



The Role of the Judge Independence and Impartiality

A) Introduction:

A truly independent judiciary is one of the most essential safeguards of a well working democratic system. The rule of law can only prevail when the application and execution of the rules and laws is controlled by independent judges. Accountability of the elected government can not be achieved if its actions are not checked for their legality by an institution which is not influenced by the executive branch itself. So the **principle of separation of power** has to be applied with **firm strictness on the relation between the judicial and the executive power**.

In Cambodia the separation line between these two powers is still not drawn very clearly. As a **legacy of the socialist judicial system** imposed on Cambodia from 1979 until 1993 the **influence of the executive on the judiciary** still remains very strong. During that time the Ministry of Justice even had the power to have judgements annulled by the Council of State. After that time the Ministry of Justice still kept the competence to issue guidelines and circulars to advise judges how to interpret the law according to a draft sub-decree dated 1994 that was never formally enacted but reflected the general practice¹³. Although the “Sub-decree on the Function of the Ministry of Justice” of 7th March 2000 does not vest this power anymore to this ministry the executive power still exercises a significant influence on the judiciary through the members of the Supreme Council of Magistracy. This council is not really independent from the executive: It does not include members of the National Assembly, or the Bar-Association, or law-professors, or members of civil society but its majority consists of high ranking formerly appointed old judge cadres who owe their membership to just their position in the legal system but not to any elections.

This **political background** has to be kept in mind when looking at the basic principles of an independent and impartial judiciary and at the specific shortcomings of this principle in Cambodia¹⁴.

Two more factors that weaken the independence of judges have to be considered as well when talking about judicial independence in Cambodia:

Due to an insufficient salary for judges the present judiciary system suffers from a **high level of corruption** which has been quoted in many human rights reports including the reports of the special UN-representative for human rights.

Moreover many of these judges have not enjoyed a full academic legal training but suffer from a **lack of training and skills** as they were quickly chosen and appointed shortly after the Pol Pot dictatorship had killed almost all of the members of the legal profession leaving alive just a handful of legally trained persons.

¹³ For details on the historical development see: Koy Neam, “The Cambodian Judicial System”, 1998 (in English and Khmer), pages 3, 4, 9 – 11

¹⁴ For more details on the situation of the Cambodian judiciary in the 90's read: Basil Fernando, “The Problems Facing the Cambodian Legal System”, (Asian Human Rights Commission, July 1998).

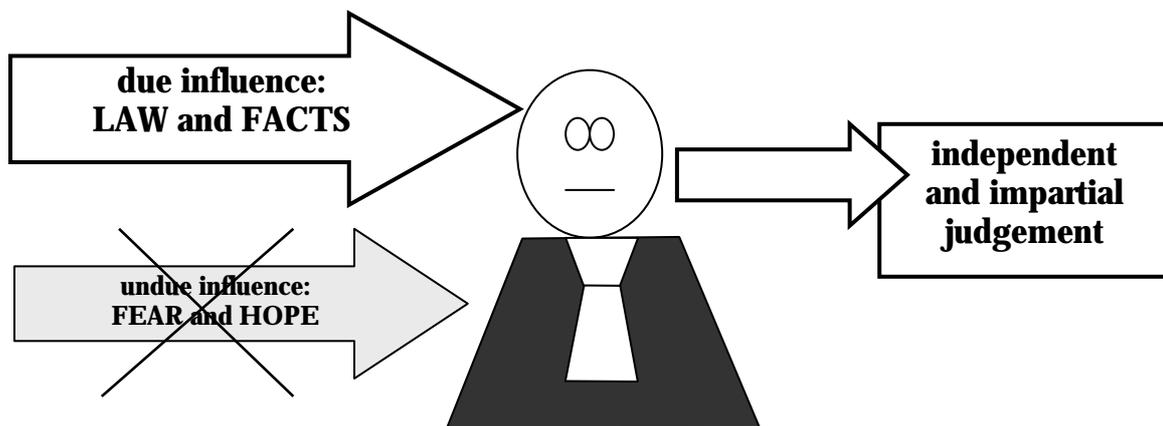


B) What does “Independence” and “Impartiality” mean?

Both, independence and impartiality (Article 128 I and II CC), mean that there are **no undue influences** on the judge’s decision that may stem from his/her relation to the **parties of the dispute** (“partiality”) or from **third parties and outside sources** (like political influence or instructions for example in form of circulars of the Ministry of Justice, etc.).

In other words: The **only “due” influence on a judge’s decision** shall come from the **law** s/he is obliged to apply and from the given **facts** s/he has to examine.

Independence can also be described as a **state of mind**: The judge shall have **no fear** and **no hope** when s/he decides a case. (There is an inscription in the stone above the entrance door of an old court building in Italy that reads: “Without fear and without hope”. It reminds the judge who enters the court through this door every day to take care of his/her independent state of mind). The judge shall not be afraid of punishment or sanctions from whatever side when making a decision. His/her decision making must be free of intimidation, coercion or outside pressure. But it must be as well free of the expectation of benefits, favors and personal advantage.



Buddhist wisdom teaches the same values of good administration of justice¹⁵:

Buddhist sayings on good judgement:

- Any judge shall be impartial and free from prejudice.
- The judge shall avoid the 4 wrong ways of judgement:
 - personal favour
 - hatred
 - delusion
 - fear
- A judge shall be free from corruption. S/he shall not take bribes.
- A judge shall make no difference between kinsmen and the rest of subjects.
- A judge shall thoroughly sift through all points, great and small and inquire into both right and wrong with thoughtful consideration.



¹⁵ see: Siddhi Butr, “The Social Philosophy of Buddhism” - Chapter V: Buddhas Political Ideas, 1995, pages 14 and 15



C) Legal Framework to Ensure and Strengthen Judicial Independence:

I) Main Goals of Legal Framework:

Independence does not only derive from the judge's state of mind but also from the design of his/her personal position. It takes a **legal, social and financial framework** to ensure, encourage, protect and **guarantee the judge's independence**. This means conditions must be created that assist the judge in keeping his/her independence.

Judicial independence is not only endangered by outside influences and pressures on honest judges who want to be independent. Independence is also endangered by the judges themselves when they are corrupt, prejudiced and not willing to decide impartially. So it is important to note that **independence is not a personal privilege of the judge** that has to be protected for his/her personal sake. But to have independent judges is a **right of the people**. This means every judge has the **duty** to be, act and decide independently and impartially because people have a right to an independent judge. Therefore the legal framework must also create obstacles and limits for any judge to prevent him/her from making partial decision and to make it more difficult for the judge to take bribes and violate the law.

So to guarantee judicial independence any legal framework which designs the judge's position by describing his/her duties and rights must meet the following two requirements.

The legal framework to protect and ensure independence must:

- **strengthen and protect the judge against** any outside and **undue influences and pressures**
- **create obstacles** making it **difficult for the judge him/herself to act partially, corrupt or biased**.

II) International Standards for such a Legal Framework:

Every country faces the same problem creating and designing a legal framework to guarantee the independence of its judges. Different countries come to different conclusions and find different solutions for that problem. Some countries for example elect their judges, others have a system of laymen participation and some countries select older experienced members of the legal profession (for example of the Bar Association) to become judges.

But there are some **common standards** that a majority of nations have found to be appropriate after a long process of discussion, international exchange and historical experience with various models of establishing an independent judiciary.



Some very interesting **in depth studies about the basic problems and safeguards of an independent judiciary** that provide a lot of guidance and practical examples can be found in the internet¹⁶.

The United Nations for example adopted the

Basic Principles on the Independence of the Judiciary (1985)¹⁷

and an Assembly of High Court Judges of more than twenty different countries from all over Asia adopted the

Beijing Statement of Principles of the Independence of the Judiciary in the Asia Region (1995)¹⁸.

These texts are not binding conventions but they provide a helpful tool of interpretation of the term “judicial independence”. These declarations identify all those topics that regularly cause problems for the judicial independence. The declarations give some suggestions and recommendations how to avoid or handle related problems.

The Cambodian lawmakers have explicitly acknowledged the UN Basic Principles on the Independence of the Judiciary in Article 1 of the UNTAC Criminal Code.

The **United Nations (UN)** are eager to promote judicial independence as this is one of the most important safeguards for an effective protection of human rights and the only measure to solve conflicts peacefully¹⁹. Therefore the UN established the office of a **Special Rapporteur on Judicial Independence** in 1994. This Special Rapporteur examines and evaluates the situation of the judiciary in various countries of concern all over the world and publishes a report of his/her findings. S/he also gives recommendations and advice to the respective governments and institutions. The Special Rapporteur not only covers developing countries but for example also developed countries.



Example:

A very critical report was written by this Rapporteur on the situation of the judiciary in **Italy** as the Italian government initiated some laws that would endanger the judicial independence quite severely.

From 1994 until July 2003 this office was held by a Malaysian, Mr. Cumaraswamy. His successor is the Argentinean Mr. Despouy who came into office in August 2003²⁰.

¹⁶ for example:

- “Guidance for Promoting Judicial Independence and Impartiality” by USAID: January 2002, 176 pages, including regional studies, annex of all principles and links to related websites = www.dec.org/pdf_docs/pnacm007.pdf
- “The Role of the Independent Judiciary” by Susan Sullivan Lagon, Institute for Contemporary Studies, San Francisco, July 1993 = <http://usinfo.state.gov/products/pubs/archive/freedom/freedom4.htm>
- “An Independent Judiciary”, Report of the American Bar Association Commission on Separation of Power and Judicial Independence with useful topics = www.abanet.org/govaffairs/judiciary/report.html

¹⁷ see www.umn.edu/humanrts/instree/i5bpj.htm

¹⁸ see: www.law.murdoch.edu.au/icjwa/beijst.htm

also see the European Judges Charter = www.richtervereinigung.at/international/eurojus1/eurojus15a.htm

¹⁹ see the introduction to the UN work on judicial independence: “Independence of the Judiciary: A Human Rights Priority” = www.un.org/rights/dpi1837e.htm

²⁰ UN website on the Special Rapporteur = www.unhcr.ch/html/menu2/7/b/mijl.htm



The **International Commission of Jurists (ICJ)**, an internationally operating NGO supported by judges and lawyers from all over the world also cares about standards for judicial independence. Its **Center for the Independence of Judges and Lawyers** provides training programs for judges. It also trained Cambodian judges and prosecutors in the 1990's²¹.



III) Basic Questions Concerning Judicial Independence:

Looking at the judiciary as a system that needs to operate independently and free from any undue influence one can identify six weak points in this system that may open doors for undue influences. These points need to be examined carefully and special regulations, laws or code of ethics need to be stipulated to minimize the related dangers for independence.

Those weak spots can be easily detected by asking the following six questions:

6 Basic Questions On Judicial Independence	
1. How are judges selected?	The process of selection, appointment and especially later promotion of judges can render them very much dependent on other persons. Their hope for promotion and higher rank and salary can influence their decisions in an undue way.
2. How strong is the personal position of the judge?	The judge also is very dependent if his/her personal position is weak, if s/he does not get sufficient salary, if no one protects him/her against killings or if his/her right of free association is denied.
3. Which judge decides on which case?	If there are no clear rules of assignment it depends on the arbitrariness of the court president (or the court clerk) what case will be heard and decided by which judge. This opens doors for judges to pick those cases they are personally interested in because they are personally affiliated with one dispute party, etc.
4. How does a judge have to conduct a trial?	Clear proceedings rules as well as rules about the duty to investigate, to raise evidence and to give written reasons for the judgement force the judge to only stick to the law and the facts. Otherwise it would be very easy to hide a biased motivation of his/her decision.
5. Who can control the judge's performance?	Like all other powers the judiciary needs control, supervision and sanctions or even punishment when it does not fulfill its duties well. Without control judges are tempted to make corrupt and biased decisions. But the control must be strictly limited and shall not affect the necessary independence of the decision. Therefore the control is exercised by a variety of different actors (like the higher instances, lawyers, the media, etc.) of which each just has limited control ²² .
6. Who funds the court budget and controls the court's expenses and administration?	No court can operate without a budget . If the budget does not cover the basic needs of the judges like desks, shelves, chairs, law texts and law books the judges are forced to buy their equipment at their own expense and can easily be bribed or loose their commitment and decent spirit for work. Moreover any other power controlling the budget of a court or its administrative staff can directly influence the efficiency and smooth management of specific cases.

²¹ see International Commission of Jurists (Center for the Independence of Judges and Lawyers = www.icj.org and the International Commission of Jurists - Western Australia Branch = www.law.murdoch.edu.au/icjwa/ see further: Development Gateway -Judicial and Legal Reform = www.developmentgateway.org/node/130655/

²² The controlling body in Cambodia, the Supreme Council of Magistracy (SCM), is too strongly affiliated with the executive branch or with persons of one political party. Therefore Cambodian judges easily become handy men for outside interests thus losing their independence.

If those questions are not addressed properly the judiciary will not be independent but will be a puppet dependent on a lot of undue influences, direct, indirect and from various actors.



(Poster distributed by the Center of Social Development, CSD)

The following checklist shows some of the weak spots in the organization and functioning of any judiciary in detail and offers some strategies how to minimize the related dangers for the independence and impartiality.



Checklist

Judicial Independence and Impartiality

Weak Spots	Safeguard Strategies
How are the judges selected?	
skills, education, experience	<ul style="list-style-type: none"> • decent education at the Law Faculty, • transparent selection of the best graduates including an assessment of their personality
appointment process	<ul style="list-style-type: none"> • transparent rules • mixed appointment body: (parliament, judges, lawyers, civil society)
promotion process	promotion by age and commitment record
How strong is the personal situation of the judge?	
salary	sufficient remuneration to maintain a good living standard for judge and family to avoid temptation of bribes
instructions/orders from above	<ul style="list-style-type: none"> • no circulars of ministries • penalties for attempts to give orders • clear laws ruling out the possibility of any instructions
transfer of judges	no transfer to other courts without prior consent of judge
removal of judges	regularly lifetime appointment, dismissal only in case of severe criminal offense related to judge office
personal security of judges	<ul style="list-style-type: none"> • police protection of judge and family if necessary • investigation and prosecution of any attempts to harm judge
freedom of association and expression	clear assurance in the law about right of judges to free expression and association (of course limited by professional secrecy in specific cases) = strongest means of self defense for judges to protect their independence and to protect them against undue influences (if necessary with support from media)
party membership	prohibition of party membership only for a transitional period of time in countries with a long history of one party rule
Which judge decide on which case?	
scope of jurisdiction	jurisdiction for all legal disputes, no special cases excluded from judicial control
case distribution among judges	<ul style="list-style-type: none"> • general and prior prescription of distribution of new cases • circuiting judges traveling the districts regularly • rotation of judges with their advance consent
affiliation with dispute/parties	<ul style="list-style-type: none"> • rights of parties to object the judge • legal duty for judge to withdraw from the case when personal interest or any affiliation with dispute parties



Weak Spots	Safeguard Strategies
How does a judge have to conduct the trial?	
rule of procedure law	<ol style="list-style-type: none"> 1) duty to allow all parties to present their view points 2) duty to give sufficient time to both parties to present their arguments 3) duty to listen to all parties 4) duty to distribute all relevant documents to all parties
raising evidence	clear rules of evidence
rule of material law	<ul style="list-style-type: none"> • law texts must be clear • material law must be binding (possibility of judge-made law in case of law gaps?)
delivering of judgement	<ul style="list-style-type: none"> • judgement must be in writing and must show reasons for decision • judgement must be delivered to both parties
Who can control the judge's performance?	
parties and their lawyers	<ul style="list-style-type: none"> • right to appeal the judgement • right to file a complaint about judge's trial conduct with supervisory body (i.e. court president, SCM)
public and media	free access of public to all trials (except in cases of protected privacy: minors/rape cases)
laymen judges	<ul style="list-style-type: none"> • transparent selection of laymen • same vote for laymen judges
judge colleagues of the same bench	<ul style="list-style-type: none"> • bench with more than one judge • but no internal hierarchies and rankings among bench members • same vote for chairman and other bench members
court president	no hidden undue influence by giving instructions how to decide the case (= no control of application of procedural or material law) only instructions in case of violation of code of conduct
disciplinary board	<ul style="list-style-type: none"> • sanctions only by a board of elected judges • fair hearing for the accused judge • publication of the result
prosecutor	no exemption of judges from criminal prosecution (for taking bribes or willfully interpreting the law in a wrong way) but protection against arbitrary defamation charges
civil law liability	no personal liability of judge but liability of state in case of willful and intentional abuse of law

these safeguard strategies require public and oral court proceedings

these control mechanisms require written

- **proceeding protocols**
- **proceeding files**
- **judgements**



Weak Spots	Safeguard Strategies
Who funds the court budget and controls the court's expenses and administration?	
funds for court activities	<ul style="list-style-type: none">• court must have own budget to administer itself• there must be sufficient allocation of state funds to the courts to fulfill tasks properly
appointment, supervision, discipline of court staff	judges/court presidents control administration staff of courts by themselves



Study Question 8

Read the following articles of the Draft Law on the Statute of Judges and Prosecutors (March 2003):

Article 16:

Students and government servants who also have fulfilled the following conditions may be allowed to attend the exam for selection of the training judges:

- 1) shall have Khmer nationality;
- 2) shall be at most 30 years old on the date of the examination;
- 3) shall be graduated of Bachelor of Law;
- 4) shall never be convicted to imprisonment for a felony or misdemeanor;
- 5) shall have sufficient physical fitness to fulfill duties;

For those candidates who are civil servants of the cadre who has fulfilled the conditions may attend the examination for selection of judges, but their ages shall not be exceeding 38 years old on the date of examination.

Article 33:

The promotion of the judges in grade shall be based on:

- Compliance with the working disciplines;
- Good achievement of work performance;
- Good behavior and moral conduct which does not affect honor of the judiciary magistracy;
- Having completed a long-term study at any university, or faculty, or at any vocational training center;
- Working in any rural, health-affected, or dangerous area.

Article 94:

Before taking office, judges shall take an oath of allegiance in accordance with the Buddhist religion, at the Preah Keo Morakat Silver Temple (Preah Vihear Preah Keo Morakat).

The Oath taking shall be processed according to the instructions and formula of a chief of protocol under the management of the Ministry of Royal Palace.

a) Article 16 of this Draft Law lists up conditions for becoming a judge. Do you agree with all these conditions? Please give a reason for your answer.

b) Look at Article 33 of this Draft Law. Do you approve all of the listed conditions for promotion or not? Give a reason for your answer.

c) Look at Article 94 of this Draft Law. Is this regulation compatible with the “Beijing Statement of Principles of the Independence of the Judiciary” (1995)? Quote an article of this Beijing Statement.