

Global Corruption Report: Education

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Private civil actions

A powerful tool in the fight against corruption

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The battle against corruption has generally been framed in terms of using and strengthening criminal justice systems. Controlling corruption has been accomplished by enhancing the state's capacity to prevent, detect, investigate and prosecute violators, and by improving anti-corruption laws and regulations. The most robust rule-of-law approaches, whether strengthening whistleblower protection, improving access to justice or establishing investigative bodies, are designed to reinforce the prospects of criminal prosecution.

A notable weakness of the focus on criminal justice in the fight against corruption is that, ultimately, success in reducing corruption depends upon vigorous enforcement of the criminal law by state authorities through investigation and successful prosecution. If the required level of investigative and prosecutorial vigor is not present, corruption will continue. Even when prosecution *is* attempted, its success depends upon overcoming the high standards of proof required in criminal proceedings.

While criminal prosecution should remain the centrepiece of anti-corruption efforts, there is also a growing interest in the use of private civil actions to fight corruption. These may be particularly relevant to the fight against corruption in education, which in turn may be a good testing ground for the civil actions approach, in which such remedies as injunctions against the barring of a student from admission to a school, the recovery of an illegal fee extorted from parents under duress or the disciplinary sanctioning of a school official for failing to register a child in school are clearly more valuable to a victim and society in general than ensuring that a perpetrator is convicted of a criminal offence.

Legal basis for civil actions

The legal framework needed to support private civil actions is well established. Most civil and common law jurisdictions recognise the right of private individuals and entities, including states, to initiate legal proceedings to recover damages or other remedies for harm suffered as a result of intentional acts (bearing in mind that there may be differences and nuances in calculating compensation, as different jurisdictions apply legal doctrines very differently in this area of law).²

It is perhaps of greatest significance that the right of private parties to instigate civil proceedings against corruption has now been recognised in key international treaties. The

Council of Europe's Civil Law Convention on Corruption³ provides the right to compensation for damage resulting from an act of corruption, and requires that each state party legislate for the right to bring a civil action in corruption cases.⁴ Although the convention has a limited number of signatories, it is notable for its extensive and explicit definition of what the signatory states must provide.

The extensive adoption and universal application of the UN Convention against Corruption (UNCAC) makes it arguably more significant.⁵ Article 35 of the convention requires that state parties ensure that entities (including states) and (legal and natural) persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation. Further, article 53(a) provides that states can initiate civil actions in connection with asset recovery proceedings.

Despite these encouraging developments, awareness of the 'civil law option' in the fight against corruption among the general public, national legal circles and the international anti-corruption community is low. This might change through better communication of the notable advantages of the civil actions approach.

Potential advantages to pursuing private civil actions

There are a growing number of advocates of the use of civil actions in the fight against corruption. As early as 2007 legal scholar Bryane Michael⁶ called upon donors to support pursuit of civil remedies against corruption instead of directing their efforts at criminalisation.⁷ He argued that civil remedies such as the ability to sue corrupt officials and their departments are a 'powerful weapon against corruption', and that, in the case of suits initiated by businesses, the prospect of winning money awards provides a greater incentive for denouncing corruption than the prospect of seeing a corrupt competitor prosecuted. Simon Young, a professor in the University of Hong Kong's Faculty of Law, has further argued that the rise in use of private legal actions against corruption lies in 'the empowering effect of suing, the political significance of these lawsuits'.⁸ For policy-makers and reformers, this should be a significant consideration.

There are several advantages that civil suits may have in the fight against corruption. These include the following:

Increased number of litigants

The number of potential instigators of legal actions against the corrupt is vast. In theory, every person and legal entity in the world and all states, if harmed (whether directly or indirectly) by corruption, can initiate actions.⁹ Instead of relying on a small number of state officials to bring criminal actions, reformers would do well to consider how to leverage the power residing in a vast army of well-informed private individuals and legal entities looking after their own interests.

Further, a state party harmed by corruption can also use civil suits as an adjunct to criminal prosecution to recover funds removed from the state through corruption, whether or not the criminal prosecution is successful.

A different model of justice: retributive versus restorative?

As outlined above, an individual or legal entity harmed by a corrupt act would appear to have more incentive to initiate a legal proceeding to recover damages than to report a corrupt act to a public official. Justice for the state normally means a criminal conviction and the imposition

of punishment. While it might bring some satisfaction to a victim of corruption to see the wrongdoer prosecuted, it is likely that the victim, whether a person or a legal entity, would be more likely to feel that the best outcome would be 'to be made whole' or to be compensated for losses.

Civil actions are more suited to restorative justice than criminal prosecutions are. Under criminal law, a victim's sense of vindication may be satisfied by a successful prosecution, but the victim's net economic position remains unchanged. When the prosecutor fails to act or decides not to proceed because of the unlikelihood of conviction, the civil law option may still be available to victims if they can meet the threshold requirements of legal standing and other technicalities required to initiate legal action.

A different burden of proof: beyond reasonable doubt versus balance of probabilities?

The burden of proving a case is stated and managed differently in different legal systems. In many jurisdictions the standard of proof required for the success of a civil proceeding is lower than the standard of proof required for a criminal conviction. In Common Law jurisdictions the burden of proof in a criminal action is often formulated as 'beyond reasonable doubt'. In civil proceedings in such jurisdictions, the standard is more a matter of balancing the facts and arguments presented by the litigants, and to succeed the plaintiff must present a 'preponderance of evidence'. Caution is called for in this area, however. For instance, under German law, which follows the Continental Law tradition, the judge must be convinced beyond reasonable doubt in all types of proceedings.¹⁰

In any event, in some jurisdictions in which prosecutorial resources are scarce and government budgets meagre, one may be able to make a working assumption: that in a situation in which the judicial authorities are not themselves compromised, civil litigants will have an easier time prevailing against a defendant than the state prosecutor will for the same corrupt acts.

Too small to prosecute?

Civil proceedings are available to victims seeking redress for acts of petty corruption that state authorities will rarely act on in this area, if only because they do not have the resources to investigate and prosecute every act of petty corruption. Among the poor and vulnerable in particular, however, it is the helplessness engendered by endemic petty corruption that establishes the pattern for opportunistic corruption throughout society. If this is left unchecked, it is hard to imagine that a state will succeed in controlling larger kinds of corruption.

Much of the corruption in the education sector of developing countries, although pervasive, may appear to the prosecutor to be too trivial to pursue. The decision to prosecute becomes a product of a cost-benefit analysis in which a case may be perceived as 'too small to prosecute'. Without any remedy, though, victims of various forms of petty corruption in the education sector are likely to suffer grave injustices, which impact significantly on their prospects for working their way out of poverty. When the prosecutor is inactive, civil suits may be an alternative.

To overcome the difficulties that filing civil actions against petty corruption may present, the role of civil society organisations and NGOs, including legal aid organisations, becomes vital. They would be key to organising some form of class actions or some other kind of mass litigation scheme, or to providing the necessary resources and guidance that would be required for individuals to pursue their own civil actions.

Box 4.5 Acts in the education sector that raise private civil action risk based on corruption

Corrupt act: unexplained budgetary shortfall.

Action: parents could initiate an action to secure an order to compel an independent accounting, which would trace the actual use and allocation of authorised budgets.

Corrupt act: parents being forced to pay an unofficial fee to a school administrator to secure admission of a child into a school.

Action: parents could initiate an action for the return of the unlawful fee.

Corrupt act: a child being refused admission to a school because parents did not pay a requested bribe to a school administrator.

Action: assuming that the minimum conditions for launching a civil action and recovery for compensation of damages were present (such as proven illegality of the conduct, actual damage and the existence of a causal link between the conduct and the damage), parents could initiate a suit to compel admission of the child.

Corrupt act: schoolteacher or administrator abusing his or her position of trust for personal gain.

Action: parents initiate civil action against violator and school for damages, and restraining order in cases of harassment.

Corrupt act: fraud in the employment and deployment of teachers.

Action: teachers deprived of opportunities initiate an action to compel judicial review of the hiring and deployment process and annulment of hiring and deployment decisions.

Beginning with the poorest of the poor

One way to draw attention to the potential that private civil actions have in the fight against corruption is to help the poorest of the poor secure their rights to education. A novel example would be set if the most vulnerable persons in society were to take the lead. They would provide an illustration of how the legal empowerment of the poor can encourage people at all levels to engage in the fight against corruption.

As an example, consider the hypothetical case of a mother who accompanies her daughter to a government school in country X to ensure that the daughter is properly enrolled. When the mother arrives, the headmaster informs her that she has to pay a special fee as a condition of her daughter's admittance. The fee is the equivalent of a month's income for the mother. The mother is faced with a dilemma. If she goes away, her daughter may never receive a formal education – a benefit that, in principle, is provided free of charge to all children. If the mother pays the extorted charge, however, it would bring great hardship to her family. In normal circumstances, the mother would not have a means of recourse. Even if she complains to the authorities, the prosecutor in her country is not likely to be interested in prosecuting this kind of petty crime. Even if the prosecutor were to be interested, the prosecutor's office would probably not have the resources to undertake prosecution of this kind of

endemic malfeasance. Tragically, though, it is precisely pervasive corruption of this kind that weighs so heavily on the poor.

Nonetheless, it may be that the poorest of the poor – people who are highly unlikely to get justice from the prosecutor or anyone else – can show the way. If the poorest of the poor were to decide to take action in the courts, it would send a strong message to the corrupt, and perhaps galvanise others into action.

Through the rich network of support groups already operating in country X, especially legal aid groups, the mother of the child – and others who have been similarly victimised by the headmaster – could be helped to file tiny suits against the headmaster just to get back what they had to pay under duress. Even in jurisdictions in which the burden of proof in civil actions would be lower than that required in criminal prosecutions, the plaintiff would still have to present proof that the alleged acts took place and the judge would still need to be convinced, however. Therefore, good cases in which there are multiple witnesses to testify as to the corrupt act could be given priority in this exercise. If there were five or 10 – or, indeed, 50 – suits against the same administrator for the same type of corrupt behaviour then, no matter what their outcomes, the education authorities would have to address the situation.

An aggressive communication strategy could be put in place to tell the story worldwide. Getting such cases into the limelight would also limit the ability of corrupt judges to dismiss cases involving obvious exploitation of the poor. Nothing could be more inspirational than a poor mother who is seeking to get back her meagre earnings by standing up and demanding justice in court. Her message would be simply 'Give it back'. Perhaps the name for the movement could be the 'Give it back' movement.

Challenges and open areas

There are several difficulties with civil suits against corruption that must be taken into account.

First, while most legal systems allow private actions to recover losses due to corruption, the approach is seldom used. Thus, there is a shortage of jurisprudence and experience to provide guidance in the preparation and pursuit of legislation.

Second, the same fear of consequences, which inhibits whistleblowing, would certainly need to be overcome. It takes a brave soul to file a civil suit against a public official in any country.

Third, the surreptitious nature of corrupt acts makes them difficult to prove. Without sufficient evidence a suit is not likely to be successful.

Fourth, there are other practical challenges that also need to be borne in mind, such as the cost of launching civil suits, the time needed for litigation, the need to identify assets against which the judgment can be enforced and the possibility of then requiring asset-freezing orders to ensure that a judgment can be paid.

Fifth, in addition to the actual civil suit actions, there are other ancillary legal issues that need to be further explored, such as establishing causation between the corrupt act and the damage suffered, as well as the actual calculation of damages.

Sixth, some jurisdictions may require that, before a civil suit for corruption is filed, a criminal proceeding must have been instigated. When such a requirement exists, the room for private civil actions may be limited.

Finally, the possibility of initiating civil actions presumes a transparent and functioning judiciary. This may not be present where the judiciary is weak and courts are clogged with backlogs of legal claims.

These limitations may well outweigh the advantages of private action outlined above. Any serious attempt to start a 'civil action movement' in any country would have to begin with a

thorough analysis of the laws there. If the laws of the jurisdiction were not found to favour the approach, the first step in the movement would then have to be the launching of an initiative to change the laws. In this regard, the above-cited Council of Europe Civil Law Convention on Corruption and the preparatory and implementation work related to that convention would be instructive.

Conclusion

The use of private civil actions has the potential to become a useful tool in the fight against corruption. Legal systems and international conventions already provide the legal framework. The international anti-corruption community should consider empowering the poorest of the poor in the fight against corruption. The poorest of the poor could lead the way, and private actions against corruption in education provide a particularly strong entry point for tackling endemic corruption that once seemed out of reach.

Notes

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2. See, for example, Paola Mariani, 'How Damages Recovery Actions Can Improve the Fight against Corruption: The Crisis of Criminal Law Policies and the Role of Private Enforcement in an Italian Case of Judicial Corruption', Legal Studies Research Paper no. 2007241 (Milan: Bocconi University, 2012).
3. Civil Law Convention on Corruption, Strasbourg, 4 November 1999, article 3, paragraph 1.
4. Civil Law Convention on Corruption – Explanatory Report (COETSER 2), 4 November 1999, available at www.worldlii.org/int/other/treaties/COETSER/1999/2.html (accessed 6 January 2013).
5. UN General Assembly, United Nations Convention against Corruption, 31 October 2003, A/58/422, available at www.unhcr.org/refworld/docid/4374b9524.html (accessed 6 January 2013).
6. Bryane Michael is an academic currently lecturing at Linacre College, Oxford, and the American University in Paris as well as serving as a senior adviser to the Ukrainian and Moldovan governments. He also sits on the board of directors of four companies. Previously, he worked for almost five years with the World Bank and the OECD, serving as a key adviser to the governments of Russia, Turkey, Azerbaijan, Bolivia and Nicaragua.
7. Bryane Michael, 'Suing against Corruption: The Role of Civil Law', Policy Innovations, 23 July 2007, available at www.policyinnovations.org/ideas/innovations/data/000015 (accessed 6 January 2013).
8. Simon Young, 'Why Civil Actions against Corruption?', *Journal of Financial Crime*, vol. 16 (2009), pp. 144–159.
9. Note, however, that legal standing and the formal ability to sue will in practice depend upon the legal rules of individual state parties, who will have idiosyncratic rules with respect to commencing proceedings.
10. Juliane Kokott, *The Burden of Proof in Comparative and Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Alphen aan den Rijn: Kluwer Law International, 1998), p. 18.