

Anti-Corruption Laws in the Philippines: Prospects for Reform

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I. INTRODUCTION

Corruption is generally defined as the “misuse of power for private benefit[.]”¹ It is among the most complex issues that have “reached plague proportions in past ... [and] present societies[.]”² and it takes various forms. The damage corruption brings to institutions and the general public cannot be overemphasized.³ At present, it is considered to be an “enormous obstacle to the realization of all human rights[.]”⁴

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1. SIMON S.C. TAY & MARIA SEDA, *THE ENEMY WITHIN: COMBATING CORRUPTION IN ASIA* 87 (2003).
2. FETHI BEN JOMMA AHMED, *THE DILEMMA OF CORRUPTION IN SOUTHEAST ASIA* xiii (2005).
3. See Vinay K. Bhargava, *Curing the Cancer of Corruption*, in *GLOBAL ISSUES FOR GLOBAL CITIZENS AN INTRODUCTION TO KEY DEVELOPMENT CHALLENGES* 341-46 (Vinay K. Bhargava ed., 2006).
4. Office of the High Commissioner for Human Rights, *The Human Rights Case Against Corruption*, available at <http://www.ohchr.org/EN/NewsEvents/Pages/HRCaseAgainstCorruption.aspx> (last accessed July 8, 2014).

Essentially, corruption has two sides: (1) the *supply side*, composed of private bribers (individuals or corporations) and (2) the *demand side*, composed of public officials.⁵ The fight against corruption is difficult, particularly when it is institutionalized in a society where everyone appears to be involved.⁶ Reform in law and policy is necessary to address corrupt practices and improve governance.⁷ States now recognize the need to address corruption on both the supply and demand side, and at the national and transnational level.⁸ Corruption affects both developed and developing countries, but more so in the latter, where resources are scarce.⁹

This Article focuses on Philippine anti-corruption laws, arguing that they are generally weak as they fail to adequately deter the private sector from engaging in corrupt activities, particularly by participating in the act of bribing public officials. This Article suggests that the adoption of anti-corruption laws similar to that of Malaysia, Hong Kong, and Indonesia, which specifically criminalizes bribery by private entities, or companies of public officials in the Philippines and abroad, can adequately address the supply side of corruption. Moreover, such reforms will align Philippine anti-corruption laws with current international anti-corruption standards.

The first part of this Article briefly looks at the anti-bribery regimes established by multilateral instruments, which lay down international anti-corruption standards and procedures. The second part examines Philippine anti-corruption laws, identifies key challenges and weaknesses, and presents various prospects for reform inspired by anti-corruption frameworks in neighboring countries like Malaysia, Indonesia, and Hong Kong. In particular: (1) expanding the definition of corrupt acts to include bribery of public officials by private entities (partnerships, business organizations, and corporations) and bribery of foreign public officials by Filipino private entities; (2) increasing the penalties for those committing corrupt acts; and (3) creating a single focal institution responsible for tackling corruption.

II. GLOBAL ANTI-CORRUPTION EFFORT

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5. Ben W. Heineman, Jr. & Fritz Heimann, *The Long War Against Corruption*, 85 FOREIGN AFFAIRS 75, 76 (2006).
 6. TAY & SEDA, *supra* note 1, at vii.
 7. *Id.*
 8. See Wayne A. Sandholtz & Mark M. Gray, *International Integration and National Corruption*, 57 INTERNATIONAL ORGANIZATION 761, 768-74 (2003).
 9. See U.N. Office on Drugs and Crime, *Impact of Corruption on Development and How States Can Better Tackle Corruption Under the Spotlight at U.N. Anti-Corruption Conference in Morocco*, available at <http://www.unodc.org/islamicrepublicofiran/en/impact-of-corruption.html> (last accessed July 8, 2014).

In recent decades, international agreements have been entered into to address the gaps in national anti-corruption laws, specifically those dealing with the reduction of bribery on the supply side. Two prominent international anti-corruption agreements are briefly discussed below.

A. OECD Anti-Bribery Convention

In 1997, the Organisation for Economic Co-operation and Development (OECD)¹⁰ adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).¹¹ It was signed by 34 OECD member states and six non-members, namely Argentina, Brazil, Bulgaria, South Africa, Columbia, and Russia,¹² consisting of around 90% of world trade.¹³ It requires member-states to enact and enforce laws that sanction against companies that engage in bribery in the conduct of international business.¹⁴

The OECD Anti-Bribery Convention emphasizes that “all countries share a responsibility to combat bribery in international business transactions[.]”¹⁵ States must then criminalize bribery in international business transactions and render mutual legal assistance in that regard.¹⁶ Further, it requires country monitoring and extensive peer-led follow up, which aims to ensure that “the fight against bribery is effective, thus creating a level playing field for fair competition.”¹⁷

In 2001, the Asian Development Bank (ADB) and the OECD created the ADB/OECD Asia Pacific Anti-Corruption Initiative (ADB/OECD Initiative), which brought together 28 Asian and Pacific economies that have

10. See OECD, The Organisation for Economic Co-operation and Development (OECD), *available at* <http://www.oecd.org/about/> (last accessed July 8, 2014).

11. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *adopted* Nov. 20, 1997, 37 I.L.M. 1 [hereinafter OECD Anti-Bribery Convention].

12. OECD, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *available at* <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (last accessed July 8, 2014).

13. See Thomas O. Gorman, OECD: Global Corruption Enforcement is on the Rise, *available at* <http://www.secactions.com/oecd-global-corruption-enforcement-is-on-the-rise/> (last accessed July 8, 2014).

14. *Id.*

15. OECD Anti-Bribery Convention, *supra* note 12, at pmbl.

16. *Id.* art. 9.

17. OECD, Colombia joins OECD Anti-Bribery Convention, *available at* <http://www.oecd.org/daf/antibribery/colombiajoinsocdantibriberyconvention.htm> (last accessed July 8, 2014).

committed to implement the OECD anti-bribery instruments.¹⁸ In 2004, Asia Pacific Economic Cooperation (APEC) member-states committed to implement the United Nations Convention Against Corruption (UNCAC).¹⁹

B. UNCAC

In 2003, the UNCAC was signed by 140 states and became the first globally binding anti-corruption instrument.²⁰ State-parties are obligated to implement and enforce anti-corruption measures in their respective jurisdictions.²¹ Unlike the OECD, which focused on bribery, the UNCAC covers a broader range of issues — domestic and foreign corruption, bribery, extortion, and pay offs to the private sector and public officials.²²

Subsequently, the United Nations Convention against Transnational Organized Crime (UNTOC)²³ was entered into force and signaled an important step in fighting transnational organized crime, including “the establishment of domestic criminal [offenses] relating to ... corruption and money laundering, mutual assistance[,] and law enforcement cooperation.”²⁴

The OECD Anti-Bribery Convention and UNCAC were created with the intention of reducing bribes supplied by foreign investors, through the increase of the cost (*e.g.*, penalties and fines) of bribing abroad.²⁵ Likewise, both instruments indicate that state-parties must institute measures that ensure the seizure and confiscation of paid bribes and the proceeds thereof, or have similar sanctions in place.

18. Norton Rose Group, *Anti-Corruption Laws in Asia Pacific (An Unpublished Guide Which Provides an Overview of International and National Anti-Corruption Regimes Within an Asia Pacific Context)* 8, available at <http://www.nortonrosefulbright.com/files/anti-corruption-laws-in-asia-pacific-63559.pdf> (last accessed July 8, 2014).

19. See United States Department of State Archives, *APEC Course of Action on Fighting Corruption and Ensuring Transparency*, available at <http://2001-2009.state.gov/p/inl/rls/other/38786.htm> (last accessed July 8, 2014).

20. U.N. Convention Against Corruption, *adopted* Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC].

21. *Id.*

22. Heineman, Jr. & Heimann, *supra* note 5, at 80-81.

23. U.N. Convention Against Transnational Organized Crime, *adopted* Nov. 15, 2000, 2225 U.N.T.S. 209 [hereinafter UNTOC].

24. Norton Rose Group, *supra* note 19, at 8.

25. Heineman, Jr. & Heimann, *supra* note 5, at 77.

The Philippines ratified the UNCAC²⁶ and UNCTOC.²⁷ While the Philippines is not a signatory to the OECD Anti-Bribery Convention,²⁸ it is part of the ADB/OECD Initiative.²⁹ It is obligated to comply with the provisions of these international agreements since the 1987 Philippine Constitution adopts both incorporation and transformation doctrines as means by which international law becomes domestic law.³⁰ By ratification, international agreements and treaties become binding on the Philippines upon ratification by the President and concurrence of the Senate.³¹ Hence, under international law, the Philippines is obliged to combat domestic and foreign corruption, bribery, extortion, and pay offs to private sector and public officials.

III. PHILIPPINE ANTI-CORRUPTION EFFORT

In 2013, the Philippines was ranked 94th on the Corruption Perceptions Index (CPI) out of 177 countries.³² In 2012, it ranked 105th out of 117 countries, making it the 69th most corrupt country in the world.³³ The

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26. See United Nations Treaty Collection, UNCAC Status as at: 18-06-2014 05:01:00 EDT, available at https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=XVIII-14&chapter=18&lang=en#Participants (last accessed July 8, 2014) [hereinafter UNCAC Status].
27. See United Nations Treaty Collection, UNCTOC Status as at: 18-06-2014 05:01:00 EDT, available at https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=XVIII-12&chapter=18&lang=en#Participants (last accessed July 8, 2014) [hereinafter UNCTOC Status].
28. See OECD, Ratification Status as of 8 April 2014 (An Unpublished Report on the Ratification Status of OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions), available at http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus_May2014.pdf (last accessed July 8, 2014).
29. See OECD, Member countries and economies, available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/theinitiativesmembercountriesandeconomies.htm> (last accessed July 8, 2014).
30. JOAQUIN G. BERNAS, S.J., INTRODUCTION TO PUBLIC INTERNATIONAL LAW 60 (2009 ed.).
31. PHIL. CONST. art. VII, § 21.
32. Transparency International, Corruption Perceptions Index 2013, available at <http://www.transparency.org/cpi2013/results> (last accessed July 8, 2014).
33. ABS-CBN Interactive, PH improves in global corruption index, available at <http://www.abs-cbnnews.com/business/12/05/12/ph-improves-global-corruption-index> (last accessed July 8, 2014).

Philippines is among the top countries where the perceived level of corruption is high.³⁴

This Section discusses the Philippine anti-corruption effort, and examines its anti-corruption laws, with special focus on the legal measures to reduce the bribery committed by foreign investors or private bribers (individuals or corporations). It identifies key challenges and weaknesses and presents prospects for reform in legislation and implementation.

The Philippines faces several challenges in combating corruption, the most basic of which are: (1) anti-corruption laws focused on the public sector; (2) conflicting and overlapping roles and mandates; and (3) unclear focal point or central national authority with respect to investigating and prosecuting corruption cases.

A. First Problem

1. Public Sector-centric Definition of Bribery and Corrupt Practices

Interestingly, there is no exact definition of graft and corruption in Philippine law.³⁵ There are 10 pieces of legislation³⁶ apart from the Constitution that deal with anti-corruption in the Philippines, ranging from investigation, prosecution, and forfeiture. Likewise, jurisprudence does not

34. See Transparency International Official Website, Corruption Perceptions Index 2012, available at <http://www.transparency.org/cpi2012/results> (last accessed July 8, 2014).

35. See Joselito D.R. Obejas, *Wiping Away the Footprints of Corruption in the Philippines*, in RESOURCE MATERIAL SERIES NO. 77 97-122 (2009).

36. See, e.g., Anti-Graft and Corrupt Practices Act, Republic Act No. 3019 (1960); An Act Establishing a Code of Conduct and Ethical Standards for Public Officials and Employees, to Uphold the Time-Honored Principle of Public Office Being a Public Trust, Granting Incentives and Rewards for Exemplary Service, Enumerating Prohibited Acts and Transactions, and Providing Penalties for Violations Thereof, and for Other Purposes [Code of Conduct and Ethical Standards for Public Officials and Employees], Republic Act No. 6713 (1989); An Act Providing for the Functional and Structural Organization of the Office of the Ombudsman, and for Other Purposes [The Ombudsman Act of 1989], Republic Act No. 6770 (1989); An Act Strengthening Civilian Supremacy Over the Military Returning to the Civil Courts the Jurisdiction Over Certain Offenses Involving Members of the Armed Forces of the Philippines, Other Persons Subject to Military Law, and the Members of the Philippine National Police, Repealing for the Purpose Certain Presidential Decrees, Republic Act No. 7055 (1991); An Act Defining and Penalizing the Crime of Plunder, Republic Act No. 7080 (1991); & An Act Further Defining the Jurisdiction of the Sandiganbayan, Amending for the Purpose Presidential Decree No. 1606, as Amended, Providing Funds Therefore, and for Other Purposes, Republic Act No. 8249 (1997).

give an exact definition of what constitutes *graft* or *corruption*, since they come in various forms and each have different elements.³⁷

Although there is no concise definition of graft or corruption in various pieces of anti-corruption legislation, the Philippines has two principal anti-bribery laws — the Revised Penal Code³⁸ (RPC) and Republic Act No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act³⁹ (AGCP Act). Bribery is considered among the acts that fall under corrupt acts, based on its basic definition, which is the “misuse of [] power for private benefit.”⁴⁰

The definition of bribery, specifically under the RPC, focuses on penalizing a public officer’s receipt of bribes, in connection with the performance of his or her official duties, under the offense called Direct Bribery⁴¹ Article 210 of the RPC provides —

Art. 210. *Direct bribery.* — Any public officer who shall agree to perform an act constituting a crime, in connection with the performance of this official duties, in consideration of any offer, promise, gift[,] or present received by such officer, personally or through the mediation of another, shall suffer the penalty of *prision mayor* in its medium and maximum periods and a fine [of not less than the value of the gift and] not less than three times the value of the gift in addition to the penalty corresponding to the crime agreed upon, if the same shall have been committed.

If the gift was accepted by the officer in consideration of the execution of an act which does not constitute a crime, and the officer executed [the] said act, he [or she] shall suffer the same penalty provided in the preceding paragraph; and if said act shall not have been accomplished, the officer shall suffer the penalties of *prision correccional* [] in its medium period and a fine of not less than twice the value of such gift.

If the object for which the gift was received or promised was to make the public officer refrain from doing something which it was his [or her] official duty to do, he shall suffer the penalties of *prision correccional* in its maximum period and a fine [of not less than the value of the gift and] not less than three times the value of such gift.

In addition to the penalties provided in the preceding paragraphs, the culprit shall suffer the penalty of special temporary disqualification.

37. See Obejas, *supra* note 35, at 97–98.

38. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815 (1932).

39. See R.A. No. 3019, § 3.

40. See Transparency International, Hungary, Corruption Perceptions Index, available at http://www.transparency.hu/Corruption_Perceptions_Index (last accessed July 8, 2014).

41. REVISED PENAL CODE, art. 210.

The provisions contained in the preceding paragraphs shall be made applicable to assessors, arbitrators, appraisal and claim commissioners, experts[,] or any other persons performing public duties.⁴²

While Indirect Bribery is committed when a public officer accepts gifts offered to him simply by reason of his or her office.⁴³ Article 211 of the RPC provides that “[t]he penalties of *prision correccional* in its medium and maximum periods, and public censure shall be imposed upon any public officer who shall accept gifts offered to him by reason of his [or her] office.”⁴⁴

This definition of bribery is different from those in international instruments for several reasons. First, the RPC focuses on the public officer’s receipt or solicitation of bribes.⁴⁵ Thus, under Philippine law, bribery is associated with the public official’s receipt of a money or gift in connection with the performance of his or her official duties. On the other hand, the crime committed by the offeror is Corruption of Public Officials under Article 212 of the RPC which states that “[t]he same penalties imposed upon the officer corrupted, except those of disqualification and suspension, shall be imposed upon any person who shall have made the offers or promises or given the gifts or presents as described in the preceding articles.”⁴⁶

Second, only natural persons, and not juridical persons (*i.e.*, corporations), can be held liable for offering bribes under the RPC.⁴⁷ Lack of liability of corporations under the RPC appears logical, since the penalty for offering bribes is imprisonment of the offeror and payment of a fine equivalent to at least thrice the value of the gift received by the public official.⁴⁸

Similarly, under the AGCP Act, there is a *deep focus* on the public sector because it describes corrupt acts as those committed by public officers in the broadest sense.⁴⁹ Section 2 (b) of the AGCP Act defines a public officer as any person occupying a position in the Government, “whether elective [or] appointive, permanent or temporary, whether in the classified or unclassified or exempt service receiving compensation, even nominal, from the

42. *Id.*

43. *Id.* art. 211.

44. *Id.*

45. *Id.* arts. 210 & 211.

46. *Id.* art. 212.

47. *See* An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, arts. 40-47 (1950).

48. REVISED PENAL CODE, art. 212.

49. R.A. No. 3019, §§ 3-8.

[G]overnment[.]”⁵⁰ Further, the AGCP Act, under Section 3, enumerates the corrupt practices of public officers:

Section 3. *Corrupt practices of public officers.* In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

- (a) Persuading, inducing[,] or influencing another public officer to perform an act constituting a violation of rules and regulations duly promulgated by competent authority or an offense in connection with the official duties of the latter, or allowing himself [or herself] to be persuaded, induced, or influenced to commit such violation or offense.
- (b) Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or [herself or] for any other person, in connection with any contract or transaction between the Government and any other part, wherein the public officer in his [or her] official capacity has to intervene under the law.
- (c) Directly or indirectly requesting or receiving any gift, present[,] or other pecuniary or material benefit, for himself or [herself or] for another, from any person for whom the public officer, in any manner or capacity, has secured or obtained, or will secure or obtain, any Government permit or license, in consideration for the help given or to be given, without prejudice to Section [13] of this Act.
- (d) Accepting or having any member of his [or her] family accept employment in a private enterprise which has pending official business with him during the pendency thereof or within one year after its termination.
- (e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage[,] or preference in the discharge of his [or her] official administrative or judicial functions through manifest partiality, evident bad faith[,] or gross inexcusable negligence. This [P]rovision shall apply to officers and employees of offices or government corporations charged with the grant of [licenses, permits, or other concessions].
- (f) Neglecting or refusing, after due demand or request, without sufficient justification, to act within a reasonable time on any matter pending before him for the purpose of obtaining, directly or indirectly, from any person interested in the matter some pecuniary or material benefit or advantage, or for the purpose of favoring his [or her] own interest or giving undue advantage in favor of or discriminating against any other interested party.
- (g) Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby.

50. *Id.* § 2 (b).

- (h) Directly or indirectly having financing or pecuniary interest in any business, contract[,] or transaction in connection with which he intervenes or takes part in his [or her] official capacity, or in which he [or she] is prohibited by the Constitution or by any law from having any interest.
- (i) Directly or indirectly becoming interested, for personal gain, or having a material interest in any transaction or act requiring the approval of a board, panel[,] or group of which he [or she] is a member, and which exercises discretion in such approval, even if he [or she] votes against the same or does not participate in the action of the board, committee, panel[,] or group.
- (j) Interest for personal gain shall be presumed against those public officers responsible for the approval of manifestly unlawful, inequitable, or irregular transaction or acts by the board, panel[,] or group to which they belong.⁵¹

Corrupt practices under Section 3 of the ACGP Act may include bribery and lists punishable corrupt practices of public officers.⁵² It covers acts of public officials “requesting or receiving any gift ... or [any] benefit for himself [or herself] or for any other person, in connection with any contract or transaction between the Government and any other party[.]”⁵³ It includes “receiving any gift or benefit for himself [or herself] or for another, from any person for whom the public officer, in any manner or capacity, has secured or obtained, or will secure or obtain, any Government permit of license, in consideration for the help given or to be given[.]”⁵⁴ Another act of corruption is when a public official accepts or has “any member of his [or her] family accepts employment in a private enterprise which has pending official business with him [or her] during [its] pendency or within one year after its termination.”⁵⁵ While private persons can be made liable under the ACGP Act for corrupt acts, they can only be prosecuted alongside the public officers whom they allegedly bribed or illegally influenced.⁵⁶

Philippine anti-corruption laws primarily target public official corruption crimes. The laws seek to cover public corruption crimes in every way imaginable. The primary objective is to regulate and prevent public officials from committing corrupt activities.⁵⁷ This is the strength of Philippine anti-

51. *Id.* § 3.

52. *Id.*

53. *Id.* § 3 (b).

54. *Id.* § 3 (c).

55. R.A. No. 3019, § 3 (d).

56. *Id.* § 9.

57. Section 1 of R.A. No. 3019 provides that “it is the policy of the Philippine Government, in line with the principle that a public office is a public trust, to

corruption legislation; however, this is also its weakness. The problem lies in the failure to address the supply side of corruption, specifically private enterprises or juridical entities that offer bribes for private gain.

Business communities acknowledge that there were times that the pressures of globalization and increasing international competition “are so considerable that they cannot simply [forego] bribery as a means of last resort to keep their products in some markets.”⁵⁸ However, the short-time benefit for businesses has long term negative impacts in society, and distorts market conditions.⁵⁹ Thus, local legislation needs to address this issue by specifically penalizing private entities in order to curb the supply of bribes.

2. Expanding the Definition of Corrupt Acts and Imposition of Heavier Penalties

The first and most apparent problem underlying Philippine anti-corruption legislation is that it is almost exclusively directed towards the public sector.⁶⁰ To address active corruption on the supply side, Congress needs to amend the existing anti-corruption laws in order to: (1) hold corporations liable for Corruption of Public Officials under the RPC using the strict liability standard; (2) create a specific offence of bribing a foreign public official; and (3) increase the penalties for corporations engaged in bribing public officials.

The Philippines needs to enforce its anti-bribery laws against enterprises, because without it, bribery would continue as enterprises would find ways to pay knowing that other enterprises are doing the same.⁶¹ Curbing, if not cutting, the supply of bribes through strict liability of companies and heavier penalties also sends a clear good governance message across all sectors of society. Such approach will also be consistent with the good governance campaign that the present Aquino administration has pushed for since 2010.⁶²

repress certain acts of public officers and private persons alike which constitute graft or corrupt practices or which may lead thereto.” *Id.* § 1.

58. Mark Pieth, *International Cooperation to Combat Corruption, in* CORRUPTION AND THE GLOBAL CANCER 120 (Kimberly Ann Elliott ed., 1997).

59. *Id.*

60. Norton Rose Group, *supra* note 18, at 54.

61. Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. OF INT’L BUS. STUD. 634, 635 (2008).

62. See Office of the President of the Philippines, Biography, available at <http://www.president.gov.ph/biography/> (last accessed July 8, 2014) & Jose Maria M. Mendoza & Steven Rood, Is Aquino Moving the Philippines Closer to Good Governance?, available at <http://asiafoundation.org/in-asia/2013/05/29/is-aquino-moving-the-philippines-closer-to-good-governance/> (last accessed July 8, 2014).

Bribery by an enterprise takes place in order to access an economic advantage over competitors. Profit-maximization is the underlying economic theory behind the existence of businesses.⁶³ Laws that target the bribers can work as an effective deterrent because the private sector is profit-driven. The success or failure of a business is measured depending on how successful it is in approximating or maximizing its profits.⁶⁴ Such goal is pervasive regardless of the size of the business.⁶⁵ Therefore, paying bribes at the high risk of hefty fines and penalties is counter-intuitive for businesses.

Renowned professor Alvaro Cuervo-Cazurra points out that all countries have laws that punish bribery and aim to reduce the bribes demanded by public officials, but such laws are not effective in countries where corruption is prevalent and systemic.⁶⁶ Laws that target the supply side of corruption “reduce the incentives for corruption by increasing the cost and risk of detection”⁶⁷ of the foreign investor or multinational enterprise that pays a bribe to the foreign public official.⁶⁸ To reduce the bribes of foreign investors, countries have to implement laws against bribery abroad and coordinate with other countries with regard to its implementation.⁶⁹ Hence, corrupt activity is deterred when the nature of the activity is shifted from “low risk, high reward” to “high risk, low reward.”⁷⁰ Hong Kong was successful in doing this, beginning in the late 1970s,⁷¹ while Indonesia has done the same in the past five years.⁷²

The goal is to make it economically impractical for the private sector to engage in corrupt activities because it will cost them huge amounts of money (i.e., hefty fines and lawyers fees) and their reputation. An increase in criminal penalties by way of hefty criminal fines and closure of all or part of

63. RICHARD J. PIERCE, JR. & ERNEST GELLHORN, *REGULATED INDUSTRIES IN A NUTSHELL* 29 (1999).

64. *Id.*

65. *Id.*

66. Cuervo-Cazurra, *supra* note 65, at 635.

67. *Id.*

68. *Id.*

69. *Id.*

70. Jon S.T. Quah, *Comparing Anti-Corruption Measures in Asian Countries: Lessons to be Learnt*, 2 *ASIAN REV. OF PUB. ADMIN.* 71, 75 (1999).

71. Jon S.T. Quah, *Controlling Corruption in City-States: A Comparative Study of Hong Kong and Singapore*, 22 *CRIME, L. & SOCIAL CHANGE* 391, 399-409 (1995).

72. Emil P. Bolongaita, *An Exception to the Rule? Why Indonesia's Anti-Corruption Commission succeeds where others don't — a comparison with the Philippines' Ombudsman* (An Unpublished Online Publication by the U4 Anti-Corruption Resource Centre) 9, available at <http://issuu.com/cmi-norway/docs/3765-an-exception-to-the-rule?e=0>. (last accessed July 8, 2014).

the company for a maximum duration of one year, similar to what was found effective in Indonesia, can be implemented in the Philippines.⁷³

At present, the penalty under the RPC is only thrice the value of the bribe offered.⁷⁴ Therefore, the penalty under the RPC should be amended to *increase* the fine to *not less than five times the sum or value of the bribe*, which is the subject matter of the offense where such bribe is capable of being valued or its pecuniary nature, or a set huge amount, and apply whichever of the two is higher.

Under the RPC and AGCP Act, good faith is a defense that results in lengthening the process of prosecution. Thus, legislation should be amended to indicate that intention should be made irrelevant. In Malaysia, each charge of corruption creates a *prima facie* presumption of guilt on the accused.⁷⁵

Under the Corporation Code of Philippines,⁷⁶ directors are not liable for any offense committed by the company or its employees unless the directors were privy or involved in the act of corruption itself.⁷⁷ This Article suggests that the Philippines adopt a framework similar to that of Malaysia's anti-corruption statutes, wherein a company may be found liable for corruption and charges may be brought against the offending company since a "person" liable includes "a body of persons, corporate or unincorporated" and anti-corruption statutes apply to companies as they do to individual persons.⁷⁸ Further, legislation should be amended to accommodate only one defense having in place adequate procedures to prevent bribery, similar to that of the United Kingdom's Bribery Act.⁷⁹ This effectively shifts the burden of proof to the offeror of the bribes, and creates pressure on them to come up with adequate procedures to prevent bribery, which thereby effectively makes bribery a "high risk, low reward" activity.

Finally, substantive reforms should be codified in one piece of legislation to assist the public, complainants, investigators, and prosecutors in combating corruption.⁸⁰ Fragmented anti-corruption laws cause confusion to

73. Norton Rose Group, *supra* note 18, at 40.

74. REVISED PENAL CODE, art. 210.

75. Norton Rose Group, *supra* note 18, at 49.

76. The Corporation Code of the Philippines [CORPORATION CODE], Batas Pambansa Blg. 68 (1980).

77. *Id.* § 31.

78. Norton Rose Group, *supra* note 18, at 50.

79. See Bribery Act 2010, 2010, c. 23, § 7 (2) (Eng.). This Section provides that "it is a [defense] for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct." *Id.*

80. Obejas, *supra* note 35, at 107.

the public, enforcement agencies, and prosecutors alike. Likewise, archaic or vintage provisions in existing anti-corruption laws should be updated to keep abreast with developments in governance.⁸¹

B. Second Problem

I. Multiple Anti-Corruption Agencies with Overlapping Roles and Mandates

An expanded definition of corrupt acts and an increase in penalties for bribery committed by the private sector become effective tools in curbing the supply of bribes when there is an effective anti-corruption law enforcement and prosecution agency. Overlapping roles and mandates of several government agencies directly affect the anti-corruption campaign, because it creates inefficiency and delay, and sends out a message that anti-corruption is not the top priority of the Philippine Government.⁸²

Apart from the Philippines having the most number of anti-corruption measures in Asia, composed of at least 9 laws, it has had 19 anti-corruption agencies since the 1950s.⁸³ That roughly translates to an average of around three new anti-corruption agencies every decade. Key anti-corruption bodies such as the Office of the Ombudsman (Ombudsman),⁸⁴ Civil Service Commission (CSC),⁸⁵ and the Department of Justice (DOJ)⁸⁶ have overlapping roles and mandates.⁸⁷ Furthermore, there is a lack of consistency and continuity in the programs and institutions dealing with anti-corruption because almost each administration has a committee tasked to address corruption issues. Often, these entities were “short-lived and were replaced

81. *Id.*

82. Jenny Balboa & Erlinda M. Medalla, *Anti-Corruption and Governance: The Philippine Experience (An Unpublished Paper Submitted to the Asia-Pacific Economic Cooperation Study Center Consortium Conference) 19*, available at http://www.apec.org.au/docs/06ASCC_HCMC/06_9_I_Balboa.pdf (last accessed July 8, 2014).

83. JON S.T. QUAH, *CURBING CORRUPTION IN THE PHILIPPINES: AN IMPOSSIBLE DREAM? 136* (2011).

84. See Office of the Ombudsman, *About Us*, available at <http://www.ombudsman.gov.ph/index.php?home=1&navId=MQ==&subNavId=Nzk=#> (last accessed July 8, 2014).

85. See CSC, *Mandate*, available at <http://excell.csc.gov.ph/cscweb/mandate.html> (last accessed July 8, 2014).

86. See DOJ, *About — Vision, Mission and Pledge*, available at <http://doj.gov.ph/vision-mission-and-mandate.html> (last accessed July 8, 2014).

87. Balboa & Medalla, *supra* note 82, at 19.

by a new office or task force when term of office of the President ends.”⁸⁸ This resulted in redundant functions and waste of resources.⁸⁹

To illustrate, the DOJ, the Government’s national criminal prosecution arm,⁹⁰ and the Ombudsman both prosecute corruption cases.⁹¹ The DOJ is the principal agency of the Government mandated to enforce the rule of law and investigate and prosecute offenders,⁹² while the Ombudsman is the office principally charged to implement the State policy to maintain honesty and integrity in the public service, and take effective measures to counter graft and corruption.⁹³

The Ombudsman and the DOJ have concurrent jurisdiction over the complaints for crimes involving public officers and employees falling outside the exclusive jurisdiction of the Sandiganbayan.⁹⁴ The DOJ is tasked with prosecuting all criminal cases filed against any public officer before the first level courts, but the same also applies to the Ombudsman.⁹⁵ Criminal cases filed with the Sandiganbayan⁹⁶ are prosecuted by the Office of the Special Prosecutor of the Ombudsman.⁹⁷ Preliminary investigation for low-ranking public officers can be done by either the DOJ or the Ombudsman.⁹⁸

In 2012, the Ombudsman and the DOJ formally recognized the challenge brought about by concurrent jurisdiction.⁹⁹ They entered into a Memorandum of Agreement,¹⁰⁰ which aimed to simplify the procedure, which stated, among other things, that

[t]he [Ombudsman] and the prosecution offices of the DOJ have concurrent jurisdiction over complaints for crimes involving public officers and employees falling outside the exclusive jurisdiction of the

88. *Id.* at 14.

89. *Id.* at 19.

90. DOJ, *supra* note 86.

91. Office of the Ombudsman, *supra* note 84.

92. Office of the President, Administrative Code of 1987, Executive Order No. 292 [E.O. No. 292] Book IV, Title III, Chapter 1, § 3 (July 25, 1987).

93. *See* PHIL. CONST. art. XI, § 13 & The Ombudsman Act of 1989, § 15.

94. R.A. No. 8249, § 4.

95. Obejas, *supra* note 35, at 105.

96. R.A. No. 8249, § 4.

97. *Id.*

98. *See* Soriano v. Marcelo, 507 SCRA 571, 589–92 (2001).

99. *See* Office of the Ombudsman, OMB and DOJ ink MOA for effective investigation and prosecution of cases, available at <http://www.ombudsman.gov.ph/index.php?home=1&pressId=MjU0> (last accessed July 8, 2014).

100. *Id.*

Sandiganbayan[;] *Provided*, [t]hat the office where such a complaint for preliminary investigation shall acquire jurisdiction over the complaint to the exclusion of the other[;] *Provided further*, [t]hat the [Ombudsman] may refer/endorse any complaint filed before it to any prosecution office of the DOJ having jurisdiction over the complaint.¹⁰¹

The Ombudsman-DOJ 2012 Memorandum appears to reinforce the process that allows the complainant to choose whether to file an anti-corruption case, which is criminal in nature, either with the DOJ or the Ombudsman.¹⁰² Consequently, this requires effective coordination, reporting, and monitoring of cases in order to avoid duplicity of suits. At present, both offices are still working on these.

Interestingly, the corresponding administrative penalties that come with the charge of corruption cannot be determined by the DOJ, but rather, by the Ombudsman.¹⁰³ However, administrative penalties are not only meted by the Ombudsman, but also by the CSC, since they have concurrent jurisdiction to hear and decide administrative cases stemming from criminal acts.¹⁰⁴ To avoid conflict in decisions, the Ombudsman will terminate its investigation if the CSC took cognizance of the administrative case first.¹⁰⁵ Unfortunately, there is no reliable system of monitoring between the agencies, and duplication of suits occurs, and such is based on the Author's experience as a Graft Investigator and Prosecution Officer in the Ombudsman.

Despite multiple anti-corruption agencies, conviction rates are low. In the 25 years the Ombudsman has existed the "highest ranking official convicted of corruption is at the level of the governor; only two governors have been convicted but neither ultimately served time in prison[.]"¹⁰⁶ The only notable exception is former President Joseph E. Estrada, who was convicted of plunder by the Sandiganbayan after his ouster, but did not serve the penalty of *reclusion perpetua* due to the full, unconditional, and absolute

101. Memorandum of Agreement (Memorandum of Agreement between the Office of the Ombudsman and the DOJ) 2, available at http://www.ombudsman.gov.ph/docs/references/OMB-DOJ_MOA.pdf (last accessed July 8, 2014).

102. *Id.*

103. The Ombudsman Act of 1989, §§ 13 & 25.

104. See CSC, *supra* note 85.

105. Lalaine D. Benitez, An Advocate's View of Corruption (An Unpublished Paper Presented to the Office of the Ombudsman) 16, available at http://www.unafei.or.jp/english/pdf/RS_No89/No89_PA_Benitez.pdf (last accessed July 8, 2014).

106. Bolongaita, *supra* note 72, at 11.

pardon extended to him by former President Gloria Macapagal-Arroyo.¹⁰⁷ In contrast, other anti-corruption agencies in the region are performing better.¹⁰⁸

Establishing a centralized and independent anti-corruption agency works best to fight corruption,¹⁰⁹ as in the case of Hong Kong's Independent Commission Against Corruption (ICAC), and Indonesia's Corruption Eradication Commission (CEC), whose performance rates have soared in the past years.¹¹⁰

Hong Kong experienced widespread corruption in all levels of Government,¹¹¹ and the ICAC was established in 1974 to eliminate corruption and to rebuild public confidence in its Government.¹¹² ICAC has been described as a universal model because of its investigative, preventive, and communicative functions reflected in its organizational structure that has one department devoted to each function.¹¹³

2. Creation of a Single Focal Anti-Corruption Institution

To address the issue of overlapping roles and mandates of anti-corruption agencies, the Government can create a single focal institution similar to that of Hong Kong's ICAC and Indonesia's CEC.

The ICAC was established as an entirely independent organization created to fight corruption, through the "three-pronged approach of investigation, prevention, and education."¹¹⁴ Unlike the Philippines, which does not deal with corruption in the private sector, the Prevention of Bribery Ordinance of Hong Kong prohibits bribery in both the public and

107. Manny Mogato, Former Philippine president Estrada pardoned, *available at* <http://uk.reuters.com/article/2007/10/25/uk-philippines-estrada-idUKMNB0007120071025> (last accessed July 8, 2014).

108. Jon S.T. Quah, *Benchmarking for Excellence: A Comparative Analysis of Seven Asian Anti-Corruption Agencies*, 31 ASIA PAC. J. PUB. ADMIN. 171, 175-76 (2009).

109. The Economist, Who will watch the watchdogs?, *available at* <http://www.economist.com/node/2446845> (last accessed July 8, 2014).

110. Bolongaita, *supra* note 72, at 9-12.

111. CHEUNG TAK-SING, ET AL., CORRUPTION AND ITS CONTROL IN HONG KONG: SITUATIONS UP TO THE LATE SEVENTIES 45-72 (Rance P. L. Lee ed., 1981).

112. *Id.*

113. John Heilbrunn, *The Universal Model: Hong Kong's ICAC*, in THE ROLE OF PARLIAMENT IN CURBING CORRUPTION 136-37 (Rick Stapenhurst, et al. eds., 2006).

114. See Hong Kong ICAC, Brief History, *available at* http://www.icac.org.hk/en/about_icac/bh/ (last accessed July 8, 2014).

private sector.¹¹⁵ This is consistent with the rationale behind the OECD's Anti-Bribery Convention, which sends a strong message of the commitment to fight corruption, and helps create a level playing field for firms competing internationally.¹¹⁶

In 2003, Indonesia's CEC was established to fight corruption following the Asian financial crisis. Although patterned after ICAC, CEC had prosecutorial powers, while the ICAC had none.¹¹⁷ In a recent study, the Philippine Ombudsman was compared with the CEC, and it was revealed that despite the similarities in their history of corruption, economic development, geography, and population, the latter has done a much better job in the prosecution of corrupt officials and their accomplices.¹¹⁸

Indonesia's CEC has "all the investigative powers of a law enforcement agency, while the [Philippines] does not."¹¹⁹ In Indonesia, a guilty verdict of their anti-corruption court is immediately executable even pending appeal, while in the Philippines, 86% of those convicted by the Sandiganbayan are out on bail pending appeal in the higher courts.¹²⁰ Hence, the low risk of prosecution and imprisonment does not provide an effective deterrent to corruption.

It is important to address private sector corruption, and this can be accomplished by first creating a single focal point with regard to corruption of public officials by the private sector, regardless of whether the public official is local or foreign. At present, the Ombudsman has preventive, investigative, and prosecutorial powers with regard to the enforcement of anti-graft and corruption laws, except on members of the Judiciary, Congress, and impeachable officials.¹²¹ Such powers were vested upon it by the Ombudsman Law¹²² and more importantly, by the 1987 Philippine Constitution, which states that

[t]he Office of the Ombudsman shall have the following powers, functions, and duties:

- (1) Investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office[,] or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.

115. Prevention of Bribery Ordinance, (1997) Cap. 207, 120, § 4 (H.K.).

116. OECD Anti-Bribery Convention, *supra* note 12, at pmb1.

117. Bolongaita, *supra* note 72, 6-7.

118. *Id.*

119. *Id.* at 14.

120. *Id.* at 18-19.

121. *See* The Ombudsman Act of 1989, § 15.

122. *Id.*

- (2) Direct, upon complaint or at its own instance, any public official or employee of the Government, or any subdivision, agency[,] or instrumentality thereof, as well as of any government-owned or controlled corporation with original charter, to perform and expedite any act or duty required by law, or to stop, prevent, and correct any abuse or impropriety in the performance of duties.
- (3) Direct the officer concerned to take appropriate action against a public official or employee at fault, and recommend his [or her] removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith.
- (4) Direct the officer concerned, in any appropriate case, and subject to such limitations as may be provided by law, to furnish it with copies of documents relating to contracts or transactions entered into by his [or her] office involving the disbursement or use of public funds or properties, and report any irregularity to the Commission on Audit for appropriate action.
- (5) Request any government agency for assistance and information necessary in the discharge of its responsibilities, and to examine, if necessary, pertinent records and documents.
- (6) Publicize matters covered by its investigation when circumstances so warrant and with due prudence.
- (7) Determine the causes of inefficiency, red tape, mismanagement, fraud, and corruption in the Government[,] and make recommendations for their elimination and the observance of high standards of ethics and efficiency.
- (8) Promulgate its rules of procedure and exercise such other powers or perform such functions or duties as may be provided by law.¹²³

However, the CSC also hears administrative cases against public officials under Republic Act No. 6713,¹²⁴ and the DOJ has the power to investigate bribery cases.¹²⁵ The jurisdiction on some matters is concurrent with the Ombudsman, and whichever agency takes cognizance of the case first excludes the others.¹²⁶ Often, overlaps are a source of confusion and inefficiency, thereby wasting the parties' and the Government's time and resources.¹²⁷ Furthermore, unlike the CEC, the Ombudsman is practically toothless because it does not have all the investigative powers of a law

123. PHIL. CONST. art. XI, § 13.

124. See Code of Conduct and Ethical Standards for Public Officials and Employees, § 12.

125. See R.A. No. 8249, § 4.

126. Benitez, *supra* note 105, at 3-17.

127. Bolongaita, *supra* note 72, at 19.

enforcement agency.¹²⁸ The Ombudsman has to secure court orders in order to collect evidence used to build cases against those under investigation.¹²⁹ Wiretapping is prohibited¹³⁰ and bank accounts are secured by the Bank Secrecy Laws,¹³¹ except for cases of suspected money laundering.¹³² Thus, often the Ombudsman resorts to sending subpoenas to government offices to require the latter to share information that is basically already public in nature.¹³³

The Ombudsman should be the single focal point in all matters pertaining to anti-corruption, especially with regard to investigation and prosecution. The DOJ and the CSC were not specifically created for the enforcement of anti-corruption laws. The DOJ handles regular criminal cases,¹³⁴ and the CSC handles administrative cases related to employment in the public service.¹³⁵

However, with the centralization of investigative and prosecutorial powers comes the need for better checks and balances, without infringing on the institution's independence as a constitutionally-created agency. Even theoretically independent agencies are still subject to political interference, most obviously through appointments.¹³⁶ A separate body composed of members from the private and public sector must audit or monitor the performance of the Ombudsman with regard to how it discharges its important functions.

The Ombudsman can likewise adopt a framework similar to the ICAC, such as in cases where it keeps a close relationship with important agencies such as the Securities and Futures Commission (SFC)¹³⁷ and the Hong Kong

128. *Id.* at 14-15.

129. *Id.*

130. An Act to Prohibit and Penalize Wire Tapping and Other Related Violations of the Privacy of Communication, and for Other Purposes, Republic Act No. 4200 (1965).

131. *See* An Act Prohibiting Disclosure of or Inquiry into, Deposits with any Banking Institution and Providing Penalty Therefor, Republic Act No. 1405 (1955).

132. Bolongaita, *supra* note 72, at 14-15.

133. *Id.*

134. *See* DOJ, *supra* note 90.

135. *See* CSC, *supra* note 89.

136. Bolongaita, *supra* note 72, 24-25.

137. *See* Securities and Futures Commission, Our role, *available at* <http://www.sfc.hk/web/EN/about-the-sfc/our-role/> (last accessed July 8, 2014).

Monetary Authority.¹³⁸ It established a Corruption Prevention Network¹³⁹ and worked with the SFC Enforcement Division to improve systems of bribery prevention.¹⁴⁰ Chan points out that cross-boundary collaboration and “the promotion of professional ethics in ... industries, and the joint effort ... in implementing preventive and educational measures are innovative strategies that have proven to be effective.”¹⁴¹

Corruption requires a multi-faceted approach, as well as short-term and long-term approaches.¹⁴² Expanding the definition of corrupt acts to apply to the private sector creates a more holistic approach to the problem. The creation of a focal point streamlines the process of prevention, investigation, and prosecution of corruption cases.

IV. CONCLUSION

The Philippines' investment ranking has improved the past year since the launch of a stronger anti-corruption campaign.¹⁴³ However, the issue of the pork barrel scam still looms,¹⁴⁴ and bribery by private entities to win government contracts are still prevalent.¹⁴⁵ The salaries of public officials are unlikely to be substantially increased, and the prices of commodities, housing, health, and education become more expensive each year. Thus, the temptation to accept bribes remains strong.

138. See Hong Kong Monetary Authority, About the HKMA, available at <http://www.hkma.gov.hk/eng/about-the-hkma/hkma/about-hkma.shtml> (last accessed July 8, 2014).

139. See Thomas Chan, *Corruption Prevention — The Hong Kong Experience*, in RESOURCE MATERIALS SERIES NO. 56 367 (2000).

140. Kin-Man Chan, *Current Challenges and Anti-Corruption Measures in Hong Kong*, in THE ENEMY WITHIN: COMBATING CORRUPTION IN ASIA 126 (Simon S. C. Tay & Maria Seda eds., 2003).

141. *Id.* at 129.

142. Heineman, Jr. & Heimann, *supra* note 5, at 77.

143. See Seeking Alpha, Philippines Described as a Rising Star by Moody's, Growth Forecast Raised by S&P, available at <http://www.nasdaq.com/article/philippines-described-as-a-rising-star-by-moodys-growth-forecast-raised-by-sp-cm242865> (last accessed July 8, 2014).

144. See Bong O. Wenceslao, *Scope of the pork barrel scam*, SUN STAR CEBU, Apr. 25, 2014, available at <http://www.sunstar.com.ph/cebu/opinion/2014/04/25/wenceslao-scope-pork-barrel-scram-339842> (last accessed July 8, 2014).

145. See Ronald D. Holmes, With the Philippines' economy booming, who cares about pork?, available at <http://www.crikey.com.au/2013/10/21/with-the-philippines-economy-booming-who-cares-about-pork/> (last accessed July 8, 2014).

Effectively combating corruption is a difficult process, but is not impossible. While the Philippine Government cannot afford to pay higher salaries, it can maximize its power to make corrupt activities “high-risk, low-reward” by criminalizing all acts of bribery of public officials by the private sector. Ultimately, there is no exact formula for success but the chances of success increase as long as the Philippine Government aspires to continually improve, by learning from other jurisdictions, and creating innovative solutions suitable to the unique challenges it faces on the ground.