

Standing Doctrine and Anticorruption Litigation: A Survey

Matthew C. Stephenson
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This paper is the first in a series examining the challenges and opportunities facing civil society groups that seek to develop innovative legal approaches to expose and punish grand corruption. The series has been developed from a day of discussions on the worldwide legal fight against high-level corruption organized by the Justice Initiative and Oxford University's Institute for Ethics, Law and Armed Conflict, held in June 2014.

Mathew C. Stephenson is Professor of Law, Harvard Law School, where he teaches administrative law, legislation and regulation, anti-corruption law, and political economy of public law. His research focuses on the application of positive political theory to public law, particularly in the areas of administrative procedure, anti-corruption, judicial institutions, and separation of powers.

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Contact:
Ken Hurwitz
Senior Legal Officer
Anticorruption
Open Society Justice Initiative
Ken.Hurwitz@opensocietyfoundations.org

Introduction

While private parties have always played a role in anticorruption enforcement, for example by acting as whistleblowers or watchdogs, the pursuit of legal action in the courts against corrupt actors has usually been left to public bodies – prosecutors, anticorruption agencies, ombudsmen, and the like.¹ But in recent years, a range of private citizens and civil society organizations (CSOs) have become more active in going to court directly, bringing (or at least contemplating) a variety of anticorruption legal actions. Such actions can take a variety of forms. Alleged victims of corruption might sue for compensation, restitution, or other relief from corrupt government officials and private parties. In some instances, where the legal system permits it, private parties have sought, or may seek, judicial imposition of criminal penalties on corrupt actors. Private parties may also file suits challenging the legality of government decisions that were allegedly the product of corruption – sometimes seeking to invalidate allegedly unlawful government action or inaction. And sometimes private complainants might seek to compel government agencies to initiate enforcement proceedings against corrupt actors, when such enforcement has been withheld for allegedly unlawful reasons. This movement in the direction of more private anticorruption litigation is in keeping with the United Nations Convention Against Corruption (UNCAC), which requires every member state to “take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or 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.”²

An important potential barrier to private anticorruption actions, however, is the doctrine of standing (known in some systems by the Latin term *locus standi* – “a place to stand”). In brief, courts will only entertain suits complaining of unlawful conduct by complainants who are legally entitled to do so. This inquiry usually (though, as we shall see, not always) involves determining whether the complaining party has a sufficiently direct and concrete interest in the subject of the lawsuit. If the complaining party lacks standing, the court will not hear the complaint, no matter how plausible the allegations of unlawful conduct. Standing doctrine is of particular relevance to lawsuits challenging corruption, or failure to act against corruption, because in many such cases it is difficult to demonstrate a direct connection between the defendant’s unlawful conduct and an injury to the would-be private

¹ For example, a 2009 review of practice in nine European countries (Bulgaria, Denmark, Estonia, France, Germany, Poland, Spain, Sweden, and the United Kingdom) concluded that there had been relatively little attention given to the possibility of using private lawsuits as an anticorruption tool, even when such suits were available under existing law. See Olaf Meyer, ed., *The Civil Law Consequences of Corruption* (2009).

² See United Nations Convention against Corruption, art. 35.

complainant.³ It is therefore important for anticorruption activists hoping to use the courts to fight corrupt behavior to have a basic familiarity with standing doctrine, as well as a sense of the diversity of approaches to this area of law. Indeed, legal systems – even systems within the same legal “family” – vary quite a bit with respect to the doctrine of standing.

The purpose of this paper is to provide a brief overview of standing doctrine and its implications for private anticorruption litigation. The paper is intended to complement the other contributions to this series, many of which touch on issues of standing in the context of particular cases or initiatives. The paper will proceed in four parts. Part I introduces the basic concept of standing and discusses some of the reasons why legal systems might (or might not) want to impose limits on the parties who are entitled to challenge unlawful behavior in court. Part II provides a brief, non-comprehensive survey of the approaches to standing in civil cases that different legal systems have adopted, in order to illustrate the significant doctrinal differences across systems and to suggest some implications of these doctrinal differences for private anticorruption litigation in the civil context. Part III considers the standing of private parties to initiate or to compel *criminal* actions, and also discusses some additional topics that, while perhaps not involving standing per se, are sufficiently related to mention. Part IV discusses how standing requirements may differ when the party bringing the challenge is a CSO, rather than an individual, business organization, or other entity. This topic is of particular importance to private anticorruption litigation, given the central role that CSOs have played, and will continue to play, in spearheading such action.

I. What Is Standing Doctrine and Why Does It Exist?

Although different legal systems organize their concepts somewhat differently, standing doctrine is generally distinguished from other potential restrictions on access to the courts in that standing doctrine focuses on the complaining party, rather than on the nature of the claim, the identity of the defendant, or the merits of the suit (though in practice it is not always possible to draw clean, sharp lines between these different considerations). The basic idea is that there may be limits on which individuals or entities are entitled to invoke the power of the courts to remedy an unlawful activity. Those with a sufficient interest in that allegedly unlawful activity have standing to bring a suit; those without a sufficient interest do not have the requisite standing, and the courts will not entertain their claims or provide judicial redress, no matter how egregious the alleged violations of the law.

³ This is one reason why even relatively restrictive standing limitations may not necessarily contravene UNCAC Article 35, which after all only requires state parties to grant the right to initiate legal proceedings to those who “have suffered damage as a result of” corruption. A country’s standing doctrine can be viewed as determining what sorts of injuries count as “damage,” and what sorts of causal connection between the corruption and the damage are required to establish that the damage was the “result of” corruption. Here it is also important to recall that Article 35 only requires a state party to take such measures that are “in accordance with principles of its domestic law,” which would include its law of standing.

How do courts decide whether a would-be plaintiff has a sufficient interest in the alleged misconduct to have standing to maintain a lawsuit? As subsequent sections of this paper will describe, there is a great deal of diversity across (and sometimes within) different legal systems in the answer to this question. Some systems have very liberal standing rules, which allow just about anyone who can claim a good-faith interest in the subject matter to initiate a lawsuit. Such systems are hospitable territory for anticorruption activists interested in using private litigation as a major component of their overall strategy. Other systems, however, have much more restrictive standing rules, often requiring a would-be plaintiff to demonstrate that he or she was directly and personally injured by the defendant's allegedly unlawful conduct, and that this injury is particular and concrete, rather than broad, diffuse, abstract, or ideological. Such restrictive standing rules may pose challenges to the use of private litigation as part of an anticorruption strategy, because the damage that corruption does to a society is often quite difficult to connect to specific individual victims. This is not always the case – if a building collapses because an inspector took bribes to overlook substandard construction, or a business loses a contract because a rival paid off the procurement officer, or a corrupt minister embezzles funds from the state treasury and flees the country, then there may be identifiable plaintiffs (tenants in the building, the business that lost the contract, the state itself) who can show a direct, personal, concrete injury. But quite often, corruption (whether grand or petty) causes severe harms that are nevertheless diffuse, indirect, and widely shared: corruption may distort markets, worsen government performance, sap vital public programs of needed resources, marginalize and oppress those without connections to the ruling elites, and so forth. In this sense, anticorruption activists who want to initiate private litigation are often in a more difficult position than, say, CSO activists seeking redress for more traditional human rights violations, which usually have identifiable victims with identifiable injuries.

The case for liberal standing rules is intuitively appealing, perhaps especially to anticorruption advocates who are likely the principal audience for this series and this paper. After all, if a defendant has broken the law, it seems straightforward (at least to many people) that someone who objects to that illegality should be able to go to court and get some sort of redress – at the very least, an order to stop the unlawful conduct, and perhaps some sort of penalty or other remedy. And while most people would probably find it sensible to limit standing in cases of purely private injury – if X breaches a contract with Y, then it should be up to Y to decide whether she wants to sue for damages—in cases of unlawful conduct that causes a public injury, many would maintain that any member of the public, or at least any member of the public who can demonstrate a good-faith concern about this particular sort of illegality, should be able to sue.

Because a position in support of liberal standing rules is more intuitive (and, I should acknowledge, the position to which I am generally more sympathetic), it is perhaps worth spending a bit of time considering the possible justifications for imposing standing requirements that make it difficult for plaintiffs to bring lawsuits in cases

involving illegal conduct with diffuse, general harms. Advocates for a more restrictive standing doctrine put forward a number of such justifications; most revolve, in one way or another, around concerns about the appropriate role of courts and litigation in addressing social problems.

For example, some maintain that although courts are relatively good at resolving cases that involve the infringement of legal rights held by individuals, and assigning liability for concrete injuries, courts are not terribly good at managing complex social problems, reforming complex institutions, or crafting remedies that balance conflicting political values. For this reason, the argument continues, courts should be reluctant to weigh in on cases where there is not an identifiable injured party with a concrete, individual interest – such as the infringement of an individual right – that the court can vindicate with a relatively simple judicial remedy. A related but perhaps distinct justification for restrictive standing doctrines has been advanced in systems that endorse a separation of legislative, executive, and judicial power. According to this (controversial) argument, the general enforcement of the law is an executive function that is the province of the executive branch; the judicial branch is concerned with redressing injuries to identifiable legal interests. So, the argument continues, if the legislature and the courts empower private parties to oversee the general enforcement of the law, out of the context of individual legal injury, they would effectively usurp executive branch authority, and this would be bad because (according to those who subscribe to this view) the executive branch's ability to decline to enforce certain laws aggressively is an important, valuable institutional feature of the political system.⁴

Another concern that may justify a more restrictive standing doctrine is simply the conservation of judicial resources. The number of individuals with a general interest in fidelity to the law is very large (potentially everybody), and many of the complaints they bring may ultimately be meritless. Allowing the actions to proceed to the merits stage is costly, consuming scarce judicial resources and imposing considerable burdens on the defendants (often government agencies, which may be challenged from all sides). Standing may be one tool that enables courts to more efficiently screen out many cases at the front end of the process, limiting the ability of parties to file frivolous (or, for that matter, non-frivolous but ultimately meritless) legal complaints. This concern may be especially acute in contexts where there are legitimate concerns about political adversaries using the courts to harass or damage one another; courts in such settings may prefer to remain “above the fray” as much as possible, limiting access to those who can show a specific harm to themselves, rather than those who accuse their opponents of any number of unlawful acts.⁵ Indeed, as some commentators have put it, the most fundamental trade-off when crafting

⁴ See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U. L. Rev.* 881 (1983).

⁵ See David Feldman, *Public Interest Litigation and Constitutional Theory in Comparative Perspective*, 55 *Mod. L. Rev.* 44, 54-55 (1992).

standing doctrine is between the desire to enforce the law and the desire to avoid excessive judicial interference in politics.⁶

In addition, courts and commentators have sometimes expressed concern that litigants who lack a direct, personal interest in the subject of the lawsuit simply might not do a very good job, and if they bungle the suit, it might have collateral consequences for other parties whose interests are ultimately more directly affected. Even collusive suits are a possibility, though there may be other effective ways to address that concern. The idea here is that, even if standing requirements may seem somewhat arbitrary, limiting access to the courts to those with a concrete interest in the outcome of the case may ensure more effective advocacy.

To be clear, I do not offer the above discussion as an endorsement (or, for that matter, as a rejection) of any of the proffered arguments for restrictive standing rules. Rather, I seek to give a sense of the tensions and trade-offs involved in determining which individuals have the right to invoke the power of the courts to redress unlawful conduct, including corruption and related activities. There is likely no single right answer to the question of which would-be plaintiffs ought to have standing, and as the remainder of this paper will show, different systems have resolved that question quite differently. The above discussion may be relevant for anticorruption activists for an additional reason as well: as the subsequent sections will illustrate, in some countries standing doctrine has been the subject of proposed or actual reforms, and indeed the general trend around the world, particularly over the past twenty years, has been toward liberalizing standing doctrine – though there are a number of important exceptions to this trend.⁷ Insofar as anticorruption activists want to participate in the push for further liberalization of standing doctrine, they will need to engage and address the reasons why some countries remain reluctant to do so.

II. Standing to Sue in Civil Cases: A Spectrum of Approaches

Although some private anticorruption litigation seeks to impose criminal penalties on corrupt actors, to date most private anticorruption litigation, and most public interest litigation more generally, has involved civil suits. Sometimes these suits are brought against corrupt public officials, bribe-paying firms, or intermediaries (such as banks), seeking damages, injunctions, or other remedies. Civil suits may also be brought against the government; such suits may seek judicial review of government action (or inaction) that is allegedly tainted by corruption, or of the allegedly unlawful failure of the government to address corruption appropriately.

⁶ See Richard S. Kay, *Standing to Raise Constitutional Issues*, in *Standing to Raise Constitutional Issues: Comparative Perspectives* (Richard S. Kay, ed., 2005).

⁷ See, e.g., Jon Owens, *Comparative Law and Standing to Sue: A Petition for Redress for the Environment*, 7 *Envtl. Law.* 321, 324, 343 (2001).

In order to maintain such suits, the would-be plaintiffs must establish standing, and as noted above, some countries have quite restrictive standing doctrines. The United States is a leading example. According to prevailing doctrine, the U.S. Constitution requires a would-be plaintiff in a U.S. federal court to establish that the plaintiff suffered a concrete and particular “injury-in-fact,” one that is fairly traceable to the defendant’s alleged conduct, and that a favorable judicial ruling could redress. Neither a general interest in enforcing the law nor an ideological or professional interest in the subject matter is sufficient to confer standing on private plaintiffs in the U.S. federal system.⁸ And because the U.S. Supreme Court has grounded these requirements in the Constitution, they are not amenable to legislative revision. On top of those constitutional standing requirements, U.S. federal courts have adopted additional standing requirements, or read such additional requirements into statutes. For example, even if a U.S. government agency’s alleged violation of a statute has caused a private party to suffer a sufficiently concrete injury-in-fact to satisfy constitutional standing requirements, that party still does not have standing to bring a legal challenge to the action unless she can show that the sort of injury she suffered is within the “zone of interests” that the statute at issue is intended to protect.⁹ (That is, the plaintiff alleging violation of a federal statute must show not only that she suffered harm but also that this harm was of the sort the statute is intended to prevent.)

Although the United States may have one of the most restrictive approaches to standing in the world – particularly because the U.S. Supreme Court has constitutionalized the core aspects of the doctrine, making it impossible to reform through ordinary legislation – a number of other countries have adopted a similarly restrictive approach. Germany, for example, has a narrow approach to standing, requiring a complainant to show a direct injury to a personal legal interest, and not allowing private groups to sue on behalf of collective public interests.¹⁰ Nigeria – apparently influenced by the U.S. approach (a fact some commentators lament) – has also adopted a uniform standing rule that requires the plaintiff to show some particular injury (actual or threatened) that differs in some special way from the injury to other members of the public.¹¹ Likewise, the People’s Republic of China (perhaps unsurprisingly) strictly limits access to the courts for public interest

⁸ Significantly, state courts in the United States can and often do have approaches to standing doctrine that are different from, and often more liberal than, the doctrine adopted in the U.S. federal courts. For a discussion of standing issues in the context of anticorruption suits at the state level, see Beth A. Levine, *Defending the Public Interest: Citizen Suits for Restitution Against Bribed Officials*, 48 *Tenn. L. Rev.* 347 (1981).

⁹ See Jonathan R. Siegel, *Zone of Interests*, 92 *Geo. L.J.* 317 (2014).

¹⁰ See Roxane Reiser, *Towards an Actio Popularis? Standing and Constitutional Values: A Comparative Analysis*, 2 *Oxford U. Undergraduate L.J.* 24, 29 (2013); Michael S. Greve, *The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law*, 22 *Cornell Int’l L.J.* 197, 200 (1989).

¹¹ Okechukwu Oko, *The Problems and Challenges of Lawyering in Developing Societies*, 35 *Rutgers L.J.* 569, 629 (2004); Obinna B. Okere, *Judicial Activism or Passivity in Interpreting the Nigerian Constitution*, 36 *Int’l & Comp. L.Q.* 788, 804 (1987); Tunde I. Ogowowo, *Wrecking the Law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria*, 26 *Brook. J. Int’l L.* 527, 529 & 529 n.9 (2000).

litigants: Chinese civil law requires a plaintiff to have a direct interest in the suit, and this “direct interest” requirement is construed narrowly.¹² Singapore also makes it difficult for non-governmental actors to pursue public interest goals through litigation, as Singaporean courts will confer standing only on plaintiffs who can show an injury to a private right, or else some kind of “special damage” particular to that plaintiff.¹³ In these and other countries that adopt a similarly restrictive approach, public interest litigants (including anticorruption litigants) face daunting challenges. It is of course sometimes possible to identify a party who has suffered a sufficiently direct, personal injury due to corruption, but this will often not be the case.

At the other end of the spectrum, some countries have extremely liberal standing rules, at least when the plaintiff seeks to vindicate some public right. Spain and South Africa are leading examples. Spanish law grants legal standing to all Spanish citizens on issues involving the public interest, and – in stark contrast to the United States – petitioners need not show a direct injury to initiate a public interest suit, including a suit seeking judicial review of government action, or in certain cases (to be discussed more below) seeking to initiate criminal proceedings.¹⁴ South Africa’s approach to standing is, if anything, even more relaxed, allowing standing for virtually all citizens on matters of public importance, whether or not the would-be plaintiffs can demonstrate particular injury or special interest in the subject matter.¹⁵ A number of other countries appear to have adopted similarly broad approaches to standing, at least in public interest cases. For example, Colombia has a liberal standing doctrine that allows any citizen to bring a suit, even if that individual has no personal stake in the case,¹⁶ and the Venezuelan Constitution allows a plaintiff to sue not only to vindicate a personal right or interest but also to vindicate a collective or public right or interest.¹⁷ The Kenyan Constitution – though very new – also appears, at least on its face, to grant similarly broad standing rights.¹⁸

¹² Civil Litigation Procedure Act, art. 108 (2007) (China); see also Zhu Xiao & Charles Warren, *The Development of Legal Standing within Chinese Environmental Social Organizations and an American Comparative Perspective*, 1 *China Legal Sci.* 76, 78–79 (2013). This is not to say that public interest litigation is impossible in China. Indeed, interest in such litigation, particularly in the environmental context, has been growing in recent years, and there have been a few notable successes, including cases in which Chinese courts have construed the “direct interest” standard in Article 108 of the Civil Litigation Procedure Act broadly enough to allow challenges alleging various sorts of environmental pollution. Nonetheless, Chinese standing law is very much on the stricter end of the spectrum.

¹³ See Li-Ann Thio, *Administrative and Constitutional Law*, 14 *S.A.L. Ann. Rev.* 13 (2013); Tham Lijing, *Locus Standi in Judicial Review: Two Roads Diverge in a Singapore Wood*, *Law Gazette*.

¹⁴ L.J.C.A. Title II, Ch. II, §19.1.h (Spain).

¹⁵ S. Afr. Const. ch. 2 §34; see also Jack Greenberg, *A Tale of Two Countries, United States and South Africa*, 41 *St. Louis U. L.J.* 1291, 1292 (1997); Eric C. Christiansen, *Empowerment, Fairness, Integration: South African Answers to the Question of Constitutional Environmental Rights*, 32 *Stan. Env’tl. L.J.* 215, 217 (2013); Edwin Cameron, *Constitutionalism, Rights, and International Law: The Glenister Decision*, 23 *Duke J. Comp. Int’l. L.* 389, 396 (2013).

¹⁶ Constitución Política de Colombia [C.P] arts. 241–42 (Colon.); see also Victor Ferreres Comella, *Commentary: Courts in Latin America and the Constraints of the Civil Law Tradition*, 89 *Tex. L. Rev.* 1967, 1969 (2011).

¹⁷ See Allan R. Brewer-Carías, *Standing to Raise Constitutional Issues in Venezuela*, in *Standing to Raise Constitutional Issues: Comparative Perspectives* (Richard S. Kay, ed., 2005).

¹⁸ Constitution [of Kenya?], art. 22 (Kenya).

Another leading example of a country with very liberal standing rules – and which is therefore quite hospitable to public interest litigants, including anticorruption litigants – is India. The Indian case is a bit more complex, however, perhaps due to the fact that India’s long and rich tradition of public interest litigation has given Indian courts more opportunities to refine (and complicate) the doctrine. On the one hand, the Indian Constitution contains provisions that allow for the initiation of public interest litigation, and Indian courts have construed these provisions very broadly, thus posing relatively few standing barriers to public interest organizations and litigants.¹⁹ And indeed, as another contribution to this series shows, anticorruption activists have taken advantage of India’s liberal standing doctrine.²⁰ At the same time, there are some important qualifications to this broad standing right. First, although the Indian Constitution allows a person or entity to bring a public interest suit even if that plaintiff has not been “injured” in the traditional sense, if there *is* some individual who *has* suffered a more traditional injury due to the allegedly unlawful conduct, and that individual does not want to seek relief, other entities have no standing to bring a lawsuit. Indian courts, however, have interpreted this limitation quite narrowly, so in practice public interest litigants rarely find it an obstacle.²¹ Second, although Indian standing law is extremely liberal with respect to who may bring a lawsuit, the doctrine is somewhat more restrictive with respect to standing to seek *particular remedies*. For example, although a public interest litigant has standing to sue to compel a government agency to undo a decision tainted by corruption, that public interest litigant does not have standing to seek a judicial order that the defendant pay punitive damages for its misconduct. The explanation for this rule is that only those parties against whom the defendant acted with malice have standing to seek punitive damages.²² (Some Indian scholars criticize this decision, arguing that the standing issue goes only to the court’s jurisdiction to hear the case, and once standing is established, the court should be able to award whatever legal remedies are available to redress the illegality.²³) Third, even though all citizens in principle have an equal right to bring a suit alleging unlawful conduct against the public interest, in high-profile cases an Indian court may appoint an experienced lawyer as *amicus curiae* to represent the public, and once an *amicus* is appointed, no other public interest organizations may intervene or formally take part in the proceedings (although they retain the ability to provide information and evidence to the *amicus*).²⁴ In a somewhat similar vein, there are a few other countries that do not

¹⁹ Constitution of India, art. 32(1); see also Roxane Reiser, *Towards an Actio Popularis? Standing and Constitutional Values: A Comparative Analysis*, 2 Oxford U. Undergraduate L.J. 31 (2013); Josh Gellers, *Righting Environmental Wrongs*, 26 *Env’t. L. Litig.* 39, 59 (1991).

²⁰ See Arghua [Should this be spelled Arghya?] Sengupta, *Anti-Corruption Litigation in the Supreme Court of India: A National Case Study* (this volume).

²¹ *Gupta v. President of India*, A.I.R. 1982 S.C. 149; *Raju v. State of Karnataka*, I.L.R. 1986 K.A.R. 587.

²² *Common Cause v. Union of India* (1999).

²³ See Arghua [Again, should this be spelled Arghya?] Sengupta, *Anti-Corruption Litigation in the Supreme Court of India: A National Case Study* (this volume).

²⁴ *Narain v. Union of India* (1988), 1. S.C.C. 226.

impose strict “injury-in-fact” or “direct interest” requirements but do impose other hurdles – some mild, others more significant – on plaintiffs seeking standing to vindicate some public or diffuse interest in court. In Guatemala, for instance, any person has standing to bring a suit on matters of general interest, but only if that person has the assistance of at least three attorneys.²⁵ And the Peruvian Constitution grants standing to bring constitutional challenges to (among others) any group of 5,000 citizens and to professional associations on matters concerning their fields.²⁶

While India is an example of a country that generally has quite liberal standing rules, but with some important exceptions and qualifications, the Philippines is an example of a country that generally has more restrictive standing rules, but with some important exceptions and qualifications. To establish standing in Philippine courts, the plaintiff is usually required to show a “direct injury” – a requirement similar on its face to that found in Germany or the United States. However, Philippine courts have construed this requirement broadly and carved out important exceptions, particularly for cases involving the public interest. Most relevant to the anticorruption context, Philippine courts have adopted an expansive conception of “taxpayer standing” that a Philippine plaintiff can invoke to sue to restrain unlawful expenditure of public funds. The courts have also occasionally relaxed or eliminated the usual standing requirements in cases of so-called “transcendental importance.”²⁷ (The “transcendental importance” doctrine has been invoked for cases involving curfews and martial law; it is unclear whether it might be available for claims involving serious, high-level corruption as well. In one case, the court invoked the doctrine to consider a challenge to the creation of the Philippine Truth Commission, which was charged with investigating corruption in a prior regime.²⁸) The doctrine on these qualifications or exceptions to the usual standing rules is not entirely clear, and as a result some commentators criticize the application of standing rules by Philippine courts as inconsistent and somewhat unpredictable.

Just as standing requirements may differ depending on the remedy sought, as in India, standing requirements may differ in cases seeking remedies against an individual party (such as a private person, private firm, or public official sued in his or her individual capacity), and in cases seeking judicial review of an official government

²⁵ Writ of Protection, Habeas Corpus, and Constitutionality Act, Decree 1-86, art. 134 (2002) (Guat.); see also Angel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 *Tex. Int'l L.J.* 185, 218 (2008).

²⁶ Peru Constitution, art. 203. The 1998 Ecuadorian Constitution appears to have had a similar provision, granting standing to bring constitutional challenges to any group of at least 1,000 citizens, but that provision appears not to have been retained in the new Ecuadorian Constitution, adopted in 2008. Ecuador Const., art. 277; see also Angel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 *Tex. Int'l L.J.* 185, 218 (2008).

²⁷ Philippines Constitution, art. VII, §1 (1987); Jon Owens, *Comparative Law and Standing to Sue: A Petition for Redress for the Environment*, 7 *Env'tl. Law.* 321, 361–362 (2001). See Solomon Lumba, *The Problem of Standing in Philippine Law* 8 (Asian Law Institute Working Paper Series No. 3, 2009); Bryan Dennis G. Tiojanco, *Stilted Standards of Standing, the Transcendental Importance Doctrine, and the Non-Preclusion Policy They Prop*, 86 *Phil. L.J.* 606, 606, 613, 620 (2012).

²⁸ *Biraogo v. Philippine Truth Commission*, G.R. No. 192935 (S.C., Dec. 7, 2010) (Phil.).

action. The English approach is illustrative. In civil litigation seeking damages or similar remedies, the general rule under English law is that the plaintiff must have sufficient interest in the subject matter of the claim, which typically requires an invasion of a personal, legally protected right the plaintiff holds.²⁹ Of particular relevance to anticorruption suits, although English law recognizes a tort of “misfeasance in public office,” a plaintiff does not have standing to bring such a tort suit unless the plaintiff can show material damaged because of the corrupt behavior in question.³⁰ Partly because of this (and given similar provisions of Scottish law), Transparency International’s U.K. chapter has declared that, in the corruption context, “there is no basis for civil society to bring private civil proceedings in the U.K.”³¹ U.S. rules are similarly restrictive for these sorts of civil suits, but the systems diverge with respect to suits seeking judicial review of agency action; England’s rules are much more relaxed and flexible than those applied in U.S. federal courts. While U.S. courts apply the same injury-in-fact, causation, and redressability requirements to plaintiffs challenging allegedly unlawful agency action, an English citizen with a general or public interest in an agency action may seek judicial review of that action without a such a showing, at least in cases of serious public importance.³² This distinction in English law demonstrates that we need to be careful about generalizing too broadly about standing doctrine even within individual jurisdictions.

Finally, in addition to variation according to the identity of the defendant and the nature of the remedy sought, in some countries standing rules vary according to the subject matter of the lawsuit. It is not uncommon for a country to have a default standing requirement that is relatively restrictive, but to have statutes that broaden standing to seek judicial redress for violations of particular laws. This is more generally the case where standing doctrine is grounded in statutes passed by the legislature, rather than the constitution or judge-made common law. In Italy, for instance, the default statutory rule, established by the Code of Civil Procedure, requires the complainant to present a concrete rather than hypothetical question, and to allege that the defendant violated a recognized right or interest; in making this latter determination, Italian courts focus on the legislative intent behind the statute the defendant has allegedly violated.³³ However, the Italian parliament has modified these statutory default rules in particular contexts, liberalizing standing rules with respect to suits allegedly violating specific statutes, particularly (though not

²⁹ 11 Halsbury’s Laws of England §208 (Lord Mackay of Clashfern, ed., 5th ed., 2009); Senior Courts Act, 1981, §31(3) (Eng. And Wales); see also Matt Handley, *Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue*, 21 Rev. Litig. 97, 116 (2002).

³⁰ *Watkins v. Sec’y of State for Home Dep’t*, [2006] UKHL 17.

³¹ Transparency International U.K., *Closing Down the Safe Havens* 19 (2013).

³² See Rule 54.1 Scope and Interpretation, Civil Procedure White Book §54.1.11 (2014 ed.); See, e.g., Jon Owens, *Comparative Law and Standing to Sue: A Petition for Redress for the Environment*, 7 *Env’tl. Law.* 321, 345–346 (2001); Roxane Reiser, *Towards an Actio Popularis? Standing and Constitutional Values: A Comparative Analysis*, 2 *Oxford U. Undergraduate L.J.* 24 (2013).

³³ Article 81 of the Italian Code of Civil Procedure. Article 100 of the Italian Code of Civil Procedure. See also Douglas L. Parker, *Standing to Litigate “Abstract Social Interests” in the United States and Italy: Reexamining “Injury in Fact,”* 33 *Colum. J. Transnat’l L.* 259, 276–277 (1995).

exclusively) in areas like labor rights and environmental protection.³⁴

III. Standing to Bring Private Criminal Complaints

In many (perhaps most) countries, the standing of private parties to initiate, compel, or participate in criminal actions is more limited than it is in the civil context. Even countries with liberal standing rules for civil cases often adopt the view that the enforcement of the criminal law is the exclusive responsibility of the government, and while private parties may provide information about alleged crimes, file complaints, or encourage public prosecutors to act, such private parties have no standing themselves to file a criminal complaint or to otherwise invoke the power of the courts to influence prosecutorial decisions. This is not universally true, however: in many countries, private parties do have standing to bring criminal complaints – to act as so-called “private prosecutors.”

Spain’s broad standing rights extend to criminal as well as civil criminal proceedings. Under Spanish law, any Spanish citizen can initiate criminal proceedings, and any non-citizen who is a victim of a crime can as well. Distinct provisions of Spanish law cover victims and non-victims: a crime victim is an *acusador particular*, while a non-victim who initiates criminal proceedings to vindicate the public interest is an *acusador popular*.³⁵ Prosecutions brought by an *acusador popular* do not require the permission or prior approval of the public prosecutor. Anticorruption CSOs have already taken advantage of the *acusador popular* procedure. In one particularly notable case, the Asociación Pro Derechos Humanos de España (in cooperation with the Open Society Justice Initiative) filed a criminal complaint acting as an *acusador popular* targeting a series of transactions involving Equatorial Guinea and the Spanish Banco Santander. As of the time of this writing, the investigation is still ongoing, but indictments are expected.³⁶

England and a number of jurisdictions that inherited the English legal system, including Australia, Hong Kong, and Singapore, also allow private prosecutions: any person (including any business or NGO) has the right to initiate and conduct a criminal prosecution, regardless of whether the crime directly affected him or her.³⁷ The English courts have described the availability of private prosecutions as “a valuable constitutional safeguard against inertia or partiality on the part of authority.”³⁸ Nonetheless, the scope for private prosecution in England is much more

³⁴ See Douglas L. Parker, *Standing to Litigate “Abstract Social Interests” in the United States and Italy: Reexamining “Injury in Fact,”* 33 Colum. J. Transnat’l L. 259, 282–295 (1995).

³⁵ Constitution of Spain, art. 125; Ley de Enjuiciamiento Criminal, arts. 101 & 270; Elena Merino-Blanco, *Spanish Law and Legal System* 29, 140–142 (2nd ed., 2006).

³⁶ See Ken Hurwitz, Introductory Remarks, Conference on Legal Remedies for High-Level Corruption (Said Business School, University of Oxford, 28 June 2014).

³⁷ See 27 Halsbury’s Laws of England §21 (Lord Mackay of Clashfern, ed., 5th ed., 2010); Prosecution of Offences Act, 1985, c. 23, §6 (U.K.).

³⁸ See Lord Wilberforce, *Gouriet v. Union of Post Office Workers* [1978] A.C. 435.

limited than in Spain. First, the Crown Prosecution Service (CPS) may take over any private prosecution and may discontinue proceedings if it does not believe there is a realistic prospect of conviction (though not just because the CPS would not have brought the case itself).³⁹ Second, even though the default rule is that any person can initiate a private prosecution, some statutes – most importantly in the present context, including the U.K. Bribery Act – require the prior consent of the Director of Public Prosecutions.⁴⁰ Also, and of particular importance for asset recovery actions, the only compensation private prosecution can pursue is compensation for direct personal injury or loss, and only when there is no real question as to those who had suffered the loss, and how much; private prosecution cannot pursue recovery of proceeds of crime.⁴¹ Other countries that have private prosecution provisions on the books impose even more significant limitations on these actions, which sharply limit their usefulness for anticorruption activists. In Egypt, for instance, private parties may lodge a criminal case without going through the public prosecutors only if the party filing the case is the actual victim of the crime, the crime in question is a misdemeanor rather than a felony, and the crime was committed domestically rather than abroad. Even more significant for anticorruption litigants, private prosecutions alleging criminal charges relating to public officials’ performance of their work cannot proceed without permission of the public prosecution authority.

Although relatively few countries follow Spain and England in granting private parties broad rights to act as private prosecutors, a larger number of countries have a formal procedure through which a private party can seek to compel the public prosecutor to pursue a case, or at least to publicly justify a decision not to do so. While these mechanisms do not relate directly to the doctrine of standing, they do provide an avenue to pursue redress for an individual who might under other circumstances pursue a private prosecution. Therefore, I will discuss them briefly.

Switzerland and Spain have provisions for the filing of a “denunciation” – essentially the filing of a criminal complaint, but with greater formality and with a greater consequent obligation on the public prosecutors than a system without this mechanism would require. In Spain, the public prosecutor is under an independent legal obligation both to proceed with an investigation if there is credible evidence of crime, and to prosecute a case once there is enough evidence to convict, regardless of the prosecutor’s wishes (and, in the case of a public criminal offense, regardless of the victim’s wishes). For this reason, citizens can compel action by the public prosecutor simply by filing a sufficiently credible complaint – a *denuncia*.⁴² And in Switzerland, although the Prosecutor’s Office has a monopoly on criminal enforcement actions, any person or entity (including any CSO) can file a criminal complaint – a *dénonciation pénale*. Unlike in Spain, the filing of a credible *dénonciation* in

³⁹ Prosecution of Offences Act, 1985, § 6(2); R (Gujra) v. Crown Prosecution Serv. [2011] EWHC 472.

⁴⁰ Bribery Act of 2010, c. 23, § 10 (U.K.).

⁴¹ Powers of Criminal Courts (Sentencing) Act, 2000, c. 6, § 130 (U.K.); R v. Stapylton, [2012] EWCA Crim 728.

⁴² Elena Merino-Blanco, *Spanish Law and Legal System* 141, 153–154 (2nd ed., 2006).

Switzerland does not obligate the prosecutor to pursue the case, and complaining parties have no right to appeal a prosecutorial decision.⁴³ However, the filing of a *dénonciation* does require the public prosecutor to formally reply, and to explain a decision not to pursue the case if that is what the prosecutor chooses to do. Scottish law achieves a similar result in a slightly different way: Scottish law nominally allows for private prosecutions, but only if the public prosecutors do not bring charges, and only if the private prosecutor secures the prior approval of the public prosecutor; requests for such approval are almost always refused, but the request does obligate the public prosecutor to give reasons for not bringing charges, in a manner somewhat similar to how the filing of a *dénonciation* in Switzerland obligates the public prosecutor to give a formal explanation if it chooses not to pursue the case.⁴⁴

Some countries permit private parties to sue to compel the public authorities to initiate or pursue a corruption investigation (or any other matter) if the responsible government agencies have decided not to do so. In most but not all countries it is usually very difficult for private parties to compel prosecutors or other government enforcement agencies to take such action. Obstacles to a lawsuit seeking to compel prosecutors to pursue criminal investigations or similar enforcement actions generally fall into three categories. The first is standing doctrine, the main focus of this paper. In many countries, as I have shown, parties may not bring a suit unless they can show some direct personal injury. In the case of a challenge to non-prosecution of alleged corruption, a restrictive standing rule would require the complainant to show that the prosecutor's failure to pursue the case caused the plaintiff a direct personal injury, typically a high barrier. Second, many countries impose doctrines of non-reviewability that are distinct from doctrines of standing. For example, in the United States, a regulatory agency's decision not to bring an enforcement action is presumptively non-reviewable, even if the party filing the complaint can establish standing by showing a direct personal injury derived from the non-enforcement decision.⁴⁵ (Proponents of such non-reviewability doctrines typically argue that these doctrines avoid entangling courts in thorny and politically charged questions of agency enforcement priorities and resource allocation decisions.) Finally, even when a private party has standing to challenge a government non-enforcement decision, and even when that non-enforcement decision is judicially reviewable, it simply may be hard to win on the merits because the courts in many countries are reluctant to second-guess a prosecutor's judgment or good faith. A nice illustration of this last point (as well as the distinction between these different obstacles) is the British case involving a suit brought by The Corner House, an anticorruption CSO, challenging the Serious Fraud Office's decision to drop its investigation into allegations that the British multinational BAE Systems had bribed senior government officials in Saudi Arabia. As this paper has shown, although English courts apply relatively restrictive standing requirements to ordinary civil

⁴³ Criminal Procedure Code of the Swiss Confederation, art. 126.

⁴⁴ *Her Majesty's Advocate v. Stuurman*, [1980] J.C. 111.

⁴⁵ See Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653 (1985).

suits, standing requirements are quite liberal for challenges to allegedly unlawful agency action, and The Corner House's standing to bring the case was never questioned. Furthermore, in contrast to the prevailing U.S. doctrine, the U.K. courts treated the SFO's decision to drop the investigation as presumptively reviewable. But The Corner House lost nonetheless, in part because of judicial reluctance to second-guess the prosecutors.⁴⁶

IV. Special Standing Rules for CSO Plaintiffs?

Many public interest lawsuits are brought not by (or not only by) individuals but by non-governmental civil society organizations with an organizational interest in the subject matter of the lawsuit. This is especially true in the anticorruption context, where a range of CSOs, in both wealthy and developing countries, have taken a leading role in pursuing judicial remedies for corrupt activities. In many jurisdictions, the standing rules that would apply to individual public interest plaintiffs differ in cases where the plaintiff is a CSO. One way to think about why this might be so is to consider the proffered justifications for restrictive standing rules discussed in Part I of this paper. It's at least plausible to assert that some of these justifications do not apply, or do not apply in the same way, when the plaintiff is a CSO rather than an individual or a firm.

Again, looking across countries, we see a range of approaches to standing for CSOs. The United States, which takes a very restrictive approach to standing generally, also takes an extremely restrictive approach to standing for CSOs and other representative organizations. Although such organizations may bring lawsuits in U.S. federal courts, they may do so only on behalf of their members, only if their members (or at least one member) would have independent standing to sue, and only if the organization is sufficiently representative of those members. In other words, in the United States, a CSO bringing a lawsuit, and seeking standing as a representative organization, is subject to *additional* standing requirements, rather than relaxed standing requirements.⁴⁷ The United States is not alone in this approach: other countries, such as Nigeria and Egypt, require CSOs to meet (at minimum) the same standing requirements that would apply to individual litigants.

By contrast, some other countries – even some that adopt restrictive standing requirements for individual litigants – relax standing requirements for CSOs with a particular interest in the subject of the lawsuit. Italy, as noted above, has liberalized its standing rules in certain substantive areas (most notably labor rights and environmental protection), and has done so principally by granting standing not to citizens in general but to specific organizations (labor unions and certified environmental protection CSOs, respectively).⁴⁸ Argentina is another example, and

⁴⁶ See Cecily Rose, *The Corner House Case and the Incomplete Incorporation of the OECD Anti-Bribery Convention in the United Kingdom*, 20 Tulane J. Int'l & Comp. L. 351 (2012).

⁴⁷ See Heidi Li Feldman, *Divided We Fall: Associational Standing and Collective Interest*, 87 Mich. L. Rev. 733 (1988).

⁴⁸ See Douglas L. Parker, *Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining "Injury in Fact,"* 33 Colum. J. Transnat'l L. 259, 282–295 (1995).

may be particularly notable because in most other ways Argentina's standing law is very similar to that of the United States (requiring the plaintiff to demonstrate concrete injury-in-fact, causation, and redressability).⁴⁹ Despite this similarity, Argentinian law allows an organization to sue to vindicate the interests it was designed to pursue, without requiring that the organization be acting as a representative of individual members who would have standing to sue in their own right, based on some concrete personal injury.⁵⁰ In other words, the usually strict requirement of a particular, non-ideological, non-abstract injury is not applied to CSOs in Argentina, even though it is applied to individual plaintiffs. Similarly, Sri Lanka generally requires that a plaintiff show a "sufficient interest" in the subject of the suit, but Sri Lankan courts have held that a CSO with a dedicated mission germane to the issues raised in the suit can satisfy that requirement.⁵¹ And in the Netherlands, the General Administrative Law Act allows an organization to bring a legal challenge to an administrative act so long as the organization's goals and interests (which may be distinct from the individual interests of its members) relate to the challenged actions.⁵²

Other countries have staked out a variety of intermediate positions, somewhat relaxing standing requirements for CSOs but regulating more assiduously which CSOs are entitled to avail themselves of these more liberal rules. Here, the French approach is particularly interesting, and especially salient for anticorruption CSOs. In France, the Public Prosecutor's Office has a default monopoly over criminal prosecutions and investigations, but in certain special types of cases, CSOs are qualified to file criminal complaints on behalf of the general public. In 2010, in a case brought by the CSOs Transparency International France (TI-F) and Sherpa, the Cour de Cassation ruled that TI-F was qualified to file a complaint on behalf of citizens injured by corruption, even though at the time there was no explicit statutory right under French law for CSOs to bring private prosecutions in relation to corruption matters. The basis of the Cour de Cassation's standing ruling was an interpretation of the "personal and direct damage" provision of the French Criminal Code, which French courts have interpreted to allow a CSO to bring a complaint if the offense alleged directly impairs the interests the association is organized to defend. The Cour de Cassation's 2010 ruling was limited to the standing of TI-F in that particular case, but in 2013 the French parliament affirmed and expanded the recognition of CSO standing in anticorruption cases by enacting a special provision that allows approved anticorruption CSOs to file complaints on behalf of the general public in cases of corruption (including foreign bribery), influence peddling, money laundering, and

⁴⁹ See Christopher J. Walker, *Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law*, 18 Fla. J. Int'l L. 745, 769–770 (2006).

⁵⁰ Daniel R. Ortiz & Juan Cruz Azzarri, Abstract, *Associational Standing: A Comparison between the American and Argentinian Systems*, El Derecho (forthcoming).

⁵¹ See Mario Gomez, *Emerging Trends in Public Law*, 20–40 (1998).

⁵² See Tom Zwart, *Standing to Raise Constitutional Issues in the Netherlands*, in *Standing to Raise Constitutional Issues: Comparative Perspectives* (Richard S. Kay, ed., 2005), 357–358; Jon Owens, *Comparative Law and Standing to Sue: A Petition for Redress for the Environment*, 7 *Env'tl. Law* 321, 357 (2001).

concealment.⁵³ But this authorization is subject to an important limitation: an anticorruption CSO must be certified to avail itself of this special authority to file a complaint on behalf of the public. Such certification requires that the CSO has existed for at least five years, and that during those years the CSO has publicly committed the majority of its resources to fighting corruption. Additionally, the CSO must establish that it has a relatively large membership, that it is independent (including from funding sources), and that its members manage it on an ongoing basis.⁵⁴ The certification must be renewed every three years, and the Minister of Justice can revoke it. Bangladesh, which also has a generally liberal approach to CSO standing, imposes a different kind of restriction on which CSOs have standing to bring public interest lawsuits: a Bangladeshi CSO may sue on behalf of its members alleging a general injury, but *only* CSOs unique to Bangladesh may do so; international NGOs, and the Bangladeshi branches of international CSOs, are not eligible for this relaxed standing requirement.⁵⁵

Whereas France makes it easier for CSOs to file complaints in anticorruption than most other jurisdictions, Brazil is perhaps an example of the opposite, with higher barriers to anticorruption action than other kinds of complaints. Brazil has been described as a “friendly haven for litigating collective public interests,”⁵⁶ in part because Article 1 of the 1988 Brazilian Constitution supports broad access to the courts,⁵⁷ and in general Brazil recognizes CSOs as legitimate parties to lawsuits, without any causation or injury-in-fact requirements, so long as the NGO is at least one year old and is dedicated to pursuing specific public interests germane to the subject of the suit.⁵⁸ However, Brazil restricts standing—including standing for CSOs—in the context of anticorruption law far more than in relation to other complaints. For instance, under the Brazilian Administrative Misconduct Act – the principal statute regulating misconduct, including corruption, by public officials – standing is limited to the entity that suffered damage due to the misconduct, and to the public prosecutors (who act as representatives of the public interest). The public prosecutors also have the exclusive standing to seek an injunction to freeze the defendants’ assets; the injured entity may not seek this remedy. Many Brazilian scholars have criticized the public prosecutors’ monopoly over anticorruption lawsuits, but the Brazilian government has resisted proposals to expand standing to

⁵³ Loi no. 2013-1117; French Code of Criminal Procedure, art. 2-23.

⁵⁴ Decret no. 2014-327 du 12 mars 2014 relatif aux conditions d’agrément des associations de lutte contre la corruption en vue de l’exercice des droits reconnus à la partie civile. The Italian environmental statute granting broader standing to environmental CSOs contains similar limitations; to qualify under that statute, the CSO must be a national organization operating in at least five regions, and must be formally recognized by the Minister for the Environment, who must certify the organization’s programmatic goals, its internal democratic character, the continuity of its actions, and its external importance. Presidential Decree No. 316, art. 13.

⁵⁵ *Farooque v. Bangladesh* (1997) 17 BLD (AD) 1, 19.

⁵⁶ Matt Handley, *Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue*, 21 Rev. Litig. 97, 129 (2002).

⁵⁷ Constitutikao [Should this be spelled “Constituição?”] Federal [C.F.], art. 1 (Brazil).

⁵⁸ Civil Public Action Act No. 7.347, art. 5 (1985) (Brazil); see also Matt Handley, *Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue*, 21 Rev. Litig. 97, 129 (2002).

permit CSOs to bring suits under the Administrative Misconduct Act.⁵⁹ Likewise, under Brazil's new Anticorruption Act, which focuses on bribe-paying companies, standing to bring an action lies with the public authorities, not with private parties or CSOs. And another Brazilian law allows any citizen to bring a lawsuit to nullify certain government acts that are harmful to the government, including government contracts tainted by corruption – but that law extends standing to bring such a suit under this law only to individual citizens, not to CSOs.

Conclusion

It is important for anticorruption CSOs and other activists – including non-lawyers – to have a basic familiarity with the doctrine of standing for at least two reasons. First, as private litigation becomes a more central feature of the anticorruption agenda, advocates will need to carefully assess both the promises and limits of this approach, and to make strategic choices about how to invest their resources. Existing rules on access to the courts – of which standing doctrine is one important component – will inevitably have implications for those decisions. Second, standing doctrine is neither uniform across jurisdictions nor static across time; it is the subject of ongoing debate, revision, and reform. Anticorruption activists are already participants in certain important efforts to liberalize standing doctrine, and as private litigation becomes a more central feature of their strategy, this engagement will become all the more significant. An appreciation of the range of approaches to standing doctrine, as well as an appreciation (though not necessarily an endorsement) of the legitimate concerns that sometimes favor more restricted access to the courts, is important for effective participation in these conversations.

⁵⁹ Debora Chaves Martines Fernandes et al., *The Effectiveness of the “Anti-Corruption” Legal System in Brazil*, *Serie Pensando o Direito* no. 34 (2011).

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