

NEWSLETTER
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Newsletter

Legal Commentary Special

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First Special Edition on the current legal debate in Cambodia; Constitutionalism and the formation of the National Assembly.

Opposition party CNRP leader Sam Rainsy has declared the current government “illegal”, stating that it has been formed under a “**constitutional coup**” during the ongoing political deadlock; citing two articles which have apparently been violated by the ruling party CPP (Rainsy, 2013: 1). In a letter to the President of the Asian Development Bank dated October 7th, Rainsy highlighted the reasoning behind boycotting the inaugural National Assembly meeting on September 23rd (ibid). The 55 elected CNRP members have thus far refused to take their seats owing to election irregularities and a refusal by CPP to allow an impartial and independent investigation to take place (ibid).

Rainsy quotes Article 76 of the Constitution of the Kingdom of Cambodia; “the National Assembly consists of at least 120 members” (Constitutional Council, 1993/2010: 25) and further reinforces this sentiment by referring to a Constitutional Council decision on the interpretation of this exact paragraph (CC, 054/005/2003). However, it should be noted that this decision “is a problem concerning only the case when the election to replace the deputy who **passed away, resigned or lost his/her quality** as member of the National Assembly could not take place; and that the total number of the remaining parliamentarians would be reduced to less than 120” (ibid). In this context, the CC determined “that there shall be at least 120 deputies to be able to form the National Assembly at every legislature. Electoral law cannot limit the number of parliamentarians to less than 120. This paragraph 1 is a necessary condition for the formation of a National Assembly but not for its functioning” (ibid). Rainsy also applies Article 51 which states “the Kingdom of Cambodia adopts a policy of liberal multi-party democracy” (Constitutional Council, 1993/2010: 18); suggesting that the single-party National Assembly is in fact “unconstitutional” (Rainsy, 2013: 1).

Lawyers and coalitions of NGOs have debated both sides of this argument, with no solid conclusions regarding Rainsy’s interpretation of the Constitution and Council decisions. Ms. Theary Seng is one such lawyer providing legal commentary on the aforementioned issue. She argues that in order for the National Assembly to be “fully, legally and constitutionally formed”; the election results must provide for at least 120 members; the King must invite them all and be present; all of the elected MPs must convene the inaugural session and finally; they must take an oath prior to the commencement of their official functions (Seng, 2013: 2). Seng further highlights Articles 82, 83 and 88 as important considerations in interpreting this question of constitutionality and the **formation** of the National Assembly. The author distinctly draws attention to the difference between the convening session of the NA which requires “the attendance of ‘at least 120 members’” and other extraordinary or ordinary “**functioning**” aspects of the NA. These respectively require an absolute quorum and a two-thirds majority attendance of MPs (Art. 83, Art. 88); “where most times the President, Vice-Presidents and/or chairs of various commissions are already established” (ibid). Citing Article 82, Seng states that “**the election period has not ended**” as both the

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CPP and CNRP are claiming victory, therefore, the 120 NA members have not been legally determined, leading the lawyer to conclude that the current government has been formed **unconstitutionally** (ibid: 3).

In contrast, Mr Anirudh Bhati's legal commentary critiques the selective nature of arguments such as the preceding debate by Ms. Seng. The lawyer stresses the importance of considering firstly the **entire text** of the CC decision, secondly, the **primary reason** for the decision, and thirdly, the **context** in which the decision was made. "The learned legal representatives did not consider it prudent to include the entire relevant text of the decision of the Constitutional Council in their Joint Analysis which would have helped shed light on the meaning that the body intended to convey" (Bhati, 2013). The author further elaborates that the CC decision was in fact related to the "death, removal or incapacity of members of the assembly" and not "primarily deciding on the minimal number of members required to be present in the inaugural session of the National Assembly" (ibid). Bhati continues to comment on the CC decision stating that "the Council explains that the final result of the election **should** give 120 deputies or more in accordance with the number fixed by the Electoral law in order to be able to form a National Assembly" (ibid), however, it is pertinent to reveal a small error as the decision is actually quoted as saying "at the end of the election, the final result **must** give 120 deputies or more according to the number fixed by the Electoral law in order to be able to form a National Assembly" (CC, 054/005/2003). It is a subtle alteration, but it could be argued that it does change the meaning and force of the decision which Bhati has referenced. Much in the same vain, the lawyer suggests that the NA is properly formed when the election results have been "officially declared after which the members officially take function", as was the case in September of this year, when the results were officially announced and confirmed by the National Election Committee (Bhati, 2013). Bhati concludes by reinforcing the argument that "the legislative term of the National Assembly begins once the requisite number of members (62 and above) have fulfilled constitutional requirements and taken office" (ibid).

As evidenced in this short summary of the current legal discussion in Cambodia, neither side of the debate regarding the constitutionality of the formation of the NA in 2013 can be deemed a uniquely fair argument. Both lawyers discussed above demonstrate convincing arguments; however, it is inconceivable that the current ruling party will take either into consideration. As far as CPP are concerned, they have formed the NA, they have formed the government; now, they are waiting for CNRP to reopen negotiations.

Further reading:

Seng, T. (2013) How is the National Assembly Formed? Legal Commentary. Civicus, 15 October, 2013. <https://app.box.com/s/rmvge0099mhbr08zjdnq>

CC. (2003) A Decision by the Constitutional Council on Case No. 069/013/2003, Decision No. 054/005/2003 http://www.ccc.gov.kh/english/dec/2003/dec_005.html

Rainsy, S. (2013) A Letter to the President of ADB. October 7th, 2013. <http://blueladyblog.com/wp-content/uploads/2013/10/Letter-to-Mr.-Takehiko-Nakao-President-of-ADB.pdf>

CC. (1993) The Constitution of the Kingdom of Cambodia. <http://www.ccc.gov.kh/english/CONSTITUTIONEng.pdf>

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Bhati, A (2013) Contextualism and the Constitution of Cambodia

<http://blueladyblog.com/article/contextualism-and-the-constitution-of-cambodia.html>

Bhati, A (2013b) Can the Cambodian People's Party form the Royal Government?

<http://blueladyblog.com/article/can-cambodian-peoples-party-form-the-royal-government.html>

PPP (2013) Balls in their Court: CPP <http://www.phnompenhpost.com/national/ball%E2%80%99s-their-court-cpp>

PPP (2013) Rainsy's Reasoning Questioned

<http://www.phnompenhpost.com/national/rainsy%E2%80%99s-reasoning-questioned>

PPP (2013) PM's Legal Reasoning Questioned

<http://www.phnompenhpost.com/national/pm%E2%80%99s-legal-reasoning-questioned>