

CURRENT ISSUES IN THE INVESTIGATION, PROSECUTION AND ADJUDICATION OF CORRUPTION CASES

*Nuon Norith**

I. OVERVIEW

Corruption is a complex social, political and economic phenomenon that affects all countries. Corruption undermines democratic institutions, slows economic development and contributes to governmental instability. Corruption takes place in all human societies and at all walks of life. Cambodia is also experiencing this social phenomenon. The Royal Government of Cambodia does not turn a blind eye to this problem. The Royal Government is strongly committed to fighting corruption, formulating a separate anti-corruption law and empowering an independent anti-corruption mechanism.

II. LEGAL FRAMEWORK

A. Background

Cambodia applies Civil Law and the judicial system is composed of a Supreme Court, Court of Appeal and Court of First Instance. The Supreme Court is the highest level of the court system that can receive complaints of a party that is not satisfied with the judgement of the Court of Appeal. The Appeal Court has the authority to decide on the appeal against the judgement of the court of first instance of its jurisdiction for criminal cases. If any party to the case is not satisfied with the judgement of the Appeal Court, she/he can appeal to the Supreme Court. The Supreme Court is the highest court in the country and the place of the last and final appeal. The court of first instance is a low-level court with full capacity to implement all existing provisions and laws with respect to each court's own jurisdictions. This court has the authority to handle all cases, including administrative cases. During a hearing, the court consists of one judge and one prosecutor for misdemeanour cases, and three judges and one prosecutor for felony cases.

B. Anti-Corruption Law (ACL)

The Anti-Corruption Law was promulgated by Royal Kram on 17 April 2010. It is a substantive law that is 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 stipulates the general provisions, definitions, the establishment of the Anti-Corruption Institution that is composed of the National Council Against Corruption (NCAC) and the Anti-corruption Unit (ACU), asset and liability declaration, criminal procedure to conduct investigation, sanction, and strategies to fight corruption effectively with four strategies: education, prevention, law enforcement with participation and support from the public, and international cooperation

C. Criminal Code

The criminal law defines offences, determines who may be found guilty of committing them, sets penalties, and determines how they shall be enforced. Offences are classified

* Deputy Director, General Department of Operation, Anti-Corruption Unit, Cambodia.

pursuant to their seriousness as felonies, misdemeanours, and petty offences. Forty (40) articles of corruption offences are extracted from the Penal Code (2009) and are stipulated in the ACL, article 32. Notably, these articles are implemented by the ACU only.

D. Code of Criminal Procedure (CCP)

The Code of Criminal Procedure aims at defining the rules to be strictly followed and applied in order to clearly determine the existence of a criminal offence. The provisions of the Code shall apply to criminal cases unless there are special rules set forth by separate law. Importantly, the investigation procedure by judicial police, prosecution by prosecutors, the investigation by the investigating judge, security measures, judicial supervision, provisional detention, trial hearing, types judgements, judgements against the court of the first instance, the appeals court, and the Supreme Court, etc. are precisely stated. But some articles of the Code are contradicted by some articles of the ACL due to the special privileges of the ACU.

III. INVESTIGATION BY THE ANTI-CORRUPTION UNIT

A. The Sole National Investigation Agency

Under the Anti-Corruption Law, the Anti-Corruption Unit is the sole institution responsible for investigating corruption offences as stipulated in both the Anti-Corruption Law and the Penal Code. Officials of the Anti-Corruption Unit who are accredited as judicial police are empowered to investigate corruption offences. 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.

B. Investigation Power of ACU Officials

Officials of the Anti-Corruption Unit who are accredited as judicial police take charge of investigating corruption offences. If different offences are found during the course of a corruption offence investigation, and if the facts are related to the offence being investigated by the Anti-Corruption Unit, officials of the Anti-Corruption Unit may continue the investigation of the offences to the final stage. The Anti-Corruption Unit cannot investigate other offences that are unrelated to corruption unless the unit is ordered by the court to do so.¹ In the framework of these investigations, and contradictory to some articles in the Code of Criminal Procedure, the ACU investigators have the power to arrest suspects after officially assigned by the President of the ACU without asking permission or informing to prosecutor before the arrest. After the arrest, the prosecutor exercises his power as stated in the Code of Criminal Procedure. 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.

C. Special Privileges of the 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. 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.

D. Privileges of the Anti-Corruption Unit Related to Monitoring

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

¹ Anti-Corruption Law, art. 25.

- a. Check and put under observation the bank accounts or other accounts which are described to be the same as bank accounts.
- b. Check and order the provision or copy of authentic documents or individual documents, or all bank, financial and commercial documents.
- c. Monitor, oversee, eavesdrop, record sound and take photos, and conduct wiretapping.
- d. Check documents and documents stored in the electronic system.
- e. Conduct operations aimed at collecting real evidence (trapping).

The above measures will not be considered as violations of professional secrets. Bank secrecy is not a justification for failing to provide evidence related to corruption offences under the provisions of this law.

E. Privileges of the Anti-Corruption Unit Related to Freezing an Individual's Assets²

Upon the request by the President of the 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, include the funds received or which form an asset belonging to him/her.

F. Privileges of Anti-Corruption Unit in Cooperation with Public Authority³

The President of the Anti-Corruption Unit may order public authorities, government officials, citizens who hold public office through election, as well as units concerned in the 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.

G. Procedure Relating to Asset Seizure and Repatriation of Proceeds of Corruption

(a) Seizure⁴

When a person is found guilty of corruption, the court will confiscate all his/her corruption proceeds including property, material and instruments derived from corrupt acts, and the proceeds will be transformed into state property. If the above seized asset is transferred or changed into different property from the nature of the original asset, this transformed asset will become the subject of seizure at the place where it is located. 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, or payment, of the proceeds lost.

(b) Repatriation of the proceeds of corruption

If assets and corruption proceeds are found kept in foreign states, the competent authority of the Kingdom of Cambodia shall take measures to claim those assets and proceeds and to

² Ibid., art. 28.

³ Ibid., art. 29.

⁴ Ibid., art. 48.

repatriate them back to Cambodia through means of international cooperation. The Kingdom of Cambodia shall cooperate with other countries who request the repatriation of corruption proceeds that are kept in Cambodia.

H. Current Issues in Investigation

So far, even though many achievements have been made by the ACU, it still faces certain challenges:

- Competent skills of investigation officials are limited.
- Lacking high-tech materials and equipment, such as lie detectors (Polygraph) night vision cameras, etc.
- **Suspects** commit crime in complex and tricky ways and sometimes use advanced technology to hide or to camouflage acts of crime. Criminals are usually high-ranking, powerful and rich officials.
- **Complainants and the ordinary citizens are** hesitant and not so cooperative in providing information related to corruption due to feeling frightened or scared in terms of his security, business, etc.
- **Law:** Even if there is a good law but it has some loopholes that fail to prevent criminals from committing crime, amendments to such laws must be done according to social development and must be effective in practice. Though there are many laws to fight corruption, a law on protection of witnesses and whistleblowers is not in place yet.

IV. PROSECUTION

Prosecutors charge suspects with criminal offences and ask for the application of laws by the Court. Prosecutors are responsible for the implementation of orders of the criminal court on criminal offences, including the dissemination of arrest warrants. In performing his duties, a prosecutor has the right to directly mobilize public forces. A prosecutor shall attend all hearings of the trial court in criminal cases. Therefore, prosecutors have the power to conduct their own investigation, and it is always done where there are big or sensitive cases. When he receives dossiers from the judicial police, he will examine and interrogate the suspects again.

Filed without processing: the Prosecutor shall inform the complainant about such decision within the shortest possible period, and in any case not more than two months. This filing shall be based on grounds of law and fact. Filing without processing does not have the effect of *res judicata*. The prosecutor may always change his decision as long as the criminal action has not been extinguished. If the complainant is not satisfied with the prosecutor's decision to hold the file without processing, the complainant may appeal that decision to the General Prosecutor attached to the Court of Appeal.

V. ADJUDICATION

A. Investigation Judge

Investigating judges are assigned by the Court President, and they open judicial investigations against one or more persons until there is an introductory submission from the

Royal Prosecutor. He has obligation to collect “charge” (incriminatory) and “uncharged” (exculpatory) evidence. The investigating judge may make site visits or observations and may search and seize exhibits with his court clerk, informing the prosecutor thereof. In practice, an investigating judge may issue letters rogatory asking another judge or the judicial police to undertake the investigation instead of him (Art. 131).

- The presence of a lawyer during interrogation is needed; if there is no lawyer, it shall be noted in the record (Art. 145).
- At any time during a judicial investigation, the Royal Prosecutor may request the investigating judge to conduct any investigative act that he believes will be useful. If he has not decided within 15 days, the prosecutor will appeal to the investigation chamber at the court of appeal (Art. 132).
- At any time, the prosecutor may examine the case file or ask for its transmission. In the latter case, the prosecutor shall send the case file back within 24 hours (Art. 135).
- The prosecutor may be present during any investigative act, in particular the interrogations of the charged person, confrontations and interviews (Art. 136).
- Searches and seizures and other investigations require warrants. An investigating judge shall conduct a search in the presence of the occupant of a place. In the absence of the occupants, the judge shall search in the presence of two witnesses to be selected by the judge. The witnesses may not be police or military police officers from the force conducting the search. An investigating judge may not conduct a search before 6:00 A.M or after 6:00 P.M (Art. 159).
- Wiretapping for the purpose of ascertaining the truth: the investigating judge may issue an order authorizing the listening to and recording of telephone conversations. The investigating judge may also order the recording of all other telecommunications, such as by facsimile or email.
- The investigating judge may issue a letter rogatory authorizing any judge who is in the same court or in another court, judicial police officers or judicial police units (or the ACU) to investigate on his behalf.
- An investigating judge may issue subpoenas, “bringing warrants” or orders to bring a suspect to court, arrest warrants and detention orders (Art. 185).
- An investigation judge (IJ) has the right to order provisional detention in criminal cases (6 months and may extend for 6 months) and in misdemeanour cases (4 months and may extend for 2 months). The prosecutor must be informed of the detention; if the IJ or the prosecutor disagrees with facts of or the explanation for the detention, he or she may appeal to the court of appeal. The IJ, the prosecutor and charged person may request release at any time according to procedure (Art. 215-217).

B. Trial Judge

A judge cannot be the trial judge in a criminal case where she/he has been the prosecutor, deputy prosecutor, or investigating judge. The presiding judge conducts the proceedings and

maintains order in court etc. The role of the trial judge is to decide on the guilt or innocence of the accused person, based on evidence (exhibits and witnesses) included in the case file or presented at trial. The trial judges also determine the sentence if the accused person is found guilty.

- The accused shall appear in person during the hearings at the court and may be assisted by a lawyer chosen by himself. He may also make a request to have a lawyer appointed for him in accordance with the Law on the Bar (art. 301).
- Witnesses shall appear before the court in compliance with summonses. The court may use public forces in order to force the witness to appear (art. 315). In general, witnesses always give statements to the prosecutor or IJ and sometimes to the judges' council (three judges presiding over criminal cases) which will give permission to witnesses to appear during trial for the purpose of benefit of all parties (victim or accused).
- In criminal cases all evidence is admissible. The court has to consider the value of the evidence submitted for its examination, following the judge's intimate conviction (i.e., each judge involved in the case must examine the evidence and rule based on his or her personal understanding of the evidence). The judgement of the court may be based only on the evidence included in the case file or which has been presented at the hearing (both prosecutor and IJ). A confession shall be considered by the court in the same manner as other evidence. A declaration given under the physical or mental duress shall have no evidentiary value. Evidence emanating from communications between the accused and his lawyer is inadmissible (art 312).
- The judgement is issued on the hearing date or in a subsequent session. In the latter case, the presiding judge shall inform the parties of the date of the announcement.
- Types of Judgement: Non-Default Judgement (one month for appeal), Judgement deemed as Non-Default (one month for appeal after receiving judgement information regardless of the means), Default Judgement (Time limit for opposition motion is 15 days after date receiving) (art. 360, 361, 362, 368, 381).