

The Need for a Good Whistleblower Protection Law In Cambodia



Whistleblowers play a crucial role in the fight against corruption. In order to encourage them to speak up, legal protection is essential, as has been established in the Anti-Corruption Law Enforcement Strategy in the Rectangular Strategy for Growth, as well as in Article 13 of the Law on Anti-Corruption. However, the Cambodian Law on Anti-Corruption as it stands might have a deterrent effect on speaking up, as proper protection for whistleblowers that report in good faith is not assured and the threat of imprisonment exists (Article 41). To promote the reporting of corruption, the Royal Government of Cambodia has announced plans to draft a whistleblower protection law. Since the Royal Government of Cambodia has ratified the United Nations Convention Against Corruption (UNCAC), such a law should be in accordance with the specifications of Article 33 on the protection of reporting persons. Specifically, the new law should protect any person reporting corrupt practices, in good faith and on reasonable grounds, from any unjustified treatment. First, this policy brief outlines how the current Law on Anti-Corruption has to be amended in order to protect whistleblowers and encourage reporting. Second, building on internationally established best principles,¹ it highlights some of the best practices in view of the drafting of a new whistleblower protection law.

CORRUPTION AND THE IMPORTANCE OF WHISTLEBLOWERS

Corruption is a complex social, political, and economic phenomenon that affects all countries and all areas of public life. It can be defined as the misuse of entrusted power for private

gain.² Corruption slows economic development, undermines democratic institutions, threatens social and political stability, and is a central cause of poverty.

Key to the prevention of corruption are effective reporting mechanisms that encourage people to report corruption and other wrongdoing, and protect them when they do so. The term *whistleblowers* refers to individuals who uncover any information or activity that is regarded as corrupt or unlawful, either private or public, and which is of concern to or threatens the public interest³. Due to their proximity to the source of the problem, for instance as employees in a certain organization, whistleblowers often have knowledge about wrongdoing which would otherwise go undetected.

In the United States, for instance, False Claims Act lawsuits, which allow private citizens to sue those that commit fraud against government programs, have returned over US \$55 billion to federal and state governments since amendments to strengthen the False Claims Act have been made in 1987.⁴ In 2012, the Justice Department recovered a record US \$4.9 billion in cases involving fraud against the government. More than half the money recovered (US \$3.3 billion) was directly attributable to information from whistleblowers.⁵ Moreover, a study conducted to identify the most effective mechanisms for detecting corporate fraud looked at 216 reported fraud cases in large U.S. companies between 1996 and 2004. The study found that fraud detection primarily relies on information provided by employees, the media, and industry regulators rather than actors such

1 Transparency International, International principles for whistleblower legislation: Best practices for laws to protect whistleblowers and support whistleblowing in the public interest, 2013

2 Transparency International, organization website, FAQs on Corruption: http://www.transparency.org/whoweare/organisation/faqs_on_corruption [accessed 21 May 2015]

3 is Vandekerckhove, W. (2006). Whistleblowing and Organizational Social Responsibility: A Global Assessment. Ashgate

4 Fraud Statistics Overview, Civil Division, U.S. Department of Justice <http://www.taf.org/resource/fca/statistics> as well as <http://www.taf.org/resource/fca/faq#faq6>

5 <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-5-billion-false-claims-act-cases-fiscal-year-2012>

as auditors.⁶ Similar results come from KPMG studies; a study on fraud conducted in Australia and New Zealand in 2002 found that employees reported 25% of fraud.⁷ Further data from a study conducted in Africa in 2005 even found that 44% of fraud was exposed by whistleblowers.⁸ These data show that, with their engagement, whistleblowers protect financial resources, safeguard the rule of law, and in other cases save lives and protect human rights.

However, to expose information of significant public importance and thereby to protect the public interest, whistleblowers often take on high personal risk. They may be subject to intimidation, harassment, dismissal or violence, and they might risk their livelihoods, their reputations, and, in extreme cases, even their lives and the lives of their families. Therefore, the encouragement of whistleblowing must be accompanied by legal protection and clear guidance on reporting procedures.

LEGAL SITUATION IN CAMBODIA

Corruption is a serious problem for Cambodia and reports and international indicators show persistently high levels of corruption.⁹ The Royal Government of Cambodia has repeatedly shown its commitment to fight corruption. It has ratified the United Nations Convention Against Corruption

(UNCAC) in 2007.¹⁰ It has further prioritized the fight against corruption in its Rectangular Strategy for Growth¹¹ and has passed a separate Law on Anti-Corruption in 2010.¹² The law established the Anti-Corruption Institution, which is comprised of the Anti-Corruption Unit (ACU) and the National Council Against Corruption (NCAC). The ACU has a mandate to implement corruption-related laws and to lead corruption prevention activities.¹³ The NCAC acts as the board of the ACU and provides guidance and recommendations on anti-corruption strategy and policy. It is composed of 11 members from across government institutions.¹⁴ Moreover, following the election in 2013, the National Assembly established the Commission on Investigation and Anti-Corruption (Commission 10). The commission's main responsibilities include reviewing and initiating proposed laws related to anti-corruption, and monitoring the enforcement of these laws by relevant state institutions.¹⁵

HOW TO ENCOURAGE INDIVIDUALS TO REPORT CORRUPTION

The Royal Government of Cambodia could profit significantly from the information provided by whistleblowers. However, despite the passage of the Anti-Corruption Law, many Cambodians who witness corruption do not report it. In 2014, for instance, the ACU received 899 complaints,¹⁶

6 Dyck, I. J. A., Morse, A., & Zingales, L. (2009). Who blows the whistle on corporate fraud? http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891482

7 Cited in Scholtens, Review of the Operation of the Protected Disclosures Act - Report to the Minister of State Services (NZ), December 2003 at 3.31. (NZ Review)
Available: <http://www.beehive.govt.nz/sites/all/files/ACFF62C.pdf>

8 KPMG Forensic Africa, Africa Fraud and Misconduct Survey 2005.

9 Transparency International, Global Corruption Barometer, 2013 (Berlin: Transparency International, 2013); Transparency International, Corruption Perception Index 2014

10 United Nations Office on Drug and Crime, Convention Against Corruption: Signatories and Ratification Status, Updated 15 April 2015 <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> [accessed 20 Mai 2015]

11 Samdech Techo Hun Sen, Prime Minister. Rectangular Strategy for Growth Phase III (Phnom Penh: Royal Government of Cambodia, 2013)

12 Law on Anti-Corruption, 2010

13 Law on Anti-Corruption, 2010: Art. 25

14 Law on Anti-Corruption, 2010: Art. 6

15 Decision on Roles and Responsibilities of Commission on Investigation and Anti-Corruption of the National Assembly, the National Assembly of Cambodia, 2014

16 Anti-Corruption Unit (ACU). <http://www.acu.gov.kh>

which is not a high number given that Cambodia has been repeatedly rated as one of the most corrupt countries worldwide.¹⁷ A recent nationwide study has shown that possible barriers preventing people from reporting corruption include the fear of having no protection, and a lack of knowledge on reporting procedures (see Box 1).¹⁸

To effectively fight corruption, it is therefore crucial to remove these barriers that prevent individuals from reporting it. On the one hand, several passages in the current Law on Anti-Corruption should be revised, as it fails to provide proper protection for whistleblowers that report in good faith and even threatens them with imprisonment if they cannot provide sufficient

evidence for their claim. The current legal situation might therefore discourage people from speaking up. On the other hand, a new comprehensive whistleblower protection law, which is in accordance with the UNCAC and ensures the safety of individuals reporting corruption, could become an effective tool to encourage reporting, and, as a result, detect and combat corrupt acts.

NECESSARY AMENDMENTS TO THE CURRENT LAW ON ANTI-CORRUPTION

To strengthen the Law on Anti-Corruption, and to assure that it is in accordance with Article 33 of the UNCAC on protection of reporting persons (see Box 2), the following amendments to the Law on Anti-Corruption are recommended:¹⁹

First, **Article 13** of the Law on Anti-Corruption

BOX 1

BARRIERS PREVENTING YOUNG CAMBODIANS FROM REPORTING CORRUPTION

A 2015 nationwide study among 1,200 young Cambodians aged 15 to 30 has shown that although 67% said they were, in principle, willing to report corruption if confronted with a corrupt act, only 8% stated that they have done so in the past, although many of the survey responders had experienced corruption.¹ A third (33%) of the survey responders even reported reluctance to report corruption. Fear of having no protection, the view that reporting corruption will have no impact, and a lack of knowledge on reporting procedures are the main barriers preventing youth from reporting corruption.

1 Transparency International Cambodia, Questioning Corruption: A National Survey on Youth Perceptions of Corruption and Integrity in Cambodia (2015)

17 Transparency International, Global Corruption Barometer, 2013 (Berlin: Transparency International, 2013); Transparency International, Corruption Perception Index 2014

18 Transparency International Cambodia, Questioning Corruption: A National Survey on Youth Perceptions of Corruption and Integrity in Cambodia (2015)

BOX 2

ARTICLE 33 OF UNCAC ON THE PROTECTION OF REPORTING PERSONS

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports, in good faith and on reasonable grounds, to the competent authorities any facts concerning offences established in accordance with this Convention.¹

1 United Nations Convention against Corruption (available: http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf)

19 Transparency International Cambodia, Corruption and Cambodia's Governance System (2014): 'Anti-Corruption Institution (ACI)' pillar report; Transparency International, International principles for whistleblower legislation: Best practices for laws to protect whistleblowers and support whistleblowing in the public interest, 2013; United Nations Office on Drug and Crime, United Nations Convention Against Corruption. United Nations, New York, 2004

which defines the duties required of the ACU as needing to “take necessary measures to keep the corruption whistleblowers secure.”²⁰ However, protected disclosures and persons afforded protection are not clearly defined and should be specified.

Second, **Article 41** on defamation and disinformation allows for the imprisonment of a complainant of a corruption-related crime for between one and six months and a fine from one to ten million Riel, should the complaint filed with the ACU be considered by the agency to be “a useless inquiry” due to insufficient evidence to support the claim.²¹ Article 41 should be removed. Any investigation into such an allegation should be done in accordance with defamation provisions contained under the Penal Code (2009, Art. 305),²² which does not allow a custodial sentence for the defendant of any successful defamation claim.

Furthermore, the onus of proof should be shifted to the responsible entity to provide documentary evidence that the whistleblower has:

- Falsely made a complaint against someone for whom there is no evidence of corrupt behavior, and;
- Was aware that the complaint was false.

GOVERNMENT ANNOUNCED COMMITMENT TO DRAFT A WHISTLEBLOWER PROTECTION LAW

The Royal Government of Cambodia has identified the weaknesses in the Law on Anti-Corruption as it stands. In November 2014, the ACU and the National Assembly’s Commission 10

expressed a joint commitment that a whistleblower protection law would soon be drafted to ensure the safety of individuals seeking to expose corruption.

With its aim to implement whistleblower protection legislation, the Royal Government of Cambodia follows a growing number of countries throughout Asia that have adopted whistleblower protection laws within the past few years, including Bangladesh, India, Japan, Malaysia, the Republic of Korea, and Vietnam.

After implementing the whistleblower protection laws, some of these countries have presented remarkable achievements in their fight against corruption. The Republic of Korea, for instance, has adopted a comprehensive law, which covers not only a wide range of unlawful behavior in both the private and the public sector, but also covers any person who becomes aware of an act of corruption (Box 2). Between 2002 and 2012, the Anti-Corruption and Civil Rights Commission of the Republic of Korea has received a total of 24,629 whistleblowing reports of corruption. Following up on the reports, the Commission recovered about US \$50m in 183 cases. In 2012 alone, about US \$10m were recovered in 40 cases²³. These numbers show that encouraging people to report wrongdoing, and protecting them when they do so through comprehensive laws, is a successful way to avoid the loss of large amounts of corporate and public funds.

RECOMMENDATIONS FOR A NEW WHISTLEBLOWER PROTECTION LAW

To assure a new Whistleblower Protection Law is in accordance with Article 33 of the

20 Law on Anti-Corruption, 2010, Article 13; see also Samdech Techo Hun Sen, Prime Minister. Rectangular Strategy for Growth Phase III (Phnom Penh: Royal Government of Cambodia, 2013)

21 Law on Anti-Corruption, 2010, Article 41

22 Penal Code (2009, Art. 305)

23 Anti-Corruption and Civil Rights Commission, Korea Transparency Newsletter (Spring 2013), available at: <http://www.acrc.go.kr/eng/board.do?command=searchDetail&method=searchDetailViewInc&menuId=020503&confId=63&conConfId=63&conTabId=0&currPageNo=1&boardNum=35638>

UNCAC, it needs to be ensured that any person reporting corrupt practices in good faith is protected, is guaranteed secure legal aid, and that there is no possibility of imprisonment. To carry out its functions, the ACU shall be provided with adequate resources and capacity.

Transparency International has recently published a list of international principles for whistleblower legislation.²⁴ Transparency International Cambodia recommends drafting the announced law on whistleblower protection based on these principles and to pay particular attention to the selection of their recommendations listed below. Moreover, the Act on the Protection of Public Interest Whistleblowers of the Republic of Korea, which is internationally perceived as good practice, could serve as a template for drafting a whistleblower law.²⁵

■ RECOMMENDATIONS²⁶

① GUIDING DEFINITION

Whistleblowing – The disclosure of information related to corrupt, illegal, fraudulent, or

hazardous activities being committed in or by public or private sector organizations, including perceived or potential wrongdoing – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action.

② GUIDING PRINCIPLE

Protected individuals and disclosures – all individuals, including all employees and workers in the public and private sectors, need:

- ▶ accessible and reliable channels to report wrongdoing;
- ▶ robust protection from all forms of retaliation; and
- ▶ mechanisms for disclosures that promote reforms that correct legislative, policy, or procedural inadequacies, and prevent future wrongdoing.

③ SCOPE OF APPLICATION

Broad definition of whistleblowing – whistleblowing is the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation; miscarriages of justice; specific dangers to public health, safety, or the environment; abuse of authority; unauthorized use of public funds or property; gross waste or mismanagement; conflict of interest; and acts to cover up of any of these.

Broad definition of whistleblower – a whistleblower is any public or private sector employee or worker who discloses information covered in the definition of whistleblowing above and who is at risk of retribution. This includes individuals who are outside the traditional employee-employer relationship, such as consultants, contractors, trainees/interns, volunteers, student workers, temporary workers, and former employees.

Threshold for whistleblower protection: “reasonable belief of wrongdoing” – Protection shall

24 Transparency International, International principles for whistleblower legislation: Best practices for laws to protect whistleblowers and support whistleblowing in the public interest, 2013; see also OECD (CleanGovBiz Initiative), Whistleblower protection: encouraging reporting, 2012, available at: <http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf>; OECD, G20 Action Plan 7: Protection of Whistleblowers – Whistleblower Protection frameworks, Compendium of best practices and guiding principles for legislation, 2011 (available <http://www.g20.org/load/781360580>)

25 Received from <https://track.unodc.org> [accessed 15 June 2015] Direct link: <https://track.unodc.org/LegalLibrary/LegalResources/Korea,%20Republic%20of/Laws/Act%20on%20the%20Protection%20of%20Public%20Interest%20Whistleblowers.pdf>

26 Taken from: Transparency International, International principles for whistleblower legislation: Best practices for laws to protect whistleblowers and support whistleblowing in the public interest, 2013. The recommendations selected refer to the recommendations with the following numbers in the original text: 1, 2, 3, 4, 5, 6, 7, 11, 12, 13, 14, 18, and 20. Note that some of the recommendations were changed slightly.

be granted for disclosures made with a reasonable belief that the information is true at the time of disclosure. Reasonable belief is defined as when a person reasonably could suspect wrongdoing in light of available evidence at the time it is disclosed. Protection extends to those who make inaccurate disclosures made in honest error, and should be in effect while the accuracy of a disclosure is being assessed.

4 PROTECTION

Protection from retribution – Individuals shall be protected from all forms of retaliation, disadvantage, or discrimination linked to or resulting from whistleblowing. This includes all types of harm, including dismissal, probation, and other job sanctions; punitive transfers; harassment; reduced duties or hours; withholding of promotions or training; loss of status and benefits; and threats of such actions.

Preservation of confidentiality – The identity of the whistleblower may not be disclosed without the individual's explicit consent.

Right to refuse participation in wrongdoing – Employees and workers have the right to decline to participate in corrupt, illegal, or fraudulent acts.

Preservation of rights – Any private rule or agreement is invalid if it obstructs whistleblower protections and rights. For instance, whistleblower rights shall override employee "loyalty" oaths and confidentiality/nondisclosure agreements.

Anonymity – Full protection shall be granted to whistleblowers who have disclosed information anonymously and who subsequently have been identified without their explicit consent.

Personal protection – Whistleblowers whose lives or safety are in jeopardy, and their family members, are entitled to receive personal protection measures.

5 DISCLOSURE PROCEDURES

Disclosure and advice tools – A wide range of accessible disclosure channels and tools should be made available to employees and workers of government agencies and publicly traded companies, including advice lines, hotlines, online portals, compliance offices, and internal or external ombudspersons. Mechanisms shall be provided for safe, secure, confidential, or anonymous disclosures.

6 RELIEF AND PARTICIPATION

Full range of remedies – a full range of remedies must cover all direct, indirect, and future consequences of any reprisals, with the aim to make the whistleblower whole. This includes interim and injunctive relief; attorney and mediation fees; transfer to a new department or supervisor; compensation for lost past, present, and future earnings and status; and compensation for pain and suffering. A fund to provide assistance for legal procedures and support whistleblowers in serious financial need should be considered.

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