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ABOUT THE JOURNAL

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 an open access journal 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.

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Editorial Foreward

Editorial foreword

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QSCIENCE
دار جامعة حمد بن خليفة للنشر
HAMAD BIN KHALIFA UNIVERSITY PRESS

As the world struggles to find its way out of the current pandemic, the significance of the rule of law and the challenge of corruption have been thrown into an even-sharper relief. Countries already affected by weak institutions have been suddenly required to engage in massive social and financial undertakings to protect their societies (and economies), offsetting the balance between urgency and accountability and in the process giving venal officials new opportunities to engage in corruption—even at the expense of human lives. In this context, the publication of the 5th issue of the Rule of Law and Anti-Corruption Center (ROLACC) Journal could hardly be more timely.

This issue builds on the strong academic foundations of previous numbers—which addressed the private sector, national institutions, terrorism, emerging technologies, and other relevant areas—by focusing on proposed legal measures to control corruption.

The authors tackled a number of significant issues, starting with the conflict between legal immunity and law enforcement in Palestine, pointing out the challenges this creates for the prosecution of malfeasance, and the need for an impartial, objective, and independent decision-making process. Highlighting the issue of accountability among key decision-makers, this author's argument is particularly relevant today.

Not disregarding the prominence of supranational efforts, another author addressed the African Union Convention on Preventing and Combating Corruption (AUCPCC) to argue for the application of private civil actions. He further proposed a protocol that represents a viable route to complement the traditional—and largely ineffective—criminal approach in punishing corruption, with the added value of providing a way to compensate its victims.

Finally, the discussion is elevated to a global level by reflecting on the emergence of deferred prosecution agreements (DPAs) as an instrument increasingly adopted in different jurisdictions around the world. Due to the associated costs of prosecution and high threshold of evidence that law enforcers must meet—further exacerbated in international cases—DPAs are becoming a crucial weapon in the fight against corporate wrongdoing.

On behalf of the Editorial Board, I wish to congratulate the contributors to this issue. The instruments and approaches offered by the authors promise to be of great value to ethically-committed national and international reformers.

افتتاحية العدد

في الوقت الذي يكافح فيه العالم لإيجاد طريقه للتغلب على الوباء الحالي والخروج منه، تراخت حدة التركيز على أهمية حكم القانون ومكافحة الفساد.

فقد تأثرت معظم البلدان التي طُلب منها الانخراط فجأة في تعهدات اجتماعية ومسؤوليات مالية ضخمة لحماية مجتمعاتها (واقتصادها) وذلك جراء الأداء الضعيف لمؤسساتها، مما أدى اختلال التوازن بين مسئلتي حالات الاستعجال والمساءلة، علاوة على ذلك وأثناء هذه العملية، تُستحدث فرص للانخراط في الفساد على حساب الأرواح البشرية. وفي هذا السياق، فإن وقت نشر العدد الخامس من مجلة مركز حكم القانون ومكافحة الفساد (ROLACC) جاء ملائما لمناقشة ذلك . حيث يستند هذا العدد على الأسس الأكاديمية القوية للأعداد السابقة – التي تناولت القطاع الخاص والمؤسسات الوطنية والإرهاب والتقنيات الناشئة والمجالات الأخرى ذات الصلة – من خلال التركيز على التدابير القانونية المقترحة لمكافحة الفساد. انطلاقاً من السياق الوطني، يعالج الكتّاب مواضيع متعددة، ابتداء من الصراع بين الحصانة القانونية وإنفاذ القانون في فلسطين، حيث يشير الكاتب إلى التحديات التي تخلقها هذه المسألة تحديدا في الملاحقة القانونية، والحاجة إلى عملية اتخاذ قرارات محايدة وموضوعية ومستقلة. ومن خلال تسليط الضوء على قضية المساءلة بين صانعي القرار الرئيسيين، فإن حجة الكاتب تتصل بشكل خاص بالمجريات الحالية.

ومع عدم تجاهل أهمية الجهود الفوق الوطنية، يتناول احد الكتاب في اتفاقية الاتحاد الأفريقي لمنع ومكافحة الفساد (AUCPCC) للمناقشة واقتراح حزمة من الإجراءات المدنية الخاصة. حيث يمثل البروتوكول المقترح مسار فعال ومكمل للنهج الجنائي التقليدي – الغيرفعال إلى حد كبير – في معاقبة الفساد، مع القيمة المضافة التي يقدمها و المتمثلة في توفير طريقة لتعويض الضحايا.

أخيراً تأخذ المناقشة منحى عالمي يعرضها الكاتب من خلال التفكير في ظهور اتفاقيات المحاكمات المؤجلة (DPAs) كأداة يتم اعتمادها بشكل متزايد في ولايات قضائية مختلفة حول العالم وذلك نظرًا للتكاليف المرتبطة بالمقاضاة وارتفاع الحد الأدنى من الأدلة لتطبيق القانون – والتي تتفاقم في القضايا الدولية، وبذلك أصبحت الأداة محل الدراسة سلاحًا حاسمًا في مكافحة مخالفات الشركات.

بالنيابة عن هيئة التحرير، أود أن أهنئ الكتّاب المساهمين في هذه العدد. حيث ان الأدوات والمناهج التي يقدمها المؤلفون واعدة وذات قيمة كبيرة للمصلحين الوطنيين والدوليين الملتزمين أخلاقيا.

جوزيف بوزجاي ألفاريز
أستاذ مساعد – برنامج في مركز دراسات جنوب شرق آسيا بجامعة كيوتو، ومؤسس شبكة اليابان لباحثي مكافحة الفساد (جانار).

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RESEARCH ARTICLE

الحصانة من منظور المواجهة الجزائية لظاهرة الفساد في التشريع الفلسطيني

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ملخص

شددت اتفاقية الأمم المتحدة لمكافحة الفساد على ضرورة تحقيق التوازن بين الحصانة وفاعلية المواجهة الجزائية لظاهرة الفساد، بالرغم من أن الواقع العملي غير ذلك؛ لذا، لا يمكن تحقيق ذلك التوازن إلا بالحد من تلك الحصانات، من خلال حصر مفعولها في الإجراءات الماسة بشخص المتمتع بالحصانة وبحرمة مسكنه، مع ضرورة أن يكون الفصل في طلب رفع الحصانة بواسطة جهة قضائية محايدة، وموضوعية، ومستقلة، وذلك بناءً على إجراءات عملية واضحة ومضبوطة بمدة معينة، بحيث تكون سريعة.

الكلمات المفتاحية: المواجهة، الجزائية، الفساد، الحصانة، الامتيازات، القانون، العقاب، التوازن، الإجرائية.

Title: Immunity from the perspective of penal encountering of corruption phenomenon in the Palestinian legislation

ABSTRACT

The United Nations Convention against Corruption stressed the need to achieve a balance between immunity and the efficiency of criminal confrontation of the corruption phenomenon, however, the practical reality is otherwise. The desired balance can be achieved by limiting these immunities, through restricting their influence in the procedures of dealing with the persons enjoying immunity and the inviolabity of their residences. Notwithstanding, the decision to lift this immunity should be taken by an impartial, objective and independent judicial authority, and based on practical, clear, timely-framed, and quick procedures.

Keywords: Encountering, penal, corruption, immunity, privileges, law, penalty, balance, procedural.

1–0 المقدمة

تصنف ظاهرة الفساد على أنها ظاهرة عالمية، حيث تشمل آثارها السلبية معظم الوحدات السياسية والكيانات الاجتماعية، فيما يختلف مدى تلك الظاهرة بين الدول نتيجةً لتباينها في درجة الاستجابة للأنظمة القائمة على محاربة الفساد، علاوةً على تفاوتها في عوامل الاستقرار السياسي والاجتماعي والاقتصادي والتنموي، ولعل هذا ما يتضح جليًا عند النظر في المؤشرات التي تصدرها منظمة الشفافية العالمية.[1] حيث يجد المتفحص لهذه الأخيرة بأن الدول الأكثر تطورًا تأتي في مرتبة متقدمة على صعيد التصنيف الدولي؛ وذلك بفعل انخفاض معدلات الفساد في إطارها. فيما تندرج غالبية الدول النامية في قاع التصنيف سابق الذكر، على اعتبار أنها تعاني من زيادة مطردة في حجم الممارسات التي تنطوي تحت مفهوم ظاهرة الفساد؛ وذلك نتيجة انعقاد عدة عوامل تسهم في انتشار الظاهرة المذكورة.

وتتنوع العوامل المساهمة في تفشي ظاهرة الفساد، وتنقسم بدورها إلى: عوامل سياسية، وأخرى إدارية، وثالثة اجتماعية، ورابعة اقتصادية.[2] وترتبط هذه العوامل –على

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1 Corruption perceptions index - Transparency International Secretariat, 2018, Available at: https://www.transparency.org/, Viewed on 272019-8-.

2 ينظر في: أحمد محمد براك حمد: مكافحة الفساد في التشريع الفلسطيني والمقارن -دراسة تحليلية تأصيلية مقارنة، ط.1، دار الشروق للنشر والتوزيع، رام الله –فلسطين، 2019، ص. 47 وما بعدها.

اختلاف إشكالها– بعلم الإجرام، حيث يبحث هذا الأخير في الدوافع المؤدية إلى اقتراف الجريمة. وهو؛ أي علم الإجرام، يتولى مهمة تغذية المشرع العقابي بما توصل إليه من نتائج؛ وذلك لغايات الاستعانة بها في الحد من الظاهرة الإجرامية محل المكافحة؛[3] وهي في حالتنا ظاهرة الفساد. وتتطلب المواجهة الجزائية الفعالة للظاهرة المذكورة ضرورة إعداد قواعد قانونية عقابية تكون قادرة على الحد من تغول تلك الظاهرة في أوساط المجتمع والدولة، على نحو يحقق أهداف الإدارة العامة، ويلبي متطلبات التنمية المستدامة، ويكرس أجواء الاستقرار السياسي والاجتماعي والاقتصادي.

وتتولى النصوص العقابية مهمة التصدي لظاهرة الفساد والحد من آثارها، وهذا هو الأصل الذي يتوافق مع أصول السياسة الجزائية الرشيدة. إلا أنه من الممكن أن تنحرف تلك القواعد عن مهمتها في بعض الأحيان على نحو يدخلها –والحالة هذه– في نطاق الدوافع التي تسهم في ارتكاب جريمة الفساد، بدلًا من أن تكون سببًا في مكافحتها ومحاولة القضاء عليها. ويجد ما سبق ذكره تطبيقًا عندما تكون القواعد القائمة على محاربة الفساد مصابةً بالقصور والخلل.[4] ويكون الحال كذلك إذا كانت القواعد المذكورة لا تشمل كافة الأفعال المؤثمة على صعيد الأحكام الموضوعية، أو تسمح للفاسدين بالإفلات من العقاب بالنسبة للإجراءات الجزائية.

ونتيجةً لما ورد آنفًا؛ فقد ألزمت اتفاقية الأمم المتحدة لمكافحة الفساد الدول الأطراف بضرورة اتخاذ التدابير اللازمة لغايات ضمان الفاعلية الحقيقية للمواجهة الجزائية لظاهرة الفساد. ولعل أبرز ما أكدت عليه الاتفاقية المذكورة هو أهمية الحد من الحصانات المقررة في نطاق تشريعات الدول الداخلية؛[5] إذ لا أحد ينكر ما لتلك الحصانات من أثر على تقويض الفاعلية التطبيقية لمنظومة المواجهة الجزائية لجرائم الفساد. ولذلك، فقد ذهبت الاتفاقية الأممية نحو التأكيد على وجوب تحقيق التوازن بين الحصانات أو الامتيازات من جهة –والملاحقة الجزائية المترتبة إثر انعقاد جرم الفساد من جهة أخرى.[6]

1–1 مفاهيم الدراسة

تتحدد مفاهيم الدراسة من خلال النظر في عنوان البحث، حيث يحتوي الأخير على ثلاثة مصطلحات قانونية، وهي على النحو التالي:

1–1–1 الحصانة

تنقسم الحصانة إلى طائفتين؛ الأولى موضوعية، والأخرى إجرائية. تتميز الحصانة الإجرائية عن الموضوعية من حيث أن هذه الأخيرة تحجب إمكانية إنزال العقاب بخصوص بعض الجرائم التي يرتكبها الشخص المتمتع بالحصانة،[7] فيما يقتصر مفعول الأولى على تأجيل السير –مؤقتًا– في إجراءات الملاحقة الجزائية لحين زوال الحصانة بحكم القانون، أو الحصول على الإذن برفعها وفق الشكل المنصوص عليه قانونًا.[8] وحيث إن موضوع دراستنا يتعلق بالحصانة في مجال جرائم الفساد، ونظرًا لأنه لا حصانة موضوعية لأحد إزاء تلك الجرائم؛ فإن نطاق بحثنا سوف ينحصر في إطار الحصانة الإجرائية.

1–1–2 المواجهة الجزائية

ينصب مصطلح المواجهة الجزائية على رؤية الشارع العقابي المكرسة في سبيل محاربة الظاهرة الجرميّة، سواء تعلق الأمر بالقواعد الجزائية الموضوعية أو الإجرائية، على نحو يحقق خاصية الفاعلية في المواجهة الجزائية؛[9] وذلك بغية الوقاية من الظاهرة محل التجريم وتلافي حدوثها، أو الحد من آثارها السلبية حال انعقادها على الصعيد الواقعي. فيما تعرف منظومة المواجهة الجزائية لظاهرة الفساد على أنها مجموعة القواعد العقابية المتعلقة بالتأثيم الجنائي لواقعة الفساد، وملاحقة مرتكبيها، وصولًا إلى إنزال العقاب المقرر قانونًا بحقهم، على نحو يؤدي إلى تحقيق أهداف العقوبة الجزائية، ويقي المجتمع من مخاطر الفساد، ويطهر مكونات الدولة من الآثار السلبية لهذا الأخير.[10]

1–1–3 ظاهرة الفساد

تعرف ظاهرة الفساد على أنها التنكر لمقتضيات الوظيفة العمومية، وذلك عن طريق الإجتراء على مكنات هذه الأخيرة –بشكلٍ سيء– لغايات الحصول على ربح أو مغنم لا يحظى بوصف المشروعية القانونية.[11] ويمكن لنا تعريف الفساد على أنه «سلوك غير سوي ينطوي على قيام الشخص باستغلال مركزه وسلطاته في مخالفة القوانين والأنظمة والتعليمات لتحقيق منافع لنفسه أو لذويه من الأقارب والأصدقاء والمعارف وذلك على حساب المصلحة العامة، ويظهر السلوك المخالف أو غير السوي على شكل جرائم؛ كالرشوة، والاختلاس، وسوء استخدام المال العام، والإنفاق غير المبرر للمال العام وهدره. فما هو إلا انحراف عن الالتزام بالقواعد والنظم القانونية المعمول بها محليًا أو دوليًا».[12]

1–2 إشكالية الدراسة

تتمثل إشكالية الدراسة في وضع تساؤل جامع مانع غير مركب، ألا وهو: إلى أي مدى استطاع التشريع الفلسطيني أن يقيم التوازن بين تطبيق أحكام الحصانة الإجرائية وبين فاعلية المواجهة الجزائية لظاهرة الفساد؟

1–3 أهمية الدراسة

تبرز **الأهمية النظرية (العلمية)** لموضوع البحث بالنظر لأكثر من جانب، حيث يشكل موضوع الحصانة والمواجهة الجزائية لظاهرة الفساد انعكاسًا للتطور الواقع في الميدان السياسي.[13] وتتجلى أهمية موضوع الدراسة

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3 سهير عبد المنعم إسماعيل: الحماية الجنائية لنزاهة الوظيفة العامة، رسالة دكتوراه، جامعة القاهرة، 1991، ص. 38.

4 مضر ياسين سعيد: المواجهة الجنائية لجرائم الفساد في الاتفاقيات الدولية والتشريع الجنائي العراقي، رسالة دكتوراه، جامعة القاهرة، 2017 ، ص. 20.

5 لويزة نجار: الفساد ظاهرة إجرامية دولية، إقليمية ووطنية، مجلة الحقوق للبحوث القانونية والاقتصادية -جامعة الإسكندرية، ع. 2، 2012، ص. 658.

6 نصت (2/30) من اتفاقية الأمم المتحدة لمكافحة الفساد على أن «تتخذ كل دولة طرف، وفقًا لنظامها القانوني ومبادئها الدستورية، ما قد يلزم من تدابير لإرساء أو إبقاء توازن مناسب بين أي حصانات أو امتيازات قضائية ممنوحة لموظفيها العموميين من أجل أداء وظائفهم وإمكانية القيام، عند الضرورة، بعمليات تحقيق وملاحقة ومقاضاة فعالة في الأفعال المجرمة وفقًا لهذه الاتفاقية».

7 يتركز نطاق تطبيق الحصانة الموضوعية في تلك التي يتمتع بها أعضاء المجالس النيابية نتيجةً لعملهم، إذ تقتضي الحصانة الموضوعية البرلمانية أن لا يتم مسائلة عضو البرلمان بسبب الآراء التي يبديها، أو الوقائع التي يوردها، أو التصويت الذي يقوم به، أو الأعمال التي يقوم بها، وذلك من أجل تمكينه من أداء واجبه الوظيفي.
للمزيد حول الجانب التاريخي للحصانة البرلمانية الموضوعية ينظر في:
WIGLEY, S. Parliamentary Immunity: Protecting Democracy or Protecting Corruption?, The Journal of Political Philosophy: Vol. 11, N. 1, 2003, p. 24.

8 ينظر في: عبد الاله لحكيم بناني: الحصانة البرلمانية وتكريس المساواة أمام القانون في النظام البرلماني المغربي، المجلة العربية للفقه والقضاء، ع. 29، إبريل (2004)، ص. 136. وأحمد سليمان عبد الراضي محمد: المسئولية التأديبية لأعضاء المجالس النيابية -دارسة مقارنة، دار النهضة العربية، القاهرة، 2016، ص. 94. وزهير أحمد قدورة: الحصانة البرلمانية -دراسة مقارنة في الدساتير العربية والأجنبية، مجلة مؤتة للبحوث والدراسات / سلسلة العلوم الإنسانية والاجتماعية -جامعة مؤتة، مج. 23، ع. 2، 2008، ص. 180. و الداه محمد إبراهيم: الحصانة البرلمانية -دراسة مقارنة، مجلة المعرفة، ع.3، يونيو (2015)، ص. 222.

9 Carr, I. Fighting corruption through regional and international conventions: satisfactory solution. European Journal of Crime, Criminal Law and Criminal Justice, 15(2), (2007), p. 128.

10 محمد نصر محمد القطري: الحماية الجنائية من الفساد، مجلة مصر المعاصرة، ع. 508، أكتوبر (2012)، ص. 111 وما بعدها.

11 ينظر في: حمزة سليمان ناصر الدغمي: النظام القانوني لجريمة الفساد في التشريع الجزائري الأردني، رسالة ماجستير، جامعة آل البيت، 2008، ص. 5. وليلى عاشور الخزرجي: ظاهرة الفساد - الآثار الاقتصادية ... التداعيات الاجتماعية واستراتيجيات مكافحته، مجلة جامعة كركوك للعلوم الإدارية والاقتصادية، مج. 1، ع. 2، 2011، ص. 123 - 124.

12 ينظر في: أحمد محمد براك حمد: مكافحة الفساد في التشريع الفلسطيني والمقارن - دراسة تحليلية تأصيلية مقارنة، المرجع السابق، ص. 33.

13 ويجد ذلك تطبيقه نظرًا لاتصال موضوع الدراسة بجملة من المبادئ التي يقوم عليها النظام السياسي للدولة بمفهومها المعاصر، والحديث هنا عن مبدأ المشروعية، ومبدأ المساواة أمام القانون، إضافةً لمبدأ الفصل بين السلطات؛ لذا، فإن تحقيق التوازن بين الحصانة وبين المواجهة الجزائية لظاهرة الفساد يؤدي إلى صون مكونات النظام السياسي في الدولة، على نحو يحقق مفهوم العدالة الجزائية الناجزة. ويكرس أهداف الإدارة العامة والحوكمة الرشيدة . للمزيد ينظر في: بشير سعد زغلول: إلغاء الحصانة البرلمانية الإجرائية بين الواقع والمأمول - دراسة مقارنة، مجلة كلية الحقوق للبحوث القانونية والاقتصادية - جامعة الإسكندرية، ع. 2، 2017، ص. 1155 وما بعدها.

العلمية كذلك نظرًا لكونه يمثل انعكاسًا للتطور في الميدان الاقتصادي والاجتماعي،[14] بالإضافة لكونه يعد من قبيل الموضوعات الجدلية.[15] فيما ترجع **الأهمية العملية** للبحث في موضوع الدراسة إلى سببين رئيسين. السبب الأول؛ أن التكريس التشريعي السليم لنقطة التوازن بين الحصانة وبين المواجهة الجزائية لظاهرة الفساد يساهم مساهمة أصيلة في تجسيد أصول السياسة الجزائية الرشيدة في مكافحة الفساد، على نحو يحقق أهداف التشريع العقابي، ويكرس الاستقرار السياسي في إطار الدولة، ويضمن الديمومة لمقومات التنمية الاقتصادية، بما يعود بالفائدة على مكونات المجتمع ككل. أما السبب الثاني، وهو الأكثر أهمية، فقد كشف الواقع العملي عن الأثر السلبي الذي تحدثه الحصانة على صعيد التصدي للممارسات التي تنطوي تحت مفهوم ظاهرة الفساد؛ حيث تعتبر الأولى –أي الحصانة– بمثابة عائق حقيقي يحد من إمكانية تفعيل المنظومة الجزائية القائمة على مكافحة الظاهرة المذكورة؛ وذلك نتيجة لتعويل بعض الفاسدين على الحصانة لغايات الإفلات من العقاب.[16]

1–4 منهج الدراسة

تعتمد الدراسة على المنهج التأصيلي، والمنهج التحليلي، وكذلك المنهج المقارن، وتحديدًا المقارنة الأفقية؛ تجنبًا للتكرار. وتنطلق الدراسة من أحكام اتفاقية الأمم المتحدة لمكافحة الفساد، وعلى وجه الخصوص تلك الأحكام المتعلقة بالحصانات؛ وذلك للوقوف على مدى التوافق الفعلي بين قواعد الاتفاقية الأممية لمكافحة الفساد وبين القواعد المنظمة للحصانات في مجال التشريعات المقارنة، وتحديدًا التشريع الفلسطيني، بالإضافة لبعض التشريعات الأخرى، كالتشريع الفرنسي، والمغربي، والمصري، والأردني، والبريطاني في بعض الأحيان.

1–5 خطة الدراسة

حيث إن إشكالية الدراسة تتعلق بنقطة التوازن بين تطبيق أحكام الحصانة الإجرائية وبين فاعلية المواجهة الجزائية لظاهرة الفساد؛ لذا، فإن أصول المنهجية القانونية السليمة تقتضي أن يتم التطرق للآتي ذكره :
المبحث الأول: ماهية الحصانات في مجال مكافحة الفساد.
المبحث الثاني: أثر الحصانة على فاعلية المواجهة الجزائية لظاهرة الفساد.

2–0 ماهية الحصانات في مجال مكافحة الفساد

تقتضي مهمة الوقوف على فحوى هذا المبحث من الدراسة ضرورة أن يتم التطرق إلى حيثية التعريف بالحصانات الواردة في مجال مكافحة الفساد (المطلب الأول 1–2)، إضافةً إلى البحث في صور الحصانات المكرسة في مجال مكافحة الفساد (المطلب الثاني 2–2).

2–1 التعريف بالحصانات الواردة في مجال مكافحة الفساد

تندرج الحصانة ضمن نوعين: الحصانة الموضوعية، والحصانة الإجرائية. وقد بينا فيما سلف بأنه لا حصانة موضوعية لأحد في مواجهة جرائم الفساد؛ ذلك أن الحصانة الموضوعية تنطوي –وفق البعض– على سبب إباحة وتبرير يمتاز بالنسبية،[17] وحصانة إجرائية دائمة وفق البعض الآخر،[18] هذا من جانب. ومن جانب آخر، فإن نطاق الحصانة الموضوعية ينحصر –وفق ما ذهبت إليه غالبية التشريعات المقارنة– في تلك التي تخول لأعضاء البرلمان، وتحديدًا بخصوص الأفكار والآراء التي يبدونها بمناسبة العمل البرلماني.[19]

وتتمحور الحصانة المقررة في مجال مكافحة الفساد حول مفهوم الحصانة الإجرائية المؤقتة؛ تلك الحصانة التي تعطل السير في إجراءات الملاحقة الجزائية لبعض الوقت، وتحديدًا لحين انتهاء مدة الحصانة، أو حتى زوالها وفق الطريقة التي رسمها القانون. وحيث إن الحصانة الإجرائية تثبط حركة الإجراءات الجزائية بشكل مؤقت، ونظرًا لأنه قد جرى تكريس مجمل أحكام تلك الحصانة ضمن قواعد غالبية الدساتير المقارنة؛ فإن هذا يدفعنا إلى حتمية طرح التساؤل التالي: هل تعتبر الحصانة الإجرائية أصلًا دستوريًا؟ أم أنها تعد استثناءً دستوريًا على المبادئ الدستورية الأصيلة؟

مما لا شك فيه بأن الحصانة الإجرائية لا تُعبر عن القواعد الدستورية الأصيلة، وإنما هي نتاج حاجة ملحة استدعت تكريسها ضمن قواعد الدساتير المقارنة، وذلك على اعتبار أن الحصانة المذكورة تتعارض ظاهريًا مع جملة من المبادئ والقواعد التي تشكل قوام الوثيقة الدستورية، وتعد بمثابة دعامة حقيقية للنظام السياسي في الدولة، والحديث هنا –على وجه الخصوص– عن مبدأ المشروعية (سيادة القانون)، ومبدأ المساواة.[20]

وعلى الرغم مما سبق ذكره فإنه لا يمكن وسم الحصانة الإجرائية على أنها غير دستورية؛ وذلك نظرًا لأنه قد جرى تكريس معظم صورها دستوريًا، هذا من جهة. ومن جهة أخرى، فهي تعد بمثابة ضرورة، إذ أنها شرعت لغايات ضمان فاعلية ممارسة المهام الدستورية الموكلة للمتمتعين بالحصانة؛[21] فالحصانة البرلمانية قررت «ضمانًا لاستقلال السلطة التشريعية في مواجهة السلطة التنفيذية، وحتى يؤدي أعضاء السلطة التشريعية عملهم بحرية،[22] وحتى لا تكون الإجراءات الجزائية سيفًا مسلطًا على رقاب الأعضاء فيحول ذلك بينهم وبين أداء عملهم على خير وجه».[23] والحال كذلك بالنسبة للحصانة المقررة لبعض القائمين بأعباء السلطة التنفيذية في الدولة، وعلى وجه الخصوص

14 ويجد ذلك تبريره على اعتبار أن المواجهة الجزائية الفعالة لظاهرة الفساد تساهم في تحقيق التنمية الاقتصادية للدولة، على نحو يتبلور معه المعنى الحقيقي للاستقرار الاجتماعي؛ والعكس صحيح، إذ أن وضع العقبات أمام تفعيل منظومة المواجهة الجزائية لظاهرة الفساد يؤدي إلى انعدام مقومات التنمية الاقتصادية، والحيلولة دون تحقق عوامل الاستقرار المجتمعي، بما يجلب الدمار للشعوب والحكومات، وتحديدًا على صعيد الدول النامية التي تعاني من هشاشة الاقتصاد وضعف الموارد. للمزيد ينظر في :
Wodage, W. Criminalization of possession of unexplained property and the fight against public corruption, Mizan Law Review, 8(1), (2014), p. 70.

15 وذلك لكون موضوع الدراسة يتمحور حول جدلية التوازن بين تطبيق أحكام الحصانة -وتحديدًا الإجرائية منها– وبين ضمان فاعلية المواجهة الجزائية لظاهرة الفساد، حيث يشهد الموضوع المذكور نقاشًا قانونيًا مستفيضًا بين أوساط الفقه، إذ يؤكد بعض الفقه على ضرورة رفض فكرة تطبيق الحصانة الإجرائية بشكلٍ مطلق، سواء تعلق الأمر بجرائم الفساد، أو بغيرها من الجرائم، فيما يبقي البعض الآخر على تطبيق أحكام الحصانة المذكورة ضمن ضوابط وشروط معينة، وبالمقابل يذهب البعض إلى القول بأن الحصانات -وتحديدًا تلك المذكورة في التشريع الفلسطيني– لا تشكل عائق أمام الملاحقة القضائية الفعالة لجرائم الفساد؛ وأمام تشعب الآراء سابقة الذكر، واختلاف حججها، ومبرراتها، وأسانيدها القانونية، تبرز الأهمية العلمية للبحث في موضوع الدراسة، في محاولة للوقوف على نقطة التوازن بين تطبيق أحكام الحصانة وبين فاعلية المواجهة الجزائية لظاهرة الفساد. للمزيد حول الآراء سالفة الذكر ينظر في :
Shaghaji, D.R. Les crimes du jus cogens, le refus de l'immunitè des hauts reprèsentants des ètats ètrangers et l'exercice de la compètence universelle. Revue québécoise de droit international, 28(2), (2015), p. 167.
وعمار ياسر جاموس: الحصانة البرلمانية والعفو الخاص وأثرهما على مكافحة الفساد في فلسطين، المركز الفلسطيني لاستقلال المحاماة والقضاء «مساواة»، رام الله، 2015، ص. 42 - 44.
وكذلك مؤتمر الدول الأطراف في اتفاقية الأمم المتحدة لمكافحة الفساد -فريق استعراض التنفيذ في دولة فلسطين، الدورة السادسة المستأنفة، سانت بطرسبرغ، نوفمبر (2015)، ص. 7 على التقرير.

16 محمد عمر مراد: الحصانة البرلمانية في التشريع الفلسطيني، رسالة ماجستير، الجامعة الإسلامية -غزة، 2015، ص. 55.

17 للمزيد حول هذا الاتجاه الفقهي ينظر في: أحمد سليمان عبد الراضي محمد: المسئولية التأديبية لأعضاء المجالس النيابية -دارسة مقارنة، المرجع السابق، ص. 34.

18 للمزيد حول هذا الاتجاه الفقهي ينظر في: محمود نجيب حسني: شرح قانون الإجراءات الجنائية وفقًا لأحدث التعديلات التشريعية، مج. 1، ط. 6، دار النهضة العربية، القاهرة، 2019، ص. 159.
وعبد العظيم مرسي وزير: الجوانب الإجرائية لجرائم الموظفين والقائمين بأعباء السلطة العامة -دراسة مقارنة في القانونين المصري والفرنسي، دار النهضة العربية، القاهرة، 1987، ص. 73.
European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, Parliamentary immunity in a European context, In-depth analysis for the JURI & 2019-12-IPOL_IDA(2015)536461_EN.pdf, Viewed on 11/536461/committee, 2015, p. 7, Available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015.

19 ينظر في: المادة (1/53) من القانون الأساسي الفلسطيني المعدل، والمادة (1/26) من الدستور الفرنسي لعام 1958 وتعديلاته، والمادة (112) من دستور جمهورية مصر العربية لعام 2014م، والفصل (64) من دستور المملكة المغربية لعام 2011م، والمادة (87) من دستور المملكة الأردنية لعام 1952م.

20 للمزيد ينظر في: حسينة شرون: الحصانة البرلمانية، مجلة المفكر -جامعة محمد خيضر بسكرة، ع. 5، 2017، ص.153. ومشعل محمد العازمي: الحصانة البرلمانية -دراسة مقارنة بين الأردن والكويت، رسالة ماجستير، جامعة الشرق الأوسط، 2011، ص. 32.

21 إبراهيم كامل الشوابكة: الحصانة البرلمانية -دراسة مقارنة، رسالة ماجستير، الجامعة الأردنية، 1997، ص. 14.

22 WIGLEY, S. Parliamentary Immunity: Protecting Democracy or Protecting Corruption?, supra note, p. 24.

23 ينظر في: أحمد محمد براك حمد: مبادئ الإجراءات الجزائية -دراسة تحليلية تأصيلية مقارنة، ج.1، ط.1، دار الشامل للنشر والتوزيع، رام الله –فلسطين، 2019، ص. 242.

رئيس الدولة، وأعضاء مجلس الوزراء ومن هم في حكمهم، حيث يهدف المشرع الدستوري من وراء تقرير الحصانة لهؤلاء الأشخاص إلى ضمان فاعلية قيامهم بأعمالهم المنوطة بهم دستوريًا، على نحو لا تكون معه الإجراءات الجزائية خطرًا مداهمًا لهم في كل حين، بما يحجب عنهم الاتهامات الموجهة إليهم، وتحديدًا تلك التي تتصف بعدم الجدية، أو بالكيدية.[24] أما العلة من تجسيد الحصانة الإجرائية لأعضاء السلطة القضائية، فتتمحور حول صون هيبة وكرامة السلطة القضائية، وذلك من خلال حماية أعضائها من الإجراءات التي تتصف بالخفة والكيد،[25] على نحو يستهدف تأمين العمل القضائي، والحفاظ على سلامته واستقلاليته.[26]

وترتبط الحصانة الإجرائية بأشخاص وجرائم وإجراءات؛ ولعل هذا يدفعنا إلى ضرورة طرح التساؤل التالي: ما هي الضوابط التي تحدد نطاق تطبيق أحكام الحصانة الإجرائية؟

إن الإجابة عن التساؤل سالف الذكر تقتضي أن يتم التطرق إلى نطاق تطبيق أحكام الحصانة الإجرائية من حيث الأشخاص، والجرائم المشمولة بالحصانة، وطبيعة الإجراءات الجزائية التي تقع في نطاق الحصانة المذكورة.

2-1-1 نطاق الحصانة الإجرائية من حيث الأشخاص

يرتبط تحديد الأشخاص المشمولين بالحصانة بالعلة من تقريرها، حيث تتمحور هذه الأخيرة حول رغبة المشرع الدستوري في توفير الفعالية للمهام المسندة للأشخاص المتمتعين بالحصانة؛ ولعل هذا ما يجعلنا نؤكد على أن الحصانة موضوع دراستنا هي حصانة وظيفية،[27] ترتبط وجودًا وعدمًا بالوظيفة الملقاة على عاتق الشخص المحصن ضد الإجراءات الجزائية؛ وحيث إن الحصانة المذكورة تتعلق بتوفير الحماية لأعمال القائم بالوظيفة، فمن الطبيعي أن تكون شخصية؛[28] بمعنى أن مفعولها لا يشمل سوى الشخص القائم بالعمل الذي شُرّعت من أجله الحصانة[29] دون غيره من الأشخاص، بما في ذلك أقاربه؛ كزوجه وأولاده وعائلته، أو غير الأقارب ممن يعملون معه أو تحت إمرته.

2-1-2 نطاق الحصانة الإجرائية من حيث الجرائم

تصنف الجرائم ضمن ثلاثة أنواع، بحيث يأتي على رأسها الجنايات، ثم الجنح، فالمخالفات؛ ونتيجةً لذلك، فقد اختلفت التشريعات المقارنة على صعيد تحديد الجرائم المشمولة في نطاق أحكام الحصانة، إلا أن التشريع المقارن قد اتفق على عدم استثناء الجنايات والجنح من مفاعيل الحصانة؛ في ظل حجب تلك المفاعيل عن الجرائم من نوع المخالفات في بعض الأحيان.[30] وحيث إن دراستنا تتعلق بالحصانة في مجال جرائم الفساد؛ لذا، يمكن القول بأن كل الأفعال المؤثمة التي تصنف على أنها جرائم فساد تدخل في إطار مفاعيل الحصانة الإجرائية، على اعتبار أن تلك الأفعال في مجموعها تنطوي على جرائم من نوع الجنايات والجنح،[31] إذ لا يندرج أيًا منها في نطاق الجرائم التكديرية (المخالفات).

2-1-3 نطاق الحصانة الإجرائية من حيث الإجراءات

تتمحور الإجراءات الجزائية حول مجموعة من المراحل الاستقصائية، حيث تبدأ هذه الأخيرة بمرحلة جمع الاستدلالات، مرورًا بالتحقيق الابتدائي، وصولًا إلى المحاكمة (التحقيق النهائي)، وأخيرًا مرحلة التنفيذ. وحيث إن الحصانة الإجرائية تقيد الإجراءات الجزائية بشكل مؤقت، فإنه يتوجب علينا ضرورة الوقوف على الإجراءات التي تقع محلًا للتقييد بفعل الحصانة، حيث تنصب هذه الأخيرة –وفق الرأي السائد في الفقه– على الإجراءات الماسة بشخص وحرمة مسكن المتمتع بالحصانة؛ ولذلك، فلا يجوز القبض عليه، أو تفتيشه، أو استجوابه، أو توقيفه احتياطيًا، ولا يمكن تفتيش مسكنه، أو ضبط مراسلاته، أو إجراء تسجيلات لمحادثاته أو أحاديثه، والأهم من ذلك كله أنه من غير المقبول قانونًا أن يتم رفع دعوى الحق العام ضده، نتيجةً لتمتعه بالحصانة المقيدة للملاحقة الجزائية، وذلك تحت طائلة البطلان، على اعتبار أن الحصانة تتعلق بالنظام العام، إذ يجوز الدفع بها في أي مرحلة من مراحل المحاكمة، ولو كان ذلك أمام محكمة النقض، ولا يمنع من تقرير البطلان رضاء المتمتع بالحصانة بما اتخذ قبله من إجراءات باطلة.[32]

أما إذا تعلقت الإجراءات الجزائية بمسائل غير متصلة بشخص المتمتع بالحصانة أو بحرمة مسكنه؛ فإنه يجوز عندئذٍ اتخاذها وفقًا للأصول والقانون، بل إنه يتوجب على الجهات القائمة على التحري والتحقيق في مجال جرائم الفساد –وفي حالتنا هيئة مكافحة الفساد– ضرورة القيام بالتحريات والتحقيقات التي من الممكن أن يستدل من خلالها على وجود شبهات فساد،[33] على نحو يستوجب رفع الحصانة.[34]

وبعدما فرغنا من بيان هذه الجزئية، ننتقل للحديث عن صور الحصانات المكرسة في مجال مكافحة الفساد (المطلب الثاني 2–2).

2-2 صور الحصانات المكرسة في مجال مكافحة الفساد

تنطوي الحصانة الإجرائية على تأخير السير في الإجراءات الجزائية لفترة زمنية مؤقتة،[35] وتعد الأولى من قبيل القيود التي ترد على حرية النيابة العامة في تحريك الدعوى الجزائية.[36] ويشترط في الحصانة ضرورة أن تكون مكرسة ضمن نصوص القانون؛ إذ أنه لا حصانة إلا بنص قانوني، بحيث يتولى هذا الأخير مهمة تحديد ضوابط التمتع بها وزوالها على حد سواء. ولعل هذا يوصلنا إلى ضرورة طرح التساؤل التالي: كيف نظم التشريع الفلسطيني الحصانات المقيدة لإجراءات مكافحة جرائم الفساد؟[37]

إن الإجابة على التساؤل السابق تقتضي البحث في كل نوع من أنواع الحصانة على حدة، على نحو يشمل الحصانة البرلمانية، والحصانة المقررة لبعض القائمين بأعباء السلطة التنفيذية، وكذلك الحصانة القضائية، وأخيرًا حصانة رئيس هيئة مكافحة الفساد.

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24 Vrushi, J. The provisions of immunity for ministers and Parliament members, Transparency International, 2018, p. 3.

25 سر الختم عثمان إدريس ومحمد عبد اللطيف محمد: الحصانة القضائية وضوابط رفعها، مجلة الدراسات العليا -جامعة النيلين، مج. 11، ع. 44، 2018، ص. 75.

26 Goré, M. La responsabilité civile, pénale et disciplinaire des magistrats, Electronic Journal of Comparative Law, vol. 11.3, (December 2007), p. 9.
ولعل هذا ما يمكن أن يستدل عليه صراحةً مما صرحت به الجمعية العمومية لقسمي الفتوى والتشريع المصرية، حيث أكدت الأخيرة على أن «... حصانة القضاة لا يجوز أن تكون موطنًا لحماية أعضاء السلطة القضائية من المسؤولية عن عثراتهم التي تخل بشروط توليهم القضاء وقيامهم على رسالته، ولا أن تكون عاصمًا من محاسبتهم عما يصدر عنهم من أعمال تؤثر في هيبة السلطة القضائية وعلى منزلتها أو تنتقص من ثقة المتقاضين في القائمين على شؤونها. وإنما يتعين أن تظل الحصانة مرتبطة بمقاصدها، ممثلة في تأمين العمل القضائي من محاولة التأثير فيه، ضمانًا لسلامته...» . للمزيد ينظر في : فتوى الجمعية العمومية لقسمي الفتوى والتشريع، ملف رقم 269/1/58، الصادرة بتاريخ 2014/1/20، منشورات موقع منشورات قانونية، ص. 9 – 10 على الفتوى.

27 WIGLEY, S. Parliamentary Immunity: Protecting Democracy or Protecting Corruption?, supra note, p. 27.

28 محمد سعيد نمور: أصول الإجراءات الجزائية، ط.1، دار الثقافة للنشر والتوزيع، عمان، 2005، ص. 198.

29 Article sur « Fiche de synthèse n°16 : Le statut du député», publié sur le site du Assemblée nationale française, Disponible en : http://www2.assemblee-nationale.fr/, Vu sur 152019-12-.

30 للمزيد ينظر في: محمود نجيب حسني: شرح قانون الإجراءات الجنائية وفقًا لأحدث التعديلات التشريعية، المرجع السابق، ص. 166.

31 ينظر في: المادة (1) من قانون مكافحة الفساد الفلسطيني المعدل رقم (1) لسنة 2005م، وذلك بدلالة النصوص ذات العلاقة من قانون العقوبات رقم (16) لسنة 1960م المطبق في الضفة الغربية.

32 ينظر في: أحمد محمد براك حمد: مبادئ الإجراءات الجزائية -دراسة تحليلية تأصيلية مقارنة، المرجع السابق، ص. 243 وما بعدها.

33 حكم محكمة النقض الفلسطينية -الدائرة الجزائية، قرارها في الدعوى رقم 2016/196، الصادر بتاريخ 2018/1/23، حكم غير منشور، ص. 5 على الحكم.

34 ينظر في: المواد (1/12)، (1/17–2) من قانون مكافحة الفساد الفلسطيني المعدل رقم (1) لسنة 2005م.

35 Guèrin, C. Immunitès et statut des dèputès: Vers une suppression de L'inviolabiltè?, Article publié le 22 novembre 2017, Disponible en: http://blog.juspoliticum.com, Vu sur 152019-12-.

36 ينظر في: عمار ياسر جاموس: الحصانة البرلمانية والعفو الخاص وأثرهما على مكافحة الفساد في فلسطين، المرجع السابق، ص. 30. ويحيى بن أحمد الخزان: الحصانة القضائية في الفقه والقانون اليمني والتونسي، رسالة دكتوراه، جامعة الزيتونة -المعهد الأعلى لأصول الدين، 2001، ص. 276.

37 في هذا المطلب سيقتصر الحديث على بيان صور الحصانات المكرسة في مجال مكافحة الفساد في التشريع الفلسطيني، وذلك لسببين؛ أولهما، أن التشريع المذكور هو التشريع المركزي في هذه الدراسة. أما السبب الثاني، فيتمحور حول تطبيق منهج المقارنة الأفقية، تجنبًا للتكرار، وذلك على اعتبار أنه سيتم التطرق لصور الحصانات الواردة في التشريع المقارن ضمن المبحث الثاني من هذه الدراسة.

2-2-1 الحصانة البرلمانية

ترتبط الحصانة البرلمانية بالسلطة التشريعية، على اعتبار أنها تُمنَح لأعضاء البرلمان (المجلس التشريعي)، وذلك بغية تمكينهم من القيام بمهامهم على أكمل وجه،[38] دون ابتزاز أو تهديد، وبمعزل عن تغول السلطة التنفيذية.[39] وهي؛ أي الحصانة البرلمانية، تختلف باختلاف ظروف الجريمة المرتكبة من قبل عضو البرلمان، وتحديدًا من حيث توافر ظرف التلبس في الجريمة من عدمه.

والأصل أنه لا يجوز أن تتخذ أية إجراءات جزائية فورية بحق عضو المجلس التشريعي، وذلك نتيجةً لتمتعه بالحصانة الإجرائية، إذ أن هذه الأخيرة تؤخر السير في إجراءات الملاحقة لحين زوال الحصانة أو رفعها وفقًا للأصول. بيد أن المشرع الفلسطيني قد أورد استثناءً على ما تقدم ذكره، وتحديدًا في حالة التلبس بجناية،[40] حيث يُصار –والحالة هذه– إلى السير بشكل فوري في الإجراءات الجزائية بحق عضو المجلس التشريعي، شريطة إبلاغ المجلس بالإجراءات المتخذة في مواجهة العضو، وعلى إثر ذلك –وتحديدًا إذا وقعت الجريمة في أدوار الانعقاد– يقوم المجلس باتخاذ ما يراه مناسبًا في هذا الإطار، أما إذا لم يكن المجلس منعقدًا، فإن تلك المهمة تناط بهيئة مكتب رئاسة المجلس التشريعي، حيث تقوم هذه الأخيرة بمتابعة الإجراءات المتخذة بحق عضو المجلس التشريعي، وإجراء المناسب في هذا المجال.[41]

أما إذا ارتكب عضو المجلس التشريعي جناية في غير حالة التلبس، أو جنحة، فإنه يُصار –عندئذٍ– إلى اتباع إجراءات رفع الحصانة المنصوص عليها قانونًا، حيث يقدم طلب حجب الحصانة من قبل النائب العام إلى رئيس المجلس التشريعي،[42] وذلك من خلال مذكرة خطية تحدد نوع الجرم، وظروفه المادية من حيث الزمان، والمكان، بالإضافة إلى التحريات المتخذة بمناسبة الجريمة؛ ومن ثم يحيل رئيس المجلس الطلب إلى اللجنة القانونية ويعلم المجلس بتلك الإحالة، وتقوم اللجنة المذكورة ببحث الطلب وتقدم تقريرها إلى المجلس. وعلى إثر ذلك، يتخذ الأخير قراره برفع الحصانة بأغلبية الثلثين، بعد أن يقوم بالاستماع لرأي عضوين موافقين وعضوين آخرين رافضين لموضوع الطلب.[43]

2-2-2 الحصانة المقررة لبعض القائمين بأعباء السلطة التنفيذية

كرس قانون مكافحة الفساد الفلسطيني حصانات إجرائية لبعض الأشخاص ممن ينتمون للسلطة التنفيذية،[44] وعلى رأس هؤلاء رئيس الدولة. ويلاحظ المتفحص للنص الناظم لحصانة رئيس الدولة،[45] بأن طلب رفع الحصانة يُعد من قبل رئيس هيئة مكافحة الفساد أو النائب العام، وذلك بناءً على وجود شبهات تتعلق بارتكاب جريمة فساد من طرف رئيس الدولة، حيث يُقدم الطلب إلى المجلس التشريعي والمحكمة الدستورية، ويتم رفع الحصانة عن رئيس الدولة بقرار من المحكمة الدستورية العليا، وموافقة أغلبية ثلثي أعضاء المجلس التشريعي.[46]

وقد جاء قانون مكافحة الفساد الفلسطيني بنص آخر يمنح الحصانة الإجرائية لرئيس الوزراء، ومستشاري رئيس الدولة، وأعضاء مجلس الوزراء، ومن هم في حكمهم. ويلاحظ المتمعن في ذلك النص،[47] بأن طلب حجب الحصانة يعد من قبل رئيس مكافحة الفساد، مؤيدًا بالأدلة التي تشير إلى وجود شبهات فساد، ويقدم إلى رئيس الدولة، أو رئيس الوزراء، وذلك بحسب الشخص المطلوب رفع الحصانة عنه. وعلى إثر ذلك، تبحث اللجان أو الدوائر القانونية في الرئاسة أو مجلس الوزراء –بحسب الحال– في الطلب، وترفع توصياتها بهذا الشأن، وفي حالة كون الطلب محقًا، يقوم رئيس الدولة بإحالة رئيس الوزراء للتحقيق، وكذلك الحال بالنسبة للوزراء ومن في حكمهم، حيث يقوم رئيس الوزراء بإحالتهم للتحقيق وفق الأصول.[48]

2-2-3 الحصانة القضائية

أكد قانون مكافحة الفساد الفلسطيني على مسألة تمتع أعضاء السلطة القضائية بالحصانة الإجرائية، على نحو يشمل القضاة وأعضاء النيابة العامة، وذلك بغية حماية العمل القضائي من الكيد والتعسف.[49] ويلاحظ المتفحص لنص المادة (1/17) من قانون مكافحة الفساد، بأن طلب رفع الحصانة يرتبط بوجود شبهات قوية على ارتكاب جرم الفساد من قبل عضو السلطة القضائية، حيث يقدم ذلك الطلب من قبل رئيس هيئة مكافحة الفساد إلى مجلس القضاء الأعلى، وبدوره يقوم الأخير بمنح الإذن لغايات رفع الحصانة، متى تحققت شروط ذلك.[50] وتستثنى حالة التلبس من التقيد بإجراءات رفع الحصانة، حيث يجوز –والحالة تلك– أن يُصار إلى القبض على عضو السلطة القضائية أو توقيفه، بشكل فوري، على أن يتم تبليغ مجلس القضاء الأعلى بذلك، وتحديدًا خلال الأربع والعشرين ساعة التالية للقبض، حيث يقوم المجلس –حينئذٍ– باتخاذ المقتضى القانوني وفقًا لأحكام قانون السلطة القضائية.[51]

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38 يرجع تاريخ تكريس أول نظام قانوني حمائي للوظائف العامة إلى عهد الرومان، حيث كان القانون آنذاك يعاقب بالإعدام على الفعل المتعلق بالتعدي على نواب الشعب أو عرقلة وظائفهم. وبحلول أواخر القرن السابع عشر، أصبحت بريطانيا أول دولة في العالم تقرر الحصانة القانونية للبرلمانيين، على نحو يضمن فعالية ممارستهم للمهام المنوطة بهم. وفي نهاية القرن الثامن عشر، انبثق عن الثورتين الأمريكية والفرنسية طرق جديدة لتوفير الحماية لممثلي الشعب، وذلك ضد الأخطار التي تتمحور حول تدخل وتغول السلطة التنفيذية في أعمال السلطة البرلمانية. للمزيد ينظر في:
Vrushi, J. The provisions of immunity for ministers and Parliament members, supra note, p. 2.

39 معاذ عبد الستار شعبان؛ الحصانة البرلمانية في الفقه الإسلامي، مجلة جامعة الأنبار للعلوم الإسلامية، مج. 9، ع. 38، 2018، ص. 194.

40 للمزيد حول مفهوم حالات التلبس ينظر في: المادة (26) من قانون الإجراءات الجزائية الفلسطيني رقم (3) لسنة 2001م.

41 ينظر بهذا الشأن في: المادة (4/53) من القانون الأساسي الفلسطيني المعدل. وكذلك المادة (4/95) من النظام الداخلي للمجلس التشريعي الفلسطيني. وأيضاً المادة (24) من قانون واجبات وحقوق أعضاء المجلس التشريعي رقم (10) لسنة 2004.

42 تجدر الإشارة هنا إلى ضرورة أن يقوم المشرع الفلسطيني بالتأكيد على أن طلب رفع الحصانة عن أعضاء المجلس التشريعي يجب أن يكون مقدمًا من قبل رئيس هيئة مكافحة الفساد؛ أسوةً بباقي طلبات رفع الحصانة المنصوص عليها في قانون مكافحة الفساد، وذلك على اعتبار أن المادة (1/17) من القانون المذكور قد شملت أعضاء المجلس التشريعي ضمن أحكام الحصانة المكرسة في مجال محاربة الفساد؛ وحيث إن هيئة مكافحة الفساد هي صاحبة الصلاحية الأصيلة في تحريك دعاوى الفساد، لذا، فإنه يتوجب أن يتم تقديم طلب رفع الحصانة عن أعضاء المجلس التشريعي من قبل رئيس هيئة مكافحة الفساد.

43 ينظر في: المادة (96) من النظام الداخلي للمجلس التشريعي الفلسطيني. وكذلك المادة (26) من قانون واجبات وحقوق أعضاء المجلس التشريعي رقم (10) لسنة 2004.

44 للمزيد ينظر في: أحمد محمد براك حمد: مكافحة الفساد في التشريع الفلسطيني والمقارن - دراسة تحليلية تأصيلية مقارنة، المرجع السابق، ص. 143 وما بعدها.

45 تنص المادة (1/12) من قانون مكافحة الفساد الفلسطيني المعدل رقم (1) لسنة 2005م على أن «إذا تبين لرئيس الهيئة أو النائب العام وجود شبهات فساد من قبل رئيس الدولة يتقدم بطلب تمهيدي إلى المجلس التشريعي والمحكمة الدستورية طالباً البحث في الأهلية القانونية لرئيس الدولة وفقاً للأصول الواردة في القانون الأساسي».

46 ينظر في : المادة (1/37/ج) من القانون الأساسي الفلسطيني.

47 تنص المادة (1/17) من قانون مكافحة الفساد الفلسطيني المعدل رقم (1) لسنة 2005م على أن «إذا تبين للهيئة بالنسبة للفئات المنصوص عليها في البنود (1، 2، 3، 4) من المادة (2) من هذا القانون باستثناء رئيس الدولة وجود شبهات قوية على ارتكاب إحدى الجرائم المشمولة في هذا القانون يحيل رئيس الهيئة الأمر إلى رئيس الدولة بالنسبة لرئيس الوزراء ومستشاريه، وإلى رئيس مجلس الوزراء بالنسبة للوزراء ومن في حكمهم... لاتخاذ الإجراءات القانونية اللازمة وفقاً للقانون الأساسي والتشريعات ذات العلاقة».

48 ينظر في: المادة (1/75–2) من القانون الأساسي الفلسطيني.

49 يحيى بن أحمد الخزان: الحصانة القضائية في الفقه والقانون اليمني والتونسي، المرجع السابق، ص. 280.
& European Committee for Democracy through Law, Venice Commission, Amicus curiae brief The judges' immunity To the Constitutional Court From Moldova, Adopted by the Venice Commission At the ninety-fourth plenary session (Venice, March 82013 ,9-), p. 5, Available at :https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)008-e, Viewed on 112019-12-.

50 يرى بعض الفقه - ونوافقه الرأي - بأن أحكام الحصانة القضائية تستوجب – في غير أحوال التلبس - أن يتم الحصول على إذن مجلس القضاء الأعلى قبل إتخاذ أية إجراءات جزائية ماسة بعضو السلطة القضائية؛ على نحو يكفل الحماية له، ولمسكنه، ضد إجراءات القبض، والتفتيش، والاستجواب، والتوقيف، ومراقبة الأحاديث والمحادثات. للمزيد ينظر في: أحمد محمد براك حمد: مبادئ الإجراءات الجزائية -دراسة تحليلية تأصيلية مقارنة، المرجع السابق، ص. 246. ومحمود نجيب حسني : شرح قانون الإجراءات الجنائية وفقاً لأحدث التعديلات التشريعية، المرجع السابق، ص. 167.

51 حيث تنص المادة (1/56–2) من قانون السلطة القضائية الفلسطيني رقم (1) لسنة 2002م على أن «–1 في غير حالات التلبس بالجريمة لا يجوز القبض على القاضي أو توقيفه إلا بعد الحصول على إذن من مجلس القضاء الأعلى. –2 وفي حالات التلبس على النائب العام عند القبض على القاضي أو توقيفه أن يرفع الأمر إلى مجلس القضاء الأعلى خلال الأربع وعشرين ساعة التالية للقبض عليه، ولمجلس القضاء الأعلى أن يقرر بعد سماع أقوال القاضي إما الإفراج عنه بكفالة أو بغير كفالة وإما استمرار توقيفه للمدة التي يقررها وله تمديد هذه المدة».

2-2-4 حصانة رئيس هيئة مكافحة الفساد

أشار قانون مكافحة الفساد الفلسطيني إلى انطباق أحكام الحصانة الإجرائية بحق رئيس هيئة مكافحة الفساد، وذلك على نحو يكفل له الحماية، بعيدًا عن التهديد والكيدية، بهدف تمكينه من أن يكون سيفًا مسلطًا على الفاسدين، بما يضمن الفعالية الحقيقية لأداء هيئة مكافحة الفساد ويحقق أهدافها. ويلاحظ المتفحص لنصوص قانون مكافحة الفساد،[52] بأن طلب رفع الحصانة عن رئيس الهيئة يرتبط بوجود شبهات قوية على ارتكابه لإحدى جرائم الفساد المنصوص عليها قانونًا، حيث يحيل -حينئذٍ- رئيس الدولة ملف تلك الشبهات إلى المجلس التشريعي، ويتولى هذا الأخير مهمة التقصي والتحقيق في الشبهات موضوع الإحالة، وعلى إثر ذلك، ومتى تحققت موجبات رفع الحصانة، يقرر المجلس التشريعي بأغلبيته المطلقة رفع الحصانة عن رئيس الهيئة، ووقفه عن العمل، وإحالته إلى القضاء المختص للنظر في الموضوع وفق الأصول.[53]

وبعدما فرغنا من بيان صور الحصانات الإجرائية المكرسة في مجال مكافحة الفساد على الصعيد الفلسطيني،[54] ننتقل للحديث عن أثر الحصانة على فاعلية المواجهة الجزائية لظاهرة الفساد (المبحث الثاني 3-0).

3-0 أثر الحصانة على فاعلية المواجهة الجزائية لظاهرة الفساد

إن مهمة الخوض في هذا المبحث من الدراسة تقتضي منا أن نعترف بأن الحصانة تعيق فاعلية المواجهة الجزائية لظاهرة الفساد (المطلب الأول 3-1). وحيث إن الحصانة تقوض فاعلية المواجهة الجزائية لظاهرة الفساد؛ لذا، فإنه لا بد من تكريس أسس تحقيق التوازن المناسب بين الحصانة والمواجهة الجزائية للفساد (المطلب الثاني 3-2).

3-1 الحصانة تعيق فاعلية المواجهة الجزائية لظاهرة الفساد

كرست اتفاقية الأمم المتحدة لمكافحة الفساد نصًا توجيهيًا ملزمًا غاية في الأهمية؛ حيث يتمحور هذا الأخير حول حث الدول الأطراف على ضمان الفاعلية الحقيقية لمنظومة المواجهة الجزائية لظاهرة الفساد؛ وذلك من خلال إجراء الإصلاحات التشريعية اللازمة على نظام الحصانات المكرسة قانونًا، وتحديدًا في الحالة التي تؤدي فيها تلك الحصانات إلى إفلات مرتكبي جرائم الفساد من العقاب، نتيجةً لتمتعهم بالحصانة؛[55] ولذلك، فإن أي عملية إصلاح تشريعي تتطلب -وكنقطة أساس- ضرورة الوقوف على مواطن القصور في أنظمة الحصانات. ولعل هذا ما يدفعنا إلى طرح التساؤل التالي: كيف تحد الحصانات من فاعلية المواجهة الجزائية لظاهرة الفساد في نطاق التشريع الفلسطيني والمقارن ؟

إن الإجابة عن التساؤل سابق الذكر توجب علينا ضرورة البحث في مواضع الضعف التي تعتري النظام القانوني للحصانات، على نحو يشمل التشريع الفلسطيني والمقارن على حدٍ سواء. ولا يكون ذلك ممكنًا إلا من خلال وضع اليد على مكامن الوهن في كل من: نظام الحصانة البرلمانية، وحصانة رئيس الدولة، وحصانة رئيس وأعضاء مجلس الوزراء، وأخيرًا الحصانة القضائية.

3-1-1 الحصانة البرلمانية

تربط غالبية التشريعات المقارنة مسألة رفع الحصانة عن عضو البرلمان بضرورة الحصول على إذن مسبق من المجلس الذي يتبعه العضو المتمتع بالحصانة؛ وهذا هو موقف معظم التشريعات العربية،[56] وكذلك هو الحال بالنسبة للمشرع الفرنسي.[57]

ويقع نظام الحصانة البرلمانية بين التأييد والمعارضة، حيث يذهب البعض إلى القول بأن النظام المذكور سيحقق الغرض المنشود منه إذا ما اقترن بمتطلبات النزاهة عند تقرير رفع الحصانة؛ ويكون ذلك في حالة تكليف الأشخاص النزيهين والمستقلين بعضوية اللجان البرلمانية الرئيسية المكلفة بالبحث في حيثية حجب الحصانة.[58] ومن جانبنا نبدي بأننا لا نتفق مع الشكل الذي يتخذه نظام الحصانة البرلمانية في إطار التشريعات المقارنة؛ وذلك نتيجة عدة أسباب، لعل أهمها: **أولاً**؛ أن نظام الحصانة البرلمانية -بالشكل الذي هو عليه- يؤدي إلى الخلط بين المسائل القضائية والسياسية، على نحو يضر بالعدالة الجزائية، إذ أن تركيبة البرلمانات تقوم على ما تفرزه الانتخابات السياسية، وينبثق عن ذلك ما يسمى بالأغلبية والأقلية البرلمانية؛ لذا، فإن ربط مسألة رفع الحصانة بتصويت البرلمان على ذلك سيضر بالأعضاء الذين ينتمون للمعارضة في أغلب الأحوال، هذا من جانب. ومن جانب آخر، فإن منح البرلمان صلاحية الفصل في طلب حجب الحصانة يتناقض مع طبيعة ذلك الطلب، على اعتبار أن موضوع هذا الأخير يتمحور حول فحص الاتهام، واستبعاد الاتهامات الكيدية وغير الجدية، وهذا ما يجب أن يقترن بجهة قضائية مستقلة، بحيث تكون قادرة على تمحيص التهمة، وبسط أدلتها الأولية، والوقوف على مدى جديتها، وتقرير رفع الحصانة بشأنها، نتيجةً للتحقق من الدلائل المبدئية التي تشير إلى ثبوتها.

أما **السبب الثاني**، فإن شكل الحصانة الذي تعتمده التشريعات المقارنة يشجع بعض البرلمانيين على استغلال الحصانة بشكل سلبي،

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52 ينظر في: المادة (2/17) من قانون مكافحة الفساد الفلسطيني المعدل رقم (1) لسنة 2005م.

53 تجدر الإشارة إلى أن رئيس ديوان الرقابة المالية والإدارية يعين بدرجة وزير وفقاً للقانون، وبالتالي فهو يتمتع بالحصانة المقررة للوزراء، وذلك طبقاً لنص المادة (1/17) من قانون مكافحة الفساد الفلسطيني المعدل رقم (1) لسنة 2005م.

54 كنا قد تحدثنا في هذا المطلب عن الحصانة التي تؤخر السير في الإجراءات الجزائية، وجديرٌ بالذكر أن نشير إلى نوع آخر من الحصانة، والحديث هنا عن حصانة إقرارات الذمة المالية ضد إجراءات الاطلاع والحفظ لدى هيئة مكافحة الفساد، إذ تحوز تلك الإقرارات على وصف السرية، بحيث لا يجوز الاطلاع عليها إلا بإذن من المحكمة المختصة، بناءً على طلب يقدم من قبل هيئة مكافحة الفساد، وتحديدًا بالنسبة لإقرارات الذمة المالية الخاصة برئيس الدولة، ورئيس وأعضاء مجلس الوزراء، ورئيس وأعضاء المجلس التشريعي، وأعضاء السلطة القضائية والنيابة العامة.

وفي هذا المجال يتوجب علينا التأكيد على أنه ينبغي على المشرع الفلسطيني أن يتخلى عن السرية التي تحيط بإقرارات الذمة المالية، وذلك من خلال حفظ جميع إقرارات الذمة المالية لدى هيئة مكافحة الفساد، لكي يتسنى لها الاطلاع عليها، وإحداث الرقابة بشأنها، خصوصًا وأن التشريعات الحديثة -ومنها التشريع الفرنسي وتشريعات الدول الغربية- تذهب نحو نشر إقرارات الذمة المالية الخاصة بكبار المسؤولين، وإتاحتها للعموم، بغية إحداث الرقابة الشعبية عليها، مع الأخذ بعين الاعتبار الحق في الخصوصية بالنسبة لبعض البيانات التي تتضمنها الإقرارات المذكورة.

55 Vrushi, J. The provisions of immunity for ministers and Parliament members, supra note, p. 8.

56 تجنبًا للتكرار ينظر في: المادة (53) من القانون الأساسي الفلسطيني المعدل، والمادة (96) من النظام الداخلي للمجلس التشريعي الفلسطيني، وكذلك المادة (26) من قانون واجبات وحقوق أعضاء المجلس التشريعي رقم (10) لسنة 2004.

وبنفس الاتجاه ينظر في: المادة (113) من دستور جمهورية مصر العربية لعام 2014، والمادة (86) من دستور المملكة الأردنية لعام 1952.

57 تنص المادة (2/26) من الدستور الفرنسي لعام 1958 وتعديلاته على أن «ولا يجوز أن يكون أي عضو في البرلمان -في ما يتعلق بالجنايات أو الجنح- محل توقيف أو أي إجراء آخر يسلبه حريته أو يقيدها إلا بترخيص من المجلس الذي ينتمي إليه. ولا يشترط هذا الترخيص في حالة التلبس بجناية أو جنحة أو في حالة الإدانة النهائية».

تجدر الإشارة إلى أن المشرع الفرنسي قد عمد إلى إدخال جملة من التعديلات على تشريعه الدستوري منذ الرابع من أغسطس عام 1995م، وقد أصبح من غير الممكن أن تتخذ أية إجراءات جزائية فورية بحق عضو البرلمان إلا في حالتي التلبس والإدانة النهائية، أما ما عدا ذلك من حالات، فإنه لا يجوز اعتقال أي عضو من أعضاء البرلمان أو تقييد حريته دون الحصول على إذن من المجلس الذي ينتمي له العضو. وتطبيقًا لما سبق، فقد أكد المجلس الدستوري الفرنسي على أن « ... يستفيد أعضاء البرلمان، بموجب الفقرة الأولى من المادة 26 من الدستور، من الحصانة نتيجة للآراء أو الأصوات المعبر عنها بمناسبة ممارسة الوظيفة البرلمانية، وتطبيقاً للفقرة الثانية من نفس المادة، فإنه لا يجوز أن يخضع عضو البرلمان للتوقيف أو أي تدبير آخر يقيد الحرية دون إذن من المجلس الذي هو جزء منه... ويستثنى من ذلك حالتي التلبس أو الإدانة النهائية». للمزيد حول ما سبق ذكره ينظر في:

Article sur « Fiche de synthèse n°16 : Le statut du député», publié sur le site du Assemblée nationale française, Disponible en : http://www2.assemblee-nationale.fr/, Vu sur 152019-12-.

& Conseil constitutionnel, décision n° 98408- DC du 22 janvier 1999, Concernant le traité établissant le statut de la Cour pénale internationale, Paragraphe (16) de la décision, Disponible en : https://www.doctrine.fr, Vu sur 152019-12-.

58 Richter, M & Miriam, K. The case against parliamentary immunity in Ukraine, 6 August 2019, Available at : https://www.atlanticcouncil.org/blogs/ukrainealert/the-case-against-parliamentary-immunity-in-ukraine/, Viewed on 152019-12-.

نتيجةً لسوء استخدامها، بغية تحقيق مآرب شخصية، وبدعم من البرلمان في بعض الأحيان. والأمثلة على ذلك عديدة، ففي ألبانيا مثلًا، رفض البرلمان رفع الحصانة عن أحد أعضاء البرلمان رغم اتهامه بجريمة تهريب مخدرات. وفي مصر، وتحديدًا في العام 2006، عثرت مصلحة الجمارك المصرية على 1700 كيلو غرام من حبوب الفياجرا، كان قد جرى استيرادها بطريقة غير مشروعة باسم شركة نائب في البرلمان، وقد نفى هذا الأخير ارتكابه لأية مخالفات، واستخدم الحصانة لحماية نفسه من الملاحقة الجزائية.[59]

ونتيجةً لما سبق ذكره، فإن التشريع المغربي –ونوافقه الرأي– لا يعترف بالحصانة الإجرائية للبرلمانيين. حيث اقتصر دستور المملكة المغربية لعام 2011 على تكريس الحصانة البرلمانية الموضوعية فحسب، وتحديدًا تلك التي تتعلق بالآراء والتصويت. وقد قلنا فيما سبق بأن الحصانة الموضوعية تفرز حصانة إجرائية دائمة، بحيث تنصب هذه الأخيرة على عدم جواز إجراء الملاحقة الجزائية بحق عضو البرلمان بمناسبة إبدائه لرأي معين أو قيامه بالتصويت على مسألة معينة. وفي هذا المقام فإن المشرع المغربي قد وسع نطاق الحصانة الموضوعية لتشمل كل الآراء والمعتقدات البرلمانية للنائب، باستثناء تلك التي تمس بالنظام الملكي، أو الدين الإسلامي، أو بالاحترام الواجب للملك، إذ يؤدي ارتكاب تلك الأفعال إلى تعطيل أحكام الحصانة الموضوعية، وما يترتب عليها من حصانة إجرائية دائمة، ويُصار حينئذٍ إلى السير في إجراءات الملاحقة الجزائية وفق الأصول.[60]

3–1–2 حصانة رئيس الدولة

ترتبط حصانة رؤساء الدول بالأنظمة الرئاسية، وشبه الرئاسية، على اعتبار أن الأنظمة البرلمانية الملكية تقوم على قاعدة عدم جواز المسائلة الجزائية للملك. وتختلف التشريعات المقارنة في مسألة تنظيمها لحيثية رفع الحصانة عن رئيس الدولة، حيث ينيط التشريع الفلسطيني تلك المهمة بالمحكمة الدستورية والمجلس التشريعي معًا، فيما يسند التشريع المصري المهمة المذكورة إلى مجلس الشعب.[61] أما التشريع الفرنسي[62] فيحدد أحكام حصانة رئيس الدولة في إطار المادة 68 من الدستور؛ وبموجب هذه الأخيرة فإنه لا يمكن حجب الحصانة عن الرئيس إلا إذا تحققت الشروط التالية: **أولًا**، لا بد أن يتوافر اقتراح مشترك برفع الحصانة من قبل مجلسي البرلمان. **ثانياً**، لا يتخذ قرار رفع الحصانة إلا خلال الجهة التي حددها الدستور، والتي تتمثل في البرلمان الذي يتم تشكيله في صورة محكمة عليا، بحيث يرأس رئيس الجمعية الوطنية برلمان المحكمة، ويأخذ الأخير قراره بأغلبية الثلثين، خلال شهر واحد فقط؛ وعلى إثر ذلك، يتم رفع الدعوى في مواجهة رئيس الدولة عن ما اقترفه من جرائم تستوجب محاسبته.[63]

وفي مجال التعقيب على موقف التشريعات سابقة الذكر، نبدي بأنه حسنٌ فعل المشرع الفلسطيني عندما أناط مسألة رفع الحصانة عن رئيس الدولة بالمحكمة الدستورية. إلا أنه لم يصحبه التوفيق حينما اشترط موافقة المجلس التشريعي على ذلك، إذ أن إقران تلك المهمة بمجلس النواب لا يتفق مع المنطق القانوني السليم، لاحتمالية تسييس طلب رفع الحصانة، على نحو يبعده عن الحيادية والموضوعية. وينطبق ما سبق ذكره على صعيد ما تضمنه التشريع الفرنسي، إذ أن الأخير وعلى الرغم من أنه قد ربط رفع الحصانة بقرار يصدر عن محكمة عليا، إلا أن هذه المحكمة لا تندرج ضمن مكونات السلطة القضائية، وإنما هي هيئة سياسية، لأنها تُشكل بناءً على مبادرة من أحد مجلسي البرلمان، ويرأسها رئيس الجمعية الوطنية. وبالتالي فإن فرصة التشاور مع قضاة محترفين بخصوص طلب رفع الحصانة تكون معدومة، وتضحي الحسابات السياسية أكثر حضورًا من الجوانب القانونية التي يجب أن يعول عليها لغايات الفصل السليم في طلب رفع الحصانة.[64]

3–1–3 حصانة رئيس وأعضاء مجلس الوزراء

اختلفت التشريعات المقارنة على صعيد هذه المسألة، حيث ربط التشريع الفلسطيني مسألة رفع الحصانة عن رئيس الوزراء بقرار يتخذه رئيس الدولة، أما بالنسبة للوزراء، فيتم حجب الحصانة عنهم بموجب قرار صادر عن رئيس الوزراء.[65] فيما تتعلق حيثية رفع الحصانة –وفقًا للتشريع الأردني– بمجلس النواب، حيث يحق لهذا الأخير إحالة الوزراء إلى النيابة العامة، وذلك بقرار من أغلبية أعضاء المجلس.[66]

بالمقابل؛ فلا تطبق بعض التشريعات –ونوافقها الرأي– نظام الحصانة بالنسبة لرئيس وأعضاء مجلس الوزراء،[67] ومن ذلك التشريع المصري، حيث يخضع هذا الأخير هؤلاء الأشخاص للقواعد العامة المنظمة

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59 Vrushi, J. The provisions of immunity for ministers and Parliament members, supra note, p. 34-.

60 وتطبيقًا لذلك، فقد نص الفصل (64) من دستور المملكة المغربية لعام 2011 على أنه «لا يمكن متابعة أي عضو من أعضاء البرلمان، ولا البحث عنه، ولا إلقاء القبض عليه، ولا اعتقاله ولا محاكمته، بمناسبة إبدائه لرأي أو قيامه بتصويت خلال مزاولته لمهامه، ما عدا إذا كان الرأي المعبر عنه يجادل في النظام الملكي أو الدين الإسلامي، أو يتضمن ما يخل بالاحترام الواجب للملك».

وتجدر الإشارة إلى أن البرلمان المغربي يتكون من مجلسين، هما: مجلس النواب، ومجلس المستشارين، ولكل من المجلسين نظام داخلي خاص به، وبالرجوع إلى هذين النظامين، نجد بأنهما قد أكدا على نفس ما تضمنته المادة (64) من الدستور. للمزيد ينظر في: المواد (159–161) من النظام الداخلي لمجلس المستشارين المغربي، والمادة (122) من النظام الداخلي لمجلس النواب المغربي.

61 تجنبًا للتكرار ينظر في: المادة (1/12) من قانون مكافحة الفساد الفلسطيني المعدل رقم (1) لسنة 2005م، وذلك بالعطف على المادة (1/37/ج) من القانون الأساسي الفلسطيني المعدل. وبنفس الاتجاه، ينظر في: المادة (159) من دستور جمهورية مصر العربية لعام 2014م، حيث تنص هذه المادة على أن «يكون اتهام رئيس الجمهورية بانتهاك إحكام الدستور، أو بالخيانة العظمى، أو أية جناية أخرى، بناء على طلب موقع من أغلبية أعضاء مجلس النواب على الأقل، ولا يصدر قرار الاتهام إلا بأغلبية ثلثي أعضاء المجلس، وبعد تحقيق يجريه معه النائب العام...».

62 للمزيد ينظر في: المادة (68) من الدستور الفرنسي لعام 1958 وتعديلاته.

وتجدر الإشارة إلى أن الحصانة الخاصة برئيس الدولة الفرنسي قد مرت بعدة حقبات تاريخية، ففي ظل النظام الملكي، كان يسود مبدأ اللامسؤولية المطلقة، استنادًا لقاعدة أن الملك لا يخطئ. وقد اختفت هذه القاعدة في وقت لاحق نتيجةً لتعارضها مع المبادئ الثورية المعلنة عام 1789م، حيث شرعت الجمهورية الثانية نظام مسؤولية واسع جدًا، إذ شمل هذا الأخير «جميع أعمال الحكومة والإدارة». وفي إطار الجمهورية الثالثة، عادت المسؤولية الرئاسية إلى الظهور في القوانين الدستورية، وتحديدًا في العام 1875، حيث أصبح رئيس الدولة غير مسؤول من حيث الأصل، باستثناء حالة الخيانة العظمى، وقد بقيت المسؤولية الجزائية لرئيس الجمهورية قائمة في ظل الجمهورية الرابعة والخامسة، وهي حاليًا تقوم على أساس ما تتضمنه المادة (68) من الدستور الفرنسي، المنقحة بموجب التعديلات الدستورية المؤرخة بتاريخ 23 فبراير 2007. للمزيد ينظر في:

Meijet, A. Vers une irresponsabilité pénale du Chef de l'État ?, «, publié sur le site du le petit juriste, en 21 avril 2017, Disponible en : http://cours-de-droit.net/statut-et-responsabilite-des-ministres-a121611916/ , Vu sur 162019-12- .

63 Bellan, M . La responsabilité pénale du chef de l'Etat enfin clarifiée, publié sur le site du lesechos, en 22 déc. 2010, Disponible en : https://www.lesechos.fr/201012//la-responsabilite-penale-du-chef-de-letat-enfin-clarifiee-445119, Vu sur 142019-12- .

64 Article sur « Responsabilité pénale du président de la République», publié sur le site du cours-de-droit, en 27 mars 2019, Disponible en : http://cours-de-droit.net/statut-et-responsabilite-des-ministres-a1216119916/ , Vu sur 142019-12- .

65 تجنبًا للتكرار ينظر في: المادة (1/75–2) من القانون الأساسي الفلسطيني المعدل، والمادة (1/17) من قانون مكافحة الفساد الفلسطيني المعدل رقم (1) لسنة 2005م.

66 ينظر في: المادة (56) من دستور المملكة الأردنية لعام 1952، المعدلة بموجب المادة (15) من تعديل الدستور الأردني لعام 2011، المنشور في الجريدة الرسمية الأردنية، ع. 5117، بتاريخ 2011/10/1، ص. 4452 وما بعدها. حيث تنص تلك المادة على أن « لمجلس النواب حق إحالة الوزراء إلى النيابة العامة مع إبداء الأسباب المبررة لذلك ولا يصدر قرار الإحالة إلا بأغلبية الأعضاء الذين يتألف منهم مجلس النواب».

67 ينص الفصل (94) من دستور المملكة المغربية لعام 2011م على أن «أعضاء الحكومة مسؤولون جنائيًا أمام محاكم المملكة، عما يرتكبون من جنايات وجنح، أثناء ممارستهم لمهامهم. يحدد القانون المسطرة المتعلقة بهذه المسؤولية».

وتجدر الإشارة إلى أنه قد صدر قانون في المملكة المغربية ينظم أشغال الحكومة والوضع القانوني لأعمالها، إلا أنه لم يتم -لغاية الآن– تحديد المسطرة القانونية الخاصة بالمسؤولية الجزائية للوزراء، ولذلك، يمكن القول بأن الأحكام العامة في الإجراءات الجزائية هي التي تسري بالنسبة للجرائم المرتكبة من قبل رئيس الحكومة وأعضائها. للمزيد ينظر في : المادة (27) من الظهير الشريف رقم 1.15.33 الصادر بتاريخ 2015/3/19 بشأن تنفيذ القانون التنظيمي رقم 065.13 والمتعلق بتنظيم وتسيير أعمال الحكومة والوضع القانوني لأعضائها، المنشور في الجريدة الرسمية المغربية، ع. 6348، بتاريخ 2015/4/2، ص. 3515 وما بعدها.

للتحقيق والمحاكمة.[68] وكذلك التشريع الفرنسي،[69] وينطبق ما سبق ذكره على صعيد التشريع البريطاني، حيث يطبق هذا الأخير الإجراءات الجزائية العادية على الجرائم التي يرتكبها رئيس الوزراء والوزراء، مهما كانت طبيعة الجرم المرتكب؛ ولا يتمتع الوزراء بأية حصانة أو امتياز على صعيد الخضوع للولاية القضائية.[70]

3-1-4 الحصانة القضائية

تباينت مواقف التشريعات المقارنة على صعيد هذا النوع من الحصانات، حيث ذهبت أغلب التشريعات العربية إلى ربط مسألة حجب الحصانة القضائية بضرورة الحصول على إذن من المجلس القضائي الأعلى.[71] فيما لم يمنح البعض الآخر من التشريعات –ونوافقه الرأي– أية حصانة أمام الإجراءات الجزائية بالنسبة لأعضاء السلطة القضائية، وهذا ما ينطبق على صعيد التشريع المغربي،[72] والتشريع الفرنسي كذلك.[73]

وفي مجال تقدير موقف التشريعات سابقة الذكر، نبدي بأننا لا نتفق مع مسألة ربط إجراء رفع الحصانة بالحصول على إذن المجلس القضائي، إذ أن التجربة العملية قد أثبتت بأن المجالس القضائية تتحيز –في بعض الأحيان– لمصلحة أعضائها، بحيث لا تذهب لرفع الحصانة الإجرائية عنهم، على نحو يشكل مساسًا بمبدأ المساواة بين القضاة والمواطنين العاديين، بما يضر بسمعة القضاء. كما أن موضوع رفع الحصانة عن طريق المجلس القضائي قد يمنح للقاضي فرصة للتسويف والمماطلة؛ بغية تدمير الأدلة في جرائم الفساد، على نحو يضر بالعدالة الجزائية، خصوصًا إذا ما علمنا بأن تلك الجرائم تتسم أساسًا بالسرية والغموض، بحيث يصعب اكتشافها بسهولة.[74]

وبعدما فرغنا من بيان هذه الجزئية، ننتقل للحديث عن أسس تحقيق التوازن المناسب بين الحصانة والمواجهة الجزائية للفساد (المطلب الثاني 3-2).

3-2 أسس تحقيق التوازن المناسب بين الحصانة والمواجهة الجزائية للفساد

مما لا شك فيه بأنه لا يجوز أن تؤدي الحصانات إلى الحيلولة دون معاقبة مرتكبي جرائم الفساد؛[75] ولذلك، فإنه يقع على عاتق التشريعات الوطنية ضرورة الحد من تلك الحصانات، على نحو يضمن الفعالية الحقيقية للمواجهة الجزائية لظاهرة الفساد. ولعل هذا ما صرحت به لجنة وزراء مجلس أوروبا، ضمن قرارها رقم (97) – 24، الصادر بتاريخ 1997/11/6، وتحديدًا في المبدأ رقم (6)، حيث أكد هذا الأخير على ضرورة «الحد من الحصانة في التحقيق أو المقاضاة أو الفصل في جرائم الفساد إلى الحد اللازم في مجتمع ديمقراطي».[76] إن مسألة تكريس التوازن بين الحصانة والمواجهة الجزائية للفساد تتطلب ضرورة وضع أسس لتحقيق ذلك التوازن، على نحو يتضمن التحديد الدقيق للإجراءات الجزائية المشمولة بالحصانة، بالإضافة إلى الجهة المختصة برفع أو حجب الحصانة، وأخيرًا الإجراءات المرتبطة بطلب رفع الحصانة.

3-2-1 الإجراءات الجزائية المشمولة بالحصانة

ينبغي أن يقتصر مفعول الحصانة على التعطيل المؤقت للإجراءات الجزائية الماسة بالشخص المتمتع بالحصانة أو بحرمة مسكنه؛ ولذلك، فإنه لا يجوز قانونًا –قبل أن يتم رفع الحصانة– أن يُصار إلى القبض على ذلك الشخص، أو تفتيشه، أو استجوابه، أو توقيفه احتياطيًا. ولا يمكن كذلك تفتيش مسكنه، أو ضبط مراسلاته، أو إجراء تسجيلات لمحادثاته أو أحاديثه. وبالتبعية فإنه من غير المقبول قانونًا أن يتم رفع دعوى الحق العام ضده. أما ما عدا ذلك من إجراءات، فإنه يحق –بل يتوجب– على هيئة مكافحة الفساد اتخاذها،[77] والحديث هنا عن إجراءات جمع الاستدلالات، والتحقيق الأولي، وذلك بغية إعداد طلب رفع الحصانة، على اعتبار أن هذا الأخير يجب أن يكون معززًا بشبهات الفساد التي تؤديه، والتي يُصار إثرها إلى تقرير رفع الحصانة من قبل الجهة المختصة بذلك.

3-2-2 الجهة القائمة على رفع الحصانة

يتوجب أن تناط مهمة الفصل في طلب رفع الحصانة بجهة قضائية، وليس جهة تشريعية، أو تنفيذية، أو سياسية؛ وذلك على اعتبار أن موضوع الطلب المذكور يتمحور حول تقدير جدية الاتهام، واستبعاد الاتهامات الكيدية، أو غير الجدية؛ وليس هناك أقدر من القضاء للقيام بهذه المهمة. بيد أنه يشترط لضمان فعالية تلك المهمة ضرورة أن تتصف

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68 تنص المادة (173) من دستور جمهورية مصر العربية لعام 2014م على أن «يخضع رئيس مجلس الوزراء وأعضاء الحكومة للقواعد العامة المنظمة لإجراءات التحقيق والمحاكمة، في حالة ارتكابهم لجرائم أثناء ممارسة مهام وظائفهم أو بسببها...».

69 نصت المادة (1/68) من الدستور الفرنسي لعام 1958 وتعديلاته على أن «يكون أعضاء الحكومة مسؤولون جنائيًا عن الأفعال التي يرتكبونها أثناء ممارسة وظائفهم والتي تعتبر جنايات أو جنح وقتها ارتكابها. وتحاكمهم محكمة عدل الجمهورية. تكون محكمة عدل الجمهورية مقيدة بمفهوم الجنايات والجنح، وكذلك بتحديد العقوبات المنصوص عليها في القانون».
في السابق، كان التشريع الفرنسي يوفر الحصانة للوزراء، وتحديدًا من خلال اشتراطه لمحاكمتهم من خلال المحكمة العليا، بعد أن يتم التصويت على ذلك من قبل مجلسي البرلمان بالأغلبية المطلقة. إلا أن هذا النظام قد أثبت فشله، مما دفع المشرع الفرنسي -وتحديدًا في العام 1993- إلى إدخال تعديلات على نظام المسؤولية الجزائية للوزراء، بحيث أصبح يمكن لأي شخص متضرر أن يقدم شكوى ضد أي وزير أمام لجنة المظالم، وهي لجنة قضائية، تتكون من قضاة في محكمة نقض، ومجلس الدولة، ومحكمة الحسابات، وتتولى اللجنة المذكورة مهمة فحص الشكوى، وعلى إثره، تقرر إما حفظها، أو إحالتها للنائب العام في محكمة النقض بغرض إشعار محكمة العدل في الجمهورية، والتي تقوم بدورها بمحاكمة الوزير، وتطبيقًا لما سبق كله، فقد أكد المجلس الدستوري الفرنسي على أن «... أنه بموجب المادة 68–1 من الدستور، يمكن محاكمة أعضاء الحكومة على الجنايات والجنح المرتكبة من قبلهم أثناء ممارسة وظائفهم، وذلك من قبل محكمة العدل في الجمهورية فقط...». للمزيد ينظر في :
Article sur « le statut et la responsabilité des ministres», publié sur le site du cours-de-droit, en 27 mars 2019, Disponible en : http://cours-de-droit.net/statut-et-responsabilite-des-ministres-a121611916/ , Vu sur 142019-12- . & Conseil constitutionnel, décision n° 98408- DC du 22 janvier 1999, supra note, Paragraphe (16) de la décision.

70 Article sur «Responsabilité pénale des gouvernements», publié sur le site du le-politiste, Disponible en : https://le-politiste.com/la-responsabilite-penale-des/, Vu sur 16-2019-12.

71 تجنبًا للتكرار ينظر في: المادة (1/56–2) من قانون السلطة القضائية الفلسطيني رقم (1) لسنة 2002م، والمادة(1/17) من قانون مكافحة الفساد الفلسطيني المعدل رقم (1) لسنة 2005م. وبنفس الاتجاه، ينظر في : المادة (28) من قانون استقلال القضاء الأردني رقم (29) لسنة 2014 وتعديلاته، المنشور في الجريدة الرسمية الأردنية، ع. 5308، بتاريخ 2014/10/16، ص. 6001 وما بعدها.
وبنفس الإطار كذلك، ينظر في: المادة (96) من قانون السلطة القضائية المصري المعدل رقم (46) لسنة 1972، المنشور في الجريدة الرسمية، ع. 40، بتاريخ 1972/10/5. حيث تنص تلك المادة على أن «في غير حالات التلبس بالجريمة لا يجوز القبض على القاضي وحبسه احتياطيًا إلا بعد الحصول على إذن من اللجنة المنصوص عليها في المادة 94...». وقد آل اختصاص اللجنة المذكورة في المادة سابقة الذكر إلى مجلس القضاء الأعلى وفقًا للتعديلات التي طرأت على قانون السلطة القضائية بمقتضى القانون رقم (353) لسنة 1984. للمزيد بهذا الجانب ينظر في : محمود نجيب حسني : شرح قانون الإجراءات الجنائية وفقًا لأحدث التعديلات التشريعية، المرجع السابق، ص. 164.

72 ينظر في: الباب السابع من دستور المملكة المغربية لعام 2011م، وتحديدًا الفصول (107-128)، حيث جاءت تلك الفصول خلواً من الإشارة للحصانة القضائية.

73 ينظر في: الباب السابع من الدستور الفرنسي لعام 1958 وتعديلاته. وعلى وجه الخصوص المواد (64–66)، إذ لم تشر تلك المواد إلى تمتع أعضاء السلطة القضائية بالحصانة الإجرائية. ويؤكد التشريع الفرنسي على مسألة خضوع أعضاء السلطة القضائية للقواعد العامة في المسائل الجزائية، إذ لم يعد القاضي يتمتع بأي امتياز أمام الولاية القضائية، وذلك طبقًا للقانون رقم 93–2 المؤرخ 4 يناير 1993، وبالتالي فإنه يمكن محاكمته جزائيًا، كأي مواطن آخر، تطبيقًا لمبدأ المساواة أمام القانون، وينطبق ما سبق ذكره بالنسبة لجرائم الفساد، على اعتبار أنه من غير المبرر -وفقًا للسياسة الجزائية في فرنسا– أن تغطي الحصانة الأفعال التي تنطوي على جرائم فساد، إذ أنه يتوجب توفير الحماية للقاضي على صعيد الأعمال المتصلة بقضائه فحسب، على نحو يضمن استقلاليته، بحيث لا يكون لشيء سلطان عليه سوى القانون. للمزيد ينظر في:
Joly-Hurard Julie. La responsabilité civile, pénale et disciplinaire des magistrats. In: Revue internationale de droit comparé. Vol. 58, N°2, 2006, p. 457.
& G. Canivet & J. Joly - Hurard. Responsabilité des juge. article constitue une version remaniée de l'intervention faite par le de Premier Président de la Cour de cassation Guy Canivet aux Entretiens d'Aguesseau, qui se sont tenus à Limoges le 18 novembre 2005 et qui avaient pour thème « La Responsabilité des juges », R.I.D.C. 42006-, p. 1056.

74 European Committee for Democracy through Law, Venice Commission, Amicus curiae brief The judges' immunity To the Constitutional Court From Moldova, supra note, p. 6, 9.

75 عبد المجيد محمود عبد المجيد: المواجهة الجنائية للفساد، ج. 3، ط. 2، دار نهضة مصر للنشر، الجيزة، 2015، ص. 26.

76 Council of Europe Committee of Ministers, Resolution No. (97)- 24, Twenty anti-corruption guidelines, on 6 November 1997, p. 1.

77 ينظر بهذا الشأن في: قرار الديوان الأردني الخاص بتفسير القوانين، قرار رقم 2018/5، الصادر بتاريخ 2018/3/6، المنشور في الجريدة الرسمية للمملكة الأردنية، ع. 5507، بتاريخ 2018/3/15، ص. 1694 وما بعدها.

الجهة القضائية بالحياد والموضوعية،[78] وهذا يتطلب أن لا يعرض عليها طلبات لرفع الحصانة عن الأشخاص المنتمين لها، هذا من جانب. ومن جانب آخر، فإنه يشترط أن يكون هناك استقلال فعلي للقضاء القائم على رفع الحصانة، على نحو يكون معه هذا الأخير مسيطرًا على قراره بشكل ذاتي، دون إملاءات أو تداخلات من السلطة التنفيذية، أو التشريعية، أو حتى السلطة القضائية نفسها.[79]

3-2-3 الإجراءات المتعلقة بطلب رفع الحصانة

يُقدم طلب رفع الحصانة من قبل رئيس هيئة مكافحة الفساد بكل الأحوال، باستثناء الحالة التي يتهم فيها رئيس الهيئة بارتكاب جريمة فساد. ويجد ذلك تفسيره بالنظر إلى أن هيئة مكافحة الفساد تعد صاحبة الصلاحية في تحريك دعاوى الفساد، وهي الجهة تقوم بمهام التحقيق الأولي في تلك الدعاوى، تمهيدًا لإحالتها إلى النيابة العامة لغايات إتخاذ المقتضى القانوني.[80] وينبغي أن تتصف إجراءات الفصل في طلب رفع الحصانة بالموضوعية، وأن تكون إجراءات عملية،[81] هذا من جانب. ومن جانب آخر، فيتوجب على المشرع أن يضبط مدة الإجراءات المذكورة، بحيث تكون سريعة، إذ أن التأخير في تلك الإجراءات قد يساعد الجاني في التستر على أدلة الجريمة، على نحو يلحق الضرر بالعدالة الجزائية، خصوصًا إذا ما علمنا بأن جرائم الفساد تعد من قبيل الجرائم التي تتصف بالغموض والسرية، بحيث يصعب اكتشافها بسهولة.[82]

4-0 الخاتمة

تعتبر الحصانة من قبيل القيود التي ترد على الحق في تحريك الدعوى الجزائية. وهذه الأولى وإن كانت تعد بمثابة ضرورة لغايات تفعيل المهام الدستورية الموكلة للمتمتعين بالحصانة؛ إلا أنها يجب أن تتقيد دائمًا بقدر تلك الضرورة. ولعل هذا ما يوجب على المشرع الوطني والمقارن ضرورة العمل على الحد من تلك الحصانات؛ انسجامًا مع أحكام اتفاقية الأمم المتحدة لمكافحة الفساد، ومنعًا لإفلات مرتكبي جرائم الفساد من العقاب، وحفاظًا على أدلة الجريمة، على نحو لا تكون معه الحصانة مدخلًا للتستر على تلك الأدلة، بما يضر بالعدالة الجزائية، خصوصًا إذا ما علمنا بأن جرائم الفساد تتسم بالغموض والسرية، بحيث يصعب اكتشافها بسهولة؛ لذا، فإنه يتوجب المحافظة على أدلتها، تحقيقًا لأهداف السياسة الجزائية، وتفعيلًا لمبدأ العدالة الجزائية الناجزة والمحققة، والتي لا يمكن أن يتهرب منها أي شخص كان، مهما علا شأنه، وبصرف النظر عن مركزه الوظيفي، هذا من جانب. ومن جانب آخر، فمن الممكن أن تؤدي الحصانة إلى إفلات الفاسدين من العقاب، وذلك نتيجة سريان أحكام التقادم على الدعاوى المتعلقة بالفساد، وتحديدًا في التشريعات التي تُخضع جرائم الفساد والدعاوى المرتبطة بها لأحكام التقادم.

5-0 التوصيات

نوصي المشرع الفلسطيني والمقارن بإلغاء الحصانات المنصوص عليها في القانون، على نحو يشمل الحصانة البرلمانية، والحصانة الخاصة برئيس الوزراء، والوزراء، والحصانة القضائية، وحصانة رئيس هيئة مكافحة الفساد، وحصانة رئيس ديوان الرقابة المالية والإدارية، وذلك تماشيًا مع ما قررته التشريعات المقارنة، وتحديدًا التشريع الفرنسي والمغربي، وانسجامًا مع المبادئ الدستورية الأساسية، وعلى وجه الخصوص؛ مبدأ سيادة القانون، ومبدأ المساواة، ومبدأ الفصل بين السلطات. وبالتناوب، وفيما لو لم يُصار إلى إلغاء الحصانات المذكورة أعلاه؛ فإننا نوصي بالآتي ذكره:

العمل على إعادة النظر في أحكام الحصانة المكرسة على صعيد التشريع الفلسطيني؛ وذلك من خلال قصر الحصانة على الإجراءات الماسة بشخص المتمتع بالحصانة أو بحرمة مسكنه، أما ما عدا ذلك من إجراءات، فإنه يحق، بل يتوجب، على هيئة مكافحة الفساد القيام بها؛ بغية التحري عن شبهات الفساد، على اعتبار أن تحقق هذه الأخيرة يعد بمثابة الأساس الذي ينبني عليه طلب رفع الحصانة.

ضرورة أن يكون الفصل بطلب رفع الحصانة من خلال جهة قضائية، بحيث تتصف هذه الأخيرة بالحياد، والموضوعية، والاستقلالية؛ وذلك على اعتبار أن القضاء هو الأقدر على الفصل في طلب حجب الحصانة، لأن موضوع هذا الأخير ينصب على تقدير جدية الاتهام، وهو ما يدخل في صميم المهام الموكلة للقضاء. وهذا المجال، نقترح أن تكون تلك الجهة القضائية هي المحكمة الدستورية العليا في كل الحالات، باستثناء الحالة التي يكون فيها طلب الحصانة متعلقًا بأحد قضاة المحكمة الدستورية، فإنه يُصار عندئذٍ إلى اللجوء للمحكمة العليا. وبذات الوقت، ينبغي أن يكون هناك جهة قضائية لمراجعة القرارات الصادرة بمناسبة الفصل بطلبات رفع الحصانة، بحيث لا تكون تلك القرارات قطعية، وإنما قابلة للمراجعة والتدقيق أمام الهيئة العامة للمحكمة الدستورية، أو الهيئة العامة للمحكمة العليا، وذلك بحسب الشخص المطلوب حجب الحصانة عنه.

يتوجب أن تتصف إجراءات الفصل في طلبات الحصانة بالموضوعية، وأن تكون بذات الوقت عملية، ومضبوطة بمدة معينة، بحيث تكون سريعة، حفاظًا على أدلة الجريمة، ومنعًا لإتلافها أو التستر عليها، على نحو يحقق أهداف العدالة الجزائية، ويمنع إفلات المجرمين من العقاب.

ضرورة إعادة النظر في الأحكام الناظمة لإقرارات الذمة المالية الخاصة بالأشخاص المتمتعين بالحصانة، على نحو تخضع من خلاله تلك الإقرارات للحفظ والرقابة والمتابعة من قبل هيئة مكافحة الفساد، بعيدًا عن التحصين، ومسألة عدم جواز الاطلاع عليها إلا بإذن من المحكمة المختصة، وكذلك حفظها لدى المحكمة العليا؛ ويجد ذلك تبريره بالنظر إلى أن التشريعات المقارنة الحديثة تذهب حاليًا باتجاه نشر تلك الإقرارات، وإتاحتها للعموم، تحقيقًا للرقابة الشعبية، مع الأخذ بعين الاعتبار الحق في الخصوصية، وتحديدًا بالنسبة لبعض البيانات التي اشتملت عليها تلك الإقرارات.

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78 Article sur «Immunity», publié sur le site du Sénat français, en septembre)2019), Disponible en : https://www.senat.fr/lc/lc92/lc920.html, Vu sur 282019-8-.

79 Guèrin, C. Immunitès et statut des dèputès : Vers une suppression de L'inviolabiltè?, supra note, Disponible en : http://blog.juspoliticum.com, Vu sur 152019-12-

80 حكم محكمة النقض الفلسطينية -الدائرة الجزائية، قرارها في الدعوى رقم 2019/30، الصادر بتاريخ 2019/7/3، حكم غير منشور، ص. 3 على الحكم.

81 European Committee for Democracy through Law, Venice Commission, Report on "The scope and lifting of parliamentary immunities, Adopted by the Venice Commission at its 98th plenary session (Venice, 2122- March 2014), p. 33. Available at : https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e, Viewed on 152019-12-.

82 ينظر في: عبد الله عبد الكريم عبد الله: نحو فعالة لمنع إفلات مرتكبي الفساد من العقاب، ورقة بحثية مقدمة في مؤتمر «النزاهة في العلاقة بين القطاعين الخاص والعام»، 24–25 سبتمبر 2013، ص. 30 على الورقة.

Vrushi, J. The provisions of immunity for ministers and Parliament members, supra note, p. 5.

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RESEARCH ARTICLE

First working draft of a protocol to the 2003 African Union Convention on Preventing and Combating Corruption (AUCPCC) on private civil actions against corruption with comments and background footnotes

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ABSTRACT

Corruption is an international phenomenon that continues to be at the heart of governance deficits in Africa. It impedes societal development, denies citizens access to quality infrastructure, good health facilities, affordable and quality education, and, above all, breeds political violence and insecurity. In an effort to combat this corruption, the African Union adopted the African Union Convention on Preventing and Combating Corruption (AUCPCC) in 2003. The adoption of the AU Convention in 2003, and its enforcement in 2006, gave hope to many in Africa that governments across the continent were determined to fight corruption. The convention is currently at its seventeen-year anniversary since its adoption, during which time there have been no significant or positive changes witnessed throughout the African continent.

Meanwhile, it has been a struggle for Africa to effectively fight corruption through the criminal justice system, and it is well recognized that the criminal justice system does not provide for compensation to victims of corruption for damages suffered as a result of corrupt acts. In the light of the above facts, this paper highlights the importance of private civil actions (PCAs) in our legal system if considered by the AU Head of States. This method can play an important and complementary role in the criminal justice system's efforts to fight corruption in Africa. The proposed PCA methodology is not intended to substitute a court's jurisdiction to prosecute corrupt acts through the criminal justice system. Rather, it is intended to establish the foundation for an additional method to fight corruption in Africa.

This paper concludes with a first draft of a protocol to the 2003 AU Convention that can serve as the starting point for an initiative to later successfully adopt a PCA protocol by the AU Member States. This is the first proposed protocol in Africa on the topic of PCAs against corruption. The adoption of this proposed protocol will help obtain a permanent solution to corruption in Africa.

Keywords: Private Civil Actions (PCA), African Union (AU), protocol, corruption, Africa, convention, damages, compensation

العنوان: اتفاقية الاتحاد الأفريقي لمنع ومكافحة الفساد – اقتراح أول لبروتوكول حول موضوع الإجراءات المدنية الخاصة لمكافحة الفساد

ملخص

يقبع الفساد كظاهرة دولية في قلب عجز الحوكمة في أفريقيا. بحيث يعوق التنمية المجتمعية ويحرم المواطنين من الوصول إلى البنية التحتية السليمة والمرافق الصحية الجيدة والتعليم الصحيح والميسور التكلفة، وقبل كل ذلك، فهو يولد العنف السياسي و يورث انعدام الأمن في البلاد.

اعتمد الاتحاد الافريقى اتفاقية الاتحاد الافريقى لمنع ومكافحة الفساد (AUCPCC) فى عام ٢٠٠٣ في محاولة لمكافحة هذا الفساد. اعتماد اتفاقية الاتحاد الافريقى في عام ٢٠٠٣، ودخولها حيز التنفيذ في عام ٢٠٠٦، أعطى الكثيرين الامل في افريقيا بأن جميع أنحاء القارة مصممة على محاربة الفساد. بالرغم من مرور ستة عشر عاما على اعتماد تلك الاتفاقية ، لم يشهد خلالها أي تغييرات كبيرة أو إيجابية في جميع أنحاء القارة.

كانت أفريقيا تكافح من أجل مكافحة الفساد بشكل فعال من خلال نظام العدالة الجنائية. الا ان النظام المذكور ايضا لم ينص على تعويض ضحايا الفساد عن الأضرار التي لحقت بهم نتيجة أعمال الفساد. في ضوء ما سبق، تركز هذه الورقة على أهمية الإجراءات المدنية الخاصة (PCAs) في نظامنا القانوني إذا نظر فيها رؤساء اتحاد دول أفريقيا. حيث يمكن أن تؤدى هذه الطريقة دورا مهما ومتكاملا في دعم جهود نظام العدالة الجنائية لمكافحة الفساد في افريقيا. والجدير بالذكر أن المنهجية المقترحة لا تهدف إلى استبدال اختصاص المحكمة في محاكمة الأفعال الفاسدة من خلال نظام العدالة الجنائية، بل تهدف إلى إرساء أسس لطريقة إضافية لمكافحة الفساد في افريقيا. تختتم هذه الورقة بمشروع أول لبروتوكول لاتفاقية الاتحاد الأفريقي لعام ٢٠٠٣ الذى يمكن أن يكون بمثابة نقطة انطلاق لمبادرة اعتماد البرتوكول بنجاح من قبل الدول الأعضاء في الاتحاد الأفريقي.

يعد هذا البروتوكول المقترح الأول من نوعه في أفريقيا حول موضوع الإجراءات المدنية الخاصة لمكافحة الفساد، والذي باعتماده سوف يساعد في التوصل إلى حل دائم للفساد في أفريقيا.

الكلمات المفتاحية: اجراءات مدنية خاصة، الاتحاد الافريقي، البروتوكول، الفساد، افريقيا، اتفاقية، ضرر، تعويض

1. INTRODUCTION

Corruption is a major challenge to sustainable development in Africa, which continues to negatively hamper efforts aimed at promoting democratic governance, socio-economic transformation, and peace and security in the AU Member States. Corruption is pervasive and has unfortunately become a part of everyday life. Although it can take many forms, bribery in business transactions and dealings with government officials regarding political matters is arguably the most widespread. Petty corruption may have become accepted by the general populace, but its effects fall heavily on the poorest and weakest members of society. Fortunately, a call to arms in the fight against corruption was recently made at the 30th Ordinary Session of the African Union Assembly Summit held at Addis Ababa on January 29, 2018. The summit's theme and focus was on how the AU and its member states can wage and win the war against corruption.[1] Commenting on the present situation, the former chairman of Transparency International, José Ugaz, said that:

> Corruption creates and increases poverty and exclusion. While corrupt individuals with political power enjoy a lavish life, millions of Africans are deprived of their basic needs like food, health, education, housing, access to clean water and sanitation.[2]

The primary international and regional instruments on corruption emphasize control of corruption by strengthening the applicable criminal laws and their enforcement. The relevant international and regional criminal legal frameworks on corruption also take the criminal law approach. These include the United Nations Convention against Corruption, the Criminal Law Convention on Corruption of the Council of Europe, the Framework Decision of the Council of the European Union on Combating Corruption in the Private Sector, the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the 2003 African Union Convention on Preventing and Combating Corruption (AUCPCC), and the Inter-American Convention Against Corruption.[3] Meanwhile, reliance on the above legal frameworks and on the actions of the prosecutorial services and anti-corruption agencies that enforce them has not resulted in a material drop in the incidents of corruption. Corruption continues to expand in both the public and private spheres.[4] Significantly, however, a change in strategies is slowly taking shape. As Africa struggles to fight corruption through the criminal justice system, there are ever stronger voices advocating for compensation to victims of corruption for damages suffered as a result of corrupt acts.[5] The primary tool for securing such compensation would be through private civil actions.[6]

2. THE CONCEPT OF PRIVATE CIVIL ACTIONS

Using private civil actions (PCAs) to combat corruption is significant for a number of reasons. First, it is an alternative method of fighting corruption that can be used even when no criminal charges have been made. Second, the remedies sought by an aggrieved plaintiff can be crafted to fit different situations. One plaintiff may wish to receive compensation for losses and harm suffered, while another may seek restitution or another type of remedial action. Third, victims of corruption who resort to civil actions become central protagonists in the fight against corruption; however, they are relegated to being mere observers of the criminal justice system over which they have little influence. Finally, in some jurisdictions, especially in jurisdictions following the common law tradition, the standard of proof required to establish the facts in a civil adjudication may be lower than for criminal proceedings.[7] While there have been a growing number of cases in which individuals and private entities have used normal tort, equity, or civil responsibility principles to seek compensation for damages brought about by corrupt acts, there are now a number of international instruments that have called for signatory states to establish *clear procedures* under which PCAs against corruption can be made. The adoption of this proposed concept on PCAs in

1 Press Release, African Union, The 30th Ordinary Session of the African Union Assembly Concludes with Remarkable Decisions on (3) Flagship Projects of Agenda 2063 (Jan. 30, 2018), available at https://au.int/en/pressreleases/20180130/30th-ordinary-session-african-union-assembly-concludes-remarkable-decisions-3.
2 Corruption in Africa: 75 Million People Pay Bribes, Transparency Int'l (Nov. 30, 2015), https://www.transparency.org/news/feature/corruption_in_africa_75_million_people_pay_bribes.
3 Anastasia Sotiropoulu, Fighting Corruption through the Lens of Civil Law: The Option of Civil law Remedies, in ESSAYS IN HONOR OF NESTOR COURAKIS at 629 (Ant. N. Sakkoulas Publications 2017).
4 Transparency Int'l, Global Corruption Report: Education (2013), *available at* https://issuu.com/transparencyinternational/docs/global_corruption_report__educatio?e=2496456%252F5037959.
5 Simon Young, *Why Civil Actions against Corruption?* 16 J. Fin. Crime 144 (2009) available at https://www.researchgate.net/publication/235310574_Why_civil_actions_against_corruption
6 Williams T. Loris, *Private Civil Actions: A Tool for a Citizen-Led Battle against Corruption*, 5 World Bank Legal Rev. 437 (2013).
7 *Id.*
8 Council of Europe, Parliamentary Assembly: Working Papers Vol. 5 (1999).

our convention in Africa will support a permanent solution to corruption in Africa, following the declaration made at the 29th Assembly of the Heads of State and Government in January 2017, to dedicate the theme for the year 2018 to "[w]inning the fight against corruption: a sustainable path to Africa's transformation."

The first, and certainly the most extensive, legal basis for PCAs is the 1999 Council of Europe Civil Law Convention against Corruption, which complements the Criminal Law Convention on Corruption.[8] Both the preparatory work for the convention and the European Parliament debates on the draft are instructive for other future regional initiatives seeking to establish a legal framework in this area. The working definition of corruption in Europe is found in Article 2 of the 1999 Civil Law Convention, which states that:

"Corruption" means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof.[9]

Commenting on the objectives of PCAs, Article 3 states that "[e]ach Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. Such compensation may cover material damage, loss of profits and non-pecuniary loss." Furthermore, paragraph eleven of the introductory part of Explanatory Report to 1999 Civil Convention provides that:

> The Council of Europe became strongly interested in the international fight against corruption because of the obvious threat corruption poses to the basic principles this organisation stands for: the rule of law, the stability of democratic institutions, human rights and social and economic progress. Also, because corruption is a subject well-suited for international co-operation: it is a problem shared by most, if not all, member States and it often contains transnational elements … Therefore, one of the characteristics of the Council of Europe approach in the fight against corruption is the possibility to tackle corruption phenomena from a civil law point of view.[10]

Additionally, PCAs were made part of the United Nations Convention against Corruption (UNCAC). Article 35 provides that:

> Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.[11]

However, follow-up on Article 35 at the national level has received little attention.[12] The UNCAC is the most important international convention on corruption in terms of both its breadth and the number of state signatories. It was adopted by the United Nations General Assembly on October 31, 2003, and enforced on December 14, 2005.[13] As of October 3, 2017, the convention had 183 member states.[14] The convention was created to respond to corruption as a global problem and addresses a wide variety of issues. Article 5 encourages the participation of society in a joint collaborative effort to fight corruption, stating that:

> Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

Significantly, in terms of the present paper, member states are required to implement in their respective national laws provisions that facilitate PCAs, which aim to provide a way for victims of corruption to be compensated for their losses. Unfortunately, follow-up on Article 35 at the national level has received little attention.[15]

The Arab Anti-Corruption Convention also plays a role in the support for PCAs against corruption. The convention was developed by the League of Arab States, which is regarded as the first official pan-Arab anti-corruption treaty. The convention obtained the signatures of ministers of the interior and minister of justice from twenty-one Arab countries, excluding Somalia, on December 20, 2010.[16] The convention consists of thirty-five articles,[17] which is founded on Islamic doctrine and various religious books. According to the convention's preamble, the burden of fighting corruption is not only placed on the official authorities, but also on civil society and individuals who can also play an important role in the struggle.

The convention is an important regional legal instrument for fighting corruption in the Arab region. This heightens the importance of the Arab Convention as another possible source of law pertaining to PCAs. This is strengthened by Article 8 of the Convention, which provides that:

> Each State Party shall provide in its domestic legislation that all those that suffered damage as a result of an act of corruption, under the present convention, shall have the right to bring an action for compensation for such damage.[18]

The convention has been a successful legal framework for PCAs against corruption. It advocates for the compensation of victims of corruption and acknowledges the role of civil societies as partners in the joint effort to fight against corruption.

Meanwhile, in Africa, the only regional convention on corruption is the 2003 African Union Convention on Preventing and Combating Corruption (AUCPCC). The convention was adopted on July 1, 2003, and enforced on August 5, 2003.[19] Forty-nine out of the fifty-five African states are signatories to the convention, and

9 Civil Law Convention on Corruption, E.T.S. No. 174 (1999) available at https://rm.coe.int/168007f3f6
10 *Id.*
11 U.N. Convention against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC] available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf
12 H.G. Schmidt, Private Remedies for Corruption Towards an International Framework (2012).
13 UNCAC, *supra* note 11.
14 *Id.*
15 SCHMIDT *supra* note 12.
16 Abdelaziz Nouaydi & Saad Filali Meknassi, *A Glance at the Arab Convention to Fight Corruption*, Transparency Int'l Blog (Aug. 21, 2012),
17 http://blog.transparency.org/2012/08/21/a-glance-at-the-arab-convention-to-fight-corruption/.
18 Arab Convention Against Corruption (2010), available at http://star.worldbank.org/sites/star/files/Arab-Convention-Against-Corruption.pdf.
19 African Union Convention on Preventing and Combating Corruption (2003), available at https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption.
20 African Union, Status of the Ratification of the Convention on Corruption (June 28, 2019), http://www.auanticorruption.org/auac/about/category/status-of-the-ratification.

thirty-eight member states have ratified the convention.[20] One of the convention's objectives is to "[c]oordinate and harmonize the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent."[21]

3. FORWARD-LOOKING ASSESSMENT FOR PRIVATE CIVIL ACTIONS (PCAS) IN AFRICA

As Africa struggles to fight corruption through the criminal justice system, there is a second way to fight this war. This involves direct or collective actions by individuals and legal entities, and in some cases even the State, seeking compensation and other remedies through PCAs. This assessment will examine how this tool (PCAs) can be developed by the AU Members States and adopted in African jurisprudence. The strengths and weaknesses of this approach will also be addressed.

This assessment was carried out through desktop research, which is structured in the following section. The background of the assessment provides the nature and scope of the assessment. It further explains the background problem and issue that the assessment intends to clarify and address by clearly expressing the working understanding of the topic and the proposed method. To guide the assessment and to better understand the topic, three major assessment questions are presented with a thorough and detailed analysis. Finally, the assessment culminates in a set of recommendations, along with a statement of the potential advantages and disadvantages of each recommendation.

3.1. Limitation of the Assessment

The assessment will be carried out as a desktop assessment. However, it will rely on consistent communications with the partner organization for this research, the Arusha-based African Union Advisory Board on Corruption (AUABC). Their office is located at 3rd Floor, AICC Complex, East Africa Road, Arusha, Tanzania. A limitation of this assessment is that there is a certain degree of information that the Advisory Board is not able to share due to confidentiality concerns.

3.2. Background of the Assessment

Many of the international and regional instruments on corruption are drafted with the assumption that the detection of corrupt acts and the prosecution of the perpetrators of corruption under criminal statutes is the main tool for fighting corruption. While this research does not dispute this assumption, it seeks to analyze how PCAs can play an important and complementary role. As part of the evaluation of a complementary mechanism in the fight against corruption, different legal systems and laws in various African states are compared to determine the extent to which the various legal systems of African countries permit the use of PCAs for this purpose. Additionally, this research also includes an examination of past and current examples of relevant instances of corruption cases. Finally, the paper will provide preliminary indications within the existing provisions of 2003 Africa Union on Prevention and Combating Corruption, which can support the extension of that agreement to bring in provisions similar to those cited in the conventions.[22]

3.3. Assessment Tasks and Activities

To conduct the assessment, the following questions will guide the tasks and activities of the assessment and detailed answers will be provided accordingly.

- **To what extent does the current law in African countries permit the use of private civil actions against corruption?** The assessment will make a comparison between different legal systems in Africa to arrive at a valid conclusion on the above question.
- **Are there examples of private civil actions against corruption that demonstrate the feasibility and legal basis for such actions?** The assessment will review laws and treaties of other non-African countries on private civil actions. Additionally, there will be a review of some past and present corruption cases on private civil actions.
- **Are there any provisions in the 2003 Africa Union Convention on Prevention and Combating Corruption (AUCPCC) that can serve as the basis for further development of the convention in the area of private civil actions against corruption?** Research and analysis will be undertaken on several provisions of the 2003 Africa Union on Convention Prevention and Combating Corruption to determine whether any of the convention's provisions can be used to support further extension of the convention to include provisions concerning private civil actions.

3.4. Identified Stakeholders

The major key stakeholders that may be associated with the proposed method have been identified in the assessment. They have both direct and indirect impacts on the effectiveness and success of private civil actions (PCAs) as powerful anti-corruption tools in Africa. However, Table 1 summarizes the roles of stakeholders and how they can positively influence the adoption of the newly proposed anti-corruption tool in Africa.

21 Ibid
22 Africa Union on Prevention and Combating Corruption, art. 2(4).

Table 1: Stakeholders' role in the effective implementation of private civil actions in Africa

S. no.	Stakeholder	Role
1.	The African Union Commission (AUC) and the African Union Member States	To take the lead role in the drafting agreement and ratification process of the proposed draft protocol on private civil actions in Africa. To encourage the AU Member States to enact and enforce laws after the signature and ratification of the proposed draft protocol on private civil actions among the member states.
2.	Parliament	To ratify and adopt in their respective national laws the proposed draft protocol on private civil actions. To amend their existing criminal laws to reflect the proposed draft protocol on private civil actions, which may assist in good governance.
3.	Judiciary and Lawyers	To make administrative arrangements and follow procedures necessary to facilitate the use of private civil actions in their respective courts and judgments. To train judges on any new laws and regulations on private civil actions against corruption and the handling of civil cases of this nature.
4.	Universities and Law Schools	To teach law students by offering coursework on private civil actions and introducing it in the school's academic curriculum. To promote private civil actions through research, colloquiums, and publications.
5.	Human Rights Activists and Bar Associations	To promote adoption and incorporation of the proposed draft protocol on private civil actions into national laws. To express the need to fight corruption in their country by promoting the use of private civil actions.
6.	Media	To raise public awareness through the dissemination of information on the new additional methods of fighting corruption through private civil actions. To educate the public through articles and programs on how private civil actions can be used as anti-corruption tools.
7.	Law Scholars and Students	To write comparative papers, articles, books, and journals on private civil actions.
8.	NGOs, CBOs, and Religious Institutions	To raise awareness of the new method of fighting corruption through private civil actions.

3.5. Assessment Analysis

The analysis and justification of the paper shall be based on three major research questions with well-detailed findings.

3.5.1. The extent to which different legal systems (i.e. civil law and common law systems) permit the use of private civil actions against corruption in Africa

There are two recognized legal systems in Africa. These are the civil law and common law systems. The civil law, or continental, legal systems are modeled on various versions of the codified law system set up by Napoleon in 1804. In that system, each area of law has been reduced to rules set out in various codes that serve as the guiding source of law on the area covered. However, the common law system was developed in England, which is founded on case law (judicial precedence). Meanwhile, the history of the civil law system can be traced back to the sixth century. It emerged from a tradition of codification that goes back to the Roman Empire -- Emperor Justinian's massive codification project and the *corpus juris civilis* in 600 CE. However, in the nineteenth century, the civil law system became a body of law that was assembled, organized, and distributed across the continent of Europe in the form of codes.[23] France and Germany are prime examples of this codification effort.

Civil codes are organized and arranged in books and can be categorized into penal law and civil law. The penal law deals with the criminal aspects of law, while the civil law deals with non-criminal matters. The civil law is further divided into "obligations" that deal with both "contracts" and "civil responsibilities." Examples of African countries with civil law systems are Cameroon, Gabon, Togo, Tunisia, Senegal, Rwanda, Niger, Ivory Coast, Morocco, Burkina Faso, Mauritius, Mali, Madagascar, Chad, Central African Republic, Guinea, Sudan, Mauritania, Lesotho, Congo, and Benin.[24] African countries that were formerly colonies of France and operate under the civil law systems have a similar reflection of arrangements in their laws.

23 Piyali Syam, *what is the Difference Between Common Law and Civil Law*, @WashULaw Blog (Jan. 28, 2014), https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/.
24 *African Countries' Names, Colonial Names, and Their Independence Days and Dates*, My Africa Now (Aug 6, 2015), http://www.myafricanow.com/african-countries-independence-days-dates/.

On the other hand, common law systems can be traced back to the British royal monarchy system. This involves the issuance of formal orders called "writs" for proceedings. During that period, writs could not be applied in all cases brought before the king. Therefore, the people had no option other than to start making their complaints to the king. These complaints brought about the establishment of a court of equity to hear and apply equitable principles to such complaints that could not be heard by the writs. All of these decisions were then collected and published to serve as precedent for the courts for any future cases brought before them. This was the birth of the common law system.[25] Examples of African countries with common law systems are Nigeria, Gambia, Zambia, Egypt, Ghana, Kenya, Malawi, Sierra Leone, Somalia, South Africa, Uganda, Zimbabwe, Botswana, Ghana, Tanzania, and Kenya.[26]

Under the common law system, cases brought before the court are classified as either criminal actions or civil actions. Criminal actions are instituted by the State and its political subdivisions through criminal prosecution. Civil actions cover a vast area of law; basically, everything that has not been made part of the criminal law. One major area of law in this respect is the law of torts. It should be noted here that, in some cases, there are independent civil rights (fines) in criminal law under the common law system, but these are distinct from the proposed private civil actions addressed by this assessment. This is best explained by William Geldart in his book called *Introduction to English Law 146*, who stated that:

> The difference between civil law and criminal law turns on the difference between two different objects which law seeks to pursue – redress or punishment. The object of civil law is the redress of wrongs by compelling compensation or restitution: the wrongdoer is not punished; he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law, or at least he avoids a loss. On the other hand, in the case of crimes, the main object of the law is to punish the wrongdoer; to give him and others a strong inducement not to commit same or similar crimes, to reform him if possible and perhaps to satisfy the public sense that wrongdoing ought to meet with retribution.[27]

As quoted above, the only punishment awarded against the defendant under the civil law is the payment of damages to victims for injuries. However, under the criminal law, the defendant may only be convicted by serving an imprisonment term or non-custodial punishment, which may consist of the payment of fines or community service.[28] The non-custodial punishment could be regarded as an independent civil right to sue in a criminal case; however, payment of fines is not certain in all cases, and, most of the time, any fines are paid to the State and not to the victims. Additionally, it is clear that in rare and exceptional cases, the court may charge a defendant with a fine in lieu of imprisonment in criminal law. Use of the independent civil right fine in criminal law is rare and differs from what private civil actions seek to establish against corruption.

Based on the above analysis, findings have shown that African countries from civil law jurisdictions have a trace of civil actions in their legal system found under "contracts and obligations," whereas African countries with common law jurisdictions have this action available under the tort law. Moreover, there is a strong support for civil actions in both jurisdictions. However, the use of private civil actions is not the main anti-corruption tool in both jurisdictions because of the differences in their legal systems. Corruption, as it stands, is a criminal offence that does not provide for compensation to its victims. As a result, none of the existing laws in Africa provide a clear procedure for the use of private civil actions as a primary anti-corruption tool because corruption falls under the criminal law.

3.5.2 Jurisprudence on private civil actions (PCAs) against corruption -- the feasibility and legal basis for immediate actions

There are several court cases and situations that are frequently cited regarding private recovery in corruption cases. For example, a leading example of a PCA in Italy is the infamous case of *CIR vs. Fininvest*. In this case, the victim was awarded compensation in the amount of €560 million. The facts of the case are as follows:

> In the 1980s, the head of the Mondadori Group was a holding company named AMEF. In 1988, CIR and the Formenton Family, as principal shareholders in the holding company, signed a shareholder control agreement transferring the Formenton Family's AMEF shares (27.75%) to CIR which already owned 27.71% of the capital stock. The agreement included an arbitration clause. After a corporate raid from Fininvest, who owned a minority of the shares in the holding company (8.28%), the Formenton Family sought to rescind the shareholder agreement concluded with CIR. CIR initiated arbitral proceedings according to the arbitration clause in the shareholder agreement. The arbitration panel found that there had been a breach of contract by the Formenton Family. The arbitral award ordered the Formenton Family to sell its stocks to CIR, according to the contract. The Formenton Family raised an appeal to the Rome Court of Appeals on the grounds that the arbitral award is null and void. The court confirmed the arbitral award was contrary to public policy. Later, a settlement was made between CIR and Fininvest and Fininvest took control of the Mondadori Group. Ten years later, the Milan Criminal Court found that the Judge-Rapporteur of the chamber of the Rome Court of Appeals that declared the arbitral award null and void was in fact bribed by the Fininvest lawyer to issue a decision annulling the arbitral award which was favorable to the Formenton Family. The court had dismissed the liability against a number of persons involved in the scandal such as the director of Fininvest due to the expiry of time limitation for the criminal act. CIR raised civil action to recover damages resulting from the corruption of the Judge-Rapporteur.[29]

In the eyes of the Italian Supreme Court, the harm suffered by CIR is regarded as damage that came from the criminal actions of Fininvest. The court found Fininvest liable for corruption, and damages were awarded to CIR in the amount of €560 million.[30]

25 Id
26 Id
27 *Civil Law vs. Criminal Law*, Diffen, https://www.diffen.com/difference/Civil_Law_vs_Criminal_Law (last visited Apr. 18, 2020).
28 Id
29 Mohamed R. Abdelsalam, Applying Civil Law in an Effort to Eradicate Corruption in Egypt, available at https://www.luc.edu/media/lucedu/prolaw/documents/volume4/ F.%20 Applying%20Civil%20Law%20in%20an%20Effort%20to%20Eradicate%20Corruption%20in%20Egypt_Mohamed%20Abdelsalam%20M4.pdf
30 Stefano Pagliantini, *Remedy for Fraud in Cir vs. Fininvest: Damages or Specific Performance*, 1 Italian L.J. 141 (2015).

Beginning in the 1960s, there has been a trend to take the victim's interests into account in the prosecution of a crime. Examples of this support include the Victims and Witness Protection Act of 1982 and the Mandatory Victims Restitution Act of 1996, both of which represent important victories for victims' rights advocates. Furthermore, in 2004, the US Congress enacted the Crime Victims' Rights Act (CVRA) and the Foreign Corrupt Practices Act, furthering this trend.[31] Private civil actions frequently have been used in the USA in cases involving a company's shareholders suing the directors of the company. This may be done in one of two ways. First, the officers of the company may be sued for alleged fraud, and, second, the directors may be sued for allowing the company to pay or receive bribes.

In a recent case related to regime change in Indonesia, the facts are as follows:

> On January 2008, a 1.5 billion USD civil lawsuit was instituted against the late former president of Indonesia – President Suharto and his son (Tommy). The former president was alleged to have misappropriated the charity scholarship fund of US$440 million, and Tommy was involved in corrupt land exchange scheme as a result of which the country had suffered in damage of the sum of $55million. The former president eventually escaped the criminal prosecution, after declaring himself to be mentally incapable to stand trial. Nevertheless, the Supreme Court in December 2010 announced the retrieval of 2.8 trillion rupiah which equates to approximately US$307.440.000 at today's rates.[32]

Furthermore, in cases involving a breach of trust, the principal can institute a private civil action against their agent to recover all illicit benefits obtained or losses suffered in breach of trust while in the course of their work. An example of this is the 2007 case in which the brother to Sultan of Brunei, Prince Jefri Bolkiah, was sued by the State of Brunei for misappropriating the sum of US$13.5 billion while serving as the Minister of Finance and Chairman of Brunei Investment Agency and the Privy Council.[33]

There was also a German case involving a claim brought by the Siemens Company against eleven former senior executive managers and two supervisory members, Neuburger and Ganswindt, for failure to stop a corrupt payment by the company. The managers were alleged to have paid a bribe in the range of US$2 billion to boost the business of the corporation. Siemens later paid US$800 million to settle the charges brought under the FCPA (Foreign Corrupt Practices Act) by the DOJ and SEC, and another US$800 million to the German government. Siemens then filed a claim in the lower court demanding US$18 million from former director Neubuger. Nuebuger filed a counterclaim against the company when he was unable to pay the judgment. He claimed that the company owed him unpaid bonuses and stock benefits. Finally, Ganswindt settled, but the civil suit is still pending before the court in Germany against Neubuger.[34]

Finally, in a Nigerian case, an NGO sued the government before the ECOWAS Community Court of Justice. This case was the Registered Trustees of the Social-Economic Rights and Accountability Project (SERAP) vs. the Federal Republic of Nigeria & Universal Basic Education Commission (UBEC).[35] An excerpted explanation of this case is as follows:

> SERAP is a Nigerian human rights NGO that raised a case against the government due to the failure of the success of the national basic education plan. The case was based on a financial reduction in the national fund that was supposed to finance the education plan due to corruption crimes and violations of Articles 1.2, 17.21 and 22 of the African Charter on Human and Peoples' Rights. These articles guarantee the human right to quality education, human dignity, and economic and social development. The applicant said that following the diversion of funds, there is insufficient money available to the basic education sector. The result was over five million children having no access to primary education.[35] SERAP blamed a number of factors that had negatively affected the educational system of the country, including failure to train more teachers, the non-availability of books and other teaching materials, etc., that "contributed to the denial of the right of the peoples to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of other economic and social rights such as the right to education." The court held as follows: the defendants do not contest the fact that every Nigerian child is entitled to free and compulsory basic education. What they earlier on said was that the right to education was not justiciable in Nigeria, but the court in its earlier ruling of 27th October 2009 in this case, decided it was justiciable under the ACHPR. Finally, the court ordered the defendants to take the necessary steps to provide the money to ensure the implementation of the education programme.[36]

In the above analysis, I have been able to provide several case examples and situations of private civil actions against corruption that are frequently cited and serve as leading examples of PCAs around the world. They illustrate the success of private civil actions and demonstrate what Africa could potentially achieve if determined to fight corruption through a multi-pronged approach within the legal system. Italy and the USA were carefully studied, and it has been shown that private civil actions have been frequently used in both countries. The USA also passed the Crime Victims' Rights Act of 2004, which allows crime victims to obtain compensation, and the Foreign Corrupt Practices Act (FCPA), which makes foreign official bribery illegal for those who are subjected to American law.

3.5.3. Are there any provisions in the 2003 Africa Union Convention on Prevention and Combating Corruption that can serve as the basis for further development of the convention in the area of private civil actions (PCAs) against corruption?

A protocol relates to the amendment of a treaty or convention. It cannot stand on its own without an existing convention that it intends to amend, fill in the gaps, or complement. The proposed draft protocol on PCAs is intended to complement the 2003 Africa Union Convention on Prevention and Combating Corruption (AUCPCC). This seems to be the only existing convention on corruption in Africa. Article 2(4) of the Convention states that: "[p]romote socio-economic development by

31 Crime Victims' Rights Act: A Summary and Legal Analysis of 18 U.S.C. §3771 available at https://www.everycrsreport.com/reports/RL33679.html
32 Mohamed Suharto, Case ARW-127 (2010), *available at* http://star.worldbank.org/corruption-cases/node/18554.
33 Conal Walsh, *'Fixer' Files £5.2m Suit against Brunei Royals*, Observer (June 17, 2006), https://www.theguardian.com/business/2006/jun/18/theobserver.observerbusiness2.
34 Richard L. Cassin, *Siemens Settles Recovery Suit with Last of Eleven Execs from 2008 Bribery Case*, FCPA Blog (Dec. 16, 2014), http://www.fcpablog.com/blog/2014/12/16/siemens-settles-recovery-suit-with-last-of-eleven-execs-from.html.
35 Serap v. Nigeria, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, Nov. 30, 2010), *available at* http://www.worldcourts.com/ecowasccj/eng/decisions/2010.11.30_SERAP_v_Nigeria.htm.
36 Supra

removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights."

The above provision encourages member states to remove obstacles that may impede social, economic, developmental, and any other hindrance that prevents citizen enjoyment of civil and political rights. Meanwhile, corruption has been identified as one of the obstacles to social and economic development. To enjoy meaningful and sustainable development in Africa, corruption must be eliminated. A plethora of evidence illustrates on how government funds and revenue meant for social and economic development have been siphoned by the economic and political elite. Corruption has wreaked havoc on and directly damaged the development of Africa. In addition, the enjoyment of civil and political rights by African citizens has obstructed as a result of corruption. A prominent example of this in practice is the case of election rigging, which prohibits citizens from exercising their liberty to choose their desired representatives. Therefore, to remove the obstacles and tackle corruption, PCAs should be introduced into the laws in Africa. This can only be achieved by adopting a protocol rooted in the provision of Article 2(4) of the AUCPCC.

Finally, the first proposed draft of the protocol will serve as the starting point of an initiative that will hopefully result in the adoption of the said protocol by the AU Member States. Consequently, this would serve as the first protocol in Africa in the area of PCAs against corruption. The adoption of this protocol on PCAs could serve as part of a permanent solution to corruption in Africa, followed by the declaration made at the 29th Assembly of the Heads of State and Government in January 2017 to dedicate the theme for 2018 on how the AU and its member states can wage and win the war against corruption.

4. FIRST WORKING DRAFT OF A PROTOCOL TO THE 2003 AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION (AUCPCC) ON PRIVATE CIVIL ACTIONS AGAINST CORRUPTION WITH COMMENTS AND BACKGROUND FOOTNOTES

PREAMBLE: The Member States of the African Union.
RECOGNIZING corruption as one of the most serious challenges to the further development of the African Continent; and that corruption affects people's lives daily, from poor roads to unequal access to health care and medicine, to crime and violence in our communities and across borders, and, finally, to political choices distorted by money and greed.

WHEREAS failing to address corruption inhibits sustainable long-term growth and undermines human development, especially of vulnerable populations, including the financial suffering of the poor and the unequal power and gender dynamics affecting women and girls.
WHEREAS on July 11, 2003, the African Union (AU) Heads of State and Government adopted the African Union Convention on Preventing and Combating Corruption in Africa (AUCPCC)[37] and the AUCPCC entered into force on August 5, 2006, and signaled the political commitment of African leaders to fight and combat the [cancerous] scourge of corruption on the African continent.
[Alternate reference to the AUCPCC] DETERMINED to build a corrupt-free African continent, the forty-nine (49) Member States of the African Union agreed upon the text of the African Union Convention on Preventing and Combating Corruption in Africa (AUCPCC) and thirty-seven (37) African countries have ratified/acceded to the convention, while most of the other member states have taken steps to domesticate the provisions of the AUCPCC in their national laws.
RECALLING the resolution adopted at the 29th Assembly of the Heads of State and Government in January 2017, the Head of States recognized that if corruption is not dealt with in Africa, the Africa Agenda 2063 and its first ten-year action plan, the 2030 global plan for sustainable development, and the Vision 2020 on silencing the guns may not yield the expected results.
FURTHER RECALLING as part of its efforts to prevent and fight corruption, the AU during its 30th Assembly of Heads of State and Government held in January 2018, in Addis Ababa, Ethiopia, launched 2018 as the African Anti-Corruption Year. This followed the declaration made at the 29th Assembly of the Heads of State and Government in January 2017, to dedicate the theme for 2018 to "[w]inning the fight against corruption: a sustainable path to Africa's transformation."
WHEREAS the Member States of the African Union wish to encourage private entities and the citizens of the African States to join with the member states in an intensified battle against corruption.
RECOGNIZING the fact that Africa has been struggling to fight corruption through the criminal justice system, and that the criminal justice system does not provide for compensation to victims of corruption for damages suffered as a result of corrupt acts.[38]
AWARE that private civil actions can play an important and complementary role in the criminal justice system to fight corruption in Africa.[39]
CONVINCED that private civil actions are not intended to substitute the court's jurisdiction to prosecute under the criminal justice system, but intended to establish the basis for an additional method to fight corruption in Africa.[40]

37 The Member States of the African Union adopted the convention at the Second Ordinary Session of the Assembly of the Union held in Maputo, Mozambique on July 11, 2003. The convention came into force on August 5, 2003, thirty days after the deposit of the fifteenth instrument of ratification. The convention has twenty-eight articles. COMMENT: One of the objectives of the convention is to coordinate and harmonize the policies and legislation between state parties for the purposes of prevention, detection, punishment, and eradication of corruption on the continent. One of the reasons behind this provision is that, in private civil actions, a private party may initiate a civil action independently even when the state authorities decide not to press criminal charges. The ability of private citizens and legal entities to decide independently whether to initiate private actions limits the circumstances in which a jurisdiction's executive and justice institutions can politically afford to remain inactive.

38 COMMENT: The primary international and regional instruments on corruption emphasize control of corruption by strengthening criminal law and its enforcement. The reliance on criminal legal frameworks and on the actions of the prosecutorial services and anti-corruption agencies has not resulted in a material drop in the incidents of corruption. Corruption appears to be continuing to expand in both the public and private spheres.

39 COMMENT: Using private civil actions to combat corruption is significant for a number of reasons. First, it is an alternative method of fighting corruption which can be used even when no criminal charges have been brought. Second, the remedies sought by an aggrieved plaintiff can be crafted to fit different situations. One plaintiff may wish to receive compensation for losses and harm suffered, while another may seek restitution or another type of remedial action. Third, victims of corruption who resort to civil actions become central protagonists in the fight against corruption and not mere observers of the criminal justice system over which they have little influence. Finally, in some jurisdictions, especially in jurisdictions following the common law tradition, the standard of proof required to establish the facts in a civil adjudication can be lower than for criminal proceedings. As part of the evaluation of the complementary role of civil actions in the fight against corruption, different legal system and laws in various African states have been examined to support this new method

40 COMMENT: Private Civil Actions are not intended to substitute the court's jurisdiction to prosecute under the criminal justice system. It is intended to establish the basis for an additional method to fight corruption in Africa. In preparation of the document, considerable inspiration has been derived from the 1999 Council of Europe Convention on Civil Actions against Corruption. However, it is recognized that further development of the document will need to be done to make it an African document.

RECALLING THAT Aspiration 3 of AU Agenda 2063 for Africa's Transformation recognizes that good governance is one of the necessary preconditions for a prosperous and peaceful Africa, and that it seeks to instill a universal culture of good governance, democratic values, gender equality, respect for human rights, justice, and the rule of law.[41]

RECALLING ALSO that Aspiration 4 of AU Agenda 2063 recognizes that the above principles are necessary preconditions for a peaceful and conflict-free continent.[42]

RECALLING that Article 2, Subsection 4 of the African Union Convention on Preventing and Combating Corruption in Africa (AUCPCC) encouraged the member states to remove obstacles that impede social, economic, developmental, and any other type of hindrance that prevents the enjoyment of citizens' civil and political rights.[43]

BEARING IN MIND the increased international interest in the use of private civil actions against corruption [in various African and other jurisdictions] and that the fight against corruption is a collective responsibility of all African citizens.

[TAKING INTO ACCOUNT] as relevant precedent Article 3 and Article 5 of the 1999 Council of Europe Civil Law Convention against Corruption, which is the first and the most extensive international convention on private civil actions against corruption.[44]

[FURTHER TAKING INTO ACCOUNT] that Article 35 of the United Nations Convention against Corruption (UNCAC) provides that State Parties to that Convention shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage to obtain compensation through private civil actions and that most of the AU Member States are States Parties to that Convention.[45]

[TAKING INTO ACCOUNT ALSO] as a relevant precedent Article 8 of the Arab Anti-Corruption Convention that heightens the importance of private civil actions as another possible source of law pertaining to the fight against corruption in the League of Arab States, of which some African countries are members.[46]

UNDERTAKING to establish the basis for an alternative and additional method to fight corruption in Africa and implement clear procedures under which private civil actions can be used to fight corruption.

RECALLING the resolutions adopted at the 29th Assembly of Heads of State and Government in January 2017, as well as at the 30th Assembly of Heads of State and Government held in January 2018, in Addis Ababa, Ethiopia, regarding assessing the impact of corruption in Africa.

NOW THEREFORE THE PARTIES HAVE AGREED AS FOLLOWS:

Chapter I
MEASURES TO BE TAKEN AT THE NATIONAL LEVEL

Article 1 – Objective of the Protocol

Each Member State of the African Union will undertake to provide in its domestic law effective compensation for aggrieved entities or persons who have suffered damage as a result of acts of corruption and the right to initiate legal proceedings against those

41 COMMENT: Aspiration 3 Agenda 2063: Africa shall have a universal culture of good governance, democratic values, gender equality, respect for human rights, justice and the rule of law. We aspire that by 2063, Africa will: (a) be a continent where democratic values, culture, practices, universal principles of human rights, gender equality, justice, and the rule of law are entrenched; and (b) have capable institutions and transformative leadership in place at all levels. The continent's population will enjoy affordable and timely access to independent courts and judiciary that deliver justice without fear or favour. Corruption and impunity will be a thing of the past Africa will be a continent where the institutions are at the service of its people. Citizens will actively participate in social, economic and political development and management. Competent, professional, rules and merit-based public institutions will serve the continent and deliver effective and efficient services. Institutions at all levels of government will be developmental, democratic, and accountable.

42 [COMMENT: Aspiration 4 of AU 2063 Agenda says that by 2020 all guns will be silent. Mechanisms for peaceful resolution of conflicts will be functional at all levels. A culture of peace and tolerance shall be nurtured in Africa's children and youth through peace education. Africa will be a peaceful and secure Continent, with harmony among communities starting at the grassroots level. The management of our diversity will be a source of wealth, harmony, and social and economic transformation rather than a source of conflict. It is aspired that by 2063, Africa shall have: (a) an entrenched and flourishing culture of human rights, democracy, gender equality, inclusion and peace; (b) prosperity, security and safety for all citizens; and (c) mechanisms to promote and defend the continent's collective security and interests. It is recognized that a prosperous, integrated and united Africa, based on good governance, democracy, social inclusion and respect for human rights, justice and the rule of law are the necessary pre-conditions for a peaceful and conflict-free continent. The continent will witness improved human security with sharp reductions in violent crimes. There shall be safe and peaceful spaces for individuals, families and communities. Africa shall be free from armed conflict, terrorism, extremism, intolerance and gender-based violence as a major threat to human security, peace, and development. The continent will be drugs-free, with no human trafficking, and where organized crime and other forms of criminal networks, such as the arms trade and piracy, are ended. Africa shall have ended the illicit trade in and proliferation of small arms and light weapons. Africa shall promote human and moral values based on tolerance and rejection of all forms of terrorism irrespective of their motivations. By 2063, Africa will have the capacity to secure peace and protect its citizens and interests, through a common defense, foreign and security policy.]

43 Article 2 (4) of the African Union Convention on Preventing and Combating Corruption states that the objectives of this Convention are to Promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.

44 [COMMENT: The first, and certainly the most extensive, treaty on private civil actions is the 1999 Council of Europe Civil Law Convention against Corruption, which complements the Criminal Law Convention on Corruption. The convention was adopted on November 4, 1999, by the European Union member states. The convention is divided into three chapters with twenty-three articles. The convention advocates for measures to be taken at the national level and with international collaboration. It also provided for monitoring and implementation measures to be taken by the member states at each level and ends with the final clauses.]
The working definition of corruption in Europe is found in Article 2: "'[c]orruption' means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof." Commenting on the objectives of private civil actions, Article 3 states that "[e]ach Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. 2. Such compensation may cover material damage, loss of profits and non-pecuniary loss." Finally, Article 5 states that "[e]ach Party shall provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party, from that Party's appropriate authorities."]

45 [COMMENTS: The UNCAC is the most important international convention on corruption, both in terms of its breadth and the number of state signatories. It was adopted by the United Nations General Assembly on October 31, 2003 and entered into force December 14, 2005. As of October 3, 2017, the convention has 183 member states. The convention was created to respond to corruption as a global problem, and it addresses a wide variety of issues. Significantly, in terms of the present protocol, member states are required to implement in their individual national laws provisions facilitating private civil actions aimed at providing a way for corruption victims to be compensated for their losses. This is provided for in Article 35 of United Nation Convention against Corruption, which states that "each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation." Unfortunately, follow-up on Article 35 at the national level has received little attention.]

46 [COMMENTS: The Arab Convention against Corruption was developed by the League of Arab States. It is regarded as the first official pan-Arab anti -corruption treaty. On December 20, 2010, the convention obtained signatures of ministers of the interior and ministers of justice from twenty-one (21) Arab countries, apart from Somalia. The convention has thirty-five (35) articles and is founded on Islamic doctrine and various religious books. According to the convention's preamble, the burden of fighting corruption is not only placed on the official authorities, civil society and individuals also play an important role in the struggle. Article 2 is an agreement to prevent and eradicate any form of corruption with the help of League of Arab States, especially in the recovery of stolen assets. Article 4 lists and describes thirteen actions that are categorized as corruption. Some of these include corruption in the private and public sectors, bribery of national and international public officials, money laundering, abuse of functions, illicit enrichment, trading in influence, embezzlement of property in the private and public sectors, and obstruction of justice. Finally, Article 8 addresses private civil actions stating that: "Each state party shall provide in its domestic legislation that all those that suffered damage as a result of an act of corruption, under the present convention, shall have the right to bring an action for compensation for such damage."]

responsible for that damage in order to obtain such compensation [and secure other legal and equitable remedies].

Article 2 – Definition of Corruption

For the purpose of this protocol, "corruption" means the acts and practices, including related offences, prescribed by the 2003 African Union Convention on Preventing and Combating Corruption.[47]

Article 3 – Sanctions for Acts of Corruption

Each Member State of the African Union shall, in accordance with its domestic legislation, adopt measures to punish corruption. In this context, State Parties may take into account corruption as an important factor when taking legal steps to cancel or revoke a contract, withdraw a concession or other similar arrangements, or taking any other remedial measure.

Article 4 – Compensation for Damage

1. Each Member State of the African Union shall make available in its domestic law for aggrieved entities and persons who have suffered damage as a result of corruption the right to institute an independent action to obtain full compensation for such damage.[48]
2. Such compensation may cover material damage for entities and persons who wish to recover loss of profits and non-pecuniary loss in terms of restitution or remedial action.[49]
3. The right of entities and persons to initiate legal proceedings referred to in this Article shall not be conditioned upon the initiation of an investigation or of the prosecution of alleged corruption by state authorities or upon the outcome of such investigation or criminal prosecution.

Article 5 – Liability

1. Each Member State of the African Union shall provide in its domestic law for the following conditions to be satisfied for the aggrieved entities or persons who are entitled to receive damages or compensation:
   - **i.** the defendant has committed or authorized the act of corruption or failed to take reasonable steps to prevent the act of corruption;
   - **ii.** the entities or persons have suffered damage; and
   - **iii.** there is a connecting bond between the act of corruption and the damage.
2. Each Member State of the African Union shall provide in its domestic law that if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable.

Article 6 – Obligation of State Parties

Each Member State of the African Union shall provide in its domestic law for appropriate separate procedures for entities or persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to make a claim for compensation against the State or, in the case of a non-State Party, from that Party's appropriate authorities.[50]

Article 7 – Limitation Periods

Each Member State of the African Union shall provide in its domestic law for proceedings for the recovery of damages to be subject to a limitation period of not less than [three] years from the day the entities or persons who have suffered damage became aware or should reasonably have been aware that damage has occurred or that an act of corruption has taken place, and of the identity of the responsible person. However, such proceedings shall not be commenced after the end of a limitation period of not less than [ten] years from the date of the act of corruption.[51]

Article 8 – Validity of Contracts

1. Each Member State of the African Union shall provide in its domestic law for any contract or clause of a contract providing for corruption to be declared invalid.
1. Each Member State of the African Union shall provide in its national law for the possibility for parties to a contract whose consent has been damaged by an act of corruption to be able to seek remedies in court for the contract to be annulled, while nevertheless still maintaining their right to bring a claim for compensations.

Article 9 – Protection of Employers/Employees of a Company

1. Each Member State of the African Union shall provide in its domestic law appropriate measures to prevent cases involving a breach of trust; the principal or officers of the company may sue or be sued for paying or receiving bribes on behalf of or within the company.[52]

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47 [COMMENT: We shall be relying on the definition of corruption and other related definitions related to corruption as provided for under the 2003 African Union Convention on Preventing and Combating Corruption.]

48 [COMMENT: The reason behind this provision is that one of the advantages of private civil actions is that a private party may initiate a civil action independently, even when the state authorities decide not to press criminal charges. The ability of private citizens and legal entities to decide independently whether to initiate private actions limits the circumstances in which a jurisdiction's executive and justice institutions can politically afford to remain inactive.]

49 [COMMENT: The remedies sought by the aggrieved plaintiff can be crafted to fit different situations. One plaintiff may wish to receive compensation for losses and harm suffered. Another may seek restitution or another type of remedial action].

50 COMMENT: A recent case example that has to do with public officials being sued in the exercise of their functions is an Indonesian from January 2008. In this case, a USD $1.5 billion civil lawsuit was instituted against the late former president of Indonesia – President Suharto and his son, Tommy. The former president was alleged to have misappropriated a charity scholarship fund of USD $440 million, and Tommy was involved in a corrupt land exchange scheme as a result of which the country suffered damages in the sum of USD $55 million. The former president eventually escaped criminal prosecution by declaring himself to be mentally incapable to stand trial. Nevertheless, in December 2010, the Supreme Court announced the retrieval of 2.8 trillion rupiah which equates to approximately USD $307,440,000 at today's rates.

51 COMMENT: In cases involving breach of trust, the principal can institute civil actions against their agents to recover all illicit benefits obtained or losses suffered in breach of trust while in the course of their works. The case of CIR vs. Fininvest is an example in which compensation in the amount of €560 million was awarded to the victim within the ten-year limitation period. In the 1980s, the head of the Mondadori Group was a holding company named AMEF. In 1988, CIR and the Formenton family, as principal shareholders in the holding company, signed a shareholder control agreement transferring the Formenton family's AMEF shares (27.75%) to CIR, which already owned 27.71 % of the capital stock. The agreement included an arbitration clause. After a corporate raid by Fininvest, which owned a minority of the shares in the holding company (8.28%), the Formenton family sought to rescind the shareholder agreement concluded with CIR. CIR initiated arbitral proceedings according to the arbitration clause in the shareholder agreement. The arbitration panel found that there had been a breach of contract by the Formenton family. The arbitral award ordered the Formenton family to sell its stocks to CIR according to the contract. The Formenton family raised an appeal to the Rome Court of Appeals on the grounds that the arbitral award is null and void. The court confirmed the arbitral award was contrary to public policy. Later, a settlement was made between CIR and Fininvest, and Fininvest took control of the Mondadori Group.
Ten years later, the Milan Criminal Court found that the Judge-Rapporteur of the chamber of the Rome Court of Appeals that declared the arbitral award null and void was in fact bribed by the Fininvest lawyer to issue a decision annulling the arbitral award, a decision that was favorable to the Formenton family. The court had dismissed liability against a number of persons involved in the scandal including the director of Fininvest due to the statute of limitations for the criminal act. CIR brought a civil action to recover damages resulting from the corruption of the Judge-Rapporteur.
In the eyes of the Italian Supreme Court, the harm suffered by CIR is regarded as damage, which came out from the criminal act of Fininvest. However, the Italian Supreme Court found Fininvest liable for corruption and damages was awarded against it in favour of CIR for the sum of €560 million.

52 COMMENT: This can arise in cases involving breach of trust. The principal can institute civil actions against their agents to recover all illicit benefits obtained or losses suffered in breach of trust while in the course of their works. An example case is 2007 lawsuit in which the brother of Sultan of Brunei,Prince Jefri Bolkiah, was sued by the State of Brunei for misappropriating the sum of USD $ 13.5 billion while serving as the Minister of Finance and Chairman of the Brunei Investment Agency and the Privy Council.

2. Each Member State of the African Union shall provide in its domestic law for appropriate measures that will protect and allow the employees of a company to institute civil actions against their employers to recover all illicit benefit obtained or losses suffered in breach of trust while in the course of their work.
3. Each Member State of the African Union shall provide in its domestic law for appropriate protection against any unfair or baseless sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.

Article 10 – Accounts and Audits

1. Each Member State of the African Union shall in its domestic law take any necessary measures for the annual accounts of companies to be drawn up clearly and give a true and fair view of the company's financial position.
2. With a view to preventing acts of corruption, each Member State of the African Union shall provide in its domestic law for auditors to confirm that the annual accounts present a true and fair view of the company's financial position.[53]

Article 11 – Acquisition of Evidence

Each Member States of the African Union shall provide in its domestic law for effective procedures for the acquisition of evidence in civil proceedings arising from an act of corruption.

Article 12 – Protection of Informers, Witnesses, Experts, and Victims

Each Member State of the African Union shall provide the necessary legal protection to informers, witnesses, experts, and victims who give evidence relating to corrupt acts referred to by the present protocol. This shall include protecting their relatives and those closely connected to them from any possible act of revenge or intimidation. Such means shall include:

i. providing protection in their dwelling places;
ii. not disclosing information relating to their identity or location;
iii. informers, witnesses, experts, and victims giving evidence in a manner that ensures their safety, such as by the use of communications technology;
iv. taking disciplinary measures against anyone who discloses information relating to the identity or location of informers, witnesses, experts, or victims.

Article 13 – Interim Measures

Each Member State of the African Union shall provide in its domestic law for such interim court orders as are necessary to protect the rights and interests of interested parties during civil proceedings arising from an act of corruption.

Chapter II
INTERNATIONAL CO-OPERATION AND MONITORING OF IMPLEMENTATION

Article 14 – International Co-operation

The parties shall co-operate effectively in matters relating to civil proceedings in cases of corruption, especially concerning the service of documents, obtaining evidence abroad, jurisdiction, recognition and enforcement of foreign judgments, and litigation costs, in accordance with the provisions of relevant international instruments on international co-operation in civil and commercial matters to which they are party, as well as with their internal law.

Article 15 – Monitoring

The African Union Advisory Board on Corruption (AUABC) shall monitor the implementation of this protocol by the parties.

Chapter III
FINAL CLAUSES

Article 16 – Signature and Entry into Force

1. This protocol shall be open for signature by members of the African Union (AU) General Assembly of the Heads of State and Government that have participated in the elaboration of this protocol and who are the signatories of the 2003 African Union Convention on Preventing and Combating Corruption.
2. The protocol shall enter into force thirty (30) days after the date of the deposit of the fifteenth instrument of ratification or accession. The instruments of ratification shall be deposited with the Chairperson of the African Union Commission, who will notify all the members of the names of those who have ratified. The Chairperson shall transmit certified copies to each of the signatory governments.
3. For each State Party ratifying or acceding to the protocol after the date of the deposit of the fifteenth Instrument of Ratification, the protocol shall enter into force thirty (30) days after the date of the deposit by that State of its instrument of ratification or accession.

5. RECOMMENDATIONS

After thorough research and based on the above analysis and findings, it seems accurate to say that the criminal side of the law alone has not been effective in the fight against corruption. To attempt to remedy the situation and bring about available legal recourse from both the criminal and civil sides of the law, the following recommendations are suggested for the African Union (AU):

- The African Union (AU) should launch an information campaign. The advantage of this method is that it has a very low cost and does not require significant manpower. This campaign entails the AU making a concerted effort to raise awareness by talking about available remedies wherever it can, including in meetings and on social media. The AU can also allocate funds to quickly initiate this campaign. The potential disadvantage of this method is that uncertainty may continue in our legal system, as informational awareness alone may not be sufficient to move people into action.
- Private Civil Actions (PCAs) should be integrated into African law school curriculums. The AU should work with law schools to develop plans to teach students about PCAs as part of their foundational academic curriculum. The advantage of this method is that future lawyers and policy-makers will be equipped with a better understanding of this approach and will be prepared to use it on behalf of their clients or constituents once it becomes part of the law. However, we should note that it may be an extended period of time before the PCA framework is integrated into the legal system, meaning that students

53 COMMENT: In a German case that involved a claim brought by the Siemens Company against eleven former senior executive managers and two supervisory members– Neuburger and Ganswindt—for failure to stop a corrupt payment by the company. The managers were alleged to have paid a bribe in the range of USD $2 billion to boost the business of the corporation. Siemens later paid the USD $800 million to settle the charges brought under the FCPA by the DOJ and SEC, and an additional sum of USD $800 million to the German government. Siemens then filed a claim in the lower court demanding $18 million from the former director, Neubuger. Nuebuger also filed a counter-claim against the company when he was unable to pay the judgement. He claimed that the company also owed him unpaid bonuses and stock benefits. Finally, Ganswindt settled, but the civil suit is still pending before the court in Germany against Neubuger.

would be learning about provisions of the law that are not yet in place, and, in the meantime, corruption goes on and keeps expanding.

- The AU may work through local NGOs to start promoting the idea of private civil actions among the people in Africa.
- The AU may also try to improve the legal framework in Africa on a country-by-country basis. The advantage here is that this method may work well in bringing about change on a country-level basis. However, this approach may also be the most labor-intensive because of the different legal systems of each individual country. Therefore, there is also the possibility that this method may be met with different levels of resistance in each country.
- The AU should adopt a protocol for the 2003 Africa Union on Prevention and Combating Corruption. This method, if negotiated and ratified by the AU General Assembly of Head of States, will serve as an alternative and independent tool to the old method of fighting corruption through the domain of criminal law. Additionally, it will also compensate victims of corruption for the harm they have suffered as a result of corruption. However, this requires a substantive effort, as it may not be easy for the AU to convene all African countries in a roundtable to seriously start negotiating and adopt a protocol due to the political efforts and pressures that such an approach may require. Notwithstanding these drawbacks, this seems to be the most effective method to fight corruption in Africa and is aligned with the emphasis made at the 30th ordinary session of the African Union Assembly summit held at Addis Ababa on January 29, 2018, which focused heavily on winning the fight against corruption.[54]

6. CONCLUSION

As demonstrated in this study, the use of private civil actions against corruption is not well defused in Africa. It is not one of the main anti-corruption tools because of the different legal systems, different colonial past experiences, and very low understanding of both the public and legal professionals about the possibility of compensation for criminal corruption acts being provided to victims through private civil actions. Therefore, Africa has recognized the need to address the epidemic of corruption and is determined to build a corrupt-free African continent. However, it is high time we stopped limiting the fight against corruption to the criminal justice system. It is time that Africa should recognize and implement the role of private civil actions in this struggle. This method is a powerful anti-corruption tool that should not be neglected in Africa, and the proposal contained within this paper is a first step toward integrating this tool into the legal framework for combating corruption.

54 Press Release, African Union, the 30th Ordinary Session of the African Union Assembly Concludes with Remarkable Decisions on (3) Flagship Projects of Agenda 2063 (Jan. 30, 2018), *available at* https://au.int/en/pressreleases/20180130/30th-ordinary-session-african-union-assembly-concludes-remarkable-decisions-3.

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RESEARCH ARTICLE

The rise and globalization of negotiated settlements: How an American procedure, the Deferred Prosecution Agreement (DPA), became a transnational key tool to fight transnational corporate crimes

Michel A. Perez*

"*Crimes are more effectively prevented by the certainty than by the severity of the punishment*."

Cesare Beccaria, 1764[1]

"*DPAs have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe*."

Lanny A. Breuer, US Assistant Attorney General, 2012[2]

"*Non-trial resolutions have become a prominent way of enforcing serious economic offences*."

OECD, 2019[3]

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ABSTRACT

The use of corporate deferred prosecution agreements (DPAs) to fight corporate crimes in the USA, and more recently in other countries, has raised some challenges. However, the benefits of these procedures are significant when compared to the lengthy and costly ways of "traditional" justice. DPAs provide governments with limited resources a method to more efficiently resolve white-collar criminal charges through the developing concept of "negotiated justice."

The development of procedures similar to the American DPA in other jurisdictions, notably the UK and other countries of common law tradition, as well as in some civil law jurisdictions such as France, has created a new legal paradigm in recent years. Even the European Union is building a transnational enforcement system, underscoring the necessity of adopting comparable provisions in domestic laws worldwide. As illustrated in an OECD (Organization for Economic Cooperation and Development) survey published in March 2019, the diversity of judicial systems around the world precludes a "one size fits all" approach for a procedure to fight corporate crimes. However, coordinated prosecutions among agencies of different jurisdictions and the creation of international prosecutorial bodies and enforcement are signs of the emergence of a new transnational judicial system. This research seeks to

1 Cesare Beccaria, On Crimes and Punishments [Dei Delitti e Delle Pene], 1764 (David Young trans., Hackett Publ'g Co, 1986) .

2 Lanny A. Breuer, U.S. Asst. Atty. Gen., Speech the New York City Bar Association (Sept. 13, 2012), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association

3 OECD, Report on Resolving Foreign Bribery Cases with Non-Trial Resolutions 3 (2019), *available at* https://www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm.

analyze and evaluate the effectiveness and desirability of these tools as a means of combating corporate crimes.

Keywords: DPA; corporate crime, settlement; transnational, procedure, negotiated justice

العنوان: بزوغ وعولمة اليات مفوضات التسوية

ملخص

على الرغم من التحديات التي اثارتها استخدام اتفاقيات المقاضاة المؤجلة للشركات (DPAs) لمكافحة جرائم الشركات في الولايات المتحدة، ومؤخراً في بلدان أخرى الا أن فوائد هذه الإجراءات مهمة عند مقارنتها بالأساليب المطولة والمكلفة للعدالة «التقليدية.“

توفر اتفاقيات سلام دارفور للحكومات ذات الموارد المحدودة طريقة لحل التهم الإجرامية المقترفة من قبل ذوي الياقات البيضاء بشكل أكثر كفاءة من خلال تطوير مفهوم مفوضات التسوية «العدلة المفاوضة» فقد تم تطوير إجراءات مماثلة للعدالة المفاوضة لوزارة الشؤون الأمريكية في ولايات قضائية أخرى، ولا سيما المملكة المتحدة وبلدان أخرى من تقاليد القانون العام، وكذلك في بعض الولايات القضائية للقانون المدني مثل فرنسا مما أدى الى تبلور قناعة وفكر قانوني جديد في السنوات الأخيرة.

علاوة على ذلك فإن الاتحاد الأوروبي في طور تشكيل نظام إنفاذ عبر وطني، مما يؤكد على ضرورة اعتماد أحكام قابلة للمقارنة في القوانين المحلية في جميع أنحاء العالم. وكما هو موضح في استطلاع منظمة التعاون الاقتصادي والتنمية (OECD) الذي نشر في مارس 2019، فإن تنوع الأنظمة القضائية في جميع أنحاء العالم يحول دون اتباع نهج «مقاس واحد يناسب الجميع» لمكافحة جرائم الشركات. ومع ذلك، فإن المحاكمات المنسقة بين وكالات السلطات القضائية المختلفة وإنشاء هيئات ملاحقة دولية وإنفاذ ماهي الا علامات على ظهور نظام قضائي جديد عبر وطني. بناءا على ذلك، تسعى هذه الدراسة إلى تحليل وتقييم أهمية وفعالية هذه الأدوات كوسيلة لمكافحة جرائم الشركات.

الكلمات المفتاحية: اتفاقيات المقاضاة المؤجلة، جرائم الشركات، التسوية، عبر وطني، إجراءات، العدالة المفاوضة

“Negotiated justice” is an expression that has been commonly used, sometimes with a negative connotation in Europe, by corporate lawyers and legal scholars since the beginning of this century. The concept known in America as “negotiated settlement” is well established in the USA and other common law jurisdictions, but it is relatively new in civil law countries, which comprise most of Continental Europe. This term mostly covers non-trial agreements reached directly between large corporations and national financial supervisors with no or limited judicial review. According to a recent Organization for Economic Cooperation and Development (OECD) study, “[n]on-trial resolutions, also referred to as settlements, have been the predominant means of enforcing foreign bribery and other related offences since the entry into force of the Anti-Bribery Convention, twenty years ago.”[4] Advocates of settlements argue that their compromising rather than adversarial nature constitutes an incentive for wrongdoers to self-report to prosecutors and increases the prospects of corporate governance reforms.

The best known and most used of the procedures to reach negotiated settlements is the American “Deferred Prosecution Agreement” (DPA). It became a model for other jurisdictions and has served as a major tool in the hands of prosecutors around the world to police and change corporate behavior since the beginning of the 21st century. During the last two decades, DPAs and similar procedures heralded major changes in organizations’ governance. They could force companies to:

- oust or reassign executives and directors;
- agree to pay substantial penalties, fines, restitutions, and other remedial relief;
- change long-standing sales and compensation practices;
- set up, staff and implement extensive controls, compliance and reporting programs; and
- nominate a corporate monitor who not only reports to the prosecutor but also has wide investigative powers and broad discretion over compliance and the supervision of business decisions.

This article reviews how a relatively obscure American procedure became a major tool in corporate enforcement and how it has led to a new concept of “transnational negotiated justice.”

1. INTRODUCTION: THE CONCEPT OF CORPORATE CRIMINAL LIABILITY

In the USA, the concept of corporate criminal liability was established by the Supreme Court more than a century ago, in particular in the case of *New York Central Railroad Company v. United States* decided on February 23, 1909. In this case, the Court established that “corporations can commit crimes which consist in purposely doing things prohibited by statute, and in such case they can be charged with knowledge of acts of their agents who act within the authority conferred upon them.”[5] A number of well-publicized cases were successfully prosecuted by American authorities throughout the 20th century,[6] but a sea change in the enforcement of corporate criminal law occurred when the Department of Justice (DOJ) and other agencies started to extensively use pretrial diversion procedures referred to as Pretrial Diversion Agreements (PDAs). Pretrial diversion is defined by the DOJ Offices of Attorneys as:

> “[A]n alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service… In the majority of cases, offenders are diverted at the pre-charge stage. Participants who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution.”[7]

DPAs and NPAs (non-prosecution agreements) are the most frequently used forms of pretrial diversion in the United States.

In other major jurisdictions, the notion of corporate, as opposed to individual, liability could be differently defined but is broadly acknowledged today. Some jurisdictions like the UK are governed by a common law legal system, while others, including Germany and France, have civil law legal structures. Today, all major European jurisdictions recognize criminal liability for corporate entities. Procedures similar to the American DPA and NPA,are being implemented across the continent. Even the Court of Justice of the European Union has implicitly approved of the introduction of criminal settlements as long as the principle of *ne bis in idem*, comparable to the US double jeopardy principle, is ensured.

4 *Id.* at 11.
5 *See* N.Y. Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481 (1909).
6 Some of the best-known cases were Standard Oil and, more recently, AT&T, the tobacco companies, General Motors, and Microsoft.
7 *See* U.S. Dep’t of Justice, Justice Manual § 9-22.000 (covering the Pre-Trial Diversion Program).

Switzerland, Singapore, Australia, and Canada also introduced similar processes. According to an OECD study published in March 2019, at least twenty-seven jurisdictions have in place one or more "non-trial resolution system to resolve a foreign bribery case."[8] However, the gradual adoption of new procedures should not be construed as the cookie cutter or "copy and paste" importation of the American DPA, but rather a transposition "only if" certain conditions, namely judicial supervision, are met.

This paper first analyzes the rise of negotiated settlements in the USA as a means of resolving corruption cases, then turns to an examination of how similar procedures are being implemented in other jurisdictions, with a specific focus on analyzing the challenges to be overcome for an effective fight against corporate corruption.

2. THE RISE OF NEGOTIATED SETTLEMENTS IN THE USA

US Assistant Attorney General Breuer explains the American prosecutors:

"...had [two decades ago] only the blunt instrument of criminal indictment with which to attack corporate crime. Prosecutors faced a stark choice when they encountered a corporation that had engaged in misconduct – either indict or walk away. In the 1990s, however, the government began doing something new: agreeing to defer prosecution against the corporation in exchange for an admission of wrongdoing, cooperation with the government's investigation, including against individual employees, payment of monetary penalties, and concrete steps to improve the company's behavior. And, over the last decade, DPAs have become a mainstay of white collar criminal law enforcement. The result has been, unequivocally, far greater accountability for corporate wrongdoing – and a sea change in corporate compliance efforts."[9]

2.1. A history: from the early 1900s to 9/11

According to Peter Reilly,[10] DPAs "emerged in the early 1900s as a way to address non-serious misdemeanor charges, such as retail theft, especially when committed by juveniles or first-time offenders. Their use was justified to protect vulnerable persons in society. In 1914, the Chicago Boys' Court implemented deferred prosecution in the hope that juvenile offenders would not be stigmatized as "criminals" for the remainder of their lives. After World War II, the use of DPAs for individuals was frequent, and it was common to combine deferred prosecution with community-based counseling, training, and job-placement programs.

In 1977, the DOJ promulgated standards for the deferral of prosecution, citing three principal objectives: (1) to prevent future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services; (2) to save prosecutive and judicial resources for concentration on major cases; and (3) to provide, where appropriate, a vehicle for restitution to communities and victims of crime. They clarified that the procedure was intended for application to individuals in small cases rather than to large corporations.

On May 20, 1992, the DOJ and the SEC (Securities Exchange Commission) announced that they had reached a settlement with Salomon Brothers, an investment firm, that was generally considered to be the first modern era corporate NPA. The DOJ press release reads in part: "Salomon Brothers Inc. would pay a total of $290 million in sanctions, forfeitures and restitution to resolve charges arising out of alleged misconduct in Treasury auctions and government securities trading."[11] The settlements were reached following a ten-month multi-agency investigation. Otto Obermaier, US Attorney for the Southern District of New York, noted that Salomon had extensively cooperated in the investigation and had taken decisive and extraordinary actions to restructure its management to avoid future misconduct. He said that "[w]hile the alleged violations were serious, we believe that the combination of punishments is adequate, and **there is no need for invoking the criminal process**. **Salomon's cooperation has been exemplary. Such actions were virtually unprecedented in my experience**." This seminal case established that in exchange for full cooperation and remediation, the prosecuting authority has the discretion to stop the criminal judicial process. Similarly, the first modern corporate DPA was signed in 1994 when Mary Jo White, the then US Attorney for the Southern District of New York, entered into an agreement with Prudential Securities in a letter dated October 27.[12]

Subsequently, on June 16, 1999, the DOJ provided detailed guidance for the federal prosecutions of corporations in what became known as the "Holder Memo."[13] It reads in part:

> "Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime... In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider [specific] factors... Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so, as well as other remedial actions such as implementing an effective corporate compliance program, improving an existing one, and disciplining wrongdoers, in determining whether to charge the corporation... The primary goals of criminal law are deterrence, punishment, and rehabilitation..., however, these goals may be satisfied without the necessity of instituting criminal proceedings".

The widespread use of DPAs and NPAs followed shortly in the wake of the federal government indictment of the large accounting firm Arthur Andersen on May 6, 2002.[14] The dramatic increase starting

8 OECD, *supra* note 3, page 12.
9 Breuer, supra note 2.
10 Peter R. Reilly is Associate Professor of Law, Texas A&M University School of Law. His article *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions* was published in the Brigham Young University Law Review in January 2016. Our paragraphs on "Juvenile Origin" and "The Salomon Case and The Holder Memo" draw directly from his historical analysis. *See* Peter R. Reilly, *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Criminal Prosecutions*, 2 B.Y.U. L. Rev. 307 (2015)/
11 *See* Press Release, Dep't of Justice, Department of Justice and SEC Enter $290 Million Settlement with Salomon Brothers in Treasury Securities Case (May 20, 1992), *available at* https://www.justice.gov/archive/atr/public/press_releases/1992/211182.htm.
12 *See* U.S. Dep't of Justice, U.S. Attorney, Southern District of New York, Prudential Sec. – Deferred Prosecution Agreement (Oct. 27, 1994), *available at* http://corporatecrimereporter.com/documents/prudential.pdf. Mary Jo White was the first woman to be United States Attorney for the Southern District of New York, serving from 1993 to 2002. On January 24, 2013, President Barack Obama nominated her to become Chair of the U.S. Securities and Exchange Commission.
13 The Memorandum, which is 13 pages long, was signed on June 16, 1999 by then Deputy Attorney General Eric Holder who became the first Attorney General in the Obama Administration.
14 *See* James R. Copland, *The Shadow Regulatory State, The Rise of Deferred Prosecution Agreements*, Civ. Just. Rep., no. 14, May 2012, at 1.

in 2003 in the number of federal DPAs and NPAs is explained by two factors.[15]

First, the collapse of the venerated Arthur Andersen accounting firm in the wake of its federal indictment for a single count of obstruction of justice – the wisdom of which was further challenged by its subsequent reversal of conviction by the US Supreme Court – highlighted the risks and costs of prosecuting businesses as entities. Andersen was reportedly offered a DPA, but it objected to the accompanying conditions. The firm's collapse cost thousands of employees their jobs, more than 20,000 according to some accounts, and reduced large companies' choice of accounting firms. The DPA then appeared to be a more surgically focused way to address corporate criminal behavior than large-scale trials and an adequate procedure to remedy corporate shortcomings without endangering the survival of the corporate entity itself.

Second, the 9/11 terrorist attacks were a huge shock that changed the priorities of the US judicial system. The majority of federal, state, and specialized agencies personnel who were working on cases of corporate wrongdoing were then reassigned to tasks linked to counter-terrorism effects as their top priority. Thus, the DOJ and other departments and agencies had less personnel available to work on corporate criminal cases. They also had to develop more efficient, less resource-consuming ways to handle white-collar crimes.

On the heels of the Andersen case, Deputy US Attorney General Larry Thompson issued a new memorandum on January 20, 2003, addressing whether to prosecute corporations. The Thompson memo reaffirmed the principles of the 1999 Holder Memo and expressly offered pretrial diversion to cooperating corporations – "[i]n some circumstances, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation."[16]

2.2. The mechanics: How it works

A DPA or NPA is basically a way of imposing a term of probation before a conviction. Both types of agreements are classified as pretrial diversion agreements (PDAs), and all PDAs are negotiated settlements reached between a defendant, which, in the USA, could be a corporation or an individual, and a prosecuting party, most frequently a District Attorney who is part of the DOJ or sometimes an agency such as the Securities and Exchange Commission (SEC). PDAs allow prosecutors to sanction a firm without triggering the collateral consequences of a formal conviction, such as debarment, delicensing, or a prohibition against bidding for public markets.

In the DPA process, the government files charges but then agrees to hold them in abeyance pending the company's successful completion of certain terms in the agreement for a period of time. If the conditions set forth in the agreement are met to the government's satisfaction, then the charges are dismissed. Typically, the terms of both DPAs and NPAs come directly from the US Sentencing Guidelines, which are under the purview of Congress. Generally, the government's terms require, at minimum, an admission of wrongful conduct supported by a detailed factual basis. Other provisions that may arise include limits on public statements, restrictions on a company's ongoing business practices, and, in some cases, the appointment of a monitor to oversee the company's compliance with the agreement's terms.[17] The period of time, or the probation period, in which compliance with the terms is required before the charges are dismissed, varies from agreement to agreement. Among the 100 cases settled in 2015, a record year, the probation period varied from six months (Ansun Biopharma) to ten years (Exide Technologies); that year the majority of cases, which were part of a special DOJ program with Swiss banks, had a probation period of four years.

Deferred prosecution (or non-prosecution) is a procedure available to federal or state prosecutors and some enforcement agencies at their discretion. It can be used for many types of crimes as defined by American law. They have been used in virtually all areas of corporate criminal wrongdoing, including antitrust, fraud, domestic bribery, tax evasion, environmental violations, banking regulation infractions, as well as foreign corruption cases. By offense category, the violations frequently noted relate to laws that regulate securities and trading, competition, environmental and safety issues, foreign bribery (FCPA – Foreign Corrupt Practices Act[18]), healthcare and FDA (Food and Drugs Administration) regulations, tax-related matters and monetary transactions, frauds (such as overbilling of services), and money laundering.

American laws and statutes provide extensive powers to enforcement agencies. For instance, in the case of the FCPA, the DOJ website states:

> "With the enactment of certain amendments in 1998, the anti-bribery provisions of the FCPA now also apply to foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States. The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions."[19]

Frequently, several governmental agencies are involved in the negotiation of a DPA or NPA. In addition to one or several representatives of the DOJ (Tax Division, Fraud Division, District Attorneys), settlements may also be signed off on by officers of the SEC, the FDA, and other federal or state supervisory entities. In 2013, the SEC signed an NPA settlement for the first time in a matter involving the Ralph Lauren Corporation.

The key difference between an NPA and a DPA is that DPAs are filed by the DOJ in federal court with a charging document and are subject to judicial approval. On the other hand, NPAs can simply be letter agreements between the DOJ and the entity subject to the agreement. Regarding NPAs, there is no public filing of charges and they are not subject to judicial review. This means that it is not possible to establish accurate statistics regarding the use of terms contained in NPAs.

In practice, NPAs and DPAs are negotiated in the same manner, usually over a few months, between the target entity (or rather its executive management and legal team that often includes internal and external lawyers) and a team of legal enforcers, comprising representatives from one or several different governmental agencies. The settlement agreement is a formal document signed by all parties; it generally includes:

- an acknowledgement of responsibility for past conduct;

15 *Id.* at 3.
16 *See* Memorandum from Larry D. Thompson, Deput Attorney General, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_DOJthomp.authcheckdam.pdf.
17 This description is based on Eugene Illovsky, *Corporate Deferred Prosecution Agreements: The Brewing Debate*, Crim. Just., Summer 2006, at 36.
18 The Foreign Corrupt Practices Act (FCPA) was passed in 1977 and prohibits companies from offering bribes, kickbacks, or other payments or favors to foreign government officials.
19 *See* Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 et seq. (2017), *available at* https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

- an acknowledgement that if the defendant commits similar conduct during the agreed upon probation period, the government may prosecute for any crime, including the subject matter of the agreement;
- an obligation to cooperate with the government's continuing investigation, including making employees available for testimony;
- a waiver of the defendant's right to a speedy trial and defenses;
- language that prohibits the defendant from making contradictory factual representations to those found in the agreement; and
- the imposition of penalties, fines, restitutions, and other remedial relief.

The use of the DPA/NPA procedure is thus geared toward transforming corporate behavior.

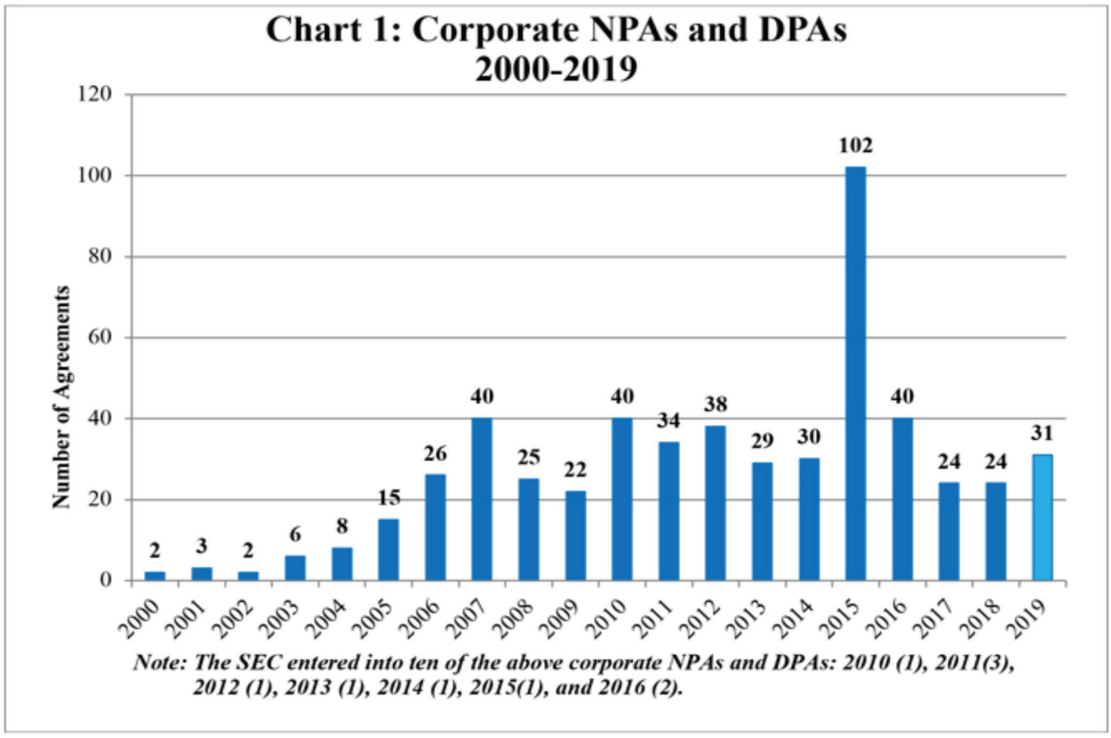
Depending on the severity of the offenses, the nature of the business, and other factors considered by the prosecutors, the agreement may impose on the defendant the appointment of an independent monitor at its expense. Corporate monitors are primarily responsible for assessing and reporting to a government agency on the effectiveness of the corporate compliance and ethics programs of companies that have had significant legal or regulatory issues resolved by a DPA, NPA, or administrative settlement.[20]

It should also be noted that DPAs and NPAs have a significant financial impact, and the publicity around discussions with governmental entities could affect stock prices of public companies and their capacity to compete.

2.3. A prevalent tool against corporate crime

In 2012, Lanny A. Breuer, the then Assistant Attorney General, declared that: "DPAs have become a mainstay of white collar criminal law enforcement."[21] Since 2000, the well-known law firm Gibson Dunn has published an annual, and now biannual, report that includes a detailed tally and analysis of recent cases.

The number of DPA and NPA resolutions in the USA is impressive as could be seen in chart 1. For the first time in 2005, the number of cases settled in the USA was a two-digit figure. In subsequent years, with the exception of 2015, the annual number varied between twenty-two and forty cases, including cases handled by both the DOJ, which dealt with the vast majority, the SEC, and other agencies. The spike in 2015 is attributable to the implementation of an agreement with Switzerland that invited Swiss banks to self-disclose tax-related conduct (and pay associated penalties) in exchange for NPAs. If one excludes the seventy-five NPAs signed with Swiss banks pursuant to this agreement, the yearly number of procedures has remained relatively stable during the last decade. Notably, changes in the US government administration do not seem to affect this trend. The reputedly pro-business Trump administration continues to use settlements as aggressively as its predecessors. As of most recent numbers, thirty-one agreements were signed during 2019, well in line with previous years.



Source: Gibson Dunn – https://www.gibsondunn.com/2019-year-end-npa-dpa-update/.

20 *See* Jason T. Wright, *The Corporate Compliance Monitor's Role in Regulatory Settlement Agreements*, Stout (Mar. 1, 2014), http://www.srr.com/article/corporate-compliance-monitors-role-regulatory-settlement-agreements#sthash.NplxqTXo.dpuf.

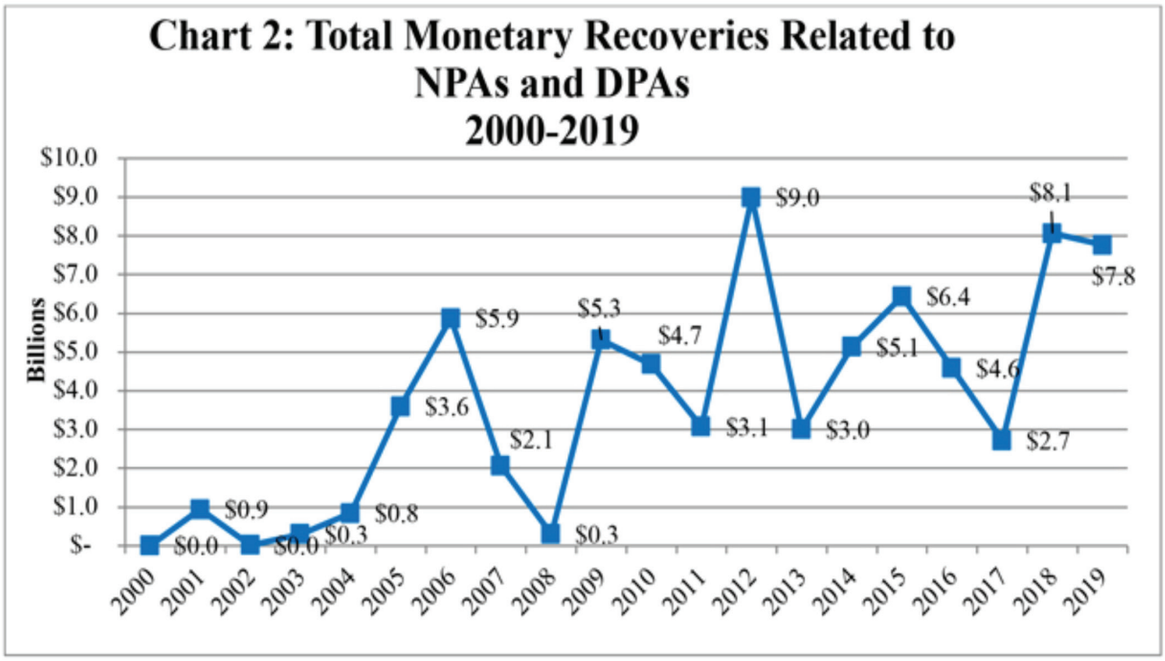
21 Breuer, supra note 2.

22 *See* F. Joseph Warin et al., Gibson Dunn, 2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements (2020), *available at* https://www.gibsondunn.com/2019-year-end-npa-dpa-update/.

The monetary penalties are substantial, as can be seen in Chart 2, which traces monetary recoveries *directly* related to NPAs and DPAs settled in the USA. As an indication, according to the statistics compiled by Gibson Dunn, total penalties for only AML (anti-money laundering)/sanctions violations during 2006–2017 amounted to more than $110 billion.[22]

The general trend for the last decade for monetary recoveries, with a notable peak in 2012 when $9 billion were collected after some large settlements, is relatively stable. "Only" $2.7 billion was collected in 2017, but the annual aggregate amounts were $8.1 billion in 2018 and $7.8 billion in 2019. Most corporate settlements include monetary penalties in the tens or hundreds of millions of US dollars.

However, in order to correctly assess the monetary costs and deterrent effects of US enforcement actions, we should keep in mind that some of the largest corporate penalties assessed stem not from NPAs/DPAs, which are used by prosecutors to settle "regular" crimes, but by other procedures that are used to adjudicate crimes considered particularly serious. For instance, Chart 2 does not include the $8.9 billion in fines that BNP Paribas had to pay pursuant to a "Consent Agreement," basically a guilty plea, entered into on June 30, 2014. In addition, as corporate entities can be sued cumulatively under several criminal or civil procedures, and settlements frequently mandate costly changes in governance, the financial impact on an entity sued by the DOJ or other US authorities could be well in excess of the NPA/DPA monetary fines. As some settlements, mostly NPAs, remain confidential, official consolidated figures are not available.



Source: Gibson Dunn – https://www.gibsondunn.com/2019-year-end-npa-dpa-update/.

2.4. New policies and coordinated investigations

US prosecutors now frequently use NPAs and DPAs as procedures to resolve corporate and, sometimes individual, crimes. Since 2006, the annual number of settlements achieved through these measures has been at least in the twenties. Thus, it became necessary to better define the conditions of use for these procedures and their possible outcomes to avoid any impression of unfair or preferential treatment. While some scholars complained that settlements amount to a denial of justice because of the absence (in the case of NPAs) or minimal (in the case of DPAs) role of judicial supervision, several control mechanisms are in place.

The first is the US Sentencing Commission,[23] an independent agency in the judicial branch that was created as part of the Sentencing Reform Act of 1984. Commissioners are nominated by the President and confirmed by the Senate. The Attorney General, or the Attorney General's designee, and the Chair of the US Parole Commission serve as *ex officio*, non-voting members of the Commission. The main objectives of the Commission are:

a) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes;

b) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and

c) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as a public information resource.

The policies of the DOJ and other agencies tasked with fighting back against corruption and other economic crimes have evolved, and gradually their framework became defined more precisely by a series of published administrative texts. The priorities and approaches in enforcement also changed, taking into account not only directives from the executive branch but also guidance from the Congress, public opinion and reactions, and advice from legal

23 *See About*, U.S. Sentencing Comm'n, https://www.ussc.gov/about-page (last visited Apr. 18, 2020).

professionals. Thus, broad policies, which are in fact instructions to prosecutors and district attorneys, are articulated in a series of memoranda outlining the types of crimes to be investigated, the key aspects and priorities of the investigations, under what circumstances settlements should be used, and remedies to be sought. These memoranda are usually issued by the Deputy Attorney General in charge of policy at the time. Thus, the memorandum recommending a large use of negotiated settlements in some defined circumstances is known as the "Thompson memorandum" of 2003, as it was issued by Deputy Attorney General Thompson. More recently, the "Yates memorandum" of 2015 focuses on the need to investigate and hold accountable individuals as well as corporations. It states that: "One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing."[24] However, the actual implementation of the Yates memo is often questioned, as practically no executive has been held accountable for the frauds that led to the 2008 financial crisis.

In recent years, the DOJ has encouraged a policy of cooperation in exchange for leniency with corporations and began to closely coordinate with other agencies and non-US jurisdictions.

An example of this can be seen with regard to the FCPA. The "FCPA Pilot Program" aims to encourage the voluntary disclosure of companies involved in corporate malfeasance at an early stage. In November 2017, Deputy Attorney General Rod Rosenstein announced a new policy creating a presumption that companies will receive a declination of charges for FCPA misconduct if they satisfy certain standards, including self-disclosure, full cooperation, and timely remediation. Dozens of companies are known to have filed with the DOJ under this program, which since has been expanded to other types of infractions. However, reliable statistics are unavailable, and, therefore, it is not possible to assess the degree to which the program may be used as a substitute in cases that would normally have led to a DPA or whether the program will increase or reduce the amount of yearly fines normally collected under "old" procedures.

Another cooperative tool has been the "Non-Piling Policy." The implementation of the DOJ's "Non-Piling Policy" promoted cooperation between the USA and other sovereign jurisdictions. Both American and foreign companies are affected by non-trial resolutions, and prosecutors around the world recognized that international cooperation is necessary to effectively tackle corporate crimes, which are often transnational in nature. Thus, a trend developed to settle cases through multi-jurisdictional agreements. It started in 2008, with the joint "parallel" prosecution of Siemens in the USA and Germany, and joint investigations and coordinated resolutions have become more prevalent since 2016. Many multi-jurisdictional cases have been settled through a combination of guilty pleas and DPAs. Notable cases of multi-jurisdictional cooperation over the last few years include:

- The prosecution of Netherlands-based VimpelCom,[25] one of the largest telecom companies in the world, resulted in a global $800 million resolution in February 2016; the resolution encompassed a guilty plea by VimpelCom's Uzbek subsidiary, a DPA with VimpelCom, and settlements with the Public Prosecution Service of the Netherlands.
- Telia Company AB,[26] a Stockholm-based international telecommunications company and its Uzbek subsidiary, Coscom LLC, entered into a global foreign bribery resolution with Swedish, Dutch, Uzbek, and US regulators in December 2017, and agreed to pay a combined total penalty of $965 million to resolve charges arising out of a scheme to pay bribes in Uzbekistan.
- Embraer[27] entered into a three-year DPA and admitted to its involvement in a conspiracy to violate FCPA's anti-bribery provisions in October 2016. In a resolution reached jointly with US and Brazilian prosecutors, the company agreed to penalties of $107 million and a three-year monitorship.
- Rolls-Royce[28] entered into two separate but coordinated DPAs in the USA and the UK in January 2017. It was the first time the USA and the UK's Serious Fraud Office (SFO) entered into such a coordinated resolution. The global resolution of the Rolls-Royce case ultimately involved three jurisdictions – the USA, UK, and Brazil – and the payment of $800 million in penalties.
- Société Générale of France[29] and its related affiliates were under investigation in the USA, UK, and France. The settlement it agreed to created a new dawn in Franco-American cooperation.[30] On June 5, 2018, the French bank entered into a DPA for violation of the FCPA and agreed to pay a penalty of $585 million to be divided equally between the USA and the French prosecutors. Separately, the bank also paid $475 million in fines, penalties, and disgorgement for violation of LIBOR rules.
- Ericsson, a Swedish company, agreed to a DPA involving both the DOJ and the SEC on December 8, 2019, which involved a three-year monitorship and paying record fines in an aggregate of $1.06 billion to settle FCPA-related violations in Djibouti, China, Vietnam, Indonesia, and Kuwait. While the settlement was only with one jurisdiction, the USA, the official communiqué "praised the investigative efforts of [….] law enforcement authorities in Sweden."[31]

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24 Sally Quillian Yates, Deputy Attorney General, U.S. Dep't of Justice, Memorandum on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), *available at* https://www.justice.gov/archives/dag/file/769036/download.

25 *See* Press Release, U.S. Dep't of Justice, VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016), *available at* https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.

26 *See* Press Release, U.S. Dep't of Justice, Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017), *available at* https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965.

27 *See* Press Release, U.S. Dep't of Justice, Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016), *available at* https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges.

28 *See* Press Release, U.S. Dep't of Justice, Rolls-Royce PLC Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017), https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act.

29 *See* Press Release, U.S. Dep't of Justice, Societe Generale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018), *available at* https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan [hereinafter Societe Generale Press Release].

30 The investigation in the U.S. of BNP Paribas—which ended in June 2014 with a guilty plea, financial penalties of $8.9 billion, and strict monitoring—created a diplomatic incident at the time.

31 *See* Press Release, U.S. Dep't of Justice, Ericsson Agrees to Pay More than $1 Billion to Resolve Foreign Corrupt Practice Act Case (Dec. 6, 2019), *available at* https://www.justice.gov/usao-sdny/pr/ericsson-agrees-pay-more-1-billion-resolve-foreign-corrupt-practices-act-case.

- Most recently, in January 2020, Airbus agreed to an American DPA, a British DPA, and a French CJIP, which entailed aggregate penalties of over $4 billion and a three-year monitorship. The case created a potentially interesting precedent because the US prosecutors agreed to receive a relatively small part of the monetary penalty ("only" $582 million) and tacitly accepted the French "blocking mechanism" because the monitorship will be under the supervision of the French anti-corruption agency (AFA).

The above cases illustrate that corruption is a transnational problem that transcends the framework of the traditional national jurisdiction, rendering the coordination and harmonization of investigations and enforcement procedures a necessity.

3. THE GLOBALIZATION OF NEGOTIATED SETTLEMENTS

As an increasing number of large companies, both US-based and foreign, became parties to DPA /NPA agreements, these companies had to pay large fines and were forced to substantially change their business practices. This was not only the case for their US operations; on a worldwide basis, other jurisdictions started to introduce similar procedures that called for pretrial settlements. In an effort to promote standardized and compatible procedures, international organizations, and the OECD in particular, played a leading and coordinating role. The introduction of the new procedures was relatively smooth in countries with a common law legal system, but was more difficult to implement in countries rooted in the civil law tradition because of its incompatibility with the traditional concepts of "equality" and "contradictory justice" that assume only a judge (not a prosecutor) can render proper justice. Overcoming the disparity of jurisdictional systems among its members, Europe is now spearheading joint prosecutions at the regional level.

3.1. International coordination

Leaders of many countries have proclaimed their desire to fight corporate corruption. The USA used its international clout to encourage other jurisdictions to impose on their companies rules inspired by the FCPA since its 1988 revision to create an international-level field. If American corporations are penalized for engaging in the use of corruption and bribery to win contracts overseas, companies from other countries should also be subjected to the same rules to preserve fair global competition.

During the last three decades, a number of international organizations were set up and conventions, more or less a legal instrument equivalent to treaties, were signed with the aim of eradicating corruption, money laundering, bribery, and other corporate malfeasances. Some of these initiatives entail a global approach, while others have a regional, mostly European, scope. The best known include:

- The Merida Convention or UNCAC (United Nations Convention Against Crime) is a charter against corruption that was established by the UNODC (United Nations Office on Drugs and Crime) and became effective in 2005.
- The FATF/GAFI (Financial Action Task Force/GAFI is a French acronym) was created by the G7 (USA, UK, France, Italy, Canada, Japan, and Germany) in 1999, "for combating money laundering, terrorist financing and other related threats to … the international financial system." As of 2020, it has 39 member states. The FATF issues recommendations, which were last updated in 2012, that the member states must incorporate in their national legislations and regulations. The FATF also has a peer-review mechanism system that evaluates the status of AML CFT (Anti-Money Laundering and Combating the Financing of Terrorism) policies of its members and their implementation. However, its scope is limited to AML CFT policies.
- Eurojust was established in 2000 and supports coordination among European Union (EU) member state nationals investigating and prosecuting authorities. It also has cooperation agreements with twelve third-party states: Albania, North Macedonia, Georgia, Iceland, Liechtenstein, Moldova, Montenegro, Norway, Serbia, Switzerland, Ukraine, and the USA. It works closely with Europol, OLAF, Frontex, and other EU entities.
- GRECO (Group of European Countries against Corruption) was created by the Council of Europe in 1999. As of 2020, it has fifty members, mostly European countries plus the USA and Kazakhstan. It monitors the compliance of its members with the organization's anti-corruption standards and works in cycles (*evaluation rounds*) to produce evaluation reports that are generally published and scrutinized by financial supervisors, legislators, and the public at large.

However, for our purposes, the international body mostly engaged in the study and promotion of negotiated settlements is the OECD. It was officially established in 1961. It is a successor of the OECE, an organization initially created after World War II to channel and administer funds from the US Marshall Plan in a collegial way. Initially established by eighteen European countries plus the USA and Canada, OECD membership has grown to forty-four members, mostly developed countries, as of 2019. It is dedicated to economic cooperation and also functions as a think tank and monitoring system.

Established in 1994, the OECD Working Group on Bribery in International Business Transactions (Working Group) is responsible for monitoring the implementation and enforcement of the OECD Anti-Bribery Convention of 2009 and its related instruments.[32] The organization established a peer-review monitoring system, which is considered by Transparency International to be the "gold standard" of monitoring. The 2009 Convention states in Article 3 that "bribery of a foreign public official shall be punishable by **effective, proportionate and dissuasive** criminal penalties" but does not define the mechanisms to do so. While respecting the sovereignty and legal organization of each member, the Working Group advocates for common standards in enforcement and harmonization in sanctions. Each country, in line with its traditions and legal system, should develop its own procedures for "settlements" and "non-trial resolutions." The Working Group considers guilty pleas or equivalent procedures as "non-trial settlements," and has thus adopted a wider scope than the one proposed in this research for "negotiated settlements" (which includes NPA/DPA procedures but excludes guilty plea types of resolutions); nevertheless, the upward trend for the use of settlements is striking.

In its study published on March 20, 2019, the OECD asserts that "non-trial resolutions have become a prominent means for resolving economic crimes, including corruption and bribery of

32 *See* OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2017), *available at* https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

foreign public officials or other related offences."[33] According to the OECD database of 890 concluded foreign bribery cases from 1999 to 2018, 695 (78%) were concluded through non-trial resolutions.

During the last twelve years, DPA-type corporate settlements for bribery came with very hefty penalty amounts. Most large cases involved several jurisdictions, with the USA occupying a preeminent role[34] as shown in chart 3.

Chart 3: Parallel or Joint Settlements Involving Several Jurisdictions

Company	Total penalties	Jurisdictions involved	Year imposed
Airbus	$4 billion	France, UK, USA	2020
Odebrecht/Braskem	$3.5 billion	Brazil, Switzerland, USA	2016
Siemens	$1.6 billion	Germany, USA	2008
Ericsson	$1.06 billion	USA (support from Sweden)	2019
Telia Company AB	$965 million	Netherlands, Sweden, USA	2017
VimpelCom	$835 million	Netherlands, USA	2016
Rolls-Royce	$800 million	Brazil, UK, USA	2017
Alstom	$772 million	USA *	2014
Société Générale	$585 million	France, USA	2018
KBR/Halliburton	$579 million	USA *	2009
Teva Pharmaceutical	$541 million	USA, Israel	2016, 2018
Keppel Offshore & Marine Ltd	$422 million	Brazil, Singapore, USA	2017

*with the assistance of other jurisdictions in the discovery process

The study also outlines the reasons why negotiated settlements became internationally prevalent:

> "One recognised advantage that resolutions have over trials is that multi-jurisdictional cases can be resolved between several authorities at the same time, giving both prosecution authorities and companies some certainty in the outcome and in particular the amount of the combined financial penalty…The factors explaining the increasing use of non-trial resolutions to resolve foreign bribery matters are mainly of a practical nature. In general, governments have limited resources available to devote to corporate criminal enforcement. Investigating and prosecuting foreign bribery requires tremendous time and financial resources. Collecting evidence is complex and resource-intensive. As the offences typically involve several jurisdictions, investigation often requires mutual legal assistance (MLA) from foreign jurisdictions. Obtaining MLA can sometimes take months, if not years, before assistance is provided, thus creating a risk that the evidence may become less valuable over time or even, in certain jurisdictions, the case may become time-barred or otherwise less viable. Bribery schemes are increasingly complex and their investigation requires the support of highly specialised professionals, including forensic accounting experts. The investigation is all the more challenging that both the bribe giver and the bribe taker have a shared interest in concealing the crime from law enforcement authorities and these crimes often lack a direct victim eager to bring evidence to the authorities."[35]

The OECD praises the merits of settlement agreements and notes that "the business community is increasingly in favor of non-trial resolutions."[36] However, it also acknowledges the stark differences between jurisdictions in the principles, use, implementation, and outcomes of the procedures.[37] Given these differences, it is useful to study the implementation of DPA-like procedures in the respective civil and common law legal systems. As a country-by-country review would be fastidious, this analysis focuses on, aside from the USA, leading jurisdictions that include the UK and some commonwealth countries, France (as it created a new paradigm in 2016), and the new landscape in the EU.

3.2. The UK DPA and initiatives in Singapore, Canada, and Australia

Like the USA, the UK is a common law country and, given the historic, economic, and financial ties between the two nations, the creation of an English version of the American DPA has been seriously considered since the beginning of this century. The cornerstone of the current British legislation to fight corruption is the UK Bribery Act of 2010 and its related instruments. Its key enforcer, the SFO, was already formed in 1987 by the Criminal Justice Act. The "British Deferred Prosecution Agreement" was established under the provisions of Schedule 17 of the Crime and Courts Act of 2013.[38] It is supplemented by a Code of Practice,[39] and can be used by the SFO as well as the prosecutors of the Crown Prosecution. This is a significant change to the enforcement of criminal law in a country where legislators, courts, and prosecutors

33 OECD, *supra* note 3.
34 *Id.* at 119 tbl. 2 (updated as of Mar. 31,2020, to include the Airbus and Ericsson cases). The OECD table did not include a $1.78 billion Petrobras settlement with the SEC , DOJ and Brazilian prosecutors.reached in November 2018, mostly for accounting fraud.
35 *Id.* at 14 et seq.
36 *Id.* at 80.
37 *See* Quentin Alexandre, *Non-Trial Resolutions of Transnational Corporate Crimes have Become the Norm According to the OECD, but Principles and Procedures Need Further Clarification*, 2 Revue Trimestrielle de Droit Financier, 2019.
38 Crime and Courts Act, sched. 17, ¶ 1 (2013) (U.K.).
39 U.K. Serious Fraud Office & Crown Prosecution Serv., Deferred Prosecution Agreement Code of Practice, Crime and Courts Act 2013 (2013), *available at* https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf.

alike have long exhibited skepticism about consensual arrangements as a means to resolve criminal investigations and prosecutions.

In the UK, the prosecutor brings charges against an alleged wrongdoer – a corporate body, a partnership, or an unincorporated association, but not an individual[40] – for a criminal offense before entering into the DPA. The prosecution is not required to offer a DPA, nor is the alleged wrongdoer required to accept one.

The DPA terms may include, but are not limited to, the payment of a financial penalty to the prosecutor; the payment of compensation to the victims; the donation of money to a charity or other third party; the disgorgement of any profits from the alleged offense; the implementation of a compliance program, or changes to the current compliance program; the cooperation in any investigation; and payment of the prosecutor's reasonable costs.

Furthermore, if the DPA is to only apply in relation to the prosecution for the alleged offense referred to in the statement of facts, this statement of facts may (but is not required to) include admission by the defendant. While parties must agree upon a set of facts, there is no formal requirement for an admission of guilt. This is illustrated in the Standard Bank DPA, the first DPA entered into in the UK, which simply held that "Standard Bank agrees that the Statement of Facts is true and accurate." In fact, the bank did not admit the failure of the commercial organization to prevent bribery (referred to in the "statement of offence") that constituted the basis for the agreement reached.[41]

Judicial oversight is a hallmark of the British DPA. The UK has adopted a "hybrid form of DPA," as it includes mandatory judicial oversight. It also refers to the fundamental principles of fair trial and to the interests of justice and the public. Indeed, once the principle of an agreement is reached between the parties, the proposed DPA has to go through two stages of judicial review: one for an approval to proceed; and the other for an approval of the final agreement reached by the parties.[42] The prosecutor shall apply to the Crown Court at a preliminary hearing, and declare that entering into the DPA is "likely to be in the interests of justice" and that the proposed terms of the agreement are "fair, reasonable and proportionate."[43] The amount of any financial penalty agreed upon between the prosecutor and the alleged wrongdoer must be broadly comparable to the fine that a court would have imposed on conviction for the alleged offense following a guilty plea. The court may then allow the agreement or refuse the negotiations to go further, and shall give the reasons for its decision. If the court approves the application to enter into the DPA, the prosecutor and the alleged wrongdoer proceed to further negotiations and present the agreed terms to the court for approval. In this second hearing, the court also gives its reasons for approving or refusing the agreement, once again referring to the interests of justice, fairness, reasonableness, and proportionality of the punishment.

The judicial oversight takes place in private until the application for approval of the DPA is successful. Thus, the role of the court is crucial in this process. For instance, in the approved Standard Bank DPA mentioned above, the President of the Queen's Bench Division held that:

> "[T]he court has assumed a pivotal role in the assessment of its terms. That has required a detailed analysis of the circumstances of the investigated offence, and an assessment of the financial penalties that would have been imposed had the Bank been convicted of an offence. (…) Suffice to say I am satisfied that the DPA fully reflects the interests of the public in the prevention and deterrence of this type of crime".[44]

As in the USA, if the alleged wrongdoer has fully complied with the conditions of the DPA at the end of its term, the charges will be withdrawn in court unless it is found that inaccurate, misleading, or incomplete information was provided to the prosecution when entering the agreement. If the conditions of the DPA have been met, the alleged wrongdoer will not be prosecuted for the same offense.

Conversely, if the alleged wrongdoer fails to comply with its terms of the DPA, the prosecution may apply to the Court to ascertain that, on the balance of probabilities, the terms of the agreement have been breached and this determination allows the original proceedings to be resumed. The statement of facts contained in the DPA will then be treated as an admission (proof by formal admission) in relation to those facts in any criminal proceedings.[45]

The use of the British DPA procedure has been much sparser than in the USA in fighting corporate criminality. Although the UK established a DPA program in February 2014, as of March 2020, after six years of existence, the SFO had only secured seven cases: "Standard Bank" in 2015; "Sarclad Ltd" in 2016; Tesco and Rolls-Royce in 2017; none in 2018; "Serco Geografix Ltd" and Gurlap Systems Ltd in 2019; and Airbus in 2020.

The British DPA, in the seven procedures since its inception, brought an aggregate of £1.53 billion to the coffers of H.M. Treasury and the resolution of some complex cases in cooperation notably with American, Tanzanian, Brazilian, and French authorities. However, the SFO has been criticized for its inability to hold accountable individuals who were connected to entities suspected to be involved in bribery or other financial crimes. The first DPA, which was concluded in November 2015, required Standard Bank to pay nearly $26 million in fines and disgorgement of profits, and to pay $6 million in compensation to the Government of Tanzania which was considered to be the victim of the fraud. Subsequently, the bank fully cooperated with the SFO and changed its compliance procedures, but the DPA was formally lifted on November 30, 2018, without any individual being sued. In the case of Sarclad, the company "agreed to pay financial orders of £6,553,085, comprised of a £6,201,085 disgorgement of gross profits and a £352,000 financial penalty. £1,953,085 was paid by Sarclad's US registered parent company."[46] The company also fulfilled the agreed-upon compliance reforms. Yet, the SFO brought charges against three executives who went to trial and were acquitted by the court on July 16, 2019.

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40 Crime and Courts Act, sched. 17, ¶ 4.

41 *See* Wendy Wysong et al., *First UK Deferred Prosecution Agreement Provides Important Lessons for APAC Corporates*, Clifford Change (Dec. 3, 2015), http://www.cliffordchance.com/briefings/2015/12/first_uk_deferredprosecutionagreementprovide.html; T. Lewis & N. Quinlivan, *Deferred Prosecution Agreements Come of Age*, Field Fisher (Dec. 8, 2015), http://www.fieldfisher.com/publications/2015/12/deferred-prosecution-agreements-come-of-age.For further details and to get access to the DPA and the Statement of Facts, *see* https://www.sfo.gov.uk/cases/standard-bank-plc/.

42 Crime and Courts Act, sched. 17, ¶¶ 7-8.

43 *Id.* ¶ 7(1).

44 Serious Fraud Office v. Standard Bank PLC, Case no. U20150854 (Nov. 30, 2015).

45 Crime and Courts Act, sched. 17, ¶ 13(2) (*see* Provisional Dispensing with Court Action; Provisional Termination of Proceedings).

46 *See Sarclad Ltd*, Serious Frauds Office (Dec. 23, 2019), https://www.sfo.gov.uk/cases/sarclad-ltd/.

The fine imposed on Tesco Plc was £129 million, and the three individuals prosecuted stood trial in September 2017. However, the trial was abandoned in February 2018, owing to the ill health of one of the defendants. The retrial of the two remaining defendants began in October 2018, but collapsed a month later after a judge ruled that there was no case to answer. In January 2019, the SFO offered no evidence against the remaining defendant (whose trial had been abandoned due to ill health), and he was formally acquitted.

Rolls-Royce was fined £497 million under its DPA, which was the result of a coordinated investigation with American and Brazilian authorities. However, on February 22, 2019, after two years of additional investigations, the new Director of the SFO declared that she "concluded that there is either insufficient evidence to provide a realistic prospect of conviction or it is not in the public interest to bring a prosecution."[47]

In accordance with its DPA, Serco Geographix agreed to a three-year probation period and paid a financial penalty of £19.2 million plus the full amount of the SFO's investigative costs (£3.7 million), but no prosecution of executives was announced. In the other 2019 DPA against Gurlap Systems Ltd, the company accused of bribery in connection with a sale in South Korea, agreed to a three-year probation period and monetary fines of £2 million, and the three individuals who were charged for the misdeed were tried and acquitted by a jury.

Finally, the SFO announced on January 31, 2020, that it entered into a three-year €991 million DPA with Airbus SE as part of a €3.6 billion global resolution with France and the USA, but did not indicate whether it intended to press charges against individuals.

Following the UK, other jurisdictions steeped in English legal culture developed their own versions of the DPA procedure. For example, in Singapore, legislation was passed on March 19, 2018, introducing the concept of the deferred prosecution agreement (DPA) to the jurisdiction for the first time. Under the new law, corporations (but not individuals) facing prosecution for offenses of corruption, money laundering, or receipt of stolen property may attempt to negotiate the terms of a DPA with prosecuting authorities, under which they would avoid prosecution, in return for adherence to various conditions imposed upon them for a set period of time. The Singaporean Parliament reviewed various international models and settled on adopting a framework very similar to that introduced by the UK. As with the British scheme, the terms of any Singaporean DPA must be court-approved (in this case, by the Singaporean High Court), with a judge satisfied that the DPA is "in the interests of justice" and that the terms are "fair, reasonable, and proportionate." Similar to the features of other international corporate criminal resolutions, these terms may include financial penalties, disgorgement of profits, compensation to victims, imposition of a compliance monitor, requirements to implement enhanced internal controls and other compliance measures, and a prohibition against further offenses during the DPA's term. Also, as with the UK scheme, the court's approval of a DPA is a matter of public record, as are the terms of the agreement and the facts of the underlying conduct. As of June 2018, the legislation has been enacted, but no cases have been announced as of the end of 2019.

In Canada, after an elaborate consultation process and parliamentary debates, a new legislation inspired by the British model came into effect on September 18, 2018. The Canadian DPA, called a Remediation Agreement, refers to an agreement under Part XXII.1 of the Criminal Code that was amended by the new law. The agreement is made between the Crown prosecutor and an organization alleged to have committed certain types of criminal offenses, usually in the context of fraud or corruption, with the consent of the relevant Attorney General and under the supervision of a judge. The Crown prosecutor can agree to defer bringing a prosecution for the alleged offenses if the organization takes steps to improve its conduct, makes restitution, and establishes internal controls to avoid a repetition of the conduct. However, the implementation of the new procedure was the cause of controversy and created a political scandal.

SNC-Lavalin, a large construction company registered in Quebec, was suspected of bribery and sought to settle the charges, but the federal Public Prosecution Service of Canada refused to settle on a remediation agreement on the basis that SNC-Lavalin did not meet the conditions prescribed by the law. Subsequently, a report issued on August 14, 2019, by the Office of the Conflict of Interest and Ethics Commissioner (CIEC) found that Prime Minister Trudeau had contravened the Conflict of Interest Act by applying direct and indirect pressure on the Attorney General and the prosecutors. The case ended on December 18, 2019, when Lavalin agreed to a guilty plea with a fine of CAD $280 million (an unusually high amount in Canada) and a three-year probation period.

In Australia, the Minister of Justice officially released a public consultation paper on a proposed model for a DPA scheme on March 31, 2017,[48] and on December 2, 2019, the Federal Government presented the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 in the Senate. The 2019 Bill[49] broadens the definitions of economic crimes, in particular bribery and dishonesty, which were included in the Combatting Corporate Crime Bill of 2017. The Amendment also introduces a Commonwealth DPA. This procedure is available for a range of serious corporate crimes, including foreign bribery, money laundering, fraud, breaches of sanctions laws, and various criminal breaches of the Corporations Act. However, a DPA will only be accepted if the Commonwealth Director of Public Prosecutions (CDPP) is satisfied that it is in the public interest, it is approved by a retired judicial officer appointed for that purpose, and it contains at least the following elements:

- a statement of facts relating to each offense specified in the DPA (but not an admission of guilt);
- the last day for which the DPA will be in force;
- the requirements to be fulfilled by the person under the DPA;
- the amount of any financial penalty to be paid by the person to the Commonwealth; and
- the circumstances that constitute a material contravention of the DPA.

As of March 15, 2020, the proposed procedure in Australia has not yet been enacted.

In all of the above common law jurisdictions, the adoption of a DPA-like procedure came with lengthy debates, and sometimes

47 *Id.*; Press Release, Serious Frauds Office, SFO Closes GlaxoSmithKline Investigation and Investigation into Rolls-Royce Individuals (Feb. 22, 2019), https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/.

48 *See* Attorney-General's Dep't, Australian Gov't, *Proposed Model for a Deferred Prosecution Scheme in Australia* (May 1, 2017), https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx.

49 *See* Rani John et al., Analysing the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019, Ashurt (Dec. 5, 2019), https://www.ashurst.com/en/news-and-insights/legal-updates/failure-to-prevent-foreign-bribery-and-deferred-prosecution-agreements/

vigorous parliamentary insistence, to preserve the role and independence of the judiciary. As we have seen, the number of agreements reached is relatively small compared to the USA.

If we now consider jurisdictions of the civil law tradition, there are additional doctrinal issues to be overcome. A study of each legal and jurisdictional system of countries influenced by the Napoleonic code would show many nuances, but for the purposes of this study the analysis will focus on the case of France, which substantially modernized its system, and the future of negotiated settlement procedures in the EU framework.

3.3. The French CJIP *(Convention Judiciaire d'Interet Public)*

On the European continent, several countries, including Austria, Italy, Germany, the Netherlands, Norway, Poland, and Switzerland, have implemented or are looking into the implementation of pretrial agreements similar to the DPA.[50] Of course, each country has to take into account the characteristics of its own legal system when attempting to put new procedures in place.[51] The case of France is particularly significant because it engaged in significant reforms that led to a new paradigm and well-publicized resolutions.

On December 9, 2016, France enacted a new Law on Transparency, the Fight against Corruption and Modernization of Economic Life (*Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*), commonly referred to as the "Sapin II Law." The law is named after Finance Minister Michel Sapin, who introduced the legislation that resulted in protracted and sometimes heated debates among legal scholars and in Parliament before its enactment. Sapin II is considered to create a new paradigm in the prosecution of white-collar crimes.[52] Among other dispositions, it created a new prosecutorial tool, the *convention judiciaire d'intérêt public* (CJIP), allowing for the pretrial settlement of corporate criminal cases. As the procedure could only be used for corporate entities (not individuals) and includes an obligation of publicity and judicial supervision, it is in fact closer to the UK procedure than to the American version of the DPA.[53] Its main features are:

- The use of the CJIP is restricted to certain specified offenses. In the original text, these included corruption, influence peddling, and laundering tax fraud proceeds. Its scope was subsequently enlarged to cover other crimes, including tax fraud.
- CJIPs must be approved by a judge who reviews both the substantive and procedural aspects of the settlement. The approving judge must issue a public statement explaining his/her decision. In addition, companies can withdraw from a CJIP settlement within ten days of the judge's approval. Upon withdrawal, the CJIP would become null and void, and none of the statements or documents provided by the company to the prosecutor during the CJIP process can be used by the prosecutor as part of subsequent proceedings against the company.
- CJIPs must specify the company's obligations, including paying damages to victims, paying fines, and implementing or enhancing a compliance program under the supervision of the French Anti-Corruption Agency (AFA – *Agence Francaise Anticorruption*), which was also created by the Sapin II Law. Each CJIP order, amount, and settlement agreement must be published on the agency's website.

In the French system, either the prosecutor or an investigative judge (*juge d'instruction*) who is already assigned to the case may suggest a CJIP to the defendant. The CJIP does not require an admission of guilt, thereby avoiding the effects of a conviction. In particular, the CJIP does not disqualify the defendant from participating in public markets bidding in France or the EU. Potential fines can be significant; the amount must be fixed "in proportion to the benefits derived from the reported breaches" and could reach up to "30% of the average annual sales calculated based on the last three known years of sales on the date these breaches were reported." However, even if the payment of the agreed upon penalty is tantamount to canceling the criminal proceedings for the company in question, its executives and other legal representatives remain criminally liable as natural persons.

As of March 2020, the CJIP procedure has been used ten times, and in most cases (6 out of 10), the prosecution was represented by the *Parquet National Financier* (PNF). Created in 2013 and staffed with outstanding investigators, the PNF is a specialized prosecution office dedicated to large and complex financial crimes.

In the first case, HSBC Private Bank (Suisse) SA (HSBC PB)[54] had been under investigation by French authorities for laundering tax fraud proceeds since 2008, among other allegations. On November 14, 2017, the PNF announced that it had settled the case through a CJIP that was approved by the Paris High Court. The CJIP's statement of facts set forth allegations describing how the bank and its employees assisted clients in concealing assets and evading tax payments in France. The HSBC Group also acknowledged past weaknesses in controls at its Swiss private bank and stated that it had enhanced its anti-money laundering and tax compliance procedures. The total financial settlement amounted to €300 million, consisting of compensation to the French state (€142 million), disgorgement of profits (€86 million), and a financial penalty (€72 million). The last two elements, totaling €158 million, equal to about 30% of HSBC PB's average annual revenue over the preceding three-year period, which is the maximum fine allowed under Sapin II.

Another significant settlement was signed on May 24, 2018, with Société Générale. The case involved not only French but also American and British prosecutors. Under the coordinated settlement agreements, the bank paid penalties of €250,170,755 (about $290 million). It also agreed to implement a reinforced compliance program and pay €3 million to cover the costs of a two-year monitorship to be supervised by the AFA. As required by French law, the CJIP was judicially approved[55] and made public on June 4, 2018. At the same time, the American DOJ announced a parallel settlement in the USA. In their separate but coordinated press releases, prosecutors on both sides of the Atlantic

50 *See* F. Joseph Warin et al., Gibson Dunn, 2019 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements (2018), *available at* https://www.gibsondunn.com/wp-content/uploads/2018/07/2018-mid-year-npa-dpa-update.pdf.

51 *See* Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 U.S.C. L. Rev. (forthcoming 2020), *available at* https://ssrn.com/abstract=3478298.

52 For example, Margot Seve has a dedicated chronicle, "White Collar Crime and Compliance", to covering these matters in *Revue Trimestrielle de Droit Financier*.

53 *See* Michel A. Perez & Kossi Amouzou, *L'introduction de la Compliance et de la Justice Negociee en France (2/2): Du DPA Americain a la CJIP Francaise*, 189 Banque et Droit, Jan.-Feb. 2020, *available at* http://www.revue-banque.fr/risques-reglementations/article/dpa-americain-cjip-francaise.

54 Jamie L. Boucher et al., *France Announces Its First Deferred Prosecution Agreement*, Skadden (Dec. 8, 2017), https://www.skadden.com/insights/publications/2017/12/france_announces_deferred_prosecution_agreement (reviewing the HSBC PB case).

55 The law was approved by the President of Tribunal de Grande Instance de Paris (Paris High Court).

congratulated each other for their cooperation. The DOJ stated that:

> "Today's resolution – which marks the first coordinated resolution with France in a foreign bribery case – sends a strong message that transnational corruption and manipulation of our markets will be met with a global and coordinated law enforcement response[56].This was echoed by the French authorities who thanked their American counterparts for their trust and cooperation. This first coordinated resolution agreement is a significant progress in the fight against international corruption."[57]

Four CJIPs were concluded in 2018 and 2019 with mid-size entities. An innovative use of the procedure for tax-related matters was enacted on September 12, 2019, in a settlement between the PNF and Google France Sarl and Google Ireland Ltd, which agreed to pay a fine of €500 million for tax evasion in line with a ruling from the French tax authorities that insist that goods sold via the Internet to French residents, even if the transactions are booked in a different jurisdiction, are subject to French taxes. In January 2020, a CJIP was signed with the Bank of China, which was investigated for money laundering and deficient compliance systems. It agreed to pay a fine of €3 million, representing the benefit derived from the violations, plus €900,000 to cover the costs of the investigation and the loss of tax income to the public coffers.

The $4 billion settlement of the Airbus case announced on January 31, 2020 was a landmark event for numerous reasons: it serves as a model of cooperation among jurisdictions; demonstrated self-reporting from the target; imposed a significant penalty amount; and arguably created tacit recognition of the French blocking mechanism by the other two countries involved. Separate but coordinated press releases were issued by the PNF for France, the SFO for the UK, and the DOJ for the USA, each of them praising the prosecutors from the two other countries for their cooperation. In fact, a joint investigation team (JIT), including members of the SFO and the PNF, was formed in January 2017, and they later brought in American investigators.

The considerable number of documents collected by Airbus as part of its internal investigation (more than 30.5 million from more than 200 custodians) led to the development of new procedures to filter out classified information or information covered by attorney client confidentiality… Throughout this investigation, Airbus kept the JIT informed of the results of its internal investigations via numerous presentations and the production of documents.[58]

The JIT investigated more than 1,750 entities. The PNF focused its investigations more particularly on the conduct of Airbus, its divisions and/or its subsidiaries in the UAE, China, South Korea, Nepal, India, Taiwan, Russia, Saudi Arabia, Vietnam, Japan, Turkey, Mexico, Thailand, Brazil, Kuwait, Colombia. The SFO focused on… South Korea, Indonesia, Sri Lanka, Malaysia, Taiwan, Ghana and Mexico… The company offered exemplary cooperation with the JIT.[59]

The coordinated DPA/CJIP fines and other penalties required the company to pay a global amount of €3.9 billion, making it the largest settlement in a foreign bribery case to date. The fines are split between the PNF receiving close to €2.1 billion, the SFO €984 million, and the DOJ €526 million. As in the Société Générale case, the company agreed to implement an enhanced compliance program to be supervised by the French Anti-Corruption Agency. The DOJ press release also states that:

> "The US resolution recognizes the strength of France's and the United Kingdom's interests over the Company's corruption-related conduct, as well as the compelling equities of France and the United Kingdom to vindicate their respective interests as those countries deem appropriate, and the department has taken into account these countries' determination of the appropriate resolution into all aspects of the US resolution."[60]

This statement appears to be a tacit admission that France may use the "blocking mechanism" mandated by a 1968 French law (*loi de blocage*), which prevents the communication of sensitive information or data to foreign (i.e. non-French) authorities.

In the traditional French judicial system derived from the Napoleonic code of 1804, only a judge after an impartial trial could punish a person, individual, or corporation by issuing a sentence. The introduction of negotiated settlements and the CJIP was considered by some as an American Trojan horse and nearly sparked a revolution in judicial practices. In 2013, two lawyers, Francois Garapon and Pierre Servan Schreiber, published a best-selling book, in fact a pamphlet, *Deals de Justice* with the subtitle "The American market of worldwide obedience."[61] Later in 2016, the Conseil d'Etat, one of the country's highest courts, considered the procedure contrary to the principle of equality enshrined in the French constitution. However, it later changed its position and successful resolutions, especially in well-publicized cases such as Société Générale and Airbus, have showcased the merits of the new approach.

3.4. The European Union seeking a model for a transnational procedure

At the EU level, while, by definition, each country jurisdiction will need to legislate and implement its own version of the DPA equivalent, some limited procedures to enforce competition regulations were put in place and a number of discussions had to establish some basic common principles that would promote the development of transnational enforcement procedures. The Court of Justice of the European Union, one of the seven EU institutions, constitutes the EU's judicial authority, which ensures the uniform application and interpretation of EU law in cooperation with the courts and tribunals of the member states. After years in the shadows, the Luxembourg-based, two-tier European court system – the Court of Justice of the European Union and the General Court (previously called the Court of First Instance), as distinct from the European Courts of Human Rights in Strasbourg – has emerged as what Lord Mance, a leading British judge, calls "a

56 Societe Generale Press Release, *supra* note 29.
57 Press Release, PNF (June 4, 2018), https://www.economie.gouv.fr/files/files/directions_services/afa/Communique_CJIP_SG_LIA_-_4_juin_2018.pdf.
58 France v. Airbus SE, PNF-16 159 000 839, Convention Judiciaire d'\Intérêt Public ¶ 41 (Jan. 29, 2020*), available at* https://www.agence-francaise-anticorruption.gouv.fr/files/files/CJIP%20AIRBUS_English%20version.pdf.
59 *Id.* ¶¶ 43, 52.
60 Press Release, U.S. Dep't of Justice, Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020), https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case.
61 Antoine Garapon & Pierre Servan Schreiber, Deals de Justice, le Marche Americain de l'Obeissance Mondialisee (2013).

central achievement of the EU, a court with unparalleled transnational power."[62] The European court system has not expressly ruled on the use of settlement agreements, however, it has tacitly agreed to them, in principle, by accepting their validity.

The EU has set up an extrajudicial settlement procedure to handle anti-competition cases under what it calls its leniency policy.[63] Article 101 of the Treaty on the Functioning of the European Union (TFEU or Treaty of Lisbon of 2009) prohibits agreements between companies that prevent, restrict, or distort competition in the EU. Prohibited activities include engaging in price-fixing or market-sharing cartels. The penalties for such activities follow strict guidelines[64] and can be severe. The largest fine imposed on a single company was over €896 million; the largest fine imposed on all members of a single cartel was over €1.3 billion. The Commission and its staff act as *de facto* investigators and prosecutors. Since 2008, companies that the Commission finds out to have participated in a cartel can use the settlement procedure. In essence, the leniency policy offers companies involved in a cartel that self-report and hand over evidence either total immunity from fines or a reduction of the fines that the Commission would have otherwise imposed on them. It also benefits the Commission, allowing it not only to pierce the cloak of secrecy in which cartels operate but also to obtain insider evidence of the cartel infringement. Only the first company or individual to self-report can receive immunity. Other entities or individuals that self-report and cooperate with the investigation may benefit from a reduction of fines if they provide evidence that represents "significant added value" to that already in the Commission's possession and they have terminated their participation in the cartel. The first company to meet these conditions is granted 30–50% reduction, the second 20–30%, and subsequent companies up to 20%. The Commission may reject the settlement route for cases it considers not suitable. Otherwise, it presents parties with the evidence and notifies them of its conclusions as to duration, seriousness, liability, and an estimated fine. The parties must make an oral or written submission acknowledging their liability and stating that they accept the Commission's statement of objections. There is strict judicial supervision as all final decisions are subject to a judicial review. In particular, Article 31 of Regulation (EC) No. 1/2003 states that the Court of Justice will "have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed."

Since the first settlement in 2010, the leniency procedure has been used in at least thirty cases. Its effectiveness was further reinforced with the development of a policy protecting whistleblowers and the creation of a tool allowing them to report anonymously in 2017. Some cases received significant publicity and served as a cautionary tale. For instance, in May 2019, five banks – Barclays, RBS, Citigroup, JPMorgan, and MUFG – were fined €1.07 billion in two separate but coordinated settlements for participating in foreign exchange spot trading cartels. However, UBS received full immunity for revealing the existence of the cartels and avoided fines that would have amounted to €285 million under the 2016 guidelines.[65]

Currently, the leniency policy and related procedures are restricted to matters related to the enforcement of competition regulations. However, they are part of a series of judicial innovations with the dual objective of streamlining existing procedures and allowing the transnational prosecution of criminals. Another example is the Convention of May 29, 2000, on Mutual Assistance among Member States that provides for direct communications between magistrates from different countries. Another landmark was the EU Decision of June 13, 2002, that created the European Arrest Warrant (EAW), which has revolutionized the traditional extradition system by adopting innovative rules, including: limited grounds for refusal of execution; shifting decision-making from political to judicial authorities; the possibility of surrendering nationals of the executing state; the abolition of the dual criminality requirement for thirty-two listed offenses; and clear time limits for the execution of each EAW.

A directive that entered into force on May 17, 2017, created a simplified procedure for replacing the traditional and cumbersome letter of request (rogatory letter) system. It introduced the European Investigation Order (EIO), which enables judicial authorities in one EU country (the issuing state) to request that evidence be gathered in and transferred from another EU country (the executing state). The EIO reduced paperwork by introducing a single standard form for authorities to use to request help when seeking evidence. It also set strict deadlines for gathering the evidence requested and limited the grounds for refusing such requests.

Another major change in criminal prosecution is expected to come from the European Public Prosecutor Office (EPPO), the creation of which was approved by the European Parliament on October 12, 2017,[66] and will become operative by the end of 2020. The EPPO is structured as a supranational prosecution office for twenty-two countries.[67] It is an independent and decentralized prosecutorial body headed by a European Chief Prosecutor assisted by two deputies and run by a college of twenty-two European prosecutors (one representing each member country). Headquartered in Luxembourg, the EPPO will work closely with European Delegated Prosecutors located in each member state. The relatively broad scope of criminal offenses falling within the EPPO's competence allows it to prosecute a large array of financial crimes, including tax evasion, money laundering, and embezzlement. Its staff of over 100 includes experienced investigators familiar and comfortable with pretrial mechanisms similar to the American or British DPA or the French CJIP. Furthermore, it can be expected that they will promote the use of such procedures within the European legal framework and respect the laws of each country.

62 *See* Roland Flamini, *Judicial Reach: The Ever Expanding European Court of Justice*, World Affairs (2012), http://www.worldaffairsjournal.org/article/judicial-reach-ever-expanding-european-court-justice.
63 *See Leniency*, Eur. Union, https://ec.europa.eu/competition/cartels/leniency/leniency.html (last visited Apr. 4, 2020).
64 *See* Communication from the Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (45) 7.
65 *See* Press Release, Eur. Union Comm'n, Antitrust: Commission Fines Barclays, RBS, Citigroup, JPMorgan and MUFG €1.07 Billion for Participating in Foreign Exchange Spot Trading Cartel (May 16, 2019), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2568.
66 On EPPO, *see* Francois Falletti, *Recent Developments in International Cooperation in Criminal Justice: A Brief Overview*, 2 Revue Trimestrielle de Droit Financier (2018).
67 Out of the 27 EU countries, Denmark, Hungary, Poland, Ireland, Sweden are not members, but could join at a later date

4. CONCLUSION

The implementation of corporate DPAs in the USA on a large scale since the early 2000s, and more recently in other countries, has raised certain challenges. However, the benefits of these procedures compared to the lengthy and costly methods of "traditional" justice became apparent as a way for governments with limited resources. The use of what scholars have termed "negotiated justice" allows a government to more efficiently resolve matters with corporations.[68] The multiplicity of legal systems and jurisdictions makes it impossible to design a "one size fits all" model, as pointed out in the March 2019 OECD study.

As such, the American pretrial diversion and other negotiated settlement procedures have their critics. In 2011, Anthony and Rachel Barkow identified and studied a number of abuses in their work *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct*.[69] Historically, there were glitches in the earlier implementation of the American DPA when the application of this procedure to large corporate cases was relatively new. For example, Chris Christie who was District Attorney for New Jersey from 2002 to 2008 convicted or obtained guilty pleas from 130 officials accused of corruption but at least seven of the DPAs he concluded were contested. In one case, his office deferred criminal prosecution of pharmaceutical company Bristol Myers in a deal that required the company to dedicate $5 million for a business ethics chair at Christie's alma mater.

However, as procedures in the USA have become more codified and Congress has undertaken to regularly review sentencing guidelines, such shortcomings have become, if not impossible, at a minimum, very rare. A related implementation problem is that, in many jurisdictions, the role and necessary qualifications of the monitor are ill-defined. The monitor is the person or entity that supervises and ensures that the settlement provisions, in particular those regarding compliance, are effectively put in place. Yet, some rightfully ask "who is monitoring the monitor?" About one-third of US PDA cases demand the appointment of an independent monitor. In March 2008, the DOJ issued a memorandum (the "Morford Memo") to provide guidance with respect to the monitor's accountability and oversight. Additional guidelines from the DOJ are regularly issued, but the costs, impartiality, and efficiency of monitors remain open to questions. Lively discussions on this issue occurred when the UK DPA and the French CJIP procedures were enacted. The solution in those countries was to provide for oversight by both the judiciary and special government appointed agencies, namely the SFO in the UK and the AFA in France.

The need for judicial supervision has been widely debated and remains a major issue. "Justice Deferred is Justice Denied: We Must End our Failed Experiment in Deferring Corporate Criminal Prosecution"[70] was the title of a 2015 paper by Peter R. Reilly, Associate Professor of Law at Texas A&M University. His article posits "that this alternative dispute resolution vehicle makes a mockery of the criminal justice system by serving as a disturbing wellspring of unfairness, double standards, and potential abuse of power." In Europe, some legal scholars, mostly in civil law jurisdictions, consider that justice must be "contradictory"[71] – there must be at least two parties presenting arguments to an "impartial" judge. Others point out that the very high risk of "capture," a sociological phenomenon in which the regulator or prosecutor is captured – led to share the same point of view and values – by the regulated entities he is supposed to supervise. In a nutshell, those critics have a doctrinal opposition to the concept of "out of trial" justice as they believe only judges, not prosecutors, can guarantee the impartiality of the process.[72]

While we may sympathize with the philosophical argument, it seems doubtful that, in our current globalized and complex economy, most regular judges have the training to understand fully the situations that they are to adjudicate. If they have to rely on technical experts, who would guarantee their qualifications and impartiality? In other words, in the complex corporate situations that are the norm in most large corporate prosecutions, there is no certainty that justice could only be served by a judge. In addition, "traditional" justice in corporate cases has often failed because the sentences available to the judges were inadequate and the defendants could use all sorts of dilatory tactics and drag out the process from appeal to appeal.[73] A balanced solution came with the procedures put in place for the British DPA and the French CJIP, which enshrine a supervisory and mandatory role for the judiciary but still encourage fair and relatively speedy settlements.

The assessment of individual, as opposed to or in addition to corporate, responsibilities is a recurrent challenge. In the USA, both corporations and individuals can be parties to a negotiated settlement, but in the UK, France, and the majority of jurisdictions, expedited procedures are reserved for legal entities and are not available to individuals. Some observers noted that negotiated settlements have sometimes been used to give an appearance of justice while the individual culprits, especially top executives, go scot-free.[74] On September 9, 2015, a well-publicized memo "Individual Accountability for Corporate Wrongdoing" from Sally Yates, the then Deputy Attorney General, specifically addressed this issue. It states that:

> "Attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct.... we [thus] maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.... Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals."[75]

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68 *See* Jennifer Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops*, *in* Criminalità D'impresa e Giustizia Negoziata: Esperienze a Confronto 91 (Stefano Manacorda & F. Centonze eds., Giuffrè 2018).

69 Anthony Barkow & Rachel Barkow, Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct (2011).

70 Reilly, ***supra*** note 10.

71 *See* Marie Anne Frison Roche, Generalites Sur le Principe du Contradictoire (doctoral thesis, 1988), *in* Anthologie du Droit (LGDJ 2014).

72 For a review of doctrinal arguments against PDAs, *see* Alizee Dill & Michel Perez, *The Rise of the American DPA and its European Avatars*, 2 Revue Trimestrielle de Droit Financier (2016).

73 For instance, the French oil company Total was accused of bribery. On May 29, 2013, it settled its charges with the U.S. Department of Justice by paying a $245 million monetary penalty. Total was also prosecuted in France, b,ut after years of appeals, Total was only charged by the French tribunal with a €500,000 fine on December 18, 2018. *See All About the Law # Sapin2*, Republique Francaise (Mar. 29, 2016), https://www.economie.gouv.fr/transparence-lutte-contre-corruption-modernisation.

74 *See*, *e.g.*, Brandon L. Garrett, Too Big to Jail: How Prosecutors Compromise with Corporations (2014).

75 *See* Yates, *supra* note 24.

76 *See* Press Release, U.S. Dep't of Justice, Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce PLC and Its U.S. Subsidiary (Nov. 7, 2017), *available at* https://www.

While it was noted that, in the USA, few executives were sued for their roles in the 2008 financial crisis, individuals, particularly in the UK, were prosecuted in parallel investigations to recent DPAs. For instance, there were five individual prosecutions of executives in parallel with the Rolls-Royce 2017 settlement.[76]

The *ne bis in idem* argument is a particularly sensitive issue with European regulators, corporate executives, and scholars. They claim that American prosecutors, at their discretion, reserve the right to sue corporations who have already reached a settlement in Europe when there is mutual recognition of finality among European jurisdictions. While US courts may not consider themselves bound by judicial decisions supervised by the European court system, in practice, US investigators and courts have given credit to defendants for penalties and other sanctions reached in non-US jurisdictions in most recent cases,. This approach became policy with issuance of the DOJ directive against "Piling On." In a May 9, 2018, speech, Deputy Attorney General Rosenstein stated that the "aim…is to enhance relationships with our law enforcement partners in the USA and abroad, while avoiding unfair duplicative penalties." In an implementation memorandum, he instructed DOJ personnel to "endeavor, as appropriate, to consider the amount of fines, penalties and/or forfeiture paid to [other] foreign law enforcement authorities that are seeking to resolve a case with a company for the same misconduct."[77]

In the present environment, it is unlikely that the USA will agree to any international convention or treaty that would bind American courts to settlements reached in other jurisdictions. However, it is very likely that any specific reference in a DPA to a parallel settlement in a non-US jurisdiction will *de facto* protect the defendant against double jeopardy.

As the transnational use of negotiated settlements becomes more widespread, the OECD in its March 2019 listed three "Good Practices in Coordinated Multi-Jurisdictional Resolutions":

- Cooperate early: prosecuting authorities that learn about conduct that may be prosecuted in multiple jurisdictions should consider sharing information early in order to better understand the facts, as well as to consider whether a global resolution is possible.
- Determine what issues must be addressed if a multi-jurisdictional resolution is possible: for example, an efficient method for information sharing, the jurisdictions best suited to prosecute certain conduct, the necessity for a defendant's continuing cooperation in other jurisdictions, how the terms of a resolution in one country may impact other jurisdictions, whether a monitor is necessary, whether a jurisdiction may agree not to prosecute a defendant under certain circumstances, and the timing of releasing information publicly.
- Prioritize fairness: consider the sanctions imposed by other jurisdictions when determining any penalties and fines.[78]

However, these are only guidelines. They do not have force of law and are expressed in general terms that can have various interpretations by investigators from different countries. Still, based on recent experiences and available specialized literature, we can posit that negotiated settlements are more effective and serve as better deterrents if they follow some key principles:

- *Transparency*: procedures and settlement outcomes (but not negotiations which could remain confidential) must be made public and the relevant documentation easily accessible.
- *Proportionality*: the penalties imposed through a settlement must be proportional to the crime and not be a way for corporations and individuals to avoid being held accountable for their behavior. The granting of immunity should be exceptional; reduced penalties and sentences are better options.
- *Fairness*: victims, when they can be identified, should be compensated first. The right of the prosecuted entity to a reasonably speedy and fair process must also be respected. It is essential to avoid "forum shopping" or the practice of corporations to self-report their misdeeds in a soft or lenient jurisdiction with the expectation that they may avoid harsher penalties in other countries. To mitigate this risk, coordination among investigators and prosecutors of different jurisdictions, for instance through Eurojust or the OECD Working Group and/or personal professional contact, must be encouraged.

Judicial supervision is a way to ensure that the above principles are respected.

In practice, to be efficient and fulfill their deterrence function, negotiated settlements must be accompanied by the requirement of full and willful cooperation with the investigating authorities in each jurisdiction in which they are used. This implies reduced penalties for individuals and corporations who cooperate but harsher punishments for those who do not. The positive effects of the procedure, measured by the number of resolutions obtained and by the reduction of occurrence of future criminal offenses, are also enhanced by the existence of easy to access a program that protects whistleblowers.

Negotiated settlements in their various forms are not a panacea for efficient justice. They are only one element in the tool kit available to magistrates, prosecutors, and investigators. The prosecutors always have the option of declination – deciding to not pursue a case – either because it is deemed too benign or because there is lack of tangible evidence. Conversely, for offenses considered particularly serious, prosecutors can pursue a trial and seek an exemplary punishment.

Both the development of coordinated prosecutions among agencies in different jurisdictions and the creation of supranational prosecutorial bodies and procedures are signs of the emergence of a transnational judicial system. Such a system is expected to be more efficient than "traditional justice" in rooting out international corporate crimes and will provide more certainty to corporate executives, encouraging them to cooperate with rather than fight supervising agencies. While procedures, including various forms of pretrial diversions, do not need to be identical from country to country, they should at least be compatible with each other to allow cross-border enforcement. Streamlined procedures that can be enforced across jurisdictions are clearly a better solution to prevent crime. Magistrates, prosecutors, lawyers, and scholars can also learn from each other – "[a]s European and other nations continue down the path of modernizing their approaches to combatting corporate crime, a highly fruitful research agenda –

justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us.

77 Rod J. Rosenstein, Deputy Attorney General, Remarks at the American Conferernce Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (May 9, 2018), *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes.

78 OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions 39 (2019).

79 Arlen & Buell, *supra* note 51.

teaching much more about corporate enforcement both abroad and within the USA – is sure to follow."[79]

In 1764, Cesare Beccaria, an Italian lawyer considered to be the father of modern criminology, wrote that "[i]t is essential that [sentences] should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law."[80] In modern language, we would say that for justice to be efficient it must be reasonably quick (no lengthy delays from cumbersome procedures and appeals); logical and certain (once the infraction is established, the punishment could be deducted); as lenient as possible while remaining a deterrent (including leniency granted for cooperation); and any punishment should be proportional to the gravity of the crime and within the limits clearly stipulated by law. Beccaria would certainly have considered in a positive way the ongoing and increasing cooperation among specialized governmental entities with quasi-prosecutorial powers such as the British SFO, the French AFA, and specialized US agencies such as the SEC and CFTC (the Commodity Futures Trading Commission). International cooperation is certainly the only effective way to fight transnational crime.

80 *See supra* note 1.

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