Colombian anti-corruption law: a comparative analysis with the United States' Foreign Corrupt Practices Act (FCPA) on the public official bribery elements and penalties.

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Abstract

This paper compares the effectiveness of Colombia's anti-corruption regulatory regime with that of he United States. Bribery is defined as the act of offering, giving, accepting or receiving something of value in exchange for a discretional decision or behavior from the recipient, usually leading to an advantage for the payer.

1. **Introduction:** Corruption defined and the international regulatory context.

Corruption can be defined as the "abuse of power, influences, professional position for one's individual interests and goals" (Walczak, 2018). It comprises a broad variety of behaviors that range from false documents to money laundering and bribing public officials. A more holistic interpretation of this definition may include the misallocation of economic, social, and political resources, which can only originate from the position of influence.

Bribery is a type of corruption that can be seen as a threat to the law and the democratic process of governance, as well as its legitimacy. It is defined by the act of offering, giving, or soliciting, or receiving something of value in exchange for a favor or act that is illegal or unethical (James, 2002). This phenomenon has a serious but often underrated impact in society. It affects the average life of citizens without them realizing it. According to a study by Nugroho, Cubillos and Bopusy in 2022, it goes beyond affecting the moral and legal legitimacy of governments and their officials; rather it disables the creation of employment and relevant infrastructure needed for health care, education, transportation, and even alimentary health (Onder, 2021).

To address these concerns, , Article 1 of the OECD Anti-Corruption Convention requires signing countries – such as the Colombia and the United States – to take necessary measures as to create criminal offenses under their domestic laws. More specifically, his provision requires signing parties to criminalize the "promise, offering or giving to a foreign public official (…) of an undue advantage, whether directly or through intermediaries, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business." Likewise, Article 16 of the United Nations Convention Against Corruption instructs signing parties to "consider the criminalization (…) of the promise, offering or giving, to a public official or another person, directly or indirectly, of an undue advantage for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions."

So, while both conventions call for the countries' legislators to criminalize bribery, even in an indirect form, the United Nations Convention Against Corruption adds to the element of the subject not necessarily being a Public Official. Interestingly, it seems like these statutes focus on the criminalizing of active bribery, with little mention of the possible and necessary repercussions of public officials receiving something of value in exchange for certain behaviors relating to their job mandated activities.

Colombian authorities sought to comply with these international standards by adopting a set of mandatory offenses the signing states need to have in their legal systems, such as bribery of foreign public officials, money laundering, and record and accounting offenses; they also set out some optional offenses like the passive crime of taking a bribe, abusing the public function to obtain a bribe and illicit enrichment. The extent to which these offenses are enforced to combat corruption is less clear.

This paper will compare and contrast the Colombian regulatory context in comparison with United States laws, specially the Foreign Corrupt Practices Act ("FCPA") [Add reference to statutory citation] and 18 U.S.C. § 201.[1]

2. The Colombian context

2.1. Why Colombia is so prone to corruption?

The Corruption Perceptions Index created by Transparency International from the years 2013 to 2022 shows that in Latin America corruption and state legitimacy are an ever-growing issue. Colombia, particularly, has been ranked as one of the most corruption prone countries from an institutional point of view (Langbein & Sanabria, 2013), and the public's trust in the governmental institutions is fragile.

[1] It should be noted that in addition to the U.S. Foreign Corrupt Practices Act (FCPA) and Colombian Anti-Corruption law, other important anti-bribery regulations exist globally, such as the UK Bribery Act and Canadian Anti-Bribery Act. While this paper will not delve into a comparative analysis of these regulations, they should be considered in any comprehensive study of anti-corruption laws.

Bribery is a prevalent issue in Colombia, where it is commonly used to go around the sometimes-extravagant bureaucratic processes and obtain a favorable treatment from public officials (Laajaj et al., 2019). This problem is particularly persistent in public contracting and government procurement, although it is also common in the private sector and is especially prevalent in the political sector, where it is used to gain power and influence. Which factors make the perfect cocktail combination for Colombia to have such a high rate of corruption has been the question for many scholars. Some important factors include Colombian culture, weak governmental institutions, and the reality of drug cartel history.

From the cultural standpoint, Bryan W. Husted highlights two key components: power distance and collectivism. Power distance, defined by Hoftsede, 1997 as "*the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally*" suggests that governmental leaders and public officers are held to have certain advantages because they are thought to be more educated than the average person, which leads citizens to assume that they themselves have to engage in impermissible or illegal conduct to be a public official or remain one. Collectivism in a society structure, as opposed to individualism, holds that decisions are made by prioritizing the goals of the group the person belongs to, which means that public officials are prone to prioritize the needs of family and friends over those of the general public.

The weak governmental institutions outlook provides that according to Brinks, Levtisky and Murillo in *The Politics of Institutional Weakness in Latin America*, the governments are not willing, or when willing not able, to enforce the laws created by their legislatures, causing the vicious circle effect of no matter what laws exist they are not being complied with. The Colombian authorities have most of the infrastructure needed to carry out investments and projects, but the issue is the constant appropriation and overall loss of the resources used for them.

But the most important aspect might be that Colombia's economy and politics have been particularly influenced by the internal conflict and its intertwining with drug cartels. The already

growing leftist guerrillas, once created to oppose to the conservative hegemony, joined forces with the cartels around the 1960's in what could be described as the downfall of state legitimacy in Colombia. This convergence of factors, has significantly contributed to the escalation of corruption within the country, as the influence and power of these groups have undermnined governmental institutions and have fostered an environment that leads to illicit activities. As a result, corruption is more pervasive in various secotrs of the Colombian society,

2.2. Colombian criminal law overview:

There are three main laws to be taken into consideration when it comes to behaviors that can be categorized as bribery of public officials in Colombia: The Penal Code, the Anti-Corruption Statute, and the Asset Forfeiture Law.

As part of a codified system, the Colombian Penal Code from 2000 outlines what are criminal offenses and the calculation of their corresponding penalties, which range from fines to imprisonment. This code also includes the Criminal Procedural Code, which sets out the rules and procedures that the officials, prosecutors, and judges must follow when investigating and prosecuting the offenses. Furthermore, based on the Criminal Code, Colombia has specialized investigative and prosecutorial units, such as the Attorney General's office and the National Anti-Corruption Director, which are both responsible for working with intelligence units from the police to collect evidence and bring cases against the suspected corrupt actions.

Firstly, according to Article 405 of the Colombian Criminal Code, bribery is considered a criminal offense. It specifically prohibits individuals from offering something of value to a public official in exchange for influencing an official act. Similarly, Article 411 of the Colombian Criminal Code criminalizes the act of public officials receiving or accepting bribes.

These statutes establish three fundamental elements of bribery. Firstly, there must be an offer, promise, or grant of a benefit or advantage by the person seeking to bribe. This indicates that the individual expects something in return from the public official. Secondly, there is a requirement for the intention of obtaining or retaining an unlawful benefit or advantage, which stems directly

from the deliberate actions of the public official. Lastly, the actual act of soliciting, accepting, or receiving something of value completes the elements of bribery as outlined in Article 405.

In summary, these three elements emphasize the necessity of an exchange of benefits or promises in bribery cases. The person seeking to bribe expects a reciprocal action from the public official, and the intention to obtain or retain an unlawful advantage arises from the deliberate actions of the official.

Secondly, the Colombian Anti-Corruption Statute (Law 1474 of 2011) intends to prosecute and prevent corruption by establishing measures to detect such conduct, especially when it comes to bribery of public officials. There are some key aspects to the Law 1474 of 2011, the first one being the creation of the National Anti-Corruption Authorities, which supervise the fulfilment of this law by prosecuting the cases in coordination with the Attorney General's Office. The second essential feature of this law is the creation of an online system where all public officials are required to publish their assets and income, which was intended as a way of deterrence.

The Colombian Anti-Corruption statute focusses on deterring corruption in public procurement. Said focus is understandable given the vast number of economic resources involved in governmental bids for infrastructure projects, which may also attract political interests and potential misuse of this resources, making corruption more prevalent in this area. Consequently, this statute imposes a range of consequences on individuals and entities engaging in illegal conduct in pursuit of favor in state-awarded contracts, giving particular attention to bribery as the most common method of corrupting the bidding process.

This statute is significant for two reasons. First, it allows for the punishment of corporations by joining the criminal law and administrative law, although this is not a practice in Colombia, where the criminal law only applies to human individuals. Secondly, it imposes direct sanctions on foreign individuals and companies found to be engaging in bribery to secure contracts.

In addition, The Anti-Corruption Statute increases the penalties for bribery and other corruption related conduct such as embezzlement and abuse of power. The original Colombian Criminal

Code sanctions established a maximum of twelve years of prison. This law creates a new maximum of twenty years for individuals who engage in corrupt activities. Since one of the founding principles of criminal law in Colombia is the personal character of penalties, which suggests for instance that one felony's fault cannot be transferred to another person, corporations have long been overlooked when it comes to corruption liability (Gómez, 2016). The latter has been a long-discussed topic by Colombian scholars in the sense that criminal law should be able to punish such behaviors, but the corporate veil is not hard but rather impossible to pierce when the criminal law cannot be used by authorities to sanction corporations directly via fines.

The Public Procurement Law (Law 80 of 1993) sets forth guidelines and procedures of the public procurement process so that it is transparent and efficient in avoiding fraudulent behaviors. It dictates the use of fair competition when it comes to bidding and establishes sanctions for those who engage in discretional behavior that results in the abuse of the positions of power, for instance, in the selection of a construction firm. Such conduct can be sanctioned with fines and the disqualification from participating in public procurement processes in the future. This goes hand in hand with The Asset Forfeiture Law (Law 1708 of 2014), which states that the government can seize assets acquired through illegal means, including bribery of public officials, providing the authorities the legal tools to claim stolen public funds and assets.

The conduct of bribery is addressed in the afore-mentioned laws, that prohibit ,with respect to public officials, the offering, giving or receiving of bribes . The discussion of whether these laws are implemented in an appropriate manner remains to be studied, as it seems like the infrastructure, the lack of political will and resources do not allow the Colombian authorities to fully comply with these laws no matter how appropriate they seem.

2.3. United States regulatory context:

Overall, the most significant United States legislation on the topic is the FCPA. The FCPA has two main provisions: anti-bribery and accounting. The accounting provision requires publicly-traded companies to maintain accurate books and records.. Section 8 of the FCPA states that failure to comply with the latter will result in investigation from the Security and Exchange

Commission, which is the governmental agency responsible for enforcing federal securities laws ("Securities and Exchange Commission", n.d.).

The jurisdiction of the FCPA is broad, by applying to a varied set of individuals and entities that engage in corrupt practices. This law covers what it calls "domestic concerns", by including any business incorporated under the United States' laws, and any person who is citizen or resident of the United States. The FCPA applies to issuers as well, which are companies that have been registered to the Securities and Exchange Commission as mandated by Section 12 of the Securities Exchange Act of 1934. In this sense, the accounting provisions of the FCPA apply only to issuers. This law also applies to persons and entities, other than issuers and domestic concerns that engage in corrupt practices while in the United States territory. This is a broad subject jurisdiction that extends itself to cases outside the United States' territory.

Section 78dd-1 of the FCPA is the anti-bribery provision. It sets forth the following elements that must be satisfied to give rise to a violation. First, the statute requires the offer, promise or payment of a bribe or other item of value. Nonetheless, for it to be criminalized, the payment needs to be intended to induce the receiver to not only use but misuse their position so that whoever gives out the payment or item of value gains an advantage. When outlining the definition of an item of value, this may include cash, its equivalents, but also gifts, travel, meals, or a form of entertainment. The crucial aspect lies in the presence of the quid pro quo behavior, where certain commonplace transactions related to the negotiation and that do not pertain to an expectation of receiving a benefit that comes from the official's additional discretional act for the exchange of something valuable.

Second, the bribe needs to be offered or paid to a foreign governmental official: Section 78dd-2(h)(2) of the FCPA defines a public official as:

> Any elected or appointed government official; any person acting for, or on behalf of, a government official, agency, or instrumentality; any person acting for on behalf of a political party, or any candidate for public office; any person acting on behalf of a public

international organization, such as the World Trade Organization; or any person acting for or on behalf of any entity that is wholly or partially government owned or controlled.

The variables used to determine whether an entity is a governmental instrumentality can be taken from the United States' Internal Revenue Service, which refers to the extent of the government's ownership in the entity, its degree of control over it, the purpose of the entity's activities, and the reason for its creation ("IRS", n.d.).

Third, for the purpose of influencing the official or to secure any improper advantage, or in order to obtain or retain business. These elements show that the FCPA anti-bribery provisions seek to ensure that business is conducted transparently and there are no unfair advantages gotten through illicit means.

In addition to the FCPA, section 201 of the United States Code criminalizes bribery of public officials by making it illegal for public officials to solicit, accept or receive anything of value in exchange for the performance of an official act. This section also defines "public official" broadly to include elected and appointed officials but also employees from the federal government, as well as members of the Congress, judges and even any employee of local governments.

Besides public officials, Section 201 of the U.S. Code also applies to the witnesses in federal proceedings by forbidding anyone from offering, giving, or promising anything of value to a witness, when done with the intent of influencing the testimony, which brings back the quid pro quo element necessary for the act to be recognized as corruption by applying it to domestic bribery in the United States.

In addition to the FCPA and Section 201, other laws also address bribery from a national perspective; for instance the Travel Act 18 U.S.C. § 1952criminalizes bribery by making it a federal crime to use any kind of interstate commerce tool to promote, manage, carry on, or facilitate any unlawful activity, which includes bribery. This section has been used by prosecutors to investigate persons who engage in bribery across state lines.

tates may have also enacted laws prohibiting bribery; for instance, tOhio Revised Code Section 2921.02 prohibits "knowingly soliciting, accepting, or agreeing to accept any property or benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter." This law penalizes both public officials and private individuals that intend to seek discretional benefits from the other person, which can result in fines and imprisonment. In addition, the Ohio Ethics Law sets the ethical standards relevant for public officials and their employees.[2]

2.4. Comparison between the United States' and Colombian anti-bribery system:

While there are significant differences between the Colombian and United States legal frameworks regarding the scope of application, sanctions imposed and conduct definitions, there are some common points regarding the elements of the bribery conduct, and the criminal policy reasons behind the laws that combat bribery as a form of corruption in these countries. The study of different jurisdictions allows the analysis of what kind of law and enforcement agencies are needed to better combat corruption. Of course, the specific social, economic and historical context of each country provides different anthropological reasons for a law to be effective or not, but t United States' anti-corruption law can be compared to Colombian anti-corruption law to show a hint of what works in each jurisdiction and what might be better implemented in a developing country like Colombia.

First, both countries have a similar interest in the transparency of subjects that might engage in bribery and have imposed accounting controls. In the United States, the FCPA's accounting provisions require issuers to maintain accurate books, records and accounts that reflect the transactions and assets. These requirements are set forth in Sections 13 (b)(2)(A) and 13(b)(2)(B), of the Securities Exchange Act of 1934. In the Colombian legislation, the Financial Superintendency requires all corporations that under the previous year have done business in

[2] The UK Bribery Act differentiates commercial bribery from bribery of a government officer by defining the former as influencing a private actor to abuse their position of power because of a financial influence.

Colombia to be registered in their system and to file annual financial statements. By enforcing such regulations, both counties aim to maintain integrity in their financial systems and ensure that businesses operating in their jurisdiction are honest and ethical.

Second, in terms of severity of the penalties, both the United States and Colombian laws provide for substantial prison terms and fines for individuals and substantial fines for companies that engage in such practices. In the United States, the FCPA and Section 201 provides for sentences up to five years per violation and fines up to $2 million for companies. In addition, individuals and companies face disgorgement, which requires them to give up all of the illicit profits gained. A notable case on this is *United States v. Esquenazi*, in which two United State-based executives were convicted of bribing Haitian public officials, conspiring to violate the FCPA, and money laundering (United States v. Esquenazi, 2010). The court sentenced each individual to fifteen years in prison. For the Colombian case, its Criminal Code criminalizes both offering and receiving bribes with penalties ranging from 4 to 12 years in prison. Additionally, companies and individuals can face fines, asset forfeiture and future immediate disqualification from public contracting or even participating in public procurement tenders. In one case, the former director of the National Anti-Corruption Department in Colombia, Gustavo Moreno, was sentenced to four years in prison for accepting bribes from a previous governor in exchange for the reduction of his sentence in a corruption scheme. Gustavo Moreno was also ordered to return the money he received.

By holding individuals and companies accountable, both countries seek to promote transparency and accountability, especially when it comes to public officers and procurement. The question then is whether someone who commits this type of crime is effectively prosecuted in either of these two jurisdictions. The Colombian law is quite robust when it comes to the consequences of criminal activity in what is commonly referred as ‘punitive populism’, which is a mostly Latin American phenomena that represents the political strategies used by governments and legislators to satisfy the voters by stating a strong attitude towards crime by promoting the creation of legislation that shows such posture (MD Bonner, 2019).

Even though the penalties in Colombia are more severe, they do not necessarily signify more effectiveness in deterring bribery or criminal practices in general. According to the study made by the Global Index of Impunity (GII 2020), Colombia has what is referred to as a "medium impunity", meaning that it is not high or low in comparison to other countries. However, due to the lack of state legitimacy and public mistrust regarding the effectiveness of legal action, an interesting phenomenon arises where people refrain from denouncing corruption in the first place. This can be attributed to the belief that no concrete action will be taken to address the illegal act, leading to a generalized sense of impunity but also reluctance to engage in reporting. Nonetheless, the lack of state legitimacy and public discomfort with impunity leads to the curious phenomenon of people not denouncing in the first place (Rose-Ackerman, 2001).

It seems that no matter the length of the prison consequences in the law, both the Colombian and United States are trying to implement non-prosecution related alternatives that relate more to deterrence than to imprisonment. For instance, in the United States v. VimpelCom Ltda. , the company entered into a deferred prosecution agreement where they agreed to cooperate with the investigation and the only criminal penalty was the fine imposed on them. Both countries are developing policies that recognize the importance of deterrence over imprisonment by implementing alternative measures that emphasize cooperation, fines, and penalties. However, a significant concern might emerge regarding fairness and equal treatment of the law to all corporations. The possibility of larger companies resolving legal matters by paying fines instead of facing prosecution leads to the concern of whether these agreements promote accountability.

Second, when it comes to jurisdiction, the FCPA has a broader jurisdictional scope than does the Colombian Penal code. In general terms under the FCPA there are three subjects to which the statute applies: (i) foreign nationals acting as agents or officers of an issuer, which is any company listed on the United States' stock exchange (section 78dd-a) (ii) a Domestic Concern, which is any citizen or company that has been organized under the United States' law (section 78dd-2); (iii) foreign nationals who are not issuers or of domestic concern, but that engage in corruption while in the United States.

On the other hand, since from the Colombian perspective all conduct that can be regarded as corruption or bribery of public officials relies on the application of the Penal Code, the latter's jurisdiction will be the one applicable to any corrupt practice. Article 29 of this law states its jurisdiction relies on two main points: felonies committed on Colombian land and acts criminalized by this code committed on foreign land according to the international treaties subscribed and ratified by Colombia and its internal legislative power. Examining the success rates of prosecutions, their challenges and perception on the legal system's legitimacy can shed light on areas that need improvement. In the United States, according to a survey conducted by Gallup in 2021, the public's confidence in the judicial system's honesty rounded up to 27% (Gallup, 2021). This indicator is relatively low in regard to the level of trust in the legal system. Similarly, in Colombia, a study conducted by the Latin American Public Opinion Project (LAPOP) revealed that 19% of respondents believed the judicial system was effective against corruption (LAPOP, 2018). These statistics highlight the challenges faced by both countries in terms of public perception in the legal system's ability to effectively combat corruption.

Third, it is important to highlight the distinct difference in the application of the FCPA compared to the Colombian Penal Code. In the case of United States v. Firtash, the defendants, who were Ukrainian and Hungarian citizens, were accused of bribing public officers in India to secure mining contracts. This case exemplifies the extraterritorial jurisdiction of the FCPA, which extends beyond the United States' originally intended territorial boundaries.

The Colombian Penal Code, where jurisdiction would typically be limited to cases involving Colombian citizens or actions committed within Colombian territory, but the FCPA's reach extends to certain subjects/defendants acting outside of the United States. In the Firtash case, the defendants were not United States citizens, and the corrupt acts did not occur within the United States or involve a United States-based company. Even so, the FCPA's jurisdiction was invoked because the defendants utilized United States financial institutions to transfer the money that was ultimately used for the bribes.

This highlights the extraterritorial scope of the FCPA, demonstrating its ability to extend jurisdiction based on the involvement of United States financial systems, even when the main actors and actions occur outside of the United States' territory.

Colombia has signed several treaties looking for assistance and cooperation with other nations in their fight against corruption. Some of these are the Agreement over Legal Assistance and Judicial Mutual Cooperation with Panama or the analogous Judicial Cooperation and Mutual Assistance Agreement with Brazil. These show an interest from the Colombian prosecutorial authorities to exchange information that might facilitate prosecution since their jurisdiction is limited to the Colombian territory and cannot access information otherwise, but its effect are yet to be seen.

Conclusion:

In conclusion, corruption and bribery are persistent issues in both Colombia and the United States, requiring regulatory measures to combat these practices. The Colombian has context specific factors contributing to its susceptibility to corruption, including cultural aspects such as power distance and collectivism, weak governmental institutions, and the historical influence of drug cartels. Colombian criminal law addresses bribery through the Penal Code, the Anti-Corruption Statute, and the Asset Forfeiture Law, establishing criminal offenses and penalties for both individuals and corporations. However, the enforcement of these laws is still a challenge due to infrastructure limitations and insufficient resources.

On the other hand, the United States has a robust regulatory framework, with the Foreign Corrupt Practices Act (FCPA) playing a crucial role. The FCPA's anti-bribery provisions cover a wide range of individuals and entities engaging in corrupt practices, including domestic concerns, U.S. citizens and residents, and non-U.S. actors within U.S. territory. The FCPA also addresses accounting practices for publicly-traded companies. The enforcement jurisdiction of the FCPA extends beyond U.S. borders, allowing for investigations and penalties in cases involving corrupt practices outside U.S. territory.

While both Colombia and the United States have taken steps to combat bribery and corruption, there is a challenge effectively implementing and enforcing these laws, as the success of anti-corruption efforts depends on the commitment of governmental institutions, allocation of resources, and cooperation among international partners. To achieve progress in this area, ongoing evaluation and improvement of laws and enforcement mechanisms are essential.

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