Special Issue
Ethical Challenges of Corrupt Practices

Leges Sine Moribus Vanae?: On the Relationship Between Social Morality and Law in the Field of Foreign Bribery

*By Cornelia Rink**

Abstract

The relationship of social morals and laws becomes particularly crucial and problematic with regard to foreign bribery. This is because of three reasons: Foreign bribery is embedded in social actions, has a transnational character, and is mostly committed in business contexts. Therefore, the author reflects on the relationship of social morals and laws. The author argues that even though social morals and laws have to be distinguished on a conceptual level, it is wise to work towards a factual synchronicity. In this context, the author provides some suggestions for linking social morals and anti-bribery laws more closely. However, this linkage becomes especially problematic regarding extraterritorial criminal liability. Nevertheless, after a critical examination the author concludes that the reproach of moral imperialism is not substantial.

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A. Introduction

Synchronizing social morality and law has always been a challenge in any legislative activity regarding criminal law.[1] Horace describes this in the context of Augustus forcing new laws on the reprobate Romans, when he raises the rhetorical question: "Quid leges sine moribus vanae proficiunt?"[2]—"Of what avail are empty laws without [good] morals?"[3] In the transnational context, especially in the field of foreign bribery, the challenge of balancing laws, practical needs, and social morals has gained substantial significance because the legal standards must consider both a global, ever-changing economy and high social-moral demands. Accordingly, recent legislative efforts in Germany have shown that the fight against foreign bribery is one in which old questions become pressing issues again.[4]

The relationship of social morals and criminal law is discussed in the first part of this article. The article concludes that laws and social morals have to be distinguished conceptually. Nevertheless, it seems necessary for the law not to lose touch with social morals. In the field of foreign bribery, it is argued that such a synchronization of social morals and criminal law falls less within the province of the national legislator and more within that of legal operators, namely the courts and the corporations.

The second part of this article then goes a step further: If the social morals are not theoretically but factually closely tied to laws, is it possible to transfer the anti-bribery provisions to other countries—or would this be a moral imposition? This article ends with a short discussion on the issue of moral imperialism due to anti-corruption laws. It becomes apparent that this concern does not fully take into account cultural and economic realities and, consequently, has to be rejected.

B. Social Morals and Anti-Corruption Law

The article begins with a description of the difficulties of laws and social morality in the context of corruption, particularly foreign bribery. Subsequently, the relationship between social morals and criminal law is shortly illuminated on a more general level. Ultimately,

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[1] DIETMAR VON DER PFORDTEN, RECHTSETHIK 68–70 (2d ed. 2011) (defining both social morality and law as part of social ethics).

[2] HORACE, THE ODES, EPODES, AND CARMEN SAECULARE, bk. III, ode 24, ll. 35–36 (Clifford Herschel Moore ed., 1930).

[3] For the translation, *see Frequently Asked Questions*, UNIVERSITY OF PENNSYLVANIA, https://secure.www.upenn.edu/secretary/FAQ.html (last visited Oct. 25, 2015).

[4] The new German Law against Corruption from Nov. 2015, published in Bundesgesetzblatt Part 1, No. 46, p. 2025; on this: Michael Kubiciel & Cornelia Spörl-Rink, *Gesetz zur Bekämpfung der Korruption—Stellungnahme zum Referentenentwurf des Bundesministeriums für Justiz und für Verbraucherschutz*, 4 KÖLNER PAPIERE ZUR KRIMINALPOLITIK 2 (2014); Heiko Maas, *Wann darf der Staat strafen?* NEUE ZEITSCHRIFT FÜR STRAFRECHT 305 (2015).

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this section gives thought to how to bridge the gap between the two in the area of foreign bribery.

I. Corruption: A Challenge for Social Morals and Criminal Law

Corruption is a challenging field for both law and social morality. Both determinants have to confront considerable uncertainties when it comes to the decision whether an action is corrupt or not.

1. Social Morals: Uncertainty and Inflated Expectations

Corruption, roughly defined as "the abuse of entrusted power for personal gain,"[5] is the cardinal anti-social action because it is detrimental to society as a whole and benefits only the individual.[6] To avoid damage to the collective, it therefore seems natural to condemn any corrupt behavior by all possible social-moral means. In cases of doubt, the idea is that it is better to label too much than too little. This leads to a common labeling of behavior as corrupt.

But the term "corruption" is not only used too frequently; it is also used imprecisely.[7] The inexactitude of its use can be attributed to the fact that corruption is a difficult concept to grasp. The reason for this lies, first and foremost, in a characteristic of corruption: its embeddedness in social actions.[8] No other potential criminal act is this much intertwined with normal social behavior and, thus, it is almost incomparably difficult to distinguish it from the social-morally reprehensible.[9]

Compounding the problem of the social-moral side of corruption is that the public attitude toward white-collar crime is just as inconsistent as the public's relationship with business behavior. This problematic relationship to the economic world is primarily due to two

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[5] For definition, see *FAQs on Corruption*, TRANSPARENCY INTERNATIONAL, https://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/ (last visited Oct. 25, 2015).

[6] Michael Baurmann, *Korruption, Recht und Moral*, *in* DIMENSIONEN POLITISCHER KORRUPTION 164 (Ulrich von Alemann ed., 2005).

[7] MATTHIAS BAUER, KORRPTIONSBEKÄMPFUNG DURCH RECHTSETZUNG 15–16 (2002); Werner Plumpe, *Korruption – Annäherungen an ein Historisches und Gesellschaftliches Phänomen*, *in* GELD – GESCHENKE – POLITIK: KORRUPTION IM NEUZEITLICHEN EUROPA 19 (Jens Ivo Engels, Andrea Fahrmeir & Alexander Nützenadel eds., 2009); ULRICH SOMMER, KORRUPTIONSSTRAFRECHT para. 1 (2010).

[8] Samuel W. Buell, "*White Collar" Crimes*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 837, 841–42 (Markus D. Dubber & Tatjana Hörnle eds., 2014); Baurmann, *supra* note 6, at 165–66.

[9] Buell, *supra* note 8. This indistinguishability between criminal and normal behavior holds even true for many perpetrators. On the "acceptable and even necessary behavior" in "occupational subcultures," see JAMES WILLIAM COLEMAN, CRIMINAL ELITE: UNDERSTANDING WHITE-COLLAR CRIME 190 (5th ed. 2002).

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reasons. First, our economic system is characterized by continuing transformation and growth. Business conditions are complex and change quickly. Many financial operations are barely comprehensible without special expertise. This applies not only to business transactions like corporate acquisitions but also, for example, to the construction of an airport. It can be hard to form a public attitude towards a certain behavior that is embedded in such complex and ever-changing conditions.[10]

Second, our capitalist economic system is built on the idea that individual growth fosters collective economic and social development.[11] In other words, being self-interested serves the community. For this reason, it could be difficult to define which pursuit of profit is socially desirable to ensure proper economic growth, and which is abhorrent because it solely and entirely benefits the individual. The public relationship to economic activities is especially complex in Germany where, unlike in the United States, capitalism has never been fully embraced despite certain economic boom times.[12] The general unease about the capitalist economic system with its few leaders[13] increases the uncertainties in judgments concerning specific questions within this system. This leads to a situation in which social morals gain strength, regularly finding expression in harsh media reports,[14] while there is still confusion concerning where to draw the line between legality and illegality in the first place.

2. Laws: Rigidity and Lethargy in Reference to the Intricate and Dynamic Economy

This challenge becomes even more crucial for legislation. Because corruption permeates every aspect of society,[15] it is hard to define it in a legal way that encompasses all the

[10] *Wall Street* (Twentieth Century Fox Film Corporation 1987) ("Greed, for lack of a better word, is good. Greed is right. Greed works. Greed clarifies, cuts through, and captures the essence of the evalutionary spirit. Greed, in all forms . . . has marked the upward surge of mankind.") (quoting character Gordon Gekko). On the "culture of competition," see COLEMAN, *supra* note 9, at 189–90; Jürgen Matthes, Christina Langhorst & Bodo Herzog, *Globalisierung in Deutschland*, 89 KAS ZUKUNFTSFORUM POLITIK 1, 41 (2008). Critically, "the American Dream is criminogenic." MATTHEW ROBINSON & DANIEL MURPHY, GREED IS GOOD 3 (2009).

[11] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (1937). For an examination of the egocentrism of economic operators with further references, see BAUER, *supra* note 7, at 101.

[12] Sven Thomas, *Soziale Adäquanz und Bestechungsdelikte*, *in* FESTSCHRIFT FÜR HEIKE JUNG 973, 974 (Heinz Müller-Dietz et al. eds., 2007).

[13] Viktoria Kaina, *Deutschlands Eliten Zwischen Kontinuität und Wandel*, 10 AUS POLITIK UND ZEITGESCHICHTE 8 (2004); RUPRECHT-KARLS-UNIVERSITÄT HEIDELBERG, HEIDELBERGER ELITESTUDIE 2005 2 (2005) (observing a gradual rapprochement with elites). On the widespread extreme left-wing attitudes in Germany, see KLAUS SCHROEDER & MONIKA DEUTZ-SCHROEDER, GEGEN STAAT UND KAPITAL – FÜR DIE REVOLUTION! LINKSEXTREMISMUS IN DEUTSCHLAND – EINE EMPIRISCHE STUDIE (2015); CHRISTIAN GALONKSA, DIE WIRTSCHAFTSELITE IM ABSEITS (2012).

[14] HAUKE BRETTEL & HENDRIK SCHNEIDER, WIRTSCHAFTSSTRAFRECHT 48 (2014).

[15] Urs Kindhäuser, *Voraussetzungen Strafbarer Korruption in Staat, Wirtschaft und Gesellschaft*, 6 ZIETSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 462 (2011).

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situations in which it occurs.[16] Corruption affects not only politics, but also the health sector,[17] the construction industry,[18] and even sports.[19] It can influence public or private decision-making processes, and it can be grand and petty.[20] The various forms of corruption make it difficult to address with quick legislative action.[21] This is particularly problematic because socioeconomic conditions change rapidly, and lawmakers cannot keep pace with the changing conditions.[22] The dynamic nature of economic activities is checked by the static nature of laws.

3. Transnationalizing National Criminal Law Without Globalized Social Morals

Transnational components further complicate the situation. Then, corruption does not only cross internal borders within a society but also external borders to other countries and cultures.[23] In this context, a global anti-corruption fight becomes particularly necessary at the core of transnational bribery: The bribery of foreign public officials.[24] Many international and regional conventions, intergovernmental strategies, and other transnational initiatives exist in this field.[25]

[16] This is also the reason why corruption is governed variably by the German laws. *See* Thomas Grützner & Nicolai Behr, *Korruption – Strafrecht, Zivilrecht, Steuerrecht, Vergaberecht*, *in* WIRTSCHAFTSSTRAFRECHT, ch. 9, paras. 5–6, 9–10 (Carsten Momsen & Thomas Grützner eds., 2013).

[17] KAI BUSSMANN, MICHAEL BURKHARDT & STEFFEN SALVENMOSER, WIRTSCHAFTSKRIMINALITÄT–PHARMAINDUSTRIE 8 (2013); Taryn Vian, *Review of Corruption in the Health Sector: Theory, Methods and Interventions*, 23 HEALTH POL'Y & PLAN. 23 (2008).

[18] Florian Kienle & Jan Kappel, *Korruption am Bau – Ein Schlaglicht auf Bestechlichkeit und Bestechung im Geschäftlichen Verkehr*, 60 NEUE JURISTICHE WOCHENSCHAU [NJW] 3530 (2007).

[19] For the example of the *Hoyzer* case in Germany, see Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 15, 2006, BGHST 51, 165; for an in-depth analysis of corruption in sport and the methods used to counteract and prevent it, see GRAHAM BROOKS, AZEEM ALEEM & MARK BUTTON, FRAUD, CORRUPTION AND SPORTS (2013).

[20] Nikos Theodorakis, *Public Corruption*, *in* THE ENCYCLOPAEDIA OF WHITE-COLLAR AND CORPORATE CRIME 757, 758–59 (Lawrence M. Salinger ed., 2013).

[21] Kindhäuser, *supra* note 15, at 468.

[22] Buell, *supra* note 8, at 843.

[23] On the cultural impact of the anti-corruption strategies, see *infra* Part B.I.2.

[24] Acribaldo Miller, *Corruption Between Morality and Legitimacy in the Context of Globalization*, *in* BETWEEN MORALITY AND THE LAW: CORRUPTION, ANTHROPOLOGY AND COMPARATIVE SOCIETY 53, 58 (Italo Pardo ed., 2004).

[25] *See, e.g.*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, COMPENDIUM OF INTERNATIONAL LEGAL INSTRUMENTS OF CORRUPTION (2d ed. 2005).

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Although initiatives to combat transnational corruption exist, studies suggest that social-moral views have not yet globalized.[26] This means that despite the fact that politics and economics already work globally, the public's attitude towards corruption has not yet been developed to such an extent. This is hardly surprising considering that even the German federal government opposed a general foreign bribery law in an official statement only ten years ago.[27] This political approach lost its validity as it has been undermined by the development of the global law.

Considering the increasing use of international conventions to harmonize widely varying national laws against corruption, the question raised by Horace is of crucial importance: Is it possible to use the law as a means to implement moral values to societies? Or is it, on the contrary, necessary to model the law after the moral views of a society? The following section addresses these fundamental questions from a national perspective. It is concerned with clarifying the relationship between social morals and laws with respect to anti-bribery provisions. On the basis of these considerations, the section below develops suggestions for improving the linkage of laws and social morals.

II. Laws and Social Morality in the Ever-Changing Field of Foreign Bribery

1. The Theoretic Relationship Between Laws and Social Morality

To understand the present nature of the theoretic relationship between criminal laws and social morality, it is helpful to review some significant evolutionary steps. By way of example, it will be shown that—just like the laws and social morals themselves—the relationship between them has always been a reflection of their respective political and cultural circumstances. The following short summary will give insights into a few of the major phases of the relationship's overall development to the present day.

We have already seen that Horace, as an ancient Roman scholar, was convinced that morals and laws had to be deeply intertwined.[28] Thomas Aquinas is an example for a medieval natural lawyer[29]. In his day, the State as the law-giver and the Church as the

[26] Celia Moore, *Moral Disengagement in Processes of Organizational Corruption*, 80 J. BUS. ETHICS 129 (2008); James Dungan, Adam Waytz & Liane Young, *Corruption in the Context of Moral Trade-Offs*, 26 J. INTERDISC. ECON. 97 (2014); Adam Waytz, James Dungan & Liane Young, *The Whistleblower's Dilemma and the Fairness-Loyalty Tradeoff*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 1027 (2013). For the foundational social identity theory, see HENRI TAJFEL, SOCIAL IDENTITY AND INTERGROUP RELATIONS (1982).

[27] DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 13/642, paras. 4–5, *available at* http://dipbt.bundestag.de/doc/btd/13/006/1300642.pdf.

[28] *See supra* note 2 and accompanying text. Clearly, the dispute between legal positivism and natural law reaches back into ancient times.

[29] The term "natural law" is controversial, though: *See* ERIK WOLF, DAS PROBLEM DER NATURRECHTSLEHRE (1955).

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moral-giver were closely connected. Moreover, moral interpretation and knowledge were not commonly accessible but a privilege of the Church. As a result, not only Aquinas but nearly all scholastics were clerics, so that "the boundaries between legal and theological scholarship turn[ed] out to be rather porous,"[30] causing an enormously fruitful "cross-fertilization between the ius commune, the canon law tradition and the moral theological literature."[31] Aquinas came to the conclusion that any human law that defies natural law violates eternal law and, therefore, loses its moral quality, which in turn induces its destruction[32] or, in short: "Lex iniusta non est lex."[33] This view had the potential to constrain power insofar as the law was considered not only human-made but fixed to an extra-positive source. One could even rate this as an early form of checks and balances—very limited, however, due to the large power of the Church and its interlacement with the State.

In the Age of Enlightenment, the traditional authoritarian hierarchies were called into question and began to crumble. The qualitative changes in the structure and framework of society were reflected by jurisprudence. The process included severing ties to the Church's monopolized prerogative of interpretation. Consequently, the decline of the Church's influence also on legal thinking was considerable. However, it was not uncommon to espouse a strong connection between law and social morals. The consistency of law and social morality the natural lawyers envisioned helped to emancipate European societies from the existing authoritarian structures.[34] This is because it had a liberating effect that law was considered not to be imperious but fixed to an extra-positive source. Kant, the Enlightener par excellence, assumed a priori laws to be imposed by reason and, consequently, holds on to an objective source of law.[35] This can be construed as one

[30] WIM DECOCK, THEOLOGIANS AND CONTRACT LAW: THE MORAL TRANSFORMATION OF THE IUS COMMUNE (CA. 1500–1650) 38 (2013) (discussing the late Spanish scholastics).

[31] *Id.* at 40.

[32] THOMAS AQUINAS, SUMMA THEOLOGIAE I–II, question 95, art. 2 (Fathers of the English Dominican Province trans., Christian Classics 1981). *See also* Georg Wieland, *Gesetz und Geschichte*, *in* THOMAS VON AQUIN: DIE SUMMA THEOLOGIAE 223, 240 (Andreas Speer ed., 2005); Michael Baur, *Law and Natural Law*, *in* THE OXFORD HANDBOOK OF AQUINAS 238, 247 (Brian Davies & Eleonore Stump eds., 2012).

[33] This famous legal saying originates from AUGUSTINE, DE LIVERO ARBITRIO, bk. I, ch. 5, verse 11 (Anna Benjamin & L. J. Hackstaff trans., Prentice Hall 1964) (4th century): "Non videtur esse lex, quae justa non fuerit." GABRIAL NOGUEIRA DIAS, RECHTSPOSITIVISMUS UN RECHTSTHEORIE 44 (2005) gives a general explanation of this basic maxim of natural law. *See also* AQUINAS, *supra* note 32, at question 96, art. 4.

[34] MICHAEL STOLLEIS, ÖFFENTLICHES RECHT IN DEUTSCHLAND: EINE ENFÜHRUNG IN SEINE GESCHICHTE 45 (2014); Matthias J. Fritsch, *Naturrecht und Katholische Aufklärung im 18. Jahrhundert*, *in* MACHT UND MORAL: POLITISCHES DENKEN IM 17. UND 18. JAHRHUNDERT 92, 93 (Markus Kremer & Hans-Richard Reuter eds., 2007). For the development of the natural lawyers from advocates of absolutism to their role as freedom fighters, see MARTIN REULECKE, GLEICHHEIT UND STRAFRECHT IM DEUTSCHEN NATURRECHT DES 18. UND 19. JAHRHUNDERTS 127 (2007).

[35] LEWIS WHITE BECK, A COMMENTARY ON KANT'S CRITIQUE OF PRACTICAL REASON 124 (1960). Kant did, however, obviously have "a basic distinction between law and morality," right, and virtue; on this idea of Kant's The Metaphysics of

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approach to narrow down the power of the rulers who had rather absolute control and influence before. The limitation of power is an achievement of the enlightenment which led to positive consequences such as the constitution of human rights, and later, in the nineteenth century, the establishment of basic criminal procedure rules.[36]

With industrialization, the political and economic parameters changed and a devotion to science prevailed. As a result, a central idea was positivism,[37] which was also adopted by representatives of the contemporaneous jurisprudence.[38] This prevalence of legal positivism led to a legal scientific orientation of many legal scholars, who ruled out transcendental elements in the laws, and, accordingly, rejected divine or natural sources of law.[39] The formerly assumed union of law and social morals was opposed or, rather, the separation of law from morals was championed. Hence, it was assumed that even an unjust law retains its binding character. This suggests that, once the cornerstones for Western law as we know it today had been laid, the recourse to natural sources of law seemed to diminish the legal certainty more than it increased it.

But the debate on natural law never ended. In particular, it flared up again in difficult periods of transition when fundamental rights were called into question: In Germany after 1945 and in the early 1990s.[40] The failure of the legal system provoked a call for natural sources of law. But with regard to criminal law only in such extreme cases, when the law unspeakably contradicts justice, can the positivity of law be challenged.[41] For all other

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Morals. *See* STEFANO BERTEA, THE NORMATIVE CLAIM OF LAW app. 2 (2009). Generally on the difficulty of classifying Kant: ERNST LANDSBERG, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT. DRITTE ABTEILUNG, ERSTER HALBBAND 503 (1898).

[36] On the genesis of the first reform laws, see ALEXANDER IGNOR, GESCHICHTE DES STRAFPROZESSES IN DEUTSCHLAND 1532–1846: VON DER CAROLINA KARLS V. BIS ZU DEN REFORMEN DES VORMÄRZ 259–88 (2002).

[37] For basic work on the philosophy of positivism, see AUGUSTE COMTE, PLAN DE TRAVAUX SCIENTIFIQUES NÉCESSAIRES POUR RÉORGANISER LA SOCIETÉ (1822).

[38] THOMAS VORMBAUM, EINFÜHRUNG IN DIE MODERNE STRAFRECHTSGESCHICHTE 119–21 (2d ed. 2011).

[39] *Id.* at 121.

[40] LENA FOLJANTY, RECHT ODER GESETZ: JURISTISCHE IDENTITÄT UND AUTORITÄT IN DEN NATURRECHTSDEBATTEN DER NACHKRIEGSZEIT (2013).

[41] The improper law must then be replaced by a just one. For an overview of the so-called Radbruch Formula (*Radbruchsche Formel*), see Gustav Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht*, SÜDDEUTSCHE JURISTENZEITUNG 105, 107 (1946). This formula was adapted by the Federal Constitutional Court. *See* 3 BVERFGE 225; 6 BVERFGE 132; 6 BVERFGE 389; 23 BVERFGE 98; 54 BVERFGE 53; 95 BVERFGE 96. For a more modern expression of this concept, see European Convention on Human Rights, art. 7, para. 2 (incorporating the principle "no punishment without the law"). *See also* Hans-Ullrich Paeffgen, *Art. 7 EMRK*, *in* SYSTEMATISCHER KOMMENTAR ZUR STRAFPROZESSORDNUNG [SK-StPO] vol. 10, para. 41 (Jürgen Wolter ed., 4th ed. 2011). For a discussion of the so-called "weakened conjunction theory," see ROBERT ALEXY, BEGRIFF UND GELTUNG DES RECHTS 83 (1992).

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criminal law cases, legal positivism is nowadays generally acknowledged.[42] This is because social morals cannot define clear and reliable guidelines for behavior. Certainly the legislators should, on the one hand, aim at making laws that reflect existing social morals or which can be internalized by social morals, because such accepted or at least acceptable laws can easily be enforced.[43] On the other hand, however, we cannot look only to social morals for guidance.[44] First, this is due to a multitude of values in our modern society. Second, even in a hypothetical homogenous society, the question whether and to which amount certain acts have to be criminalized cannot always be deduced from social morals. Sometimes scientific measurements or mere consensus give rise to a criminal law provision: For example, in environmental criminal law, but also in public procurement directives and transparency rules.[45] This means that some laws have to be regarded as morally neutral.[46] Both variants show that social morals cannot provide a clear framework—only laws are able to provide a minimum of legal certainty. Thus, it is in the hands of the democratically legitimized legislator to decide which laws to enact—and his decision has a weighty claim to validity.[47]

Hence, laws and social morality have to be separated conceptually.[48] This applies to the bribery of foreign public officials as part of the absolute vast majority of crimes. Principally, laws and social morals are not intertwined at a criminal theoretical level.

2. The Factual Relationship Between Laws and Social Morality

In spite of this finding, criminal law is an area of law with particularly close factual ties to social morality. Criminal law itself communicates a code of conduct;[49] it prescribes future

[42] *See* Hans-Dieter Assmann, *Recht und Ethos*, *in* WELTETHOS UND RECHT 11, 19 (Anton Pelinka ed., 2011); MANFRED Rehbinder, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 28–29 (5th ed. 1995). On the broad definition of legal positivism, see WALTER OTT, DER RECHTSPOSITIVISMUS—KRITISCHE WÜRDIGUNG AUF DER GRUNDLAGE EINES JURISTISCHEN PRAGMATISMUS 106 (1976).

[43] On the theoretical foundations of this objective, see MICHAEL KUBICIEL, DIE WISSENSCHAFT VOM BESONDEREN TEIL DES STRAFRECHTS 60–61 (2013) (referencing Humboldt and Feuerbach).

[44] This is a reason for the state monopoly on the use of force. *See* PFORDTEN, *supra* note 1, at 81.

[45] They might be punishable under Strafgesetzbuch [StGB] [Penal Code], §§ 298, 299, 331–35(a).

[46] MICHAEL FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 17 (9th ed. 2014).

[47] CLAUS ROXIN, STRAFRECHT ALLGEMEINER TEIL BAND I, §2, Ch. X, para. 36–37 (3d ed. 1997).

[48] Called the *Trennungsthese* (Doctrine of the Separation of Law and Morals), see H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615 (1958).

[49] GÜNTHER JAKOBS, NORM, PERSON, GESELLSCHAFT: VORÜBERLEGUNGEN ZU EINER RECHTSPHILOSOPHIE 53 (3rd ed. 2011).

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behavior and thereby influences the social morals.[50] Even though the purpose of criminal law cannot be to shape social morality,[51] law effectively has an impact on social morals due to this reciprocal effect.

Not only are social morals influenced by the law, but also it makes sense to orientate the law toward the social morals. This is for three reasons: First, applying the law to social reality is easier the closer the law is linked to social reality—a functional argument.[52] Second, in line with the general attempt to leave the individual's freedom as unrestricted as possible, the norm addressee's inclination to respect the law should be taken into account.[53] Finally, if criminal punishment aims at restoring the applicable law,[54] it thereby confirms the society's normative identity, effectively saying, "This is how we are!" Consequently, the informal norms of social morality have to be considered when interpreting or applying the law.[55] In the words of the German Federal Constitutional Court in its judgment on the Treaty of Lisbon:

> Every criminal provision contains a decision to penalize a certain behavior based on a social-ethical condemnation furnished with state authority . . . . It is a fundamental decision, to which degree and in which areas a polity employs criminal legislation to enforce its code of conduct, which is pillared on its values. Therefore, the violation has to be considered so grave and unbearable for coexistence in society by the common conviction that it requires punishment.[56]

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[50] This feature of the criminal law was described as *Kulturhebel*, a lever for culture, by the famous German legal scholar Franz von Liszt. *See* Franz von Liszt, *Einheitliches mitteleuropäisches Strafrecht*, 38 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 1, 3–5 (1917). In contrast to Liszt, the described procedure is not so much meant as a deliberate measure, but as a psychological automatism. *See* BRITTA BANNENBERG, KORRUPTION IN DEUTSCHLAND: PORTRAIT EINER WACHSTUMSBRANCHE 29 (2004) (arguing that not criminalizing a behavior would mean to encourage it).

[51] For more enlightenment on this issue, see KUBICIEL, *supra* note 43, at 22–23 (analyzing Hobbes, Locke, Pufendorf, Kant, Feuerbach, et al.)

[52] *See* MAX ERNST MAYER, RECHTSNORMEN UND KULTURNORMEN 10 (1903). *See also* KUBICIEL, *supra* note 43, at 196–97.

[53] INO AUGSBERG, DIE LESBARKEIT DES RECHTS 180 (2009).

[54] Followers of the theory of positive general deterrence assume this.

[55] On the theory of positive general prevention, see generally Michael Baurmann, *Vorüberlegungen zu einer empirischen Theorie der positiven Generalprävention*, GOLTDAMMER'S ARCHIVE FÜR STRAFRECHT 368–84 (1994).

[56] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08, para. 355 [hereinafter *Judgment of June 30, 2009*]. Author's translation.

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This means that by protecting certain legal interests, criminal law conveys fundamental beliefs of a society.[57] For this reason, criminal legislation is considered a national matter, a *domaine réservé,* for the national legislation: For the specific jurisdiction a legal interest is deemed so valuable that even criminal law is a justified means to its protection.[58] In sum, it can be said that there is and should be a factual connection between laws and social morals.

3. Intermediate Conclusion

Notwithstanding that social morality and law have to be distinguished dogmatically, they are closely connected in actual fact. The factual connection is favorable for both and should therefore be harnessed in the application of the law. Thus, the overall aim is clear: The gap between social morals and anti-corruption law has to be bridged. But how can this actually work?

III. Bridging the Gap Between Social Morals and Anti-Corruption Law

The quoted passage from the German Federal Constitutional Court[59] only prods to the strong link between criminal law and social morality, but it does not say anything about how to further develop the two. If socioeconomic conditions change—just as they currently do in relation to globalization—what needs to change first: The law or the social morality? Does the law co-develop the social morality or do social-ethical beliefs shape the law?

> Jede Strafnorm enthält ein mit staatlicher Autorität versehenes sozialethisches Unwerturteil über die von ihr pönalisierte Handlungsweise. . . . Es ist eine grundlegende Entscheidung, in welchem Umfang und in welchen Bereichen ein politisches Gemeinwesen gerade das Mittel des Strafrechts einen in ihren Werten verankerten Verhaltenskodex, dessen Verletzung nach der geteilten Rechtsüberzeugung als so schwerwiegend und unerträglich für das Zusammenleben in der Gemeinschaft gewertet wird, dass sie Strafe erforderlich macht.

For this reason, the German Federal Constitutional Court concludes that criminal law generally is a state matter—an opinion that it mitigated in its subsequent decisions.

[57] HANS HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 50–51 (1996). On the protection of social morals—the objectified feeling—by criminal law, *see* KUBICIEL, *supra* note 42, at 69–71.

[58] Michael Kubiciel, *Einheitliches europäisches Strafrecht und vergleichende Darstellung seiner Grundlagen*, 2 JURISTENZEITUNG [JZ] 64, 65 (2015) (providing also further references).

[59] *See Judgment of June 30, 2009* at para. 355.

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1. Laws Go First

Whenever new societal problems arise, social and legal norms must be reconsidered. In this context, Franz von Liszt opined that law should be used as *Kulturhebel*, a lever for culture.[60] Laws are made, and the social morals have to assimilate in order to be advanced. This means that the socially shared values are not self-created, but imposed externally. The inevitable assimilation process is characterized by a massive compulsory element.[61] Moreover, psychological findings show that internalized norms are better accepted and obeyed than ones that are forced on a society against their will.[62]

Hence, anti-bribery laws should not be created with the aim to educate and discipline people against their complete will and values. If the social-moral ground is not at all prepared, it is not wise to ratify the international conventions.

2. Social Morals Go First

The German legal philosophers Max Ernst Mayer and Erik Wolf were exponents of the opposite approach. As Mayer put it pointedly, "There is no behavior which is inhibited by the state but not by culture."[63] They were of the opinion that values exist as sociocultural assets in a society.[64] In their view, it is the task of the legislator to pick up "the cultural claims, which have stood the test of time, and pour them into a new mould [sic]; . . . the law."[65] This way, social-cultural assets are transformed into legal assets.[66] Thus, criminal law conceptualization has a "value-referring method."[67]

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[60] Franz von Liszt, *supra* note 50, at 3.

[61] Michael Kubiciel, *Strafrechtswissenschaft und europäische Kriminalpolitik*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 742, 748 (2010).

[62] DIETER HERMANN, WERTE UND KRIMINALITÄT: KONZEPTION EINER ALLGEMEINEN KRIMINALITÄTSTHEORIE 70 (2003).

[63] MAYER, *supra* note 52, at 20. *See also* ERNST RUDOLF BIERLING, ZUR KRITIK DER JURISTISCHEN GRUNDBEGRIFFE I (1877); GEORGE JELLINEK, ALLGEMEINE STAATSLEHRE (1900).

[64] An idea known as *soziales Kulturgut*. *See* ERIK WOLF, DIE TYPEN DER TATBESTANDSMÄSSIGKEIT: VORSTUDIEN ZUR ALLGEMEINEN LEHRE VOM BESONDEREN TEIL DES STRAFRECHTS 8–9 (1931). For more on Erik Wolf, see KUBICIEL, *supra* note 42, at 73; MAYER, *supra* note 52, at 19.

[65] MAYER, *supra* note 52, at 19. *See also* RUDOLF VON JHERING, GEIST DES RÖMISCHEN RECHTS, Vol. 2, § 1, 45 (1854).

[66] The difference between Wolf and Mayer is that Wolf thinks that the sociocultural assets have to be transferred into state assets before becoming a legal asset. *See* WOLF, *supra* note 64, at 9.

[67] A concept known as *wertbeziehende Methode der strafrechtlichen Begriffsbildung*. *See* WOLF, *supra* note 64, at 8.

This view is no longer convincing. Its prerequisite is a consistent and differentiated canon of values—one that no longer exists in our pluralistic society. Additionally, the business conditions in which white collar crimes are committed do not change so gradually that neither social morals nor the legislator can keep up.[68] Conclusively, the legislator cannot always and exclusively follow social morals and make them precursors for the advancement of the laws.

3. Laws and Social Morals Running Together

Consequently, neither laws nor social morals alone can take the lead role in developing new norms. Instead, a communication process, in which transnational anti-bribery laws and social morals mutually evolve, is necessary. The question is how to realize such a channeled and output-driven communication. For this, I would like to present a hypothesis: The best way to realize this communication process is to create relatively broad criminal provisions and leave it to the legal practitioners to specify the law with the use of case groups, and to translate anti-bribery laws into concrete action instructions or "best practices" for their specific area of business.

As an actual matter of fact, the scopes of most white-collar crime provisions are already ample and characterized by indefinite legal terms.[69] Most certainly, this holds true for anti-bribery statutes. At the moment, the wide scope of these statutes is not appreciated as an advantage but as a common subject of criticism. This happens with a view to the principle of legal certainty and the principle of last resort, which are both traditionally important concepts of the German criminal law due to its significant bearing on constitutional rights.[70] And indeed, as a general rule, the constancy of laws provides mutual trust in the field of law because it ensures the predictability of legal decisions.

The drawback is, however, that narrow criminal provisions balk at a flexible application of the law and occasionally hamper just verdicts more than they promote them. As shown above, this becomes particularly acute when it comes to white-collar crime because rigid laws tend to have difficulties in adjusting to the ever-changing conditions encountered here.[71] The multifarious nature of bribery and its rapidly changing socioeconomic

[68] *See supra* Part B.I.2.

[69] *See* BRETTEL & SCHNEIDER, *supra* note 14, at § 2, para. 6; Gerhard Dannecker, *Die Entwicklung des Wirtschaftsstrafrechts*, *in* HANDBUCH DES WIRTSCHAFTS- UND STEUERSTRAFRECHTS, para. 108 (Heinz-Bernd Wabnitz & Thomas Janovsky eds., 4th ed. 2014).

[70] Claus Kreß, *Nulla Poena Nullum Crimen Sine Lege*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1–2 *available at* www.mpepil.com; on criminal law as *ultima ratio* in the business context, *see* ANJA NÖCKEL, GRUND UND GRENZEN EINES MARKTWIRTSCHAFTSSTRAFRECHTS 225–27 (2012).

[71] *See supra* part B.I.2.

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conditions continuously produce unforeseeable forms of conduct. Whether a specific act falls under a criminal provision might be a matter of chance if anti-foreign bribery laws are too narrow.

In the context of a highly dynamic, increasingly specialized, and disaggregated landscape, broad criminal provisions leave enough flexibility to bridge the gap to social morals. Legal practitioners then have to function as a communication hinge between laws and social morals. In this regard, the courts and the companies are of paramount importance. Why they can act as communication interface between anti-foreign bribery provisions and social morals is going to be described in the following—both from the legal and the social-moral perspective.

3.1 The Role of the Judiciary from a Legal Perspective and a Social-Moral Perspective

The broad provisions make interpretations necessary, but this also gives the courts the discretion to respond to the changing realities. In applying laws to the specific facts of a case, the courts put the widely conceived provisions into concrete terms by creating case groups in order to adjust the anti-corruption laws to the practical needs.[72] They can thereby empathize with the "vividly developing mind that wants to progress with and to adjust to the conditions of life" instead of reading "dead letters."[73] By applying the criminal provisions to the specific case in question, the courts act as an important communication pivot because they amplify the aims expressed by the laws.

This judicial communication performance is also important from a social-moral point of view. Large trials often trigger public debates, which at their core are processes of self-reflection and updates of the prevailing social morality. The court rulings then confirm the validity of norms and, thus, help to harmonize social-moral and legal standards.

Whenever there is a growing conviction among the citizens that unfair judgments are passed, they have the opportunity to exert political pressure through their representatives. The legislator has the opportunity to react to this in order to make sure that the criminal law does not lose touch with social mores.[74]

[72] With a view on white-collar crime, *see* BUELL, *supra* note 8, at 858; THOMAS, *supra* note 12, at 976.

[73] Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 29, 1957, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 718–19.

[74] *See supra* part B.II.2; seeing this danger, *see* HELMUT FIEBIG & HENRICH JUNKER, KORRUPTION UND UNTREUE IM ÖFFENTLICHEN DIENST—ERKENNEN, BEKÄMPFEN, VORBUGEN 17 (2004).

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3.2 The Role of Companies from the Employee Perspective

Legal sociologist Kai Bussmann revealed in his research that employees are not as concerned about the legal situation as they are about the business ethics of their company.[75] Assumedly, the same holds true for administrative officers regarding internal administrative guidelines. This means that criminal law, on its own, experiences difficulties in keeping contact with social morals in the business context. For an effective fight against foreign bribery, it is therefore important to include corporations and administrations. They can establish codes of conduct adapted to their field of business. The general advantage is that these rules are tailor-made solutions, which, ideally, hamper innovation and competition less than static laws.[76] The specific advantage for the employee is that he or she knows exactly which business activities are allowed. Thus, internal business or administrative guidelines have a bridging function between laws and social morals.

3.3 The Role of Companies from the Company Perspective

The remaining question is: Why should companies accept their role as communication hinges and enact codes of conduct?[77] In Germany, a corporate criminal law does not yet exist.[78] Thus, corporations cannot be subject to direct criminal investigations. Nevertheless, it is in the interest of corporations that their employees behave compliantly. First, even though it is not punishable under criminal law, a corporation can be fined with administrative penalties for countenancing corruption. But these fines do not regularly exceed the skimmed-off excess profits by a significant amount.[79] From a company's perspective, being publicly identified as a corrupt corporation might sometimes be even more fatal than administrative penalties, because the companies suffer considerably from bad publicity and reputation damages. A study by the World Economic Forum of 2012 showed that a reputation constitutes more than a quarter of a company's market value.[80]

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[75] Kai Bussmann, *Wirtschaftskriminalität und Unternehmenskultur—Empirische Betrachtungen*, *in* DAS VERBOT DER AUSLANDBESTECHUNG: STRAFGRUND, DURCHSETZUNG, PRÄVENTION (Michael Kubiciel & Elisa Hoven eds., forthcoming Jan. 2016).

[76] Kai Bussman, *Business Ethics und Wirtschaftsstrafrecht—Zu einer Kriminologie des Managements*, 86 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM 89, 95 (2003).

[77] *Id.* at 94.

[78] On the ambitions to change this, *see* Michael Kubiciel, *Verbandsstrafe—Verfassungskonformität und Systemkompatibilität*, ZEITSCHRIFT FÜR RECHTSPOLITIK 133, 136–37 (2014); Thomas Fischer & Elisa Hoven, *Unternehmen vor Gericht?*, ZIS 32 (2015).

[79] "Gewinnabschöpfung" in German. *See* Gesetz über Ordnungswidrigkeiten [OWiG] [German Administrative Offenses Act] Feb. 19, 1987, § 130.

[80] Deloitte, *2014 Global Survey on Reputation Risk*, 4 (2014), http://www2.deloitte.com/content/dam/Deloitte/pl/Documents/Reports/pl_Reputation_Risk_survey_EN.pdf.

Thus, reputational risks are the "top strategic business risks."[81] Reducing reputational risks means living by high business ethics.[82] Social-morally unacceptable behaviors, which could annoy the stakeholders, have to be abolished.[83]

This makes corporations an interface between laws and social morals: If they do not act in accordance with legal *and* social-moral standards, they suffer financial losses. For example, joint-stock companies are likely to lose a significant market share of their value due to corruption scandals. Consequently, companies have a strong motivation to put the broad criminal law provisions into concrete terms and specify them for their field of business by giving themselves results-driven codes of conduct. Accordingly, Siemens says on its homepage, "Good corporate citizenship is the basis of our reputation and our long-term success."[84]

Even though companies certainly do not make their business decisions on moral grounds but rather out of economic reasons, they serve as a communication medium between laws and social morals. Out of self-interest and in due consideration of the prevailing social morals, they "translate" criminal law provisions into best practices and, thus, fill them with life.

4. Intermediate Conclusion

Altogether, this means that the judicial branch and the business and administrative directives function as communication interfaces between laws and social morals with the aim of increasingly converging the two by finding new solutions to new problems.[85] The courts have to take the laws as a starting point and limit of any ruling,[86] but they also take "social adequacy" and the "appearance of venality" as a correction possibility to guarantee

[81] *Id.*

[82] *See* Tiago Melo & Alvaro Garrido-Morgado, *Corporate Reputation: A Combination of Social Responsibility and Industry*, 19 CORPORATE SOC. RESPONSIBILITY & ENVTL. MGMT. 11, 11 (2012) ("Corporate social responsibility (CSR) is a key driver of corporate reputation."); Ying Cao, Linda A. Myers & Thomas C. Omer, *Does Company Reputation Matter for Financial Reporting Quality? Evidence from Restatements*, 29 CONTEMPORARY ACCOUNTING RESEARCH 956, 957 (2012–13) (showing the inverse relationship: "companies with higher reputations are less likely to misstate their annual financial statements").

[83] A survey of 1,699 CGMA designation holders in ninety-nine countries revealed that the motivation to embed ethical standards was primarily (eighty percent) driven by the reputational views of the stakeholders. *See* CGMA ETHICS SURVEY (2014), *available at* http://www.cgma.org/magazine/news/pages/201411062.aspx.

[84] *See Corporate Responsibility*, SIEMENS (2014), https://www.siemens.co.kr/en/company/aboutus_citizenship.asp.

[85] On this in more theoretical terms, *see* KUBICIEL *supra* note 43, at 44–45.

[86] In Germany, the precedence of statutes already arises from the constitution *see* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, Arts. 20(iii), 28(i)(1), 97(i).

the reference to social moral standards with regard to corruption.[87] Even though the principle of last resort dictates that criminal law is used as an *ultima ratio* rather than a *prima ratio*, the communication process helps to figure out, negotiate, stipulate, update, and affirm terms of compliant behavior. Indeed, there is no quick and final solution on how to regulate the specific area of white-collar crime, but this approach helps to reach appropriate verdicts without disregarding the legality principle. This makes awareness-raising crucial in the battle against corruption: Both legislators and the public have to constantly scrutinize and develop their views on specific questions of corruption.

Furthermore, the evaluation and measurement of the concrete application and interpretation of the harmonized laws should be considered. Until now, anti-corruption reports and development studies only review the number of corruption cases and whether the international conventions have been enforced. They do not point out which cases have been subsumed under which laws—partly because the number of cases has been very low up to now. Future studies could provide a detailed comparison of the different cases once the anti-corruption measurements are deemed effective and produce a higher number of judgments.

IV. Considerations on "Anti-Corruption Law as Moral Imperialism"

We have already seen that law must not be used as a "lever of culture." In the context of the global anti-foreign bribery policy, it is a common reproach, however, that the transnational legislative efforts are exactly such a lever.

In the following section, I would like to respond to the concerns raised regarding the transnationalization of social moral beliefs: Is there really a potential danger to social morals due to anti-foreign bribery laws? Are these laws tending to restrict the freedom of living out cultural particularities?

1. What is Moral Imperialism?

The mere fact that foreign bribery is tackled globally is sometimes described as imperialistic.[88] Imperialism is generally defined as "the effect that a powerful country or group of countries has in changing or influencing the way people live in other, poorer countries."[89] With respect to the fight against foreign bribery, the reproached imperialism has two components: a legal and a cultural one.

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[87] THOMAS, *supra* note 12, 980-981; on the German concept of social adequacy, see generally THOMAS EXNER, SOZIALÄQUANZ IM STRAFRECHT 58 (2011).

[88] Bernd Schünemann, *Das Strafrecht im Zeichen der Globalisierung*, GA 299 (2003).

[89] MERRIAM WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/imperialism.

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The first relates to the question of jurisdiction.[90] Enacting the offense of foreign bribery means to criminalize cross-border cases. Even so, the general rule is the so-called "Principle of Territory," which has its reason in protecting the sovereignty of a state.[91] But whether anti-foreign-bribery laws are still in line with international law or have to be defined as an act of legal imperialism cannot be discussed here, but has to be canvassed elsewhere.[92] The issue, which arises with regard to the relationship of social morality and laws in the context of foreign bribery, is moral imperialism. This term is used to criticize the international anti-corruption efforts that undeniably bear unmistakable signs of Western influence.[93] The reproach is that the Western majority forces value-laden standards by legal decree on cultural minorities.[94] It is argued that the rules in the anti-bribery conventions are not in any real sense applicable to other cultural areas. "[S]maller-scale payments, tokens, gratuities, and hospitalities are difficult to characterize with certainty as either corrupt or innocuous across cultures."[95] Criminalizing them would therefore mean to accept "potentially serious social costs."[96] Whether the reproach of moral imperialism is convincing is subject to the following considerations.

It should be stated at the outset that the stigma of cultural imperialism regularly arises in the context of legislative changes that affect more than just one culture. In this context, it must be noted that jurisdictions and cultures are not necessarily congruent. A single state may be decidedly multicultural. In fact, one could argue that nowadays societies with a multitude of cultures are the norm rather than an exception.[97] Further, at the international

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[90] *See* SCHÜNEMANN, *supra* note 88; discussing Schünemann's approach *see* SEBASTIAN WOLF, DER BEITRAG INTERNATIONALER UND SUPRANATIONALER ORGANISATION ZUR KORRUPTIONSBEKÄMPFUNG IN DEN MITGLIEDSSTAATEN 74 (2007).

[91] H. LOWELL BROWN, BRIBERY IN INTERNATIONAL COMMERCE § 4:16 (2003).

[92] *See, e.g.,* H. Lowell Brown, *Extraterritorial Jurisdiction Under The 1998 Amendments To The Foreign Corrupt Practices Act: Does The Government's Reach Now Exceed Its Grasp?*, 26 N.C. J. INT'L L & COM. REG. 239, 319–24.

[93] Jessica A. Lordi, *The U.K. Bribery Act: Endless Jurisdictional Liability On Corporate Violators*, 44 CASE W. RES. J. OF INT'L L., 955, 984–85; Lester A. Myers, *Art. Corruption*, *in* ENCLYOPEDIA OF WHITE-COLLAR AND CORPORATE CRIME 226, 231 (Lawrance M. Saliger ed., 2013); Charles F. Smith & Brittany D. Parling, *"American Imperialism": A Practitioner's Experience With Extraterritorial Enforcement Of The FCPA*, U. OF CHI. LEGAL F. 237, 248 (2012).

[94] Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Harmony*, 20 MICH. J. OF INT'L L. 419, 422 (1999).

[95] Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657, 684 (2000).

[96] *Id.* at 685; *see also* Joongi Kim & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 PAC. RIM L. & POL'Y J. 549, 578–80 (1997).

[97] Societies with a diversity of indigenous cultures, especially the post-colonial ones like Australia, have a long history of finding solutions to this problem. *See* Sam Garkawe, *The Impact of the Doctrine of Cultural Relativism on the Australian Legal System*, 14 MURDOCH U. ELEC. L.J. Vol. 2 No. 1 (1995).

level, the reproach of cultural imperialism does not only appear in the context of international bribery conventions, but is even more often subject of discussions concerning other areas, particularly human rights.[98] When put in perspective, it becomes clear that in regard to foreign bribery, the problem is actually far less dramatic than in the abovementioned contexts. Nevertheless, it is still a serious accusation that will be discussed critically in the following section.

2. Are Transnational Legislative Efforts Against Corruption "Moral Imperialism?"

For this purpose, the following four groups of cases have to be distinguished: Criminalization of active bribery and passive bribery, as well as criminalization of cases in a member state and of those in a non-member state. The most substantial encroachment would be the criminalization of passive bribery in a state that is not a member of an international anti-corruption convention. Nevertheless, the most important conventions do not contain (obligatory) rules concerning passive bribery.[99]

In contrast, the least culture-intrusive measure is when a state decides to join one of the conventions and become a member state. This instance can on no account be declared as imperialism—even in the most coercive scenario in which a state was under political pressure when it ratified an anti-foreign bribery convention. Even in this case, the concept of sovereignty and maturity of states has to be cherished. Disregarding a state's consent to an international convention would mean to reduce its autonomy. It is in its responsibility to withstand the pressure and to decide whether opposing national cultural characteristics exist and how to deal with them.

3. Specification: Active Bribery in a Non-Member State

Nevertheless, the question remains whether the criminalization of active bribery in a non-member state is an act of moral imperialism. German scholar Sebastian Wolf denies this and thereby refers to the 140 members of the UN Convention, which are mostly developing countries. Not only have they ratified the conventions by their own choice, but they also go far beyond their obligatory scope when transferring it into national law.[100] Following this reasoning, the vast majority cannot be defined as a victim of moral imperialism. But for all that, the reproach of moral imperialism remains relevant in cases to be discussed, in which the state has not ratified the convention. Criminalizing active

[98] David Pimentel, *Rule of Law Reform Without Cultural Imperialism?,* 1, 5 HJRL 2 (2010).

[99] *See, e.g.*, United Nations Convention Against Corruption Arts. 4, Art. 16(i)–(ii) (2005) (protecting explicitly "the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of States").

[100] WOLF, *supra* note 90, at 73.

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bribery abroad does not only protect the home country against corruption and its consequences; it also changes the business practices in the other state. A German businessman might refrain from bringing a customary gift for a host public official in Sudan if he fears to be prosecuted for this at home.

First, it has to be noted that corrupt structures cannot be properly declared characteristics of a society. Sociologic studies revealed that corruption is not an integral part of a traditional culture but often merely a lack of development and education.[101] Moreover, the affected societies are only those for which trade plays a significant role, because otherwise the foreign bribery laws would not affect them. It follows: Whenever a society decides to trade with another society, it decides to interact. It exposes itself to the danger that some of its cultural habits and traditions are not only perceived emically but also from an etic point of view. As a result of close ongoing business relationships with other cultures, the business practices may already change or at least get a different meaning. A business interaction always consists of two or more participants—neither of which can claim the right to set the rules unilaterally. Whether a gift is meant as a nice gesture without any ulterior motives or as a straightforward bribe is not only determined by legal decree but also through the interactions of the cultures themselves.

Engaging in business activities means opening up to foreign spheres; the resulting coalescence is the core of globalization. A culture is always in a state of flux and changes in the course of time. Generally speaking, it therefore seems auspicious to perceive global changes not merely as a danger but primarily as an opportunity for economic growth and prosperity, as well as a critical reflection on values and behavior and the development of a cultural identity. Thus, a change in norms does not result from an act of paternalism but from a self-determinative behavior of the state—namely, to enter the world market. This is also because most states have the opportunity to join the international initiatives and take part in their negotiation processes in order to influence the outcome. This would be welcome as it seems likely that anti-corruption strategies in due consideration of cultural idiosyncrasy are more sustainable than those ignoring cultural distinctions.[102] After all, the accusation of moral imperialism due to the conventions that prohibit active foreign bribery

[101] Dorothea Schulz, *Die Demand Side: Realitäten der Korruptionsbekämpfung in Afrika*, *in* DAS VERBOT DER AUSLANDBESTECHUNG: STRAFGRUND, DURCHSETZUNG, PRÄVENTION (Michael Kubiciel & Elisa Hoven eds., forthcoming Jan. 2016) (discussing the reasons for corruption in Africa—lack of information and lack of experience with the rule of law); *See also* OECD, FIGHTING CORRUPTION IN EASTERN EUROPE AND CENTRAL ASIA: ANTI-CORRUPTION REFORMS IN EASTERN EUROPE AND CENTRAL ASIA, 38 (2013). This is also why Indonesia—one of the most corrupt countries of the world according to Transparency International—focuses in its fight against corruption on education. *See* GOV'T OF INDONESIA, NATIONAL STRATEGY ON CORRUPTION PREVENTION AND ERADICATION 21 (trans. UNODC, 2012), https://www.unodc.org/documents/indonesia//publication/2012/Attachment_to_Perpres_55-2012_National_Strategy_Corruption_Prevention_and_Eradication_translation_by_UNODC.pdf.

[102] *See generally Corruption and Integration. Combatting Corruption Globally: Cultural Imperialism or Integrating Movement towards a World Society?*, U. CONSTANCE, *available at* https://www.exzellenzcluster.uni-konstanz.de/572.html.

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in non-member states cannot be sustained. The anti-foreign bribery policies are part of a mutual evolution.

C. Conclusion

Combating corruption is an immense task that occupies a considerable amount of financial and personal resources and can therefore only be achieved with public support. Therefore, it is of great significance to prevent an alienation of criminal law and social morals. However, this seems particularly challenging in regard to foreign bribery. The path to synchronizing social morals and anti-corruption laws suggested in this paper is to focus the attention on the courts and business or administrative directives. These are flexible tools that can easily adapt to the special needs of the various guises of foreign bribery—while a comprehensive legal framework still exists. For the purpose of responding to these processes, it would be crucial to reflect on the concrete applications of the laws not only by the legislative branch and the criminal jurisprudence, but also by anti-corruption evaluation and measurements.

The short analysis of the criticism has shown that the fight against foreign bribery does not have its fundamentals to be called into question. The accusation of cultural imperialism turned out to be groundless. Even though criminal laws that contradict the social morality could turn out to be problematic, the special case of legislation against foreign bribery does not affect countries adversely. Or, to use the words of Horace again: The laws against foreign bribery are neither empty nor without good morals.

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