

RESEARCH ARTICLE

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

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ABSTRACT

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

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

ملخص:

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

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

I. INTRODUCTION AND OVERVIEW

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

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

It is normally acknowledged that societal standards and concepts of economic and social justice design the frame of moral conduct. In the *Qur'an* and *Sunnah*, corruption refers to an extensive array of behavioral digressions that affect the economic, social, fiscal, and ecological balance. These are elucidated at several places in the *Qur'anic* texts in plain language, in terms of being just or unjust, with reference to their harmful influence on social organization, and in relation to the moral virtue's norms.⁵ Islam prohibits taking, giving bribes and warns all of those involved of hell fire. However, the Muslim scholars affirm that bribery is prohibited when it is aimed at consuming other's property or rights unfairly. Thus, if someone finds himself in a situation in

which all avenues of redressing a wrong done to him, or recovering a right which has been forfeited, are blocked except through the payment of a bribe, the sin of it will not be on him but on the recipient of the bribe.⁶

A. Literature review and empirical analysis

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

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

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

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

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

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

5 See generally MARK TURNER & DAVID HULME, *GOVERNANCE, ADMINISTRATION, AND DEVELOPMENT* (1997). See also Mark Richard Hayllar, *Accountability: Ends, Means, and Resources*, 3 ASIAN REV. PUB. ADMIN. 2 (1991).

6 See TURNER & HULME, *supra* note 6.

7 See generally ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (eds. D.D. Raphael, Benjamin C.D. Diara & Nkechinyere G. Onah) (2014); *Corruption and Nigeria's Underdevelopment: A Religious Approach*, 4 RES. HUM. & SOC. SCI. 4 (2014).

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

9 *Id.* at 28:4; 89:10–12.

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

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

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

13 Hainsworth, *supra* note 12.

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

B. Importance and implication of corruption concerns in Islamic law

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

Among others, these values promote commercial fairness and ethical business as basic standards of economic activities, integrity, and transparency in business transactions, as bribery is taken very seriously in Islam.²⁰ Regarding generation and creation of wealth, fair trade and the creation of wealth for the benefit of all are definitely encouraged in Islam, but even more significant is the sharing of that wealth: "O ye who believe! Give of the good things which ye have honorably earned."²¹ In the realm of ethics and morals in business, there are recurrent bans in the *Qur'an*, for example, to "weigh with accurate scales" and the text warns against those who do not weigh fairly, as the "weighing" applies not only to scales in the sense of merchandise, but also in the

sense of passing of judgment.²² In the context of general business ethics, there are precise Islamic recommendations for doing business, as business dealings must be evidently documented and certified as a means of sustaining finance, defining rights, and instilling mutual confidence, all of which contribute to generating strong relationships among individuals.²³ Duties towards other people should be fulfilled promptly. It is a virtue to grant relief to those who are bankrupt or to relieve them altogether of their liabilities.²⁴ Such conduct helps reduce disputes, deepens trust, and keeps transactions in balance. Furthermore, raising prices without any legitimate necessity or reasonable ground and inconsiderately making use of people's destitution are totally prohibited, as there is a great emphasis on lawful, as opposed to unlawful, profit.²⁵ In terms of contracts, deals and businesses must be certified by recording and signing of contracts in the presence of witnesses, as they may influence and legitimize the Islamic method on corruption but do not determine how corruption is dealt with in practice in fundamentalist cultures or countries implementing the inaccurate Islamic law.²⁶

C. Legal discussion

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

14 TURNER & HULME, *supra* note 6.

15 *Id.*

16 *Id.* Accordingly, if an official takes bribes or unjustly appropriates the property of another, the ruler is obliged to return the assets to its true owner and to punish the offender.

17 *Id.*

18 See generally A. Giddens, *Power, Property and State, in A CONTEMPORARY CRITIQUE OF HISTORICAL MATERIALISM* (UCLA Univ. Press 1981).

19 *Id.*

20 For instance, Mohammad said in a famous *hadith* "Damned is the bribe-giver (or 'corrupter'), the bribe-taker (or 'corrupted'), and he who goes between them," which explains the severity with which bribery and corruption is viewed.

21 *Qur'an*, 2:267.

22 *Id.* at 55:7–8.

23 *Id.*

24 TURNER & HULME, *supra* note 6.

25 *Id.*

26 The Prophet Mohammad called on Muslims to comply with obligations and contracts saying, "Never break or throw aside a covenant you have signed with anybody until the period of the covenant comes to a natural end."

27 MOHAMED SELIM EL-'AWA, FI 'USUL AL-NIZAM AL-JINAI' AL-ISLAMI [PRINCIPLES OF ISLAMIC CRIMINAL SYSTEM] 290 (2nd ed., 1983).

28 MAGED IBN HELAL IBN HAMADAN EL-HAGRY, AL-RASHOUA WA AHKAMEIHA: DERASSA FIQHIIA MOKRINA [BRIBE AND ITS PROVISIONS: COMPARATIVE JURISTIC STUDY IN ISLAMIC SHARIE'A LAW] 4 (2003) (on file with author).

29 MOUSTAFA ABOU ZIED FAHMI, FAN AL-HUKUM FI AL-ISLAM [PRINCIPLES OF GOVERNANCE IN ISLAM] 155 (2003).

30 *Id.* See 'ABDELGHANY BASSIOUNI ABDULLAH, 'USUL 'ILM AL-IDARA AL'AMA: DERASAH LE 'USUL WA MABADE'E 'ILM AL-IDARA AL'AMA FI AL-ISLAM WA AL-WALAYEAT AL-MOTAHEDA AL-AMRICIYA WA FRANSA WA MASER WA LEBENAN [PRINCIPLES OF PUBLIC ADMINISTRATION: STUDY OF THE GENERAL PRINCIPLES OF PUBLIC ADMINISTRATION IN ISLAM, THE UNITED STATES OF AMERICA, FRANCE, EGYPT, AND LEBANON] 84–101 (2006).

31 *Id.* Furthermore receiving gifts—as *Hanafi* School said—in the terms of reaching deceptiveness or a false included in this concept.

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

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

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

White-collar crimes are grave delinquencies that Islamic criminal law considers concurrently religious and criminal deeds due to the

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

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

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

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

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

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

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

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

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

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

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

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

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

41 See M. CHERIF BASSIOUNI, *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* (1982), at 33.

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

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

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

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

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

On the other hand, regarding the bribery of mediators and intercessors, there are two parties, the mediator (bribee) and the briber. Each of them is dealt with by rules explained by Muslim scholars. They differ broadly in how they regard the mediator when he receives a gift from the briber by attaining his own [private]

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

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

46 HUSSEIN MADKUR, AL-RASHWA FI AL-FIQH AL-ISLAMI MUKARNAN BELKANOUN [BRIBERY IN ISLAMIC JURISPRUDENCE: A COMPARATIVE ANALYSIS BETWEEN ISLAMIC LAW AND POSITIVE LAW] (1984).

47 *Id.* at 200.

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

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

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

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

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

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

54 *Id.* at 39.

55 *Id.* at 44-55.

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

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

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

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

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

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

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

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

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

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

1. The Actus Reus

The model of a criminal act in all legal systems, including Islamic criminal legal systems, is that a person commits all the integral elements of a crime. Thus, under the Islamic law, elements of bribery may involve positive (commission) and negative (omission) acts as well as the object of the bribe and the purpose of the act committed by the receiver of the bribe.⁶⁷ As a general norm in Islamic criminal law, at the purely psychological stage of the criminal project, the idea of the offense is born and may harden into a resolution or a mental determination to commit it before an overt act is committed, and this falls altogether outside

the scope of penal policy.⁶⁸ Therefore, it is unanimously admitted among Muslim jurists that there will be no offence in the absence of external activity on the part of the offender and his/her activity reflects what took place within his/her psyche.⁶⁹ Hence, bribery in Islam is “giving or accepting the bribe agreed upon [by] both briber and bribee for whatever purpose.”⁷⁰ Anything of value presented for any purpose represents an essential part of the *actus reus*. It may include cash and negotiable instruments, so that almost any form of direct or indirect benefit could create a bribe irrespective of its value. There are practically no limitations on what can be construed as “anything of value,” as the real value may vary from person to person depending on his means and circumstances.⁷¹ For realizing this crime in Islam, it is not sufficient that the inducement is taken or received from the briber or under the request of the bribe, but rather there must be a purpose for it, such as gaining or retaining business for or with, or directing business to, a person; influencing (manipulating) an official act or decision; convincing an individual to do or omit to do any act in breach of his/her legal duty; influencing any government act or decision; or securing any other improper benefit.⁷²

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

the form of food for the hungry. The Islamic State Exchequer was first established by Mohammad and was then further developed by his companions and is similar to a *takaful* (insurance) corporation. It was the state’s revenues were collected and where any citizen facing a financial crisis found sanctuary (first social solidarity institutions in the world) and also served for the redistribution of wealth to achieve a balance between the rich and the poor and to diminish the gaps between the classes of society. See generally Edwin E. Hitti, *Basic Mechanisms of Islamic Capitalism IV* (2007). See also generally EGBERT HARMSSEN, *ISLAM, CIVIL SOCIETY, AND SOCIAL WORK: MUSLIM VOLUNTARY WELFARE ASSOCIATIONS IN JORDAN BETWEEN PATRONAGE AND EMPOWERMENT* (2008).

63 YOUSSEF KASSEM, NAZARIYAT AL-DAROURA [THEORY OF NECESSITY] 271 (1993). See also YUSUF ‘ABDULLAH AL-QARDAWI, *ISLAM BAYN AL-HALAL WA AL-HARAM [THE LAWFUL AND THE PROHIBITED IN ISLAM]* (1996).

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

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

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

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

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

69 *Id.*

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

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

72 *Id.* at 222.

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

74 *Id.*

75 *Id.*

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

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

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

2. The Mens Rea

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

The principle of the presumption of innocence and its impact on the burden of proof represents the vital backbone of evidence under Islamic criminal law. Consequently, the burden of proof is on the prosecution.⁸² In Islamic jurisprudence, evidence in criminal matters essentially consists of *al-shhada* (witness’s testimony), *al-iqarat* (confession), and *al-qara'in* (presumptions).⁸³ Muslim jurists require that the witness begin his or her testimony with the word *ashhadu* (“I testify”), which designates being certain of one’s testimony along with taking the oath and no other word may be substituted as it would be less affirmative and the door would be open for doubt.⁸⁴ Generally, a minor’s testimony is inadmissible even if he understands its nature. The witness must be mentally sound both when he/she

witnesses the event and when he testifies to it and be able to speak and must possess appropriate memory to collect and retain his observations and his ability to understand what he is testifying about.⁸⁵ Visual observance and audible perception of the incident are required to be in the witness’s testimony and he must be of good character concerning moral integrity, trustworthiness, persistent avoidance of grave sins, no record of severe/petty crimes, manliness, and fulfillment of religious obligations.⁸⁶ Scholars differ in the authenticity condition in which the witness must have noticed the event with his own senses, as indirect testimony (hearsay) is admissible only if authentic or direct testimony cannot be presented due to death, sickness, or travel.⁸⁷ A witness’s testimony can be legally disqualified if there is a relationship between the witness and one of the parties which suggests a personal interest, and this interest may be advanced by the witness through his testimony, so jurists are in favor of the inadmissibility of testimony of those in the major and minor branches of the parties’ families (“blood relations”) and hostility between a witness and a party to a conflict arising out of worldly matters.⁸⁸

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

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

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

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

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

82 MA’AMOUN M. SALAMA, *AL-MABAD’E AL-’AMMAH LI AL-ITHBAT AL-JINAI FI AL-FIQH AL-ISLAMI* [THE GENERAL PRINCIPLES OF CRIMINAL EVIDENCE IN ISLAMIC JURISPRUDENCE] (2000). (“Since anyone may be accused of committing a crime, the rights of the accused must be respected. Even, these rights must be balanced against the right of the society to impose punishment ... the accused is presumed innocent; whoever claims otherwise must prove it.”). Mohammad stated: “Your evidence or his oath” and “Prevent punishment in case of doubt.” Also, he said: “Had men been believed only according to their allegations, some [p]ersons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof.” Another commentator states: “The positive evidence lies on the accuser and an oath is required of one who denies.” *Id.*

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

84 *Id.* at 115.

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

86 *Id.* at 116.

87 *Id.* at 117.

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

89 *Id.*

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

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

92 *Id.* at 121.

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

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

Criminal accountability will not apply in case of death of the criminal, pardon, or prescription (statutes of limitations).⁹⁹ Physical punishment or deprivation of liberties is abrogated with the demise of the convict. Pecuniary fines are, however, maintained, inflicted, and deducted from the convict's estate as it represents a debt of the deceased.¹⁰⁰ *'afw* (grace/amnesty) is defined as "a waiver by the community of its rights to impose punishment which it acquired by virtue of the commission of the offence and the community has the right to revoke the penalty totally or partially."¹⁰¹ It implies the revocation of punishment before it is imposed as well as the decision not to prosecute. Muslim jurists state that prescription may apply to the penalty itself or the public action and the competent authority carries out this procedure in the light of public needs taking into account individual rights.¹⁰² Last but not least, the investigation and primary-questioning stage of bribery is subject to the general rules

for indictments in Islamic criminal procedures, taking into consideration the accused's rights regarding searches, seizures, eavesdropping, interrogation, and pre-trial preventive detention along with the adoption of legal evidence; trial before a competent, fair, and impartial judge and jury; the right to counsel his or her own defense; the right to speak or remain silent; and the indemnity of an erroneous conviction.¹⁰³

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

A. *Sharie'a* (Islamic) courts

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

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

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

94 See 'ABD-EL-'AZIZ 'AMER, AL-TA'AZIR FI AL-SHARIE'AH AL-ISLAMIA [AL-TA'AZIR PENALTY IN ISLAMIC SHARIE'A LAW] 267–68, 379, 382, 389 (1957). Besides imprisonment for a fixed term, there are also indefinite sentences and usually this is reserved for incorrigible criminals (dangerous recidivists).

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

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

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

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

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

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

101 *Id.*

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

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

104 See T. POLZER, CORRUPTION: RECONSTRUCTING THE BANK'S DISCOURSE (2001).

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

106 See, e.g. THE REINTRODUCTION OF ISLAMIC CRIMINAL LAW IN NORTHERN NIGERIA, http://ec.europa.eu/europeaid/projects/eidhr/pdf/islamic-criminal-law-nigeria_en.pdf. This study commissioned by the European Commission in 2001 to analyze the issue under various aspects, including its possible conflict with basic Human Rights.

107 *Id.*

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

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

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

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

B. Alternative Islamic approaches: The case of Malaysia

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

corrupt practices of senior government officials underline the credibility of the government's political will against corruption.

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

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

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

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

108 *Id.*

109 *Id.*

110 See generally UNHCR, Human Rights Watch Report on Nigeria, UNHCR (2007), <http://www.unhcr.org/home/RSDCOI/45aca2a316.html>.

111 *Id.* For instance, in Nigeria, there is no executions or amputations have taken place since early 2002 and capital sentences have generally been thrown out on appeal. Islamic courts play a fundamental role in executing punishments related to corruption and bribery crimes.

112 See Yousif Khalifa Al-Yousif, *Economic Development in the United Arab Emirates: 1975–1990*, 8 J. Eco. & Admin. Sci. 23 (1990).

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

Thus, "political will" is the most critical factor in the fight against corruption. The introduction of democracy at grass roots is associated with decreased domestic corruption. However, what matters is specific politics, separate from local piety and the traditional local corruption environment. The results of the local politics may provide optimism for reduction of corruption at the national level, in the long term. First, a change in local corruption environments surely affects corruption at the national level per se. However, most of the Third-World countries including some Middle Eastern countries have a focus on corruption reduction at the national level, and people believe that the immediate prospects for substantial improvement are dim: corruption still

serves to fund corrupt activities and national bureaucrats still rely on corruption proceeds to supplement their salaries to meet market compensatory pay; this concept focuses on employee compensation and benefits policy-making. While compensation and benefits are tangible, there are intangible rewards such as recognition, work-life, and development. Collectively, these are referred to as total rewards, while the term "compensation and benefits" refers to discipline as well as rewards themselves. Therefore, as Friedrich Nietzsche said, "Whoever fights monsters should see to it that in the process he does not become a monster. And if you gaze long enough into an abyss, the abyss will gaze back into you."

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