

山东政法学院刑法学省级特色重点学科出版资助

曲伶俐 张霞 主编

# The Frontiers of Criminal Law

## 刑事法治前沿

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## 经济犯罪的域外视角



# Fighting Global Corruption: The Necessity for Collective Action

Prof. Dr. Shawn Marie Boyne\*

Very simply, corrupt countries are less safe. When public officials are more interested in their own personal wealth than the prosperity of the citizens they are supposed to serve, people lose faith in political institutions; and, when there is no respect for the rule of law, civilized society falters and opportunities are created for organized criminal groups and terrorist networks.<sup>①</sup>

## Introduction

World-wide, global corruption undermines human dignity, impairs fundamental rights, and upends the everyday ability of individuals to obtain the goods and services necessary for their survival. Corruption is a pervasive phenomenon impacting societies across the political and economic spectrum. Indeed according to Transparency International's 2013 Global Corruption Barometer, the costs of corruption burden everyday lives as one in four individuals reported that they had paid a bribe in the last year.<sup>②</sup> The scale of corruption world-wide is massive. In 2011, for example, the World Bank estimated that between \$20 and \$40 billion leaves developing countries each year.<sup>③</sup> Yet, the impact of the costs of corruption, extend beyond the sums

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\* Professor of Law, Indiana University Robert H. McKinney School of Law.

① U. S. Dept. of Justice News Release, Acting Assistant Attorney General Mythili Raman Speaks at the Global Anti-Corruption Compliance Congress," March 20, 2014. 2014 WL 1089535 (D. O. J.)

② Transparency International, GLOBAL CORRUPTION BAROMETER 2013, p. 3. Available online at: <http://www.transparency.org/gcb2013/report>. Hereinafter Corruption Barometer.

③ Jean-Pierre Brun, Clive Scott, Kevin M. Stephenson, and Larissa Gray, "Asset Recovery Handbook: A Guide for Practitioners," (WORLD BANK PUBLICATIONS: 2011). Available online at: <http://star.worldbank.org/star/publication/asset-recovery-handbook>.



involved. Corruption decreases public confidence in governance itself as throughout the world, the perception exists that the rich and politically connected individuals within a society reap the benefits of corruption, while ordinary members of the public suffer. <sup>①</sup> This lack of trust in governance undermines individuals' faith in the political system itself. <sup>②</sup> Indeed, if Della Porta's 2000 thesis is on the mark, an inverse relationship exists between the existence of corruption and citizens' confidence in the government. <sup>③</sup>

During the past twenty years, public concern with corruption has grown. Concerned with maintaining political legitimacy, governments throughout the world have taken steps to enact legislation to combat corrupt practices. Although most multinational corporations are familiar with the Foreign Corrupt Practices Act in the U. S. and the U. K. 's Bribery Act of 2010, corporations must now navigate a complex web of legislative schemes in a number of countries. As one corporate lawyer remarked, corporations "must also pay close attention to laws emerging in other jurisdictions' and the 'significant benefits a company will get from [those] jurisdictions to which they're subjected. "<sup>④</sup> In addition to national legislation, international organizations such as the United Nations and the World Bank also have a stake in preventing and ameliorating the effects of corruption. For example, the U. N. Convention on Corruption (UNCAC) obligates signatories to establish anti-corruption policies in both the public and private sectors as well as to facilitate the turn of illicit assets to their original owners. <sup>⑤</sup> However, UNCAC's efficacy is directly constrained by the language of the treaty itself, the structure of its' sanctioning regime, as well as the limits of its

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<sup>①</sup> See Corruption Barometer, *supra* note 3.

<sup>②</sup> See Mitchell A. Seligson, "The Impact of Corruption on Regime Legitimacy: A Comparative Study of Four Latin American Countries," 64 THE JOURNAL OF POLITICS 408, 412 (May, 2002) .

<sup>③</sup> According to Donatella Della Porta, " [1] ack of confidence in government actually favors corruption insofar as it transforms citizens into clients and bribers who look for private protection to gain access to decision-makers. " See Donatella Della Porta, "Social Capital, Beliefs in Government, and Political Corruption," at 205. In DISAFFECTED DEMOCRACIES; WHAT'S TROUBLING THE TRILATERAL COUNTRIES. (eds. Susan J. Pharr and Robert D. Putnam. ) Princeton: Princeton University Press (2000) .

<sup>④</sup> Aaron Murphy, "Press Release: Aaron Murphy Discusses Hot Topics in FCPA Law," Akin Gump, Strauss, Hauer, Feld LLP Blog, January 17, 2014. Available online at: <http://www.akingump.com/en/news-publications/aaron-murphy-discusses-hot-topics-in-fcpa-law.html>.

<sup>⑤</sup> U. N. Convention Against Corruption arts. 51, 57, Oct. 31, 2003, G. A. Res. 58/4, U. N. Doc. A/RES/58/4.

monitoring mechanisms.<sup>①</sup> On a more indirect level, the treaty's efficacy is undermined by the lack of transparency in government practices as well as the limits and challenges faced by prosecutors. A key strength of UNCAC is that it criminalizes bribery in both the public and private sectors.<sup>②</sup>

In addition to the U. N. 's Anti-Corruption initiative, many countries have promulgated their own anti-corruption laws. Indeed at first glance, recent developments in Brazil, China, Haiti, India, and Russia underscore the fact corruption is a worldwide phenomenon that is present whatever a state's organization of its system of governance. Indeed, even where laws prohibit corruption, the cultural mindset among corporate and government officials may undermine compliance with the law. According to one study, individuals who come from countries with high levels of corruption are more likely to engage in illegal behavior when they travel to another country.<sup>③</sup>

Because corruption is in part a cultural phenomenon, the act of drafting and enacting new laws to fight corruption is not a sufficient condition by itself to combat a country's culture of corruption. Critically, a state must devote adequate resources to prosecuting corruption, enlist the support of corporate actors and civil society in promoting an anti-corruption agenda, and guarantee that judicial bodies possess the strength and independence to guarantee that the laws will be fairly enforced. In the remainder of this paper, I examine the anti-corruption legislation in three countries and examine how the presence or absence of these three factors supports or undermines the fight against corruption. Although legislative enactments may serve a symbolic function in signaling intent and in communicating societal standards, the existence of legislation by itself does not mean that a nation's enforcement regime is effective. Indeed, it is not only the structure of the legislation itself that determines whether the law will be a useful tool to combat corruption. A key variable in fighting corruption is the level of expertise and resource levels of a given country's investigation and prosecution units. Moreover, given resource constraint issues, prosecutors must often limit their enforcement actions to target the most egregious offenders.

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① Ophelie Brunelle-Quraishi, "Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis," 2 Notre Dame J. of Comp. & Int'l Law 101 (2011) .

② Id. at 115.

③ Fisman, R. , & Miguel, E. (2006) . *Cultures of corruption: evidence from diplomatic parking tickets* (No. w12312) . National Bureau of Economic Research.

## A. Brazil

### 1. Corruption Profile

With a population of approximately 195 million people, Brazil currently ranks 42nd out of 177 countries on Transparency International's 2013 Corruption Perception Index.<sup>①</sup> According to Transparency International's metrics, Brazil possesses a score of 42. A score below a 50 indicates that a country has a serious corruption problem. One of the largest problems that Brazil faces is deterring bribes paid to government officials to navigate the country's regulations. Indeed a 2007 survey of Brazilian business owners and top managers revealed that over 70% of the respondents thought that corruption was a major constraint on the business sector. Indeed in a recent nine-year period, the government fired almost 4, 000 public employees due to allegations of corruption and bribe taking.

A second key problem that Brazil faces is bribe-taking by members of the parliament and the members of political parties. While this form of corruption is present on the federal level, corruption is also pervasive on the local government level. In addition, Brazil's federal structure opens the door to bribe-making on the level of local government. Finally, because the government has weak system of monitoring compliance, businesses who participate in the government's procurement system are likely to be asked to make a bribe. The size of Brazil's corruption is astonishing as a 2010 study by the Federation of Industries of the Sao Paulo State estimated that the "average annual cost of corruption in Brazil is between 1.38% to 2.3% of the country's total GDP."<sup>②</sup>

One of the most glaring problems is the lack of transparency in the funding of elections and the public's high tolerance for political corruption. Indeed, public opinion surveys confirm the majority of the public is willing to acquiesce to the fact that

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① Available at: <http://www.transparency.org/whatwedo/publications>.

② Anderson Antunes, "The Cost Of Corruption In Brazil Could Be Up To \$53 Billion Just This Year Alone," FORBES, November 28, 2013.

politicians “steal, but get things done.”<sup>①</sup> According to an official from Transparency International, the 2010 presidential candidates and their parties spent nearly \$2 billion during the election with over 95% of that money coming from corporations.<sup>②</sup> The dominance of corporate contributions in the political process underscores both the degree of corporate influence in the political process as well as the public’s lack of interest in supporting that process with their pocketbooks.

## 2. New Legislation

On January 29th, 2014, Brazil took a step forward in its efforts to create a coherent anti-corruption regime when the country’s “Clean Company Act” (CCA) came into effect. While the scope of the Act mirrors the U. S. Foreign Corrupt Practices Act and the U. K. ’s Bribery Act, there are some important differences as well. The CCA gives government agencies the power to prosecute and fine business organizations in Brazil, Brazilian foundations and organizations, and foreign entities with a registered office, branch, or affiliate in Brazil when an agent of the company, foundation, or organization bribes domestic or foreign officials. Although individual wrongdoers may not be prosecuted under the Act, they are subject to criminal liability under various provisions of Brazil’s criminal code as well as the Public Tender Law and the Improbability Law. In addition the law sets out to bring a broad range of officials and agents within its reach as it includes international public organizations and individuals at “any level or sphere of a foreign state body” even if they are only indirectly controlled by a public authority of a foreign government. Temporary workers, contractors and volunteers who hold any position or function with a foreign entity may be considered an official or agent under the purview of the Act.<sup>③</sup>

Under the Act, the targeted organizations may be held strictly liable for prohibi-

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① Carlos Pereira, Lucio Rennó & Daniel Samuels, “Corruption, Campaign Finance, and Electoral Accountability,” Workshop on Accountability Institutions and Political Corruption in Brazil, July 2008. Available online at: [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=3&ved=0CDMQFjAC&url=http%3A%2F%2Fwww.researchgate.net%2Fpublication%2F228435740\\_Corruption\\_Campaign\\_Finance\\_and\\_Electoral\\_Accountability%2Ffile%2F9c96052320\\_beb1f3d6.pdf&ei=H7UJVK-OCJP8yQT46IGgAw&usq=AFQjCNGWEytDQOtJRD2cHF2tp6LCZq700A&sig2=VEMi2IPxdyeo8o5idkEOdw&bvm=bv.74649129,d.aWw](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=3&ved=0CDMQFjAC&url=http%3A%2F%2Fwww.researchgate.net%2Fpublication%2F228435740_Corruption_Campaign_Finance_and_Electoral_Accountability%2Ffile%2F9c96052320_beb1f3d6.pdf&ei=H7UJVK-OCJP8yQT46IGgAw&usq=AFQjCNGWEytDQOtJRD2cHF2tp6LCZq700A&sig2=VEMi2IPxdyeo8o5idkEOdw&bvm=bv.74649129,d.aWw).

② Nick Thompson, “International Campaign Finance: How do Countries Compare?,” CNN, March 5, 2012. Available online at: <http://www.cnn.com/2012/01/24/world/global-campaign-finance/>.

③ T. Markus Funk, Esq., Perkins Coie LLP, and Mikhail Reider-Gordon, “The ‘Next Big Thing in Global Anti-Corruption: The Brazil Clean Companies Act,” WESTLAW JOURNAL OF WHITE COLLAR CRIME (March 27, 2014) at p. 1. Hereinafter Funk.

ted acts that are committed in their interest or for their benefit-even if the act did not provide the organization with an exclusive benefit. Because the Act is based on a theory of strict liability, prosecutors need not prove that the company's management or directors had a corrupt intent, nor need they establish that an individual employee is liable. They only need to show that a prohibited act occurred. As a result, it is possible that a company or organization that had no knowledge that an employee or agent had violated the Act may be found to be civilly liable. According to some analysts, it is expected that this lower threshold of proof will encourage authorities to launch investigations under the Act.<sup>①</sup> The Act seeks to impose administrative and civil liability on corporations or organizations that "offer or give (directly or indirectly) any undue advantage to a public servant or a third person related to him or that fund efforts to use a third party to do so."<sup>②</sup> Legal entities may also be found liable under the Act if they conceal the real identity or interest of the bribe recipient, finance or facilitate the payment of the illegal acts, engage in bid rigging or related conduct, fraudulently modify or extend government contracts, or obstruct justice or intervened in an ongoing investigation.<sup>③</sup> Because the CCA outlaws facilitation payments, which are designed to fast-track routine government actions, the behavior targeted by the Act is broader than the U. S. 's Foreign Corrupt Practices Act and in line with the recommendations of the OECD's Working Group on Bribery as well as the scope of the U. K. 's Bribery Act.<sup>④</sup>

Like the U. S. 's Foreign Corrupt Practices Act, the CCA attempts to encourage companies and organizations to self-report and to cooperate with investigative authorities. The Act's provision for "leniency agreements," entities that come forward and admit wrongdoing may see their fines reduced for up to "by up to two-thirds of the total, and will be exempt from certain judicial and administrative sanctions."<sup>⑤</sup> Those

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① Esther M. Flesch, John P. Cunningham, Bruno C. Maeda, Erica Sarubbi, Geoff Martin, and Carlos Ayres, "Brazil's Clean Company Act: How U. S. , U. K. and Global Models May Influence Enforcement," BAKER & MCKENZIE CLIENT ALERT (July 2014) . Available online at: <http://ethisphere.com/wp-content/uploads/CLIENT-ALERT-Brazil-Anti-Bribery-Comparative-July-2014.pdf>. Hereinafter Flesch.

② See Funk, *supra* note 17, at 1.

③ Id. at 2.

④ Timothy W. Blakely, Ruti Smithline, Jarod G. Taylor, and Kendall L. Manlove, "Brazil's New Clean Company Act Continues Global Fight Against Corruption," Morrison Foerster Client Alert Blog, August 6, 2013. Available online at: <http://media.mofo.com/files/Uploads/Images/130806-Brazils-New-Clean-Companies-Act.pdf>.

⑤ See Flesch, *supra* note 18, at 7.

sanctions may even include a judicial decision compelling the dissolution of the legal entity. In addition to penalties such of loss of assets, rights, or valuables related to the activity, the Court may order the company or organization to partially suspend its operations as well as fine the entity an amount that ranges between 0.1 percent and 20 percent of the company's gross revenues.<sup>①</sup> In addition, the Court may bar the company from access to public financing incentives for a period from one to five years. The nature of the punishment imposed will depend on: 1) the seriousness of the offense, 2) the entities' financial position, 3) the total value of the contracts held with public entities, 4) the degree of cooperation with the investigation and 5) whether or not the company had internal procedures in place designed to prevent corruption.<sup>②</sup> In contrast to the U. K's Anti-Bribery Act however, the fact that an organization did have procedures in place is not a complete defense to liability, but rather only a mitigating factor which may play a role in the size and scope of the sanctions.

### 3. Impediments to Progress

Will the Act make a difference? Although the law is an important step forward, it also has key limitations. To begin, commentators are conflicted as to how the government intends to enforce the Act's extraterritorial jurisdiction in practice. In theory, Brazil has the authority to prosecute foreign companies with offices in Brazil. In practice however, the government is likely to target domestic legal entities for prosecution. A second concern is the domestic reach of the Act. On the federal level, the Office of the Federal Comptroller General is staffed with qualified individuals with expertise in anti-corruption investigation and enforcement. However, although the law may discourage corruption on the national level, because the law vests its enforcement authority at the highest-level government authority affected by the bribery, it decentralizes the prosecution of corruption. Thus, resource constraints on the local level may undermine its effectiveness at that level.<sup>③</sup> Brazil's decentralization of the prosecution function is a strong departure from the centralization of the prosecution function under both the U. S. Foreign Corrupt Practices Act as well as the U. K.'s

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① See Funk, *supra* note 17, at 2.

② Freshfields Bruckhaus Derringer, "The Clean Companies Law: Brazil joins the global fight against corruption," (January 2014). Available online at: <http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Brazil%20Clean%20Companies%20Law%20-%202014.PDF>.

③ Maryum Jordan, "Brazil's Clean Company Act: Ineffective for Fighting Corruption," GAB: THE GLOBAL ANTI-CORRUPTION BLOG, May 12, 2014. Available online at: <http://globalanticorruption-blog.com/2014/05/12/brazils-clean-companies-act-ineffective-for-combating-local-corruption/>.

Bribery Act. Finally, in two crucial respects the Act limits potential sanctions. To begin, the Act does not put debarment on the table as a judicial sanction. In addition, if another corporation acquires a company found liable under the Act, successor liability is limited to fines and restitution equivalent to the damage caused up to the value of the transferred assets.<sup>①</sup>

While the CCA was enacted with great fanfare, the U. S. experience with the Foreign Corrupt Practices Act illustrates the potential limits of legislative enactments.<sup>②</sup> Although Congress passed the FCPA in 1977, during the first thirty years of the Act's existence, few cases were prosecuted. Indeed between 1978 and 2000, the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) averaged a mere three prosecutions per year.<sup>③</sup> It was not until Congress passed the Sarbanes-Oxley Act in 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 that the momentum shifted in favor of increased prosecutions. Since that time prosecutions have accelerated. In fact, in 2013 alone, federal agencies collected "over \$ 720 million in penalties against corporations, averaging \$ 80 million per corporation charged."<sup>④</sup>

It is important to note that that figure does not mean that government investigators play an active role in ferreting out corrupt practices however as the bulk of actions stem from voluntary corporate disclosures. In addition, neither the DOJ nor the SEC is busy in the courtroom taking FCPA prosecutions to trial. Almost all corporate cases are settled prior to trial.<sup>⑤</sup> However, there has been a key shift in federal resources in the direction of fighting corruption. Notably, the Federal Bureau of Investigation (FBI) now possesses a squad of agents dedicated to conducting FCPA inves-

① Blakely, *supra* note 21.

② The Act was amended in 1988 to add the affirmative defenses of the local law defense and the reasonable and bona fide promotional expense defense. "A Resource Guide to the U. S. Foreign Corrupt Practices Act," Criminal Division of the U. S. Department of Justice and the Securities and Exchange Commission, November 14, 2012, at 3. Available online at: <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>. [hereinafter Resource Guide].

③ Lena E. Smith, Note: "Is Strict Liability the Answer in the Battle Against Foreign Corporate Bribery," 79 BROOK. L. REV. 1801, 1809 (2014).

④ *Id.*

⑤ Irina Sivachenko, Note, "Corporate Victims of 'Victimless Crime': How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance", 54 B. C. L. Rev. 393, 405-06 (2013).



tigations.<sup>①</sup> Both the Department of Homeland Security as well as the Internal Revenue Service also possess investigative duties.

If the FCPA's track record holds any predictive value for the future of the CCA, one might to question whether the CCA's incentives for voluntary disclosure and Brazil's corporate cultural norms match the strength of the FCPA's provisions and the vigilance of U. S. companies in fighting corruption. In addition, the fact that the CCA does not carry with it the threat of a criminal prosecution may also undercut its ability to deter bribe-making. Finally, a key reason why the FCPA has been a successful tool in the U. S. is that companies fear the reputational impact of a prosecution. The threat of being found to have engaged in "criminal" behavior motivates companies to settle cases.<sup>②</sup>

## B. India

### 1. Corruption Profile

For decades, India's economy has felt the drag caused by several forms of corruption which include bribery, misuse of power, misappropriation of public funds, as well as intentional delays to encourage the payment of "speed money."<sup>③</sup> Unfortunately, the financial burden imposed by corruption has been heavily borne by those individuals who are least able to bear it-India's poor. Indeed, a 2008 study revealed that almost "one-third of Indians living below the poverty line paid bribes to one or more of the 11 public services in 2007."<sup>④</sup> Though the electorate may theoretically hold India's politicians accountable in the election booth, the pervasive belief that politicians may use public office for private gain has created a culture in which corruption is tolerated, if not expected.

Even if India's top politicians possessed the political will to fight corruption, they would face strong resistance from the police and lower levels of the judiciary-institutions themselves which are riddled with corruption. As Binney Seth writes:

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① Resource Handbook, *supra* note 4, at 4.

② Joseph W. Yockey, "Choosing Governance in the FCPA Reform Debate," 38 J. CORP L. 325, 329 (Winter 2013) .

③ Binney Seth, "Institutionalized Corruption in India: Judicial Systems, Ineffective Mechanisms, and Movements of Reform," 15 TOURO INT'L L. REV. 169, 170 (2012) [hereinafter Seth] .

④ Transparency Int'l India and Centre for Media Studies, *TII-CMS India Corruption Study 2007: With Focus on BPL Households* (2008) .

The TI & CMS study found the judiciary, specifically the lower formal courts, to be the second most corrupt public service, trailing the police. With bribes being most common, TI & CMS indicated that those of whom did pay bribes in the judiciary, 41% had paid to influence judgments, 31% to speed up or delay judgments, and 28% to get routine tasks done, such as case listing or copying of documents. Approximately 61% of lawyers were paid bribes by a host of individuals “as the price of getting things done.” One of the chief causes for formal judicial corruption is delay in the court system because delays motivate litigants to pay money in order to speed up the process.<sup>①</sup>

Looking at India from a comparative perspective, it is evident that experts view the country's public services sector as very corrupt. The country scored 36 out of 100 on Transparency International's 2013 Corruption Perceptions Index where the scores range from a low of zero indicating highly corrupt to one-hundred indicating that a country is perceived to be very clean.<sup>②</sup> The country scores similarly poorly on the organization's “control of corruption” index which seeks to measure perceptions about the extent to “which public power is exercised for private gain.” Indeed, India registered a negative score of 0.5167 on a scale of ranging from -2.5 to 2.5 where higher “values correspond to better governance outcomes.”<sup>③</sup>

## 2. New Legislation

India's anti-corruption efforts lag behind countries such as Brazil despite the fact that the country's public corruption legislation, the Prevention of Corruption Act (PCA) dates back to 1988. Although India signed was a signatory to the 2011 United Nations Convention Against Corruption, many subsequent legislative initiatives stalled in parliament. It was not until literally millions of Indian citizens poured into the streets to follow the lead of the seventy-three year old anti-corruption activist and hunger striker Anna Hazare that the parliament began to notice. In August 2013 new Amendments to the “Companies Bill” passed the legislature. The bill, which replaced the Companies Act of 1956, mandates that companies adopt certain accounting practices and delineates the relationship of directors and auditors within a compa-

① Seth, *supra* note 33, at 172.

② See India Country Report-Transparency International. Available online at: <http://www.transparency.org/country#IND>.

③ Id.