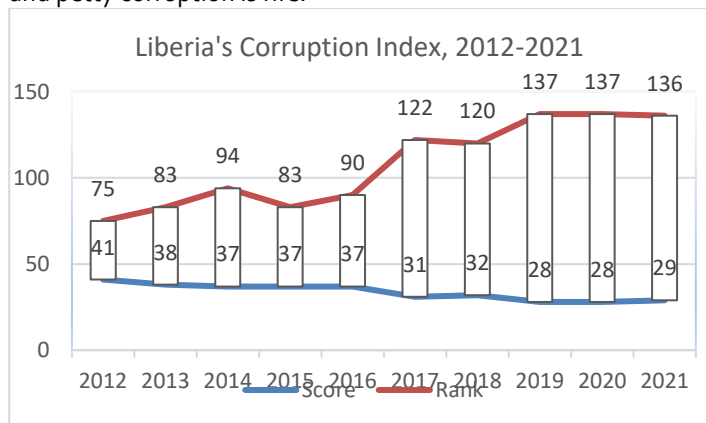




PERSPECTIVES ON PUNITIVE SANTICTIONS AND RELIANCE ON RESTITUTION FOR CORRUPTION IN LIBERIA

INTRODUCTION

Corruption represents a clear and concerning developmental challenge for Liberia. The country continues to slide downwards on various indices, including the Millennium Challenge Corporation (MCC) Scorecard which measures performances in key areas of governance, including *the control of corruption*, and which showed a decline from 61% in 2018 to 54% in 2022. Further, Liberia scored 29/100, ranking 136 out of 180 countries in the 2021 Transparency International Corruption Perception Index. The Global Corruption Barometer (GCB) from the same organization reported that in 2019, 53% of public service users in Liberia paid a bribe in the preceding 12 months. CENTAL's 2021 State of Corruption Report similarly reported high perceptions of corruption, with 90% of the 601 respondents considering corruption in Liberia to be "high".¹ Despite the establishment of the Liberia Anti-Corruption Commission (LACC), allegations of patronage, nepotism and cronyism continue to plague politics, and petty corruption is rife.



The LACC has limited or indirect prosecutorial powers and is required by law to forward all cases to the Ministry of Justice for Prosecution, consistent with Part IX of the Act establishing the LACC (2008). Very few convictions have been secured since the

establishment of the LACC. Recent reforms to strengthen the capacity of the LACC include proposed amendments to the anti-corruption legislation to introduce direct prosecutorial powers for the LACC as well as the establishment of a specialised Anti-Corruption Court F. In the meantime, the LACC has recovered the sum of 32 million Liberian Dollars in payment of restitution from persons under investigation. While indictments have been proffered in respect of some suspects (reportedly 9), restitution appears to be the current preferred method of proceeding with corruption cases. This effectively means that persons who return stolen public funds are not prosecuted. The question arises as to whether restitution represents the most effective approach especially in the absence of specific enabling provisions in the laws of Liberia. While deterrence through prosecution of corruption must play a significant approach in the fight against corruption, there are also compelling reasons why the LACC should adopt a nuanced approach.

RESTITUTION

Restitution is procedurally possible in three forms. The first relates to court ordered restitution. This occurs as part of a court sentence after a guilty verdict is entered. Courts are often empowered by statute to order that the offender pays restitution to compensate a victim for financial losses related to the crime. In this vein, an order for restitution forms part of the sentence of the court in a criminal case.

Restitution may involve the payment of fines, but the two are not the same. Restitution is principally intended to repay victims for their losses resulting from crimes committed, while fines are specific and preordained penalties that are paid to the State. Further, fines form part of a punishment system and often involve an option of imprisonment in default of payment or in addition to payment. Restitution is often effected to compensate the person who directly suffers injury or loss because of the defendant's crime. In most States, especially in relation to financial crimes, the victim may be an individual, a business or the State. Court imposed restitution is recognised by the Penal Code of Liberia which provides that the court may include in the sentence, an order for the restitution of property or its value in favour of the rightful owner.²

Second, pre-trial restitution takes place where the State has completed its investigations but decides to recover stolen funds and property rather than proceed with prosecution. This

¹ CENTAL is the acronym for a Liberian registered CSO whose full name is Centre for Transparency and Accountability in Liberia.

² Liberia Penal Code, section 31.1 (4).

approach is often possible where the State as prosecutor is also the victim. Thus, prosecutors may forego prosecution where persons who have stolen State funds or property agree to return them. Though this amounts to an admission of guilt, no conviction is obtained in respect of the crime alleged to have been committed. This approach has been justified on the basis that prosecution is expensive and time-consuming. It may be preferable, therefore, to follow a less costly path where guarantees of recouping the stolen funds are more certain than the option of prosecution which amounts to a lose-lose situation when the trial results in an acquittal. This approach must be considered carefully and contextualised locally to avoid a simplistic reasoning. Therefore, while restitution may be cheaper, the question is whether it will stem or deter corruption. In a context where corruption is rampant, few persons/institutions have been caught, fewer have faced harsh penalties, and where the authorities have not set a strong enough tone to deter corruption, restitution without severe fines or punishment, is highly unlikely to serve as a deterrence. More punitive sanctions, such as loss of liberty and heavy fines, could send a much stronger signal that corruption is a highly risky business with severe consequences.

A third, and increasingly globally popular method for recovering corruptly obtained funds is by confiscation through civil proceedings. In criminal confiscation cases, prosecutors need to prove that the defendant is guilty of a crime, and this often requires proof beyond reasonable doubt. In an increasing number of countries, non-conviction-based confiscation and private civil cases have led to successful asset recovery. Because they are decided on a lower standard of proof, a "balance of probabilities", they can thus be relied upon to hold facilitators, such as lawyers and banks, accountable when their conduct does not rise to the level of a criminal offense.



Poor road network resulting from corruption

PUNITIVE SANCTIONS

Punitive criminal sanctions resulting from prosecution and conviction tend to produce results that compel change in behaviour. The legal framework for sentencing in criminal proceedings in Liberia provides for sanctions in the form of fines, imprisonment, probation and the death sentence.³

Criminal sentencing is effective because it involves some punishment which means that some pain, discomfort or adverse sanction is imposed. The notion of sentencing is anchored on four theoretical considerations. First is the rehabilitation of the offender. Rehabilitation of a criminal means a change in his or her mental habits so that s/he will not reoffend. Second, is incapacitation which is associated with imprisonment. During the imprisonment of the offender, s/he is incapacitated from committing another offence, thereby keeping society safe. It deprives offenders of the opportunity of engaging in future mischief. Third, retribution relates to society's reserved right to revenge on behalf of harmed individuals or the social order. Retribution mirrors society's moral judgment that certain conduct deserve punishment that reflects the seriousness of the crime, usually measured by the harm it caused. The punishment imposed demonstrates the community's disapproval of the conduct, so what is communicated to the offender, and society at large, is the extent of disapprobation and indignation at his/her conduct and how others suffered because of the misconduct. Fourth, deterrence serves to prevent crime by persuading others not to commit crimes because they will be punished for violating the law. It prevents others from engaging in similar misconduct in the future, focusing on communicating a message that other violators will be punished similarly. The punishment serves as a disincentive and demonstrates that crimes such as corruption are expensive. The purpose of deterrence forms the most primary and relevant consideration for the fight against corruption. While the positivist school deny the deterrent efficacy of punishment and advocate for the rehabilitation of criminals, appropriate criminal sentences serve to deter would-be offenders. If deterrence were the sole, or even primary, goal of punishment, then a reasonable argument can be made that incarceration should be accompanied by a system of fines to produce effective results especially in respect of white-collar offenders. As Professor Posner (later appointed to the federal bench) once put it, "[F]ining the affluent offender is preferable to imprisoning him from society's standpoint because it is less costly and no less efficacious."⁴ However, monetary loss must accompany other forms of punishment to produce effective results.

THE SIGNIFICANCE OF DETERRENCE

Deterrence is an expression that a particular punishment will create benefits to society by preventing future misconduct, thereby reducing the costs of investigating, prosecuting, and incarcerating. Therefore, while it has been argued that alternatives to prosecution such as restitution are cost effective,

collecting a fine from one who can pay it (an important qualification) is lower than the cost of imprisonment. On the benefit side, there is no difference in principle between the sanctions. The fine for a white-collar crime can be set at whatever level imposes the same disutility on the defendant, and thus yield the same deterrence, as the prison sentence that would have been imposed instead.

³ Penal Code section 31.1 (4); 31.1 (2).

⁴ Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410 (1980).

He explained the reasoning in this way: In a social cost-benefit analysis of the choice between fining and imprisoning the white-collar criminal, the cost side of the analysis favors fining because ... the cost of

the cost benefits of prosecution and its deterring effects are greater. *The certainty of punishment is the principal factor in assessing the success of a deterrent.* In this regard, increased spending on detection and prosecution of corruption can have an appreciable impact on the crime rate. If we can combine a greater likelihood of being caught, together with a swifter and more severe prosecution (so that the public can witness the offender being punished), then society is likely to see more impact from deterring corruption.⁵

Under an economic analysis of the criminal law pioneered by Professor Becker in 1968, deterrence occurs where a potential offender will commit a crime only if the benefits exceed the expected sanction, so that increasing the likelihood and amount of punishment should reduce the rate of offenses.⁶ ***The greater the perceived certainty, severity, and swiftness of punishment, the lower the crime rate will be. Regrettably, these factors do not obtain in Liberia's justice system currently and, therefore, restitution as a primary strategy for tackling corruption is unlikely to be very effective.***

CONCLUSION

By not going through trial, the perpetrator of corruption is not considered as liable for a criminal conduct. S/he remains in society and can occupy public office even though his/her payment of restitution demonstrates an admission of guilt. When effected, restitution must be implemented as the return of stolen assets or confiscation of property, and not as a measure absolving wrong doers from prosecution and punishment. *This means that restitution is more effective as a post-conviction measure as provided by Liberia's Criminal Procedure Code and when combined with prosecution and conviction.* Given Liberia's context of high rates of corruption and widely held perceptions of impunity for the wealthy and powerful, restitution should be accompanied by severe fines and /or other punishment.

While the Liberia Anti-Corruption Act provides for court sanctioned confiscation of property, similar provisions do not exist providing the LACC with powers to accept restitution of funds in lieu of prosecution, nor is such procedure available under the general criminal laws of Liberia. Realistically, not all corruption cases can be prosecuted. Therefore, the LACC must produce consistent standards regarding which cases should be pushed to court for trial, taking into consideration the fact that it needs to demonstrate that it can hit hard and that there will be no sacred cows.

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⁵ Peter J Henning "Is Deterrence Relevant in Sentencing White Collar Criminals?" 61 Wayne L. Rev. (2015) 17.

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