
Separation of Powers without Checks and Balances in Cambodia

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Abstract: *The absence of checks and balances in Cambodia leads to unaccountability of the government and the political leadership. Legislative, Executive, and Judicial power is not equally divided among three different branches of the government. The Executive branch is organized in such a way that it holds all three powers and has become politically critical. This paper argues that the governmental power needs to be restrained by establishing and implementing the mechanism of checks and balances.*

1. Introduction

The idea of constitutional separation of powers maintains that the government must be divided into three branches—the executive, the judiciary, and the legislature. Each branch must function independent of each other’s interference, but must have powers to check and balance against each other. Separation of powers provides for a system of checks and balances amongst the three branches of the government that can protect the principles of democracy by ensuring decentralization of power across the government and people. The provisions of checks and balances guarantee greater governmental accountability and a check against abuse of power. (Mavedzenge and Coltart, 2014:14). In this regard, Madison states that the separation of powers should be accompanied by a system of checks and balances. One branch of the government should have the ability to obstruct the activities of a rival branch (Grigsby, 2012: 88).

Even over two decades after the UN introduced democracy, Cambodia has not been able to establish strong institutions that can safeguard and guarantee the essence of a true democracy. The transition to democracy in the country is not full-fledged, it lacks consolidation. Even though five national elections have been held since 1991, the

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democratic process remains fragile. The country still faces an urgent need for reconciliation and reconstruction (Ojendal and Lilja, 2009:14). The lack of institutional mechanism that can restrict authoritarian tendencies and establish/guarantee independent functioning of various institutions has led to the issues of 'good governance'.

The absence of checks and balances is resulting in unaccountability of the government and the political leadership. The opposition party often disregards the Cambodian parliament and claims institutions as merely a forum for and by the ruling party. Legislative, Executive, and Judicial power is not equally divided among three different branches of the government. The Executive branch is organized in such a way that it holds all three powers and has become politically critical. The governmental power need to be restrained through the mechanism of checks and balances that can protect against the executive branch becoming all-powerful.

Cambodia is a multiparty democracy under a constitutional monarchy. The king remains the head of the state, however, he does not govern the nation. The government is headed by the Prime Minister, who is chosen by the head of the National Assembly (Government of Cambodia). The Constitutional Assembly adopted the Constitution of Cambodia in September 1993 and the amendments to the Constitution were passed on 4 March 1999. The Constitution provides for separation of powers between the executive and the legislature, between the legislature and the judiciary and between the executive and the judiciary. Cambodia's Constitution enshrines the basic governing principles: separation of powers; organization and functions of state institutions; election; and appointment and status of officers. Despite the fact that the country has been a democracy for over two decades, constitutionalism has not yet been rooted in the system. Rather, several new developments have countered the process of constitutionalism (Hay, 2008).

2. Constitutional Law

Cambodia's 1993 Constitution today remains little more than a proclamation of intentions. Article 51 stipulates that 'all powers belong to the people' and that they will 'exercise these powers through the National Assembly, the Royal Government and the Judiciary'. The establishment of the three branches of government corresponds closely with the liberal democratic spirit of the Paris agreements though in practice there is not yet a separation of powers. This can be seen most clearly with regard to the National Assembly which was directly elected by the people (Hay, 1998).

Cambodian constitution is a written constitution, consisting of sixteen chapters and 157 Articles. Articles 1-6 (Chapter 1) include the details of independent, characteristics of independent, sovereign, peaceful, permanently neutral and non-aligned Cambodia. Articles 7-30 (Chapter 2) state the details about the role, functions and powers of the King. The Rights and Obligations of the Citizens are mentioned in Articles 31-50 (Chapter 3). The Constitution recognizes and respects human rights as specified in the Universal Declaration of human Rights. Article 31 states: All Khmer citizens shall be treated equal before law regardless of race, color, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status.

Articles 51-55 (Chapter 4) state the main policies of the state. Article 51 obligates that the Kingdom of Cambodia adopts a policy of Liberal Democracy and Pluralism; Cambodians are the masters of their own country; people exercise powers through the National Assembly, the Senate, the Royal Government and the Judiciary; the legislative, executive, and judicial powers shall be separate from each other. Articles 56-64 (Chapter 5) provide an overview of the national economy. Articles 65-75 (Chapter 6) outline the provisions related to education, culture, social affairs. Articles 76-98 (Chapter 7) provide the provisions related to the legislative body, the Assembly.

Provisions related to the Senate are discussed in Articles 99-115 (Chapter 8). Articles 116 & 117 (Chapter 9) focus on

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the Assembly and the States. Articles 118-27 (Chapter 10) specify the nature of the Royal Government. Articles 128-135 (Chapter 11) state the roles, functions and the jurisdictions of the judicial branch. Articles 136 & 144 (Chapter 12) discuss about the Constitutional Council. In Chapter 13 (Articles 145 and 146), administrative (provinces, municipalities and districts) set up is discussed. In Chapter 14 (Articles 147-149), the structure and the functions of the National Congress are stated. Chapter 15 (Articles 150-153) outlines the effects, revision and amendments of the Constitution. Articles 154-157 emphasize on the Transitional Provisions of the constitution.

3. The Executive Branch

The Constitution of the Kingdom of Cambodia enshrines the principle of the separation of powers in Cambodian law. Article 51 states: “The Legislative, Executive, and the Judicial powers shall be separated. The executive government is formed by the party with the largest number of seats in the National Assembly at election. It consists of the head of government (the prime minister), the Council of Ministers, and the head of state (the King).

The prime minister is appointed by the king on the recommendation of the President and Vice Presidents of the National Assembly. The Council of Ministers is named by the prime minister and appointed by the monarch. “The king is chosen by a Royal Throne Council from among all eligible males of royal descent; following legislative elections, a member of the majority party or majority coalition named prime minister by the Chairman of the National Assembly and appointed by the king” (CIA-The World Fact Book).

Article 7 of the Constitution reinforces formal limitations on the king by stating “shall reign but shall not govern”. However, Article 17 reads, “The provision as stated in the first clause of Article 7, ‘the King of Cambodia shall reign but shall not govern’, absolutely shall not be amended”. This suggests that the Council of Ministers being the Royal Government of Cambodia is the actual governing body. The king has been given considerable authority and real powers as established by the constitution. Article 9 constitutes, “the

King shall assume the august role of arbitrator to ensure the faithful execution of public powers”. Article 19 grants the king the power to appoint the prime minister and the Council of Ministers. Furthermore, the king possesses the authority to appoint, transfer, and removes high ranking civil and military officials. The King can appoint, transfer, and dismiss upon the request of the Supreme Council of Magistracy (Article 21).

The king has the power to proclaim national emergency if the nation is in danger (Article 22); declare war (Article 24); sign & ratify international treaties and conventions (Article 26). Scholars argue that vesting so many powers in the ailing king who spent most of his time abroad can be considered insignificant in practice. As per Article 28, “in case of illness and medical treatment abroad, the King can delegate his power of signing the Kram (code) and the Kret (decree) to the Head of State *ad interim*”. Full use of powers by the king’s successor can easily jeopardize the democratic institutions. “Cambodian constitution does not provide for other levels of democratic participation, apart from electing members of the assembly, such as directly voting candidates into office in the local and provincial governments” (Marks, 2010: 232).

The real power is vested in the king and political leaders controlling the royal government. According to Article 100, the prime minister is appointed by the king from the representatives of the winning party in the national assembly on the recommendation of the President and with the agreement of both Vice- Presidents of the Assembly. This suggests that the executive branch of the government dominated the political system with the king performing more than ceremonial functions (Marks, 2010: 232).

Cambodian Center for Human Rights (CCHR) states that the constitutional principles of the separation of powers and the rule of law have been systematically ignored over the years. The Royal Government of Cambodia (RGC) has “turned to a corrupt and politically-controlled judiciary as its primary tool of oppression, with criminal charges systematically levelled at the pillars of Cambodia’s fledgling democracy – parliamentarians, the media, lawyers and human rights activists”. The RGC is able to exploit the law

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and violate the constitution is due to the majority gained by the ruling party, the Cambodian People's Party (the CPP) in 2008 election (CCHR, 2011).

4. The legislative Branch

The legislative branch (Parliament) consists of two houses: the National Assembly (123 seats; members elected by popular vote for five-year terms) and the Senate (61 seats; 2 members appointed by the monarch, 2 elected by the National Assembly, and 57 elected by parliamentarians and commune councils; members serve five-year terms) (CIA-The World Fact book).

Article 90 states: The National Assembly is an organ which has legislative power, and performs its duties as provided for in the constitution and laws. The National Assembly shall approve the national budget, State planning, loans, financial contracts, and the creation, modification and annulment of tax; approve administration accounts; adopt the law on the general amnesty; adopt or repeal treaties and International Convention; adopt the law on proclamation of war. The adoption of the above clauses shall be done by the absolute majority of all members of the entire National Assembly membership. The National Assembly shall pass a vote of confidence in the Royal Government by a two-third majority of all members of the entire National Assembly membership (Government of Cambodia).

Asia Human Rights Commission (AHRC) criticizes this article for the categorical assertion that rules out any other institution or individual intending to make any laws. Therefore, if any individual, government or department purports to make any law, that law is considered unconstitutional. However, there could be a delegation of power to any minister or any government authority to make rules under any law passed by the National Assembly; but in all such cases, it is necessary that all such rules should be approved by the National Assembly. Therefore, if there are any rules made by the government or any department and if these rules are not approved by the National Assembly, all such rules should be considered unconstitutional. The power to make rules, being a delegated power, has to be exercised

strictly in accordance with the law passed by the Assembly and not otherwise (Asia Human Rights Commission, 1998).

The UNDP report suggests that “the parliament is now not better able to provide checks and balances of the elected government than in 2005”. The executive branch retains supremacy over legislature (UNDP Cambodia, 2010:6). In its report, the Committee for Free and Fair Elections in Cambodia stated that despite the constitutional provision of separation of powers, the National Assembly is unable to act a check and balance against the executive branch (COMFREL, 2010:4). Due to its overwhelming majority prior to and during 2008 elections, the Cambodian People’s Party (CPP) continues to dominate the executive and legislative branches. Although the constitution provides an impressive list of functions to be performed by the National Assembly and the Senate, the two bodies are unable to play any independent political role. The National Assembly and the Senate rarely initiate or debate measures proposed by the government before approval (Poole, 2009:56).

According to UNDP, the government’s domination over the legislative branch prevents the parliament from performing the main function of initiating/passing laws, oversight, and representation. Most of the draft laws originate within the CPP (UNDP Cambodia, 2010:7). Following the 2008 elections, multiparty democracy is further strained in Cambodia by the refusal or inability of opposition parties to fully use the limited democratic space available to them.

The democratically elected opposition does not to take part in the parliamentary commissions. The opposition argues that membership selection in the commissions is not fair and demands that a minimum number of commission chairperson positions should be allotted to them. Membership in the parliamentary commissions - where most of the debate takes place - is determined by the majority vote.....all the nine commissions of the National Assembly are presided and composed by ruling party members (UNDP Cambodia, 2010:10).

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5. The judicial Branch

Judicial independence is enshrined in Cambodian constitution with the aim to promote the rule of the law and protect political and civil liberties which have been ignored in the past (UN, 2009:70) Article 128 states that the Judiciary is an independent power and it shall guarantee/uphold impartiality and protect the rights and freedoms of the citizens. The authority of the Judiciary shall be granted to the Supreme Court and to lower courts of all sectors and levels (Constitution of Cambodia). The King of Cambodia shall be the guarantor of the independence of the judiciary and the Supreme Council of the Magistracy shall assist the King in this matter (Article 132). According to Article 130, “Judicial power shall not be granted to the legislative or executive branches”. Article 132 specifies that “the King shall be the guarantor of the independence of the Judiciary. The Supreme Council of the Magistracy shall assist the King in this matter”. Furthermore, Article 134 stipulates:

The Supreme Council of the Magistracy shall be established by an organic law which shall determine its composition and functions. The King may appoint a representative to chair the Supreme Council of the Magistracy. The Supreme Council of the Magistracy shall make proposals to the King on the appointment of judges and prosecutors to all courts. The Supreme Council of the Magistracy shall meet under the chairmanship of the President of the Supreme Court or the General Prosecutor of the Supreme Court to decide on disciplinary actions against the judges or prosecutors (Cambodian Constitution).

As Article 128 suggests, the Judiciary alone can exercise judicial powers. No other branch of the government can interfere in its affairs, as any interference in the administration of the justice department from any personnel from the Ministry of Justice (prosecutor) is considered

unconstitutional. The Supreme Council of the Magistrates has the right of appointing and removing the judges.

Dunai and Wagener (2008) argue that despite the exiting constitutional provisions of fundamental rights, its application remains subject to limitations. Parliamentarians can most effectively contribute in achieving the goal of ensuring 'good governance' and perform their constitutional functions through the proper implementation of laws, governmental accountability, and voter's representation. Separation of powers among the three branches of the government provides an opportunity for civil society to participate in decision-making process and influence outcome. However, all these constitutional provisions exist only on papers, despite the fact that the Cambodian constitution is based on the principle of democracy. The current political system is clearly dominated and controlled by the executive. The legislature (the National Assembly and Senate) have no scope to exercise their powers independently. "The Senate fails to exercise its constitutional role as a supervisory body, and the judiciary does not have enough proficient jurists. The executive and judicial branches of government are exposed to far-ranging party patronage" (Dunai and Wagener, 2008).

Kheang Un argues that the Cambodian judiciary has never been able to uphold its constitutional mandate due to ingrained problems within the system that impede its operations. These challenges include: lack of material and human resources; lack of independence; widespread corruption at all levels of the government; patron clientalism; intervention from the executive branch; quest for judicial legitimacy (Un, 2009:75-89). The last two challenges are discussed below.

Interference from the executive branch and other powerful individuals (high-ranking government officials) continues to impede the court affairs. Intervention occurs prior to, during and after the trial. Judges remain subject to political and bureaucratic pressure. In political cases, "judges deliver the verdict that fit the guidelines of the government. A judge said, "We judges have to follow because we know in advance the dimension of their power" (In Un,

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2009:85). The court officials serve the interests of political parties. Majority of chief judges are CPP that is in full control. The politicized nature of Cambodian governance makes it impossible for a neutral judicial system to emerge. Lawyers of the Non-Governmental Organizations (NGOs) complain about the challenges faced in representing political matters. Furthermore, widespread corruption severely hampers the ability of the poor without money and political connection seeking justice (Un, 2009:88-89).

Lack of independent operation of the judiciary remains major human rights concerns in Cambodia. Lack of separation of powers and the continued influence of the executive over the judiciary heavily affects the fair trial rights. “The courts are used as political tools to silence opposition and dissent” (World Justice Project). Thus the “combination of embedded corruption, nepotism, patronage politics and government interference engender a negative popular perception towards the judiciary in particular and government institutions in general”(Un, 2009:90). The attempts to introduce judicial reform continue to face strong resistance.

The most pressing challenge is that the formal system of checks and balances stipulated by Constitution is not being translated into the institutions of the states. The Constitutional Council and the Supreme Council of the Magistracy that are designed to guarantee separation of power and protect the independence of the judiciary are not empowered in true sense. Therefore, in the absence of an effective rule of law, the initiatives to establish an active civil society can never be accomplished (Hay, 1998).

6. Conclusion

A close study of Cambodian constitution and law highlights the major reasons and the challenges faced by the country. Although Cambodian constitution is one of the most liberal constitutions in Asia, the drafting and implementation of laws remains highly problematic. This may be the weakest point in the country’s post-conflict political reconstruction ((Ojendal and Lilja, 2009:21). The government can be held accountable for its attitude towards

the constitution and the lack of political will for not addressing these issues for vested political interests. Additionally, the lack of effective mechanism to ensure an effective constitutional government is the main contributing factor to this problem. As mentioned earlier, the excessive control/interference of the executive branch exerted on the judiciary is the most significant reason that has affected political legitimacy in Cambodia. It's clear that the judiciary and the legislature serve the executive. "Such blurring of the lines between the branches of government reflects the total failure of Cambodia's state institutions" (CCHR, 2011).

Reformation within judiciary is urgently needed. It's essential that the government complies with the International Covenant on Civil and Political Rights, which Cambodia has ratified and incorporated in its Constitution. The functioning rule of law calls for strong institutions with clear division of powers among the three branches of the government, minimum interference of the political leaders in the executive's affairs, civil society's participation in civil and political affairs. Independent and impartial judiciary is essential for the survival and effective functioning of constitutional mechanisms established for the protection of constitutional supremacy, separation of powers, rule of law, and fundamental human rights (Mavedzenge and Coltart, 2014:11).

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