction to Cambodian Law*, (Cambodia: Konrad-Adenauer-Stiftung, 2012), at 38-9; see also Sok-Kheang Ly, *Reconciliation process in Cambodia: 1979-2007*, (Cambodia: DC-Cam, 2017), at 145.

² Additional Provisions to the Constitution to Ensure the Regular Process of the National Institutions, Preah Reach Kram NS/RKM/0704/001, 2004.

³ First amendment article 28, dated 14 July 1994; Second amendment article 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93, and chapter 8 to chapter 14, 1999; Third amendment article 19 and 29, 2001; Forth amendment article 88 and 111, 2005; Fifth amendment article 28, 88 new, 90 new, 98, 106 new, 114 new and article 6 of Additional Provision to the Constitution, 2006; and the sixth amendment article 145 new and 146 new, 2008.

the political system changes, or in situations of conflict such as a nation split or merge, a new regime takes over, or a nation emerges from conflict.⁴

There are different approaches for drafting a new constitution that is dependent on the political and legal situation of each country. Each state may need to consider amendments to their existing constitution or create an entirely new constitution to reflect and safeguard the legal and political system.

According to Louis Aucoin, in order to study the constitutional law-making process, particularly in the countries emerging from conflict, eight categories should be formed as research questions: general issues concerning the conflict resolution and constitutional making, the structure of the process, public participation, democratic representation, timing and sequencing of the constitutional law-making process, the role of the international community, the role of international law, and, lastly, the essential issues of substance.⁵ In saying this, it is not necessary for all eight categories to be fulfilled in order to study the whole constitutional law-making process; it depends on whether all eight categories apply in one particular country. The study on the 1993 Cambodian constitutional law-making process was completed by Stephan P. Marks which focus on the above four categories. These categories will be discussed in the subsequent parts of this paper.

2. The 1993 Constitutional Law-Making Process in Cambodia

There were six constitutions from 1947 to present.⁶ The current constitution is the sixth constitution which was adopted in 1993. The sixth constitution was adopted only after the fall of the Khmer Rouge regime and when the Paris Agreements were signed in 1991.

In order to properly understand the constitutional law-making process of 1993 in Cambodia, it is essential to first look back at the historical context. The four factions existing at the end of Khmer Rouge regime saw the need of settlement as they were no longer relying on the outside support. They accepted the authority

⁴ Yubaraj Sangroula, “Non-extension or non-amendment? the supreme court’s originalist approach to interpreting the tenure of the constituent assembly”, *Participatory Constitution Making in Nepal: Issue of Process and Substance*, (Nepal: Post Peace Agreement Constitution Making in Nepal, 2014), at 125.

⁵ Aucoin Louis and Laurel E. Miller, *Framing the State in Times of Transition Case Studies in Constitution Making*, (Peace Building and Rule of Law, 2010).

⁶ The First Constitution: Constitutional Monarchy (1947 to 1970), The second Constitution: Republic Social Democracy (1970 to 1975), The Third Constitution: Communist–Pol Pot (1975 to 1979), The Fourth Constitution: Republic Socialist Democracy (1979 to 1989) The Fifth Constitution: Republic Social Democracy (1989 to 1993) and The Six Constitution: Liberal Democracy with Monarchy (1993 to Present).

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of the United Nations, and the Supreme National Council to be an interim government to maintain peace and restore the country.⁷

According to Marks, the constitutional law-making process was an impact of the civil war and influenced by the Paris Agreements.⁸ The Paris Agreements were also influenced by the post-cold war tendency to promote democracy and the rule of law.⁹ More importantly, the Paris Agreements paved the way for political settlement in Cambodia. A number of tasks were addressed during the transitional period under the supervision of the United Nations (UN) through the establishment of United Nations Transitional Authority in Cambodia (UNTAC).¹⁰ UNTAC was established in order to facilitate a free and fair national election and to ensure a legitimate government in Cambodia.¹¹ During that time, the Supreme National Council was established with the goal to work with the UN to elect a new government to rebuild state functions.¹²

The national election was held from the 23rd until the 28th of May 1993, which resulted in the election of 120 representatives. These representatives formed the Constituent Assembly. The assembly's role was not only to be an interim legislative body, but also to adopt a new constitution based on pluralism and liberal democracy required by the Paris Agreements.¹³

On 20 June 1993, the Constituent Assembly appointed its 12 members to draft the constitution based on the proportionality of the representatives of the parties that won the seats in the Constituent Assembly. The choice of the constitutional law-making process was mentioned in the Paris Agreements: it required the new constitution to be a liberal democracy on the basis of pluralism¹⁴ and to incorporate the fundamental freedoms and human rights principles.¹⁵

Between June and September 1993, the drafting committee worked on preparing the new constitution. The 1993 Constitution was not a newly constructed constitution; it was a combination of the 1947 Constitution (Monarchy constitutionalism) and the 1989 Constitution (Republic of Cambodia).¹⁶

To provide a better understanding before examining the right to participate in public affairs as stipulated in the 1993 Constitution, it is necessary to briefly discuss the 1947 and 1989 constitutions.

⁷ David Chandler, *A History of Cambodia*, 7d ed, 2007.

⁸ Marks, P. Stephen, "The Process of Creating a New Constitution in Cambodia", *Framing the State in Times of Transition Case Studies in Constitution Making*, (Peace Building and Rule of Law, 2010), at 210.

⁹ Hor, *Supra Note 1 at 37*.

¹⁰ Peace Paris Agreement, 1991, Art. 2 & 3.

¹¹ *Ibid*, Art. 12, 13 & 14.

¹² *Ibid*, Art. 4, 5, 6 & 7.

¹³ *Ibid*, Annex 5, Para 4.

¹⁴ Marks, *supra* note 7 at 226.

¹⁵ Peace Paris Agreement, Art. 23.

¹⁶ Marks *supra* note 7 at 211.

The 1947 Constitution was the first constitution adopted when Cambodia was a French protectorate, and was significantly influenced by both the late King Sihanouk and the French constitutional model of a parliamentary monarchy.¹⁷ It expressly stated, “powers are from the king,”¹⁸ even though there were other branches of government. The 1947 Constitution protected human rights under Articles 3 to 10: people could exercise their freedoms as prescribed by laws, without violating other people’s rights, and freedoms of expression and association were also guaranteed.¹⁹

The 1989 Constitution was adopted after the victory over the Khmer Rouge regime in January 1979. There was a draft constitution in 1981 (Republic Communist of Kampuchea), and eventually it was amended and promulgated in 1989. The 1989 Constitution that created the Republic of Cambodia provided a comprehensive foundation of human rights and set out the division of state powers. However, neither of these two Constitutions included the people’s right to participate in public affairs, which was only incorporated in the 1993 Constitution.

3. The Right to Participate in Constitutional Law-Making Process

a. A Moral Claim or Legal Right?

The legal right to participate in public affairs²⁰ or government²¹ is enshrined in international human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The United Nations Human Rights Council (HRC), the organ in charge of interpreting the ICCPR, further emphasized that, “[c]itizens also participate directly in the conduct of public affairs when [their government] chooses [to] change their constitution.”²²

A debate exists as to whether the meaning of the right to participate in public affairs is extended to the right to participate in the constitutional law-making process and reform. Referring to the norms of democracy, participation in constitutional making process is a moral claim.²³ The claim that the legal right to such participation exists is questioned, and, even if it did, there is the further

¹⁷ Menzel Jorg, “Cambodia: From Civil War to a Constitution to Constitutionalism?,” *Constitutionalism in Southeast Asia*, (Time Edge Publishing, 2008).

¹⁸ Constitution of Cambodia, 1947, Art. 21.

¹⁹ *Ibid*, Article 3 – 10.

²⁰ Universal Declaration of Human Rights (UDHR), Art. 21.

²¹ International Covenant on Civil and Political Rights (ICCPR), Art. 25.

²² General Comment, Article 25 of the ICCPR.

²³ Hart Vivien, “Democratic Constitution Making” (United States of Institute of Peace, 2003) at 4.

concern that there is no clear practical form for it to be implemented.²⁴ Hart Vivien claims that a legal right to participate in the constitutional law-making process is a legal justification.²⁵

The United Nations High Commissioner for Human Rights (OHCHR) and Human Rights Committee has done tremendous work to find the best practice and challenges of implementing the right to participate in public affairs. Remarkably, in 2016, there was an expert workshop organized by OHCHR under the request of Human Rights Council to discuss the existing guidance on the implementation of the right to participate in public affairs. The workshop confirmed that the right to directly participate in the drafting law process is included in right to participate in public affairs; it is a right not just a matter of political will.²⁶ Furthermore, the experts identified gaps in the practice of exercising the right to participate directly in drafting law process, such as the lack of awareness of their rights due to poor education or dissemination, lack of regulations to implement these rights in practice, lack of access to information to ensure meaningful participation, and the concern that specific groups such as women and person with disability were not provided with enough support to exercise their participation.²⁷ The form and means of public participation and the execution of legal rights in order to participate in the constitutional law-making process can be demonstrated in many ways. For instance, public participation can be done directly or indirectly through elected representatives.²⁸ Public participation includes a range of activities through civic engagement, education, media campaigns (dialogue, platform), consultations on the draft, and academic discourse.²⁹ It is anticipated that new technology aims to increase participation, but it will not necessarily create an impact on the right of everyone to participate since there is limitation to disadvantage groups and people in lower-income countries and rural areas.³⁰

Therefore, the right to participate in constitution and law-making processes is a legal right and it is necessary to create an efficient mechanism or provide a

²⁴ Tony Evans, “International Human Rights Law as Power/Knowledge”, *Human Rights Quarterly* Volume 27, 2005, at 1048; Hart Vivien, “Democratic Constitution Making” (United States of Institute of Peace, 2003) at 4.

²⁵ Hart Vivien, “Constitution Making and the Right to Take Part in a Public Affair”, *Framing the State in Times of Transition Case Studies in Constitution Making*, 2010, at 20.

²⁶ UN Secretary-General “The rule of law and transitional justice in conflict and post-conflict societies” (23 August 2004), online: <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>, retrieved on 27 March 2018.

²⁷ UNHCHR, “Expert Workshop on the Right to Participate in Public Affair” (18 May 2016), online: <http://www.ohchr.org/EN/Issues/Pages/RightToParticipate.aspx>, accessed on 5th March 2018.

²⁸ UDHR, Art. 21(1); ICCPR, Art. 25(a).

²⁹ Brandt, M. “Constitutional Assistance in Post-Conflict Countries the UN Experience: Cambodia, East Timor and Afghanistan (2005).

³⁰ UNHCHR, *supra note 27*, para 30.

practical form to exercise such participation. It is the time to realize the right and engage the public in directly exercising the given right in an effective way.

b. The Essence of the Right

The essence of the right to participate in the constitutional law-making process is not only to ensure that individual rights are be granted and enforceable under the Constitution but also to uphold the distribution of power and enhance a strong relationship between the government and the people. This has been materialized, for instance, in the practice of the participation in constitutional law-making process in South Africa and Nepal. In South Africa, the process of making a new constitution took seven years to complete, as the Constitutional Assembly needed to motivate their voters to participate in the process directly. The assembly did so by putting forward a slogan saying, “You’ve made your mark, now have your say.” It is estimated that seventy three percent of South Africans were touched by the assembly’s campaign, therefore making two million submissions to the assembly.³¹ In Nepal, participatory constitutional law-making was adopted as mandatory by Nepal Constituent Assembly’s rules. The Nepal constitutional law-making was carried out through a bottom up approach and open for submission directly from its citizens, which took almost five years from 2008 to 2012.³²

Nepalese people were confident with the constitutional making process, which provided an inclusive environment for everyone to feel ownership over the process and product. Participatory and inclusive constitutional law-making process offered no alternative mean to realize the existence of a democratic constitution in Nepal.³³ It is a significant indicator of the essence of the right to participate in constitutional law-making process.

c. Right to Participation and the 1993 Cambodia Constitution-Making Process

The election and adoption of the 1993 Constitution were regarded by the international community as a remarkable success in bringing peace and stability to Cambodia. It was also viewed as a positive step and foundation towards rebuilding the country, incorporating a stronger political and legal system. However, the drafting process did not include public participation for a number of reasons. First, there was no measure taken to ensure the public participation. The draft text was not disclosed to the public for consultations. Even though the content of the

³¹ Hart, *supra* note 23 at 7.

³² Khanal Krishna “The participatory Constitutional Making Process in Nepal: An Assessment of the CA Process (2008-2012)” *Participatory Constitution Making in Nepal: Issues of Process and Substances*, (2014) at 11.

³³ Neeru Shrestha “Spot Light on Inclusion Debate in Nepal with Special Focus on Constituent Assembly Thematic Committee Reports” *Participatory Constitution Making in Nepal: Issues of Process and Substances*, (2014) at 397-398.

draft was leaked, which allowed members of the civil society as well as the media to comment on the draft, it was not taken into consideration by the drafting committee.³⁴ As mentioned above, the process of drafting the Constitution was entrusted to the committee who was appointed by the Constituent Assembly. However, there were suspicions that the committee was not independent from the political parties who won the majority seats. It was further perceived that the main purpose underpinning the drafting process was to share the benefit and power among the political leaders rather than to represent the will and best interests of the people.³⁵

— Second, there was insufficient time for the public to engage with the process. The constitutional law-making process was completed in three months, which did not allow for a proper and meaningful consultation. The result of such a short period of time for drafting was also because of the premature withdrawal of the UN forces (UNTAC) from Cambodia while the situation remained fragile.

Third, there was a lack of interest and understanding about the essential of exercising such a right by the public. Only did the civil society and the media observe and follow the situation and process by questioning the transparency of the constitutional law-making process. They subsequently became more engaged after the Constitution was promulgated by being actively involved in the dissemination process and educating the public.³⁶

Lastly, there was an immediate need to consolidate peace, a process of which the adoption of the Constitution was an essential part. This justified the need to amend the Constitution later.³⁷ It is understood that the Constituent Assembly was elected by the people, so the people were indirectly participating by choosing their representatives. However, the concern is the absence of the people's participation directly during the drafting process.

The following part of this paper will discuss the relationship amongst the governmental institutions and the relationship between the government and the people as enshrined in the Constitution *de jure* and further highlight the *de facto* aspect regarding the implementation of the right to participate in public affair, particularly right to participate in the constitution and law-making process.

III. THE RELATIONSHIP AMONG THE GOVERNMENTAL INSTITUTIONS AND THE PEOPLE IN THE 1993 CONSTITUTION, *DE JURE*, AND *DE FACTO*

The application of a constitution is rested on the constitutional value. This section provides an overview of what constitutional value is and examines whether the

³⁴ Marks, *supra* note 8, at 214.

³⁵ *Ibid* at 215.

³⁶ *Ibid* at 217.

³⁷ Ghai Y.P. "The Constitution Reform Process: Comparative Perspectives" (Journal of Democracy, 2004).

Cambodian Constitution embraces constitutionalism and to what extent constitutionalism in Cambodia has been developed to protect constitutional rights. In doing so, the relationships among governmental institutions and those between the government and the people are assessed.

1. The Constitutional Value

Wolin notes that, “[C]onstitutions are considered to be profound expressions of national commitment, [and] are about the highest of all political stakes.”³⁸ Constitutional value is jeopardized when it is used as a legal instrument to maintain power rather than to protect the rights of the people.³⁹ Constitutionalism strives for the balance between the division of state powers and the will and interest of the people. After all, a constitution is the supreme law which protects people through the allocation of power to state institutions. It also prevents the misuse and abuse of power.

However, issues may arise when it comes to constitutional enforcement. Constitutional value can be of almost no or limited effect. The *per se* binding provisions of a constitution might be difficult to enforce due to the lack of enforcement mechanisms or lack of intention to enforce.⁴⁰ If the constitutional value is undermined, the right of the people will be at risk.

Therefore, it is important to strictly comply with the duty that the constitution imposes on state institutions, to promote and protect human rights, while respecting the will of the people and acting in their best interests. The will and interest of the people can be expressed and protected through legal representatives, namely state institutions (parliament), while civil society can monitor and work closely with the minority group.

2. Constitutionalism and Rule of Law

There is no consensus notion of constitutionalism. According to Sweet, constitutionalism refers to the “commitment on the part of any given political community to be governed by constitutional rules and principles.”⁴¹ For other scholars such as Jorg Menzel, Carl Friedrich, and Koen Lenaerts, constitutionalism refers to limited government operating in associate with concept of rule of law,

³⁸ Wolin Sheldon, *Constitutionalism and the Separation of Power* (1989).

³⁹ Hassal Graham & Saunders Cheryl “Asia Pacific Constitutional System” (Cambridge University Press) at 244.

⁴⁰ *Ibid* at 23.

⁴¹ Alec Stone Sweet “Constitutionalism, Legal Pluralism, and International Regimes” (2009), *Faculty Scholarship Series*, Paper 1295.

separation of powers, protection of fundamental rights, democracy, etc.⁴² Hence, it is worth to mention all relevant concepts as mentioned above to assess whether a constitution is embracing constitutionalism and protecting constitutional rights, particularly the right to participate in constitution and law making.

The governmental system consists of three branches, namely the executive, the legislative, and the judiciary. Each has different roles to play in making and enforcing laws. It is simply understood that the legislative adopts the laws, the executive enforces the laws and the judiciary applies the laws. The main concern is whether processes exist to ensure that the law is just and applies to everyone equally. From a law-making process point of view, it is essential that constitution and legislation are properly enacted and assessed carefully.⁴³ Based on a study on constitutions in the Asia Pacific region, Hassall and Saunders concluded that some states “treat the doctrine of separation of power as a political tool to protect the interest of the state rather than the rights of individuals.”⁴⁴ Therefore, the law making process needs to be complemented by the concept of checks and balance. Regardless of the independence of each branch, the power of one branch might be checked or challenged by the other branches to ensure that there is no abuse of power.⁴⁵ The improper implementation of the checks and balance principles may make the state institutions become the victim of political and economic elites.⁴⁶

In addition, the concept of the rule of law plays a part in limiting the abuse of power by the government or state and increases the respect of human rights.⁴⁷ Illustratively, the report of the expert workshop on the right to participate in public affair organized by UNHCHR stated the following: “The Secretary-General of United Nations has described the rule of law a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws, equally enforced and independently adjudicated, and which are consistent with international human right norms and standard.”⁴⁸ Nevertheless, there is no exact definition of the rule of law. Some scholars argue that the rule of law is subject to court implementation rather than state agencies and that the court has a strong role to uphold the rule of law and state agencies

⁴² Jorg Menzel, *Introduction to Cambodian Constitutional Law* (2010) at 4; Alec Stone Sweet “Constitutionalism, Legal Pluralism, and International Regimes” (2009), *Faculty Scholarship Series*, Paper 1295.

⁴³ Donnell Guillermo O “Why the rule of law matters: The Quality of Democracy” (*Journal of Democracy*, 2004) at 35.

⁴⁴ *Ibid* at 43.

⁴⁵ Hall Daniel J. & Feldmeier John, *Constitutional Law: Governmental Powers and Individual Freedoms*, 3d ed (2016).

⁴⁶ Gargarolla “We the People Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances” (2014) at 141.

⁴⁷ Grenfell Laura, “Promoting the rule of law in Post-Conflict States” (Cambridge University Press, 2013) at 16.

⁴⁸ *Supra* note 27.

consequently submit to the rule of law.⁴⁹ Professor Hor Peng further endorses the view that the principle of the rule of law is fulfilled by the creation of judicial review and independence of judicial power.⁵⁰ Other scholars argue that the rule of law might be simply understood as “whatever a government does, it should do through laws.” However, this notion can be problematic, as some politicians view the existence of laws as a means to serve their power which is not considered limited.⁵¹

3. The Relationship between Cambodian Governmental Institutions under the 1993 Constitution

Upon briefly reviewing constitutional value, constitutionalism, and the rule of law, this part will discuss the constitutionalism which has been incorporated into the current Cambodian Constitution; this is necessary to understand the governmental system and how it works to ensure the protection and promotion of the right to public participation, particularly, the right to participate in the constitutional law-making process and reform.

According to the 1993 Cambodian Constitutional text (*de jure*), it is demonstrated that the 1993 Constitution embraces constitutionalism. Under the 1993 Constitution, the King is the head of state and is separated to the other three branches of the government; the executive, the legislative and the judiciary.⁵² The Cambodian legislative system is bicameral and consists of a senate and a national assembly. The Senate was established in 1999 to resolve political deadlock after the national election in 1998.⁵³ The legislative branch of government has power to propose and adopt laws⁵⁴ and oversee government accountability.⁵⁵ The Cambodian executive branch of the government is the head of the machine that runs the country. The Prime Minister is the head of the executive branch and of the Council of Ministers. The position is assisted by deputy ministers, senior ministers, ministers and secretaries of state.⁵⁶ According to the Constitution, the judiciary is an independent power.⁵⁷ In addition, the Constitutional Council, which was established in 1999, has the power to guarantee the respect and

⁴⁹ Donnell, *supra* note 43 at 36.

⁵⁰ Hor, *supra* note 1 at 31.

⁵¹ Tamanha Brain Z. “On the rule of law: History, Politics, Theory” (Cambridge University Press, 2004) at 92; see also Carothers Thomas “The rule of law Revival” (Foreign Affairs, 1998) at 97.

⁵² Cambodian Constitution 1993, Art. 51; Cambodian Constitutional Council, Decision No. 004/006/2001.

⁵³ Preah Reach Kram NS/RKM/0399/01 (Law), Amendment Article 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93, and from Chapter 8 to Chapter 14 of the Constitution, 1999.

⁵⁴ Cambodian Constitution 1993, Art. 91-93.

⁵⁵ *Ibid.* Art. 89, 94, 96-98.

⁵⁶ *Ibid.* Art. 118-127.

⁵⁷ *Ibid.* Art. 109.

interpretation of the Constitution.⁵⁸ The Constitutional Council is not a court but has court-like functions, dealing with any claim to challenge the constitutionality of laws and electoral disputes. A decision made by the Constitutional Council is final and binding.

The next part examines whether the relationship of the three branches is a response to the concept of constitutionalism that covers the concept of limited government, rule of law, and protection of individual rights (*de facto*).

a. Executive and Legislative Relationship

There are concerns about the relationship between the executive and legislative branch. First, the extensive power is delegated by the legislative to issue decree laws or regulations.⁵⁹ This has raised concerns that regulations adopted by the executive branch are not subject to constitutionality checks unless there are complaints or requests made to the Constitutional Council for review.⁶⁰ Second, there is lack of legislation in place to regulate the government's conduct,⁶¹ even though some self-regulatory power may be necessary, at times, to ensure that the government can implement its constitutional duties.⁶² It is essential to examine these two contradicting aspects in terms of where the line should be drawn in order to impose regulations on government conduct. This is important for the government to implement its functions effectively without being influenced by other powers or abuse its power. Third, the executive branch of government drafts most of the laws and does so with little challenge from the legislative.⁶³ This can imply that the legislative branch has less influence or is less active, while an active and strong legislative is necessary to ensure the quality of performance of the executive toward the legislative as a whole. Nevertheless, Professor Hor Peng is of the view that if the legislative and executive branches work well together, it is an indication that their overall functions have been well developed.⁶⁴ The executive holds the legislative accountable, so there needs to be a strong legislative to monitor the performance of the executive.

⁵⁸ *Ibid.* Art. 136.

⁵⁹ Mehren Arthur Taylor Von & Gordely James Russell (1977), 2d ed at 255.

⁶⁰ Cambodian Constitution, 1993, Art. 140, 141.

⁶¹ Menzel, *supra* note 16 at 21.

⁶² Hisham Mousar, "The Constitutional Roles and Powers of the Royal Government" *Cambodian Constitutional Law*, (Konrad-Adenauer-Stiftung, 2016) at 161.

⁶³ Menzel, *supra* note 16 at 24.

⁶⁴ Hor Peng, "The Constitution of the Kingdom of Cambodia: The Evolution of Constitutional Theories and Interpretation" *Cambodian Constitutional Law*, (Konrad-Adenauer-Stiftung, 2016) at 57.

b. Executive and Judiciary Relationship

There are potential concerns regarding the association between the executive and the judiciary. First, there is concern regarding the role of the executive branch towards the judiciary. This role is materialized through the Ministry of Justice, who has a duty to allocate the court budgets and to facilitate court administration.⁶⁵ Referring to the study of international standards and best practices, particularly regarding the opinions of the Consultative Council of European Judges on the Council for the Judiciary, it is suggested that the Supreme Council of Magistracy should have control over the court management, administration and even the court budget to assure the quality of justice and independence of the judiciary.⁶⁶ Second, the government, rather than the judiciary, normally requests judicial reform,⁶⁷ and that it might be questioned that the executive has influence on the independency of the court. In 2014, three laws were adopted: a law on the organization and functioning of the court, a law on organization and functioning of the supreme council of magistracy, and a law on the status of judges and prosecutors. There was a legal analysis attempt to examine the scope of the legislative and executive bodies as enshrined in these three laws. The analysis addressed the concern of the independence of the judiciary that the laws allowing the executive branch to influence the grade and ranking promotion of judges and prosecutors.⁶⁸

c. Legislative, Judiciary and Constitutional Council Relationship

The judiciary has a crucial role in enforcing constitutional values and rules. As Ginsburg states, “[during a] Constitutional review, the power of courts is to strike down incompatible legislation and administrative (government) action.”⁶⁹ It is necessary that each power has the liberty to safely exercise its functions. In the event that the legislature adopts a law that violates the constitution, the constitutional court or council may rule out that law on the basis of unconstitutionality.⁷⁰

The Cambodian Constitutional Council (Council) is the only institution that renders bidding decisions about the constitutionality of any laws.⁷¹ In addition to constitutionality reviews and checks, the Council has power to interpret the

⁶⁵ Law on Establishment of Ministry of Justice of Cambodia, Preah Reach Kram, NS/RKM/0196/04, 1996.

⁶⁶ “Legal Analysis on the three draft laws relating to the judiciary” (CCHR, 2014) at 10.

⁶⁷ *Ibid* at 1.

⁶⁸ *Ibid* at 1.

⁶⁹ Maartje De Visser, “We All Stand Together: The Role of the Association of Asian Constitutional Courts and Equivalent Institutions in Promoting Constitutionalism” (Asian Journal of Law and Society, 2016) at 106.

⁷⁰ Mehren & Gordely, *supra* note 59 at 247.

⁷¹ Law on Organization and the Functioning of the Constitutional Council, 1998.

Constitution and laws by providing advisory opinion.⁷² Nevertheless, the Council has limited authority in this regard. The Council has no authority to initiate reviews of the constitutionality or interpretation of a law, except the organization laws (i.e. law on the organization and the functioning of the Council of Ministers), unless there is a request from a competent authority as proscribed by the constitution such as the king, president of senate, president of national assembly, prime minister, one-tenth members of national assembly and one-fourth members of senate.⁷³ Those can request the Council to review the constitutionality of any laws before and after promulgation and the court can request the Council for a constitutionality review only after the laws are adopted.⁷⁴

The council has extensive powers by law in terms of ruling decision regarding the constitutionality check. Yet, it has self-constraint in exercising its power when dealing with issues related to politics. According to its advisory opinion, the Council has no authority to interpret or deal with political comments, and its interpretation is purely judicial to clarify the legal aspect only.⁷⁵ It should be noticed that there has never been a decision of the Council which ruled that a law was unconstitutional.

d. The Relationship between the Government and its Citizens

The Constitution allows citizens, through their representatives, the legislative and executive and the courts to challenge the constitutionality of any laws.⁷⁶ This also includes the laws which might restrict or limit their rights which are guaranteed by the Constitution. For instance, there can be the case where a victim files a complaint to check for the constitutionality of the provision under the Cambodian Criminal Code of Procedure regarding the arrest period within 24 hours without allowing access to lawyer. It might be questioned whether it is inconformity with the constitution provisions, as Article 38 stipulates that “any individual shall have the right to his/her own defence through the judicial system.” However, there has never been a case referred by the court through individual complaint to challenge the constitutionality of any law.⁷⁷

The importance of participating in constitution and law-making is to provide citizens and the community ownership over the constitution and strengthen the

⁷² *Ibid.* Art. 1.

⁷³ Cambodian Constitution 1993, Art. 140; Cambodian Constitutional Council, Decision No. 089/016/2006, 13 December 2006, para. 7.

⁷⁴ Cambodian Constitution 1993, Art. 141.

⁷⁵ “The competence of Constitutional Council”, Constitutional Council of Cambodia, Advisory opinion No. 20/2003.

⁷⁶ Cambodian Constitution 1993, Art. 140 & 141; Decision No. 089/016/2006 Cambodian Constitutional Council, 13 December 2006, para. 7 and see also the law on organization and functioning of the Constitutional Council, Art. 19.

⁷⁷ Teilee Kuong, “Constitutional Council of Cambodia” *Constitutional Courts in Asia: Western Originals and Asian Practice* (2016), at 261.

relationship between the government and its citizens.⁷⁸ The Cambodian Constitution does guarantee fundamental rights to all Cambodian citizens. It is understood that exercising certain rights and freedoms is subject to limitations when it is in the interest of public order and national security (state emergency) or when it would adversely affect the rights and freedom of others. According to Article 35 of the Cambodian Constitution, the “citizens of both sexes have the right to participate actively in the political economic, social and cultural life of the nation. All requests from citizens shall be given full consideration and resolution by the State’s organizations.”⁷⁹

The current human rights situation in Cambodia is still a concern. According to Rhona Smith, special rapporteur on the situation of human rights in Cambodia, in her statement on situation of Cambodia in 2017, democratic space in Cambodia has been reduced, freedom of expression and participation has been restricted, and laws have been adopted or translated into being political projects.⁸⁰ Anyhow, she expressed hope and appreciated the willingness of the government to recognize the challenges and concerns in the society. She further called on the Human Rights Council and other states for continuous support for Cambodia to ensure what Cambodian citizens deserve with the peaceful transition of Cambodia from conflict and genocide to democracy in accordance with the constitution and based on the reality of the society.⁸¹

The lack of public belief on the essence of exercising the right to participate in public affairs, particularly the right to participate in the constitution and law-making process is the main barrier. Furthermore, the voices of those who do participate (for instance, civil societies or non-governmental institutions) are not given due consideration. It can be concluded that the relationship between the government and citizens, from a legal perspective, needs to be closer.

VI. CONCLUSION

The Constitution can be changed, interpreted, or developed in order to safeguard the rule of law, individual rights, democracy, and, eventually, social welfare. The right to participate in public affairs shall be interpreted to include the right to participate in the constitution and law-making process directly. This significance is not only about exercising the right to participation, but it is also an indicative of power sharing with the citizens and further strengthening the relationship between the government and the people. The aim of the constitutional law-making process should be to put the interests and the will of the people first and the division of powers second. Individuals should be allowed to exercise their rights given under

⁷⁸ “Participatory Constitution Making Process”, (Centre for Constitutional Dialogue, 2009) at 4.

⁷⁹ Cambodian Constitution, 1993, Art. 35.

⁸⁰ Rhona Smith, “Statement by the United Nations Special Rapporteur on the Situation of Human Rights in Cambodia” (UN Press Statement, 2017).

⁸¹ *Ibid.*

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Constitution to take part in constitutional law-making either directly, through their elected representatives, court, or through constitutional council. In addition, citizens, civil societies, and the media should be allowed to observe and to provide comments in the drafting process. They should be provided with the opportunity to voice their aspirations through public consultation and this should be guaranteed under the constitution or separate laws. Furthermore, time should be allocated for public consultation on the draft. Any suggestion during public consultation should be taken into consideration. In doing so, the draft shall be shared with the people before it is to be adopted. Dissemination and education should be provided more to the public about the given right and freedoms to ensure the effectiveness of exercising such rights and without making any delay or obstacles to the work or development of the national institutions.

Exercising the right to participate in the constitution or law-making process might be perceived as unnecessary and unpractical. It might be questioned whether public consultation might be regarded, given due consideration, or is just an instrument to legitimate and consolidate the making process. However, it is essential to engage and exercise the right to ensure that voices are heard and can slowly make change. Nowadays technology, through social media, could be a good approach for the inclusion of the new generations to participate in public life.

Furthermore, there should be a clear delineation regarding the engagement among the three branches of the Cambodian government. For instance, there needs to be a clear and transparent delineation of the relationship between the executive and judiciary branches regarding budget and administrative issues. This means that national institutions should be strengthened, and each relevant institution should be more active by being critical and taking initiative to take the ownership of their work. Overall, Cambodia needs a stronger political will to implement the constitutional rights, respect the principle of limited government, and uphold rule of law. More importantly, the public should initiatively exercise their power and right by engage in the constitution and law-making process through meaningful public consultation. This practice will not change overnight. The process needs time and engagement of each individual to progressively strengthen the accountability of the government toward its own people.

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