

KINGDOM OF CAMBODIA: THE CRIMINAL JUSTICE RESPONSE TO CORRUPTION

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I. CURRENT SITUATION OF INVESTIGATION AND PROSECUTION OF CORRUPTION

A. Introduction

Good governance is the most important prerequisite to ensure socio-economic development with sustainability, equity and social justice. Good governance has been continuously strengthened through a number of reforms in key sectors, including fighting corruption, legal and judicial reforms, public administration reform, and armed forces reform. The Royal Government of the third legislature has taken numerous practical measures to tackle corruption through the introduction of Governance Action Plan and the adoption and implementation of a number of measures such as Law on Public Financial System, Law on Customs, Sub-decree on Public Procurement, Order on the Management of Non-tax Revenues, and Code of Conduct and Ethics for Customs Officials.

More importantly, Law on Anti-Corruption was promulgated by Royal Kram on 17 April, 2010. This law has a purpose to promote effectiveness of all forms of service and strengthen good governance and rule of law as well as to maintain integrity and justice which is fundamental for social development and poverty reduction.¹

B. Legal Framework

1. National Legal Framework

(i) *Law on Audit of the Kingdom of Cambodia*

The Law on Audit of the Kingdom of Cambodia was passed by the National Assembly on the 12 January 2000. The purpose of the Audit Law is to establish a National Audit Authority and Internal Audit Department within each institution, ministry and public enterprise, which is independent in its operations.² This law also stipulated the provision regarding to the type of audit, the nominating of General, Deputy General Auditor, auditing report, the right to collect information, the confidential of report/information, and the punishment.

(ii) *Anti-Corruption Law*

The Anti-Corruption Law was promulgated by Royal Kram on 17 April, 2010. It is a substantive law that applicable to all forms of corruption in all sections and at all levels throughout the Kingdom of Cambodia, which occurs after the law comes into effect. It stipulated the General provisions, definition, the establishment of an Anti-Corruption Institution, asset and liability declaration, criminal procedure to conduct investigation, sanction, and strategies to fight corruption effectively.

To effectively root out corruption, the Anti-Corruption Law provided four strategies:

- education;
- prevention;
- law enforcement with participation and support from the public; and
- International cooperation.³

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¹ Anti-Corruption Law, Art. 1.

² Law on Audit, Art. 1.

³ Anti-Corruption Law, Art. 3.

To comply with UNCAC, Anti-Corruption Law included more corrupt offences as it was not included in the Penal Code (2009). The offenses are listed at the Sanctioning and Prosecuting Corruption and Related Offenses Part.

The amendment of Anti-Corruption Law was promulgated by Royal Kram on 1 August, 2011 and turn all corruption offences stipulated in either penal code or Anti-Corruption law enter into force.

(iii) Penal Code

Most corruption offenses are stipulated in Penal Code (2009). The offences are listed at the Sanctioning and Prosecuting Corruption and Related Offenses Part.

(iv) Criminal Procedure Code (CPC)

The Criminal Procedure Code stipulates the investigating procedure of the judicial police, prosecutors, and investigating judge. It is also provides the procedure during trial at the court of first instance, appeals court, and supreme court, extradition, etc.

2. International Legal Framework

In the context of international cooperation, Cambodia is a party to multilateral instruments, namely UNCAC, UNTOC, OECD convention on Combating Bribery of Foreign Public Officials in International Business Transactions, South East Asia Memorandum of Understanding for Preventing and Combating Corruption, which is now renamed as South East Asia Parties Against Corruption (SEA-PAC). Bilateral extradition treaties are currently in force with P.R. of China, Thailand, Lao PDR and Korea. In addition, Cambodia has bilateral agreement with the Republic of India, Australia, and Thailand on the Transfer of Sentenced Persons as well as the government of the United States of America Regarding the Non-Surrender of Persons to the International Criminal Court. Cambodia is also a party to the ASEAN Treaty on MLA in criminal matters comprising ten members (Brunei Darussalam, Indonesia, Lao PDR, Malaysia, Philippine, Singapore Vietnam, Myanmar, and Thailand).

C. Detecting, Investigating, and Prosecuting Corruption

1. Law Enforcement Agencies

(i) The National Audit Authority and Internal Audit Department

The National Audit Authority is responsible for executing the external audit function of the Royal Government. The Auditor-General is empowered to conduct audits on accounting records, accounts, management systems, operation controls and programmes of government institutions in accordance with generally accepted auditing standards and Royal Government auditing standards. The National Audit Authority is one of the government mechanisms to prevent corruption and find out corruption.

The Auditor-General and the Deputy Auditor-Generals are appointed by royal decree on the recommendation of the Royal Government and approved by a two-thirds majority of all members of the National Assembly. The Auditor-General and the Deputy Auditor-Generals are appointed for a term of five years and may be reappointed for another five-year term only upon the completion of the first term.

To carry out its functions, the National Audit Authority has the power to:

- request documents from other ministries, and compel ministry officials to appear and answer questions;⁴
- enter and remain on the auditee's premises during working hours;
- fully and freely access to documents, reports or properties belonging to government ministries/institutions;⁵
- examine, make copies or extract documents from any report.

The penalty for obstructing an audit is a fine of one to five million riel, imprisonment from one to three months, or both. Providing false information to the National Audit Authority is subjected for penalty as fine

⁴ Law on Audit arts. 30.

⁵ Law on Audit Arts. 32.

from more than five million riel, or imprisonment from one to five years, or both.⁶

The Auditor-General is mandated to report National Assembly, Senate, Council of Ministers, Ministry of Economic and Finance, and the relevant ministries whenever there is irregularity in the account statement, financial management, and current asset. Furthermore, National Audit Authority's report is considered as public report. However, the report is kept confidential in case of:

- Affected security, defense, and integrity, or international relation of Cambodia;
- Affected the commercial interest of legal entities or individual.⁷

According to Global Integrity 2008, none of the reports made by the National Audit Authority have been made public and⁸ the legislature does not act on the findings of the National Audit Authority, partly due to the weak link between the National Audit Authority and the parliament, and the low quality of the audit reports. According to Global Integrity 2008, these problems are being addressed under the National Audit Authority's Strategic Development Plan 2007 to 2011. Hence, Global Integrity 2008 evaluates the National Audit Authority as 'weak'.

In addition to the establishment of the National Audit, the law on audit also established the Internal Audit Department within each government ministry, institution and public enterprise.⁹ Internal Audit Department independently monitors and evaluates the effectiveness of the implementation of internal audit of their institution, ministry and public enterprise. However, the internal audit report is reported to the head of institution, ministry and public enterprise for approval before it is sent to National Audit Authority.¹⁰ The independent of Internal Audit Department remain in question.

(ii) The Ministry of National Assembly and Senate Relations (MONASRI)

MONASRI was established by the Law on the Establishment of the Ministry of National Assembly Senate Relations and Inspection in 1999. MONASRI has two main functions: 1) coordinate the relations between the executive and legislative branches; and 2) inspecting all operations of the government in order to fight against corruption, abuse of power and other misconduct.¹¹ In the inspection field, MONASRI is mandated to:

- Propose measures to prevent misconduct, and corruption among civil servants, military, and police
- Investigate, collecting evidence, and interview any relevant person in the corruption or misconduct case.
- Report the result of each inspection to the government and ask for further recommendations or measurement, for instance, refer the case to the court.

Due to the MONASRI's report need to have checked and approved from the government before it is released to public, MONASRI was assumed by the public that it is not executed its assignment independently.

(iii) Anti-Corruption Unit (ACU)

In April 2010, National Anti-Corruption Council (NACC) and Anti-Corruption Unit (ACU) were established right after the adaptation of Anti-Corruption law. The National Anti-Corruption Council has a role to set forth the Strategic Plan and provide guidance, recommendations on anti-corruption work. It is composed of 11 members from different backgrounds, institutions and led by one President ranking as Deputy Prime Minister whereas the Anti-corruption Unit as an executive body to independently undertake its duties. The Anti-corruption Unit is led by one President with the rank of Senior Minister, and four Vice-Presidents with the rank of Minister and a number of Assistants, ranking as Secretary of State, Under Secretary of States and Director Generals respectively.

⁶ Law on Audit Art. 44-45.

⁷ Law on Audit Art. 38.

⁸ See <http://www.business-anti-corruption.com/country-profiles/east-asia-the-pacific/cambodia/initiatives/public-anti-corruption-initiatives/>

⁹ Law on Audit, Arts. 41-43.

¹⁰ Law on Audit Arts. 41.

¹¹ Sub-Decree on Organization and Functioning of the Ministry of National Assembly Senate Relations and Inspection at Art 2, No. 67/ANK/BK, dated 3 August 1999. Art. 2.

To be truly independent institution, Anti-Corruption law was amended and promulgated on 1 August 2011 to provide anti-corruption institution a separated budget from council of ministers to function its mandate effectively. It also provides the president of National Against Corruption Council the right to structure and nominate the staffs from deputy director level to bottom line.

Under anti-corruption law, the Anti-Corruption Unit is responsible for investigating corrupt offences as stipulated in both the penal code and anti-corruption law. Officials of the Anti-Corruption Unit who accredited as judicial police are empowered to investigate corruption offenses. In addition, other units that are aware of corruption offences shall make corruption complaints to the Anti-Corruption Unit or its branch offices in the Capital or provinces.¹²

The prosecutors' office is responsible for prosecuting Anti-Corruption Law and Penal Code corruption offences.

(a) Investigative power of Anti-corruption Unit

Officials of Anti-corruption Unit who are accredited as judicial police take charge of investigating corruption offences. If during the course of a corruption offence investigation different offenses are found whose facts are related to the offence being investigated by Anti-corruption Unit, officials of Anti-Corruption Unit may continue the investigation of the offences to the final stage. The Anti-Corruption Unit cannot investigate other offences except corruption ones unless the unit is ordered by the court to do so.

At the end of each investigation, the Anti-corruption Unit shall submit all facts to the prosecutor for further action in conformity with the provisions of the code of criminal procedures.

(b) Special Privileges of Anti-Corruption Unit

The president of the Anti-Corruption Unit can ask the concerned authority to suspend all functions of any individual who is substantially proven to be involved in a case of corruption offence. If the suspect flees to a foreign country, the president of the Anti-Corruption Unit can ask the competent authority to undertake an extradition in accordance with the provisions in force.

(c) Privileges of Anti-Corruption Unit related to investigation

In the case there is clear hint of corruption offence, the Anti-Corruption Unit can:

1. Check and put under observation the bank accounts or other accounts which are described to be the same as bank accounts;
2. Check and order the provision or copy of authentic documents or individual documents, or all bank, financial and commercial documents;
3. Monitor, oversee, eavesdrop, record sound and take photos, and engage in phone tapping;
4. Check documents and documents stored in the electronic system;
5. Conduct operations aimed at collecting real evidence.

The above measures will not be considered as violations of professional secrets. The secret of banks is not be served as justification for not providing evidence related to corruption offences in the provisions of this law.

(d) Privileges of Anti-Corruption Unit related to freezing an individual's assets

Upon the request by the president of Anti-Corruption Unit, the Royal Government may order the General Prosecutor of the Appeals Court or Prosecutor of the Municipal/Provincial Court to freeze the assets of individuals who commit offences stated in Anti-Corruption Law and corruption offences stated in the Penal Code. The individual assets, stated in the above paragraph, includes the funds received or which forms to be an asset belonging to him or her.

(e) Privileges of Anti-Corruption Unit in Cooperation with Public Authority

The president of the Anti-Corruption Unit may order public authorities, government officials, citizens

¹² Anti-Corruption Law, art. 22.

who hold public office through election, as well as units concerned in private sector, namely financial institutions, to cooperate with officials of the Anti-Corruption Unit in the work of investigation. The president of the Anti-Corruption Unit may also ask the national and international institutions to cooperate in forensic examinations related to its investigation work.

2. Regulations relating to Forfeiture and repatriation of Proceeds of Corruption

(i) Forfeiture¹³

When a person is found guilty of corruption, the court will confiscate all his/her corruption proceeds including property, material, instrument that is derived from corruption act and the proceeds will be transformed into state property. If the above seized asset is transferred/changed into different property from the original asset nature, this transformed asset will become the subject of seizure at the place where it locates. If the corruption proceeds make more benefits or other advantages, all of these benefits and advantages will be seized as well. If the corruption proceeds disappear or lose value, the court may order the settlement of the proceeds.

(ii) Repatriation of the proceeds of Corruption¹⁴

In case assets and corruption proceeds are found kept in foreign states, the competent authority of the Kingdom of Cambodia shall take measure to claim that asset and proceeds back to Cambodia through means of international cooperation. The Kingdom of Cambodia shall cooperate with other countries who request to repatriate corruption proceeds that are kept in Cambodia.

A. Sanctioning and Prosecuting Corruption and Related Offences

1. Criminalizing Corruption Offences

Corruption offences are principally governed by the Penal Code (2009) and anti-corruption law (2010). Cambodia's main domestic bribery offences are stipulated in Articles 594¹⁵ and 605¹⁶ of the Penal Code.

¹³ Anti-Corruption Law, art. 48.

¹⁴ Anti-Corruption Law, art. 49.

¹⁵ Article 594: (Bribe Taking by public official or a citizen entrusted with public mandates through an election) (Passive Bribery).

It is punishable by an imprisonment from 7 (seven) years to 15 (fifteen) years for any act committed by a public official or a citizen entrusted with public mandates through an election to directly or indirectly solicit or accept without authorization the donation, gift, promise, or any interest in order:

1. To perform any act of his/her functions or facilitate anything using his/her functions;
2. Not to perform any act of his/her functions or facilitate anything using his/her functions.

¹⁶ Article 605: (Bribe Offered to public official or a citizen entrusted with public mandates through an election) (Active Bribery).

It is punishable by an imprisonment from 7 (seven) years to 15 (fifteen) years for an unauthorized person who directly or indirectly delivers present or gift, make promise or give interests to a public official or a citizen entrusted with public mandates through an election so that the latter:

1. Perform any act of his/her functions or facilitate anything using his/her functions;
2. Not to perform any act of his/her functions or facilitate anything using his/her functions.

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	Accepting Bribes (Passive Bribery)	Offering of Bribes (Active Bribery)
Penal Code (2009)	<ol style="list-style-type: none"> 1. Article 278 (Bribe Taking By Employees) 2. Article 280 (Bribe Taking By Governor) 3. Article 517 (Bribe Taking By Judges) 4. Article 547 (Bribe Taking By Witnesses For False Testimony) 5. Article 553 (Bribe Taking By Interpreter) 6. Article 555 (Bribe Taking By Experts) 7. Article 594 (Bribe Taking by public official or a citizen entrusted with public mandates through an election) 8. Article 637 (Bribe Taking By A Person Who Has Competence To Issue False Certificate) 9. Article 639 (Bribe Taking By Member Of Professional Board Of Medicine To Issue False Certificate) 	<ol style="list-style-type: none"> 1. Article 279 (Bribe Offered To Employees) 2. Article 518 (Bribe Offered To Judges), 3. Article 548 (Bribe Offered To Witnesses) 4. Article 554 (Bribe Offered To Interpreter) 5. Article 556 (Bribe Offered To Experts) 6. Article 605 (Bribe Offered to public official or a citizen entrusted with public mandates through an election) 7. Article 638 (Bribe Offered To A Person Who Has Competence To Issue False Certificate) 8. Article 640 (Bribe Offered To Member Of Professional Board Of Medicine To Issue False Certificate)
	<ul style="list-style-type: none"> • Other related offences: <ul style="list-style-type: none"> - Article 387 (Improper Bidding) - Article 404 (Definition Of Money Laundering) - Article 592 (Definition Of Misappropriation) - Article 595 (Definition Of Passive trading in influence) - Article 597 (Definition Of Embezzlement) - Article 599 (Definition Of Favoritism) - Article 601 (Intentional Destruction And Dishonest Embezzlement) - Article 606 (Active trading in Influence) - Article 607 (Extortion) - Article 608 (Destruction And Embezzlement) - Article 641 (Execution Of Misdemeanor Of Articles 639 And 640 For All Medical Professions). 	
Anti-Corruption Law (2010)	<ol style="list-style-type: none"> 10. Article 33 (Bribe taking by Foreign Public Officials or Officials of Public International Organizations) 	9. Article 34 (Bribes offered to Foreign Public Officials or Officials of Public International Organization)
	<ul style="list-style-type: none"> • Other corruption offences: <ul style="list-style-type: none"> - Article 35: Abuse of function - Article 36: Illicit Enrichment - Article 37: Corruption proceeds offences - Article 43: Petty corruption offences 	

2. Liability of Legal Persons for Corruption Offences

The Penal Code expressly provides for liability of legal persons for specific offences such as:

- Article 279 (bribe offered to employees)
- Article 404 (definition of money laundering)
- Article 518 (bribe offered to judges)
- Article 548 (bribe offered to witnesses)
- Article 554 (bribe offered to interpreter)
- Article 556 (bribe offered to experts)
- Article 605 (Delivery of Bribes) (Active Bribery)
- Article 606 (active trading in influence)
- Article 607 (extortion)
- Article 638 (bribe offered to a person who has competence to issue false certificate)
- Article 640 (bribe offered to member of professional board of medicine to issue false certificate)

In this presentation paper, we would like to analyse the elements of bribery offence stipulated in article 594 and 605 of Penal Code as follows:

	Article 594 (Bribe Taking by public official or a citizen entrusted with public mandates through an election)	Article 605 (Bribe Offered to public official or a citizen entrusted with public mandates through an election)
Perpetrator	- public official - a citizen entrusted with public mandates through an election	Briber
Activities	- Soliciting or accepting the bribe (the donation, gift, promise, or any interest) directly or indirectly - without authorization	- Offering, promising or giving bribe directly or indirectly - without authorization
Intention	- Perform or - not to perform any act of his/her functions or facilitate anything using his/her functions	- Perform or - not to perform any act of his/her functions or facilitate anything using his/her functions

3. Other Offences

(i) Petty Corruption Offences and Punishment

The petty corruption offence shall meet the following criteria:¹⁷

- Offences committed for daily survival;
- Offences committed in petty manner;
- Offences which is not harmful to society;
- defined by the Anti-Corruption Unit as petty corruption offences.

Any person who commits petty corruption will be sentenced to prison from seven days to five years. Up to date, Anti-Corruption Unit has not defined other petty offences. In actual practice, the suspects who commit petty offence will be subjected for warning by the Anti-Corruption Unit.

II. PROBLEMS

Prevention, education, law enforcement strategies and budget planning are currently envisaged in the five years Term of Strategic Plan (2011-2015) and a Two Years Term of Action Plan (2011-2012). It was planned to implement at the beginning of 2011. However, due to the amendment of Anti-Corruption Law, those strategies have been partly implemented in particular the dissemination of the Anti-Corruption Law.

III. CHALLENGES

It has been more than one year since the establishment of Anti-Corruption Unit. There are many challenges on the way to build its fundamental ground.

- The resources, budget supported by government is now in the administration process for this initial step;
- Participation, support and trust from the public are not widen due to the raising awareness is limited and the use of old practice has its popularity;
- Lack of professional, expert in the field of education, prevention, and law enforcement;
- Cooperation among relevant institutions has improved but cooperation with the Ministry of Interior, Police, Financial Investigation Unit (FIU) and courts is still required.

IV. CONCLUSION

Although the Anti-Corruption Law provides the Anti-Corruption Unit the power and privilege to investigate corruption offences and the independence to execute its duties, there are many obstacles along the way. Curbing corruption is a very difficult task as people involved in corruption are intelligent,

¹⁷ Anti-Corruption Law, art. 43.

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knowledgeable and powerful, and professional staff are required to deal with it. Experts in the field of investigation, forensic science, law, accounting, procurement, education, etc. are required to work in certain posts. It is also required to formulate a system of integrity that applies to all staff.

Second, the Anti-Corruption Unit requires adequate resources and budget from the government to implement its Five Year Strategic Plan (2011-2015) and Two Year Term of Action Plan (2011-2012) effectively. It is also requires the participation of the public, development partners and civil society.