

Fact Sheet: Institutions Series: The Separation of Powers and the Rule of Law

Institution: The state – the legislature, the executive and the judiciary

CCHR Concern: The principles of “separation of powers” and the “rule of law” are not observed: the executive has seen fit to reduce the other branches of government – namely the legislature and the judiciary – to political pawns that serve executive ends.



Introduction

This fact sheet introduces the concept of establishing robust and independent institutions that respect the principles of the “separation of powers” and the “rule of law”, and considers its application in the Kingdom of Cambodia (“Cambodia”). This fact sheet is written by the Cambodian Center for Human Rights (“CCHR”), a non-aligned, independent, non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – primarily civil and political rights – throughout Cambodia.

The principle of the separation of powers

The principle of the “separation of powers” refers to the division of a democratic state into three institutions or branches of government: the legislature, the executive and the judiciary. The rationale being that each branch acts as a “check and balance” on the others, with no one branch exercising more power than either of the other two. Such a separation, it has been argued, limits the possibility of arbitrary excesses by government, since the sanction of all three branches is required for the making, executing, and administering of laws. Such a division helps to prevent abuses of power and is essential to a healthy democracy.

The three branches of government

The Constitution of the Kingdom of Cambodia (the “Constitution”) enshrines the principle of the separation of powers in Cambodian law: *“The Legislative, Executive, and the Judicial powers shall be separated.”* (Article 51) Furthermore: *“All powers belong to the people; the people exercise these powers through the National Assembly, the Royal Government and the Judiciary.”* (Article 51) Later articles of the Constitution set out the three branches of government in Cambodia in more detail:

- the legislature - has the power to initiate legislation, approve or amend laws. The National Assembly consists of at least 120 members (Article 76) and is granted legislative power under the Constitution (Article 90). The Senate can examine and give out opinions on draft laws and proposed bills which have been adopted by the National Assembly (Article 113);
- the executive - has the role of running the country and enforcing the law. It comprises the Council of Ministers, led by one Prime Minister assisted by Deputy Prime Ministers, and by State Ministers, Ministers, and State Secretaries as members (Article 118) otherwise known as the Royal Government of Cambodia (the “RGC”); and
- the judiciary - is responsible for interpreting and applying the law. It is an independent power whose authority shall be granted to the Supreme Court and to lower courts of all sectors and levels (Article 128). 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).

Rule of law vs rule by law

The rule of law is the principle that no one is above the law. The objective of this principle is that

governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced by established procedural steps that constitute due process. The principle is intended to be a safeguard against arbitrary rule, whether by an authoritarian leader or by mob rule. Thus, the rule of law guards against both dictatorship and anarchy.

In its “Rectangular Strategy” – the socio-economic policy agenda of the RGC’s political platform – and its “Strategy on Legal and Judicial Reform”, the RGC outlines its commitment to the rule of law, *i.e.*, the law is pre-eminent and should serve as a judicial and legislative check against abuses of power. The rule of law is distinguished from “rule by law”, whereby the law acts as a tool of executive or legislative oppression. The preamble to the Constitution makes reference to the rule of law in specifying that the government will “*guarantee[ing] human rights and the respect of law*”.

The executive’s monopoly on government

The principles of the separation of powers and the rule of law have been increasingly flouted over the years, with the RGC shrewdly changing its tactics to maintain the semblance of political legitimacy. From about 2004 onwards, the RGC 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. Recently, however, the RGC has devised a concerted legislative agenda to limit the rights to freedom of association and expression of all Cambodian citizens, codifying criminal defamation in the 2009 Penal Code, while currently finalizing draconian and controversial laws that will regulate and shrink the democratic space of trade unions, NGOs and associations. The RGC’s ability to exploit the law in this manner is due to the majority gained by the main ruling party, the Cambodian People’s Party (the “CPP”) in the last election. This approach – an application of rule by law – should be seen as the newest phase in the RGC’s push towards a non-pluralistic and undemocratic Cambodia – in gross violation of the Constitution.

It is clear that the dominance of the executive is almost complete: first the judiciary and then the legislature have been brought into line to serve the executive, with the executive presiding over their subordination. Faith in the judicial system is so weak that cases have been reported of villagers asking the Prime Minister or other senior members of the ruling CPP to intervene in land disputes. Such blurring of the lines between the branches of government reflects the total failure of Cambodia’s state institutions.

Conclusion and recommendations

Heavy CPP dominance of the courts and the National Assembly are evidence that the separation of powers is non-existent in Cambodia, and that the rule of law is unable to take its rightful place as the cornerstone of Cambodian democracy. The RGC should focus on strengthening the rule of law and developing robust and strong institutions that enable and ensure the rule of law. What is required is a wholesale overhaul of Cambodia’s corrupt and dysfunctional state institutions, in observance of the principle of separation of powers. Until the RGC takes such steps, it will be in severe breach of the Constitution, and the Cambodian people will not be “*masters of their country*” (Article 51).

For more details please contact Ou Virak (tel: +855 (0) 1240 4051 or e-mail: ouvirak@cchrcambodia.org) or Robert Finch (tel: +855 (0) 7880 9960 or e-mail: robert.finch@cchrcambodia.org).