

THE RIGHT TO BE TRIED BY A COMPETENT, INDEPENDENT, AND IMPARTIAL TRIBUNAL



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About Cambodian Center for Human Rights

The Cambodian Center for Human Rights (“CCHR”) is a non-aligned, independent, non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – in particular civil and political rights – in the Kingdom of Cambodia (“Cambodia”).

CCHR’s vision is of a peaceful Cambodia in which all people can enjoy the fundamental human rights to which they are entitled, all are subject to the rule of law without impunity, all are treated equally without discrimination, all are empowered to participate fully in the democratic process, and all can share in the benefits of Cambodia’s sustainable economic development. CCHR’s logo shows a white bird flying out of a circle of blue sky – this symbolizes Cambodia’s bid for freedom.

CCHR’s Cambodian Human Rights Portal, accessible at <http://www.sithi.org>, is the 2011 winner of the Information Society Innovation Fund Award in the category of Rights and Freedoms and the 2013 winner of the Communication for Social Change Award awarded by the Centre for Communication and Social Change at the University of Queensland in Brisbane, Australia.

For more information about CCHR, please visit www.cchrcambodia.org.

About the Fair Trial Rights Project

The Module on Module on the Right to Be Tried by a Competent, Independent, and Impartial Tribunal is part of a series of modules on fair trial rights produced by CCHR’s Fair Trial Rights Project (“the FTR Project”). The FTR Project is the first – and only one – of its kind in Cambodia, uniquely and innovatively working to promote and protect fair trial rights in practice. It overall aims to increase the impartiality and independence of Cambodia’s judiciary by supporting the right to a fair trial in Cambodia’s courts. In pursuit of this goal, the FTR project has two specific objectives: to socialize the concept of fair trial rights among the public by raising its awareness of fair trial rights and to increase compliance with fair trial standards within the judiciary through trial monitoring.

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Queries and Feedback

Should you have any questions or require any further information about this module, please contact CCHR at:

Address: #798, Street 99, Boeung Trabek, Khan Chamkarmon, Phnom Penh, Cambodia

Tel: +855 (0) 23 72 69 01

Web: www.cchrcambodia.org



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**The Right to Be Tried by a
Competent, Independent,
and Impartial Tribunal**

1. Definition



In the criminal context,¹ anyone charged with a criminal offense has the right to have those charges determined in a hearing by a **competent, independent, and impartial tribunal established by law.**²

A **tribunal** is defined as a “*designated body, regardless of the denomination that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.*”³

Tribunals must have been **established by law** to be able to hear cases, such as by the Constitution or any other legislation passed by lawmakers.⁴

In addition, tribunals must fulfil the **following three requirements** to be able to adjudicate criminal cases:

- **Tribunals must be competent.** A competent tribunal is a tribunal that **has jurisdiction to hear cases**, meaning that it has been **given the power** to make decisions over subject matters defined **by law.**⁵ If a subject matter is not covered by the jurisdiction of existing tribunals, States must establish such competent tribunals or extend the jurisdiction of existing courts in order to safeguard individuals’ right to access a tribunal.⁶ Tribunals must also be able to **make binding decisions** that cannot be altered by non-judicial authorities.⁷ Finally, tribunals must be **staffed by suitably qualified and experienced persons.**⁸ To ensure that those in charge of delivering justice are competent, procedures regarding their qualifications, appointment, recruitment, promotion, and retirement should be established. **Legal education for judicial staff** must also be ensured in a continuous manner⁹ to maintain their competency.

¹See UN Human Rights Committee (“UNHRC”), General Comment No.32 - Article 14: Right to equality before courts and tribunals and to a fair trial”, (CPPR/C/GC/32, 23 August 2007), para. 16, for more details, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F32&Lang=en (UNHRC, General Comment No.32).

² UNHRC, General Comment No. 32, para. 15.

³ Ibid., para. 18.

⁴ Amnesty International, “Fair Trial Rights Manual,” 2nd Edition, (2014), p. 109, <https://www.amnesty.org/en/documents/pol30/002/2014/en/> (Amnesty International’s Fair Trial Rights Manual).

⁵ Ibid., p.110.

⁶ OSCE, “Legal Digest of International Fair Trial Rights” (2012), p.57, <https://www.osce.org/files/f/documents/1/f/94214.pdf> (OSCE’s Legal Digest of International FTR).

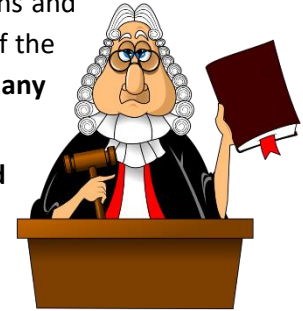
⁷ Ibid., p.57.

⁸ Ibid., p.56.

⁹ Amnesty International’s Fair Trial Manual, p. 108.

- **Tribunals must be independent.** This means that the judiciary must be **protected from political interference by the executive or legislative branches** in its proceedings and decision-making. This must be ensured through the constitution or adoption of laws **establishing clear procedures and objective criteria** for the **appointment, remuneration, promotion, suspension, and dismissal of judicial officers** and **disciplinary sanctions** taken against them.¹⁰ Functions and competencies of the judiciary must be clearly distinguished from those of the executive and legislative branches and judicial officers must be **free of any control or direction of the executive or legislative over them.**

Finally, judges must also be **protected against conflicts of interest and intimidation** and their **status** (i.e., term of office, independence, security, remuneration, conditions of service, pensions, and age or retirement) must be **adequately secured by law** to safeguard their independence.



- **Tribunals must be impartial.** The requirement of impartiality is **two-fold**. **1.** Judges must **not let their judgment be swayed by personal biases or prejudices, have preconceptions** about the cases they adjudicate, or act in ways that favors the interests of one party at the detriment of the other. **2.** The tribunal must also **appear as being impartial** in the eyes of a reasonable observer.¹¹

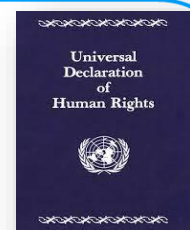


2. Legal Framework

2.1. International law

The right to be tried by a competent, independent, and impartial tribunal is enshrined in the **Universal Declaration of Human Rights (“UDHR”)** and the **International Covenant on Civil and Political Rights (“ICCPR”)**, which are directly applicable in Cambodian law through Article 31 of the Cambodian Constitution.

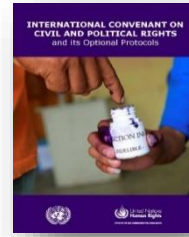
- **Article 14(1) of the ICCPR:** *“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”*



¹⁰ UNHRC, General Comment No. 32, para. 19.

¹¹ UNHRC, General Comment No. 32, para. 21.

- **Article 14(1) of the ICCPR:** *“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”*



2.2. Cambodian law

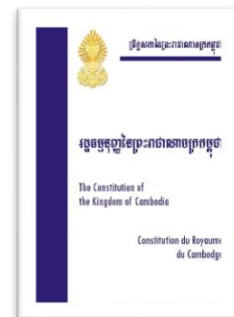
The requirements of competence, independence, and impartiality of tribunals are also enshrined in the **Cambodian Constitution** and in various provisions of the **Law on the Statute of Judges and Prosecutors (“LSJP”)**, the **Law on the Organization of the Courts (“LOC”)**, the **Law on the Organization and Functioning of the Supreme Council of Magistracy (“LOFSCM”)**, the **Code of Criminal Procedure of the Kingdom of Cambodia (“CCPC”)**, and the **Cambodian Code of Judicial Ethics**.

Article 128 of the Constitution: *“The Judicial power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.[...]”*

Article 129 of the Constitution: *“[...] Only judges shall have the right to adjudicate. A judge shall fulfill this duty with strict respect for laws, wholeheartedly, and conscientiously.”*

Articles 130 and 131 of the Constitution: *“The Judicial power shall not be granted to the legislative or executive branches” and “Only the Department of Public Prosecution shall have the right to file criminal suits.”*

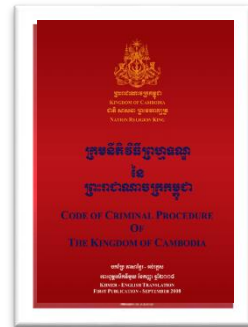
Article 132 of the Constitution: *“The King shall be the guarantor of the independence of the judiciary. The Supreme Council of Magistracy shall assist the King in this matter.”*



Article 55 of the CCPC: *“A member of the Investigation Chamber may not participate in the trial of a criminal offense which he has knowledge of in his capacity as investigation judge. Otherwise, the judgment shall be null and void.”*

Article 288 of the CCPC: *“Any sitting judge who has been acting as a Prosecutor or Deputy Prosecutor or investigating judge upon a certain case may not participate in the adjudication of that case, otherwise the judgment shall be deemed null and void.”*

Article 337 of the CCPC: *“The court shall retreat to deliberate in a deliberation room to reach its verdict. No further request may be submitted to the court; no further argument may be raised. The Royal Prosecutor and the court clerk are not authorized to participate in the deliberation.”*



LOC: This law determines the organization and the functioning of all categories and levels of courts in Cambodia, the organization and functioning of prosecution offices attached to all levels of courts in Cambodia, and the jurisdiction of all types and levels of courts based on specialization. **Article 1** of this law states that the purposes of this law are to *“ensure the independence of the judiciary, ensure impartiality and protect the rights and freedoms of citizens, ensure the good functioning of courts and prosecution offices, enhance the effectiveness and quick proceedings of public services, and ensure that justice is delivered in all cases to increase confidence from citizens and contribute to strengthening social safety.”* **Article 6**, for instance, also provides that only judges have the right to adjudicate cases that that they have to perform this duty *“independently by obeying the law strictly, honestly, and in good conscience”*.



LOFSCM: This law establishes and determined the organization and functioning of the Supreme Council of Magistracy in order to assist the King in his mission to guarantee the independence of the judiciary in accordance with the Cambodian Constitution (Article 1). This law applies to all judges and prosecutors of Cambodia (Article 2).

LSJP: This law determines the status of judges and prosecutors and other principles related to judges and prosecutors to ensure the independence of the judiciary.

- For instance, **Article 8** states that *“All judges shall make decisions impartially, based upon legal principles, without pressure, threat or intimidation or order, whether direct or indirect, from any party to the case or any other person.”*
- Similarly, **Article 77** states that *“All prosecutors shall perform their functions and duties based upon legal principles, without pressure threat or intimidation, or order whether direct or indirect, from any party to the case or any other person.”*

Note: The LOC, LOFSCM, and LSJP were adopted in 2014 with the aim to ensure the independence of the judicial power. However, these laws were drafted without any prior publication or consultation with civil society, the public, or other stakeholders and have been criticized for weakening the separation of powers and the independence of the judiciary. These laws effectively give the executive branch direct control over the judiciary by increasing the level of influence of the Ministry of Justice over judges and prosecutors through its involvement in judicial budgets, appointments, promotions, tenure, and removal of judicial officers.¹²

Cambodian Code of Judicial Ethics: This Code complements the LSJP. Its provisions aim to strengthen the independence and dignity of judges and prosecutors as well as their behavior outside of work to ensure public trust in the judicial system and the reputation of judges and prosecutors.

- For instance, **Article 2** provides that *“The Judge shall be independent based on the evaluation of fact and knowledge of the law, without any influences such as lobby, pressure, threat, coercion, or intervention from individual or group or other reasons directly or indirectly. The Judge shall be free from any attempts to influence their decision-making.”*
- **Article 7** provides that *“Judges shall maintain a good behavior and preserve their impartiality at work but also outside of work in order to protect and enhance public trust, legal professionalism and parties in cases. Judges shall not participate in public discussions involving court cases because it can impact their impartiality. In decision-making, judges shall not manifest prejudice based upon race, color, sex, religion, political opinions, disabilities, age, or family status, economic and social status. The Prosecution shall evidence without bias to ensure fairness and effective prosecution.”*

3. Importance



The right to be tried by a competent, independent, and impartial tribunal is a **cornerstone of a fair trial** and essential to ensuring the **proper administration of justice** and **the rule of law**.

The requirements of competence and impartiality ensure that the judicial officers who adjudicate criminal cases have the **adequate legal expertise and integrity** to make objective and neutral decisions based solely on the evidence and in accordance with applicable laws.¹³

¹²For more details, see CCHR, “Fair trial rights in Cambodia, Monitoring at the Court of Appeal: Annual report 1 November 2018 – 31 October 2019”, (October 2020), footnotes 22 on page 3, [https://www.cchrcambodia.org/admin/media/report/report/english/FTR%20Annual%20Report_ENG%20\(2018-2019\).pdf](https://www.cchrcambodia.org/admin/media/report/report/english/FTR%20Annual%20Report_ENG%20(2018-2019).pdf).

¹³ Amnesty International’s Fair Trial Rights Manual, page 115.

The requirement of independence ensures that judgments rendered by the judicial branch are not corrupted by political or personal motives. This requirement is rooted in the principle of the **separation of powers**. Essential in a democratic society, this principle ensures **checks and balances** between the executive, legislative and judicial branches and prevents any of them from becoming too powerful and abusing their power,¹⁴ thus enabling the rule of law to thrive.

Failure to uphold the right to be tried by a competent, independent, and impartial tribunal, therefore, undermines defendants' right to a fair trial and impedes the proper administration of justice as well as the exercise of the rule of law.

4. Limitations

The right to be tried by a competent, independent, and impartial tribunal is **an absolute right that cannot be subject to any exception**,¹⁵ including during emergency situations.¹⁶ The requirements of competence, independence, and impartiality further apply to all courts that fit the definition of a tribunal (See Section 1), whether ordinary or specialized, civil or military.¹⁷ They also apply to religious courts or courts based on customary law recognized by a State and entrusted with judicial tasks.¹⁸



¹⁴ Ibid., page 111.

¹⁵ UNHRC, Communication No. 263/1987; M. Gonzalez del Rio v. Peru (CCPR/C/46/D/263/1987), October 28, 1992, para. 5.2., <https://juris.ohchr.org/Search/Details/332>.

¹⁶ UNHRC, General Comment No. 29, para. 16, https://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/21/Rev.1/Add.11.

¹⁷ Ibid., para. 22.

¹⁸ Ibid., para.24.