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THEORISING CORRUPTION IN THE GLOBAL SOUTH: A MULTI-JURISPRUDENTIAL APPROACH

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ABSTRACT

This article contributes to ongoing discussions on corruption by calling for the application of a multi-jurisprudential approach towards understanding corruption in the Global South (using Nigeria as an example). Accordingly, three prominent legal theories are discussed, namely, Law and Economics, Critical Legal Studies, and Legal Realism, and their respective contributions to anti-corruption normativity efforts. While the Law and Economics approach is useful in understanding the mechanics behind corruption, that is, what motivates an individual to engage in or refrain from corrupt activities, the Critical Legal Studies approach questions the Northern-centred character of most anti-corruption literature and policies. Finally, a Legal Realism lens is employed to make a formidable appeal for an interdisciplinary approach towards understanding and solving the corruption problem.

Keywords: Law and Economics, Critical Legal Studies, Legal Realism, Corruption.

1.0. INTRODUCTION

"Corruption is an ignored pandemic."[1] Of late, there has been pandemonium across the globe due to emergence of the new coronavirus strain – COVID-19. Reflecting on the world's reaction to the virus and on corruption, we observe that corruption and COVID-19 share certain characteristics. For one, both are pandemics for

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[1] T. Burki, "Corruption is an 'Ignored Pandemic'" (2019) 19(5) *The Lancet Infectious Diseases*, p. 471.

which no holistic cure has been engineered.[2] The corruption problem is even more acute in these times as there are fears that COVID-19 is being used as a cloak to hide corrupt activities – that is, in terms of securing lucrative contracts for the production and supply of medical supplies.[3] With this in mind and considering that corruption is a global problem, there is an urgent need for scholars and experts to further study corruption with a view to understanding what it is and its attendant ramifications. This, therefore, leads us to ask, "What is corruption?" As with many other subjects, the term "corruption" has no widely accepted definition. Rose and Peiffer assert that:

> The meaning of corruption cannot be determined by citing whatever is recorded in a dictionary. It is socially constructed according to the context in which it is used and the normative standards of those using the term[4]

Notwithstanding this, a working definition is useful, and definitions put forward by the Organisation for Economic Co-operation and Development (OECD) and Transparency International are good starting points. The OECD defines corruption as "the active or passive misuse of powers of public officials (appointed or elected) for private, financial or other benefits."[5] Transparency International also provides a similar definition of corruption as, "the abuse of entrusted power for private gain. It can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs."[6] Essentially, corruption is the opposite of good governance as it affects the provision of quality public service and democracy. Corruption is also a universal problem – in the Global South and

[2] As at the time of writing this paper.

[3] S. Steingrüber, M. Kirya, and S. Mullard, "Corruption in the Time of COVID-19: A Double-Threat for Low Income Countries", available at https://www.u4.no/publications/corruption-in-the-time-of-covid-19-a-double-threat-for-low-income-countries (accessed 19 December 2020).

[4] R. Rose and C. Peiffer, "Understanding Corruption in Different Contexts" in H.M. Grimm (ed), *Public Policy Research in the Global South: A Cross-Country Perspective* (2019), p. 29.

[5] OECD, "Glossary of Statistical Terms - Corruption Definition", available at https://stats.oecd.org/glossary/detail.asp?ID=4773 (accessed 24 July 2020).

[6] Transparency International, "What is Corruption?", available at https://www.transparency.org/what-is-corruption (accessed 24 July 2020).

North.[7] Prevailing research, however, indicates that it is more prominent in the South.[8] Transparency International's 2019 Corruption Perception Index, in particular, seems to suggest this. From the Index, it can be observed that the top 20 countries are developed economies scoring between 75 and 87 and the last 20 countries are developing economies scoring between nine and 23.[9]

One of the main challenges with defining corruption lies in describing what corruption actually is, and this is because it takes numerous forms. Literature is replete with such descriptions and categories of corruption. This could range from the acceptance of a bribe, gifts, favours, in exchange for the provision of a public service or even the use of violent means – including harassment or bullying – to gain some benefit.[10] In terms of categories, scholars have identified petty and grand corruption and a myriad of other categories.[11] Petty corruption

[7] G.O. Apata, "Corruption and the Postcolonial State: How the West Invented African Corruption" (2019) 37(1) *Journal of Contemporary African Studies*, available at https://doi.org/10.1080/02589001.2018.1497292 (accessed 19 December 2020).

[8] B.A. Olken and R. Pande, "Corruption in Developing Countries", (2012) 4 *Annual Review of Economics*, available at https://www.annualreviews.org/doi/abs/10.1146/annurev-economics-080511-110917 (accessed 19 December 2020).

[9] Transparency International, "Corruption Perceptions Index 2019", available at https://www.transparency.org/en/cpi/2019/results (accessed 24 July 2020). The purpose of the Corruption Perception Index is to rank 180 countries and territories by their perceived levels of public sector corruption. The Index uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean.

[10] S.D. Morris, "Forms of Corruption", available at https://www.ifo.de/DocDL/dicereport211-forum2.pdf (accessed 24 July 2020); P.C. Kratcoski, "Introduction: Overview of Major Types of Fraud and Corruption" in P.C. Kratcoski and M. Edelbacher (eds.), *Fraud and Corruption: Major Types, Prevention, and Control* (2018), p. 3.

[11] For a broader understanding of petty and grand corruption, see S. Rose-Ackerman, "Corruption & Purity" (2018) 147(3) *Daedalus,* available at https://www.amacad.org/publication/corruption-purity (accessed 19 December 2020), pp. 98-110; B. Mashali, "Analysing the Relationship between Perceived Grand Corruption and Petty Corruption in Developing Countries: Case Study of Iran" (2012) 78(4) *International Review of Administrative Sciences,* p. 775. In A. Cuervo-Cazurra, "Better the Devil You Don't Know: Types of Corruption and FDI in Transition Economies" (2008) 14(1) *Journal of International Management,* p. 12, Cuervo-Cazurra talks about arbitrary and pervasive corruption. In M. Bac, "The Scope, Timing, and Type of Corruption" (1998) 18(1) *International Review of Law and Economics*, p. 101., Bac discusses individual versus organized

refers to the incidences of corruption that occur on a rather small scale and quite frequently in respect of day-to-day transactions, and grand refers to outright misappropriation of public funds, diversion of public funds to private hands, using public office for private gains.[12] The list goes on. This article seeks to add to these ongoing discussions which attempt to unpack corruption, by adopting a multi-jurisprudential approach towards understanding corruption in the Global South, using Nigeria as an example.

2.0. A PROPOSED MULTI-JURISPRUDENTIAL APPROACH

Several corruption theories have been developed across varying disciplines which attempt to ascertain the "characteristics, cause, and consequences of corruption".[13] Here, Law's contribution to the discourse will be discussed through three prominent legal theories, namely, Law and Economics, Critical Legal Studies, and Legal Realism. I suggest a multi-jurisprudential analysis of this nature because it provides a platform for scholars to scrutinize the corruption problem from a myriad of perspectives. It is hoped that a combination of these perspectives will reveal a much clearer picture and pave way for more comprehensive and effective anti-corruption measures.

2.1. A Law and Economics Approach

As previously stated, corruption is endemic and has persisted for several years despite the existence of anti-corruption laws.[14] The World Bank has pointed out that there is a need for research on

corruption; See *Definitions of Corruption*, Research Brief 48 (Public Safety Canada) available at https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rgnzd-crm-brf-48/index-en.aspx (accessed 24 July 2020).

[12] Rose-Ackerman, *supra* n 11, at p. 101; S. Rose-Ackerman, "Corruption: Greed, Culture, and the State", (2010) 120 *The Yale Law Journal,* available at https://www.yalelawjournal.org/forum/corruption-greed-culture-and-the-state (accessed 24 July 2020).

[13] Y.J. Kim and E.S. Kim, "Exploring the Interrelationship between Public Service Motivation and Corruption Theories" (2016) 4(2) *Evidence-based HRM,* p. 182.

[14] A. Shleifer and R.W. Vishny, "Corruption" (1993) 108(3) *The Quarterly Journal of Economics,* p. 599.

corruption to look into the fundamental question of why it persists.[15] In taking up this challenge put forward by the World Bank, a Law and Economics approach proves useful.

Generally, a Law and Economics approach involves either the use of economic methods to solve legal problems or examining how laws affect the market.[16] In this article, the subject of corruption will be discussed using the first approach. This approach is geared towards understanding various considerations that come into play when a rational individual is deciding whether or not to engage in corrupt activities by applying the economic model. Before we delve into this, however, it is useful to keep in mind a key assumption of the economic model, which is that people act in their personal interest.[17] The economic model is useful to the corruption discourse in numerous ways. For example, it helps us "determine the marginal utility of a proposed action" in order to predict whether a person will take a particular action.[18] From this, we can investigate the possibility of an increased sanction serving as a deterrent.[19] We can also "gauge the marginal social utility of that increased sanction by comparing the marginal social costs and benefits."[20]

The concept of "marginalism" or "marginal utility" discussed above is an economic theory which explains, with mathematical precision, why a person would be willing to pay the full price for the cost of a hot plate of jollof rice, and not be willing to pay the same price for her

[15] The World Bank, *Anticorruption in Transition: A Contribution to the Policy Debate* (Washington, DC: World Bank, 2000). See also R. Damania, P.G. Fredriksson, and M. Mani, "The Persistence of Corruption and Regulatory Compliance Failures: Theory and Evidence" (2004) 121(3/4) *Public Choice,* p. 363.

[16] R.L. Hayman et al (eds.), "Law and Economics" in *Jurisprudence: Classical and Contemporary: From Natural Law to Postmodernism*, American casebook series, 2nd ed. (2002). See also A. Marciano (ed), *Law and Economics: A Reader*, 1st ed. (Routledge: Kindle, 2013). Posner talks about the economic analysis of law in R.A. Posner, *Economic Analysis of Law*, 7th ed. (Aspen Publishers: New York, 2007).

[17] Hayman et al, *supra* n 15.

[18] *Ibid*, at 302.

[19] *Ibid*. That is, in terms of marginal deterrence (an approach by which the probability of severe crimes being committed are limited by varying penalties for lesser crimes).

[20] Hayman et al, *supra* n 15, at 303.

third or thirtieth plate.[21] Similarly, the Darwinism source of progressive legal thought also posits that human preference is not "autonomous" but based on an "instinct for survival" which connotes that human actions are predictable.[22] By combining both marginalism and progressive Darwinism, we observe that as a rule of thumb, people make decisions based on perceived incremental gains that can be derived from an action, relative to the attendant losses.[23] We, therefore, understand that the likelihood of a rational person engaging in corruption is dependent on the perceived gains and losses that would be derived from the said act.[24]

Another thread that runs through Law and Economics (progressive legal thought perspectives) is the lack of trust in government officials to effectively and efficiently regulate the economy, and the preference for "private self-interested market participants" to take on this role.[25] This is a major component of the Coase theorem, which essentially decries state control and advocates for a free economy on the basis that in the absence of state control, parties will, on their own, bargain to the optimal re-allocation of resources, and laws or regulations are of no consequence.[26] In the context of corruption, this suggests that corrupt practices are employed by the free market economy as a mechanism to address the inefficiencies of state resource allocation. From this lens, corruption can be regarded as the market's way of

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[21] H. Hovenkamp, "The Mind and Heart of Progressive Legal Thought" (1995) 12 *University of Iowa Presidential Lecture Series*, available at https://ir.uiowa.edu/presidential-lecture-series/12 (accessed 24 July 2020), p. 6. For a comprehensive overview of the concept of marginal utility, see R.S. Howey, *The Rise of the Marginal Utility School, 1870-1889*, (Lawrence: University of Kansas Press, 1960), p. 271.

[22] H. Hovenkamp, "Knowledge about Welfare: Legal Realism and the Separation of Law and Economics" (2000) 84(4) *Minnesota Law Review*, p. 815. Progressive Darwinism is based on scholarship which posits that the struggle for survival supersedes other desires and even rational thought. See also R. Hofstadter, *Social Darwinism in American Thought* (Beacon Press: Boston, 1992).

[23] *Ibid*.

[24] *Ibid*. See also S. Kramer, "An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions" (1990) 81(2) *Journal of Criminal Law & Criminology*, p. 399.

[25] Hovenkamp, *supra* n 22, at 825.

[26] See R.H. Coase, "The Problem of Social Cost" (2013) 56(4) *Journal of Law & Economics,* p. 837.

regaining control over resource allocation. That is, in the sense that individuals choose to engage in corrupt behaviour in order to gain access to resources that would otherwise have been allocated to another party.

In the same vein, researchers have argued that corruption is merely a "fifth factor of production" which essentially greases the wheels of productivity without which progress cannot be made (due to the bureaucracy involved in government dealings).[27] To take this further would mean that the free market not only perceives corruption as resource reallocation mechanism but also champions it as a legitimate tool to achieve desired ends. As a matter of fact, should the free market have its way, corruption will not be termed "corruption" but something perhaps akin to "tipping".[28] The challenge with this, however, is that it then boils down to nothing more than "he who pays the piper dictates the tune." This is because this resource allocation approach to corruption will favour rich individuals and corporations who have the financial means to push for resources to be allocated to their needs, leaving minorities and those who do not have the same financial might to scramble for leftovers. If effectively managed, however, state control can serve as an arbiter that mediates between these two extremes, such that resources are efficiently allocated, and everyone receives a piece of the pie.

Furthermore, the marginal utility principle discussed earlier can be applied towards understanding why corruption persists from a cultural perspective. In Hollywood, we see that "snitches" are not embraced fondly. The same is true across other cultures. In Nigeria, the

[27] E. Kameir and I. Kursany, *Corruption as a "Fifth" Factor of Production in the Sudan*, 72 (Scandinavian Institute of African Studies: 1985).

[28] The average person's reaction to this proposition will be similar to that received by Landes and Posner's "The Economics of the Baby Shortage" which argued strongly for a free baby market. See E.M. Landes and R.A. Posner, "The Economics of the Baby Shortage" (1978) 7(2) *Journal of Legal Studies*, p. 323. The reaction is essentially one of revulsion and, perhaps, incredulity at the proposition that we legitimize corruption. The reason for this is for the simple fact that normativity tells us that corruption is bad and is something to shun. Accepting this school of thought that suggests that corruption is not bad, seemingly calls upon the application of a postmodern perspective which posits that there are no absolutes.

likelihood of reporting a crime that does not directly harm you or anyone else is unlikely – and this is one of the footholds upon which corruption rests. The rule is that you see, but you do not speak. An individual is however more likely to speak up if there are some financial or other miscellaneous benefits to gain from doing so. This explains why to date, whistleblowing has been the most effective method employed to fight corruption in Nigeria.[29] Whistleblowing procedures, with financial incentives attached, provide opportunities for individuals to maximize their gain. When presented with the whistleblowing incentive, as rational persons, individuals put on their thinking caps and proceed to weigh the marginal gain against possible losses. Whistleblowing, therefore, serves as a counteraction which acts on the rational person's desire to maximize gain.

The socio-economic considerations behind corruption are also worth addressing. An individual's inclination to engage in corrupt practices depends on various factors which include "official wage rate, severity of punishment, awareness of penalties, probability of being detected and probability of being prosecuted."[30] The probability of being detected and prosecuted is an important point. In Nigeria, the fear of detection is perhaps non-existent, not only because corruption is the norm, but also because there is the possibility of offering incentives to persons who discover the act to keep quiet and not take action. This is how it starts, with one individual, until the entire organization is caught in a conspiracy of silence with everyone benefitting from keeping quiet.[31] This corruption game is similar in many respects to game theory which Chábová, succinctly explains below:

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[29] H.A. Salihu, "Whistleblowing Policy and Anti-Corruption Struggle in Nigeria: An Overview" (2019) 12(1) *African Journal of Criminology and Justice Studies,* p. 55, available at https://www.umes.edu/uploadedFiles/_WEBSITES/AJCJS/Content/VOL12.1.%20SALIHU%20FINAL.pdf (accessed 24 July 2020).

[30] J. Juraev, "Rational Choice Theory and Demand for Petty Corruption" (2018) 5(2) *Journal of Eastern European and Central Asian Research*, available at https://ieeca.org/journal/index.php/JEECAR/article/view/219 (accessed 24 July 2020), p. 24.

[31] Organizational theories are useful here. For example, the Chicago school refers to a situation such as this as "social disorganization" – where everyone

> Game theory looks at the decision making of an individual when collaborating with a different person. One of the most famous applications of the game theory is the Prisoner's dilemma. In the classic prisoner's dilemma situation, there are two prisoners and each of them goes through interrogation. If one betrays the other, he/she goes free, however, if both of them betray the other one, they serve very long sentence in prison. But if none of them betray the other, they both serve short sentences.[32]

The motivation, therefore, is not to speak as everyone's silence is everyone's gain. The lone individual who dares to step out is "taken care of" in ways that range from frustrating their day-to-day activities to outright dismissal from employment.[33] With regard to the private sector, Nichols similarly terms this the "assurance problem" which he explains as follows:

> If all actors abide by the rules, if no business acts corruptly, then all will be better off. On the other hand, if defection occurs, then those that do defect – those that act corruptly – will at least survive, whereas those that attempt to abide by the rules will probably suffer and could be driven out of business.[34]

It is on this basis that Nichols explains that "in a systematically corrupt system… a business that does not act corruptly may face extinction."[35] On the subject of punishment, in tandem with the marginal utility principle, scholars have suggested that harsher sanctions be imposed for corruption relative to other offences. However, further research reveals that severe punishment is not a sufficient deterrent to

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follows through with deviant behaviour rather than punishing it. See K. Chábová, "Norms and Values Connected to Corruption: Is There Difference between Post-Communist Countries and the Rest of Europe?" Available at http://www.europeansocialsurvey.org/docs/about/conference/CHABOVA_Norms-and-Values-corruption.pdf (accessed 24 July 2020).

[32] *Ibid*, at 6.

[33] S. Daniel, "Group Slams Minister over Sack of Whistle Blower", available at https://www.vanguardngr.com/2017/03/group-slams-minister-sack-whistleblower/ (accessed 24 July 2020).

[34] P.M. Nichols, "Multiple Communities and Controlling Corruption" (2009) 88 *Journal of Business Ethics,* p. 806.

[35] *Ibid.*

corruption.[36] For example, in China, even though life-imprisonment is imposed as a sanction for corruption, this has not substantially affected the occurrence of corrupt activities.[37] This discrepancy indicates that a Law and Economics approach alone does not hold the answers we seek.

2.2. A Critical Legal Studies Approach

Here, Feminist Legal Theory, Critical Race Theory, and the Third World Approaches to International Law (TWAIL) as subcategories of the Critical Legal Studies movement and their possible applications to the corruption discourse are discussed.

Starting with feminist and critical race theories, this writer is of the view that corruption is similar to racism, sexism and other "isms". The average individual says to themselves, "I am not sexist." "I am not racist." "I am not corrupt." We are however quick to point out when someone else is sexist, racist or corrupt. We can, therefore, learn a lot from the perspectives offered by critical race and feminist theories as to how we tend to see ourselves other than we are.[38]

Additionally, an application of these theories draws our attention to the fact that laws in the Global North are made from the perspective of white men for other white men. Thus, when countries in the Global South borrow these laws and adopt them as theirs, albeit with some modifications here and there, they unknowingly replicate these

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[36] G.S. Becker, "Crime and Punishment: An Economic Approach" (1968) 76(2) *Journal of Political Economy,* pp. 177–178. A number of other authors have also pointed out that in a systematically corrupt economy, sanctions are not effective to combat corruption given that perpetrators may very well easily pay their way out than face consequences. See N.K. Katyal, "Conspiracy Theory" (2003) 112(6) *The Yale Law Journal*, p. 1307; D.C. Richman, "Prosecutors and their Agents, Agents and Their Prosecutors" (2003) 103 *Columbia Law Review,* p. 749; and O.L. Reed, "What is 'Property'?" (2004) 41(4) *American Business Law Journal,* p. 459.

[37] *Supra* n 30, at 27.

[38] Although this paper will only discuss the feminist perspectives of anti-corruption law, it is important to keep in mind Crenshaw's point that "race and gender are not mutually exclusive categories of experience and analysis". See K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *University of Chicago Legal Forum*, p. 139. Therefore, the same arguments that may be put forward by feminists may similarly be advanced by Crits.

Northern perspectives within their systems. Such laws are replete and widespread.[39] Consequentially, the white man's way of thinking is perpetuated across the Global South without adequate consideration given to the inherent culture of such countries. In the same vein, Northern anti-corruption laws are transposed to the South and due to the divergence in foundational principles and thinking, there is a clash between Northern anti-corruption jurisprudence and the receiving state's culture. The effect is that such laws are unable to adequately address corruption because they do not reflect the state's culture. This perhaps provides some insight into why people are often quick to pronounce themselves as being anti-corrupt but will not think twice about offering a bribe or an incentive to grease the wheel if need be. For example, Ackerman had this to say about corruption in Nigeria:

> The politically powerful are expected to receive tribute from their subjects. If politicians or public officials have the opportunity to enrich themselves, they have an obligation to do so and to share generously with those who helped them to advance. This puts civil servants in a bind. Their professional legitimacy arises from their training as public administrators on the European model, but their social legitimacy depends on conforming to local norms that clash with their training.[40]

Furthermore, Radin reckons that "the perspective of domination and the critical ramifications it must produce once it is taken seriously seem to be feminism's important contribution to pragmatism".[41] Dominance in the sense that the dominant or majority group may be tempted to see its perspective or viewpoint as true and absolute and this is the sort of thinking that feminism seeks to do away with.[42] Part

[39] For instance, Nigeria, through her Statute of General Application, adopted several British laws. These laws include the Wills Act 1837 and the Conveyance Act 1881.

[40] Rose-Ackerman (2010), *supra* n 12.

[41] M.J. Radin, "The Pragmatist and the Feminist" (1989) 63 *Southern California Law Review,* p. 1711.

[42] M. Becker, "Patriarchy and Inequality: Towards a Substantive Feminism" (1999) 1999 *University of Chicago Legal Forum,* pp. 23-30. See also A. Allen, "Feminist

of the work of feminists is to unmask "patriarchal jurisprudence" because most of "modern jurisprudence is masculine."[43] Northern jurisprudence now stands in the same stead as patriarchal jurisprudence. Northern thinking and perspectives are often stated in absolute terms and to question their validity seems absurd.

The North's perception of what corruption is and how it should be eliminated permeates a lot of anti-corruption related research and we have taken these as absolute, unquestionable truths.[44] A feminist approach to anti-corruption will have us challenge the dominant role of Northern jurisprudence. It would have us ask questions such as; "is corruption really what it has been made out be?", "do the actions regarded as corrupt actually amount to corruption?" And because it is difficult to come across an article written by Northern scholars discussing corruption without reference to a Southern state, "do Northerners really understand how the Southern system works?" By way of illustration, this tendency is reflected in the writings of Ackerman who states thus:

> Nigerians and Ghanaians are extremely critical of the level of corruption in their country, and they believe that it promotes the inequality of wealth and power. Ordinary people condemn corruption at the elite level, but they themselves participate in networks that socially reproduce corruption.[45]

Even though Ackerman discusses the Nigerian culture of gift-giving in earlier portions of her article, the above analysis is devoid of appropriate cultural and socio-economic context. It frames the issue such that anyone who is not familiar with Nigerian culture will not fully appreciate the context in which corruption operates in Nigeria. Context is important to our understanding of legal issues, and analysis without context is bound to throw up misleading conclusions.

Perspectives on Power", available at https://plato.stanford.edu/entries/feminist-power/ (accessed 21 December 2020).

[43] R. West, "Jurisprudence and Gender" (1988) 55(1) *University of Chicago Law Review,* p. 58.

[44] *Supra* n 7.

[45] Rose-Ackerman (2010), *supra* n 12.

There is first a need to clarify that when people "participate in networks that socially reproduce corruption" due to certain factors, they do not perceive their actions as corruption.[46] One factor is cultural expectations. The Nigerian culture is to use resources at one's disposal to help family and other relations, and this is what happens daily.[47] Secondly, economic difficulties which the average person faces make it difficult to forgo any benefit, no matter how marginal, that may be derived from subscribing to a corrupt act. The combined effect of these two factors is that in a society where it is difficult to make ends meet, marginal gains that can be derived from indulging in corrupt activity is attractive to the average rational Nigerian who, due to socio-economic challenges, is forced to squarely focus on her interest and that of her family. These considerations are key in analysing corruption in Nigeria and any analysis that ignores such considerations will be inchoate. There is therefore a need to challenge the dominant thinking on current anti-corruption jurisprudence. Perhaps, this holds the key to unlocking new answers to the corruption problem.

In addition to Feminist Legal Theory and Critical Race Theory perspectives, a TWAIL approach proves useful here. The TWAIL approach essentially highlights how the experiences of the Global South are different from that of the North and that the creation of standards based on Northern perspectives, has a tendency to not only short-change the South, but also put them in a bad light.[48] As Mutua succinctly puts it:

> TWAIL is driven by three basic, interrelated and purposeful objectives. The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and

[46] *Ibid.*

[47] V.E. Dike, "Corruption in Nigeria: A New Paradigm for Effective Control" (2005) *Africa Economic Analysis*, p. 5.

[48] See O.C. Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10 *International Community Law Review,* p. 371; P. Parmar, "TWAIL: An Epistemological Inquiry" (2008) 10(4) *International Community Law Review*, p. 363.

> institutions that subordinate non-Europeans to Europeans.[49]

Although the subject of this paper is not international law so to speak, the TWAIL approach is still relevant because the "perpetuation of a racialized hierarchy of … norms and institutions" occurs even outside the scope of international law. It occurs in every area where the North exacts dominance through its jurisprudence, whenever discussions or laws are framed from a Northern perspective. This is particularly visible in research activities where the North tends to have a dominant voice. This dominant voice enables Northern researchers to shape discussions on any topic of their choosing – even if the topic concerns issues for which they do not have the necessary cultural competence. Through this, Northern jurisprudence exerts its dominance over the South and the subordination continues. The views of authors such as Breit, Lennerfors and Olaison are also of interest. They speculate thus:

> Another aspect of corruption that has been revealed by critical studies is that the discourse is highly Western-centric and that it therefore—often unfairly—involves positing corruption as a result of non-Western activities... It has been argued that the function of the Corruption Perceptions Index, for example, is to legitimize anticorruption measures in the developing countries, with the aim of eliminating obstacles for the free flow of capital, rather than to fight corruption.[50]

A similar argument has been canvassed by Elsheikh who asserts that the World Bank's Doing Business Report is geared towards further under-developing the South by imposing conditions that subject Global South countries to "the brutality of global finance."[51] In all, a

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[49] M.W. Mutua and A. Anghie, "What is TWAIL?" (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)*, p. 31.

[50] E. Breit, T.T. Lennerfors, and L. Olaison, "Critiquing Corruption: A Turn to Theory" (2015) 15(2) *Ephemera,* p. 326. A similar argument has been put forward by Olaleye-Oruene who argues that corruption is a European construct and is a legacy of colonialism. See T. Olaleye-Oruene, "Corruption in Nigeria: A Cultural Phenomenon", (1998) 5(3) *Journal of Financial Crime*, p. 233.

[51] E. Elsheikh, "Examining the World Bank's doing Business Report", available at https://belonging.berkeley.edu/examining-world-bank%E2%80%99s-doing-business-report (accessed 24 July 2020).

TWAIL perspective will require us to dig deeper into the veracity of these statements as they support prior arguments on the North's dominance in framing anti-corruption jurisprudence.

To take this further, adopting a Critical Legal Studies (CLS) perspective to the corruption discourse will have us make attempts to deconstruct hierarchies in order to solve social injustice.[52] Within the Nigerian context, we can do this by taking a critical look at the relationship between government and the citizenry and its impact on anti-corruption efforts. In Nigeria, there appears to be a conspiracy within the government to keep the public in the dark. The executive, legislature, and the judiciary appear to be in cahoots with one another with the common goal of maximizing private gains from resources available to them regardless of the implications on public welfare. This, therefore, makes it clear that the government cannot effectively fight corruption because it cannot fight itself. Anti-corruption crusades that originate outside the government, therefore, stand a better chance than those initiated within the government. Consequently, we need to look outside and amongst the citizenry to ensure accountability of public officials.

Similarly, a CLS lens lets us see corruption as a breach of agency duties.[53] In the sense that, just as directors are seen as agents of shareholders under the shareholder primacy model of corporate governance, and owe certain fiduciary duties to them, public officials are seen as agents of the citizenry and owe a duty to the public to effectively manage its resources. In the same vein, just as directors are often required to act in the corporation's best interest, public officials are required to act in the interest of the general public. Another corporate governance theory sees the relationship between directors and the corporation as one of stewardship. This theory asserts that

[52] This critical perspective is based on the premise of the CLS school of thought which calls upon us to deconstruct hierarchy. See J.M. Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 *The Yale Law Journal,* pp. 746, 765. See also E.D. Neacsu, "CLS Stands for Critical Legal Studies, If Anyone Remembers" (2000) 8(2) *Journal of Law and Policy,* pp. 421-422 where Neacsu explains that CLS was born as a tool to rectify social injustice which arose as a result of hierarchies in social power.

[53] Breit, Lennerfors, and Olaison, *supra* n 50, at 319.

directors will act in the corporation's best interest because they want to be seen as good stewards and perceive their reputation to be tied to that of the corporation. This means that directors are cognizant of the trust reposed on them by shareholders.[54] A similar CLS argument can be made for the relationship between public officials and the citizenry because it is based on trust. Individuals turn out *en masse* at every election to cast votes for those they believe have the potential to deliver on their campaign promises and those they verily believe will act in their best interest. This belief is not based on empirical facts or absolute certainty, but a belief – a gut feeling, if you would – that the chosen candidate will act in their general interest. It is akin, in many respects, to the belief and trust you have when hiring a candidate for a position in your organization. Although the candidate furnishes you with her resume, paints a glowing picture of herself and promises to be the most dedicated staff you have ever had, there is no empirical data that would guarantee that she will indeed live up to these promises. This transaction is solely based on the concept of "trust."

As a lawyer who has undergone vigorous legal training, however, I was taught that the law does not act on the concept of trust. We do not trust that a party to an oral contract will keep up their end of the bargain or that in the absence of a formal lease, my landlord will not have me kicked out of my apartment in the middle of the month. As lawyers, we are taught to take precautions and ensure that our clients' interests are protected. Long gone are the days of gentleman's agreements. The motto today is that if we wish to work together, we must bind ourselves via a contract that spells out the terms of our relationship. This contractual arrangement has, however, for the most part, been predominantly applied in the provision of goods and services other than public goods. More particularly, government-citizen relationships are not bound by contract. At best, we may refer to Hobbes' social contract, (which is reflected in constitutional

[54] M. Hernandez, "Toward an Understanding of the Psychology of Stewardship" (2012) 37(2) *The Academy of Management Review,* p. 172. See also J.H. Davis, F.D. Schoorman, and L. Donaldson, "Toward a Stewardship Theory of Management" (1997) 22(1) *The Academy of Management Review,* p. 20.

provisions) as the nearest equivalence.[55] Given this already skewed relationship, public officials have the upper hand, and can easily take advantage of the public's trust. Opportunities for such to happen are rampant given that checks on the official's powers are little or non-existent in many instances.[56] Officials, therefore, weigh the pros and cons and choose to enrich themselves rather than uphold the trust reposed in them. This is how corruption creeps in. A CLS perspective, therefore, encourages us to pay critical attention to the government-citizen relationship in our attempts to tackle corruption.

2.3. The Legal Realism Approach

One of the tenets of legal realism involves ascertaining that the "correct process" is being used to solve the problem at hand.[57] Because legal realism is focused on pragmatic problem solving, it calls for an interdisciplinary approach to solving problems.[58] Also, realists particularly recognize that rules are "abstracted from real world experiences and may be counterproductive to problem solving."[59] Consequently, applying a realist view to the subject matter discussed will have us look beyond jurisprudence to other allied areas such as criminology, sociology, psychology and political science to draw on the wealth of knowledge that has been put forward by these disciplines. This is an important venture because laws and rules of themselves have no pragmatic value. To achieve their aim, positive anti-corruption law must take into consideration issues of politics in the country in

[55] T. Hobbes, *Leviathan* (Baltimore: Penguin Books, 1968). In countries like Nigeria where citizen's rights to public goods are non-justiciable, as it is under Chapter II of the 1999 Constitution of the Federal Republic of Nigeria, this presents an even more difficult challenge.

[56] D.A. Yagboyaju and A.O. Akinola, "Nigerian State and the Crisis of Governance: A Critical Exposition" available at https://journals.sagepub.com/doi/full/10.1177/2158244019865810 (accessed 24 July 2020).

[57] R.L. Hayman et al (eds.), "Legal Realism" in *Jurisprudence: Classical and Contemporary: From Natural Law to Postmodernism*, American casebook series, 2nd ed. (2002), p. 156.

[58] K.R. Kruse, "Getting Real About Legal Realism, New Legal Realism and Clinical Legal Education" (2011) 56 *New York Law School Law Review,* p. 317.

[59] *Supra* n 57, at 157.

question, culture, socio-economic constructs, and a study of human mind and behaviour.

Economists have sought to explain corrupt behaviour based on marginalism,[60] Coase theorem,[61] prisoner's dilemma, etc.[62] Criminologists suggest that penchant for corruption is as a result of deviant behaviour.[63] Anthropologists assert that culture plays a major role in shaping peoples' perception of corruption.[64] These findings are indeed beneficial to our understanding of corruption, but because of a lack of cohesive and coherent effort, there seems to be scattered results here and there, such that it makes it difficult for policymakers to get a clear picture of what is really going on. As such, anti-corruption scholars across disciplines must do better in making their research coherent and understandable to policymakers as well as to the public. For anti-corruption laws to be effective, it has to be developed taking into consideration these various findings, and in a cohesive manner.

Although New Legal Realists like William Twinning assert that "we have outgrown realist texts",[65] because today, most legal research adopts an interdisciplinary perspective. There is however still a need to remind ourselves to think up alternative realist approaches that go beyond adopting a "law and" approach. Nonetheless, a true legal realist approach to understanding corruption calls us to draw on knowledge that has been articulated across various disciplines and identify them as pieces of a rather complex puzzle. Each piece fits

[60] See H. Dawid and G. Feichtinger, "On the Persistence of Corruption" (1996) 64 *Journal of Economics,* p. 177.
[61] *Supra* n 26.
[62] Chábová, *supra* n 31.
[63] S.C. Monahan and B.A. Quinn, "Beyond 'Bad Apples' and 'Weak Leaders': Toward a Neo-Institutional Explanation of Organizational Deviance" (2006) 10(3) *Theoretical Criminology,* p. 361; P. Csapodi, I. Takács, and K. György-Takács, "Corruption as a Deviant Social Attitude" (2011) 56(1) *Public Finance Quarterly,* p. 27.
[64] See D. Torsello and B. Venard, "The Anthropology of Corruption" (2016) 25(1) *Journal of Management Inquiry*, p. 34; J. Hasty, "The Pleasures of Corruption: Desire and Discipline in Ghanaian Political Culture" (2005) 20(2) *Cultural Anthropology,* p. 271.
[65] W. Twining, "Talk about Realism" (1985) 60(3) *New York University Law Review*, p. 382.

distinctively within the set and it is our job as scholars to find the right angle for these pieces. It is surely not an easy task, but if we persevere, we may very well end up with a workable cure for the corruption virus. To achieve this, scholars and policymakers must work hand-in-hand as the goal cannot be achieved by one faction.[66]

Furthermore, in as much as the law is no longer averse to associating with other disciplines, and we now have several "law and" scholars, there still appears to be some friction which does not serve the common good.[67] Many disciplines are quick to disown legal scholarship on the basis that it is substantially normative and not sufficiently empirical.[68] As such, while legal scholars now actively seek to incorporate other disciplines into their research, these disciplines have become wary of lawyers and legal scholarship in the same fashion as one is wary of an unwanted admirer. This discordant relationship unduly affects research output, outcome, and translation, and is perhaps one rationale as to why developing an effective anti-corruption legislation/policy has been a challenge.

3.0. CONCLUSION

Answering the question, "why does corruption persist?" may be as difficult as explaining why crimes occur. Crimes occur because we do not live in a utopian world. Although post-modernists would be hesitant to agree with my assertion of this as an absolute truth, it is unlikely that this state of affairs will change anytime in the future. A world with no crime is the dream of the average well-meaning person, but that is as far as it goes – a dream not capable of becoming a reality. In as much as it is a difficult question with complex answers, as

[66] V. Nourse and G. Shaffer, "Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory" (2009) 95 *Cornell Law Review*, p. 84.

[67] See D.W. Vick, "Interdisciplinarity and the Discipline of Law" (2004) 31(2) *Journal of Law and Society,* p. 164.

[68] See Y. Chang and P. Wang, "The Empirical Foundation of Normative Arguments in Legal Reasoning" (2016) *Public Law Working Paper No. 561 (University of Chicago),* available at http://www.ssrn.com/abstract=2733781 (accessed 24 July 2020), p. 1. Here, Chang and Wang discuss how "in Germany and many civil law countries, empirical legal scholars may find themselves outsiders of legal communities, as their work is not considered relevant for legal scholarship (Rechtswissenschaft), which is usually regarded as a normative enterprise."

scholars, we must take up the charge and dedicate resources towards understanding what corruption really is and why it persists. Theorizing corruption is, therefore, a profitable enterprise, and as we do so, we gain new perspectives that may lead us to the answers we seek. Although this is not the dominant view, it is a worthy enterprise.[69] Breit, Lennerfors and Olaison particularly note as follows:

> We maintain that such "ventures" of theorizing corruption will lead to rewards, as they "[strive] to reduce the confusion, to simplify the evidence, to discard the obsolete and unverifiable, and to incorporate new thinking" (Caiden, 2010: 10). In short, theorizing corruption enables us to engage in theoretical debates and critique about social practices and organizational behaviour generally.[70]

As Roscoe Pound said, "In the house of jurisprudence, there are many mansions. There is more than enough room for all of us."[71] It is, however, important to keep in mind that in as much as we do this, we must be careful not to, as Gilmore puts it, make our "intellectual discussions… too tidy," as "when our categories become over-defined, we lose touch with reality."[72] While theorizing corruption, we, therefore, need to be careful not to theorize for theorizing sake. In our quest to put forward new theories, we have to avoid creating a state of confusion. Care must be taken to ensure that our findings and our contributions to the anti-corruption literature are borne out of a sincere interest in the topic and a genuine discovery that would help advance our collective cause.

In keeping with the above, this article has analysed the subject of corruption through a jurisprudential lens. It identified how applying a

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[69] Breit, Lennerfors, and Olaison, *supra* n 50. In M. Johnston, "The Search for Definitions: The Vitality of Politics and the Issue of Corruption" (1996) 48(149) *International Social Science Journal*, p. 321, Johnston is particularly of the view that we should not spend much time theorizing corruption but that we should channel our energy and resources into eradicating it.

[70] Breit, Lennerfors, and Olaison, *supra* n 50, at 323.

[71] R. Pound, "The Call for a Realist Jurisprudence" (1931) 44(5) *Harvard Law Re*view, p. 711.

[72] G. Gilmore, "Legal Realism: Its Cause and Cure" (1961) 70 *Yale Law Journal,* p. 1039.

Law and Economics approach reveals that corruption is seen as a means to an end and that the possibility of an individual engaging in corrupt activities is relative to such person's perception of the cost and benefit of indulging in the said act. We also entertain the possibility that corruption may, in fact, be a "fifth" factor of production which functions as the market's way of redistributing resources. A CLS approach (through feminist and critical race perspectives), also reveals that there is more to how corruption plays out in the South compared to the North. The Nigerian context, in particular, further supports the need for researchers to pay attention to issues of culture in framing discussions on corruption. The TWAIL perspective also draws us to the realization that the current description of corruption is Northern-centred and in this way, the North still exerts some form of dominance over the South.

This article also employs a CLS lens by taking on a critical analysis of the agency relationship between the arms of government and the citizenry and how it is structured in such a way that gives little power to the citizenry and makes ample room for corruption. Furthermore, the legal realism approach and how it draws our attention to the need for more cohesive interdisciplinary work on the subject of corruption is discussed, highlighting the importance of making our findings more easily understood by policymakers and the general public. The legal realism perspective is particularly important because it presents us with various theories. These theories bring different perspectives to the table and it is important that we take time out to examine each one. In so doing, we expand our understanding of the subject.

The combined effect of this jurisprudential analysis is that it challenges us to examine corruption from different angles – different from our initial conceptions. We ask, "What is corruption?" "How is corruption in the South different from the North?" "In what ways have our perceptions of corruption been predominantly shaped by Northern jurisprudence?" "How can we actively address corruption?" Answers to these questions lie in the legal theories discussed in this article as well as others not discussed. To adequately address corruption, we cannot afford to take a static, immutable position on the subject. We must be open to investigating its attributes and questioning its

character. Legal theories, therefore, serve as a lens through which we can achieve this. By looking through a jurisprudential lens, we are able to put forward Law's contribution to anti-corruption research in the pool of interdisciplinary anti-corruption studies.

We must however also be mindful of the fact that no one theory solves all problems. By keeping this in mind, we cure jurisprudence of its most significant problem – the fact that everyone is speaking but no one is listening. We are all trying to correct one another's perception and understanding of the law. For jurisprudential analysis to be of any benefit to us, we must take a step back, stop speaking and start listening because as we listen to one another, we may find answers to a lot of our persisting challenges. By carefully listening to the voices of scholars across various schools of thought, we can begin to identify various pieces of the puzzle that is corruption, and listen we must, as it would not do any good to lend our voices to the discussion when we have not yet listened.