



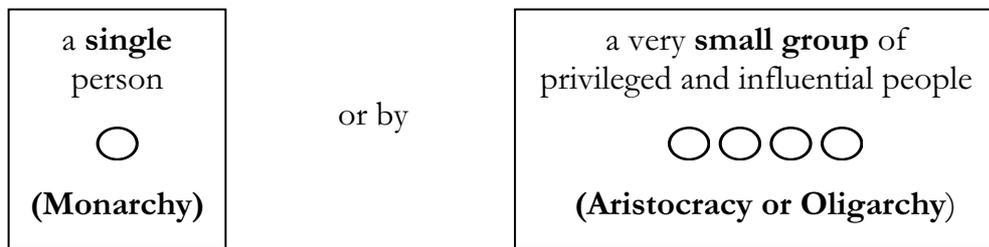
Function of the Legislation

A) General Principles of a Democratic Legislation:

Any group or society has to solve its common problems. Therefore it has to **make decisions and set up rules for all group members** and control the execution of these decisions and rules.

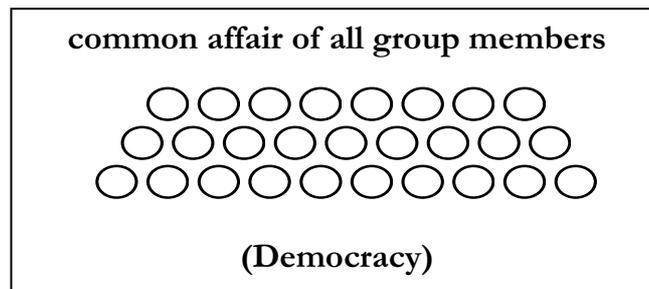
The question of how to organize such a **process of decision making** can be answered in different ways:

In some groups or societies the decisions are just made by



who rule and exercise their power over the other members of the society.

Contrary to that the decision making process is a



in a society which is based on human rights because the most basic human right is the right of **equality**. This means that all human beings have the same value no matter what ethnic, social or racial origin or political or religious belief they have. When all members of a group or society deserve the same respect no one has privileges or a higher value that could entitle him/her to rule and tell other group members what to do.

Instead of this the group rules itself (**self-rule**).

Concerning the decision making process self rule means **pluralism**:

The voice of every individual member of the group or society has to be heard, every idea has to be considered and everyone can contribute his/her proposal of a solution for common problems. This is especially important for minority members or for smaller



groups who have opposite ideas. As the decisions have to be made for the whole group the majority decision always has to respect and consider the minority's position as well. The disadvantage of such a common decision making process may be that it takes more time than the decision making of just a single person. But the idea of common decision making is that the competition and discussion of all solution proposals will lead to the best and most just result, because it combines the variety and strengths and capacities of all group members and does not rely on the capacity of just one leader. Furthermore rules and decisions are more acceptable for all group members when they had the chance to **participate** in the decision making process. This leads to a more peaceful and stable society.

This self-rule model is called “**Democracy**”. That word means: “**Rule of the People**”. It is the model which Cambodia adopted.

Article 51 I and II Cambodian Constitution (CC):

The Kingdom of Cambodia adopts a policy of liberal democracy and pluralism.

The Cambodian people are the master of their own country.

All powers belong to the people.

The democratic model of decision making and self-rule applies not only to the Cambodian National Assembly but also to all other groups and associations of Cambodian society. For example the democratic model applies to the Commune Councils

Article 48 I and II Law on Administration and Management of the Communes:

A Khum/Sangkat shall have legislative and executive powers. Legislative power of the Khum/Sangkat shall be exercised through resolutions of the Khum/Sangkat to manage affairs within the framework of its roles, functions and powers.

or to the Political Parties¹, the Labor Unions, the Bar Association², the NGOs³ or to Students Representation Bodies at universities etc.

¹ see for example the Internal Rules of the Political Parties:

CPP Statutes www.camnet.com.kh/cpp/statutes.htm

Funcinpec: www.funcinpec.org/principle.htm

² Articles 2 and 3 Internal Regulations of the Bar Association – www.ifrance.com/cambodia/judicial/jud008g.htm

³ see Articles 12 and 14 of the Draft Law on NGOs and Associations



B) Legislation: Exercise of People's Power:

The Cambodian People are the master of their own country and destiny. All political power stems from the people. The **most important power is the power to make decisions and set up rules**. These rules need to be executed. The execution of these rules and decisions need to be controlled. To avoid power concentration and abuse of power the people's power is separated into three parts (= separation of power).

Article 51 III and IV CC:

All powers belong to the people. The people exercise these powers through the National Assembly, the Royal Government and the Judiciary.

The Legislative, Executive, and the Judicial powers shall be separate.

According to this structure of power the **National Assembly** (NA= legislative power) has two **main functions**⁴:

- to **make decisions** (Articles 90 I and 91 I, II CC), that means
 - to make laws (this means to set up general rules for all Cambodians)
 - to approve decisions of other institutions (Article 90 II - V CC; for example to approve the national budget submitted by the government or to approve an amnesty granted by the government)
- to **control the execution of decisions**, that means
 - to choose the executive power (= government, Article 119 I and II CC)
 - to control the government by questioning, accusing and dismissing it (Articles 89, 96 I, 97, 98, 121 and 126 CC)

Article 89 CC:

Upon the request by at least 1/10 of its members the National Assembly shall invite a high ranking official to clarify important special issues.

Article 90 CC:

The National Assembly shall be the only organ to hold legislative power.

The National Assembly shall approve the national budget, state planning, loans, lending and the creation, changes or annulment of tax.

The National Assembly shall approve administrative accounts.

The National Assembly shall approve the law on amnesty.

The National Assembly shall approve or annul treaties or international convention.

The National Assembly shall approve law on the declaration of war.

⁴ for more details see graphic on page 23



Article 96 CC:

The deputies have the right to put a motion against the Royal Government. The motion shall be submitted in writing through the Chairman of the National Assembly.

The replies shall be given by one or several ministers depending on the matters related to the accountability of one or several ministers. If the case concerns the overall policy of the Royal Government, the Prime Minister shall reply in person.

The explanations by the ministers or by the Prime Minister shall be given verbally or in writing.

The explanations shall be provided within 7 days after the day when the question is received.

In case of verbal reply, the Chairman of the National Assembly shall decide whether to hold an open debate or not. If there is no debate, the answer of the minister or the Prime Minister shall be considered final. If there is a debate, the questioner, other speakers, the ministers, or the Prime Minister may exchange views within the time-frame not exceeding one session.

The National Assembly shall establish one day each week for questions and answers. There shall be no vote during any session reserved for this purpose.

Article 97 CC:

The National Assembly commissions may invite any minister to clarify certain issues under his/her field of responsibility.

Article 98 CC:

The National Assembly shall dismiss a member or members of the Royal Government or the whole Cabinet by the adoption of a motion of censure by 2/3 majority of the entire National Assembly.

The motion of censure shall be proposed to the National Assembly by at least 30 assembly members in order for the entire National Assembly to decide.

Article 121 CC:

Members of the Royal Government shall be collectively responsible to the National Assembly for the overall policy of the Royal Government.

Each member of the Royal Government shall be individually responsible to the Prime Minister and the National Assembly for his/her own conduct.

These articles of the constitution raise the **question whether the parliament's rights are strong enough to control the government.**

Problem:

Why shall it be at the discretion of a single person, here the Chairman of the Assembly to cut off an open debate about a motion against the prime minister? Why should it be at the discretion of the ministers/prime minister to choose if they want to answer verbally or in writing? (see Article 96 III and V CC).

C) Core Elements of a Democratic Decision Making Process⁵:

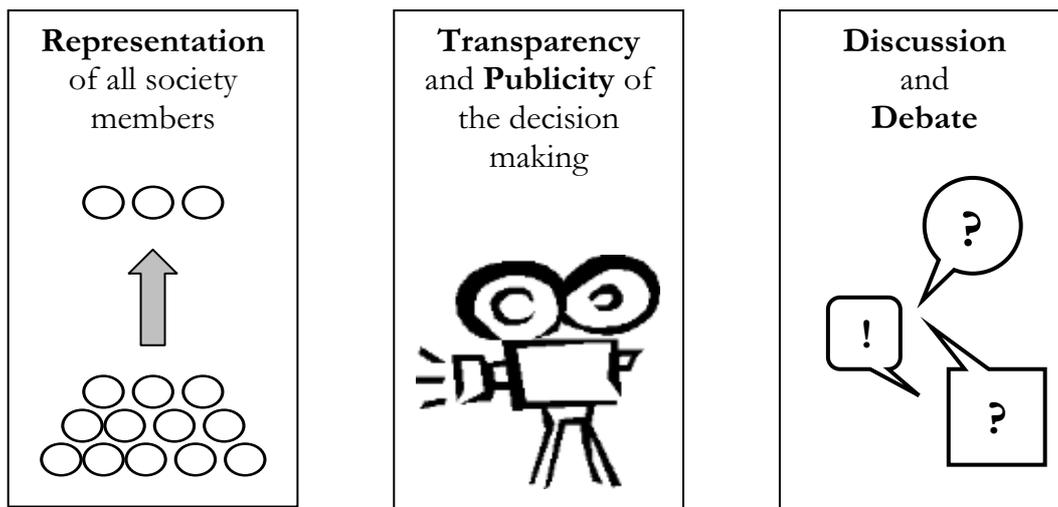
Democratic legislation means: Making rules for **all** members of a society. The law has the function to balance the different human rights of the members of society. Therefore every member must have the right to **participate** in the process of making rules that can affect his/her personal affairs and rights. Such a process of collective decision making must be **open** and **pluralistic**. Otherwise the output of this process would not be acceptable, especially for minorities and opposition members.

Democratic legislation has two main purposes:

- to find the **best possible solution for social problems and conflicts** which violates the human rights of the involved persons least
- to **create legitimacy** of the law

To achieve these goals three elements of the lawmaking process are essential which can not be renounced without damaging the democratic legislative process.

These elements are:

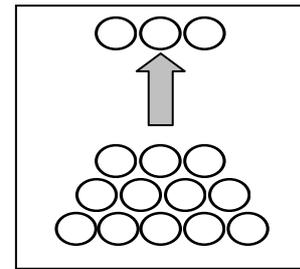


⁵ for further details read the article: “The Role of the Legislature in a Democracy” on <http://usinfo.state.gov/products/pubs/archive/freedom/freedom3.htm>
See further “Creating and Disseminating Law in a Democratic Society” on <http://usinfo.state.gov/products/pubs/archive/freedom/freedom7.htm>
Read as well: Putzig/Rendall: “Democracy: A Citizen's Role” and Rendall: “The Constitution and Government of Cambodia”. Both books are published also in Khmer by the NGO “Community Legal Education Center” (CLEC), # 54, Street 306, Phnom Penh.



I) Representation:

It is essential that the interest of all members of a society is represented during the legislation process. Representation means that the **parliament links the government with the people.**



Article 77 I CC:

The deputies in the National Assembly shall represent the entire Khmer people, not only Khmers from their constituencies.

1) First of all it must be ensured that the **representatives** of the Cambodian people in the National Assembly must be elected **from all over the country in a proportional manner**. For all provinces there must be seats in the National Assembly. Provinces with large populations must have more seats and influence than those with only small population (Article 9 Law on the Election of NA-Member (LEMNA)).

Article 5 LEMNA:

Members of the National Assembly shall be elected by a general, universal, free, fair, equal, direct, and secret election by means of secret balloting. The electoral system shall be proportional representation, with provincial/municipal constituencies.

Example:

The principle of proportionate representation does not only apply to the distribution of seats in the NA. It also applies to the work of the parliament itself. The principle of proportionate representation was for example violated when the Chairman of the NA excluded lawmakers of the opposition party from participating in an international meeting with the Inter Parliamentary Union in Geneva by only choosing lawmakers from both ruling parties to be sent to the meeting.

2) One way to **ensure a broad representation** of most society members is to claim a **2/3 majority** for some very important decisions. This makes sure that not only a little more than half of the population sees itself represented by the decision.

Example:

The Cambodian Constitution can not be amended by just a 50 % + 1 majority of the NA members but such a step requires a 2/3 majority (Article 151 II CC). Such a majority is also required for the election and dismissal of the government (Article 90 VII and 98 I CC).



3) Another way to **ensure broad representation** is to **set up additional institutions of legislation and decision making** which not only have members elected by the people but also appointed members of society. These appointed members can represent those parts of the society who have considerable ideas and interests but do not have the capacity to form a political party which runs for the election and can hold seats in the NA. The principle to have additional law making bodies is called **bi-cameralism** which means the existence of **two** chambers or parliamentary institutions.

Example:

The **Cambodian Senate**⁶ is such an institution which was created to represent some special groups and interests not based on general elections. It also has lawmaking power (Articles 99 I, 112, 113 CC). The senate members must have a minimum age of 40 years which means special representation of the older and experienced generation (Article 99 IV 2 CC). They are partly appointed by the King and shall be elected by "non-universal" elections (Article 100 CC). That means not all Cambodians but only some special groups representing different society interests can elect them. The details must be regulated by a law (Article 101 CC).

The problem at the moment is that such a law still does not exist so no one knows which groups may take part in the non-universal election. Such groups could be for example: farmers', doctors', teachers' or youth associations, the Chamber of Commerce, women's organizations, etc.

The **National Congress** is another such institution provided by the Cambodian Constitution (Art. 147 CC). It shall enable the people to be directly informed and to raise questions and issues of national interest for the state authorities to solve. It shall have the power to give recommendations to be considered by the Government, the Senate and the National Assembly.

The problem with the National Congress is as well that the necessary law to enact this institution (see Article 149 II CC) does not exist yet.

4) Finally those who are in the minority position need ways to articulate their wishes and need to influence the common decision making process of the legislation. So a legislative process always must provide a **platform for the articulation of minority positions**.

In other words: It must give **opposition/minorities/civil society groups** the **chance to be heard**. If people are not heard they feel frustrated and in the end turn to be violent to make their position being noticed. Furthermore **democracy always means: Listening to the people** and their needs and expectations. To give a platform for minority positions is especially important when the majority of the parliament members - usually without discussion - approve the draft laws submitted by the elected government. The minority shall have the chance to raise its concern and criticize the majority position and to introduce some ideas into the lawmaking process which the majority might have neglected or turned a blind eye on. The majority decision is only acceptable for the minority when it had at least a chance to influence and criticize the majority and through this make the majority at least to justify, rethink or clarify its position.

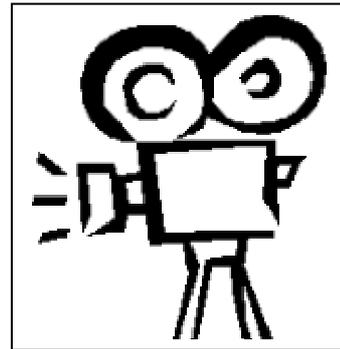
⁶ for more details see pages 24 and 25

Some good examples:

- The National Assembly of Cambodia once held a public hearing. It invited stakeholder groups, experts and civil society groups to give their comments on a draft law.
- The former Governor of Phnom Penh held a public hearing inviting citizens to tell him their wishes and needs on urban development.
- The NGO “Oxfam” conducted a process of participatory law drafting together with the Ministry of Forestry, Fishery and Wildlife. This included talking and listening to the affected fishermen, fishing communities and fishermen-families. The result was the new draft law on fishery.

II) Transparency:

Any democratic law making process must be **transparent** because the voters and citizens as well as the members of parliament and civil - society stakeholders need sufficient information to **understand and follow the lawmaking process**, to **assess not only the quality of the law** but also **the quality of the lawmakers** who stand candidate for re-election.



This means the following topics must be clear and visible for the public (and also for the lawmakers themselves!)

- What is the **text of the draft law** (and of the existing laws)?
- On what **facts** is the draft law text based?
- What are the **different positions** and **alternative proposals** of all involved groups on that draft?
- How is the **process of lawmaking** going on? Which lawmaker represents which position?
- Which **interests** and **affiliations** influence each lawmaker?

To make the legislative process transparent in the abovementioned sense some provisions and structures are essential:

1) There must be a **publication of law texts and of draft law texts** which is **easily accessible** for the public in a **timely and inexpensive** way.

Problem:

At present such a sufficient structure of publication of laws/draft laws does not exist in Cambodia. It is hard to find the full text of existing laws (but see Article 93 II CC) and even more difficult to find the text of draft laws⁷ which in many cases are kept like a secret by the ministry which produced the text. One of the main topics of the draft Action Plan for Legal and Judicial Reform is to create such a publication system⁸.

⁷ To find draft law texts look at the home-page of STAR Kampuchea: www.forum.org.kh/~star-ldp

⁸ For details about the dissemination of law in a democratic society click on:

<http://usinfo.state.gov/products/pubs/archive/freedom/freedom7.htm>.

On law publication see further:

Sok Siphana, Editor, “International Conference on Cambodian Legal Reform”, 1998, pages 198 – 210 and

Sok Siphana “Legal and Judicial Reform Strategy for Cambodia”, 2002, pages 33 - 40



2) There must be **open access for the public to attend debates** of the parliament (and any other legislative body like for example the Commune Councils) as well as to **visit their elected representatives**.

Problems:

- Open access of the public is basically granted by Article 88 I and 111 I CC for the sessions of the National Assembly and the Senate.

But both provisions also include the possibility that the sessions have to be closed for the public on the simple request of 1/10 of its members or of the King or the Prime Minister. The provision does not regulate that any reasons for such a request have to be given. Principle 64 sentence 2 of the NA Internal Rules regulates (- contrary to Article 88 I CC! -) that “in principle” the Assembly’s Chairman “can allow the public to enter the meeting hall”. So it is just at the discretion of these actors to cut off the public without any reason if they wish.

This is incompatible with the basic idea of a democratic lawmaking process. The elected representatives as well as the government should not hide anything from the public. If they cut off the public from information they put severe damage to the legitimacy of the lawmaking process. How can the Cambodian people trust that the law was produced in a fair and reasonable way when they do not know the content of the debate?

There may be some reasons to exclude the public, for example when military secrets are discussed, but this should be a clearly named and legally stated exception of the publicity of debates.

- Not compatible with the basic democratic principle of public access to legislative meetings is as well the decision of the Phnom Penh Municipal Council to generally exclude journalists and the public from its sessions. Article 4 I Press Law and Article 41 I 1 CC (Freedom of expression which includes free access to information) do not justify such a decision.

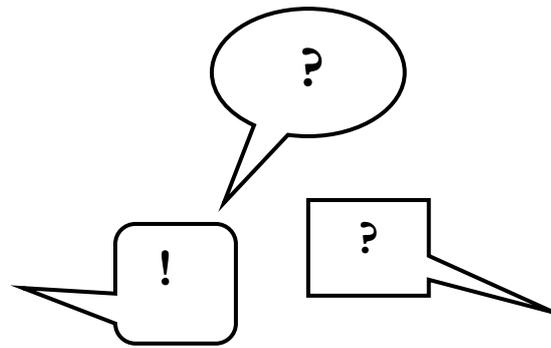
- It also seems not compatible with the idea of a transparent lawmaking process if the General Secretary of the National Assembly claims that every journalist who enters the assembly has to tell the assembly’s administration which assembly member he wants to visit. Such a kind of information duty creates a control mechanism which damages the free and uncontrolled exchange of views between assembly members and citizens. There simply is no reason why the general Secretary of the NA should know this.

3) The **economical and affiliation background** (association membership, membership in commercial enterprises, etc.) **of each lawmaker** should be **published** in a parliamentary handbook (this exists for example in Germany) as well as the **agenda of the legislative sessions** (Article 83 III CC only foresees the publication of the agenda of an extraordinary session of the National Assembly. But it should be published in particular for the ordinary sessions as well). Thus the public can better assess their representatives’ activities and can better follow the lawmaking process.



III) Discussion and Debate

The legislature is often the best and most legitimate **forum for debating differences**. Every society has differences about what policy directions to be on the national agenda. Providing opportunities and the best **environment for a real debate** is an important function of the legislature.



A major function is also to provide an outlet for the legitimate opposition. Constructive **criticism** of the government or of a draft law should be welcome and not seen as an obstacle but as a **chance to find the best solution for the society**.

The word “Parliament” stems from the French word “parler” which means “to talk”. The democratic idea relies on the common, lively and **open discussion** of all problems as the **best and non-violent means to solve the conflicts** which exist in every society.

Such a debate culture is foreseen by the Cambodian Constitution which grants the lawmakers the following rights:

- **immunity:** Article 80 II and 104 II 1 CC protect any lawmaker against prosecution for opinions expressed during the exercise of his/her function.
- **right to question** government members and authorities during assembly session (see Article 89, 96 I, 97 CC, as well as Principle 32 and 33 NA Internal Rules).
- **right to speak** (see Principle 54 -61 NA Internal Rules)

The Constitution explicitly rules that there shall be time for questions and answers which means there shall be time for discussion:

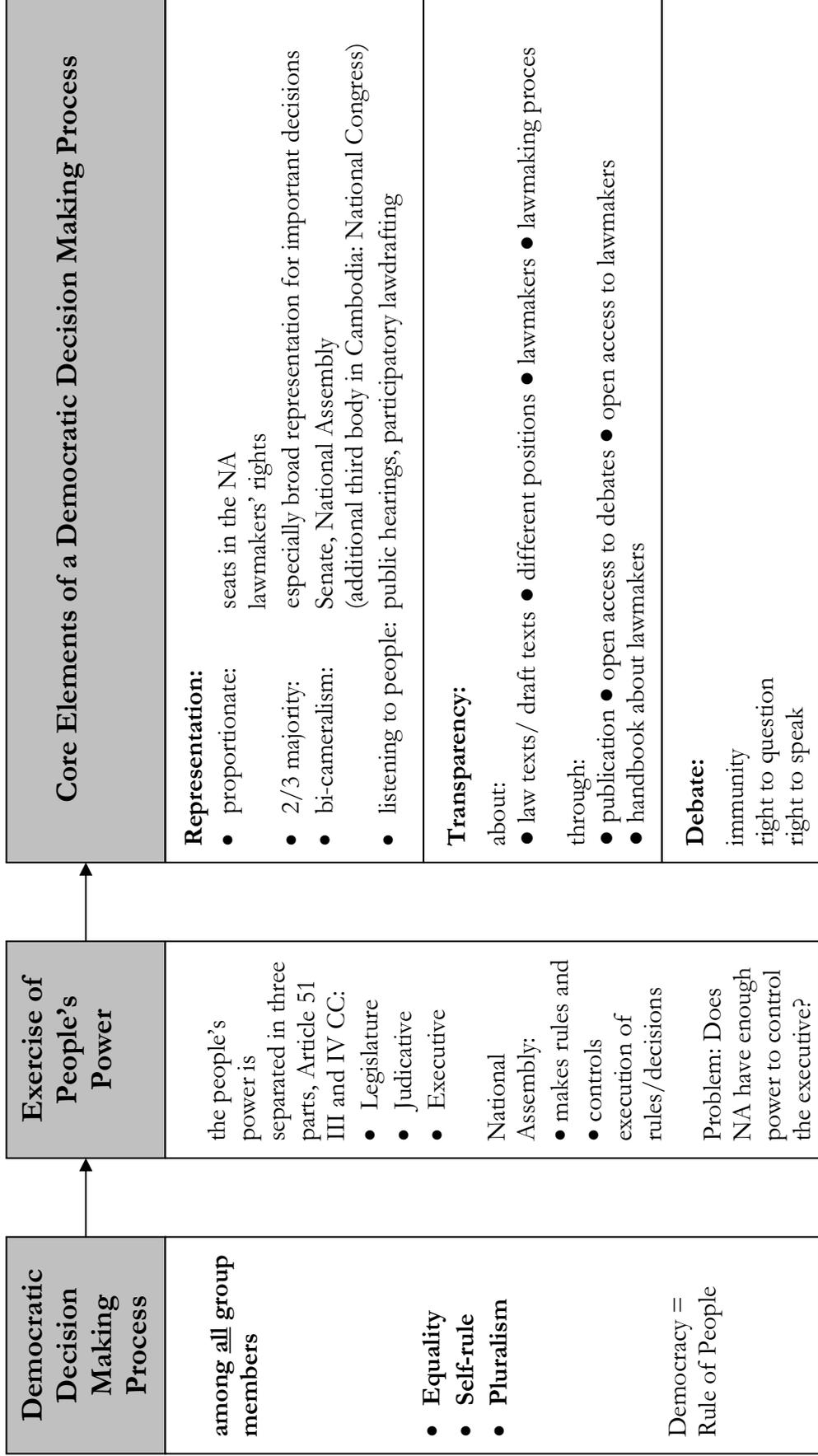
Article 96 VI CC:

The National Assembly shall establish one day each week for questions and answers. There shall be no vote during any session reserved for this purpose.

To grant the exercise of these rights especially the Chairman of the Assembly has to take care that also opposition members get a fair amount of time and a chance of uninterrupted speaking.



Legislation





Study Question 1

Look into the Cambodian Constitution and enumerate the functions of the parliament (National Assembly)!



Study Question 2

Which core elements of democratic decision making can be found in the following summary of Cambodian Daily's article of April 3, 2003?

The Ministry of Justice discussed with NGOs the long-delayed draft law on the statutes of the judges and prosecutors. The law, drafting of which began in 1994, provides regulations on the education of judges, their impartiality, remuneration and disciplinary sanctions. Kem Sokha, director of the Cambodian Center for Human Rights said that it remains to be proved whether that draft will be really implemented whereas Ky Tech, president of the Cambodian Bar Association in general praised the draft, but said that it is still unclear what offenses could lead to disciplinary action.