

WHISTLEBLOWING: A WESTERN AND SHARI'AH PERSPECTIVE*

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ABSTRACT

The concept of whistleblowing law in Islam is unique and differs from the West as it derives from the elements of *Tawhid* and *Shari'ah*. The concept is essentially dynamic and relevant since it was initially introduced during the Islamic ruling era until the present time. The practice of whistleblowing in Islam maintains the public interest (*maslahah 'ammah*) which aims in fulfilling the five objectives of *Maqasid Shari'ah*. On the other hand, the western whistleblowing law was developed in response to tragedies in assuring good governance and protecting the public interest, in which the ideas of good and bad are determined by social norms and not based on the scriptures. In the present time, notably, the role of whistleblower is significant to response to corruption as a global issue plaguing many nations, which causes substantial destruction to social, economic and political aspect. In this regard, the purpose of this paper is to explore and compare the concept and scope of disclosure of whistleblowing law from Shari'ah perspective and its western counterpart and how its principled conviction, upholding public interest disclosure could deal with the current phenomenon plaguing many nations, corruption. With that, the methodology employed in this paper reflected the descriptive, analytic, and prescriptive approaches by analyzing the existing laws, decided cases and literature pertaining to the conceptual and the legal frameworks of whistleblowing under the Western and Islamic jurisprudences.

* This paper is a revised and expanded version of a paper entitled 'Whistleblowing: A Comparative Analysis between the Western Law and Shari'ah Perspective' presented at the 'Inaugural Joint Postgraduate Conference 2017' at Ahmad Ibrahim Kuliyyah of Laws, International Islamic University of Malaysia (IIUM) on August 16, 2017.

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Keywords: whistleblower protection, *hisbah*, public interest, Public Interest Disclosure Act 1998

PEMBERI MAKLUMAT: PERSPEKTIF BARAT DAN SHARI'AH

ABSTRAK

Konsep undang-undang pemberi maklumat di dalam Islam adalah unik dan berbeza dari Barat kerana konsep undang-undang ini terhasil dari elemen-elemen Tauhid dan Shari'ah. Konsep undang-undang pemberi maklumat yang dibawa oleh Islam sangat dinamik dan relevan untuk digunapakai sejak era pemerintahan Islam sehingga pada masa kini. Di dalam undang-undang Islam, amalan pemberi maklumat adalah bertujuan memastikan kemaslahatan umum yang mana merupakan fokus bagi mencapai kelima-lima objektif Maqasid Shari'ah. Manakala, undang-undang pemberi maklumat di Barat telah diwujudkan susulan beberapa tragedi yang berlaku dalam masyarakat Barat dari masa ke masa bertujuan untuk menjamin urus tadbir yang baik dan melindungi kepentingan awam di mana idea mengenai baik atau buruknya sesuatu ditentukan oleh norma sosial dan bukanlah berdasarkan elemen agama. Dewasa ini, peranan pemberi maklumat dilihat sangat membantu dalam menangani rasuah yang menjadi salah satu isu global yang telah menyebabkan kerosakkan besar dalam aspek sosial, ekonomi dan politik. Justeru, kajian ini bertujuan untuk menerokai dan mencari perbezaan konsep dan skop pendedahan maklumat dalam undang-undang pemberi maklumat dari perspektif Shari'ah dan Barat dan bagaimana prinsip-prinsipnya yang jelas dalam pendedahan untuk kepentingan masyarakat awam boleh membantu menangani rasuah yang membelenggu banyak negara. Kajian ini menggunakan pendekatan penjelasan, analisis dan preskriptif dengan menganalisa undang-undang sedia ada, kes-kes yang diputuskan mahkamah dan kajian-kajian terdahulu mengenai konsep dan kerangka undang-undang mengenai pemberi maklumat di dalam perundangan Barat dan Islam.

Kata kunci: perlindungan pemberi maklumat, *hisbah*, kepentingan awam, Public Interest Disclosure Act 1998

INTRODUCTION

A survey performed by Transparency International revealed that the best method to fight corruption is by 'speaking out', or reporting such acts. This appeared to be the top response given by citizens across nations when posed with the question of 'what is the best way to fight corruption?'.¹ In fact, disclosure of information and documents on such malpractices may save many lives and billions of dollars derived from public funds from being misused.² Hence, the function of a whistleblower is critical to safeguard the public interest in both corporate governance and government institution.

In another study carried out by Transparency International, two nations; the United States and the United Kingdom, have been acknowledged to have devised the most comprehensive whistleblowing law to date. This is in advance of other 167 countries that have ratified the United Nation Convention against Corruption (UNCAC).³ In addition, many nations still lack effective legal protection to safeguard and empower whistleblowers to come forward and file reports regarding corruption.⁴ This explains the phenomenon why the percentage of

¹ Mariya Gorbanova, "Speak Up : Empowering Citizens against Corruption" (Berlin, 2015), accessed August 13, 2017, https://www.transparency.org/whatwedo/publication/speak_up_empowering_citizens_against_corruption. 20.

² Transparency International, "International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest" (Berlin, 2013). accessed August 13, 2017, https://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation. 2.

³ "Strengthening Whistleblower Protection: An International Imperative," *Transparency International Organization*, 2013, accessed August 13, 2017, https://www.transparency.org/news/feature/strengthening_whistleblower_protection_an_international_imperative.

⁴ Ibid.

corruption is escalating, to the extent of affecting the progress in many nations.⁵

Nowadays, although the significant role of a whistleblower is acknowledged from the social, economic and political aspects, a whistleblower is often subjected to not only retaliation like unfair dismissal, suppression at workplace, threat to life, family, and safety;⁶ but also detrimental laws, such as the Financial Service Act,⁷ Official Secret Act⁸ and contract of employment,⁹ which protects certain documents and information from being exposed to the public based on the duty of confidence. In the worst cases, this detrimental law has resulted in severe punishment to the whistleblower who discloses the protected documents and information even though the disclosure intends to preserve public interest.¹⁰ Admittedly, the duty of confidence is undeniably important to certain extent, but in this regard, it could be argued that those documents and information might be potentially useful in proving the alleged corruption. Thus disclosure of these documents is pertinent in order to protect public interest.

In this relation, this article examines the concept, origin, source of law, objective, scope of disclosure, current practice and development of whistleblowing laws found in the West, particularly in the United States and the United Kingdom; and Shari'ah. The law governing whistleblowing in the United States is known as the Whistleblower Protection Act (WPA) 1998 (hereafter refers as 'WPA 1998'), amended by Whistleblower Protection Enhancement Act (WPEA) 2012 (hereafter refers as 'WPEA 2012'); while the United Kingdom employs the Public

⁵ "Corruption Perception Index 2016," *Transparency International Organization*, Accessed on August 13, 2017, https://www.transparency.org/news/feature/corruption_perceptions_index_2016#table.

⁶ Gorbanova, "Speak Up : Empowering Citizens against Corruption.", 7.

⁷ Alison Lui, "Protecting Whistle-Blowers in the UK Financial Industry," *International Journal of Disclosure and Governance* 11, no. 3 (2014). 4.

⁸ Transparency International, "International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest.", 8.

⁹ Lucy Vickers and A, "Whistleblowing at Work: The Legal Implications For Employees of Making Disclosures of Confidential Information" (PhD diss., Oxford Brookes University, 1996). 43.

¹⁰ *Mohd Rafizi bin Ramli & Anor v Public Prosecutor* [2017] MLJU 548.

Interest Disclosure Act (PIDA) 1998 (hereafter refers as 'PIDA 1998'). Meanwhile, as for the duty of commanding the good and forbidding the evil or also known as *hisbah* in Islamic governance, references are sought from both primary and secondary sources of Shari'ah such as the Al-Qur'an and the Tradition of the Prophet (S.A.W.) known as *Sunnah*, the practice of The Prophet (S.A.W.) and his companions and the legal mechanism of *maslahah mursalah*.¹¹ The following discussion is rooted on the concept of whistleblowing from perspectives of the West and the *Shari'ah* and the development of whistleblowing laws.

DEFINITION OF WHISTLEBLOWING

Historically, the term 'whistleblowing' was initially defined by a consumer activist from the United States. In 1971, Ralph Nader defined whistle blowing as, 'an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity.'¹²

Meanwhile, the preamble of the United Kingdom's PIDA 1998 stipulates that the PIDA was designed to protect whistleblowers as 'individuals who make certain disclosures of information in the public interest.'¹³ Meanwhile, some leading experts in the field, namely Guy Dehn from the UK's Public Concern at Work, and Richard Calland from the South African Open Democracy Advice Centre, described the concept of 'whistleblowing' as 'the options available to an employee to raise concerns about workplace wrongdoing. It refers to the disclosure of wrongdoing that threatens others, instead of personal grievance.'¹⁴ Additionally, the Transparency International Organization defines whistleblowing as 'the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed to or by public

¹¹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2003). 14-310.

¹² David Banisar, "Whistleblowing: International Standards and Developments," *Corruption and Transparency: Debating The Frontiers Between State, Market and Society*, (2011). 5.

¹³ The Government of United Kingdom, "The United Kingdom Public Interest Disclosure Act 1998".

¹⁴ Banisar, "Whistleblowing: International Standards and Developments." 4.

or private sector organization – which are of concern to or threaten the public interest – towards individuals or entities believed to be able to give an impact upon an action.’¹⁵

Furthermore, Transparency International has made a broad definition to illustrate the nature of whistleblowing activity in which whistleblowing is regarded as “...an activity of disclosing or reporting of wrongdoing about corruption, criminal offences, breaches of legal obligation and also includes miscarriages of justice, specific dangers to public health, safety or the environment, abuse of authority, unauthorized use of public funds or property, gross waste or mismanagement; conflict of interest. The definition of whistleblower includes any public or private sector employee or worker who discloses information, exposes to risk of retribution and also individuals outside the usual employee-employer affiliation, such as consultants, contractors, trainees or interns, volunteers, student workers, temporary workers and former employees.”¹⁶

In discussing the concept of whistleblowing, Latimer has presented that a whistleblower may either be seen as betraying a secret or as a hero convicting a truth.¹⁷ In the words of Professor Fox:

[T]he current inhospitality of the legal system to whistleblowers is a product of communal ambivalence towards them. Admiration for the moral courage and social utility of those who defy the system in order to expose corruption or incompetence in the body politic is balanced by discomfort at their perceived disloyalty and by an awareness of the danger of encouraging mischief and malcontents. Current common law and statute send out dual messages: breaches of confidence may be permitted or punished.¹⁸

In looking at the *Shari'ah* position, one of the essential components which is equivalent to the concept of whistleblowing is the institution of *Hisbah* which derives from a duty of enjoining the good and forbidding

¹⁵ Transparency International, “International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest.”, 4.

¹⁶ Ibid.

¹⁷ Paul Latimer, “Whistleblowing in the Financial Services Sector,” *University of Tasmania Law Review VO* - 23, no. 2 (2004): 2.

¹⁸ Latimer, “Whistleblowing in the Financial Services Sector.”

the evil (*amr ma'ruf nahi mungkar*).¹⁹ Literally, Ibn Taymiyyah defines *hisbah* as a calculation, consideration or recognition.²⁰ According to Al-Mawardi, technically, *hisbah* means enjoining what is right when it is found neglected and forbidding what is wrong when it is found to be practiced.²¹ It represents a state's political, economic, and social institutions to promote appropriate conducts, as well as to evade all types of malpractices or offenses.²² This is commonly done in anticipation of a reward from Allah (*ihtisab*).²³

Based on the definitions outlined above, it is thus clear that a whistleblower is the one who blows the whistle pertaining to corruption in the interest of the public, whereas the very concept of whistleblowing refers to the disclosure of malpractices, such as corruption, illegal, fraudulent or hazardous activities that take place in the public and private sectors, thus threatening the public interest. Apparently, the definition of *hisbah* which connotes the idea of forbidding the evil and commanding the good, indicates that there is a responsibility on any individual that sees an evil act to forbid it or in the context of whistleblowing, to report such wrongful acts. This is done with the sole intention of protecting the well-being of the society.²⁴ The next part of the article deals with the roles and responsibilities of a whistleblower and/or a *Muhtasib*.

¹⁹ Muhtar Holland, *Public Duties in Islam: The Institution of Hisba* (Leicester: The Islamic Foundation, 1992), 91.

²⁰ Holland, *Public Duties in Islam: The Institution of Hisba*.

²¹ Abu al-Hassan `Ali Muhammad Habib al-Basri Al-Mawardi, *Al-Ahkam Al-Sultaniyyah*, Cet 1 (Beirut: Beirut: Dar al-Kutub al-'Ilmiyyah, 1996).

²² Fauzan Saleh, "The Institution of Hisbah : Its Roles in Nurturing Fair and Just Economic System in Islam," (paper presented at the National Conference On Islamic Economics 2009 at Universiti Malaya on 10th-11th February 2009). 2.

²³ Muhtar Holland, trans., *Public Duties in Islam: The Institution of Hisba* (Leicester: The Islamic Foundation, 1992). 91.

²⁴ Mohd Ab et al., "The Institution of Hisbah : In the Purview of Its Significances and Development," *Global Journal of Business and Social Science Review* 1, 3 (2013). 61.

THE ROLE OF A WHISTLEBLOWER AND *MUHTASIB*

Whistleblowing has been identified as one of the most significant measures in a democratic government to ascertain good governance, transparency, accountability, and stability in a country's fight against corruption.²⁵ In fact, in modern laws concerning whistleblowing, its role essentially blankets both the public and private sector.²⁶

Historically, the institution of *hisbah* or the duty of commanding the good and forbidding the evil functions as an essential aspect of governance during the era of Prophet Muhammad (s.a.w).²⁷ The person who carries out the role of the institution of *hisbah* is known as *al-Muhtasib*.²⁸ *Al-Muhtasib* is officially appointed by the authority, whereas *al-Mutatawwi* carries out the role of the institution of *Hisbah* voluntarily.²⁹ *Al-Muhtasib* may be regarded as an officer who carries out the responsibilities of the police and corruption commission in the present time. Meanwhile, *al-Mutatawwi* carries out collective responsibilities in a society voluntarily when there are discrepancies within the society.³⁰ In the current context, a person playing the role of *al-Mutatawwi* could be associated to that of a whistleblower. Based on the responsibility of every Muslim to stop any evil, a corollary duty also exists to report any mismanagement, wrong doing or corruption in any organization in both public and private sectors to fight corruption and malpractices.

During the time of the Prophet (s.a.w.), the role of institution of *hisbah* was to supervise the market from illegal trades that promoted

²⁵ Dorasamy, Nirmala, and Soma Pillay. "Whistle blowing: Impediments to effective implementation within the South African public sector." *Corporate ownership and Control* 8, no. 3 (2011). 200.

²⁶ Banisar, "Whistleblowing: International Standards and Developments."

²⁷ Ibrahim Azrin, "Accountability (Hisbah) in Islamic Management: The Philosophy and Ethics behind Its Implementation," *International Journal of Humanities and Social Science* 5, no. 8 (2015). 185.

²⁸ Ab et al., "The Institution of Hisbah : In the Purview of Its Significances and Development." 64.

²⁹ A Yate, trans., *Al-Ahkam as-Sultaniyyah: The Laws of Islamic Governance* (London: Taha Publishers, 1996). 337-338.

³⁰ Ab et al., "The Institution of Hisbah : In the Purview of Its Significances and Development.", 64.

fraudulent,³¹ *riba'* (interest),³² *gharar* (uncertainty),³³ *maysir* (gambling),³⁴ and other illegal tradings, such as the use of false weights and measures,³⁵ which are prohibited by Islamic law for these are all unfair. Thus, the role of *hisbah* was not only to maintain order, but also to supervise the behaviors of both buyers and sellers in the market so as to ensure the right conducts and to practice the public law.³⁶ The function of *hisbah*, nonetheless, has been expanded to supervise the moral being of a society and the mandatory offences, as described in Islamic law, such as non-performance of prayers and the crimes prescribed by Islamic law.³⁷ Hence, one can infer that the institution of *hisbah* covers the right of Allah swt and the right of individuals³⁸ and also worldly as well as matters affecting the hereafter. In the modern world, the duty of *hisbah* may be applied as an essential component in corporate governance and government institutions to safeguard the public interest.

In fact, the primary function of a whistleblower and the institution of *hisbah* is significant to the present phenomenon where many people suffer from poverty, unequal distribution of wealth, impeded education, and so forth, due to poor governance and corruption in both public and

³¹ "Eat not your property among yourselves unjustly by falsehood and deception, except it be a trade amongst you by mutual consent" [Al-Baqarah:188].

³² "But Allah has permitted trade and has forbidden interest." [Al-Baqarah:275].

³³ "Eat not your property among yourselves unjustly by falsehood and deception, except it be a trade amongst you by mutual consent" [Al-Baqarah:188].

³⁴ "They ask you about wine and gambling. Say, "In them is great sin and [yet, some] benefit for people. But their sin is greater than their benefit." And they ask you what they should spend. Say, "The excess [beyond needs]." Thus, Allah makes clear to you the verses [of revelation] that you might give thought" [Al-Baqarah :219].

³⁵ "And give full measure when you measure, and weigh with an even balance. That is the best [way] and best in result" [Surah Al-Isra':35]

³⁶ Saleh, "The Institution of Hisbah : Its Roles in Nurturing Fair and Just Economic System in Islam." 2.

³⁷ Muhtar Holland, trans., *Public Duties in Islam: The Institution of Hisba* (Leicester: The Islamic Foundation, 1992). 59.

³⁸ Saleh, "The Institution of Hisbah : Its Roles in Nurturing Fair and Just Economic System in Islam.", 2.

private sectors. However, a whistleblower is often subject to retaliation and detrimental for such disclosure. In this regard, an effective law must be in place to protect whistleblowers and encourage many to come forward without any fear to protect the public interest.

Unfortunately, it is worthy to mention that colonization had changed political, economic, and social structures in many Muslim countries today.³⁹ With the adoption of colonial legal regimes, many roles of the institution of *Hisbah* have been disregarded nowadays, for instance, the role prescribed for the *Muhtasib* previously included the power of making decision (*ijtihad*) and sentencing (*qada'*) the offenders.⁴⁰ As such, in the modern context, the role of the *Muhtasib* or *Mutatawwi* has almost diminished or has very limited application.

THE WESTERN LAW REGARDING WHISTLEBLOWING: SCOPE OF DISCLOSURE

The Western law concerning whistleblowing, both the United Kingdom and the United States are used as references in this discussion. This is because; both laws fulfil most of the international standards for whistleblowing law,⁴¹ apart from being acknowledged as the most comprehensive laws available in the present time.⁴²

In the United Kingdom, the governing law for whistleblower protection is the Public Interest Disclosure Act, (PIDA)1998, which was enacted to offer a wider coverage to the Employment Relation Act 1996. The PIDA sets out the type of disclosure that can give rise to protection. Section 43B (1) of PIDA 1998 provides protection for a disclosure on any matter falling into categories that not only covers criminal offences, failure to comply with legal obligation, and miscarriages of justice; but

³⁹ Ibrahim Barkindo, "The Role of the Institution of Hisba in the Sharia Implementing States in Northern Nigeria" (PhD diss., University of Ahmadu Bello, 2011). 68.

⁴⁰ Ibid. 67.

⁴¹ Transparency International, "International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest."

⁴² Ibid.

any threat to one's health and safety, damage to the environment, and concealment of information in any matters previously mentioned.⁴³

Meanwhile, in the United States, the Whistleblower Protections Employees Act, (WPEA) 2012 refers to the enhancement of the US Whistleblower Protections Act, (WPA) 1989 that primarily designs to provide protection for whistleblowers of federal employees. Generally, the scope of disclosure is almost parallel to PIDA 1998 when WPEA 2012 also provides protection to any disclosure of information by an employee or applicant for employment that the employee or applicant reasonably believes is evidence of censorship related to research, analysis, or technical information will cause any violation of law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. However, there are exceptions provided in that such disclosure must not be specifically prohibited by law or such information is not specifically required by Executive order to be kept classified in the interest of national defence or the conduct of foreign affairs.⁴⁴

Based on the above two whistleblowing laws, it is suggested that the scope of disclosure of other countries whistleblowing laws must be determined to clarify the extension of a disclosure to include public interest matters. This approach is significant in order to identify the public interest matters that are allowed for whistleblowing disclosure and to determine the entitlement of legal protection under the law against retaliation, victimization and discrimination which are detrimental towards the whistleblower.

THE DEVELOPMENT OF WHISTLEBLOWING LAW IN THE WEST

Several recent developments have taken place in the Western whistleblowing law. In the United States, in the case of Katherine Gun, a whistleblower who was charged under the United States Official Secret Act 1989 (hereafter refers as 'OSA 1989') in 2003 due to disclosure of information pertaining to a request from the US National Security Agency to bug the offices of nations in the United Nation Security

⁴³ Section 43B (1) of UK PIDA 1998.

⁴⁴ Section 2302(b)(8)(A) of Whistleblower Protection Enhancement Act 2012.

Council prior to the vote on invading Iraq.⁴⁵ This is because the US National Security Agency had wanted the nations within the United Nation Security Council to vote in favour of the US.⁴⁶ Based on the foresight of potential deception and blackmail, Gun revealed such confidential matter to the public, which had been published in the Observer.⁴⁷ Due to political pressure, it was reported that the prosecution was subsequently dropped.⁴⁸ After that, Gun went out and called for a public defence to be initiated into the United States' Official Secrets Act, 1989, in order to protect whistleblowers, as well as to prevent governments from concealing politically embarrassing information.⁴⁹ In the preamble, WPEA 2012 clarifies that, 'the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, and offer certain authority for the special counsel',⁵⁰ which basically allows such disclosure on protected documents and information, but in a non-disclosed manner with special counsel. It can be inferred that for national security affairs, US however, deals with matters brought up by whistleblowing in a special non-disclosure manner.

Additionally, it is rather interesting to note the position in the United Kingdom. In response to the case of *Parkins v Sodexho*,⁵¹ the Enterprise and Regulatory Reform Act received royal assent in April 2013 which expanded the scope of whistleblower protection beyond that which had been intended by the Parliament.⁵² It made a critical change to the law on whistleblowing by amending the type of disclosure from the previous 'qualifying disclosure', to allow what is qualified by the law only, to introduce the 'public interest test', a test which allows any disclosure in

⁴⁵ Owen Bowcott, "Ex-GCHQ Whistleblower Attacks Plans To Extend Dragnet of Secrecy Law," *The Guardian*, February 2017.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ The United States Whistleblower Protection Enhancement Act 2012.

⁵¹ *Parkins v Sodexho* [2001] All ER (D) 377 (Jun).

⁵² *Chesterton Global Ltd v Nurmohamed (Public Concern at Work intervening)* [2017] EWCA CIV 9.

the interest of the public.⁵³ The duty of confidence is undeniably important; however, it could be argued that such protected documents and information might be potentially useful in proving corruption charges. This significant development may strike the balance pertaining to this matter by making public interest as the objective and prevails over personal interest.⁵⁴

To date, a more recent case that illustrates the position of public interest test under the PIDA can be seen in the case of *Chesterton Global Ltd v Nurmohamed*.⁵⁵ In this case, a disclosure was made regarding manipulation of a company's account by marking up the costs, thus overstating lower payments for about other 100 employees in the company. The claimant was later dismissed from the company after the disclosure and subsequently took this case to the court for unfair dismissal against the company. The company argued that the disclosure was in breach of a contract of employment and did not satisfy the public interest test because it was concerning a private company whose interest did not serve the public. The court, however, upheld the public interest test, stating that 'if the accounts in question had been the statutory account, even of a private company, the disclosure of such misstatement would unquestionably be in the public interest'. Furthermore, a wider definition of what affected the public interest was given in the case of *Underwood v Wincanton*. In this case, the court held that the public interest test is satisfied even only four of the employees were affected.⁵⁶ The current development witnesses the scope of disclosure being extended to any disclosure in the public interest and thus, providing a whistleblower legal protection under the law.

⁵³ National Audit Office, "Government Whistleblowing Policies" (London, 2014), 9.

⁵⁴ *Chesterton Global Ltd v Nurmohamed (Public Concern at Work intervening)* [2017] EWCA CIV 9.

⁵⁵ *Chesterton Global Ltd v Nurmohamed (Public Concern at Work intervening)* [2017] EWCA CIV 9.

⁵⁶ *Underwood v Wincanton* [2015] All ER (D) 129 (AUG).

WHISTLEBLOWING FROM THE SHARI'AH PERSPECTIVE

According to David Banisar, the whistleblowing laws in modern times have initially developed in response to several tragedies.⁵⁷ However, the duty of commanding good and forbidding the evil, in Islamic law, derives from the commandments of Allah s.w.t found in the Holy Qur'an⁵⁸ and the Hadith of the Holy Prophet s.a.w. These principles aim to protect and to preserve the public interest (*maslahah 'ammah*) entirely since its revelation.⁵⁹ The public interest is a whole value-oriented goal of every ruling based on the five objectives of Shari'ah, known as the *Maqasid Shari'ah*; which protects religion (*deen*), wealth (*mal*), lineage (*nasab*), intellect (*'aql*), and self (*nafs*).⁶⁰

Islam is a complete way of life that covers all aspects of life.⁶¹ The foundation of Islam is *Tawhid*,⁶² which means Allah, as The Oneness and

⁵⁷ Banisar, "Whistleblowing: International Standards and Developments.", 21. ('In the United States, the aftermath of the Challenger disaster in 1986 led to the Whistleblower Protection Act. In the United Kingdom, accidents involving ferries, trains and oil rigs resulting in serious losses of life led to the adoption of the Public Interest Disclosure Act. In all of these cases, it was later revealed that insiders were aware of the potential hazards and either too afraid to speak up or attempted to and were ignored').

⁵⁸ The term is mentioned several times in the Holy Qur'an. Among others in Surah Ali Imran (3): 110 which means, "You are the best nation (as an example) for mankind. You enjoin what is right and forbid what is wrong and believe in Allah. If only the People of the scripture had believed, it would have been better for them. Among them are believers, but most of them are defiantly disobedient."

⁵⁹ Kamali, *Principles of Islamic Jurisprudence*, 395–96.

⁶⁰ Jasser Auda, *Maqasid Al-Shari'ah as Philosophy of Islamic Law A System Approach* (London: The International Institute of Islamic Thought, 2007). 30. ('For example, Abd al-Malik al-Juwayni, one of the earliest contributors to *al-maqasid* theory as we know it today used *Al-Maqasid* and public interests (*al-maqasid ammah*) interchangeably. Abdul Hamid Al-Ghazali elaborated on a classification of *maqasid*, which he placed entirely under what he called 'unrestricted interests' (*al-masalih al-mursalah*)').

⁶¹ Mustapha Sidi Attahiru and Syarifah Binti Yusof, "Moderating Role of Hisbah Institution on the Relationship of Religiosity and Islamic Culture to Islamic Work Ethics in Nigeria," *Econ Journals: International Review of Management and Marketing* 6 (2016). 127.

⁶² Ibid. 127.

entrusts all mankind as the world's vicegerents.⁶³ Allah puts trust to mankind as a vicegerent to monitor the well-being of a society.⁶⁴ Therefore, the act of whistleblowing is a duty as a vicegerent in this world to make sure what Allah has ordered is carried out and what Allah has forbidden is abstained for the public interest.⁶⁵

Notably, the protection of public interest can also be seen from the term Shari'ah itself. In defining the Shari'ah, Ibn al-Qayyim describes Shari'ah as follows:

The Shari'ah is based on the wisdom and the objective of achieving people's welfare in this life and afterlife. Shari'ah is all about justice, mercy, wisdom, and goodness. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief or wisdom with nonsense, is a ruling that does not belong to the *Shari'ah*, even if it is claimed to be so based on several interpretations.⁶⁶

The duty of *hisbah* may include whistleblowing and functions as a tool to protect public interest⁶⁷ which aims at ensuring justice (*'adalah*).⁶⁸ In this regard, when the principles of *tawhid* and Shari'ah are translated into the modern society, they hold the civil society to play the duty and responsibility to collectively fight against corruption or malpractices in

⁶³ Saleh, "The Institution of Hisbah : Its Roles in Nurturing Fair and Just Economic System in Islam." 2.

⁶⁴ Ssuna Salim, Syahrul Faizaz Binti Abdullah and Kamarudin bin Ahmad, "Wilayat Al-Hisba; A Means to Achieve Justice and Maintain High Ethical Standards in Societies," *Mediterranean Journal of Social Sciences* 6, no. 4 (2015). 201.

⁶⁵ Khairunnisa Abd. Samad, Haniza Khalid and Saim Kayadibi, "Reducing Apathy in the Face of Corrupt Behaviour : Whistleblowing as an Act of ' Amr Bi -l- Ma ' Ruf Wa - Nahy ' an Al -Munkar," *Journal of Emerging Economies and Islamic Research* 3 (2015). 11-12.

⁶⁶ Muḥammad Ibn-Abi-Bakr Ibn-Qaiyim Al-Jawziya, *I'lam Al-Muwaqqi'in an Rabb Al-'Alamin* (Dar al-Kutub al-Ḥaditha, 1969).

⁶⁷ Abd. Samad, Khalid, and Kayadibi, "Reducing Apathy in the Face of Corrupt Behaviour : Whistleblowing as an Act of ' Amr Bi -l- Ma ' Ruf Wa - Nahy ' an Al -Munkar." 6.

⁶⁸ Ibid.

both the public and private sectors, as commanded by Allah. It is not only a moral obligation to everyone, but a religious duty upon all Muslims.⁶⁹

Even though there is no specific Qur'anic verse that describes the command of establishing a *Hisbah* institution, the duty derives from a principle found in Surah 'Ali-Imran in which Allah says:

وَلْتَكُنْ مِنْكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ

[L]et there arise out of you a group of people inviting to all that is good (Islam), enjoining *al-ma'ruf* (all that Islam orders) and forbidding *al-munkar* (all that Islam has forbidden).⁷⁰

There are many ahadith in support of the duty of commanding the good and forbidding the evil (*amr ma'ruf nahi munkar*). In a hadith, the Prophet Muhammad (S.A.W.) said:

He who amongst you sees something abominable should modify it with the help of his hand; and if he has not strength enough to do it, then he should do it with his tongue, and if he has not strength enough to do it, (even) then he should (abhor it) from his heart, and that is the least of faith.⁷¹

Therefore, the duty of *Muhtasib* or *Mutatawwi* to speak out against corruption is an act by tongue commanded in Islam to forbid evil. On the other hand, there is an argument with regard to a duty of a Muslim to not disclose the faults of others to anyone, thus, the act of whistleblower in disclosing faults of others seem to be contrary to such duty.⁷² It is based on a hadith where the Prophet (s.a.w.) mentioned that:

[O]h you who have lip-believed and in whose hearts faith has never entered, never backbite Muslims, nor trace their weaknesses, for he

⁶⁹ Abd El-Rehim Mohamed Al-Kashif, "Shari'ah's Normative Framework as to Financial Crime and Abuse," *Journal of Financial Crime* 16, 1 (2009).

⁷⁰ Quran, Surah Ali-Imran (3): 104.

⁷¹ Imam Muslim, *Sahih Muslim*, vol. 1 (Lahore: Ashraf Press, 1972), para. 49a.

⁷² Ashgar Ali Ali Mohamed, "Wrongdoing or Improper Conduct In An Organisation: Employee's Duty To 'Blow The Whistle' From An Islamic Perspective," *Shariah Law Reports Articles (ShLRA)* 2, no. xxxiii Shariah (2015): 4.

who traced his brother's weakness, Allah will trace his, and he whose weaknesses are traced by Allah shall be exposed by Him even inside his own house.⁷³

Based on this hadith, it can be inferred that Islam grants the rights of privacy to the individuals.⁷⁴ However, in the case of stopping or preventing an evil act, disclosure of a person's fault is commanded in Islam and the rights to privacy of the alleged faulty person shall cease.⁷⁵ In a hadith reported by Jabir ibn Abdullah, the Prophet (s.a.w) said:

Meetings are a trust, except three: those which are for the purpose of shedding blood unlawfully, committing Zina (adultery or fornication) or acquiring wealth unlawfully.⁷⁶

Based on this hadith, corruption can be associated with unlawful accumulation of wealth through illegal ways thus Islam allows a person to disclose such faults of others in order to stop such faults or for further action by the authority.⁷⁷ It is because such wrongdoings that affect the rights of other persons.⁷⁸ The disclosure is made with the intention to stop the person from further committing the act or to correct the wrongdoings or misconducts.⁷⁹ Upon omission of enjoining the good and forbidding the evil, one would be answerable in the Day of Judgement.⁸⁰ This is based on the Prophet (S.A.W.)'s reminder, which is as follows:

⁷³ Imam Abu Dawud, *Sunan Abu Dawud*, vol. 5 (Riyadh: Darussalam, 2008), para. 4946.

⁷⁴ Ashgar Ali Ali Mohamed, "Wrongdoing or Improper Conduct In An Organisation: Employee's Duty To 'Blow The Whistle' From An Islamic Perspective," *Shariah Law Reports Articles (ShLRA)* 2, no. xxxiii Shariah (2015): 4.

⁷⁵ Ibid.

⁷⁶ Abu Dawud, *Sunan Abu Dawud*, 2008, vol. 5, para. 4869.

⁷⁷ Ashgar Ali Ali Mohamed, "Wrongdoing or Improper Conduct In An Organisation: Employee's Duty To 'Blow The Whistle' From An Islamic Perspective," *Shariah Law Reports Articles (ShLRA)* 2, no. xxxiii Shariah (2015): 4.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

There is no man among a people who commit acts of disobedience, and they are able to change it, but they do not change it, but Allah will punish them before they die.⁸¹

Historically, the duty of *hisbah* was only translated into political, economic, and social structures at the time when the Prophet (S.A.W.) was the head of Medina, when the duty of *hisbah* was originally known as a duty of commanding the good and forbidding the evil (*amr makruf nahy mungkar*).⁸² In considering the duty of *hisbah*, what is right and wrong is determined by *Shari'ah* and corruption is clearly prohibited in Islam.⁸³ The legacy continued up until the *Uthmaniyyah* or Ottoman era and the term 'Institution of *Hisbah*' was only used during the *Abassiyah* era ruled by Abdul Malik Bin Marwan as a state's political, economic, and social institution.⁸⁴ The fact remained that The Prophet Muhammad (S.A.W.) was the first *Muhtasib*.⁸⁵ Subsequently, The Prophet Muhammad (S.A.W.) appointed some of his companions to perform this duty, including Said b. al-'As in Mecca and Umar b. al-Khattab in Medina.⁸⁶

In addition, there was a case when Umar al-Khattab, as the head of state, was questioned on the source of his long robe openly in public

⁸¹ Imam Abu Dawud, *Sunan Abu Dawud*, vol. 4 (Riyadh: Darussalam, 2008), para. 4339.

⁸² Ab et al., "The Institution of Hisbah : In the Purview of Its Significances and Development." 63.

⁸³ Allah says: 'And do not consume your property among yourselves wrongfully, nor seek access to judges by means of it in order that you may sinfully consume a portion of people's wealth, while you know (what you do).' [Al-Baqarah: 188]. The Prophet Muhammad (S.A.W.): "Allah cursed the one who offer the bribes and the one who receives it, and the one who arranges it.' (Reported in al-Tirmidhi and Ahmad).

⁸⁴ Ibrahim Barkindo, "The Role of the Institution of Hisba in the Sharia Implementing States in Northern Nigeria" (PhD diss., University of Ahmadu Bello, 2011). 66.

⁸⁵ Saleh, "The Institution of Hisbah : Its Roles in Nurturing Fair and Just Economic System in Islam.", 2.

⁸⁶ Ibid. 2.

while he was delivering a Friday sermon.⁸⁷ The man asked him: "O the leader of the believers, I will not listen to your sermon until you explain how you came up with your long dress (Arabian robe)".⁸⁸ It was reported that some distribution of fabrics were made for the people and Umar was not able to make his robe because the portion given was initially inadequate for Umar's height.⁸⁹ In response to the question, Umar's son stood up and explained that a dress could be made to fit Umar's measurement because he gave his portion to his father.⁹⁰ The explanation was accepted by the man and subsequently Umar resumed his sermon.⁹¹ This public inquiry was formerly practiced to safeguard the public interest, not only to inquire the public, but also the head of the state for the purposes of transparency and accountability. This process could be considered as fulfilling the responsibility of commanding good and forbidding evil. This therefore supports the role of a whistleblower as a *Muhtasib* or *Mutatawwi*, acting with the intention of protecting the public and must be regarded as a legal mechanism to respond to corruption, a global issue plaguing many nations.

ANALYSIS AND FINDINGS

The present development of law witnesses the shift from legalism to a more value-orientated approach.⁹² It is found that the failure to protect whistleblowing disclosure in the interest of the public is mainly due to a static legal approach and hence, requires value-oriented reform. The Shari'ah principles related to a duty of commanding good and forbidding the evil can be adopted as a paradigm for the development of a whistleblowing model of law in Malaysia, in an attempt to outweigh the duty of confidence with the role of whistleblowers to protect the public interest. This value-oriented approach propounds and appreciates the

⁸⁷ Maszlee Malik, *Foundations of Islamic Governance: A Southeast Asian Perspective*, 1st ed (New York: Taylor & Francis, 2016), 151.

⁸⁸ Malik, *Foundations of Islamic Governance: A Southeast Asian Perspective*.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Mohammad Omar Farooq, *Toward Our Reformation from Legalism to Value-Oriented Islamic Law and Jurisprudence* (London: International Institute of Islamic Thought, 2015). 4-11.

value of the public interest (*maslahah ammah*) over and above the need to protect the organization or the people in charge of an organization.

In Islamic law, one of the secondary sources in deciding legal issues, excluding worship matters (*ibadah*),⁹³ is known as *maslahah mursalah*, which means consideration of the public interest, as the objective of Islamic law is to secure benefits and prevent harm.⁹⁴ Besides, as mentioned above, the protection and preservation of public interest is the ultimate aim of every Shari'ah ruling. Shari'ah is described as a dynamic law due to its relevancy and has continued to serve the society since its revelation until the present time. Furthermore, under the legal mechanism given by *maslahah mursalah*, conflict between two interests; first, the public interest (*maslahah 'ammah*), should prevail over the private interest (*maslahah khassah*).⁹⁵ In dealing with the issue of governance, Maszlee Malik states the following:

*[M]aqasid determines the radius of policies governing the society by accumulating general benefits and avoiding harm to the whole community to enhance public interest (maslahah 'ammah). The eradication of mafsadah (in its various forms) may lead to underdevelopment, unemployment, and economic crises that impede the accomplishment of the maqasidic goals, which is indeed an act of good (Islamic) governance.*⁹⁶

For the application of public interest test as discussed above, this may also be one of the principles to observe and to determine that the public interest (*maslahah ammah*) should prevail over the private interest (*maslahah khassah*).⁹⁷ Secondly, the stronger interest shall prevail.⁹⁸

⁹³ Nik Abdul Rahim Nik Abdul Ghani, Hayatullah Laluddin, and Amir Husin Mat Nor, "Maslahah as a Source of Islamic Transactions (Mu'amalat)," *Islamiyyat* 33 (2011). 63.

⁹⁴ Kamali, *Principles of Islamic Jurisprudence*. 267.

⁹⁵ Ibn Asyur, *Maqasid Al-Syariah Al-Islamiyyah* (Tunisia: Dar al-Suhnun lil-Nashr, 1867). 66.

⁹⁶ Maszlee Malik, "Al-Maqasid Al- Shari'ah (The Comprehensive Objectives of Shari'ah)," in (a paper presented in *Forum on "Maqasid Syariah in A Constitutional Democracy"*), vol. 1, 2015.

⁹⁷ Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence* (Islamabad: Advanced Legal Studies Institute, 1998). 216

⁹⁸ Ibid. 215

Thirdly, the definite interest shall prevail over probable interest.⁹⁹ In contrast, the purpose of law towards protecting the public interest would apparently be defeated and the corrupt would employ such detrimental laws as an escape, thus spreading corruption to affect the public interest politically, economically, and socially. Hence, these principles may be observed as further development to the public interest test, which has been reflected in the decision made for the case of *Chesterton Global Ltd v Nurmohamed*,¹⁰⁰ as discussed above.

CONCLUSION

Both whistleblowing in the west and the duty of commanding good and forbidding the evil (*amr ma'ruf nahy mungkar*) which is manifested through the institution of *Hisbah* in *Shari'ah* could both be a significant response to corruption. Nevertheless, this article has illustrated that both concepts are derived from different origins and sources of law. The institution of *Hisbah* is the duty of each person who has witnessed a wrongdoing, mismanagement or corruption in an organization to report or stop these wrongful acts, whereas whistleblowing laws in this modern time provides a mechanism on how this responsibility could be carried out effectively by providing the necessary protection to the whistleblowers when necessary. This article has also presented that what is allowed and prohibited by the *Shari'ah* is dynamic and relevant to the modern world because the whole idea of *Shari'ah* is clearly to protect public interest as stipulated in the *Maqasid Shari'ah*, such as prohibition of corruption which is regarded as unlawful wealth accumulation and a breach to the right of public. Upon the breach, the duty to report shall lie upon all related individuals. Meanwhile, the scope of western whistleblowing disclosure has been recently developed to include public interest as a reason to blow the whistle which qualifies a whistleblower for legal protection. In the present time, it is observed that the UK whistleblowing law is more developed as compared to other countries in filling the void. The law upholds the public interest test to determine what can be disclosed by listing the types of matters that are regarded as

⁹⁹ Ibid. 217.

¹⁰⁰ *Chesterton Global Ltd v Nurmohamed (Public Concern at Work intervening)* [2017] EWCA CIV 9.

public interest in the UK PIDA. For instance, the UK PIDA includes safety, health and environmental aspects as the scope of disclosure in the public interest. This recent development witnesses a significant change from the previous ‘qualifying disclosure’ approach, which allows what is allowed by the law only, to the recent development of any disclosure in the public interest thus, may strike the balance by making public interest prevails over private interest. In upholding public interest, Shari’ah principles may offer further development within its principles and objectives, that in terms of observing the public interest (*maslahah ‘ammah*), it shall prevail over private interest (*maslahah khassah*); secondly, the stronger and thirdly, definite interest shall prevail over the probable interest. The public interest (*maslahah ‘ammah*) as the objective of law, notably has been proposed under *Maqasid Shari’ah* and the legal mechanism of *maslahah mursalah* in Islamic law. These attributes, contributed by both whistleblowing model of laws, may help a whistleblower to play significant role in disclosing or reporting the wrongdoing by highlighting public interest as the scope of disclosure to blow the whistle to fight against corruption. Therefore, the absence of public interest disclosure as the scope of disclosure in many whistleblowing laws and protection for such disclosure are loopholes that must be dealt with.¹⁰¹

¹⁰¹ Hazlina and Shaik Noor, “Public Interest Paradigm: Quo Vadis? Whistleblower Protection Act 2010,” *Malayan Law Journal* 6 (2010): 8.