INDONESIAN COMPARATIVE LAW REVIEW
Volume 3, Issue. 2, 2021, 81-95
P-ISSN: 2655-2353, E-ISSN: 2655-6545

Honorary Article

Adjudicating Separation of Powers: The European Court of Human Rights and Comparative Perspectives from Asia[1]

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DOI: http://dx.doi.org/10.18196/iclr.v3i2.12037

Abstract

Efforts to build a regional human rights mechanism in Asia are being renewed. Separation of powers adjudication will be inevitable if the right of access to court is included in the new mechanism. This is significant since the potential for separation of powers cases involving human rights issues in Asia is high. An Asian human rights mechanism must take this possibility into account, since adjudicating on such issues may severely impact its stability and long-term viability. A mechanism based on existing regional systems such as the ECHR can seek to minimize these risks via institutional solutions. On the other hand, an Asian mechanism can side-step these issues in the short term by focusing on a narrow set of rights, which minimize the potential for raising issues of separation of powers. In the long term, however, a complete charter of fundamental rights cannot ignore separation of powers issues being linked with human rights. The aim of this paper is to highlight both the inevitability and risks of adjudicating cases involving a nexus between separation of powers and human rights by a regional human rights court.

Keywords: adjudication; human rights; separation of powers.

1. Introduction

At the 3rd Congress of the World Conference on Constitutional Justice 2014, Chief Justice Park of South Korea called for renewed efforts to build a regional human rights system in Asia (Han-Chul, 2014) It is clear that regional human rights protection can be more effective than mechanisms at the universal level.(Baik, 2012, p. 166) The initiative launched by Justice

[1] *Notice: This article originated from a draft conference paper presented at the 6th Asian Constitutional Law Forum – Constitutionalism in the Courts: Judicial Review and the Separation of Powers in Asia, held in 2015 at the National University of Singapore. It was a joint presentation with Fabian Duessel, but further work on the text for journal publication is by Seokmin Lee. At Mr. Duessel's request and by mutual agreement, this article is published under the single authorship of Seokmin Lee.*

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Park is therefore of great significance. As of 2021, discussion on a possible regional human rights system does not appear to be at a stage pursued by a group of states and is still in the form of being intermittently addressed just by a few figures or scholars. However, it is worth noting that in Asia, where there is yet no regional human rights court, these discussions could become more active at some point in the future.

The establishment of a regional human rights mechanism is complex, especially in a region as diverse as Asia.(Hashimoto, 2004, p. 143) Further problems may surface after such a system is put in place, since international organizations have the tendency to generate a life of their own.(Klabbers, 2015, p. 33)

Separation of powers adjudication by a supranational court is controversial because it may severely affect the power balance within domestic political systems.(Ginsburg, 2003, p. 130) Just as domestic constitutional and supreme courts may be called upon to uphold the separation of powers through judicial review, such a task is likely to also fall within the competencies of a regional human rights court. By taking into account the experience of the European Court of Human Rights (ECtHR), this paper shall explore the following questions: First, how has the enforcement of separation of powers through the ECtHR worked in practice? Second, what lessons can be drawn for building a future human rights system in Asia?

The aim of this paper is thus to explore possibilities and risks a potential Asian human rights mechanism will face in the context of the nexus between separation of powers and human rights adjudication. This will be done by taking into account selected separation of powers controversies in Asia with a human rights dimension. The argument is as follows: Separation of powers cases which involve human rights issues or vice versa are inevitable at the domestic and regional levels. However, such cases bear significant risks for a potential regional human rights mechanism. Therefore, solutions must be found to accommodate the inevitability of the linkage between separation of powers and human rights adjudication.

2. The European experience

2.1. The European Court of Human Rights

The success of the ECtHR has prompted some commentators to argue that it has taken on the role of a supranational constitutional court.(Stone Sweet, 2009) Just like constitutional courts in the member states of the Council of Europe, it has dealt with the issue of separation of powers. Yet according to Kosar, policing separation of powers is a new role for the ECtHR and that due to structural problems, the ECtHR should proceed with care and give greater deference to domestic actors in the process. Even though the ECtHR only enjoys limited jurisdiction over such issues, Kosar demonstrates that it has expanded its reach through its case law, such as via cases concerning the compatibility of parliamentary immunity enshrined in national constitutions with the right to access to courts guaranteed in Article 6(1) of the European Convention on Human Rights (ECHR).(Kosar, 2012, pp. 38–39)

By using the example of parliamentary immunity, Kosar argues that in the process of engaging with separation of powers the ECtHR produced conflicting case law. In *A v. United Kingdom* (2002) the court adopted a "separation of powers perspective," typical of a constitutional court. It then reverted to a classic "human rights paradigm" in the *Cordova* cases (2003), only to again adopt the former stance in *Kart v. Turkey* (2009).(Kosar, 2012, p. 55) The human rights paradigm, however, continues to be used.(European Court of Human Rights

(ECtHR)-Case No. 27759/05 and 41219/07, Urechean and Pavlicenco v. the Republic of Moldova., 2014) The focus of the separation of powers perspective is on the institutional limits of the ECtHR, since the "separation of powers rationale seems to have been critical for accepting the bright-line rule and rejecting the balancing exercise."(Kosar, 2012, p. 49) When the ECtHR reverted to the human rights paradigm, it was emphasised that no general interest considerations could justify denying the applicant of his rights of access to court.(Kosar, 2012, p. 55) The engagement with separation of powers at the ECtHR thus seems to have produced various strands of case law, each adopting a different fundamental rationale. Kosar's argument that the ECtHR is structurally ill-equipped to adopt a separation of powers perspective is made in the context of this uncertainty.

2.2. Adjudicating immunity

In *A v. United Kingdom* (European Court of Human Rights (ECtHR), Case No. 35373/97, A. v. United Kingdom, 2002) the ECtHR ruled that the applicant's right of access to court was not violated by the parliamentary immunity enjoyed by a Member of Parliament (MP). The ECtHR argued that Parliamentary immunity is not in principle a disproportionate restriction on the right of access to a court.(Kosar, 2012, p. 50) The judges relied on the rationale of the separation of powers, the key concern being the institutional autonomy of the legislature. As an elected representative, freedom of expression is of utmost importance to an MP. Since this absolute immunity only applies to speeches delivered on the floor of the Houses of Parliament, this privilege serves to protect Parliament as a whole, and not the MP in his or her individual capacity. The significance of parliamentary immunity for a functioning democracy is widely acknowledged. In *A v. United Kingdom,* the ECtHR remarked that there was widespread acceptance of the principle of parliamentary immunity among the member states of the Council of Europe.(European Court of Human Rights (ECtHR), Case No. 35373/97, A. v. United Kingdom, 2002, pp. 78–81)

The ECtHR's argument that by making exceptions to immunity the legitimate aims behind this principle would be undermined was echoed in a later case. The ECtHR's reasoning in *Kart v. Turkey* (European Court of Human Rights (ECtHR), Case No. 8917/05, Kart v. Turkey, 2009) also adopted the "separation of powers" perspective and relied on institutional arguments. It held that the refusal to allow an MP to waive parliamentary privilege in order to engage in litigation was not a violation of the right to access to courts. Echoing *A v. United Kingdom*, it was emphasised that "inviolability is not a personal privilege for the benefit of the MP but rather a privilege linked to his or her status."(European Court of Human Rights (ECtHR), Case No. 8917/05, Kart v. Turkey, 2009, p. 97) If MPs were permitted to waive parliamentary immunity, the functioning and integrity of Parliament would be disrupted.(European Court of Human Rights (ECtHR), Case No. 8917/05, Kart v. Turkey, 2009, p. 91) So even though the case was concerned with actions of the MP taking place outside Parliament, for the sake of preserving separation of powers the MP's right to access to courts could nevertheless be legally limited.

According to Kosar, between *A v. United Kingdom* and *Kart v. Turkey*, the ECtHR had reverted to a human rights perspective. In *Cordova v. Italy (no. 1)* and *(no. 2)* the ECtHR held that the applicant's right of access to court was violated by the Italian Senate's rejection of the MP's request to waive his parliamentary immunity. Kosar argues that these decisions directly contradicted *A v. United Kingdom* by clearly making an exception to parliamentary immunity. The exception was made by stating that the parliamentary immunity was compatible with Art. 6(1) ECHR only if the impugned statements had a "clear connection" with a parliamentary

activity.(European Court of Human Rights (ECtHR), Case No. 8917/05, Kart v. Turkey, 2009, p. 83) The spatial criterion seems to have been abandoned in favour of the nature of the behaviour in question. According to Kosar, this judgement stands in direct conflict with judge Costa's remark in *A v. United Kingdom*, namely that no particular model of public order is to be imposed on a member state on such a politically sensitive field.(Kosar, 2012, p. 51)

However, if one recalls the rationale behind the expansion of the concept of immunity by member states beyond the confines of their domestic parliaments, and then return to the facts of the *Cordova* cases, the willingness of the ECtHR to be flexible when interpreting separation of powers can be viewed positively. Maduro reminds us that "historically parliamentary privilege was limited to speech in Parliament because, at the time, political discourse was concentrated within Parliament. In modern democracies, political discourse and debate on matters of public relevance takes place in a much broader forum, which includes printed and electronic media and the internet…consequently… the spatial criterion would be too narrow."(The Immunity of Members of the European Parliament, In-Depth Analysis" European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, 2014) The key criterion becomes whether the behaviour was a part of the performance of the MP's duties.(The Immunity of Members of the European Parliament, In-Depth Analysis" European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, 2014, p. 15) As the ECtHR convincingly argues in the *Cordova* cases, the behaviour in question "is more consistent with a personal quarrel. In such circumstances, it would not be right to deny someone access to a court purely on the basis that the quarrel might be political in nature or connected with political activities."(European Court of Human Rights (ECtHR), Case No. 40877/98 and 45649/99, Cordova v. Italy (No. 1) and (No. 2)., 2003) In fact, the ECtHR also pointed to case law of the Italian Constitutional Court, which supports a flexible view on the separation of powers, namely that a connection to parliamentary activities is a decisive factor.(European Court of Human Rights (ECtHR), Case No. 40877/98 and 45649/99, Cordova v. Italy (No. 1) and (No. 2)., 2003, p. 27)

By being willing to adopt a narrow reading of *A v. United Kingdom*, the ECtHR in *Cordova v. Italy (no. 1)* and *(no. 2)* was trying to settle on a concept of parliamentary immunity that satisfies the minimum requirements of the ECHR without offending the constitutional traditions of member states. The judgement was sensitive to the broad conceptions of parliamentary immunity applied by member states but made it clear that in the present cases there was a convincing reason for a narrow interpretation. As Kloth argues, the "narrow interpretation of parliamentary immunity which the court took in these cases is to be welcomed. The judgements were all taken unanimously and do not give rise to much controversy."(Kloth, 2010) As a 2013 report by the Venice Commission states, "the ECHR does not regulate parliamentary immunity, and in general sets few restrictions on the application of such rules at the national level…," however, national rules "must still be applied in a way that is proportional and necessary in a democratic society."(Venice Commission, 2014) The ECtHR takes a functional approach to parliamentary immunity.(Venice Commission, 2014, p. 17) The connection to parliamentary activity revolves around the question whether the workings of the legislative as an institution will be impaired. This is evident in the justifications of the ECtHR in *Kart v. Turkey*, where the key concern was the preservation of the ability of parliament to conduct its duties.

2.3. Structural problems

Whether or not a specific model of parliamentary immunity was in fact imposed by the ECtHR, Kosar's concerns over structural problems of the ECtHR merit further discussion. He correctly points out that due to structural problems of the ECtHR, a more cautious stance should be adopted whenever issues of separation of powers within the domestic systems of member states are at stake. Firstly, separation of powers issues are addressed by the ECtHR in the context of an individual complaint. The parties in this procedure consist of the individual applicant and the respondent state. Yet the state is usually represented by the executive branch. Views communicated to the ECtHR by the respondent state thus usually are skewed towards the executive's perspective. Views of the domestic judiciary or the legislature thus may not form part of the discussion. The ECtHR thus has to adjudicate cases without being able to obtain the full picture of the issues at stake. Therefore, even though the outcome of separation of powers cases may result in severe repercussions for a range of domestic actors, only a very limited number of these actors have the opportunity to give an input into the ECtHR proceedings.(Kosar, 2012, p. 58)

Secondly, Kosar points out that in order to adequately develop a pan-European position on separation of powers, as the ECtHR may in fact end up doing through adjudication, it may be necessary to take into account as many of the different conceptions of separation of powers among the 47 member states as possible. This is necessary for the system's legitimacy as well as for countering the charge of democratic deficiency. Yet gaining an accurate understanding of the different views on separation of powers across all member states is a daunting task, which Kosar argues is currently not fulfilled by the ECtHR.(Kosar, 2012, pp. 58–59) The relatively minor convergence on separation of powers issues among member states,(Venice Commission, 2014, p. 3) the risk of overlooking relevant literature written in less dominant languages, and the limited input from domestic actors other than the executive make the topic of separation of powers a "minefield" for the ECtHR.(Kosar, 2012, p. 59) Even though the ECtHR takes a case-by-case approach, Kosar comes to the conclusion that the ECtHR has been assessing institutional design issues that go far beyond what it was ever meant to do, especially when structural problems of the ECtHR makes an activist stance of the court undesirable. He argues that the ECtHR should thus adopt an even more careful approach and give greater deference to domestic actors.

However, Kosar's critique should not be understood as a discouragement for the ECtHR to engage with separation of powers issues. This is because it is historically plausible to argue that the ECtHR should be tasked with policing separation of powers. The establishment of the ECHR in 1950 was heavily influenced by the idea of the treaty serving as a collective pact against totalitarianism.(Bates, 2010, p. 8) The aim was to establish a regional human rights charter enforced by a regional human rights court, which would act as a warning signal for the region when the stability of a member state's democratic system of governance is threatened. Bates thus argues that even though there were two motivations for the establishment of the ECHR, namely as a safeguard against totalitarianism as well as the aspiration for a European Bill of Rights, it was the former which was dominant in the period of the ECHR's establishment. The latter only became a defining characteristic of the system after rapid development of case law in the 1970s.(Bates, 2010, p. 18) Thus one must not forget the dominant motive underlying the founding of the ECHR, namely the preservation and strengthening of liberal democratic government in the face of actual and potential authoritarian threats at home or from abroad.

The incentive for states to establish or join an international human rights treaty is to "lock in" current political preferences.(Moravcsik, 2000, p. 220) That can certainly include the desire to uphold the separation of powers as a crucial ingredient of a functioning democracy. The ECtHR has been able to enforce aspects of the separation of powers via Article 6(1), thus still acting as a human rights court while also adhering to its founding aim of preserving democratic government. The protection of individual rights is thus fundamentally linked to the preservation of democracy. As Moellers argues, "we must recognize that there is a minimum catalogue of personal rights, which systematically precede every democratic decision precisely because collective self-determination cannot function without them."(Moellers, 2013, p. 210)

Indeed, in 2014 the ECtHR continued to adjudicate separation of powers issues. In *Urechean and Pavlicenco v. the Republic of Moldova*, the Court for the first time addressed the immunity of a president of a member state, holding that Moldova's "application of the rule of immunity in this manner, without any further enquiry into the existence of competing interest considerations, serves to confer blanket immunity on the head of State. The Court considers that blanket inviolability and immunity are to be avoided."(European Court of Human Rights (ECtHR)-Case No. 27759/05 and 41219/07, Urechean and Pavlicenco v. the Republic of Moldova., 2014, p. 52) This argument is a clear continuation of the "human rights perspective."

3. The Asian context

Even though the adjudication of separation of powers for constitutional courts is fraught with risks,(Ginsburg, 2003, p. 87) constitutional courts in Asia have not shied away from such cases. First, two cases in relatively well-established democracies of East Asia will be discussed. A comparison between the cases in South Korea and Taiwan demonstrates that even though they have stable democracies, their respective constitutional courts nevertheless have to engage in certain strategies to minimize the risks in separation of powers adjudication. The third case highlights the potential manipulative role separation of powers arguments can play in a relatively fragile democracy such as Cambodia. Drawing on the experience in Europe and applying it to the Asian context, it can be inferred that a future Asian human rights mechanism will inevitably be called upon to adjudicate separation of powers of issues, if an equivalent provision to Art. 6(1) ECHR is included.

3.1. South Korea

One of the most controversial cases dealt with by the South Korean Constitutional Court (KCC) in its early years was a case in 1995 involving the question of presidential immunity. Following the assassination of President Park Chung Hee in October 1979, General Chun Doo-Hwan staged a military coup in December. The coup was followed by protests and demonstrations across the country. On 18 May 1980, Chun ordered the military to suppress the demonstrations in Kwangju. The city was besieged, resulting in a large number of civilian casualties. When Chun became President, he labelled the Kwangju demonstrations a "rebellion."(KCC (1995). See Also Chang / Thio / Tan / Yeh (2014), 359-360; Cho (2007), 579, 581-582, 1995)

Following South Korea's democratization, Chun and several military leaders came under legal investigation in 1993. However, the prosecutors decided not to prosecute in 1995, reasoning that "a successful coup d'état was not punishable" because a successful coup engenders immunity. According to Article 84 of the Constitution of the Republic of Korea, the

president "shall not be charged with a criminal offense during his tenure of office except for insurrection or treason."(Constitution of the Republic of Korea, 1987) It thus seemed that a separation of powers issue is preventing the investigation into human rights violations. The petitioners filed a constitutional complaint against the decision not to prosecute. However, fearing that their case would still fail at the Constitutional Court due to statute of limitations, the petitioners made a last-minute withdrawal. Meanwhile, the introduction of a "special law" to enable prosecution was pending in the National Assembly.

However, even though the petitioners withdrew, four of the justices agreed to the continued deliberation of the case due to the perceived necessity to clarify what in their view was a constitutionally important question. This led to the publication of a part of the previously agreed-upon final decision: Three justices held that individuals who become part of the executive after staging a coup do not enjoy absolute immunity. They argued that "…even if a successful coup makes it practically impossible to punish the perpetrators during their incumbency, they can always be punished whenever the constitutional institutions recover their proper function and thereby regain de facto power to punish them." Also, in "this case, the treasonous acts of the two former Presidents were neither justified by the circumstances nor were ratified by free expressions of the people."(KCC (1995). See Also Chang / Thio / Tan / Yeh (2014), 359-360; Cho (2007), 579, 581-582, 1995) Therefore "the prosecutor's non-institution of prosecution decision for reason of immunity of 'a successful coup' brings misunderstanding."(KCC (1995). See Also Chang / Thio / Tan / Yeh (2014), 359-360; Cho (2007), 579, 581-582, 1995) The coup in this case was punishable, as concluded by the "previously agreed-upon final decision."(KCC (1995). See Also Chang / Thio / Tan / Yeh (2014), 359-360; Cho (2007), 579, 581-582, 1995)

Combined with the eventual passage of the special law enabling prosecution, the judgement led to the punishment of Chun and his associates, and the victims received compensation. Thus, the argument for presidential immunity did not in the end hinder the process of transitional justice. One could draw some comparisons to *Cordova v. Italy* in the sense that similar to the ECtHR, the Constitutional Court of Korea took a "human rights perspective" and showed flexibility when dealing with immunity. However, the outcome of this case was heavily dependent on the introduction of a "special law" and the unusual insistence of the justices to continue the case and publish the previously agreed-upon decision. Without these special circumstances, the actions of Chun and his associates at Kwangju may well have remained unpunished. If this had been the case, a potential regional human rights mechanism could have provided an avenue of relief for the claimants, when all local remedies were exhausted or deemed ineffective due to a rigid application of the separation of powers doctrine.

3.2. Taiwan

Issues of separation of powers and human rights do not have to be directly linked in order to be a concern for a future Asian human rights mechanism. They can be indirectly linked via the politicization that is generated by a separation of powers case, which then leads to conditions where human rights may be argued to have been violated. This can be observed in a case concerning presidential immunity in Taiwan (Judicial Yuan (J.Y.) , Interpretation No. 627, 2007) and its aftermath.(See for Example, Guardian, "Taiwan Court Jails Former President for Corruption," 2009) Thus even though the facts of the following judgement of Taiwan's constitutional court, known as the Judicial Yuan (J.Y.), do not directly relate to a violation of human rights, it is relevant for two reasons. First, it demonstrates clearly how politically

charged cases of presidential immunity can become. Second, after stepping down in 2008, the continuation of prosecution of the former president, which was enabled by J.Y. Interpretation No. 627, has raised a number of human rights concerns.

Following anti-corruption protests in 2006, Taipei District Court prosecutors began investigating the allegations against President Chen Shui-Bian. However, under Article 52 of the Constitution,(Constitution of the Republic of China (Taiwan), 1946) President Chen enjoyed criminal immunity. The prosecutors continued the investigation on the grounds that the investigation was directed at the first lady, Ms. Wu Shu-Chen, and not the President. Wu was charged with embezzlement with respect to a presidential special fund. Although President Chen was not formally charged, he was indicted as an accomplice and cited throughout the prosecutorial motion. As a result, motions for presidential impeachment and recall were placed on the Legislative Yuan's agenda. President Chen argued that the prosecution against his wife should have been barred by his constitutional immunity, and that the disclosure of details in the special fund violated presidential privileges and was a grave encroachment on the separation of powers.(Yeh & Chang, 2011, p. 169)

The Judicial Yuan agreed with the continuation of the prosecution and ruled that "immunity from criminal prosecution is merely a temporary procedural barrier, rather than a substantive immunity from any criminal liability on the part of the President."(Judicial Yuan (J.Y.) , Interpretation No. 627, 2007) According to the judgement, presidential criminal immunity "is not an essential idea of constitutional law, but rather a decision of constitutional policy made by the respective states…"(Judicial Yuan (J.Y.) , Interpretation No. 627, 2007) Article 52 of the Constitution thus does not guarantee absolute immunity, and "any measure not directly concerning the esteemed status of the presidency and exercise of the presidential authorities, or prompt inspection and investigation of a crime scene may still be conducted by the criminal investigation authorities or the trial courts in a case where the President is considered as a suspect or defendant."(Judicial Yuan (J.Y.) , Interpretation No. 627, 2007)

Similar to South Korea, Taiwan's presidency operates in a contentious polity,(KCC (1995). See Also Chang / Thio / Tan / Yeh (2014), 359-360; Cho (2007), 579, 581-582, 1995, p. 170) and the constitutional court "is a natural third party to turn to with its functional expertise in dispute resolution and nonpartisan mode of composition."(Ginsburg, 2003, p. 87) In J.Y. Interpretation No. 627, the constitutional court of Taiwan thus chose to resolve the highly contentious case by providing a procedural, rather than substantive solution.(Chen, 2014, p. 146) The Court ruled that it is up to the legislature to "formulate additional provisions regarding the President in respect of the restrictions on the places to be searched, the grounds on which the President may reject the search or seizure."(Judicial Yuan (J.Y.) , Interpretation No. 627, 2007) In the absence of such provisions, a five-judge special tribunal of the High Court was formed to exclusively decide on the adequacy and necessity of relevant searches and seizures. Even though President Chen disagreed with the Court's decision, he promised to respect the ruling. After stepping down in 2008, Chen was detained while he and his wife awaited trial.(Chang, 2010, p. 891)

As this case shows, questions of horizontal separation of powers in relatively stable Asian democracies can still be highly politicized, leading to attempts by constitutional courts to create a "win-win" situation.(Chang, 2010, p. 899) Even though J.Y. Interpretation No. 627 was not related to human rights violations, the highly politicized trial of former president Chen after he stepped down in 2008 was criticized by some commentators and human rights activists for lack of due process.(Yu, 2015, p. 132) see also (Taipei Times, 2012) According to

Gold, "Taiwan's legal system was as much on trial as the defendants themselves, whose guilt was in little doubt."(Gold, 2010) Questions over the treatment which Chen received remained unsettled.("Terms of Imprisonment," 2012) In a debate over the possibility of granting Chen medical parole in 2013, Jerome A. Cohen, a legal academic at New York University, concluded after visiting Chen that he could benefit from being sent to a hospital: "I don't have any sympathy for Chen and his wife. I think their behavior was shocking and tragic and terrible. On the other hand, I do have an interest to make sure he's treated fairly."(Ramzy, 2013)

It may thus be argued that if a regional human rights mechanism had existed in 2008, including a provision on the right to fair trial similar to that of Article 6(1) ECHR, Chen may have launched an individual complaint to such a hypothetical body. Whether such a complaint would be successful or not, is another question.

3.3. Cambodia

In Cambodia, the ruling elite has used legal instruments to marginalize political opposition and critics,(Un & So, 2012) and the notion of judicial independence has been manipulated and thus violated by the executive branch.(Un & So, 2012, p. 189) A violation of the separation of powers is thus a common theme and human rights issues can easily become bound up with separation of powers issues. Over the last decade, law suits against members of political opposition parties, NGO leaders, and journalists have occurred, which have weakened opposition parties and suppressed civic space, as well as political and civil liberties.(Un & So, 2012, p. 190) Notable cases also concern parliamentary immunity.

In February 2005, the National Assembly voted to lift the parliamentary immunity of three opposition parliamentarians, including that of Sam Rainsy, leader of the Sam Rainsy Party (SRP). This was conducted in connection with lawsuits filed by members of the ruling parties. One of the parliamentarians, Cheam Channy, was arrested and later tried, while Sam Rainsy went into self-imposed exile. In 2009 the majority Cambodian People's Party (CPP) again voted to lift the parliamentary immunity of three members of the opposition in order to allow civil or criminal charges to be pursued. Sam Rainsy was convicted in absentia and sentenced to ten years prison in January 2010. (Un & So, 2012, p. 191)

These incidents in Cambodia demonstrate the controversies surrounding the intertwining of human rights violations with separation of powers issues in the context of a an Asian country outside the group of established Asian democracies. The opposition MPs could have claimed that the attempt by government MPs to lift the former's parliamentary immunity in order to permit judicial proceedings is using a separation of powers argument to violate their political freedoms. Such a constellation would be a mirror image of *Kart v. Turkey*, thus demonstrating the potential for political manipulation. In *Kart v. Turkey* the claimant argued for the lifting of his parliamentary immunity in order to engage in judicial proceedings. By refusing to do so, he claimed that his rights were violated by the infringement on the judicial process by rules of the legislature. In the Cambodian context, it could be argued that instead of vindicating fundamental rights, the act of lifting parliamentary immunity actually led to the violation of political freedoms of the opposition. This is especially of concern since the lawsuits in question are filed by members of the majority party, and the opposite scenario of lawsuits being filed by opposition party members against ruling party members are rarely successful.(Un & So, 2012, p. 191) The weakness, lack of professionalism, and politicized nature of courts in Cambodia(Un & So, 2012, p. 191) mean that individuals are unable to obtain legal redress domestically. Opposition parties are thus seeking redress abroad. For example, in recognition of the partiality of the Cambodian courts, Rainsy allegedly filed or planned to

file at least two complaints against ruling party members in foreign courts, such as a criminal complaint against the prime minister in a New York court.(Un & So, 2012, p. 191)

South Korea and Taiwan provide examples where the interplay between the need to respect separation of powers and the imperative to remedy alleged human rights violations have caused politicization even in relatively stable constitutional systems in Asia. Cambodia is an example of an Asian country where constitutionalism has not yet developed to an extent where most separation of powers cases can be easily settled domestically and are subject to manipulation. It is thus predictable that compared to Europe, the number of separation of powers cases involving human rights dimensions that may be dealt with by a potential Asian regional court will be high.

4. An Asian regional mechanism?

4.1. The inevitability of adjudication

As demonstrated in Part III, Asian democracies are confronted with politically controversial separation of powers cases which are linked with human rights issues. Even though the cases discussed in Part III are merely a small sample, two of the examples cover some of the most stable democracies in Asia. However, scarcely thirty years have elapsed since the commencement of democratization in South Korea and Taiwan.(Yeh & Chang, 2011, p. 807) This historical fact is significant. For example, as Wang and Chou argued in 2010, since in Taiwan "changes to liberty and democracy have only been in effect for about 20 years, the Taiwanese public does not entirely understand or accept the concept of constitutionalism based on liberty and democracy."(Wang & Chou, 2010) It may thus be assumed that less stable democracies will be confronted with such cases in even larger numbers and with more controversial substance. This can be inferred from observations in countries such as Cambodia. A hypothetical regional human rights mechanism in Asia may thus have to deal with a larger number of separation of powers cases than the ECtHR. However, to what extent such a mechanism deals with separation of powers cases depends on the confidence it enjoys in terms of effectiveness and independence.

If domestic constitutional systems possess a strong mechanism to resolve separation of powers issues, then the frequency and political controversy of such cases may be fewer. Separation of powers can be argued in terms of human rights, as is the case when parliamentary immunity prevents legal action against members of parliament, or executive immunity prevents legal investigations of government ministers. It seems that the judges in South Korea were willing to make exceptions to standard procedure in order to safeguard the long-term interests of preserving constitutionalism. In Taiwan, the judges were aware of the political divisiveness of the case and attempted to resolve the issue via a procedural approach. In both cases it could be argued that to some extent, an initially extremely controversial case was settled by the respective constitutional courts, resulting in landmark cases. Even though the aftermath of such cases is not easily predicted, these cases have contributed to the maturity of the respective democracies. If a regional human rights mechanism exists, any domestically unsettled spill-over effects may be dealt with via the rule of law at the supranational level, thus encouraging the continuation of the peaceful settlement of disputes.

As the Cambodian case suggests, less established democracies in Asia face an even greater challenge in resolving separation of powers which involve human rights violations. Immunities are interpreted broadly and often abused. As suggested by Dressel, a low degree

of de facto judicial independence combined with a low degree of judicial involvement in politics leads to "judicial muteness" in Cambodia.(Dressel, 2012, p. 6) One can draw the following conclusion: The less established the democracy, the greater the likelihood that the issue of separation of powers becomes linked with human rights grievances. The difficulty of resolving such a case also increases. Even if a country like Cambodia does not become a signatory to a potential regional human rights mechanism in the foreseeable future, an international body in the region concerned with issues of human rights, democracy and rule of law may exercise indirect influence through the "neighbourhood effect," since a "regional human rights body will solicit more Asian members to participate in the institution and encourage them to join the human rights dialogue with greater openness".(Baik, 2012, p. 167)

It remains to be seen exactly which rights a regional human rights charter in Asia will incorporate. As Chief Justice Park of South Korea suggests, a regional court may start off with jurisdiction over issues that already enjoy a consensus among Asian countries, such as the prevention of genocide, and ending violence against women and children. However, he also suggested that parallel to such an initiative, a broader project of drafting an Asian Charter of Fundamental Rights should proceed.(Rath, 2015) If we take currently existing regional human rights charters as examples, it is probable that a provision will guarantee the right of access to courts. The European experience demonstrates that such a provision may lead to conflicts over separation of powers being brought to the regional court for adjudication. The Asian cases show that it is likely that an Asian regional human rights mechanism guaranteeing access to courts will inevitably be called upon to resolve extremely controversial cases involving intertwined issues of human rights and separation of powers.

4.2. Risks of adjudication

Adjudicating separation of powers at the regional level undoubtedly is an opportunity to safeguard and advance democracy and the rule of law in Asia. Yet it is also a risk for a potentially young regional institution, which may not enjoy the confidence of all founding and potential member states. The ECtHR survived its difficult birth partly because it was a relatively powerless institution in the 1950s and 1960s.(Bates, 2010, p. 9) As Ginsburg suggests, the adjudication of separation of powers is inherently fraught with risks for adjudicating court. His analysis on the dangers for domestic constitutional courts in deciding horizontal separation of powers(Ginsburg, 2003, p. 87) may be exacerbated by the perceived unjustified interference by an international court which deploys the rhetoric of human rights but in fact strongly contributes to shifting the domestic "triadic dispute resolution to two-against-one."(Ginsburg, 2003, p. 73) According to Frowein, up to 1973, the ECHR was a "sleeping beauty," which was "frequently referred to" but had not much impact."(Bates, 2010, p. 11) It is thus unsurprising that the adjudication on politically controversial cases such as the separation of powers emerged only after the major reforms of 1998. Upon ratification in 1951, the UK government "stated quite openly and unashamedly in the House of Commons that the United Kingdom would certainly not be accepting the right of individual petition, or the jurisdiction of the Court."(Bates, 2010, p. 101) By keeping individual petition and recognition of the ECtHR as optional at the time of establishment, the European system was able to keep the larger European states such as the UK on board. In 1966, the UK accepted the right of individual petition and the jurisdiction of the Court. But this was "precisely because it was thought that the Court, and the Convention more generally, would have little influence on domestic law."(Bates, 2010, p. 12)

Neither was the ECHR always a homogeneous club of states unquestionably possessing well-developed constitutional systems of governance. The rapid expansion of ECHR signatory states in the 1990s in the form of new democracies of Central and Eastern Europe led to a rise in cases at the ECtHR, which impaired the effectiveness of the ECtHR. Significant reforms of the ECtHR were thus introduced in 1998.(Bates, 2010, p. 21) A similar problem may be faced by a potential Asian human rights mechanism. As was the case with the new ECHR member states of the 1990s, it is likely that potential claimants in the Asian context may treat an Asian human rights court as a quasi-court of first instance, arguing that domestic remedies are quickly and easily exhausted. Severe controversies over parliamentary immunity in Cambodia are a case in point.

It may be argued that in developing its strand of separation of powers case law, as observed by Kosar, the ECtHR went beyond what the framers of the ECHR intended.(Kosar, 2012, p. 62) One key critique of the ECtHR by the current Conservative government of the United Kingdom is that the ECtHR has developed "mission creep."(*UK Conservative Party: Protecting Human Rights in the UK*, 2014) The key question is, whether the member states are willing to accept such developments. If the new Asian human rights mechanism contains a provision similar to Article 6(1) ECHR and the recognition of a right to individual petition as well as the jurisdiction of the regional court are compulsory right from the start, then many potential states may be reluctant to join such a project. Given the existence of the politically controversial domestic separation of powers cases reviewed in Part III, such provisions in an Asian regional human rights mechanism may be problematic. Linked to the European experience, including the persistent structural problems pointed out by Kosar, it may be difficult to persuade governments to join a regional mechanism which from the beginning has the means to influence domestic separation of powers arrangements via the language of human rights protection. An evolutionary approach is thus crucial.

4.3. Safeguarding a new mechanism

What exact shape a future Asian Charter of Human Rights will take remains to be seen. Yet from the European experience it is likely that such a project will be long-term. If a charter with similar content to the ECHR, which is then also enforced by a regional court, is to be adopted, the issue of separation of powers adjudication will have to be addressed. The key question will be, whether enforcing the separation of powers among its member states should be a founding mandate. If this question is left unclear, separation of powers adjudication will creep into the court over the years via provisions on the access to courts and the right to a fair trial. As argued by Kosar, such an expansion in the court's jurisdiction will not only be politically, but also technically problematic due to the adversarial nature of adjudication as well as the need to take into account different understandings of separation of powers. The range of legal as well as political cultures is arguably greater in Asia than in Europe. This is because European ideas of constitutionalism have been fused with indigenous understandings(Baik, 2012, pp. 61–64) to create a diversity of constitutionalism in theory and in practice.

There may be several ways in which a future Asian human rights treaty may deal with the risk of allowing adjudication of separation of powers issues. First, the treaty itself may include general provisions which bar any adjudication which will alter the domestic separation of powers arrangements on the member states. However, this would narrow the effectiveness of provisions guaranteeing the right of access to court. Second, individual member states may make reservations which limit the jurisdiction of the future court on such issues. However,

this will pose difficulties for the court to develop coherent case law and authoritative precedents. Third, the new system would replicate the structure of the ECHR and ECtHR while being aware of the problems associated with adjudicating separation of powers, thus conducting further research and launching initiatives to foster a common understanding of separation of powers among member states.

However, a regional human rights mechanism in Asia may take an entirely different path. As Chief Justice Park of South Korea suggests, efforts may first focus on agreeing to a charter which is limited to the crime of genocide and violence against women and children.(C Rath, 2015) The prohibition of genocide would partly echo the founding aims of the ECHR. In terms of focusing on protecting the rights of women and children, this is a reflection of existing sub-regional efforts on human rights cooperation in Asia. Park did stress that work on a broader human rights charter should be conducted in parallel. He nevertheless argues that to first focus on a narrower catalogue of regional norms would be more fruitful. Such an approach fits with the observation that building a regional human rights mechanism takes time, especially if it is to be an effective one. If a mechanism based on a narrower set of norms can develop and mature, greater consensus can be built for a more comprehensive project in the future. By not including rights such as the right of access to courts, this approach would first side-step the thorny issue of potentially unpredictable rulings by an international court over the domestic separation of powers arrangements of individual states.

5. Conclusion

Efforts to build a regional human rights mechanism in Asia are being renewed. Separation of powers adjudication, which is politically sensitive and controversial, will be inevitable if the right of access to court is included in the new mechanism. This is significant since the potential for separation of powers cases involving the human rights is higher in Asia than in Europe. An Asian human rights mechanism must take this possibility into account, since adjudicating on such issues may severely impact the stability and future of a regional human rights mechanism. A mechanism based on existing regional systems such as the ECHR can seek to minimize these risks via institutional solutions. On the other hand, an Asian mechanism can side-step these issues in the short term by focusing on a narrow set of rights, thus minimizing the chance of linking human rights with separation of powers issues. This may be a pragmatic start for regional human rights cooperation in Asia. However, in the long term, a complete charter of fundamental rights cannot ignore the linkage between separation of powers issues and human rights. The aim of this paper is to highlight both the inevitability and risks of adjudicating cases involving a nexus between separation of powers and human rights by a regional human rights court.

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