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مجلة مركز حكم القانون ومكافحة الفساد

RULE OF LAW AND ANTI-CORRUPTION CENTER JOURNAL

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Rule of Law and Anti-Corruption Journal (ROLACC) is an international peer-reviewed journal which publishes original articles on all aspects of anti-corruption perspectives including rule of law. It is devoted to important law or evolutionary questions, studies of civil society engagement, resources management, justice sector, anti-trust issues, legal systems comparisons, sports, finance, cross-border interrogations.

ROLACC Journal will be the platform for physical and digital content of rule of law, governance, and anti-corruption studies from around the world. We aim at bringing important work in these fields and making it the dedicated resource to a wide international audience and the hub for experts and researchers. Therefore, ROLACC only publishes papers with strong and distinct messages that advance collective understanding of anti-corruption principles. The research presented must demonstrate a link to the specialized field of anti-corruption. Experimental, theoretical, and descriptive studies are accepted, however, these must offer insights into issues of general interest to the journal. ROLACC Journal aims at being a leading example in Qatar, the region, and the world. This journal is open access and publishes manuscripts in English and Arabic and publishes twice a year, June and December.

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EDITORIAL

Editorial forward by the Editor-in-Chief

Dr. Ali bin Fetais Al Marri*

* Editor-in-Chief of the Rule of Law and Anti-Corruption Journal Chairman of the Board of Trustees of the Rule of Law and Anti-Corruption Center

د.علي بن فطيس المري رئيس تحرير المجله، رئيس مجلس الامناء لمركز حكم القانون ومحاربة الفساد

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It is my greatest pleasure to welcome you to this, the first issue of the Rule of Law and Anti-Corruption Journal.

It is my sincere hope that, with the publication of the first issue of the Rule of Law and Anti-Corruption Journal, we are able to assure future generations that in order to exist in a world built on alliance rather than conflict, in a world that seeks to promote and uphold the values of good governance, all of us, whether we are individuals, groups and nations, can and shall restore confidence in our global system and strive to create a better world for all humanity. With that in mind, the Rule of Law and Anti-Corruption Centre are proud to present to the reader the first issue of the Rule of Law and Anti-Corruption Journal.

This journal is the first, and currently the only journal dealing specifically with the rule of law and the fight against corruption. It is an international journal in this unique field, thus provides a platform for all experts and academics involved in this field, through which they can share new knowledge and build upon each other's efforts.

The Journal of Rule of law and Anti-Corruption Center is biannual and bilingual, and it publishes original articles on all aspects of anti-corruption. These include works on the rule of law, civil society engagement, resource management, the justice sector, legal system comparisons, sports, finance, interrogations, investigations and complex cross-border issues.

This journal is an incubator for all physical and digital content related to subjects and studies of the rule of law and the fight against corruption in the world; this makes it unique among other journals in the field. The team responsible for the journal is proud of this achievement, as it represents a practical step towards serving humanity, recognizing the importance of achieving justice, ensuring the development of effective solutions to counter corruption in all its forms, and enhancing the ability of society to cope with the rapid developments in this field.

The Rule of Law and Anti-Corruption Journal, therefore, serves as a line of communication between specialists and experts, making it possible to extract the most value from the research and studies that fall under the remit of this crucial field.

In conclusion, I would like to extend my sincere thanks and appreciation to all those who contributed to bringing this scientific work to life, and to those who contributed to the concept, the materials, the editing, the review and the final creation. In addition, I would like to thank the members of the editorial board and the researchers who participated to provide the journal with their studies and research.

افتتاحية العدد بقلم رئيس التحرير

بسم الله الرحمن الرحيم
عزيزي القارئ.. أحييكم أطيب تحية.
أود في البداية ان أؤكد للأجيال القادمة بأننا لن نكون في عالم مترابط، نعزز قيم الحكم الرشيد ونصونه، الا اذا استطعنا جميعا، أفراد وجماعات ودول استعادة الثقة وإيجاد عالم أفضل للجميع، فإدراكا منا بحقيقة ان عمل اليوم هو أساس المستقبل، وان العلم المكتوب هو الإرث الخالد وذلك بعد مشوار طويل من معترك الحياة العملية.
وايمانا بأهمية توافر مجلات علمية محكمة في مجال حكم القانون ومكافحة الفساد، حيث أن المجلات من هذا القبيل تعد في غاية الندرة.
نفخر بأن نقدم للقارئ العددَ الأوَّل من (مجلة مركز حكم القانون ومكافحة الفساد) ، حيث تعتبر مجلة حكم القانون ومكافحة الفساد المجلة الأولى من نوعها والوحيدة التي تناولت على وجه التحديد قضايا حكم القانون ومكافحة الفساد، فهي أول مجلة محكمة دوليا في هذا المجال الفريد من نوعه، وبذلك تعتبر منصة لجميع الخبراء و الأكاديميين المعنيين في هذا المجال.
ان مجلة حكم لقانون ومكافحة الفساد النصف سنوية/ ثنائية اللغة. تنشر مقالات أصلية عن جميع الجوانب المتعلقة بمكافحة الفساد (بما في ذلك سيادة القانون، والمشاركة في المجتمع المدني، وإدارة الموارد، وقطاع العدالة، ومقارنات النظم القانونية، والرياضة، والمالية، والاستجواب والقضايا المعقدة العابرة للحدود).
تمثل هذه المجلة حاضنة لكافة المحتويات المادية والرقمية المتعلقة بمواضيع ودراسات سيادة القانون ومكافحة الفساد في العالم مما ادى الى إكسابها صبغة التميز عن المجلات العلمية والأخرى في التخصص على ندرتها.
ومن المؤكد أن فريق العمل فخور بهذا الإنجاز المثمر الذي يشكل خطوة عملية نحو خدمة البشرية، إدراكاً لأهمية تحقيق العدالة، والحرص على تطوير الحلول الناجعة في مواجهة آفة الفساد بكافة صوره، وتعزيز قدرة المجتمع على مواكبة التطورات السريعة التي يشهدها هذا المجال.
تضيف مجلة مركز حكم القانون ومكافحة الفساد مجالا للتواصل بين المتخصصين وأصحاب الخبرات، مما يتيح الاستفادة القصوى من البحوث والدراسات التي تندرج تحت مظلة هذا المجال بمفهومه العلمي الواسع.
و يطيب لي في الختام أن أقدم خالص الشكر و التقدير لجميع الذين أسهموا في إخراج هذا العمل العلمي إلى حيز الوجود، و من كان لهم إسهام في الفكرة و المادة العلمية و التحرير و المراجعة و الإخراج النهائي، و أعضاء هيئة التحرير ، و الباحثين الذين شاركوا بتزويد المجلة بدراساتهم و بحوثهم.
وفقنا الله وإياكم أصوب العمل واخلصه
والسلام عليكم ورحمة الله وبركاته

رئيس التحرير ،،

د.علي بن فطيس المري

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RESEARCH ARTICLE

Assessment of the effectiveness of anti-corruption measures for the public sector and for private entities

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ABSTRACT

1. Premise. 2. The essential characteristics of an effective model for preventing corruption. 3. The process of contamination between models devised for preventing corruption in different contexts. 4. The distinctive traits of the public sector model adopted under Italian Law no. 190/2012. 5. The private sector model traits pursuant to Italian Legislative Decree no. 231/2001. 6. The point of intersection between the private and public sector models: private companies controlled by public bodies. 7. The scope of the different models involved. 8. Closing remarks on the effectiveness of these models: simple laws, effective procedural models and the ethical responsibility of public sector employees and economic operators.

Keywords: Ethical responsibility, anti corruption model, Italian Legislative Decree no. 190, Italian Legislative Decree no. 231, public sector, private companies.

ملخص:

١. الفرضية. ٢ . الخصائص الأساسية للنموذج الفعال لمكافحة الفساد. ٣. التماهي الناتج عن خلط النماذج التي تم تصميمها لمنع الفساد في سياقات مختلفة. ٤. السمات المميزة لنموذج القطاع العام المعتمد بموجب القانون الإيطالي رقم ١٩٠/٢٠١٢.
٥. السمات المميزة لنموذج القطاع الخاص وفقا للمرسوم التشريعي الإيطالي رقم. ٢٣١/٢٠٠١. ٦. نقطة التقاء نماذج القطاعين العام والخاص: الشركات الخاصة التي تدار من قبل الهيئات العامة . ٧. نطاق النماذج المعنية الأخرى. ٨. الملاحظات الختامية حول فعالية النماذج محل الدراسة : قوانين بسيطة ونماذج إجرائية فعالة والمسؤولية الأخلاقية لموظفي القطاع العام والمشغلين الاقتصاديين.

الكلمات المفتاحية: المسؤولية الأخلاقية، نموذج مكافحة الفساد، المرسوم التشريعي الايطالي ١٩٠، المرسوم التشريعي الايطالي ٢٣١، القطاع العام، شركات خاصة

1. PREMISE

At this historic time for the Italian legal system, three anti-corruption measures are in effect. The first has a *typically public sector nature*: it is the system implemented by the "Severino Law" (no. 190/2012) and by all the provisions set out under the said law or, in any event, ancillary to it, which serve to fully enact the general rules contained therein, including the "Madia Law" (no. 124/2015, together with its delegated decrees), Law no. 69/2015, the Public Contracts Code adopted under Legislative Decree no. 50/2016 as integrated by Legislative Decree no. 56/2017[1].

Previously, the Italian legislature (with Legislative Decree no. 231/2001) set out provisions that established the application of a *model for the prevention of typically private sector corruption*: this procedure is the result of obligations derived from urgent demands placed on Italy by the international context in which it participates. The adaptation of the Italian legal system to the OECD Convention of 1997 on combating the corruption of foreign public officials in international business transactions and the three conventions drafted within the European Union to combat fraud against the financial interests of the Organisation[2] in fact required an internal adjustment which also covered rules regarding the obligations of legal entities and entities in general. Therefore, it considered how to pursue the latter for acts of corruption committed to its advantage[3] by persons who are either in senior executive positions or subject to the supervision or direction of the latter. In response to this requirement, our legislation adopted a regulation that allows private entities to be exonerated from liability if the organisational model it has implemented is proven to be – despite the occurrence of unlawful acts – suitable and effectively implemented for combating corruption[4].

Finally, an anti-corruption model was recently (2016) adopted, which is relevant to both the *public sector* and the *private sector*: the *UNI ISO 37001*[5]. This is the fruit of self-regulatory activities adopted by economic operators and state public institutions, organised within private associations dedicated – at different levels in which they operate: global, European and national – to harmonising procedures and technical rules. Its scope (as suggested by the title "*Sistemi di gestione per la prevenzione della corruzione*", meaning "Management Systems for Preventing Corruption") is to establish appropriate measures to prevent instances of corruption from becoming entrenched.

In this paper, I will discuss the "philosophy" of the three models, examine how they relate to each other, consider the areas covered by each one or by more than one and, finally, outline a few considerations regarding their effectiveness.

2. THE ESSENTIAL CHARACTERISTICS OF AN EFFECTIVE MODEL FOR PREVENTING CORRUPTION

The fundamental question that I considered viewing the phenomenon from the perspective of the procedures of the Italian Anticorruption Authority led me to explore the fundamental characteristics of a good structure designed to prevent corruption. I am referring to a general model, regardless of the sector (public or private) within which it is intended to operate. Considering the procedures with which ANAC is involved, I decided that, when the authority is asked to evaluate the 3-year programmes for prevention of corruption and transparency in the public bodies that it supervises, there seem to be four fundamental criteria against which the effectiveness of these programmes should be assessed.

2.1. First, the entity must move towards the so-called *risk-based* approach, in order to use a term (and therefore a technique) developed in the international context, particularly in terms of the cooperation built within the Organisation for Economic Co-operation and Development[6]: this means that the entity must consider the risk-corruption issues arising from its specific activity, in the particular context in which it operates, and how the latter can be managed.

This technique extends starting from a concatenation of conceptual and operational stages marked by two fundamental steps: the first step (*risk assessment*) is intended to verify the presence of risks, identify the risk factors for corruption, define measures for dealing with the latter and devise measures for monitoring and control. The second step (*risk mitigation and management)* is concerned with adopting the resulting decisions which must be made to manage the risk that was identified[7].

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1 This issue is discussed in greater detail in N. Parisi, *Alcune poche considerazioni conclusive*, in Il Contrario Della Corruzione. Integrità E Nuovi Mariuoli, Nuova Autorità Nazionale Di Prevenzione, Nuovi Strumenti Interni E Internazionali Di Repressione (D. Rinoldi ed., 2017).

2 This relates to the Convention on the Protection of the European Communities' Financial Interests adopted on 26 July 1995; this is supplemented by three Protocols: the first (27 September 1996) relates to the corruption of Community officials; the second (19 June 1997) concerns the liability of legal persons and the respective sanctions, money laundering and confiscation, cooperation between the services of the European Commission and Member States, as well as data protection; the third (29 November 1996) confers jurisdiction on the European Court of Justice to interpret the Convention through preliminary rulings. Italy adopted the Convention and the first and third Protocols following the authorisation for ratification and the enforcement order issued with Law no. 300 of 31 October 2000 (which also gives authorisation to the government for its full implementation: see Legislative Decree no. 231 of 8 June 2001). The second Protocol was executed and authorised for ratification with Law no. 135 of 04 August 2008. With reference to the Convention, its Protocols and their impact on the legal systems of Member States, among many publications. *See* S. Manacorda, La Corruzione Internazionale Del Pubblico Agente. Linee Dell'indagine Penalistica (1999); L. Salazar, *Genèse D'un Droit Pénal Européen: La Protection Des Intêrets Financiers Communautaire*, *in* Rev. int. dr. pén. 39 (2006); A. Venegoni, *La Convenzione Sulla Protezione Degli Interessi Finanziari Della Unione Europea*, *in* Diritto Penale Sostanziale E Processuale Dell'unione Europea Vol. I 40–69, Vol. II 10–56 (L. De Matteis et al. eds., 2011).
The Convention and its Protocols are destined to be substituted by the regulation set out under the Directive of 05 July 2017, to which Member States must adapt within 2 years of its adoption. On this subject, *see* N. Parisi & D. Rinoldi, *La Protezione Del Bilancio Dell'unione Tramite Il Diritto Penale. Spunti A Partire Dalla Direttiva Relativa Alla Lotta Contro La Frode Che Lede Gli Interessi Finanziari Dell'unione*, *in* Il Diritto Penale Della Globalizzazione (2017).

3 This last condition became obsolete with the most recent reform of the regulation introduced with the transposition of the European Union's framework decision, which is discussed in note 3.

4 Legislative Decree no. 231/2001, arts. 5–7. The decree has been amended on many occasions, mainly for the purpose of extending the list of offences to which the regulation is applicable; in relation to the issue in question – preventing the commission of acts of corruption – this was amended by Legislative Decree no. 38/2017 to fulfil the European rules on private sector corruption (Framework Decision 2003/568/JHA), which, in amending Article 2635 of the Italian Civil Code, also removed the condition of the entity having to derive an advantage from the act of corruption as a criterion used to assess the entrenchment of its liability.

5 The abbreviation UNI ISO is derived from the manner in which the standard was adopted; or rather, it is applied when the *Ente Nazionale Italiano di Unificazione* (UNI, Italian National Standardisation Body) adopts (even by supplementing it) a standard that has already been approved universally by the International Organization for Standardization (ISO); if European bodies are also involved, that is, if the European Committee for Standardization (CEN) assisted in drafting the standard, then the applicable abbreviation is UNI EN ISO. The UNI represents the interests of Italy at the CEN and ISO.

6 Unfortunately, I am obliged to use, and not infrequently, English terminology, due to the fact that the technique for fighting corruption through the punitive measures adopted in Italy starting with the Severino Law has international origins (a legal context in which the working language is mostly English). In relation to the international origins of the Italian regulation, please refer to N. Parisi, *Il contrasto alla corruzione e la lezione derivata dal diritto internazionale: non solo repressione, ma soprattutto prevenzione*, in *Diritto comunitario e degli scambi internazionali*, 2016, p. 185 et seq.

7 The process as it is applied in the Italian legal system by the Severino Law has been described and praised at the international level. *See* OECD, Rapporto Sull'integrità In Italia. Rafforzare L'integrità Nel Settore Pubblico, Ripristinare La Fiducia Per Una Crescita Sostenibile 106–07 (2013), *available at* http://www.keepeek.com/Digital-Asset-Management/oecd/governance/rapporto-ocse-sull-integrita-in-italia_9789264206014-it#.WgCDWo_Wzow#page2 (last visited June 18, 2018).

The important process of exploring risk in light of an analysis of the external and internal contexts of the entity itself should be emphasised. The programme that each entity adopts, in fact, must be considered a unique and unrepeatable creature[8]: therefore, the discovery of a specific risk is a necessary process for the entity, which relates to the intrinsic nature of the compliance model adopted to prevent corruption. The events that led to the formulation of the "legislation 231 models" are very informative in this respect, in the sense that they explain why they suffered from the problems of inefficiency as well as of bureaucratisation within private entities. When they were first introduced, in fact, many initiatives had been put forward to package the models proposed by consultancy firms, forgetting that, by obtaining assistance from outside the entity, the latter was not in a position to recognise the risks that might arise separately and specifically against it, both in a specific external context and in light of its own internal traits. Unsurprisingly, the models adopted in this way turned out to be ineffective when tested by criminal courts[9].

2.2. The second characteristic of a constructive approach to preventing corruption within an organisation is the presence of individuals in *top management* who are engaged in combating the risk of corrupt behaviour. This is a typically private sector term; if I were to limit my discussion here to the public sector, then I would need to refer to the political leaders of public entities and their senior managers; I have chosen "top management" to use a more general term that covers both the public and private sectors, considering furthermore that the public sector also must learn to organise itself on the basis of efficiency criteria, in the same way that private companies do.

Therefore, the decision-makers of the entity must be involved in the activity of identifying, analysing and managing the risk of corruption. The absence of a real interest in this type of approach is what many people within public bodies, who are tasked with being in charge of transparency and preventing corruption, complain about, having encountered the great difficulty of engaging the political leaders in the process of formulating a good anti-corruption strategy.

The National Anti-Corruption Authority has tried to alleviate this lack of support; there already seem to be some positive results. During the meetings dedicated to the RPCT, i.e. the person in charge of transparency and the prevention of corruption situated in each public body (held on 24 May 2015, 2016 and 2017), there was a very clear change in the attitudes of the individuals to whom the initiative was addressed: in the first year, they complained almost exclusively about the problems that arose from their isolation within the entity. In the second year, the same persons in charge of transparency and the prevention of corruption (PTPCs) explained that their isolation persisted, but, nonetheless, they could devise some strategies for sharing the burden of the tasks associated with the job. On 24 May 2017, the event was very constructive, well above expectations: there was a widespread proactive attitude among the PTPCs, who presented the operative solutions they had been able to prepare and even introduce into the procedures of their respective public bodies.

I believe this difference in attitude can be attributed to the strategy that ANAC implemented with regard to the performance of regulatory activities exercised through the previous adoption of the National Anti-Corruption Programme (NAP) in October 2015: in this context, the programme suggests that each public entity should also use structures and persons within its organisation to guide them in preventing corruption, in accordance with – but if I may add, to enhance – their specific competences and respective roles. Substance is thus given to the method, according to which the PTPC is the last stop in an internal process in which many "agents" participate, starting with the Internal Supervisory Body (ISB), political leaders, senior management and each individual employee, with the aim of preventing corruption from taking root within the entity[10].

With regard to this last point, we could explore the role of public sector employees who report instances of corruption and other offences taking place within their places of work: who better than they, in fact, to know what problems exist within their public body, how certain strategies are working and how the "ritual" of clocking-in and clocking-out functions. This is the time to promote the role of public sector employees who represent a different way of behaving: the way of the employee who knows that the Constitution asks him to perform his job "with discipline and honour"[11], given that he works for a public entity that must ensure "the proper functioning and impartiality" of public sector work[12]. In this context, he is involved, personally and individually, in the responsibilities associated with the safeguarding and promotion of the entity's culture of integrity. However, for this to happen (returning to how I began these considerations), the decision-makers need to be involved in the culture of integrity: only in this way will public sector employees feel at home, in a secure and confident environment.

With regard to this, it seems very important to mention some of the steps involved in the recommendations adopted by the Committee of Ministers of the Council of Europe on the protection of whistleblowers[13], especially where it is stated that "[t]he normative framework should reflect a comprehensive and coherent approach to *facilitating public interest reporting and disclosures*"[14] and that "[t]he national framework should be promoted widely in order to develop *positive attitudes* amongst the public and professions and *to facilitate the disclosure of information* in cases where the public interest is at stake"[15].

Returning to the matter at hand, the lack of involvement by the entity's decision-makers leads directly to a lack of credibility for the programme. A culture of integrity is established by example, just as we do (excuse the hagiographic reference) with our children: there is no point in giving long lectures about virtuosity; what is essential is to practise integrity in our daily lives, if there is to be any chance that our efforts to instil good behaviour will be successful. Therefore, if the administrative and political leaders are involved in the culture of preventing corruption, then the entire work environment cannot fail to benefit from this favourable

8 It has been correctly pointed out (in relation to the organisational model required by Legislative Decree No. 231/2001) that this must be "*tailor made*". M. Zecca & A. Paludi, *Corruzione E Modelli Di Organizzazione Delle Imprese. Un'analisi Giurisprudenziale, in* Il Contrasto Alla Corruzione Nel Diritto Interno E Nel Diritto Internazionale 117 (A. Del Vecchio, P. Severino eds., Padua 2014).

9 See the procedure discussed in M. Colacurci, *L'idoneità Del Modello Nel Sistema 231, Tra Difficoltà Operative E Possibili Correttivi, in* Diritto Penale Contemporaneo no. 2/2016, 66 et seq.

10 The NAP adopted this with Decision No. 12 of 28 October 2015, para. 4.

11 Art. 54 Costituzione [Cost.] (It.).

12 *Id.* art. 97.2.

13 Recommendation, adopted on 30 April 2014, identifies 29 principles that the states must apply to establish "*a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threat or harm to the public interest*" (as per the 11th recital).

14 *Id.* (Principle no. 7).

15 *Id.* (Principle no. 27).

climate, providing the anti-corruption structure with a better chance of effectively penetrating the entity's culture.

2.3. The third feature of an effective anti-corruption model consists of creating procedures governing the different *risk-based* operations, devising a specific *action plan*. From this process, among other things, excellent opportunities arise for reorganising the entity, in terms of making it more efficient generally: in this process, the connection between performance and the prevention of corruption is very clear. From a conceptual perspective, this feature has, among other things, the certainty of the medium- and long-term benefits of an approach to anti-corruption measures based on a logic not merely of formal compliance with legislative provisions but of a constructive opportunity for rationalising the entity in terms of its organisation and in relation to the ways in which it conducts its activities.

This kind of procedures partly consists of the strategy adopted in many national legal systems, which is strongly supported by the context of international cooperation between institutions[16]. The strong point of this strategy is the programmes devised for short- and medium-term planning on how to combat the risk of corruption: in the Italian legal system, these schemes are called "compliance programmes" (for the private sector, in relation to the need to comply with Legislative Decree No. 231/2011) and Three-year Programmes for Transparency and the Prevention of Corruption (TPTPCs, for the public sector, as established under the Severino Law and Legislative Decree no. 97/2016).

With regard to the advantages derived from this strategy, we can refer again to the context of international cooperation: again, the OECD claims that in the countries where it is practised, the programmes and plans are intended "to modernise the public service in general, and in particular to make the regulations more stringent, to ensure transparency in the administration and in financing political parties, to promote openness of government information and freedom of the media and to improve international cooperation in such efforts"[17].

2.4. Finally, the fourth feature of a good model for preventing corruption (which in my experience has still not been widely implemented in the Italian public sector) consists of applying a stress test to the programme. In fact, when a model is formulated for this purpose, rules for its operation, procedures for its implementation and functioning, monitoring and reporting systems and supervision methods, including checks during and after the process, are established. In order to evaluate and guarantee the efficacy and effectiveness of the model, all these procedures must be tested to verify their efficacy and effectiveness.

However, we must go even further. When an anti-corruption structure tends to become obsolete over time, because the way it functions is known and shared, the entity must be prepared to continuously update the model and the assumptions on which it is based: it is also for this reason (and not only because of the constant evolution of the social context), it must be considered a "dynamic" creature rather than something static. It is not a coincidence that the Severino Law, in relation to the public model, envisages a (3-year) programme on an annual rolling basis. This system offers an excellent opportunity for guaranteeing effectiveness: it enables everything that was learnt from the experiences of the previous year to be promptly added to the programme; it enables checks to be made on which part of the model was inadequate in relation to acts of corruption, which aspects need only adjustment and which ones were successful and can be confirmed. Similarly, it is not by chance that the case law, which evaluated the efficacy of an organisational model pursuant to Legislative Decree no. 231/2001, considered its capacity to be dynamic as one of its essential criteria[18].

3. THE PROCESS OF CONTAMINATION BETWEEN MODELS DEVISED FOR PREVENTING CORRUPTION IN DIFFERENT CONTEXTS

The second point I would like to examine concerns the process of fertilisation (or hybridisation) that we experience between models. This is a process defined by the fact that the underlying needs of the public and private sectors are identical in terms of the aspects relevant to our discussion, in the sense that they both require the establishment of effective responses to the risk of corruption.

This contamination between models is very interesting, very complex and characterised by a transnational influence. It primarily takes place through processes that are entirely internal to the Italian legal system. For example, it is certainly not original to observe that the anti-corruption measures established under the Severino Law are inspired by the compliance programmes system set out under Legislative Decree no. 231/2001[19]. This process of, what we call, horizontal fertilisation within our legal system is evident even by observing how the strategy based on the programme initially became established in the banking and finance sector[20], spreading later to other fields of private economic activity and was finally generalised by the aforementioned legislative decree.

This process of contamination also operates vertically. I have already emphasised how anti-corruption strategies have been in many ways prepared, particularly for the Italian legal system, based on ideas originating in the international context, which has managed to influence the national legal system, guiding it towards certain basic principles of the anti-corruption model[21]. Furthermore,

16 On this subject, *see* OECD, Trust in Government Ethics Measures in OECD Countries (2000), *available at* https://www.oecd.org/gov/ethics/48994450.pdf (last visited June 18, 2018).

17 *Id.* at 68.

18 Order of the Preliminary Proceedings Judge of the District Court of Milan on 20 September 2004, Foro it., 2005, II, c. 528.

19 The inspirational function of the "231 model" in relation to the strategy of preventing corruption in the public sector originates from the work of the so-called Garofoli Commission: "[…] the Commission waited for different proposals to be drafted on promoting mechanisms for preventing corruption. First of all, the development, within public entities, of methods for identifying and measuring corruption, as well as the establishment of a suitable management structure, based on risk management models, along the lines of the organisation and control models used in private companies and entities as established under Legislative Decree no. 231 of 08 June 2001". Rapporto Della Commissione Per Lo Studio E L'elaborazione Di Proposte In Tema Di Trasparenza E Prevenzione Della Corruzione Nella Pubblica Amministrazione, La Corruzione In Italia. Per Una Politica Di Prevenzione. Analisi Del Fenomeno, Profili Internazionali E Proposte Di Riforma 8.1, 35 (R. Garofoli ed., Oct. 1 2012). The contamination between the two models, however, encounters certain limits, which arise from the intimate nature of each of these – as highlighted by the guidelines adopted by the National Anti-Corruption Authority with Decision no. 8/2015 entitled *Guidelines for the Implementation of the Law on Transparency and the Prevention of Corruption by Private Sector Companies and Entities Owned or Partially Held By Public Sector Bodies and For-Profit Public Entities* – mainly attributable to two facts: the public model must address only corruption offences against the State (i.e. only passive corruption); the notion of corruption assumed by this is much broader, since it considers not only criminally significant actions, but also those that consist of the so-called "maladministration". *Id.* at 11; *see also* N. Parisi, *L'attività Di Contrasto Alla Corruzione Sul Piano Della Prevenzione*, in La corruzione a due anni dalla "Riforma Severino" 91–137 (R. Borsari ed., Padova University Press 2016).

20 *See*, *mutatis mutandis*, Financial Action Task Force (FATF-GAFI) International Standards to combat money laundering and the Financing of Terrorism & Proliferation (2012, *available at* www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html (last visited June 18, 2018.

21 Please refer *supra* to notes 2, 4, 6 and 7, in relation to the influence of the Italian experience of this issue on the international scene.

the process of vertical contamination also operates in the opposite direction: it is true that the virtuous practices of some states are likely to continuously flow back from the national programme into the international programme during the many periodic working groups attended by individuals and entities from both the public and private sectors. In this respect, what emerges from the work of the so-called "SPIO Working Party" (*Senior Public Integrity Officials Network*), established by the OECD within the *Directorate for Public Governance*, is significant, which is able to circulate the best practices regarding models for the integrity of national public administrations among the 35 member states of the organisation. To date, this has produced, for example, two separate generations of recommendations, which push national administrations to adopt virtuous models of conduct[22]. Furthermore, the Italian context has also contributed towards enriching this circulation of good conduct: the definition of effective forms of institutional cooperation and procedures for the supervision of public tenders implemented by ANAC in coordination with the OECD[23], to mark EXPO 2015, was recognised by the OECD as a best practice of the Organisation[24] and therefore exported to other national contexts engaged in large construction projects, for example, the new airport in Mexico's capital city. Additionally, the compliance programmes technique adopted by the OECD is based on the system applied in the USA[25].

The circulation of best practices at the international level therefore tends to develop a process of harmonisation and strengthening of national strategies, resulting in significant contamination: good national practices, once brought to the international cooperation level, do not remain unchanged; they influence each other, flowing back into the domestic context in a form improved and enriched by many other experiences from other national contexts. This process, with its circular manner of operation, is reciprocally enriching for both legal systems involved.

The UNI ISO 37001 model of 2016 (*anti-bribery management systems*) certainly belongs to this type of "mutual contamination" experience. It contains standards that have mainly been formulated at the national level: in fact, the model originates from the combination of two of the leading bodies for technical standards: the one established in the United Kingdom (pursuant to the UK Bribery Act of 2010, which implemented it[26]) and the one in the United States (pursuant to the Foreign Corrupt Practices Act (FCPA) of 1977). Their contents have been subsumed at the international level following a complex process of debate and discussion at the ISO[27]; finally, these re-entered our legal system, thanks to the work of the Italian National Unification Body (*Ente Nazionale Italiano di Unificazione*, UNI).

4. THE DISTINCTIVE TRAITS OF THE PUBLIC SECTOR MODEL ADOPTED UNDER ITALIAN LAW NO. 190/2012

Here, I will give a very brief outline of the public sector model applied in the Italian legal system.

Law no. 190/2012 requires that each public body should adopt a Three-year Anti-Corruption Programme, which under Legislative Decree no. 97/2016 must also include measures concerning transparency. Incidentally, this decision to merge the two different programmes originally established as separate seems very appropriate. Transparency is the essential component of an anti-corruption strategy. In this respect, I am certain that, if we could achieve transparency in the public sector, then our country would almost entirely solve its problems with regard to corruption, which is supported by the persistence of opacity. It seems obvious, in fact, to say that transparency makes corrupt agreements more difficult: maybe it is not too malicious to think that for this reason precisely, in our legal system, there are many obstacles to full transparency in both the public sector and its relations with certain activities pursued in the private sector.

As mentioned earlier, the model advocated by the law is a model that is characterised by three elements: it operates on "*a rolling basis*", is "*cascading*" and based on pursuing effectiveness.

4.1. First, I want to return to an image I used earlier: each entity (whether public or private) is not a static creature, but a body in motion. This means that we must continuously consider the needs that continuously (the repetition is intentional) arise from the internal and external contexts of the entity. In order to be effective and complete, the analysis must be able to consider the two sides of risk: both the "threats" side (i.e. the dangers that attack the system) and the "vulnerabilities" side (in their two sub-aspects: the negative aspect of problems and weaknesses and the positive aspect of the capacity to resist and react, that is, the so-called resilience).

Acknowledgement of this requirement leads us to recognise the need for an anti-corruption structure that is dynamic too. The Plan required under Law no. 190/2012 is defined as "rolling", in the sense that, even though it is adopted for a 3-year period, it must be updated every year.

This process is not merely cosmetic. Indeed, it should take place on the basis of two elements. Additions and amendments should primarily be established through the experience of the entity itself, which is required to evaluate which indicators, which problems and what data emerge from the process, so that they can be considered in the Plan and a more effective system for preventing corruption can be created. The second element, which contributes to the process of updating the Plan, consists of the National Anti-Corruption Programme, which ANAC, in turn, adopts annually and which also operates on a "rolling" basis.

4.2. Reference is thus made to the second component of the anti-corruption strategy devised under Law no. 190/2012 and represented by the fact that it is "cascading", organised as it is on the basis of a double-level (central and peripheral) response to the risk of corruption within the entity: the first level is administered by a National Anti-Corruption Programme (*Piano Nazionale Anticorruzione*, NAP) adopted by the governance body for the sector, ANAC, and the second level is administered by the individual public administrations through their own Three-year

22 On 26 January 2017, the OECD Council approved (after the complex and long consultation process that took place in the working group mentioned earlier with the public administrations of the member states) the new Recommendations C(2017)5 *on Public Integrity*, to promote the construction of a coherent, all-encompassing public system of integrity; these substitute the Recommendations of 1998 *on Improving Ethical Conduct in the Public Service.*

23 Memoranda of Understanding of 06 October 2014 and 12 May 2016, *available at* http://www.anticorruzione.it.

24 *See* Report of the OECD (Dec. 18, 2014); Report of the OECD (Mar. 30, 2015).

25 On this subject, *see* C. De Maglie, L'etica E Il Mercato: La Responsabilità Penale Delle Società 102 et seq. (2002).

26 This refers to BS 10500. *See* Bribery Act 2010 (U.K.), https://www.legislation.gov.uk/ukpga/2010/23/contents.

27 *See* ISO 37001, Anti Bribery Management Systems. Requirements with Guidance for Use (2016). Developed by a committee composed of representatives from the United Kingdom, the United States and other ISO member states, it was devised to help organisations reduce the risk of corruption and, through their widespread adoption, create a common baseline of minimum corruption levels that should be adopted by the organisations.

Programmes for Transparency and Preventing Corruption. As mentioned earlier, the NAP is also 3-yearly and "rolling", just like the plans established by individual public sector bodies.

The purpose of the NAP is to identify "the main risks of corruption and the associated remedies (...) in relation to the dimension and different sectors of activity in which entities operate", in order to guide and support public sector bodies and the other parties to which the anti-corruption legislation is applied in the preparation of the TPTPCs[28]. The programme contains recommendations; given that it also includes illustrative guidelines, there remains a need to contextualise the risks and remedies (the so-called measures) in relation to the specific organisational context of each entity. The method used therefore, supplemented by the two rolling and cascading actions, enables the creation of a continuous cycle of control, learning and application of personalised, made to measure instruments for prevention.

4.3. I must also mention the effectiveness that this strategy aims to achieve. In this context, it seems appropriate to note the change to the strategy that occurred between the approval by the CIVIT (*Commissione per la valutazione, la trasparenza e l'integrità delle amministrazioni pubbliche*, Commission for the evaluation, transparency and integrity of the public sector) of the first NAP (2013) and the adoption by ANAC of the subsequent NAPs (2015, 2016 and 2017). It was a change in strategy in some way instigated by the requests for support that reached the authority from certain areas of the public sector, notably from the health service; but it was also noted by the authority itself as necessary after the findings that emerged from its supervisory activity in the period immediately following the establishment of the new Council (July 2014). From this activity, in fact, it was noted that the quality of the TPTPCs had to be considered "generally unsatisfactory"[29].

The poor quality of the first TPTPCs was partially attributable to the novelty of the compliance required: at that time, the public sector was not equipped to evaluate and manage the risk of internal corruption, since adequate time and appropriate occasions for developing the necessary "revolutionary" skills had not been allocated, and the same applied to the Italian legal system. It is true that, due partially to this situation, in handling this new task, there was a tendency (which was also demonstrated in the first application of Legislative Decree no. 231/2001) towards a merely formal compliance with the rules established on the subject by the Severino Law. Consider, by way of example, that the first round of supervisory activity revealed the case of a municipal authority that had adopted the TPTPC of another municipal authority (without even changing the heading of the entity and the name of the Person in Charge of Preventing Corruption) and a large hospital in Campania that had used the TPTPC of a hospital in a small province of Piedmont.

As mentioned above, this resulted in an evaluation of the sterility of a NAP, which, in its genericness and expected uniform application, lent itself to a "cut-and-paste" operation, to mere vague proposals, and, in addition, to cosmetic operations inserted from outside the entity itself. The public sector was not put in a position, from the first introduction of Law no. 190/2012, to understand the logic, and the benefits, of the process, which consists of acknowledging the specific, individual risks determined by the context (both external and internal) that characterises each separate entity.

The subsequent NAPs, including the one that is about to be published, are based on the principle according to which the public sector is not an undifferentiated universe, consisting instead of very diverse components. These NAPs, consequently, are equipped with a small component of measures aimed generally at the public sector as a whole[30], whereas most of them consist of clarifications directed at specific areas of the public sector[31]. ANAC has therefore abandoned the idea of issuing the same recommendations to all public sector entities, regardless of the function of each entity, its size, whether it is central or local territorial or local non-territorial and whether it has a stable nature or not. The aim is to appreciate the diversity of the general and specific risks, the difference between the areas at risk according to the function, the different external context and the different duration and stability of the entity, which may have been established only for contingent and transient needs. Furthermore, this appreciation was helped by the technique used: that is, through consultation with those who for different reasons have been made aware of the contents of the NAP via joint "working groups" in which the risks of corruption and the measures available for combating them were discussed.

ANAC considers this type of conceptual approach more practical in order to guarantee that the recommendations aimed at the public sector will be more effective. Only in this way can the organisational model for preventing corruption be operative.

The search for a substantialist approach emerges from all the authority's practices. Only one example is needed, which illustrates the practice of "copying homework", so to speak. The Severino Law establishes the obligation to impose sanctions on public bodies that do not have a TPTPC, not when they have one, but it is ineffective. ANAC has concluded that copied programmes are essentially non-existent programmes; therefore, it considers these cases to be equally liable for sanctions. This idea contradicts the assumption according to which the proceduralisation of anti-corruption measures leads to a new, more intense (ineffective) bureaucratisation of the public sector, forcing the entity to invest human and financial resources into a model that has proven to be ineffective because it was not developed in the context of the entity itself[32].

5. THE PRIVATE SECTOR MODEL PURSUANT TO ITALIAN LEGISLATIVE DECREE NO. 231/2001

The compliance model set out under Legislative Decree no. 231/2001 does not find detailed instructions, which are helpful for identifying its contents and drafting techniques, in the guidelines of positive law[33]. Three parameters are stated therein: on the one hand, with regard to the establishment of a possible strategy for combating (also) risks of corruption, it should be noted that the

28 Law no. 190/2012, as amended by Legislative Decree no. 97/2016, art. 1.2*bis*.
29 ANAC, Relazione Annuale 2015 79 (2016).
30 The 2015 NAP contains 24 general pages; the 2016 NAP, 37; the 2017 NAP only 17.
31 In the NAP, the clarifications pertain, in 2015, to the public tender and health service sectors; in 2016, small municipal authorities, metropolitan cities, professional associations and colleges, academic institutions, cultural heritage, territorial government and healthcare, and in 2017, to the port system authorities, official receivers and universities.
32 Furthermore, Article 2 of the Severino Law contains an invariance clause: this determines the illegitimacy of consultancy fees in relation to the preparation of the TPTPC (as established by ANAC with Decision no. 831 of 03 August 2016).
33 On the conciseness of the provisions in question, see the recent publication by R. Sabia & I. Salvemme, *Costi E Funzioni Dei Modelli Di Organizzazione E Gestione Ai Sensi Del D.Lgs. N. 231/2001*, *in* Tutela Degli Investimenti Tra Integrazione Dei Mercati E Concorrenza Di Ordinamenti 434, 438, 456 (A. Del Vecchio & P. Severino eds., 2016).

organisation, management and control model (essential for avoiding the possibility of the entity being considered liable for alleged offences) must respond to certain characteristics, which I will set out by reproducing the text of the provision: "a) identify the activities in the context of which offences may be committed; b) establish specific protocols intended to schedule the formation and implementation of the entity's decisions with regard to the offences that need to be prevented; c) identify methods for managing financial resources, which are suitable for preventing the commission of offences; d) establish obligations to disclose information to the organisation assigned to supervise the functioning of and compliance with the models; e) introduce a suitable disciplinary system to penalise non-compliance with the measures set out in the model."[34] The model must also establish, "in relation to the type and dimensions of the organisation and the type of activity performed, suitable measures for ensuring the performance of the activity in accordance with the law and identifying and promptly eliminating risk situations."[35] On the other hand, in terms of effectiveness, it was established that the model must at least require "a) periodic verification and, where appropriate, amendments to the same when significant breaches of the rules are discovered or when there are changes to the organisation or the activity; b) a disciplinary system appropriate for penalising non-compliance with the measures set out in the model."[36]

With regard to the conciseness of the regulatory provisions, the rulings of a few criminal courts provide relevant case law. On several occasions, they have considered, in addition to the criminal liability of the natural person who effectively implemented the act of corruption, the possibility of reconstructing a liability[37] of the entity on whose behalf the person acted[38]. It was thus that a system of rules was codified, a group of conditions through which the entity can presume it has an effective anti-corruption model: the so-called "Milan Decalogue", supplemented by the case law of the Naples District Court (Tribunale di Napoli),[39] provides a useful summary. However, this analysis performed using case law is still too unreliable to give certainty to the subjects who adopt the model in terms of the "resistance", before the criminal courts, of an organisational and management model, and therefore, it does not help to make the process of adopting (with costs that are sometimes unjustifiable) a similar model appealing in substantive terms[40]. The absence of incentives to make this process effective and not a merely cosmetic operation has led to, along with the fragility of the system, the implementation of attempts to reform it[41].

6. THE POINTS OF CONTACT BETWEEN THE PRIVATE AND PUBLIC SECTOR MODELS: PRIVATE COMPANIES CONTROLLED BY PUBLIC BODIES

The two briefly described models (public and private) have a point of contact in the construction of an anti-corruption strategy within private companies in which public entities hold a share.

Anyone reading this paper will certainly know that, in accordance with the mandate contained in the "Madia Law", Legislative Decree no. 175/2016 was passed and contains the Consolidated Act on reorganisation with regard to companies in which the public sector holds a share (SOEs). This codification is, however, unusually almost silent on the subject of anti-corruption and transparency so much so that we need to find the regulation relevant to our discussion in another piece of legislation with identical origins (Legislative Decree no. 97/2016), intended to regulate, in general terms, the subject of fighting corruption through prevention in public bodies (as well as using administrative transparency measures), which was already covered under the Severino Law and Legislative Decree no. 33/2013[42].

The solution identified in establishing rules on transparency and the prevention of corruption, even for the so-called public companies, is built on the basis of the limited instructions that emerge in part from Law no. 190/2012[43], as enhanced by the 2016 NAP[44] as well as the current Guidelines adopted by ANAC[45] and outlined by Legislative Decree no. 97/2016, which was confirmed by the Council of State[46]. This requires that in relation to private companies owned by public bodies, the "231 model", which in my opinion is not compulsory for private entities, on penalty of its sometimes pointless bureaucratisation[47], when present, must be supplemented by a programme of anti-corruption measures[48].

34 Severino Law, art. 6.2.
35 *Id*. art. 7.3.
36 *Id.* art. 7.4.
37 The literature is divided on the type of liability of the entity under Legislative Decree no. 231/2001. For a reconstruction with a general scope, *see* P. Severino, *"Omogeneizzazione" Delle Regole E Prevenzione Dei Reati: Un Cammino Auspicato E Possibile*, *in* Corporate Criminal Liability and Compliance Programs 427 et seq (A. Fiorella & A.M. Stile eds., 2012). The administrative nature is affirmed by M. Romano, *La responsabilità amministrativa degli enti, società, associazioni: profili generali*, *in* Riv. soc. 398 et seq. (2002). For a discussion of the mixed nature, is O. Di Giovine, *Lineamenti Sostanziali Del Nuovo Illecito Punitivo*, *in* Reati E Responsabilità Degli Enti 15 et seq. (G. Lattanzi ed., 2015); and similarly the Italian Supreme Court, Section VI, Sentence no. 36083 of 9 July 2009. Claiming (and I agree) that this involves criminal liability, C.E. Paliero, *La Responsabilità Della Persona Giuridica Nell'ordinamento: Profili Sistematici*, *in* Societas Puniri Non Potest 23 et seq. (F. Palazzo ed., 2003). For a comparative discussion on the evolution at the European level of the legal regime of company liability and entrepreneur's liability, *see* F. Clementucci, *Comparative Analysis Of Criminal Law, Procedures And Practices Concerning Liability Of Entrepreneurs*, https://rm.coe.int/16806d8140 (last visited 18 June 2018).
38 Case law (up to 2012) is presented in Codice Della Responsabilità "Da Reato" Degli Enti Annotato Con La Giurisprudenza (S.M. Corso ed., 2015).
39 This concerns the orders adopted respectively by the Preliminary Investigations Judge at the Milan District Court (Tribunale di Milano) on 20 September 2004 (in *Guida dir.*, no. 47/2004, p. 69 et seq.) and the Preliminary Investigations Judge in Naples on 26 June 2007 (in *Resp. Amm. Soc.*, no. 4/2007, p. 163 et seq.). For an effective comment on the contents of this case law, please refer to Zecca & Paludi, *supra* note 9, at 113.
40 Regardless of the uncertain benefits of this internal compliance system in terms of court proceedings, the process of collecting and analysing data that it requires, it can enable the organisation concerned, if nothing else, to identify, acknowledge and understand some internal problems.
41 On this point, *see* F. Centonze & M. Mantovani, *Dieci Proposte Per Una Riforma Del D.Lgs. N. 231/2001*, *in* La Responsabilità "Penale" Degli Enti. Dieci Proposte Di Riforma 23 et seq. (Idem ed., 2016).
42 On this subject, see R. Cantone, *Prevenzione Della Corruzione Nel Sistema Delle Società Pubbliche: Dalle Linee Guida Dell'anac Alle Norme Del D.Lgs. 175/2016*, in I Controlli Nelle Società Pubbliche 17 et seq. (F. Auletta ed., 2017); A. Massera, Gli Statuti Delle Società A Partecipazione Pubblica E L'applicazione Delle Regole Amministrative Per La Trasparenza E L'integrità 45 et seq. (2017); Le Società Partecipate Dopo Il Correttivo 2017 (M. C. Lenoci, D. Galli & D. Gentile eds., 2017); La Gestione Delle Società Partecipate Pubbliche Alla Luce Del Nuovo Testo Unico. Verso Un Nuovo Paradigma Pubblico-Privato (M. Lacchini, C. A. Mauro eds., 2017); S. Fortunato & F. Vessia, Le *"Nuove" Società Partecipate E In House Providing*, 408 Quaderni di giurisprudenza commerciale (2017); V. Sarcone, *L'applicazione Delle Misure Di Prevenzione Della Corruzione E Sulla Tutela Della Trasparenza (L. N. 190/2012 E Decreti Attuativi) Alle Società Pubbliche*, in Le Società Pubbliche Nel Testo Unico 220 et seq. (F. Cerioni ed., 2017).
43 Originally, the rule was stated in Article 1.2 of Law no. 190/2012; this was amended by Legislative Decree no. 97/2016, which added (thanks to the provision contained in Article 41) a new Article 1.2*bis*.
44 NAP, p. 13 et seq.
45 Decision no. 8/2015, *supra* note 20.
46 Council of State Opinion no. 1257 of 29 May 2017 (It.).
47 In the sense claimed here, *see* Supreme Court, Section VI, Judgment of 23 June 2006, no. 32627. *Contra*, even though authoritative, Council of State, Opinion 1257, *supra* note 47, at para. 9.1.
48 This interpretation of the rules was established by ANAC, Guidelines Adopted for the Implementation of Legislation on Transparency and the Prevention of Corruption in Private Companies and Entities that Are Owned or Partially Owned By Public Administrations or For-Profit Public Bodies, adopted 8 Nov. 2017, para. 1.3.

Specifically, in relation to the prevention measures intended to implement administrative transparency, the regulation established for public entities[49] is also applied to publicly owned private entities "as regards both its organisation and the range of activities performed"[50]. The solution collectively chosen by the Legislature originates from the desire to achieve a substantial assimilation (limited to these aspects) between the owned private entity and the public entity[51].

When a private entity is only partially owned, then only the rules on transparency are applied (and not all the others on preventing corruption), establishing, moreover, that this latter regulation is to be used "only in relation to activities carried out in the public interest"[52]. This is a broad interpretation of the legislative structure that emerges from Article 22 of Legislative Decree no. 175/2016 and Legislative Decree no. 97/2016 according to which any private entity that performs (even non-exclusively) public functions must be transparent with regard to these provisions. The structure has important consequences in terms of public access, which can therefore be exercised even with regard to partially owned private companies[53].

Listed companies are situated outside this sphere. Legislative Decree no. 97/2016 does not cover these, since it was not considered appropriate to extend to them the regulation established for non-listed companies due to the different interests involved, and refers to a subsequent legislative provision devised in consultation with the Ministry of Economics and Finance and CONSOB.

The recent Law, adopted by Parliament on 15 November 2017[54], "Provisions for the protection of those who report offences or irregularities, which they have become aware of in the context of a private or public sector job", adds a useful element with regard to companies in which public entities hold a share. Its provisions, with regard to what is set out under Article 1, are fully applicable to subsidiaries due to their connection with the anti-corruption regime applicable to the public sector, and, with regard to what is set out under Article 2, to subsidiaries, with a regime that is certainly weaker because it is governed by only the "231 model", which the company itself has adopted.

7. THE SCOPE OF THE DIFFERENT MODELS INVOLVED

Some interesting points emerge from a comparison of the contexts covered by the three anti-corruption models in force.

The public sector model identifies seven criteria for any corruption risk management system: an analysis of the entity's internal and external context, along with a consultation with the stakeholders; the assignment of roles and competencies within the organisation; the analysis of risks of corruption; the identification of prevention measures starting with the areas of activity most at risk from corruption; the formulation of a plan with details regarding time scales and duties for its implementation; verification of what has been achieved and connection of the results of the outputs established in the Plan with the system for evaluating the performance of the managers[55].

The proper criteria for a compliance programme as set out under Legislative Decree no. 231/2001 can be found in the aforementioned case law analysis, according to which "the effectiveness of an organisational model depends (...) on its suitability in practice with regard to creating decision and control mechanisms that can significantly eliminate or reduce the risk of liability and obviously effectiveness and must be linked to the efficiency of instruments suitable not only for penalising unlawful acts, but also for identifying the areas of risk in the company's activity"; this must be "specifically suitable for preventing the commission of offences in the context of the entity for which it was prepared; the model must therefore be specific, effective and dynamic such that it can adapt to changes to the entity concerned"[56]. In addition, the existence of this model is not enough. It is necessary that the entity "has implemented it effectively, by applying it in practice, through ongoing verification of the suitability of its functioning, through progressive updating, so as to ensure a constant adjustment to operational and/or organisational changes that have occurred"[57].

In practice, the two models tend to function according to methods that are in some ways similar. We consider that, in practice, even in relation to the anti-corruption sector in the strict sense, ANAC tends to apply a mode of conduct that is based on the tried and beneficial process of collaborative supervision codified for the public tender sector[58], as a consequence of the desire (and the effort) to support the public sector in adopting virtuous conduct, instead of imposing sanctions. Conversely, long ago, the judiciary launched a process that tends to establish methods of collaboration (during preliminary investigations) with the entity, invited to launch internal defensive investigations to support and coordinate with the public prosecutors offices, in order to avoid, as much as possible in some cases, the initiation of criminal proceedings, which often entail the application of cautionary measures, both pecuniary and prohibitory[59], in a certain sense borrowing the experience (collaborative) gained in other legal systems, where criminal prosecution is not even compulsory[60].

The UNI ISO 37001 standard is based on a system that adopts a structure common to all ISO standards: this is the so-called *High Level Structure* (*HLS*), which consists of seven conceptual stages, constituting an organisational model, leadership (*focus on the top*), planning, support, operational activities, evaluation of services and improvements to be made. This seems methodologically more valuable than the two models detailed above, which, instead, are quite homogeneous: it adds, in

49 *See* the new Article 2*bis* of Legislative Decree no. 33/2013 (introduced by Legislative Decree no. 97/2016).
50 This is the confirmation of the legislation in force implemented in the Guidelines of ANAC. *See supra*, note 48, para. 1.2.
51 The legislative solution, furthermore, confirms what was already established in ANAC's Guidelines adopted with Decision no. 8 of 17 June 2015, fully replaced by the new Guidelines cited *supra* note 48.
52 ANAC, *supra* note 48.
53 ANAC, *supra* note 48, para. 3.3.3–3.3.4.
54 Not yet published in the Official Journal.
55 L. Carrozzi, *Piani Di Prevenzione Della Corruzione. L'approccio Dei Sistemi Di Gestione E I Fattori Critici Di Successo*, *in* Gnosis 161 et seq. (2016).
56 Preliminary Investigations Judge District Court of Milan, Order of 20 Sept. 2004.
57 Preliminary Investigations Judge District Court of Naples, Order of 26 June 2007.
58 Public Tenders Code, art. 213, par. 3(h); Supervisory Regulation of 15 Feb. 20, art. 4, para. 2(a).
59 F. Palazzo, *Obblighi Prevenzionistici, Imputazione Colposa E Discrezionalità Giudiziale*, 12 Diritto Pen. Proc. 1545, 1545–52 (2016).
60 In France it was governed by the hypothesis of "*convention judiciaire d'intérêt public*". Law no. 2016–1691 of 09.12.2016 (Loi Sapin II), art. 22, inserted into the new French Code of Criminal Procedure art. 41–1-2. In the United States, the model applied is the *Deferred Prosecution Agreement* ("DPA") introduced in 1999 by the United States Department of Justice (DOJ) with *DOJ Guidance for Proceeding Against a Corporation* "*Federal Prosecution of Corporations*" (*Holder Memo*).

comparison to these, for example, a system of reporting, monitoring, auditing and periodic verification, not detailed under Law no. 190/2012 or in Legislative Decree no. 231/2001, as well as the performance of investigations and the implementation of corrective actions, which in the Severino Law are only implied.

The result is that the process of fortification among models could be useful in terms of the methodological enrichment that comes from UNI ISO[61].

However, a new element was introduced by model 37001 (the element that the pertinent literature considers the most important) in relation to which there is much to discuss. This is because of the fact that the UNI ISO model explicitly states the possibility of certifying how real and effective the anti-corruption organisational model is, for all types of organisation (small, medium, large, public and private). This development is not new; it was already suggested in the practices adopted during the period when the "231 models" were launched; the development was then re-proposed in the draft bill prepared by the Research and Legislation Agency (*Agenzia di Ricerche e Legislazione* – AREL)[62].

Undoubtedly, the process of certifying the effectiveness of a model has its own intrinsic benefits: indeed, it enables not only the standardisation of models, but also inducement to use a common language at the international level. From this perspective, certification could produce a positive effect on the entire strategy system for preventing corruption in the context of international trade. This characteristic also accounts for another factor: the UNI ISO model is suitable for B2B relationships (not by chance does it include business practices), but is much less suitable for dialogue between for-profit entities and public authorities (regardless of their type: administrative or judicial).

However, looking first at the experience of the "231 models", one cannot fail to have some serious doubts about the role of certification in exonerating the entity of its liability for the commission of acts of corruption. The *Impregilo case* provides a good example in this respect: first the District Court of Milan[63] and then the Court of Appeal in the same city[64] ruled that the organisational model implemented by the entity was adequate in relation to actions committed by those in top management positions who had fraudulently evaded the model itself. These decisions, however, were subsequently overturned by the Italian Supreme Court (Corte di Cassazione)[65]: making a ruling on legality, the latter did not feel, in short, constrained by any certification (in the event arising from the model having adopted both the scanty provisions of Articles 6 and 7 of Legislative Decree no. 231/2001 and the Guidelines adopted by Confindustria) and ruled with full autonomy, having assessed the efficacy and effectiveness of the compliance model. Furthermore, ANAC will not feel constrained by an ISO certification of effectiveness, whether in relation to a public body or a private for-profit entity, just because the strategy fulfils the criteria of model 37001 and, as a result, it received certification.

Second, and from the conceptual perspective, part of the literature points, not without reason, to "the impossibility and (...) inadequacy of the certification mechanisms in terms of managing blame within an organisation": this would have an influence, in fact, in a context that is "structurally not (...) subject to certification and instead (...) is totally incompatible with assessments of that type"[66].

I will omit the matter of the cost of the process, even though it is not irrelevant: it is a "burden" that is added to the many expenses for-profit entities have to pay; and we must consider that it cannot be borne by public entities, given the provisions of Article 2 of the Severino Law[67].

Both the "231 model" and the UNI ISO 37001standard share a common benefit (including the benefit of the public sector model): they enable the organisation to recognise and discover internal problems. Ultimately, they enable a sort of check-up to be performed, which can photograph the structure and organisation of the entity's activities: what represents a beneficial outcome, even if not strictly essential, but only preparatory, for the measures needed to prevent corruption.

In conclusion, apart from the educational value that a different study of the compliance models could provide, nothing seems to have changed with regard to the framework used by the court as an assessment parameter, for the private sector, and by the authority in charge of preventing corruption, for the public sector.

8. A FEW CLOSING REMARKS ON THE EFFECTIVENESS OF THESE MODELS: SIMPLE LAWS, EFFECTIVE PROCEDURAL MODELS AND THE ETHICAL RESPONSIBILITY OF PUBLIC SECTOR EMPLOYEES AND ECONOMIC OPERATORS

Academics, figures from the sphere of economics and observatories (national and otherwise) on the methods that underlie the strategy of fighting corruption through prevention increasingly claim that the procedures implemented in this respect represent an element that contributes towards (if not determines) the inefficiency of the public sector system and business activity due to the costs, delays and "burdens" that they involve. The common factor in their reasoning is their affirmation of the pointlessness or rather the unsuitability of the rules for changing the attitudes and the culture of a state and a nation.

On the contrary, I am deeply convinced that the law (and therefore the procedures that it implements) can be a powerful tool for establishing a different cultural approach towards corruption and the behaviours that support it and feed it from what we have now[68]: a cultural approach central to which is an awareness of the seriousness of the damages that a high, pervasive level of corruption such as that which has affected the "Italian system" for a long time entails[69].

The contradiction of an argument such as this is truly unique, when in other ways these same individuals consider themselves passionate supporters of the rule and primacy of law.

61 It is very evident how much this model deviates from the public sector model and the "231 model". UNI ISO 37001 is a pervasive, very rigid and static instrument: it has to be fully adopted, with all its processes being applied to each entity that wants to use it; it "photographs" the condition of the entity at a particular moment in time and is not designed to adapt itself, through the fundamental support of the controls, to the dynamism of the flow of social life. Furthermore, a methodological function is performed by UNI ISO 31000/2010 in relation to the first NAP (2013), of which Appendix 6 contains the principles for the management of risk based on the said model.

62 *See* AREL, http://www.arel.it. On this subject *see* La certificazione del Modello organizzativo ex Decreto Legislativo 231/2001, *available at* http://www.filodiritto.com.

63 Judgment of 20 Sept. 2004, *Foro it.*, 2005, II, c. 528.

64 Judgment of 21 Ma. 2012, no. 1824, *available at* www.penalecontemporaneo.it.

65 Judgment of 18 Dec. 2013, no. 4677, sec. VI, *reproduced in* Dir. pen. proc. 1429 et seq. (2014).

66 On this, Sabia & Salvemme, *supra* note 34, at 462 (reporting the judgment of C. Piergallini, Paradigmatica dell'autocontrollo penale, Parte II, Cass. Pen. 842 et seq. (2013)).

67 *See* supra note 32.

68 On the promotional function of the law, *see*, more authoritatively, N. Bobbio, Dalla Struttura Alla Funzione. Nuovi Studi Di Teoria Generale Del Diritto (1977).

69 On the damages that are summarised, for example, in the Preamble of the Merida Convention against the corruption, *see*, from among many, V. Mongillo, La Corruzione Tra Sfera Interna E Dimensione Internazionale 8 et seq.(2012); G.M. Racca & R. Cavallo Perin, *Corruption as a Violation of Fundamental Rights: Reputation Risk as a Deterrent Against the Lack of Loyalty*, *in* Integrity and Efficiency in Sustainable Public Contracts 23 et seq. (G.M. Racca & C.R. Yukins eds., 2014).

The law and the associated procedures represent a victory and a bastion for those who do not hold power (public power, since it is part of the government institutions, or private power, since it is economically strong). Bureaucracy in the modern sense of the word originated precisely for achieving collective goals according to criteria of impartiality, impersonality of power and rationality: this forms an instrument for transmitting command that is contrary to the arbitrary exercise of the same[70]. In principle, the existence of corruption in society cannot therefore be attributed to the presence of laws and procedures: good rules lower the risk as instruments for affirming the principle of the supremacy of law over arbitrariness[71].

It is also said (with further reference to historical legacies[72]) that the problem was caused by too many rules: of course, excessive legislation often leads to difficulties in terms of interpretation and application, aporias and contradictions. Simplicity is a sign of good legislation; however, it does not respond to objective and universal indicators, since each situation deserves a greater or lesser degree of legislation. In this context, I will give an example taken from experience gained at the National Anti-Corruption Authority, which highlights how the quantitative reduction of rules does not necessarily lead to a better legislative structure. With regard to the performance of supervisory functions, the authority has up until very recently only one regulation, that is, the one related to public contracts, which was extended to the other sectors covered by the authority itself (conflicts of interest, anti-corruption, transparency): it decided to substitute this single undifferentiated regulation with four separate regulations, for each of the four areas of activity[73]. This decision was taken by the Authority's Board due to evidence that the certainty of the law and the protection of the individual prerogatives of people involved in supervisory proceedings are guaranteed better by a specific regulation for each area, different from the others.

Having considered the quantitative aspect, let us now consider the quality of the rules[74]. Now, when a situation of widespread, pervasive illegality needs to be combated, the quality of the rule is measured by its effectiveness and thus its capacity to combat that situation. To this end, there are a few conditions that cannot be overlooked: First, the incentivising capacity for anyone who has to apply the rules of conduct and the procedures that result from the rules; second, the exercise of public power by a competent and ethical administration and third, the presence of the same traits in the interlocutors for the public sector.

Finally, the question surrounding the interpretation and application of the rule: conceptual processes that must be informed by a substantialist criterion. The law, in fact, is an instrument that is not an end in itself, but useful for achieving justice.

These are the conditions that cannot be improvised. From this perspective, perhaps it is easier to understand why I argue that (good) procedures can contribute towards establishing a culture of individual responsibility, the antechamber of an intact social and legal context, in which just a few rules are upheld by the best antidote to corruption: transparency. However, this condition (transparency in the public sector and in the management of private businesses) represents a victory that can be achieved at the end of a long journey supported and guided by rules that set out clear models of conduct and contain incentives for virtuosity[75], so as to accelerate the process of incorporating the models of integrity.

The fight against corruption is a process that cannot be completed instantly. Indeed, it takes a long time and is not a linear process. Many of the instruments it uses could themselves be corrupt. We therefore need to initiate and launch a cultural process to change the cultural approach of individuals, starting with simple, clear rules of conduct.

From this viewpoint, the question of equipping the country with a set of rules and procedures, which, of course, constrain every entity to an initial burden of work required by the risk-based strategy, is central. However, these are the rules and procedures, which, if followed, in a substantialist manner and not as a merely formal obligation, will lead in the long term to the formulation of virtuous models of conduct. Furthermore, the awareness of the seriousness of the damages caused by conduct that is now so pervasive should lead the healthy part of our country to react to corrupt practices with alternative models, which are capable of reversing the trend.

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70 Of course, reference must be made to the theorist of modern bureaucracy, M. Weber, Economia E Società (W.J. Mommsen & M. Meyer eds., Donzelli 2005); *see also*, more recently, K.J. Meier & L.J. O'Toole, Bureaucracy in a Democratic State: A Governance Perspective (2006).

71 On the principle of legality and the characteristics of the rule that permit it to be considered a "law", see the complex case law of the European Court of Human Rights with regard to the interpretation and application of Article 7 of the European Convention on Human Rights, as reconstructed by D. Rinoldi, L'ordine Pubblico Europeo para. 41 (2008).

72 The words of Tacito are notable – always used by those who claim the law is useless – "*Corruptissima re publica plurimae leges*" (*Annales*, Book III, 27): according to the intention of the author, this does not mean that many laws produce corruption, but instead that a corrupt state tends to multiply rules that produce corruption, since they are adopted *ad personam*.

73 The regulations (adopted in February 2017) are available on the Authority's website www.anticorruzione.it.

74 With regard to rules, which themselves produce corruption, *see* F. Giavazzi & G. Barbieri, Corruzione A Norma Di Legge. La Lobby Delle Grandi Opere Che Affonda l'Italia (2014).

75 With regard to the need to equip the anti-corruption legislation with incentives, *see* S. Rose-Ackerman, *Corruption: An Incentive-Based Approach*, 1(2) Corruzione contro Costituzione. Percorsi Costituzionali 109 (2012).

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RESEARCH ARTICLE

White-collar crimes, corruption and bribery in Islamic criminal law: Lacuna and conceivable Paths

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ABSTRACT

The Islamic legal system differs from other legal traditions, such as civil law, based on codification or common law based on binding judicial precedents. In Islamic law, there is neither a history of codification of law, nor a reliance on binding legal precedents. The process of *ijtihad* (analogical deduction) in Islamic (*Sharie'a*) law, however, is similar to case law model. In this regard, Muslim scholars interpretation of the *Sharie'a* rules and divine (God)'s law were based on the *Qur'anic* provisions and the authentic *Sunnah* (Prophet Mohammad) traditions. The chief sources of Islamic criminal law are the *Qur'an*, *Sunnah*, *ijma'a* (consensus), *Qiyyas* (individual reasoning) along with other supplementary sources. Where the principles of the *Qur'an* and *Sunnah* do not sufficiently resolve a legal issue, Muslim intellectuals use *Fiqh* (jurisprudence) which is the process of deducing and applying *Sharie'a* values to reach a legal purpose and its methodologies and implementation are many, as numerous schools of jurisprudential (*Sunni* and *Shie'aa*) thought (*Hanafi*, *Maliki*, *Shafi'i*, and *Hanbali*) transpires.[4] This article will deal with the main principles of the Islamic criminal justice system regarding corruption and bribery from a descriptive viewpoint and will conclude that there is no real difference between the Islamic system and the positive justice mechanisms.

Keywords: Islamic (*Sharie'a*) law, Islamic Criminal Jurisprudence, ijtihad (analogical deduction), corruption, bribery.

ملخص:

يختلف النظام القانوني الإسلامي عن الأنظمة القانونية الأخرى، مثل القانون المدني المبني على التقنين أو القانون العام المؤسس على السوابق القضائية الملزمة. في ظل غياب تاريخ التقنين والاعتماد على السوابق القضائية في الشريعة الاسلامية، فإن عملية الاجتهاد في الشريعة الإسلامية تتشابه مع نموذج السوابق القضائية الملزمة. في هذا الصدد، بنيت تفسيرات علماء المسلمين للشريعة والقوانين الإلهية على الأحكام القرآنية والسنة النبوية الأصيلة (النبي محمد). ان المصدر الرئيسي للقانون الجنائي الإسلامي هو القرآن، والسنة، والإجماع، و القياس (المنطق الفردي) جنبا إلى جنب مع المصادر التكميلية الأخرى. وفي ظل تعذر استخلاص حل من القرآن والسنة للمسائل القانونية يستخدم المفكرون المسلمون الفقه وهو عملية استخلاص وتطبيق قيم الشريعة للوصول إلى غرض قانوني، وكما يتضح العديد من المدارس الفقهية (السنية والشيعة) الفكر (الحنفية والمالكية والشافعية والحنابلة) فإن طرق ومنهجات الفقه كثيرة. بناءا على ذلك تتناول هذه المقالة المبادئ الرئيسية لنظام القضاء الجنائي الإسلامي فيما يتعلق بمسائل الفساد والرشوة من وجهة نظر وصفية، وصولا إلى استنتاج عدم وجود فرق حقيقي بين النظام الإسلامي وآليات العدالة.

الكلمات المفتاحية: قانون الشريعة الإسلامية، الفقه الجنائي الإسلامي، الاجتهاد (استخلاص التناظرات)، الفساد، الرشوة

I. INTRODUCTION AND OVERVIEW

The Islamic legal system differs from other legal traditions, such as civil law, based on codification or common law based on binding judicial precedents. In Islamic law, there is neither a history of codification of law nor a reliance on binding legal precedents.[1] The process of ijtihad (analogical deduction) in Islamic (Sharie'a) law, however, is similar to the case law model. In this regard, Muslim scholars have had debates over the interpretation of the Sharie'a rules and divine (God's) law based on the Qur'anic provisions and the authentic Sunnah (Prophet Mohammad) traditions.[2] The chief sources of Islamic criminal law are the Qur'an, Sunnah, ijma'a (consensus), and Qiyyas (individual reasoning) along with other supplementary sources.[3] Where the principles of the Qur'an and Sunnah do not sufficiently resolve a legal issue, Muslim intellectuals use Fiqh (jurisprudence), which is the process of deducing and applying Sharie'a values to reach a legal purpose, and its methodologies and implementation are many, as numerous schools of jurisprudential (Sunni and Shie'aa) thought (Hanafi, Maliki, Shafi'i, and Hanbali) transpires.[4] This article will deal with the main principles of the Islamic criminal justice system regarding corruption and bribery from a descriptive viewpoint and will conclude that there is no real difference between the Islamic system and the positive justice mechanisms.

II. CORRUPTION AND BRIBERY UNDER THE ISLAMIC PENAL JUSTICE SYSTEM: QUO VADIS?

It is normally acknowledged that societal standards and concepts of economic and social justice design the frame of moral conduct. In the *Qur'an* and *Sunnah*, corruption refers to an extensive array of behavioral digressions that affect the economic, social, fiscal, and ecological balance. These are elucidated at several places in the *Qur'anic* texts in plain language, in terms of being just or unjust, with reference to their harmful influence on social organization, and in relation to the moral virtue's norms.[5] Islam prohibits taking, giving bribes and warns all of those involved of hell fire. However, the Muslim scholars affirm that bribery is prohibited when it is aimed at consuming other's property or rights unfairly. Thus, if someone finds himself in a situation in which all avenues of redressing a wrong done to him, or recovering a right which has been forfeited, are blocked except through the payment of a bribe, the sin of it will not be on him but on the recipient of the bribe.[6]

A. Literature review and empirical analysis

The responsibility of all Muslims is to play a proactive role in the campaign against corruption as it represents a veritable *'amal ṣāliḥ* (good task-motive) which is the right moral action that the *Qur'an* recurrently commands upon all Muslims. Moreover, it is an act with great societal benefit that raises the standing of the *ummah* (community) along with the international community. Combating *rashwa* (bribery) and *fasād* (corruption) is an integral part of the *Qur'anic* teachings and the *hadith* (Mohammad's teachings).[7] The *Qur'an* forbids *akl al-māl bi'l-bāṭil* (devouring/misappropriation of the property of others), which is a broad concept that subsumes such other offences as fraud, hoarding, theft, and gambling.[8] Furthermore, the Islamic law condemns those in authority who spread corruption and mischief among people, bestowing favors on some and oppressing others.[9] The Prophet Mohammad added his voice to say that all the parties to bribery, "the bribe-taker, the bribe-giver, and their go-between," provoke God's wrath and condemnation.[10]

It should be noted that the scope of *rashwah* is prolonged to financial transactions among the members of the public and governmental officials, which are obviously favorable to the latter, and hence, any sale, lease, hire, and partnership that are so concluded fall under bribery.[11] The second *Caliph* 'Umar ibn al Khattab expropriated and confiscated the properties of some of his officials had accumulated due to favors they had received and he divided the assets in question and surrendered a portion thereof to the public treasury.[12] Thus, *Fasād* is more general than *rashwah* as it includes dishonesty, betrayal of trust, abuse of power, and deceit in both private and public dealings. It refers to private gain from public office or seeking recompense for rendering duties customarily considered as non-compensatory.[13] Because of the many forms it can take, corruption escapes inclusive definition, as it knows no boundaries, applies to rich and poor, as well as to individuals and communities, and tends to have a cultural dimension. Although conducts such as officials

1 *See* Joseph Dainow, *The Civil Law and the Common Law*: *Some Points of Comparison*, 15 Am. J. of Comp. L. 419, 419–35 (1966).

2 *See* Irshad Abdal-Haqq, *Islamic Law: An Overview of its Origin and Elements*, 7 J. Islamic L. & Culture 27, 57 (2002) (noting the different sources of Islamic law and the meaning of the public interest's interpretation).

3 M. Cherif Bassiouni & Gamal Badr, *The Shari'h*: *Sources*, *Interpretation*, *and Rule-Making*, 1 UCLA J. Islamic & Near E. L. 135, 150 (2002). *Qur'an* is the word of God to the Prophet Mohammad and recorded by scribes and edited by scholars. *Sunnah* (Prophet's traditions) are the recorded statements, judgments, and even the tacit acts of Mohammad, which explain, detail, and supplement *Qur'an*. *Ijm'a* is a consensus regarding the interpretation or application of a *Sharie'a* question of law or fact and where Muslim jurists or community's members of reach a consensus concerning a legal matter, their interpretation becomes reference and deference (doctrine) for future generations. A rule by consensus entails a participation of an adequate number of jurists, who reach a unanimous decision, based on an unequivocal statement of agreement by each scholar. *See also* Khizr Muazzam Khan, *Juristic Classification of Islamic Law*, 6 Hous. J. Int'l. L. 23 (1983) (defining the secondary sources of Islamic law).

4 Bassiouni & Badr, *supra* note 4, at 140–41. *Qiyyas* is the extension of a *Sharie'a* ruling in one case to a new, similar case due to the resemblance of both cases' '*ilah* (effective cause). *See also* M. Cherif Bassiouni, Introduction to Islam 28 (1985).

5 *See generally* Mark Turner & David Hulme, Governance, Administration, and Development (1997). *See also* Mark Richard Hayllar, *Accountability*: *Ends*, *Means*, *and Resources*, 3 Asian Rev. Pub. Admin. 2 (1991).

6 See Turner & Hulme, *supra* note 6.

7 *See generally* Adam Smith, The Theory of Moral Sentiments (eds. D.D. Raphael, Benjamin C.D. Diara & Nkechinyere G. Onah) (2014); *Corruption and Nigeria's Underdevelopment*: *A Religious Approach*, 4 Res. Hum. & Soc. Sci. 4 (2014).

8 *Qur'an* 4:29; 2:188.

9 *Id*. at 28:4; 89:10–12.

10 It is further reported that the "Messenger of *Allah* cursed the donor of *rashwah* and its recipient in all matters that involve a judgement or ruling". Also, the renowned Companion Abdullah ibn Masud went on record to say: "When a man removes hardship form another and then receives a gift from him, large or small, he has taken something which is *harām* for him."

11 Geoffrey Hainsworth, *Rule of Law, Anti-corruption, Anti-terrorism and Militant Islam: Coping with Threats to Democratic Pluralism and National Unity in Indonesia*, 48 Asia Pac. Viewpoint 1 (2007), https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467–8373.2007.00335.x (last visited June 18, 2018).

12 This was done for prominent figures, as Abu Hurayrah, 'Amr ibn al'Aas, Nafi' ibn 'Amr, Saad ibn Abi Waqas, Khalid ibn alWalid, and the governors respectively of Bahrain, Egypt, *Makkah*, *Kufah*, and Shām. The practice was institutionalized under the *Abbasid caliph*, Jaafar alMansure, when a department known as *Diwan al-Musadirin* (confiscation department) was established for handling expropriation issues and the accountability involving government officials, merchants, contractors, and anyone who worked or conducted business with the government and accumulated disproportionate amounts of wealth.

13 Hainsworth, *supra* note 12.

demanding bribes are considered corrupt in virtually all cultures, attitudes vary as to gift giving and cronyism among countries and cultures.[14] Furthermore, it is forbidden for government officials to accept any kind of bribe from anyone, whether gift, donation, or contribution, in the course of duty, irrespective of whether the gift is specified or unspecified and benefits the official directly or indirectly.[15] Other models of enrichment that materialize through misuse of public assets may amount to *khiyānah* (a breach of trust) and *ikhtilās* (embezzlement), which are also prohibited and a gift that has not yet been received by the official should be returned to the donor, but if this cannot be done, it should be paid to the public treasury.[16]

B. Importance and implication of corruption concerns in Islamic law

There is a rich tradition in Islamic heritage of high moral standards, ethics, values, and norms of behavior, which regulates personal, professional, and business life. These values, ethics, and norms have much in common with other creeds of the world and as such, it may be more beneficial and unifying to appeal to these ideals as common cultural standards, rather than to promote them as essentially Islamic principles.[17] However, in the time of growing religious fundamentalism, *Sharie'a* and divine laws offer a normative framework that is likely to give more content, impact, and legitimacy to anti-corruption initiatives in the context of Islamic countries.[18] Furthermore, as experts consider that an entirely secular legal system is not an option in Islamic countries, they argue that in Islam there is no separation between the secular and the sacred as with religion and the law. As a result, fighting corruption in an Islamic context must be rooted in the Islamic values secured by the Islamic law to guarantee ownership and legitimacy of anti-corruption actions and anti-bribery measures.[19]

Among others, these values promote commercial fairness and ethical business as basic standards of economic activities, integrity, and transparency in business transactions, as bribery is taken very seriously in Islam.[20] Regarding generation and creation of wealth, fair trade and the creation of wealth for the benefit of all are definitely encouraged in Islam, but even more significant is the sharing of that wealth: "O ye who believe! Give of the good things which ye have honorably earned."[21] In the realm of ethics and morals in business, there are recurrent bans in the *Qur'an*, for example, to "weigh with accurate scales" and the text warns against those who do not weigh fairly, as the "weighing" applies not only to scales in the sense of merchandise, but also in the sense of passing of judgment.[22] In the context of general business ethics, there are precise Islamic recommendations for doing business, as business dealings must be evidently documented and certified as a means of sustaining finance, defining rights, and instilling mutual confidence, all of which contribute to generating strong relationships among individuals.[23] Duties towards other people should be fulfilled promptly. It is a virtue to grant relief to those who are bankrupt or to relieve them altogether of their liabilities.[24] Such conduct helps reduce disputes, deepens trust, and keeps transactions in balance. Furthermore, raising prices without any legitimate necessity or reasonable ground and inconsiderately making use of people's destitution are totally prohibited, as there is a great emphasis on lawful, as opposed to unlawful, profit.[25] In terms of contracts, deals and businesses must be certified by recording and signing of contracts in the presence of witnesses, as they may influence and legitimize the Islamic method on corruption but do not determine how corruption is dealt with in practice in fundamentalist cultures or countries implementing the inaccurate Islamic law.[26]

C. Legal discussion

Regarding the *al-takeef al-kanuni* (legal characterization) of this criminal offense, Muslim '*ulmma* (scholars) differ in defining it. Etymologically, *fasad*/*ifsad* (corruption) covers mischief, misuse, degradation, spoiledness, decay, corrosion, putrefaction, depravity, wickedness, viciousness, inequity, fraudulence, misconfidence, and pervertedness.[27] Epistemologically, there are many descriptions among Muslim jurists in the criminal context, as some argued that *rashwa* (bribery) is the key form of corruption and defined it as what is given to invalidate (nullify) a *haq* (right) or to validate (legalize) a *batil* (deception or falsehood).[28] Others claimed that bribery is a gift, whether in real or monetary terms, presented to judges, heads of states, public officials, and other decision/policy makers to enable a favorable ruling or verdict.[29] Other intellectuals said bribery is an abuse of judicial or administrative power or of political authority, trust, or financial competency.[30] Accordingly, most Muslim criminal jurists see bribery as embodying corruption as "something given by the *briber* and received by the *bribee* irrespective of it is a material or a moral thing, money or a benefit."[31] Thus, having canvassed Muslim academics, white-collar crimes can be described as "cover[ing] governance matters, decision making, rules through rebuking the misuse of trust placed in public servants through acts such as accepting gifts, utter misappropriation or embezzlement of public funds, and undermining rules in exchange for

14 Turner & Hulme, *supra* note 6.
15 *Id*.
16 *Id*. Accordingly, if an official takes bribes or unjustly appropriates the property of another, the ruler is obliged to return the assets to its true owner and to punish the offender.
17 *Id*.
18 *See generally* A. Giddens, *Power, Property and State, in* A Contemporary Critique of Historical Materialism (UCLA Univ. Press 1981).
19 *Id*.
20 For instance, Mohammad said in a famous *hadith* "Damned is the bribe-giver (or 'corrupter'), the bribe-taker (or 'corrupted'), and he who goes between them," which explains the severity with which bribery and corruption is viewed.
21 *Qur'an*, 2:267.
22 *Id*. at 55:7–8.
23 *Id*.
24 Turner & Hulme, *supra* note 6.
25 *Id*.
26 The Prophet Mohammad called on Muslims to comply with obligations and contracts saying, "Never break or throw aside a covenant you have signed with anybody until the period of the covenant comes to a natural end."
27 Mohamed Selim El-'Awa, Fi 'Usul Al-Nizam Al-Jinai' Al-Islami [Principles of Islamic Criminal System] 290 (2nd ed., 1983).
28 Maged Ibn Helal Ibn Hamadan El-Hagry, Al-Rashoua wa Ahkameiha: Derassa Fiqhiia Mokrna [Bribe and its Provisions: Comparative Juristic Study in Islamic Sharie'a Law] 4 (2003) (on file with author).
29 Moustafa Abou Zied Fahmi, Fan Al-Hukum fi AlIslam [Principles of Governance in Islam] 155 (2003).
30 *Id*. *See* 'AbdElghany Bassiouni AbduAllah, 'Usul 'Ilm Al-Idra Al'Ama: Derasah le 'Usul wa Mabade'e 'Ilm Al-Idara Al'Ama fi Al-Islam wa Al-Walayeat Al-Motaheda Al-Amriciya wa Fransa wa Maser wa Lebenan [Principles of Public Administration: Study of the General Principles of Public Administration in Islam, The United States of America, France, Egypt, and Lebanon] 84–101 (2006).
31 *Id*. Furthermore receiving gifts—as *Hanafi* School said—in the terms of reaching deceptiveness or a false included in this concept.

bribes, on recommendation or due to family and tribal considerations (peddling/trafficking in influence)."[32]

It is significant to highlight the distinction between bribery and other numerous concepts that are in close connection with it, comprising illegal earnings, gifts, charities, and salaries. *alsoht* means *al-haram alzy la yahal kesbhe wa akleh* (prohibited earnings and the maximization of profits in an illegitimate manner) and is defined by the *Maliki* School as "bribery given to the witness to testify, the judge to rule, and the price of power."[33] On the other hand, *alhadiya* (gift) means to give something without any compensation in a real or monetary form and supported by the *Qur'an*.[34] Therefore, the purpose of both a gift and a bribe is to transfer the benefit to the other, although with a gift, there is no compensation expected, and in contrast, the briber anticipates his private benefit from the bribe.[35] *alSadaqah* (charity) means giving it to the poor people in order to be blessed and receive the mercy of God, which is the only true purpose of giving it, and so, it involves giving without any monetary or non-monetary compensation.[36] Sometimes, the bribee is a poor person or the briber gives whatever he wants to give in order to be closer to him, but in reality, he has a private interest, and in such a case, charity becomes *rashwa mukna'h* (disguised bribery).[37] *alGa'al* (wage) is a known monetary obligation upon a certain work, whether known or unknown.[38] Although it is originally legitimate, some doctrines (as *Shafi'i* School) prohibit it at certain times where it might disguise fraudulent transactions, for instance, if it represents an obstacle to the realization of other legitimate public interests.[39] The Prophet Mohammad's companions (Omar ibn elkhatab) used to record the possessions of the public officials at the times of their appointments and confiscated wholly or partly whatsoever they added while in office on doubt of benefiting from their jobs.[40]

D. Under what sort of criminal activity do white-collar crimes fall? Ta'azir offense

White-collar crimes are grave delinquencies that Islamic criminal law considers concurrently religious and criminal deeds due to the severe harm caused by them to the community. Therefore, they are penalized by *ta'azir* that includes all crimes, as corruption, in which *Sharie'a* does not prescribe a specific penalty.[41] The punishment is left to the discretionary power delegated to the *qadi* (judge). Judges should take into account the crime's nature, the actual damage to the public order and the interest protected, the offender's personality (status), and most considerably, the importance of the property to be protected, whether public or private, as it is considered one of the five essential things guaranteed in Islam.[42] In such an event, the *imam* (public authorities) must lay down rules punishing all behaviors that seem injurious to the society's interests, moral standards, or public order while applying the principles of justice and the rules of flexibility to each situation (case-by-case basis) to create a proportionate, adequate, and appropriate protection of society.[43]

The majority of Muslim scholars are in favor of the *hormat* (prohibition) of corruption in all its forms comprising favoritism, extortion, blackmail, money laundering, bribery, and so on, and they infer this rule from the Islamic law sources. Several verses underscore and confirm this principle. For instance, God recites, "And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of other people's property."[44] Moreover, it has been reported that "the Apostle of *Allah* cursed the one who offers bribe as well as the one who accepts bribe."[45]

E. Sorts of bribery under Islamic penal legislation: Corruption-related criminal acts

Under the umbrella of the Islamic criminal justice system, there are different kinds of bribery. Each form has its own governing rules and principles. According to the predominant doctrines, all such sorts fall under one of four classes: bribery of judges and governors; bribery of mediators and intercessors; state bribery of others (international bribery currently); and other bribes meant to lift injustice and excess. Because of the dynamic role played by judges and public prosecutors in the achievement of justice regarding the

32 El-Hagry, *supra* note 29, at, 5–7. *See e.g.*, *Qur'an* 2:188 (banning rulers, judges, decision makers, and parties to a conflict from easing the unjustified appropriation of the property of others or public property by obtaining a favorable ruling in exchange for bribery. It calls such behavior "*batil*" (falsity) and "*ithm*" (criminal and sinful).

33 It is a sort of corrupt act explained by this *Qur'anic* verse "They are fond of listening to falsehood, of devouring anything forbidden." *Qur'anic* commentators generally agree that the meaning of *alShot* in this provision is "bribery". *See Qur'an* 5:142; El-Hagry, *supra* note 29, at 24 ("obtaining/easing an illegal right by bribe exchange").

34 God says "To *Allah* belongs the dominion of the heavens and the earth. He creates what He wills and plans. He bestows children male or female according to His Will and Plan, Or He bestows both males and females, and He leaves barren whom He will: for He is full of Knowledge and Power." *Qur'an* 42:49–50.

35 El-Hagry, *supra* note 29, at 26. These examples argued that corruption (bribery) is understood in Islamic law as an abuse of trust via the misuse of judicial powers, administrative powers, riches, and political hegemony.

36 *Id*. God says "If ye disclose acts of charity, even so it is well, but if ye conceal them, and make them reach those really in need, that is best for you: It will remove from you some of your stains of evil. And *Allah* is well acquainted with what ye do." *Qur'an* 2:271. *See, e.g.*, *Qur'an* 89:10, 12; 28:4, 77.

37 It is only a modest gift for someone in need. In fact, under Islam, simple kind words and just treatment of people is better than giving *sadaqah* followed by humiliation or insult to its recipient. It does not have to be a financial gift; it can be by helping others or simply by refraining from evil doing. There is no obligation to restrict it to Muslims; it can be given to Jews or Christians as well. Strictly speaking, there is no duty to give it, but God encourages in the *Qur'an* Muslims to give it to the needy whenever they can, by stressing the generous multiplication of rewards for those who freely give of their assets and time. Also, there is no specific time or amount required by the *Qur'an* for giving it. *See* Salma Taman, *The Concept of Corporate Social Responsibility in Islamic Law*, 21 Ind. Int'l. & Comp. L. Rev. 3 (2011) (underscoring further elaboration regarding charity in Islamic commercial law).

38 El-Hagry, *supra* note 29, at 28. The Prophet said, "Authority is a trust, and on the Day of Judgment it is a cause of humiliation and repentance except for one who fulfills its obligations and properly discharges the duties attendant thereon." Sahih Muslim 1:20.

39 The main cause for such ban is that, upon receiving the bribe, the bribee may represent it as his wage for the accomplishment of the briber's permissible private interest (benefit). Also, ibn elkhatab instructed one of his commanders to adjust the values of gifts offered to him—which he had dispatched to the central treasury—against the tax liability of the people, because taking anything more than the stipulated *jizya*(h) ("poll tax") would have been unjust. It is a per capita tax levied on a section of an Islamic state's non-Muslim citizens who met certain criteria. The tax was levied on able-bodied adult males of military age with some exemptions. It was material proof of the non-Muslims' acceptance of subjection to the state and its laws, "just as for the inhabitants it was a concrete continuation of the taxes paid to earlier regimes." In return, non-Muslim citizens were permitted to practice their faith to enjoy a measure of communal autonomy, to be entitled to the Muslim state's protection from outside aggression, and to be exempted from military service and the *zakah* taxes obligatory upon Muslim citizens. In short, it is the tax imposed on the people of religions ("People of Book "*d[z]himmis*"). Fahmi & Bassiouni, *supra* note 9, at 92–97, 177–93.

40 *Id*. Omar ibn abdelaziz recited, "I am of the view that the ruler should not trade. It is also not lawful for the officer to trade in the area of his office … because when he involves himself in trade he inadvertently misuses his office in his interest and to the detriment of others, even if he does not like to do so." El-Hagry, *supra* note 8, at 33.

41 *See* M. Cherif Bassiouni, The Islamic Criminal Justice System (1982), at 33.

42 *Id*. In this domain, *Maliki* school stated that there is no way to determine such a *ta'azir* sanction as it is delegated to the judge as the final aim of it is discipline, chastisement, rehabilitation via therapeutic jurisprudence, or discretionary correction. Consequently, it can reach the penalty of *had* or more.

43 *Id*. Some Muslim jurists interprets that accepting gifts in order to be in a close relationship among state officers, rulers, judges, and decision makers is prohibited and is considered bribery.

44 Also, God says "They are fond of listening to falsehood, of devouring anything forbidden." *Qur'an* 2:188.

45 Scholars adding the word "*fi al-hukum*," which means matters of governance, decision making, and rules. This ban is deduced, because Mohammad cursed the briber and the bribee along with the intermediary between them and stated that all of them are forbidden from God's mercy, as the most severe punishment on the Day of Judgment. He recited, "Both the briber and the bribee will be in hell." Abou Dawood 1:24, 3573.

equality principle's application, judiciary represents one of the most central positions in Islam.[46] Legally speaking, scholars comprise in this sort along with judges, state governors, prosecutors, decision [and policy] makers, rulers, and other public executives, and this form consists of either paying bribes to hold a judicial position or facilitating an illegal favorable ruling or judgment, especially in the form of gifts.[47] They agreed upon the *al-horma al-motlaqa* (absolute injunction) on attaining a judicial location in exchange for bribes as it represents "eating up" property for vanity, lack of authenticity, transparency (integrity), deceit, and abuse of confidence (trust).[48] Further, the *Qur'an* refers precisely to presenting false and fraudulent evidence before a judge (court) or other arbiter in order to obtain a favorable judgment giving one the right to appropriate another's property (false testimony criminality).[49] Hence, judges should decide on "*prima facie*" basis in which evidence and the onus of honesty is on the litigants, so they are left to their own conscience, and this mostly connected to *taqwa* (righteousness and God's fearing).[50] Similarly, jurists are varied in their opinions on accepting gifts. Some identified that it is valid for a governor or judge and others said it is illegitimate for a judge/*wali* (mayor) to accept it.[51] Prophet Mohammad is reported to have said, "Anyone who does an assignment for us and conceals even a needle, or anything bigger, acts dishonestly. He will be faced with his dishonesty on the Day of Judgment."[52] Thus, acceptance of gifts by the state governor is *haram* (forbidden) in whole, but some scholars permit gifts for judges from individuals, irrespective of family and tribal considerations, who have no case before them in the present or past.[53]

On the other hand, regarding the bribery of mediators and intercessors, there are two parties, the mediator (bribee) and the briber. Each of them is dealt with by rules explained by Muslim scholars. They differ broadly in how they regard the mediator when he receives a gift from the briber by attaining his own [private] interest [benefit] through *ikrah* by the *Sultan* (an order by the prince under compulsion, coercion), which is called in existing legal systems "trading in influence."[54] *Hanbili* School indicated that it is forbidden for the mediator to receive any sort of gifts in order to negotiate with the *Sultan*, because the general principle in Islamic law is that there will be "no salaries, wages, or gifts for the achievement of the public interests or services" and mediation (negotiations) was considered a public service related to the community's welfare in the early Islamic state.[55] *Maliki* argued that any gift received by a mediator is unlawful, as the efforts (energies) accomplished by the arbitrator to identify the benefit should be recognized (rewarded).[56] *Hanafi* and *Shafi'i* scholars, who hold the leading opinion, stated that it is unlawful for the mediator to *knowingly* and *purposely* ask for gifts to attain a *haram* interest. However, it is permitted if the mediation required considerable efforts.[57] Hence, they agreed upon the prohibition of receiving a bribe if the purpose of giving it is *batil* (deception), but are in favor of finding it legitimate to receive it as long as there is no connection (nepotism).[58]

On State (international) bribery, this category is permitted in case of *hou'dna/ mousal'hah* (truces or compromised settlements) according to the Islamic *siyar* (international) law and international public affairs only in the case of *daroura* (necessity),[59] as well as the case of *al-i'taa li ta'lief al-kolub* (giving to those whose hearts are to be won over).[60] Thus, *zakah* (mandatory financial obligation) occupies a significant spot under Islamic law and the Islamic social economic system; it is to be given as neither a favor nor a gift but its *sahih nisab* (exact amount) is accurately charged.[61] It is a main Islamic duty that can be liquidated either by straightly allocating the money to one of the uses nominated by Islamic business law or by simply giving it to the *beit al-mal* (public treasury) to spend on certain social services and public goods, and the one who gives it does not hold a favor for doing so, and the beneficiary does not have to beg for it.[62]

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46 Hussein Madkur, Al-Rashwa fi Al-Fiqh Al-Islami Moukarnan Belkanoun [Bribery in Islamic Jurisprudence: A Comparative Analysis between Islamic Law and Positive Law] (1984).

47 *Id*. at 200.

48 This prevailing approach can be deduced from Mohammad's teaching. It has been reported that "The Messenger of God said to me: 'Abd al-Rahman, do not ask for a position of authority, for if you are granted this position as a result of your asking for it, you will be left alone without God's help to discharge the responsibilities attendant thereon, and if you are granted it without making any request for it, God will help you in the discharge of your duties." Sahih Muslim, 1:20, 4487 (on the book of governance and ruling).

49 Mohammad said, "I am only human. When you come to me for judgment, some of you may have a clearer piece of evidence, and I might be inclined to rule in their favor. If I give someone anything which is not rightly his, it would be as if I have given him a brand of fire; it is up to him to take it or leave it." *Id*. For deterrence purpose, this notice immediately after reference to the God's limits and the call for more consciousness and fear of Him.

50 In other words, judicial rulings should represent parts of a harmonious and divinely ordained way of life, firmly bound together in a common framework of preserving *taqwa*.

51 *Qura'nic* texts mentions the moral qualities (credentials) associated with the Prophet to stress the importance of honesty (trust) and to ban deceit and cheating. It reminds folks that they will be held liable for their acts and that everyone will be given their fair reward. *See*, *e.g*., *Qur'an* 3:161.

52 *See*, *e.g*., Sahih Muslim & Bukhari. For instance, a Muslim may, in war state, lay his hand on something valuable when no one is watching him. If he does, he should take it to his commander, entertaining no thought of keeping it for himself, so that he does not expose himself to what this *Qur'an* says, and so that he does not meet the God and the Prophet on the Day of Resurrection in such a shameful situation.

53 Others claimed that it is highly recommended for a judge not to accept any gifts wholly to prevent the appearance of impropriety, as nepotism and favoritism, or partiality as types of bribery. El-Hagry, *supra* note 29, at 37–40.

54 *Id*. at 39.

55 *Id*. at 44–55.

56 They argued that trading in influence is forbidden as it neither requires making any effort nor is it used in achieving illicit acts, but if the mediator puts forth a lot of effort it is legal for him to receive a gift—whether monetary or otherwise—for which the benefit has been attained and the gift is considered a salary or a wage. *Id*.

57 God says "… but rather help one another in furthering righteousness and piety, and not help one another in furthering evil and aggression …" and Mohammad said: "Support your brother, whether he is the victim or the perpetrator of injustice."

58 El-Hagry, *supra* note 29, at 47.

59 Necessity in Islamic jurisprudence is a state that makes an individual breach the law in spite of himself to avert an inescapable evil befalling him, though it is in his power not to violate the law and permit the evil to befall him or someone else. Islamic law exempts such a person from punishment. Bassiouni, *supra* note 42, at 192. On the other hand, the *Maliki* doctrine absolutely allows truces even if there is *no* necessity if the *imam* discerns that public good requires it. Though, the truce should not include any *shrt fased* (false requisites) or it becomes illegal. It confirmed that love and unity creates an important element in the community that should be built on.

60 God says "Charitable donations are only for the poor and the needy, and those who work in the administration of such donations, and those whose hearts are to be won over, for the freeing of people in bondage and debtors, and to further God's cause, and for the traveler in need. This is a duty ordained by God, and God is Allknowing, Wise." *See Qur'an* 9:60.

61 Taman, *supra* note 38, at 488–90 (discussing the *zakah* system as one of the important devices of corporate social responsibility in Islam and the Muslim's eligibility to pay it from his/her wealth under the divine law).

62 It is the duty of the Muslim state to make sure that anyone who is able to work has a job. It should provide training opportunities, and it should take the necessary means for job creation and ensure that those who work receive fair wages. Those who are able to work have no claim to *zakah*, as it is a social security tax that functions between those who are able and those who are deprived. The state administers its collection and distribution when any society runs its affairs on Islamic basis. So, it is an obligatory religious tax, calculated annually on a minimum of possessions at a fixed rate paid to assist the poor and one of the five main pillars of Islam. It is an amount of money paid by Muslims at the end of the year as an obligatory donation to the needy and vulnerable members of society, especially orphans, widows, and the elderly, who can no longer work and provide for themselves. Muslim society is divided into two halves: one half is obligate to give it and the other entitled to take it. What determines whether a Muslim belongs to the half that gives or the half that takes is whether he/she possesses the ("*Sahib el-Nisab*": "wealthy person"). It is not necessarily have to be paid in money; it can be paid in the form of agricultural products, specifically in

The final sort is bribes to lift injustice (unfairness); the rampant perception among Muslim intellectuals is that it is permitted to pay a kickback (inducement) in order to obtain a right or benefit unlawfully or unjustly taken away and this only applies in the case of necessity "where a person has to violate the law in spite of himself to prevent an inescapable evil befalling him, even though it is in his power not to transgress the law and allow the evil to befall him or someone else."[63] *Sharie'a* exempts (excuses) such an individual from punishment if all other legitimate means failed to repeal the aggression and the unreasonableness was realized, as for example, the individual must protect his religion, family, dignity, honor, and property.[64] Muslim jurists consider the validity of this sort of bribery as representing an application of a basic Islamic principle, *al-darourat tobei'h al-mahzourat wa toukader bekaderha* (permits prohibited acts when necessary, as the situation is then evaluated by its importance).[65] It is within this framework of divine mercy and justice that a Muslim views—with total confidence and satisfaction—his obligations as (*Khalifah*) God's vicegerent on earth, the challenges he faces in fulfilling those duties, and the crucial reward he receives, as he believes that God is fully aware of his abilities and limitations, and will not overburden him or subject him to any duress or coercion.[66]

F. Bribery in the Islamic criminal theory: Elements, evidentiary rules, and punishments

The important question is what are the *actus reus* and *mens rea* prerequisites for the commission of bribery in the Islamic legal system?

1. The Actus Reus

The model of a criminal act in all legal systems, including Islamic criminal legal systems, is that a person commits all the integral elements of a crime. Thus, under the Islamic law, elements of bribery may involve positive (commission) and negative (omission) acts as well as the object of the bribe and the purpose of the act committed by the receiver of the bribe.[67] As a general norm in Islamic criminal law, at the purely psychological stage of the criminal project, the idea of the offense is born and may harden into a resolution or a mental determination to commit it before an overt act is committed, and this falls altogether outside the scope of penal policy.[68] Therefore, it is unanimously admitted among Muslim jurists that there will be no offence in the absence of external activity on the part of the offender and his/her activity reflects what took place within his/her psyche.[69] Hence, bribery in Islam is "giving or accepting the bribe agreed upon [by] both briber and bribee for whatever purpose."[70] Anything of value presented for any purpose represents an essential part of the *actus reus*. It may include cash and negotiable instruments, so that almost any form of direct or indirect benefit could create a bribe irrespective of its value. There are practically no limitations on what can be construed as "anything of value," as the real value may vary from person to person depending on his means and circumstances.[71] For realizing this crime in Islam, it is not sufficient that the inducement is taken or received from the briber or under the request of the bribe, but rather there must be a purpose for it, such as gaining or retaining business for or with, or directing business to, a person; influencing (manipulating) an official act or decision; convincing an individual to do or omit to do any act in breach of his/her legal duty; influencing any government act or decision; or securing any other improper benefit.[72]

In this respect, Muslim scholars agreed and decided that there will be no criminal attempt until there has been a sufficient step on the way to the commission of or attempt to commit the offense, as it is not always an easy issue to prove beyond reasonable doubt.[73] In Islamic criminal law, it is unanimously accepted by Muslim jurists that *al-waseila il'a al-haram haram* (initiating activities leading to the commission of a prohibited act is forbidden).[74] Similarly, the commencement of the execution phase (attempted act) is considered a sin or fault and is penalized by *ta'azir*.[75] Muslim writers distinguish whether the offender's non-completion of the bribe was voluntary or involuntary. Abandonment offers relief from criminal liability only when it is due to the purely internal will of the would-be offender, without any external restraint on his decision.[76] In this sort of abandonment, scholars agree on punishing the offender under *ta'azir* and taking into account the circumstances, nature of crime, and the personality of the offender.[77] If the abandonment is spontaneous, the offender will be liable for attempt, as this sort of abandonment is one which is, due to reasons, independent of the offender's will or beyond his control. Jurists favor punishing

the form of food for the hungry. The Islamic State Exchequer was first established by Mohammad and was then further developed by his companions and is similar to a *takaful* (insurance) corporation. It was the state's revenues were collected and where any citizen facing a financial crisis found sanctuary (first social solidarity institutions in the world) and also served for the redistribution of wealth to achieve a balance between the rich and the poor and to diminish the gaps between the classes of society. *See generally* Edwin E. Hitti, Basic Mechanisms of Islamic Capitalism IV (2007). *See also generally* Egbert Harmsen, Islam, Civil Society, and Social Work: Muslim Voluntary Welfare Associations in Jordan between Patronage and Empowerment (2008).

63 Youssef Kassem, Nazaryit Al-Daroura [Theory of Necessity] 271 (1993). *See also* Yusuf 'Abdullah Al-Qardawi, Islam Bayn Al-Halal wa Al-Haram [The Lawful and the Prohibited in Islam] (1996).

64 Bassiouni, *supra* note 42, at 192. Examples in that area: ("But if one is forced by necessity, without willful disobedience, nor transgressing due limits, then he is guiltless.") and ("He has explained to you in detail what is forbidden to you except under compulsion of necessity."). Therefore, if a man or woman is forced to commit a criminal activity and the requirements for necessity obtain, neither is penalized.

65 God says "God does not charge a soul with more than it can bear." *See, e.g., Qur'an*, 2:286, 2, 173; 6:119,145; 16:115; 24:31.

66 The individual must protect his religion, family, dignity, honor, and property. Any individual is fully aware that any weakness he may experience or face is not because the task is excessive, but due to his own deficiencies, and this, in turn, motivates him to strengthen his resolve and strive for excellence in his activities.

67 Madkur, *supra* note 47. In other words, "Necessities render prohibited things permissible," "Every necessity is to be assessed according to its seriousness," and "What is permitted due to an excuse ceases to be as such with the cessation of that excuse."

68 *Id*. Criminal law has nothing to do with what the person internalizes—it is not concerned with any stage prior to tangible act such as mere desires, dreams, intentions, and resolutions.

69 *Id*.

70 El-Hagry, *supra* note 29, at 122.

71 Madkur, *supra* note 47, at 217–23, 570–72. For instance, giving a loan to a public servant is banned if it is presented for the purpose of retaining or refraining from some thing or benefit, as in such an event it will considers a disguised bribery and a form of *riba* (usury) as well in which both are proscribed in Islam. Further, it is banned on a public official or a judge to borrow from persons as it considers bribery. In Islamic law, it is not permitted for the judge to borrow cash or purchase some property from somebody less than its real value. Also, it is preferable to the judge not to control selling and purchasing dealings and hire an agent for doing these sorts of acts in order to avert any unexpected relation might create nepotism.

72 *Id*. at 222.

73 *Id*. In the preliminary phase, the criminal goes some steps further towards the commission of the crime; as he/she prepares to set the criminal thought into motion.

74 *Id*.

75 Id.

76 This means that he could have gone further and accomplished the crime, but preferred of his own free will not to do so, as motives in this situation are immaterial; he might desist from fright or a sudden reform [repentance] or out of pity for the anticipated victim.

77 El-Hagry, *supra* note 29, at 126.

this sin as an "attempt" under *ta'azir* too.[78] Under the Islamic criminal justice system, it is understood that there will be no complicity without a punishable principal act being committed, and thus, scholars state that the ban of *haram* comprises a proscription of being an accomplice. The penalty prescribed for bribery is stricter for the bribee than for accomplices, as they are treated (mediator/beneficiary) as principals for the purpose of both criminal sanction and criminal culpability.[79]

2. The Mens Rea

As in all forms of legal systems, criminal intent under the Islamic law is composed of two elements: knowledge of all elements instituting the crime and a will directed towards their realization. Both elements must be realized without any sort of coercion (force) for criminal intent to exist; otherwise, the *mens rea* will not be established. Culpability is determined by the intent rather than the actions of the briber, i.e., violation of some official duty in order to be "corrupt."[80] There is no requirement that the bribe be essentially paid but rather that the bribee have the intention of being corrupted by the briber by either benefiting from doing an illegal act or withdrawing from a legal one. Thus, intent can be inferred from the objective factual circumstances. The use of circumstantial evidence is also allowed.[81] Now, the question is how should white-collar crimes, particularly corruption [and bribery] under Islamic norms, be proved?

The principle of the presumption of innocence and its impact on the burden of proof represents the vital backbone of evidence under Islamic criminal law. Consequently, the burden of proof is on the prosecution.[82] In Islamic jurisprudence, evidence in criminal matters essentially consists of *al-shhada* (witness's testimony), *al-iqrarat* (confession), and *al-qara'in* (presumptions).[83] Muslim jurists require that the witness begin his or her testimony with the word *ashhadu* ("I testify"), which designates being certain of one's testimony along with taking the oath and no other word may be substituted as it would be less affirmative and the door would be open for doubt.[84] Generally, a minor's testimony is inadmissible even if he understands its nature. The witness must be mentally sound both when he/she witnesses the event and when he testifies to it and be able to speak and must possess appropriate memory to collect and retain his observations and his ability to understand what he is testifying about.[85] Visual observance and audible perception of the incident are required to be in the witness's testimony and he must be of good character concerning moral integrity, trustworthiness, persistent avoidance of grave sins, no record of severe/petty crimes, manliness, and fulfillment of religious obligations.[86] Scholars differ in the authenticity condition in which the witness must have noticed the event with his own senses, as indirect testimony (hearsay) is admissible only if authentic or direct testimony cannot be presented due to death, sickness, or travel.[87] A witness's testimony can be legally disqualified if there is a relationship between the witness and one of the parties which suggests a personal interest, and this interest may be advanced by the witness through his testimony, so jurists are in favor of the inadmissibility of testimony of those in the major and minor branches of the parties' families ("blood relations") and hostility between a witness and a party to a conflict arising out of worldly matters.[88]

Confession is the second form of evidence which Islamic law admits to prove criminal guilt. It is "the admission by the accused of having committed the act that incurs punishment when the judge is convinced of it."[89] Muslim scholars require that the confessor must be of age; this means an ability to understand what is being admitted to and its legal outcomes; must be sane, capable of self-expression, and acting on his own free will.[90] Any torture, pressure, or deception by the judge nullifies the confession, as confession must be obvious, explicit, and unequivocal in respect of the crime, as he must describe in detail the acts he committed in a way that leaves no *shubha* (doubt) as the *Sunnah* bars doubtful confessions.[91] Confession will be invalid if not made in the court and during a legal hearing. It proves guilt and incurs punishments only when the judge is persuaded of it and the confession meets all these conditions with corroboration of the facts confessed.[92] The accused may withdraw his confession at any time before or after sentencing, or during its execution, and in this case, the judgment will be nullified if based solely on the confession.[93]

78 *Id*. at 127. So, preparatory activities as gathering cash or talking indirectly to the person to be bribed are considered attempt crimes, even they are not sins *per se* because they do not cause any harm to the third parties' rights, hence, there is no sin to be penalized if the offender's abandonment is voluntary.

79 Madkur, *supra* note 47, at 293–95.

80 *Id*. In Islamic law, the mental (moral) element denotes the part of the crime's formation structure related to the offender's will and his liability for the act or omission attributed to him.

81 *Id*. at 282–84. Under Islamic criminal system, the criminal must have knowledge of all important facts which create the crime (the essence of his act)—the dangerousness his act represents to the criminally protected interest—and its criminal consequence—the occurrence of the offence as a consequence of his act—as this kind of knowledge relating to a future fact described as "prediction." It does not suffice that the criminal be aware of his act and predicts the result thereof; it is also a condition that his will be directed at his act. He should have manifested a will to joint his act with other factors leading to the result. If his will was not directed at the occurrence of the offence, the criminal intent would be lacking.

82 Ma'amoun M. Salama, Al-Mabad'e Al-'Ammah li Al-Ithbat Al-Jinai fi Al-Fiqh Al-Islami [The General Principles of Criminal Evidence in Islamic Jurisprudence] (2000). ("Since anyone may be accused of committing a crime, the rights of the accused must be respected. Even, these rights must be balanced against the right of the society to impose punishment … the accused is presumed innocent; whoever claims otherwise must prove it."). Mohammad stated: "Your evidence or his oath" and "Prevent punishment in case of doubt." Also, he said: "Had men been believed only according to their allegations, some [p]ersons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof." Another commentator states: "The positive evidence lies on the accuser and an oath is required of one who denies." *Id*.

83 Bassiouni, *supra* note 42, at 66–67. Muslim jurists interpret that by saying that the status of the accused is that of one who is in fact innocent or that his condition is that of collateral innocence. It is significant that the rule be strictly discharged, since the law recognizes that without this presumption the accused faces the onerous if not impossible burden of proving he did not commit the crime. Also, the post-conviction legislation prescribes the means for attacking the sentences and having a new trial in specific cases. Newly discovered evidence proving innocence after conviction results in vacating a conviction. So, it is far preferable as a safeguard to presume the accused to be innocent from the time he is accused of the criminal act until he is convicted. In Islamic law, the burden of proving innocence is not imposed on the accused, for the application of this principle required that the accuser be charged with the duty of proving his accusations. The defendant in that case is not required to produce negative evidence.

84 *Id*. at 115.

85 *Id*. *Hanafis* require that the witness have sight when he gives it and the major scholars stated that the testimony of the blind is inadmissible.

86 *Id*. at 116.

87 *Id*. at 117.

88 *Id*. at 118. Witness testimony cannot be denied if he has the quality of '*adl* (fairness) even if the animosity was created by a matter involving the (divine) rights of God.

89 *Id*.

90 *Id*. at 119. Some argued that self-expression should be verbal and not in writing or sign language.

91 *Id*. Some scholars stress that the accused must repeat the confession the same number of times as that of the required number of witnesses and in favor of confessions that implicate only the accused and not his accomplices or co-conspirators based on the principle of individual criminal responsibility.

92 *Id*. at 121.

93 *Id*. A *qarina* (presumption) may be weak or strong evidence; sometimes it is considered conclusive or it might only be probative (*prima facie*). Only when it is strong, it is considered as an evidence's mode if it meet the conditions of conclusiveness and certainty, as it is defined "that by virtue of which the matter becomes definitive, a sign which makes the matter certain." So, bribery can be proven by *qarina qat'ah* (*irrebuttable* presumptions). For example, if the bribee is arrested while holding a cash amount with known numbers or with specific signs.

Islamic scholars agree that punishment cannot be imposed unless it is consistent with the legality principle; individualized; and apply equally to all persons. Given its main objectives (justice, general deterrence, and rehabilitation or reformation), Islamic law retains the traditional penalties of deprivation of liberty and pecuniary sanctions for bribery. And as a *ta'azir* offense, corporal punishments in the form of *algald* (flagellation) count as a criminal sanction for bribery, even if it is not recommended.[94] Islamic law authorizes freedom-depriving penalties, whether total, such as *alhabes* (imprisonment), or in a less preventive way through local banishment, expulsion, or displacement. Confinement is imposed on first-time offenders and common (repeat) delinquents for those wrongdoings usually penalized by *ta'azir* and its duration varies from one day to six months or to even a year and its maximum period is left to the judge (competent authority).[95] Other sanctions comprise local banishment (or exile) that must be confined in space and duration and must be accompanied by supervision outside the criminal's domicile.[96] Muslim jurists accepted fines but not without reservations, as they worried that the availability of it might lead judges to employ it to excess and plunder the defendant.[97] If the lawbreaker repeats the same crime, then he becomes liable to censure and becomes a habitual offender. In that case, his punishment may escalate to lashes and imprisonment until he is reformed (aggravating circumstances).[98]

Criminal accountability will not apply in case of death of the criminal, pardon, or prescription (statutes of limitations).[99] Physical punishment or deprivation of liberties is abrogated with the demise of the convict. Pecuniary fines are, however, maintained, inflicted, and deducted from the convict's estate as it represents a debt of the deceased.[100] '*afw* (grace/amnesty) is defined as "a waiver by the community of its rights to impose punishment which it acquired by virtue of the commission of the offence and the community has the right to revoke the penalty totally or partially."[101] It implies the revocation of punishment before it is imposed as well as the decision not to prosecute. Muslim jurists state that prescription may apply to the penalty itself or the public action and the competent authority carries out this procedure in the light of public needs taking into account individual rights.[102] Last but not least, the investigation and primary-questioning stage of bribery is subject to the general rules for indictments in Islamic criminal procedures, taking into consideration the accused's rights regarding searches, seizures, eavesdropping, interrogation, and pre-trial preventive detention along with the adoption of legal evidence; trial before a competent, fair, and/impartial judge and jury; the right to counsel his or her own defense; the right to speak or remain silent; and the indemnity of an erroneous conviction.[103]

III. ISLAMIC INSTITUTIONS DEALING WITH CORRUPTION AND MALFEASANCE: ARE ANY?

A. Sharie'a (Islamic) courts

In many countries where inaccurate application of Islamic law is practiced or implemented, the *Sharie'a* system functions together with the state legal system. In Pakistan, for instance, in the state system, there are four high courts, located in the provincial capitals, and the 17-judge Supreme Court, which together make up the "superior judiciary," and the other remaining courts are collectively known as the "subordinate judiciary."[104] There is also a federal *Sharie'a* court consisting of eight Muslim judges, including a Chief Justice, appointed by the president and has original and appellate jurisdiction, decides whether any law is repugnant to Islam and also hears appeals from criminal courts on decisions relating to the enforcement of hudud and *ta'azir* laws, which pertain to offences such as intoxication, theft, corruption, embezzlement, and sexual relations.[105]

B. Complaints devices and transparency mechanisms (The Hisbah Institution)

The office of *wafaqi mohtasib* (Ombudsman) was established in Pakistan in 1983 by a presidential order. The office of mohtasib is an ancient Islamic concept that many Islamic States established to make sure that no wrong or injustice was done to citizens. It is empowered to investigate and award compensation to those who have suffered loss or damage as a result of maladministration by a federal agency or a corrupt public official.[106] Further, the *mohtasib* is appointed by the president for a period of four years and has been given jurisdiction to investigate into the affairs of all the offices of the federal government, except the Supreme Court, the Supreme Judicial Council, the Federal *Sharie'a* Court, and the High Courts.[107]

94 *See* 'Abd-el-'Aziz 'Amer, Al-Ta'Azir fi Al-Sharie'ah Al-Islamia [Al-Ta'azir Penalty in Islamic Sharie'a Law] 267–68, 379, 382, 389 (1957). Besides imprisonment for a fixed term, there are also indefinite sentences and usually this is reserved for incorrigible criminals (dangerous recidivists).

95 Prophet's companions did visits to jails to hear complaints from prisoners and to insure that the jailers did not mistreat or abuse them. Also, the state is expected to provide the essential necessities of life such as food, shelter, and medical health care to them because depriving them of these things could lead to their deaths. Muslim scholars established conditions against violating any of their rights, especially their freedom of opinion and the integrity of their beliefs, minds, bodies, honor, and dignity.

96 Many sanctions are designed in terms of morality in those who have committed a simple mistake, such as exhortation by the judge to do well and ignore evil deeds, blame ("reproach"), and dismissal from employment for abuse of confidence bringing harm to the public good. Also, he may ostracize the criminal by excluding him from interaction with others until he admits his error and expresses a willingness to return to the straight path (express repentance).

97 A fine is implemented by calculating a portion of the criminal's wealth in lieu of physical punishment. If the criminal's behavior improves, it is returned to him, but under no circumstances is the amount withheld to be appropriated by the judge or added to the public treasury. Bassiouni, *supra* note 21, at 218.

98 *Id*. at 222. Aggravation of punishment is realized through successive degrees of severity. There are stricter punishments for the perpetrator of repeated serious crimes, who validates himself to be dangerous to other folks and society through his recidivism. On mitigating circumstances, it is assessed by the judge in each case as it depends on the gravity of the crime and the criminal's personality, so the judge considers the criminal's physical condition, as hunger, disease or disabilities of his mental faculties and push him to break the law because of the necessities imposed on him by nature); his moral state which may result from physiological, pathological conditions or moral constraint or duress exercised upon him or as a result of self-lawful defense. Islamic law, which envisages *ta'azir* as a very fixable system to suppress crime, holds that the perpetrator avoids penalty only for reasons linked to a genuine penological value and social benefit.

99 El-Hagry, *supra* note 29, at 121–24.

100 Bassiouni, *supra* note 42, at 94–100.

101 *Id*.

102 Islamic law is silent on the issue of the duration of the prescription on public action/punishment and left it to jurists.

103 Although, one set in motion, the prosecution may not be suspended by the injured party as *ta'azir* penalty is inflicted by reason of social disturbance. In order to achieve conclusiveness in the evidence, the time and place of the crime must be specified and must be consistent with other evidence adduced by the judge. Also, evidence must remain conclusive until the execution of punishment, and its presentation should not be delayed. Further, the right of defense is a principal right which attaches at the accusation stage and enables the accused to deny the accusation, either by showing the insufficiency or invalidity of evidence or submitting evidence to prove innocence. Bassiouni, *supra* note 42, at 112–13.

104 *See* T. Polzer, Corruption: Reconstructing the Bank's Discourse (2001).

105 H. Marquette, *Civic Education for Combating Corruption: Lessons from Hong Kong and the United States for Donor-funded Programmes in Poor Countries*, 27 Pub. Admin. & Dev. J. 239.

106 *See, e.g.* The Reintroduction of Islamic Criminal Law in Northern Nigeria, http://ec.europa.eu/europeaid/projects/eidhr/pdf/islamic-criminal-law-nigeria_en.pdf. This study commissioned by the European Commission in 2001 to analyze the issue under various aspects, including its possible conflict with basic Human Rights.

107 *Id*.

Islamic tradition has a history of practices and institutions specifically set up to ensure that citizens observe the laws of God, especially Islamic law. The *hisbah* (verification) is a spiritual institution under the authority of the states that accomplishes the obligatory duty under Islamic law of enjoining "what is right and forbidding what is wrong."[108] As Islamic law controls in principle economic activities as much as individual performances, the *hisbah* establishment extends to governing business trading, monitoring, and supervising commercial activities, market places, and other secular affairs.[109] Institutions such as the Committee for the Propagation of Virtue and the Prevention of Vice in Saudi Arabia, for instance, carry out some of *hisbah*'*s* tasks, but some other countries, like Malaysia, also have a Muslim moral police. It should be noted that the *hisbah* institutions operate in conjunction with other relevant government agencies and establishments.

IV. APPLICATION OF ISLAMIC LAW IN RELATION TO CORRUPTION: WHAT IS NEXT?

A. Application of Sharie'a law to fraud and corruption: Nigeria case study

Although there is a widespread literature on the application of Islamic law in personal-status laws, there is limited literature and coverage on how Islamic law – as a legal system standing together with common and civil legal systems – and courts deal with specific cases of corruption. Since 2000, in Nigeria, for instance, Islamic law has been extended to give Islamic court's jurisdiction over criminal cases in 12 of the country's 36 states. The introduction of Islamic penalties was originally widely welcomed in the country as a symbol of Islamic identity on corruption and bribery. And these cases focused on corrupt practices involving government officials appear to go unpunished and escape criminal accountability and impunity. Legal systems addressing corruption also need to meet basic human rights and international legal standards. Concerns have been raised regarding the way *Sharie'a* penal codes may conflict with basic human rights as well as the way some Islamic courts fail to meet international standards on fair and due legal process.[110] The introduction of Islamic law on corruption and bribery and other fraudulent activities does not necessarily imply that harsh punishments are actually enforced, as the *Qur'an* sets out strict evidentiary standards. In addition, strict punishments are not supposed to be applied in case of doubt, a standard set higher than the secular Western standard, namely "beyond reasonable doubt."[111]

B. Alternative Islamic approaches: The case of Malaysia

Since 2003, the Malaysian government has endeavored to implement *Islam hadhari* (civilizational Islam), a theory of government based on the principles of Islam as derived from the *Qur'an*. It represents an attempt to promote a "model Islamic democracy," while curtailing radicalism and fundamentalism through technological and economic competitiveness, moderation, tolerance, and social justice.[112] Moderate Islamic law outlines a series of fundamental principles that are designed to be a cornerstone and a robust framework to address corruption in a comprehensive and holistic manner. Fighting corruption was an important achievement for a long time in Malaysia. Tackling corruption, bringing high profile cases to court, and exposing the corrupt practices of senior government officials underline the credibility of the government's political will against corruption.

Furthermore, analysts observe that the modern Islamic approach to fighting corruption has been mainly promoted by government through a top-down approach, which could explain the mixed results of the anti-corruption campaign. Countries like Indonesia, for example, have favored a bottom-up route, which seems to be more effective as it meets the goal of a far more modest implementation of Islamic principles. The reformist agenda in these governments is being promoted by the largest and most influential Islamic organizations along with promoting a reformulation of the *Sharie'a* law, jointly campaigning against corruption in public life and in favor of accountability and transparent democracy.

V. TOWARDS ISLAMIC APPROACH ON FRAUD: CONCLUSION/POLICY RECOMMENDATIONS

Accordingly, good governance or internal liability should be enhanced by external checks and balances. Accepting plurality in politics, adopting multi-party system, practicing free and fair elections, building an independent judiciary system, and providing for freedom of the press and transparency in public service or affairs would promote good governance. Reviving the forgotten Islamic institutions such as the *zakah*, the *waqf* (endowment), the *hisbah* (ombudsman), and the *shoura* (consultation) is also necessary. In the early Islamic community, equality, accountability, and a high degree of transparency in the early Caliphate saw public funds handled with great caution and care, with military expeditions to prevent corruption. Thus, acceptance of what establishes corrupt behavior is culture-specific and varies from country to country. Did pre-Islamic Arab cultural values meet Islam's universal values? If it did not, is the failure a result of the Muslims' incapability to realize their favored set of standards (for example, in essential tasks such as education in Islam ethics) through the medium of well-designed institutions? The proposal now is that ethics can allow as well as constrain. Ethical norms, and the leading institutions by lending force to ethical norms, can widen horizons and choices, allowing people to do more than it would otherwise have been possible.

An Islamic-type method that relies solely on seeking a moral renaissance from within the individual is seriously lacking. While consciousness-raising is needed, reliance upon self-restraint is not sufficient. According to some scholars, typical Western philosophy does not distinguish between different sets of values; thus, a second-order preference exists, blurring the distinction between right and wrong. In contrast to the Platonic notion of the good, the Kantian focus on the "ought" and its justification, contemporary analytic philosophy has sought to develop against the backdrop of a value-neutral world. Accordingly, internal accountability should be supplemented by external checks and balances. Thus, privatization of public organizations and the application of the familiar cost–benefit method to the provision of social goods offer another protection. Moreover, making use of highly qualified internal and external auditors is essential, as the recruitment of government officials with adequate wages should be based on competence and integrity. The law should be clear

108 *Id*.
109 *Id*.
110 *See generally* UNHCR, Human Rights Watch Report on Nigeria, UNHCR (2007), http://www.unhcr.org/home/RSDCOI/45aca2a316.html.
111 *Id*. For instance, In Nigeria, there is no executions or amputations have taken place since early 2002 and capital sentences have generally been thrown out on appeal. Islamic courts play a fundamental role in executing punishments related to corruption and bribery crimes.
112 *See* Yousif Khalifa Al-Yousif, *Economic Development in the United Arab Emirates: 1975–1990*, 8 J. Eco. & Admin. Sci. 23 (1990).

enough and applied to secure justice for all. A freely elected legislative body that is representative of all sections of society should exist, and its decisions should be binding on all, including the head of state. Furthermore, the existence of an independent judiciary system and free press is important. The educational system is of vital importance to transmit Islamic values.

Thus, "political will" is the most critical factor in the fight against corruption. The introduction of democracy at gross roots is associated with decreased domestic corruption. However, what matters is specific politics, separate from local piety and the traditional local corruption environment. The results of the local politics may provide optimism for reduction of corruption at the national level, in the long term. First, a change in local corruption environments surely affects corruption at the national level per se. However, most of the Third-World countries including some Middle Eastern countries have a focus on corruption reduction at the national level, and people believe that the immediate prospects for substantial improvement are dim: corruption still serves to fund corrupt activities and national bureaucrats still rely on corruption proceeds to supplement their salaries to meet market compensatory pay; this concept focuses on employee compensation and benefits policy-making. While compensation and benefits are tangible, there are intangible rewards such as recognition, work-life, and development. Collectively, these are referred to as total rewards, while the term "compensation and benefits" refers to discipline as well as rewards themselves. Therefore, as Friedrich Nietzsche said, "Whoever fights monsters should see to it that in the process he does not become a monster. And if you gaze long enough into an abyss, the abyss will gaze back into you."

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RESEARCH ARTICLE

The "other side" of whistleblowing practice: Experiences from Nigeria

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ABSTRACT

Whistleblowing, the act of reporting or disclosing wrongdoing, is widely proven to have a practically useful mechanism in fighting corruption in public and private sectors. Within the ambit of the whistleblowing framework, the disclosure of corrupt practices is primarily justifiable only on the ground that the action is genuinely directed towards protecting the interest of the public. The usual benefit of financial reward to whistleblowers is secondary, as it basically aims at encouraging individual employees to expose unethical misconducts in their organizations. Regardless of this, whistleblowing intrinsically benefits the public as well as the individual(s) who raises the alarm against any dishonest acts. However, despite its benefits to the public and the individual informant, whistleblowing attracts certain heavy costs, mainly on the part of the whistleblower, mostly in the form of victimization or witch hunting, retaliation, denial of work-related benefits, recrimination, suspension from work and even dismissal, for their involvement in disclosure wrongdoing. Impliedly, besides its valuable attributes as an important anti-corruption weapon and mechanism for incentivizing the citizens, there is the "other side" of the whistleblowing practice. Using some practical examples and experiences from Nigeria, this paper demonstrates that there is the "other side" of whistleblowing, and concludes that the practice, indeed, has distinct dual sides, especially in the absence of a well-articulated legal framework for protection of whistleblowers, as in the case of Nigeria. Thus, in this paper, we basically argue that the Nigerian government should take immediate actions to enact a comprehensive whistleblowers' protection law, so as to guarantee adequate protection of informants, who risk their lives to expose corruption acts in the interest of the public, from likely abuses. As this study is a qualitative and theoretical research, we adopt the documentary methods of data collection and analysis. These approaches were preferred as they will allow for the objective interrogation of the subject matter under consideration and the achievement of the study's objective.

Keywords: Anti-corruption, Nigeria, whistleblowing practice, corruption, development, good governance, whistleblowing risks.

ملخص:

لقد ثبت أن كشف الفساد، أي الإبلاغ عن المخالفات أو الكشف عنها، يعد آلية مفيدة عملياً في مكافحة الفساد في القطاعين العام والخاص. وفي إطار

كشف الفساد، يكون الإفصاح عن الممارسات الفاسدة مبرّراً في المقام الأول فقط على أساس أن الإجراء موجه في الأساس نحو حماية مصلحة الجمهور. وتعد الفائدة المعتادة للمكافأة المالية للمبلغين عن المخالفات أمراً ثانوياً، حيث أنها تهدف بشكل أساسي إلى تشجيع الأفراد العاملين على فضح سوء السلوك غير الأخلاقي في مؤسساتهم. وبغض النظر عن هذا، يفيد كشف الفساد الجمهور بشكلٍ عامٍ وكذلك الأفراد الذين يبلغون عن أي أعمال غير شريفة. ومع ذلك، وبالرغم من فوائد ذلك للجمهور والمبلغين الأفراد، يفرض كشف الفساد تكاليف معينة باهظة، خاصة من جانب الكاشفين عن الفساد، ومعظمهم في شكل الإيذاء أو التعقب والانتقام والحرمان من المنافع المرتبطة بالعمل والاتهامات والإيقاف عن العمل بل حتى الفصل من العمل، لمشاركتهم في الكشف عن مخالفات. وبالتالي، هناك "جانب آخر" لممارسة الكشف عن الفساد، بالإضافة إلى صفاتها القيمة كسلاح هام لمكافحة الفساد وآلية لتحفيز المواطنين، حيث أنه باستخدام بعض الأمثلة/الخبرات العملية من نيجيريا، يوضح هذا البحث أن هناك "جانب آخر" للكشف عن الفساد، ويخلص إلى أن هذه الممارسة، في الواقع، لها جانبان مزدوجان متميزان، خاصة في غياب إطار قانوني واضح لحماية الكاشفين عن الفساد، كما هو الحال في نيجيريا، وذلك لكونها دراسة حالة. وبالتالي، يناقش البحث في الأساس أن على الحكومة النيجيرية أن تعجل في اتخاذ إجراءات لسن قانون شامل لحماية الكاشفين عن الفساد، وذلك لضمان الحماية الكافية للكاشفين عن الفساد، الذين يخاطرون بحياتهم من أجل فضح أعمال الفساد لمصلحة الجمهور، من التعسفات المحتملة. الدراسة عبارة عن بحث نوعي ونظري، ومن ثم، يتبنى البحث الأساليب المستندية لجمع البيانات وتحليل البيانات. وكان هذا النهج هو المفضل لأنه ساعد على التحقيق الموضوعي في الموضوع قيد النظر وتحقيق هدف الدراسة.

الكلمات المفتاحية: مكافحة الفساد، نيجيريا، ممارسة كشف الفساد، الفساد، التنمية، الإدارة الرشيدة، مخاطر كشف الفساد.

I. INTRODUCTION

Corruption in public and private sectors is undoubtedly an albatross to social, economic and political development throughout the world. This is true, as the ubiquitous nature of the phenomenon (corruption) makes it undesirably present in all societies. Indeed, corruption constitutes a major obstacle to transformative changes in all countries in the Southern and Northern Hemispheres, although at varying degrees and forms. By its very nature, corruption creates unequal distribution of socio-economic resources, undermines efforts at reducing poverty incidence and denies the vulnerable groups in society access to public opportunities and privileges. Corroborating this assertion, the former Secretary General of the United Nations (UN), Ban Ki-moon unequivocally posits that:

> Corruption is a global phenomenon that impedes growth and development, which is also a threat to the important efforts being made in reducing poverty and achieving the MDGs. Because of corruption, many poor and vulnerable people are being denied education and other essential services they need to maintain a normal day-today living[1].

In appreciation of the devastating effects of corruption on societies, he expresses the need for concerted efforts at combating the menace, noting that:

> Corruption distorts the market and increases costs for companies, so building partnership between public and private sectors is very crucial to combat the threat of corruption against global economy, and calls on cooperations between civil society organizations (CSOs) across the world[2].

Furthermore, Ban Ki-moon emphasizes proactive urgent actions against the menace, particularly arguing that "the fight against corruption is and should remain at the centre of rule of law" and that "the fight against corruption requires more urgency now than before to promote human rights and all the Millennium Development Goals (MDGs) are achieved"[3].

This advocacy by the former UN Secretary General is presumably expected to ignite a renewed interest and increased momentum in the war against corruption globally, most importantly in developing countries, where the menace has virtually destroyed the fabrics of the society and eaten so deep into its marrow. Corruption is the arch cog in the wheels of progress of developing countries. A report by Transparency International (TI) demonstrates that corruption is the major factor in explaining why developing countries are experiencing difficulties in reaching the Millennium Development Goals (MDGs). The MDGs are eight development targets set by the United Nations Millennium Declaration, to be achieved by 2015, which was signed in September 2000 with the aim of facilitating improvements in the social and economic conditions in the poorest countries of the world. The Transparency International report, which is called "The Anticorruption Catalyst: Realizing the MDGs by 2015" clearly shows the statistical links between corruption and development statistics in strategic areas such as illiteracy, death rate and availability of drinking water[4].

The report asserts that:

> In many developing countries corruption has become a "regressive tax", particularly affecting poorer households", and "calls on governments to integrate anticorruption measures into their MDG policies, claiming that strengthening transparency, accountability and integrity, will help developing countries achieve the MDGs[5].

The report recommends increased access levels to public information relating to efforts undertaken towards achieving the MDGs in developing countries, as a means of attaining improved transparency, whereas accountability can be achieved by ensuring more meaningful and greater involvement of members of the community, coupled with the support of civil society organizations (CSOs)[6]. Ban Ki-moon also rightly observes that "all people have the responsibility to speak against corruption because combating it starts with every individual, which makes it important to focus on anti-corruption education in order to tackle the issue head on"[7]. From this perspective, it becomes evident that the international community duly recognizes the essential role of members of the community in fighting corruption and achieving the established Millennium Development Goals (MDGs) at all

1 Government Investigation & White Collar Litigation Group, *The Rule of Law and Anti-Corruption Centre Launched in Qatar*, Subject to Inquiry (Dec. 12, 2011), https://www.subjecttoinquiry.com/corruption-2/the-rule-of-law-and-anti-corruption-centre-launched-in-qatar/.
2 *Id.*
3 *Id.*
4 *Anti-Corruption Policies Key to Helping Developing Countries Reach Millennium Development Goals*, Lexology (Oct. 6, 2010), https://www.lexology.com/library/detail.aspx?g=3ca879c3-f739–46fb-8871–082ef89dc3cc.
5 *Id.*
6 *Id.*
7 GIWCLG, *supra* note 1.

levels of societies. Whistleblowing provides one of the most useful mechanisms and ample opportunity for all the citizens to supplement governments' efforts in fight against corruption in public and private settings in any country. By acting as informants or blowing the whistle to disclose "in public interest" and "in good faith", any acts of wrongdoing in their workplaces or organizations, community members serve as anti-corruption agents, strengthening governments' determination and will to fight formidably against the menace of corruption.

The involvement of community members in the war against corruption through the whistleblower mechanism is generally known to have produced worthwhile results in many climes: first, in protecting public interest; second, in incentivizing citizens who see it as a voluntary moral obligation to expose unethical practices in their organizations. Despite its intrinsic goodness to the society and individual informants, the whistleblowing culture also attracts certain heavy costs, mainly in relation to anyone who blows the whistle or raises the "red flag" against dishonest acts in public and private sector organizations. It is upon this premise that this paper, based on some practical experiences from Nigeria, attempts to demonstrate that there is an "other side" of the whistleblowing practice. This paper is organized into eight sections with Introduction as the first section. The second section explains the meaning of the concept of whistleblowing. The third section presents the theoretical framework adopted by the study. The fourth section is a review of the scholarly literature on the "other side" of whistleblowing. The fifth section demonstrates the "other side" of whistleblowing by considering some experiences from Nigeria. The sixth section examines the implications of the "other side" of whistleblowing for the anti-corruption campaign in Nigeria. The seventh section recommends effective measures by which Nigeria can address the undesirable development. Finally, the eighth section provides conclusions drawn from the study.

II. THE CONCEPT OF WHISTLEBLOWING EXPLAINED

Scholars and researchers in the field of anti-corruption have defined the term "whistleblowing" in various ways. For instance, the Nolan Committee on Standards in Public Life defines whistleblowing as "raising concerns about misconduct within an organization or within an independent structure associated with it"[8]. Similarly, Near, Rehg, Van Scotter and Miceli refer to whistleblowing as "an act of disclosure by members of an organization of illegal and immoral acts perpetrated by the organization and organization members to persons or organizations that may bring about a change"[9]. In another related sense, the International Labour Organization (ILO) sees whistleblowing as "reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers"[10]. The definition offered by the Chambers Dictionary is also closely related to the foregoing definitions. According to the Chambers Dictionary, as cited by Audit Scotland et al., whistleblowing involves "giving information (usually to the authorities) about illegal or underhand practices"[11]. The South African Public Service Commission posits that "whistleblowing is not about informing in negative, anonymous sense but rather about raising a concern about malpractice in an organization"[12].

Furthermore, as cited by Audit Scotland et al., the Public Concern and Work (PCaW) conceives whistleblowing in a slightly broader way, referring to it as "a worker raising a concern about wrongdoing, risk or malpractice with someone in authority either internally and/or externally" (i.e. regulators, media and MPs)[13]. Eaton and Akers also define whistleblowing in the same sense, asserting that the practice "involves the act of reporting wrongdoing within an organization to internal or external parties"[14]. According to them, internal whistleblowing involves the disclosure of information to a source within an organization, while external whistleblowing implies reporting information outside an organization, such as to the media or regulators[15]. Regardless of their slight differences, these definitions are simple and they clearly convey the same meaning regarding the concept or practice. Thus, on the basis of the concern and scope of this study, all the above definitions offered in an attempt to explain the meaning of whistleblowing can rightly be said to be quite tenable and apt in understanding the subject matter being examined in this study. As an upshot, the working definition employed in this study summarizes the definitions given above as "the act of raising the "red flag" or exposing corruption acts in public and private sector organizations in public interest". On the contrary, according to Babajide, "a whistleblower is defined in the Longman Dictionary of Contemporary English (5th Edition) as "someone who tells people in authority or the public about dishonest or illegal practices at the place where they work"[16]. Similarly, as it pertains to this study, a whistleblower is "the person who reports wrongdoing or inappropriate activities to appropriate authorities".

III. THEORETICAL FRAMEWORK

It is a tradition in social sciences that investigations into any phenomena or issues are conducted within the fulcrum of appropriate theories, in order to provide adequate guidance and direction, as well as to enhance proper understanding of the subject matter under consideration. In accordance with the practice, this study deploys the "role theory" as a basic analytical framework of explanation. In this paper, we recognize the fact that there are other theories that can as well be adopted in engaging the problematique of the study. However, the study finds the role theory most suitable and appropriate in advancing its argument.

The role theory is one of the most important and dominant theories in sociology for understanding social behaviours. The theory "is a perspective in sociology and social psychology that considers most of everyday activity to be the acting out of socially

8 Audit Scotland et al, Whistleblowing in the Public Sector: A Good Practice Guide for Workers and Employers 7 (2014), *available at* http://www.audit-scotland.gov.uk/docs/corp/2014/as_141125_whistleblowing_public_sector.pdf (last visited Sept. 24, 2015).

9 J.P. Near et al., Developing a Model of the Whistleblowing Process: How Does Type of Wrongdoing Affect the Process?, 14 Bus. Ethics Q. 219 (2004) (as cited in B. Ogungbamila, *Whistleblowing and Anti-Corruption Crusade: Evidence from Nigeria*, 10(4) Canadian Soc. Sci. 145, 146 (2014).

10 OECD, G20 Anti-Corruption Action Plan: Protection of Whistleblowers. Study on Whistleblowers Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation 7 (2010), https://www.oecd.org/corruption/48972967.pdf.

11 Audit Scotland et al., *supra* note 8, at 7.

12 South African Public Service Commission, Whistle-blowing: A Guide for Public Sector Managers, Promoting Public Sector Accountability, Implementing the Protected Disclosure Act, http://www.psc.gov.za/documents/docs/guidelines/PSC_odac_update.pdf (last visited April 25, 2018).

13 Audit Scotland et al., *supra* note 8, at 7.

14 T.V. Eaton & M.D. Aker, *Whistleblowing and Good Governance*, The CPA Journal, *77*(6), 2007, at 66, 67.

15 *Id.*

16 I. Babajide, *Opinion: The Role of the Whistle-blower in Nigeria—To Be or Not to Be?*, Naija.com (Nov. 30, 2013), http://ynaija.com/opinion-the-role-of-the-whistle-blower-in-nigeria-to-be-or-not-to-be/.

defined categories (e.g. mother, manger and teacher)"[17]. In other words, role theory's general assumption or major argument is that "human beings behave in ways that are different and predictable depending on their respective social identities and the situation"[18]. The earliest proponents, whose theoretical works popularized the role theory within the discipline of sociology, were George Simmel, George Herbert Mead, Ralph Linton, Jacob Moreno and Talcott Parson[19]. In particular, however, George Herbert Mead is generally considered the earliest contributor to the development of the theory, through his two concepts of "the mind and the self"[20]. Biddle observes that:

> As the term role suggests, the theory began life as a theatrical metaphor. If performances in the theater were differentiated and predictable because actors were constrained to perform "parts" for which "scripts" were written, then it seemed reasonable to believe that social behaviours in other context were also associated with parts and scripts understood by social actors. Thus, role theory may be said to concern itself with a triad of concepts: patterned and characteristic social behaviours, parts or identities that are assumed by social participants, and scripts or expectations for behavior that are understood by all and adhered to by performers[21].

The term "role" became popular in sociological discourse in the 1920s and the 1930s, but even prior to these periods, the concept had existed in European societies for many centuries[22]. Generally, "roles may be defined as a collection of everyday activities of the people"[23]. A social role consists of a set of rights, duties, expectations, norms and behaviours that a person has to endeavour to accomplish[24]. The role theorists do not agree with each other on the meaning of the word "role". Although a role can be perceived in terms of a social position, behaviour related to a social position or a typical behaviour, some role theorists believe that roles are basically expectations about how a person should behave in a particular situation. To others, a role refers to how an individual can behave in a given social position. There are also others who favour the idea that a role is a characteristic or expected behaviour, a part to be played or a script for social conduct[25]. Roles guide individual's behaviour, and they are dictated partly by social structure and partly by social interactions. To this end, "many of role theorists see role theory as one of the most compelling theories bridging individual behavior and social structure"[26].

Importantly, while other conceptions of the term "role" by role theorists are plausible, the conception of the term by the functionalist approach within the role theory vividly captures the very substance of argument being advanced by the paper and the justification for the deployment of the theory in this study. The functionalist approach "sees a role as the set of expectations that society places on an individual"[27]. In line with this position, it becomes tenable that the desire for a corruption-free society places important demand on employees not to hesitate to raise alarm or report in the interest of the general public, any acts of corruption or unethical behaviour in their organizations found to be against the well-being of the society. Given the overarching adverse threats of corruption to the society and public welfare, employees in public and private sectors have a voluntary civic responsibility to expose wrongdoing by their organizations or members of their organizations, provided that the disclosure is aimed at saving the public from certain detrimental effects. This responsibility is not without benefit; anyone who reports or exposes wrongdoing in good faith is entitled to financial reward as incentive. Informants are also entitled to legal protection from associated risks such as reprisal, intimidation, victimization, suspension from work and even outright dismissal. This is based on the understanding that whistleblowing is like a coin with two opposite sides. Regardless of its laudable benefits, informants often suffer various forms of maltreatments for performing their voluntary civic responsibility, that is, disclosure of wrongdoing in public spirit.

IV. LITERATURE REVIEW: THE "OTHER SIDE" OF WHISTLEBLOWING

Views and opinions by scholars and researchers in the field of anti-corruption generally support the main argument of this paper, that is, the point that there is the "other side" of whistleblowing. For instance, the position has been advanced that:

> Around the world, whistleblowers have been hailed as heroes for revealing corruption and fraud in organizations and for preventing potentially harmful mistakes from leading to disasters. The disclosures range from revealing the theft of millions of money in the public and private businesses and other dangerous transactions that threaten businesses and help save wealth. However, many who bring these issues to light face also severe repercussions for their actions. They lose their jobs or are ostracized for their actions. Some are charged with crimes for violating laws or employment agreements. In extreme cases, they face physical danger[28].

Consequently, as Sule opines, "it is to be noted that, two things are indisputably true about whistleblowing"[29]: The first is that it "is a risky business"[30] and the second is that it "is a helpful practice"[31]. Arguably, "it is a risky business because of the dangers, the detriment and threats awaiting an employee who courageously decides to say "enough is enough" to the wrongdoing of either his coworkers or his employers"[32]. Supporting Sule's stance, Vickers states that whistleblowers usually "face discipline or dismissal"[33]. The reason for this is that they are commonly wrongly perceived.

17 E. Sesen, *Role Theory and Its Usefulness in Public Relations*, 4(1) Eur. J. Bus. & Soc. Sci. 136, 139 (2015).
18 B.J. Biddle, *Recent Developments in Role Theory*, 12 Ann. Rev. Sociol. 67, 68 (1986).
19 *Id.*; Sesen, *supra* note 17.
20 M.J. Hindin, *Role Theory*, *in* The Blackwell Encyclopedia of Sociology 3959–62 (George Ritzer ed., 2007).
21 Biddle, *supra* note 18, at 68.
22 Hindin, *supra* note 20.
23 D. Lattimore, O. Baskin & S. Heiman, Public Relations: The Profession and the Practice 61 (2004).
24 H.A. Michener & J.D. Delamater, Social Psychology (1979).
25 R.L. Coser, *The Complexity of Roles as a Seedbed of Individual Autonomy*, *in* The Idea of Social Structure: Papers in Honor of Robert K. Merton 252–277 (Lewis Coser ed., 1975).
26 Sesen, *supra* note 17, at 139.
27 *Id.*
28 *What is Whistleblowing?*, News Herald (Sept. 24, 2015), https://newsherald.com.ng/2015/09/24/what-is-whistle-blowing/.
29 I. Sule, *Whistleblowers' Protection Legislation: In Search for Model for Nigeria*, IPPA (2009), at 5, http://www.ippa.org/IPPC4/Proceedings/18TransparencyAccountabilityinProcurement/Paper18–8.pdf.
30 L. Vickers, *Whistleblowing in the Public Sector and the ECHR*, 94 Pub. L. 594 (1997).
31 Sule, *supra* note 29.
32 *Id.*
33 Vickers, *supra* note 30.

Whistleblowers, according to Bowers and Lewis, are mostly seen as "particular threat to, and thorn in the side of, an employing organization"[34]. They also attract to themselves "more negative labels such as informants, snitches, rats, squabbles, sneaks, or stoolies"[35], "which could have impact on them or their families"[36]. For these and many other reasons, most employees choose to remain silent even in the face of obvious corruption acts and unethical behaviours by their employers or co-workers.

Unveiling why whistleblowing is a helpful practice, the Committee on Standard in Public Life asserts that "it is both an instrument in support of good governance and a manifestation of a more open organisational culture"[37]. Also, Sule believes that:

> Through whistle-blowing accidents and disasters could be prevented, lives of innocent people could be saved and huge financial loss could also be barred. It could also deter other potential wrongdoers. All these benefits and more others are the results of making one employee a "sacrificial lamb"[38].

Moreover, in their own words, Thompson Okpoko and Partners further buttress that whistleblowing is a helpful practice in that it helps the government in fighting corruption and recovering looted public resources. On the other hand, it is a risky business due to the dangers involved in it, that is, the detrimental effects and threats that the whistleblower has to bear[39]. According to Auwal Ibrahim Musa:

> Whistleblowers are hitherto perceived as disloyal employees and trouble makers, who are out to unveil all manners of corruption practiced in secrecy. Reporting misconduct has caused some employees to be victimized by their employers as well as fellow employees, thus employees generally do not feel protected enough to come forward with information on misconduct and corrupt practices[40].

Unsurprisingly, "even in countries with strong rule of law, low unemployment, reasonable security of life and property, people are still not likely to blow the whistle to the detriment of their sources of livelihood"[41]. It therefore follows that the disclosure of wrongdoing in the absence of a protective law, as in the case of a country like Nigeria, is even much more risky. Of course, as Babalola holds, "reporting questionable practices or abuses of power without protection is simply risky"[42]. Corroboratively, Babajide contends that "the risks that go with being a whistleblower cannot be over emphasized, hence the need to have a law that protects them"[43].

In its definition of "whistleblowing", the popular global corruption monitoring institution Transparency International (TI) also vividly recognizes the "other side" of the whistleblowing culture. In its quite unique conception, the Transparency International describes whistleblowing as a four-stage process:

1. A triggering event occurs, involving questionable, unethical or illegal activities, which leads an employee to consider "blowing the whistle".
2. The employee engages in decision-making, assessing the activity and whether it involves wrongdoing, gathering additional information and discussing the situation with others.
3. The employee exercises voice by blowing the whistle; alternatively, the employee could exit the organization or remain silent out of loyalty or neglect.
4. Organization members react to and possibly retaliate against the whistleblower[44].

Consolidating the point in the fourth stage of TI's definition, undeniably, "there have been reports of people who have blown the whistle on their employers and consequently have faced hardship even as far as unfair dismissal, purposeful deterred progress, legal action, and even emotional and physical torture"[45]. Onyejianya distinguishes between internal and external whistleblowing, asserting that it is the internal whistleblowers who are exposed to higher risks. According to him:

> Essentially there are two types of whistleblowers: internal and external. Internal whistleblowers come from within an organisation, for example when an employee reports misconduct or illegal activity stemming from parts of the organisation or key individuals. The external whistleblowers may not necessarily have a connection with the organization but report their observations to regulatory authorities such as law enforcement agencies or special protective agencies. It is quite clear that of the two types, it is the internal whistleblower who takes more of a risk when making a disclosure because of the perceived high risk of loss of job, victimization and other issues which may ensue following a disclosure[46].

This is the right explanation for why there are only a few whistleblowers[47] as deserved everywhere. As concerning jeopardizing their means of livelihood, whistleblowers do not only run the risk of losing their present jobs, but also most of the times the employers put the whistleblowers' name on a blacklist, thereby making it difficult for them to find a new job in the same field. "This

34 J. Bowers & J. Lewis, *Whistle-blowing: Freedom of Expression in the Workplace*, 6 EHRLR 637 (1996).
35 G. Gilan, *Whistleblowing Initiatives—Are They Merely Secrecy Games and/or Blowing in the Wind?*, Company Law., 24(2), 2003, at 38.
36 Sule, *supra* note 29, at 6.
37 Committee on Standard in Public Life, Getting the Balance Right: Implementing Standards of Conducts in Public Life 89 (2005), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336897/10thFullReport.pdf (last visited May 17, 2018).
38 Sule, *supra* note 29, at 7.
39 Thompson Okpoko & Partners, *The Federal Ministry of Finance's Whistleblowing Programme: The Need for a Law to Protect Whistleblowers*, Thompson Okpoko (Apr. 24, 2017), http://www.thompsonokpoko.com/news/2017/04/24/the-federal-ministry-of-finances-whistleblowing-programme-the-need-for-a-law-to-protect-whistleblowers/.
40 *CSOs Demand Passage of Whistle-Blowers Protection Bill*, Newsdiaryonline (Aug. 25, 2015), http://newsdiaryonline.com/csos-demand-passage-of-whistle-blowers-protection-bill/.
41 *How "Whistleblowing" Can Save Nigeria*, The Leader News Online, (May 31, 2013), http://theleaderassumpta.com/2013/05/31/how-whistleblowing-can-save-nigeria/.
42 A.A. Babalola, *Government 5% Reward Policy on Whistleblowers: Need for Statutory Framework for Protection (2)*, Afe Babalola University News (Jan. 25, 2017), http://abuad.edu.ng/government-5-reward-policy-on-whistleblowers-need-for-statutory-framework-for-protection-2/.
43 Babajide, *supra* note 16.
44 *Whistleblowing under Turkish Law,* The Legal 500 (2010), http://www.legal500.com/c/nigeria/developments/10817.
45 CIA Admin., *The Probe and the Whistleblower*, CSR in Action (Jul. 31, 2015), http://www.csr-in-action.org/index.php/resources/featured-articles/item/659-the-probe-and-the-whistleblower.
46 B.A. Onyejianya, *The Whistleblower as a Gatekeeper of Good Governance*, Businessday Online (Nov. 14, 2013), http://businessdayonline.com/2013/11/the-whistleblower-as-a-gatekeeper-of-good-governance/.
47 *Id.*

will terrify the employees and force them not to expose any wrongdoing and prevent themselves by not hitting the blacklist"[48].

As an upshot, Sule thinks that " a potential whistleblower will be moved to engage in balancing and weighing between the effect and impact of what he is going to reveal and the dangers to his life and livelihood and to his family, refutation and profession"[49]. It is also noteworthy that " regardless of jurisdiction, the risk for informants remain the same"[50]. Apparently, whistleblowers in all societies, both in developed and developing nations, suffer virtually similar fates. As revealed by Irish Times of 29 May 2000:

> A study of whistleblowers in the US in the year 2000 found out that 100% of those who blew whistle were fired and most of them were unable to find new jobs. 17% lost their homes; 54% were harassed by peers at workplaces; 15% were subsequently divorced; 80% suffered physical deterioration; 90% reported emotional stress, depression and anxiety and sadly, 10% of them attempted suicide[51].

Pointing at other forms of ill fates that usually befall informants, Onyejianya recalls that:

> High profile whistleblowing cases of the past decade e.g. Enron, Halliburton and Edward Snowden cases, involved informants who had to overcome a series of obstacles before their credibility could be established. In some cases it took years before legal action was taken against the organization involved. In reality only a small proportion of whistleblowing cases are taken seriously and an even smaller proportion make the media headlines[52].

Also, internally, " it can be quite a task for whistleblowers to be taken seriously by senior management of their organizations"[53]. This is because employers and co-workers commonly regard whistleblowers more as organizational deviants than as faithful employees and patriotic citizens, who understand that the society depends partly on their role as community members to make life better for fellow patriots. To the extent that individuals who in "good faith" and in "public spirit" seek to protect the society from imminent harms are in most cases branded "trouble makers" and made to bear unwarranted consequences for their actions, the subject matter of whistleblowing can therefore be rightly described as an inherently controversial issue.

V THE "OTHER SIDE" OF WHISTLEBLOWING: EXPERIENCES FROM NIGERIA

Whistleblowing practice has gained immense popularity and widespread relevance in the fight against corruption globally, due to its pivotal role in protecting public interest and incentivizing citizens who "in good faith" uncover wrongdoing at their workplaces. Despite its virtues, in most countries, informants globally encounter unprecedented adversities for exposing corruption acts and/or corrupt people in private and public sector organizations. Experiences abound virtually everywhere, including in developed and developing countries, related to the adverse consequence suffered by whistleblowers, which manifest in diverse forms including retaliation, victimization, intimidation, recrimination by supervisors or co-workers, denial of work-related benefits, suspension from work and sometimes outright dismissal. In this study, the focus is precisely on Nigeria. Numerous practical experiences in the Nigerian context validate the claim that there is the "other side" of whistleblowing as an anti-corruption mechanism.

According to Shaibu, one of Nigeria's key anti-corruption agencies, the Independent Corrupt Practices and Other Related Offences Commission (ICPC) has before it volumes of petitions filed by civil servants who claim to have been victimized and denied their due entitlements for reporting corrupt practices perpetrated in their offices[54]. To lend credence, the travail of a particular undisclosed Nigerian civil servant is captured as follows:

> recently, a staff of the Federal Ministry of Defence sought the assistance of ICPC against alleged victimization for exposing corrupt acts perpetrated by an officer of the Federal Civil Service Commission (FCSC). The staff who also alleged that his service file with FCSC was missing said that his travails began in 2013 when he took his file to the Commission for regularization and promotion. He alleged that the file was unattended to and had even disappeared from records office of FCSC, adding that he had been named an "enemy of the civil service" and disqualified from the 2015 promotion exercise because ICPC was prosecuting the indicted staff of FCSC in an Abuja High Court[55].

In another instance, the Ministry of Foreign Affairs unlawfully suspended a director from work for exposing a financial fraud of N70.6 million in the Directorate of Technical Cooperation in Africa (DTCA). Succinctly narrating the ordeal, the amount mentioned was withdrawn and mismanaged by some officials of the top echelon of the Directorate for Technical Cooperation in Africa. The money was drawn from the Nigerian Technical Cooperation Fund domiciled with the African Development Bank (AfDB) and jointly managed for the Nigerian Federal Government by the AfDB and DTCA. The officials withdrew the money under the guise of celebrating the 10th anniversary of the Nigerian Technical Cooperation Fund (NTCF), which was allocated $36,852.00, and supervision of various projects being executed from the Trust Fund across Africa. Another sum totalling N800,000.00 was also allocated for the sensitization seminar to be organized by SERVICOM in the Directorate and the sales of board government vehicles. When the whistleblower, Mr. Ntia Thompson, an Assistant Director in DTCA got clues about the diversion of the fund, he immediately reported the matter to the Economic and Financial Crimes Commission (EFCC) and the Inspector General of Police, seeking for necessary protection[56].

48 *Whistleblowing—Origin, Meaning, Problems Involved In It*, Layman Blog, http://layman-blog.blogspot.com.ng/2011/05/whistleblowing-origin-meaning-problems.html (last visited May 17, 2018).
49 Sule, *supra* note 29, at 6.
50 Onyejianya, *supra* note 46.
51 Sule, *supra* note 29, at 7.
52 Onyejianya, *supra* note 46.
53 *Id.*
54 I. Shaibu, *ICPC to Prosecute Heads of MDAs over Whistle-Blower Victimization*, *ICPC News*, Vol. 10(3), Sept. 3, 2015 at 13.
55 *Id.* at 13.
56 *How Foreign Affairs Ministry Suspended Whistle-blower for Exposing N70.6m Fraud at DTCA*, Vanguard News, (Jan. 21, 2017), http://www.vanguardngr.com/2017/01/foreign-affairs-ministry-suspended-whistle-blower-exposing-n70–6 m-fraud-dtca/.

> In the long run:
>
> Findings showed that although the EFCC waded into the matter and compelled the affected officials to refund the sum of N800,000, no further action was taken against the officials to refund the $229,000 which they had already taken. But a few days after the EFCC had begun investigation into the scam, the whistleblower was summoned by the DTCA and queried on why he leaked official documents to the anti-graft agency and the media thereby exposing the agency to embarrassment[57].

More worrisomely:

> Apart from that, the IGP to whom the man whistleblower had sought protection reported to the DTCA that the man was not under any serious threat and should not be afforded any protection. Arising from the police report, the DTCA on December 19, 2016 formally suspended Mr. Thompson from work and asked him to surrender all property in his disposal to the agency with immediate effect. The suspension letter with ref. No. DTCA/P.082 Vol. 1 was entitled, "Letter of suspension from duty" and signed by Sanda Isah, Head, Department of Administration/ Secretary SSAPDC[58].

In August 2011, a staff of the National Women Development Centre, Abuja, who exposed the alleged embezzlement by some top members at the centre, of a whopping N300 million meant for poverty alleviation programme, was unlawfully dismissed from service. It was through the heart-felt intervention of some civil society organizations that he was reinstated to office. This was before the period when Mrs. Fatima Bamidele, the Permanent Secretary of Ministry of Niger Delta, came under serious unwarranted threats for exposing corruption and mismanagement of public funds at the disposal of the Ministry. The life of Mrs. Bamidele was vehemently threatened for uncovering the fraud involving the sum of N803,000,000:00 by staff of the Ministry, which the EFCC since arraigned before a competent court of jurisdiction[59].

Perhaps another popular whistleblowing case that has become part of Nigeria's history is the one involving the former governor of the Central Bank of Nigeria (CBN). When the illegally and unsystematically suspended former governor of the Central Bank of Nigeria (CBN), Sanusi Lamido Snausi, popularly dubbed the "best CBN governor" blew the whistle over an alleged monumental scandal that resulted in the disappearance of the sum of $20,000,000,000.00 from the public treasury, it was already expected that Sanusi would be sacked, fired, removed or suspended. Nigerians partly agreed that some kind of unimaginable consequences must befall the former CBN governor, as he had stepped on toes by disclosing the scandal. As analysed, $20b, in literal terms, is equivalent to N3,200,000,000,000.00 (three trillion, two hundred billion) if $1 is N160. Then, every Nigerian will get about N17,778.00 (seventeen thousand, seven hundred and seventy-eight) if Nigeria has a total population of 180,000,000. If the money was to be shared among the states, every state, including the Federal Capital Territory, Abuja, could get as much as N86,486,486,486.50 (eighty-six billion, four hundred and eighty-six million, four hundred and eighty-six thousand, four hundred and eighty-six naira, fifty kobo)[60]. With this landmark disclosure by the former CBN governor, the public came to know about such a colossal case of corruption, but Sanusi was eventually suspended unconstitutionally[61]. The suspension is now a history, but nobody sought to protect Sanusi or to ensure his reinstatement in office.

In another development, Onyejianya recalls that:

> there has been a media frenzy following the leak of the acquisition of the two armoured security vehicles by the Nigerian Civil Aviation Authority (NCAA) on behalf of the Ministry of Aviation by a public officer of the agency. Whilst little attention has been paid to the whistleblower involved, it is somewhat discouraging to find his name bandied about by the press rather than preserving his anonymity[62].

In a similar vein:

> It could be recalled that one Mr. Aaron Akase, a staff of Police Service Commission blew the whistle to reveal serious allegations of possible fraud in the Commission involving the Management Mr. Akase was not only humiliated, he was also placed under indefinite suspension from work without salaries. He also faces threats to his life and family daily[63].

Moreover, "in October 2006 a prominent case of whistleblowing in Nigeria involving Cadbury's Nigeria led to the discovery of deliberate financial overstatements which has gone undetected for several years following an audit ordered by the parent company"[64]. Consequently, "Mr. Bunmi Oni, the Managing Director, and Mr. Ayo Akadiri, the Finance Director, were relieved of their duties following the scandal, and the Nigerian Stock Exchange Board also banned the two from running any public quoted company for life"[65].

Furthermore, *Nigerian Tribune* (online) observes that "a foremost causality is the suspension of former House of Representatives Appropriations Committee chairman who made shocking revelations on budget padding in the lower National legislative chambers"[66].

These few cases accurately depict the ugly face of the whistleblowing culture, and the accurate picture of the whistleblowing environment in Nigerian. At a time like this, when the international community has recognized whistleblowing as an indispensable tool in the global effort to exterminate the scourge of corruption and to curb its overwhelming effects on the

57 *Id.*
58 *Id.*
59 Newsdiaryonline, *supra* note 40.
60 I. Sule, *Sanusi the Whistleblower and the Nigerian Laws*, Sahara Reporters (Mar. 10, 2014), http://saharareporters.com/2014/03/10/sanusi-whistleblower-and-nigerian-laws-ibrahim-sule.
61 *Id.*
62 Onyejianya, *supra* note 46.
63 *Whistle-blowers Protection Bill Passes Second Reading*, Daily Post Nigeria (Oct. 20, 2016), http://dailypost.ng/2016/10/20/whistle-blowers-protection-bill-passes-second-reading/.
64 Onyejianya, *supra* note 46.
65 O. Bamgbose, *Whistle Blowing; The Whistle Blower; The Whistle Blowing Act: A Simple Expose/An Easy to Read Discourse on the Concept of Whistle Blowing*, 20(3) African J. for the Psych. Stud. of Social Issues 316, 320 (2017).
66 The Limits of Whistle-Blowing, Nigerian Tribune, (June 7, 2017), http://www.tribuneonlineng.com/limits-whistle-blowing/.

realization of the Millennium Development Goals (MDGs), whistleblowers in Nigerian private and public sectors have forcibly virtually gone silent. This is resultant from the shabby ways informants, who in "good faith" and "public interest" reveal that unethical practices in private and public spheres in Nigeria are being treated.

VI. IMPLICATION OF THE "OTHER SIDE" OF WHISTLEBLOWING FOR ANTI-CORRUPTION CAMPAIGN IN NIGERIA

The consequences of the current unsatisfactory state of affairs, that is, the unwarranted abuses and maltreatments of whistleblowers, for the war against corruption in Nigeria are huge and not far-fetched. Notably, the following implications are quite noticeable:

A. Absence of comprehensive whistleblowers' protection law

The demonstrable ugly fate suffered by whistleblowers in Nigeria basically sends signals within and outside the country about the share absence or lack of a comprehensive and effective legislation, enacted by the National Assembly of the country for ensuring the protection of patriots who act in public spirit to expose unethical misconducts at their workplaces. This can be taken to mean that Africa's largest country Nigeria is merely paying lip service with regard to her signatory and ratification of many of the international conventions and instruments in the field of anti-corruption. These include but are not limited to the United Nations Convention against Corruption (UNCAC), which Nigeria ratified on 14 December 2004, and the African Union Convention on Prevention and Combating Corruption (AUCPCC). Article 33 of the UNCAC encourages countries signatory to incorporate provisions for protection of whistleblowers and their families from any unwarranted treatment, in their domestic legislations. Similarly, in view of the Article 5(5) of the AUCPCC, State Parties undertake to adopt legislative and other measures to protect informants and witnesses, as well as their identities in corruption and related offences. However, Nigeria is still struggling with the problem of promulgating a known whistleblower protection law[67]. By implication, Nigeria seems to be reluctant in embracing holistically, globally accepted international best practices and legal instruments for fighting corruption and illegal practices. Yet, Nigerian Federal Government hopes to win the war against corruption in the country.

B. Discouragement to whistleblowers

The nonexistence of effective and known whistleblower protection legislation, coupled with the already "hostile" whistleblowing atmosphere in Nigeria discourages employees in both private and public sectors from coming forward to report genuine instances of corruption and unethical misconducts in their organizations. This, by extension, undermines the expected role of the citizens in the ongoing anti-graft war in the country.

C. Loss of confidence in governments' inability to protect

Given the level of insecurity and threats to life and loss of means of livelihood by sincere whistleblowers, who regard it a voluntary civil obligation to expose corrupt acts in the interest of the public, it becomes clear that Nigerian government currently lacks the capacity, legally and otherwise, to protect citizens who risk their lives for the good of the country. This state of affairs in turn creates loss of confidence and faith in government and further leaves adverse consequences for the relationship between the government and the citizens.

D. Lack of political will to combat corruption

Although Nigeria, especially under the present Buhari administration, can be said to be observably working assiduously to win the fight against corruption, not having a functional whistleblowers' protection law, shows a lack of sincerity and genuine will to address the issue of corruption in the country. Whistleblowing has recently become an integral part of anti-corruption frameworks in most countries. This is due to realization that the masses of the citizenry have important role to play in national anti-corruption campaigns, precisely as informants. Therefore, not considering the protection of whistleblowers a critical factor in winning the anti-graft war in Nigeria shows lack of seriousness on the part of the government, and this could make the situation worse off.

E. Nigerian government's indifference to good governance

The fight against corruption is directly located at the heart of the popular "good governance for development strategy" advocated by the international community. Without a model law to regulate whistleblowing activities and associated issues, it can be rightly affirmed that Nigeria is yet to show any serious sign of preparedness to allow the culture of good governance to take root within the polity.

VII. MEASURES FOR ADDRESSING THE SITUATION

In a bid to address the prevailing circumstance, enhance the potentials of whistleblowing and motivate employees in private and public sectors to perform their expected role in the society, in line with the argument of the functionalist tradition within the role theory, and to impact positively on the war against corruption in Nigeria, this paper recommends the following measures:

> The Nigerian Federal Government should, first and foremost, enact the proposed Whistleblower Protection Bill that has been on the floor of the Senate for some years now, so as to evolve a legal framework for ensuring adequate protection of informants from possible retaliation and victimization in public and private sectors. This would serve as the foundation upon which any functional whistleblowing framework or programme in the country will be erected. The pieces of provisions, as found variously in Sections 28 and 64 of the Independent Corrupt Practices and Other Related Offences Commission (ICPC) Act, 2000; Section 39(1) of the Economic and Financial Crimes Commission (EFCC) Act, 2004; and Section 27(2) of Freedom of Information (FOI) Act, 2011, among others, regarding whistleblowers protection, are not adequately sufficient to guarantee informants the needed protection. There is therefore the need for a dedicated and comprehensive legislation to properly protect whistleblowers. This would boost the confidence and courage of Nigerian employees to raise alarm, whenever the need genuinely arises, to disclose unethical acts in

67 Thomson Okpoko & Partners, *supra* note 39.

> public interest. South Africa, Ghana and Jamaica have laws similar to that of the UK, that is, the UK's Data Protection Act of 1998. Nigeria could develop her whistleblower protection legislation along the UK model. With the right legal framework in place, whistleblowing would sooner become a valuable tool for promoting government's anti-corruption drives and good governance in Nigeria.

The enacted legislation should be robustly enriched with special provisions regarding the contexts, conditions, meanings, forms and acts that constitute retaliation against whistleblowers, as well as the remedies and sanctions to be borne by culpable organizations and/or individuals. As a matter of deterrence, severe sanctions and penalties should be clearly spelled out to be meted out to any organizations or their officials, as the case may be, who involved in victimization or retaliation against any employee for exposing any wrongdoing. To borrow the views expressed in *The Leader News Online* of 31 May 2013, "such a law must carry has, uncompromising and unsympathetic punishment for offenders especially in the public sector"[68]. In the long run, this would help to drastically curtail the level of victimization suffered by genuine informants, who take risk to protect the country from possible dangers or loss of assets.

In a developing country such as Nigeria, where the culture of respect for the rule of law has not yet been firmly entrenched, depending solely on the law to provide security for whistleblowers is unarguably not sufficient. Nigerian government should also cultivate the practice of deploying the security apparatuses to ensure the protection of informants from possible physical dangers, such as attacks on their lives and family members, as well as property. Such a practice, if adopted, would help to build higher-level trust and confidence in government's ability to protect whistleblowers, which would further encourage patriotic individuals to be eager to raise the alarm against any corruption acts and illegal activities done in their organizations.

The risk undertaken by informants in Nigeria undoubtedly far exceeds the usual 5 percent financial reward accruable to them under the existing Federal Government whistleblowing programme. Without going too far, one of Nigeria's closest neighbouring countries, Ghana, offers as much as 10 percent to any whistleblower who discloses any information that eventually leads to the recovery of looted assets. Nigeria should take a cue from Ghana in this regard, as it would go a long way to motivate employees not to hesitate to report any acts of corruption by their organizations, especially with the understanding that might lead to positive changes in their economic status. Moreover, some countries, such as the United States, have set the precedent, in terms of instituting a whistleblower award scheme, all in a bid to ensure that individual employees are motivated to come forward and report corrupt practices in their organizations. To concretize this claim, Onyejianya confirms that:

> In the US, a whistleblower award program has recently been implemented to incentivise whistleblowers whilst preserving their anonymity at the same time. Setting a precedent, the US SEC paid out a watershed sum of $1 m on October 1, 2013 to an unidentified informant for providing information which led to a successful enforcement action and the recovery of large investor funds. The incentivisation scheme adopted in the US could set a new global standard for whistleblowing leading to enhanced protection as well as financial incentives for informants. Although there are ethical issues associated with incentivisation, if it is properly managed, the advantages could outweigh the disadvantages as it could still do more to encourage individuals to come forward. Good news for individuals who want to highlight internal corruption and bad practices but bad news for culpable organizations[69].

Nigeria could equally copy the US practice as that would go a long way in motivating the citizens to complement government's effort in the fight against corruption in the country.

The two major Nigerian anti-graft agencies, EFCC and ICPC, jointly with the Federal Ministry of Finance (FMF), which currently houses the existing Nigerian Federal Government's Whistleblowing Policy, have important roles to play in this regard. There is a need for a stronger and closer synergy between the three institutions and relevant Civil Society Organizations (CSOs). There is apparently somewhat a high-level lack of awareness among Nigerians regarding whistleblowing and its related matters. Many Nigerians do not know the available government policies, legal structures, procedures and the appropriate channels to report corruption cases, as well as how to make disclosures safely, in such a way that their identities are not disclosed. As a matter of fact, many are not even aware of the financial reward accruable to them, should they disclose any information that successfully leads to the recovery of any stolen government assets, which is supposed to be a source of motivation. Against this backdrop, the EFCC, ICPC and FMF need to work in closer collaboration with relevant CSOs, to promote whistleblowing culture among Nigerians, by sensitizing and enlightening the masses on the subject matter "whistleblowing", especially with regard to the existing Federal Government Whistleblowing Policy, since Nigeria is yet to promulgate a comprehensive whistleblower protection law. If undertaken, the awareness-raising exercise would help to equip and reposition Nigerians psychologically and otherwise to voluntarily speak out "in good faith" and "in public interest", in case of any observed corrupt practices in their organizations. With well-articulated advocacy and awareness programs, whistleblowing can serve as an important instrument for mobilizing citizens' support for government's anti-graft campaign in Nigeria.

Notwithstanding the existence of EFCC and ICPC, being Nigeria's two major anti-corruption agencies, the establishment of a Federal Bureau of Whistleblowing (FBWB) is of utmost important. This is in view of the wave of monumental corruption sweeping across all spheres of Nigeria's national life under the prevailing Fourth Republic and the present Buhari administration's unfettered drive and determination to rid the country of the twin evil of corruption and bad governance. The Bureau of Whistleblowing, if established, should be responsible for coordinating all whistleblowing programmes of the Federal Government and for handling all cases related to whistleblowing and associated matters in Nigeria. If implemented, this would be a watershed development in the history of whistleblowing practice in Nigeria.

VIII. CONCLUSION

In this paper, we have examined the "other side" of the whistleblowing culture. Whistleblowing has undoubtedly, a

68 The Leader News Online, *supra* note 41.
69 Onyejianya, *supra* note 46.

tremendous impact on the fight against corruption and unethical behaviours in most societies in the world. Hence, it has become widely accepted as an important part of any well-articulated, functional and result-driven anti-graft framework globally. This is to the extent that many extant international anti-corruption conventions, treaties and legal instruments, for example the UNCAC and AUCPCC, consist of provisions on whistleblowing, as evident in the study. Whistleblowing has thus come to be recognized as a very useful tool to all modern societies, owing to its intrinsic role and values. On the basis of its natural configuration as an anti-corruption mechanism, the whistleblowing mechanism is useful for protecting the public interest and saving the society from dangers and losses. It also serves as a means of incentivizing citizens who perform their expected role in the society (disclosure of wrongdoing in good faith and in public interest), in accordance with the role theory adopted in this study. Despite these facts, experiences show that while whistleblowing does much good to the public and individuals who leverage on the framework to report wrongdoing in their immediate environment, the practice is not without a huge cost, mainly on the part of the informants.

In virtually all societies, whistleblowers suffer great misfortune or ill fate for disclosing corrupt acts in their organizations, as a way of discharging their supposed duty as faithful community members. These include but are not limited to victimization, retaliation and recrimination by co-workers, witch-hunting, denial of work benefits, suspension from duty and even absolute dismissal. In this study, this is technically referred to as the "other side" of whistleblowing. The Nigerian experiences as reviewed in this study clearly supports this. Essentially, the "other side" of whistleblowing is not without some consequences for the war against corruption in Nigeria. As found in this study, it is a manifestation of the absence of virile and comprehensive whistleblowers' protection law; it discourages reporting of wrongdoing by employees; it creates loss of confidence and faith in Nigerian government's ability to protect its faithful citizens; it is a display of the lack of political will to combat corruption in the Nigerian state; and it also exposes Nigerian government's indifference to good governance. Despite the present circumstances, this study is optimistic that a proper adoption of the measures recommended in this paper would remedy the situation and bring about significant improvement in the usefulness of the whistleblowing mechanism in Nigeria's anti-graft war.

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RESEARCH ARTICLE

When Law & Economics violates the rule of law: Three illustrations

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ABSTRACT

Law & Economics scholarship movement continues to be an important methodological approach to the positive and normative analysis of law since its inception in the second half of the 20th century. However, Law & Economics has been criticized on various grounds, from its over-reliance on consequentialist arguments against deontological arguments to its indifference towards the fundamental concepts of law such as the Rule of Law. This latter argument is scrutinized and further illustrated in this article. Here, we demonstrate that despite the common theoretical underpinnings between Law & Economics and the Rule of Law (I), it is argued that Law & Economics conflicts with the Rule of Law principles on three major instances, namely the Coase theorem, the theory of efficient breach of contracts and the influential rule of reason in the field of competition law and policies (II). We therefore conclude that there cannot be a practical convergence between Law & Economics and the Rule of Law at the universal level unless Law & Economics revisits some of its normative conclusions that conflict with the Rule of Law as exemplified in this article.

Keywords: Law & Economics, Rule of Law, economic analysis of law, Coase theorem, efficient breach, Rule of Reason.

ملخص:

لا تزال حركة المنح الدراسية في مجال القانون والاقتصاد تمثل منهجا مهمّا للتحليل الإيجابي والمعياري للقانون منذ نشأتها في النصف الثاني من القرن العشرين. ومع ذلك، فقد انتقد القانون والاقتصاد لأسباب مختلفة، ابتداءا من الاعتماد المفرط على حجج العاقبة ضد حجج الأخلاق الواجبة إلى عدم اكتراثها بالمفاهيم الأساسية للقانون مثل حكم القانون. وسوف يتم التدقيق والتوضيح في السبب الأخير في هذه المقالة. وفي هذه المقالة يتم توضيح أنه على الرغم من الأسس النظرية المشتركة بين القانون والاقتصاد وحكم القانون الا انه لازال هنالك جدل بأن القانون والاقتصاد يتعارضان مع مبادئ حكم القانون في ثلاث حالات رئيسية: نظرية كوس (Coase)، نظرية الخرق الغير تعسفي، وقاعدة حكم السبب في مجال القانون والسياسات المنافسة. وتخلص هذه المقالة إلى أنه لا يمكن أن يكون هناك تقارب عملي بين القانون والاقتصاد وحكم القانون على المستوى العالمي إلا بإعادة النظر في بعض الاستنتاجات المعيارية للقانون والاقتصاد التي تتعارض مع حكم القانون كما هو مذكور في المادة.

الكلمات المفتاحية: القانون والاقتصاد، حكم القانون، التحليل الاقتصادي للقانون، نظرية (كوس)، خرق غير تعسفي، حكم السبب.

I. INTRODUCTION

In this section, we will provide some definitions of the Rule of Law (a), as well as envisage and define Law & Economics as a scholarship movement.

A. Definitional aspects of the Rule of Law

As *'existing constitutional principle'*[1], the Rule of Law is one of these expressions that are used in the law with a precise meaning but without a clear definition. Indeed, Lord Bingham admits that while an appealing concept, the 'Rule of Law' has admittedly no specific definition of its own. Historically, the Rule of Law has emerged as a substitute to the rule of might, to the rule of the Crown, to the rule of arbitrary powers – in a nutshell, to the rule of injustice[2].

On the one hand, the Rule of Law refers to the well-functioning of the legal order from a vertical relationship, whereby the rulers are also bound by the rules enacted. This is the Rule of Law as obedience to the law, that is, *the procedural justice of the Rule of Law*. On the other hand, the Rule of Law refers to the fact the law rules – *lex suprema est*[3]. The Rule of Law in that facet refers to the rule of justice since there are peaceful, voluntary and horizontal commitments by individuals to individuals where abidance to the law is essential[4]. Rule of Law is here approached as meaning protection of individual rights, *i.e. the substantive justice of the Rule of Law*. The dual etymological origin of the Rule of Law[5] has produced what can be identified as the three main legal characteristic of the Rule of Law:

1. Equality before the law: this requires the law to be indistinctly applicable to the rulers and individuals. The Rule of Law therefore entails the lack of discrimination not only between the rulers and the individuals but also among individuals. The law rules equally to persons in similar situations[6].
2. Liberty in the law: this is historically the most ancient element of the Rule of Law as illustrated in England, for instance, by the Magna Carta of 1215, followed by the Habeas Corpus of 1679, the Petition Rights of 1628 and the Bill of Rights of 1689. The Rule of Law ensures liberty in the law by granting fundamental personal rights (freedom from unfair trial and illegal detention, etc.) and fundamental economic rights (property rights, contractual rights, liability rules, etc.).
3. Certainty of the law*:* this is guaranteed by the Rule of Law with respect to the protection of vested interests and rights of individuals and with respect to quality requirements of the law. Law must be of sufficient certainty and quality in order to protect both the well-functioning legal order and individuals' rights to know and rely on the law. The legal certainty derived from the Rule of Law requires the law to be intelligible, of sufficient clarity, and of necessary predictability. Individuals must also put legitimate expectations onto the law for the law to be aligned with the Rule of Law principle.

These three characteristics of the Rule of Law correspond not only to ethical imperatives[7], but also to economic objectives[8]. Indeed, the Rule of Law is engrained with economic reasoning since it has been one of the prerequisites for the development of modern economies. As Zywicki argues, '*the rule of law should not be understood as a mere means to a social order predicated on limited government, freedom, and prosperity. Instead, the rule of law is an inherent part of a free, peaceful, and prosperous society*'[9]. More specifically, the Rule of Law encompasses the following features essential for a legal system to be conducive to prosperity:

The Rule of Law as rules of interdiction: the State is not permitted to be outside the ambit of an equal

1 Lord Bingham, *The Rule of Law*, 66 Cambridge L.J. 67, 67 (2007) (arguing that this principle has been '*too clear and well understood to call for statutory definition*').

2 'If Aristotle, Livy and Harrington knew what a republic was; the British constitution is much more like a republic than an empire. They define a republic to be '*a government of laws, and not of men.*' J. Adams *Novanglus Papers* No 7, *in* The Works of John Adams (Charles Francis Adams ed., Little, Brown, & Co. 1851). The idea that the Rule of Law is the government of laws and not of men is however an often-quoted expression whose origin is attributed to Chief Justice Marshall's opinion in *Marbury v. Madison*, 5 U.S. (I Cranch) 137, 163 (1803).

3 Indeed, the second meaning of Law comes from its second etymological origin: Law refers to the Latin word '*Ius*', which means the '*bond*', the '*connection*' and the '*lien*' with which individuals commit themselves to one another. *Ius*' comes from the verb '*iurare*', which means '*to swear, to commit oneself*' while expecting an '*ans-swear*' (or *'to speak in turn*'). '*Iustitia*' is the institutional protection of the '*ius*'. The opposite to '*iurare*' is '*iniurare*', which leads to warlike actions such as *'inflicted injuries and insults'* by destroying the social bonds of individuals.

4 *See* Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development* 9 (Legal Studies Research Paper Series No 09-0172, St John's University, School of Law, 2009).

5 Historically, the Rule of Law has emerged in the writing of lawyers and scholars, in modern times, from John Locke who vouched for governing through *'established standing Laws, promulgated and known to the People'*. He contrasted this with rule by *'extemporary Arbitrary Decrees'. See* J. Locke, Two Treatises of Government § 135–7 (P. Laslett ed., Cambridge University Press 1988). Locke added that the law cannot violate private property rights: *'The Supreme Power cannot take from any Man any part of his Property without his own consent.' Id.* at § 138. Then, Montesquieu considered that 'things that depend on principles of civil right must not be ruled by principles of political right', where 'civil right' is defined in Montesquieu as private law, which itself is the 'palladium of property rights *See* C. Montesquieu, *The Spirit of the Laws* 510 (A. Cohler, C. Miller & H. Stone eds., Cambridge University Press 1989). The first conceptualization of the Rule of Law in England remains the one proposed by Dicey who precised that the law is so that *'[N]o man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land'*. A.V. Dicey, Introduction to the Study of the Law of the Constitution 110 (McMillan & Co. 1982). *Dicey added that equality before the law is a fundamental trait of the Law : '[W]ith us no man is above the law [and] every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.' Id.* at 114. *Dicey defines the Rule of Law with three principles, namely: (a) 'law prevails over arbitrariness and discretionary power', (b) 'every man is subject to the ordinary law of the realm and amendable to the jurisdiction or the ordinary tribunals' and (c) 'the general principles of the constitution (as, for example, the right to liberty, or the right of public meeting) are […] the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts,' rather than the result of legislation.*

6 For, the rule of law requires 'not only that no man is above the law, but (what is a different thing) that (…) every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.' *See* Dicey, *supra* note 6, at 114.

7 Or a morality of law, *see* Lon L. Fuller, The Morality of Law 39 (Yale University Press 1964), where Fuller elaborate eight principles of legality that embodies the essence of the rule of law: 1) laws must be of general application (i.e. specifying rules prohibiting or permitting behaviour of certain kinds), 2) laws must be widely promulgated or publicly accessible to ensure that citizens know what the law requires, 3) laws should be prospective in application, 4) laws must be clear and understandable, 5) laws must be non-contradictory, 6) laws must not make demands that are beyond the powers of the parties, 7) laws must be constant and not subject to frequent changes, 8) congruence between rules as announced and their actual administration and enforcement. *See also* Joseph Raz, *The Rule of Law and Its Virtue, in* The Authority of Law: Essays on Law and Morality 214-18 (Joseph Raz ed., Clarendon Press 1979), who add to Fuller's principles a requirement on institutional design (namely, quality and independence of the judiciary).

8 Most authors try not to define the Rule of Law as this concept is presumably self-explanatory to them, or explained by references to scholarships. For instance, T. Zywicki (2012) argues that '*it is not necessary to specifically define the rule of law; it is adequate to adopt a functional shorthand definition. At its heart the value of the rule of law is Hayekian. Simply, the world is in a state of constant flux.' See* T. Zywicki, *Economic Uncertainty, the Courts, and the Rule of Law*, 35 Harv. J.L. & Pub. Pol'y 195, 196 (2012), who concludes that *'it is precisely in times of crisis that we must adhere to the rule of law.' Id.* at 212. The unanimity regarding the Rule of Law may well be caused by its lack of clear definition. S. Chesterman (2008) hence argues that *'high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning'. See* S. Chesterman, *An International Rule of Law?*, 56 Am. J. Comp. L. 331, 332 (2008); *see also* Richard H. Fallon, Jr., *The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1 (1997).

9 T. Zywicki, *The Rule of Law, Freedom and Prosperity*, 10 Sup. Ct. Econ. Rev. 1, 6 (2003). Free states enjoy the Rule of Law as engine of prosperity, *see* Friedrich A. Hayek, *The Origins of the Rule of Law,* in The Constitution of Liberty, 162 (1960); Anthony I. Ogus, *Economics, Liberty and the Common Law*, 18 J. Soc'y Pub. Teachers L. 42 (1980).

implementation of the law across individuals[10], to illegally detain individuals, to prosecute them without charge, to judge twice the same facts, to seize and/or trespass property without a legal basis and so on.

The Rule of Law as rules of direction: strong protection of property rights, the lay down of liability of rules for deterring those having involuntarily entered in inefficient exchanges, the lay down of contractual rules for securing voluntary and efficient exchanges, the lay down of a competitive order protecting the contractual freedom of economic actors and so on[11].

The Rule of Law as rules of procedure: the judiciary and the constitutional system guarantee the separation of powers whereby the government is submitted to both parliamentarian sovereignty and independence of the judiciary; courts' procedures are designed transparently and applied equally, trials are fair, and intrinsic qualities[12] are attached to the law such as the clarity and the predictability of the law.

These three qualities of the Rule of Law are cumulative qualities because a legal system grossly lacking one or two of these three qualities will not be considered as respecting the ideals of the Rule of Law.

B. Definitional aspects of Law & Economics

Economics studies the prices put on human actions and compares the costs and benefits derived from the social ordering of things with a fictional – 'natural' or alternative – ordering of things. Both law and economics deal with the study of the behaviours of individuals in a world of scarcity of resources[13]: because resources are scarce, human actions are to be constrained by legal determinants and/or by economic necessities[14]. The interactions between law and economics are therefore apparent with respect to the impact of legal interventions onto market exchanges and to the necessary scientific study of humanly designed legal norms. The law refers to the social ordering of individuals restricted in their means of actions by sanctionable and enforceable norms[15]. The law puts a price on human actions that impairs the natural ordering of market exchanges in favour of a generally accepted social ordering of things[16]. Economics refers to the scientific study of the human actions by the individuals. If economics is focused on the maximization of wealth (or of utility), the efficiency rationale of economics can be compatible with the justice rationale of the law (or juridical sciences) because if a legal rule is not necessarily efficient, an inefficient rule can hardly be a legal rule. Indeed, an inefficient situation, at its cornerstone, yields more costs than benefits and therefore infringes upon more rights than it protects or creates existing rights[17].

The two disciplines – law and economics – have been comprehensively analysed under the Law & Economics scholarship, which has been a major trend of legal and economic literature from the second half of the 20th century[18]. The lessons of the Law & Economics movement have participated in increasing the efficiency of the legal rules and institutions. While Law & Economics scholarship has been very rich in the diversity of approaches it generated – from Austrian economics[19] to utilitarian economics through public choice school[20] and behavioural economics[21] – and

10 Some define the Rule of Law only by this feature. For example, *see* N. Mandela, *The Rule of Law – Cornerstone of Economic Progress, Address at the IBA South Africa Conference*. InterAlia, Spring, 1996, at 41, 42, (arguing *'But what is "rule of law" and the characteristics desired in this regard? The question of the precise meaning of the rule of law has been much debated. At its most basic, the rule of law has been held to mean simply that the government is required to act in accordance with valid law.'*) This definition of the Rule of Law is the 'narrow conception' of the Rule of Law according to O. Chukwumerije, *Rhetoric versus Reality : The Link Between the Rule of Law and Economic Development,* 23 Emory Int'l L. Rev. 383, 400 (2009). J. Raz has been one of the main proponents of such narrow conception of the Rule of Law when it defines it as meaning: *'The rule of law means literally what it says: the rule of laws. Taken in its broadest sense this means that people should obey the law and be ruled by it,' see* J. Raz, The Authority of the Law 212 (1979).

11 For a discussion of the Hayekian view on the Rule of Law, which requires the existence of substantive rules with Posner's view on the Rule of Law, which denies the fact that the Rule of Law contain a set of legal rules, *see* T. Zywicki, *Posner, Hayek and the Economic Analysis of Law*, 93 Iowa L. Rev. 559 (2008).

12 The intrinsic qualities of the law required by the Rule of Law are tantamount to the eight principles of Fuller's 'inner morality of the law', where the law is said to have the following characteristic traits for being moral: generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruence. *See* Fuller, *supra* note 7. Fuller added that *'Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey (…) your indifference to his powers of self-determination.' Id.* at 162. Similarly, J. Raz attributed to the Rule of Law the qualities of clarity, accessibility, stability and predictability of the law. *See* Raz, *supra* note 10, at 214-19.

13 *See* F. Easterbrook, *The Inevitability of Law and Economics*, 1 J. Legal Educ. 3 (1989) (Easterbrook simply and rightly argues, at 5, that *'Economics is the study of rational behaviour under constraint. All good things are scarce (…) Laws are, or alter, constraints'). See also* R.J. Heilman, *The Correlation Between Law and Economic Science*, 20 Cal. L. Rev. 379 (1932); Karl N. Llewellyn, *The Effect of Legal Institutions upon Economics*, 15 Am. Econ. Rev. 665 (1925).

14 See Heilman's insightful discussion on the relationship between law and economics in terms of scarcity of resources in the world: Heilman *supra* note 13.

15 *See* F. Fukuyama, *Development and the Limits of Institutional Design, in* Political Institutions and Development: Failed Expectations and Renewed Hopes 21, 24 (Natalia Dinello & Vladimir Popov eds., (2006).

16 Robert D. Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1523 (1985).

17 A. Portuese, *Principle of Proportionality as Principle of Economic Efficiency*, 19 Eur. L.J. 612 (2013) for a discussion on efficiency rationale of the balancing exercise of the proportionality principle.

18 For a general introduction to Law & Economics, *see* E. Mackaay, *History of Law and Economics*, *in* Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and *Economics* (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). *See also* L.A. Kornhauser, *L'analyse Économique Du Droit (The Economic Analysis of Law)*, 313 Revue de Synthese 118, 118-19 (1985); L.A. Kornhauser, *Economic Analysis of Law*, 16 Materiali per una Storia della Cultura Giuridica, 233 (1986); L.A. Kornhauser, *Economique (Analyse - du droit)*, *in* Dictionnaire Encyclopedique de Theorie et de Sociologie du Droit, Librairie General de Droit et de Jurisprudence (André-Jean Arnaud ed., 1988); Richard A. Posner, *The Economic Approach to Law*, 53 Tex. L. Rev. 757 (1975). Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. Chicago L. Rev. 281 (1979); Richard A. Posner, *The Law and Economics Movement*, 77 Am. Econ. Rev. Papers & Proceedings 1 (1987); Cento G. Veljanovski, *The Economic Approach to Law - A Critical Introduction*, 7 British J. L. & Soc'y 158 (1980).

19 *See, e.g.*., Friedrich A. Hayek, Law, Legislation and Liberty - Volume 1: Rules and Order (1973); Friedrich A. Hayek, Law, Legislation and Liberty - Volume 2: The Mirage of Social Justice (1976); Friedrich A. Hayek, Law, Legislation and Liberty - Volume 3: The Political Order of a Free People (1979); Bruno Leoni, Freedom and the Law (3d ed. 1991); Randy E. Barnett, *The Function of Several Property and Freedom of Contract, in* Economic Rights 62-94 (Ellen Frankel Paul Jr., Fred D. Miller & Jeffrey Paul eds., 1992); Randy E. Barnett, The Structure of Liberty - Justice and the Rule of Law (1998); Mario J. Rizzo, *Uncertainty, Subjectivity, and the Economic Analysis of Law*, *in* Time, Uncertainty, and Disequilibrium - Exploration of Austrian Themes 71-95 (Mario J. Rizzo ed., 1990); Mario J. Rizzo, *Change in the Common Law: Legal and Economic Considerations (Symposium)*, 9 J. Leg. Stud. 189 (1980); Stefan Voigt, *On the Internal Consistency of Hayek's Evolutionary Oriented Constitutional Economics - Some General Remarks*, 3 Journal des Économistes et des Études Humaines, 461 (1992); Henri Lepage, Pourquoi la Propriété (Why Property?) (1985); Anthony I. Ogus, *Economics, Liberty and the Common Law*, 15 J. Soc'y Pub. Teachers L. 42 (1980); Anthony I. Ogus, *Law and Spontaneous Order: Hayek's Contribution to Legal Theory*, 16 J. L. & Soc'y 393-409 (1989).

20 Anthony Downs, An Economic Theory of Democracy (1957); James M. Buchanan & Gordon Tullock, The Calculus of Consent - Logical Foundations of Constitutional Democracy (1962); Towards a Theory of the Rent-Seeking Society (James M. Buchanan, Robert D. Tollison & Gordon Tullock eds., 1980); A. Allan Schmid, Property, Power, and Public Choice - An Inquiry into Law and Economics (1978).

21 *See, e.g.*, David D. Friedman, Law's Order: What Economics Has to Do with Law and Why It Matters (2000); Robin Paul Molloy, Law and Market Economy (2000); Eric Posner, Law and Social Norms (2000); Behavioral Law and Economics (Cass Sunstein ed., 2000). For a recent account of this evolution from a founding scholar of Law & Economics, see G. Calabresi, The Relationship of Law and Economics (2016), *available at* http://blog.yalebooks.com/2016/01/26/%EF%BB%BF%EF%BB%BFeconomic-analysis-of-law-or-law-and-economics/.

while some make the distinction between Law & Economics and economic analysis of law, we will refer to Law & Economics scholarship as the traditional (and influential) Posnerian Law & Economics[22]. On the basis of rational self-interestedness and welfare maximization criterion, Posnerian Law & Economics claims that common law rules tend to be economically efficient (*positive claim*) and that legal rules ought to be economically efficient (*normative claim*). The notion of economic efficiency itself has been the subject of much controversy[23]. However, in general, Law & Economics scholarship 'survived' and economic efficiency remains the prime normative criterion for Law & Economics.

In that regard, Law & Economics has allegedly identified efficiency-enhancing rules in modern economies, and relied classically on neoclassical liberal theory and utilitarianism.

After having introduced the Rule of Law and Law & Economics scholarship, we now turn to the common theoretical convergence between the Law & Economics movement and the Rule of Law requirements. More specifically, the rationale of the law and economics are reconciled, balanced and analysed into a common methodological approach under the Law & Economics scholarship movement.

II. THEORETICAL CONVERGENCE: TWO ILLUSTRATIONS

A. Philosophical convergence: Law & Economics and the rule of law

Law & Economics have been argued against the political (if not populist) use of the law in favour of economically motivated legal rules. In that respect, the Rule of Law can be seen as echoing Law & Economics to the extent that Rule of Law principles aim at rationalizing the legal rules by stating the principles of law which are independent from any political volatilities or from any populist agenda.

Therefore, a philosophical convergence exists between the Law & Economics methodological approach and the Rule of Law principles only to the extent that Law & Economics is compatible with these principles whenever they bear an economic rationale such as the protection of property rights, the protection of the freedom of contract, the protection of the competitive order and the absence of unjustified discrimination. These values strongly enshrined into Rule of Law principles have been defined by Law & Economics scholars as being efficiency-enhancing. While the Law & Economics scholarship justifies these rules with arguments pertaining to consequentialist ethics, the Rule of Law principles are justified on the basis of arguments pertaining to deontological ethics. Consequently, while Law & Economics scholarship uses consequentialist arguments to justify liberally minded rules such as property rights protection and individual freedom in a market economy, the Rule of Law has recourse to deontological arguments to also justify market economy principles.

B. Universalist convergence: Law & Development, Law & Finance

Law & Economics movement has even generated a sub-trend of research wherein Law & Economics approach is applied to the developing world – the so-called 'Law & Development' and 'Law & Finance' approaches[24]. The Rule of Law, from its inception, had a universalist ambition. The guarantee of procedural and substantive rights from one country, *i.e.* England, had quickly been the source of inspirations for popular claims requesting similar rights. Thus, the French Declaration of Human Rights of 1789 has an explicitly universal ambition, inasmuch as the American Bill of Rights of 1791 and other international and constitutional texts[25]. Interestingly enough, the Rule of Law principles and Law & Economics have so far remained quite isolated from one another. The Rule of Law has been a crucial constituent of the law and development practice in the late 20th century[26]. *'[I]t is the efficiency logic of law and economics that is the real novelty act here with the rediscovering of the Rule of Law*', argues Newton[27].

For the United Nations, the Rule of Law are principles of governance in which all 'persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and that are consistent with international human rights norms and standards'. The UN posits that application of the Rule of Law requires 'measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency'[28].

Also, The World Justice Program (WJP) uses a working definition of the rule of law based on the following four universal principles: i) the government and its officials and agents are accountable before the law; ii) laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property; iii) the process by which the laws are enacted, administered and enforced is accessible, fair and efficient; and iv) justice is delivered by competent, ethical and independent representatives and neutrals who are of sufficient number, have adequate resources and reflect the makeup of the communities they serve[29].

The export of the Rule of Law principles[30], historically a Western heritage of legal culture, has dramatically increased with the fall of communism in the late 1980s and the early 1990s[31]. Indeed, the prevailing model of capitalism, combined with the Rule of Law principles, has gained the sufficient political and legal legitimacies for a legal transplant of the fundamental principles commanded by the Rule of Law[32]. Historically[33], the modern development theories started in the second half of the 20th century with what Newton calls the '*Inaugural Moment*' of the '*Developmentalist Démarche*' of

22 *See, e.g.*, Richard Posner, Economic Analysis of Law (1st ed. 1973); Richard Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. Leg. Stud. 103 (1979); Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 Hofstra L. Rev. 487 (1980); Richard Posner, *Wealth Maximization Revisited*, 2 Notre Dame J.L. Ethics & Pub. Pol'y 85 (1980); Richard Posner, The Problems of Jurisprudence (1990); Richard Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry, in* Philosophical Foundations of Tort Law (David G. Owen ed., 1995).

23 See for instances of decades-long intellectual debates, Rizzo, *supra* note 19; Victor P. Goldberg, *Toward an Expanded Economic Theory of Contract*, 10 J. Econ. Issues 45 (1986); C. Edwin, *The Ideology of Economic Analysis of Law*, 5 Phil. & Pub. Aff. 3 (1970).

24 For a detailed account of the rise of the Law & Development movement as sub-discipline of the Law & Economics, *see* Chukwumerije, *supra* note 10, at 288-99.

25 G. O'Donnell, *Why the Rule Of Law Matters*, 14 J. Democracy 15 (2004).

26 *See* The New Law and Economic Development: A Critical Appraisal (D.M. Trubek& A. Santos eds., 2006); K. *Dam, The Law-Growth Nexus: The Rule of Law And Economic Development (2006)*; K.E. Davis & M.J. Trebilcock, *The Relationship Between Law and Development: Optimists versus Skeptics*, 56(4) Am. J. Comp. L. 895 (2008).

27 *See* Glaeser et al., *Do Institutions Cause Growth?.* ; S. Haggard & L. Tiede, *The Rule of Law and Economic Growth: Where Are We?*", 39(5) World Dev. 681 (2011); S. Newton, *The Dialectics of Law and Development, in* The New Law and Economic Development: A Critical Appraisal 174, 192 (D.M. Trubek& A. Santos eds., 2006).

28 U.N. Office of the Sec. Gen., The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004), http://www.unrol.org/doc.aspx?n=2004%20report.pdf.

29 *See* M.D. Agrast et al., *Rule of Law Index 2012-2013*, The World Justice Project (2013), http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf.

30 *See* Trubek & Santos, *supra* note 26; *Dam, supra note 26:* S. Stacey, Promoting the Rule of Law Abroad: In Search of Knowledge (Thomas Carothers ed., 2006).

31 Haggard & Tiede, *supra* note 27.

32 J. Reitz, *Export of the Rule of Law*, 13 J. Transnat'l L. & Contemp. Problems 429, 432 (2003).

33 For an historical outlook, *see* L. Nader, *Promise or Plunder ? A Past and Future Look at Law and Development.* 7 Global Jurist 1 (2007).

1960–1974[34]. This approach is characterized by 'decolonization', and the 'statist principles and prescriptions of first-generation development economics are routinely and ubiquitously deployed'. In the early 1970s, the 'Political Economy' approach of the 'Critical Moment' from 1974 to 1985 prevailed: *'the oil shocks, international economic slowdown, collapse of international monetary regulation (floating currency exchange rates), and the advent of the Third World debt crisis, [t]hese form the backdrop of the rise of the family of antidevelopmentalist theories'*[35]. The need for a more political economy approach was derived from these macroeconomics shocks, therefore leaving only an incidental role for the law in development theory.

Also, the Critical Moment has been internationalized with national economic policies substituted to a more encompassing approach of global economic development via the growing role of the International Monetary Fund[36]. With an increasing impact of Law & Economics in the late 1980s, with the rise of the so-called 'Washington consensus' with the World Bank[37] and the International Monetary Fund, the late 1980s and the early 1990s have experienced the rediscovering of the Rule of Law in development approaches. To demonstrate this great interest, the World Bank, for instance, is said to have alone *'spent $2.9 billion dollars on some 330 projects in its pursuit of the ROL since 1990'*[38]. The export of Rule of Law principles only might trigger criticism of legal imperialism. Indeed, the less political objectives are encompassed in Rule of Law reforms, the more such reforms will portray an intellectual valence disconnected with reservations of legal imperialism[39].

The '*Revivalist Moment*' of 1985–1995 is the moment when the Rule of Law has become the main tool for development economics[40]. The '*revival*'[41] of the Rule of Law is rapid and irresistible both in the literature and in practice. Bolstered by the rise of the theory of new institutional economics[42], the importance of the Rule of Law applied in developing countries has been seen as a new way to develop economies after the failures of the previous developmental approaches to the Third World[43]. The Revivalist Moment has been characterized by:

- Legislative best practices;
- Analyses of proposed or existing commercial legislation, or regulatory approaches, from an economic efficiency or institutionalist standpoint;
- Evaluations of the implementation of new legislation;
- Institutional capacity building of the legal sector;
- Dispute resolution;
- Legal education reform;
- Rule of Law;
- Review articles and studies[44].

Advisors should therefore focus on the narrow understanding of the Rule of Law in order to implement such principles of law for the improvement of both the legal and economic orders of a particular society. The narrow version of the Rule of Law, focusing only on the legal and institutional improvements, can claim universality more easily[45]. The protection of the Rule of Law principles in developing countries is 'measured' through data sets such as the one proposed by the World Justice Programme Rule of Law Index, which takes the four previously mentioned WJP principles as its basis and disaggregates these into 48 sub-factors to inform the following nine dimensions of the rule of law: limited government powers, absence of corruption, order and security, fundamental rights, open government, regulatory enforcement, access to civil justice, effective criminal justice and informal justice[46].

The export of Rule of Law through the current 'Revivalist Moment' of Law and Development has also been reinforced by another trend of Law & Economics scholarship called 'Law & Finance'[47]. The theoretical ramifications of Law & Economics with the Rule of Law are most exemplified in this 'Law & Finance' research agenda where it has been evidenced that countries that most protect the Rule of Law principles are those having the most efficient rules and most prosperous economies. While being debated and contested, the 'Law & Finance' trend of researches has been influential in fostering the justification of Rule of Law principles in developing countries.

Indeed, Law & Finance has participated in the Law & Development's Revivalist Moment, where legal theory came to the conclusions that rather than detailing precise legal rules, the promotion of the principles derived from the Rule of Law would most be conducive to the prosperity of developing economies. Indeed, most human rights enshrined in Rule of Law principles are efficiency-enhancing[48]. Institutional rules and legal rules are conducive to economic efficiency whenever Rule of Law principles,

34 Newton, *supra* note 27, at 170.
35 *Id.* at 182.
36 Haggard & Tiede, *supra* note 27.
37 *See* G. Barron, *The World Bank & Rule of Law Reforms* (LSE Development Studies Institute Working Paper n°05-70, 2005).
38 *Id.* at 9.
39 For discussion on such suspicions, *see* Reitz, *supra* note 32, 460, that *'It is true that some legal exporters, especially the World Bank, have exerted strong financial pressure on importer countries to adopt neo-liberal reforms for their economies by eliminating or greatly reducing state subsidies and other forms of welfare. This could be viewed as a form of economic coercion. Such economic reform has no necessary relationship to the rule of law, I have argued, but it has regrettably generated some opposition to rule of law reforms'.*
40 Newton, *supra* note 27, at 187.
41 T. Carothers, *The Rule of Law Revival*, 77 Foreign Aff. 95 (1998).
42 Nobel Prize winning economic historian Douglass North is a prime example of the rise of this economic theory. *See* Douglass C. North, Institutions, Institutional Change, and Economic Performance (1990).
43 *See* R. Cooter & H.-B. Schaefer, Solomon's Knot: How Law Can End the Poverty of Nations (2011).
44 Newton, *supra* note 27, at 190.
45 Reitz, *supra* note 32, 442-43.
46 *See* Agrast et al., *supra* note 29. *See also* U.N., U.N. Indicators of the Rule of Law (2011), http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf. On the scientific difficulty to collect such data, *see* Haggard & Tiede, *supra* note 27.
47 This trend of literature has been developed by R. La Porta et al., *Legal Determinants of External Finance*, 52 J. Fin. 1131 (1997); R. La Porta et al., *Law and Finance*, 106 J. Pol. Econ. 1113 (1998); R. La Porta et al., *The Quality of Government*, 15 J.L. Econ. & Org. 222 (1999); R. La Porta et al., *Government Ownership of Banks*, 57 J. Fin. 265 (2002). This trend of literature expressly or implicitly concludes that common law countries are superior in terms of efficiency than civil law countries because the former upheld Rule of Law principles more vigorously. This claim has been criticized, for instance, by M. Graff, *Law and Finance: Common Law and Civil Law Countries Compared - An Empirical Critique*, Economica, 75(297), 2008, at 60–83; A. Musacchio, *Can Civil Law Countries Get Good Institutions? Lessons from the History of Creditor Rights and Bond Markets in Brazil*, 68(1) J. Econ. Hist. 80 (2008).
48 On the relationship of rule of law principles and efficiency of legal rules in developing countries, *see* Trubek & Santos, *supra* note 26; Davis & Trebilcock, *supra* note 26; M. Trebilcock, & J. Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 Va. L. Rev. # (2005); L. Blume & S. Voigt, *The Economic Effects of Human Rights*, 60(4) Kyklos 509 (2007); S. Knack & P. Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Indicators*, 7(3) Econ. & Pol. 207 (1995); on de facto judicial independence, *see* B. Hayo & S. Voigt, *Explaining De Facto Judicial Independence*, 27(3) Int'l Rev. L. & Econ. 269 (2007).

notably property rights protection[49], are upheld[50]. Convincingly and empirically evidenced, the study conducted by Kaufmann et al. demonstrates that 1-point increase on the 6-point of their Rule of Law scale is correlated with a 2.5- to 4-fold improvement in per capita incomes of developing countries[51].

As a result, one would wonder what are the remaining differences between the Rule of Law principles and Law & Economics scholarship in general. Despite the common underpinnings between the Rule of Law principles and Law & Economics both theoretically and apprehended in their universalist dimensions, the following section argues that Law & Economics scholarship still conflicts with the Rule of Law principles, as evidenced by three instances of legal issues.

III. PRACTICAL DIVERGENCE: THREE ILLUSTRATIONS

The Rule of Law shares common grounds with the Law & Economics movement. This hypothesis theoretically developed in the previous section will now be tested in practice. We will demonstrate the fundamental conflicts between the Rule of Law principles and Law & Economics teachings using three illustrations chosen from three different legal issues, which are presented below.

A. The Coase Theorem in property rights protection

The so-called '*Coase theorem*' refers to Nobel Prize Laureate Ronald Coase's seminal article '*The Problem of Social Cost*' published in the Journal of Law & Economics[52], wherein Ronald Coase demonstrated that nuisance disputes will always be efficiently resolved regardless of the legal rule chosen, provided that the parties in the dispute can negotiate with zero transaction costs.

We will now discuss the essence of what has subsequently (and curiously) been called the '*Coase theorem*'. Ronald Coase has demonstrated that in a hypothetical world of zero transaction cost, parties with a conflict would bargain and achieve efficient allocation of resources, independently of the legal rules allocating rights between them. Property rules are normally protected by injunctive reliefs, namely rules that stop trespassers to encroach on individuals' properties. Liability rules are normally governed by damages – financial compensation, whereby the victim is compensated for the harm caused. Ronald Coase demonstrates that legal rules ascribing property rights are irrelevant with respect to efficiency if parties can costlessly bargain over their rights in a hypothetical world of costless transactions.

Ronald Coase takes a simple example to illustrate his argument, that is, a cattle-raiser and a farmer operating on neighbouring properties. It is inevitable that the cattle would stray onto the farmer's property and destroy crops. An increase in the quantity of meat produced corresponding to an increase in the size of the cattle herd increases the crop loss to the farmer so that the case may be summarized as follows:

Cattle Meat Output, in tons	Additional Profits	Total Profits (P)	Additional Damage, in £	Total Damage (D)	Total Net Profits (P-D)
0	0	0	0	0	0
1	10.000	10.000	1.000	1.000	9.000
2	4.000	14.000	15.000	16.000	-2.000
3	2.000	16.000	20.000	36.000	-20.000

In terms of property rights, entitlements are either for granting the farmer a right to have undamaged crops or for granting the cattle-raiser a right to raise cattle, including a right to damage the farmer's crops. If the farmer holds the entitlement and if he is protected by injunction, then he can stop the cattle-raiser from allowing his cattle to damage the crops. If the cattle-raiser holds the entitlement, then the farmer has to buy him off to be free from damage.

The more efficient solution with respect to the opportunity cost of not maximizing outputs would be to negotiate damages rather than injunctive reliefs. The cattle-raiser will have to pay damages for the harm caused by his cattle. Conversely, if the cattle-raiser holds the entitlement, protecting him with damages as remedy would mean that the farmer will have to compensate the cattle-raiser for his 'damages' (lost profits) in order to restrict his cattle raising.

In the current situation, the efficient solution from the example above would be to produce only 1 ton as it maximizes overall net profits with £9.000. However, if transactions are costless, information is full and damages of liability rules are being preferred over injunctions for property rights issues, then as Coase argues, it becomes possible to reach a completely different outcome than the one delivered by the current state of law. Indeed, in the example given above, the cattle-raiser stands to gain a £10.000 profit from producing 1 ton of meat while the farmer only loses £1.000 worth of crops. Thus, it would be efficient to reach an agreement under which the cattle-raiser would pay the farmer a sum between £1.000 and £10.000 in return for a right to produce 1 ton of meat. Production will remain at the optimum level of 1 ton. To produce 2 tons, the cattle-raiser would have to buy the farmer off with at least £15.000, whereas he

49 *See* specifically D. Acemoglu & S. Johnson, *Unbundling Institutions*, 113(5) J. Pol. Econ. 949 (2005; D. Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 Am. Econ. Rev. 1369 (2001); D. Acemoglu et al., *Institutions as the Fundamental Cause of Long-Run Growth*, *in* Handbook of Economic Growth Vol. 1A 385-472 (P. Aghion, and S. Durlauf eds., 2005).

50 *See* Stacey, *supra* note 36; Trubek & Santos, *supra* note 26; Dam, *supra* note 27; Acemoglu et al., *supra* note 49; E. Neumayer & L. Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment*, 33(10) World Dev. 1567 (2005); John Ahlquist & Aseem Prakash, *FDI and the Costs of Contract Enforcement in Developing Countries*, 43(2) Pol'y Sci. 181 (2010). But compare Haggard & Tiede, *supra* note 47; A.J. Perry, *The Relationship Between Legal Systems and Economic Development: Integrating Economic and Cultural Approaches*, 29(2) J. L. & Soc'y 282 (2002).

51 D. Kaufmann, A. Kraay & P. Zoido-Lobaton, *Governance Matters* (World Bank Policy Research Working Paper Series 2196, 1999). In a similar vein, *see* Rodrik, Subramanian & Trebbi, *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development*, J. Econ. Growth 131 (2004) who demonstrate that property rights protection and rule of law protection ensure higher per capita incomes in developing countries.

52 R. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1960).

stands to gain only £4.000. Similarly, it would not be sensible to produce the third ton.

The resulting production level would be the same if a damage remedy were chosen instead. It would be beneficial to both parties for the cattle-raiser to pay the farmer 1.000 £ in damages to produce 1 ton of meat. Again, there would be no incentive to bargain for a higher level of production. The efficient amount of meat would still be produced if the cattle-raiser held the entitlement instead. The cattle-raiser would have the right to produce meat at maximum capacity (*i.e.* 3 tons) without having to compensate the farmer for the damage to his crops. Because of zero transaction costs, the farmer would negotiate with the cattle-raiser to reduce the output of meat. The farmer would buy off the cattle-raiser with some amount between £6.000 and £35.000. The cattle-raiser would reduce output from 3 tons to 1 ton and thereby reduce damage to the farmer by £35.000. It would not be beneficial to negotiate for a further reduction in the production of meat since the farmer would have to pay the cattle-raiser £10.000 to reduce damage of only £1.000. The efficient amount of production would be reached, as argued by Coase.

The Coase theorem, by emphasizing the disturbing role of transaction costs in reaching efficient solution, has seminally pointed out the problem of the social costs generated by transactions. From a normative perspective, the Coase theorem, applied in a positive cost world, justified institutions' roles, not only paved the way for the New Institutionalism personified by economists such as Nobel Prize Laureate Williamson, but also has been foundational to the Law & Economics scholarship[53].

With respect to the Law & Economics teachings examined from the Rule of Law principles' perspective, one can ask the following question: to what extent the solution provided by the so-called '*Coase theorem*', aimed at reaching an efficient solution, contradicts the Rule of Law? Let us ignore the economic feasibility of the assumptions under which the Coase theorem can realistically take place[54], there are a number of reasons for seeing the Coase theorem, albeit fundamental to the Law & Economics scholarship, as encroaching upon the fundamental principles commanded by the Rule of Law.

First, property rights are not, under Coase theorem, protected by injunction reliefs but by simple damages: trespassers are not estopped from violating individuals' properties. They are only asked to compensate the victims for such trespasses. The moral imperative of prohibition of trespasses, given the violation of the fundamental property rights, is disregarded. The ethical requirement of adherence to the law is jeopardized for the sake of efficiency and consequentialist-loaded arguments. The justice of the Coase theorem solution is highly questionable. Second, the economic rationale of the Coase theorem can be questioned on the very economic side: the dynamic approach of the benefits of property rights is denied in favour of a static approach to social production. Indeed, what if the property owner, here the farmer, planned to invest in his property and have long-term projects that require free disposal of his own property? The social cost, à la Coase, is considered only from a static perspective without the long-term perspective of negative impact on property investments[55].

Consequently, the enforcement of fundamental rights and the claim of one's property rights can be seen, in Coase's eyes, as uncooperative behaviours creating extra transaction costs. This 'inefficient' behaviour is nothing less but the enforcement of constitutional rights that every individual is entitled to claim. Therefore, the whole theory of rights and wrongs, of principles and torts, is being weakened for the attempted attainment of an efficiency goal wherein the 'social cost' is minimized. The individual constitutional property rights protected by injunctive reliefs are curbed in favour of a collective objective derived from utilitarianism of 'economic efficiency'.

The theory of rights, according to which 'rights matter', is where Rule of Law principles are given full effects. Rule of Law principles do not scrutinize onto the respective costs and benefits of negotiating trespass between the tortfeasor and the victim. Rule of Law principles are limited to the fundamental first stage of analysis, namely whether or not the human action breaches an individual his/her fundamental property rights. Because the answer to this question in the Coase theorem would be positive, injunctive reliefs would be issued so that the Rule of Law empowers the victim to have his/her private property rights freed from any intrusion irrespectively of the costs and benefits of each involved party or of the society.

The fundamental premise upon which Law & Economics movement has flourished – the consequentialism of the Coase theorem's contribution to property rights – therefore contradicts the fundamental premise upon which the Rule of Law has emerged – the deontological protection of private property rights. The Coase theorem contradicts the Rule of Law because the Rule of Law principles cannot be superseded by the economic principle of efficiency with respect to its ethical superiority. After property rights protection, it seems that Law & Economics scholarship may contradict the Rule of Law principles when it comes to its idea of an 'efficient breach' of contract law.

B. The 'efficient breach' in contract law

'Central to law and economics of contract law'[56], the notion of 'efficient breach' contradicts the principles underpinning the Rule of Law. The notion of 'efficient breach' of contracts flows from the belief that breaches of contracts should be deterred, via specific performance or compensatory damages, only when such breaches are inefficient.

Breaches of contracts are said to be inefficient whenever the value generated by the respect of the contractual promises is lower than the associated costs. However, the assessment of both the 'value' and the 'costs' of a specific contract is subject to controversy as the conclusion may dramatically differ whether or not one takes only the breaching party's perspective, two contracting parties' perspective or the whole social costs into account. Consequently, the mathematical computation of the realisticness of the 'efficient breach' pares down to an impossible calculus.

Indeed, according to law and economics thinking, '*if the breaching party has to pay the other parties' loss then the breach can be subject to a comparison of gains and losses. If the gains from breach plus expectation damages are small or negative, then*

53 *See* Warren J. Samuels, *The Coase Theorem and the Study of Law and Economics*, 14 Natural Resources J. 1 (1974).

54 Guido Calabresi has famously restated the Coase Theorem by stating that: *'If one assumes rationality, no transaction costs, and no legal impediments to bargaining, all misallocation of resources would be fully cured in the market by bargains,' see* G. Calabresi, Comment, *Transaction Costs, Resource Allocation, and Liability Rules*, 67 J. L. & Econ. 67 (1968). But, there is no such a world with costless transactions and with full information – assumptions made however necessary for the Coase Theorem. For a full discussion of the Coasean unrealistic assumptions, *see* Robert D. Cooter, *The Cost of Coase*, 11 J. Leg. Stud. 1 (1982).

55 *See* Cooter, *supra* note 54.

56 C. Veljanowski, Economic Principles of Law 126 (2007).

the breach will not occur, and should not occur from an economic viewpoint. However, if there are gains, then it would be efficient to release the resources to alternative uses'[57].

According to law and economics, there can be situations when efficient breach can be called for. For instance, in light of the change in price between the time of the signing of the contract and the time of the performance of the contract, the seller could breach the contract whenever the higher price is less than the original buyer's valuation price. The instability, unpredictability, increased insurance costs and increased deterrence in contracting such concept of efficient breach would structurally far outweigh any conjectural and relative gain from the seller's viewpoint. Irrespectively of the economic rationale of such measure, the 'efficient breach' concept drastically undermines the premises of the Rule of Law, according to which obedience to the law, in general, and obedience to the law of any contracting parties (*i.e.* the contracts), in particular, are both an ethical and legal imperative.

C. The rule of reason in competition law

Competition law is a fundamental area of law and policy allowing for the emergence and reinforcement of a competitive order through regulatory interventions of the economic freedoms of market actors. The reduction of the economic freedoms of the market actors is such a sensitive issue that strong legal and economic argumentations must be ex ante developed in order to justify subsequent regulatory restrictions upon the market actors' economic freedoms.

Historically, competition law (or 'antitrust law' in North America) had had recourse to 'economic structuralism' in order to identify which business practices were susceptible to distort competition in the market and hence be made illegal. Economic structuralism refers to the need for identifying the key fundamental market structures for achieving a high level of competition. Outside these market structures, the actions of the market actors would become dubious with respect to their willingness of not distorting competition in the market.

Economic structuralism had numerous advantages and limitations with respect to the application of competition law. Economic structuralism allowed for competition authorities not to be warned when business practices were not outside the structural criterion. For instance, if the abuse of dominant practice can only occur when a firm has 50% of the market shares of its relevant market, a firm with 45% of the market shares, regardless of its presumably abusive practices, would not be scrutinized by competition authorities. Certainty and predictability in the law helped market actors to understand competition law, which therefore remained clear, accessible and predictable. These are the intrinsic qualities of the Rule of Law. Indeed, economic structuralism resembled a principled approach to the law, where competition law was focused on potential infringements by markets actors only when principles of law and of the competitive order were to be breached. Economic structuralism has generated the '*per se* rule', whereby some specific behaviours under certain specific circumstances (market structure) were deemed to be anticompetitive. Outside such circumstances, no minor charges against market actors could be found, therefore providing for greater legal certainty and hence greater economic freedoms.

Interestingly, because some scholars considered that economic structuralism was catching not too little but too many behaviours of market actors, scholarship moved away from a strict economic structuralism approach to competition in favour of a more behavioural approach. Under the economic behaviourism of competition law, it no longer matters whether the market shares are detained by each market actor in order to conclude whether each of them was willing to be under the scrutiny of competition law. However, it has become the anti-competitive behaviour of market actors as such, which has become the interest of competition authorities. Irrespective of the market shares of market actors, some behaviours can infringe or not onto the level of competition in a specific market. Therefore, some market actors with high market shares have started being excused and justified under economic behaviourism, whereas economic structuralism would have fined them. The outcome has been increased uncertainty as the competition authorities' investigations were possibly targeting any market actors. Behaviours of market actors have become increasingly suspicious as the lines between the legality and illegality of behaviours under competition law are blurred. The principles of law being weakened, the practice of law more importantly relies on a casuistic approach. The intrinsic qualities of the Rule of Law are lacking, the equality before the law is jeopardized, the liberty in the law for market actors is constrained under constant fears of administrative investigations and legal certainty is no longer achieved.

Economic behaviourism has tentatively tried to legitimize itself with the so-called 'rule of reason', which was preferred over the '*per se* rule'. According to the rule of reason, competition authorities are fining market actors according to the criterion of reasonableness. The main and historical proponent of the rule of reason – the US Supreme Court – has gradually departed from the *per se* rule in favour of a rule of reason. Indeed, in the United States, according to Section 1 of the Sherman Act, *'every contract (...) in restraint of trade or commerce (...) is declared to be illegal (...)'* and there is no legal exception to this prohibition. Certain agreements which are considered very likely to be anti-competitive are automatically found to be illegal, and for other types of agreements, the anti-competitive and pro-competitive aspects of the agreement are weighed before an agreement is condemned as illegal[58]. The first time a rule of reason has explicitly been applied in the United States is when Justice White in *Trans-Missouri Freight Association*[59] argued that there needs to be a criterion of '*reasonableness'* in the interpretation and application of Section 1 on the basis of the fact that *'it is not the existence of the restriction of competition, but the reasonableness of that restriction'*.

Unlike in the United States, the European Union has adopted a more formalistic approach with Article 101 of the Treaty on the Functioning of the European Union (TFEU), which involves both prohibition and exemption provisions for agreements in restriction of competition, with Article 101(1) and Article 101(3), respectively. Article 101(3) can be applied to all types of agreements, whether they have the restriction of competition as their object or effect. There is no such possibility in the US antitrust law, since an equivalent of Article 101(3) does not exist. Article 101(3) provides for a sort of European rule of reason where pro- and anti-

57 *Id.* at 156.

58 The rule of reason has been applied in cases dealing with restraints of trade (Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 96–97 (1911)); vertical non-price restraints (Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 57 (1997)); vertical maximum resale price maintenance (State Oil Co. v. Khan, 522 U.S. 3, 15 (1997)); for vertical minimum resale price maintenance (Leegin Creative Leather Prods. Inc. v. PSKS, Inc. 127 S. Ct. 2705, 2712 (2007)).

59 United States v. Trans-Missouri Freight Assoc., 166 U.S. 290, 350–52 (1897).

competitive effects of practices are weighed out with an economic approach that increases legal uncertainty and confusions. However, the major shifts in the EU institutions' practices towards a more 'economic' approach, which is favourable to a rule of reason, can be witnessed with the *'White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty'*[60] and with the Merger Regulation 1/2003[61]. The rise of the rule of reason in the EU has started with judgements taking into consideration the *'legal and economic context'* of the firms' practices of the economic analysis of the pro-competitive effects of the defendants' arguments[62].

For instance, in *Wouters*[63], the ECJ balanced anti-competitive effects with other public policy considerations – notably, the restrictive effect of bar admissions for lawyers with the objective of ensuring useful effects of professional regulations. The ECJ concluded that public policy considerations outweighed harm to competition: the rule of reason is broadened to other public policy considerations. The ECJ can be said to have favoured a *'partial rule of reason'*[64], where a balancing test between pro- and anti-competitive effects is carried out, but with some aspects of a *per se* rule with respect to the restrictive object of agreements.

With the rule of reason, the question becomes as follows: can one provide a reasonable justification for the behaviours of the market actor under scrutiny? If the answer is yes and/or if the justification with respect to the economic efficiency of the contested behaviours is provided, the investigations will cease. If the answer is no and/or if the justification with respect to the economic efficiency of the contested behaviours are considered by competition authorities as being not sufficiently convincing, the investigations will ban these behaviours. If the line is thin, the consequences are dramatically opposite. It is sufficient for competition authorities to be convinced regarding the supposed economic benefits of the behaviours and such behaviours will be deemed pro-competitive. If not, the behaviours will be deemed anti-competitive.

The principled-based approach to competition law under economic structuralism has therefore been substituted to a behavioural approach to competition law where the rule of reason has outplayed the Rule of Law[65]. The rule of reason *'embraces antitrust's most vague and open-ended principles, making prospective compliance with its requirements exceedingly difficult'*[66]. The flexibility, and hence unprincipled approach of the rule of reason, has sometimes been acclaimed[67]. However, the rule of reason is not an ancillary rule in competition law. It is a fundamental bedrock to current competition practice inasmuch as the 'efficiency defence' (or the economic justification based on the supposed pro-competitive effects of contested behaviours) has developed into an essential element of justification in competition cases. In contrast to the original intent of scholars vouching for a departure of economic structuralism in favour of economic behaviourism with the rule of reason in order to exempt some market behaviours from competition authorities, this evolution has tended to increase the number of competition investigations, the extent of market behaviours caught under competition law and the legal uncertainty in relying upon competition law. The Rule of Law is here undermined. The efficiency defence therefore has worked as an engine of disintegration of the Rule of Law in competition law. The Law & Economics teachings in competition law, which naturally favours the efficiency defence of the rule of reason as part of the economic behaviourism this movement has actively promoted, are contrary to the principle-based approach of the Rule of Law to competition law.

However, competition law is one of the main areas of law where Law & Economics applications have largely been uncontested. Therefore, even in one of its core elements, Law & Economics favours ideas and concepts that contradict the clarity and predictability required by the Rule of Law principles. In light of the pitfalls generated by the luring rule of reason, some attempts have been made to vouch for a more '*structured* rule of reason', which would be something in-between the rule of reason and the *per se* rule, and their respective economic approaches, namely economic behaviourism and economic structuralism. It is nothing else but an increased level of justification, which yields no particular benefit in terms of legal certainty, but increased costs in terms of discovery and argumentative discourses[68]. Indeed, M. Strucke (2009) rightly wonders: *'so how does the rule of reason (…) standard for evaluating conduct under the Sherman Act fare under these rule-of-law principles? Poorly'*[69]. The Rule of Law principles require the predictability and the clarity that the rule of reason fails to address and hence give up these qualities of the law for supposedly efficiency gains. The conceding of the Rule of Law principles for elusive efficiency gains is contrary to the very essence of Rule of Law principles. Consequently, Rule of Law principles can only accept *per se* rules of competition law, rules continuously criticized by Law & Economics scholars.

These three illustrations have evidenced the claim according to which the lessons derived from the Law & Economics scholarship are not always compatible with the Rule of Law principles. This claim is even more telling since the above illustrations have been chosen among the fundamental lessons of Law & Economics movement in three fundamental areas of law, namely property rights (Coase theorem), efficient breach (contract law) and rule of reason

60 *White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* [1999] OJ C132/1; *see also* Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97.

61 Council Regulation (EC) no. 1/2003 of 16 Dec. 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1. Regulation 1/2003 became effective on 1 May 2004.

62 *See, e.g.*, Société La Technique Miniére v. Maschinenbau Ulm GmbH, (56/65), [1966] ECR 235; Delimitis v. Henninger AG, Case C-234/89 [1991] ECR I-935 ; SA Brasserie de Haecht v. Consorts Wilkin-Janssen, Case 23/67 [1967] ECR 407 ; European Night Services, Case T-374/94 ECR II-3141; Métropole Télévision SA v. Commission, Case T-112/99 (2001) ECR II-2459.

63 J.W. Savelbergh Wouters, Price Waterhouse Belastingadviseurs BV & Algemene Raad van de Nederlandse Orde van Advocaten, Case C-309/99, (1999), ECR I-1653.

64 *See* E. Steindorff, *Article 85 and the Rule of Reason*, 21 Common Market L. Rev. 639, 646 (1984).

65 M. Strucke (2009) rights call this a '*disturbing trend*', according to which *'antitrust are straying from rule-of-law principles'*, *see* M. Strucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 UC Davis L. Rev. 1375, 1378 (2009).

66 *Id.* at 1379.

67 For instance, the Antitrust Modernization Commission said *'advances in economic learning have persuaded courts to replace [their] per se rules with a more flexible analysis under the rule of reason'*, *See* Antitrust modernization commission, report and recommendation (2007).

68 *See* Strucke, *supra* note 65, at 1384-86.. The understanding of the dangers of a rule of reason applied in competition law was clear as early as at the time of President Wilson who, during his presidential address, rightly pointed out the need for legal certainty in competition law: *'The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. (…) And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. advice, the definite guidance and* information which can be supplied by an administrative body, an interstate trade commission'. See Woodrow Wilson, U.S. President, Address to a Joint Session of Congress on Trusts & Monopolies, Jan. 20, 1914.

69 Strucke, *supra* note 65, at 1421.

(competition law). Furthermore, this incompatibility contradicts our former claim, according to which both theoretical and universal perspectives justify that the Rule of Law principles and Law & Economics scholarship should be more aligned to each other.

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RESEARCH ARTICLE

Corruption and corporate social responsibility codes of conduct: The case of Petrobras and the oil and gas sector in Brazil

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ABSTRACT

Corruption and combating corruption is one of the most important challenges for both developing and developed countries. Corruption is a serious threat to principles and values of any government. It undermines the enforcement of the rule of law and compromises democracy. In the early 1990s, corporate social responsibility (CSR) codes of conduct emerged as an effective mechanism for integrating responsible economic practices against corruption. However, the question that arises is whether this self-regulatory instrument has any impact on the practice and policy of companies with respect to corruption. This study addresses this question through an analysis of the provisions related to corruption issues embodied in international conventions and guidelines, the norms or standards of oil and gas associations, NGOs, international and multilateral organizations. In particular, this paper examines how Petrobras, the giant Brazilian oil and gas company, responds to corruption in its CSR code of conduct. Using a comparative analysis of Petrobras' policy and practice as expressed in its CSR statements and the related provisions embodied in the international framework, this study examines the extent to which provisions included in Petrobras' CSR code of conduct are consistent with the belief of the current international framework system. Finally, this paper investigates the responses to questionnaires related to CSR codes of conduct of oil and gas companies operating in Brazil.

Keywords: Brazil, corruption, corporate social responsibility, CSR, oil and gas sector, Petrobras, codes of conduct

ملخص:

يمثل الفساد ومكافحة الفساد أحد أهم التحديات التي تواجه البلدان النامية والمتقدمة على حد سواء، حيث يُعد الفساد تهديداً خطيراً لمبادئ وقيم أي حكومة لأنه يقوض تطبيق سيادة القانون ويعرض الديمقراطية للخطر. ظهرت مدونة المسؤولية الاجتماعية للشركات (CSR)، في أوائل تسعينيات القرن العشرين، كآلية فعالة لإدماج الممارسات الاقتصادية المسؤولة ضد الفساد، بيد أن السؤال هو ما إذا كان صك التنظيم الذاتي ذلك له أي تأثير على ممارسات الشركات وسياستها فيما يتعلق بالفساد أم لا. تتناول هذه الدراسة هذه المسألة من خلال تحليلات للأحكام المتعلقة بمسائل الفساد المنصوص عليها في الاتفاقيات والمبادئ التوجيهية الدولية، أو قواعد أو معايير اتحادات النفط والغاز، والمنظمات غير الحكومية، والمنظمات الدولية والمتعددة الأطراف. يدرس هذا البحث على وجه الخصوص كيفية قيام بتروبراس، شركة النفط والغاز البرازيلية العملاقة، بالاستجابة إلى الفساد في مدونة المسؤولية الاجتماعية للشركات الخاصة بها. ومن خلال تحليل مقارن لسياسة وممارسات شركة بتروبراس، كما تم التعبير عنه في مدونات

المسؤولية الاجتماعية للشركات والأحكام ذات الصلة المضمنة في الإطار الدولي، تمكنت هذه الدراسة من الوصول إلى أي مدى تتوافق الأحكام الواردة في مدونة المسؤولية الاجتماعية للشركات الخاصة بشركة بتروبراس مع معتقدات نظام الإطار الدولي الحالي. وأخيراً، يدرس هذا البحث الردود على الاستبيانات المتعلقة بمدونات المسؤولية الاجتماعية للشركات في قطاع النفط والغاز العاملة في البرازيل.

الكلمات المفتاحية: البرازيل، الفساد، المسؤولية الاجتماعية للشركات، قطاع النفط والغاز، بتروبراس، قواعد السلوك

I. INTRODUCTION

Corruption is widespread throughout the world, which represents a serious threat to the principles and values of any country. Corruption causes damage to both public confidence in democracy and the efficiency of the rule of law. It arises at the boundaries between the public and private sectors[1]. Among the most accepted definitions, corruption is "the abuse of public office for private gain." This definition is used by a range of institutions and NGOs, including the World Bank (WB) and Transparency International (TI). It is also consistent with the provisions of the United Nations Convention against Corruption (UNCAC), the only global anti-corruption legally binding instrument, and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). The study of corruption has been multidisciplinary, with reports ranging from theoretical models to corruption scandals. Corruption remains one of the main challenges of doing business in many countries. There is no disagreement among mainstream scholars about the fact that corruption has a more negative effect on developing and least developed countries. In fact, its negative effect seems to be stronger in these markets.

Companies are important actors in fighting corruption in developing and least developed countries through the implementation of their corporate social responsibility (CSR) codes of conduct. Zaheer recalls that the liability related to foreign operations and the extent to which it affects the performance of multinational companies in foreign countries have attracted much attention in the recent past[2]. In the early 1990s, CSR codes of conduct emerged as a mechanism for integrating responsible economic practices. The primary goal of CSR codes is to provide safety for global activities by establishing minimum conduct standards for companies. CSR represents an effective mechanism for integrating responsible corporate practices against corruption. Some empirical works have proved that CSR codes can be a valuable instrument for improving the local quality of life for communities where multinational companies are operating[3]. Nevertheless, CSR codes can be an effective mechanism against corruption only if multinational companies fully comply with their CSR statements.

Recent scandals involving FIFA, Toshiba and Volkswagen indicate that, by and large, the execution of the values behind corporate social responsibility is at stake. For instance, Brazil recently discovered its biggest corruption scandal at the state-controlled oil and gas company *Petróleo Brasileiro S.A.* (Petrobras). The Petrobras scandal, known as "*Operação Lava Jato*" or Car Wash Investigation, is until today the largest corruption probe in Brazil's history. The Car Wash investigation splashed the reputation of Petrobras together with the government and political parties when it revealed an intricate network of kickbacks, bribes, money laundering, trading in influence and other related illicit activities.

This paper analyzes the extent to which CSR codes can be used as a tool to fight corruption in a developing country such as Brazil and in a challenging sector such as oil and gas. Thus, this study examines how Petrobras, the giant Brazilian oil and gas company, responds to corruption in its CSR code of conduct. The question that arises is whether this self-regulatory instrument has any impact on the practice and policy of Petrobras with respect to corruption. Using a comparative analysis of Petrobras' policy and practice as expressed in its CSR statements and the related provisions embodied in the international framework, this study examines the extent to which provisions included in Petrobras' CSR code of conduct are consistent with the belief of the current international framework system against corruption. If Petrobras fully implements its CSR code, it can be an important actor in fighting corruption in Brazil. Finally, this paper compares the responses of a survey on the CSR codes of conduct of oil and gas companies operating in Brazil.

II. LITERATURE REVIEW

According to Nye's seminal work, corruption is a "behavior that deviates from the formal duties of a public role (elective or appointive) because of private-regarding (personal, close family, private clique) wealth or status gains"[4]. Broadly speaking, corruption is understood as the misuse of public resources by public officials for private gains. Bribes, kickbacks, "grease," and "speed" money are the most commonly used types of corrupt behaviors[5]. Corruption can take on several forms and meanings that can range from single bribes to malfunction of an entire political and economic system[6]. Supported by international organizations and associations, many studies, research projects, surveys, books, seminars, and conferences deal with corruption and anti-corruption practices and policies. Corruption has been studied as political, economic, legal, cultural and/or moral issues. Many countries are unable or unwilling to fight corruption. While corruption is endemic in societies, its punishment in most of the cases is arbitrary, or it results from political payback. Nowhere does corruption cause more damage to the civil society than in developing and least developed countries. There is no disagreement among mainstream scholars about the fact that corruption has a negative effect on sustainable economic growth in emerging markets[7].

1 S. Rose-Ackerman, Corruption: A Study in Political Economy (1978).

2 S. Zaheer, *Overcoming the Liability of Foreignness*, 38(2) Acad. Mgmt. J. 341 (1995).

3 *See* M. Zairi & J. Peters, *The Impact of Social Responsibility on Business Performance*, 17 (4) Managerial Auditing J. 174 (2002), *available at* https://www.emeraldinsight.com/doi/abs/10.1108/02686900210424312 (last visited May 14, 2018); D. O'Brien, *Integrating Corporate Social Responsibility with Competitive Strategy: 2001 Winner. Best MBA Paper in Corporate Citizenship* (The Center for Corporate Citizenship at Boston College, 2001).

4 J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61(2) Am. Pol. Sci. Rev. 416 (1967).

5 J. Doh et al., *Coping with Corruption in Foreign Markets*, 17(3) Acad. Mgmt. Exec. 114 (2003), *available at* http://www.voxprofessori.com/eden/Publications/Doh-et-al-corruption-AME-2003.pdf (last visited May 14, 2018).

6 L.M. Costa, *The Dynamics of Corruption in Brazil: From Trivial Bribes to a Corruption Scandal*, *in* Corruption Scandals and Their Global Impact 189–203 (Omar E. Hawthorne & Stephen Magu eds., 2018).

7 S. Rose-Ackerman & B.J. Palifka, Corruption and Government: Causes Consequences and Reform (2d ed., Cambridge University Press 2016); L.M. Costa, *Battling Corruption through CSR Codes in Emerging Markets: Oil and Gas Industry*, RAE Eletrônica, vol. 7, issue 1, 2008, http://rae.fgv.br/rae-eletronica/vol7-num1–2008/battling-corruption-through-csr-codes-emerging-markets-oil-and-gas-ind (last visited May 14, 2018).

Corruption can destabilize a country's economic performance, affect investment decisions, limit economic growth, and cause distortion in competition[8]. It can mismanage natural resources, harm the poor, and weaken economies and societies[9]. This assumption is true, and Brazil is a good example as evident from the Petrobras corruption scandal. It is difficult to measure corruption. One of the most popular indices available to measure corruption is the one compiled by the Transparency International (TI), TI Corruption Perception Index (CPI). In 2017, the TI CPI of Brazil was 37, which ranked 96 among 180 countries (Table 1), at the same level of Colombia, Indonesia, Panama, Peru, Thailand, and Zambia. To a large extent, endemic corruption faced by Brazil indicates that corrupt practices are widespread, well known and implicitly tolerated[10].

Table 1. Brazil: Corruption Perception Index.

BRAZIL		
	Score Index	**Rank**
2017	37	96
2016	40	79
2015	38	76
2014	43	69

Source: TI Corruption Perception Index, Transparency International.

Although the concept of CSR code of conduct has been advocated for decades and used by companies at the global level, agreement on how CSR should be defined and, in particular, implemented remains a debate among academia and society. CSR codes represent a change in the traditional paradigm of companies[11]. The concept of CSR began in the 1920s; however, only in the 1950s, it became a more relevant topic among business leaders. In fact, CSR took shape during the 1950s and 1960s. One of the earliest definitions of corporate social responsibility was given by Howard Bowen who affirmed that CSR codes of conduct are "obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society"[12]. Moreover, McGuire claimed that "the idea of social responsibilities supposes that the corporation has not only economic and legal obligations but also certain responsibilities to society which extend beyond these obligations"[13]. CSR codes of conduct are no longer altruistic in nature and more than just philanthropy and community projects. Over the subsequent decades, CSR definitions have expanded immensely. More recently, Rasche et al. emphasized that "CSR refers to the integration of an enterprises' social, environmental, ethical, and philanthropic responsibilities towards society into its operations, processes, and core business strategy in cooperation with relevant stakeholders"[14]. CSR has gone through evolutions over the last decades and today, it is a well-developed management practice. More transitions are likely to occur in the near future in order to respond to the needs of globalization.

Increasing integrity in business transactions has two different but complementary tracks. One is the conventional regulatory path represented by the adoption of local, regional, and international conventions against corruption. The other is the self-regulatory route where the primary goal is to improve the integrity of business through CSR codes of conduct. Some recent empirical works have proved that CSR codes can be a valuable instrument for improving the local quality of life for communities where they are operating, including fighting corruption.

III. METHODOLOGY

Compliance with CSR codes of conduct can occur because other behaviors are inconceivable in coping with corruption in emerging markets despite local and international legislation[15]. This paper examines how the largest oil and gas company operating in Brazil, Petrobras, responds to fighting corruption in its CSR code of conduct. It intends to corroborate the assertion that CSR codes can be used as a tool for integrating companies' responsible practices in emerging markets, such as the Brazilian market, by means of a comparative analysis of Petrobras's CSR codes of conduct and the international framework against corruption. This assumption may be true only if Petrobras' CSR statements are in accordance with the international treaties and conventions, guides and standards related to corruption and are fully implemented by the company.

The global coalition against corruption is expanding every day. Despite the fact that provisions embodied in the international legal framework system related to corruption are countless, we can recall the following: the United Nations Convention against Corruption (UNCAC), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), the United Nations Convention against Transnational Organized Crime and its Protocols (UNTOC), the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms), the International Chamber of Commerce Business Charter for Sustainable Development, the OECD Guidelines on Multinational Enterprises, the Global Sullivan and Global Compact Principles, the SA8000 and the Sullivan Principles, among others. This study aims to corroborate the assertion that the CSR code of conduct may be an effective mechanism for integrating responsible economic practices against corruption. By means of CSR codes, companies can play an important role in improving the fight against corruption only if their codes fully comply with the international legal framework.

Quantitative data for this study was collected by e-mail survey. The surveys were sent to executives from selected companies

8 B.W. Husted, *Wealth, Culture, and Corruption*, 30(2) J. Int'l Bus. Stud. 339 (1999).
9 *See* Costa, *supra* note 6, at 191.
10 J. Cartier-Bresson, *Corruption Network, Transaction Security and Illegal Social Exchange*, 45(3) Pol. Stud. 464 (1997).
11 C. Adams, *Internal Organizational Factors Influencing Corporate Social and Ethical Reporting*, 15(2) Acct., Auditing & Accountability 223 (2002); A. Carroll, *A Commentary and Overview on Key Questions on Corporate Social Performance Measurement*, 39(4) Bus. & Soc'y 466 (2000); J.G. Frynas, *The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies*, 81(3) Int'l Aff. 581 (2005); D. Wood, *Corporate Social Performance Revisited*, 16(4) Acad. Mgmt. Rev. 691 (1991); J.A. Zerk, Multinationals and Corporate Social Responsibility Limitations and Opportunities in International Law (2006); L.M. Costa, Sustainable Development in Emerging Markets and Csr Codes of Conduct: Oil and Gas Industry in Brazil, 4 J. Operations & Supply Chain Mgmt 44 (2012), *available at* http://bibliotecadigital.fgv.br/ojs/index.php/joscm/article/viewFile/9563/8613 (last visited May 14, 2018).
12 H.R. Bowen, Social Responsibilities for the Businessman 6 (Harper 1953).
13 J.W. McGuire, Business and Society 144 (McGraw-Hill, 1963).
14 A. Rasche, M. Morsing & J. Moon, *The Changing Role of Business in Global Society: CSR and Beyond, in* Corporate Social Responsibility, Strategy, Communication, Governance 1, 6 (2017).
15 R.W. Scott, Institutions and Organizations 58 (2d ed., Sage Publications 2001).

operating in Brazil. The chosen companies include BP p.l.c. (BP), Eni S.p.A (Eni), Exxon Mobil Corporation (ExxonMobil), The Royal Dutch/ Shell Group of Companies (Shell), and TOTAL S.A. (Total). Companies were selected based on their relevance in the Brazilian oil and gas market. A total of 50 questionnaires were e-mailed, with ten questionnaires per firm. University letterhead was used in the cover letter to increase legitimacy. E-mail addresses of these individuals were obtained from local directories, embassies and consulates, and social media, in particular LinkedIn.

The response rate was low (40 percent) but deemed acceptable for this study, as the same number of respondents from each company was achieved in order to avoid a response bias.

The findings comprise the following three main sources:

(1) Data collected from the website of Petrobras. In this case, Petrobras' website was examined for references to corruption in order to get information about the extent to which the company has engaged these concepts in a way that is publicly available. Secondary data were collected and classified from publications, reports and documents posted on the company's website;
(2) Data collected from websites related to international guidelines, norms or standards of oil and gas associations, NGOs, international and multilateral organizations, in order to compare Petrobras' code of conduct with the provisions of the international legal framework; and
(3) Data collected from the survey conducted to investigate oil and gas companies operating in Brazil, in order to analyze their attitudes towards different approaches to combating corruption.

IV. RESULTS

The results from this survey were divided into two sections: a) a comparative analysis of Petrobras' code of conduct and the international legal framework and b) a questionnaire about the perception of corruption in the oil and gas sector in Brazil based on a survey conducted with respondents of foreign companies operating in the country.

A. Comparative analysis: Petrobras' code of conduct and the international legal framework against corruption

CSR codes can be an effective mechanism against corruption only if multinational companies fully comply with their CSR statements. Petrobras has a code of conduct with issues related to fight against corruption; however, it is necessary to compare these policies with the international legal framework. It is not enough to promote social responsible corporate policies against corruption by means of CSR codes of conduct. It is also important that these anti-corruption policies should be acceptable to all stakeholders at the global level. The international framework helps to limit the negative effect of corruption and the "legislative" power of CSR codes of conduct. As far as the international framework is concerned, the main provisions related to corruption issues are embodied in two major conventions: the UNCAC and the OECD Convention. Corruption issues present at Petrobras' CSR code were analyzed and divided into three common subcategories as follows: bribery and corruption, political contributions, and financial transparency.

Bribery and corruption

Petrobras' CSR code includes statements rejecting the payment or acceptance of bribes, collusion, pressure, or illegitimate favors, either directly or through third parties, whether public officers or private individuals: "Businesses should work against all forms of corruption, including extortion and bribery"[16]. More specifically, Petrobras' code of ethics "specifically forbids the use of unlawful practices (corruption, bribery and "off-the-books" accounting) in order to obtain commercial advantages"[17].

According to the international legal framework, article 21 of the UNCAC refers to the intention of committing a crime and commits member-state to

> "adopt such legislative [...] to establish as criminal offences, when committed intentionally:
> a) the promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties"; and
> "b) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties"[18].

Similarly, the OECD Convention calls for effective measures to combat bribery of foreign public officials, in particular the prompt, effective and coordinated criminalization of such bribery and in conformity with the jurisdiction and other basic legal principles of each country. Article 1.1 disposes as follows:

> "Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, 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 improper advantage in the conduct of international business."[19]

Some relevant provisions related to corruption and bribery embodied in international guidelines, norms, or standards of oil and gas associations, NGOs, international and multilateral organizations were also examined and compared: for example, the Caux Roundtable Principles for Business (Caux), the Global Sullivan Principles, the International Chamber of Commerce Business Charter on Sustainable Development (ICC Business Charter), the Regional Association of Oil and Natural Gas Companies in Latin America and the Caribbean (ARPEL), the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises(OECD Guidelines), and

16 Petróleo Brasileiro SA (Petrobras), Sustainability Report (2016), http://www.petrobras.com.br/en/society-and-environment/sustainability-report/(last visited May 14, 2018).
17 *Id.*
18 U.N. Convention Against Corruption, art. 21, G.A. Res. 58/4 (Oct. 31, 2003), *available at* https://www.unodc.org/unodc/en/treaties/CAC/ (last visited May 14, 2018).
19 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1999), *available at* http://www.oecd.org/document/21/0,2340,en_2649_37447_2017813_1_1_1_37447,00.html (last visited May 14, 2018).

the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms).

For instance, Article 11 of the UN Norms says that:

> "Transnational corporations and other business enterprises shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage, nor shall they be solicited or expected to give a bribe or other improper advantage to any Government, public official, candidate for elective post, any member of the armed forces or security forces, or any other individual or organization."[20]

The Global Sullivan Principles state that fair competition includes "not offer, pay or accept bribes"[21]. Similarly, the ICC Business Charter provides a method of self-regulation by businesses against the lack of national anti-bribery laws and regulations in developing and least developed countries. Furthermore, the OECD Guidelines cover all of the areas of business ethics including labor, environmental standards, and health and safety, with Chapter VI of the Guidelines focusing on combating bribery. The OECD Guidelines expressly provide that companies should not "directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage"[22]. The Caux mention that fair economic competition requires "refrain from either seeking or participating in questionable payments or favors to secure competitive advantages"[23].

The results of the comparative analysis between Petrobras' CSR code of conduct and the international legal framework reveal that Petrobras' CSR code of conduct is in agreement with the international legal framework regarding policies against bribery and corruption.

Political contributions

Petrobras' CSR code does not permit contributions to a political party, organization, or any individual who either holds public office or is a candidate for a public office. In fact, Brazilian law no longer permits contribution to political parties. The law has been recently amended as a result of the Car Wash operation.

Few international associations have specific statements regarding political contributions. The ICC Business Charter establishes that "contributions to political parties or committees, or to individual politicians, may only be made in accordance with the applicable law, and all requirements for public disclosure of such contributions shall be fully complied with"[24]. Similarly, the OECD Guidelines state that enterprises should "not make illegal contributions to candidates for public office or to political parties or to other political organizations" and that any "contributions should fully comply with public disclosure requirements and should be reported to senior management"[25]. Therefore, it can be stated that Petrobras' CSR code of conduct is consistent with the international framework.

Financial transparency

Petrobras' CSR code has policies to promote financial transparency. For instance, one of the Petrobras' "guiding principles" is "a commitment to the transparency and accuracy of the information provided to all the stakeholders".

According to Article 12 of the UNCAC:

> "Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures"[26].

Furthermore, in accordance with Article 14. 1 (a) of the UNCAC:

> "each State Party shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions"[27].

Some international associations have policies to encourage and strengthen financial transparency, such as ICC Business Charter and ARPEL. ICC Business Charter declares that "all financial transactions must be properly and fairly recorded in appropriate books of account available for inspection by boards of directors, if applicable, or a corresponding body, as well as auditors"[28]. The OECD Guidelines reaffirm that enterprises should "ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation, and performance," and that they should "apply high quality standards for disclosure, accounting, and audits"[29]. The UN Norms generally state that companies' financial statements should display financial conditions, results of operations and cash flows of the business[30].

We may argue that there is a clear collective commitment to financial transparency. Broadly speaking, Petrobras' CSR code of conduct complies with the spirit of the international framework on financial transparency.

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20 U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), *available at* http://hrlibrary.umn.edu/links/norms-Aug2003.html (last visited May 14, 2018) [hereinafter U.N. Norms].

21 Global Sullivan Principles (1999), *available at* http://hrlibrary.umn.edu/links/sullivanprinciples.html (last visited May 14, 2018).

22 OECD Guidelines for Multinational Enterprises (2011), *available at* http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html (last visited May 14, 2018) [hereinafter OECD Guidelines].

23 Caux Roundtable Principles for Business (2010), *available at* http://www.cauxroundtable.org/index.cfm?menuid=8 (last visited May 14, 2018).

24 ICC Business Charter on Sustainable Development (2015), *available at* https://www.iisd.org/business/tools/principles_icc.aspx (last visited May 14, 2018).

25 OECD Guidelines, *supra* note 22.

26 See U.N. Convention Against Corruption, supra note 18.

27 Id.

28 See ICC Business Charter, supra note 24.

29 OECD Guidelines, supra note 22.

30 See U.N. Norms, supra note 20.

B. Questionnaire on data perception of corruption in the oil and gas sector in Brazil

Survey participants provided information about the characteristics of their company based on companies' headquarters. All companies reported as being listed companies; the questionnaire did not ask them to further distinguish by stock exchange market.

CSR and corruption

We asked the respondents to rank different aspects of CSR and to order them based on priorities. Corruption was placed more or less in the middle, and the most relevant aspects of CSR codes for the respondents were labor rights, health and safety, and anti-discrimination, and the least prioritized aspects were human rights and environmental protection (Table 2).

Table 2. Prioritization of CSR Issues.

CSR Issue	Score
Labor rights	4.2
Health and safety	4.0
Discrimination	3.9
Corruption	3.8
Environmental protection	2.1
Human rights	2.2

Most influential rules with respect to corruption

The most influential sources of rules identified by the respondents were the stock exchange rules together with companies' codes of conduct with respect to corruption. On the other hand, less formal sources were ranked as the least influential sources of rules for fighting corruption.

Anti-corruption legal instruments

Consistent with the headquarters of the companies and with the general list of the New York Exchange Market and operation in the United States, the US Foreign Corrupt Practices Act (FCPA) was considered to be the most influential specific set of legal instrument followed by the UK Bribery Act. In general, beyond these two most influential instruments, legislation of the country where companies are operating were also ranked high. Multi-stakeholder's coalitions, international associations, NGOs and voluntary initiatives received the lowest scores. The OECD and the UNCAC conventions ranked higher but still with low scores (Table 3).

Table 3. Anti-corruption Legal Instruments.

Legal Instruments	Score
FCPA	4.8
UK Bribery Act	3.8
US Sarbanes-Oxley Act	3.5
OECD Convention	3.4
UNCAC	3.1
OECD Guidelines	1.9
ICC Business Charter	2.0
UN Global Compact	2.2
UN Norms	1.4
Others	1.0

V. CONCLUSION

With corruption being a social and global phenomenon, fighting corruption has become one of the most important challenges of the 21st century. Almost not a single day passes without corruption scandal news someplace in the world. CSR codes can be an effective mechanism against corruption only if multinational companies fully comply with their CSR statements. CSR codes can promote the integration of responsible economic practices against corruption, but they can also be used as a response to deflect criticism. CSR codes can be an effective mechanism against corruption only if companies fully comply with their CSR statements. In order to confirm these limits, corruption issues present in Petrobras' CSR code were analyzed and divided into the following three common subcategories: bribery and corruption, political contributions, and financial transparency. Petrobras' code of conduct was compared with the international legal framework in order to generally limit the "legislative" power of companies in their CSR statements. The compliance of Petrobras' CSR code with the international legal system is a proven fact. If Petrobras fully complies with its CSR codes, it will be an important tool to fight corruption in the oil and gas sector in Brazil. A company that establishes a CSR code without ensuring full compliance of its statements compromises the ideals behind this approach. Moreover, it is better for companies to change the approach, before they have to do so, as it happened to Petrobras. It became clear that there was a gap between the claimed concern for fighting corruption as established in the CSR code of conduct and the former behavior of Petrobras.

The data show possible directions for improvement with respect to corruption, as it was placed more or less in the middle among the most relevant aspects of CSR codes. The perception data may be useful in future anti-corruption efforts regarding the fact of being more structured and formal over multi-stakeholder's coalitions, international associations, NGOs, and voluntary initiatives. The response rate for the questionnaire on data perception of corruption in the oil and gas sector in Brazil was low with consequent implications. Furthermore, at this stage, only three issues related to corruption were considered in this study. As this study was based on perceptions, the respondents might have emphasized their perceptions instead of their experiences and companies' recommendation and training to answer the questionnaire. This can limit the results of this research. However, this paper did not attempt to provide an exhaustive analysis. Several issues that have not been addressed in this paper deserve close examination. To further investigate these hypotheses, future analysis will be performed to examine the full range of issues related to CSR codes of oil and gas companies operating in Brazil.

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U.N. Convention Against Transnational Organized Crime and Its Protocols, G.A. Res. 55/25 (Nov. 15, 2000), *available at* http://www.unodc.org/unodc/en/treaties/CTOC/index.html (last visited May 14, 2018).

U.N. Global Compact Principles, U.N. Global Compact, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited May 14, 2018).