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DEVELOPMENTS IN THE FIELD

Whistleblowers as Defenders of Human Rights: The Whistleblower Protection Act in Japan

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I. Introduction

In October 2020, the Government of Japan formulated a National Action Plan (NAP) on Business and Human Rights in response to the United Nations Guiding Principles on Business and Human Rights (UNGPs) and ensuing greater international awareness of violations of human rights by corporations.[1] In the NAP, the government of Japan stated that on the basis of the UNGPs, it expects companies to (i) formulate human rights policies, (ii) conduct due diligence with respect to human rights, and (iii) establish grievance mechanisms.[2] In order to achieve these goals, businesses need to understand whether and how they are violating human rights and prepare appropriate solutions. Whistleblowers play a crucial role in this process.

In order for companies to formulate appropriate human rights policies and conduct human rights due diligence, it is necessary for them to accurately identify whether human rights are being violated as a result of their business activities. Companies may conduct top-down internal investigations or audits for this purpose. However, investigators do not always have enough information to discover abuses, and organizational concealment of violations at the departmental level may cause investigators to miss relevant facts. Therefore, a bottom-up approach to human rights due diligence is essential as a supplement to the work of investigators; i.e., an approach in which the facts of human rights violations are detected as a result of whistleblowing by such third parties as the victims of human rights abuses or people who have witnessed the abuses.

The problem is that whistleblowing almost always results in retaliation against the whistleblower by the wrongdoer. If the whistleblower is an employee of a company, the

[1] Ministry of Foreign Affairs of Japan, 'Business and Human Rights', https://www.mofa.go.jp/fp/hr_ha/page23e_000551.html (accessed 16 October 2022).

[2] Inter-Ministerial Committee on Policy Promotion for the Implementation of Japan's National Action Plan on Business and Human Rights, *Guidelines on Respecting Human Rights in Responsible Supply Chains* (2022), https://www.meti.go.jp/english/press/2022/pdf/0913_001a.pdf (accessed 16 October 2022).

retaliation may take the form of reduced pay, suspension of promotion, or termination.[3] Laws have been enacted at the global, regional and national levels to protect whistleblowers from retaliation. Examples at the global level include the International Labor Organization's Termination of Employment Convention, 1982 (No. 158); and at the regional level, the European Union's Directive on Whistleblowing 2019/1937 (EU Directive on Whistleblowing). In addition, over the past thirty years many countries have enacted laws to protect whistleblowers from retaliation. In the United States, several federal and state laws provide such protection. In the United Kingdom, the Public Interest Disclosure Act of 1998 does so.

UNGP 29 and UNGP 31 state that companies should establish an effective grievance mechanism for victims and concerned parties. To be viable, such a mechanism requires a broader system of remedy that includes a company's internal reporting or whistleblowing system. According to UNGP 31, the effectiveness of a grievance mechanism depends on whether it is fairly administered, accessible to all concerned parties, transparent, equitable, and predictable in its procedures. It should also provide for dialogue with stakeholders. However, without adequate protection for whistleblowers, it is difficult to establish an effective mechanism. Laws to protect whistleblowers must therefore be carefully designed to give companies incentives to establish an appropriate internal reporting system that does protect whistleblowers. Using Japan's Whistleblower Protection Act as a foil, this paper considers the optimal design of a whistleblower protection law that would be effective in addressing human rights abuses. The Japanese law was originally enacted in April 2006, but it was deeply flawed. In June 2022, the government enacted a revised version of the Act. It still has significant deficiencies.

Although victims of corporate abuses sometimes blow the whistle, whistleblowing by third parties who are not the victims of corporate wrongdoing is becoming increasingly common in Japan.[4] Using the law to protect whistleblowers from retaliation is the key to preventing abuses of human rights associated with business activities, but the law must be robust enough to do so.

II. The Japanese Whistleblower Protection Act of 2006

Overview of the 2006 Act

On 1 April 2006, Japan enacted the Whistleblower Protection Act (2006 Act). Modelled primarily on the UK's 1998 Public Interest Disclosure Act, Japan's 2006 Act establishes requirements for receiving legal protection in each type of reporting context: reporting within a business, reporting to a government agency, and reporting to other outside organizations (e.g., news organizations and consumer groups). The law applies to workers in private companies and public institutions. It provides legal protection for workers who report a crime if the workers have no improper purpose and meet certain requirements. Whistleblowers may use this law as a basis for filing an out-of-court or in-court claim against a company in order to seek a remedy for any adverse treatment that they have received for blowing the whistle.

The two purposes of this short law, which consists of only 11 articles, are to protect whistleblowers who report crimes from retaliatory actions such as dismissal, demotion or

[3] For a detailed discussion, see Masaki Iwasaki, 'Relative Impacts of Monetary and Non-Monetary Factors on Whistleblowing Intention: The Case of Securities Fraud' (2020) 22 *University of Pennsylvania Journal of Business Law* 591, 603.

[4] Toshiaki Yamaguchi, 'Bizinesu to zinken gensoku no zissen [Business and Human Rights Principles in Practice]', Bizinesu Houmu No Heya [Business Law Room] (19 July 2021), http://yamaguchi-law-office.way-nifty.com/weblog/2021/07/post-a23e56.html (accessed 16 October 2022).

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reduction in pay, and to ensure that companies and government agencies comply with regulations to protect the lives, health and property of citizens.[5] The over-arching objective of the Act is to promote whistleblowing by providing informants with appropriate legal protections and to use the threat of whistleblowing to deter organizational wrongdoing.

The 2006 Act distinguishes between three types of whistleblowing: reporting within a business or other organization, reporting to a government agency, and reporting to other outside organizations. The requirements for receiving legal protection are the least strict for whistleblowing within organizations and the most strict for whistleblowing to external organizations other than administrative agencies. The reason for these differences is that the legislators thought it best that problems within an organization be resolved by the organization itself when possible, in large part because they thought that reporting to an external institution other than a government agency would unnecessarily damage the reputation of the organization if the report proved to be false.

Whistleblowing within a business is legally protected if a whistleblower believes that a criminal act has occurred or is about to occur.[6] Protection of reporting to an administrative agency, however, requires that a whistleblower have reasonable grounds to believe that a criminal act has occurred or is about to occur.[7] In the latter case, then, the standard of proof is stricter; more evidence is required to obtain legal protection. In addition to the condition of possessing reasonable grounds, legal protection for reporting to other external organizations also requires that the whistleblower have reasonable grounds to believe that the whistleblower's organization will retaliate against him or her or that the organization will destroy evidence if he or she reports internally.[8]

Under the terms of the 2006 Act prior to its revision, not all whistleblowers were eligible for legal protection, and corporate officers[9] and former employees were not covered. Nor were whistleblowers entitled to legal protection for all kinds of wrongdoing committed by businesses. The scope of facts subject to protected reporting was limited to certain criminal offences and did not cover acts for which only administrative fines could be imposed.

Consequences of the Act

After the 2006 Act came into effect, the amount of whistleblowing increased as more businesses set up internal reporting systems. Most whistleblowers have reported some kind of human rights abuse. In a survey of businesses that the Consumer Affairs Agency conducted in 2016, it asked businesses that had established a whistleblower hotline about the types of reports they received, allowing respondents to choose multiple answers. Among 1,592 businesses, the highest percentage, 55 per cent, had received reports on acts destructive of the workplace environment, such as workplace bullying and sexual harassment; 27.5 per cent had received reports on violations of internal rules like employment and working rules; 11.5 per cent had received reports on violations of labour laws, such as non-payment of overtime wages.[10]

[5] Act, Article 1. See an English translation of the Act at: https://www.japaneselawtranslation.go.jp/en/laws/view/3362/en (accessed 16 October 2022).

[6] Act, Article 3 (i).

[7] Act, Article 3 (ii).

[8] Act, Article 3 (iii).

[9] Corporate officers include directors and executive officers. See Revised Act, Article 2 (1).

[10] Consumer Affairs Agency, *Minkan zigyousya ni okeru naibu tuuhou seido no zittai tyousa houkokusyo* [*Survey of Whistleblower Systems in the Private Sector*] 47 (2016), https://www.caa.go.jp/policies/policy/consumer_system/whisleblower_protection_system/research/pdf/research_190909_0002.pdf (accessed 16 October 2022).

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However, although the number of whistleblowers increased, those reports were often not properly handled by the organizations that received them, or the whistleblowers were not appropriately protected, or both. In a survey of workers conducted by the Consumer Affairs Agency in 2016, 43 per cent of 3,000 respondents said that they would not report if they learned of misconduct – not to their own organization, not to a government agency, not to other external organizations.[11] The main reasons given for being unwilling to report were belief that the situation would not improve (27.8 per cent) and fear of being retaliated against (24.8 per cent). Of the 197 respondents who had actually reported misconduct, 51.8 per cent indicated that no investigation took place or no corrective action was taken as a result, and 56.9 per cent of these 197 respondents gave up trying to solve the problem.[12]

If whistleblowing systems are to function effectively, organizations that receive whistleblowing tips must handle them properly and actually resolve the problems being reported, and whistleblowers must be appropriately protected. If the first condition is not met, people will be discouraged from blowing the whistle for fear that doing so would be pointless. If the second condition is not met, they will hesitate to report for fear of retaliation. The 2006 Act received much criticism for failing to ensure that these two conditions are met, so the government amended the Act. The revised Whistleblower Protection Act of 2022 ('Revised Act') came into effect on 1 June 2022.

III. Revised Whistleblower Protection Act of 2022

This section describes the main amendments in the Revised Act.

Duty to Maintain an Internal Reporting System

After the original version of the 2006 Act began to be enforced, more and more businesses set up internal reporting systems, but many of these systems were mere formalities and ineffective. So the Revised Act requires businesses with 301 or more employees to establish a system that properly responds to internal reporting.[13] Each business entity must appoint someone to manage the internal reporting system, and this person is obliged to keep confidential any information that could identify a whistleblower.[14] If the business is a stock company, regardless of whether it is a publicly-traded company, the directors of the company have a duty to maintain an internal reporting system that fulfils the requirements of the revised Act.[15] If they violate this duty, they are liable for damages to the company and to third parties, including whistleblowers.[16]

Relaxed Requirements for Reporting to Administrative Agencies

Under the 2006 Act, a whistleblower was required to have reasonable grounds to believe that a wrongful act had occurred or was about to occur in order to be legally protected when reporting to an administrative agency, and this burden of proof was a heavy one. The

[11] Consumer Affairs Agency, *Roudousya ni okeru koueki tuuhousya hogo seido ni kan suru isiki nado no inta-netto tyousa houkokusyo* [*Internet Survey of Workers' Awareness of Whistleblower Protection Systems*] 11 (2016), https://www.caa.go.jp/policies/policy/consumer_system/whisleblower_protection_system/research/pdf/research_190909_0004.pdf (accessed 16 October 2022).

[12] Ibid, 54–55.

[13] Revised Act, Article 11 (2). See the Revised Act at https://elaws.e-gov.go.jp/document?lawid=416AC0000000122 (accessed 16 October 2022).

[14] Revised Act, Article 11 (1).

[15] Companies Act, Article 355.

[16] Companies Act, Articles 423 (1) and 429 (3).

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legislators reduced this burden in the 2022 revision: a whistleblower is now legally protected if he or she submits only a document stating the whistleblower's name and address, the acts being reported, the reason that the whistleblower believes a wrongful act has occurred or is about to occur, and the reason that he or she believes that legal action should be taken with respect to the reported acts.[17]

Definition of Whistleblowers

The Revised Act now covers corporate officers[18] and former employees who report within one year of resignation as whistleblowers who are entitled to legal protection.[19] Japanese legislators believed that employees who have just left a firm are more likely than employees who left the firm much earlier to have information about ongoing misconduct in the organization and that this information could be used to expose such misconduct.[20] They also believed that corporate officers are more likely to know about serious misconduct than lower-level employees because of their involvement in important organizational decision-making.[21] Japanese lawmakers also took into account the fact that under the 2006 Act, corporate officers and former employees were still often treated adversely, adverse treatment that included harassment and damage claims about breaches of confidentiality.[22]

Although these revisions improve the original 2006 Act, they are still inadequate. There is no good reason to provide legal protection only to those employees who have left a firm one year ago or less. For the sake of maintaining anonymity, some former employees may not want to blow the whistle very soon after resigning. Even more than a year after resigning, some former employees remain vulnerable to retaliation if they blow the whistle. For example, employers may make claims for return of severance pay or for damages for breaching confidentiality.[23]

Scope of Facts That Can Be Reported

The Revised Act expands the scope of the facts that may be reported in protected whistleblowing by including wrongful acts subject to administrative fines in addition to wrongful acts subject to criminal penalties.[24] The legislators accepted the argument that expanding the scope of facts subject to whistleblowing makes businesses more likely to comply with laws and regulations and that even wrongful acts subject only to administrative fines can cause serious harm.[25]

IV. Towards a Whistleblower Protection Law More Fully Consistent with the UNGPs

In relation to protecting human rights, whistleblower protection laws have two functions: (i) to prevent legitimate whistleblowers from suffering retaliation for

[17] Revised Act, Article 3 (ii).

[18] Former officers are not covered. See the revised Act, Article 2 (1) (iv).

[19] Revised Act, Articles 2 (1) (i) and (iv) and 6.

[20] Ryouta Totsuka and Asuka Hachisu, 'Kaisei koueki tuuhousya hogohou no gaiyou [Overview of the Amended Whistleblower Protection Act]' (2022) 6 *Houritu no hiroba* [*Legal Forum*] 4, 9.

[21] Ibid.

[22] Ibid.

[23] Wataru Tanaka, 'Kaisei koueki tuuhousya hogohou no kadai [*Issues in the Revised Whistleblower Protection Act*]' (2022) 6 *Houritu no hiroba* [*Legal Forum*] 24, 27.

[24] Revised Act, Article 2 (3).

[25] Totsuka and Hachisu, note 20, 10.

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blowing the whistle and (ii) to deter organizational wrongdoing, including abuses of human rights, by promoting whistleblowing. Appropriate legal intervention is necessary if companies are to establish the kind of effective grievance mechanisms discussed in the UNGPs, and the government needs to further improve the Revised Act to fulfil these two functions.

Reversing the Burden of Proof Regarding Adverse Treatment of Whistleblowers

Under Japan's whistleblower protection system, a whistleblower can obtain legal redress only by demanding that a business correct adverse treatment and, if the business fails to do so, also files a lawsuit proving that the whistleblower was treated adversely because of the whistleblowing. However, businesses generally have more evidence and information than whistleblowers do about the reasons for such adverse treatment as dismissal, demotion, or reduction in pay. Moreover, whistleblowers have less incentive to blow the whistle if they must shoulder the burden of proving adverse treatment in addition to that of submitting evidence of wrongdoing.

For these reasons, the burden of proof should be shifted to businesses. When accused of retaliation against a whistleblower, to avoid being penalized for this businesses should be required to legally claim and prove they are not treating the whistleblower adversely because of the whistleblowing. The EU Directive on Whistleblowing has adopted this approach and is calling on member states to reverse the burden of proof with respect to retaliation against whistleblowers.[26]

Introducing Strong Sanctions Against Acts of Retaliation

Under the Revised Act currently in force, if a business treats a whistleblower in a disadvantageous manner, the business is required only to restore the whistleblower to the status that he or she enjoyed prior to the disadvantageous treatment, and the business is not subject to any administrative or criminal penalties. If a business violates its duty to establish an effective internal reporting system, the government will provide the business with guidance on how to improve; if the business still fails to comply, its name will be made public. This is a minor sanction[27] that does too little to discourage businesses from committing wrongdoing. More serious sanctions, such as administrative orders and criminal penalties, should therefore be imposed on businesses for adverse treatment of whistleblowers.

The EU Directive on Whistleblowing and the US Sarbanes-Oxley Act impose criminal penalties if a business retaliates against a whistleblower.[28] Japan's Act imposes much weaker sanctions on businesses that retaliate against whistleblowers. Moreover, the excessive burden of proof that the Act imposes on whistleblowers discourages rather than encourages whistleblowing. Under such circumstances, businesses may even exploit an internal reporting system as a means of discovering which employees are critical of corporate management.[29]

[26] EU Directive on Whistleblowing, Recital 93.

[27] Revised Act, Articles 15 and 16.

[28] EU Directive on Whistleblowing, Recital 10; Sarbanes-Oxley Act, Section 1107, 18 U.S.C. 1513(e).

[29] During World War II, the Japanese government required its citizens to monitor each other and report anti-government people to it using a system similar to whistleblowing. See Masaki Iwasaki, 'Segmentation of Social Norms and Emergence of Social Conflicts Through COVID-19 Laws' (2022) 13:1 *Asian Journal of Law and Economics* 1, 26.

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V. Conclusion

For all countries, designing whistleblower protection laws that are consistent with the UNGPs is a challenge. This paper analysed Japan's Whistleblower Protection Act as one example. Understanding the shortcomings of the Act can teach us many lessons that will help guide other countries as well as Japan. Specifically, a broad interpretation of the definitions of whistleblowers and reportable facts of abuses, reducing the burden of proof on whistleblowers, and imposing severe sanctions for retaliation against whistleblowers are essential for effective whistleblower protection. In addition, it would be worthwhile to consider strengthening whistleblower protection in supply chains and introducing a monetary reward system for whistleblowers. In the case of Japan, the former is mentioned in the Guidelines on Respecting Human Rights in Responsible Supply Chains, which was released by the Japanese government in September 2022,[30] but the arguments about whistleblowers are vague and should be fleshed out by law. The latter idea has been rejected in Japan but introduced in the U.S. and other countries. It is likely to be extremely effective in promoting whistleblowing.[31]

Conflicts of interest. The author declares none.

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[30] Ministry of Economy, Trade and Industry of Japan, 'Release of Japan's Guidelines on Respecting Human Rights in Responsible Supply Chains', https://www.meti.go.jp/english/press/2022/0913_001.html (accessed 13 December 2022). The protection of whistleblowers in supply chains is also touched on briefly in the Consumer Affairs Agency's guidelines for establishing internal reporting systems for private businesses. See Consumer Affairs Agency of Japan, *Guidelines for Private Enterprises Regarding the Development and Operation of Internal Reporting Systems Based on the Whistleblower Protection Act* (2016), https://www.japaneselawtranslation.go.jp/notices/view/104 (accessed 13 December 2022).

[31] See Masaki Iwasaki, 'A Model of Corporate Self-policing and Self-reporting' (2020) 63 *International Review of Law and Economics*, 105910, 12.

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