

# RESEARCHING CIVIL REMEDIES FOR INTERNATIONAL CORRUPTION: THE CHOICE OF THE FUNCTIONAL COMPARATIVE METHOD

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## Abstract

This paper motivates the choice of the functional comparative method to research the issue of civil remedies for international corruption. It shows how the social, economic and political factors that have shaped the normative context of the research question point to the functional comparative method as an appropriate methodology. The paper suggests that this method of legal research is able to meet the challenges inherent in the cross-cultural analysis required in the case of issues with an international dimension. The paper also argues that the use of the functional comparative method provides a perspective on the larger issue of rule making in a globalised world, by providing an element of predictability in the search for ‘common rules’ of interaction. Furthermore, the functional comparison of responses of legal systems to the question of civil remedies for international corruption provides a window on the possibilities that exist for legal reform and development.

## 1 Introduction

This paper motivates the choice of the functional comparative method to research the issue of civil remedies for international corruption. The particular advantage of the functional comparative method is that it focuses on the legal responses of states to common problems. In this view, the functional comparative method is not so much the study of legal rules in their historical, social or transplanted contexts but rather a means to acquire a better understanding of the legal responses that are likely to influence an eventual international consensus on the issue under consideration.

To this end, Section 2 of the paper outlines the research question in its cultural, economic and political setting, recognising that these factors influence not just the choice of method, but also its process. Section 3 looks at the research question from its normative perspective and explains how the existence of a starting point, in the form of a consensus condemning international corruption, is an essential first step that has created the normative framework in which functional comparative analysis on civil remedies for international corruption can be undertaken. Section 4 of the paper goes on to examine how the functional comparative approach addresses some of the methodological problems of translation that arise in researching matters with

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an international dimension, such as the question that is the focus of this research project. Finally, Section 5 suggests that the focus on responses to shared problems that characterises functional analysis enables the anticipation of the ‘common platforms’<sup>1</sup> of interaction that are capable of arising. It concludes that the use of the functional comparative method provides an element of predictability regarding the direction of reform and/or international regulation regarding the issue of civil remedies for international corruption.

## 2 The Research Question

About three decades ago, the Watergate scandal in the United States led to the passage of the Foreign Corrupt Practices Act (FCPA).<sup>2</sup> By creating a modality under which domestic legal structures are given the capacity to tackle corruption occurring in foreign countries, the FCPA changed the face of the fight against corruption. Its central idea of extending the repudiation of commercial corruption already found under domestic laws to foreign transactions has been replicated at the international level by an array of international and regional instruments.<sup>3</sup>

The main approach adopted under the FCPA and the international regulatory framework has been criminalisation. This represents a significant step in the fight against corruption. There is, however, some debate about its efficacy. The Transparency International (TI) Global Corruption Barometer 2007 shows that half of those interviewed expect corruption in their country to increase in the next three years and think that their government’s efforts to fight corruption are ineffective.<sup>4</sup> In 2004, Tarrullo remarked that, despite the impressive institutionalisation of anti-corruption obligations and programmes, ‘there is little evidence of any diminution in the incidence of corruption in, and by nationals of the ... participating countries’.<sup>5</sup> It would appear that this still holds true today.

In the 1970s, when the FCPA was passed, the world stood on the threshold of far-reaching globalisation and integration of world markets. At that time, the distinctions between public and private bribery, foreign and domestic bribery and criminal as opposed to civil approaches to tackling bribery were probably clearer. Today, the realities of international commerce and globalisation have made distinctions more nuanced. Globalisation is changing the frontiers of what used to be the realm of private as opposed to public law. As innovative strategies are employed to reduce the capacity of corporations and governments to profit from corruption, the boundaries between civil, criminal, public and private enforcement in this area begin to coalesce.

<sup>1</sup> Almost fifty years ago, Schmitthoff spoke of the emergence of a ‘common platform for commercial lawyers from all countries, those of planned and free market economies, those of civil and common law, and those of fully developed and developing economies...’. See C. Schmitthoff, ‘The Law of International Trade: Its Growth, Formulation and Operation’, in C. Schmitthoff (ed.), *The Sources of the Law of International Trade* (London, Stevens and Sons 1964) 3 at 5.

<sup>2</sup> The Foreign Corrupt Practices Act (1977), 15 U.S.C. §§ 78dd-1 et seq. (hereinafter, the “FCPA”).

<sup>3</sup> One author comments that ‘to understand the FCPA is to understand the underpinnings of the larger international anti bribery scheme ...’. See L.H. Brown, *Bribery in International Commerce* (Eagan, MN, Thompson/West 2003) 2.

<sup>4</sup> See *Report on the Transparency International Global Corruption Barometer 2007* (Berlin, Transparency International 2007) at 2, available at: <[http://www.transparency.org/policy\\_research/surveys\\_indices/gcb/2007](http://www.transparency.org/policy_research/surveys_indices/gcb/2007)> (accessed 9 June 2009).

<sup>5</sup> D. Tarrullo, ‘The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention’ (2004) 44(3) *Virginia Journal of International Law* 665 at 666.

Research shows that there is increased participation of the private sector in the provision of security.<sup>6</sup> It has indeed been asserted that ‘... states acting alone ... are no longer a sufficient means of producing security...’.<sup>7</sup>

The question of civil remedies is particularly relevant because of the obligation to provide such a means of redress under the Council of Europe Civil Law Convention on Corruption<sup>8</sup> and the UN Convention against Corruption.<sup>9</sup> The Civil Law Convention stipulates that citizens should have the right to bring private actions for compensation for all damages suffered as a result of corruption.<sup>10</sup> It establishes a general principle of liability of persons, as well as states, to pay compensation to persons who have suffered damage as a result of corruption.<sup>11</sup> The UN Convention against Corruption establishes as a new principle of international law the direct return of illicitly obtained property through a combination of civil actions and international cooperation on confiscation.<sup>12</sup> It also requires that parties to the Convention establish liability, including civil liability, for the offences of corruption established.<sup>13</sup> Furthermore, the UN Convention calls on states to ensure that entities or persons that have suffered damage from corruption have a right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.<sup>14</sup>

There is not much literature that addresses the complexities faced in the pursuit of such civil remedies, and this is due in part to the fact that up till now the civil action for corruption is an uncommon step.<sup>15</sup> Yet, as has been pointed out, civil law consequences have the potential of being ‘surprisingly effective’ in the tackling of crime.<sup>16</sup> The civil action enables the victim of corruption to seek recourse independently of the state. Civil remedies are in general subject to lower burdens of proof and focus on compensating the victim, providing restitution and denying unjust enrichment. In general, civil remedies can target not only the wrongdoer but also related persons or organisations.

<sup>6</sup> Some authors have referred to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) as a ‘spectacular’ example of nodal governance that blurs the line between the public and private spheres and ultimately has global consequences. They state that ‘far from remaining in the realm of contract, under state regulation, the firms at the center of the TRIPS story are in essence wielding the power of state and international trade law through nodal means. Here the private sector steers and the state rows.’ See S. Burris, P. Drahos and C. Shearing, ‘Nodal Governance’ (2005) *Australian Journal of Legal Philosophy* 30 at 46-47.

<sup>7</sup> L. Loader and N. Walker, ‘Locating the Public Interest in Transnational Policing’, EU Working Paper No. 2007/17 (European University Institute) 2, available at SSRN: <<http://ssrn.com/abstract=1022882>> (accessed 9 June 2009).

<sup>8</sup> Council of Europe Civil Law Convention on Corruption (1999), European Treaty Series No. 174 (hereinafter, the ‘Civil Law Convention’).

<sup>9</sup> UN Convention against Corruption (2004), 43(1) ILM 2004 at 37 (hereinafter, the ‘UN Convention’).

<sup>10</sup> Art. 3 Civil Law Convention.

<sup>11</sup> Arts. 4 and 5 Civil Law Convention.

<sup>12</sup> Arts. 53-57 UN Convention.

<sup>13</sup> Art. 26 UN Convention.

<sup>14</sup> Art. 35 UN Convention.

<sup>15</sup> In their study of thirteen OECD countries, Heine and Rose point out that the reasons for the reluctance to pursue civil remedies include: (1) rules that substantially limit the plaintiff’s possible claim; (2) the fact that damage claims must be brought in separate proceedings from criminal prosecutions; (3) damages do not adequately compensate for the costs of protracted litigation; (4) difficulty in investigating and compelling production of evidence and witnesses in international cases; (5) showing damages with certainty and proving causal links; and (6) obtaining jurisdiction. See G. Heine, B. Huber and T. Rose, *Private Commercial Bribery: A Comparison of National and Supranational Legal Structures* (Paris, ICC 2003) 654-655.

<sup>16</sup> Atiyah remarks that, while it is normally the function of criminal law to provide a deterrent against criminal conduct, contract law as an additional deterrent over and above that provided by criminal law can be surprisingly effective. P. Atiyah, *An Introduction to the Law of Contract* (New York, Oxford University Press 1981, 3rd ed.) 255.

Another important advantage of the civil law approach rests on the fact that the proceeds of transnational bribery are often hidden in foreign jurisdictions using vehicles designed to break the chain of ownership. Civil law can pursue such moneys by tracing purported changes in ownership and piercing the veil of incorporation by undoing trusts and other arrangements that seek to preserve illicitly acquired assets within the reach of the perpetrator but outside the reach of the law.<sup>17</sup> Again, civil judgments are enforceable against the defendant in any jurisdiction where he or she holds assets. These advantages are important in the context of the larger question of the fight against international corruption. Simpson concludes that ‘some theoretical and anecdotal empirical evidence suggests that civil justice processes may offer more efficient corporate deterrence than the imposition of criminal legal sanctions.’<sup>18</sup>

Berg highlights the potential of civil consequences for international corruption and laments that ‘... on the part of regulators there has been no recognition that improving and clarifying the civil law remedies ... would do much to combat corruption.’<sup>19</sup> Burger and Holland give several examples of cases where corporations have pursued civil remedies against international bribes even without ‘direct statutory support’<sup>20</sup> and state that ‘the right of civil action provides a useful complement to criminal proceedings as a deterrent.’<sup>21</sup> They argue that private actors, rather than governmental ones, are in a position to lead the next stage of the global fight against corruption.<sup>22</sup> In a similar vein, Paul Carrington remarks on the weakness of enforcing anti-corruption laws by means of the very public servants that are a part of the problem and states that ‘... it is the integrity of governments that is the global problem in greatest need of a plausible threat of civil liability.’<sup>23</sup> However, as Olaf Meyer points out, a review of the practices in several countries in Europe and the United States shows that ‘there is still no discernable systematic approach to the phenomenon of corruption ... in the shape of a well-planned civil law strategy.’<sup>24</sup>

These facts lay the groundwork for continued research into effective methods of tackling international corruption that can build on and augment the foundations established by the criminal law. This is the motivation for research on civil remedies for international corruption. What then is an appropriate methodology? The following section examines two preliminary questions in this regard. Firstly, what does the rule-making process of the international trading society suggest about the appropriate approach to researching civil remedies for international corruption? Secondly, in the face of the multiplicity of values and traditions that characterise international society, what is the starting point of such research?

<sup>17</sup> Kevin Chamberlain, for example, discusses the difficulties faced by the Nigerian government in recovering moneys stolen from Nigerian citizens and deposited outside the jurisdiction of Nigerian courts by the former head of state General Sanni Abacha (now deceased) using foreign banks and various laundering schemes. See K. Chamberlain, ‘Recovering the Proceeds of Corruption’ (2002) 6(2) *Journal of Money Laundering Control* 157-165.

<sup>18</sup> S. Simpson, *Corporate Crime, Law, and Social Control* (Cambridge, Cambridge University Press 2002) 78.

<sup>19</sup> A. Berg, ‘Bribery-Transaction Validity and Other Civil Law Implications’ (2001) 1 *Lloyd’s Maritime and Commercial Law Quarterly* 27 at 28-29.

<sup>20</sup> E. Burger and M. Holland, ‘Why the Private Sector Is Likely to Lead the Next Stage in the Global Fight against Corruption’ (2006-2007) 30 *Fordham International Law Journal* 63-69.

<sup>21</sup> *Id.*, at 63.

<sup>22</sup> *Id.*, at 75.

<sup>23</sup> P. Carrington, ‘American Law and Transnational Corruption: Is There a Need for Lincoln’s Law Abroad?’, in O. Meyer (ed.), *Civil Law Consequences of Corruption* (Baden Baden, Nomos Verlag 2009) 37 at 49.

<sup>24</sup> Meyer, above n. 23, at 18.

### 3 The Research Question in Normative Perspective

A new society is emerging that defies traditional state models of international politics.<sup>25</sup> Cheap transportation, the Internet and direct access of individuals to each other has radically changed the structure of societies. The free flow of goods and services competes with the flow of organised crime, corruption and terrorism. Mass movements of people and the tremendous growth of industry have created great potential but have also been the harbinger of environmental pollution, pandemic risks, human trafficking, global financial distress and international corruption. Jobs are outsourced, corporations have divisions scattered over diverse continents, individuals have gone global and the world has fundamentally changed.<sup>26</sup>

Providing solutions to issues that are transnational in nature, such as international corruption, have assumed a new urgency. The articulation of the rule of law<sup>27</sup> has become imperative as the globalisation and integration of world markets makes national borders opaque. Our international law system, based as it is on states and territorial sovereignty, seems to be startled by this rapid pace of events. The rule of law is closely associated with the role of the state within its own territory and struggles with a 'relocation'<sup>28</sup> to the gap between states without descending into 'meaninglessness'<sup>29</sup> or 'mere sloganeering'.<sup>30</sup>

Yet, never before in the history of mankind have we needed global rules as we do now. Problems assume an international dimension even as they arise and pose a far greater existential threat than they ever did. The ascent from chaos to order threatens to dissolve yet again into chaos if we experience system failure. Groups may opt out and seek their own solutions. Regardless of market advances, the gains of globalisation can be undone. A vacuum created by an incoherency in the rule system may lend itself to alternative ideologies, grabs for power, the rise of nationalism, the promotion of self-interest and a race to wealth by the strong and rich at the expense of the weak and poor.<sup>31</sup> It is against this background of an urgent need for common rules in a global society that the issue of civil remedies for international corruption has arisen.

The need to arrive at rules governing supranational problems implies the creation of international normative frameworks for interaction. How does the articulation of the rule of law take place? How do we find solutions across legal traditions and

<sup>25</sup> Saskia Sassen speaks of how privatisation, deregulation and digitalisation have resulted in the weakening of the nation state, resulting in the need for the articulation of other spatial units that reflect the ascendancy of globalisation. See S. Sassen, *The Global City: New York, London, Tokyo* (Princeton, Princeton University Press 2001, updated 2nd ed.) xviii.

<sup>26</sup> In his insightful book, Friedman talks about the reality of a world that has become flat as a result of globalisation with elusive national borders. T. Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (New York, Farrar, Straus and Giroux 2005).

<sup>27</sup> The expression 'rule of law' was coined by Albert Venn Dicey in his treatise *An Introduction to the Study of the Law of the Constitution* (London, Macmillan 1959, 10th ed.) From Plato and Aristotle to modern day writers, the rule of law represents the essential idea that laws should govern societies rather than the arbitrary compulsions of men. As such, no one is above the law and good governance is best represented by a 'government of laws and not of men'. See J. Adams, 'Part the First: A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts', *The Constitution of the Commonwealth of Massachusetts* (1780) Art. XXX.

<sup>28</sup> Expression taken from the title of the conference 'Relocating the Rule of Law', held at the European University Institute, Florence, Italy, on 8-9 June 2007.

<sup>29</sup> J. Shklar, 'Political Theory and the Rule of Law', in A. Hutchinson and P. Monahan (eds.), *The Rule of Law, Idea or Ideology* (Toronto, Carswell 1987) 1.

<sup>30</sup> J. Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195 at 195.

<sup>31</sup> Trippe points out that there are already signs that economic distress is increasing nationalist fervour and political instability in hot spots including Pakistan, Turkey, Ukraine and the nations of Central Asia, Thailand and Iran. See J.E. Garten, 'Stop the Free-Fall' (22 December 2008) *Newsweek* 20-23 at 22.



cultures? What methods can we use? To quote Teubner, 'how can authentic law "spontaneously" emerge on a transnational scale without the authority of the state, without its sanctioning power, without its political control and without the legitimacy of democratic processes? Where is the global *Grundnorm*? Where is the global "rule of recognition"...?'<sup>32</sup>

The 'rule of recognition' is found in the structuring of the society of trading nations. The internationalisation of world trade has created a space of interaction that is supranational in nature.<sup>33</sup> In this space, the desire to exploit the potential of foreign direct investment has over the ages facilitated and provided an incentive for countries to comply with autonomous frameworks or 'common platforms' developed to protect and encourage investment.<sup>34</sup> As such, in this society of trading nations, strategies have been employed for centuries that are aimed at facilitating and stimulating the growth of much-needed trade.<sup>35</sup>

The society that exists in the gap between states, is held together by the dynamics of mutually dependent relationships.<sup>36</sup> The need to provide 'common answers' to shared problems is symptomatic of an increasingly integrated world market characterised by high volumes of trade accompanied by a mass movement of persons and goods occurring outside the domestic jurisdictions of states. These activities propel the need for accepted rules of interaction so that the associated societies can coexist in an efficient manner. Considerations of pragmatism coupled with party autonomy result in 'a self-validating legal discourse'.<sup>37</sup> As Donaldson and Dunfee point out, international trade is capitalistic and opportunistic, yet it is predictable in its need for certainty that transactions will be honoured, contracts upheld, property respected and all of this in the absence of a supranational enforcing body.<sup>38</sup>

International corruption occurs within the purview of international trade, an activity supported and encouraged by state interests yet carried out in the main by private actors. These private actors have fashioned a 'common platform' of interaction that caters privately to private interests and has drifted further and further away from the control of individual states in a process that proceeds on a 'case-by-case basis' rather than as a 'comprehensive system'.<sup>39</sup> Teubner points out that

<sup>32</sup> G. Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in G. Teubner (ed.), *Global Law without a State* (Aldershot, Dartmouth 1997) 3 at 11.

<sup>33</sup> Jessup spoke of a 'law applicable to the complex interrelated world community which may be described as beginning with the individual and reaching up to the so-called "family of nations" or "society of states"'. P. Jessup, *Transnational Law* (New Haven, Yale University Press 1956).

<sup>34</sup> A. Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Spectre of Neoliberalism' (2000) 41(2) *Harvard International Law Journal* 419 at 422.

<sup>35</sup> Blackstone wrote in his commentaries '... whereas no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandize; neither can they have a proper authority for as there are transactions carried on between the subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of.' W. Blackstone, J. Stewart (ed.), *Commentaries on the Laws of England* (Chicago, Callaghan and Co. 1872).

<sup>36</sup> Velasquez points out the importance of a core common morality as necessary for economic interaction. Without this, economic interactions would be 'nasty and brutish if not short'. M. Velasquez, 'International Business Morality and the Common Good' (1992) *Business Ethics Quarterly* 2 at 27.

<sup>37</sup> Taken from the title of Part 1 of the book *Global Law Without a State*, Teubner points out that the '*lex mercatoria*, the transnational law of economic transactions, is the most successful example of global law without a state.' See Teubner, above n. 32, at 3.

<sup>38</sup> In their 'integrative social contracts theory', Donaldson and Dunfee argue that 'all particular or "macrosocial contracts" whether they exist at the national industry or corporate level, must conform to a hypothetical "macrosocial" contract that lays down objective moral boundaries for any social contracting.' See T. Donaldson and T. Dunfee, *Ties That Bind: A Social Contracts Approach to Business Ethics* (Cambridge, MA, Harvard Business School Press 1999) at 6.

<sup>39</sup> Teubner points out that '[t]oday's globalization is not a gradual emergence of a world society under

‘the new living law of the world is nourished not from stores of tradition but from the ongoing self-reproduction of highly technical, highly specialized, often formally organized and rather narrowly defined, global networks of an economic, cultural, academic or technological nature.’<sup>40</sup> He states that ‘global law will grow mainly from the social peripheries, not from the political centres of nation states and international institutions.’<sup>41</sup> He argues that this ‘new living law growing out of fragmented social institutions which have followed their own paths to the global village seems to be the main source of global law.’<sup>42</sup> He concludes that this implies that an adequate approach to the formulation of global law must be based on a theory that embraces legal pluralism.<sup>43</sup>

In this society of trading partners, what is the most appropriate method of researching civil remedies for international corruption? An inward-looking approach that focuses on the position in a given legal system may be suitable for national problems and issues. However, with a supranational problem like international corruption, an inward-looking approach is handicapped by the limitations of national values and interpretations. In this view, a problem of international dimension, such as civil remedies for international corruption, requires an outward-looking methodology that can accommodate and anticipate an inherent plurality of meaning and interpretation. This suggests an approach that involves the comparison of more than one national system, which is found, for example, in a comparative legal methodology.

Another reason to look beyond a particular legal system is the inevitable *penumbra of uncertainty*<sup>44</sup> that exists in law. The gap between the law and the remedial needs of society requires that the law possess a certain flexibility or indeterminacy so as to achieve justice in a particular case. This indeterminacy is inherent in the dynamics of growth and development. Just as this is true at the national level, it is even truer at the international level. Singer pointed out two decades ago that, if, as traditionalists propose, determinacy is a critical element of the rule of law, then ‘by their own criteria – the rule of law has never existed anywhere.’<sup>45</sup> Indeterminacy implies that legal theories may lack comprehensiveness, may contain gaps and may be contradictory.<sup>46</sup> In the fluid dynamics of interactions of international trade, this penumbra of uncertainty is even more pronounced, legal theories are even more incomprehensive and the rule of law is very much a work in progress.

However, Singer also points out that indeterminacy is balanced out by the consolidating effect of culture. He states that within a ‘*particular culture*’ the commonality of thought may lead to ‘*shared understanding*’ and predict the outcome of the judicial process.<sup>47</sup> This idea of shared understandings that lead to predictability can also be applied to the particular culture that is thrown up in the gap between states. This gap embraces a plurality of legal traditions and suggests that, as regards the question on civil remedies for international corruption, a research methodology that addresses this pluralism should be adopted.

Such an outward-looking approach that accommodates a plurality of diverse national systems is also supported by the fact that the international anti-corruption

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the leadership of interstate politics, but a highly contradictory and fragmented process in which politics has lost its leading role.’ See Teubner, above n. 32, at 5.

<sup>40</sup> Id., at 7.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> H. Hart, ‘Positivism and the Separation of Morals’ (1958) 71 *Harvard Law Review* 593 at 606-607.

<sup>45</sup> J. Singer, ‘The Player and the Cards: Nihilism and Legal Theory’ (1984) 94(1) *Yale Law Journal* 1 at 14.

<sup>46</sup> Id., at 14-16.

<sup>47</sup> Id.

framework places compliance at the level of domestic legal structures. This grounding of enforcement at the level of the state implies a plurality of methods of enforcement in diverse systems.

### 3.1 The Normative Framework for Inquiry

An outward-looking approach must nonetheless proceed from a given starting point. The juxtaposition of the terms ‘international’ and ‘corruption’ throws up images of diverse traditions, cultures, peoples, values and norms, all flooded with a kaleidoscope of meanings. How does one arrive at a common understanding of this phrase? Corruption is commonly acknowledged to be a phenomenon with a ‘multitude of faces’.<sup>48</sup> It is a problem that dates back to ancient antiquity, and in almost every culture it is stigmatised as an illegal act.<sup>49</sup> Yet, there is indecision about the ‘actual content’ or ‘nature’ of corruption. What is considered as bribery in a certain jurisdiction may simply be a legitimate business practice in another.<sup>50</sup> The problem of cultural relativism would seem to militate against the emergence of a common, cross-cultural definition.

What, then, is international corruption? This fundamental question defines the parameters of research into civil remedies for international corruption. Cultural relativism implies that a definition of corruption from within one tradition will not necessarily hold true for all. A definition that is valid for all cultures would have to be reached by a process of consensus and would have to assume a higher ranking than or even displace the domestic understanding. In the absence of such a supranational consensus, there is a ‘chaos of meaning’,<sup>51</sup> and there would be no basis upon which to pose the question addressed in this research project on the potential and scope for civil remedies for international corruption. Simply put, there has to be a starting point, a normative rule that lends coherence, content and definition to the research question. In the absence of such a normative space, the question of civil remedies of corruption would not be ‘ripe’ enough to be asked. There would be no coherent starting point in a plethora of rules and values.

The history of the international anti-corruption movement suggests that a normative space has been created that establishes the framework in which the research question on civil remedies for international corruption can legitimately be posed. The international movement to fight international corruption can be traced to

<sup>48</sup> E. Campos and S. Pradhan (eds.), *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level* (Washington, D.C., The World Bank 2007) at 9. The authors point out that the scale of corruption can be grand or petty and classify corruption into three broad types: state capture, patronage and nepotism, and administrative corruption.

<sup>49</sup> Nichols shows that corruption is condemned in every major legal tradition including Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism and Sikhism as well as in most countries. See P. Nichols, ‘Outlawing Transnational Bribery through the World Trade Organisation’ (1997) 28(2) *Law and Policy in International Business* 305.

<sup>50</sup> For example, the argument of counsel representing the giver of a US\$2 million bribe in the recent case of *World Duty Free v. Kenya* argued that this was understood to be a ‘standard business practice’ that was part of the local Kenyan custom of ‘*harambee*’ which rendered the payment ‘not only acceptable, but fashionable’. See *World Duty Free Company Ltd v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, at para. 120.

<sup>51</sup> Resorting to Wittgenstein, Hildebrandt writes about the relationship of mutuality between rules and action, stating that one does not precede the other. The decision that an act counts as a crime is dictated as much by the rule that governs our understanding of the crime as by the type of action that we understand as the crime. Hildebrandt emphasises that norms are implicit standards that rule our actions without which we would live in ‘a chaos of meaning’. M. Hildebrandt, ‘Trial and “Fair Trial”’: From Peer to Subject to Citizen’, in A. Duff, L. Farmer, S. Marshall and V. Tadros (eds.), *The Trial on Trial Judgment and Calling to Account* (London, Hart 2006) at 15.



a domestic law passed in the United States. The US Foreign Corrupt Practices Act (FCPA)<sup>52</sup> has laid the foundations for the international criminalisation of international bribery. This domestic law not only articulates the notion of international corruption but also sets in place the principle of assuming jurisdiction over corruption that has occurred in foreign countries. The answer to the question regarding the source of the international rules on international corruption can literally be traced to this domestic norm.

This FCPA was a response to the ‘moral outrage’ triggered by revelations to the American public concerning the events leading up to the Watergate scandal.<sup>53</sup> Investigations revealed disconcerting levels of corruption, slush payments and bribes paid by corporations to foreign officials.<sup>54</sup> The public reaction and the political response ultimately resulted in the FCPA. The provisions of the FCPA criminalise the bribing of foreign officials, require corporations to keep fair and accurate books and records and put in place systems of internal control. The FCPA makes it unlawful and punishable by fine and/or imprisonment for a person to whom it applies, within or outside the United States, to seek to give a bribe with the intent of inducing a person to do or omit to do an act or to use his or her influence with a foreign government to influence any act or decision of such government so as to assist such a person in obtaining or retaining business.<sup>55</sup>

The FCPA extended the scope of a US domestic norm to cover bribery occurring in different legal systems and cultures. It tackled the arbitrariness and inequality occasioned by differences in standards or interests by insisting that the same local US standard against corruption be applied equally to transactions occurring beyond American shores. In so doing, the FCPA set the agenda for the criminalisation of international bribery. A new normative framework was in the making.<sup>56</sup>

The fact that only the United States had rules prohibiting international corruption placed it at a competitive disadvantage in the global market place.<sup>57</sup> American companies were faced with a dilemma. To remain competitive, the choice was clear: either this new standard against international corruption had to go global or it had to

<sup>52</sup> See above n. 2.

<sup>53</sup> Several commentators have described the chain of events that led from the Watergate scandal to the FCPA. See S. Sporkin, ‘The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday’ (1997-1998) 18 *Northwestern Journal of International Law and Business* 269 at 271; S. Lochner, ‘The Criminalisation of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977’ (1980-1981) 13 *New York University Journal of International Law and Politics* 645 at 645-653; J. Duncan, ‘Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard’ (1982) 4 *Northwestern University Journal of International Law and Business* 203.

<sup>54</sup> Lowell Brown, commenting on the Senate and Securities Exchange Commission (SEC) investigations, remarks that the SEC investigation resulted in enforcement actions against United Brands, Gulf Oil Corporation, Ashland Oil Company, Boeing Company and Lockheed Corporation, among others, and that in all more than 400 companies admitted making overseas payments in excess of US\$300 million and that 117 of these companies were in the Fortune 500. See Brown, above n. 3, at 3-5.

<sup>55</sup> 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a) and 78dd-3(a).

<sup>56</sup> This normative aspect is well illustrated by the severe criticism that was levelled at the US FCPA, which has been described as ‘misguided American moralism’. See J. Brademas and F. Heimann, ‘Tackling International Corruption: No Longer Taboo’ (1988) 77(5) *Foreign Affairs* 17. Salbu has remarked that ‘... because the nuances of varying practices around the world must be understood in their cultural context, the FCPA’s bluntness subjects Congress’ efforts to justifiable charges of ethnocentrism and moral imperialism.’ See S. Salbu, ‘Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act’ (1997) 54 *Washington and Lee Law Review* 229 at 287.

<sup>57</sup> Nathan comments that Under Secretary of State Stuart Eizenstat is reported to have stated that US businesses lost contracts worth US\$30 billion from mid-1997 to mid-1998 because of corruption. S. Nathan, ‘Tie Loans to Corruption: Weigh Bribery in Aid Decisions’ (17 February 1999) *USA Today*.

be dismantled. With these trade concerns, the United States started an international effort to turn the American rule into the rule for all.<sup>58</sup> A drive for consensus was born out of economic necessity.

The moral outrage felt by the American public found no traction beyond its shores. Despite the almost universal existence of national laws prohibiting domestic corruption, the general attitude to commercial corruption occurring outside national borders seems to have been 'anything goes'.<sup>59</sup> A blind eye was turned to whatever it took to get the deal closed, to the extent that bribes were treated as tax deductible expenses in many countries.<sup>60</sup> For about twenty-five years, the Americans and their new normative standard were pretty much isolated in their position.<sup>61</sup>

However, several factors have converged to reverse this indifference. The accommodation that corruption has enjoyed in international trade has dwindled.<sup>62</sup> The last twenty years have witnessed a shift in social, political and business attitudes towards international corruption. A number of reasons have been identified as having led to this change of attitude. These include the end of the cold war; the increasing integration of Europe, the increase in international mergers, the recognition of the economic costs of corruption and the emergence of a borderless global market.<sup>63</sup> Also key are the links that have been made between international corruption and the lack of sustainable development, poverty and organised crime.<sup>64</sup>

Furthermore, the fact that, in a globalised world, the effects of the consequences of international corruption, such as poverty and crime, do not stay safely within one jurisdiction but migrate with the flow of goods and markets across the globe, in the form of brain drain, money laundering, refugees, disease and conflict, has increased the sensitivity towards this issue. The repudiation and moral outrage felt by the American people against foreign corruption was transformed into an economic, social and political issue of international dimension.

The first step of the move towards consensus was the stigmatisation of international corruption as a violation of the norms that coexist for the good of the society.<sup>65</sup> The establishment of a base line of legality or common rule is the first requirement of

<sup>58</sup> D. Gantz, 'Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus' (1998) 18 *Northwestern Journal of International Law and Business* 457 at 466-468.

<sup>59</sup> Vogel notes that 'many corporations have been paying bribes around the world for decades.' See F. Vogel, 'The Supply Side of Global Bribery' (1998) 35(2) *Finance and Development* 30 at 33.

<sup>60</sup> In response to this practice, the OECD passed the *Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials*, adopted on 11 April 1996, urging member countries that allowed the tax deductibility of bribes to foreign public officials to re-examine this treatment with a view to denying the tax deductibility of such bribes. See: <[http://www.oecd.org/document/46/0,2340,en\\_2649\\_34551\\_2048174\\_119672\\_1\\_1\\_37447,00.html](http://www.oecd.org/document/46/0,2340,en_2649_34551_2048174_119672_1_1_37447,00.html)> (accessed 3 May 2009).

<sup>61</sup> Several authors describe the emergence of the FCPA and the effects of its lone status on the international scene. See B. Earle, 'The United States Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument' (1996) 14 *Dickson Journal of International Law* 207. L. Low, 'New Antibribery Rules Create New Compliance Responsibilities' (1998) 26 *International Business Lawyer* 272; C. Corr and J. Lawler, 'Damned if You Do, Damned if You Don't? The OECD Convention and the Globalisation of Anti-Bribery Measures' (1999) 32 *Vanderbilt Journal of Transnational Law* 1249 at 1253.

<sup>62</sup> P. Van Duyne, 'Corruption: Acts and Attitudes', in B. Huber (ed.), *Combating Corruption in the European Union* (Trier, Academy of European Law 2002) 1 at 13.

<sup>63</sup> B. George, K. Lacey and J. Birmele, 'On the Threshold of the Adoption of Global Anti-Bribery Legislation: A Critical Analysis of Current Domestic and International Efforts toward the Reduction of Business Corruption' (1999) 32 *Vanderbilt Journal of Transnational Law* 17.

<sup>64</sup> See generally G. Abed (ed.), *Governance, Corruption, and Economic Performance* (Washington, D.C., International Monetary Fund 2002). S. Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (Cambridge, Cambridge University Press 1999).

<sup>65</sup> Some have argued that international corruption is a crime against humanity. See B. Ilias, 'Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies' (2006) 4(3) *Journal of International Criminal Justice* 466.

the rule of law. Hildebrandt has remarked that, for a violated norm to regain its position as a guideline, the negation of the norm caused by its violation must be undone. Punitive interventions, she states, are the counteractions that nullify the initial action.<sup>66</sup> The punitive reaction that sanctions as it stigmatises is characteristic of criminal law.<sup>67</sup> International condemnation followed the path charted by the FCPA in a slew of international instruments criminalising international corruption.<sup>68</sup>

In 1996, the Organization of American States adopted the Inter-American Convention against Corruption.<sup>69</sup> Other instruments include the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,<sup>70</sup> the Council of Europe's Criminal and Civil Law Conventions on Corruption,<sup>71</sup> the Convention of the European Union on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States,<sup>72</sup> the UN Convention against Transnational Organised Crime,<sup>73</sup> the African Union Convention on Preventing and Combating Corruption<sup>74</sup> and, finally, the recent UN Convention Against Corruption.<sup>75</sup>

The international instruments repudiating corruption have been implemented as required by member states under their domestic laws. The OECD convention, for example, provides in respect of international corruption that '... each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law...'.<sup>76</sup> The thirty-six states parties to the OECD Convention have enacted implementing legislation criminalising transnational bribery.<sup>77</sup> The EU Convention is also mandatory in its approach. It states that each member state 'shall' take the necessary measures to criminalise the active bribery of EU officials.<sup>78</sup> It permits no exceptions in this respect.<sup>79</sup> The UN Convention, which has been signed by 140 countries and ratified by 136, calls on parties to take measures establishing the act of international corruption as a criminal offence, subject to the principle of sovereign equality and non-intervention in the domestic affairs of other states.<sup>80</sup>

The repudiation of international corruption at the level of international society has created a new common basis for interaction. The consensus necessary for such international rules reflects the recognition of the rules at the level of the state. This

<sup>66</sup> Hildebrandt, above n. 51, at 20.

<sup>67</sup> Criminal law has a definitional function. It helps to categorise certain acts as detrimental to the public good and therefore prohibited. Section 1.01 of the American Model Penal Code illustrates this when it states that 'the general purposes of the provisions governing the definition of offences are: (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests...'.  
<sup>68</sup> This has been referred to as the 'corruption eruption'. See M. Naim, 'The Corruption Eruption' (1995) 2(2) *Brown Journal of World Affairs* 245.

<sup>69</sup> Inter-American Convention against Corruption (1996), 35 ILM 1996 at 724.  
<sup>70</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), 37 ILM 1998 at 1 (hereinafter, the 'OECD Convention').

<sup>71</sup> Council of Europe Criminal Law Convention on Corruption (1999), European Treaty Series No. 173.

<sup>72</sup> Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of the European Union (1997), 37 ILM 1998 at 12; *Official Journal of the European Union* 1997 C 195 (hereinafter, the 'EU Convention').

<sup>73</sup> UN Convention against Transnational Organised Crime, 40(2) ILM 2001 at 353.

<sup>74</sup> African Union Convention on Preventing and Combating Corruption, 43(1) ILM 2004 at 5.

<sup>75</sup> See above n. 9.

<sup>76</sup> Art. 1 OECD Convention.

<sup>77</sup> See the OECD's website for details on the implementation of OECD Convention at: <[http://www.oecd.org/document/30/0,2340,en\\_2649\\_34859\\_2027102\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/30/0,2340,en_2649_34859_2027102_1_1_1_1,00.html)> (accessed 9 June 2009).

<sup>78</sup> Art. 3(2) EU Convention.

<sup>79</sup> Art. 15(2) EU Convention.

<sup>80</sup> Art. 4 UN Convention against Corruption. A list of signatories and ratifications is available at: <<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>> (accessed 9 June 2009).

transnational agreement by states on rules repudiating international corruption reflects a general acceptance of the negative consequences of international corruption for their individual and joint stability. The extent of this agreement is the reach of a new normative order. Within this framework, the fight against international corruption is no longer simply a matter of private agreement between parties or an issue left to be regulated by market forces.<sup>81</sup> Criminalisation has introduced a moral and public tone into the fight against international corruption.<sup>82</sup> World-wide criminalisation has put in place a 'morally unassailable'<sup>83</sup> 'hypernorm'<sup>84</sup> repudiating international commercial corruption.

In this normative space, the constitutional principle of the rule of law is reflected in the creation of an international framework of rules repudiating international corruption so as to restrict arbitrary action by competing interests. It is also reflected in the equality created by tackling the corruption that undermines fair competition. The mechanism that allows for the submission of violations of the rules established by the international regulatory framework to domestic courts and independent processes of international arbitration is an integral aspect of the rule of law.

The wide-reaching criminalisation of international corruption means that the relative, culture-specific perspective has given way, in certain aspects and to a certain extent, to a common standard.<sup>85</sup> The emergence of the international framework of rules regulating international corruption has clarified and given content to the legal concept of international corruption. The OECD Convention is representative of the definition of the offence of international corruption found in the various instruments and provides:

Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.<sup>86</sup>

The provisions dealing with international corruption deal with a very specific aspect of corruption and circumscribe this area with a certain degree of accuracy. They establish the substantive content of the crime of international corruption. For an international system of commerce confronted with varying legal traditions and standards, criminalisation is arguably a necessary first step. It establishes the normative definition of international commercial corruption that makes possible the identification and enforcement of infringed rights. In the absence of this first step, the very notion of civil remedies would flounder in a sea of relativism. This limiting of the discourse to the unfair market competition argument certainly does not reflect all the faces of or possible responses to corruption. However, the merit of limiting the

<sup>81</sup> See generally A. Makinwa, 'Civil Remedies for International Corruption: The Role of International Arbitration', in Meyer, above n. 23, 257 at 263-265.

<sup>82</sup> See B. Bukovansky, 'Corruption is Bad: Normative Dimensions of the Anti-Corruption Movement', Working Paper No. 2002/5, Australian National University, Department of International Relations (2002) at 3, available at: <[http://rspas.anu.edu.au/ir/pubs/work\\_papers/02-5.pdf](http://rspas.anu.edu.au/ir/pubs/work_papers/02-5.pdf)> (accessed 9 June 2009).

<sup>83</sup> See B. Shaw, 'The Foreign Corrupt Practices Act and Progeny: Morally Unassailable' (2000) 33 *Cornell International Law Journal* 689.

<sup>84</sup> Donaldson and Dunfee remark that hypernorms constitute principles so fundamental that, by definition, they serve as 'second-order' norms by which lower order norms are to be judged. See Donaldson and Dunfee, above n. 38, at 50.

<sup>85</sup> A. Makinwa, 'The Rules Regulating Transnational Bribery: Achieving a Common Standard?' (2007) 1 *International Business Law Journal* 17.

<sup>86</sup> Art. 1 OECD Convention.

field of enquiry to the scope provided by the normative framework on international corruption is that it enables a coherent analysis of one aspect of what is generally accepted to be a multifaceted, multi-value phenomenon.

In summary, researching the potential of civil remedies for combating international corruption requires a research strategy that looks outward and accepts that a plurality of legal systems must interact in community to create shared values. It also accepts the need for a normative starting point that enables a discourse across legal cultures. It accepts that, while legal cultures, principles and concepts may differ, pragmatism dictates that a community bounded by mutual self-interest will develop common solutions to common problems. This is the motivation for the choice of the functional comparative method for this research, which is discussed in the following section.

#### 4 The Functional Comparative Approach

Comparison is a part of human nature.<sup>87</sup> In legal research, comparative law may occur at the macro level, involving the comparison of entire legal systems, or at the micro level, involving the comparison of particular elements or issues of selected legal systems.<sup>88</sup> Comparison may be viewed as an end in itself in the search for common principles or as a means to achieve insight into the reaction of legal systems to common problems. Comparative law can serve many purposes depending on the purpose for which it is being used. It starts from a given problem or issue, and it is this 'main purpose for which ... comparative study or research is undertaken [that] will to a large extent dictate the choice of legal systems or topics to compare and the method of comparison.'<sup>89</sup>

The ends of the comparative method are described variously as serving as an aid to legislation and law reform, as a tool of construction, as a means of understanding legal rules or as a means of contributing to the systematic unification or harmonisation of law.<sup>90</sup> The aim of this research on civil remedies for international corruption focuses essentially on the urgent question of how the problem of international corruption can be curtailed. This issue calls for a re-examination of the question why existing methods and concepts have not yet provided the desired decreases in international corruption. The use of comparison in this project will therefore be undertaken with the objective of: (1) understanding the existing position regarding civil remedies for international corruption; (2) examining the extent to which the existing position can make realisable the goals of international anti-corruption legislation; and (3) proposing what needs to be done if there is a gap between the position as it is and the position that may be needed for more effective recourse against international corruption from the perspective of the use of civil remedies.

In the case of a problem of international dimension, such as civil remedies for international corruption, the immediate problem of the comparatist is how to compare apples with apples and not oranges. How are comparisons of differing value systems to be undertaken? How are comparisons of laws set in different social, historical

<sup>87</sup> John Hall once remarked that '[t]o be sapiens is to be comparatist'. See J. Hall, *Comparative Law and Social Theory* (New York, Vail-Balloy Press, Inc. 1963) 9.

<sup>88</sup> P. De Cruz, *Comparative Law in a Changing World* (London, Cavendish Publishing 1995) at 224-226.

<sup>89</sup> W. Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 *International and Comparative Law Quarterly* 485 at 489.

<sup>90</sup> De Cruz, above n. 88, at 17.



and economic stages valid? How does one bridge the differences of language and concepts?<sup>91</sup> Reitz refers to this as the ‘enigma of translation’.<sup>92</sup>

In their seminal work, Zweigert and Kotz tackle this issue head on. They declare that the basic methodological principle of comparative law is ‘functionality’, which they argue rests on the fact that ‘the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar results’.<sup>93</sup> The functional comparative method differs from other comparative approaches in that it focuses not so much on the rules themselves but on the response of a legal system to a particular problem. Unlike the study of legal transplants or comparative legal history, where deeper insight is sought into the rules themselves, the functional comparative method focuses on the organic responses of legal systems. It is the response that is identified and compared.

Defining the problem that requires a common solution is at the heart of comparative analysis. By defining the problem, one has a reference point for comparison.<sup>94</sup> Only responses to the same problem possess the necessary basis for comparison.<sup>95</sup> The functional comparative method facilitates a cross-cultural analysis of ‘solutions’ provided by particular systems.<sup>96</sup> Rheinstein, describing the functional approach, remarks that it addresses how ‘the problems set by life, ... the actual conflicts of social interests [are] solved by the legal order ...’.<sup>97</sup> Such a comparison, he states, very often shows that different legal systems may use different technical means for the same purpose.<sup>98</sup> In his opinion, functional comparative analysis ‘finds a particularly important application in legislative reform, where it shows how a given problem demanding a reform at home is solved abroad. In our modern world, the problems demanding regulation by law are alike, often identical in many countries, especially in countries of a similar economic structure.’<sup>99</sup>

To put it in simplistic terms, the primary question that the functionalist asks is: ‘what would you do?’ As opposed to: ‘what is your rule?’, ‘what is your legal history?’ or ‘what is your legal culture?’ The study of legal responses occurs very naturally in international trade, where the primary force for cohesion is the agreement between contracting parties. The question ‘what would you do?’ is very quickly followed by ‘this is how we do it – how can we work together?’ Functional comparison is the substance of this discussion. It is very much a means to an end and not an end in itself.

<sup>91</sup> Legrand discusses this problem of translation at length. See P. Legrand, ‘How to Compare Now’ (1996) 16 *Legal Studies* 232 at 234 ff.

<sup>92</sup> He points out that ‘In one sense every term can be translated because there are things in each legal system that are roughly the functional equivalent of things in the other legal system. In another sense nothing can be translated because the equivalents are different in ways that matter at least for some purposes. At a minimum, generally equivalent terms in each language often have different fields of associated meaning ...’. J. Reitz, ‘How To Do Comparative Law’ (1998) 46 *American Journal of Comparative Law* 617 at 620-621.

<sup>93</sup> K. Zweigert and H. Kotz, *Introduction to Comparative Law*, translated from the German by Tony Weir (Oxford, Clarendon Press 1998, 3rd ed.) at 34.

<sup>94</sup> See R. Michaels, ‘The Functional Method of Comparative Law’, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press 2006) at 339.

<sup>95</sup> Zweigert and Kotz, above n. 93, at 34.

<sup>96</sup> Rosenblum remarks that ‘[c]omparative law holds significant potential to understand how nations internalise international norms.’ See D. Rosenblum, ‘Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods’ (2006-2007) 45 *Columbia Journal of Transnational Law* 759 at 770.

<sup>97</sup> M. Rheinstein, ‘Comparative Law and Conflict of Laws in Germany’ (1934-1935) 2 *University of Chicago Law Review* 232 at 248.

<sup>98</sup> Id.

<sup>99</sup> Id., at 249.

The functional comparative approach realises that there are many roads that lead to Rome. Each road is distinct and unique, and there might be similarities or differences in their construction, but they all serve the same purpose, namely getting to Rome. In this approach, the focus is not on analysing the road but rather on identifying the roads that lead to Rome and how it is done. The emphasis remains on the process of building and confluence and not necessarily in the identification or discovery of a *single* road.

The result of the process of functional comparison is to reveal differences but also – more importantly – commonalities. Rheinstein points out that, while each legal system may use certain fundamental concepts in order to express its rules, and these concepts often differ in different legal systems, comparative observation may reveal how little such concepts constitute ends in themselves.<sup>100</sup> Rheinstein sees these concepts as ‘nothing but blocks with which to build structures.’<sup>101</sup> He touches on the essence of functionalism when he states that it ‘will show us the variety of means which may be and have been used for the same purposes, thus enlarging our “stock of solutions”.’<sup>102</sup>

In this view, the functional comparative method can provide an element of predictability. The international rules that stipulate civil remedies for corruption do not give content or definition to these remedies. The rules present concepts such as ‘victim’, ‘damage’, ‘compensation’ and ‘invalid contracts’, which are in themselves complex in nature. As such, exploratory research of an analytical and conceptual character is necessary in order to translate and give content to these concepts. The functional comparative method does not resolve the problem of translation, but, by focusing on function rather than content, it can provide a picture of the position on civil remedies for international corruption in various jurisdictions. Starting from the problem enables a certain detachment from particular concepts, substantive laws or procedures in cases where they arrive at ‘more or less the same result’.<sup>103</sup> In this way, the functional comparative method enables the identification of various solutions to the question of civil remedies for international corruption. These solutions provide the contours of civil remedies for international corruption, i.e. its building blocks.

It must be accepted that the identification of building blocks only provides a pointer as to the direction of legal development. The functional comparative approach allows for the identification of the basic elements at play; how they operate within the selected national systems; the extent of their compatibility or incompatibility; and how, if at all, they are likely to influence the ‘common platform’. However, there are limits to this method. It points the way to a possible consensus but may not in itself discover a ‘common rule’. As Palmer points out, ‘the discovery of transnational rules or “common concepts”, which has been almost a slogan of professional comparative study since the 1900 Paris Congress, will be difficult to discover through functional analysis ... while functionality is a factor, it is not even the main factor in the assessment of optimal doctrines.’<sup>104</sup> The existence of a common solution does not necessarily imply the identification of a universally acceptable rule. The pragmatism of the solution is coloured by the influence of power and politics. The history of the international regulatory framework for international corruption described above shows how a domestic American norm prevailed, due to intense politicking by the

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Reitz points out that ‘By asking how one legal system may achieve more or less the same result as another legal system without using the same terminology or even the same rule or procedure, the comparatist is pushed to appreciate the interrelationships between various areas of law, including especially the relationships between substantive law and procedure.’ See Reitz, above n. 92, at 622.

<sup>104</sup> V. Palmer, ‘From Lerotholi to Lando: Some Examples of Comparative Law Methodology’ (2005) 53 *American Journal of Comparative Law* 261 at 284.

US government, as the basis for the international normative standard. The triumph of the American norm repudiating corruption represents a confluence of power and strategy that has set the tone in the fight against international corruption.

The functional comparative method can provide a window on to how the law is likely to develop in response to articulated problems of international dimension. Beyond this point lies the unpredictability of political interests. While it may indeed not identify a universally applicable rule on civil remedies for international corruption, the functional comparative method can point to the likely shape of a common position by presenting a 'basket of solutions' that provides us with a perimeter within which such a common position on civil remedies is likely to take occur.

#### 4.1 The Process of Comparison<sup>105</sup>

There is no supranational body charged with the enforcement of private suits for damage suffered as a result of international corruption. This means that implementation will necessarily have to occur via domestic legal structures. As such, a logical starting point for inquiry is at the domestic level, where the right to civil redress for international corruption can exist as an enforceable right.

Civil remedies, proceeding as they do from the individual, are closely linked to local customs, attitudes and practices. The diversity of such practices means that a 'view from nowhere'<sup>106</sup> may fall short of reality. Our notions of civil remedies are limited by the constraints of national legal systems. In this sense, international rules and concepts are constrained by the limits of those systems.

Freeman points out that the law is normative but also factual, as is the degree of compliance with the law.<sup>107</sup> Researching civil remedies for corruption thus implies a move from the normative demand that states *ought* to provide the means for victims of corruption to seek remedies to the substance of *how* such remedies are provided in the implementation and interpretation of the norm. This process raises two important questions. Firstly, what systems should form the basis of the comparison? Secondly, what should the parameters of the comparison be?

#### 4.2 The Systems for Comparison

It could be argued that the question of civil remedies for international corruption cannot be answered without having detailed information about the system of international trade and all its participants. Since most countries in the world are involved in international commerce, this would be a weighty task. However, this may not be a valid argument, as not all players in a system necessarily play a similar role in the emergence of the rules that shape it. There is a definite politics of rule making in which traditional configurations of power and statehood play an important

<sup>105</sup> Expression adopted from Kamba, above n. 89, at 510.

<sup>106</sup> Donaldson and Dunfee point out that the 'pivotal traditions of ethical theory, when applied in diluted form to real world problems, have offered a "view from nowhere". They have been incapable of locating the complex, particular problems of corporations, industries, economic systems, marketing strategies, etc., in a way that would provide an institutional "somewhere".' See Donaldson and Dunfee, above n. 38, at 13. The authors adopted this phrase from the illuminating book by T. Nagel. *The View from Nowhere* (New York, Oxford University Press 1986).

<sup>107</sup> M. Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge, UK/Malden, US, Polity Press 2002) at 77.

role. The experience of the emergence of criminal rules regulating international corruption, and the central role played by the United States in this regard, underscores the influence of political interest.

The selection of countries for comparison is guided by the problem at hand. International corruption is an issue of international commercial law. The language of commerce is heavily influenced by the Western tradition. As Watson points out ‘... virtually every country in the world has borrowed most of its commercial law from a few legal systems, particularly French and German civil law and English common law.’<sup>108</sup> These legal systems remain the foundation of the commercial laws of states and from a pragmatic point of view are the logical focus of a comparative study to determine the direction that the issue of civil remedies for international corruption may take. This fact narrows the discourse by excluding religious traditions such as Islamic and Hindu law, traditions of the Far East such as the Chinese and Japanese systems and other legal traditions such as African, Russian or unclassifiable systems.

The selection of countries for study is also guided by the history of the development of the anti-corruption regulatory framework. The US has played a pre-eminent role. Its position in the world economy, coupled with its historical role in the regulation of international corruption, makes it an important indicator on the question of civil remedies for international corruption that may exert a great influence on reform.

Thus, as far as the question of civil remedies for international corruption is concerned, the functional comparative analysis of countries representing the civil and common law systems as well as a consideration of US law can help to identify concepts that may serve as building blocks that point to the shape of possible regulation on this issue.<sup>109</sup> Does such recourse to legal systems of the Western tradition provide a sufficient platform on which to accommodate the global need to fight corruption? Can other traditions provide a more effective methodology? With a problem as complex as corruption, there can be no exclusiveness of approach. The market-based approach to fighting international corruption is directed at the specific aspect of international commercial corruption. Different approaches or strategies may be needed for other aspects of corruption, such as, for example, political or petty corruption. This implies a plurality of strategies. Indeed, the idea of a single strategy to fight corruption may miss the mark to the extent that the various types of corruption are driven by different factors. It is important to identify the different streams and faces of corruption and tailor the medicine to the underlying causes.

### 4.3 Parameters for Comparison

Kamba proposes a three-stage process of comparison that comprises a descriptive phase, an identification phase and an explanatory phase.<sup>110</sup> This process is derived, in his words, from the fact that comparison ‘entails not merely the ascertainment of divergences and resemblances between the legal systems or parts of the legal systems compared, but also the explanation of such divergences and resemblances.’<sup>111</sup> This

<sup>108</sup> A. Watson, *Legal Transplants: An Approach to Comparative Law* (Athens, University of Georgia Press 1974, 2nd ed.).

<sup>109</sup> This research project also uses decisions of the European Court of Justice in developing its methodology. The role of the ECJ in shaping Community law requires a move away from national to autonomous interpretations of concepts guided by the objectives of the European Union. This can in some ways be likened to the autonomous ‘common platforms’ desired in the international trading system.

<sup>110</sup> Kamba, above n. 89, at 511-512.

<sup>111</sup> *Id.*, at 511.

systematic approach allows for the identification of the basic elements at play; how they operate within the selected national systems; the extent of their compatibility or incompatibility; and how, if at all, they are likely to influence the 'common platform'.

The first step of the descriptive phase of functional analysis is to ascertain the existing state of affairs under the legal systems chosen for comparison. This can be done by examining the solutions presented by the chosen legal systems to the two principal requirements regarding civil remedies for international corruption contained in the UN Convention and the Civil Law Convention, which cover two areas: the right to sue and transaction validity.

The classic private right to bring an action for harm or damage caused is a new flank in the fight against corruption that has been opened up by the Civil Law Convention and the UN Convention. Persons who have suffered damage as a result of corrupt activity are to be given the right to sue for compensation. Article 3 of the Civil Law Convention provides that every party to the Convention '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.'<sup>112</sup> Such compensation may cover material damage, loss of profits and non-pecuniary loss.<sup>113</sup> The UN Convention for its part requires 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.'<sup>114</sup> This private right to enforce anti-corruption rules by suing for harm suffered changes the dynamic of the fight against corruption by bringing in the victims of corruption as active participants in the sanctioning process.

The second aspect of the civil recourse presented by the international instruments flows from the fact that most jurisdictions now have measures in place criminalising international corruption. To allow persons to benefit from contracts resulting from such criminal transactions contradicts the logic of the international rules. What is the effect of corruption on contracts arising from or tainted by international corruption? The Civil Law Convention and UN Convention propose that the presence of corruption should play a role in determining the validity of the contracts concerned.

Article 8 of the Civil Law Convention provides that 'each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void.' Instances where the contract itself does not provide for corruption but is the result of corrupt activity also fall within the scope of the Convention. Article 8(2) of the Civil Law Convention provides that 'each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.' Similarly, Article 34 of the UN Convention requires its parties to consider corruption as a 'relevant factor' in legal proceedings relating to the validity of contracts, the grant or withdrawal of a concession or similar instrument or other remedial action.<sup>115</sup>

The descriptive phase uses these international stipulations to assess the degree to which the objectives under the international framework can or cannot be achieved by the existing national systems. This exercise helps to identify areas of development and/or reconciliation. How does this comparison take place? Simply placing the

<sup>112</sup> Art. 3(1) Civil Law Convention.

<sup>113</sup> Art. 3(2) Civil Law Convention.

<sup>114</sup> Art. 35 UN Convention.

<sup>115</sup> Art. 34 UN Convention.



national laws next to the international stipulations may not convey how these rules influence or fit within the decision and rule-making process.<sup>116</sup>

This research project has chosen parameters for comparison drawn from the interface between the rules and the societies in which they operate. The Civil Law Convention on Corruption and the UN Convention against Corruption establish a broad framework by stating that nations should provide victims of corruption with ‘the right to initiate legal proceedings’<sup>117</sup> on the one hand and provide ‘effective remedies’<sup>118</sup> on the other. The interpretation of the European Court of Justice of similar phrasing in other instruments provides two helpful parameters.<sup>119</sup>

The first parameter is the extent to which states have *taken measures* that can be effectively relied upon before national courts to ensure that the objectives of the UN Convention and the Civil Law Convention are realised. The European Court of Justice, interpreting Article 6 of Council Directive 76/207, which provides that ‘all persons who consider themselves wronged by discrimination between men and women must have an effective judicial remedy’, stated that this article requires member states to introduce into their internal legal systems such measures as are needed to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process. The Court found that it followed from this provision that member states must take measures that are sufficiently effective to achieve the aim of the directive and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned.<sup>120</sup>

The second parameter is the extent to which the courts give a *positive interpretation* of existing rules and principles within the legal system in a manner that gives effect to the rights of persons to claim redress for damage caused by intentional corruption. The European Court of Justice, referring to ‘effectiveness’ in the context of Community law, has stated that it is for member states to establish a system of legal remedies and procedures that ensure respect for the right to effective judicial protection and, in that context, *to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the court the legality of any decision or other national measure relative to the application to them of a Community act of general application*.<sup>121</sup>

A third parameter, adapted from the work of Willem van Boom, examines the extent to which existing laws within the system under comparison *are actually used* to attain the objectives of the international conventions. The focus here is on compliance. Van Boom states that the ‘efficacy of enforcement of substantive private law rules depends on the availability of a remedy and how it is used in practice.’ Thus, he states, ‘a remedy ensuring maximum compliance in theory, which is hardly used in practice ... lacks efficacy.’<sup>122</sup>

<sup>116</sup> Legrand castigates what he refers to as the ‘narrow view of the comparative enterprise’, which is reduced to a ‘dry juxtaposition of the rules of one legal culture ... with those of another’. Legrand, above n. 91, at 234.

<sup>117</sup> Art. 35 UN Convention.

<sup>118</sup> Art. 1 Civil Law Convention.

<sup>119</sup> The European Court of Justice provides helpful insights because of its pre-eminent role in ensuring equality before the law for members of the European Union and its duty to provide uniform and binding interpretation for member states that represent different legal families.

<sup>120</sup> Case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651.

<sup>121</sup> Case C-50/00 P, *Unión de Pequeños Agricultores v. Council of the European Union*, [2002] ECR I-6677.

<sup>122</sup> W. van Boom, ‘Efficacious Enforcement in Contract and Tort’ (2006) *Erasmus Law Lectures* 11.

The comparisons in the descriptive phase set the stage for the identification phase where areas of commonality and dissonance are identified. The last phase, the explanatory phase, seeks to explain the rationale and implications of these areas of agreement and disagreement for the attainment of civil remedies for international corruption.<sup>123</sup> The use of the functional comparative method in this manner provides an element of predictability in the identification of the possible configuration of the 'common platform' of interaction in respect of civil remedies for international corruption.

## 5 Concluding remarks

Corruption is an impediment to the sustainable development of nations. In a world that is ultimately a closed system, no country is an island or immune from its devastating consequences. Corruption is a multi-faceted problem, and a plurality of strategies may be needed to address its various aspects. For research into civil remedies for international corruption, a normative starting point is provided by the regulatory framework criminalising international corruption. This framework represents a consensus so broad that it is viewed as a hypernorm that acts as a second-order norm by which lower (national) norms are validated. It adopts a market approach to fighting international corruption and is centred on the unfair competition caused by bribery in international trading transactions.

The approach taken in this research project on civil remedies for international corruption is to limit its remit to the scope of the international normative framework regarding international corruption. The advantage of such a field-limiting approach is that it allows for a coherent analysis and establishes a starting point for research across a plurality of values embraced by the many cultures that comprise the international trading system. Indeed, for the question of civil remedies for international corruption to be posed at all, there must be specific content to the meaning of international corruption. Without such a baseline, the research question would be stymied in a 'sea of relativism' and would be limited, at best, to national formulations.

This paper asserts that the methodology to be adopted in researching such a question of international dimension is influenced by the rule-making process of the largely autonomous society of trading nations. A primary concern in this regard is how 'common rules' can be arrived at in cases where an issue cuts across legal traditions and cultures. This concern is addressed by the reality that the enforced coexistence of countries results in a zone of shared rationalities. Mutually dependent interactions require trust, certainty and predictability. Participants in this society must fashion binding objective rules, particularly in the face of increasingly integrated markets, in order to interact efficiently.

The logic of the international trading order requires the certainty of the rule of law. This is the driving force for the constant formulation of common rules to regulate the expanding sphere of commercial activity beyond state borders. The process of rule formulation proceeds from problem to problem as states coordinate their responses in the framework of their mutually dependent relationships. The methodology adopted in this research on civil remedies for international corruption focuses on the identification, comparison and analysis of these responses. This method of comparison is functional and pragmatic.

The functional comparative method does not resolve the problems of translation inherent in researching issues with an international dimension. However, by focusing on the pragmatism of the solutions presented in the responses of legal systems to a

<sup>123</sup> This three-stage approach is borrowed from Kamba, above n. 89, at 510-512.

particular shared problem, it can provide a deeper understanding of the nature of the legal problem concerned. It also provides a window on the 'building blocks' or concepts that may influence the shape of a 'common platform'. The source of these building blocks will depend on the nature of the problem being researched. In the case of international corruption, the primary role that the Western legal tradition has played and continues to play in shaping the regulatory framework for international commerce provides a strong motivation to choose examples from the principal common and civil law systems within this tradition as subjects for comparison. The American legal system, which served as a catalyst for the current framework of rules regulating international corruption, is also a logical and important point of comparison.

The process of comparison itself should be much more than a dry analysis of 'juxtaposed' rules. Rather, it should reflect the systems, processes and solutions of the legal systems chosen for analysis. This research project has chosen as parameters for comparison the extent to which society *provides* recourse to civil remedies, *interprets* provisions in a manner conducive to the pursuit of such remedies and *uses* such remedies to assuage the harm suffered by citizens. This approach helps to identify a framework of solutions that provides an element of predictability and may highlight areas of 'shared understanding' that can influence the development of an international approach towards the question of civil remedies for international corruption.

To a certain extent, the functional comparative method addresses the methodological problems associated with research into issues of international dimension. It is certainly an important tool in the determination and development of the rules of interaction that are needed to preserve the stability and effectiveness of the international trading system. To this end, the functional comparative method is not just a dry legal analysis but is responsive, dynamic and pragmatic. It is most useful where it paints a vivid picture of the interaction between the cultures, legal traditions, economies and – indeed – political practices of the legal systems chosen for comparison as they respond to the shared problem that forms the basis of the research question.