Cambodia's Competing Constitutional Sites and Spirits

by

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MA, School of Oriental and African Studies, University of London, 2012
BA, University of Leicester, 2008

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Supervisory Committee

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Abstract

This thesis studies the Cambodian Constitution from a socio-legal and ethnographic perspective, highlighting some of the multiple ways in which diverse constitutional discourses and practices manifest themselves in the country outside of judicial, or even state, institutions. The thesis starts by recognising that existing literature typically associates constitutionalism exclusively with the work of courts, and with liberal-democracy, before providing a series of case studies that focus on constitutional practices that are typically obscured from view by such a focus. These case studies provide accounts of how, for example: international actors and local civil society groups engaged in Cambodia's 1993 constitution-making process; Cambodia's apparently liberal-democratic Constitution has been used publicly by the government to facilitate and justify authoritarianism; court cases are themselves used by local activists to conduct domestic and internationally-focused advocacy; constitutional provisions have helped to shape the way Buddhist monks understand their role in society and politics; and artists are helping to shape constitutional definitions of national identity and culture through their interactions with or avoidance of state censorship. The result is a nuanced, empirically grounded account of a constitutional order that has been largely overlooked by scholars in the country and abroad. However, it is also an exploration of the ways in which constitutionalism can be understood to operate outside of courts or state institutions, and how a liberal-democratic constitution can simultaneously act as a source of legitimacy for and challenge to authoritarianism.

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List of Acronyms

ADHOC: The Cambodian Human Rights and Development Association

BLDP: Buddhist League for Development Party

CCHR: Cambodian Centre for Human Rights

CGDK: Coalition Government of Democratic Kampuchea

CNRP: Cambodian National Rescue Party

CPP: Cambodian People's Party

DK: Democratic Kampuchea

FUNCINPEC: United Front for an Independent, Neutral, Pacific and Cooperative Cambodia

KPNLF: Khmer People's National Liberation Front

LICADHO: The Cambodian League for the Promotion and Defense of Human Rights

PRK: People's Republic of Kampuchea

RGC: Royal Government of Cambodia

SoC: State of Cambodia

UNOHCHR: United Nations Office of the High Commissioner for Human Rights

UNTAC: United Nations Transitional Authority in Cambodia

Acknowledgments

To start, I would like to give my heartfelt thanks to my supervisor, Victor Ramraj. Victor, since our first Skype conversation in early 2014, before either of us had even arrived at UVic, your enthusiasm and optimism about my project has helped me to believe it would possible and given me confidence to make it so. Your patience and open-mindedness has enabled me to play around with and pursue ideas that I would otherwise have felt unable to. Your flexibility and willingness to entertain the idea of me writing this dissertation from more than 11,000 miles away, and conduct meetings via Skype at awkward hours and at no small inconvenience to yourself, has allowed me to grow in ways that I could not have imagined. While I have learnt a lot from *what* you have said to me over the years, I think I have learnt even more about *how to be* in academic environments from your humility and thoughtfulness.

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questions that I might never have asked myself, or might equally easily have thought I already had answers to. I hope to be able to take the lessons I have learnt from you – about how to do research (and academia more broadly) in a way that is compassionate, critical, and authentic – with me into the future.

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In coming to, thinking about, researching and writing this dissertation, I have benefitted enormously from the insights of various friends, colleagues and mentors. At the School of Oriental and African Studies, University of London, the seed of this thesis was planted by Professor Gina Heathcote, and nurtured by my ever-encouraging thesis supervisor, Alex Fischer. My introduction to Cambodian language and culture was enriched by the Khmer language cohort of 2011-12, taught by the always-entertaining Justin Watkins, and brought to life by friends Fionn Travers-Smith, Scott Rawlinson, and Andrew Johnstone. My pre-PhD experiences in Cambodia, and my understanding of those experiences, was deepened immensely by friends like Sophal Thim, Tivea Koam, the Khmer teachers at LINK, and later by Ben Rutledge and John Caughlan. My time at UVic benefitted hugely from the 2014 cohort, the early guidance of Michael M'Gonigle, and the comradery of Mark Zion, Kate Plyley, and Keith Cherry. I am also so grateful to Robyn Fila and Janet Shephard, who helped me navigate my often fraught time living in Victoria. As this dissertation has developed, I have been fortunate enough to benefit from the guidance and support of so many others: Lynette Chua, David Engle, and the mentors at the ASLI Young Scholars Workshop in Singapore in the summer of 2016; as well as Nick Cheesman, Ben Schonthal, Keebert von Benda Beckmann, Andrew Harding, Arun Thiruvengadam, Steve Heder, and – for some years now – my friend Neil Loughlin.

I came to this dissertation with a close personal attachment to Cambodia. This is partly thanks to my in-laws: Lok Ta and Lok Yeay (who sadly passed halfway through my PhD, having seen so much in their lives), Vannary Uong, Von Sao, Ashlyn, Chris, Pi, Rodney, Nissay, Boramie, Om Yany, Om Choo, Om Nee, Om Hol, Ming Tang, Pou Nol, Ming Oun, Pou Rith, Pou Duch, and Pou Peou. Thank you for all your support and for everything you have taught me so far.

Much to her bemusement, my wife – Amara Sao – is the original and enduring reason that this dissertation exists. Amara, you have made many sacrifices, endured many hardships and been bitten by many mosquitos in order to support me throughout this process. So much of the burden, stress and anxiety of my life as a PhD student has been borne by you as well as me. Yet, so much of the drive, passion and excitement I have

found and re-found for this project over the years has been provided by you. Your unerring sense of right and wrong, your seemingly effortless ability to live by the principles you set for yourself, and the combination of your adventurous spirit and the knack you have of making even the most mundane things enjoyable have kept me grounded throughout all of this.

Dedication

To my father. Who only ever asked me to do what I cared most about.
I hope you would be proud of where it has taken me.

To my mother. Whose courage, patience and understated sense of justice continues to teach me more than any book ever could.

To Amara. Without whom none of this would have been possible. With all your sacrifices, your ability to remind me why I am doing what I am doing, and your ability to make me laugh when it seemed impossible to, this is as much your work as it is mine. Thank you so much.

And to all the Cambodian people who have lost their lives, liberty or loved ones for saying or doing that which you had a constitutional right to say or do.

Chapter 1 - Introduction

It took a surprisingly long time for the large, corrugated-iron gate to creak open. In those moments waiting in the sun, even on a supposedly cool February morning, Phnom Penh's ever-present heat and humidity could be felt as acutely as ever. When the gate finally opened, giving way to the impressive colonial-era villa that now houses one of Cambodia's main human rights NGOs, the security guard met me with a timorous smile. The interview I was expecting to conduct had been postponed, I was told. My intended interviewee, the organisation's Advocacy Director, was not available. He could not explain why. What would otherwise be a tranquil setting, a carefully tended to garden and patio with a small seating area, felt remarkably tense. Those employees who were still loitering outside clustered around a small table, speaking in hushed tones, while another strode purposefully into the building. Inside the offices, I later discovered, key members of the organisation's staff were running through safety-procedures with the Cambodian political commentator and analyst, Meas Nee. Just 24 hours earlier, Meas had been singled out and criticised publicly by the Cambodian Prime Minister, Hun Sen, as part of a characteristically sweeping speech in which he also claimed to have obtained audio-recordings of interviews given to a leading English-language newspaper by both Meas and the opposition MP, Son Chhay. Suspicion was rife, therefore; as was concern about the safety of prominent government critics. Just seven months prior, another prominent political activist, who I had also planned to interview for this research, Kem Ley, had been publicly gunned down in broad-daylight.

Now only a handful of months before the local Commune Elections of June 2017, and shortly after the complete collapse of an often-tenuous détente between the ruling Cambodian People's Party (CPP) and the opposition Cambodian National Rescue Party (CNRP), Meas Nee had touched a nerve. The CNRP had returned to their tactic of selectively boycotting sessions of the National Assembly after a short-lived "culture of dialogue" with the CPP ran aground, but they had nevertheless announced their intention

to call three senior government officials to parliament for questioning.[1] By submitting letters of request to the President of the National Assembly, the opposition hoped to compel the respective ministers to appear before the parliament. First among the names who would be called was Minister of Defence, Tea Banh, who the opposition hoped to interrogate over the promotion of two military officials just weeks after they had been released from prison, having served sentences for assaulting CNRP MPs (Nhay Chamroeun and Kong Saphea) directly outside of the National Assembly building. Supporting their request was Article 97 of the Constitution, which states that legislative commissions "may invite any minister to clarify certain issues under his/her field of responsibility." On February 1st, however, the Prime Minster vowed to block any such request when it was received by his Council of Ministers.[2]

The following day, newspaper reports of the stand-off had included quotes from Meas Nee. Most notable among these was a statement in which he called the potential ban on ministers appearing before the National Assembly a "serious violation of the Constitution."[3] The response from the Prime Minister the following day, however, was very clear. "My reaction yesterday was that you yourselves have to respect the rule first; you must join the National Assembly," Hun Sen told an audience of graduating students at the National University of Management, before adding:

> "There was this pundit Meas Nee who said something about the Article 97 of the Constitution, about inviting ministers to take questions on respected field of responsibility. I know that. … I know the Constitution. I do not hold a PhD degree, but I am the father of doctors since not less than two of

[1] "It's good to talk: Cambodia's culture of dialogue", (1 September 2015, last accessed 14 December 2019), online: *Southeast Asia Globe Mag* <http://sea-globe.com/cambodia-culture-of-dialogue-southeast-asia-globe/>; Kuch Naren, "'Culture of Dialogue' Faces Official Demise", (31 January 2017, last accessed 14 December 2019), online: *Cambodia Daily* <https://www.cambodiadaily.com/news/culture-of-dialogue-faces-official-demise-124308/>.

[2] Ben Sokhean, "PM Vows Unconstitutional Block of Ministers' Questioning", (2 February 2017), online: *Cambodia Daily* <https://www.cambodiadaily.com/news/pm-vows-unconstitutional-block-of-ministers-questioning-124461/>.

[3] *Ibid*.

> my children hold PhDs. … Meas Nee, I would send a message to you, to not go too far."[4]

What it meant to go "too far," or what the limits of reasonable critique now were, of course, was not elaborated upon. Meanwhile, any suspicion that this sort of discursive confrontation might be a one-off was eradicated just over seven months later. "Constitutional interpretation is not the right of the analyst," the Prime Minister asserted that in a speech commemorating the 24th anniversary of the promulgation of the Constitution, because "only the Constitutional Council has the right to do so."[5]

These skirmishes went more or less unnoticed at the time. For those involved, of course, such an overt threat was deeply worrying. However, in a period that saw seismic shifts in the way Cambodia is governed – captured succinctly in the final headline of local English-language newspaper the *Cambodia Daily*, which read "Descent Into Outright Dictatorship"[6] – the significance of such stories undoubtedly paled in comparison. Yet, I would argue that they provide a useful starting point for understanding constitutional contestation in contemporary Cambodia, because they symbolically capture what exactly it is that is being contested. At first blush, Meas Nee's experience is one of a prominent, public critic of a government challenging its leaders on their commitment to following

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[4] Socheat Samreth, "Selected Comments Samdech Techo Hun Sen at the Graduation and Diploma Presenting Ceremony of the National University of Management [Unofficial Translation] | អង្គភាពព័ត៌មាន និងប្រតិកម្មរហ័ស", online: <http://pressocm.gov.kh/en/archives/9718>; Mech Dara & Shaun Turton, "PM takes aim at Post, analyst, National, Phnom Penh Post", online: <https://www.phnompenhpost.com/national/pm-takes-aim-post-analyst>.

[5] Socheat Samreth, "Samdech Techo Prime Minister Advises Political Analysts to Learn More about Cambodia's Constitution | អង្គភាពព័ត៌មាន និងប្រតិកម្មរហ័ស", online: <http://pressocm.gov.kh/en/archives/13442>. Inspired by the French constitutional traditions, the Constitutional Council is Cambodia's main organ for judicial review. It was established under Chapter 13 of the Constitution at its drafting in 1993, separately from the judicial system (Chapter 12), but did not come into existence until 1998. Its nine members are not necessarily judges, or even qualified lawyers, and are appointed by either the King, the National Assembly, and the Supreme Council of the Magistracy. The Council is primarily responsible for reviewing the constitutionality of legislation before or after its promulgation, and settling electoral disputes.

[6] Global Witness, "Cambodia's 'descent into outright dictatorship'", online: *Glob Witn* <https://www.globalwitness.org/en/blog/cambodias-descent-outright-dictatorship/>; "Cambodian paper shuts with 'dictatorship' parting shot | Reuters", online: <https://www.reuters.com/article/us-cambodia-media/cambodian-paper-shuts-with-dictatorship-parting-shot-idUSKCN1BE11H>; "5 signs of Cambodia's 'descent into outright dictatorship'", (11 September 2017), online: *Asian Corresp* <https://asiancorrespondent.com/2017/09/cambodia-dictatorship/>.

constitutional procedures. This is a compelling, but largely familiar story. However, a closer reading of Prime Minister Hun Sen's words, both on 2nd February and later on 24th September, suggest that what was being contested was not *whether* the government had violated the constitution, but *who was the appropriate judge* of constitutionality. Meas Nee's mistake, in other words, was not that he believed that the government had violated the Constitution, but that he believed he had the right to interpret the Constitution, to defend that interpretation publicly, and to use it to challenge what he thus interpreted to be the government's violation of Constitution.

Despite the danger that is implicit in such an enterprise, publicly articulated critiques of the government have, for many years, been relatively commonplace in Cambodia. Equally common-place, meanwhile, is the framing of such challenges, and their rebuttals, in constitutional terms. These discursive skirmishes over the meaning of the Constitution bring into view some of the central fault lines in Cambodian society. Beneath those fault lines lay foundational tensions that are exposed and excavated throughout the various case studies presented by this thesis, in many cases for the first time. Such tensions include those that have emerged between the Constitution's sweeping promises of liberal democratic principles and a ruling party that is often seen to be unable or unwilling to live up to those promises, apparently viewing them as a threat either to the continuation of its rule or at least to the stability on which much of its legitimacy is based. Beneath those fault lines also lay differing views on how and why Cambodia's Constitution came into being in 1993, with that process – as part of an unprecedented, U.N.-sponsored peace-making process – appearing as either a site of renewal for Cambodian civil society, or a rushed and non-participatory one in which ideas were imposed on the country. It is also there that we find fundamental questions about what the relationship between the state and religious institutions should look like, and the extent to which Buddhist monks should engage in politics or social activism. There, too, beneath Cambodia's constitutional discourse we find a poignant debate, about what it means to be Cambodian, and whether or how the essence of Cambodian culture and identity should be protected.

That throughout the abovementioned case studies, and in the story of Meas Nee described above, people persist in referring to or relying upon constitutional ideals and arguments to support them in the pursuit of their various goals, is interesting in itself. Those that articulate constitutional arguments in Cambodia (such as the analyst, Meas Nee), do so with a pervasive and profound scepticism about the Constitution's effectiveness. It is often in spite of a fundamental disbelief in the ability of the Constitution to fulfil its promises, in other words, that people continue to speak and act as if it were able to do so. As part of constitutional practices that have been almost entirely overlooked in academic scholarship, for example, Cambodians in various settings call upon the Constitution to fairly resolve disputes, to limit government, protect rights, and guarantee the separation of powers; to justify or to question the right of Buddhist monks to engage in politics; and, even, to explain what it means to be Cambodian. What is more, because of a deep-seated distrust of Cambodia's public institutions, most notably the judiciary, such constitutional challenges primarily find their expression outside of the courtroom. Despite, or perhaps because of this tendency to manifest outside of judicial or even institutional fora, scholars – whether focused on Cambodia or on constitutional developments in the region – have routinely overlooked the existence of constitutional contestations in the country. In a recent study of rule of law in Cambodia and Singapore, for example, Un Kheang and Stephen McCarthy concluded that "constitutional contestation has been relatively muted."[7] Such a view is only possible, I argue, if one assumes a narrow and formalistic definition of constitutional contestation that obscures the everyday constitutional practices that can be found when one looks beyond courts or state institutions.

It should be noted, meanwhile, that in many instances the public articulation of constitutional arguments described above does have something like the impact that their articulators intend. Two years after Meas Nee found himself in dangerous waters, for instance, a handful of similarly placed public figures expressed concern at a suggestion that Cambodia might reinstate the death penalty. Prime Minister Hun Sen, speaking to an audience of staff from an anti-human trafficking NGO, claimed that he was considering a

[7] Stephen McCarthy & Kheang Un, "The rule of law in illiberal contexts: Cambodia and Singapore as exemplars" (2017) Polit Const Southeast Asia 315 at 325.

national referendum on the return of capital punishment for instances of rape. Such a move would have required a constitutional amendment, given that provisions against capital punishment were included in the Constitution since it was drafted in 1993; a fact that was pointed out immediately by Sok Sam Oeun, Ou Virak, Chak Sopheak and Sok Touch. "I agree with their analysis," the Prime Minister was quoted as saying just a day later, because:

> "Our country has abolished the death penalty since the era of the State of Cambodia. When we changed the Constitution from a popular Republic of Cambodia to the State of Cambodia, we already abolished the death penalty."

While it is impossible to be sure how seriously his initial suggestion – which would have meant holding a referendum for the first time in Cambodia's post-civil war constitutional era – should be taken, Hun Sen's recognition of the constitutional arguments put forward by the individuals named above is itself telling. The volte-face, if nothing else, demonstrated not only that the Prime Minister was willing to contemplate amendments to the Constitution unexpectedly, apparently almost on a whim, but also that constitutionally framed arguments – articulated publicly, a long way from any courtroom – might play some role in shaping Cambodia's constitutional order.

Constitutions, of course, are typically declared in the name of "the people." Yet, the practice of constitutionalism is typically understood with more or less exclusive reference to courts, or state institutions. By focusing on exactly this sort of discursive contestation in Cambodia, this thesis aims to – at least momentarily – decentre judicial institutions from the study of constitutionalism, and to explore some of the otherwise overlooked spaces in which in which constitutional practice might also manifest.[8] With reference to

[8] Throughout this thesis, I follow Benjamin Schonthal in making the distinction between constitutional law, constitutionalism and 'constitutional practice,' with the latter being defined as "the acts of drafting, debating, implementing and invoking constitutional law." Meanwhile, the idea of refocusing constitutional study away from courts was first comprehensively articulated by Mark Tushnet, but has also been called for in a context of studying globalisation by Gunther Teubner. See Benjamin Schonthal, *Buddhism, politics and the limits of law: the pyrrhic constitutionalism of Sri Lanka*, Comparative constitutional law and policy (New York, NY: Cambridge University Press, 2016) at 11; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999); Gunther Teubner, *Constitutional fragments: societal constitutionalism and globalization* (Oxford University Press, 2012).

the above story, this thesis argues that by taking "the analyst" seriously as a constitutional actor, we can come to a more nuanced and textured understanding of the multiple roles that constitutions play.[9] While the above example is, admittedly, a distinctly political one, this thesis will ultimately demonstrate that the role of the Cambodian Constitution extends far beyond the realm of judicial or even state institution. Specifically, constitutional discourses pervade societal conversations about religion, culture and society; including, for example, conversations about the role of monks in politics, or about the meaning of Cambodian culture and identity. Equally, while the case-study data on which this thesis is based is undeniably unique to Cambodia, this thesis posits that the lessons that can be extracted from that data are nevertheless generalizable.[10] In other words, the question that this thesis seeks to answer – namely, what role does the Constitution, and the concept of constitutionalism, play *outside of the courts* in Cambodia – can and should be asked in numerous other jurisdictions or social contexts.

Cambodia: Exceptional and Exemplary

Cambodia's Constitution and constitutional practices are widely overlooked or misunderstood in academic scholarship, as I hope the juxtaposition of Un and McCarthy's suggestion that constitutional contestation in Cambodia is "muted"[11] with the constitutional debates initiated by the likes of Meas Nee aptly suggests. This oversight in the literature is hardly uncommon for a country that does not fit the Western, liberal-democratic mould that is so regularly taken as the norm for understanding constitutionalism. Typically characterised as a country governed by a hybrid or electoral-authoritarian regime – not to mention one so infamously ravaged by civil war, genocide, and crimes against humanity, before being designated as the poster-child of U.N. peace-building missions in the post Cold War era – Cambodia is not the first place that scholars of constitutionalism might look. Likewise, constitutional law and literature on constitutionalism has for a long time ranked low on the list of priority disciplines for

[9] The analyst is used here, as it was by Prime Minister Hun Sen (see page 3) to denotes anyone who – like Meas Nee – publicly articulates interpretations of the Constitution or understandings of constitutionalism.
[10] Chapter 2 provides an exploration of the challenges of comparison, as well as articulating the theoretical basis for my approach.
[11] McCarthy & Un, *supra* note 8 at 325.

Cambodia-studies scholars, or those seeking to better understand Cambodian politics or society. As I explain in greater detail in Chapter 2, this tendency is exacerbated by a formalistic and Eurocentric assumptions that underlie popular and academic understandings of constitutionalism. Firstly, as Arun Thiruvengadam has observed, scholarship on constitutionalism "continues to be dominated by western experience."[12] Secondly, as Li-Ann Thio notes, the focus on western experiences – in which judicial institutions play a particularly strong role – has consequently helped to "render… constitutional law synonymous with the law of a supreme court."[13] Yet, despite this lack of scholarly attention, the vocabulary of constitutionalism is *rife* in Cambodia. Used differently but nonetheless regularly by actors across the country's social and political spectrum, the spectre of the 1993 Constitution is simultaneously seen by some to offer legitimacy to authoritarian practices, as well as to those seeking to challenge them. Similarly, regardless of whether such preoccupations (with liberal-democracy, or a judicialised politics) necessarily represent the normative goal of constitutionalism, empirically speaking they are far from the norm as far as the actual practice of constitutionalism around the world is concerned.[14]

As such, this thesis seeks to provide a deeper, "thicker"[15] understanding of constitutional practices in Cambodia. Such an understanding, I argue, can contribute not only to knowledge about Cambodia, but also to the growing literature on constitutionalism (and

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[12] Arun K Thiruvengadam, "Excavating Constitutional Antecedents in Asia: An Essay on the Potential and Perils" (2012) 88 Chic-Kent Law Rev 45.

[13] Li-ann Thio, "Soft constitutional law in nonliberal Asian constitutional democracies" (2010) 8:4 Int J Const Law 766 at 767.

[14] As Tamir Moustafa explains: "more than half of all states [are] categorized as authoritarian or semi-authoritarian, and more [are] headed that way." Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*, 1 edition ed (Cambridge New York Melbourne: Cambridge University Press, 2009) at 20.

[15] The phrase "thick description,", is dealt with at length by anthropologist Clifford Geertz, although he originally took the term from the work of philosopher Gilbert Ryle. In Geertz's work, and in anthropology more generally since then, "thick description" reflects an understanding that any individual act takes on or is assigned meaning beyond its "phenomenalistic" existence, based on the social and cultural context in which it occurs. Using Ryle's example of a twitch and a wink, he explains how the two actions are ostensibly the same, when taken out of their specific context, but points out that a wink has specific social meanings that are only made possible by the intention that lays behind the act or the way in which the act is interpreted by those who notice it. Clifford Geertz, *The Interpretation of Cultures: Selected Essays*, First Edition edition ed (New York: Basic Books, 1973) at 6–16; Clifford Geertz, "Thick description: Toward an interpretive theory of culture" in *Cult Geogr Read* (Routledge, 2008) 41; Gilbert Ryle, *Collected Essays 1929 - 1968: Collected Papers Volume 2*, 1 edition ed (London ; New York: Routledge, 2009).

law more generally) in non-western, post-conflict and illiberal contexts. Of course, the nature and substance of constitutional contestation is, to a large extent, influenced by Cambodia's specific, if not singular, historical and social context. Cambodia's modern history, as preeminent historian David Chandler rightly notes, has been characterised by tragedy.[16] Foremost among those tragedies was, of course, the Democratic Kampuchea (DK) period from 1975-1979. As Simon Springer rightly notes, "the psychological scarring and unspeakable suffering" caused in this period – during which time at least one-and-a-half million people, around twenty percent of the population, died as a result of the backward-looking and brutal policies of the Khmer Rouge – is in many respects "a national commonality."[17] In material terms, the Khmer Rouge's attempt to return Cambodia to "year zero" completely destroyed its legal system; the mistreatment and murder of anyone with an education (including a legal education), the destruction of almost all legal texts, and the repurposing of buildings that housed courts or law schools left Cambodia needing to rebuild a legal system "from scratch."[18] On a more psychological level, however, the recognition of this shared history can help observers to understand – but not explain or excuse – state-led constitutional interpretations and practices to this day, as I explain in Chapter 4 of this thesis. In this sense, then, Cambodia certainly was not starting "from scratch" in 1979 or in 1993, but may have instead inherited a predisposition towards stability that has – at least to some degree understandably, but certainly not inevitably – been used to underwrite authoritarian approach to constitutionalism.

The tragedy of Cambodia's recent history, however, goes back further than the undoubted devastation of Khmer Rouge rule, as this period was preceded – and to a large degree precipitated – by a four year period (from 1969-1973) in which the United States ruthlessly bombed the country's rural areas, killing an estimated 600,000 people.[19]

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[16] David P Chandler, *The tragedy of Cambodian history: Politics, war, and revolution since 1945* (Yale University Press, 1991).

[17] Simon Springer, *Cambodia's neoliberal order: violence, authoritarianism, and the contestation of public space*, Routledge Pacific Rim geographies 8 (Milton Park, Abingdon, Oxon ; New York: Routledge, 2010) at 1.

[18] Dolores A Donovan, "Cambodia: Building a Legal System from Scratch" (1993) 27 Int Lawyer ABA 445.

[19] Ben Kiernan, *How Pol Pot came to power: colonialism, nationalism, and communism in Cambodia, 1930-1975* (Yale University Press, 2004).

Further suffering was inflicted upon Cambodia in the decade after the fall of the Khmer Rouge, meanwhile. The fact that Cambodia was, on 7th January 1979, liberated, occupied and transformed into a client-state (known formally as the People's Republic of Kampuchea, or PRK) by its neighbour and America's cold war adversary, Vietnam, meant that Cambodia spent almost the entire 1980s under international sanctions.[20] Adding insult to terrible injury, meanwhile, a coalition of anti-PRK forces that included the Khmer Rouge not only proceeded to wage a protracted civil war with foreign support, it also occupied Cambodia's seat at the United Nations General Assembly in New York. The fall of the Berlin Wall and the end of the cold war, however, brought a recalibration in Cambodia's international status and domestic politics.[21] With Vietnam no longer able to act as a patron, and the west was no longer willing to support a coalition which claimed the abhorrent Khmer Rouge leadership as members, "the Cambodia question that had been allowed to fester for a decade could finally be answered."[22] Reflecting a brief moment of international consensus, captured in the heady optimism of Francis Fukyama's declaration of "the end of history," a peace process administered by the United Nations and centred on democratic elections was to be the order of the day.[23] The recalcitrant Khmer Rouge later reneged on the commitments it made in the 1991 Paris Peace Accords, refusing to give up their arms, boycotting the U.N.-supervised elections and returning to guerrilla warfare against the state until their eventual surrender and reintegration in 1998. However, the Accords enabled the effective isolation of the Khmer Rouge, as their former coalition partners[24] and the ruling party[25] agreed (at least in principle) to settle their political differences with ballots rather than bullets.

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[20] Elizabeth Becker, *When the war was over: Cambodia and the Khmer Rouge revolution* (Hachette UK, 1998); Evan Gottesman, *Cambodia after the Khmer Rouge: Inside the politics of nation building* (Yale University Press, 2003).

[21] Ben Kiernan, ed, *Genocide and democracy in Cambodia: the Khmer Rouge, the United Nations and the international community*, Monograph series / Yale University Southeast Asia Studies 41 (New Haven, Conn: Yale University Southeast Asia Studies, 1993).

[22] Springer, *supra* note 18 at 1.

[23] Francis Fukuyama, "The End of History?" (1989) 16 Natl Interest 3.

[24] The royalist National United Front for an Independent, Neutral, Peaceful and Cooperative Cambodia (FUNCINPEC) and the anti-communist Khmer People's National Liberation Front (KPNLF), which transformed itself into the Buddhist League for Democracy Party (BDLP) to run in the 1993 elections.

[25] What is now the Cambodian People's Party (CPP), but until 1991 was the Khmer People's Revolutionary Party (KPRP).

As Chapter 3 explains in greater detail, the promulgation of Cambodia's Constitution on 24th September 1993 was the culmination of an 18-month experiment in internationalised peace-building, wherein the United Nations – under the auspices of its Transitional Authority in Cambodia (UNTAC) – supervised the country and administered its first genuinely democratic elections. As such, the document was to be a harbinger for a new era for Cambodia, and the foundation of a triple transition: from decades of war to (relative) peace; from Marx to markets; and from authoritarianism to liberal democracy.[26] As such, much of what has been written about Cambodia has focused primarily on those transitions. Early studies concerned themselves mainly with measuring and evaluating the impact of the UNTAC mission.[27] Generally, they noted significant success in terms of the procedural aspects of the 1993 election but glaring failures with respect to its mandate for disarming the (in some cases still warring) conflict-parties, or for de-politicising the country's military and administrative apparatus.[28] Subsequently, the majority of literature on Cambodia has been framed in terms of democratisation.[29] Thus, scholars have been unsurprisingly concerned either with the progress of institution-building, or with the informal or external institutions that have inhibited democratic progress.[30] Studies have effectively and evocatively demonstrated how aid-dependence,[31] systems of patronage,[32]

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[26] Dylan Hendrickson, "Globalisation, Insecurity and Post-War Reconstruction Cambodia's Precarious Transition" (2001) 32:2 IDS Bull 98; Springer, *supra* note 18; Caroline Hughes & Kheang Un, eds, *Cambodia's economic transformation*, NIAS studies in Asian topics 49 (Copenhagen: Nias Press, 2011).

[27] Grant Curtis, *Transition to What?: Cambodia, UNTAC and the Peace Process* (UNRISD, 1993); Kiernan, *supra* note 22; Michael W Doyle, *UN peacekeeping in Cambodia: UNTAC's civil mandate*, International Peace Academy occasional paper series (Boulder, Colo: Lynne Rienner Publishers, 1995); Trevor Findlay, *Cambodia: The legacy and lessons of UNTAC*, 1 (Oxford University Press, USA, 1995); Caroline Hughes, *UNTAC in Cambodia: the impact on human rights*, 92 (Institute of Southeast Asian Studies, 1996); MacAlister Brown & Joseph Jermiah Zasloff, *Cambodia confounds the peacemakers, 1979-1998* (Cornell University Press, 1998).

[28] Steve Heder, "Cambodia's democratic transition to neoauthoritarianism" (1995) 94:596 Curr Hist 425; Duncan McCargo, "Cambodia: getting away with authoritarianism?" (2005) 16:4 J Democr 98.

[29] Joakim Öjendal & Mona Lilja, *Beyond democracy in Cambodia*, Democracy in Asia series (NIAS Press, 2009).

[30] Sorpong Peou, *Intervention & change in Cambodia: towards democracy?* (New York : Singapore : Chiang Mai, Thailand: St. Martin's Press ; Institute of Southeast Asian Studies ; Silkworm, 2000); Caroline Hughes, "CAMBODIA: Democracy or Dictatorship?" (2001) Southeast Asian Aff 113; Kheang Un, "State, Society and Democratic Consolidation: The Case of Cambodia1" (2006) 79:2 Pac Aff Vanc 225; Sorpong Peou, *International democracy assistance for peacebuilding: Cambodia and beyond*, Rethinking peace and conflict studies (Basingstoke: Palgrave Macmillan, 2007).

[31] Sophal Ear, *Aid dependence in Cambodia: How foreign assistance undermines democracy* (Columbia University Press, 2013); Sophal Ear, "The political economy of aid and governance in Cambodia" (2007) 15:1 Asian J Polit Sci 68; Sophal Ear, "The political economy of aid and regime legitimacy in Cambodia"

or neoliberal capitalism,[33] for example, have undermined democracy in Cambodia. More recently, meanwhile, reflecting an increased interest in the comparative study of authoritarianism and its varieties, modalities and mechanics, a growing body of literature has amassed that treats Cambodia not as a test-case for democratisation, but rather as an iteration of "competitive-authoritarianism" or "electoral authoritarianism."[34] In addition to tracing the foundations of Cambodia's "hybrid" system back to UNTAC's overwhelmingly procedural focus on elections, scholarship may now be turning to study how institutions such as elections actually work to perpetuate authoritarianism in Cambodia.[35]

Constitutional Practice in Exceptional Times

The nature and extent of constitutional contestation in Cambodia, too, must be understood within the context of changes in the style or model of authoritarian governance being practiced. Though not a study that is focused on defining or classifying Cambodia's "regime-type," this thesis begins with an awareness that constitutional practice in Cambodia – like that in any other context – is contingent to some degree on

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(2009) Democr Cambodia Polit Reconstr Post-Confl Soc 151; Caroline Hughes, *Dependent Communities: Aid and Politics in Cambodia and East Timor* (SEAP Publications, 2009).

[32] Kheang Un, "Patronage politics and hybrid democracy: Political change in Cambodia, 1993-2003" (2005) Asian Perspect 203; David Roberts, "The superficiality of statebuilding in Cambodia: Patronage and clientelism as enduring forms of politics" (2009) Dilemmas Statebuilding Confronting Contradict Postwar Peace Oper Lond Routledge 149; Kheang Un & Sokbunthoeun So, "Land Rights in Cambodia: How Neopatrimonial Politics Restricts Land Policy Reform" (2011) 84:2 Pac Aff 289; Hughes & Un, *supra* note 27.

[33] Springer, *supra* note 18; Simon Springer, "Violent Kleptocracy: The Articulations of Neoliberalism and Patronage" in *Violent Neoliberalism* (Palgrave Macmillan, New York, 2015) 41.

[34] As will be explained shortly, and expanded upon in Chapter 4, Competitive or Electoral Authoritarianism are categories elaborated by Steven Levitsky and Lucan Way, and Andreas Schedler respectively. They depict political systems in which regular elections are held between competing political parties, but where the incumbent ruling-party stack the electoral odds in its own favour so as to guarantee victory and the maintenance of power. Steven Levitsky & Lucan Way, "The rise of competitive authoritarianism" (2002) 13:2 J Democr 51; Andreas Schedler, ed, *Electoral authoritarianism* (Boulder [CO] ; London: Lynne Rienner Publishers, 2006); Mikael Baaz & Mona Lilja, "Understanding Hybrid Democracy in Cambodia: The Nexus Between Liberal Democracy, the State, Civil Society, and a 'Politics of Presence'" (2014) 6:1 Asian Polit Policy 5; Sebastian Strangio, *Hun Sen's Cambodia* (New Haven: Yale University Press, 2014); Lee Morgenbesser, *Behind the façade: elections under authoritarianism in Southeast Asia* (Albany: State University of New York Press, 2016); Astrid Norén-Nilsson, *Cambodia's second kingdom: Nation, imagination, and democracy* (Southeast Asia Program, Cornell University, 2016).

[35] Morgenbesser, *supra* note 35; Lee Morgenbesser, "The failure of democratisation by elections in Cambodia" (2017) 23:2 Contemp Polit 135; Michael Sullivan, *Cambodia votes: democracy, authority and international support for elections 1993-2013*, Governance in Asia no. 5 (Copenhagen: NIAS Press, 2016).

the variety of authoritarianism that prevails there. By the time that the concept was coined by Andreas Schedler, Cambodia already demonstrated many of the characteristics of "electoral authoritarianism."[36] Elections were and are held regularly, and generally understood to meet at least a minimum standard of procedural fairness. However, political space around elections is heavily circumscribed and state institutions are comprehensively co-opted by the CPP, in such a way that the scales of political competition are heavily tipped in favour of the ruling party. As the category of "electoral authoritarianism" was later refined, following the seminal work of Levitsky and Way, Cambodia has come to be understood as a "competitive authoritarian" regime, rather than a hegemonic one.[37] In addition to the comparative fairness and openness of elections,[38] this classification was based on the existence of: (a) a relatively free press; (b) an large, active and often critical civil society; and (c) the existence of grassroots political space at both a national and local level. These factors, combined with the remarkably liberal-democratic character of the Constitution (a result of preconditions imposed on the 1993 drafting process by signatories of the Paris Peace Accords), similarly means that constitutional contestation has been possible, often vibrant even, but ultimately imbalanced.

Nowhere has the imbalance been more evident than in Cambodia's judicial system. As a consequence of the limitations of the UNTAC experiment (which will be explained in greater detail over the course of this thesis), the Cambodian Constitution inherited a "weak, corrupt, and politically subordinate" judicial system.[39] On an everyday level, a lack of physical, financial and human resources has meant that courts not only lack the capacity to dispense justice fairly and efficiently, but also rely heavily on informal institutions of patronage and corruption in their functioning. As such, the courts are frequently cited as the least trusted institution in the country. Meanwhile, the

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[36] Schedler, *supra* note 35.

[37] Levitsky & Way, *supra* note 35; Steven Levitsky & Lucan A Way, *Competitive authoritarianism: Hybrid regimes after the cold war* (Cambridge University Press, 2010).

[38] After the 1993 polls, which were won by the royalist party (FUNCINPEC), the CPP had won all subsequent elections, but never by a landslide. That is, until the 2018 elections, when – having dissolved the only major opposition party, the CNRP – the CPP won all 125 of the available seats at the National Assembly.

[39] Quoted from Un & So, *supra* note 33 at 302; Kheang Un, "The judicial system and democratization in post-conflict Cambodia" (2009) Democr Cambodia 70.

pervasiveness of patronage networks and political influence has also meant that – despite constitutional provisions to the contrary – the judiciary is widely understood to be subservient to the ruling CPP. Hence, to the extent that courts are the forum for political or social contestation in Cambodia, they primarily work to perpetuate the dominance of the ruling elite while providing a thin veneer of competition. In fact, as they have been increasingly used to hamstring electoral opponents and public critics of the government, the courts can be understood to have played the role of hegemonic counterpoint in what has otherwise been a competitive authoritarian system. While Cambodia's electoral system appears to be set up to enable democratic political competition, in other words, its judicial system has functioned to limit that competition and ensure the hegemony of the ruling party by silencing critics and criminalising electoral opponents. It is for this reason, in fact, that Un and McCarthy suggest that – rather than focusing on elections – focusing on rule of law to assess progress towards liberal democracy, as they claim that rule of law is "a far more important indicator" and "more reflective of the particular regime type."[40] Similarly, an underlying theme in this thesis is that while the state of rule of law is not decisive in terms of whether or not constitutional practice exists in any given context, it is a major contributing factor in deciding what *form* that practice takes.

The discussion of regime-type, though, has one further significance for situating this research; a point that also gives this thesis's findings about constitutionalism particular significance for those interested in the study of constitutionalism. Specifically, the period in which primary data for this thesis was taken actually coincided with a major political shift in the country. Decried as a "Descent into Outright Dictatorship," that shift has subsequently been characterised by political-scientists as constituting a move from the *competitive* electoral-authoritarian model to the *hegemonic* one.[41] In attempting to "go beyond surface perceptions of dominance," meanwhile, some scholars have attempted to

[40] Stephen McCarthy & Kheang Un, "The evolution of rule of law in Cambodia" (2017) 24:1 Democratization 100 at 103.

[41] Not only because the CPP ran away with the 2018 elections – winning all 125 seats in the National Assembly after the major opposition party, the CNRP, had been dissolved by the Supreme Court after its leader was arrested on treason charges – but also because a handful of critical media outlets were forced to suspend operations, an international NGO was banned and a local one suspended by the Ministry of Interior, while the public was warned that military units would be used to "smash the teeth" of potential protestors, who were seen as posing a threat to stability.

"examine… power dynamics behind the scenes."[42] Most notably, Jonathan Sutton has pointed to the death of senior ruling-party leader, Chea Sim, in 2015, which he claims "effectively removed the final limitations on Hun Sen's personal power from within the regime."[43] From this perspective, the shift to hegemonic electoral authoritarianism is actually an expression of a less obvious shift within the ruling party, from a "power-sharing model" to one of "personalist autocracy."[44] For Un Kheang, however, the shift was the pragmatic response to domestic and international changes, as "China's engagement in Cambodia served as an important enabling factor," by offsetting the traditional influence of the West that has been a feature of Cambodia's aid-dependence since 1993.[45] Ultimately, though, it appears that domestic, electoral considerations necessitated the reversion to authoritarianism. As Un explains, having seen the Cambodian National Rescue Party make significant gains in the 2013 national election and 2017 communal elections:

> "the ruling party believed that the opposition might be unstoppable if the[y]… allowed the continuation of electoral authoritarianism with the presence of a united opposition party, press freedom (albeit limited), and the rather open operation of civil society organizations."[46]

Formal competition and political space in Cambodia, then, was ultimately subverted as soon as it became clear that their continuation might lead to the electoral demise of the ruling party. Far from being external to constitutionalism in Cambodia, however, this shift was actually operationalised by the state through what, drawing on the work of David Landau and Mark Tushnet, is described in Chapter 4 as "abusive"[47] or "authoritarian"[48] constitutionalism.

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[42] Jonathan Sutton, "Hun Sen's Consolidation of Personal Rule and the Closure of Political Space in Cambodia" (2018) 40:2 Contemp Southeast Asia J Int Strateg Aff 173 at 178.
[43] *Ibid* at 175.
[44] Sutton, *supra* note 43.
[45] Kheang Un, *Cambodia: Return to Authoritarianism* (Cambridge University Press, 2019) at 53.
[46] *Ibid* at 3.
[47] David Landau, "Abusive Constitutionalism" (2013) 47 UC Davis Law Rev 189.
[48] Mark Tushnet, "Authoritarian Constitutionalism" (2014) 100 Cornell Law Rev 391.

Exceptional and Exemplary Theory

It would be an error, though, to continue to overlook the constitutional contestations that existed (and still persist), as much of the literature on Cambodia and on constitutionalism in Southeast Asia currently does. First, doing so would ignore the extent to which authoritarianism has been pursued and legitimised with explicit reference to constitutional procedures and provisions. Second, it would be to disregard the frequency and ferocity with which the government has been challenged on those same terms. Thirdly, it would be to understand the extent to which constitutional vocabularies and concepts permeate everyday life, beyond the reach of the state. Such an oversight is made possible, if not inevitable, however, by the abovementioned preoccupation with elite-level, institutional politics; the tendency to view constitutionalism "from the top-down" or "from above."[49] Instead, I posit, everyday constitutional dynamics can be best observed through a socio-legal, even ethnographic, lens; one that allows us to view constitutionalism "from the ground-up" or "from below."[50] Specifically, for the reasons explained above, these trends rarely manifest themselves in formal constitutional amendments or court decisions. Instead, they are made visible only through careful attention to the "everyday politics" of constitutionalism in Cambodia.[51] Such an approach has already proven fruitful for the study of rule of law elsewhere in the region. Scholarship from the law and society tradition, by the likes of Nick Cheesman and Jothie Rajah, for example, has shed surgical light on the ways in which rule of law operates under authoritarian and illiberalism in Myanmar and Singapore, respectively. Through the exploration of "opposing ideas," Cheesman's *Opposing the Rule of Law* has shown how a conscious effort to "conflate" rule of law with what he describes as its

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[49] Lynette J Chua, *Mobilizing gay Singapore: Rights and resistance in an authoritarian State* (NUS Press, 2014) at 5; Balakrishnan Rajagopal, *International law from below: development, social movements, and Third World resistance* (Cambridge, U.K. ; New York: Cambridge University Press, 2003).

[50] Rajagopal, *supra* note 50; Boaventura de Sousa Santos & César A Rodríguez-Garavito, *Law and globalization from below: towards a cosmopolitan legality* (Cambridge University Press, 2005); Gavin W Anderson, "Societal Constitutionalism, Social Movements, and Constitutionalism from Below" (2013) 20 Indiana J Glob Leg Stud 881.

[51] This approach was first introduced by James Scott, in his study of "everyday resistance" and "everyday politics. " See James C Scott, *Weapons of the weak: everyday forms of peasant resistance* (New Haven: Yale University Press, 1985); Patricia Ewick & Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998).

"asymmetrical opposite," framed as law and order, has long undergirded the everyday practice of arbitrariness and injustice in Myanmar.[52] Likewise, Jothie Rajah's nuanced attention to discourse in Singapore has similarly helped to demonstrate how rule of law concepts have helped not only to entrench illiberalism in Singapore, but also to legitimise it.[53]

Of course, such a fine-grained approach to the study of law in authoritarian or illiberal contexts does not exclusively or necessarily lend itself to viewing law solely as an instrument of power. Cheesman's exposition of law-and-order in Myanmar, even, concludes that rule of law is properly understood as "a political ideal around which people can mobilize for all sorts of purposes," and which "fundamentally challenges how power has been and continues to be exercised."[54] Similarly socio-legal techniques have also been central to the ability of Chua's expositions of LGBT social movements, and their attempts to bring about legal change in those very same jurisdictions. There, the focus is on how sexual minority communities organise and advocate for legal change, in spite of prevailing authoritarianism, through everyday practices that she describes as "pragmatic resistance."[55] Finally, it is also worth noting that ethnography, and the study of "micropolitics,"[56] has enriched the study of international human rights law. Approaching the subject "from below," for example, Balakrishnan Rajagopal has shown how international law is not only used, but is also *shaped* by social movements that "offer a local and indigenous… way of questioning the violence of the postcolonial developmental state."[57] Meanwhile, taking an ethnographic approach to international human rights, Sally Engle Merry has emphasised how laws against gender-based violence

[52] Nick Cheesman, *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order* (Cambridge, United Kingdom: Cambridge University Press, 2015).
[53] Jothie Rajah, *Authoritarian rule of law: legislation, discourse, and legitimacy in Singapore*, Cambridge studies in law and society (Cambridge ; New York: Cambridge University Press, 2012).
[54] Cheesman, *supra* note 52.
[55] Chua, *supra* note 50.
[56] Rajagopal, *International Law from below*, 13–14; but also in Jothie Rajah, "Punishing Bodies, Securing the Nation: How Rule of Law Can Legitimate the Urbane Authoritarian State," *Law & Social Inquiry* 36, no. 4 (2011): 967, https://doi.org/10.1111/j.1747-4469.2011.01257.x.
[57] Rajagopal, *International Law from below*, 2003, 254.

are "translated" into local justice.[58] Irrespective of their subject matter, then, this growing body of literature suggests that a law and society-inspired approach, complete with ethnographic insights, an attention to discourse, and a preference for "thick" description of everyday practices, can be a productive one for the study of constitutionalism.

Taking inspiration and insight from this growing body of work, this thesis seeks to follow in the footsteps left by the literature surveyed above, and to employ ethnographically-inspired methodologies, to the study of constitutionalism. It is not the first such attempt, of course. In fact, the concept of "Constitutional Ethnography" was elucidated by Kim Lane Scheppele, in the introduction to a 2004 special issue of the *Law & Society Review* dedicated to the topic. There, Scheppele outlines the general agenda for the approach as such:

> "Constitutional ethnography does not ask about the big correlations between the specifics of constitutional design and the effectiveness of specific institutions but instead looks to the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic, and cultural elements… While any one specific constitutional setting has distinctive and ungeneralizable features, each constitutional context also has logics that link various specific features found in the particular case into patterns whose traces may also be visible elsewhere with different specific manifestations."[59]

It is clearly into this mould that this thesis's account of Cambodia's constitutional practice fits. Yet, it is in some ways an uneasy fit, given that the focus of each study contained within that special issue – although not always focusing on idealised Anglo-American models – focused primarily on European examples, and concentrated analysis largely on the role of courts or other state or supra-national institutions. Similarly, Rohit De's path breaking work on constitutionalism in India has highlighted the manifold ways in which "ordinary Indians" have engaged with the Constitution through litigation. While

[58] Sally Engle Merry, *Human rights and gender violence: translating international law into local justice*, Chicago series in law and society (Chicago: University of Chicago Press, 2006); Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle" (2006) 108:1 Am Anthropol 38.
[59] Kim Lane Scheppele, "Constitutional Ethnography: An Introduction" (2004) 38:3 Law Soc Rev 389.

adding incredible nuance and texture to understandings of the constitutional history of post-independence India, De's account nonetheless focuses entirely on courtroom struggles over the meaning of the Constitution, thereby eliding those that occurred outside of judicial institutions.[60] As Chapter 2 of this thesis explains in depth, and partially on the basis of the flaws in the country's judicial system alluded to above, such an approach is inadequate for understanding Cambodia's constitutional practice.

Hence, in addition to acknowledging the role of constitutional discourses in the practice of authoritarianism, this thesis seeks to decentre the state from the study of constitutionalism, and to instead expand the range of actors and spaces that are available to it. In this regard, I follow Benjamin Schonthal's call, in his pioneering study *The Pyrrhic Constitutionalism of Sri Lanka*, to "rethink" constitutional law through: (a) the thick description of everyday practice that he describes as "constitutional microhistory," and (b) using an "expanded archive" to study constitutionalism.[61] Such an approach, Schonthal argues, "takes especially seriously the agency of actors whose voices have been occluded or elided by the official record."[62] Hence, this thesis seeks to find constitutional practices not only in courtroom battles or elite level, electoral politics, but also in the everyday practices of societal actors, such as nongovernmental organisations, activists, and dispossessed communities, Buddhist monks, artists, filmmakers and performers. It argues that, while far from an exhaustive list of possible constitutional actors, these groups provide poignant and diverse examples of the ways in which non-state actors can actively engage in the practice of constitutionalism; sometimes by supporting dominant constitutional narratives, other times by challenging, undermining or even displacing them with new ones.

While such an approach is, I argue, necessitated by the specific, if not singular circumstances under which constitutional practice takes place in Cambodia, its relevance is not exclusive to the Cambodian context. Rather, Cambodia offers an ideal environment

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[60] The struggles that De describes as "everyday," in other words, can only be seen as common-place if one's attention to constitutionalism is trained entirely on the courts. Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic* (Princeton University Press, 2018).
[61] Schonthal, *supra* note 9 at 17–19.
[62] *Ibid* at 19.

in which to explore the ways in which constitutional contestation can still take place under authoritarianism, and the extent to which this largely happens beyond the reach of state institutions. The existence of a competitive-turn-hegemonic electoral authoritarian system, and its uneasy coexistence with a formally liberal-democratic constitution, for instance, produces a kind of tension between law-on-the-books and law-in-practice that can be productive, at least for theorising about constitutionalism. Meanwhile, Cambodia's hybrid system has, until recently, been characterised by the comparatively wide berth afforded to what has become a vibrant – if largely non-autochthonous – civil society, as well as a relatively open political space. As such, constitutional contestation in Cambodia appears to have been able to flourish, to the extent that it has operated outside of the courts and beyond the reach of the state. Far from making it an exception, however, I argue that this makes Cambodia a rich source of examples for what I believe to be a common, yet comprehensively overlooked, feature of constitutionalism.

As noted earlier, the question of what role the Constitution – and the concept of constitutionalism – plays *outside of the courts* in Cambodia is one that can and should be asked in other jurisdictions as well. It should be asked, I argue, because failing to do so obscures the extent to which constitutions have a life outside of the courtroom. Further, by obscuring this existence – or at least the possibility – of this everyday life, we risk allowing ourselves only a partial, incomplete, even impoverished account of how constitutions, constitutional law or constitutionalism actually function in reality. As I have suggested above, and as the case studies presented in this thesis demonstrate, what is elided from such accounts might be significant – even fundamental – to that reality. Whether directly or indirectly, in other words, the life that a constitution leads outside of the courtroom, the divergent meanings it takes on and the importance that particular provisions or principles are afforded, for example, can and do directly impact the way that it works in practice. If this is true in repressive political settings, where analysts are told "to not go too far" by their political leaders, then one can only hypothesise that it must be true elsewhere.

Yet, there is an additional, more pressing, reason to recognise the life that constitutions lead outside of judicial or state institutions. Because that everyday-life is created, supported and given meaning by the everyday constitutional practices of people and communities who are typically ignored or excluded from consideration by more conventional accounts of constitutionalism. In addition to being potentially significant to constitutional scholarship, the fact that the everyday practices of those people and communities – regardless of whether or not they themselves directly experience injustice, or risk their lives or freedom to engage in such practice – is then omitted from what is commonly understand as constitutionalism is in itself an injustice. The interviewees I met during the course of gathering data for this thesis, in other words, not only face or seek to rectify injustices in their own lives, but they are also done the additional injustice of being treated as though they are not actors, as though they do not have agency, in the constitutional order in which they find themselves. I am reminded, here, of what one such interviewee said to me as I turned off my voice recorder and shuffled my papers at the end of a long conversation. We had finished by speaking about the government's use of the "public order" provision to limit the right to assembly and to curb public protests. "Please do not believe this stuff that they say," they turned to me with urgency. "I don't believe it, and ordinary people don't believe it. We just cannot do anything about it."

Methodology

The "bottom-up" approach that recognises the role of everyday constitutional practice by previously overlooked constitutional actors, I argue, must start from an understanding of constitutionalism as a discursive, as well as a procedural, phenomenon. As Jothie Rajah has noted, however, discourse itself has become "a term so expansive and inclusive in its meanings and applications that [it] should be marked 'danger.'"[63] It might be helpful to clarify, then, that the model of Critical Discourse Analysis described extensively by Norman Fairclough and others is the one that guides this study.[64] Ultimately, this

[63] Rajah, *supra* note 53 at 30.

[64] Norman Fairclough, *Critical Discourse Analysis* (Continuum, 2001); Roger Fowler, "Norman Fairclough, Critical discourse analyisis The critical study of language London Longman, 1995 Pp XIII, 265" (1997) 26:03 Lang Soc 421.

approach is based on an understanding of language as "the primary medium of social control and power," and the recognition that "disputes over the meaning of political expression [such as constitutionalism] are a constant and familiar aspect of politics."[65] Similarly inspired by the work of Foucault, it sees discourse as "a convergence of statements, texts, signs, and practices across different, even dispersed, sites" and focuses more on *how* examples of that discourse appear, rather than *how often*.[66] Hence, a critical analysis of the discourse of constitutionalism requires a process of "learning how to read in new ways."[67] Here, it means studying publicly available materials such as public statements by government officials, NGO publications and press releases, and media reports; asking what sort of constitutional arguments or interpretations are being deployed, as well as when, where and by whom. In this respect, the extensive reporting on Cambodian politics from the country's leading English-language newspapers, the *Cambodia Daily* and the *Phnom Penh Post*,[68] was integral, although it was supplemented and cross-checked with Khmer-language media and state resources where possible. Discourse analysis, then, forms a key empirical element of this study. The "close reading of texts" helped to inform my conclusions about the role of constitutionalism in Cambodia, grounding them "in the detail of history, language and social encounters."[69]

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[65] Fairclough, *supra* note 65 at 19.

[66] Kathleen Canning, "Feminist History after the Linguistic Turn: Historicizing Discourse and Experience" (1994) 19:2 Signs 368 at 379.

[67] *Ibid*.

[68] As part of Cambodia's shift to a more overtly hegemonic authoritarianism, the last two years have seen Cambodia's media landscape change dramatically. As noted above, September 1st 2017 saw the publication of the final issue of the *Cambodia Daily*, which was forced to close after being presented by the Cambodian government with an overwhelming tax bill. Meanwhile, concerns about taxes also appear to be behind the sale of the Phnom Penh Post in May 2018 to a Malaysian investor and affiliate of Prime Minister Hun Sen. The changes were not restricted to newspapers or English-language media, of course. In August 2017, 15 local radio stations that were known for broadcasting content from foreign-owned stations (including Voice of America, Voice of Democracy and radio Free Asia) were forced to close by the Ministry of Information. Julia Wallace & Mike Ives, "A Newspaper Is Sold, and Cambodians Fear the End of Press Freedom", *N Y Times* (7 May 2018), online: <https://www.nytimes.com/2018/05/07/world/asia/cambodia-phnom-penh-post-sale.html>; Leng Len, "RFA, VOA Broadcasts Booted Out of Cambodia's Provinces", (28 August 2017), online: *Cambodia Daily* <https://www.cambodiadaily.com/news/rfa-voa-broadcasts-booted-out-of-cambodias-provinces-134110/>; Mech Dara & Ananth Baliga, "Government closes 15 radio stations | Phnom Penh Post", online: <https://www.phnompenhpost.com/national/government-closes-15-radio-stations>; "Shutdown of Prominent Cambodia Newspaper Fuels Fears of Government Crackdown Ahead of Elections", online: *VOA* <https://www.voacambodia.com/a/fearless-newspaper-closure-marks-declaration-of-post-truth-era-in-cambodia/4017429.html>.

[69] Rajah, *supra* note 53 at 53.

Discourse analysis, with its reliance on publicly available materials and principally written sources, however, would not provide a complete account of contemporary Cambodia's constitutional experience. This is particularly true in Cambodia, where many resources that would be vital to such an approach – particularly official state documents, including court decisions – are not publicly available in either English or Khmer. As such, the survey of constitutional practice provided by this thesis uses the aforementioned sources to supplement data drawn from 45 open-ended, semi-structured interviews. Conducted between September 2016 and September 2017, interviews generally lasted around one hour, and were conducted either in cafes, restaurants, or at the participant's place of work. In an attempt to capture a range of perspectives that were nonetheless relevant to the topic at hand, I employed "purposive sampling,"[70] building on my pre-existing knowledge and network in Cambodia to approach individuals who I believed to be uniquely well-placed to speak to particular viewpoints or sectors of society. The majority of interviews were conducted in Phnom Penh, although interviewees themselves were from a number of different provinces, thereby representing a broad swathe of the country. However, around ten interviews were conducted while on field-trips to Stung Treng, Siem Reap, and Battambang. In one instance, attending a legal-education workshop being held in Siem Reap by a Phnom Penh-based national NGO resulted in interviews with participants from Preah Vihear and Ratanakiri provinces.

As the year of fieldwork progressed, it became increasingly clear that a handful of specific issues would be of central significance to the thesis, either because of how both I and the research participants themselves perceived their importance, or because of their unique ability to highlight what I argue are exemplary aspects of constitutional practice in Cambodia. These issues were generally topical ones: problems or contestations that were playing out in the public sphere, in the background to my interviews. As such, they are dealt with in individual case studies, but presented as snapshots that, I argue, can be understood to capture broader themes in Cambodia's constitutional practice over the past two-and-a-half decades. As these themes and the resulting case studies began to

[70] Kenneth D Bailey, *Methods of social research*, 3rd ed. (New York: Free Press, 1987) at 96.

crystallise, I was able to adapt my "purposive sampling"[71] so as to hone in on them in greater detail. By the end of the fieldwork process, I had narrowed my interviewees down into categories: politicians, political figures and government officials; lawyers; NGO workers and activists; Buddhist monks; artists, performers and filmmakers; dispossessed communities. Between five and ten participants from each "category" were interviewed.[72] Particular effort, meanwhile, was exerted to ensure that – while not a central focus of this thesis – the state was represented in the selection of research participants. This was, it must be noted, no small feat. Though Sutton's assessment that "[a]ccess to the regime for outsiders, especially foreigners, is now virtually non-existent"[73] in Cambodia is misleading, it is certainly true that gaining access to members of the ruling party – and particularly those with positions in government – is more challenging than gaining access to any of the other participant-categories. The vast majority of formal requests for interview – sent by letter to the appropriate offices of specific ministries – went unanswered. Some that were answered, meanwhile, resulted in little more than prolonged exchanges by phone, often over a period of months, as I tried and failed to secure an interview that had, theoretically, been approved. Nonetheless, this research benefitted from the extensive length of time that I was able to spend 'in the field,' and the wide-ranging network that I was able to develop in the process. Specifically, while I spent a total of one year dedicated solely to fieldwork (after arriving in Phnom Penh in September 2016), I have spent a further two years in-country to write this thesis, teach, and work as a consultant for an international organisation. Finally, and most importantly in respect to access to government officials, the assistance I received from the local research institution, the Cambodian Development Resource Institute, ensured that I was able to make appropriate contact with target ministries. Without this assistance, I can see how some researchers might conclude that access is "virtually non-existent."

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[71] *Ibid* at 96.

[72] Specifically, a breakdown of the five categories is as follows: politicians, political figures and government officials (9); lawyers (10); NGO workers and activists (8); Buddhist monks (6); artists, performers and filmmakers (6); dispossessed communities (6).

[73] Jonathan Sutton, *Authoritarian Politics and the Outcome of Nonviolent Uprisings* (Thesis, University of Otago, 2018) [unpublished] at 71.

Though it is unlikely to surprise those who have experience with research in Cambodia, it is notable that securing interviews with members of government was significantly harder than securing interviews with other participant groups. This reflects an often taken-for-granted reality in Cambodia, that even the most busy lawyer, civil society worker, monk, artist or performer will undergo no small inconvenience, and take genuine personal risk, to help a researcher (perhaps particularly a foreign researcher) to understand their country from their perspective. It also, I believe, reflects the fundamental basis on which this thesis is built: that, even in repressive settings where constitutional contestation is supposedly "muted,"[74] those who are typically excluded from academic accounts of constitutionalism often have an unerring desire to have their voice heard. If anything, my overriding feeling at the end of interviews was not one of disappointment at the lack of valuable data I had managed to "extract" from participants, but rather a sense of guilt that perhaps my questions had not been thoughtful enough or had failed to give the interviewee the proper opportunity to express themselves. More than anything else, this research is only possible because of those people who shared with me their time, trust, knowledge and experience.

On a practical level, all research participants were in receipt of a Letter of Invitation in advance of their interview. The Letter, which was read aloud to participants who were not confident with literacy, included background information on the project and an explanation of the interview process, to ensure that each participant was able to make an informed and considered decision on whether or not to participate. Each interviewee was also asked to sign a Consent Form at the start of the interview, and was given options as to whether or not the discussion was recorded, whether or not notes were taken, and whether or not they preferred to remain anonymous. As part of this process, interviewees were encouraged to consider the potential risks of participating in the research, and of being named in it. Where participants asked to remain anonymous, they were given the opportunity to suggest a way in which they felt comfortable being identified. Although a set of questions were devised in advance, and tailored to the specific profile of the participant, interviews were generally treated as researcher-led conversations wherein I

[74] McCarthy & Un, *supra* note 8 at 325.

gave interviewees ample time to formulate and articulate thoughts, and responded with improvised follow-up questions when an area of particular interest came to the fore.

Recognising the potential that ideas of constitutionalism could be imposed upon the interviewees experiences by those questions, I generally began interviews with general questions about post-UNTAC Cambodia, introducing legal and constitutional questions only as the interviews progressed, or in response to them being raised by the interviewee. While in many instances this technique proved fruitful, as it allowed interviewees to gain confidence and comfort by answering less specific or technical questions, for others it was clearly a source of frustration or confusion, as I failed to move the conversation quickly enough to the topic we had agreed to discuss. The idea that I could completely avoid signalling my interest in discussing the Constitution until I raised it as a topic in the interview, meanwhile, was also undermined by the fact that I typically declared (or was quite rightly asked to declare) exactly what the topic of the interview would be before an interviewee agreed to speak to me. After interviews were completed, participants were given the option to retract any or all of what they said, and were reminded again of the option to remain anonymous. Subsequently, recordings were uploaded onto a computer at the earliest opportunity, and immediately deleted from the recording device. As soon as they had been transcribed (and translated where necessary), the recordings were deleted from the computer, and only the transcriptions were kept on a password-encoded hard-drive that remained in a locked safe.

Throughout the fieldwork process, I benefitted from the help of a Cambodian Research Assistant, Ly Bendith. Bendith assisted me in approaching potential interviewees, conducting interviews and translating them afterwards. However, I am also proficient in spoken and written Khmer, to an intermediate level. The presence of Bendith helped to ensure that I was able to pick up on any cultural cues during interviews, and gave interviewees confidence that they could speak freely and fluently in Khmer if they preferred to do so. Yet, some interviews were conducted in English, or shifted between English and Khmer, according to the substance of the question or the person who asked it. While all participants in the research were Cambodian citizens, conversations with

non-Cambodia residents (most of whom worked as advisors or consultants for government, international agencies, and local or international NGOs) were nonetheless helpful in shaping the ideas that went into this thesis, as well as in the process of identifying potentially interesting interviewees. However, given that the focus of this thesis is understanding how ideas of constitutionalism have come to be used and understood by Cambodians, this second form of conversation was not directly treated as data.

The aim of this thesis, then, is to include a range of views that can be indicative of the diversity of constitutional opinions and knowledges that exist in Cambodia outside of the narrow confines of its political class, rather than to produce a comprehensive reflection of the views of the entire country. As well as adding additional and otherwise potentially overlooked voices to those that already dominate political discourse in the Cambodian public sphere, the use of interviews is motivated by a desire to avoid what Canning has described as "the deterministic view in which discourse always seems to construct experience."[75] This, of course, is a particularly worrying possibility, when one considers the way in which the Cambodian state – as evidenced at the beginning of this Introduction – has sought to co-opt and monopolise constitutional discourse. Instead of focusing solely on elite-level discourse, the turn to interviews was based on a recognition of what Diamond and Edwards have called "the authority of experience,"[76] as well as a desire to place my own understanding of the role of constitutionalism in the country into doubt. This process of interviewing people with drastically different perspectives, and perspectives that are drastically different to my own, then, becomes an important step towards ensuring that Cambodians are able to "act as subjects rather than objects of [their own] history."[77] Chapter 6's discussion of how Buddhist monks use supernatural tools, including casting spells and summoning spirits, to protect land or forests that are at risk of destruction, was not something that I expected to embark on when I began my Ph.D., for example. Not only was this practice a challenge to my own understanding of how

[75] Canning, *supra* note 67 at 378.
[76] Arlyn Diamond & Lee R Edwards, eds, *The Authority of experience: essays in feminist criticism* (Amherst: University of Massachusetts Press, 1977).
[77] Nancy C M Hartsock, *The feminist standpoint revisited and other essays*, Feminist theory and politics (Boulder, Colo: Westview Press, 1998) at 163.

constitutions work (or do not work); studying these practices was also a challenge to my limited understanding of how Buddhism works and what Buddhist monks could or should believe. Of course, a willingness to question my own assumptions, or even my own empirically grounded conclusions, need not equate to an uncritical acceptance of any or all of the testimonies offered by participants. Nor does it mean that any one participant's view of constitutionalism has been privileged over another, or even my own. Instead, interview data was read and re-read with a critical eye, often through the prism of critical discourse analysis.

Finally, as far as possible, the words of interviewees are reported here as they were spoken. As Glenda Gross explains, this develops from a belief that interviews should not simply be a process of "gathering informants reports and stories," but must also involve "giving them voice in academic… discourse."[78] In this regard, I have sought to avoid the traditional "domesticating translation" method that attempts to make the translator "invisible" but often prioritizes "the cultural and aesthetic values of the target language/audience."[79] Instead, I intend to report participants in their own words. This method, known as "testimonio," is described by its lead proponent, David Beverley, as one that "allows the subaltern to speak in his or her own terms."[80] All of this, of course, does not immunize the interview process – or the study of constitutionalism generally – from issues of translation. Despite the fact that I am conversant in Khmer and nevertheless enlisted the help of a translator, I note that there is an unavoidable loss of situated meaning in any attempt to translate. As Bogusia Temple explains, this loss emerges from the fact that words and ideas "have a history specific to the society they originate from,"[81] which does not always have a direct correlate in another language. Hence, following Pooja Parmar, I have attempted to pursue what Gayatri Spivak has called "ethical translation," which begins with listening as "an act of hearing-to-respond" and maintains a commitment of "fidelity to the original… not because it is possible but

[78] Glenda Gross 'Feminist Qualitative Interviewing: Experience, Talk and Knowledge' in Sharlene Nagy Hesse-Biber, *Handbook of feminist research* (SAGE, 2012).
[79] Springer, *supra* note 18 at 15.
[80] David Beverly 'Testmonio, Subalterneity and Narrative Authority' in Norman K Denzin & Yvonna S Lincoln, *Strategies of Qualitative Inquiry* (SAGE, 2008) at 611.
[81] Bogusia Temple, "Watch Your Tongue: Issues in Translation and Cross-Cultural Research" (1997) 31:3 Sociology 607 at 611.

because one must try."[82] It is, therefore, necessary to start by recognizing that any conversation about constitutionalism in Cambodia necessarily involves multiple layers of translation: in the telling, transcribing, analysing, representing and reading of each participant's experiences. However, the call for "ethical translation" goes beyond just thinking critically about the correspondence between one language and another, as it also includes the demand – articulated here by Pooja Parmar – that we "begin by taking seriously what the [participants] say, and attempt to make sense of it within all of that which comprises their normative life-world."[83]

My attempt to translate ideas and experiences between these different life-worlds was, of course, not entirely successful. In some instances – such as in the case of Buddhist monks' use of supernatural tools to supplement secular political, environmental or social justice activism, for example – the process of translation and understanding was, to some degree, possible with the help of a lot of thought and an honest attempt to be "humbly agnostic."[84] In others, however, the bridge was often too great. While I would have loved for this thesis to be able to uncover some kind of authentic, autochthonous vision of constitutionalism in Cambodia, such findings were often beyond the reach of what this research was capable of. To the dismay of Bendith, my Research Assistant, and with the work of the Thai historian Nidhi Eoseewong in mind, for example, I occasionally sought to elicit from interviews some kind of culturally-grounded explanation of how power is or could be restrained in Cambodia, without dependence on the state or the formal constitution. Such questions, however, proved difficult to answer for even the most thoughtful of interviewee. Perhaps such questions are better answered by studies adopting different methodologies; or perhaps such questions cannot be answered at all. As I discuss in Chapter 2, specifically in relation to Nidhi's work, cultural explanations can themselves be problematic, even when they seek to supplement or displace more

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[82] Gayatri Spivak, quote in Pooja Parmar, *Indigeneity and legal pluralism in India: claims, histories, meanings*, Cambridge studies in law and society (New York, NY: Cambridge University Press, 2015) at 15–18; Gayatri Chakravorty Spivak & Rosalind C Morris, eds, *Can the subaltern speak? reflections on the history of an idea* (New York: Columbia University Press, 2010).

[83] Parmar, *supra* note 84 at 10.

[84] Manuel A Vasquez, *More Than Belief: A Materialist Theory of Religion*, 1 edition ed (Oxford ; New York: Oxford University Press, 2010).

explicitly hegemonic ones that appear to have been imposed from outside a national community.

Throughout this thesis, the perspectives that emerged through interviews, discourse analysis and ethnographic observation are gradually disentangled and studied for their constitutional significance, before being interwoven into five distinct but interconnected case studies of constitutional contestation in Cambodia. These case studies are, of course, temporally bound, to the extent that they focus on issues that were prominent – and therefore offered powerful examples of constitutional contestation – during the time that fieldwork was undertaken. Yet, in many cases, they are also representative of broader themes in Cambodia's constitutional practice, as it has emerged and evolved over the past two-and-a-half decades. Chapter 3, for instance, situates itself at the very birth of Cambodia's current constitutional order and is historical in its focus; yet, it nevertheless attempts to go beyond simply re-telling the Constitution's origin-story, and instead seeks to draw out themes from that history that pervade the following chapters. Equally, part of the research for each case-study involved a significant historical component, as I sought to follow the "genealogy" of specific issues backwards in time. As such, each chapter in this thesis relies, at least to some degree, on what the Commaroff's call "an ethnography of the archives."[85] This approach, then, helps to place the "snap-shots" of constitutional practice that are the focus of each chapter, within the appropriate historical context and back-story.

Outline of Chapters

To fully capture how the approach and empirical findings of this thesis can be considered novel, and to accurately convey why it is that a study of constitutionalism that goes beyond the discipline's formalistic and court-centric preoccupations is so unorthodox and yet necessary, it is first helpful to understand the theoretical landscape in which it is situated. This approach is helpful, I believe, because – in addition to being a study of

[85] Nicholas B Dirks, "Annals of the archive: ethnographic notes on the sources of history" (2002) Margins Hist Anthropol Its Futur 47.

Cambodia that speaks to the multidisciplinary literature that has amassed on the country – this thesis has, at its core, propositions about how we should theorise the study of constitutionalism. Hence, Chapter 2 of this thesis attempts to provide an overview of contemporary approaches to the study of constitutionalism. Rather than simply surveying this vast literature, however, this chapter takes a critical approach: it begins from the dilemma outlined earlier in this introduction, whereby the formalistic and court-centric preoccupations of the sub-discipline appear to have obscured the manifold ways in which constitutional discourses actually operate in Cambodia. As such, Chapter 2 explores the idea that an expansion in the way that constitutionalism is conceptualized can help to shed greater light its role in contemporary Cambodia, and elsewhere in the world. To do so, it will first be necessary to explain how existing formulations – namely, legal and political constitutionalism – fail to fully capture the amorphous role that constitutionalism can play in contexts that do not fit the liberal-democratic standard that has typically been used to model the concept. This process involves an, admittedly brief, engagement with the Anglo-American literature that dominates the field. Following this, however, will be a more thorough explication of alternative approaches to constitutionalism; ones that place less of a focus on western models, or on the role of state institutions. After explaining some of the pitfalls, as well as the strengths, in existing theories of "hybrid," "transitional" and "cultural" constitutionalism, I settle on a holistic understanding of constitutionalism in Cambodia that, while cognizant of the former, also integrates the insights of a "societal" or socio-legal approach. While essential in laying the foundations for the empirical account of constitutional practice in Cambodia that follows it, this chapter is also designed with other contexts in mind, as its lessons – like those that are developed over the course of this thesis – are also of notable relevance to other country-contexts elsewhere in Southeast Asia and beyond.

The empirical data on which this thesis is built begins to emerge in Chapter 3. Focused on providing an historical account of how Cambodia's Constitution came into existence, this chapter combines a fine-grained reading of the historical record of the 1993, U.N.-sponsored constitution-making process with data collected from interviews with key figures in Cambodia who were either involved in that process, or were excluded from it.

Hence, as well as surveying the historical and geopolitical landscape in which Cambodia's Constitution was drafted, Chapter 3 also situates this process within the theoretical framework that has been developed by the ever-expanding literature on constitutional making processes. As such, the chapter attempts to explain how and why a formally democratic, liberal Constitution emerged from what was, comparatively speaking, a less-than-participatory process. Noting that a lack of participation in the drafting process was justified by many at the time as a necessary precaution to ensure "peace," "order" and "stability," and that this became the basis for extensive constitutional activism and awareness-raising activities by Cambodia's then-flourishing civil society, this chapter also suggests that some of the key themes of constitutional practice in Cambodia can also be traced back to 1993. In so doing, then, Chapter 3 provides an introduction not only to Cambodia's constitutional order, but also to the contestations and practices that characterise it.

One such example of those practices, not to mention one which embodies the ongoing instantiation of "order" and "stability," is detailed in Chapter 4. The only chapter to focus primarily on the state, Chapter 4 examines the way in which the Constitution and the concept of constitutionalism is understood "from above." Specifically, it focuses on the government's usurpation of constitutional language and process, as exemplified in debates over the protection provided by parliamentary immunity and in the Supreme Court's 2017 decision to dissolve the parliamentary opposition, the Cambodian National Rescue Party (CNRP). These examples, I argue, provide powerful and prescient examples of the way in which constitutional procedure, rather than being entirely overridden by the government, is in fact used to undermine what would otherwise be considered some of the key normative contents of the constitutional document. Here, again, I suggest that the imperatives of "order" and "stability" are in operation, and provide a subtext for understanding the formal Constitution that is ultimately seen to legitimise – or even necessitate – the undermining of liberal-democracy. As such, this chapter suggests that, rather than reflecting an absence of constitutionalism, Cambodia can in fact be understood to exhibit characteristics of "thick" constitutionalism that are associated with

what a growing body of literature is describing as "abusive" or "authoritarian" variants of the concept.

Yet, this state-led constitutional narrative has not become entirely hegemonic, as it continues to be contested and challenged by various actors in Cambodian society. The most prominent, if conventional, space in which this contestation is manifested is, in fact, in and around Cambodia's courts. Chapter 5, then, hones its attention on the work of activist lawyers, who persist in attempting to use constitutional arguments to highlight the state's authoritarian tendencies and hold it to account. Rather than focusing solely on the apparent futility of this work, as measured by courtroom success or failure, however, this chapter follows the strategic logic that the lawyers themselves follow, noting the extent to which constitutional litigation and defence is understood to contribute to wider advocacy activities. Specifically, lawyers see themselves as uniquely well-placed to act as spokespeople for political change, given the relative safety in the courtroom and are able to articulate otherwise dangerous challenges to authoritarian constitutional practice in the technical (and, therefore, less threatening) language of law. With the help of advocacy NGOs, activists and journalists, however, these critiques are then recorded and amplified to both national and international audiences. In the process, the in-court work of lawyers can be seen to contribute to the work of Cambodia's expanded Legal Complex,[86] which seeks simultaneously to call for international stakeholders to exert greater pressure on the government, and to educate and mobilise domestic constituencies, in the hope of bringing about broader, systemic changes. Yet, this tactic can also be seen to have a disempowering effect, as it channels ostensibly political discontent into largely unresponsive institutions and into a language that, in its technicality, can appear alien to those whom it is being deployed to help.

The work of the Legal Complex is not the only example of constitutional vocabularies permeating beyond the walls of the Cambodian courtroom, however. The most notable

[86] Terence C Halliday, Lucien Karpik & Malcolm M Feeley, eds, *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism* (Oxford ; Portland, Ore: Hart Publishing, 2007); Lucien Karpik & Terence C Halliday, "The Legal Complex" (2011) 7:1 Annu Rev Law Soc Sci 217.

example of this is elucidated by Chapter 6's account of internal debates within the Buddhist Sangha, and of the work of activist monks. Specifically, this Chapter traces the ways in which a remarkably inorganic approach to religion enshrined in Cambodia's Constitution – which was the first in the country's history to proclaim the universal franchise without an exception for Buddhist monks – has been actively inhabited and domesticated by Cambodians since 1993. Beginning with a comparative explanation of the different constitutional approaches to the universal franchise taken in the region's Theravada Buddhist countries, the chapter then hones-in on the decades-old constitutional debate about the voting rights of Cambodian monks. In so doing, I highlight the ways in which the decision over whether or not monks should engage in politics has ultimately been decided internally, within Buddhist institutions, with explicit reference to the secular language of constitutional law. Then, turning attention to the handful of monks who have taken to social justice activism as an extension of their enfranchisement, I discuss the ways in which 'activist monks' have consciously applied religious norms and supernatural tools to uphold constitutional values. Rather than viewing religious and secular identities of monks, or religious dogma and constitutional principle, as distinct, I argue, politically active monks demonstrate a remarkable confluence between the two.

Expanding the study of extra-judicial constitutionalism still further, Chapter 7 concentrates attention on the Ministry of Culture's *Code of Conduct for Artists and Performers*. A unique, but apparently innocuous document that outlines a series of rules for Cambodia's budding culture-industry to follow, the *Code of Conduct* is in fact a prime example of the extent to which the language of the Constitution pervades the workings of the Cambodian state, and legitimizes limits on constitutionally guaranteed rights. Drawing on interviews from a number of artists, filmmakers and performers from around Cambodia, as well as a representative from the Ministry of Culture, Chapter 7 suggests that the *Code of Conduct* in many ways represents a profound and widely shared anxiety and ambivalence about the meaning of Cambodian culture and national identity. In negotiating this fraught terrain, this chapter suggests, contemporary Cambodian artists, filmmakers and performers can be seen to be reshaping existing definitions of national

culture and identity. In the process, whether they directly challenge the state's definitions or simply avoid having them imposed upon their work, this otherwise overlooked (and admittedly disparate) segment of society elaborates its own interpretation of Articles 41, 69 and 70 of the Constitution. As such, I contend, they help to shape the meaning of the Cambodian Constitution, thus effectively becoming a constitutional actor themselves.

This thesis concludes with a chapter that, in attempting to weave together the insights from the case studies that went before it, draws out some of the key themes that bind them together. Combining lessons from preceding chapters with some comparative insights from elsewhere in Asia, not to mention the theoretical discussion of conceptual models for understanding constitutionalism, the concluding chapter restates and refines this thesis's call for a constitutional theory to move beyond its court- and state-centricity. It argues not only that such a socio-legal, even ethnographic, approach can lead to more nuanced and accurate empirical depictions of how constitutionalism actually operates, but also that an enhanced appreciation of the role of societal actors in constitutionalism brings a recognition that these actors enrich and enliven constitutional practice. To do so, however, it is first necessary to explain how and why such findings could be considered novel, by putting this thesis in its theoretical and disciplinary context; a task to which Chapter 2 is dedicated, and to which I now turn.

Chapter 2 – Towards a Reconceptualised Constitutionalism in Cambodia

Since the country's post-Cold War "transition"[87] began almost two decades ago, much has been written about Cambodia. While this literature spans a range of disciplines, and ideological perspectives, its numerous authors almost invariably present the country's constitutional arrangements in one of two ways. On the one hand, a majority of scholars – even those interested in the very political, social and economic issues that are encapsulated in the written document – are prone to treating the Constitution as insignificant, if they acknowledge its existence at all.[88] On the other, a smaller group of scholars – primarily those with a specific interest in legal developments in Cambodia – tend to regard the document and its subsequent amendments optimistically.[89] From this view, Cambodia's Constitution is a statement of intent, if not fact, that is gradually but inevitably developing towards some formalistic ideal, and would already be matched by reality were it not for the vagaries of domestic politics. Though not entirely false representations, neither picture satisfactorily depicts the actually-existing role of the Constitution in contemporary Cambodia.

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[87] Often characterized as a "triple transition" – from "war to peace, dictatorship to democracy, and Marx to market." See Simon Springer, *Cambodia's Neoliberal Order Violence, Authoritarianism, and the Contestation of Public Space*, Routledge Pacific Rim Geographies 8 (Milton Park, Abingdon, Oxon ; New York: Routledge, 2010),

[88] This oversight is understandable, given that law or constitutionalism is not typically a focus of Cambodia studies literature. However, the fact that such little attention is paid to law or the Constitution is itself telling. Meanwhile, of the literature that does exist, few give the Constitution more than cursory attention. Mentions of the Constitution, in fact, typically take the form of (first) an initiation recognition of its liberal content, followed by (second) a juxtaposition of this with Cambodia's authoritarian realities.. This acknowledgement of a gap between law on the books and law in reality is treated as grounds for paying no further attention to the document. See, for example, Caroline Hughes, *The political economy of the Cambodian transition* (Routledge, 2003) at 52, 82, 95, 98, 112.; Springer, *supra* note 88; Hughes & Un, *supra* note 26; Ear, *supra* note 31; Sebastian Strangio, *Hun Sen's Cambodia* (New Haven [Connecticut]: Yale University Press, 2014) at 50, 89, 101,113, 228; Norén-Nilsson, *supra* note 34 at 6, 58, 79–82, 99, 108, 158–159; Un, *supra* note 45 at 1, 2, 6, 12, 14 –16, 53.

[89] See, for example, Clauspeter Hill, *Constitutionalism in Southeast Asia* (Konrad Adenauer Stiftung, 2008); Jörg Menzel, "Constitutionalism in Southeast Asia: Some Comparative Perspectives" (2009) 3 Const Southeast Asia 9; Peng Hor, Phallack Kong & Jörg Menzel, *Introduction to Cambodian law / Hor Peng, Kong Phallack, Jörg Menzel, (eds.)* (Cambodia: Konrad-Adenauer-Stiftung, 2012); H O R Peng, KONG Phallack & Jörg Menzel, *Cambodian Constitutional Law* (Singapore: Konrad Adenauer Stiftung, 2016).

Significantly, academic accounts of the Cambodian Constitution, not to mention its role in political, social and economic life, appear to suffer from a surfeit of formalism when conceptualizing constitutionalism. This is somewhat unsurprising, given the aforementioned observation by Arun Thiruvengadam, that thinking about constitutionalism "continues to be dominated by western experience,"[90] and by Li-Ann Thio, that this experience in turn "renders… constitutional law synonymous with the law of a supreme court."[91] These preoccupations seem to lead almost inevitably to an assessment that, because constitutional practice in Cambodia does not follow liberal-democratic principles, and operates only partially through formal court decisions, constitutional enquiry has little to tell us about Cambodia and, conversely, that Cambodia's experience has little relevance to the study of constitutionalism. Yet, as Ginsburg and Moustafa have argued with respect to the role of courts under authoritarianism, the assumption that constitutions "lack any independent influence on political life" should not obfuscate the extent to which they, like courts, "are often used to advance the interests of authoritarian regimes, and yet paradoxically… are also sometimes… important sites of political resistance."[92] An appreciation of the multifaceted (and often contradictory) role of the Constitution in Cambodia, however, first demands a broadening of scope in what we consider as constitutional law, and where we look to find it in the first place. As will be explained below, any attempt to capture – even partially – the role of the Constitution in Cambodian society demands that we look beyond the work of courts, and in some cases beyond the state. Thus, while making regular references to constitutional practice in Cambodia, this chapter will concentrate primarily on alternative conceptual frameworks; particularly those that shift the focus of constitutionalism beyond formal documents and state institutions.

Before doing so, though, it is important to understand the debates that currently dominate the discipline. Rather than replicating the oft-noted bias that implicitly "presents the U.S.

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[90] Thiruvengadam, *supra* note 13.
[91] Thio, *supra* note 11 at 767.
[92] Tom Ginsburg & Tamir Moustafa, eds, *Rule by Law: The Politics of Courts in Authoritarian Regimes*, 1 edition ed (Cambridge UK ; New York: Cambridge University Press, 2008) at 8.

position as the norm and the other positions as departures,"[93] I aim to do so in such a way that demonstrates the extent to which the ideas of constitutionalism that dominate the discipline are themselves contingent, contextual, and culturally-constructed. With this as a precursor, it will then be possible to examine a range of alternative frameworks for conceptualizing constitutionalism in Cambodia – including the "hybrid," the "transitional," the "cultural," and the "societal" – on their own merit. As such, this Chapter will highlight some of the strengths and weaknesses of these various conceptual models, before ultimately attempting to weave together their undoubted insights into a more inclusive and comprehensive conceptualization of constitutionalism. This approach will build on the ability of existing models to extend the scope of constitutional-enquiry beyond the realm of courts and state institutions, allowing a more pluralistic, ethnographically-engaged, "bottom-up" perspective on constitutionalism. While necessarily specific to the Cambodian experience, this process of reconceptualization will also have implications for how constitutionalism can – if not should – be studied elsewhere. Before that, however, it may be instructive to consider some of the theoretical concerns that are implicit in any attempt to think about constitutions, or the law more generally, in more than their context-specific circumstances.

The Simultaneous Singularity and Universality of Constitutional Law

"Law is local knowledge."[94] Thus goes the memorable and provocative call to arms of Geertz. However, in the less-quoted sentences that follow, the prominent anthropologist acknowledges that comparison, "an imperfect enterprise" though it may be, "is all we have."[95] This is the paradox of comparative constitutional law. And so it is that, in response to the crescendo of constitution-making and re-making that followed the end of the Cold War (to which Cambodia was an early contributor, as discussed in Chapter 3),[96]

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[93] Wen-Chen Chang et al, *Constitutionalism in Asia: Cases and Materials* (Bloomsbury Publishing, 2014) at 4. Quoting *Comparative Constitutionalism: Cases and Materials*, 2 edition ed (St. Paul, MN: West Academic Publishing, 2010).
[94] Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 2008), 218.
[95] *Ibid* at 219.
[96] David S Law & Mila Versteeg, "The Evolution and Ideology of Global Constitutionalism" (2011) 99 Calif Law Rev 1163 at 1167.

the field of comparative constitutional law has emerged as an, at times highly "contest[ed] and controversial," growth industry.[97] As Rosenfeld and Sajo note, in the introduction to their *Oxford Handbook of Comparative Constitutional Law*, a field that was "once a minor and obscure adjunct… has grown exponentially."[98] This growth, they later explain, has often been characterized by the use of empirical, quantitative data but, at the same time, "animated by a search for the universal… or conformity with the ideal (liberal, constitutionalist) arrangement."[99] Such objectives are evident, respectively, in Law and Versteeg's attempt to "explain" the world's constitutions "as a function of just two variables,"[100] and Ginsburg, Elkins and Melton's attempt to find an ideal "formula" for constitution-makers.[101]

Even in their attempts to enumerate, describe and categorise constitutionalism in its varied forms, Law and Versteeg readily acknowledge that a quantitative approach to constitutionalism has distinct limitations. In their article "The Evolution and Ideology of Constitutions," the authors pioneer a statistical approach to code and then measure the rights-related content of the last six-decades worth of national constitutions from around the globe.[102] As such, Law and Versteeg discover an apparent convergence of constitutional systems around two distinct poles, or models of constitution. Yet, the authors are careful to caveat these interesting findings with an acknowledgement that the purpose of these apparently converging provisions may differ from country to country. Constitutional change, they are aware, is often used to "satisfy… diverse audiences" which can be "both foreign and domestic," meaning that to investigate and elaborate upon these purposes from such a distance is ultimately little more than "theoretical speculation."[103] Equally evident in Law and Versteeg's study, meanwhile, are the dangers of focusing exclusively on a constitutional text as a source of data. As they chart the

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[97] Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law*, 1st ed (Oxford, U.K: Oxford University Press, 2012), 1,
[98] Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law*, 1st ed (Oxford, U.K: Oxford University Press, 2012), 1,
[99] Rosenfeld and Sajó, 10.
[100] Law & Versteeg, *supra* note 97 at 1164.
[101] Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (Cambridge ; New York: Cambridge University Press, 2009).
[102] Law & Versteeg, *supra* note 97.
[103] *Ibid* at 1169.

world's constitutions along a continuum of "statist" to "libertarian," the authors produce data that places New Zealand at the extreme end of the latter.[104] However, using a more locally attuned, "realist" methodology, Matthew Palmer has described the country's "constitutional culture" as being characterized by "a preference for strong government."[105] This divergence, it seems, is based on Palmer's more holistic approach, which takes into account the customs, conventions, processes and principles that make up what he terms "the 'complete' constitution." Clearly, as well as a healthy skepticism about attempts to "measure" constitutionalism, which Law and Versteeg themselves recognise is necessary, such a divergence in conclusions also underlines the need, as Palmer goes on to state so eloquently, to "stand back from the text to consider context."[106]

Focusing exclusively on the content of formal constitutional texts, then, is but one approach to the comparative study of constitutional law; albeit one that is undeniably interesting in its own right. Yet, as Pierre Legrand has noted on the different but highly applicable subject of legal transplants, this sort of dependency on "law as rules"[107] formalism can often prove detrimental to academic understandings of law, not to mention constitutions. In response, and as part of a heated scholarly debate about the utility – even the very possibility – of legal transplants, Legrand has emphasized the inseparability of law from the cultural contexts in which it emerges. Any attempt to generalize about the law, let alone to transfer a legal rule from one cultural context to another, Legrand suggests, is "fatally, and damagingly, reductionist."[108] In this respect, the law itself is "haunted" or "constitutively inhabited by specters" that are "nonetheless there… at least as much as the actual wording" of any legal rule.[109] In other words, Legrand argues that any attempt to transfer laws from one context to another are doomed to failure, due to the

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[104] Law & Versteeg, *supra* note 97.
[105] Matthew S. R. Palmer, "Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution," *The American Journal of Comparative Law* 54, no. 3 (July 1, 2006): 597.
[106] *Ibid* at 593.
[107] Pierre Legrand, "Impossibility of Legal Transplants, The" (1997) 4 Maastricht J Eur Comp Law 111 at 113.
[108] Pierre Legrand, "Comparative Legal Studies and the Matter of Authenticity" (2006) 1 J Comp Law 365 at 367.
[109] *Ibid* at 524.

fundamentally fluid nature of language and meaning, not to mention the complexity of translation.

It is, however, possible to acknowledge the context-dependency of legal meaning and, at the same time, be cognizant of the "massive borrowing"[110] of laws across jurisdictions that is an undeniable fact of modern legal systems. Whilst being a fundamental concern of legal-transplant theorists, this borrowing is also – as Law and Versteeg's research implies – a key feature of the last six-decades of constitutional change around the world. Meanwhile, as Chapters 3 and 4 together demonstrate, questions over the desirability and practical viability of such borrowing are of utmost importance to understanding constitutional practice in Cambodia, where much of the content of the formal Constitution were indeed borrowed, or some would say imposed. Acknowledging the practical fact of such borrowing, however, does not inevitably mean questioning the "relationship between law and society" altogether, as suggested by Alan Watson, a leading proponent of legal transplants.[111] Rather, an acknowledgement of the fact of legal borrowing (or imposition) in formal terms can instead be helpfully supplemented by an awareness that law, in Legrand's words, "must manifest itself singularly."[112] Hence, the study of constitutions in countries such as Cambodia, where the move toward "modern constitutionalism mark[s] a radical departure"[113] from existing practice, must always be a study of law, whether borrowed or imposed, being instantiated *in context*. Much like many other ideas and ideologies that have spread with globalization, this means understanding constitutionalism not as comprehensively universal or irredeemably particular, but as "a loose assembly of assemblages," that are embodying themselves in variegated and locally-contingent processes everywhere. [114] In other words, constitutional principles and even the vocabulary of constitutionalism *can* and *are* being borrowed, transplanted or imposed in new cultural contexts; yet they are also inevitably re-shaped – and, some would argue, distorted – in the process.

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[110] Alan Watson, *Legal transplants: an approach to comparative law*, Virginia legal studies (Charlottesville: University Press of Virginia, 1974) at 108.
[111] *Ibid* at 107.
[112] Pierre Legrand, "On the Singularity of Law" (2006) 47 Harv Int Law J 517 at 523.
[113] Thiruvengadam, *supra* note 13 at 45.
[114] Legrand, *supra* note 113 at 529. For a more thorough explication of how globalizing ideologies instantiate themselves locally, particularly in Cambodia, see Simon Springer *Cambodia's Neoliberal Order*

"Pristine" Constitutions?

Legal Constitutionalism and Judicialisation

As implied earlier, constitutional law scholarship has, traditionally at least, tended to treat the Western experience of constitutionalism as the norm. More specifically, this preoccupation has often elevated a particular type of constitutionalism as the concept's inherent end-goal: a "legal" model, popularized by the United States since the seminal Supreme Court decision of *Marbury v Madison*. Manifested most comprehensively in more recent years by the work of Ronald Dworkin,[115] legal constitutionalism treats constitutions as an almost exclusively *written* documents, which form the sole foundation of pubic power. Then, through the process of judicial review, the "legal" model of constitutionalism allocates interpretative and enforcement powers to the courts, treating judges as the guardians of liberal democratic governance. Hence, a constitution, as a supreme national law, is understood by "legal" constitutionalists as the foremost check on government, while its interpretation by courts comes to be seen as the primary protection against arbitrary rule by both the legislative and executive branches.

A more detailed analysis of the internal dynamics of legal constitutionalism is beyond the scope of this paper. Such an analysis is also largely unnecessary given the prevalence of legal constitutionalist ideas.[116] However, it is undoubtedly worth noting at this stage that the perceived inevitability of the emergence of judicial review and legal constitutionalism – even in the U.S. – has not gone unchallenged. In fact, as Kramer explains in his book *The People Themselves*, for much of American history "the idea of turning this responsibility [for interpreting and enforcing the Constitution] over to judges was simply

[115] Dworkin *Freedom's Law*, among others

[116] The omnipresence of legal constitutionalist ideas in constitutional theory means a full inventory of its literature is not possible. However, seminal texts include Ronald Dworkin, *Taking rights seriously* (Duckworth, 1977); Ronald Dworkin, *Law's Empire*, 1st edition ed (Cambridge, Mass: Belknap Press of Harvard University Press, 1986).

unthinkable."[117] Now, however, the meteoric rise of judicial review "has fundamentally altered the meaning of republican citizenship" by taking decisions out of the hands of democratically elected politicians.[118] Legal constitutionalism, in other words, precludes certain outcomes in public decision-making, regardless of how democratic those decision-making processes might be; it also seeks to place certain issues entirely outside of the realm of public debate. This critique, of course, is commonly referred to in academic literature as constitutionalism's counter-majoritarian paradox. However, for Kramer, the extent to which constitutionalists appear comfortable with the counter-majoritarian effects of constitutionalism means that they now resemble "today's aristocrats," due to their apparent distrust of the public's ability to make desirable decisions. As such, the idea of constitutionalism is itself coming to be understood "almost exclusively in anti-democratic [read anti-populist] terms."[119] From Kramer's perspective, then, legal constitutionalism is a largely undesirable model that has been imposed on America's democratic system – and presented as a safeguard of it – by overzealous judges, despite being fundamentally antithetical to the very principles on which that system is supposed to be based.

The "judicialisation" of politics, meanwhile, has not been limited to the United States. In fact, it can be understood as a central feature of modern globalization; one facilitated by the winds of constitutional change that have swept the globe in the post-Cold War era. As Ran Hirschl explains, constitutions "in numerous countries… [have] transferred an unprecedented amount of power from representative institutions to judiciaries, whether domestic or supranational."[120] However, while it is significant for Hirschl that "courts have become the crucial fora for dealing with the most fundamental questions" in many societies, it is equally important to acknowledge that this trend has political, social and economic roots that are often ignored. "Judicial power does not fall from the sky" but "is politically constructed," Hirschl reminds us.[121] Noting that the judicialisation of politics

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[117] Larry D Kramer & Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004) at 7.
[118] Ibid., 229, 247, 5.
[119] Ibid., 229, 247, 5.
[120] Ran Hirschl, "'Juristocracy' -- Political, Not Juridical," *The Good Society* 13, no. 3 (2004): 6.
[121] *Ibid* at 11.

is typically theorized as part of a power-grab by courts, in which distrusting courts empower themselves to act as a counter-majoritarian check on the political decisions of elected institutions, Hirschl points to a tendency among political leaders in liberal democracies to actively encourage this trend. Whether to avoid responsibility for unpopular policy decisions, or to insulate those decisions from the comparative uncertainty of electoral politics, Hirschl points out that judicialisation is born from an active deference to courts. This deference, Hirschl demonstrates through a number of illustrative examples, tends to emerge when political and economic elites come to share common interests that they fear will be threatened by more democratic processes of decision-making.

Though lesser in extent perhaps, the political "construction" of judicial power is indeed taking place well beyond the liberal democratic contexts that Hirschl's work is confined to. As Ginsburg and Moustafa note, illiberal and authoritarian regimes, too, have a purpose for judicial review. Specifically, Ginsburg and Moustafa outline five main purposes for courts in authoritarian regimes: namely, to enhance "social control" by criminalizing opposition or dissent; to "bolster legal legitimacy" by giving that control a veneer of legality; to "strengthen administrative compliance" by holding the state bureaucracy to centrally defined standards and policies; to "facilitate trade and investment" by providing and upholding legal safeguards for businesses; and to implement "controversial policies," thus creating distance between rulers and decisions that might damage their popularity. As Chapters 4 and 5 of this thesis will demonstrate, many of these purposes can be understood to be at play in Cambodia, where it is possible to see a *judicialisation of politics* taking place in spite – or perhaps even because – of the continued *politicisation of the judiciary*.[122] However, at the same time as reinforcing and (at least in theory) legitimising authoritarian politics, this process of judicialisation also creates spaces through which those politics can be challenged and undermined; a dynamic Ginsburg and Moustafa call the "boomerang effect." Yet, as Chapter 5 of this

[122] This is a point made by Bjorn Dressel, first about Thailand in Björn Dressel, "Judicialization of politics or politicization of the judiciary? Considerations from recent events in Thailand" (2010) 23:5 Pac Rev 671; Björn Dressel, "The judicialization of politics in Asia: Towards a framework of analysis", (31 May 2012), online: *Judic Polit Asia* <https://www.taylorfrancis.com/>.

thesis also demonstrates, this effect does not always damage the foundations of authoritarian rule. In fact, authoritarian rule can be further perpetuated by this "boomerang effect," if judicialisation of politics (and dissent) nonetheless channels the efforts of those who wish to challenge the status quo into a forum that is still largely controlled by the state. Hence, to the extent that constitutional practice in Cambodia does engage with judicial institutions, it is helpful to understand the very decision to pursue this engagement as a political one. Similarly, it is also interesting to situate this trend both in the local context of Cambodian politics, and within a wider context where – regardless of regime-type – political battles are increasingly fought inside of courtrooms.

Political and Popular Constitutionalism

Rather than being restricted to a critique of the "legal" model, meanwhile, some scholars have also attempted to offer alternative conceptions of constitutionalism. Front and center among these – at least in the Eurocentric world of mainstream constitutionalism discourse – have been a group of, primarily British, theorists who have developed a "political" model of constitutionalism. Pioneered by J.A.G. Griffiths, this approach understands constitutions as "descriptions of equilibrium" in society, characterized by the seminal and provocative statement:

> "the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing were to happen, that would be constitutional also"[123]

Hence, instead allotting further power to unelected judges, Griffith argued for the democratic process itself being the most effective guardian against arbitrary rule. Ultimately, however, this stemmed not from an innate trust in elected politicians but from skepticism over the emancipatory power of legal rights. In his analysis of a 1977 decision by the European Court of Human Rights, for example, Griffith argued against entrusting fundamentally political decisions to "the imprecisions of Bills of Rights or the illiberal

[123] J. A. G. Griffith, "The Political Constitution*," *The Modern Law Review* 42, no. 1 (January 1, 1979): 1, 19.

instincts of judges."[124] Further, Griffith argued, the "legal" model of constitutionalism risked lending legitimacy, and protection from criticism or change, to existing institutions by demanding undue respect for a Rule of Law ideology that he understood to be inherently conservative.

Taking up the mantle laid down by Griffith, meanwhile, contemporary scholars have tried to make up for what has been perceived as a lack of normative content in his account, in what has been described as the political constitutionalism's "normative turn." Jeremy Waldron, for example, has poignantly highlighted the ability of elected representatives to act judiciously when debating issues that would, under a "legal" model of constitutionalism, be the exclusive domain of judges.[125] Similarly, in his book *Political Constitutionalism*, Richard Bellamy argues quite convincingly against judicial review, not on the basis that democratic politics should trump "constitutionalism, rights and rule of law," but rather "because democracy embodies and upholds these values."[126] It is here, of course, that the limitations of the political constitutionalist model become apparent. While undoubtedly a valid composite to the legal model, as far as discussion about constitutionalism in liberal democratic contexts is concerned, the political model of constitutionalism nonetheless assumes a relatively functional democratic system whereby legislative bodies – not to mention, by extension, the elected officials who occupy them – can and will uphold the values of those whom they are supposed to represent. Hence, while the political model of constitutionalism is helpful to the extent to which it offers a thoughtful critique of legal constitutionalism, its ability to capture the empirical reality of constitutional practice is limited somewhat by a reliance on an institutionalized idea of politics, not to mention an idealised view of institutionalised politics.

It is helpful at this stage to acknowledge context. Specifically, given the increasing prevalence of legal constitutionalism and its proponents, even in the UK where the

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[124] *Ibid* at 14
[125] Jeremy Waldron, *Law and disagreement* (New York: Oxford University Press, 1999) at 102.
[126] Richard Bellamy, *Political constitutionalism: a republican defence of the constitutionality of democracy* (Cambridge: Cambridge University Press, 2007).

constitution – according to Hickman[127] – "is being reinvented," the "normative turn" and the arguments it has generated, can be seen as a somewhat reactionary enterprise. In this sense, as Gee and Webber have noted, political constitutionalism is often "defined by an array of contrasts… to rebut challenges… rather than in terms of its own possibilities,"[128] not to mention its limitations. Meanwhile, perhaps paying heed to this, and Neil Loughlin's warning that "constitutional scholarship should not be… some adversarial contest,"[129] some scholars have attempted to establish a middle ground that utilizes the descriptive power of the "political" model. This can be seen in Hickman's "dual embrace," which sees the two models "not as competitors but as partners," by highlighting the extent to which characteristics of *both* legal and political constitutionalism coexist concurrently in contexts that are typically considered to be examples of *either* one or the other.[130] Similarly, the attempt to find a middle ground is also evident in Palmer's use of "Constitutional Realism" to decipher the "complete" constitution in the U.S. and elsewhere. Here, Palmer brings to light the extent to which the legal model of constitutionalism is itself supported by unwritten norms and conventions that are typically considered to be characteristic of the political model.[131] Although, as Victor Ramraj notes, these debates have largely "distracted constitutional scholars from the broader implications of constitutionalism beyond western democracies,"[132] the models over which these debates nevertheless maintain notable descriptive value. As will be seen shortly, to the extent that an account of constitutionalism in Cambodia should focus on institutions, any acknowledgement that primarily non-judicial state actors do in fact engage in constitutional interpretation is, indeed, insightful.

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[127] Tom R Hickman, "In Defence of the Legal Constitution" (2005) 55:4 Univ Tor Law J 981.
[128] Graham Gee and Grégoire C. N. Webber, "What Is a Political Constitution?," *Oxford Journal of Legal Studies*, April 14, 2010, at 275. Meanwhile, the question of "whether… constitutional identity formation *ex negativo* is normatively desirable" is helpfully asked, albeit in a different context, by Jan-Werner Müller, "On the Origins of Constitutional Patriotism," *Contemporary Political Theory* 5, no. 3 (August 1, 2006): 278–96.
[129] Martin Loughlin, "Towards a Republican Revival?," *Oxford Journal of Legal Studies* 26, no. 2 (June 20, 2006): 435.
[130] Hickman, *supra* note 128. 1016.
[131] Palmer, *supra* note 107.
[132] Victor V Ramraj, "Constitutional Tipping Points: Sustainable Constitutionalism in Theory and Practice" (2010) 1:2 Transnatl Leg Theory 191 at 191.

Still more insightful for the Cambodian context, though, is the growing literature on Popular Constitutionalism.[133] This approach, according to a central proponent, Mark Tushnet, calls attention to "the deployment of constitutional arguments by the people themselves, independently of, and sometimes… in conflict with, constitutional interpretations offered and enforced by the courts."[134] From this perspective, then, rather than being consigned to courts or legal institutions, constitutionalism is for the people to "*perform*… through (some of) their political mobilizations,"[135] as well as through their engagement (or disengagement,[136] presumably) with those institutions. By one account this engagement is only occasionally constitutional in nature. According to Bruce Ackerman's "Constitutional Moments" thesis, at least, these moments emerge only occasionally in a country's history.[137] However, as has been noted elsewhere, this notion rests on the overstatement of what is an ambiguous distinction between constitutional politics and "ordinary" politics.[138] As Ruti Teitel notes, constitutional politics – particularly "in periods of substantial political change – do not always manifest in ways that fit neatly into such a binary distinction. In fact, the following chapters of this thesis suggest, such an oversimplified distinction can in fact obscure the extent to which constitutional politics occurs at an everyday level, in constitutional practices that extend far beyond state institutions. Hence, instead of falling back into this apparent trap of institution-centricity, it is interesting to follow a slightly different path. Doing so means

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[133] Kramer & Kramer, *supra* note 118; Larry Alexander & Lawrence B Solum, "Popular - Constitutionalism" (2004) 118 Harv Law Rev 1594; Mark Tushnet, "Popular Constitutionalism as Political Law" (2006) 81 Chic-Kent Law Rev 991; Saul Cornell, "Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion" (2006) 81 Chic-Kent Law Rev 883; Matthew D Adler, "Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law" (2006) 100 Northwest Univ Law Rev 719; Frank I Michelman, "Unenumerated Rights under Popular Constitutionalism" (2006) 9 Univ Pa J Const Law 121; David E Pozen, "Judicial Elections as Popular Constitutionalism" (2010) 110:8 Columbia Law Rev 2047; Tom Donnelly, "Making Popular Constitutionalism Work" (2012) 2012 Wis Law Rev 159; Mark V Tushnet, "Popular constitutionalism and political organization" (2013) 18:1 Roger Williams Univ Law Rev 1; Mila Versteeg, "Unpopular Constitutionalism" (2014) 89 Indiana Law J 1133; Eric C Ip, "The High Court of the People: Popular Constitutionalism in Hong Kong under Chinese Sovereignty: The High Court of the People" (2014) 36:3 Law Policy 314; Bui Son & Pip Nicholson, "Activism and Popular Constitutionalism in Contemporary Vietnam" (2017) 42:3 Law Soc Inq 677.

[134] Tushnet, *supra* note 134 at 991.

[135] *Ibid* at 994.

[136] Here, we can observe a possible link with Georgio Agamben's notion of "distituent," rather than constituent, power. Giorgio Agamben and translated by Stephanie Wakefield, "What Is a Destituent Power?," *Environment and Planning D: Society and Space* 32, no. 1 (2014): 65–74.

[137] Bruce A Ackerman, *We the people* (Cambridge, Mass: Belknap Press of Harvard University Press, 1991).

[138] Ruti G. Teitel, *Transitional Justice* (New York ; Oxford: Oxford University Press, 2000), 195.

returning to Robert Cover's classic text, *Nomos and Narrative*, and acknowledging that the innate plurality of societies means that any "paideic community" is always, already generating interpretations all of the time.[139] Applying this Coverian-inspired version in Cambodia, meanwhile, allows for a recognition that a weak judiciary and polarized political landscape means neither the courts nor the executive being able to assume the "jurispathic" role of negating the plurality of interpretations with a singular authoritative one. Because the judiciary is generally held in low esteem by the Cambodian public, in other words, multiple interpretations of the Constitution are able to proliferate and persist in spite of, as well as in the absence of, what would otherwise be determinative decisions by the courts. For the study of constitutionalism in Cambodia, then, this demands a more ethnographic, socially engaged approach to situate the Constitution within the "webs of significance" spun by societies.[140]

Constitutional Law's "Pivot": Conceptualizing Constitutionalism in Asia

Hybridity and Transition

Clearly, while the models discussed above are of some utility for understanding the normative aims of liberal constitutionalism, they may not be so helpful for empirically describing the characteristics of constitutional practice in illiberal or undemocratic contexts. The fact that these theories have emerged as part of a debate that is centred in an entirely different social, political, economic and cultural context, in other words, does limit the extent to which they are able to aptly describe the ways in which constitutionalist ideas operate in Cambodia. These limits, it appears, are also present in a number of jurisdictions that do not fit the liberal-democratic model upon which theories of constitutionalism have primarily been developed. As Ramraj has observed, these theories, therefore, "assume an enduring commitment to constitutionalism,… [strong] legal institutions… and a legal culture conducive to constitutionalism," which often does

[139] Robert M Cover, "Foreword: Nomos and Narrative" (1983) 97 Harv Law Rev 4.
[140] Ibid; quoting Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973).

not hold true in Southeast Asia, for example.[141] Instead, an accurate understanding of constitutionalism in the region, Ramraj argues, must begin with an understanding of the concept as "less certain and more fluid," and a willingness to look "beyond formal constitutionalism and the courts."[142] Clearly, such an approach may have enormous descriptive, if not normative, power in contexts where judicial institutions, as well as commitment to and support for constitutionalism, seem to be more politically malleable. However, it is important, even at this early stage, to note that there remains significant room for divergence within such understandings of constitutionalism. As one of the region's most prominent scholars of constitutionalism – Albert HY Chen – has noted, detailed comparison "suggests that no distinctly Asian mode… can be identified," making any attempt to paint a singular, homogenous picture of practice in the region "bankrupt."[143]

The diversity of political, economic and cultural contexts in Southeast Asia does nevertheless offer opportunities to test and challenge the aforementioned models. One important element of this challenge, scholars of constitutionalism in Southeast Asia have argued, comes from understanding how constitutionalist ideas operate in illiberal political regimes. Li-Ann Thio, for example, has suggested that understanding constitutionalism in Southeast Asia demands, first, that "the concepts of constitutionalism and liberalism must be disentangled."[144] At first glance, such an assertion presents a fundamental challenge to existing theories, which have largely assumed a concomitance between liberalism and constitutionalism due to the fact that the two concepts emerged almost in unison in the West.[145] However, Thio and a number of other scholars of constitutionalism have noted that this assumption is neither necessary or accurate, as the emergence of constitutionalist ideas in western contexts also appears to have pre-dated the rise of liberal-democratic governance. Equally, as Chapter 4 of this thesis demonstrates, the language of constitutionalism– does not necessarily keep the same connotations in different contexts.

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[141] Ramraj, *supra* note 133 at 192.
[142] *Ibid* at 209.
[143] Albert H. Y. Chen, "Pathways of Western Liberal Constitutional Development in Asia: A Comparative Study of Five Major Nations," *International Journal of Constitutional Law* 8, no. 4 (October 1, 2010): 849, 883.
[144] Li-Ann Thio "Constitutionalism in Illiberal Polities" in Rosenfeld & Sajó, *supra* note 98 at 134.
[145] N W Barber, *The Principles of Constitutionalism* (Oxford, New York: Oxford University Press, 2018).

Constitutionalism, like the rule of law in Nick Cheesman's study of Myanmar, does not travel well; or rather, the meaning of the concept, and the lexicon associated with it, is subject to change as it is translated and applied in new contexts.

Yet, while existing studies of constitutionalism in illiberal or undemocratic contexts represent a challenge to the normative assumptions of constitutional theory, it is not clear to what extent this challenge is based on any methodological differences. In *Constitutionalism in Asia in the Early 21st Century*, for example, Albert HY Chen suggests using constitutionalism in Asia as a laboratory in which to develop a concept of constitutionalism that can rise to Thio's challenge. Drawing a distinction between "Pristine," or western, constitutions and "Secondary," or non-western ones, Chen notes that the latter are "not necessarily… intended to serve the same functions" as the former. Merging Loewenstein's ontological category of "nominal" constitutions, which have an aspirational and even educational power, and Sartori's concept of "façade constitutions," Chen proposes a concept of "Hybrid Constitutionalism" which is not necessarily synonymous with democratic governance. When applied more practically to the Cambodian context, however, the similarities between the "hybrid" approach and those discussed earlier becomes more apparent. Specifically, Chen summarizes 25 years of constitutional developments in Cambodia according to "regular elections…, several constitutional amendments, and a Constitutional Council [being] established" while Hun Sen "continued to rule as a strongman." Hence, despite astutely capturing the nonliberal character of Cambodia's constitutional order, Chen's assessment – and the subsequent chapter by Kevin YL Tan, upon which it is based – maintains a primarily institution-centric approach to constitutionalism in the country. In the process, such an approach also implies sense of (intended or actual) progress towards liberal-democratic model in the process.

This sense of progress remains a relatively fundamental element of much of the literature on constitutionalism in Southeast Asian contexts.[146] While this is hardly surprising, given

[146] Tom Ginsburg, *Judicial review in new democracies: Constitutional courts in Asian cases* (Cambridge University Press, 2003); Mark Sidel, *Law and society in Vietnam: The transition from socialism in*

the perceived nexus between constitutionalism and liberal-democracy, it is not necessarily clear that it is helpful for accurately and empirically capturing the role that constitutionalist ideas and vocabularies actually play in the region. Despite maintaining a noticeable skepticism about the applicability of the western, liberal project of constitutionalism, for example, even Albert HY Chen acknowledges that it "has appealed to Asian peoples in their struggles for emancipation and peace" nevertheless.[147] In concluding his introduction to *Constitutionalism in Asia*, in fact, Chen goes on to assert that "if progress is at all possible in human history," constitutionalism stands as a "significant element and sign of such progress."[148] This understanding is prescient, as a precursor to Chapters 4 and 5 of this thesis; however, it can also be given additional degrees of nuance by the data presented therein. Specifically, the image of constitutional practice in Cambodia that is painted by Chapters 4 and 5, is one in which the language of the Constitution can be understood to have become central to ongoing battles *between* emancipation and peace. As Chapter 4 demonstrates, constitutionalism appears to be understood by the Cambodian state as a tool for enforcing (from above) the imperatives of order and stability. Yet, at the same time, Chapter 5 explains how constitutional guarantees of rights simultaneously provide a protective shield for calls for greater justice and freedom. Rather than seeing a particular conception of `constitutionalism inherently as a sign of progress, then, the Cambodian example suggests that contemporary political struggles are often pursued through battles over the very meaning of constitutionalism.

Yet, a number of accounts of constitutionalism in Southeast Asia appear to treat constitutionalism as part of a more or less inevitable progression towards liberal democracy. Presenting a notion of the "transitional" that has figured heavily in other accounts of constitutional practice in Southeast Asia, for example, Ruti Teitel begins by suggesting that constitutionalism can have a "radical" role in facilitating progressive political change.[149] Highlighting constitutionalism's potentially "disentrenching role,"

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comparative perspective (Cambridge University Press, 2008); Hongyi Chen, ed, *Constitutionalism in Asia in the early twenty-first century*, Comparative constitutional law and policy (Cambridge ; New York: Cambridge University Press, 2014); Chang et al, *supra* note 94.

[147] Chen, *supra* note 147 at 32.

[148] *Ibid*.

[149] Teitel, *supra* note 139 at 191.

Teitel takes a "constructivist" approach associated with political theorist John Rawls, arguing that constitutions can contribute to the "gradual construction of political consensus."[150] A similar perspective is taken by Albert H.Y. Chen, whose focus on constitutional development in five Asian countries is focused almost entirely on the extent to which they have reached a "constitutionalism in its Western form," and highlights political instability (rather than culture) as the primary inhibitors to such a development. When countries are politically stable and can reach consensus, in other words, western-style liberal constitutionalism will likely emerge. [151] While it may indeed be the case that agreement over constitutional principles *can* contribute to this process of consensus-building, the Cambodian example suggests that this is not inevitable. As explained above in relation to Chapters 4 and 5, but also in later discussion of debates over Buddhism (Chapter 6) and the protection of tradition (Chapter 7), the data presented in this thesis suggests that constitutional practice is often marked by a high degree of dissensus. At best, perhaps, the case studies from Cambodia presented in this thesis can be taken to suggest that constitutionalism, even in a context where institutions are seen as dysfunctional – can assist in channeling this dissensus into more legalized vocabularies, procedures and institutions. For Ramraj and Thiruvengadam too, constitutions – and even the use of emergency powers in them – can have a stabilizing influence, which assists in "securing a foundation on which a liberal constitutional order might eventually be built."[152] Again, despite its perceived "radical" and "transformative" potential, the tendency of the "transitional" perspective appears to be the assumption of liberal democracy as the normative end-goal.

While the notion of a "transitional" constitution is undoubtedly helpful in assessing the role of constitutionalism in Cambodia's transition since the early-1990s, Cambodia's experience of transition thus far can also be instructive for those who utilize the "transitional" model. For example, the presence of the "might" in Ramraj and Thiruvengadam's assessment allows us the opportunity to contemplate the possibility of

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[150] *Ibid* at 196.
[151] Chen, *supra* note 147.
[152] Victor V. Ramraj & Arun K Thiruvengadam, eds, *Emergency powers in Asia: exploring the limits of legality* (Cambridge [U.K.] ; New York, N.Y: Cambridge University Press, 2010) at 6.

alternatives, in case Cambodia's transition has "stalled,"[153] or is in reverse. Such a possibility is further recognized by Ramraj and Thiruvengadam's emphasis that "the rule of law [and constitutionalism] require a *political* struggle," which must be fought by legal professionals and institutions, as well as by others.[154] However, what is missing, and what the Cambodian context can offer this approach, is an acknowledgement that the emphasis on "stability" and "order," which is implicit in the act of "securing a foundation" for constitutionalism, can have damaging long-term consequences.[155] The assumption that one needs to "secure a foundation" for constitutionalism, for example, is implicit in the state-led discourses discussed in Chapter 4; as the undermining of constitutional principles is routinely justified in terms of the need to protect the constitutional order by first ensuring "order" and "stability." Similarly, Teitel's description of constitutionalism as the "gradual construction of political consensus" perhaps overlooks the violent or oppressive ways through which that consensus might be imposed by the state, and distracts from the more important role of constitutionalism in channelling dissensus and political conflict into less violent channels.[156] What results, then, is a situation whereby the "transitional" imperatives that are supposed to be *the exception* instead become *the rule*, and what was optimistically described as a "transition" model is either stalled or becomes normalized as a "hybrid" model in which "order," "stability" and "consensus" are imposed by the state.

The "Cultural" Turn

The move away from treating constitutionalism as synonymous with a written constitution and the decisions of courts, meanwhile, undoubtedly can allow for additional insight. As Chang, Thio, Tan and Yeh explain, in their casebook *Constitutionalism in Asia*, this requires "greater specificity and "thick" description."[157] Recognizing, in turn, that culture is "both a product and producer of context," the authors assert that, in order to

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[153] Sorpong Peou, "Cambodia in 1997: Back to Square One?" (1998) 38:1 Asian Surv 69.
[154] Ramraj & Thiruvengadam, *supra* note 153 at 48–49.
[155] See Springer, *Cambodia's Neoliberal Order* for an in-depth discussion of the use, or misuse, of the language of order and stability in Cambodia.
[156] Paul Bowman & Richard Stamp, *Reading Ranciere: Critical Dissensus* (A&C Black, 2011).
[157] Chen, *supra* note 147 at 67–68.

fully comprehend and capture what constitutionalism means in Asia, "we need to understand how people feel about it."[158] Ultimately, then, scholars of constitutionalism in Asia find themselves, at least tentatively, tipping their cap toward Pierre Legrand, whose anthropologically-inspired critiques recognize culture as "the silent language" of the law.[159] However, taking up the mantle of attempting to interpret this language – it must be said – remains a fraught process. This is particularly so in literature on Cambodia, where the engagement with culture has often led to its demonization as "the primary and intractable obstacle" to peace, stability, and progress.[160] As shall be seen shortly, while this tendency is prevalent in Cambodia, which is routinely diagnosed with a "culture of violence," it is also dangerously present elsewhere. Hence, any account of the relationship between law and culture would do well to follow Arun Thiruvengadam's cautious words that "one has to be careful about the methodology… and the conclusions one draws."[161] While such a warning does not preclude methodological approaches that rely upon or engage with culture as a factor in constitutional practices, it does demands a more thoughtful engagement that is cognisant of the risks inherent in the cultural turn. Specifically, the latter entails a methodology that recognises culture as a dynamic, heterogeneous and multivalent phenomenon that is itself socially constructed, and questions conclusions that have the potential to essentialise or reify cultural practices.

A perfect example of both the benefits and dangers of the turn to culture in the study of constitutionalism, as well as its seminal text, is Nidhi Eoseewong's *The Thai Cultural Constitution*. In many ways, perhaps, reflecting the spirit of Griffith's Political Constitution, which placed "conflict… at the heart of modern society," Nidhi's account attributes constitutional status to "*political culture,"* in which "various people and institutions struggle to create and defend their power status."[162] Constraints on government, meanwhile, come almost organically from the *de facto* division of power at the local level, a required "external manifestation of morality," and the ability of

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[158] Ibid., 65, 70.
[159] Legrand, *supra* note 109 at 337.
[160] Springer, *supra* note 88 at 7.
[161] Thiruvengadam, *supra* note 13 at 59.
[162] Nidhi Eoseewong, "The Thai cultural constitution" (2003) 3:3 Kyoto Rev Southeast Asia, online: <http://kyotoreview.org/issue-3-nations-and-stories/the-thai-cultural-constitution/> at 1.

"influence" to undermine pure power.[163] However, Nidhi often appears to conceptualize the cultural constitution singularly, despite his recognition that it is the result of political struggle.[164] So, too, it would seem, is there a tendency for "culture" to substitute almost imperceptibly for tradition, or the status quo. A prime example of this is Nidhi's assertion that, in the eyes of the Thai public, "using *influence* for some private benefit is not a problem."[165] The inclusion of a National Counter Corruption Commission in the populist constitution, which followed just six years later, appears to suggest that this attitude was, perhaps, not so widely held after all. In much the same vein, assurances like "equality for the Thai is the equality of the market"[166] seem to represent a particular political perspective.

The attribution of this perspective to a national culture, however, should neither be made nor received uncritically. Not only is it unclear on what empirical basis, in this instance, Nidhi is able to attribute such a position to "the Thai" as a people, but it is also fundamentally questionable whether any such position could be attributed to such a large and diverse group. One wonders, for example, whether this excludes the many anti-capitalist movements that have existed throughout Thai history, and which persist to this day in various forms, from the Thai nation in Nidhi's eyes.[167] Without a firm empirical grounding and a reflexive awareness of the dangers inherent drawing conclusions that treat culture as homogenous and static, then, attempts to assign specific constitutional principles to cultural beliefs or practices are potentially misleading. Such a sleight of hand, however, if far from uncommon in the study of constitutionalism more generally, reminiscent as it is of the attempt, noted in a very different context by J.A.G. Griffith, to

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[163] Ibid, 10-12.

[164] Though perhaps a trick of translation, the consistent refence to "the Thai," as if they were some undifferentiated mass, is in itself potentially problematic.

[165] Eoseewong, *supra* note 163 at 14.

[166] *Ibid* at 19.

[167] See, for example, Thadeus Flood, "The Thai left wing in historical context" (1975) 7:2 Bull Concerned Asian Sch 55; Chantana Banpasirichote, "Civil society discourse and the future of radical environmental movements in Thailand" (2004) Civ Soc Southeast Asia 234; Thongchai Winichakul, "Nationalism and the Radical Intelligentsia in Thailand" (2008) 29:3 Third World Q 575; Tim Forsyth, "Thailand's Red Shirt Protests: Popular Movement or Dangerous Street Theatre?" (2010) 9:4 Soc Mov Stud 461.

use constitutional discourse to "throw a protective sanctity around certain… institutions and principles."[168]

The notion of a Cultural Constitution, meanwhile, has been utilized by a number of scholars since Nidhi's first articulation of it in 1991. The resulting accounts have, to some extent, reinforced Nidhi's observations, such as that the accumulation of personal wealth from public office is "regarded as quite normal,"[169] and that coups have been "normalized as a mechanism for handling political crises."[170] However, they have also provided the basis for an understanding of cultural constitutionalism in Thailand that is less backward looking and institution-centric in orientation. In 'When Notions of Legitimacy Conflict,' for example, Bjoern Dressel observes that "what constitutes a legitimate political order is being questioned more than ever."[171] In language that is profoundly significant for Cambodia, Dressel's account highlights a polarization between those who seek legitimacy from "the traditional conception of a stratified paternal-authoritarian state," and a "younger and weaker" alternative that gains legitimacy from "popular sovereignty, constitutionalism and performance."[172] While this division should not be assumed to map directly onto the political terrain in Cambodia, given the historic and contemporary differences between the two countries, it undoubtedly contains insights for Cambodia. Yet, much like in Thailand, the battle over the meaning of the Cambodian Constitution can also be understood to have significant (but not decisive) implications for the legitimacy of any number of actors; including, as this thesis demonstrates, state institutions (Chapter 4), lawyers and civil society organisations (Chapter 5), the Buddhist *Sangha* (Chapter 6), and even artists or performers (Chapter 7). Equally, as Andrew Walker has noted in relation to Thailand, the notion of cultural constitutionalism can also shift the focus away from an elite or top-down approach. Using James C. Scott's notion

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[168] Griffith, *supra* note 124 at 15.
[169] Andrew Walker, "The Rural Constitution and the Everyday Politics of Elections in Northern Thailand," *Journal of Contemporary Asia* 38, no. 1 (February 1, 2008): 95.
[170] Harding, quoted in Ramraj & Thiruvengadam, *supra* note 153 at 11.
[171] Bjorn Dressel, "When notions of legitimacy conflict: the case of Thailand" (2010) 38:3 Polit Policy 445 at 448.
[172] *Ibid* at 445.

of "everyday politics"[173] as a starting point, Walker suggests that ideas of localism, benefit sharing and transparency have the power to "shape judgments about legitimate, and illegitimate, political power."[174] While this undoubtedly plays into the macro-political debates about democratic contestation and human rights described in Chapters 4 and 5 of this thesis, an idea of cultural constitutionalism can also be understood as operating at a more micro-level in Cambodia. For instance, debates about the relationship between the state and the Buddhist *Sangha*,[175] or the role of monks in politics, as well as in discussions over the very meaning of Cambodian identity and tradition, explored in Chapters 6 and 7 respectively, also feature a prominent role for the constitution.

Their conclusions inevitably differ somewhat from those that would emerge from the Cambodian context, but both Dressel and Walker's investigations demonstrate the undoubted utility of ethnographic methods and a critically aware turn to culture. Specifically, in Cambodia, such an approach could offer an insight into the way in which the current Constitution – made in a hurried and largely non-participatory process during the United Nations' administration of the country – has been indigenized, both by national political elites and by the population at large.[176] It would also mean acknowledging the extent to which constitutionalism is shaped by extra-constitutional institutions, such as the Buddhist *Sangha*[177] the international donor community,[178] or even by non-institutional agents such as NGOs. From this perspective, then, it is possible to understand the state as just one, albeit a very important one, among a manifold number of actors engaged in an ongoing struggle over constitutionalism. As the data presented in

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[173] James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven: Yale University Press, 1985).

[174] Walker, *supra* note 170 at 102.

[175] The *Sangha* can be understood essentially as the collection of Buddhist institutions, and their members, in much the same way as one might refer to 'the Church' in Christianity. Historically, however, an expanded version of this definition has been common, in which it refers more generally to a Buddhist community (for example, not only Buddhist institutions and their leaders, but also those who attend Buddhist ceremonies or practice Buddhism within the jurisdictions of those institutions).

[176] For accounts of a somewhat similar process, see Christopher A Ford, "Indigenization of Constitutionalism in the Japanese Experience, The" (1996) 28 Case West Reserve J Int Law 3.

[177] See Alexandra Kent and David P. Chandler, eds., *People of Virtue: Reconfiguring Religion, Power and Morality in Cambodia Today*, NIAS Studies in Asian Topics 43 (Copenhagen: NIAS Press, 2008) for analyses of the *Sangha*'s role in modern day Cambodia, and Penny Edwards, *Cambodge: The Cultivation of a Nation, 1860-1945* (University of Hawaii Press, 2007) for an historical account.

[178] Sophal Ear, *Aid Dependence in Cambodia: How Foreign Assistance Undermines Democracy* (Columbia University Press, 2013).

the forthcoming chapters demonstrate, this struggle is not so much for constitutionalism (or, by implication, against it), but is instead a struggle between competing conceptions, or perhaps even "translations," of constitutionalism. Perhaps inevitably, the zenith of this struggle in Cambodia continues to be taken up by debates over the meaning of constitutional guarantees of rights and the rule of law (described in Chapters 4 and 5), which are often carried out in courtrooms and other state institutions. However, later chapters of this thesis suggest that struggles over constitutionalism can also be found at a much more micro-political level, in decisions made by political activists, Buddhist monks, and artists, for instance. It is these struggles, perhaps as much as those that take place inside the courtroom, that shape the meaning of constitutionalism in Cambodia.

Societal Constitutionalism

The project of de-centring the state in the study of constitutionalism, meanwhile, is also furthered by those who have developed the concept of societal constitutionalism. Inspired by Christopher Thornhill's *Sociology of Constitutions*,[179] and forged primarily by Gunter Teubner, this approach attempts to identify constitutional sites, processes and forces "beyond the state."[180] Sitting relatively neatly alongside elements of cultural constitutionalism that recognize the constitutional significance of extra-constitutional norms and actors (religious institutions being the most prominent example), the societal approach goes a step further. Beginning with an awareness of the "functional differentiation" of modern society, an insight developed from systems theory,[181] societal constitutionalism posits the potential for other, often ostensibly private, centers of power to be considered as sites of constitutionalism. Once these processes come into view, any vision of constitutionalism in Cambodia that focuses solely on the *state* constitution can be understood as, at best, only a partial one. Instead, a less state-centric approach can help to recognize the self-constituting processes of these alternative sites, not to mention

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[179] C J Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2011).
[180] Gunther Teubner & Anna Beckers, "Expanding Constitutionalism" (2013) 20:2 Indiana J Glob Leg Stud 523.
[181] See works by for Talcott Parsons and Niklas Luhman

the distinct interpretation of the state constitution that they internalize, that shape constitutional practice in any given society. From this perspective, discussions within the Buddhist *Sangha* about the proper relationship between religion and politics (Chapter 6), or the way in which artists support or resist state-proffered definitions of Cambodian culture or tradition (Chapter 7), become additionally interesting for the study of constitutionalism. As well as shaping the way in which the formal constitutional provisions are understood, these struggles also shape the internal self-understanding and self-regulation of the institutions in which they occur.

Meanwhile, this comparative broadening of scope may also provide additional insight for understanding the interaction between constitutionalism and authoritarian rule in Cambodia. The societal approach, for example, can shed light on the ways in which private or non-state-based centres of power present a challenge to the hegemony of the state: a possibility that is particularly interesting in the context of authoritarian rule. To the extent that they are able to constitute and regulate themselves, for example, religious institutions, the Bar and other professional associations, or even less formally defined groups (such as the artists described in Chapter 7) are potentially able to resist the assumed authority (and thus challenge the legitimacy) of an authoritarian state. However, as this thesis demonstrates, the societal approach can also help to acknowledge the ways in which the authoritarian state also extends and consolidates its power by co-opting these rival sites of constitutionalism. Notably, Chapter 5 shows how this is achieved by ensuring government-aligned lawyers lead the Bar Association, by using patronage to influence to do the same in the *Sangha* (Chapter 6), and even by initiating and supervising the constitutionalisation of the arts, media and culture sectors (Chapter 7). Hence, in a descriptive sense at least, the societal approach is helpful in its ability to accommodate an investigation into processes and perspectives that are usually – at least until it is brought before a court – considered beyond the scope of constitutional discourse. This is particularly so in a context where state and private power is often so closely intertwined as to be indistinguishable, and where public office is often used to pursue private interests, or vice versa.

Conclusion

"If constitutional law begins to ask what people actually do under a particular constitution," Carl J. Friedrich wrote in 1937, then "the constitutional lawyer becomes a political scientist (one hopes)."[182] To that could be added a sociologist, an historian, or an ethnographer, to name but a few. However, even outside of the law school, as the multidisciplinary literature on Cambodia demonstrates, formalistic understandings of the constitution – as the supreme (written) law of the land and the exclusive domain of courts – continue to dominate and limit our constitutional imagination. If constitutions are to be enforced by courts, then a document that is not enforced must not be worth the paper it is written on; or so the assumption seems to go. Alternatively, though, it is possible – and more fruitful, in the Cambodian context at least – to ask when the Constitution is invoked and to what ends, rather than simply to dismiss its relevance out-of-hand. Finding answers to those questions, it seems, requires the insights of more than one singular "model" of, or approach to, constitutionalism. It also means going beyond the "law-as-rules formalism"[183] that often characterizes constitutional scholarship, and demands that we expand the horizons of constitutional enquiry beyond formal processes and institutions.

Hence, the object of this initial foray into constitutional theory has not been the pursuit of one singular approach to constitutionalism at the expense of all others. Nor to suggest that any or each should be seen as mutually exclusive. Rather, it has been to highlight the elements of existing theories that can be most helpful to understanding constitutional practice in Cambodia, and outside of western, liberal democracies generally. The traditional "legal" model of constitutionalism, with its assumption of a strong judicial system and entrenched commitment to constitutional governance, seems ill-suited to Cambodia. However, the growing body of literature that is amassing in response to its profligacy, whether in liberal-democratic contexts or otherwise, is a helpful reminder that the decision to turn to courts is always a political one, wherever and whenever that

[182] Carl J Friedrich & 1901-, "Constitutional government and democracy; theory and practice in Europe and America" (1941), online: <http://agris.fao.org/agris-search/search.do?recordID=US201300454587> at 505.
[183] Legrand, *supra* note 108 at 1113.

decision is made. Equally, proponents of the political model are focused primarily on putting it forward as an alternative to the legal one, in a debate that is of purely theoretical utility outside of liberal-democracies. Yet, political constitutionalism does at least provide a basis from which it is possible to begin thinking of non-judicial actors as constitutional ones nonetheless.

From there, it is only a short step to understanding not just elected officials, but also those who elect them, as constitutional actors. Put differently, this can be understood as allowing room alongside constituted power in the study of constitutionalism for the ongoing presence of constituent power, returning "we the people" to discussion of constitutional practice. However, the realities of modernity require that we see society as more than just a singular, homogenous mass.[184] Hence, a more complete understanding of constitutionalism must not just contemplate the role of the "multitude," it must also acknowledge the numerous other institutional and non-institutional actors that make up contemporary society. This should include "cultural" institutions, such as those discussed by Nidhi. Similarly, it could any of a number of social sub-systems, which – with the insights of societal approach – we can understand to be constitutional actors, sources of constitutional interpretation, and even autopoietic constitutional orders themselves. As Chapters 5, 6 and 7 demonstrate, societal institutions such as the Bar Association, the Buddhist Sangha, or even a state-created disciplinary body of artists and performers, respective, are indeed influential in Cambodia's everyday constitutional practice. In addition, recognising this influence, Cambodia's ruling party is seen to have identified such institutions – and, in the case of the Ministry of Culture's Board of Discipline, even created one – as important targets for co-optation. Combining these, one can get a sense of a complex, multi-dimensional set of *orders*, of which the nation state's is just one, admittedly prominent, example. Finally, as we become increasingly aware of the significance of private systems and accumulations of power, such an understanding can also allow for a more nuanced description of the ongoing interaction between those systems and the state constitution.

[184] As Hardt and Negri have noted in their restatement of constituent power, in fact, the *Multitude* is "composed of innumerable internal differences that can never be reduced to a single identity." Michael Hardt, *Multitude: war and democracy in the Age of Empire* (New York: The Penguin Press, 2004).

What is needed, then, is not a new model for understanding constitutionalism, so much as an expansion of the scope within which it is studied. Thus, taking seriously Chang, Thio, Tan and Yeh's assertion that to understand a constitution's significance, "we need to understand how people feel about it,"[185] I suggest a more ethnographically-engaged, "bottom-up"[186] approach to constitutionalism. This is undoubtedly an "awkward scale" on which to conduct such studies, given the difficulty of obtaining accurate, nuanced and representative data reflecting a national public's perception of a constitutional text in any given jurisdiction. Nevertheless, I argue, our understanding of constitutionalism will nonetheless benefit from the insights of "thick[er] description." This is because, as the Comaroff have noted, even "macrohistorical processes… have their feet on the ground" and must be "rooted in the meaningful practices of people, great and small."[187] Returning to Robert Cover's seminal foreword, *Nomos and Narrative*, then, we can begin with the realization that Constitutions mean nothing without the "webs of significance" that are spun around them. While institutionally-proffered meanings are usually dominant in public discourse, these webs are innately plural. This fact becomes particularly visible in specific "constitutional moments," such as those noted by Eric C. Ip in Hong Kong or, as I argue in Chapter 5, evident on the streets of Phnom Penh at the end of 2013.[188] However, this plurality of meaning is also a fact of everyday life; one that, as Andrew

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[185] Chang et al, *supra* note 94 at 70.

[186] For a helpful example of how a view "from below" can fundamentally change legal knowledge, see Balakrishnan Rajagopal, *International law from below: development, social movements, and Third World resistance* (Cambridge, UK ; New York: Cambridge University Press, 2003).

[187] John L Comaroff & Jean Comaroff, *Ethnography and the historical imagination*, Studies in the ethnographic imagination (Boulder: Westview Press, 1992) at 33.

[188] Eric C. Ip, "The High Court of the People: Popular Constitutionalism in Hong Kong under Chinese Sovereignty: The High Court of the People," Law & Policy 36, no. 3 (July 2014): 314–38. This article has, of course, taken on renewed relevance given the massive protests that re-erupted in late-April 2019. For an overview of how the movement developed, see "Timeline: Key dates in Hong Kong's protests", Reuters (1 October 2019), online: <https://www.reuters.com/article/uk-china-anniversary-timeline-idUSKBN1WG3XK. For insight into the protest movement and its tactics, see Antony Dapiran, City of Protest: A Recent History of Dissent in Hong Kong: Penguin Specials: Penguin Specials (Penguin Group Australia, 2017); "Sinica Podcast: Antony Dapiran on the Hong Kong protests", (28 June 2019), online: SupChina <https://supchina.com/2019/06/27/sinica-podcast-antony-dapiran-on-the-hong-kong-protests/>; "Umbrella Revolution 2.0 – or something else? Antony Dapiran on the Hong Kong demonstrations | Sinica Podcast", online: SupChina <https://supchina.com/podcast/umbrella-revolution-2-0-or-something-else-antony-dapiran-on-the-hong-kong-demonstrations/>. And for a focus on the constitutional groundings and implications of the protest, see "Should Hong Kong's Basic Law be scrapped?", (12 May 2017), online: South China Morning Post <https://www.scmp.com/comment/insight-opinion/article/2094057/should-hong-kongs-basic-law-be-scrapped-and-new-constitution>..

Walker and Bjorn Dressel have demonstrated in the Thai context, underwrites everyday politics in a way that may not be explicit at first glance.

Finally, then, the study of constitutionalism must be seen as the study of conflict. While each of the theories discussed above can offer insights into constitutional practice, especially when read alongside one another and situated within multiple geographic scales, they are at their most dynamic when imbued with a sense that context, contingency and struggle. Just as the move to courts that epitomizes the "legal" model is the product of political decisions, so too can written constitutions be understood as "the statement of a political conflict pretending to be the resolution of it."[189] However, while the political constitutionalists may be right to argue that "the best we can do is enlarge the areas for argument and discussion," the extent to which they are able to do that – at least as far as the Cambodian context is concerned – is fundamentally limited by a focus on an institutionalized idea of politics. In places where constitutionalism is "less certain and more fluid,"[190] conflict exists between radically different ideas of constitutionalism, if not over the very significance of the concept itself. Hence, while "hybrid" and "transitional" approaches are of undoubted descriptive significance, they gain this significance from their ability to recognise – and perhaps begin to account for – the contingent and constantly changing outcomes of ongoing conflicts, often between drastically opposing constitutional ideologies. It is these contestations that ultimately shape constitutional practice in any given place, over time. Similarly, for the turn to culture to be anything other than essentialising, it too must emphasize that a cultural constitution is the product of a "political culture" that is both a product and process of contestation between multiple groups, individuals and institutions seeking "to create and defend their power status."[191] The same, of course, is true when the terrain of enquiry is extended beyond institutions that are traditionally considered "constitutional," as the societal approach also attempts to do. These alternative sites of constitutionalism are unlikely to be able to comprehensively constrain the power of the state on their own, as liberal constitutional theory often expects constitutionalism to do. Neither do they always necessarily channel debates or

[189] Griffith, *supra* note 124 at 14.
[190] Ramraj, *supra* note 133 at 209.
[191] Eoseewong, *supra* note 163 at 1.

disputes into mutually agreeable discursive or procedural frameworks. Nevertheless, this thesis underlines the fact that they are still valuable elements of constitutional practice as it exists in Cambodia. Equally, the role of these non-state sites is interesting to the extent that they persist in attempting to fill the constitutional gaps left by weak or unresponsive institutions, and go some way to demonstrating that a culture conducive to constitutionalism might already exist in Cambodia outside of the state. Nevertheless, in Cambodia particularly, as actors with radically different political ideologies continue – whether consciously or not – to contest the spirit of the 1993 Constitution, we are again reminded not only of the inherently political nature of constitutional law, but also of the potential for this politics to operate beyond the reach of state institutions, in the everyday practices of lawyers, civil society organisations, Buddhist monks, and even artists or performers.

Chapter 3 – Locking-In a Constitution, Locking-Out '*The People*': Revisiting Cambodia's Constitution-Making Process

Cambodia's Constitution was promulgated on 24th September, 1993. It was to be the culmination of an 18-month, United Nations-administered peacebuilding process, and the foundation of what was billed as a "triple transition": from war to peace, from dictatorship to democracy, and from Marxism to the free-market.[192] As such, much of the overall content of Cambodia's Constitution, not to mention the process by which it was drafted, was decided in advance, as part of the Comprehensive Political Settlement of the Cambodia Conflict,[193] outlined in what has come to be known as the Paris Peace Accords (herein, the Accords). Signed on 23rd October 1991 after three years of negotiation between the Cambodian state[194] and three other warring factions (a resistance movement, known as the Coalition Government of Democratic Kampuchea, or CGDK, made up of the royalist FUNCINPEC,[195] the KPNLF,[196] and the Khmer Rouge), the Accords were brokered and signed by the international community.[197]

Though the Khmer Rouge ultimately reneged on their promises and returned to armed insurgency against the state, the Accords effectively allowed for their domestic and international isolation. Western countries – now reassessing their alliances after the end of cold war rivalry – were able to pivot their political and material support away from the Khmer Rouge and towards state structures that would be given democratic legitimacy by

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[192] Simon Springer, *Cambodia's Neoliberal Order: Violence, Authoritarianism, and the Contestation of Public Space*, Routledge Pacific Rim Geographies 8 (Milton Park, Abingdon, Oxon ; New York: Routledge, 2010).

[193] This is the formal, legal name for the Paris Peace Accords

[194] From 1979-88, the Cambodian state was known as the People's Republic of Kampuchea (PRK), but this was changed to the State of Cambodia (SoC) as part of a constitutional reform in 1988.

[195] An acronym for the French name, *Front uni national pour un Cambodge indépendant, neutre, pacifique et coopératif*

[196] An acronym for the Khmer People's National Liberation Front, which later to became the Buddhist Liberal Democratic Party, or BLDP, when it took on the status of a political party.

[197] This included the Permanent Five members Security Council (China, France, Russia, the United Kingdom and the United States), some ASEAN member-states (notably including neighbours Vietnam and Thailand, but also Indonesia, which played a major role in mediating the agreements, Brunei and Singapore), as well as Australia, Canada, India, Japan and Yugoslavia.

elections in which the remaining warring factions would participate.[198] While a full account of this history is beyond the scope of this thesis, it is worth noting – as I also do in the Introduction – that the Accords brought to an end a decade of stalemate in which a Vietnamese client state in Cambodia – which was in desperate need of assistance – had nevertheless been hamstrung by western sanctions and even denied a seat at the United Nations. The resolution of the "Cambodia question," then, enabled the flow of international capital and donor funding into the country, providing it a long overdue opportunity to rebuild, if not reconcile, as well as allowing the U.N. to remove one significant blot from its record before moving on to more important items on the international agenda.

In practical terms, the Accords provided for a temporary power-sharing agreement, with sovereignty resting in the Supreme National Council (made up of the existing government, the People's Republic of Kampuchea, or PRK, and the resistance movement) and delegating powers to the United Nations Transitional Authority in Cambodia (UNTAC), which was established in February 1993 by U.N. Security Council Resolution 745. As Lisa L Hall MacLeod later noted, UNTAC "broke records as the largest and most expensive operation to be authorised by the U.N. Security Council,"[199] deploying over 20,000 personnel and consuming a budget of over US$1.5 billion. Under the terms of the Paris Accords,[200] UNTAC was charged with a mandate to supervise large portions of the civil administration (Article 6), ensure the removal of all foreign troops from Cambodian soil (Article 8), guarantee a cease-fire and the disarmament of the warring factions (Articles 9-11), supervise the repatriation of Cambodian refugees (Articles 19-20), and administer democratic elections. Those elections, held between the 23rd and 28th May 1993, created a Constituent Assembly that was to be responsible for drafting a new constitution before transforming itself into a legislative body (Article 12 and 23).

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[198] See Kiernan, *supra* note 22; Springer, *supra* note 18.

[199] Lisa A Hall MacLeod, *Constructing Peace: Lessons from UN Peacebuilding Operations in El Salvador and Cambodia* (Lanham: Lexington Books, 2007) at 51.

[200] "Framework for a Comprehensive Political Settlement of the Cambodia Conflict | UN Peacemaker", online: <https://peacemaker.un.org/cambodiaparisagreement91>.

Fundamental principles to be included in the new Constitution, meanwhile, were outlined in Annex 5 of the Accords. Specifically, the Annex stated that the Constitution would: "be the supreme law of the land" (Article 1); "contain a declaration of fundamental rights… consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments (Article 2); guarantee Cambodia's status as "sovereign, independent and neutral" (Article 3); provide for "a system of liberal democracy, on the basis of pluralism" with "periodic and genuine elections" based on "universal and equal suffrage" (Article 4); and establish an independent judiciary (Article 5). As will be discussed below, the particulars of the UNTAC project, decided in Security Council Resolution 745, eventually meant that the Constituent Assembly would have just three months after the announcement of election results in which to discuss and decide upon a new constitutional document, the promulgation of which would signify the end of the U.N.'s mandate in Cambodia.

Despite the massive amount of international interest and involvement in Cambodia at this time, relatively little has been written about the constitution-making process itself. While a voluminous academic literature has emerged since the UNTAC period, only the accounts of Stephen P. Marks and Jorg Menzel deal exclusively – or even comprehensively – with the drafting of the 1993 Constitution.[201] Meanwhile, the majority of academic accounts of the UNTAC period has focused either on assessing the success of the U.N.'s intervention as an experiment in international peacebuilding,[202] on placing that mission within a broader context of Cambodian history, or on deciphering the role of both of the former in Cambodia's purported transition.[203] While a full overview of this literature is beyond the scope of this Chapter, it is worth noting that in these three streams of writing, the Constitution and the process by which it was drafted is treated somewhat

[201] Peng Hor et al, *Introduction to Cambodian Law* (2012); Steven Marks, "The Process of Creating a New Constitution in Cambodia" (2010) Const-Mak Peace Build Natl Reconcil U S Inst Peace Forthcom Publ.

[202] Curtis, *supra* note 28; Doyle, *supra* note 28; Findlay, *supra* note 28; Brown & Zasloff, *supra* note 28; Steven R Ratner, "The Cambodia settlement agreements" in *Cambodia Change Contin Contemp Polit* (Routledge, 2017) 3.

[203] Curtis, *supra* note 27; Doyle, *supra* note 27; Sorpong Peou, *Conflict neutralization in the Cambodia war: from battlefield to ballot box* (Oxford University Press, USA, 1997); Heder, *supra* note 28; Hughes, *supra* note 27; Hughes, *supra* note 89; Andrew Robert Cock, "External actors and the relative autonomy of the ruling elite in post-UNTAC Cambodia" (2010) 41:2 J Southeast Asian Stud 241.

parenthetically. The specifics of the drafting process appear in these accounts as a mere procedural formality, and the document itself is considered as a relatively straightforward formalisation of the principles of Cambodia's transition.[204] This is hardly surprising, of course, as this is also how the Constitution and the constitution-making process appears to have been seen at the time. As Stephen P. Marks has noted, for instance, the institutional focus on 'deliverables' meant that the proper conduct of elections was prioritised above all else.[205] Meanwhile, the lack of attention otherwise paid to the constitution's drafting is, perhaps, also understandable given that the importance of this process paled in comparison to the seismic changes occurring in Cambodia pursuant to the other aforementioned elements of UNTAC's mandate, the implementation of which was mixed.

Viewed from the broader academic perspective as an experiment in peacebuilding, there is a general consensus from the majority of academic studies that UNTAC should be described as a "limited success."[206] Elections were evaluated by Yasushi Akashi – the special representative of the U.N. Secretary General, and head of UNTAC – as meeting "the minimally acceptable standards of freeness and fairness."[207] That 4,267,192 voters (89% of those registered) attended the polls, was considered a triumph for a fledgling democracy that was emerging from more than a decade of conflict. This triumph occurred despite the fact that the Khmer Rouge (who had abandoned the cease-fire and boycotted the elections) attempted to disrupt the polls, and that elsewhere there was, according to Hall McLeod, "some evidence that the parties were unwilling to hold their own supporters accountable for attacks against their political opponents."[208] More worryingly, however, UNTAC was seen to have largely failed in the implementation of other

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[204] See, for example, Findlay, who dedicates only one page of a 170-page book about UNTAC and its impacts to the drafting process. Meanwhile, though Brown and Zasloff offer the most lengthy engagement of the drafting process in the literature on UNTAC, the process is still largely treated as a stage in the peace-process rather than as a significant process in itself; as such, the drafting process is covered within seven pages. Findlay, *supra* note 28 at 95; Brown & Zasloff, *supra* note 28 at 192–199.

[205] Marks, *supra* note 202.

[206] David Chandler, *A History of Cambodia, 4th Edition*, 4th edition ed (Boulder, Colo.: Routledge, 2007) at 241.

[207] Staff, "Khmer Democracy: Where's the Participation?", (27 August 1993), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/khmer-democracy-wheres-participation>.

[208] MacLeod, *supra* note 200 at 79.

elements of its mandate, not least the disarmament of the warring factions and the protection of the cease-fire. While the Khmer Rouge's return to conflict was ultimately ended in 1998, some of UNTAC's other shortcomings are understood to have had a more lasting impact on Cambodia's transition. Specifically, as David Chandler has noted, the presence of the U.N. and the relatively successful conduct of elections should not obscure the fact that "day-to-day political power in the form of provincial governorships, police, defence, and the national police, to say nothing of the entire civil service, remained in the hands of the CPP."[209] Hence, when the final results of the election showed that FUNCINPEC had won 58 of an available 120 seats, compared to the CPP's 51, and would be able to achieve the two-thirds majority to form a government by forming a coalition with the BDLP (who were former allies in the anti-PRK resistance movement), the CPP were able to force a compromise agreement. As such, and seemingly subverting the results of Cambodia's first genuinely democratic election, the CPP threatened non-cooperation and even a return to civil war[210] until a settlement was agreed by which government positions were split between FUNCINPEC and the CPP. This was accompanied by the creation of a unique co-prime-ministership, in which FUNCINPEC's leader, Prince Norodom Ranariddh, was made First Prime Minister and the CPP's nominee, Hun Sen, was made Second Prime Minister.

This singular status quo did not last for long, of course. Nevertheless, the fact that democratic elections were held – and guaranteed for years to come under the terms of the Peace Accords – while relatively little was done to end the CPP's control over state institutions has been understood to have laid the foundations for what has ultimately come to be seen either as a hybrid-democracy or an electoral-authoritarian regime in Cambodia. In this same vein, this chapter will attempt to explore how some of the themes that will be elaborated in greater detail over the course of this thesis can be understood to have emerged during, or as a direct result of, the 1993 constitution-making process. Specifically, by noting that much of the content was decided in advance of the drafting

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[209] Chandler, *supra* note 207 at 241.

[210] This included one part-affiliated military general, Prince Norodom Chakrapong, temporarily and unilaterally announcing the secession of a handful of provinces under his control from the country. Cite source

process, it is possible to understand how a formally liberal, democratic Constitution came to be inhabited by a regime that has (at most) an ambivalent relationship to those ideals, but is at the same time unwilling to overtly dismiss them. Similarly, the rushed nature of the drafting process – and the apparent superficiality of the agreement that it created – meant that those same principles were elaborated in vague terms, allowing for them then to be subverted by administrative, legislative and judicial bodies employing "abusive" interpretations. Meanwhile, the very fact that a Constitution – especially one guaranteeing a broad swathe of rights – was written at this time, and intended as a foundation for Cambodia's "transition," also seems to be reflected in the extent to which contemporary political struggles continue to be framed in constitutional terms. Finally, that the roots of Cambodia's "vibrant" civil society can be found during UNTAC, and appear to have found common ground in calling for greater public participation in – not to mention awareness of – the drafting of the Constitution in 1993 is indicative of the ongoing centrality of the document to contemporary activism in the country. These themes, which animate much of the case studies discussed in forthcoming chapters, can thus be traced quite clearly back to the 1993 constitution-making process under UNTAC.

In the process of highlighting the origins of the abovementioned themes, this chapter builds upon the particularly insightful account of the constitution-making process given by Stephen Marks. Noting some of the structural weaknesses in the drafting process that Marks highlights through his contribution to the edited volume *Framing the State in Times of Transition*, this Chapter aims to construct an historical foundation upon which more empirical analyses of contemporary practice in Cambodia can be erected in later chapters. Of course, this might suggest a high degree of path dependency; perhaps implying that contemporary manifestations of constitutional practice are the inevitable result of decisions and events in 1993. While such an analysis might be alluring, it risks oversimplifying more than two decades of complex constitutional contestations, and thus denying the agency of local Cambodian actors subsequent to the promulgation of the Constitution in 1993. Instead, the retrospective look at the drafting process provided by this chapter should be read as an attempt to trace the origin of some of the themes evinced in later chapters, so as to demonstrate that they are not isolated or anomalous

cases. First, however, it is helpful to foreground an analysis of the 1993 drafting process with an overview of the academic literature on constitution-making processes, as this will provide the framework through which some of the key facets of the Cambodian experience can be best understood. Then, through an engagement with academic accounts, archival resources and data from interviews with those who were either involved in or excluded from the debates at the Constituent Assembly, this chapter will look in greater depth at the constitution-making process. Specifically, this will highlight how the rushed and restricted nature of the process, and the absence of participatory mechanisms beyond the Constituent Assembly elections of May 1993, can be understood to have had lasting impacts that have helped to shape constitutional practice in Cambodia.

Constitution-Making, Theoretically Speaking

The end of the Cold War saw a resurgence of constitutional overhaul and re-drafting around the world. The collapse of the Soviet Union and the supposed triumph of liberal democracy heralded prematurely as "the end of history"[211] led – in the words of Andrew Arato – to crises in legitimacy characterised by "the impossibility for old regime actors to save their system through mere reform, and the inability of oppositional… movements to carry out a revolution."[212] Largely in response to this trend, there has also been a parallel renaissance in academic literature dedicated to analysing and theorising the processes by which constitutions are made. Surveying this rich literature, and adding a notable degree of quantitative data to it, Ginsberg, Elkins and Blount note that three key sets of variables exist across all constitution-making processes: firstly, which institutions are involved, and at what stage; secondly, the degree of public participation; and, thirdly, the time allocated or taken for drafting, participation and promulgation.[213] With regard to the former, the empirical data put forward by the authors, based on an analysis of 460 of the 808 national constitution-making processes that had been undertaken between 1789 and 2005, suggests that more than 81% of constitutions were drafted at least in part by a Constituent

[211] Fukuyama, *supra* note 24.
[212] Andrew Arato, "Conventions, Constituent Assemblies, and Round Tables: Models, principles and elements of democratic constitution-making" (2012) 1:1 Glob Const 173 at 180.
[213] Tom Ginsburg, Zachary Elkins & Justin Blount, "Does the process of constitution-making matter?" (2009) 5 Annu Rev Law Soc Sci 201.

Assembly or a Constituent Legislature. Likewise, some 51% of constitutions studied incorporated an Executive in either their drafting or ratification. Hence, despite the notable variability in constitutions over time, the process by which they are drafted demonstrates a notable degree of continuity.[214]

The prevalence of a select few institutions, of course, masks the extent to which other actors may also play a part in constitution-making process. This is highlighted by Noah Feldman,[215] as well as Elkins, Ginsberg and Melton, who have pointed out the significant number of constitutions that have been written under foreign occupation, and the extent to which the very presence of an occupying force can influence both the content of a constitution and the process by which it is made. Yet, as numerous scholars have noted, direct occupation is not the only conduit through which international actors might influence constitution-making process. D.M. Davis[216] and Perry,[217] for example, have separately noted the prominent role of foreign advisors in constitutional drafting processes around the world, while Ginsberg, Elkins and Blount have suggested that "drafting that occurs concurrently with peace negotiations often attracts international advisers and interests."[218] Hence, even where foreign intervention or involvement is less overt, external influences may still be perceptible below the level of formal institutions. This is particularly so in the case of UN-sponsored peace processes, argues Vijayashari Sripati, as "the U.N.'s potential to impact the political reshaping of post-conflict states is all-pervasive and is not confined to direct constitutional assistance."[219] This, Sripati suggests, is at least partially due to the fact that the U.N.'s "legitimating ideologies" of liberal-democracy, rule of law and human rights are well known even to local actors in peace-processes, and that those actors intuitively assume those same ideologies in the shadow of the U.N.'s involvement. Thus, even though the U.N. may not have been

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[214] See figure on page 205, *Ibid*.
[215] Noah Feldman, "Imposed Constitutionalism" (2004) 37 Conn Law Rev 857.
[216] D M Davis, "Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience" (2003) 1 Icon - Int J Const Law 181.
[217] Barbara A Perry, "Constitutional Johnny Appleseeds: American consultants and the drafting of foreign constitutions" (1991) 55 Alb Rev 767.
[218] Ginsburg, Elkins & Blount, *supra* note 214 at 209.
[219] Vijayashri Sripati, "UN constitutional assistance projects in comprehensive peace missions: An inventory 1989–2011" (2012) 19:1 Int Peacekeeping 93 at 418.

directly involved in the drafting process, international involvement in the brokering of the Paris Accords and UNTAC's presence in the country at the time of constitution-making in Cambodia might still be understood to have influenced the final product of that process. While this influence might be understood as a positive one given the normative quality of those "legitimating ideologies," Peter Burnell has also noted (in relation to British involvement in the Zimbabwe experience) the tendency for such dynamics to create strategic appeasement rather than genuine political commitment to those ideologies on the part of local actors.[220]

Some ambivalence also seems to exist over the desirable degree of public participation in constitution-making processes. Although Ginsberg, Elkins and Blount's data suggests participatory mechanisms were increasingly common throughout the twentieth century, the authors note that the type and timing of public participation has been much more variable. Specifically, the majority of public participation in constitution-making typically appears to have occurred through the election of representatives, either to constituent assemblies or to legislative body that then take on a drafting role. However, in such cases, where representatives draft a constitution in the knowledge that they will later take a place in government (and thus benefit and be bound by the resulting document), there is a risk that they will act with their future interest in mind: a problem Ginsberg, Elkins and Blount term "self-dealing."[221] Likewise, campaigns for electing such officials will inevitably involve trade-offs, as the electorate are potentially asked to vote both for constitutional ideals, and for candidates for legislative/government positions: a dynamic those same authors call "interest aggregation."[222] Yet, constitution-making theorists and practitioners have put forward alternative ways to seek public participation, most commonly through a public referendum, but increasingly also via direct participation mechanisms such as pubic consultations. According to Kirsti Samuels, such processes are desirable as they tend to produce "constitutions favouring free and fair elections, greater political equality, more social justice provisions, human rights protections and stronger

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[220] Peter Burnell, *The Relationship of Accountable Governance and Constitutional Implementation , with Reference to Africa* (2009).
[221] Ginsburg, Elkins & Blount, *supra* note 214 at 206.
[222] *Ibid* at 212.

accountability mechanisms" rather than "a mere division of spoils between powerful players."[223] Along with a number of other scholars, Samuels suggests that participation raises constitutional awareness in society, and empowers the public to better hold the government to the terms of the resulting constitution, while Yash Ghai has noted that governments are proven be more likely to uphold rights that have emerged from participatory drafting processes.[224] Hence, as Ginsberg, Elkins and Melton succinctly note: "[t]he passage of the constitution is important, independently of its content."[225]

Constitution-Making in a Moment of Internationalism

In spite of the presence of the United Nations Transitional Authority in Cambodia and the huge influx of international organisations around the period in which the Constitution was written, there is little doubt that the practical act of constitution-making was a primarily Cambodian-led affair. In a July article titled 'Assembly Decries Lack of Assistance,' for example, one senior UNTAC official reiterated the widely-known view of mission-head Yasushi Akashi, that the U.N. and international stakeholders should take a "hands-off" approach to the process.[226] "The policy is sensible," the anonymous official asserted, because "it must be Cambodia's constitution, not America's, not UNTAC's. If we expect them to live by it, they must accept it as their own."[227] This stance was welcomed in the same article by the Secretary General of the Constituent Assembly, Toh Lah, who praised UNTAC for the fact that "[t]hey respect us and respect our sovereignty.... they leave us alone."[228] Hence, on one level the "hands off" approach was a principled decision, based on the abovementioned assumptions put forward empirically by Yash Ghai, that constitutions are most likely to be effective when they are

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[223] Kirsti Samuels, "Post-conflict peace-building and constitution-making" (2005) 6 Chi J Intl L 663 at 668–670.

[224] Yash P Ghai, *Human rights and social development: toward democratization and social justice* (United Nations Research Institute for Social Development Geneva, 2001); Y Ghai & G Galli, "Constitution Building Processes and Democratization (Stockholm: International IDEA)" (2006).

[225] Zachary Elkins, Tom Ginsburg & James Melton, *The endurance of national constitutions* (Cambridge University Press, 2009) at 78.

[226] Staff, "Assembly Decries Lack of U.N. Help", (16 July 1993), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/assembly-decries-lack-un-help>.

[227] *Ibid*.

[228] *Ibid*.

autochthonous. However, on another level, it also appears to have been a pragmatic decision, based on an awareness that assistance or involvement from UNTAC would be considered as an overreach. This was confirmed in an interview with a civil society leader who (as shall be explained below) was active in lobbying the Constituent Assembly at the time:

> "I also know because at that time my husband was working for the UN at the communication department, they were ready to help them draft the constitution with… you know, constitutional lawyer but 'No we don't need foreign support. Nobody cook Khmer food better that Khmer'."[229]

As such, whether representatives of UNTAC wished to assist in the drafting or not, it is clear that such involvement would not be well-received by the Constituent Assembly. This came to a head on 24th September 1993, as the drafting process neared its conclusion, when Prince Sihanouk – as head of the Supreme National Council – demanded that all foreign assistance to the Assembly should cease, and cut ties with UNTAC altogether.[230]

Nevertheless, there is also a sense in which the legitimacy of Cambodia's Constitution is actually bolstered by a continued belief that its drafting was internationalised. Whether a result of misunderstandings about the role of UNTAC in the drafting process, or a reflection of the significant influence on the content of the document that had already been exerted through Annex 5 of the Paris Accords, many research participants noted exactly this during interview. One Cambodian journalist, who also had legal training, for example, noted thus:

> "It seems like they were foreigner-centric (*borratheayniyum*) when they created all of that. There was help, because all our leaders agree that there need to be help from foreigner."[231]

From this perspective, whether international experts were directly involved in the drafting process or not, the Constitution as a document is in fact understood to benefit from an additional level of legitimacy, because of its association with international assistance.

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[229] Interview 26: Anonymous Civil Society Activist. 20th April, 2017. Phnom Penh.
[230] Marks, *supra* note 202 at 226.
[231] Interview 10: Anonymous Journalist. 11th February 2017. Phnom Penh.

The dynamic of this legitimacy, meanwhile, was explained later in the same interview, when the journalist elaborated on this idea of foreigner-centricity by saying that "if foreigner says it is right, then it is right… if a Khmer say it is right, we don't believe it yet."[232] Hence, contrary to the belief that the credibility of a constitution is tied to the degree to which it is believed to be an indigenous creation, there is reason to believe that – for at least some parts of society – international involvement in the process had – and continues to have – a legitimising quality. This, of course, speaks to the specific historical context in which the Cambodian Constitution was written: notably, the probability that, after such a long period of civil conflict, popular trust in political elites and institutions was (and in many cases continues to be) in short supply. However, it is also seen in the comparable ways in which international election observation is commonly seen to legitimise elections in new democracies.[233]

Additionally, the above quotes are also indicative of the extent to which the constitution-making process became synonymous with the wider UNTAC experiment. As such, it seems that the Constitution continues to be viewed as a foundation for (or even the completion of) Cambodia's planned democratic transition, and re-introduction into the international community. This is particularly significant given the fact that, twenty-five years on from the end of UNTAC, the ruling party has increasingly sought to downplay the significance of both the Paris Accords and the U.N. intervention that followed. One spokesman for the CPP, and former advisor to the National Assembly, exemplified this approach in an interview when he described the promulgation of the Constitution in 1993 in this way:

> "The transition period was over and UNTAC's mission was ended. The content of Paris Accords was constituted in Cambodia Constitution, so the Paris Agreement is only of history value"[234]

As will be explained in Chapter 4, this reframing of the Constitution as the embodiment of the Paris Accords has been central to the ruling party's attempts to reassert control over political discourse in Cambodia. Specifically, this is because doing so downplays the

[232] Interview 10: Anonymous Journalist. 11th February 2017. Phnom Penh.
[233] Sullivan, *supra* note 36.
[234] Interview 43: Anonymous Spokesperson, Cambodian People's Party. 4th September, 2017. Phnom Penh.

extent to which the government is accountable to the signatories of the Accords, replacing this mechanism with domestic institutions (including the Constitution, and Constitutional Council) that are far more pliable. Yet, this still leaves an ambivalent relationship between the ruling party and the democratic principles enshrined in the Constitution; a point that was made by one interviewee, specifically a legal educator and researcher, who argued that the government "need to support the constitution, and the content of the Constitution as well, in order to get international aid."[235] From this perspective, Cambodia's dependency on foreign aid and investment,[236] combined with the suggestion that this support is contingent on respect for the Constitution as the domestic legal legacy of the Peace Accords, continues to compel its ruling elite to at least pay lip-service to liberal, democratic constitutional principles.

This legacy of constitutional legitimacy, then, could explain the dynamic (elaborated in Chapter 4) whereby the CPP has relied on judicial, legislative and administrative tools (rather than outright constitutional reform or overhaul) to undermine constitutional principles that sit uncomfortably alongside its preferred mode of governance. This analysis, of course, fits neatly with the evaluations of UNTAC mentioned earlier, which highlight its role in creating the foundations for a CPP controlled electoral-authoritarian regime in Cambodia. However, this seemingly superficial commitment to the principles outlined in Annex 5 of the Paris Accords was not restricted to the CPP. As Stephen P Marks has noted, many observers at the time were equally sceptical of the royalist party, FUNCINPEC, and others in this regard. In fact, the requirement that Cambodia become a liberal democracy was proposed by Prince Sihanouk during peace talks, despite the fact that the Cambodian state that Sihanouk ruled over for a decade-and-a-half bore few resemblances to such principles. "It seems likely that he used this term in the context of negotiations," Marks notes, "because he assumed it was what the U.S. representatives and other key participants… wanted to hear."[237] Even the seemingly liberal and democratically-minded BLDP, meanwhile, appear to have been somewhat ambivalent

[235] Interview 2: Anonymous Law Professor. 24th January, 2017. Phnom Penh.
[236] Sophal Ear
[237] Marks, *supra* note 202 at 221.

over the precise meaning of the term. During interview, for example, veteran Cambodian lawyer and constitutional law expert explained:

> "I met one Member of Parliament at that time from Son Sann party. He was a very high, very senior in the [Buddhist Liberal Democracy] Party. I asked him what do you think, why should the parliament adopt the principle of liberal democracy? What type, and what does liberal democracy mean? He said 'I don't know too [laughs], but it is a new term, a good term [laughs]."[238]

While any attempt to speculate on the degree of commitment to liberal democratic principles among other parties that challenged the CPP in the UNTAC-administered victory would be speculative, it is clear that any attempt to attribute Cambodia's current constitutional trajectory solely to the character of the CPP and its leadership could be misleading.

From Constituent Assembly to Constitutional Drafting Committee

General commitment to the principles upon which the 1993 Constitution was to be based was ambiguous across the political spectrum. However, this ambiguity was exacerbated by the means by which the document's drafters came to their position. Much in line with Ginsberg, Elkins and Blount's theory of "interest aggregation," the UNTAC administered ballot that provided for membership of the Constituent Assembly offered little in the way of concrete indication as to what type of regime the public could be understood to have voted for.[239] The elections of 1993, of course, were the country's first elections in decades and, as a result, there was little in the way of constitutional discourse during the campaign period. While praising the enthusiasm with which the Cambodian public went to the polls that May, for example, prominent historian, David Chandler, has noted that "what they were voting for, aside from peace, was much less clear."[240] This concern was also expressed at the time, meanwhile, as observers and reporters described a campaign that focused not on policies, let alone constitutional models, but instead on the

[238] Interview 18: Anonymous Legal Expert. 15th March, 2019. Phnom Penh.
[239] Chandler, *supra* note 207 at 241; Hughes, *supra* note 27.
[240] Chandler, *supra* note 207 at 241.

personalities of the leading candidates, particularly Prince Norodom Ranariddh and Hun Sen. As such, a 6th June *Phnom Penh Post* article claimed that the recently held election was "understood more as a Presidential election than a constituent assembly election."[241] Beyond the enshrinement of those principles outlined in Annex 5 of the Peace Accords, then, it seems that the Constituent Assembly was given little in the way of direction for how the constitution they were charged with drafting should look.

Ultimately, as most historical accounts have noted, the victory of FUNCINPEC at the polls was seen as a public vote in favour of the restoration of the monarchy. However, this did not translate into consensus around the idea. With only a three-month timeframe allocated for the drafting of the Constitution after the confirmation of the election results, the Constituent Assembly still did not begin work immediately, with another month passing without formal discussions before a 12-person Drafting Committee was formed.[242] In a process that is described in detail in Marks' account of constitution-making in Cambodia, the next six weeks saw that Committee meeting in secret, eventually producing two separate drafts: a republican draft based on the former State of Cambodia Constitution that had been enforce before UNTAC, devised by the CPP, and a monarchical one that drew heavily from the 1947 Constitution, which was itself based on that of the French Fourth Republic, drawn up by representatives of FUNCINPEC.[243] One FUNCINPEC representative at the Constituent Assembly, who became a senior figure in subsequently opposition parties, recalled during an interview that the CPP's republican document was the one to be prepared first:

> "Originally I think from what I heard the first draft was prepared by the CPP. That was something that the CPP was very good at that. They like to be the first person to put all the document in place and then you don't see the trick that is contain in there. [The] CPP were not comfortable to start with, to adopt this idea [of constitutional monarchy], but later they were

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[241] John C Brown, "'Victory' is not everything'", (6 June 1993), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/victory-not-everthing>.
[242] John C Brown, "Sihanouk Back at the Helm", (18 June 1993), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/sihanouk-back-helm>.
[243] Marks, *supra* note 202 at 210.

> thinking maybe just to let it go, to wait and see if they can make changes later on, so the CPP were just going along with it."[244]

While not specifically clear on what sort of "trick" would be contained in the CPP's draft constitution, this Constituent Assembly member's remark is indicative of the lack of trust between the parties that existed at the time, and continues to exist to this day. As such, rather than a debate over effective models for constitutional governance, the debates at the Constituent Assembly and (as will be seen shortly) the Drafting Committee became an extension of the political bargaining and negotiation that characterised the UNTAC period and its aftermath. In particular, meanwhile, the suggestion that the CPP would "wait and see," in the hope that they could make changes later on, is also reminiscent of the type of strategic acquiescence that Peter Burnell suggests is common in constitution-making processes that have significant international involvement.

Equally, the decision to adopt the royalist draft, which ultimately created a constitutional monarchy in Cambodia, seems also to have been based on political calculations. The majority of historical accounts of the drafting process, and the perception of those outside of the Drafting Committee, have described the drafting of a monarchical draft, and the decision to adopt it, in purely democratic terms. One former FUNCINPEC member, for example, has explained how the party's victory in the May election was considered as a victory for the idea of constitutional monarchy:

> "FUNCINPEC won the election, and it is quite clear that FUNCINPEC represent the Monarchy. So the people voted for, I think, *King* Sihanouk particularly. King Sihanouk represents the Monarchy anyway."[245]

This is not surprising, of course, given that – in an election campaign that was short on policy or even ideological debate – monarchism was one of the few platforms put forward by any party that could be considered to have a constitutional character. Yet, behind this decision, there appears to have been an element of political strategizing. One BLDP representative on the Drafting Committee explained during an interview that he believed the return to a constitutional monarchy was also a strategic choice on the part of

[244] Interview 24: Anonymous Politician. 19th April, 2017. Phnom Penh.
[245] Interview 24: Anonymous Politician. 19th April, 2017. Phnom Penh.

FUNCINPEC leader, Prince Norodom Ranariddh.[246] Specifically, the drafting committee member implied, the creation of a Monarch (who would "reign but not govern," according to Article 7 of the Constitution) rather than a Presidency was preferable for Prince Ranariddh, because it would give his father a more nominal or ceremonial role as head of state, while concentrating far greater power upon himself. This, of course, reflects the peculiar moment in which the constitution-making process took place: in which Sihanouk, already the head of the Supreme National Council, was seen as a unifying figure who would inevitably take up the most senior position in the first post-UNTAC government, despite not having run in the May elections. Hence, while there was a clear democratic logic behind the establishment of a constitutional monarchy in Cambodia following the victory of the royalist party at the polls, the decision to reinstate the monarchy is also be understood by some who were directly involved in the process to have been informed by political calculation, if not self-interest. [247]

The above evidence clearly validates the concerns articulated by Elkins and others about constitution-making bodies that are elected to both draft a constitution and then (transforming into a legislative body once the document is in place) govern according to that same document. As such, with the above insight of a Drafting Committee member taken into account, the Cambodian case could be understood as an interesting example of "self-dealing," wherein decisions about the macro-institutional make-up of a new Constitution were made by key players in the drafting process with an eye towards their own positioning in that system. Additionally, the idiosyncrasies of the improvised political settlement between the major parties after the election also pervaded judicial institutions. The principle of an independent judiciary in the post-UNTAC state, of course, was provided for by the Paris Accords, under Article 5 of Annex 5, and was consequently enshrined what was Article 109 of the new Constitution. One of the key roles for the newly created Monarch, in fact, was to act as guarantor of judicial independence (Article 113), as Chair of the Supreme Council of the Magistracy (Article

[246] Interview 27: Anonymous Politician. 24th April 2017. Phnom Penh.
[247] John C Brown, "Sihanouk backs royalist charter", (10 September 1993), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/sihanouk-backs-royalist-charter>.

115) with decision-making power over the appointment, dismissal and disciplining of judges.

Yet, as many scholars have noted, the CPP maintained *de facto* control over the judiciary throughout the UNTAC period, and the post-election negotiated settlement between the major parties did little to change this.[248] As one anonymous human rights and constitutional law expert explained, the parties instead divided senior positions in the court between themselves:

> "For example, in… the Supreme Court; President go to CPP, Chief Prosecutor go to FUNCINPEC. President of Appeal Court go to CPP, and General Prosecutor go to FUNCINPEC, something like that. They share power. So, it means that any political party wins, they have power to assign their member in the position. It has become the norm. During election, any political party that wins, they have the power to remove, to change."[249]

Hence, rather than seeking to reform the judiciary in line with the constitutional guarantee of its independence, Cambodia's political leaders divided positions within the judicial system between themselves, aiming not so much at independence based on neutrality, but rather at political balance. As the interviewee notes, meanwhile, this normalised a situation in which – despite the role of the King as guarantor for its independence – the judiciary remained essentially politicised. The idea that the newly re-anointed King, who had a long career in civilian politics before founding and leading FUNCINPEC in the 1993 elections, would provide a check against the politicisation of the judiciary in the royalist party's favour is itself problematic, of course. Instead, however, as he oversaw a sharing judicial appointments between the two largest parties, Sihanouk oversaw a situation in which – under a new constitution promising an independent judiciary – the courts nonetheless continued to be seen one of the 'spoils' of victory; something to be captured and shared on the basis of electoral success. This situation, meanwhile, appears to have been further consolidated by King Sihanouk's own

[248] Kheang Un & SO SOKBUNTHOEUN, "Cambodia's judiciary: Heading for political judicialization?" in *Judic Polit Asia* (Routledge, 2012) 198 at 185–187; Marks, *supra* note 202 at 233.
[249] Interview 18: Anonymous Legal Expert. 15th March, 2017. Phnom Penh.

disinterest in the role of guarantor even after the CPP won a resounding electoral victory in 1998.[250]

That the constitution-making process represented only a temporary, fleeting moment of consensus between Cambodia's political elites, meanwhile, was reiterated by various participants. In particular, however, it is interesting to note that the short time-frame allocated by the U.N. for the Constituent Assembly to draft the Constitution was frequently considered to have contributed to this. As one Cambodian lawyer, participating on the condition of anonymity, noted during an interview:

> "I know is that the creation of the Constitution in 1993 was in a hurry… in a hurry meaning the creation of the Constitution was not in depth, and there are some places that have holes. … So that idea that we created was suddenly [made] for the agreement, I think that it was not complete 100 %, like others. Afterward, when it's not complete like that, afterward when amending the constitution, they amend for politics, it's not according to technical principles."[251]

Hence, this lawyer, like many other respondents, suggested that the lack of time for negotiation over the draft led to a lack of agreement over the precise meaning of key principles, and their implication for Cambodia's new constitutional order. Equally, the rushed nature of the drafting process – as the actual debating of the royalist draft in the Constituent Assembly began just five days before the final document was due to be submitted for promulgation – may have stifled discussions about specific details. That a large number of provisions within the resulting document explicitly required the development of organic law for their elaboration, meanwhile, would support this suspicion. However, according to one member of the Drafting Committee, this was not considered to be a problem at the time, and may even have been a more democratic outcome, since:

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[250] During interview, for example, one interviewee also explained thus: "He [King Sihanouk] hosted a luncheon, and he explained to us that he's like a monkey… no hear, no see, no say, concerning the Supreme Council of the Magistracy, because he did not know who are these judges and what they are doing. He refused to preside over the [Supreme] Council [of the Magistracy]." Interview 27: Anonymous Politician. 24th April 2017. Phnom Penh.

[251] Interview 1: Anonymous Lawyer. 24th December 2016. Phnom Penh.

> "we believed at the time that this law anyway has to be discussed, debated at the National Assembly, and we had three political parties there. But we have not thought about… after the [1997] coup."[252]

Rather than discuss and contest details while drafting the Constitution, in other words, the Drafting Committee postponed a number of key decisions, assigning responsibility for them to the National Assembly that would be responsible for drafting key laws after the promulgation of the Constitution. Hence, while time constraints in the drafting process certainly played a role in curtailing discussion – and perhaps, optimistically, agreement – on the specific details of Cambodia's new constitutional order, the drafting process appears to have been considered by some of those involved at the time as an initial phase in a process of discussion. This process, the Drafting Committee member suggests, was ultimately subverted by the coup of 1997 (in which the CPP and Second Co-Prime Minister Hun Sen ousted FUNCINPEC and First Co-Prime Minister Prince Norodom Ranariddh). Hence, the emergence of "abusive" constitutional practice in Cambodia, in which legislation works to undermine constitutional principles (as described in Chapter 4), is largely understood to be a precipitated by the reassertion of hegemony by the CPP.[253] Having regained control of government in 1997, the CPP went on to win elections convincingly in 1998, 2003 and 2008, then passing legislation that (as chapter 4 described) has undermined constitutional principles laid out by a more politically plural Constituent Assembly. However, this trend can also be understood to be facilitated, at least to some degree, by the hurried nature of the constitution-making process in 1993, when discussion of specific details were left to the legislative process.[254]

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[252] Interview 27: Anonymous Politician. 24th April 2017. Phnom Penh.

[253] McCargo, *supra* note 29.

[254] While there are a number of safeguards, procedures and principles that were not considered by the Constituent Assembly that could have been part of a more sustained discussion during the drafting process, some of those that were mentioned in the Constitution only to be assigned to the legislature were: "The organization and functioning of the Council of the Throne" (Article 13); "Restrictions on the rights to vote and the rights to stand as candidates in elections" (Article 34); "rights to establish associations and political parties" (Article 42); "The organization responsible for conducting the election, electoral procedures and processes" (Article 76); and perhaps most importantly the "composition and functions" of the Supreme Council of the Magistracy (Article 134).

Civil Society and the Call for Public Participation

Beyond the May 1993 elections, in which the public at least theoretically voted to decide their representatives at the Constituent Assembly, opportunities for the public to participate in the constitution-making process were few and far between. That the UNTAC mandate had left little time for the drafting of the Constitution undoubtedly made it difficult, on a practical level, for the Constituent Assembly to engage in the kind of public forums that have become more common around the world since that time.[255] Meanwhile, the lack of provisions for participation mechanisms in the Paris Accords, coupled with the limited agreement between the parties at the Constituent Assembly, meant that there was also little incentive to engage the public in what would be a time-consuming and challenging process. Yet, paradoxically, the emergence of a vibrant and vociferous civil society in Cambodia is frequently cited as the biggest achievement and most important legacy of the U.N.'s presence. In fact, member of the Drafting Committee suggested exactly this in an interview. "I think the big achievement from UNTAC," he explained, "is the setting up of NGOs especially for human right like LICAHDO, ADHOC and so on."[256] These connected themes are brought together by the fact that it was the secrecy and lack of participation surrounding the drafting process upon which Cambodia's fledgling civil society activists cut their teeth.[257] Hence, as this chapter and the wider thesis will demonstrate, just as the UNTAC process can be understood as the birthplace for civil society in contemporary Cambodia, so can the drafting process similarly be seen as having got relations between NGOs and political elites off to a rocky start. Similarly, this relationship was one in which debates over the Constitution (and its

[255] See South Africa and elsewhere

[256] Interview 27: Anonymous Politician. 24th April 2017. Phnom Penh.

[257] While a small handful of civil society organisations had existed in Cambodia prior to UNTAC, these were few and far between due to the politically repressive nature of the PRK and SOC regimes. Only one human rights organisation, for example, existed prior to 1992; an NGO called Vigilance, which was founded in 1986 Kem Sokha on his return to the country. (Kem Sokha went on to be a member of the Constituent Assembly and then a leader of Cambodia's political opposition.) Most other NGOs were founded during or after the UNTAC period, with many of them being led by Cambodians returning to the country after spending the 1980s abroad. These include the leading national human rights NGOs, LICADHO (the Cambodian League for the Promotion and Defense of Human Rights) and ADHOC (the Cambodian Human Rights and Development Association).

ownership) were of foundational importance, something that has continued to be the case since 1993.

The coalescence, between the birth of Cambodian civil society and a less than wholly participatory drafting process, are not coincidental. Stephen P. Marks, for instance, has noted that since the U.N.'s presence in Cambodia during the drafting process "created a high degree of public expectation that there would be opportunities to influence the drafting of the constitution."[258] Such expectations, meanwhile, were not entirely unreasonable. In addition to administering Cambodia's first elections in decades, UNTAC's presence in Cambodia had also provided for a level of space for public mobilisation that was similarly unprecedented in the country. 'Peace Marches,' for example, had already taken place before and immediately after the elections, with activists, monks and laypeople publicly demonstrated against violence, including by walking the three-hundred or more miles from Siem Reap to Phnom Penh. Recalling these events, and later mobilisations in which they called for a more transparent and participatory drafting process, one activist at the time noted nostalgically during an interview that such a level of free expression and assembly has not been seen since, either. "Every day they would walk across the city during that time…[and] the UNTAC police provided security," she said, "'Wow, what?' We never had this kind of support again after that [laughs]."[259] Unprecedented though it was, the fact that subsequent constitution-making processes around the world have allowed for greater levels of public participation has meant that expectations for the U.N. in such contexts have also been raised. Simon Chesterman, for example, has argued that the U.N.'s job:

> "must be to create not just a constitutional space but a political space in which a population can begin a conversation about what kind of country they want theirs to be."[260]

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[258] Marks, *supra* note 202 at 221.
[259] Interview 26: Anonymous Civil Society Activist. 20th April, 2017. Phnom Penh.
[260] Simon Chesterman, "Imposed Constitutions, Imposed Constitutionalism, and Ownership" (2004) 37 Conn Law Rev 947 at 952.

The U.N. presence in Cambodia, then, combined with the lack of mechanisms for public participation in the constitution-making process, may paradoxically have enabled and at the same time side-lined such conversations.

Perhaps in reaction to the realisation that the public would be largely excluded from the process, meanwhile, officials at UNTAC did integrate ideas on constitution-making into their activities. While a three-day workshop on comparative constitutional law, organised in February 1993 by the Electoral and Legal components of UNTAC, was targeted at potential members of the Constituent Assembly, other events were organised after the election that specifically aimed to educate and empower civil society activists.[261] While the constitution-making process appears to have featured only partially in such activities, the events nonetheless provided an opportunity for Cambodia's nascent civil society, as many interview participants recalled that the afternoons of these events were used by activists to coordinate and mobilise. Hence, in addition to a handful of key NGOs being established in this time, a group known as *Ponleu Khmer* (or Khmer Enlightenment) emerged from these meetings. Essentially an umbrella movement consisting of NGO activists and Buddhist monks, *Ponleu Khmer* advocated concertedly for a greater public role in the constitution-making process, for greater transparency in the Drafting Committee's activities, and even for a seat at the Constituent Assembly. When the first meeting of the Constituent Assembly was held on 18th June, for example, representatives of *Ponleu Khmer* rallied outside of the Assembly's doors to welcome its inauguration.[262] While the majority of activists remained outside the building, one of its leaders, the Venerable Maha Ghosananda (himself a prominent monk, and leader of the aforementioned 'Peace Marches') was admitted entrance into the Assembly as an observer.

Rather than simply demanding a seat at the table, however, the majority of Ponleu Khmer's activism focused on the dual, complimentary objectives of advocating for

[261] By the time that events such as The Second International Symposium on Human Rights in Cambodia, held in Phnom Penh in late-July, for example, more than 80 participants were in attendance

[262] Michael Hayes & Ker Munthit, "Monks Welcome Assembly", (18 June 1993), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/monks-welcome-assembly>.

greater transparency in the constitution-making process and educating the Cambodian public about the purpose of a Constitution. Another Buddhist monk, and President of *Ponleu* Khmer, Venerable Yos Huot, told the Phnom Penh Post at the time:

> "in Cambodia, it is always like this, the leaders think that they know the best for the people. We are afraid [because of the secrecy] that there is something more, that they will not keep their campaign promise to bring liberal democracy and human rights to Cambodia."[263]

Equally, Phnom Penh Post reporters who also attended a civil society-orchestrated public forum on the draft constitution, held in late August, quoted one participant thus:

> "We have seen many human rights groups start up in our province, and they have been teaching us about our rights. But we don't yet have our rights respected. Make sure that the Constitution includes respect for human rights."[264]

As such, Ponleu Khmer can be seen as having quickly adopted a role as educator and watchdog for a populace that may otherwise have been largely ignored by its leaders, or ignorant of what those leaders were doing. This role has since become a familiar one for civil society activists in Cambodia, of course. As Chapters 5 and 6 of this thesis elaborate in detail, the fact that the resulting Constitution guaranteed almost the full gamut of constitutional rights (as well as protections for liberal democracy) has made constitutional discourse central to these activities. From this perspective, then, the UNTAC experiment, and even – counterintuitively – the lack of opportunities for public participation in the constitution-making process, may nevertheless have served to raise constitutional awareness and thus increase demand for constitutionalist governance in Cambodia.

It would be difficult to overestimate the impact that such awareness-raising activities had, at least on an individual level for those who participated in them. As many Cambodia-focused scholars have noted, in historical terms, politics has almost exclusively been considered as the preserve of a very small elite in Cambodia, meaning that public

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[263] John C Brown, "Charter: Out of sight, Out of Mind?", (13 August 1993), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/charter-out-sight-out-mind>.
[264] Staff, *supra* note 227.

participation in high-level political decision-making – such as the drafting of a constitution – was indeed a novel concept.[265] This was reiterated by a leading opposition politician and award winning human rights activist who was initiated into civil society activism during the UNTAC period, when she explained candidly during an interview that:

> "That process [UNTAC] was really the beginning of err… the concept of human rights, the word democracy. I learnt so much at that time. First, I said 'Arrgh, the Constitution…it is beyond me. How can we, as simple citizen, be part of thinking about the constitution, the supreme law. The UN human rights group lawyer was so, very very…instrumental in making the process [more] open."[266]

Hence, while the awareness-raising activities, conducted by UNTAC and subsequently passed on by Cambodian activists to the public, may not have resulted in practical changes to the constitution-making process or the resulting document, they clearly had a lasting impact in other – albeit less tangible – respects. These activities, combined with the fact that the drafting process took place during a time of unprecedented freedom of expression and assembly, can be seen to have contributed to the empowerment of key figures in Cambodian civil society to question the state's interpretation of constitutional processes and principles. As Chapter 5 of this thesis will demonstrate, this has continued to be a central characteristic of constitutional discourse in Cambodia. Likewise, the kind of education-and-empowerment work that contemporary Cambodian civil society often engages in can also be seen to have its roots in the notably similar tactics that activists employed during this foundational moment of constitutional practice in Cambodia.

Yet, much like the contemporary constitutional advocacy described in Chapter 5, activists who called for greater participation and outreach from the Constituent Assembly appear to have been fighting a losing battle. As far as influencing the drafting process was concerned, former *Ponleu Khmer* activists acknowledged that their advocacy work had limited impact. On the occasions where the movement managed to engage senior figures

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[265] Describing elections in the post-1993 period, for example, Hughes, *supra* note 89 at 135.
[266] Interview 11: Anonymous Politician. 13th February, 2017. Phnom Penh.

in the Constituent Assembly or the UNTAC administration, their calls for greater participation appear to have been channelled towards bureaucratic processes. When a member of the Constituent Assembly attended a UNTAC-organised event about constitutions and constitution-making, for example, civil society participants were said to have lobbied for greater participation, only to be told that they should instead write formally to the Assembly with their suggestions. In response to a letter from *Ponleu Khmer*, meanwhile, UNTAC leader Yasushi Akashi is reported to have responded diplomatically that UNTAC would "urge" the group to "exercise its democratic right to lobby the members of the Constituent Assembly and the political parties."[267] In spite of the huge enthusiasm and demand for participation, then, there appears to have been little will, either on the part of UNTAC or the majority of representatives at the Constituent Assembly, to actively engage the public in the drafting process. It is telling, in fact, that the only outreach activities conducted by members of the Constituent Assembly were organised on an ad hoc basis, and sponsored by U.S.-based organisation, The Asia Foundation.[268] Specifically, a handful of representatives, headed by future activist and opposition leader Kem Sokha (then of the BLDP), were the only Assembly members who publicly ventured out outside of Phnom Penh with the aim of seeking ideas from their constituents on what principles should be incorporated into Constitution.

Though such outreach initiatives had negligible impact on the drafting of the Constitution itself, they nevertheless demonstrated that wider public participation in the process was possible. Viewed today, this point may not appear to be a significant one. However, it can be understood to be far more poignant given the specific historical context in which the constitution-making process took place, and in which there were widely-held concerns that greater participation would have a destabilising or even destructive impact on Cambodia's newly found peace. Specifically, according to Brown and Zasloff's account of the UNTAC experiment, there were serious fears among international stakeholders that "serious political divisions… might be exacerbated if the process were prolonged," since "demagogic appeals during this period of political turbulence might create mischief in the

[267] Staff, *supra* note 227.
[268] John C Brown, "Taking Democracy to the Provinces", (27 August 1993), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/taking-democracy-provinces>.

drafting process."[269] Hence, in addition to the financial restrains on the UNTAC operation, the apparent prioritization of stability over inclusivity meant that there was little interest on the part of UNTAC and the Paris Accords signatory states, in seeing a more participatory drafting process at the time. This view is reaffirmed by the fact that, broker of the Accords and then leading UNTAC official, Lt. Gen. John Sanderson was quoted by the Phnom Penh Post at the time as saying:

> "The point is right now Cambodia needs stability, it needs to say to the international community that now 'we have stability, consensus, to start reconstruction, rehabilitation.'"[270]

While practical and financial limitations undoubtedly played a part in the decision to only allow such a limited timeframe for constitution-making in Cambodia, them, it appears that the lack of interest in providing for a more participatory process during UNTAC may also have emerged from a privileging of order and stability. Of course, this need not necessarily have created a sense of path-dependency; however, it is telling that – as Chapter 4 will help to demonstrate – the imperatives of order and stability have subsequently been read-into the Constitution with some regularity by the government, to override the document's more liberal or democratic provisions.

Conclusion

Clearly, Cambodia's U.N.-sponsored drafting process is interesting both as an example of constitution-making in post-conflict settings, and as a foundational moment for constitutional practice in Cambodia. Yet, just as constitutional practice is often overlooked by academic literature on contemporary Cambodia, so too has the 1993 constitution-making process been peripheral to accounts of the wider UNTAC process. Returning to view the formulation and promulgation of Cambodia's current constitutional order, with the benefit of hindsight and a sharper focus on the importance of process (courtesy of subsequent theoretical developments in the sub-discipline of constitution-making), highlights a number of problematic dynamics. Notably, the apparent imposition

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[269] Brown & Zasloff, *supra* note 28 at 179.

[270] Ker Munthit, "Constitution Ratified", (24 September 1993), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/constitution-ratified>.

of an overarching liberal, democratic "spirit" on the document, courtesy of the far-reaching requirements of Annex 5 of the Paris Accords, as well as the limited time and space that was allowed for the process within the UNTAC framework, provided little incentive for active or inclusive discussion. These restrictions, combined with genuine fears of a return to violence and instability that had characterised the previous two decades of Cambodian history, actually meant that public participation in the drafting of the new constitution was effectively discouraged. Instead, the drafting process can be understood as an extension of the elite-level political bargaining that pervaded the UNTAC period and the early-stages of Cambodia's transition. Decisions over the restoration of the monarchy, for example, demonstrate a notable level of "self-dealing." After a Constituent-Assembly-turn-legislative-body election that provided little indication of what sort of constitutional order the public had voted for, a highly secretive Drafting Committee was formed, as key decision-makers sought the best possible set of arrangements for themselves.

While, of course, it is not inevitably so, there are notable continuities and legacies from this process in contemporary constitutional practices, as traces of the themes that characterize much constitutional practice in Cambodia today (as demonstrated over the coming chapters) are clearly distinguishable in this moment of constitution-making. The adoption of liberal-democratic, rule of law and human rights principles, for example, appears largely to have been the result of acquiescence from Cambodia's political elites. The enshrinement of these principles in the Constitution, either as a result of a lack of genuine agreement on the nature of these principles or a lack of time available to reach such agreement, appears to have been crafted in the vaguest possible terms. As a result, a dynamic was made possible whereby much of the substance of these principles was left for further elaboration through legislative, administrative or judicial decisions. Meanwhile, it is notable that the internationalization of the process, whether real or perceived, can counter-intuitively be seen to have lent the resulting document an additional degree of legitimacy. These two factors, when combined, go a long way to explain the degree to which – as chapter 4 lays out in greater detail – contemporary constitutionalism in Cambodia exhibits a high degree of politically instrumental

interpretation (which, with the help of the theoretical literature, I characterise as "abusive" in Chapter 4) at the level of day-to-day practice.

This is not where the continuities end, however. The fact that Cambodia's Constitution guarantees a broad swathe of rights – not to mention constitutionalizes the major international human rights treaties – has nevertheless had an impact on constitutional practice in the country, outside of state institutions. The formal recognition of these rights in parallel with the internationally supported re-birth of civil society in Cambodia has undoubtedly contributed to a flourishing of constitutional advocacy in the decades since, snapshots of which re documented in Chapters 5 and 6 of this thesis. While Cambodia's NGO-community is undoubtedly central to this re-birth, it is also significant to note that Buddhist monks were also particularly prominent in popular mobilizations around the constitution-making process. As Chapter 6 notes, there was a particular peak in Buddhist activism, much of which has since been stifled by the state's co-optation of the religious hierarchy. Poignantly, it is from the publicly-oriented constitutional education and empowerment activities of civil society, particularly through *Ponleu Khmer* and its composite organisations, that the most durable roots for this activism appear to have sprouted. More politically sensitive, content- and process-specific advocacy, meanwhile, ultimately found itself channeled into the less fertile ground of relatively unsympathetic institutions, as UNTAC's leadership deferred calls for the Cambodian public to have a greater say in the drafting process to the apparently already-preoccupied Constituent Assembly. Yet, this activism can nonetheless be understood to demonstrate the extent to which previously overlooked societal actors can come to play a significant role in generating and shaping constitutional discourse. What reviewing the history of the constitution-making process in Cambodia has demonstrated, in other words, was the early existence of what – throughout this thesis – has been described as popular constitutionalism or popular constitutionalist demands. Consequently, the constitution-making process, and the advocacy that emerged to challenge the lack of mechanisms to allow for public participation in it, can be understood as the birthplace for constitutional practice beyond the courts in Cambodia.

Chapter 4 – Outlawing Opposition, *Enforcing* Rule of Law: Authoritarian Constitutionalism

On 25th November, 2017, less than three months after the midnight arrest of opposition leader and MP, Kem Sokha, on suspicion of treason, the Cambodian Supreme Court used its newly assigned powers[271] to dissolve the country's main opposition party, the Cambodian National Rescue Party (CNRP). The decision to dissolve the CNRP also imposed a 5-year ban from political activity on Kem Sokha and ban 117 other members of the party, of which he was President. The dissolution, meanwhile, precipitated the removal from office of all of the CNRP's elected officials, including close to 5,000 local representatives who had won seats in Commune Elections just five months prior. Essentially foreclosing the result of the general elections the following July (widely anticipated to be the most competitive in the country's recent history[272]), the Court's decision marked the culmination of a sustained campaign by the ruling Cambodian People's Party (CPP) using all the legal devices at its disposal to undermine its political opponents. The very ability of the Supreme Court to hear such a case against a political party, for example, was made possible only by two sets of amendments to the Law on Political Parties that were made by the National Assembly and Senate (in votes that was boycotted by the CNRP) in February and then May of 2017. While the complaint against the CNRP was brought to the Court by the Ministry of Interior[273] at the request of two smaller opposition parties,[274] the case itself was prosecuted by the government, represented in court by a team of lawyers including the Prime Minister's own lawyer, and

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[271] Pursuant to amendments to the Law on Political Parties passed in February and June of 2017. See "Analysis of draft legislation | OHCHR", online: <http://cambodia.ohchr.org/en/law/analysis-draft-legislation>; "OHCHR has released its human rights analysis of the amended Law on Political Parties in Khmer | OHCHR", online: <https://cambodia.ohchr.org/en/news/ohchr-has-released-its-human-rights-analysis-amended-law-political-parties-khmer>.

[272] Caroline Hughes, "Understanding the Elections in Cambodia 2013" 2015 Aglos J Area-Based Glob Stud 1.

[273] "Interior Ministry files complaint to dissolve opposition", (6 October 2017), online: *Khmer Times* <https://www.khmertimeskh.com/85066/interior-ministry-files-complaint-dissolve-opposition/>.

[274] Namely, the royalist party, FUNCINPEC, and the Cambodian Youth Party. Ben Sokhean & rew Nachemson, "Parties file separate suits for dissolution of CNRP | Phnom Penh Post", online: <https://www.phnompenhpost.com/national/parties-file-separate-suits-dissolution-cnrp>.

was presided over by Chief Justice Dith Munty, who is himself a member of the CPP's Permanent Committee.

While unprecedented in its severity and finality, the move to formally dissolve the opposition is in many ways only the most recent iteration of the government and the ruling party's approach to law, and particularly the formal wording of the Constitution. That is, at the same time as being elevated as a source of legitimacy, the Constitution is simultaneously hollowed-out in practice, as the ruling party seeks to neutralise the normatively liberal-democratic power of the Constitution. Rather than being openly disregarded or amended, however, the Constitution is instead treated as a tool for the maintenance of "law and order" and "stability"; norms which, I argue in this chapter, animate state-led constitutional practice in Cambodia. Hence, in the process of legitimacy-making around the Supreme Court decision, key figures within the Royal Government of Cambodia contributed to the construction of an elaborate public narrative, with the CNRP portrayed not only as treasonous – based on its leader, Kem Sokha's relationship with the representatives of the government of the United States – but also as anarchistic, violent and criminal. Meanwhile, leading voices within the CPP took great pains to explain their actions – to both domestic and international audiences – in terms of their legality and, more notably, their constitutionality. While this may not come as much of a surprise, it is symbolic of a wider trend in Cambodian politics that, I suggest, has long been overlooked. Namely, a trend in which political contestation is framed in terms of adherence – or even fidelity – to the procedural requirements and the normative spirit of what is a formally a liberal-democratic constitution, at the same time as those very same processes and principles are hollowed out in the everyday constitutional practice.

Before detailing exactly how this dualistic approach to the Constitution works in practice, I will first attempt to outline the – somewhat novel – approach to constitutionalism that is required to properly understand its operation in Cambodia. With this approach in hand, I then provide a brief overview of existing literature on constitutionalism in illiberal contexts. To do this, I focus specifically on Mark Tushnet's account of "authoritarian

constitutionalism" and David Landau's concept of "abusive constitutionalism,"[275] before drawing parallels with closely related studies of the rule of law, which have highlighted that concept's pernicious potential, particularly when combined with a commitment to "law and order" and "stability."[276] Turning to recent events in Cambodia, I demonstrate how constitutional vocabulary and procedures have in fact been central to the CPP's attempts to undermine liberal, multi-party democracy: first through the whittling away of parliamentary immunity, and then through the dissolution and criminalization of the CNRP. While hardly an exhaustive set of examples of authoritarian constitutional practices in Cambodia, these two interconnected issues have been specifically chosen for two reasons. Firstly, they were the most prominent, macro-political issues throughout the period in which fieldwork for this chapter was being conducted and, as such, dominated a large proportion of the more than 45 interviews that were conducted during 2016 and 2017. Secondly, as will be explained below, these two issues, when taken together, create an accurate picture of the way constitutional practices have developed in Cambodia. Focusing on the dissolution of the CNRP, in other words, highlights the extent to which the use of law (and the Constitution) for anti-democratic purposes has indeed escalated in recent years. It also highlights the potential for Cambodia to contribute to the growing literature that exists on "megapolitical cases" decided by courts in Southeast Asia.[277] Meanwhile, foregrounding this with a discussion of parliamentary immunity can also act as a reminder of the fact that this trend is far from new.[278] Returning these concepts to the

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[275] Tushnet, *supra* note 49; Landau, *supra* note 48.

[276] Cheesman, *supra* note 52; Sarah Biddulph, *The Stability Imperative: Human Rights and Law in China*, Reprint edition ed (UBC Press, 2016).

[277] Björn Dressel & Marcus Mietzner, "A tale of two courts: The judicialization of electoral politics in Asia" (2012) 25:3 Governance 391; Bjoern Dressel & Tomoo Inoue, "Megapolitical Cases Before the Constitutional Court of Indonesia Since 2004: An Empirical Study" (2018) 4:2 Const Rev; Björn Dressel & Tomoo Inoue, "Informal networks and judicial decisions: Insights from the Supreme Court of the Philippines, 1986–2015" (2018) 39:5 Int Polit Sci Rev 616; Albert H Y Chen & Andrew Harding, *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge University Press, 2018); Björn Dressel & Khemthong Tonsakulrungruang, "Coloured Judgements? The Work of the Thai Constitutional Court, 1998–2016" (2019) 49:1 J Contemp Asia 1.

[278] This is a significant point, given that some scholars have suggested that a number of recent studies of legal politics and rule of law in contemporary Cambodia have suggested to the contrary. Melissa Curley, for example, evaluated the developments described in this paper by claiming that they "raise questions about the government's commitment to democracy" and suggest that "the 'rule of law' as a check on the arbitrary use of power is now widely undermined in Cambodia," suggesting by implication that there was an assumed commitment to democracy, and that rule of law could be seen to operate as a check on government power, prior to these events. Rather than a change in substance, these developments might better be understood as a shift in style, as Un and McCarthy note when they claim that the use of law for illiberal or

1993 drafting process, then, I end by suggesting that law, order, and stability can be understood to form part of the state-building narrative into which the Constitution was thrust, and remain a prevalent subtext for reading the document itself.

Rethinking Constitutionalism in Cambodia

It is perhaps equally unsurprising that most accounts of governance in Cambodia overlook the Constitution. Rightly acknowledging the well-documented importance of informal institutions like corruption and patronage,[279] many scholars implicitly dismiss the Constitution as a mere parchment barrier with little practical or normative influence in Cambodian society. As Astrid Noren-Nilsson explains, the fact that "[p]olitical science scholarship has produced a solid corpus of analyses of how power politics has played out in… Cambodia," often at the expense of more fine-grained attention to national imaginaries or political discourse, for example, demonstrates "a tacit understanding that… [the latter] are dwarfed, or made outright irrelevant, by the crudeness of the political game." Meanwhile, as noted in the introductory chapter of this thesis, Cambodian legal scholarship tends to focus on dogmatic interpretations of the text of the Constitution, treating the notion of liberal, democratic constitutionalism as a linear work in progress.[280] While both approaches are understandable, they tell us very little about the role that the Constitution actually plays in Cambodian politics. This chapter, then, aims to supplement these understandings by demonstrating the centrality of the Constitution to state-led political discourse in Cambodia, in turn by exposing an authoritarian potential of constitutionalism that has pertinence far beyond Cambodia's borders. To do this, I take the unconventional step of taking seriously the divergent meanings that are assigned to

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antidemocratic purposes was "a strategic calculation by the Cambodian ruling elites to utilize a more subtle and legitimate strategy of social control." The evidence presented in this paper, and this thesis more generally, not only suggests that rule of law and commitment to democracy have not been a feature of Cambodia's legal politics since the outset of the current constitutional order, but also that the use of law to silence or sideline political opponents has been a longstanding tactic of the ruling party. If anything, then, the developments discussed in this paper suggest that the use of law for authoritarian purposes has – at most – only been accelerated (rather than discovered) by the CPP in recent years. See Melissa Curley, "Governing Civil Society in Cambodia: Implications of the NGO Law for the 'Rule of Law'" (2018) 42:2 Asian Stud Rev 247; McCarthy & Un, *supra* note 41.

[279] Un, *supra* note 33; Roberts, *supra* note 33.

[280] Peng Hor, Kong Phallack and Jorg Menzel, *Introduction to Cambodian Law*, Konrad Adenauer Stiftung Cambodia, 2012.

the Constitution in everyday political life by the Cambodian government, the courts, and the ruling party . This is an important starting point, however, for understanding a country where legitimacy is so often conflated with legality,[281] in spite of the fact that legal institutions are so chronically weak and that legality thus remains a profoundly malleable and contested concept.

The aforementioned approach, however, requires a more flexible understanding of constitutionalism: one which can not only be "disentangled"[282] from liberalism, but can also include in its practice a number of non-judicial actors. While my broader research in Cambodia extends this further to non-state and even non-institutional actors, this chapter constitutes a first step by focusing not only on legislative and judicial processes, but also on the *discursive* acts surrounding them. Such attention to discourse and language to understand law in authoritarian contexts is, in fact, far from novel. Most notably, it is utilized by Jothie Rajah, in her study of rule of law discourse in Singapore. In explaining her use of Critical Discourse Analysis in *Authoritarian Rule of Law*, Rajah writes that:

> "Given that 'law' is a discursive field especially contiguous with power, dismantling the positivist isolation of 'law' becomes especially important when reading legal texts as expressions of state management of legitimacy through 'law'.
>
> Legal scholarship has recently come to approach 'law' as not just interacting with society, but being in a relationship with society "mediated by or even constituted by language itself." …The analytical approach to discourse in terms of text, interaction and context (required through Critical Discourse Analysis) also means that I attend to … how language captures and performs the relative positions of power of social actors." [283]

Clearly, the use of critical discourse analysis is well-suited to studies of law in nonliberal contexts, as it enables us not only to see the role that law plays in authoritarian practices

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[281] The most common translation of "legitimate" in Khmer is *pheap srab chbab*, which literally means "consistent with law."

[282] A challenge best articulated in Li-Ann Thio, "Constitutionalism in illiberal Polities" (2012) Oxf Handb Comp Const Law 133.

[283] Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse, and Legitimacy in Singapore*, Cambridge Studies in Law and Society (Cambridge; New York: Cambridge University Press, 2012), at 57-58.

but also sheds light on the centrality of law in the construction of legitimacy by and for the state. This latter point, meanwhile, is also well-recognised as a central purpose for constitutions.[284] Hence, through a fine-grained analysis of recent events in Cambodia, and the public utterances – by representatives of the Royal Government of Cambodia – that have surrounded them, I will demonstrate how the Constitution and the vocabulary of constitutionalism are in fact central to the CPP's current attempts to consolidate and legitimate its rule. Further, by drawing links between these events and those that have preceded them, I will suggest that the Constitution has remained a key source of legitimacy for the ruling-party since the document was drafted in 1993. However, this elevation of the Constitution as a source of legitimacy is, in practice, coupled with the simultaneous hollowing-out of its normative substance, as the ruling-party has sought to neutralise the normative power of a Constitution that, in some ways, calls for a mode of governance that it has so far been unable or unwilling to pursue comprehensively. This complex dynamic, I argue, can in fact be understood to set the stage for the dramatic contestations that play out in the case studies of later chapters. Specifically, the concurrent veneration and violation of the Constitution can ultimately be seen to create spaces and causes for popular contestations over the meaning of the Constitution, and mobilisations that claim to better embody Cambodian constitutionalism.

On Abusive and Authoritarian Constitutionalism

It is a well-established and academically well-researched fact that, since the end of the Cold War, there has been an exponential increase in countries that adopt the formal trappings of liberal democracy without necessarily meeting all of the normative or substantive requirements that such a commitment would involve.[285] Conveniently, the Cambodia's Constitution was written on the crest of the supposed "Third Wave" of democractisation, while the country itself continues to be classified variously as a semi-

[284] Tom Ginsburg & Alberto Simpser, eds, *Constitutions in Authoritarian Regimes* (New York, NY: Cambridge University Press, 2013).
[285] Law & Versteeg, *supra* note 97.

democracy, a kleptocracy, a hybrid and a neo- or competitive-authoritarian regime. [286] The latter of these categories has become particularly popular, based on the work of Levitsky and Way.[287] Interesting, though, from a legal or constitutional perspective, Levitsky and Way's *Competitive Authoritarianism*, pioneering as it may be, has been critiqued for insufficiently theorizing the role of law (and particularly constitutional law) in the contexts they study. "It is a mistake to ignore the importance of formal constitutional rules to hybrid regimes," David Landau argues, for example, because doing so overlooks the "ample evidence that constitutionalism is a key part of these projects."[288] In part as a corrective to this oversight, then, Landau himself has elaborated an idea that he calls "abusive constitutionalism." Defined as "the use of mechanisms of constitutional change to erode the democratic order,"[289] Landau's 'abusive constitutionalism' calls attention to the ways that constitutional means can be put to illiberal or anti-democratic ends. Clearly an empirically descriptive category rather than a normative ideal, Jorge Gonzalez-Jacome has described 'abusive constitutionalism' as a term that "is suggestive because it captures a set of facts that actually occur in the world today."[290] These facts, of course, are otherwise often overlooked by scholars and spectators alike, as they are dismissed as deviations from the liberal democratic norm. Hence, I argue, the concept can not only be helpful for understanding state-led constitutional practice in Cambodia, but can also be further developed through a better understanding of everyday constitutional practice in the country.

To start with, it should be noted that, while Landau's excavation of 'abusive constitutionalism' is a useful starting point, and one that has explanatory power in a number of contexts, there is still room for the concept to develop. This much is acknowledged by Landau himself, as he explains that his description of events in

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[286] Sok Udom Deth & Daniel Bultmann, "The Afterglow of Hun Sen's Cambodia? Socioeconomic Development, Political Change, and the Persistence of Inequalities" in *Glob Democr Southeast Asia* (Springer, 2016) 87.

[287] Steven Levitsky and Lucan Way, "The Rise of Competitive Authoritarianism," *Journal of Democracy* 13, no. 2 (2002): 51–65; Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (Cambridge University Press, 2010).

[288] Landau, *supra* note 48 at 212.

[289] *Ibid* at 189.

[290] Jorge González-Jácome, "On Abusive Constitutionalism: Two Critical Impulses", online: <http://www.iconnectblog.com/2015/06/on-abusive-constitutionalism-two-critical-impulses/>.

Hungary, Colombia and Venezuela could "only scratch the surface of what is an increasingly routine occurrence."[291] It is this sense of the routine, I like others would suggest, that is missing from Landau's analysis. Focusing on "constitutional amendment and replacement"[292] as tools of the abusive constitutionalist, it seems that Landau's preoccupation with macro-level constitutional process means he overlooks a more mundane but nonetheless constitutional mechanism: interpretation and ordinary legislation. This, too, has been hinted at by Gonzalez-Jacome, who suggests that "by focusing merely on constitutional structure and institutions as Landau does, one loses sight of the more complex projects that shape and are shaped by constitutional debate."[293] In other words, while Landau accurately articulates how reform or replacement are ways by which a constitutional system may be turned against its own liberal democratic values, what he leaves unsaid is the way that constitutions may not need to be "substantially reworked"[294] to achieve those very same ends. Meanwhile, the focus on formal constitutional change also masks the extent to which everyday constitutional discourse may itself be shaped by other ideals. As Gonzalez-Jacome rightly suggests, a better understanding of the everyday practice of abusive or authoritarian constitutionalism may also lead us to see that "liberal constitutionalism is just one among different types of constitutionalism that have a deep-seated tradition and a relatively long genealogy that can be traced."[295] Hence, while a liberal-democratic constitution was undoubtedly the result of the U.N.-sponsored drafting process in 1993, it is possible that the 'type' of constitutionalism practiced in Cambodia may instead be of an "abusive" or "authoritarian" variety.

The notional category of authoritarian constitutionalism, of course, is a controversial one. Once considered an oxymoron, or a contradiction in terms, the category has gained increasing credence among scholars from both Asia and South America.[296] However, authoritarian constitutionalism remains "an as yet under-examined form of

[291] Landau, *supra* note 48 at 191.
[292] *Ibid* at 189.
[293] González-Jácome, *supra* note 291.
[294] Landau, *supra* note 48 at 191.
[295] González-Jácome, *supra* note 291.
[296] Thio, *supra* note 13; Thio, *supra* note 283; Ginsburg & Simpser, *supra* note 285; Tushnet, *supra* note 48.

constitutionalism," Mark Tushnet argues, largely because "legal scholars and political theorists interested in constitutionalism as a normative concept tend to dichotomize the subject."[297] States, as a result, are either seen as practicing constitutionalism, and therefore having a constitutional system worth studying, or are seen as lacking the practice, and are therefore only of interest to scholars to the extent that their systems can be improved to create constitutionalism. This is largely true of Cambodia, a country largely overlooked by constitutional scholarship and often dismissed as "having a Constitution without constitutionalism" or as lacking "a culture of constitutionalism."[298] The irrefutable fact that law in Cambodia remains a tool of the powerful, then, is often considered a sufficiently comprehensive understanding.

Shedding light on constitutional practice in Cambodia in such a stark manner, however, risks obfuscating or casting in shadow as much as it illuminates. Specifically, by treating illiberal or antidemocratic practices as if they are devoid of their own normative content, it becomes easy to overlook that which animates constitutional practice in Cambodia, and elsewhere. This is a challenge that has already been explored, and to some extent applied to Cambodia, in relation to the rule of law. Specifically, following the work of Randall Peerenboom, scholarship on rule of law often draws a distinction between the practices of "thin" and "thick" rule of law. The former, it is argued, is largely formalistic and proceduralist in nature, requiring only that: (i) law provide "meaningful restraints on state actors"; (ii) there be rules governing which entities… may make law;" (iii) laws be publicly accessible, generally applicable and their meaning be relatively clear, consistent, stable and prospective; (iv) laws be enforced, and "acceptable to a majority of the populace or people affected."[299] Meanwhile, "thick" conceptions of rule of law include the above criteria but also include:

> "elements of political morality such as particular economic arrangements (free-market capitalism, central planning, "Asian developmental state" or other varieties of capitalism), forms of government (democratic, socialist,

[297] Tushnet, *supra* note 49 at 393.
[298] Hor et al, *supra* note 202.
[299] Randall Peerenboom, "Varieties of rule of law" in *Asian Discourses Rule Law* (Routledge, 2003) 23 at 2.

> soft authoritarian) or conceptions of human rights (libertarian, classical liberal, social welfare liberal, communitarian, "Asian values," etc.)."[300]

Though typically associated with liberal democracy, then, "thick" rule of law as defined by Peerenboom can include any number of different modes of government. However, the existence of these varieties of "thick" rule of law are, for Peerenboom, still predicated upon the simultaneous existence of the same basic standards of "thin" rule of law described beforehand.

This set of distinctions, meanwhile, have been applied to Cambodia only rarely, and with somewhat mixed results. Most recently, for example, studies by Stephen McCarthy and Un Kheang have suggested that Cambodia practices a "thin" rule of law, even comparing this practice to Singapore due to similarities in the extent to which the legal system is used to undermine political opponents of the ruling party.[301] This comparison, however, appears somewhat misleading, as it conflates one potential output of "thin" rule of law with the procedural and normative characteristics are typically used to identify it. That one government, considered by the authors to be practicing "thin" rule of law (in this case Singapore), is also seen to use its legal system for political purposes, in other words, should not mean that any government that uses its legal system in that way is necessarily practicing "thin" rule of law. A more methodical study of rule of law in Cambodia, meanwhile, is offered by Lucy West.[302] Measuring Cambodia's legal system and legal politics against the standards laid out by Peerenboom, West concludes that Cambodia fails to meet the minimum standards of "thin" rule of law.[303] West's assessment, in turn, appears to align with that of much of the Cambodia-studies literature, which typically

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[300] *Ibid* at 3–4.

[301] Stephan McCarthy and Un Kheang, 'The rule of law in illiberal contexts: Cambodia Singapore exemplars' in Marco Bünte & Björn Dressel, eds, *Politics and constitutions in Southeast Asia*, Routledge law in Asia 17 (Milton Park, Abingdon, Oxon: Routledge, 2017); McCarthy & Un, *supra* note 41.

[302] Lucy West, *The Confines of the Rule of Law in Contemporary Cambodia: Political Culture and Legal-Institutional Framework* (Griffith thesis, Griffith University, 2018) [unpublished]; Lucy West, "The limits to judicial independence: Cambodia's political culture and the civil law" (2019) 26:3 Democratization 537.

[303] However, though it is beyond the scope of this paper to offer a detailed discussion of West's analysis, it should be noted here that West repeatedly attributes Cambodia's failure to meet these minimum requirements primarily to the combination of Cambodia's civil law system and its neopatrimonial political culture. Focusing on these factors overstates their influence, potentially at the expense of a proper understanding of the violence that underpins authoritarianism in Cambodia.

characterises Cambodia as lacking rule of law in any significant form[304] and points to the lack of independence of Cambodia's judiciary as its cause.[305] While there is, then, broad consensus in academic literature on Cambodia that the judiciary is politically pliant, there remains some ambiguity about the means by which political influence is exercised. Aside from a few exceptions highlighted by West,[306] whereby the courts very overtly reversed decisions in the face of explicit public calls from the Executive for them to do so, evidence of direct interference is not always available. Instead, it is possible that – as in other authoritarian contexts – courts either come under pressure privately or pre-empt the will of the Executive without any need for such interference.[307]

Hence, this chapter begins from the academically well-founded assumption that the Cambodian judiciary is, with varying degrees of directness, "politicised." Rather than trying to prove this point once more, however, I go on to show how the courts are imbricated in (and perhaps responding to) a wider process of constitutional meaning-making that is integral to authoritarian constitutional practices in Cambodia. Concluding that Cambodia lacks even a "thin" rule of law, for example, does little to illuminate or explain what actually animates legal politics or, for that matter, constitutional practice in Cambodia. This point is made comprehensively by Nick Cheesman, who rightly notes, that hollow alternatives such as "rule of men" or "un-rule of law"[308] are often posed as to achieve this, as they are presented as rule of law's opposite. However, Cheesman argues, these sorts of alternatives are unhelpful for anyone seeking to understand the practice of illiberalism or authoritarianism. Instead, they serve "as the opposition one has when one has no particular interest in thinking through the characteristics and implications of opposing concepts." Likewise, Jothie Rajah has dismissed the dichotomy of 'thick' and

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[304] Daniel Adler & Michael Woolcock, *Justice Without the Rule of Law? The Challenge of Rights-Based Industrial Relations in Contemporary Cambodia*, ID 1445687 (World Bank, 2009); Katherine Brickell, "Gendered violences and rule of/by law in Cambodia" (2016) 6:2 Dialogues Hum Geogr 182.

[305] For a full explanation of Cambodia's flawed judicial system, see Kheang Un, "The Judicial System and Democratization in Post-Conflict Cambodia," *Beyond Democracy in Cambodia*, 2009, 70–100; Caroline Hughes and Kheang Un, eds., *Cambodia's Economic Transformation*, NIAS Studies in Asian Topics 49 (Copenhagen: Nias Press, 2011). And also Un, *supra* note 33; Kheang Un, "The judicial system and democratization in post-conflict Cambodia" (2009) Democr Cambodia 70; Hughes & Un, *supra* note 27; Un, *supra* note 46.

[306] West, *supra* note 303.

[307] Ginsburg & Moustafa, *supra* note 93; Moustafa, *supra* note 14.

[308] Nick Cheesman, "Thin Rule of Law or Un-Rule of Law in Myanmar?" (2009) 82:4 Pac Aff 597.

'thin' rule of law by noting that – in places such as Singapore, which are routinely grouped under the latter label – debate instead "centres on competing thick conceptions" of the rule of law. In the same way, I will argue, state-led constitutional practice in Cambodia is characterized not by a lack of interest in constitutionalism, but rather by an alternative conception of what the goal of constitutionalism, and the meaning of the Constitution, should be.

Two related values that – in Cambodia at least – have been subsumed within the constitutional discourse, I will argue, are those of *stability*, and *law and order*. The latter has long considered an amiable companion to legal systems, and a legitimate – if not essential – part of any state-building project,[309] but has recently been problematized adeptly by Nick Cheesman. In his book *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order*, Cheesman questions the often unconsciously assumed connection between the rule of law and law and order.[310] The latter, he argues, has often subsumed within the former, along with other concepts such as stability, as international interest in rule of law projects has grown. Instead of law and order being a part of the rule of law ideal, Cheesman argues, the two are actually asymmetrically opposed. Rather than applying consistently and equally, as the rule of law ideal suggests, law and order is expressed through the contingent and hierarchical acts of state administration and law enforcement. "Law and order naturalizes a similar kind of order to [the] police [state]: … one with an emphasis on exogenously imposed discipline," Cheesman argues, while at the same time it "is hierarchical, because it presumes that certain people or groups occupy positions of authority that entitle them to decide when order is lost, and when the state's forces should restore it."[311] Another closely related value, meanwhile, which also features prominently in state-led constitutional discourse, is that of social and political stability; an oft-overlooked concept in legal terms that has only recently attracted sustained scholarly attention through the work of Sarah Biddulph in the Chinese context. In *The Stability Imperative*, Biddulph explains how the Chinese Communist Party's

[309] See Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries* (Citeseer, 1998); Seth G Jones et al, *Establishing law and order after conflict* (Rand Corporation, 2005).
[310] Cheesman, *supra* note 52.
[311] Ibid., 26 and 31.

"obsession with social order and stability" stems from a belief that "the Party-state's capacity to maintain social order is the basis for its legitimacy" and, further, that "society has to be managed in order to be stable, with law providing the 'framework and ground rules'." Specifically, in drawing a distinction between "rigid" and "resilient stability," Biddulph explains that the CCP has privileged a view of society as "inherently unstable and therefore in need of active state intervention," over one that "sees stability as being based on norms of justice and equity, or at least mitigating injustices."[312] Much like the "law-and-order-ideal" articulated by Cheesman with regard to Myanmar, it is the former vision – an idea of "rigid stability" in which order and peace are almost entirely dependent upon enforcement from above – that Biddulph describes prevailing in China.

As I will demonstrate, such insights are particularly pertinent for understanding Cambodia, where the Constitution's references to "stability" and "public order" remain a prominent feature of state-led constitutional discourse, and represent key sites for the ongoing struggle over that same document's guarantees of liberal, multi-party democracy. Hence, this chapter now turns to some cases that exemplify this battle, and how it is being fought by the ruling Cambodian People's Party. While I intend to discuss multiple other, less conventionally political contests elsewhere, the following examples centre on explicit contest between Cambodia's main political parties, which have been fought in courtrooms through the language of criminal and constitutional law. However, I suggest that these events are especially indicative as, to borrow again from Nick Cheesman:

> "In a politically repressive setting, criminal cases are the representative mode of legal authority. In the exercise of control over the body of the accused we find the basic elements for the control over the body politic."[313]

This can also be seen particularly acutely in the examples I excavate below, as the arrest and prosecution of political opponents and the Supreme Court's decision to dissolve the CNRP are predicated on accusations of criminal offences, not to mention made possible

[312] Biddulph, *supra* note 277 at 8.
[313] Cheesman, *supra* note 52 at 11.

by the ruling party's control of the criminal justice system. However, in Cambodia we can also see that, in asserting control over the meaning of constitutional guarantees for the immunity of parliamentarians, as well as over the rules of the electoral contestation, the ruling party is able not only to reaffirm its control over the body politic, but also over language, meaning, and the parameters of democratic opposition. This process, of course, is made possible by the political pliability of the judiciary in Cambodia; a well-documented status-quo that was established during the 1980s and left largely untouched by the 1992-93 U.N. administration in Cambodia,[314] and has only been exacerbated by subsequent legislative changes to the make-up of judicial oversight organs.[315] Here, then, as well as in the cases described below, the modality of abusive or authoritarian constitutional practice is not the macro-level constitutional re-ordering, but rather the more everyday practices of legislative and judicial processes.

The Politics of Stability and Public Order

Having won the 2013 General Election by its narrowest margin since 1993, the ruling Cambodian People's Party appeared increasingly anxious to reassert and consolidate the political dominance it had previously established. Following a short period immediately after the widely-contested results emerged, in which the government took a relatively relaxed attitude to public protests led by the Cambodian National Rescue Party only to violently crack-down on them in January 2014, the ruling party reverted to a technique of using legislative and judicial processes to silence critics and hamper the work of opposition politicians. Hence, as claims of judicial harassment multiplied, the number of CNRP officials and members of civil society behind bars rose to twenty-five,[316] with

[314] Donovan, *supra* note 19.

[315] It is worth noting that while a series of changes to the judiciary in 2014 drew significant attention from civil society watchdogs and international stakeholders in Cambodia (see, for example, Human Rights Watch, "Cambodia: Withdraw Fundamentally Flawed Judiciary Laws | Human Rights Watch,"), the amendments largely represent were only the formalization – or at worst the extension – of existing practices that gave the executive a significant role in the internal workings of the judiciary. While it was no doubt a regressive step in terms of judicial independence, this change was of little practical importance for the workings of an institution that was already profoundly beholden to the ruling party (here, see Kheang Un, "The Judicial System and Democratization in Post-Conflict Cambodia," *Beyond Democracy in Cambodia*, 2009, 70–100).

[316] The term "judicial harassment" has been used with increasing frequency by Cambodian civil organisations, and refers to the filing of what they believe are "politically motivated" charges against outspoken critics of

many more fleeing the country to avoid facing charges. The culmination of this approach came in 2017, when the ruling party pushed through two amendments to the Law on Political Parties in quick succession, in February and June, and as these new provisions then provided the basis for the dissolution of the CNRP by the Supreme Court in November of that year.

The complete dissolution of an opposition party that had previously won nearly 45% of the popular vote and still held 55 of the available 123 seats in the National Assembly on 16th November, 2017 was an unprecedented step that is no doubt interesting from a purely political perspective, not to mention problematic from a doctrinal legal one. The former point has already been explained to a large degree by Un Kheang, who has described at length how the dissolution for the CNRP was the result of a calculation that their electoral popularity had made them "an existential threat" to CPP-rule, and that the 2018 elections would be a "toss-up" without some kind of intervention.[317] The doctrinal issues of the decision, meanwhile, has yet to be explored in an academic context; largely because an official version of the Supreme Court's decision has not been made public, either in English or Khmer. Based on a recognition of the political climate described by Un and others, and the lessons of academic literature (and a wealth of civil society reporting) that has already shown Cambodia's courts to be deeply politicised, however, the analysis provided below takes as a starting point the assumption that the Supreme Court's decision was influenced by political concerns. This section does not seek to provide empirical proof that the dissolution of the CNRP was a manifestation of political influence over a judiciary, in other words. As Ginsberg and Moustafa have noted, this sort of point is difficult to prove in authoritarian contexts, given the lack of a paper trail that would support such analyses. Instead, however, the data provided here seeks to demonstrate how decisions of Cambodia's courts in "mega-political" cases – including

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the government. Criminal charges typically focus on allegations of "incitement" or corruption, while civil cases are also lodged over alleged defamation. See Human Rights Watch | 350 Fifth Avenue, 34th Floor | New York & NY 10118-3299 USA | t 12122904700, "Political Prisoners Cambodia", (12 September 2018), online: *Hum Rights Watch* <https://www.hrw.org/video-photos/interactive/2018/09/12/political-prisoners-cambodia>; McCarthy & Un, *supra* note 8.

[317] As noted above, Un Kheang's work is the best example of this. Un, *supra* note 37 at 56; See also Lee Morgenbesser, "Cambodia's Transition to Hegemonic Authoritarianism" (2019) 30:1 J Democr 158.

decisions over parliamentary immunity and the dissolution of the CNRP – are legitimised in public by a discourse that I associate with "authoritarian constitutionalism."

Rather than approaching the dissolution of the CNRP from the perspective of electoral politics or legal doctrine, then, this Chapter focuses instead on the extent to which the dissolution and the legislative changes that facilitated it, as well as the aforementioned jailing of opposition parliamentarians, was justified extensively in comparative legal and even constitutional terms by key figures in the government, who frequently emphasized the role of law in ensuring "order" and "stability" in Cambodia. While certainly not intending to confer legitimacy onto such interpretations, I suggest that they remain an as yet understudied empirical phenomenon Specifically, they demonstrate the extent to which even liberal-democratic constitutions can be seen to be complicit in authoritarianism, and the extent to which the practice of authoritarianism in Cambodia seeks to simultaneously harness and undermine the normative power of constitutional principles.

Undoing Article 80 on Parliamentary Immunity

Widely considered a central component of democratic process and political systems,[318] parliamentary immunity in Cambodia has had a checkered history under the country's present Constitution. This is not, it must be noted, due to a lack of constitutional recognition: Articles 80 and 104 (new) of the Constitution prevent Parliamentarians and Senators, respectively, from being "prosecuted, detained or arrested because of opinions expressed in the exercise of his/her duties."[319] Two specific exceptions to this rule exist, however. Namely, these exceptions provide for (first) occasions where two-thirds of the respective house vote to strip a Parliamentarian or Senator of their immunity, and (second) in cases of *flagrante delicito*. Prior to the 2013 election, of course, this proved little obstacle to the ruling party, as they frequently found the required votes needed in

[318] Léon R Yankwich, "The Immunity of Congressional Speech. Its Origin, Meaning and Scope" (1951) 99:7 Univ Pa Law Rev 960; Simon Wigley, "Parliamentary Immunity in Democratizing Countries: The Case of Turkey" (2009) 31:3 Hum Rights Q 567.
[319] Cambodian Constitution, Article 80

either house in order to strip elected opposition officials of their immunity. As such, constitutional procedure has over the years allowed for: then Co-Minister of the Interior, You Hockry to be charged with corruption and drug possession in 1996;[320] Princes Norodom Sirivudh and Ranariddh to be charged with treason in 1995 and 1997;[321] and Senator Serei Kosal to be charged with fraud.[322] Later, immunity was stripped for the then leader of the opposition, Sam Rainsy to be charged with issuing false information in 2004 and for failure to pay a fine to the National Election Commission in 2009;[323] for MP Chan Cheng to be charged with collusion in a crime in 2011; and, on separate occasions, for MPs Chea Poch (2004),[324] Cheam Channy (2004), [325] Mu Sochua and Ho Vann (both 2009) to be charged with defamation.[326] Taken together, this history of cases in which parliamentary immunity has been overidden suggest that the principle, like many other constitutional protections in Cambodia, is a flexible and politically contingent phenomenon.

What perhaps makes the period since 2014 remarkable, meanwhile, is the fact that the immunity of parliamentarians has, in certain circumstances, been lifted in spite of the fact that the ruling party has not had sufficient votes in the National Assembly. Admittedly, this has not been the case in the Senate, where the recently-resigned Senator Thak Lany's immunity was stripped by a two-thirds vote, paving the way for her to be convicted in *abstentia* for defamation, having made comments that suggested Prime Minister Hun Sen

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[320] Huw Watkin, "Hockry sweating out his future", (20 September 1996), online: *Phnom Penh Post* <http://www.phnompenhpost.com/national/hockry-sweating-out-his-future>.

[321] Christine Chaumeau, "The opposition of one", (15 August 1997), online: *Phnom Penh Post* <http://www.phnompenhpost.com/national/opposition-one>.

[322] Staff, "Kosal wrangle", (9 November 2001), online: *Phnom Penh Post* <http://www.phnompenhpost.com/national/kosal-wrangle>.

[323] Sebastian Strangio & Sokchea Meas, "Sam Rainsy in France to register concerns about loss of immunity", (5 March 2009), online: *Phnom Penh Post* <http://www.phnompenhpost.com/national/sam-rainsy-france-register-concerns-about-loss-immunity>.

[324] "Rainsy summoned by court, National, Phnom Penh Post", online: <http://www.phnompenhpost.com/national/rainsy-summoned-court>.

[325] Vong Sokheng, "No resolution in sight for ousted opposition PMs", (3 June 2005), online: *Phnom Penh Post* <http://www.phnompenhpost.com/national/no-resolution-sight-ousted-opposition-pms>.

[326] Meas Sokchea, "Opposition hits out at parliament over lifting of MPs' legal immunity , National, Phnom Penh Post", online: <http://www.phnompenhpost.com/national/opposition-hits-out-parliament-over-lifting-mps-legal-immunity>.

was responsible for the assassination of the prominent critic, Dr Kem Ley.[327] Similarly, Senator Hong Sok Hour is currently serving a seven-year sentence for incitement, having posted a video on social media questioning the validity of government maps used to demarcate a highly contentious section of the country's border with Vietnam.[328] However, in the cases of CNRP leader and MP Kem Sokha in June and then September of 2017,[329] as well as for MPs Um Sam An,[330] Tok Vanchan and Pin Ratana,[331] arguments over immunity instead focused on the interpretation of Article 80's second exception to immunity; namely, the meaning of the phrase *flagrante delicito*. While Kem Sokha's arrest in September 2017, this time for treason, that is the most notable example of the debate over *flagrante delicito*, as it was this that also precipitated the dissolution of the CNRP less than two months later, it is worth noting how this line of argument was developed in earlier cases.

A striking early instance of the use of *flagrante delicito* is that of Um Sam An. Arrested in the early hours of 10th April 2016, almost immediately after returning to the country, Um Sam An was officially charged with "incitement to commit a felony (cause chaos in society)," over maps he posted on social media that showed an alternative version of the same, highly contested area of the border between Cambodia and Vietnam. The case against Um Sam An, was articulated publicly first by a Ministry of Justice spokesperson, but then in an 12th April speech by Prime Minister Hun Sen, where he explained, in characteristically bellicose fashion:

> "Don't say that you have immunity and they can't arrest you, because it was an obvious crime. It's an obvious crime, because it is incitement

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[327] Pang Vichea, "Thak Lany immunity vote today", (1 September 2016), online: *Phnom Penh Post* <http://m.phnompenhpost.com/national/thak-lany-immunity-vote-today>.

[328] "Senator Sok Hour given seven years for forgery and incitement, National, Phnom Penh Post", online: <http://www.phnompenhpost.com/national/senator-sok-hour-given-seven-years-forgery-and-incitement>.

[329] "CPP Lawmakers Clear Sokha's Path to Prison - The Cambodia Daily", online: <https://www.cambodiadaily.com/news/cpp-lawmakers-clear-sokhas-path-to-prison-113234/>.

[330] Khy Sovuthy, "CNRP Lawmaker Guilty of Incitement for Facebook Posts", (11 October 2016), online: *Cambodia Daily* <https://www.cambodiadaily.com/news/opposition-lawmaker-sentenced-facebook-posts-119092/>.

[331] Sek Odom, "Assembly Asked to Strip CNRP Lawmakers of Immunity", (4 July 2016), online: *Cambodia Daily* <https://www.cambodiadaily.com/archives/two-cnrp-lawmakers-targeted-to-be-stripped-of-immunity-114949/>.

> leading to disasters for the country. Now, at this hour, your [Facebook] page still talks about the fake maps."[332]

Interestingly, then, we see not only a justification for the MP's arrest based on an argument about his statement's threat to public order, but also a dual justification for overriding his immunity. First, we see the Prime Minister putting forward an understanding of the word "flagrant" as meaning "obvious," and secondly, we see an assertion that, because the MP's comments remained available online, the alleged crime was ongoing.

While Um Sam An has continued to insist on the validity of his immunity, storming out of court on the first day of his trial, this was overruled by the presiding Judge in the case. In fact, when finding Um Sam An guilty on 11th October 2016, Judge Heng Sokna's decision cited both the incendiary nature of his offence and justifying it as a case of *flagrante delicito*. "The activities of the defendant are an obvious crime," Judge Heng Sokna said, "because all the activities, such as writing, speaking and posting videos on Facebook, are still active."[333] While the fact that the actual written decision of the Phnom Penh Municipal Court is not publicly available, of course, places a limit on the extent to which we can assess its validity. However, it does not preclude such an assessment entirely, I would argue. Specifically, this is based on the knowledge that (i) Cambodia's courts have already been proven to be susceptible to such political influences; that (ii) officials – and specifically the Prime Minister – publicly articulated the arguments that the government would make against Um Sam An before the case went to trial; and that (iii) Um Sam An was ultimately found guilty of the charges which those arguments were supposed to support (including the incitement of social disorder). As such, it seems to be a reasonable assumption that the court's may well have been subject to political influence from the executive branch. That the court more or less directly adopted the argumentation presented publicly by the government beforehand does not, of course, necessarily

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[332] Aun Pheap & Alex Willemyns, "With Jailing, Flagrant Abuse of Constitution - The Cambodia Daily", online: <https://www.cambodiadaily.com/news/with-jailing-flagrant-abuse-of-constitution-111395/>.

[333] The Phnom Penh Municipal Court's decision was not published in this case. In fact, decisions from Cambodia's ordinary courts are not publicly available, as only the Constitutional Council (deciding on the constitutionalisty of laws), the Arbitration Council and the Extraordinary Chambers of the Courts of Cambodia (also known as the Khmer Rouge Tribunal) actively publish decisions. The above quote is instead taken from Khy Sovuthy, *supra* note 331.

demonstrate this influence. However, it is suggestive of a situation in which the presiding judge was, at least, explicitly aware of the decision that the court was expected to deliver before the case was even heard. In such circumstances, irrespective of the facts of the case or whether the expectations of the executive were directly or explicitly conveyed to the court, it has proven to be highly improbable that a judge would issue a decision that is in any way contrary to those expectations.

The case of Um Sam An, then, is a prime example of the Royal Government of Cambodia's approach to the Constitution, and legality in general. First and foremost, we see the primacy of the government's own understanding of "order." Looking beyond the guarantee of parliamentary immunity, the police and then the Ministry of Justice first had to decide that a crime had been committed, as the constitutional guarantee of free expression was overridden by its exception: the state's responsibility to ensure "public order." Secondly, in a novel interpretation of *flagrante delicito*, Um Sam An was considered to have been "caught in the act" of committing the crime, as he refused to take down the series of posts, even after authorities had deemed them offensive. While, finally, we see that, with the typical procedural route to removing immunity blocked by a National Assembly that now has less than two-thirds CPP majority, a technical, legal solution was found in its stead. It should be noted, meanwhile, that a parallel case concerning CNRP MPs Tok Vanchan Pin Ratana was dropped by the Ministry of Justice, after the National Assembly's Standing Committee decided that their crime did not fall under the definition of *flagrante delicito*.[334] Occurring as it did in the midst of what was evidently a concerted campaign of "legal harassment" against the opposition, it would be disingenuous to suggest that this latter case represented a purposeful commitment to liberal legality. Nevertheless, it is possible to see the difference between the cases as indicative of the fact that constitutional meaning and procedure might maintain a semblance of normative power, despite also being tools for 'abusive constitutionalism.'

[334] Meas Sokchea, "Council tables decision on CNRP lawmakers' immunity, National, Phnom Penh Post", online: <http://www.phnompenhpost.com/national/council-tables-decision-cnrp-lawmakers-immunity>.

Outlawing the Opposition

Debate about the limits of Parliamentary Immunity and the meaning of the *flagrante delicito* exception re-emerged again after the arrest of the remaining leader of the CNRP, Kem Sokha, on suspicion of treason. While the above account of the history of the protection of parliamentary immunity in Cambodia since 1993 clearly demonstrates that this was not an entirely ground-breaking event in itself, it was unprecedented in a number of ways. Firstly, the severity of the crime for which Kem Sokha as arrested exceeds any of the crimes for which parliamentarians had been arrested in the post-UNTAC era. Secondly, its timing – coming so shortly after the CNRP had won a record number of seats for an opposition party in a local election, and less than a year before a national election – made the impact particularly dramatic in terms of the landscape of Cambodia's electoral politics. For media and civil society organisations both domestic and international, as well as for a number of donor countries who publicly expressed concern and later condemnation, the arrest was a flagrant violation of the rule of law and of Cambodia's already troubled democracy.

The arrest itself took place just days after a video from 2013 had resurfaced online, in which Kem Sokha spoke to a Cambodian diaspora community in Australia about his longstanding relationship with the United States, as well as the advice and assistance he had received from US officials and donor institutions in his campaign to oppose the ruling-party. Interpreting this, as well statements made to protestors during the aftermath of the 2013 elections, as proof of an ongoing plot to overthrow the government, police seized Kem Sokha in the early hours of 4th September 2017, with the MP's immunity being waived by the National Assembly – at the formal request of the Ministry of Justice – days later. Speaking to me in an interview at the time, a former legal advisor to the National Assembly and current spokesman for the CPP explained:

> "For Kem Sokha's case, it is also a *flagrante delicito* case, [because] he spoke in December 2013 in Australia about how he received orders from the United States. He arrogantly admitted that he is the person the US first

> trusted, and gave a job to. This action is continuing until today; it has not ended. It's *flagrante delicito*."[335]

Of course, questions about whether a video from almost three years prior could act as evidence of an ongoing crime were voiced by multiple human rights advocates and monitors.[336] However, the debate about Kem Sokha's immunity was quickly overshadowed once it became clear that the crime of which he was accused would soon provide the pretext for the government to entirely dissolve the Cambodian National Rescue Party, which it did after a single, day-long hearing on 16th November of the same year.

Equally, while the flaws in the procedural and evidentiary basis for the dissolution of the CNRP are undoubtedly worthy of further elaboration and study, what is interesting for the understanding of "abusive" constitutional practice in Cambodia is the extent to which this process was layered with trappings of legal legitimacy by the government, the CPP and its political allies. As noted above, law had been a means through which the ruling-party has asserted its hegemony in Cambodia, by convicting individual opposition politicians; however, the outright dissolution of an opposition party was an unprecedented step, which depended upon both legislative changes and an intensification of state-led rule-of-law discourse. As such, the CPP-dominated legislative branch drafted changes to the Law on Political Parties (and subsequent changes to the Law on Elected Members of the National Assembly) in February and June of 2017.[337] These amendments made the validity (and thus the registration) of political parties dependent upon them meeting a series of loosely defined conditions; including, most notably, that they not be led by or "conspire with a person convicted of felony or misdemeanor"; that they not "affect the security of the state" nor engage in "incitement that could break the national

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[335] Interview 43: CPP Spokesperson, September 6th 2017. Phnom Penh.

[336] Human Rights Council, *Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018* (UN HRC WGAD, 2018).

[337] Erin H & ley, "In the King's name: Party Law amendments now official | Phnom Penh Post", online: <https://www.phnompenhpost.com/national/kings-name-party-law-amendments-now-official>; Pang Vichea, "Party law changes clear Senate", (19 July 2017), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/party-law-changes-clear-senate>; Meas Sokchea, "Parties lambast legal changes | Phnom Penh Post", online: <https://www.phnompenhpost.com/national/parties-lambast-legal-changes>.

unity"; and that they remain independent of foreign influence or funding.[338] Finally, the failure to meet these provisions was made punishable by suspension or dissolution by the Supreme Court. The former provisions, especially those relating to convicted criminals, were called for explicitly and publically by Prime Minister Hun Sen beforehand, when on 2nd February 2017 he suggested that Cambodia adopt provisions from Article 68 of Thailand's already-defunct 2007 Constitution, stating:

> "I think we should follow Thailand. If one has committed a serious crime, the party must be dissolved so that one will not be so troublesome anymore."[339]

This provision, which was indeed enshrined into the Law on Political Parties later that month, led immediately to the resignation of the CNRP's co-president, Sam Rainsy, who had been convicted as an accomplice to Senator Hong Sok Hour's aforementioned crime of incitement and forgery. However, it is interesting that the call for legislative change was not only grounded in the suggestion that the opposition were "troublesome" but also in a comparative reference to constitutional law in Thailand, suggesting that techniques of "abusive constitutionalism" – just like their liberal counterparts – can be the focus of transnational "borrowing."[340] Similarly, this point draws additional attention to the fact that "abusive" constitutional practices in Cambodia often occur at the level of legislative change rather than constitutional change.

The changes to the Law on Political Parties were also justified at the time of their passage, and after, by multiple government institutions and spokespeople. However, far from drawing comparative examples from other nonliberal contexts, these frequently pointed to the existence of broadly similar laws in liberal democratic jurisdictions, as well

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[338] Law on Political Paries (Amended June 2017), Article 6 (new), clauses vii, iii, and v respectively. See "Analysis of Draft Legislation, OHCHR HUMAN RIGHTS ANALYSIS OF THE SECOND AMENDMENTS TO THE LAW ON POLITICAL PARTIES (JULY) | OHCHR," accessed July 29, 2019, http://cambodia.ohchr.org/en/law/analysis-draft-legislation; "OHCHR Has Released Its Human Rights Analysis of the Amended Law on Political Parties in Khmer | OHCHR," accessed July 29, 2019, https://cambodia.ohchr.org/en/news/ohchr-has-released-its-human-rights-analysis-amended-law-political-parties-khmer.

[339] Lay Samean & Ananth Baliga, "Hun Sen mulls rules to dissolve parties for individual's wrongdoing, National, Phnom Penh Post", online: <http://www.phnompenhpost.com/national/hun-sen-mulls-rules-dissolve-parties-individuals-wrongdoing>.

[340] Alan Watson, "Legal transplants and law reform" (1976) 92:JAN Law Q Rev 79.

as asserting an interest in upholding "rule of law." Upon passage of the draft law through the legislative branch, for example, the National Assembly and Senate released a joint-statement explaining that the law's intended aim was to ensure "the rights, obligation and responsibility of every political party to guarantee proper respect according the constitution and the law."[341] Meanwhile, after the passage of the law, the Ministry of Foreign Affairs argued for its validity, declaring that the law "aims to protect the liberal, multi-party democratic system, the constitutional monarchy, and Cambodia's sovereignty."[342] The justification, in this case, came in the form of a 10-page document, which was overtly aimed at an international audience (being published in English). [343] Arguments from that document also appeared in a series of videos that were circulated online, produced and published by the Press Office of Council of Ministers.[344]

That the white-paper, titled *To Tell The Truth*, was openly aimed at an international audience – as evidenced by the introduction, which accuses "foreign governments" of instigating a "disinformation campaign" against Cambodia – is hardly surprising, especially given that the document was put together by the Ministry of Foreign Affairs. What is interesting, however, is the extent to which the amendments to the Law on Political Parties were justified in comparative terms. Going beyond the Prime Minister's previous assertion that the law be based on Thailand's defunct 2007 Constitution, the white-paper made direct references to western legal systems. Namely, the document's authors cited: provisions in the Danish and Portuguese constitutions that prohibit the incitement of violence by political parties; restrictions on foreign funding in the United

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[341] Vichea, *supra* note 338.
[342] *Ministry of Foreign Affairs and International Cooperation, "To Tell The Truth" April 2017.*
[343] *Ibid*.
[344] Socheat Samreth, "Why H E Kem Sokha Was Arrested? | អង្គភាពព័ត៌មាន និងប្រតិកម្មរហ័ស", online: <http://pressocm.gov.kh/en/archives/38758>; Socheat Samreth, "Lessons from Color Revolution in Yugoslavia and Serbia which USA dictated KEM Sokha to implement in Cambodia have crossed the red line | អង្គភាពព័ត៌មាន និងប្រតិកម្មរហ័ស", online: <http://pressocm.gov.kh/en/archives/13000>; Socheat Samreth, "(In Khmer) Why CNRP was charged for dissolution? | អង្គភាពព័ត៌មាន និងប្រតិកម្មរហ័ស", online: <http://pressocm.gov.kh/en/archives/17361>; Socheat Samreth, "WHY CAMBODIA SUPREME COURT DECIDED TO DISSOLVE THE CAMBODIA NATIONAL RESCUE PARTY? | អង្គភាពព័ត៌មាន និងប្រតិកម្មរហ័ស", online: <http://pressocm.gov.kh/en/archives/18099>.

Kingdom, Singapore, Australia, and the Federal Election Campaign Laws of the United States; as well as the Venice Commission's 1999 *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*.[345] Meanwhile, on a regional level, comparisons were also made to Indonesia's laws on "electoral crimes," the ability of the Philippines' Commission on Elections to refuse registration to political parties, and Malaysian laws that allow for the dissolution of parties that compromise "security…, public order or morality." Such comparisons, as will be explained below, are deeply indicative of the "abusive" or "authoritarian" mode of constitutional practice in Cambodia. Specifically, by equating the formal text of the law with those of western democracies, the Ministry of Foreign Affairs is able to present a case for the legitimacy of the amendments to the Law on Political Parties that is based in the comparative analysis of formal law. However, it is ultimately at the level of implementation, either by the administrative or judicial organs of the state, that a law's authoritarian potential is manifested.[346]

Admittedly, the document was written well in advance of the legal proceedings that led to the dissolution of the CNRP, and the remainder of the document focuses on explaining the government's suspension of parliamentary immunity and defending its human rights record more generally. Nevertheless, the explanation of the amendments to the Law on Political Parties appear, particularly in hindsight, to be a pre-emptive attempt at outlining the legal basis for, and therefore justifying, the Supreme Court's decision to dissolve the CNRP later the same year. Though it would be easy to dismiss the government's attempts to place the legislative changes within a rule-of-law discourse through the use of international comparisons as the obfuscatory rhetoric of "sham" constitutionalism,[347] it is interesting to note the extent to which this discourse was also adopted by some of Cambodia's other, admittedly much smaller and more CPP-friendly, political parties.

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[345] "OHCHR | Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures", online: <https://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/CoEGuidelines2.aspx>.

[346] This point is equally true of the 2015 Law on Associations and Non-Governmental Organisations (LANGO), which was widely criticised by civil society organisations. See, for an explanation, Melissa Curley's explanation of how LANGO's reporting requirements in particular can be considered a threat to the future of civil society in Cambodia. Curley, *supra* note 279.

[347] David S Law & Mila Versteeg, "Sham Constitutions" (2013) 101 Calif Law Rev 863.

That the once widely-popular royalist opposition, FUNCINPEC, along with the Khmer Youth Party, were the parties to ultimately lodge a formal complaint against the CNRP with the Supreme Court goes some way to demonstrating this. However, the up-take of rule-of-law discourse by these parties was even more notable. When submitting their complaint to on 1st October 2017, for example, FUNCINPEC released a statement citing Articles 6, 7, and 44 of the newly amended Law on Political Parties, and requesting the Supreme Court to consider dissolving the CNRP "in accordance with [the] principle of rule of law."[348] It was ultimately in response to this request, which suggests that the ruling party's conception of rule of law may have been shared by other opposition parties that were in competition with the CNRP, that the Ministry of Interior ultimately filed a case with the Supreme Court.

Similarly, as they were in the process of being allocated the National Assembly seats vacated by the CNRP after the dissolution decision by the Supreme Court, a FUNCINPEC spokesman described the process as "very clean, legally speaking," noting that "you can accuse [that there is] only one party making the law, but it doesn't matter, the law is the law."[349] Likewise, other parties benefitting from the redistribution of National Assembly seats also deferred to a perceived legal obligation, as the Khmer Economic Development Party, for example, argued that "if we do not accept or boycott the distribution of those seats, it means we are not respecting the rule of law."[350] In both instances, we see the rule of law being understood not as a principle of equality before law, nor a state of non-arbitrariness in the drafting or implementation of law, but instead as an obligation or compulsion – imposed from above – to follow or obey the law. Though clearly a deviation from the meaning traditionally assigned to rule of law, this understanding is reminiscent of that described by Nick Cheesman; namely, in which rule of law discourse often elides with, comes to represent, the exigencies of law and order. As such, while bearing many of the hallmarks of what Randall Peerenboom and others have characterised as a "thin" rule of law, which entails merely a formalistic or even

[348] Pang Vichea, "More parties to accept seats", (18 October 2017), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/more-parties-accept-seats>.
[349] ibid.
[350] *Ibid*.

instrumentalist commitment to legal procedures, it may instead be helpful to understand Cambodia – like Myanmar and Singapore – in terms of competing "thick" versions of rule of law. Rather than dismissing the significance of constitutional contestation and rule of law discourses out of hand by using an idea of "thin" rule of law that does little to explain the forces that animate legal politics in Cambodia, in other words, it might be more insightful to consider recent developments in Cambodia as examples of "thick" authoritarian versions of rule of law or constitutional practice working to hollow out the "thick" version that appears to be imagined by the formal text of the Constitution.

As is typical of Supreme Court cases, and those of the lower courts in Cambodia, the 16th November 2017 decision to dissolve the CNRP, to ban 118 of its members from political activity, and ultimately to precipitate the removal of its elected officials from office, was not officially made public. Neither, in fact, were any of the documents presented to the court made available for public examination. As such, a detailed analysis of the decision, or the basis on which it was officially made by the Court, cannot be adequately or fairly provided in this thesis. As noted in the introductory section of this chapter, however, this limitation does not prevent an understanding of the significance of the decision from the perspective of public constitutional discourse. Most notably, for example, the day of the Supreme Court's decision also saw Prime Minister Hun Sen give an evening address to the nation, in which he called for calm in the wake of the CNRP's dissolution. Specifically, the Prime Minister appealed to the Cambodian people to:

> "participate in implementing the Supreme Court's decision to continue safeguarding peace, political stability, security, social order, and rule of law in Cambodia."[351]

The dissolution, he continued, had been decided "in conformity with the Constitution." As such, in what would be the first of many attempts to justify the Supreme Court's decision to international and domestic audiences, the Prime Minister paid explicit

[351] Socheat Samreth, "Message Samdech Techo Hun Sen on Decision of the Supreme Court to Dissolve the Cambodian National Rescue Party | អង្គភាពព័ត៌មាន និងប្រតិកម្មរហ័ស", online: <http://pressocm.gov.kh/en/archives/17820>.

deference both to the concept of rule of law and to the normative power of constitutional procedures, aligning both with the imperatives of stability and law and order.

Continuing in the same vein, meanwhile, the Ministry of Foreign Affairs released a second long-form English-language document, and accompanying video in Khmer in February 2018. The document, titled *Stability and Development First*, attempted to rebuff international criticism of the Supreme Court's decision at the same time as assert national ownership over the meaning and validity of constitutional principles and procedure. Describing the 1991 Paris Peace Accords, which first laid out the requirements for Cambodia's liberal-democratic system Cambodia, as an "imposition" written by "Western authors" who imagined a "pure and perfect democracy" in Cambodia, the document presents this vision as being at odds with "the gradual quest for improving the well-being of its citizens." While a full explication of this dichotomy is beyond the scope of this chapter, it is strikingly relevant that the obstacles to democracy were largely presented as cultural barriers. Most notably, Cambodia is presented as being ill-equipped for democracy due to the population's low levels of education and pervasive, society-wide disregard for law. With regard to the latter, the paper explains:

> "politicians from the opposition are unable to express their opposing views through democratic means; the common understanding of the 'rule of law' remains weak; the basic principles underlying law and order are largely ignored."[352]

The dissolution of the opposition, in other words, is directly and very intentionally aligned with the conflated imperatives of upholding public order and educating the public about the rule of law. In much the same way as Cheesman suggests that rule of law is widely but mistakenly seen as dependent upon (and therefore intertwined with) law and order, then, Cambodia's state-led discourse conflates liberal-democratic constitutionalism with a version of political stability that, at times, necessitates illiberal and anti-democratic practices.

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[352] Kingdom of Cambodia, Ministry of Foreign Affairs And International Cooperation, *CAMBODIA: Stability and Development First* (2018).

On the Pervasiveness of Authoritarian Constitutionalism

The association of rule of law and the Constitution with the exigencies of law and order, not to mention stability, meanwhile, is not confined to the thinking of Cambodia's political leadership. In many of my interviews, a variety of respondents made this connection quite explicitly, regardless of their relation to the government. A young trainee lawyer at a Phnom Penh law firm, for example, explained that "law plays an important role because when our country has law it creates order and stability,"[353] while a NGO worker and land rights advocate similarly asserted that "if we talk about the role of law, firstly it is to keep peace and order in society, this is the role of the Constitution."[354] This, of course, is not an uncommon role to be assigned to law, or even a Constitution, especially in a country that has so recently experienced civil conflict. However, this understanding and approach to constitutional law seems also to be the foundation for the more top-down approach to ensuring order and stability taken by the ruling party. When discussing the status of human rights in the country, for instance, one local Director of Women's Affairs in Kandal province argued that there had been significant progress towards civil and political freedom, before noting:

> "This is according to the Constitution. It is also written to give the country rule of law; obey the law, receive peace and security. We [Cambodian citizens] receive freedom if we obey the Constitution."[355]

This was preceded, in fact, by an explanation of Cambodia's two-decades of peace as a corollary of government policy, in which the respondent suggested the government had:

> "clearly gone on the right track, meaning they… control the stability of the political situation and the general situation from village level to national level."[356]

Hence, rather than understanding the Constitution as a check on government power, or as the foundation of formal public institutions through which conflicting views and interests can be addressed, there emerged from interviews – even with local level officials – a very

[353] Interview 7: Trainee Lawyer. 8th February 2017. Phnom Penh.
[354] Interview 19: Program manager of Land Rights and Legal Education NGO. 17th March 2017.
[355] Interview 30: District Director of Women's Affairs, Kandal Province. 30th April 2017.
[356] Ibid.

different impression of the Constitution, and law more generally. Namely, multiple interviewees appear to share a perspective on constitutionalism and law that views both as tools for the top-down enforcement or imposition of order and stability.

Again, returning to Cheesman's work on rule of law, then, it is possible to see state-level constitutional practice in Cambodia as creating rather than flattening hierarchy, and doing so on the basis of a facilitation and monopolisation of the coercive power by the state, rather than a limiting of that power. In other words, rather than ensuring that those in power are subject to the same limitations as citizens, and creating institutions through which political, social or economic conflicts can be expressed and resolved, Cambodia's Constitution appears to be understood – at least by the ruling party – as one which instead limits the actions of the governed by enhancing the state's ability to *impose* "stability" and "order." The "abusive" strain of constitutionalism in Cambodia, in other words, is referential to the ideology of law and order in that, in Cheesman's words, "it naturalizes a similar kind of order to *police*… one with an emphasis on exogenously imposed discipline."[357] Likewise, it is also enlightening to understand this phenomenon from the perspective offered by Sarah Biddulph in *The Stability Imperative*. There, Biddulph draws a distinction between Rigid and Resilient Stability: the former being based on a view of society as "inherently unstable and therefore in need of active state intervention," as opposed to the latter, which "sees stability as being based on norms of justice and equity, or at least mitigating injustices."[358] From this perspective, it is possible to see that the "imperative" underlying state-led constitutional practice in Cambodia is largely associated with the former: a view of society as inherently chaotic and unruly, requiring the top-down enforcement of "order" for it to function. On some level, of course, this understanding of society is unsurprising given Cambodia's tragic recent historical experiences of mass-killing and civil war.[359] In fact, the relative lack of public participation in the drafting of the Constitution was itself explained by many international participants in the country's 1993, UN-sponsored transition on the basis that a greater

[357] Cheesman, *supra* note 52 at 28.
[358] Biddulph, *supra* note 277 at 8.
[359] Chandler, *supra* note 17.

degree of public participation might have led to greater political instability.[360] At the same time, however, it is not inevitable that – in response to an opposition party that ultimately threatened the CPP's decades-old grip on power[361] – Cambodia's liberal, democratic Constitution has come to be understood as a guarantor of rigid stability characterised by law and order.

This strain of constitutional practice ultimately manifests itself, meanwhile, in what could be described as an inverting of the hierarchy of laws. While the Constitution remains largely untouched, despite significant shifts in the political and legal landscape, its normative meaning is shaped – or perhaps hollowed-out – in the everyday practice of the state. In particular, this is achieved through the drafting of vaguely worded legislation that allows significant room for administrative or judicial discretion. To some degree, it is also made possible by the fact that Cambodia's Constitution, like many others, provides only vague commitments to relatively ambiguous and malleable concepts. This, one legal expert suggested during interview, may even have been a purposeful strategy on the part of the ruling party, as he asserted that:

> "if you look at our Constitution: yes, a very democratic style. But the ones that drafted it are gone… They are gone but after that we can see that the ruling party is very clever because they change the constitutional concept by drafting legislation."[362]

This, the same respondent went on to suggest, means that constitutional practice is shaped by legislation and, at an everyday level, by executive sub-decrees, ministry-level *prakas* (circulars), and even public statements by the Prime Minister, that clarify the way that legislation is to be interpreted and implemented at an administrative or judicial level. "Even what the Prime Minister says can become the law," the expert explained, and "what he says about the Constitution even."[363] This trend in particular can be seen in the examples described above, as Prime Minister Hun Sen himself called for the arrest of specific MPs based on the concept of *flagrante delicito* overriding their parliamentary

[360] Marks, *supra* note 202.
[361] Un, *supra* note 46.
[362] Interview 18: Anonymous Legal Expert. 15th March, 2017. Phnom Penh.
[363] Interview 18: Anonymous Legal Expert. 15th March, 2017. Phnom Penh.

immunity, suggested that the Constitution allowed the dissolution of political parties, as in Thailand, and in fact predicted the dissolution of the CNRP. As such, it is through the otherwise routine procedures of government and public discourse that "abusive" or "authoritarian" constitutionalism is manifested in Cambodia. This process, in turn, allows for the Constitution itself to continue to appear relatively untouched (and to some extent untouchable), while its normative content is quietly eroded from within. Yet, this simultaneous veneration and erosion of Cambodia's Constitution also creates additional spaces in which opposition politicians, civil society activists and lawyers, as well as Buddhist monks and artists even, can nonetheless attempt to challenge the government.

Conclusion

Constitutional practice in Cambodia of course leaves a lot to be desired, from a normatively liberal democratic perspective. Nevertheless, Cambodia still offers a unique opportunity to develop academic understandings of how constitutions function, albeit in a nonliberal context. This is even more true given the fact that Cambodia's Constitution was written as part of a highly internationalised transition, in which liberal, multiparty democracy was made the ultimate goal. While constitutional amendments have undoubtedly helped the ruling Cambodian People's Party to consolidate its hegemony, by making legislative and judicial institutions more amenable to the influence of the executive, a focus on formal constitutional change (whether it be through reform or replacement) does not tell the entire story. Instead, the extent to which constitutional practice in Cambodia is 'abusive' can be more comprehensively understood when one takes into account the everyday practices of legislation, constitutional interpretation and administration. It is in these arenas that the vagaries of constitutional language are refined and decided, or alternatively where the normativity of constitutional provisions is neutralized, as the *de facto* inversion of the traditional hierarchy of laws enables the demands of rigid stability and law and order to become the operative paradigm for constitutional governance. However, this should not distract from the extent to which the tools of "abusive" constitutionalism are themselves contained within constitutional texts;

legislators and bureaucrats in Cambodia have not invented the norms of order and stability, but have in fact drawn them directly from the Constitution.

Likewise, as I have explained elsewhere in Chapter 3, looking at the rushed and far from participatory way in which the Constitution itself was written suggests that the prioritization of order and stability was normalized from the Constitution's birth in 1993. Written as the culmination of a heavily internationalised transition to liberal democracy, overseen by the United Nations Transitional Authority in Cambodia while civil war still raged in the country, public participation in the constitutional drafting process was seen as a risk to political stability.[364] This, in addition to the persistence of a view of society as inherently unruly and chaotic, a perspective that is grounded to some degree by Cambodia's recent history of violent conflict and mass killing, can be seen to lend itself to an approach to constitutionalism that is preoccupied with the maintenance of "law and order" and "rigid stability."[365] While certainly not the inevitable result of Cambodia's tragic history, this approach helps to explain the pervasiveness (and perhaps the persuasiveness to a domestic audience) of the government's appeals to the Constitution's frequent references to "public order" as an explanation for ostensibly authoritarian practices.[366] As such, what are normally somewhat overlooked limitations to constitutional rights and guarantees take on additional emphasis and meaning as the specific wording of the Cambodian Constitution is translated into practice. In this process of translation, then, ideas of rigid stability and law and order can be understood to exist as a hidden subscript for reading the Cambodian Constitution, or as a prism through which its meanings are refracted.

This chapter has demonstrated how constitutional provisions and procedures have been interpreted by the legislative and executive branches to facilitate and then legitimise a series of acts that, seen together, represent what many have described as a campaign of legal harassment against Cambodia's political opposition. While clearly undermining

[364] Marks, *supra* note 202.
[365] Cheesman, *supra* note 53; Biddulph, *supra* note 278.
[366] References to public order can be found in Article 43, 52 and 53, while a reference to law and order is found in Article 41, and a reference to social order is made in Article 42.

constitutional guarantees for democracy and rights to political participation, this campaign has nonetheless been conducted with a relatively consistent attention to constitutional procedure. This can be seen most clearly, for example, in the use of the *flagrante delicto* exception for the undermining of parliamentary immunity, or through the use of ordinary legislative amendments and Supreme Court decisions for the dissolution and criminalisation of the CNRP. More interestingly still, it has been conducted using the lexical tools provided by the Constitution, and with the protection rather than the destruction of legality – defined as rigid stability or law and order – as its central normative claim. In so doing, the ruling-party has attempted to "hollow out" the normative power that would otherwise be inherent to the wording of the Constitution. Creating a public discourse in which questionably constitutional – if not patently unconstitutional – acts are presented as the "enforcement" or even protection of the Constitution can be understood as an attempt to neutralize the document as a source of, or vehicle for, opposition politics and public critique. What is particularly notable, finally, is that even in the case of Cambodia's most high-profile court case in recent memory, an undoubtedly "megapolitical" case heard by the Supreme Court, much of the evidence and argumentation of the case were simultaneously presented to the public outside of the courtroom, by state and even non-state actors. Yet, as the following chapters will explore, this is far from uncommon in Cambodia. In fact, just as the Constitution is complicit in the foreclosure of certain spaces and vocabularies, so there continues to be a variety of ways in which the Constitution provides new spaces and vocabularies through which various groups within Cambodia can attempt to challenge the government.

Chapter 5 – Keeping the Spirit Alive? Beyond the Legal Complex in Advocacy for Constitutional Rights

> *"I don't want to be part of the system that only has role-play for a lawyer. As a professional, it hurts double because we cannot help the client and we are part of the system that doesn't help people. I don't know how we can change this system so the three powers are separate. Sometimes I want to leave because I think it will cause mental problems."*
>
> Anonymous NGO Lawyer, Phnom Penh[367]

Constitutional discourse has increasingly been co-opted by the ruling Cambodian People's Party (as demonstrated in Chapter 4). Yet, the Constitution continues to hold enormous rhetorical significance to those who seek to challenge illiberal or authoritarian practices in Cambodia. Often cited – by academics, politicians, analysts and many of my interviewees – as one of the few remaining positive legacies of the UNTAC experiment, Cambodia's civil society persist in drawing upon the Constitution in their advocacy work, supporting a small group of activist lawyers who insist on liberal interpretations of the document in court, albeit with little tangible success. As such, this chapter begins from a somewhat straightforward question: how and why is the Constitution still used to critique the state, often by the very same actors that publicly and privately dismiss the document's ineffectiveness? In exploring this apparent paradox, I will highlight how the Cambodian Constitution, and those of authoritarian regimes generally (as Tamir Moustafa has shown with courts in Egypt and elsewhere), can be seen as a "dual-use institution."[368] Despite being widely perceived as at best a mere "parchment barrier," or at worst a tool of the ruling-party, the Constitution also acts as a shield and a support for critiques of the regime by lawyers and non-governmental organisations (herein, NGOs), as well as the

[367] Interview 41: Anonymous Lawyer. 23rd August, 2017. Phnom Penh.
[368] Moustafa, *supra* note 15.

people for whom they advocate.[369] In a context where judicial activism is firmly (at times lethally) off-limits and constitutionally-grounded arguments hold little sway in court, then, these activist lawyers see their role not only as advocates for their clients but also as advocates for the Constitution, and law more generally.[370]

In the process of advocating for constitutional rights, activist lawyers have developed a symbiotic relationship with civil society partners. As the former make constitutional arguments with a reflexive awareness of the futility of this tactic, they do so also with the knowledge that their plight is being monitored and reported from the gallery (often in real-time[371]) to a wider, largely international, audience by the latter. While it is not out of the ordinary to see representatives of UN agencies and foreign embassies attend high-profile political cases at Cambodia's higher courts, the presence of "court monitors" from human rights NGOs – who later report their findings to foreign donors and in international fora – is a much more common, almost everyday sight in Cambodia. As such, understanding constitutional activism in Cambodia demands an understanding of the significance of this alliance between lawyers, civil society, journalists and (in some cases) judges, described elsewhere as the "legal complex"[372] or "judicial support network."[373] However, Cambodia's experience – and the testimonies of participants in this research – further demonstrate the limitations of this dynamic relationship, and the

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[369] The phrase "parchment barrier," now a term-of-art in constitutionalism literature, was first used by James Madison, when he asked "Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?" Alexander Hamilton, James Madison & John Jay, "Federalist No. 48" in Alexander Hamilton, James Madison & John Jay, eds, *Fed Pap* (New York: Palgrave Macmillan US, 2009) 107.

[370] The danger of even the most rudimentary form of judicial activism in Cambodia was underlined in 2003 by the assassination of Municipal Court Judge Sok Sethmony, who had presided over a series of high-profile cases. See "Senior Court Judge Murdered in Cambodia - 2003-04-23", online: *Voice Am* <https://www.voanews.com/archive/senior-court-judge-murdered-cambodia-2003-04-23>; Un, *supra* note 306; Catherine Morris, "Justice Inverted: Law and human rights in Cambodia" in (2016); West, *supra* note 303.

[371] Until recently, when security guards began confiscating phones from anyone wishing to attend a high-profile trial, prominent rights NGO, Licadho, operated a live-stream in which activists in the courtroom would transcribe or summarise key moments in a trial directly onto the organisation's website and social media.

[372] Terence C Halliday & Lucien Karpik, eds, *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*, Oxford Socio-Legal Studies (Oxford, New York: Oxford University Press, 1998); Halliday, Karpik, & Feeley, *supra* note 87; Karpik & Halliday, *supra* note 87.

[373] Moustafa, *supra* note 15.

ease with which it can be hamstrung by the state; particularly in a context where judicial independence, and popular understandings of liberal legality, are limited.

Beginning with a brief comparison of existing literature on Cambodia's judicial system and those of other authoritarian regimes, this chapter explores the multi-layered ways in which Cambodia's legal complex has advocated for basic constitutional rights, both inside and outside of the courtroom. After explaining the futility with which constitutionally-grounded legal arguments are viewed, I attempt to reiterate why it is that activist lawyers persist with this approach. In doing so, it is possible to see how – for Cambodia's judicial support network – the Constitution is at once a support to those who experience injustice, a shield for those who advocate for them, and a standard against which NGOs can hold the state accountable on a local and global stage. This is followed by an investigation of how those same networks also work outside of the courtroom, and are increasingly focused on what was previously considered a by-product of case-based activism: namely, the raising of constitutional awareness and empowerment. Though still primarily reactive, focusing primarily on those communities or individuals that are involved in struggles for constitutional rights, this 'demand-side' advocacy work has bolstered grassroots demand for constitutionalism, but might also be understood as channelling dissent down already foreclosed or co-opted avenues. Finally, this chapter closes with a reminder of the legal and non-legal constraints under which judicial support networks operate in Cambodia. Doing so means recognising how the ruling-party has hobbled lawyers' attempts at activism by 'packing' the Bar Association, using the Bar's internal regulations to silence outspoken members and sever formal ties between lawyers and NGOs, as well as legally restricting the space for NGOs. Ultimately, this account will explain how traditional legal activism is still pursued, despite its limitations, while also paving the way for understanding why and how constitutional discourse in Cambodia largely operates outside of judicial institutions.

Cambodia's Courts in Context

Having received little scholarly attention until the turn of the 21st century, the role of courts in authoritarian regimes has become the subject of an increasingly nuanced body of literature. Pioneering this trend, Tamir Moustafa[374] and Tom Ginsburg[375] have helped to elaborate the diverse roles that judicial institutions can and do play in illiberal or undemocratic contexts. These roles include: the exercise of social control, the enhancement of regime legitimacy, ensuring the discipline of administrative apparatus, protecting elite cohesion, attracting increased economic investment from abroad, and implementing controversial economic reforms. However, regardless of which specific function (or functions) judicial institutions play in any one context, Moustafa and Ginburg suggest that their functioning under authoritarian conditions is almost invariably interesting, as courts "provide a useful lens through which to examine a variety of political dynamics in an environment that is otherwise distinguished by a lack of transparency."[376] As this chapter will demonstrate, this is equally true in Cambodia. Despite a relative lack of transparency in terms of the 'paper trail' left by judicial processes,[377] the conduct of trials is typically open to the public, and high-profile cases are thus well-documented by the local journalists and NGOs who frequently attend them. As such, even if we see courts in Cambodia operating "as mere pawns of their rulers," the government's commitment to pursue judicial avenues for the exercise of social control, combined with the need to allow some minimal level of contestation in the process, means that trials in Cambodia "also have the potential to open a space for activists to mobilize against the state."[378] This chapter will elaborate on this dynamic, pointing out the ways in which judicial support networks in Cambodia make use of this "space," at the same time as recognising that they are unlikely to succeed.

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[374] *Ibid*.
[375] Ginsburg & Moustafa, *supra* note 93.
[376] *Ibid*.
[377] This is noted by Ginsburg and Moustafa, but is also integral to Cheesman's ground-breaking account of Myanmar's judicial politics. However, it is important to note that Cambodia's courts rarely, if even, publish their decisions or make court files available to the public. See Cheesman, *supra* note 52.
[378] Moustafa, *supra* note 15.

As noted in Chapter 3, Cambodia's Constitution was inherited in 1993 by a judiciary that had not undergone any notable change from that which existed under the dogmatically socialist Peoples' Republic of Kampuchea of the 1980s. The smattering of academic studies of Cambodia's judiciary that have been conducted since describe a chronically underfunded, corrupt, patrimonial and politically pliant institution.[379] As authors such as Un Kheang and Catherine Morris have noted, a study at the turn of the century found that 40% of Cambodia's judges had no formal legal qualifications whatsoever, while the Ministry of Justice still received only 0.1% of the national budget by 2007, with judges salaries averaging around USD $24 per month.[380] Though this state of affairs clearly reflects the tragic circumstances of Cambodia's history, it also speaks to the relatively low esteem with which the judiciary has been held. As Un explains, this has ensured that Cambodia's courts remain "embedded in neopatrimonial structures in which an overarching system of patronage coexists with formal state institutions."[381] This, combined with the fact that judicial appointments have remained under the de facto control of the executive, means that Cambodia's courts are "highly subservient to the executive power and responsive to the interests of the ruling elite."[382] As a result, judicial institutions continue to rank as the "least trustworthy" for the vast majority of the Cambodian public.[383] Though the Royal Government of Cambodia has indeed embarked upon a public – and widely criticised[384] – program of judicial reform, outcomes so far have largely been understood as regressive. The 2014 amendment to the Three Fundamental Laws on the Judiciary, for example, appears to further enshrine executive influence over the judiciary, rather than reduce it.[385] As Un had noted much earlier,

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[379] Un, *supra* note 306; Morris, *supra* note 372.
[380] Un, *supra* note 306; Morris, *supra* note 372.
[381] Un, *supra* note 40.
[382] *Ibid*.
[383] "Judiciary the weakest link in Cambodia's Integrity System | Space for Transparency", online: <http://blog.transparency.org/2014/09/29/judiciary-the-weakest-link-in-cambodias-integrity-system/>.
[384] "Report: Human Rights in Cambodia: The Charade of Justice 2007", online: *LICADHO* <http://www.licadho-cambodia.org/reports.php?perm=113>.
[385] Official versions of the law are not available, and a lack of transparency was one of the characteristics of the drafting process. For unofficial translations, see *Law on the Status of Judges and Prosecutors*, Ministry of Justice (Unofficial Translation), NS/RKM/0714/016 [*Law on the Status of Judges and Prosecutors*]; Cambodian Centre for Human Rights (CCHR), *Draft Law on the Organization of the Courts (Unofficial Translation)*; *Draft Law on the Organization anf Functioning of the Supreme Council of the Magistracy (Unofficial translation)*; Human Rights Watch | 350 Fifth Avenue, 34th Floor | New York & NY 10118-3299 USA | t 12122904700, "Cambodia: Withdraw Fundamentally Flawed Judiciary Laws", (3 May 2014),

genuine judicial reform remains unlikely in Cambodia, given that an independent judiciary would potentially "compromise the concentration of power in elite hands."[386]

In such an environment, it is hardly surprising that judges in Cambodia are unlikely to be responsive to causes based on legal argumentation alone, let alone to cases depending on constitutional rights. It is, at least in part, because of this that advocacy for liberal constitutionalism in Cambodia takes place largely outside of judicial institutions, of course. However, it is notable that courts in Cambodia do nevertheless provide spaces for such advocacy – even if they do not provide much hope for success – and that, to the extent that it is available, a small group of lawyers persist in making use of this space. Acknowledging that the group of lawyers who take this approach is a relatively small one, studying their work and that of their allies in Cambodia's judicial support networks means taking a socio-legal approach that requires a recognition that constitutional rights provisions might have a meaning or life outside of that which is given (or denied) to them by judicial decisions. Such a recognition, Lynette Chua suggests, involves first "[s]hifting the debate from questioning the efficacy of rights to examining *how* rights matter."[387] Rather than concluding that – because they are not considered to be effectively protected by judicial institutions in the country – the practice of defending constitutional rights in Cambodia is not an interesting avenue of inquiry, in other words, this this chapter starts from an assumption that these constitutional guarantees do still matter, and seeks to explain how, when, and why. Rather than assuming that victory *in the courtroom* is the only possible result to which such lawyering can or should aim, then, this chapter suggests that there are multiple other, less tangible benefits that are sought through constitutional advocacy in Cambodia.[388]

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online: *Hum Rights Watch* <https://www.hrw.org/news/2014/05/03/cambodia-withdraw-fundamentally-flawed-judiciary-laws>.

[386] Un, *supra* note 306.

[387] Chua, *supra* note 50.

[388] Jothie Rajah and Arun Thiruvengadam, for example, have noted that the act of cause lawyering "assumes that 'the law' is amenable to delivering tangible results," but does not necessarily specify or place limits upon what those results might be. Jothie Rajah & Arun K Thiruvengadam, "Of Absences, Masks, and Exceptions: Cause Lawyering in Singapore" (2013) 31 Wis Int Law J 646.

Understanding the extent of these benefits requires that we view Cambodia's courtroom battles over constitutional rights in a broader perspective, which places courtroom contests in the context of a larger – often extra-judicial – struggle for constitutionalism. Such an approach, of course, is informed by the extensive sociological and socio-legal literature that has evolved in recent decades, focusing on the interplay between law and social movements, which suggests that courtroom battles are only one among many elements in movements seeking to bring about legal and social change.[389] That such lessons have been drawn from established democracies as well as less liberal contexts, meanwhile, is indicative of the relative universality of the constitutional practices discussed here, with reference to Cambodia. However, the examples in this chapter also highlight interesting distinctions, as the work of Cambodian activists and lawyers discussed here appears to be particularly focused upon international audiences, thus reflecting one of the unique characteristics of constitutionalism in Cambodia. Similarly, rather than seeking specific (but admittedly significant) legal reforms, such as those discussed by Charles Epp, extrajudicial activism in Cambodia appears to be part of a movement with far broader, more systematic and perhaps less easily defined aims.[390] Specifically, these aims include the protection of a whole plethora of human rights, the upholding of rule of law, the protection of judicial independence, the implementation free and fair elections, and even – some might argue – regime change.

Defending Rights, Advocating for Constitutionalism

The lawyers whose practice is described in this section consist of a mixture between what Karpik, Halliday and Feeley describe as "cause lawyers" and "political lawyers."[391] Some of those who participated in this research would fit into – or explicitly identify with – the former category, in that they actively seek-out opportunities to pursue social or political change through litigation, largely against the government. These lawyers largely

[389] The literature on social movements, law and social change is far too vast to survey here. However, the most prominent work in this field to date – and which highlights the importance of broader advocacy beyond courtrooms – is the study of rights litigation in the United States, Britain, Canada, and India by Charles Epp. See Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (W. Ross MacDonald School Resource Services Library, 2008).
[390] *Ibid*.
[391] Halliday, Karpik, & Feeley, *supra* note 87.

represent impoverished communities who have been affected by land expropriation or environmentally destructive development projects. In these instances, as the innumerable accounts of forced-evictions in Cambodia show,[392] land that is already legally occupied by these communities is sold or leased by the state to private companies (many of whom have connections to the ruling party). While legal challenges are often only one among many tactics used to seek redress – with dispossessed communities also travelling to Phnom Penh to petition authorities for greater protection or adequate compensation – those who do challenge the state in court generally base their cases on the right to ownership of private or collective property (Article 44i) and constitutional guarantee of "fair and just compensation" (Article 44iii) in the event of confiscation.[393] Meanwhile, the second group, those acting as "political lawyers" in the terms provided by Karpik, Halliday and Feeley, tend to work primarily on defending activists, journalists or opposition politicians in criminal trials. They typically deploy constitutional rights to freedom of association (Article 42), expression, or assembly (both Article 41), in response to charges for defamation, incitement, or the disturbance of public order; although they occasionally pursue cases against law enforcement or military personnel for intentional violence against protestors or activists. However, for the purposes of this enquiry, the experiences of both groups are seen more-or-less interchangeably, as they are similarly indicative of how court-room advocacy for constitutional rights plays into broader dynamics of activism for liberal constitutionalism.

Both "cause lawyers" and "political lawyers," for a start, appeared in interviews to be equally aware of the lack of independence that pervades Cambodia's judiciary. This was described as the main inhibiting factor to success in their work, as attempts to persuade judges that were couched in legal argumentation usually ran up against entrenched political interests. One cause lawyer whose firm specialised in environmental litigation, for example, explained:

> "nowadays, the judges themselves… it's like the judge has no freedom to decide. It is signed with a red pen from above, if they don't follow them,

[392] Simon Springer, "Illegal Evictions? Overwriting Possession and Orality with Law's Violence in Cambodia: Overwriting Possession and Orality in Cambodia" (2012) J Agrar Change.
[393] Cambodian Constitution, Article 44(i) and 44(iii).

> their whole family can die, in relation to that. That problem is an important problem. If there is still a power above the people that judge, the specialist, it [controversial litigation] cannot go forward."[394]

While the suggestion that one's "whole family can die" may seem extreme, it is not all that much of an exaggeration. As scholars of Cambodia's judicial politics in recent years have noted, and as the above-quoted participant no doubt was aware, the murder of a Phnom Penh Municipal Court Judge continues to haunt Cambodia's judiciary.[395] Having publicly refused then-Phnom Penh Chief of Police Heng Pov's request to overturn a verdict, and explicitly opposed the interference of the police in multiple trials over which he presided, Judge Sok Sethamony was shot dead on his way to work on 23rd April, 2003. While Heng Pov was later jailed for the killing, the assassination had a clear 'chilling effect' on judicial independence that appears to live-on in the "social memory"[396] of Cambodia's judges. Hence, from the perspective of the anonymous cause lawyer quoted above, this "social memory" continues to limit the extent to which lawyers are able to successfully pursue justice through constitutionally-grounded litigation.

This sentiment was echoed, albeit somewhat differently, by one prominent activist lawyer. Having spent more than a decade defending activists, NGO staffers, protesters and opposition politicians in court, the lawyer was quick to explain that he believed the outcome in the majority of his high-profile cases were decided not in the courtroom, but in the office of the Prime Minister. As such:

> "if Hun Sen says something this morning it will happen immediately. In relation to the political cases that I have handled…we almost never win. If it is political [we never win], except when they negotiate then there will be a release or a win. But if there is no negotiation, no matter the procedure or technique we use… the judge will not listen. They only listen to their boss."[397]

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[394] Interview 1: Anonymous Lawyer. 24th December, 2016. Phnom Penh.
[395] Un, *supra* note 306; Morris, *supra* note 372.
[396] Rajah & Thiruvengadam, *supra* note 390.
[397] Interview 25: Anonymous Lawyer. 20th April, 2017. Phnom Penh.

As a lawyer who almost exclusively takes on high-profile political cases, and who at the time of interview was defending the exiled opposition leader Sam Rainsy on three separate charges, this activist lawyer's testimony clearly suggests that courtroom victories were possible only through extrajudicial political manoeuvring. Though inherently very difficult to prove, this is relatively commonly held belief among lawyers and rights advocates, with multiple participants pointing to the courtroom developments that surrounded the June 2014 rapprochement between the ruling party and the CNRP. At that time, a series of not-guilty verdicts and bail releases were handed down in cases against opposition-party activists or labour rights protestors, just as the CNRP agreed to end its year-long post-election boycott of the National Assembly and entered a 'culture of dialogue' with the ruling party. Equally, as the 'culture of dialogue' broke down less than a year later, some of those who had been released on bail in the previous 12-months were promptly found guilty of "insurrection."[398] For many respondents, these events reaffirmed their assessment that politics, not legality, formed the basis of court decisions.

Under such circumstances, of course, it is hardly surprising that most lawyers I interviewed felt that constitutionally-grounded arguments carry little sway in court. However, what activist lawyers perceive as the Constitution's limited influence in these cases appears to go beyond mere political expedience, pointing to issues of authoritarian constitutionalism discussed in Chapter 4. In fact, on a micro-level, the plight of constitutional language in the courtroom appears – in the experience of activist lawyers – to be exacerbated by the inversion of the hierarchy of laws. The primacy of political expedience, in other words, is further facilitated by a general approach to law that allows for constitutional principles to be undermined by legislation and administrative action. As one NGO lawyer, who also specialises in high-profile rights-related cases, explained:

> "For lawyers, it is difficult to defend a client using the Constitution without a specific law. When we bring up Articles from the Constitution, the judge will say 'it is only a principle and how can you defend your

[398] "Jailings Test the 'Culture of Dialogue'", (21 July 2015), online: *Khmer Times* <https://www.khmertimeskh.com/news/13553/jailings-test-the----culture-of-dialogue---/>.

> client with this?' In practice, the Constitution says 'A' and the law says 'B, with 1, 2, 3, 4, 5.'"[399]

Hence, putting aside the possibility of direct political pressure deciding the outcome in any one particular case, this lawyer's testimony suggested that judges are typically unreceptive to constitutional argument unless a particular right had been operationalised and elaborated in law. In case the above statement was not clear enough, this participant went on to explain that they had "never had a successful use of the Constitution" and later that "[s]ometimes the judge laughs and says 'why do you use the Constitution? It's just a guide!'"[400] Hence, as a further example of the inversion of the hierarchy of laws that I argue is characteristic of authoritarian constitutionalism in Cambodia, this lawyer's experience (like those of many other activist lawyers with whom I spoke) suggests that constitutional arguments – especially ones that pose a problem for the state, such as those based in constitutional rights – are often and easily superseded by ordinary legislation.

In spite of the judiciary's general lack of receptiveness to constitutional arguments, the lawyers I spoke to still persisted in using the Constitution as a crux of their arguments, whether that be in cause-litigation or criminal defence. One of the key reasons cited for this was that while Constitutional guarantees may not have offered much protection their clients, the lawyers themselves felt that those very same guarantees at least made it possible to offer some critique or resistance against the state in a relatively public forum. As the above-quoted NGO lawyer continued, in response to a question about how they use the Constitution in court:

> "Because my clients are human rights activists, land activists and political parties, most [of my cases] are related to politics, but we try to keep it technical. And when we talk in court, we only keep it technical. … If I say it like this [as politics] I might get into trouble. … In the court I can say anything but outside I might get risk [be in danger] even if it [what I said] is just the same."[401]

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[399] Interview 41: Anonymous Lawyer. 23rd August, 2017. Phnom Penh.
[400] Interview 41: Anonymous Lawyer. 23rd August, 2017. Phnom Penh.
[401] Interview 41: Anonymous Lawyer. 23rd August, 2017. Phnom Penh.

Here, we see the possibility of speaking "technically" and drawing upon the specific language of law as offering a kind of shield for lawyers, allowing them to speak relatively openly and frankly about some of the more abusive actions of the government. As the participant also notes, this is not something that extends to all Cambodians, or even necessarily to lawyers once they leave the courtroom. Hence, it is possible to understand courts in Cambodia as offering a kind of safe-space for dissenting ideas (paradoxically, even while dissidents themselves are on trial), and to understand the Constitution as offering a kind of protected language with which to offer those ideas.

This idea has, in fact, been articulated by Karpik and Halliday, who talk about the important role of lawyers in the struggle for political liberalism being grounded in the fact that they are uniquely positioned to "claim to be the spokespersons of an abstract entity called the public" due to their ability to "speak… abstractly [and publicly] about rights."[402] Though easy to romanticise, this is of course inherently problematic for activists, as it potentially reflects an additional stratification, in which those with a legal education and title are empowered to speak for others, by virtue of having learned a technical language and risen to a social status that means that the state considers what they say to be more (if not always entirely) acceptable by comparison to those they represent. Further, as critics of rights discourse have often highlighted in other contexts, the relative safety of making constitutional arguments on behalf of others also channels dissent into less fundamentally critical avenues.[403] Lawyers representing dispossessed and landless communities speak publicly about the state's violation of property rights, the right to housing, and the failure to give adequate compensation, for example, while their clients often rail against rampant corruption, inequality and abuse of power, hinting towards the idea of the Cambodian state as a kleptocracy. As such, while lawyers undoubtedly put forward some stinging courtroom critiques of the state's failings, they rarely pierce the surface of what others – often including their own clients, not to mention

[402] Karpik & Halliday, *supra* note 87.
[403] Mark Fathi Massoud, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan* (Cambridge University Press, 2013) at 206.

many academics[404] and civil society activists[405] – believe are the most serious or fundamental flaws of the state.

Beyond "Role Play": The Motivations of Activist Lawyers in Cambodia

The fact that many of the lawyers I interviewed spoke so passionately about the futility of their work in court – whether it be pursuing constitutional litigation or presenting a constitutionally-grounded defence – raises the question of why they persist. While some of the reasons offered for this were predictable, others were not so. The first, most common and perhaps most prosaic reason was, of course, a sense of duty to their client. However, according to one activist lawyer, many clients raise doubts about the utility of presenting a legal defence. "Even the client think like this, the client or other lawyer say the lawyer [himself] will never win," one activist lawyer explained in response to this question, when it was put to him directly.[406] In this instance, other less tangible motivations take over, as the lawyer explained that "we want to encourage the implementation of law."[407] Hence, we see that a sense of duty to the legal profession, and to legality more generally, lead lawyers to continue with their courtroom struggles, in spite of their sense of hopelessness. Presenting constitutional arguments, then, is important to these activist lawyers because – theoretically and normatively – it *should* make a difference in court, rather than because it actually does so in practice.

This is a similar story to that which is told in relation to lawyering in Myanmar by Nick Cheesman and Kyaw Min San, who argue that "in authoritarian settings" we find that "the starting point for cause lawyering lies in advocacy for law itself, in advocating for the regular application of law's rules."[408] This, the authors explain, is both out of a sense of duty, but also out of a belief that they are contributing to a wider and more long-term struggle not just for their clients, but for the plight of the rule of law generally. For the

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[404] Simon Springer, "Articulated Neoliberalism: The Specificity of Patronage, Kleptocracy, and Violence in Cambodia's Neoliberalization" (2011) 43:11 Environ Plan Econ Space 2554; Springer, *supra* note 34.
[405] "Hostile Takeover", online: *Glob Witn* <https://www.globalwitness.org/en/reports/hostile-takeover/>.
[406] Interview 25: Anonymous Lawyer. 20th April, 2017. Phnom Penh.
[407] Interview 25: Anonymous Lawyer. 20th April, 2017. Phnom Penh.
[408] Nick Cheesman & Kyaw Min San, "Not Just Defending; Advocating for Law in Myanmar" (2013) 31 Wis Intl LJ 702.

lawyer quoted above, meanwhile, the presentation of a constitutionally-grounded defence was important not because such arguments *would* be decisive, but because they *should* be. Further, the lawyer explained, highlighting the fact that such constitutionally-grounded arguments were not decisive might help to create demand for the systematic change that they believe was necessary before such arguments *could* be treated as such.

More interesting and unique, perhaps, is the fact that the above-quoted lawyer, and others I interviewed, situated their defence of law beyond the immediate context of the courtroom. Presenting legal – and especially constitutional – arguments in cases that they knew they were unlikely to win, several lawyers I spoke to suggested, was not necessarily designed to make an immediate impact on the case itself. Instead, those same lawyers explained, the presentation of constitutional arguments was designed to play to a national and international audience who would either be present in the courtroom or observing from a distance. Here, it is interesting to follow his testimony at length:

> "[If] I see that the case that is related to politics or human right activists … we will see a lot of national and international organizations, especially donors and embassies; they always follow and observe the decision of the court. But if in that case we don't have a lawyer and the accused do not show up, the national and international community won't be able to see the implementation of law in Cambodia, by the Cambodian court. We do this to show that: 'if the client is innocent, why does the judge say they are guilty? It is the mistake of the judicial system, and the judge, because they are not independent.' We want the donors, embassies and the international community to apply pressure. Why? Because when they put pressure on the government… the government will put pressure on the court."[409]

Unpacking this statement, it becomes evident that lawyers in this position see themselves as playing a small role in a much wider network of national mobilisations and transnational power dynamics, as part of a much longer-term and further-reaching campaign for fundamental, structural reform of the state in Cambodia. Understanding this requires first understanding that Cambodia's higher courts, unlike those in many other

[409] Interview 25: Anonymous Lawyer. 20th April, 2017. Phnom Penh.

authoritarian regimes, are often monitored by multiple national and international NGOs and journalists. Even when representatives of "the international community" are not present in the courtroom, those NGOs (many of whom are funded by international donors and embassies) typically report the details of high-profile trials, both publicly and also privately, to many of those same actors. In the process, NGO trial-monitors outline to an international audience the extent to which the court respected constitutional rights to a fair trial, the nature and respective quality of evidence, the legal basis of arguments presented, and the legal basis (or lack thereof) for the court's final decision.

Given the fact that the paper-trail provided by judicial institutions in Cambodia is scant, trial monitoring of this sort offers international stakeholders a window into the inner workings of constitutional struggles in Cambodia, in lieu of more formal transparency mechanisms. In many ways, and as the above quote from an anonymous lawyer implies, this approach does indeed have a domestic dimension. As will be discussed later in this chapter, courtroom struggles over constitutional rights and processes, however futile, have fed into grassroots activism, as they have been used to raise awareness about legal and constitutional rights, and to expose instances in which the government has been seen to violate the constitution. As such, the contestation and reporting of these cases has been used to enhance grassroots demands for constitutionalism *within* Cambodia. At the same time, however, the testimony also highlights the extent to which activists and lawyers "skip over" domestic audiences, in the pursuit of support for their cases from more influential, international actors. As the remainder of this section will demonstrate, this strategy has produced some notable victories for rights advocates, but it is far from a tale of successful activism for constitutional, political or social change.

Nevertheless, conversations with NGO trial-monitors themselves reveals a degree of ambivalence about the effectiveness and viability of the practice. The difficulties described by monitors and NGOs who attempted to monitor the Supreme Court hearing in which the opposition CNRP was dissolved in November 2017, for example, suggests that access to the courtroom is increasingly seen less as right for those who wish to attend and more as an indulgence on behalf of the authorities. Many local NGO representatives

and journalists, in fact, were allowed through the lines of police and military barricades only with the assistance of an escort from the U.N. Office of the High Commissioner for Human Rights (UNOHCHR). More generally, meanwhile, overt successes for this type of work are few and far between, one local trial-monitor explained.

> "I don't think it changes much. The outcome is the same, at least. The main difference is that the court treats the defendant better. If we are not there, maybe the court will not respect their fair trial rights. Sometimes I have seen judges shout at the defendant. They have to be nicer. But I don't think we can affect the decision of the court."[410]

This pessimistic view is hardly surprising, of course, given the commonly-held understanding that the judges themselves have little room for discretion in the kind of high-profile, politically-sensitive cases that this monitor typically attended. However, after explaining that their work was split between trial-monitoring and advocacy, they went on to reassert the important contribution that monitoring plays in wider campaign-work. "If we monitor the case, we know more than anyone else," the monitor-advocate explained.[411] While successes were limited in number they – and similarly placed NGO activists – were able to point to specific cases, such as the release of 13 land rights activists from the Boeung Kak community in Phnom Penh, or the more recent release of human rights defenders from another NGO, known as the ADHOC 5, in which their campaign work appeared to have elicited a more leniency from the courts.[412] Yet, these

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[410] Interview 9: Anonymous Civil Society Activist. 10th February, 2017. Phnom Penh.

[411] Interview 9: Anonymous Civil Society Activist. 10th February, 2017. Phnom Penh.

[412] In the 2012, for example, a Court of Appeal decision reduced the sentences of 13 land activists from the Boeung Kak community to time served. Meanwhile, the case of 23 activists and trade union members released from prison in 2014 saw the Supreme Court commute sentences previously upheld by the Court of Appeal, instead issuing suspended sentences. Likewise, a Phnom Penh Municipal Court decision of September 2018 saw the release of the ADHOC 5, as they were handed 5 year sentences, of which their 14 months in pre-trial detention was considered time served and the remaining duration was suspended. See, for example, Shane Worrell & Khouth Sophak Chakrya, "'Boeung Kak 13' to be released | Phnom Penh Post", online: <https://www.phnompenhpost.com/national/boeung-kak-13-be-released>; "The Boeung Kak 13", *The Economist* (27 June 2012), online: <https://www.economist.com/banyan/2012/06/27/the-boeung-kak-13>; Will Jackson & Shaun Turton, "Clinton notified of Boeung Kak release, emails show | Phnom Penh Post", online: <https://www.phnompenhpost.com/national/clinton-notified-boeung-kak-release-emails-show>; Buth Reaksmey Kongkea, Shane Worrell & Daniel Pye, "High-profile cases stick to a script | Phnom Penh Post", online: <https://www.phnompenhpost.com/national/high-profile-cases-stick-script>; Human Rights Watch | 350 Fifth Avenue, 34th Floor | New York & NY 10118-3299 USA | t 12122904700, "Cambodia: Supreme Court Keeps Activist Jailed", (29 March 2013), online: *Hum Rights Watch* <https://www.hrw.org/news/2013/03/29/cambodia-supreme-court-keeps-activist-jailed>; Niem Chheng,

successes required extensive lobbying not just of the government, but also of international actors.

As the above testimonies from an activist lawyer and the anonymous trial monitor demonstrate, then, using the courtroom as a stage upon which to play-out the systemic problems of Cambodia's judiciary for the sake of local advocacy organisations and international community is not an end in itself. Rather than simply amplifying the inconsistencies of the state's use of legality, and thus undermining the very sense of legitimacy that the turn to law is designed to create (see Chapter 4), this perspective suggests that lawyers are also hoping to contribute to international pressure on the government. This, in turn, is seen as a long-term strategy through which activist lawyers can improve the overall environment in which they work: creating additional deterrents that may prevent the state from prosecuting fellow activists on the one hand, and convincing international allies to exert more concerted pressure for judicial reform on the other. Though such an approach may not be entirely unique, it is a telling reflection of the macro-level power dynamics at play in post-UNTAC Cambodia. Specifically, in a country that has widely been understood as aid-dependent for the past two-and-a-half decades,[413] exerting pressure through international actors – and especially investors, or key donor countries and institutions – has long been considered the most effective advocacy strategy for rights activists.

Hence, along with the country's commitments under international law and the Paris Peace Accords, activists and lawyers have used the government's ostensibly domestic commitments – especially those written into the Constitution – to hold the Cambodian state to account on an international stage, in the hope that this will eventually bring tangible rewards on a local and national level. The relative success of such an internationally-oriented approach in short-term and very specific instances, meanwhile, was also confirmed in a number of interviews. This included when an NGO lawyer asserted that:

"'Adhoc 5' free despite being sentenced to five years in jail | Phnom Penh Post", online: <https://www.phnompenhpost.com/national/adhoc-5-free-despite-being-sentenced-five-years-jail>.

[413] Ear, *supra* note 32; Ear, *supra* note 32; Ear, *supra* note 32.

> "in many cases that they do it like this, the people at the Embassy personally talk with [activists, civil society and defendants]. Like the 23 trade unionists [on trial in 2013-14], who were released after 5 months. It was because the [international fashion] brands said something. Also, I heard that Hillary Clinton got the release for the Boeung Kak [a high-profile land dispute] people too."[414]

In these instances, then, it seems that international fashion brands that source many of their products from Cambodia-based factories, and a visiting U.S. Secretary of State, have been engaged directly by Cambodian activists and, ultimately, have been more successful in securing immediate successes than local mobilisations and courtroom contestations might have been. As such, those campaigning for constitutionalism in Cambodia can be understood to frequently skip over any available domestic audience for their activism, focusing instead on international audiences, in recognition of the fact that the latter have proven more powerful vis-à-vis the Cambodian government.

Aside from this contribution to international advocacy for broader, systematic change in Cambodia, the NGO lawyer quoted above repeatedly stressed the significance of their relationships to each client and their family. While this is a somewhat common aspect of lawyering in any context, the support role provided by activist lawyers in Cambodia has a deeper dimension, based on the fact that many of the activists who find themselves facing prosecution do not have extensive education or experience with Cambodia's institutional politics. As Catherine Morris has noted, for example, many of the most vociferous critics of the government are those who could be termed "accidental activists"[415]: primarily, underprivileged Cambodians who have lost land, and whose personal experience of – and refusal to accept – injustice pushes them into advocacy. In their initial experience, or as they later face a legal backlash for their outspokenness, these "accidental activists" receive additional support from NGOs and lawyers who explain and help to navigate what might otherwise be a disorientating and frustrating system. Meanwhile, these same NGOs and lawyers are able, through their advocacy inside and out of the courtroom, to

[414] Interview 41: Anonymous Lawyer. 23rd August, 2017. Phnom Penh.
[415] Morris, *supra* note 372.

reassure defendants that – while they may not be victorious in their trial – they are actually on the right side of the law, and should be protected by the rights guaranteed in a Constitution that, in many cases, they may have heard about but not read. As the abovementioned NGO lawyer explained, when responding specifically to a question about what their clients know about the Constitution:

> "In Cambodia too there is limited political and legal knowledge, so when people have problems they need someone who can discuss. So even if we cannot win the case we can support them."[416]

The participant went on to explain how, over the course of the trial and with the help of other staff from the NGO for whom they worked, they were able to explain to their client, and the client's community, how and why their experience of being tried and convicted represented not only an injustice, but also a violation of their fundamental constitutional rights. This, they suggested, was of added benefit as it raised the legal- and constitutional-awareness of that community, as well as the individual. As we shall see shortly, this sort of impact is also understood by activists as a small step in a much longer journey toward systemic legal and political change in Cambodia.

When the Constitution Does Not Just Stay in the Courtroom

The impact that the aforementioned transfer of legal knowledge – in which lawyers and NGOs use courtroom battles to educate dispossessed communities about their constitutional rights – can be seen to extend far beyond the provision of consolation and comfort to those for whom they advocate. This can be seen most clearly in the rise of "accidental activists," as well as the prominence that they and other dispossessed communities have played in protest movements over the past decade. According to many research participants (both observers and activists alike), an increased awareness and sense of ownership of the Constitution was integral in this development. In one interview, a Cambodian reporter for the American-owned, English-language media outlet, Voice of America, described how grassroots social movements developed over the past decade in Cambodia, citing a central role for civil society organisations in the process:

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[416] Interview 41: Anonymous Lawyer. 23rd August, 2017. Phnom Penh.

> "I believe that they don't know the law in the beginning but we have law organisations, civil society organisations, that work on protecting human rights. They raise all these laws, like 'okay you have these rights in this [the Constitution], and those laws. So they know … this is my rights and it is written in the constitution. But the government has violated their rights. So they talk about the problem they have in the Constitution when they protest"[417]

This perspective, offered by a Cambodian reporter who had observed these movements at close quarters for many years, is interesting from a constitutional standpoint for two distinct reasons. Firstly, because it suggests that demonstrators and "accidental activists" themselves have attempted to mobilize constitutional language for their cause, despite their lack of legal education. This, in turn, implies that – regardless of the lack of faith many Cambodians express in judicial institutions, and in the government's commitment to legality – there remains a latent normative power in the wording of the Constitution, which can have an empowering effect on people even in the event of its *de facto* violation. In other words, even as they recognise that their constitutional rights are not being protected by the institutions that are responsible for safeguarding the Constitution, the above-quoted journalist suggests that otherwise "ordinary" people are empowered by the knowledge that the language of the Constitution is – in their understanding – on their side. These "ordinary" people, then, can be understood to become activists not only for their own cause, but also (albeit "accidentally") for the cause of constitutionalism. Hence, those with an interest in grassroots demand for constitutionalism might posit that the increased awareness and empowerment that are often seen as a side-effect of advocacy work may actually be the most impactful in the long-term.

Secondly, the above quote also suggests that activists and the dispossessed, like the lawyers who represent them in court, may seek to deploy constitutional language and arguments as a kind of shield. This is particularly significant in Cambodia, where criminal charges are often brought against activists for defamation or incitement, as noted early in this chapter. Hence, while some still take the route of Yorm Bopha – the Borei

[417] Interview 10: Anonymous Journalist. 11th February, 2017. Phnom Penh.

Keila community activist who questioned the "capacity" of Foreign Minister Hor Namhong – by questioning the individual character, principles or aptitude of those in power, others have apparently opted for a different tack. As such, the above quote suggests that those same activists may find protection for their critiques in the Constitution, to the extent that they are able to present the injustices they see in technical, constitutional terms. This is increasingly common, according to one anonymous Research and Advocacy Director from a major national NGO, who explained that:

> "when they [activists] need to talk in relation to freedom, it could be hard for them to talk about it directly. So they take the whole article of the Constitution to talk about, they quote it, it is okay, this protect them because when they want to express certain idea, it is their own opinion … they might get follow. But if they quote the article from the Constitution it is okay, they can protect themselves."[418]

Here, we see parallels to what scholars have noticed in China, where an even more strict approach to protest and free speech makes any other approach to dissent almost impossible.[419] In such environments, it appears that those who are able to effectively present their critiques of authoritarianism as calls for adherence to law are often safer and more impactful. As demonstrated at the very start of this thesis, of course, with the story of Meas Nee being warned by Prime Minister Hun Sen not "to not go too far," this safety and effectiveness is not absolute.[420] In fact, when critiques framed in terms of adherence to law are foundational ones – if they question the fundamental legality and legitimacy of CPP rule, for example – they, too, can be dangerous. However, framing critiques of government in terms of adherence to law often has the benefit of employing principles and a vocabulary to which the government has formally agreed, and which it has an interest in being seen to respect. Yet, as noted earlier in this chapter, such tactics also come with a cost, as the experiences and life-worlds of the activist are then forced into a somewhat alien, technocratic, and therefore potentially disempowering lexicon of constitutional discourse.

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[418] Interview 9: Anonymous Civil Society Activist. 10th February, 2017. Phnom Penh.
[419] Kevin J O'Brien & Lianjiang Li, *Rightful Resistance in Rural China* (Cambridge University Press, 2006).
[420] Samreth, *supra* note 5; Dara & Turton, *supra* note 5.

On a more everyday level, both lawyers and NGOs often find it beneficial to educate those for whom they advocate for more practical reasons. As one public interest lawyer explained to me, in relation to a case in which they represented an Indigenous community living near the site of a planned hydropower project:

> "Mostly when I work with the [rural] community, I also explain that some activities they have to do by themselves. … So we train them about EIA [Environmental Impact Assessment], train them about our Land Law, train them about Forestry Law, train them about law related to building dams, so they know. They know. So that's why when the Chinese people go, they have to listen to all the law that is related to the dam. If they don't follow the law, the indigenous people don't allow them to go to the area."[421]

Here, out of sheer necessity created by the fact that the community in question lived in a remote and inaccessible are of the country, the lawyer assisted that community not only by advocating on their behalf in the courtroom but also by providing legal education. As a result, members of that community took it upon themselves to monitor and protect their rights, using direct action to ensure that they were not forced from their land before the other (court-oriented) forms of advocacy being employed by the lawyer's firm could have their effect. This, in fact, is the context for a lot of legal education-and-empowerment work currently being conducted by Cambodian NGOs, as well. Though many NGOs work closely with communities who are threatened with or have experienced forced eviction, the sheer volume of communities who are in such as position in Cambodia – and the relative lack of lawyers in the more distant provinces – means that these organisations are forced to streamline their activities.

Hence, Cambodian NGOs increasingly focus their attention into workshops described as "training the trainers," in which they aim their legal education-and-empowerment work at one or two individuals from each community, in the hope that they will pass on their skills and knowledge to their communities. While these workshops primarily focus on explaining international and constitutional rights, as well as legal procedures, many

[421] Interview 45: Anonymous Lawyer. 10th September, 2017. Phnom Penh.

activists suggested that this work was empowering. As one grassroots community activist explained:

> "They have confident after the training… they can speak, and talk, and negotiate with local authorities … before they [used to] just shut up. That we can say is a kind of empowerment for the people."[422]

In addition to direct, case-based advocacy for constitutional rights in Cambodia, then, it is possible to see NGOs and lawyers working to enhance legal- and constitutional-consciousness in Cambodia. This type of "demand-side" work was frequently referenced by civil society activists, during my research. Due perhaps to a disillusionment with the lack of reform in Cambodia's judicial institutions, and a loss of faith in conventional advocacy, many NGO representatives explained that they were increasingly focusing their attention and resources into education-and-empowerment programs. In a context where use of a legal lexicon provides a modicum of protection for public critique of the state (as seen above), and at a time when alternative forms of activism are increasingly difficult and dangerous (as will be seen shortly), such programs also appear to provide a relatively safe alternative. Admittedly, one of the legal empowerment workshops that I personally observed, in Siem Reap province, was closely monitored by local law enforcement officials. However, in general, such activities can easily be explained as "capacity building" workshops that then appear relatively harmless to authorities. Yet, the accounts above would suggest that they might in fact have far more profound impacts on Cambodian society – at a grassroots level at least – than traditional modes of activism, by fostering a more widespread public demand for constitutionalism in Cambodia.

This, in fact, gets at the heart of how internationally funded rule of law projects have been pursued in Cambodia. As Catherine Morris notes, with reference to work done a decade earlier by Caroline Hughes, these projects "have not emphasized grassroots mobilization to facilitate broad-based human rights claims" meaning that, instead, advocacy "has become professionalized and technocratic, and human rights struggles are 'largely restricted to a limited role for the educated middle class, operating in a

[422] Interview 13: Anonymous Civil Society Activist. 15th February, 2017. Phnom Penh.

subordinate relationship with international organizations'."[423] Still, the success of demand-oriented methods are innately hard to measure, and there are also some causes for scepticism about the utility of such an approach for constitutional advocacy, many of which have been outlined by Mark Fathi Massoud.[424] As Massoud notes, for example, "[e]vidence also suggests that knowledge of rights alone is insufficient for achieving change even in robust democracies."[425] Increased demand for alternative forms of constitutionalism does not necessarily guarantee responsiveness from the supply side (i.e. the state). Hence, increased constitutional-consciousness may empower individuals and communities in the short-term, the realisation of their ineffectiveness in the long-term may in fact create further disillusionment or, worse, a sense of helplessness that might demand a turn away from formal or state-based legal mechanisms for protecting rights.[426] This, too, has been noted by Massoud, who suggested that such activities in Sudan might create a scenario in which "rights will take on a mythical quality; they will become unattainable ideals."[427] Returning to the ideas explored in Chapter 4, this could be even more likely in constitutionalist terms given the extent to which the state is able to co-opt and claim ownership over constitutional interpretation.

Finally, Massoud also raises the concern that "teaching people to pursue grievances through the legal system potentially legitimizes the regime as a fair arbiter of justice and reinforces the regime's power over its citizens."[428] Given the state's desire to mobilize law and the legal system for such ends already, then, legal education-and-empowerment run the risk of playing into and reinforcing this tactic.[429] However, data gathered from this research, which included interviews with members of dispossessed communities

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[423] Morris, quoting Caroline Hughes, "Transnational Networks, International Organizations and Political Participation in Cambodia: Human Rights, Labour Rights and Common Rights," *Democratization* 14, no. 5 (December 1, 2007): 834–52, https://doi.org/10.1080/13510340701635688.

[424] Massoud, *supra* note 405.

[425] *Ibid*; Stuart A Scheingold, *The politics of rights: Lawyers, public policy, and political change* (University of Michigan Press, 2010).

[426] It is perhaps this combination of factors, for example, that has lead other actors to seek alternative ways of interpreting and protecting constitutional provisions in Cambodia; as we shall see in the use of supernatural tools by Buddhist monks (Chapter 6), or the redefining of national identity and tradition by Cambodian artists and performers (Chapter 7).

[427] Massoud, *supra* note 405 at 202.

[428] *Ibid* at 206.

[429] This is especially true if educators are not able or willing to convincingly deconstruct and delegitimize the existing government narratives described in Chapter 4.

from multiple provinces, in fact suggests that such activities actively undermined rather than reinforced authoritarian constitutionalist narratives, and made participants more aware of the systemic weaknesses of Cambodia's courts. Yet, this should not be used to completely dismiss the anxiety and ambivalence raised by Massoud. Rather, one should return to the issue raised earlier, in which a seemingly safe, technocratic language of constitutional law displaces alternative lexicons that could be used to describe justice, and its opposite. In fact, it is in some ways this dynamic to which the next chapter is dedicated, as the description of "saffron constitutionalism" and the work of Buddhist monks in campaigning for environmental protection hints at some of the vocabularies and life-worlds that may well be side-lined in the process of legal or constitutional education and empowerment. Yet, as Chapter 6 demonstrates, this side-lining (to the degree that it has occurred) has been far from absolute in Cambodia, as other (perhaps more autochthonous) approaches to the protection of constitutional rights have nonetheless (re)emerged in recent years.

Co-optation and Regulation: How to Hamstring a Judicial Support Network

Further to recognising the internal, almost methodological, limitations of constitutional advocacy work that has been pursued in Cambodia, it is important to note the external restrictions that are also at play. As noted above, lawyers benefit from a certain degree of protection when appearing in court, allowing them to openly and forcefully articulate critiques of the state, albeit in technical language.[430] This protected status is reinforced to some degree by the fact that the laws establishing the Bar Association, and the Bar's internal regulations, explicitly assert the organisation's independence. This view was laid out clearly by one public interest lawyer, who argued that:

> "They cannot control the lawyer because in our law, the law of the Bar Association especially, all the lawyers are under the Bar Association, and the Bar Association is independent. So the government cannot control it.

[430] This protection appears to be more advanced than that afforded to judges, presumably because lawyers – no matter how vehement or convincing the case they present might be, do not have decision-making power and, therefore, are not perceived to affect the material outcome of cases.

> Unless they want to change our law to say that lawyers cannot be independent."[431]

As such, mirroring the status of the judiciary, the Bar Association benefits from formal legal protection of its independence, at least on paper. However, it is clear from other interviews, and the organisation's recent history, that this *de jure* independence does not directly translate into *de facto* freedom from political interference in everyday practice. In a tactic that bears many resemblances to that which is used to control judicial institutions in Cambodia and elsewhere, the Bar Association's *de facto* independence is called into question by the fact that the organisation boasts among its members a number of senior figures in the ruling party, many of whom have no formal legal qualifications.

This 'packing' of the Bar at one stage ensured that its presidency was held by, Ky Tech; a lawyer who, in addition to often representing the Prime Minister and being the lead prosecutor in the Supreme Court case that led to the dissolution of the CNRP, has subsequently been named as a member of the ruling party's Central Committee.[432] Even when the leadership is not directly connected to that of the CPP, meanwhile, a 'packed' Bar seems to ensure that only those with good relationships to the ruling-party can be the organisation's president. As the prominent human rights and constitutional lawyer expert explained:

> "The Bar Association, if we look at the law, I can say it is more independent [than the judiciary], but only in one way. To be President, maybe in the past, they were only the ones who were affiliated with the government, and approved by government first. Because the problem is many of the government officials are members of the Bar. [Prime Minister] Hun Sen is also a member of the Bar, [Deputy Prime Minister and Interior Minister] Sar Keng, [late Deputy Prime Minister and Chief of

[431] Interview 45: Anonymous Lawyer. 10th September, 2017. Phnom Penh.

[432] Mech Dara & Ananth Baliga, "CPP inner circle expands, dwarfing China's and Vietnam's | Phnom Penh Post", online: <https://www.phnompenhpost.com/national-politics/cpp-inner-circle-expands-dwarfing-chinas-and-vietnams>; Morris, *supra* note 372.

> Cabinet] Sok Ann, and [Chair of the Anti Corruption Unit] Om Yentieng are all members of the Bar. So they control it this way."[433]

The process of 'packing,' in other words, ensures that the Bar Association and its members stay largely within parameters that are set by the ruling party. However, there appears to be greater room for political heterogeneity within the Bar than there is, for example, in the judiciary. This is reaffirmed by the fact that, in addition to the existence of activist lawyers within the Bar, the two years immediately after fieldwork for this thesis was conducted saw two of the legally-trained civil society activists I interviewed successfully pass the Bar exam and begin practicing as lawyers. However, as we shall see, this existence of political diversity (albeit relative) within the Bar is an uneasy one that can at times become a source of inter-Association tension.

Membership of a politically co-opted Bar Association, then poses additional challenges for the activist lawyer, which is always in the background of advocacy for constitutionalism. This was implied by the NGO lawyer quoted above, when they explained that "[i]n the court I can say anything, but outside I might get risk [be in danger]."[434] Interestingly, the participant went on to note that, while they are outspoken in their criticism of the state and senior officials in the courtroom, they are much more circumspect about speaking in other public fora. Specifically, the lawyer described how they typically avoided any kind of press conference or media appearance, for fear of falling foul of the Bar Association's leadership, let alone the government. Hence, activist lawyers in Cambodia may benefit from their mastery of the technical language of law, and what Karpik and Halliday describe as the ability to "claim to be the spokespersons of an abstract entity called the public."[435] This protection, let alone the role as "spokesperson" for constitutional rights, however, does not appear to extend much beyond the doors of the courtroom. Lawyers can use courtrooms as a platform from which to act as spokespeople, and rely on others to amplify their voices beyond the reach of courts, it seems, but they are limited in the degree to which they can speak openly and critically in public. In fact, the limits of a lawyers freedom to speak publicly were once

[433] Interview 18: Anonymous Legal Expert. 15th March, 2017. Phnom Penh.
[434] Interview 41: Anonymous Lawyer. 23rd August, 2017. Phnom Penh.
[435] Karpik & Halliday, *supra* note 87.

tested to some degree by one anonymous legal expert (and practicing lawyer) I interviewed, who also remarked:

> "I myself… the President of the Bar in the last term, the previous one, he attacked when I criticized about human rights, and about [politicisation in] the Bar. … At that time, as I know, they want to disbar me but could not decide [laughter]."[436]

This lawyer's experience, then, can be seen as a demonstration of how the Bar's own internal regulations and disciplinary procedures can work to stifle advocacy for constitutional rights in Cambodia. While, in this instance, the lawyer I spoke to was not ultimately disbarred, he did note that the lingering question of disbarment had complicated his work. Equally, it is likely that this particular lawyer also benefitted from greater protection than might be afforded to others, due to the fact that he had a strong public profile, enjoys the respect of many within the legal profession, and has a good working relationship with certain parts of government.[437] As such, through the co-optation of the Bar – rather than through formal legal restrictions or physical violence – Cambodia's ruling-party has been able to stifle the ability of lawyers to act as "spokespersons" for liberal constitutionalism.

A further example uncovered during fieldwork demonstrates how even the very guarantee of the Bar's independence has been used to hamstring the work of activist lawyers. In response to the well-documented and pervasive rise in land-disputes during the late-2000s and early-2010s, a group of young cause-lawyers engaged in a program – known as the 'Pilot Project' – through which they were embedded with local NGOs, many of which were on the frontline in campaigning against land expropriation and working with dispossessed communities. The lawyers worked with their civil society partners to initiate strategic litigation on behalf of those communities, often targeting business interests that had direct links to the ruling-party or senior government officials,

[436] Interview 18: Anonymous Legal Expert. 15th March, 2017. Phnom Penh.
[437] Interview 18: Anonymous Legal Expert. 15th March, 2017. Phnom Penh.

who were almost invariably the beneficiaries of Cambodia's "land-rush."[438] However, the project was brought to an abrupt halt in 2012, again by the Bar Association. For a lawyer, the association decided, practicing under the supervision of a layperson was a violation of the Bar's guarantee of the "independence" of the legal profession.[439] Practicing lawyers, in other words, could not represent clients while working for organisations that were not led by lawyers or registered as legal offices with the Bar Association. As a result, the 'Pilot Project' was shuttered, and the lawyers themselves faced disciplinary action at the Bar, with some even having their license to practice law temporarily suspended.[440] This experience, reiterated to me by a number of participants, albeit largely off-the-record, had the threefold effect of inhibiting the work of lawyers advocating for rights and rule of law, sending a warning to others that such work would not be tolerated by the Bar Association, and driving a wedge between actors in a nascent judicial support network. As can be seen from the quotes earlier in this chapter from an "NGO lawyer," the decision of the Bar has not completely precluded lawyers from being directly employed by civil society organisations. Likewise, it does not appear to have prevented a number of private companies from employing 'in-house' legal teams.[441] However, the vague and inconsistent rule has nevertheless contributed to ensuring that the relationship between lawyers and civil society remains fraught with complications.

Of course, any description of how constitutional advocacy is restricted in Cambodia would be incomplete without reference to what was frequently described as "the shrinking space for civil society"[442] more generally. In addition to a spate of arrests in 2017, which led to the imprisonment of the ADHOC Five,[443] and not to mention the

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[438] Ian G Baird, "The Global Land Grab Meta-Narrative, Asian Money Laundering and Elite Capture: Reconsidering the Cambodian Context" (2014) 19:2 Geopolitics 431.
[439] Interview 45: Anonymous Lawyer. 10th September, 2017. Phnom Penh.
[440] Interview 45: Anonymous Lawyer. 10th September, 2017. Phnom Penh.
[441] Though no such lawyers were interviewed directly as part of this research, I have met multiple such lawyers in Cambodia both before, during and after conducting fieldwork.
[442] "Cambodia: Shrinking spaces versus empowerment of communities", online: *Stift Asienhaus* <https://www.asienhaus.de/publikationen/detail/cambodia-shrinking-spaces-versus-empowerment-of-communities/?no_cache=1&cHash=4dcc54e333729c26a5f548e510d96170>.
[443] ADHOC is another prominent human rights NGO

assassination of civil society leader Kem Lay in 2016,[444] virtually every NGO-staffer I spoke to for this research expressed concerns about the increasingly tight regulatory environment in which their organisations worked. Primarily, those concerns arose from the 2015 passage – and the subsequent implementation – of the Law on Associations and Non-Governmental Organisations (herein, LANGO). While one cause-lawyer was quick to note that LANGO was not explicitly unconstitutional, at least according to the authoritarian constitutionalist principles of the ruling-party, most lawyers and activists interviewed drew attention to the fact that LANGO had introduced: a vaguely worded obligation to maintain "political neutrality" (Article 24); extensive requirements for organisations to report their activities to relevant ministries (Article 25); and enabled the government to refuse or removed legal registration from those that "endanger security, stability and public order, or jeopardize national security, national unity, culture, traditions, and customs." Unsurprisingly, civil society activists suggested that these regulations have thus far been interpreted and implemented strategically by the Ministry of Interior and Ministry of Foreign Affairs and International Cooperation to hamper those likely to be critical of government policy.[445] As one NGO worker explained during an interview, the majority of development-oriented organisations operating in Cambodia had registered with relatively little trouble, while "for those that work on human rights, all the documents that we summit and criteria that we meet have been rejected."[446] These bureaucratic hurdles, in addition to the increasingly broad discretion taken to authorities in interpreting the "public order" exception to the right to assembly under the 2009 Law on Peaceful Protests, meanwhile, can thus be understood to inhibit NGOs from rallying around courtroom struggles to supplement or support the work of lawyers in advocating for constitutional rights. However, as will be demonstrated above, this is not the only – or

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[444] Daniel Nass, "Longtime rights champion Kem Ley gunned down in broad daylight", (10 July 2016), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/longtime-rights-champion-kem-ley-gunned-down-broad-daylight>.

[445] Pang Vichea, "Environmental NGO Mother Nature dissolved", (18 September 2017), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/environmental-ngo-mother-nature-dissolved>; Ben Sokhean, "NDI Banned, Foreign Staff Face Forcible Expulsion", (24 August 2017), online: *Cambodia Daily* <https://www.cambodiadaily.com/news/ndi-banned-foreign-staff-face-forcible-expulsion-2-133964/>; Pang Vichea, "Equitable Cambodia allowed to reopen", (26 February 2018), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/equitable-cambodia-allowed-reopen>.

[446] Interview 8: Anonymous NGO worker. 9th February, 2017. Phnom Penh.

even necessarily the most important – avenue through which lawyers and NGOs work to further calls for liberal constitutionalism in Cambodia.

Conclusion

In spite of the ruling-party's efforts to co-opt constitutional discourse in Cambodia, a small group of activist lawyers continue to defend what they understand as the true "spirit" of the 1993 Constitution. While their attempts to make constitutionally-grounded arguments in court are, almost invariably, not received well by judges, these lawyers persist in their work with the support of Cambodia's rights-focused civil society organisations, and a now-dwindling free-press. Comparing the courtroom to a stage, of course, is a fairly common parable. However, in the Cambodian version, those defending liberal interpretations of the Constitution in the courtroom are reflexively aware that they are engaging in a "role-play," as they rehearse their advocacy for constitutional rights and due process under the explicit understanding that they stand little chance of succeeding. Motivated by a desire to support their clients in often intangible ways, and to contribute to a more broadly conceived campaign for systematic change in Cambodia, they fight losing battles in the hope that their efforts will be echoed by more influential, international actors, courtesy of diligent civil society organisations who sit in the gallery. In extreme cases, Cambodia's courtroom dramas have provided a focal point around which rights advocates can rally, with high-profile trials in the past having drawn crowds of demonstrators outside the court, or into the streets more broadly. What this practice highlights, then, is that constitutional vocabularies, principles and processes nevertheless continue to be used by those seeking to challenge authoritarianism, even if a general awareness of the ineffectiveness of judicial institutions as sites for pursuing constitutionalist causes means that courts are treated only as a platform for wider advocacy projects. This seizure of discursive spaces – which are themselves provided by the Constitution and Cambodia's legal system, and protected to some degree by the government's desire to maintain some semblance of constitutional legitimacy – represent part of the everyday politics of a much more long-term struggle, I argue. As I describe

above, and further elaborate in the concluding chapter of this thesis, this struggle can be understood as demand-side "popular constitutionalism."

Yet, following the critiques posed elsewhere by Mark Fathi Massoud, one might also argue that this focus on the courtroom has also channelled disproportionate attention and resources toward institutional avenues and short-term goals of justice for individuals or select communities. At the same time, this may even have had a disempowering effect on those who they are supposed to help, privileging the ability of lawyers to "speak truth to power" in the defence of constitutionalism, while translating more autochthonous and generally-held critiques of the state into technical, legalistic language that may not represent the true perspective of their clients.[447] Similarly, the fact that international norms (however they find their way into society) receive an additional degree of legitimacy in Cambodia – as the journalist described in Chapter 3, using the phrase "*borratheayniyum*" – suggests that the liberal-democratic norms enshrined in the Constitution will continue to be "translated" in a way that attempts to emulate the inflection they would receive in the West.[448] As such, any such process of "translation" runs the risk of foreclosing the possibility of more autochthonous understandings of constitutionalism coming to the fore. This concern did not emerge directly or explicitly, however, from the accounts and experiences provided by participants in this research. Whether as a side-effect of case-based advocacy or as a result of specific attempts to educate-and-empower otherwise overlooked communities, judicial support networks have undoubtedly played a notable role in raising constitution-consciousness in Cambodia; a process that many interviewees instead understood as having an empowering influence. This influence appears to have been evident in the protests that preceded and followed the 2013 elections.

In the process of advocating for constitutionalism and fostering this constitutional-consciousness, meanwhile, these networks have inevitably made themselves a nuisance – and thus a target – for the state. Hence, the ruling party has ensured that Cambodia's Bar

[447] This disempowering effect is highlighted eloquently and at length by Pooja Parmar, in the context of Adivasi activism in India. See Parmar, *supra* note 84.
[448] Interview 10: Anonymous Journalist. 11th February, 2017. Phnom Penh.

Association remains hostile to activism, that links between lawyers and civil society are kept to a distance, and that NGOs themselves stand on shaky ground. While legislation has been used in pursuit of the latter goal, through the restrictive provisions and burdensome reporting requirements included in the 2015 Law on Associations and NGOs, the links between NGOs and lawyers, as well as the independence of the legal profession, has been undermined through more subtle means; namely, the co-optation of the Bar Association. Accounting for the co-optation of the Bar Association in constitutionalist terms, however, certainly highlights the potential for theories of societal constitutionalism to take on additional significance.

It appears to be through the structures of the Bar, particularly through its internal rules and disciplinary procedures, for example, the ruling party has been able to stifle the work of activist lawyers, restricting their advocacy to the courtroom and preventing them from developing formal alliances with civil society activists. The former was evident, for example, in the testimony given by one NGO-lawyer, who said that she could not say the same things outside of court as she does inside, for fear that she would find herself on the wrong side of the Bar's disciplinary procedures. Meanwhile, the latter was demonstrated by the history of the "pilot project" that placed a handful of lawyers with front-line human rights organisations and that was closed down by a Bar Association ruling that prevented lawyers from working with such groups under the auspices of maintaining the legal profession's "independence." Short of being able to close down judicial spaces for activist lawyers to articulate critiques of the government, and without wanting to overtly violate the formal independence of the Bar Association, then, the ruling party has sought to use the Bar's internal structures to coopt and pacify it as much as possible. An authoritarian variant of societal constitutionalism, it seems, is used by the ruling party to counteract or limit the more formal, national-level constitutional tactics being employed be certain activist lawyers.

Despite all of these findings, this chapter also raises some questions that this research has not so far been able to answer, and which could be interesting avenues for future research. Namely, it is not clear (i) to what degree there is a diversity of opinion within

the Bar Association about the meaning of the Constitution and the way in which constitutionalism is practiced in Cambodia, (ii) how and how often the Bar's internal rules and disciplinary proceedings are actually used to stifle dissenting voices within, or (iii) to what extent the Bar Association can or does act as a forum for discussions about constitutional issues between lawyers. Likewise, it is unclear to what extent changes in the leadership of the Bar might impact the answers to the above. It is notable, for example, that the Bar's current President, Soun Visal, does not appear to have the same degree of connection to the ruling party as his predecessor, Ky Tech; however, with senior government ministers included in the ordinary membership of the Bar, the profile or affiliation of the President may not be the most influential factor to the body's independence.

Nevertheless, the environment created for legal professionals is, undoubtedly, far from conducive to rights advocacy. Yet, throughout all of the data presented above, we see the possibility for constitutions to play more than one role, concurrently. Placed on an – admittedly over-simplified – axis between authoritarianism and its alternatives, for example, we can understand a Constitution as a "dual-use" document: at once empowering the state or being implicitly open to co-optation by the state (as demonstrated in Chapter 4), and at the same time providing an acceptable language with which to challenge state practice, often outside of the courtroom. Despite the closure of institutional channels – such as courts – through which opponents might actually influence or shape state-led constitutional practice, and the abusive approach that the state has taken to constitutional interpretation, Cambodia's Constitution appears to have maintained some remnants of normative power. As such, its supposedly liberal-democratic "spirit" is sustained. In the process, we see that the Constitution is mobilized by actors that are not typically considered as central to Constitutional practice: beyond the typical terrain of court decisions, ideas about the meaning of Cambodia's Constitution are contested by lawyers and even their clients, but also by local and international NGOs, as well as even more localised community associations. As the following chapters will demonstrate, however, this list can be extended still further, to include an even more

diverse list of previously overlooked constitutional actors. Hence, it is to Buddhist monks and the *Sangha* that we now turn.

Chapter 6 – Saffron Constitutionalism: Debates Over the Politicisation of the Sangha

"The word constitution, I have only heard it during this age. After I became a monk, saying it plainly, after '93. I have heard of it, but not clearly. I only know it clearly after 2000, I understand the constitution."

- Anonymous Activist-Monk [449]

Shortly before the U.N. administered elections that formed Cambodia's Constituent Assembly in 1993 (and its National Assembly for the five years thereafter), the leaders of the country's two Buddhist sects both approached the head of the United Nations Transitional Authority in Cambodia. Their request was a curious one for those unfamiliar with mainstream Buddhist teachings: for monks to be excluded from the vote.[450] That Yasushi Akashi refused to grant their request, and instead insisted on adherence to the democratic norm of universal suffrage, ultimately ensured that Cambodia's Buddhist monks would participate in democratic elections for the first time in the country's history. Meanwhile, the terms of Annex 5 to the Paris Peace Accords – signed in 1991 between the parties to Cambodia's decade-long civil war – guaranteed that the country's Constitution would include provisions for democratic elections based on "universal and equal suffrage," and thus ensured that this precedent would be enshrined in law. In the process, these decisions created a fundamental source of Constitutional contention and debate that has rumbled on for decades, about the role of religion in Cambodian politics and the relationship between Buddhism and the state. Hence, after first placing debates about the political participation of Cambodian monks into historical context, this chapter will provide an in-depth examination of the ongoing discussions in Cambodia about the right of Buddhist monks both to vote and to engage in social justice – or political – activism. In so doing, it will highlight the extent to which these discussions can be

[449] Interview 3: Anonymous Monk. 31st January 2017. Phnom Penh

[450] Ian Charles Harris, *Cambodian Buddhism: history and practice* (Honolulu: University of Hawai'i Press, 2005).

considered as examples of everyday constitutional practice. Cambodia's Buddhist monks, I argue, not only make use of constitutional rights and make constitutional arguments in defence of their activities, they also use religiously resonant practices to defend constitutional principles where the state itself fails to do so.

Before this, however, it is helpful to understand why the extension of the franchise to Buddhist monks, and a subsequent proliferation of so-called 'activist monks,' is a source of such controversy. As Tomas Larsson notes in his comparative survey of the issue in Theravada Buddhist Southeast Asia, titled 'Monkish Politics,' the exclusion of the Buddhist *Sangha*[451] from politics has long been – and, in much of the region, continues to be – the norm. However, rather than being "inherently anti-clerical and anti-religious," he explains, "religious disenfranchisement… is grounded in a religious worldview, according to which a separation between the morally 'pure' realm of the *Sangha* and the 'dirty' realm of partisan politics ought to be maintained."[452] In other words, the exclusion of monks from politics is in fact perceived as a means to protect them and the institution of the *Sangha* generally from the corrupting, divisive and distinctly this-worldly influences of politics. As such, scholar of Cambodian Buddhism, Ian Harris, has described the 1993 decision to allow monks to vote as an "imposition" and an act of "cultural insensitivity" by the U.N. and the international community.[453] In drafting the Paris Peace Accords, and particularly Annex 5, Harris suggests, the international community failed to take into account specific cultural and religious norms that would sit awkwardly alongside the concept of universal suffrage. In terms of the practice of elections since 1993, however, the fact that Cambodia's Constitution simultaneously recognises Buddhism as the state religion, could at least in theory, have provided grounds for this tension to be resolved. By implicitly assigning responsibility for the protection of Buddhism to the state, Article 43 may provide a basis on which to limit the enfranchisement of monks. As scholars of constitutional theocracy such as Ran Hirschl have suggested, granting a religion special constitutional status both elevates that religion

[451] For the purposes of this chapter, Sangha refers collectively to Cambodia's Buddhist institutions, their leaders and members. See footnote 139 for a detailed definition.
[452] Tomas Larsson, "Monkish Politics in Southeast Asia: Religious disenfranchisement in comparative and theoretical perspective" (2015) 49:1 Mod Asian Stud 40.
[453] Harris, *supra* note 452 at 204.

above others and makes it legitimate terrain for state regulation[454]. As this chapter will demonstrate, the Constitution's simultaneous enfranchisement of monks and delegation of responsibility over Buddhism to the state has, rather than helping to resolve ambiguity about the relationship between state and religion, in fact exacerbated tensions.

Ultimately, then, ambivalence in Cambodia over the relationship between Buddhism, politics and the state appears to represent another example of what Benjamin Schonthal has described as pyrrhic constitutionalism. Focusing on the protracted legal battles over Buddhist practice and the state's approach to religion in Sri Lanka, Schonthal surveys sixty years of the country's history to convincingly support his argument that "the potential to deepen disputes over religion is not an aberration of constitutional law; it is one of constitutional law's intrinsic capacities."[455] Commonly seen as a panacea to such tensions, as well as those over ideas about freedom or equality, for example, Constitutions in fact perpetuate those very same tensions, according to Schonthal, as they establish "vague consensus around multivalent principles" that later become "sources of interpretive competition." Further, constitutional law directs these tensions along adversarial paths, by channelling them towards courtrooms and making legal arguments appear as the self-evident and incontrovertible language through which to resolve them. Unlike in Sri Lanka's Pyrrhic Constitutionalism, however, debates about the political participation and activism of monks in Cambodia have largely taken place outside of the courtroom. To the extent that courts do enter into conversations about Buddhist practice, it is in part because their very jurisdiction over Buddhist monks is in question. Nevertheless, as I will demonstrate below, constitutional and legal language remains prevalent in identification and framing of disputes about Buddhist politics in Cambodia. Thus, while I follow Schonthal in pursuing a focus on "constitutional practice – the acts of drafting, debating, implementing and invoking constitutional law"[456] – I suggest that doing so in Cambodia means taking Schonthal's "expanded archive of constitutional

[454] Ran Hirschl, *Constitutional Theocracy* (Cambridge, Mass: Harvard University Press, 2010); Larry Catá Backer, "Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering" (2009) 16:1 Indiana J Glob Leg Stud 85.
[455] Schonthal, *supra* note 9 at 7.
[456] *Ibid* at 11.

law"[457] a step further, by focusing not only on court documents but also on the public discourse and the lived experiences of those involved.[458]

Cambodia's Saffron Vote in Historical Perspective

Cambodia's constitutional history reflects a relative divergence of views on the political status of monks, as well as the counterintuitive fact that regimes that formally enfranchise monks have often tended to have less rather than more regard for the *Sangha*, and Buddhism generally. Written under colonial rule and largely based on that of the French 4th Republic, Cambodia's 1947 Constitution made Buddhism the state religion and explicitly denied monks the right to vote, as has been the case with the vast majority of constitutions in other Theravada Buddhist countries. Under Article 48 of that document, which eventually became the country's post-colonial Constitution after independence in 1953, monks were precluded from holding public office or voting in elections "on account of Buddhist dogma."[459] This picture, though, was further complicated by the decision of then-King Sihanouk to extend the franchise to monks for a one-off referendum on the country's direction after independence, held in 1955. As Thomas Larsson notes, the inclusion of monks in the vote – which was an open ballot, and saw Sihanouk's vision approved by 98% of voters – was also facilitated by the use of pagodas as polling station; setting a precedent that has subsequently been taken again under the current constitutional order.[460] Though Cambodia's 1972 Constitution – written after the 1970 coup d'état by General Lon Nol, to formally establish the short-lived Khmer Republic – did not explicitly disenfranchise Buddhist monks, the previous limitation on the enfranchisement of monks based on "Buddhist dogma" was instead implemented via

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[457] *Ibid* at 17.

[458] As such, the data for this chapter emerges from an extensive "ethnography of the archive,"[458] centred primarily on journalistic accounts of monkish politics in Cambodia, as well as from a year-long period of fieldwork during which I conducted in participant observation and a series of over 45 semi-structured, qualitative interviews. The result of those interviews, as well as with government officials, politicians, civil society activists and dispossessed communities, is in an account of the ways that Buddhist monks see their role not only in the electoral process, but also in fighting for social-justice and political change beyond their constitutionally recognised right to vote.

[459] Constitution of the Kingdom of Cambodia, 1947. Article 48. Also in Larsson, *supra* note 454 at 63.

[460] *Ibid* at 64.

government decree.[461] Hence, whether Cambodia was ruled as a Monarchy or a Republic, there was relative continuity in the status of monks prior to the tragic rupture of 1975.

To focus on the voting rights of monks under the Khmer Rouge, of course, would be both irrelevant and a distraction from the horrific realities of the Democratic Kampuchea (DK) period.[462] While monks were technically enfranchised, no elections took place and the Buddhist *Sangha* was effectively dismantled and destroyed. Pagodas were used to keep farm animals or turned into prisons, while monks – described as "parasites" by the new regime – were defrocked and forced to work alongside lay-people;[463] it was by all accounts the most extreme example of how "a policy of re-enfranchisement was only ever adopted by the… most virulently anti-religious and anti-clerical regimes."[464] What followed, meanwhile, was far from a return to the previous norm. As civil war dragged on under the socialist People's Republic of Kampuchea, restrictions on the practice of religion were relaxed and the *Sangha* re-established, but neither were encouraged or allowed independence from the state. Monks, in fact, were considered as "state employees";[465] while formally allowed to vote in the country's far-from-democratic elections, they were also "expected to cultivate vegetables in the grounds of the monasteries for their own consumption." [466] The number of pagodas, and the number of monks in each, were restricted. This is apparent not only in histories of the period, but also in the official statistics that emerged, as the number of monks was limited to 7,250 until 1989 but had more than doubled to 16,400 a year later, when restrictions were eased.[467]

Not only are the consequences of this period still evident today, but the lessons taken from it – at least by some Cambodian monks – appear to underlie contemporary discussions about the relationship between Buddhism and politics. One of the most striking features of my interviews with monks was the regularity with which they recalled

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[461] *Ibid*.
[462] See the historical context, and history of Cambodia's Constitutions, sections in Chapter 1 for more detail.
[463] Ian Harris, *Buddhism under Pol Pot* (Phnom Penh: Documentation Center of Cambodia, 2007).
[464] Larsson, *supra* note 454.
[465] Ian Harris, *Buddhism and politics in twentieth century Asia* (A&C Black, 2001).
[466] Harris, *supra* note 452 at 194.
[467] *Ibid* at 200.

being exposed to violence. While many described being forced either into military service by local officials or into joining paramilitary forces by local guerrillas as children and young adults, others also recounted horrific stories of torture and extrajudicial killing. When reflecting on the catastrophic rule of the Khmer Rouge, interviewees also tended to point to the absence of religion and the prevention of political participation by monks as causes for the regimes violent excesses. "I want to say that if they block out the monk Cambodia society would end," one monk told me, before linking current debates back to historic experiences by explaining that "[w]e have experienced 3 years 8 months and 20 days because they want monk to be neutral, until they turn pagoda into prison." In other words, this monk attributed the entire experience of the Khmer Rouge era (which lasted just short of four years) to the fact that monks, Buddhist institutions and teachings more generally, were sidelined by revolutionary politics. Similarly, a prominent 'activist monk' suggested a direct connection between Cambodia's violent history and the exclusion of monks from political discourse and decision-making, as he said:

> "Five years, there are almost three million people dead. Why? Because there is no Buddhism. No Buddhism, no monk participation."[468]

Of course, the implicit assumption here that Buddhism is inherently peaceful, and could never condone violence, is intellectually questionable. As events in nearby Myanmar have demonstrated all too well, and as the authors of books such as *Buddhist Warfare*[469] and *Buddhist Fury*[470] have argued, there is reason to be wary about what Whalen-Bridge and Kitiarsa have described as "[e]ssentialist constructions of Buddhism as a polestar of peace."[471] Nonetheless, the testimonies above do point to the presence of a more locally and historically rooted justification for the enfranchisement of Buddhist monks, thereby adding greater texture to the picture presented by Ian Harris.

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[468] Interview 3: Monk. January 31st, 2017. Phnom Penh

[469] Michael Jerryson & Mark Juergensmeyer, eds, *Buddhist Warfare*, 1 edition ed (Oxford ; New York: Oxford University Press, 2010); Laksiri Jayasuriya, "Just War Tradition and Buddhism" (2009) 46:4 Int Stud 423; Dharmasoka Jayasuriya, *Buddhism, Politics, and Statecraft* (2008).

[470] Michael K Jerryson, *Buddhist Fury: Religion and Violence in Southern Thailand* (Oxford, New York: Oxford University Press, 2011).

[471] P Kitiarsa & J Whalen-Bridge, eds, *Buddhism, Modernity, and the State in Asia: Forms of Engagement*, 2013 edition ed (New York, NY: Palgrave Macmillan, 2013) at 2.

Debating the Saffron Vote?

The pursuit of "peace" was ostensibly the reason for monks first engagements in politics under Cambodia's new Constitutional order. Even while the Constitution itself was being drafted in 1993, monks led a cross-country 'Peace March' that ended in Phnom Penh, calling for the nonviolent end to Cambodia's seemingly intractable civil conflict and planting trees along the way. As some of those involved explained, the march was led my monks and women, as much of Cambodia's male population feared violent repercussions from authorities.[472] This dynamic re-emerged after Cambodia's disputed 1998 elections, when monks once again led a 'Peace March' which ultimately merged with protests over apparent irregularities that had handed the CPP an electoral victory.[473] The protests, which reportedly drew around 2,500 monks,[474] ended in violence that claimed the lives of at least 18 people, including two monks,[475] and injured many more.[476] For many, the images that emerged of bloodied and beaten men in saffron robes was proof of the moral degradation of Cambodian authorities. For others, however, it was a consequence of monks over-stepping their place in society and engaging in corrupting, partisan world of politics. Such views were expressed more or less explicitly by spokespeople from the government and the ruling party, as well as a handful of laypeople interviewed by local newspapers in the days afterwards.[477] Thus emerged a constitutional fault-line along which discussions of Buddhist monks emancipation and political activism have been split.

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[472] Interview 26: Former leader of Ponleu Khmer and NGO Director. April 20th, 2017. Phnom Penh.

[473] Heng Sreang *"The Scope and Limitations of Political Participation by Buddhist Monks"* in Alexandra Kent and David Chandler eds. *People of Virtue: Reconfiguring Religion, Power and Moral Order in Cambodia Today*.

[474] "Marchers' Platform Is Peace", (25 July 1998), online: *Cambodia Daily* <https://www.cambodiadaily.com/archives/marchers-platform-is-peace-9742/>.

[475] "UN Claims 18 Bodies Discovered", (17 September 1998), online: *Cambodia Daily* <https://www.cambodiadaily.com/archives/un-claims-18-bodies-discovered-10800/>.

[476] "Pilgrims Prepare to March for Peace and Trees", (19 March 1998), online: *Cambodia Daily* <https://www.cambodiadaily.com/archives/pilgrims-prepare-to-march-for-peace-and-trees-86645/>.

[477] Kimsan Chantara, "In Kompong Cham, Sympathy's With Protesters", (16 September 1998), online: *Cambodia Daily* <https://www.cambodiadaily.com/news/in-kompong-cham-sympathys-with-protesters-10781/>; Marc Levy, "CPP Protesters Maraud Through Capital Streets", (14 September 1998), online: *Cambodia Daily* <https://www.cambodiadaily.com/news/cpp-protesters-maraud-through-capital-streets-10739/>.

Since the universal franchise was enshrined in the Constitution in 1993, Cambodia's Buddhist institutions have struggled to come to terms with the new status quo. Rather than amendments to the Constitution or judicial challenges to its interpretation, the debate over whether or not monks should participate in politics (regardless of their constitutional enfranchisement) has largely taken place internally within the *Sangha*, as Cambodia's monks have come up with various ways to translate this status quo into everyday practice. As this section will demonstrate, the Sangha leadership has repeatedly sought to dissuade monks from voting or engaging in activism or acting upon their constitutional right to vote, while a handful of monks have actively disobeyed these wishes. One major exception to this, came relatively recently, when the leader of the largest of Cambodia's two Buddhist sects formally requested the state to intervene in the matter. In a public statement on 17th December 2014, Venerable Tep Vong, the *Sanghareach* of the Mohanikay sect, claimed that he had:

> "ask[ed] the relevant establishments, the National Assembly, the Senate, the government and all political parties, to please create procedures to make the ordained monks and novice monks stay neutral…[and] avoid participating in activities that support or oppose any political party and participating in elections."[478]

Interestingly, Ven. Tep Vong had offered justifications for this move over a decade earlier. Amid controversy emerging from monks' attempts to register to vote in the 2003 elections, he argued for restrictions not only in the doctrinal terms of maintaining the 'proper' separation of Buddhist monks from the corrupting world of politics, but also by citing Buddhism's status as the state religion. Describing himself as "the owner" of temples nationwide, Ven. Tep Vong suggested that state authorities had a duty to "protect Buddhism" that extended to placing otherwise unconstitutional limits on the universal franchise.[479] The enfranchisement of monks, in other words, was presented by Ven. Tep

[478] "Clergy Seeks Law to Ban Monks From Voting", (18 December 2014), online: *Cambodia Daily* <https://www.cambodiadaily.com/archives/clergy-seeks-law-to-ban-monks-from-voting-74417/>.

[479] Yun Samean, "Head Monk: NEC Able to Use Pagodas", (21 January 2003), online: *Cambodia Daily* <https://www.cambodiadaily.com/news/head-monk-nec-able-to-use-pagodas-21150/>.

Vong as a threat to the Buddhist institutions as it undermined their rightful separation from politics. Hence, in a pyrrhic mode,[480] one does not have to look far to find constitutional vocabularies supplementing and even supplanting theological ones in attempts to resolve disputes that engage with both secular law (the universal franchise) and religious dogma (the principle of separation between Buddhism and politics).

Of course, nothing came of Ven. Tep Vong's appeals, presumably due to the Cambodian government's reluctance to be seen as placing unconstitutional limits on Buddhism or to be taking regressive steps against Buddhist monks. In fact, during the 2007 incarnation of this same dispute, Tep Vong's edict calling for monks to abstain from voting was met by criticism from civil society, human rights advocates and even a member of the Constitutional Council, who described the move variously as un-Buddhist, illegal, and unconstitutional.[481] Minister for Cults and Religion, Chea Savoeun, meanwhile, struck a balance by stating that "I won't ban monks from voting but I won't issue a directive asking monks to vote, because if I do that I will oppose Supreme Tep Vong."[482] Instead of formal changes to the law, though, the Royal Government of Cambodia has often been accused of allowing bureaucratic measures to prevent monks from reaching the polls. Even while the National Election Committee decided to use pagodas as polling stations in the 2003 elections – much to the dismay of Ven. Tep Vong, who claimed the move violated his "rights" as the "owner" of Cambodia's temples[483] – many monks found that they were unable to register to vote, as their superiors frequently refused to assist them in securing the necessary documents to do so. Hence, what on the surface appears to be a straightforward case of path dependency is, in fact, far more complicated.[484] While the *de facto* legal recognition of enfranchisement for monks has remained in place, numerous

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[480] Schonthal, *supra* note 9.

[481] "Council Member Says Ban on Monks' Protesting Unconstitutional", (26 June 2007), online: *Cambodia Daily* <https://www.cambodiadaily.com/archives/council-member-says-ban-on-monks-protesting-unconstitutional-2-75897/>.

[482] "Rights Groups Upset by Top Monk's Edict", (30 January 2003), online: *Cambodia Daily* <https://www.cambodiadaily.com/archives/rights-groups-upset-by-top-monks-edict-21590/>.

[483] "Head Monk: NEC Able to Use Pagodas", (21 January 2003), online: *Cambodia Daily* <https://www.cambodiadaily.com/archives/head-monk-nec-able-to-use-pagodas-21150/>.

[484] This adds further nuance to Larsson's claim that "it is easier to extend rights to new groups than to take them away." While this assertion still appears to hold true, it is also clear that there are many ways of limiting rights that do not require their formal removal. Larsson, *supra* note 454 at 46.

non-legal measures for *de jure* disenfranchisement persist. Hence, a more comprehensive understanding of this constitutional issue requires a more ethnographic approach that recognizes the everyday constitutional practice of what Larsson terms "monkish politics."[485]

It is particularly notable that many of Cambodia's monks have indeed embraced their newfound role in politics, and cultivated a secular discourse of citizenship and rights along with it. However, rather than claiming the constitutional right to vote as a monk, the majority of politically active monks appear to draw a distinction between their religious and their secular lives. As one monk in Battambang province, who preferred to remain anonymous, explained:

> "I myself have a voting registration card. I went and register to vote, because the Cambodian Constitution doesn't ban monks from voting. Monks are also citizen, we also have rights. But as religious men our role is personal. As a religious man, I can vote or not. This is personal. But if we talk about the Constitution, monk have the right to vote also."[486]

Clearly, as well as an awareness of the constitutional nature of his right to vote, this monk had developed a keen sense of separation between his public role as a religious figure, and his private status as a citizen, with attendant rights. As such, it is helpful to reflect on David Engel's work on Thai and Lanna legal consciousness in relation to the use of the "blood curse" by Red Shirt demonstrators in 2010.[487] Specifically, Engel draws upon Talal Asad's ideas of 'fragmented cultures' and 'hybrid selves'[488] to suggest that "studies of law and religion should reject the modern/non-modern binary"[489] and instead acknowledge the degree to which apparently opposing identities can operate in tandem, or even become conflated.

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[485] Larsson, *supra* note 454.
[486] Interview 35: Anynymous Monk. May 9th, 2017. Battambang
[487] David M Engel, "Blood Curse and Belonging in Thailand: Law, Buddhism, and Legal Consciousness" (2016) 3:01 Asian J Law Soc 71.
[488] Talal Asad, *Formations of the secular: Christianity, Islam, modernity* (Stanford University Press, 2003).
[489] Engel, *supra* note 489 at 71.

Concepts of citizenship and rights associated with the modern state, then, should be understood to exist fluidly alongside those of religious disengagement in Cambodia, often simultaneously. This is reaffirmed by the fact that the distinction between religious and secular role of monks is not always so clear. Many other monks I spoke with drew upon their religiosity to explain the importance of their participation in elections. One self-described 'activist monk' based at Wat Ounalom – which, interestingly, is presided over by Ven. Tep Vong – described his decision-making in this way:

> "We know that the people that become monks are eligible to vote, most of them. So if they don't vote, there is a lot of ballots missing. [We are] missing our obligation as a citizen. Even if we are monks, we are still citizens of Cambodia. Some people say that monks shouldn't vote, but others say we should vote because we have the right as citizen. If we vote, [people say] it's against the rule, but I always say we don't decide on the wrong choice, we decide on what is good. For example, I am not against anyone but I am for goodness, so if you are good I am for you (laughs)."[490]

Here, we see a significant blurring of the lines between public and private, religious and secular. The anonymous monk first grounds his decision *to vote* in his right as a citizen, separate from his role as a monk, but at the same time explains his decision of *how to vote* in religious terms. However, he is clearly aware of the fact that his decision to vote is a contentious one, and one which is perceived by many to contravene the rules of Buddhism, or at least the rules that appear to have been communicated down the religious hierarchy by the Sangha's leadership; namely, that monks should not engage in politics. As a result, the monk clearly intends his response to be comforting in two ways: firstly, by suggesting quite simplistically that if religious figures do vote, they will only vote for the 'right' person; secondly, by reaffirming that monks can engage in politics without losing their sense of political impartiality. The constitutional practice of Buddhist monks, and their decisions over whether or not to vote, in other words, are decided not only by the existence of constitutional provisions allowing monks to vote, in other words, but also by the different ways in which the identity or personhood of monks is conceptualised.

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[490] Interview 20: Anonymous Monk. 28th March 2017. Phnom Penh

Neutrality and Mobilization

The need for monks to remain impartial, then, is still central to constitutional arguments over whether or not monks should participate in electoral politics. In fact, absent a legal limit on the enfranchisement, the need for monks – and the *Sangha* more generally – to remain separate from the polarizing world of politics remains one of the most cited reasons for the Buddhist clergy to abstain from voting. In fact, it was exactly this reason that leaders of the *Sangha* used to support their 2014 request for legislation to prevent monks from voting, when Chhoeng Bunchhea, deputy director-general of Buddhist education for the Mohanikaya sect, explained that "if monks favor one side, they will lose their neutrality."[491] This is of utmost importance for many in the *Sangha*, it seems, not only because of ethical concerns about their unique and prominent role in society becoming politicized, but also for practical or pragmatic reasons. Specifically, as one monk implied in a 2001 *Phnom Penh Post* article, the fact monks are sustained by small personal donations of food, drink and money from their local community means that they can ill afford to alienate pagoda-goers on the basis of politics. "I want to be politically neutral," the monk told a reporter, "because I am now eating the rice of the CPP, Funcinpec, and Sam Rainsy voters and party members."[492] Of course, the dogmatic justification for upholding neutrality also continues to be widespread. As one monk, who requested anonymity, explained to me in Siem Reap province, he followed many of his contemporaries in not registering to vote "because monks are *naek bouah* [religious men], we are different from normal people, we are not kings or citizens… [we] find spiritual ways to help nation."[493] Here, the use of the phrase *naek bouah* implies a commitment to religiosity, but also a sense of abstinence and purity that would be damaged by political participation, compounding the idea that monks are distinct from other 'ordinary' citizens. Interestingly, meanwhile, it is worth noting that the above quote comes from one of the few interviews I was able to conduct with monks who abstained

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[491] note 480.

[492] "Monks Staying Out of Next Year's Elections", (2 August 2001), online: *Cambodia Daily* <https://www.cambodiadaily.com/archives/monks-staying-out-of-next-years-elections-24808/>.

[493] Interview 34: Anonymous Monk. 7th May 2017. Siem Reap

from politics; as a rule, those who held such views tended to refuse requests for interviews once it was clear they would pertain to law, politics or constitutional practice. This realization came to me not from my repeated failures to secure interviews with monks, but instead from the discomfort that certain questions caused in the interview mentioned above. That interview was, in fact, one of the shortest I conducted during my fieldwork as - having informed the venerable interviewee that he would not be compelled to answer any questions that he felt uncomfortable with – I found many of my questions politely dismissed with a silent wave of his hand.

The Cambodian *Sangha*, though, is itself far from being neutral. While a small proportion of monks actively engage in politics, the institution is widely understood to be under the direct influence of the Cambodian People's Party.[494] This was reaffirmed for many monks by the fact that Ven. Tep Vong's edict in 2003 came at a time when monks were gaining increasing prominence in opposition politics, and were often seen at the vanguard of pro-democracy protests.[495] As such, despite the fact it reflected a long-standing position of Ven. Tep Vong, the decision to take such a public and influential stand was widely understood as a politically motivated move, intended to stifle a surge in grassroots support for those who would challenge the dominance of the ruling CPP. Though the decree had no formal legal status, it was of undoubted significance to those within the *Sangha*. Further, as one monk-interviewee told me, cautiously at first:

> "…for Cambodia …err monks,… Buddhism is not independent and fair, it is under political pressure. Meaning that the grand monk, monk officials from the top to the bottom, from the bottom to the top, are appointed by the party. Yeah?… If you don't serve the party, they take away your stature (laugh), they kick you out of the pagoda… So even monk, if you speak about law, human rights law,

[494] Alexandra Kent, "Purchasing power and pagodas: The Sīma monastic boundary and consumer politics in Cambodia" (2007) 38:2 J Southeast Asian Stud 335.

[495] "Against Decree, Monks Try to Register to Vote", (18 February 2003), online: *Cambodia Daily* <https://www.cambodiadaily.com/archives/against-decree-monks-try-to-register-to-vote-23146/>.

> the Constitution, they say you are a political monk. See? And soon the monk will starve, and get kick out of the pagoda."[496]

This account suggests that not only are Buddhist leaders themselves politicised, but that the hierarchy of the *Sangha* is also used to ensure political conformity throughout Buddhist institutions. Hence, while the norm that monks should not participate in elections exists only in unwritten form, below the radar of formal legal analysis, it nevertheless has an influence on constitutional practice in Cambodia that is comparable to that of state law, even incorporating the possibility of an informal sanction for violation.

In spite of the very public declarations of the *Sangha*'s leadership, and the apparently challenging environment for monks who choose to disobey the orders, some monks do still subvert the institutionalised norm of not voting. However, their numbers are limited. This was confirmed by one anonymous leader of the Independent Monk Network for Social Justice, when he complained to me that out of 50,000 monks in the country, 8,000 had exercised their constitutional right by registering to vote ahead of the 2017 Commune Elections. He then went on to describe what was essentially a voter registration drive that he conducted around pagodas throughout the country, which he named after the indelible ink that is used to mark the fingers of those who submit a ballot on election day:

> "[M]y team went from temple to temple. 'Come to register! Come to register!' From temple to temple and I try to talk to the head monk, each pagoda's head-monk: 'please open the door, let the monk go and register for vote…the finger is luck for the nation and themselves.' That is why I produced the project called Lucky Finger… We produced video clips and tried to call for monks and [lay-]people to go to register. 'If you don't register, your finger will not be lucky for your life, for the nation.'"[497]

Evident again is the fact that, in attempting to persuade monks to register, this anonymous monk emphasised the idea that monks – as citizens – had a duty to participate

[496] Interview 35: Anonymous Monk. 5th May 2017. Battambang
[497] Interview 12: Anonymous Monk. 14th February 2017. Phnom Penh

in politics, suggesting that it was important "for the nation." From a practical perspective, it is also interesting to note that he was careful to work within the Sangha's established hierarchy to some degree, by first seeking permission from the head monk of each pagoda. Even while explicitly contradicting the wishes of Cambodia's *Sanghareach* (or head[498] of the *Sangha*), monks from the 'Lucky Finger' project to some degree acknowledged the ordering of *Sangha* hierarchy, whilst also playing on the decentralised structure that makes Head Monks at local pagodas the key decision-making in the practice of everyday monkish politics. This decentralised structure of authority in the *Sangha*, it seems, enables a diverse, vibrant, and at times contradictory approach to constitutional practice by Cambodia's Buddhist monks.

Returning to the level of ideas, meanwhile, one anonymous activist monk went on to repeatedly contest the notion that monks could or should remain separate from politics. "Nothing is neutral in this world, only the word neutral is there," he explained, because "if you don't do bad you do good, and if you don't do good you do bad."[499] Though expressed in relation to participation in elections and the exercise of the constitutional right to vote, it is clear that this rejection of the notion of neutrality opens the door to other modes of political participation for monks, such as social justice and political activism. As such, this anonymous monk's approach bares all the hallmarks of what scholars have elsewhere described as Engaged Buddhism;[500] a religious worldview that encourages political participation, but which extends the sense of duty expressed above far beyond the ballot box. It is no surprise, then, to note that he and many of the politically active monks I spoke with were not only interested in electoral politics, but also felt the same duty in response to multiple other social issues in Cambodia, including the prevalence of land disputes, human rights abuses, deforestation and dispossession. Constitutional debates about the enfranchisement of Buddhist monks, in other words, can be seen to pave the way for the consideration of monks' involvement in other forms of constitutional practice, such as advocacy for the protection of constitutional rights and

[498] Literally translated, *Sanghareach* would mean King of the *Sangha*. However, the term is generally understood not to have such explicitly royal meaning or status.
[499] Interview 12: Anonymous Monk. 14th February 2017. Phnom Penh
[500] Christopher S Queen & Sallie B King, eds, *Engaged Buddhism: Buddhist liberation movements in Asia* (Albany: State University of New York Press, 1996); *ibid*.

principles. Likewise, as we will see below, the specter of the supernatural that is implicit in the "Lucky Finger" project – which is ostensibly focused only on encouraging monks to exercise their constitutional right to vote – also emerges when monks in Cambodia engage in other forms of constitutional practice, such as campaigning on social and environmental justice issues.

Law, Saffron Justice and the Spirit World

Looking beyond the ballot box, the constitutional ambivalence over the role of monks in politics has also exacerbated questions about whether monks should advocate for social and environmental justice. Much like the question on the right to vote, those who felt that monks shouldn't engage in such activities tended to be more reticent, or declined altogether to participate in interviews 'on the record.' However, one monk who had earlier explained that he was a registered voter did openly and explicitly express a sense of unease about the work of 'activist monks.' Responding to a direct question about this, he explained that it was the role of monks "to educate, to talk to the people and remind them – the people, authorities, those that do evil – to remind them" before asserting that "to go and do law [sic] is not right."[501] While the participant did not elaborate on what exactly *doing* law entailed, this phrase appears to be closely related to what I have already (following Schonthal) termed constitutional practice, as his explanation also made it relatively clear that he believed there were limits to how far monks should go in their political activities. Specifically, the phrase *doing* law is an interesting one, as I will demonstrate below that many of the monks who engage in social or environmental justice issues in Cambodia do so because of absences, weaknesses or failures in law. For now, however, the above statement is a helpful representation of the widely held belief that monks should not be playing the role of activists or engaging in constitutional practices beyond the exercise of their constitutional right to vote. Yet, this view is certainly not shared by all monks. In fact, a number of monks I interviewed not only suggested that it is their right to do so, as citizens, but also argued that it is their duty as Buddhists as well. As noted earlier, with reference to David Engle's application of Talal Assad's notion of

[501] Interview 34: Anonymous Monk. 7th May 2017. Siem Reap

"hybrid selves," these supposedly distinct identities and related activities appear not only to exist alongside one another in the consciousness of Cambodia's activists monks, but even seem to be conflated.

The activists monks I spoke with, in fact, often weaved together modern discourses of secular citizenship, and its attendant rights and responsibilities, with the ancient teachings of the Buddha himself. As such, the issues in which they engaged varied, with some identifying more with human rights causes, others focusing specifically on land issues, and some focusing more exclusively on the environment and deforestation. One activist monk, for example, explained how his own involvement in demonstrations and activism, and that of monks generally, has developed. After reflecting on how the violence[502] directed at monks involved in the 1997-1998 pro-democracy protests had a chilling effect on monks' political expression, one activist monk went on to claim that he had "opened a new page" in monks' political participation in 2009 by focusing on the land disputes that have ravaged Cambodia. This, he argued, was based on the fact that "monks have the right to participate in politics," while the opposition he faced from government was because "when monks are involve in politic…it affects their [the government or ruling party's] power; because monks represent justice."[503] The engagement of monks in other forms of constitutional practice, then, is partially born of secular constitutional rights. Yet, at the same time, the effectiveness of monks' involvement in constitutional practices such as advocacy and activism is seen to be bolstered by their culturally ingrained influence in society, as well as by traditional ideas of monks as bastions of justice. One anonymous monk, meanwhile, identified his concern about deforestation with a religious belief in protecting nature more generally. "Buddha was enlighten under a tree, he said, "and Buddhism is the protector of the environment."[504] Hence, the monk described how he and a number of other monks have toured the country preaching about the virtue of environmental protections. In support of communities who are affected by logging, he explained that they assist by going to "study, analyse and… report why there is a loss of

[502] note 477; "Sit-In Crumbles After Early-Morning Crackdown", (9 September 1998), online: *Cambodia Daily* <https://www.cambodiadaily.com/archives/sit-in-crumbles-after-early-morning-crackdown-10643/>.
[503] Interview 3: Anonymous Monk. 31st January 2017. Phnom Penh
[504] Interview 20: Anonymous Monk.. 28th March 2017. Phnom Penh

trees."[505] In other words, they play a role typically taken by NGOs in Cambodia, engaging in constitutional practices of monitoring and publicising deforestation that is seen to contravene constitutional principle and procedure.

Still, not all monks employ such conventionally secular strategies in their activism. In fact, in a practice that is reminiscent of that of Engaged Buddhist monks in Thailand,[506] environmentally conscious monks, such as the one quoted above, have used the idea of tying the saffron robes that are characteristically worn by monks around trees that they fear will be cut down. As he explained, while showing me a video of himself conducting such a ceremony:

> "You see how we paint the tree; we are determining this tree to be religious tree. This is just a supplement faith. The first thing that we can believe in is the law, but when the law is not implemented, we do other choice. … If the law is not able to be implement, let use some other ways of life to protect it. So we went from one forest to another using the robe, tying it to the trees and giving a blessing. At least people have the attitude: 'Oh this belongs to the monk' or 'this belongs to religion, we should not cut it.'... But at least to show them you have a mind, you should think about how this doesn't belong to you, it belongs to the world. And I use the proverb that saving me for the sake of your life. We put on the tree my survival is your life. Protect me to stop climate change. We tie all the proverb and put around the tree."[507]

Even when responding to modern issues, then, activist monks employ unique, alternative techniques that draw upon their traditional, cultural significance in Cambodian society. Though such techniques are not always successful in preventing deforestation or

[505] Interview 20: Anonymous Monk.. 28th March 2017. Phnom Penh
[506] Queen & King, *supra* note 502; Sulak Sivaraksa, *A socially engaged Buddhism* (Bangkok: Thai Inter-Religious Commission for Development : Distributed by Kled Thai Co, 1988).
[507] Interview 12: Anonymous Monk. 14th February 2017. Phnom Penh

destruction, the very fact that they are used as an alternative to Cambodia's existent, formal legal framework to uphold constitutional principles is in itself hugely symbolic.[508]

It is also notable, meanwhile, that some of the issues discussed by the monk quoted above are not formally recognised or provided for by Cambodia's Constitution. Specifically, questions about the protection of the environment and natural resources do not have clear and concise answers in the Constitution. Here, activist monks are clearly not tied to the specific wording or processes of the written Constitution, but have been able to identify issues that are clearly of fundamental importance to local, national and even international communities. With the help of religious practices, in other words, these activist monks are able to highlight principles that are not enshrined in the Constitution, but which they feel could or should be constitutive elements of Cambodian society. Equally, these constitutional practices also work to suggests that, while there is undoubtedly a demand for better legal protections for the environment, there might also be other normative systems – perhaps more historically or culturally embedded ones – in operation in Cambodia that can be directed towards similar ends, including Buddhism.

That Cambodian monks would turn to these alternatives is hardly surprising, given the disdain that they – like many lay-people in the country – express in relation to the courts. Through their close connection to everyday Cambodian life, both in Phnom Penh and in rural provinces, as well as through their community-focused activism, many monks appear to have developed a keen sense of the flaws in Cambodia's judicial institutions. As another activist monk explained, for example, for those bearing the brunt of deforestation or land appropriation, the courts do not offer much comfort:

> "It seem the justice system in Cambodia is murky/muddled. When we go to the court and listen to them it sounds like they are good, and use a lot of laws from this and that article… but at the end the judgement is bias to the rich. The justice system is Cambodia is not right; white is turned into black, and black into white."[509]

[508] Ian Harris, "How environmentalist is Buddhism?" (1991) 21:2 Religion 101.
[509] Interview 23: Anonymous Monk. 31st March, 2017. Phnom Penh

In such a context, religious and supernatural norms offer a more accessible, reliable, and less costly mechanism to protect the rights that are enshrined in Cambodia's Constitution. However, it is not only the association with monks that lends a degree of cultural legitimacy to these endeavours. As one activist with Mother Nature (an environmental NGO that has since been forced into closure) explained, similar ceremonies to that described above have been performed in the mangrove forests of Koh Kong province, and involved monks "ordaining" trees, and giving them religious blessings. This, the activist explains, is supposed to give them added protection from ancestral spirits:

> "the ordination of the mangrove is related to the belief of the people; when they ordain a tree that means that is protected by spirit (*Areak Naek Ta*) making the people respect and protect that place."[510]

By not just ordaining but also blessing the mangrove trees, local environmental activists hoped to add a lasting layer of protection; one that played into common Cambodian beliefs in the supernatural, and fears about the consequences of upsetting or displacing spirits. These spirits, then, essentially become guardians of embattled resources or land, in place of law enforcement and judicial institutions that are believed at best to be ineffective, and at worst to be co-opted and complicit. The *Areak Naek Ta* and the monks who ordain trees, in other words, become actors in Cambodia's constitutional practice.

Understanding the significance of supernatural spirits, described above by the anonymous environmental activist, means first recognising the specificities of Buddhist practices in Cambodia. As the Buddhism scholar Paul Fuller explains, this is necessary because Cambodia's "'lived Buddhism' has a complexity and 'hybridity'" that makes it "radically different from the Buddhism of textual tradition."[511] This hybridity involves an interplay between a more "rational, empirical, and even scientific" Buddhism, which was also encouraged by the French during the colonial era as an appropriately "modern" belief system,[512] and the more ritualistic or superstitious version that incorporates a belief in

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[510] Interview 15: Anonymous Environmental Activist. 9th March 2017. Phnom Penh

[511] "Rituals and religion", (8 February 2016), online: *Mekong Rev* <https://mekongreview.com/rituals-and-religion/>.

[512] Penny Edwards, *Cambodge: the cultivation of a nation, 1860-1945*, Southeast Asia--politics, meaning, and memory (Honolulu: University of Hawai'i Press, 2007).

spirits that would more commonly be associated with animism.[513] While easily dismissed as an irrational "deterioration" from Buddhism's "textual tradition,"[514] this belief in spirits is woven relatively seamlessly into everyday religious practices and belief systems in Cambodia. As such, whether one chooses to "historicise" these beliefs – as Dipesh Chakrabarty warns so powerfully against in *Provincializing Europe*[515] – or is able to follow Manuel Vasquez's advice to remain "humbly agnostic" about them, one cannot ignore the fact that Cambodia's spirit world can have "powerful material consequences."[516] Whether residing in and protecting natural landmarks, such as trees and mountains, or appearing only to possess and animate those experiencing injustice, including overworked garment factory employees and recently-dispossessed urban slum-dwellers,[517] spirits once disturbed can be seen to have intervened with some regularity in everyday Cambodian politics. Hence, it is hardly out of the ordinary to see spirits being summoned, even by Buddhist monks, in the process of constitutional practice in Cambodia, particularly by those seeking for additional protection for constitutional principles. As we shall see below, though such strategies are not always entirely effective, and are also open to co-optation, they nevertheless offer an alternative to more conventional mechanisms offered by state law, which are typically perceived as dysfunctional and ineffective.

Beyond filling the gaps left by dysfunctional institutions, the protection of spirits can also be understood to play a kind of quasi-constitutional role. Given that a large majority of forced displacements and deforestation in Cambodia takes place according to formal legal procedures and government policies,[518] summoned spirits and tree ordination ceremonies occur as a last resort for those seeking to place limits on the power of the state. As one monk involved in the spirit-summoning ceremonies in Koh Kong explained,

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[513] Philip Coggan, *Spirit Worlds: Cambodia, the Buddha and the Naga* (John Beaufoy Publishing, 2015).
[514] note 513.
[515] Dipesh Chakrabarty, *Provincializing Europe: postcolonial thought and historical difference*, Princeton studies in culture/power/history (Princeton, N.J: Princeton University Press, 2000).
[516] Vasquez, *supra* note 85.
[517] Julia Wallace, "Opinion | Workers of the World, Faint!", *N Y Times* (17 January 2014), online: <https://www.nytimes.com/2014/01/18/opinion/workers-of-the-world-faint.html>; "Explaining the Factory Faintings", (23 November 2012), online: *Cambodia Daily* <https://www.cambodiadaily.com/special-reports/ghost-in-the-machine-3347/>.
[518] Springer, *supra* note 394.

spirits are also understood to have the added benefit of being free from government control:

> "They are not afraid of the law, guns because they have guns. They are not afraid of the judicial system because it is in their hand. They are not afraid of money because they can make it themselves. But they cannot buy magic from the mind of the people. They cannot buy…any number of people… cannot buy the heart of the people."[519]

Spirits and, in this monk's vocabulary, "magic" thus have a special significance here, as they not only possess a powerful normative force, but one that has yet to be co-opted by the state. Hence in a manner that is distinctly reminiscent of the "weapons of the weak" conceived of by James C. Scott,[520] the monks and lay-activists I spoke with saw in the summoning of spirits a unique opportunity to set limits on the state, and what could be sacrificed in the name of development. Meanwhile, they simultaneously questioned the primacy of Cambodia's legal and constitutional order, by drawing upon a set of norms and mechanisms that were distinct from state law, but nonetheless grounded in local cultural and religious understandings.

Nevertheless, it is important to avoid romanticising the notion of spirits as a check on state power. While the above account from a monk who practices this type of activism suggests that the spirit-world is beyond co-optation, some recent scholarship on Cambodia suggests that this may not be the case. As Alice Beban and Courtney Work suggest in their engaging article *The Spirits Are Crying*, even if spirits cannot be "bought" they may be placated and co-opted.[521] Using a case-study from Kompong Chhnang province, Beban and Work show how state officials were able to legitimize the granting of a land-concession to a well-connected corporation, Pheapimex, by returning the more contentious parts of the concession, planting trees, and conducting tree ordination ceremonies a lot like those described above as a symbol of the corporation's

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[519] Interview 12: Anonymous Monk. 14th February 2017. Phnom Penh

[520] James C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press, 2008).

[521] Alice Beban & Courtney Work, "The Spirits are Crying: Dispossessing Land and Possessing Bodies in Rural Cambodia: The Spirits are Crying" (2014) 46:3 Antipode 593.

commitment to protecting those trees. This is far from unprecedented, the authors suggest, as historically the expansion of ancient Khmer empires were legitimised by Kings who "used the technologies of Brahmanic priests and their pantheon of sky gods" in order to "facilitate the enclosure and appropriation of people and land."[522] The spirit-world, in other words, is far from being immune to co-optation, as the leaders of contemporary Cambodian state, like their centuries old predecessors, appear in Beban and Work's piece to be particularly adept at harnessing the power of the supernatural for their own purposes, or to reify the power of the state more generally. One should be careful, then, of viewing supernatural activism romantically and uncritically as a "weapon of the weak," without recognising the distinct limits and potentials for co-optation that are inherent to this brand of activism. What this and the above accounts by practitioners of Buddhist environmental activism suggest, however, is that while the spirit-world may not present an absolute check on the state, the need to appease local spirits and at least avoid or remedy excessive violations of their realms of authority may nevertheless pose some minimum requirements and procedures on both state and non-state actors.

Conclusion

The inclusion of the international norm of universal suffrage in Cambodia's 1993 Constitution, and the decision before that by the U.N. to deny the country's senior Buddhist leaders' requests for a religious exemption to that norm for monks, enforced upon Cambodia a new constitutional *status quo* wherein monks could actively engage in electoral politics. This brought to the surface an underlying societal ambivalence over the role that Buddhism, and Buddhist monks, should play in politics, and the pursuit of a more just society. The following two-and-a-half decades have seen the Buddhist *Sangha* engage in a largely internal conversation about how to interpret the Constitution's guarantee or universal suffrage, and how to "translate" that concept into Cambodian terms, not to mention everyday practice. This period has, therefore, seen Cambodia's monks and religious institutions seek different ways of resolving this constitutional

[522] *Ibid* at 12.

tension, and inhabiting their new constitutional order in the process. Rather than ignoring or seeking to amend the Constitution, however, politicians and members of the Buddhist clergy have publicly contested the meaning of the document, and actively employed constitutional arguments as a way to further their cause. We can see that, even without judicial institutions becoming a forum for them, these debates have nonetheless taken on a constitutional lexicon "as a type of natural language." Alongside more historically routed concerns about neutrality – or the dividing lines between the corrupt, secular world of politics and the detached world of spiritual enlightenment that monks are supposed to inhabit – the debates articulated above also revolve around discourses of citizenship, rights, environmentalism and legality.

The result, at least in relative terms with respect to the otherwise largely authoritarian constitutional context in Cambodia, has been a peculiarly liberal compromise in constitutional practices. Cambodia's *Sangha* and secular-political leaders have undoubtedly attempted to discourage monks from voting or engaging in politics; yet, they have largely refrained from formally *preventing* them from doing so. Here again, as in Chapter 5's account of the politics of the Bar Association, we see the importance of informal mechanisms of power – and particularly the ruling party's strategy of co-optation – in shaping the constitutional practices and postures of societal institutions, meanwhile. While doctrinal arguments may explain why many monks do not choose to vote or engage in politics, and Cambodia's political and religious leaders have refrained from formally preventing monks from voting, the internal structures of the *Sangha* do also appear to be another major factor in limiting the extent to which monks engage in political activity. In this regard, however, there are multiple questions about how Cambodia's Buddhist *Sangha* functions that this research has not been able to ask, let alone answer. To better understanding the functioning of the *Sangha* as a societal constitutionalist system, for example, future research might ask how authority is structured within the *Sangha*'s formal hierarchies, what (formal) relationship these have to state authority, how its internal rules are made at the level of the national *Sangha* or at the level of the pagoda, and how and how often these internal rules are enforced.

Meanwhile, despite exerting informal influence over the *Sangha* leadership, it is still notable that the party-state has largely left the country's Buddhist community to resolve the issues of constitutional practice surrounding monkish politics on its own. This is out of the ordinary, given Chapter 4's account of how authoritarian constitutionalism dominate the state's approach to constitutional practice, and given the extent to which this practice often relies on the use of legislation, and administrative or judicial institutions, to undermine dissent. Perhaps out of concern for its already contested constitutional legitimacy, or perhaps as a reflection of the fact that the aforementioned strategy of informal co-optation makes it unnecessary, however, the state has repeatedly declined to intervene in the internal affairs of the *Sangha*. "'I cannot oppose the prohibition by the two chief monks," Hun Sen reportedly said in 2003, "and I also cannot oppose the constitution. The decision is the individual's right."[523] In addition to being a case that raises fundamental questions about the relationship between Buddhism and the modern state, or even between the state and religion more generally, then, Cambodia's saffron constitutionalism is also a poignant example of the extent to which constitutional law often operates beyond the reach of the judicial institutions with which it is usually associated.

Alongside more historically rooted concerns about neutrality – or the dividing lines between the corrupt, secular world of politics and the detached world of spiritual enlightenment that monks are supposed to inhabit – the debates about constitutional practice articulated above also revolve around discourses of citizenship, rights, environmentalism and legality. A newfound, constitutionally-grounded sense of citizenship, and the related discourse of rights and responsibilities, have also been deployed by monks who – in engaging with social, political and environmental issues – have sought to extend their political participation far beyond their individual (or collective) influence at the ballot box. In doing so, they have been able to seamlessly combine a modern, secular, constitutional vocabulary with a more traditional, religious one in their constitutional practices. As such, they embody Talal Asad's ideas of "fragmented cultures" and "hybrid selves," by blending together ideas of modernity and

[523] Quoted in *note 475 at 249*.

tradition. In this vein, Monks and lay activists have also collaborated to use both secular and religious strategies to call attention to the limits of constitutional law in Cambodia. Whether it is by employing conventional advocacy techniques like monitoring and reporting on deforestation, or by ordaining trees and summoning ancestral spirits, their work both highlights gaps in the enforcement of constitutional norms and attempts to fill these gaps by borrowing from other, non-state normative systems, such as religious principles and teachings.

While it is of course important to maintain a healthy scepticism about any one group's claims to embody or "represent justice," it is clear that – despite repeated scandals in recent years, not to mention Buddhist nationalism being at the centre of a Rohingya crisis in Myanmar[524] – Cambodia's monkhood can nevertheless still lay claim to an inherent legitimacy. Hence, activist monks pose fundamental questions for Cambodia's constitutional order, not only by highlighting the injustices resulting from the state's failure to live up to its constitutional promises, but also by drawing attention to societal norms that are entirely absent from the Constitution to begin with. Where principles are not enshrined in the Constitution but are considered by monks to be fundamentally important (such as those that would protect the environment and natural resources), monks use religious practices to highlight those principles. In the process, they demonstrate the extent to which those same principles are felt to be constitutive elements of Cambodian society. The result is a vibrant, complex, and at times contradictory set of everyday constitutional practices. It is a set of practices in which the state features, but

[524] See, for example, Ben Sokhean, "Meth Case Spotlights Mounting Monk Crime", (14 April 2016), online: *Cambodia Daily* <https://english.cambodiadaily.com/news/meth-case-spotlights-mounting-monk-crime-111298/>; "Monk and Students Arrested for Drugs", (21 August 2016), online: *Khmer Times* <https://www.khmertimeskh.com/27023/monk-and-students-arrested-for-drugs/>; "Monk accused in sex scandal", (1 November 2017), online: *Khmer Times* <https://www.khmertimeskh.com/88786/monk-accused-sex-scandal/>; "The sound of silence: sexual abuse in Cambodia's Buddhist pagodas", (12 February 2018), online: *Southeast Asia Globe* <https://southeastasiaglobe.com/the-sound-of-silence-sexual-abuse-in-cambodias-buddhist-pagodas/>; "Monk and friends caught using drugs", (20 February 2018), online: *Khmer Times* <https://www.khmertimeskh.com/109634/monk-friends-caught-using-drugs/>. On Buddhist nationalism and the Rohingya-crisis in Myanmar more generally, see Nick Cheesman, Nicholas Farrelly & Trevor Wilson, Debating Democratization in Myanmar (Institute of Southeast Asian Studies, 2014); Benjamin Schonthal & Matthew J Walton, "The (New) Buddhist Nationalisms? Symmetries and Specificities in Sri Lanka and Myanmar" (2016) 17:1 Contemp Buddhism 81; Melissa Crouch, ed, Islam and the State in Myanmar: Muslim-Buddhist Relations and the Politics of Belonging, 1 edition ed (New Delhi: Oxford University Press, 2016); Nick Cheesman, "Introduction: Interpreting Communal Violence in Myanmar" (2017) 47:3 J Contemp Asia 335.

only as one among many actors, and which are taking place almost entirely outside of Cambodia's judicial – or even state – institutions, in arenas that are otherwise largely ignored by traditional approaches to constitutional law.

Chapter 7 – Of Art and Order: The Ministry of Culture's Code of Conduct for Artists and Performers

In February 2017, Cambodia's Ministry of Culture and Fine Arts released a *Code of Conduct for Artists and Performers* (herein, the *Code of Conduct*). A unique but seemingly innocuous document, the *Code of Conduct* is in many ways a formalisation of existing but largely unwritten rules that have long shaped the state's approach to the artistic endeavours of its citizenry. As such, it purports to act as "a directional compass for every artist to follow in order to achieve the promotion of national reputation,"[525] outlining their specific obligations and the process by which – based on the decisions of a Board of Discipline and Reward[526] – artists and performers can be incentivised or reprimanded by the state. Hence, the *Code of Conduct* goes on to demand "loyalty to the nation, religion and king," as well as adherence to "principles of morality, virtue and truth" and "the spirit of solidarity, high national unity, [and] fraternity."[527] Finally, it provides for disciplinary actions against those who, among other things, "cause damage to national culture, traditions, customs and identity, as well as social security and safety."[528]

Though clearly interesting in itself, and as a contemporary iteration of historical cultural trends in Cambodia, the *Code of Conduct* is also of particular relevance to the study of constitutional practice in the country. This is not only because it represents an explicit limit to the right of free expression, but also – and more interestingly – because it finds its origins in the constitutional text. As such, following from the Chapter 5's explanation of how authoritarian constitutional practice in Cambodia is facilitated by an inverting of the hierarchy of laws, we see here a *Code of Conduct,* passed by sub-decree, building on a paternalistic translation of constitutional provisions to undermine explicit constitutional

[525] Ministry of Culture and Fine Arts, *Code of Conduct for Artists and Performers* (2017), Prakas No.11 (2017), Preamble
[526] Ministry of Culture and Fine Arts, Decision No.58 (2016)
[527] Ministry of Culture and Fine Arts, Prakas No.161 (2016)
[528] Ministry of Culture and Fine Arts, *Code of Conduct for Artists and Performers,* Prakas No.11 (2017), Article 3.v.

protections for the right to free expression. Specifically, Articles 69 and 70 of the Constitution assign to the state "the obligation to preserve and develop national culture" and the duty to "punish severely" any "offence affecting or relating to cultural and artistic heritage," respectively.[529] Article 41's recognition of the freedom of expression, press, publication and assembly, meanwhile, is qualified by a clause that prohibits the exercise of those same rights in ways that "affect the good traditions of the society, to violate public law and order and national security."

That the *Code of Conduct* emerges from such a unique and paternalistic constitutional mandate makes it a prescient example of constitutional practice in Cambodia, not to mention one that aptly demonstrates the extent to which constitutional language permeates the workings of the state and its engagement with the public. By targeting artists and performers, however, the state's approach appears also to have highlighted the extent to which this seemingly disparate segment of society can be understood as a constitutional actor. Equally, viewing the *Code of Conduct* as an example of both state-led constitutionalism and national-identity construction also makes visible the ways in which constitutional understandings are dependent on groups and individuals who might not otherwise be considered in academic discussions of constitutions. Hence, in addition to explaining how the drafting and implementation of the *Code of Conduct* represents an everyday example of constitutional discourse, this chapter will also explore how artists in Cambodia might also create and contest constitutional meanings through their work, as a further example of everyday constitutional practice.

Viewing artists as constitutional actors is undoubtedly a novel idea. Yet, it finds some parallels in Stacy Douglass' notion of "counter-monumental" constitutionalism.[530] In a growing body of work, Douglass has critiqued academic literature that assumes constitutions are "the central place from which to navigate and negotiate political community," noting that this assumption "neglects the ways in which imaginations of

[529] The latter clause is clearly somewhat of an anomaly in comparative constitutional law ters, and presumably came from an ongoing anxiety and anger about the frequent theft of artefacts from the sacred Angkor Wat temple complex.

[530] Stacy Douglas, "Between Constitutional Mo(nu)ments: Memorialising Past, Present and Future at the District Six Museum and Constitution Hill" (2011) 22:2 Law Crit 171.

political community are also launched at other sites of meaning-making."[531] To highlight this point, Douglass uses empirical studies of three national museums from around the world to note the manifold ways in which they "function much like constitutions."[532] Most notable among these is the way that museums simultaneously both "operate as a site from which imaginations of political community are launched," as they actively construct ideas about national culture and identity, and attempt to "simulate the organisation of the world" through their curated representations of historical reality.[533] As such, according to Douglass, museums are understood to play a role in identity (and especially national identity) formation, as well as state-building, that is akin to the one played by constitutions. In this regard, also, museums and constitutions both tend to "rely on discourses of authenticity that assimilate the individual into predetermined cultural or political communities," and as a result are engaged in "a dangerous liaison with cultural essentialism that stifles difference."[534] As will be seen shortly, this point has a real resonance for the empirical data presented in this chapter, given that the majority of artists interviewed for this research expressed concerns that the *Code of Conduct for Artists and Performers* would be used to enforce a singular version of Khmer culture and thus supress the very possibility of difference or change.

Taken more broadly, Douglass' work offers a powerful explanation of why cultural sites might also be considered sites of constitutionalism, to which this chapter could be considered a composite. Developing a notion of counter-monumental constitutionalism, for example, Douglass also highlights ways in which museums might also complicate constitutive processes of identity formation. For Douglass, in fact, museums also make possible "the necessary interruption of community,"[535] in that they make visible the ways in which national identities – and therefore nations themselves – are constructed. This, too, could be said about artistic expression, which often provides a powerful vehicle through which to deconstruct dominant or hegemonic narratives. As Caterina Preda

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[531] Stacy Douglas, "Museums as Constitutions: A Commentary on Constitutions and Constitution Making" (2015) 11:3 Law Cult Humanit 349 at 349.
[532] *Ibid*.
[533] *Ibid*.
[534] *Ibid* at 351.
[535] Douglas, *supra* note 532. Thesis

explains in her book *Art and Politics under Modern Dictatorships*, even in illiberal settings art can "be a means of deconstructing the officially assembled reality."[536] However, drawing on examples of official and unofficial art under authoritarian rule (for which she draws on examples from Augusto Pinochet's Chile and Nicolae Ceaușescu's Romania), Preda ably demonstrates that the power of art also exists largely in its ability to record the realities of everyday life. As such, even when the ability of artists to openly and overtly represent politically sensitive issues is limited, they may also make use of metaphor or "small gestures" to undermine official narratives without risking censure from the state.[537] This chapter does not follow Preda's lead in looking at artistic product to identify such gestures or deconstruct possible metaphors. Though such an approach could, indeed, be an extremely productive line of future enquiry for those interested in constitutional practice in Cambodia, or elsewhere, it is largely beyond the scope of what it is possible to do here, and beyond the realm of my academic expertise. However, what I do attempt to do in this chapter is to reflect on the experiences of artists in employing artistic techniques to challenge orthodoxy and express dissent in Cambodia. In the process of understanding these "small gestures," however, it is possible to see how artists are able to navigate and challenge, rather than simply reaffirm, state-led constitutional narratives about the preservation of traditional culture.

Yet, as previous chapters have demonstrated, the state is not the only actor in the implementation of "top-down" or "abusive" constitutionalism in Cambodia. Thus, just as Preda has noted that the state's approach to art and artistic policy is often "a direct reflection of the political model,"[538] or perhaps regime type, so in Cambodia it is evident that artistic and media associations have and will continue engaged in the promotion and policing of culture. This is most clearly evidenced by the Board of Discipline and Reward, which – like the consultation processes through which the *Code of Conduct* itself was made – includes the Presidents of national associations for television, radio film and the arts. As such, the *Code of Conduct* can to some degree be understood as a

[536] Caterina Preda, *Art and Politics Under Modern Dictatorships: A Comparison of Chile and Romania* (Springer, 2017).
[537] *Ibid* at 30.
[538] *Ibid* at 5.

step towards the constitutionalisation of Cambodia's arts-and-culture-sector, in a number of ways. First, by providing definitions of who is considered an artist or performer, it outlines the criteria for membership; it creates a "people" or constituent group, and a means by which they can be identified. At the same time, it engages representatives of this group in the construction of a set of rules by which they agree to be governed, as well as laying out the processes by which those rules can be interpreted, implemented and even changed. Yet, contrary to how "societal constitutionalism" is imagined by its theorists,[539] the drafting of the *Code of Conduct* demonstrates how the state also co-opts the practice of societal constitutionalism in Cambodia. For such a diverse and diffuse sector, however, implementation of such discipline – or even self-discipline – is rarely uniform. As such, many artists continue to subtly push back against what is often perceived as a paternalistic and regressive approach on the part of the state, resisting both the state's constitutional interpretations and their integration into a societal constitution.

To foreground an empirical discussion of Cambodia's new *Code of Conduct for Artists and Performers* that takes seriously the experiences of those who it is designed to regulate, however; this chapter will begin by locating the *Code of Conduct* in its domestic constitutional milieu. In doing so, the themes that developed in previous chapters will be extended to explain the document as an expression of "top-down" constitutionalism. Drawing on interviews with government officials from the Ministry of Culture and the Ministry of Women's Affairs, as well as artists who expressed sympathy for the government's objectives, this section will help to evince the paternalistic, statist rationale behind the *Code of Conduct*. This will be followed by a detailed exploration of how Cambodian artists themselves understand the *Code of Conduct*, and its relationship to the political aspects of their work. Here, data from interviews from a range of artists from across Cambodia will provide a unique vantage point from which to view contestations over the meaning and implementation of the *Code of Conduct*, as well as the extent to which these can be understood to be constitutive in character. Finally, viewing the implementation of the *Code of Conduct* from this perspective will also suggest some of the manifold strategies that artists themselves use to navigate through the everyday

[539] See Chapter 2's overview of conceptual frameworks for studying constitutionalism

realities of "abusive" constitutionalism in Cambodia. Ultimately, these perspectives will highlight the fact that the state's constitutional mandate to "preserve and develop" Cambodian culture and tradition is in fact being shaped by artists and performers themselves. Specifically, through their interactions with the state and through their everyday practices, artists and performers can be seen to challenge the state-led constitutional discourse by challenging the state's definition of Cambodian culture, as well as by testing the limits of the state's ability to impose and police that definition. As such, this Chapter will provide a further example of the ways in which popular understandings of the Cambodian Constitution are helping to shape the practice of constitutionalism in Cambodia.

"Top-Down" Constitutionalism: Protecting Culture, Ensuring Order

The *Code of Conduct for Artists and Performers* was ultimately established by Prakas (sub-decree) No.161, passed by the Ministry of Culture and Fine Arts on 14th October 2016, and then updated by Prakas No.11 on 23rd February 2017. Article 1 of both Prakas explicitly outlines the objectives of the *Code of Conduct*, by stating that its purpose is promoting "the preservation, protection of national arts, culture, traditions, customs and identity" and preventing "negative impacts to the national and traditional arts."[540] In its initial version, laid out in 2016 by Prakas No.161, the *Code of Conduct* outlined the obligations of artists and performers in vague terms. Article 4, 'The Overall Obligations of Artists,' for example, stated that artists must: (i) "have loyalty to the nation, religion and king"; (ii) "adhere to the spirit of solidarity, high national unity" in a way that is "in accordance with the great culture and tradition of our ancestors"; (iii) "adhere to the principles of morality, virtue, and truth," In a more cautionary tone, it also a more cautionary tone, it also forbade artists from "activity and behaviour that have negative impacts to the national culture, tradition and honour" and from creating work or performances that might "incite, cause separation, or discrimination by race, colour and

[540] Ministry of Culture and Fine Arts, *Code of Conduct for Artists and Performers* (2017), Prakas No.11 (2017), Article 1; and Ministry of Culture and Fine Arts, *Code of Conduct for Artists and Performers* (2016), Prakas No.161 (2016), Article 1.

religious faith."[541] In the more recent Prakas, No.11 of 2017, however, the Ministry clarifies exactly the sort of behaviour it seeks to target for sanction, outlining in Article 3 the specific activities that are deemed to "cause damages to national culture, traditions, customs and identity as well as social security and safety." Most notably, the first such activity listed is "wearing clothes that are contrary to national traditions and customs, and that deliberately causes the audience to be lustful." Further down the list, meanwhile, other provisions prohibit work or performances that are "immoral or unvirtuous"; are "defamatory, insulting or pornographic" in content; that "provoke, influence or incite disunity or discrimination"; or that "affects the honour of the King or the value of religion."

Having initially laid out a broad set of principles that might guide the behaviour of artists and performers in Prakas.11 of 2016, in other words, the Ministry set about providing a more explicit set of prohibitions the following year. It is telling that, among these, the first and most prominent prohibition relates to a (still somewhat vague) description of what is considered unacceptable attire. This, as I shall explain below, is what many interviewees have subsequently surmised was the overarching purpose of the *Code of Conduct*. Even during the drafting process, however, the premise of the *Code of Conduct* came under public scrutiny. In a *Phnom Penh Post* article in June of 2016, for example, opposition MP Mu Sochua argued that monitoring artists' choice of attire was "not the role of the state," while the Executive Director of the NGO Gender and Development for Cambodia, Ros Sopheap, described the prospect of such a regulation as "ridiculous."[542] The article went on to profile the opinion of five "ordinary" Cambodians, however; of those five, all expressed some level of discomfort with the way in which certain celebrities dressed.[543] The article, in other words, touched on a fundamental ambivalence

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[541] Ministry of Culture and Fine Arts, *Code of Conduct for Artists and Performers* (2016), Prakas No.161 (2016), Article 4.viii. and 4.ix.

[542] V et al, "The women pushing the limits of 'sexy dress' | Phnom Penh Post", online: <https://www.phnompenhpost.com/post-weekend/women-pushing-limits-sexy-dress>.

[543] The respondents either said that revealing clothing (generally described as "western") was completely inappropriate in Cambodian culture, or suggested that it was inappropriate in certain contexts. "Cambodian women should respect the culture and dress modestly," one respondent was quoted as saying, while others were quoted as saying that they wanted to see people "wearing acceptable clothes depending on the circumstance" or arguing that "it's acceptable for young people to wear what they want, but not to cultural events." See *Ibid*.

that the *Code of Conduct* raises: whether or not Cambodian culture is harmed by the "provocative" clothing worn by artists and performers, and whether or not it is the duty of the state to intervene.

Prohibiting artists and performers from dressing in a way that "deliberately causes the audience to be lustful," as the *Code of Conduct* puts it, may still seem like a particularly far cry from the traditional terrain of constitutional practice. Yet, the fact the *Code of Conduct* was written pursuant to Articles 69 and 70 of the Constitution, not to mention the qualifications contained in Article 41, is implicit throughout the document. In addition to making a direct reference – albeit by convention for ministerial Prakas of its sort – to the Constitution in the prologue, the *Code of Conduct* is replete with references to "social stability" or "public order," as well as to the promotion and protection of "national culture" and to Cambodia's "cultural and artistic heritage." Likewise, that the Ministry considers the *Code of Conduct* to be a step towards the fulfilment of the constitutional mandate, meanwhile, was made clear by a senior official from the Ministry of Culture, in an interview on 30th March 2017. The official, who has had significant engagement with the *Code of Conduct*'s during its drafting and implementation, explained thus:

> "I want to reiterate that we made this code through the guidance of the Constitution. … In there, if I am not mistaken, Article 70 says that any crime that affects the culture and tradition of the nation will be punish severely. That is why, in response to the Constitution, we need codes and laws to educate artists, so that they walk on the way that is good for everyone."[544]

However, echoing the language from the prologue of the document, the official went on to elaborate the much more pressing concerns that he believed had made the *Code of Conduct* necessary. "We can see that during this globalised age with international integration and technology," he asserted, "there is a fast moving flow of culture, bad and good, into Cambodia. If we don't notice it will affect the national culture."[545] While

[544] Interview 21: Anonymous Representative of Ministry of Culture. 30th March, 2017. Phnom Penh.
[545] Interview 21: Anonymous Representative of Ministry of Culture. 30th March, 2017. Phnom Penh.

Articles 41, 69 and 70 of the Constitution are understood to provide a mandate for the *Code of Conduct*, then, its creation was necessitated by social concerns over the perceived negative impacts of globalisation, and Cambodia's increased development.

This awareness of the consequences of globalisation in Cambodia was shared by a number of interviewees. Despite being largely critical of the government, not to mention the Ministry's approach to artistic expression, for example, one artist in Battambang agreed that these informational flows were already having a detrimental effect on Cambodian cultural traditions. "Now I see that in Cambodian society now, the people some youth have changed" the artists suggested, "they cannot protect the tradition culture, they have been influenced by foreign influence."[546] While not overtly replicating the sense of anxiety expressed by the state in his initial assessment, this artist went on to acknowledge that Cambodian traditions and religious practices had "been eroded bit by bit" as a result.[547] Almost inevitably, the manifestations of this influence were often seen as diverse, and often imperceptible. However, the vast majority of interviewees who were able or willing to identify specific examples of foreign influence in Cambodia tended to point towards changing dress-codes. As a local Director of Womens Affairs in Kandal province explained:

> "If we talk about the practice of our culture and tradition, our clothing is modest. We have a modest style that can be recognised as Khmer. But there are some youth, both male and female, that have taken foreign culture though social media. When they see those [abroad], they want to follow them. This is a contravention to our Khmer cultural traditions that have been written in the past."[548]

It is hardly surprising, then, that the *Code of Conduct*'s disciplinary power has primarily been directed towards the monitoring of clothing worn by popular performers. The first example of the *Code of Conduct* being implemented came in April 2017, in response to a Facebook post by Denny Kwan in which the actress was considered to have breached Article 3(i) of the *Code of Conduct*. Noting that Kwan had already been issued with a

[546] Interview 37: Anonymous Artist – 9th May 2017, Battambang
[547] Interview 37: Anonymous Artist – 9th May 2017, Battambang
[548] Interview 30: Director of Women's Affairs – 30 April 2017, Kandal Province

warning at an "education session" she had been invited to a year earlier, the Ministry issued Kwan with a year-long ban from performing.[549] Subsequently, on 18th September 2018, another female performer, Seng Sona, was banned for a year for the same reason. The following week, meanwhile, the Ministry of Culture announced that it had also sent warning letters to four performers – Pich Aviza, Sok Sreynuch, Ratanak Pisei and An Dy – warning them that their attire had contravened the *Code of Conduct*.[550] Notably, of the six performers to be warned or banned by the Ministry, only one – An Dy – is male.

Meanwhile, the fact that the *Code of Conduct* and its implementation has targeted the public actions of artists and performers, rather than solely their creative output, is indicative of a further concern. Specifically, the actions of this small sub-group of Cambodian society are subject to increased scrutiny not only because of their role in producing 'culture' for public consumption, but also because of the influence that this role affords them. As such, the *Code of Conduct* represents a paternalistic concern on the part of the state for the wider citizenry – especially the younger generation who make up a disproportionate part of Cambodia's population – who might then follow the example set by popular public figures. This, too, was articulated by the Ministry of Culture representative, who asserted during an interview that:

> "we can also say that the artist is meta-human. A human that is a bit above [the average] human because they can make us cry, laugh, worry, fear. This is why the artist is a role model that the viewer will follow. … So, in this regard, artists can have a huge influence over others. So they need a code, so that they will know how to behave themselves in way that doesn't affect the art, culture and tradition of our country."[551]

Thus, the constitutional mandate to protect culture provided by Articles 69 and 70 of the Cambodian Constitution, not to mention the qualifications contained Article 41, is

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[549] Pang Vichea, "Actress banned for sexy clothing", (27 April 2017), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/actress-banned-sexy-clothing>; Pang Vichea, "Denny Kwan ban lifted", (14 May 2018), online: *Phnom Penh Post* <https://www.phnompenhpost.com/national/denny-kwan-ban-lifted>.

[550] "Actresses warned over sexy outfits", (24 September 2018), online: *Khmer Times* <https://www.khmertimeskh.com/536090/actresses-warned-over-sexy-outfits/>.

[551] Interview 21: Anonymous Representative of Ministry of Culture. 30th March, 2017. Phnom Penh.

interpreted by the state to justify both the limitation of artistic expression, *and* the supervision of the public behaviour of artists and performers. In an autocratic and illiberal setting, this desire for control can be understood as an expression of apprehension over the potential power of non-institutionalised societal actors. As will be explained shortly, in the theoretical section of this chapter, the *Code of Conduct* can therefore be understood as an attempt to institutionalise – and perhaps even constitutionalise – this nebulous source of power, in order for the state to then assert increased control over it.

The perceived need for the state to direct and regulate the output of its culture-sector, though, can also be seen to be particularly powerful in Cambodia, for a host of contextually- and historically-specific reasons. This, too, was alluded by the representative of the Ministry of Culture during interview, as he began a description of the importance of art in Cambodia with the assertion that "[w]e can see that culture is a foundation of the identity of a nation."[552] Hence, artists and performers are considered to play a role in contributing to what is effectively a nation-building project. This responsibility, it could be argued, is felt all the more acutely in Cambodia, given that the country's tragic history has – according to many academic analyses – left a large degree of ambivalence over what it means to be Cambodian. As Astrid Noren-Nilsen notes, in her book *Cambodia's Second Kingdom*, it is largely as a result of this deep-seated uncertainty that Cambodia's political leaders have focused much of their attention on the creation of "nationalist imaginaries" over the past two-and-a-half decades.[553] This assessment was even reaffirmed by one artist during an interview, as she responded to reading the *Code of Conduct* for the first time by saying:

> "I can feel they are sentimental, not just the Ministry of Culture, but I feel that the Cambodian people in general, are sentimental of losing something. And maybe I think it is a strong sentiment also from what happened in the war, during the Pol Pot regime, it seems they are sentimental that maybe they lost something already. So I would understand this completely."[554]

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[552] Interview 21: Anonymous Representative of Ministry of Culture. 30th March, 2017. Phnom Penh.
[553] Norén-Nilsson, *supra* note 35.
[554] Interview 42: Anonymous Artist – 23rd August 2017. Phnom Penh

The creation of a *Code of Conduct for Artists and Performers*, then, is understood by this artist as a state-led expression of a nationally felt anxiety, which emanates from a sense of loss after the death and destruction wrought by the Khmer Rouge regime. This, of course, is especially poignant given the extent to which the artistically-inclined were specifically targeted by Khmer Rouge.

With a closer reading of Cambodia's history, however, it is possible to see the *Code of Conduct* as indicative of an even more deep-seated, fundamental national anxiety. Specifically, the *Code of Conduct* can in many ways be understood to express a sense of lost heritage, and a fear of complete disappearance, which many historians have highlighted as characteristic of contemporary Cambodia's national identity. This is not unusual, Anthony Barnett argued in a 1990 article titled 'Cambodia Will Never Disappear,' as "[i]n addition to pride in a unique greatness, most expressions of nationalism contain a fear of extinction."[555] However, this fear of extinction is widely understood to have become central to Cambodian national identity, primarily as a consequence of French colonial policy, as the ruins of Angkor Wat were elevated under French rule from a relatively disused religious site to a symbol of nationhood, and national decline. The suggestion of continuity between the great Angkorian empire and present day Cambodia, Barnett wrote, "projects the Khmer as a people sliding down a millennial incline."[556] Drawing a linear historical trajectory, and acknowledging longstanding, commonly held and historically justifiable fears in Cambodia about the expansionist intentions of its much larger and more powerful neighbours to the East (Vietnam) and west (Thailand), the French articulated a logic for offering Cambodia their colonial "protection" for well over a century.

The French self-justification for maintaining Cambodia as a Protectorate, the historical record suggests, became an increasingly key facet of national self-understanding, however. As Penny Edwards explains in her colonial history *Cambodge: The Cultivation*

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[555] Anthony Barnett, "'Cambodia Will Never Disappear'" (1990) 180 New Left Rev 101.
[556] *Ibid*.

of a Nation,[557] the continued salience of these justifications was largely a result of the fact that French colonial rule represented the origins of the modern nation-building project in Cambodia. Hence, Edwards writes, "the very notion of a national culture, let alone its inner core, were products of the colonial encounter."[558] Throughout this period, then, colonial authorities and local elites together developed a "preoccupation" with ideas of Cambodia's supposed decline and immanent extinction, which were based on a concern "not that actual persons would die or disappear, but that their customs and culture might vanish."[559] This, Edwards suggests, fed into colonial policies of "cultural containment" that encouraged an enhanced understanding of Khmer-ness through education, religion, and the arts. As such, the colonial era can be seen historically as an encounter that encouraged colonial-era intellectuals and elites to look backwards, to the golden age of the Angkorian empire, in pursuit of an authentic national identity, and to "equate the existence of the Cambodian nation with the maintenance of its 'traditional' culture."[560] Hence, while concerns about globalising flows of information and people may be somewhat new, they play into longstanding insecurities about foreign influence in Cambodia, as well as a foundational sense of vulnerability. With such an historical context in mind, the creation of a *Code of Conduct for Artists and Performers* takes on an added meaning, not simply as a tool of social control (as some artists have justifiably suggested) but also as a – novel and problematic – attempt to reassert the state's own agency in the (re-)construction of national identity. [561]

Yet, as noted in the introduction to this chapter, the sense of loss upon which the artist above reflects can also be understood to have a much longer history in Cambodia. This history, then, suggests that the *Code of Conduct for Artists and Performers* might be best understood as the most recent in a long series of attempts to reaffirm Cambodian self-identity as a bulwark against outside influences. It also provides an interesting historical

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[557] Edwards, *supra* note 514 at 14.
[558] *Ibid* at 7.
[559] *Ibid* at 11.
[560] *Ibid* at 14.
[561] There is already a huge literature that discusses the intersection of gender, nationalism and nation-building projects, which is far to nuanced and diverse to survey here. For an overview and wide-ranging introduction, however, see Nira Yuval-Davis, "Gender and nation" (1993) 16:4 Ethn Racial Stud 621. Meanwhile, to understand how gender has played into previous Cambodian nation-building projects, see Trudy Jacobsen, *Lost Goddesses: The Denial of Female Power in Cambodian History* (NIAS Press, 2008).

background to the focus on preserving culture through the guiding and policing of artistic endeavours. While the centrality of art to what is ostensibly an ongoing nation-building project may seem surprising at first, it was not seen as such by many of the artists interviewed over the course of this research. The potential for artists to assist in the reassertion Cambodian national identity, for example, was succinctly articulated by an artistic-director in Phnom Penh. "Because art and culture guide us to know this is Cambodia, this is Cambodian, this is who I am," she explained, "the artist is like a mirror to reflect who you are, and without them we might lose the way we are now."[562] Art, in other words, is understood as a medium through which ideas about collective identity and nationhood can be articulated. While undoubtedly significant, this compulsion to reflect upon – and thus strengthen – Cambodia's national self-identity is also compounded by a desire to see the country represented positively to the outside world. Hence, the *Code of Conduct* makes multiple references to the responsibility of artists and performers in "the promotion of national reputation" and "in promoting social norms and national honour."[563] As such, the constitutional obligation for the state to "preserve and develop national culture" ultimately makes those involved in producing 'culture' responsible for (re-)constituting the 'nation.' In other words, it turns artists and performers into constitutional actors, and acknowledges the extent to which some of the roles traditionally assigned to constitution-makers and constitutional documents might also be played by artists and performers. Equally, much like constitutional documents themselves, the role that the Ministry of Culture and Fine Arts envisages for artists and performers is at once both internal and external. Through the *Code of Conduct*, they are tasked with defining and reaffirming the meaning of Cambodian-ness (based on traditional cultural norms) for a domestic audience, at the same time as they are expected to project a positive, even aspirational image of Cambodia to an international audience.

[562] Interview 28: Anonymous Art-Director – 24th April 2017. Phnom Penh
[563] Code of Conduct (2017), Article 1

Bottom-Up Perspectives: Reception of the *Code of Conduct* by Artists Themselves

Though some artists clearly expressed some level of understanding and sympathy towards the objectives of the *Code of Conduct*, these sentiments were often outweighed by concerns about its future implementation. At times, this concern manifested itself into more generalised critiques of the state, and its perceived desire to control what might otherwise be an independent and inventive segment of contemporary Cambodian society. The aforementioned artistic-director, interviewed in Phnom Penh, put it simply:

> "I think they like to … present themselves as a big guy. They have power, and they have to control everything. So once they can make a *Code of Conduct* happen, it means that every artist will be scared of it and will stay under the guideline of the ministry."[564]

Hence, this interviewee saw the *Code of Conduct* as an everyday expression of illiberal governance, in which the state seeks to place explicit limits on its subjects. Expanding on this idea, the interviewee placed the *Code of Conduct* within the broader context of what – in Chapter 4 – I have already termed "abusive" constitutionalism. Specifically, she asserted that reading the *Code of Conduct* was "very confusing, [like] reading any constitutional law in Cambodia" because "it is like 'you can do *this* but…' and the rest of the sentence after but is very strange."[565] Here, it seems that the interviewee cited the common limitations to rights provided in the Constitution, acknowledging the idea that the *Code of Conduct* represents a constitutionally mandated caveat to free expression. These caveats, the artistic-director suggested, "make us feel confused, feel unclear, and without choice."[566] As such, this interviewee perceptively alluded to the ideas already explained in Chapter 4, where the practice of "abusive" constitutionalism in Cambodia is embodied by an inverting of the hierarchy of laws, with the state interpreting vaguely worded limitations to constitutional rights broadly, in order to pass sub-decrees that maximise room for administrative discretion.

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[564] Interview 28: Anonymous Art-Director – 24th April 2017. Phnom Penh
[565] Interview 28: Anonymous Art-Director – 24th April 2017. Phnom Penh
[566] Interview 28: Anonymous Art-Director – 24th April 2017. Phnom Penh

In the case of the *Code of Conduct for Artists and Performers*, of course, the discretion is shared between the Ministry and the heads of sector-based associations that make up the Board of Discipline and Reward. Responsibility, in other words, is spread between the state and the leaders of the sub-sectors that make up Cambodia's culture industry, which to some degree can be understood to engage in self-regulation through involvement in the drafting and implementation of the document. Despite being involved in the drafting process and currently sitting on the Board as a representative of the film industry, however, one filmmaker expressed similar apprehension about how the *Code of Conduct* will be implemented. Reflecting on the concerns he expressed during the drafting process, one filmmaker recalled during an interview:

> "Sure, I told them in the meeting many times: 'You are the censors, I am a filmmaker. You are like…a hunter that has a gun pointed at me, and you will shoot me one day, in one minute. So I am afraid that you guys will use this as a weapon to shoot me one day.' The law is like that, … because they can convey the law by their own explanation. We are ordinary people, we don't get an understanding of that."[567]

Here, again we see not only a specific sense of trepidation about the *Code of Conduct*, but also a more general awareness of the danger that law poses to "ordinary people" in Cambodia. Though this filmmaker explained that he had gone to great lengths to develop good relations with the Ministry of Culture and Fine Arts, and had engaged constructively in the drafting of the *Code of Conduct*, his assessment of the document – and of the legal system generally – is a damning one. In fact, the picture painted in the above quote is distinctly reminiscent of Carl Schmitt's *state of exception*. While not explicitly elaborated as such by the interviewee, state law appears in his statement as part of an "illusion of enduring institutionalised power [that] only masks what is actually a temporary, fleeting moment of sovereignty found in the decision."[568] In other words, contrary to the appearance of inclusive and non-arbitrary decision-making that a multi-stakeholder disciplinary panel creates, the very existence of a *Code of Conduct* – not to

[567] Interview 29: Anonymous Filmmaker – 25th April 2017. Phnom Penh

[568] Stacy Douglas, "The Time That Binds: Constitutionalism, Museums, and the Production of Political Community" (2013) 38:1 Aust Fem Law J 75 at 76.

mention its vague wording – ultimately places the artists or performer as subject to the state's will.

This profound sense of ambivalence about the implementation of the *Code of Conduct*, meanwhile, was driven home by the above-quoted filmmaker with two further comments. First, discussing the workings of the Board of Discipline and Reward, he noted a consensus had not yet been reached as to procedures by which the Board will make its decisions. As such, it remains unclear whether contraventions of the *Code of Conduct* will be identified by consensus among the members of the Board, or by a simple majority, and what weight the opinions of the Ministry's own representatives would have in that process. Secondly, the filmmaker's sense of foreboding was also exacerbated by his own personal experience with the Ministry, which has for a long time reserved the right to censor or ban films that it disapproves of. In fact, this filmmaker had already found himself on the wrong side of the Ministry's Censorship Board long before the drafting of the *Code of Conduct*, as the release of a film that he had worked on was delayed by a number of years.[569] Though the Ministry publicly claimed that this delay was due to administrative issues, this was not the view taken by the filmmaker.[570] As he explained in an interview for this research, the Ministry originally asked him to remove a sexually explicit scene, and another in which one character made utterances that may have been construed as critical of the government. The filmmaker refused to remove the scenes, however, arguing thus:

> "if you ask me to cut here and there and I follow you, it means I cut my heart, I cut my arm, I cut my ears and I cut my eyes, I don't want to do that. So I didn't, I didn't cut. They keep fighting for 2 years until the new Minister comes and then I talked to her, she watched the film she said 'Nothing wrong for today'."[571]

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[569] Although in some ways similar to the Board of Discipline and Reward, the Censorship Board is a Ministry-run body that decides exclusively on whether or not cinematic products (both domestic and international) are suitable for Cambodian audiences. It does not, for example, the power to discipline filmmakers, nor does it have jurisdiction over their pubic actions or utterances.

[570] Horng Pengly, "After two years with censors, controversial film set to be released", (2 May 2015), online: *Phnom Penh Post* <https://www.phnompenhpost.com/post-weekend/after-two-years-censors-controversial-film-set-be-released>.

[571] Interview 29: Anonymous Filmmaker – 25th April 2017. Phnom Penh

The above experience, recited by the filmmaker, is indicative of two interconnected points that a number of artists and performers raised when discussing the *Code of Conduct*. Specifically, the first relates to what is perceived by many as a disproportionate focus on the part of the Ministry with the representation of women, while the second envelopes this within a more general concern that a preoccupation with preserving traditional Cambodian culture will stifle creativity and prevent change. When asked what actions could "cause damage to national traditions and customs" under Article 3 of the *Code of Conduct*, for example, even those who had not read the document responded by referring to social expectations about the way women should dress. "I am not sure what they are referring to but to me think it is a…might be about appearance," claimed the Phnom Penh based artistic-director quoted above, "because they seem to care very much on how women appear."[572] More specifically, this interviewee argued, artists and performers "are a part of ruining the culture" in the eyes of the Ministry if they "speak loudly, act differently, have short hair, or wear anything that is short that they call sexy."[573] As such, the *Code of Conduct* is widely seen as formalising, then enforcing upon artists and performers, a set of cultural norms commonly referred to in Cambodia as the *Chbab Proh* (Boy's Code) and the *Chbab Srey* (Girl's Code).[574] These sets of norms – which have existed in Cambodia for centuries – lay out specific characteristics and behaviours that are considered virtuous for male and female Cambodians respectively.

Though they do not appear explicitly in the *Code of Conduct for Artists and Performers*, the *Chbab Pros* and *Chbab Srey* are nevertheless implicitly present, just as they are in the everyday life of many Cambodians. The focus on clothing in Article 3i or 3ii of the *Code of Conduct*, for instance, is indicative of the rules for female appearances laid out in the 'girl code.' This fact was recognised by the Ministry of Culture representative himself during an interview, when he explained that "we look at girl and boy code… this is the

[572] Interview 28: Anonymous Art-Director – 24th April 2017. Phnom Penh
[573] Interview 28: Anonymous Art-Director – 24th April 2017. Phnom Penh
[574] In Khmer: *chbab proh* and *chbab srey*. Interestingly, while *chbab* here is usually translated as "code" it is otherwise typically translated as "law" – thus reflecting a pluralistic approach to law as social norms that have – in Cambodia and many other parts of the world – typically existed primarily in unwritten form.

Cambodian custom that we have to protect."[575] For many interviewees, however, both the *Code of Conduct* and the cultural codes upon which they draw appear anachronistic and repressive, especially for women. A feminist blogger whose social media presence places her in a grey-area at the peripheries of the Ministry of Culture and Fine Art's jurisdiction, for instance, was dismissive not only of the *Code of Conduct*, but also of the preoccupation with maintaining traditional cultural norms. "They are just using culture as a way for them to suppress women, as an excuse for it," she argued, because:

> "Clothing is clothing it doesn't define a woman's worth, it doesn't define a woman's value. Just because she dresses in revealing clothes, doesn't mean that it will destroy the culture… there are parts of culture that don't apply anymore. We need to stop holding on to it for dear life."[576]

Reflecting on Cambodia's drastically changing demographics, which currently sees more than 70% of people under the age of 35, the blogger went on to suggest that "what the older generation is doing is actually counter-productive."[577] Placing the implementation of a *Code of Conduct* within a broader context that involves a culturally conservative older generation pushing traditional norms onto "rebellious" youth, she too acknowledged the need for traditions to be preserved, but qualified this by asserting that "you don't preserve it by forcing it down people's throats."[578]

Reflecting on the *Code of Conduct*, many artists and performers interviewed in this research suggested that the Ministry's approach to cultural changes – and especially the gender-based aspects of those changes – were the result of a disconnectedness from Cambodia's younger generation. The above-quoted feminist blogger, for example, explained the backward-looking and culturally conservative nature of the *Code of Conduct* by noting that the Ministry – despite being headed by a female minister – is "dominated by old… men."[579] A seemingly flippant statement, the combination of age and gender dynamics actually represents a useful insight into the fundamental changes that Cambodia's generation shift might represent. This shift was elaborated on in a

[575] Interview 21: Anonymous Representative of Ministry of Culture. 30th March, 2017. Phnom Penh.
[576] Interview 39: Anonymous Blogger – 10th May 2017. Phnom Penh
[577] Interview 39: Anonymous Blogger – 10th May 2017. Phnom Penh
[578] Interview 39: Anonymous Blogger – 10th May 2017. Phnom Penh
[579] Interview 39: Anonymous Blogger – 10th May 2017. Phnom Penh

separate interview by one dance company director and choreographer. "When I went to university, there were 3 women in a 30 person class," they explained, but now:

> "any class you go to, there is more women than men. When already, in the educational aspect of this country, you are encouraging that, and then expecting the good tradition to have the same meaning – that the lady doesn't talk back to you when she feels [something] is wrong… – then these ladies that we educated to be better become the betrayer of good tradition."[580]

From this perspective, a cultural change between generations is made inevitable not so much by globalisation and the increased connectedness of the younger generation (although that is implicitly a factor). Instead, the change is a consequence of the increasingly educated, and empowered, nature of young women in Cambodia. For the above-quoted dance company director and choreographer, the *Code of Conduct* risks creating "unintended consequences" for the country, since the Ministry's impulse to "put a blanket to cover everything," in his words, might cause Cambodia to "lose the advantage of allowing some really good artist to do what they can do."[581] In other words, this interviewee – whose dance organisation trains young Cambodian choreographers in both classical Khmer (*Apsara*) and contemporary western styles of dance – echoed the common concern that the overzealous protection of a conservatively defined national culture might stifle creativity.

As well as being widely criticised by artists on its own terms, this potential stifling of creativity was regularly described as counter-productive to the objectives of the state, and Article 69 of the Constitution. Specifically, a number of younger interviewees suggested that Cambodian culture would be better "preserved" by an approach that allowed or even embraced change, rather than supressing it. "The culture is still *there*, it is just that culture changes and evolves over time," one anonymous feminist blogger argued, for example, before suggesting that "we need to start to evolve with it as well."[582] From an artistic perspective, meanwhile, the artistic-director quoted earlier also asserted that

[580] Interview 40: Anonymous Dance Company Director and Choreographer – 10th May 2017. Phnom Penh
[581] Interview 40: Anonymous Dance Company Director and Choreographer – 10th May 2017. Phnom Penh
[582] Interview 39: Anonymous Blogger – 10th May 2017. Phnom Penh

contemporary artists and performers were simply "trying to develop the[ir] art form," rather than trying to damage it, and that this is important because "art should adapt to different generations."[583] As such, both interviewees articulated concerns – which pervade much of the data for this project – that the state's backward looking approach to national culture and arts was in danger of creating a static idea of Cambodian identity. This process of reification, it seems, is the result of an overly-literal interpretation of the obligation – outlined in Articles 41, 69 and 70 of the Constitution, respectively – to prevent acts that "affect the good traditions of the society", to "preserve and develop national culture" and to punish "[a]ny offence affecting or relating to cultural heritage and artistic heritage." Yet, the approach to cultural preservation that is embodied by the *Code of Conduct*, can also be understood to have engendered some resistance from artists and performers, as many of those interviewed for this project asserted a willingness to test the boundaries of permitted artistic expression.

Everyday Politics: The Art of Avoiding Censorship

Finally, in this regard, it is worth noting that many interviewees also saw the *Code of Conduct* as an attempt on the part of the state to limit the extent to which art could be used as a vehicle to express political sentiments and critique. Though less prominent in the *Code of Conduct* than the vocabulary of culture and traditions, the language of "order" and "stability" is present in in Article 3.iv. and 3.v.'s prohibitions against actions that cause "social separation and rupture" and damage "social security and safety," respectively, as well as Article 1.ii.'s promise to promote "national honour." Of course, such clauses do not explicitly prevent artists and performers from expressing political opinions publicly or through their work. However, the evidence presented in Chapters 4 and 5 is indicative of the extent to which the protection of "order" and "stability" has become synonymous with the silencing of dissent and the repression of political opponents in Cambodia. It is, perhaps, for this reason that the above-quoted dance company director and choreographer, reflecting on the text of the *Code of Conduct* and responding to a question about Article 3.iv.'s reference to "social order," responded thus:

[583] Interview 29: Anonymous Filmmaker – 25th April 2017. Phnom Penh

> "When we try to say the art should not be political… yes that is what people would want to believe but … there is no way we can separate the social and political aspects. There is always some connection. We can talk like it is not, but it is."[584]

Art and performance, then, is understood as inherently political. The resonance of such a perspective, however, is particularly powerful in Cambodia, where the state and the ruling party have been widely considered to be harnessing the appeal of – apparently politically neutral – popular culture to boost legitimacy. As such, both the *Code of Conduct* and the deployment of popular musicians at government events and political rallies can be understood as an example of what Caterina Preda describes as "the requirement that art be apolitical" under authoritarian rule.[585] As will be demonstrated below, such a requirement continues to be actively resisted by at least some of Cambodia's contemporary artists.

Literature on art in autocratic settings also suggests that there are multiple ways in which artists and performers can push back against the state. Caterina Preda's study, for example, highlights how "artistic discourses react to the political by means of direct confrontation (antithesis or critique) or metaphorical allusions."[586] While direct confrontation with the state is rare in Cambodia, there is an increasingly rich vein of work that employs the latter technique. One Battambang-based artist, for example, recalled during an interview that he had recently embarked on just such a project:

> "I started to work with wooden sculpture. The wooden sculptures have nails hammered in their mouth, eyes and painted with colour that expresses the emotions of those sculptures. The sculptures that have nails hammered into their mouth, I want to talk about the expression of people. When we talk it could be life threatening, we see that the people that are raised in our society that have passed away because of the shooting. It is like that."[587]

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[584] Interview 40: Dance Company Director and Choreographer – 10th May 2017. Phnom Penh
[585] Preda, *supra* note 538 at 3.
[586] *Ibid* at 28.
[587] Interview 37: Anonymous Artist – 9th May 2017. Battambang

While the artists did not explicitly name any specific victim of this trend of extra-judicial killings, or implicate the state in them, the timing of the work appears to have closely followed the assassination of the widely popular government-critic, Kem Ley. Meanwhile, the decision to use wooden sculptures – which the artist admitted he had little experience with beforehand – is also poignant, given that this has traditionally been a popular medium in Cambodian art, typically reserved for the representation of historic figures and religious icons. As such, the work can be understood as a powerful comment on the historic significance of these events and their impact on Cambodian political culture, but also as an attempt to memorialise those who have suffered as a result of political violence. Finally, this artist was also outspoken about the impact he hoped the sculptures would have. "For me I [want to] start revolution. To show my exhibition, I will confront the law," he asserted, "if the people have the knowledge, they will revolt too, because they don't want [more of] the same thing."[588] Such radical intent is not commonly expressed so openly by artists, of course. However, it is important to note that this interviewee was also acutely aware of the fact that his relatively low profile in the Cambodian art scene, combined with his distance from Phnom Penh (where political power is centred), made it possible for him to engage in such subversive work.

By contrast, another artist who is personally connected to Phnom Penh's Boeung Kak community, which has been a source of much rights activism and political dissent, was more circumspect about engaging in politics. As a result, her work has often tended to be veiled in a thicker, and therefore more protective, layer of metaphor. Reconstructing the rationale for this decision, she explained:

> "when you attack something that is sensitive right now, for example what happened to the lake [Boeung Kak]… and then get attention from the news, you will have a big problem right?"[589]

Returning to discuss how her experience of the evictions at Boeung Kak and influenced her work, this artist confided later in the interview that "It feels like I am lost… I am

[588] Interview 37: Anonymous Artist – 9th May 2017. Battambang
[589] Interview 42: Anonymous Artist – 23rd August 2017. Phnom Penh

thinking how can I react to that? What can I do?"[590] The result of this sense of disorientation, however, was an art installation rich in symbolism. Commissioned to fill a gallery space comparable in size to her old living-room years after the eviction, the interviewee recalled how she had furnished it much like her old house, and covered the floor in sand as a symbolic reference to the way that Boeung Kak residents had been forced from their homes as the lake itself was filled in. However, concerned about how such an overtly political statement would be received by her audience and by authorities, the artists recalled that she had softened its message. This was achieved by turning the exhibit into a performance art piece in which she – clad in a bikini to remind viewers that it was the women of Boeung Kak (some of whom are present as defendants in Chapter 5) who protested most vehemently, and armed with a bucket of water – created the impression of having turned her home into a beach.

Ironically, and interestingly for the purposes of this chapter, it was this step that ultimately caused her the most grief, as a family member who attended the exhibition later confronted her not about the danger of her political critique, but about the impropriety of her attire. Recollecting her surprise that the family member was not upset about her symbolic discussion of politics, the artist went on to ask "but again, what does it mean politics, you know?" before suggesting that her family member behaved "like a censor, about the land-grabbing again."[591] The artist, in other words, appears to have been subjected to at least two intersecting modes of censorship.[592] First, after experiencing this dispossession and having been forced to relocate to a different part of Phnom Penh, she was restricted in what she could say, for fear of repercussions. Then, secondly, having found a mode of expression that would enable her to represent her experiences without reprisal or censorship from the state, she was then reprimanded for choosing a mode of expression that was seen as violating another set of social and political norms. On a personal level, meanwhile, it was clearly and understandably troubling for the artist that

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[590] Interview 42: Anonymous Artist – 23rd August 2017. Phnom Penh
[591] Interview 42: Anonymous Artist – 23rd August 2017. Phnom Penh
[592] Nira Yuval-Davis, "Intersectionality and Feminist Politics" (2006) 13:3 Eur J Womens Stud 193; Leslie Mccall, "the complexity of intersectionality", (21 August 2008), online: *Intersect Beyond* <https://www.taylorfrancis.com/>; Floya Anthias, "Hierarchies of social location, class and intersectionality: Towards a translocational frame" (2013) 28:1 Int Sociol 121.

she was ultimately censured by her brother, not only because of their familial connection but also because – she believed – their mutual experience of the former mode of censorship should have made him aware of the damage that would also be done by the second.

Work that focuses on the plight of Cambodia's landless communities, though, is not only politically challenging to the state because of the potential for it to highlight injustice. Additionally, any work that focuses on the lives of Cambodia's dispossessed can be understood as an act of resistance to the extent that it sits awkwardly alongside the positive image of "national honour" that both the *Code of Conduct* and the Ministry's wider policies – including censorship – aim to promote. Even without engaging in explicit critique of the government or its policies, in Cambodia as anywhere else artistic expression can nevertheless draw subversive power from its ability to give voice to individuals and groups who are marginalised by those same policies.[593] This power is evident in *Koh Pich* (in English, *Diamond Island*), a fictional film released in 2017 that centres on the lives of Cambodia's construction workers. Though superficially a romance or coming-of-age narrative, the film juxtaposes the lives of some of Cambodia's poorest – who increasingly migrate to Phnom Penh looking for work – with the growing modernity and affluence of the capital city that they are helping to build. Presenting these incongruent trends objectively, the film nevertheless presents a somewhat damning picture of contemporary Cambodia, by exposing the inherent contradictions and inequalities that have accompanied the country's economic growth under neoliberal market-capitalism.

Yet, as one participant in this research noted, the decision to discuss these issues indirectly, as the backdrop to the narrative rather than its primary focus, was a conscious one. "The films doesn't judge anything," she explained, perhaps in part because – as we have seen with one filmmaker's experience regarding a movie about sex-trafficking –

[593] This is described by Jacques Rancière as the reconfiguration of "the distribution of the sensible." This, according to Rancière is a power that is inherent to art, emerging from its ability to "make heard as speakers those who had been perceived as mere noisy animals." Jacques Rancière, *Aesthetics and its Discontents* (Polity, 2009) at 24–45.

doing so might cause problems for the film and those behind it.[594] Yet, the great care taken not to use the film to make an over political comment did not obviate all disagreement with the Ministry. Instead, as *Koh Pich* went before the Ministry's censorship panel, concerns were raised about a seemingly much more mundane aspect of the film: namely, the fact that in one scene the female protagonist is seen smoking a cigarette. Recalling a conversation with the film's director shortly before it went before the Ministry, the interviewee described why the scene was not removed:

> "So that's how you could explain this: if you want to reach the kid, to make them understand what is good and what is bad, it's there already and the kid will judge himself… but you need to keep this kind of image, and present it because it's their life."[595]

Hence, the representation of a woman smoking had to be justified in terms of its ability to maintain the attention of young people, in order to educate them. In other words, the accurate depiction of social realities in contemporary Cambodia, especially the changing cultural practices of young women who – by moving away from home – are no longer so consistently subject to the *Chbab Srey*, were only acceptable so long as they contributed to some degree to the paternalistic objectives of the state. Nevertheless, the successful navigation of this conversation allowed the film to accurately and powerfully represent the changes and contradictions of Cambodian society, which the interviewee hoped would mean "it can maybe become like an archive."[596]

Conclusion

Evidently, the Ministry of Culture's *Code of Conduct for Artists and Performers* represents a poignant example of constitutional practice in Cambodia. In particular, it is suggestive of the everyday practice of "abusive" constitutionalism, and the processes of societal constitutionalism that facilitate the pervasion of this practice throughout non-state social structures. What at first glance appears to be a novel, but somewhat innocuous, document with little relevance to the study of constitutionalism is in fact

[594] Interview 42: Anonymous Artist – 23rd August 2017. Phnom Penh
[595] Interview 42: Anonymous Artist – 23rd August 2017. Phnom Penh
[596] Interview 42: Anonymous Artist – 23rd August 2017. Phnom Penh

understood by the Ministry as a necessary step in the fulfilment of its constitutional mandate to "preserve and develop national culture" and to punish "[a]ny offence affecting or relating to cultural heritage and artistic heritage." Translating these constitutional obligations into a broad mandate to regulate cultural production, and combining them with constitutional limitations on rights that also protect against the use of free expression to "affect the good traditions and custom of society," the Ministry is thus able to overturn the hierarchy of laws. As such, the data presented above suggests that constitutional provisions affording the state a mandate to "preserve and promote national culture,"[597] for example, cannot be properly understood separately from Cambodia's post-war nation-building project or from the prevailing forms of constitutional practice. While many artists expressed sympathy with the state's aims, and shared concern that their national culture is under threat, the majority of my interviews on this subject were pervaded by a palpable anxiety about the Ministry of Culture's potentially sweeping powers to police the work and personal conduct of artists

Yet, the state is not the only actor in the disciplinary control of artists. Rather, the *Code of Conduct* is also the product of consultations between the Ministry and the leaders of a number of sector-based associations, and is also responsible for the creation of a Board of Discipline and Reward that incorporates those associations in its own implementation. As such, the process by which the *Code of Conduct* is drafted and implemented can itself be understood as an example of societal constitutionalism. Specifically, the *Code of Conduct* outlines the criteria for membership of the sector through its definition of who is considered an artist or a performer, engages representatives of these people in the construction of a set of rules to which they must all adhere, and identifies the processes by which rules and decisions can be made by those representatives in the future. Contrary to the usual conclusions drawn by scholars of "societal constitutionalism," however, its practice in Cambodia – perhaps because of the involvement of the government – does not entirely decentre the role of state in constitutionalism. Instead, the *Code of Conduct* makes these sector-based associations at least partially responsible for implementing constitutional norms defined by the state.

[597] Article 69, Cambodian Constitution

Nevertheless, the diverse and diffuse nature of artists and performers in Cambodia has almost inevitably resulted in a degree of push-back against the Ministry of Culture and Fine Arts' paternalistic and culturally-conservative policies, as defined in the *Code of Conduct*. A younger generation of Cambodians in particular, can and will continue to be seen to critique and resist the static – even regressive – definition of Cambodian culture that is being imposed by the state. In the process, these groups and individuals provide their own answers to the foundational question of what it means to be Cambodian, and present a fundamental challenge to the state's assumed role in answering that question for its citizens. This challenge, of course, is posed only by a small portion of artists and performers. Yet, while popular culture typically fits comfortably within the parameters defined by the state (and to some degree by social norms), those on the periphery undoubtedly do use art and performance as a conduit for resistance, albeit pragmatically. This pragmatic resistance, as the above examples show, sees often painfully real personal experiences of constitutional injustice being "translated," through a more or less metaphorical use of symbols and allusions, into visually compelling work.[598] Paint covered wooden sculptures with nails driven into their mouths, eyes and ears, for instance, speak of the violence – both physical and itself symbolic – done to the Cambodian people for political ends. Sand-strewn representations of houses express solidarity with communities who have been evicted from their homes. However, another form of resistance also manifests itself in seemingly innocent attempts to document everyday life in contemporary Cambodia. As filmmakers attempt to shed light on the lives of those who are often overlooked by Cambodian elites in the course of the country's rapid development, they too find ways to justify the inclusion of images that push subtly at the boundaries of what Cambodian women are allowed to do, or at least be seen to do. Through such practices of everyday resistance, these artists and performers attempt to redefine Cambodian-ness, and wrestle back some control over national culture and identity. In so doing, they also counter the state's attempts to create and co-opt structures of societal constitutionalism that would work to limit the extent to which art

[598] The concept of "pragmatic resistance," here, is borrowed from Lynette Chua. See Lynette J Chua, "Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in S ingapore" (2012) 46:4 Law Soc Rev 713; Chua, *supra* note 50.

might be used to challenge state-proffered visions of national culture or identity. In a country where (re-)constructing national identity and preserving traditional cultural and artistic practices are essentially constitutional issues, and where societal constitutionalism can often extend rather than limit the reach of the state, these actions can be understood as nascent, or just less legible and less coordinated, examples of constitutional practice that operate far beyond the reach of judicial institutions.

Chapter 8 – Conclusion

This thesis began with the claim that much is lost in our understanding of constitutions and the practice of constitutionalism when our attention is focused exclusively on courts or other state institutions. While the state is undoubtedly central to the theory and practice constitutionalism, I suggested the process of attempting to decentre the state could help us to uncover some of the ways in which non-judicial and non-state actors contribute to, or even create their own, practices of constitutionalism. Constitutions, I claimed, are brought to life by grassroots movements, civil society activism and by everyday practices within – and even resistance by – social institutions, as much as they are animated or embodied in judicial decision-making. By focusing on a small handful of different actors that are usually excluded from, or at least seen as peripheral to, the study of constitutional practice, I hope to have demonstrated some of the ways in which such actors actually engage with, reinforce, support, challenge, reshape or subvert more statist versions of constitutionalism. Through these strategies, I have shown that Cambodian activists, lawyers, monks and artists can be seen not only to challenge the state's vision of constitutionalism, or its interpretation of the constitution, but also to assert their own. Though these alternative visions or interpretations rarely crystallise into fully articulated constitutional programs or ideologies, expressed as they usually are in the contingent circumstances of opposition to specific injustices, they nevertheless represent an overt claim to some degree of ownership over the Constitution. As I explained at the very outset of this thesis, with the story of Prime Minister Hun Sen warning the analyst Meas Nee "to not go too far," it is precisely this claim to ownership that is often at the heart of constitutional contestations in Cambodia.[599] Such claims, I have also argued, represent a form of constitutionalism that, while often manifested in reaction to government action, are not dependent upon or deferential to the state.

Undoubtedly, then, these alternative forms of constitutional practice, not to mention the various ways in which they are expressed, prove that constitutions cannot be understood

[599] Samreth, *supra* note 5; Dara & Turton, *supra* note 5.

in anything but the most superficial terms unless they are situated in their very specific sociological, political and cultural contexts. The case studies presented in this thesis, for example, have shown that the constitutional guarantee of universal suffrage cannot be fully understood without also accounting for the self-understandings of Buddhist monks, doctrinal debates within the Buddhist *Sangha*, and the extent to which constitutional principles fail to fully capture or protect religiously-informed ideas of justice. Likewise, the case studies have shown how the government's attempts to fulfil its constitutional mandate to "preserve and promote national culture,"[600] cannot be understood separately from Cambodia's post-war nation-building project, nor from the everyday practice of artists and performers, some of whom challenge or subvert state-proffered definitions of Cambodian national identity and tradition. And finally, the case studies have shown how – from Cambodia's internationalised moment of constitution-making through to its present day struggles in the courts – popular understandings of the constitution, not to mention the state's claim to constitutional legitimacy, have been shaped by activist lawyers and NGOs who work together to articulate and amplify constitutionally-framed critiques of government actions to audiences outside of the courtroom.

To say that constitutions or constitutionalism cannot be understood separately from the social, political and cultural context in which they are situated, however, is not necessarily to preclude the very possibility of comparison.[601] The case studies described above suggest that the injustices to which Cambodians are responding when they draw upon the Constitution could be, and often are, the basis for calls for constitutionalism elsewhere as well.[602] The use of law to criminalise political opposition, to silence dissent through judicial harassment, to dispossess the poor or to enforce hegemonic and superficially homogenous ideas about national identity, for example, have been subject to popular resistance – expressed in constitutional terms – in numerous contexts that are drastically different to that which we find in Cambodia. Similarly, that popular response,

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[600] Article 69, Cambodian Constitution

[601] Legrand, *supra* note 109 at 367.

[602] See recent developments in Sudan, for example. Massoud, *supra* note 405; "Analysis | Constitutional reform is important in Algeria and Sudan. Here's why.", online: *Wash Post* <https://www.washingtonpost.com/politics/2019/06/27/constitutional-reform-is-important-algeria-sudan-heres-why/>.

in calling upon constitutional guarantees of fair and equal treatment before the law, or in calling upon constitutional protections for fundamental rights and principles of dignity, is similar to that which can be found in numerous other social, political, cultural and religious contexts throughout the world. These calls, however, are almost invariably refracted through a uniquely Cambodian social, political, cultural or religious cultural lens. They are given a local inflection, as they are articulated. They are, in the words of Sally Engle Merry, "vernacularized."[603] Even within Cambodia, calls for constitutionalism are articulated differently by opposition politicians when compared to Buddhist monks, or by civil society activists and lawyers when compared to artists and performers. Yet, all of the above drive, more or less, at the same core claim: that the power of the state should at very least be held to the restrictions to which it was seen to have formally committed in 1993.

Towards an Everyday Politics of Popular Constitutionalism

First and foremost, then, what approaching the study of constitutional practice in Cambodia sociologically and ethnographically has uncovered is the empirical fact of popular constitutionalist demands.[604] These demands are largely expressed in response to a government that has sought to co-opt the Constitution by hollowing out its normative power at the same time as claiming to be protecting and embodying its promises of democracy, human rights and rule of law. Described in Chapter 4 as "abusive" or "authoritarian" constitutionalism,[605] the Cambodian state's approach has focused on the

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[603] Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle," *American Anthropologist* 108, no. 1 (2006) at 39; Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice*, Chicago Series in Law and Society (Chicago: University of Chicago Press, 2006).

[604] I distinguish this slightly from the practice (or even the concept) of "popular constitutionalism" on the basis that "popular constitutionalism" appears to describe a normative project wherein the state accommodates and is responsive to constitutionally-framed demands or popularly articulated constitutional interpretations. While this is not the case in Cambodia (just as it is not the case in the U.S.), it is important to note that this is not the result of a lack of demand for such accommodation or responsiveness. For an overview of popular constitutionalism as developed in the U.S. context, see: Larry Kramer, *The people themselves: popular constitutionalism and judicial review* (New York: Oxford University Press, 2004); Mark V Tushnet, "Popular constitutionalism as political law" (2006) 81:3 Chic-Kent Law Rev 991; Tushnet, *supra* note 134.

[605] Although developed further in Chapter 4, these two terms refer to concepts put forward, respectively, in Landau, *supra* note 48; Tushnet, *supra* note 49.

exceptions and limits that are always inherent in constitutional rights, emphasising the Constitution's parallel guarantees to "order" and "stability." The hierarchy of laws, then, has regularly been inverted to allow constitutional norms to be subverted by sub-decree and, as Chapters 5 and 6 demonstrate, societal institutions such as the Bar Association and the Buddhist Sangha have largely been co-opted by the influence of the Cambodian People's Party. Meanwhile, the data in Chapter 7 suggest that the state might also take a proactive role in creating societal institutions, such as through the Ministry of Culture and Fine Arts' Board of Discipline, in order to extend its influence over less formally organised sectors of society.

As a result, the space available for the expression of popular constitutionalist demands has been limited. However, the ruling party's desire for constitutional legitimacy, which requires at least some minimal adherence to the procedural and normative commitments contained in what is still a formally liberal-democratic constitution, has meant that the state has thus far been unable (or at least is unwilling) to completely eradicate space for constitutional contestation. Lawyers, for example, present constitutionally-grounded challenges in courtrooms, and NGOs monitor and report on these challenges, using them as opportunities for public advocacy, as well as education-and-empowerment activities. Similarly, Buddhist monks still participate in elections and engage in activism for constitutional rights, despite calls for legal restrictions from the leadership of the *Sangha*. And while it may still be in its early stages, the Ministry of Culture's Board of Discipline may ultimately provide artists and performers the opportunity to engage the government in conversation about the ways in which a backward-looking definition of Cambodian national culture may ultimately stifle artistic expression and hinder the nation-building process. Though difficult to prove causality, it seems from all of these examples that, despite limiting space for its expression, the state's "abusive" constitutionalist approach may actually be spurring on popular constitutionalist sentiments.

Of course, the Cambodian example also suggests that demand for constitutionalism is expressed only partially through legal processes and institutional politics. As such, the only time that demand-side constitutionalism in Cambodia has become obviously

identifiable on the level of macro-politics is when it has erupted through popular mobilisations and protest movements: the sporadic constitutional moments in which complaints over a disparate set of perceived injustices coalesce. Below the macro-level, however, and with space for contentious politics increasingly limited, the demand for constitutionalist governance is also expressed in more quotidian, piecemeal activities. These activities often involve distinctly non-legal methods, particularly when those involved are aware that the rhetorical support offered by the Constitution will not be sufficient. Chapter 6, for example, demonstrates how – under such circumstances – Cambodian monks and dispossessed communities have turned to supernatural techniques. Yet, these techniques are used not to undermine or distract from calls for constitutionalist governance, but to supplement them. This, it should be said, is not to romanticise these practices, or to suggest that non-state legal mechanisms – though apparently more autochthonous, and thus possibly more compelling on a practical level – are adequate substitutes for effective constitutional processes, as methods for restricting the power of the modern state. They are not.

In fact, in this regard it is always worth remembering the words of E.P. Thompson, which follow his proclamation of (a narrowly defined) rule of law as "an unqualified human good," when he wrote that:

> "To deny or belittle this good is… a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power."[606]

In the same vein, the fact that this thesis attempts to decentre courts, and even the state, from the study of constitutionalism is not necessarily to eschew their importance altogether. Rather, this thesis makes the more restricted and nuanced contention that – in addition to properly appreciating the role of courts and other state institutions – greater space should be made in the study of constitutionalism for understanding the role of non-state actors. The thrust of this argument, however, has both empirical and normative dimensions (not to mention the methodological ones discussed in Chapters 1 and 2).

[606] E P Thompson, *Whigs and Hunters* (London: Breviary Stuff Publications, 2013) at 266.

Empirically, it contends that any attempt to understand constitutionalism that does not take into consideration the role of societal actors is, at best, only able to produce a partial understanding of its practice. In many Asian contexts, or anywhere else where legal institutions are weak, a court-centric approach can also lead scholars to overlook actually-existing constitutional practices. Normatively, meanwhile, the call to pay greater attention to societal actors in the study of constitutionalism is also grounded in a belief that constitutional discourse and practice should not be considered as the exclusive domain of judges, or even elected officials. Such an approach, it seems, creates an impoverished version of constitutionalism, as it excludes from its practice those who are supposed to be constituted by its practice.

Lastly, it should be noted that thinking about constitutionalism beyond the state does not mean recognising only the extent to which societal actors shape the constitutional practice of the state. While this thesis has, at times, pointed to ways in which non-state actors challenge the state's interpretation and implementation of the Constitution, it has also pointed to conversations that those same actors are having within themselves about the meaning of the document. The Buddhist *Sangha*, for example, has long been engaged in a largely internal conversation about how to interpret the Constitution's guarantee of universal suffrage. Artists and performers, too, are acutely aware of their own power to reshape popular definitions of Cambodian national identity, and reflexively balance the desire to preserve tradition with their more creative impulses in much the same way as the state might balance its constitutional mandate to "protect" culture with the compulsion to respect free expression (albeit with differing outcomes). Further, Chapters 5, 6 and 7 have drawn upon the insights of societal constitutionalism to show how non-state constitutional actors also possess their own norms and structures that in many ways replicate those of national constitutions. Though viewing these actors as sites of societal constitutionalism is interesting in and of itself, these chapters have also suggested that a societal approach offers particular lessons for understanding how constitutionalism operates in authoritarian contexts. Namely, societal constitutionalism sheds additional light on how the state seeks to co-opt these societal structures (as in the case of the Bar Foundation in Chapter 5 and the *Sangha* in Chapter 6), and even creates such structures

in order to co-opt them (as in the case of the Ministry of Culture's Board of Discipline in Chapter 7). While the purpose of this co-optation extends far beyond its constitutional implications, it is important to note that these processes are undoubtedly used to perpetuate hegemonic, state-proffered constitutional narratives, or at least to limit criticism of those narratives.

Tales of Translation: Constitutionalism as Contestation

This thesis has not been a study of what is missing in Cambodia's constitutional order. In a country with a vibrant civil society that has produced countless reports doing exactly that, such a study would be somewhat prosaic: noting symptoms such as human rights abuses, environmental destruction and the persistence of impunity; identifying root causes such as weak institutions, a lack of resources or human capital, and deficiencies in political will; and then identifying remedies that have largely already been adopted and co-opted by political elites. Instead, this thesis has been an empirical account of what is present in Cambodia, understood on its own terms. Such an approach may seem surprising, given that the Constitution and questions relating to constitutionalism are largely overlooked in contemporary scholarship on Cambodia. Yet, as this thesis has demonstrated, if anything has characterised political discourse in recent years – perhaps even the last two-and-a-half decades – it is that contestation has increasingly been framed in terms of competing claims over the meaning of the Constitution. Legitimacy, in other words, is more and more frequently defined in legal, and particularly constitutional, terms. This statement should come as no surprise, however. Not only does it reflect a trend noticeable on a global scale, but it is also reflective of the fact that the current Constitution – replete as it is with promises of human rights, the separation of powers, and rule of law – was written in 1993 as the harbinger of a new political era in Cambodia.[607] More interestingly still, as explained in the Introduction, the rising prominence of the law-legitimacy nexus is also reflective of social and cultural practices, encapsulated by the linguistic association of legality – and thus constitutionality – with legitimacy. In a context where legitimacy is commonly translated as legality (*pheap srab*

[607] Law & Versteeg, *supra* note 97; Law & Versteeg, *supra* note 348.

ch'bab, literally 'the state of being in accordance with law'), it is little wonder that Cambodia's political struggles are, rhetorically at least, fought over and through the language of constitutional law.

Yet, on its surface at least, this story is still a surprising one. While I have argued that constitutions are mistakenly seen as the almost exclusive domain of the courts, or other state institutions, it remains true that constitutions – regardless of their ideological content – are effective to the extent that they create (or at least recognise) formal institutions into which political, social, economic or even cultural contestations can be channelled and settled effectively. Despite what is technically a relatively strong written constitution, contemporary Cambodia does not appear to have such institutions. Part of what makes Cambodia interesting as a context for studying constitutional practice beyond the state, then, is that constitutional vocabularies, principles and processes nevertheless continue to be central to such contestations. Debates over the enfranchisement of Buddhist monks, for example, are expressed as contests between the government's obligation to "protect" Buddhism as the state religion, and the constitutional right of monks – as Cambodian citizens – to vote and to engage in political activity. Similarly, the Ministry of Culture's attempts to fulfil its mandate to "preserve and protect national culture"[608] are challenged, subverted or avoided by artists and performers who are acutely aware of the constitutional guarantees to free expression, but also weary of the government's emphasis on "order" and "stability," not to mention its backward-looking approach to defining national identity. And while the image of activist lawyers using constitutionally enshrined rights guarantees to challenge the government in the courtroom is a conventional image for constitutionalism, it is given additional salience in Cambodia by the work done outside of the courtroom by civil society advocates who simultaneously seek to mobilise grassroots movements and levy international pressure. In each of these case studies, the Constitution plays a notable role in providing discursive and physical spaces (through its attendant vocabularies, principles and procedures) for non-state actors to challenge state, and to do so outside of formal (and flawed) state institutions.

[608] Article 69, Cambodian Constitution

Of course, it is important to avoid naivety in appraising the "bottom-up," discursive power of constitutions. This is especially true when one does so in authoritarian contexts where the state is at best largely unresponsive – and at worst outright repressive – to even the most carefully constitutionally-framed rhetorical critique or challenge. A large, and still growing, number of those interviewed as part of this research, for example, have been subject to such repression as a result of their publicly articulated critiques of the state. At the same time, while the Constitution creates space for discursive challenges to the state, even outside of judicial institution, it is most commonly the courts' interpretation – the state's preferred translation – of constitutional principles that win the day. As such, it is helpful to remember Sally Engle Merry's assertion that "translation takes place within fields of unequal power."[609] Rather than arguing against this relatively incontrovertible empirical fact of life in Cambodia and elsewhere, this thesis has suggested that – even despite this fact – the Constitution is still of consequence to the extent that it is a source of political empowerment and a tool for mobilisation. From this perspective, the seizure of discursive spaces provided by the Constitution, and the rhetorical contests over its meaning, represent the everyday politics of a much more long-term struggle described above as demand-side "popular constitutionalism."

Demand Side Constitutionalism in Comparative Perspective

That such demand-side constitutionalism can exist under authoritarian rule, meanwhile, is an increasingly well-recognised and well-researched empirical fact. A number of recent studies in Asian contexts, for example, have demonstrated that nascent popular constitutionalist demands can be found in neighbouring Vietnam and Thailand, not to mention in more established democracies such as Indonesia, when the focus of attention is shifted away from judicial institutions. In Vietnam, for example, Son Ngoc Bui and Pip Nicholson's study of the Petition 72 movement has shown how a group of legal academics pushed for, and then seized upon, a nationwide constitutional consultation in 2012-2013.[610] Specifically, the contributors to Petition 72 were able to popularise what

[609] Merry, *supra* note 58 at 40.
[610] Son & Nicholson, *supra* note 134.

were effectively calls for liberal-democratic constitutional reforms, through a concerted campaign of engagement with the state-led consultation process, petitioning and online activism. Though very few of the suggestions contained in Petition 72 were implemented by the government, the authors claim that the example represents a "nascent" form of "popular constitutionalism"[611] to the extent that it provoked social discourse and some limited level of mobilisation that may eventually contribute to constitutional change.

Yet, a more overt example of demand-side constitutionalism can also be found in the "motorbike constitutionalism" described separately by Mark Sidel and Son Ngoc Bui.[612] Here, public outcry over attempts to limit the number of motorcycles a citizen could own, which was expressed with repeated references to constitutional rights to the ownership of private property, forced a policy reversal from the state. In both instances, to the extent that popular constitutionalist demands were successful, it is clear that their success was at least in part due to the approach upon which they were based. Namely, the calls for constitutional reform or policy reversals were framed in such a way as to avoid challenging the legitimacy of the party-state. It is also worth noting that the latter case, which saw greater success for popular constitutionalist demands, called for changes that would have little to no impact on the ruling-party's power. As Son Ngoc Bui notes, popular constitutionalist demands in Vietnam can also be characterised as pragmatic. Building on Lynette Chua's concept of "pragmatic resistance,"[613] Bui suggests that understanding popular constitutionalism in Vietnam requires understanding the repressive environment in which it takes place: as the impulse to put forward strident constitutional critiques is offset by concerns about the movements survival.

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[611] *Ibid*, at 703

[612] Sidel, *supra* note 147; Bui Ngoc Son, "Constitutional developments in Vietnam in the first decade of the twenty-first century" in Albert Chen, ed, *Const Asia Early Twenty-First Century* (Cambridge: Cambridge University Press, 2014) 194.

[613] Son and Nicholson, "Activism and Popular Constitutionalism in Contemporary Vietnam"; making reference to Lynette J. Chua, "Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in S Ingapore," *Law & Society Review* 46, no. 4 (2012): 713–48; Lynette J. Chua, *Mobilizing Gay Singapore: Rights and Resistance in an Authoritarian State* (NUS Press, 2014), https://books.google.com/books?hl=en&lr=&id=gNh1BgAAQBAJ&oi=fnd&pg=PR9&dq=lynette+chua+gay+singapore&ots=YeCqgUHSDX&sig=C_GXV0pZNO6iJUCAfH0UJGeSVv8.

Popular constitutionalism, then, may not always translate directly into macro-constitutional reforms, or may only have a background influence on them. The Thai experience appears to support this notion as well, given that the 1997 Constitution – which resulted from a wide-ranging consultation process – has been described as having an "afterlife" that has subsequently shaped more recent attempts at constitutional redesign, as the country's cycle of coups and constitutional overhaul has continued.[614] Meanwhile, intriguingly, recent studies of constitutional practices in Indonesia have also hinted at the background importance of popular constitutionalism. While, of course, *Reformasi* was itself an example of popular constitutionalism, as public protests not only led to the removal of the Suharto regime but also produced drastic constitutional reforms shortly afterwards, studies of constitutionalism in the country suggest that a popular constitutionalist spirit continues to manifest itself, albeit in more institutionalised spaces.[615] With the region's most proactive court,[616] the *Mahkamah Konstitusi*, largely continuing to uphold the principles of the late 1990s constitutional reforms (albeit amid criticism that the standard of court decisions are declining), some scholarship has pointed very specifically to the role of civil society in driving judicial activism. Dominic J Nardi Jr, for example, has pointed to both the success of "controversial and far-reaching" NGO-initiated litigation at the *Mahkamah Konstitusi*, and the surprising frequency with which Indonesian judges refer to NGO-submitted petitions in their decisions, as evidence of civil society's "crucial and underappreciated impact."[617] Even in a context where constitutional discourse is focused into the archetypical constitutional space, then, we see the persistence of a popular constitutionalist influence.

This far from exhaustive list of examples, then, suggests that the phenomenon of popular constitutionalism is anything but limited to Cambodia. Rather, I would argue, it is an almost inevitable facet of constitutional practice anywhere in the world, which has been

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[614] Tom Ginsburg, "Constitutional afterlife: The continuing impact of Thailand's postpolitical constitution" (2009) 7:1 Int J Const Law 83.
[615] Dressel & Inoue, *supra* note 278.
[616] Dressel & Mietzner, *supra* note 278.
[617] Dominic J Nardi, *Demand-side Constitutionalism: How Indonesian NGOs Set the Contitutional Court's Agenda and Inform the Justices* (Centre for Indonesian Law, Islam and Society, Melburne Law School, The University of Melbourne, 2018) at 3; Dominic Nardi Jr, "Embedded Judicial Autonomy: How NGOs and Public Opinion Influence Indonesia's Constitutional Court" (2018).

all too easily obscured by a disciplinary preoccupation with courts and state institutions. As such, it seems that the socio-legal, even ethnographic, approach to constitutionalism taken in this thesis may in fact have almost universal application. Whether in Cambodia, where it exposes challenges to the hegemony of state-proffered constitutional narratives, in Indonesia, where it illuminates the support structures that encourage the work of a newly independent court, or in more traditional terrains for the study of constitutionalism, such as the United States, where it might draw attention back to a taken-for-granted group of constitutional actors, an ethnographic approach to the study of popular constitutionalism can clearly add nuance to the study of constitutional practice. This nuance might further help to enlighten the study of constitutionalism by helping to identify the diversity of actors, interests and processes that contribute to making specific constitutional systems function (or malfunction) in the way that they do. These findings, as the next section will suggest, might not always be entirely encouraging, however.

Imposition, Demand and Legitimacy

The data and arguments presented in this thesis, in fact, evoke additionally critical questions for those interested in the study of popular constitutionalism, and constitutionalism more generally. These questions emerge from the fact that the Cambodian Constitution was – to a large degree – imposed on the country in 1993, as part of an unprincipled political compromise between political elites, brokered by the international community and overseen by a United Nations Transitional Authority. Of course, the sudden emergence of a bold civil society that called for greater public participation in the constitution-making process is suggestive of the fact that popular constitutionalist sentiments and demands may have already existed, albeit latently. Yet, it is nonetheless true that the guarantees for liberal-democratic constitutional principles were prescribed in advance of these developments. As such, it is worth asking whether the insertion of these principles may have pre-empted more autochthonous Cambodian ideas and demands for constitutionalism. That question is not one that this thesis set out to answer. However, it is one that can and should be asked in the future, not to mention one that will be answered with increasing clarity over time by the everyday practices of

popular constitutionalism. In other words, it has yet to be seen whether popular constitutionalist discourse and demands in Cambodia currently adopt a distinctly liberal-democratic (and some would say Western) inflection as they are articulated *because* that is the type or model of constitutionalism that Cambodians desire, or because it is the type of constitutionalism that is imagined in the written Constitution, and that the document lends itself to demanding.

Undoubtedly, there is a clear demand among many Cambodians for at least a "thin"[618] version of constitutionalism, which requires adherence by the state to the commitments it is seen to have made, albeit at the behest of the international community, to divide and limit its own power (particularly with regard to separation of powers, guaranteeing institutional independence, protecting human rights). However, for now, the pursuit of this "thin" constitutionalism, and its articulation through the specific language of the written Constitution, also means that it is difficult to imagine a popular constitutionalism being articulated as anything other than a demand for western-style liberal-democracy. Outside of this apparently hegemonic constitutional ideologies, and its associate narratives, or that associated with the "authoritarian" variant of constitutionalism practiced by the state, it may well be possible to imagine that other alternatives are possible. Yet, the data on which this thesis is based does not show many signs of such alternatives taking root. Meanwhile, the fact that international norms (however they find their way into society) receive an additional degree of legitimacy in Cambodia suggests that the liberal-democratic norms enshrined in the Constitution will continue to be "translated" or "vernacularized" into popular constitutionalist demands with an overt attempt to emulate the inflection they receive in the West.

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[618] While Chapter 4, drawing on the work of Nick Cheesman, has already demonstrated that the distinction between "thick" and "thin" rule of law, or constitutionalism, is not necessarily a helpful one for understanding actually existing practices, I use it here here a helpful shorthand for public demands that do not stray far beyond calling for the basic essence of constitutionalism. In other words, while the claims do not articulate a full constitutional ideology, they call for some fundamentally constitutionalist ideals, like the limitation of state power and the protection of basic rights. The "thick" and "thin" dichotomy is put forward in Randall Peerenboom, *China's long march toward rule of law* (Cambridge University Press, 2002); Peerenboom, *supra* note 300.

This sense of imposition gives constitutional discourse in Cambodia a distinctly postcolonial dimension, then. In this regard, it is worth remembering what one journalist-interviewee described, as quoted in Chapter 3, when speaking about the concept of *borratheayniyum* (foreigner-centricity).[619] Specifically, the reporter poignantly suggested that post-1993 Cambodia has suffered from something of an inferiority complex, whereby foreign ideas and voices are often prized over more autochthonous ones. As such, "if foreigner says it is right, then it is right," the reporter noted, "if a Khmer say it is right, we don't believe it yet."[620] From this perspective, then, it would appear that the imposition of constitutional principles in 1993 was not a singular event, but may in fact be a self-perpetuating one that continues to echo through Cambodian constitutional discourse more than two-and-a-half decades later. Depending on one's normative stance, then, the lasting impact of the Constitution's liberal-democratic content could either be perceived as one of the few enduring successes of the U.N.-sponsored constitution-making process, or as one of its more troubling legacies. Based the data provided in this thesis, in which the liberal-democratic promises of the Constitution appear almost simultaneously as an inspiration and a diversion or limitation for those who seek to oppose authoritarianism and injustice, it seems to be both.

It should be noted, at least, that thinking about imposition in this way presents an additional dilemma, even to the most ardent liberal-constitutionalist. Namely, for those seeking to use the Constitution to challenge the state, there is the danger that the focus on legal tools may actually be disempowering, or may foreclose alternative methods and discourses of dissent. This is a challenge that is inherent in the process of "translation," as Pooja Parmar has shown in relation to Adivasi activism in India.[621] It is also something that has been recognised in the otherwise optimistic description of "translation" by Sally Engle Merry, when she notes that "translators work within established discursive fields that constrain the repertoire of ideas and practices available to them."[622] Most distinctively, the focus on using constitutions, and law more generally, to challenge the

[619] Interview 10: Anonymous Journalist. 11th February, 2017. Phnom Penh.
[620] Interview 10: Anonymous Journalist. 11th February, 2017. Phnom Penh.
[621] Parmar, *supra* note 84.
[622] Merry, *supra* note 58 at 40.

power of the state goes some way to professionalising dissent. The ability to speak *law* to power, of course, is contingent on some form of legal education or awareness. While not exclusively so, this is typically gained through expensive and time-consuming degree, which are beyond the reach of most Cambodians. This is especially noticeable in Cambodia, where the huge civil society sector, vibrant though it continues to be, draws largely for its human resources on the country's elite, and its growing middle class. Hence, the work described in the latter stages of Chapter 5, by NGO-affiliated lawyers and activists whose focus is on legal education-and-empowerment, is of great importance for the potential development of popular constitutionalism in Cambodia. Yet even this work can be problematic, particularly to the degree that it might further entrench imposed, hegemonic understandings of what constitutionalism can stand for. It is, in some way, potentially hegemonic – even violent – if its goal is to promote a singular "translation" of Cambodia's Constitution, or the idea of constitutionalism, at the expense of more autochthonous Cambodian interpretations and demands that might emerge from dispossessed communities themselves.[623]

Of course, conventional scholarship on constitutionalism assumes that liberal-democracy is the concept's inevitable end-point. The explication in this thesis of Cambodia's "authoritarian" constitutional mode may trouble this assumption. So too might the, albeit nascent, examples of constitutional demands that are being "translated" in their local contexts, by monks and artists for example. If the space for popular constitutionalism is allowed to grow in Cambodia (and this is a big, hypothetical *if*), we may still find that the principles enshrined in the Constitution do still take on somewhat divergent meanings. While Chapter 6's focus on Buddhist monks began by discussing the engagement of Buddhist monks with specific constitutional guarantees of democratic rights, for example, the latter part of the chapter demonstrated that activist monks are not tied to the specific wording or processes of the written Constitution. Where fundamentally important principles (such as those that would protect the environment and natural resources) are not enshrined in the Constitution, monks can be seen to adopt and adapt religious

[623] Robert Cover, "Violence and the Word" (1986) Fac Scholarsh Ser, online: <https://digitalcommons.law.yale.edu/fss_papers/2708>; Santos & Rodríguez-Garavito, *supra* note 50 at 5–10.

practices to highlight those principles. In so doing, they demonstrate the extent to which those same principles are felt to be constitutive elements of Cambodian society. Similarly, where constitutional processes do not offer adequate protection for those principles, activist monks intervene, often equipped with religiously and culturally infused tools. However, it is telling that such interventions are nonetheless claimed as a defence of the constitutional order.[624]

Similarly, when artists and performers who challenge government-proffered constitutional narratives, or pose alternative definitions of national identity, they do so in ways that weave together both global and local influences. The most striking example of this, for example, would be the traditional Cambodian sculpture described in Chapter 7, which the artist had driven nails into. While clearly speaking directly to concerns about constitutional rights to free expression, these concerns were expressed through a uniquely Cambodian cultural form: namely, a sculpture that spoke of restrictions on the freedom expression as violence against Cambodian society as a whole, rather than individuals. Symbolically, then, this particular piece – and the artist who created it – made a clear assertion that certain rights are fundamental to Cambodian society, without necessarily relying on the text of the Constitution to do so. Intriguingly, meanwhile, in describing conversations with the state about how Cambodian culture should be represented, a number of artist-interviewees repeated their belief that Cambodian culture, customs and traditions needed protection. While this belief was typically expressed in terms that would allow for a positive role for the state in *promoting* the arts, there were artists who saw a role for the state in limiting when and how cultural and religious iconography or symbolism could be used. Such demands, of course, might seem somewhat peculiar in

[624] Of course, any account of Buddhist activism should come with a caveat. It is dangerous to assume that Buddhist monks – either because of their Buddhist beliefs or their status as monks, or both – are somehow more likely to promote normatively "good" form of constitutionalism, or to do so with greater influence, than others. Experiences of Buddhist extremism in Myanmar and elsewhere should act as cautionary tales. In this regard, it is also worth noting, albeit anecdotally, that the most vehemently anti-Vietnamese views to be expressed by participants in this research were often found in interviews with activist-monks. Meanwhile, it is important to note that activist monks often rise to prominence because of the overall deterioration in the social status of the *Sangha* in Cambodia. As such, while they have undoubtedly gained significant individual notoriety and influence, this is to some degree accentuated by the fact that they have done so in a context where the influence of Buddhist figures is on the decline.[624]

other, more conventionally liberal contexts, or can still at least be considered to give culturally contextualised substance to the otherwise vaguely worded provisions of the Constitution.

At the same time, one could also make the argument that popular constitutionalism demands are not constitutional enough. Strange as this may sound, it is clear that much constitutionally-framed activism focuses on the protection of rights, without addressing the fundamental institutional flaws in Cambodia's current constitutional order. This perhaps reflects the priorities of donors who fund NGO activism, which channels civil society's critiques of the state into discursive and physical spaces that are relatively safe for the party-state. A focus on human rights is understandable, of course, given Cambodia's recent and historic record of rights protection. However, it can also be seen as a reactive or even short-sighted approach, to the extent that it focuses on resolving specific injustices or highlighting and preventing existing abuses. Campaigns for the release of imprisoned activists, or for the prevention of immanent evictions, for example, can win immediate, tangible and therefore precious victories. Yet, those familiar with the idiosyncrasies of Cambodia's "authoritarian" constitutionalism are often well aware that these victories are won only as and when the party-state considers a retreat to be expedient. In other words, they are won at the discretion of those in power. While the government rarely gains legitimacy as a result of these retreats, the focus on specific cases nevertheless offers decision-makers the opportunity to make very public concessions, effectively reinforcing the discretionary power on which the cases are believed to hinge. Though undeniably necessary, focusing funding and attention on such work could also be considered a distraction from the far more fundamental and systematic changes that need to be made, and the far more hard-fought victories that need to be won, for constitutional rights to be anything more than a privilege that is given by the state.[625]

[625] The privileging of human rights, especially in terms of donor-funding for Cambodian civil society, for example, seems to focus attention on the symptoms of injustice in Cambodia. However, the causes appear to be more systematic – like the lack of an independent judiciary or a perverse interpretation of rule of law. Similarly, the causes could be structural – such as the inherently violent, extractive and destructive nature of nation-states and global capital.

Constitutional Legitimacy, Order and Stability

Yet, adherence to the Constitution, however discretionary or malleable that adherence might be, is still seen by the state as an appearance that it is worth keeping up. As has already been noted above, the impulse to create at least a façade of constitutionalism appears to be primarily driven by a desire to harness the legitimising power of the Constitution and the lexicon of constitutional law, or at least to neutralise that power to the extent that it might be capable of undermining the legitimacy of the ruling party. However, there is evidence within the data presented in this thesis to suggest that this legitimacy can and should be disaggregated. Specifically, the above discussion of popular constitutionalism in Cambodia has focused largely on what we might term *domestic* constitutional legitimacy. Interestingly, in this regard, a number of interviewees – including many who were critical of what they saw as the government's lack of commitment to the Constitution – explicitly acknowledged that the emergence of constitutional practices that I have described as "abusive" or "authoritarian" was nevertheless an improvement on the much more overtly violent methods that had characterised politics in the past. Though intertwined, this *domestic* legitimacy is at least to some degree distinct from the *international* element of constitutional legitimacy; that is, the good-will that the Cambodian government hopes to engender beyond its borders by appearing to adhere to its constitutional commitments. In Cambodia, of course, this aspect of constitutional legitimacy is accentuated, firstly, by the fact that the constitutional principles to which the government has formally committed itself are a legacy of internationally-brokered peace agreements and, secondly, by Cambodia's continued dependence on international assistance. The influence of the *international* element of constitutional legitimacy, it could also be said, is compounded in Cambodia by the fact that the perception of *international* legitimacy (or the lack thereof) can reinforce or undermine the domestic elements.

There is, however, an additional facet to constitutional legitimacy; namely, what we might call *internal* constitutional legitimacy. Building on many of the abovementioned assumptions that underlie *domestic* legitimacy, the state's ability to provide at least a

façade of adherence to constitutional principles is also central to the ruling party's own identity, and the willingness of its members to identify with and support the continuation of authoritarian-rule. As one leader of the opposition explained during an interview:

> "they have to convince *their* supporter, *their* follower, that *it is* according to the law. They are trying to… they are trying to convince themselves."[626]

From this perspective(albeit a partial and partisan one), the development of constitutionally-framed justifications by the government is important for the self-image of the ruling party, as it attempts to reassure the party's membership that they are engaged in a project that is rules-based and, at its core, has the same aims as those that are expressed in the Constitution. This, of course, is particularly noticeable in Cambodia, where the "authoritarian" or "abusive" variant of constitutionalism that is pushed by the ruling elite not only presents the state as the guarantor of constitutional order, but also treats constitutional order as synonymous with social stability and, more pervasively, law and order. As Chapter 4 explained, drawing on the theoretical insights from work by Nick Cheesman and Sarah Biddulph, the approximation of these ideas works to invert the normal hierarchy of laws and to normalise the state of exception in ordinary constitutional practice.

Against Constitutional Order / For Constitutional *Disorder*

The insidious processes described above, however, are not necessarily external to the concept of constitutionalism. In fact, "abusive" or "authoritarian" constitutional practices can claim to trace their roots not only to specific constitutional provisions (such as in ordinary limitations on rights guarantees, for example), but also to the theoretical foundations of constitutionalism more generally. While hardly alone in this regard, those who have theorised "transitional constitutionalism" offer a prime example of how stability and orderliness is assumed to be one of constitutionalism's primary normative qualities.[627] Yet, the Cambodian example shows quite clearly that the association

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[626] Interview 11 –Anonymous Opposition Politician – 13th February 2017, Phnom Penh

[627] Ruti Teitel, "Post-communist constitutionalism: a transitional perspective" (1994) 26 Colum Hum Rts Rev 167; Ruti G Teitel, "Transitional Justice and the Transformation of Constitutionalism" (2011) Comp Const Law 57; Ruti G Teitel, *Globalizing transitional justice* (Oxford University Press, 2015).

between constitutionalism and order-and-stability lends itself to the expansion of state authority. Adherence to the Constitution comes to be seen as something that the state not only reflexively adopts, but also something that it must *enforce* upon its citizens or subjects. In other words, the constitutionalist state (and the concept of constitutionalism) is imagined as something that is built by the top-down imposition of constitutional rules. Battles over the implementation of those rules are seen as being fought *between* or *with* state institutions, *within* state institutions. To the extent that the interests of the individuals who make up these institutions converge, and to the extent that they diverge from those over whom they rule, constitutionalism becomes prone to misuse and can potentially reinforce authoritarianism.

Stepping back from Cambodia momentarily, then, it is of course true that constitutionalism elsewhere in the world gives the distinct appearance of order. However, I would argue, if the concept of constitutionalism is ever to be truly emancipatory, it must first be understood as a concept that thrives upon disorder and instability. It is these qualities that give life to constitutional principles, and which can thus allow constitutions to renew themselves. As radical critique has already begun to demonstrate, constitutional rules are never final: even in the most apparently stable constitutional orders, constitutional law – and the law more generally – is always open to refinement, reinterpretation, or even overhaul. Constitutionalism, in other words, can be a lot less orderly and a lot more anarchic than existing theory encourages us to believe. At their very foundation, for example, constitutional processes exist and perpetuate only because they are socially embedded in patterns of behaviour. Ultimately, then, those pursuing a better practice of constitutionalism in Cambodia – and in similarly authoritarian contexts – can take inspiration from the knowledge that constitutional principles and processes will change if the patterns of behaviour that sustain them are changed. This change may come through everyday politics, where these practices are gradually undermined by practices of dissent and subversion that challenge their legitimacy, or it may come as a result of "constitutional moments."[628] Meanwhile, for those who present more

[628] Bruce Ackerman, *Volume 3 We the People, Volume 3: The Civil Rights Revolution* (Cambridge: Harvard University Press, 2014).

fundamental critiques of constitutionalism, the radical openness that comes with understanding constitutional practices as inherently socially embedded also offers opportunities to move constitutionalism beyond its current, overtly liberal incarnation by thinking creatively about what the concept has to offer.

The case of Cambodia, as it has been presented in this thesis, highlights the discursive power that can be inherent in constitutions. This discursive power not only is exercised by judicial, or state institutions, but is also open to a much wider variety of societal actors than is typically recognised by constitutional law scholarship. To the extent that these otherwise largely overlooked actors do engage with, challenge or imagine their own constitutionally-framed discourses, they too should be considered to be an integral part of the practice of constitutionalism. As this thesis has shown, societal actors who behave in this way create constitutional sites and constitutional spirits that can work to decentre, if not completely dislodge, the institutions and interpretations that are created by the state. As such, paying closer, ethnographic attention to the sociological role that constitutions play can allow us to move beyond a state-centric approach, to uncover a far less coordinated – perhaps even disorderly – form of constitutionalism. In doing so, we are then able to see the additional, emancipatory role that constitutionalism can play. In the Cambodian example, this dynamic is evident in the work of traditional civil society organisations, but also in the activism they inspire – through their awareness-and-empowerment work – from laypeople. This emancipatory potential of constitutionalism was also evident in the mobilisation of Buddhist monks, some of whom appear not only enfranchised but also empowered to speak in a lexicon that mixes constitutional rights with religious ideas of justice and ethics. So, too, was constitutionalism's emancipatory potential evident, albeit latently, in conversations with Cambodian artists and performers, as they continued to insist upon their own (constitutionally grounded) right to express themselves and to promote a version of 'Cambodian-ness' that they personally identify with. These examples, of course, can give only a partial view of how constitutionalism operates beyond the reach of the state. However, even this partial view demonstrates that – even under conditions of authoritarianism – constitutional discourse continues to suffuse everyday political practices throughout society, and that these practices also

shape the way that a constitution, and the concept of constitutionalism, is understood in any given context.

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Appendix

List of Interviews

Interview 1: Anonymous Lawyer. 26th December, 2016. Phnom Penh.

Interview 2: Anonymous Law Professor. 24th January 2017. Phnom Penh.

Interview 3: Anonymous Monk. 31st January 2017. Phnom Penh.

Interview 4: Anonymous NGO Worker. 1st February 2017. Phnom Penh.

Interview 5: Anonymous Lawyer. 3rd February 2017. Phnom Penh.

Interview 6: Anonymous Lawyer. 8th February 2017. Phnom Penh.

Interview 7: Anonymous Lawyers. 8th February 2017. Phnom Penh.

Interview 8: Anonymous NGO Worker. 9th February 2017. Phnom Penh.

Interview 9: Anonymous NGO Worker. 10th February 2017. Phnom Penh.

Interview 10: Anonymous Journalist. 11th February 2017. Phnom Penh.

Interview 11: Anonymous Politician. 13th February 2017. Phnom Penh.

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Interview 13: Anonymous Community Organiser. 15th February 2017. Phnom Penh.

Interview 14: Anonymous Community Organiser. 16th February 2017. Phnom Penh.

Interview 15: Anonymous Community Organiser. 9th March 2017. Phnom Penh.

Interview 16: Anonymous NGO Worker. 13th March 2017. Phnom Penh.

Interview 17: Anonymous Lawyer. 14th March 2017. Phnom Penh.

Interview 18: Anonymous Lawyer. 15th March 2017. Phnom Penh.

Interview 19: Anonymous NGO Worker. 17th March 2017. Phnom Penh.

Interview 20: Anonymous Monk. 28th March 2017. Phnom Penh.

Interview 21: Anonymous Government Official, Ministry of Culture and Fine Arts. 30th March 2017. Phnom Penh.

Interview 22: Anonymous Government Spokesperson, Ministry of Justice. 30th March 2017. Phnom Penh.

Interview 23: Anonymous Monk. 31st March 2017. Phnom Penh.

Interview 24: Anonymous Politician. 19th April 2017. Phnom Penh.

Interview 25: Anonymous Lawyer. 20th April 2017. Phnom Penh.

Interview 26: Anonymous NGO Worker. 20th April 2017. Phnom Penh.

Interview 27: Anonymous Politician. 24th April 2017. Phnom Penh.

Interview 28: Anonymous Artist. 24th April 2017. Phnom Penh.

Interview 29: Anonymous Filmmaker. 25th April 2017. Phnom Penh.

Interview 30: Anonymous District Director of Women's Affairs, Kandal Province. 30th April 2017. Phnom Penh.

Interview 31: Anonymous Deputy District Governor. 30th April 2017. Phnom Penh.

Interview 32: Anonymous Community Organiser. 7th May 2017. Phnom Penh.

Interview 33: Anonymous Community Organiser. 7th May 2017. Phnom Penh.

Interview 34: Anonymous Monk. 7th May 2017. Phnom Penh.

Interview 35: Anonymous Monk. 8th May 2017. Phnom Penh.

Interview 36: Anonymous Artist. 9th May 2017. Phnom Penh.

Interview 37: Anonymous Artist. 9th May 2017. Phnom Penh.

Interview 38: Anonymous Artist. 9th May 2017. Phnom Penh.

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Interview 40: Anonymous Artist. 10th May 2017. Phnom Penh.

Interview 41: Anonymous Lawyer. 23rd August 2017. Phnom Penh.

Interview 42: Anonymous Artist / Filmmaker. 29th August 2017. Phnom Penh.

Interview 43: Anonymous Spokesperson, Cambodian People's Party. 4th September 2017. Phnom Penh.

Interview 44: Anonymous Political Advisor / Analyst. 4th September 2017. Phnom Penh.

Interview 45: Anonymous Lawyer. 10th September 2017. Phnom Penh.