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TESI DI DOTTORATO

CORRUPTION, GOVERNANCE REFORM AND THE RULE OF LAW ORTHODOXY: RESOLVING UNSOLVED QUAGMIRES

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E. Kofi Abotsi

DEDICATION

I dedicate this thesis to baby Elikem, whose seamless smiles inspires me beyond any difficulty.

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As I acknowledge those who have helped me in this work, I first of all thank God who makes all things possible in my life! I acknowledge with profound gratitude the guidance, indulgence and invaluable support of my supervisory team and chairperson for their help in completing this work. Their indulgence, pointers, critiques, and steady supervision has made this final work possible. To them I owe an awful debt of gratitude! I equally seize the opportunity to thank my wife, Emily, and children for their love, patience and understanding during the times when I needed them the most to be supportive of this enterprise. My completing this research is a testament to their encouragement and succor to me during the hard times of my work. I will be remiss without specially mentioning the inspiration and encouragement offered me by my lifelong friend, Prof. Paolo Galizzi and through whose strong recommendation I chose to pursue my doctoral Degree in the Universita Degli Studi Di Milano Facolta De Giurisprudenza. Finally, I acknowledge the contributions of the many who offered support in various forms including respondents to my questionnaire in the field research. And to everyone who has helped in the diverse but subtle ways to make this work complete, to you I remain grateful and indebted.

LIST OF ABBREVIATIONS

ADB	Asian Development Bank
BTI	Bertelsmann Stiftung's Transformation Index
CDF	Comprehensive Development Framework
CHRAJ	Commission On Human Rights And Administrative Justice
CPI	Corruption Perception Index
ERP	Economic Recovery Program
IFIS	Multilateral Financial Institutions
IGOS	International Governmental Organizations
IMF	International Monetary Fund
ISI	Import Substitution Industrialization
MDGS	Millennium Development Goals
OECD	Organization For Economic Cooperation And Development
OSP	Office Of The Special Prosecutor
ROL	Rule Of Law
SAP	Structural Adjustment Programs
SDGS	Sustainable Development Goals

ABSTRACT

In this thesis, the author investigates the phenomenon of endemic and persistent corruption in Ghana, despite the countless legislative reforms and changes made in recent decades to the governance architecture of the country aimed at fighting, or at least stemming, this widespread virus. In particular, the author critically analyzes the classical instrument, identified by international political and economic institutions as the most suitable for countering the phenomenon in question, consisting in the pure "formal" transplantation of typical institutions in developing countries and principles of the Western Rule of Law. The author disputes the assumption (almost a dogma) that a formalistic and orthodox application of these principles can really affect contexts, such as that of Ghana, characterized by legal and structural pluralism, whose interplay offers resistance to the "transplantation" of formal law and institutions as confirmed by the growing ubiquity of corruption in Ghana and the evident inability of laws and institutions to effectively combat, suppress and possibly eliminate the practice altogether from the political and economic spheres of the country. In this work, the author proposes a multi-purpose and mixed model or approach as an alternative to the classic formalistic approach, based on hard law and sanctions for violation by suggesting that soft law tools should be prioritized. Among these, the author suggests the setting of ethical standards to be followed in the public and private sectors, the construction of a model of decentralization, and finally, a widespread use of education on corruption and legality be adopted as a response and curative strategy. He argues that these are tools that are better suited to cultural contexts, such as those of developing countries, characterized by "informality" rather than by the rigid of law shaped by legal formalism.

GENERAL INTRODUCTION

Over the last quarter of a century, development assistant agencies and the government of Ghana have invested millions of dollars in reforming Ghana's governance system and promoting the rule of law (ROL).1 The central aim of these reform initiatives have been to promote transparency, advance the strictures of accountability and the ROL, and ultimately enhance the economic prospects of the country and wellbeing of its citizens.[2] The topical assumption informing this policy orientation is a patent belief in the curative effect of the rule of law against corruption and in the development equation in general.[3] In addition, the

1 J. H. Anderson and C.W. Gray, *Transforming Judicial Systems in Europe and* Central Asia, *in* ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOM- Ics-REGIONAL 329, 333 (Francois Bourguignon & Boris Pleskovic eds., 2007), Available at http:// siteresources.worldbank.org/EXTECAREGTOPJUDREF/Resources/ABCDE.pdf?& resourceurlname=ABCDE.pdf. ; R. Daniels & M. Trebilcock, The Political Economy of Rule of Law Reform in Developing Countries, *26 Mich. J. Int'l L. 99 (2004).;* T. Carothers, Promoting the Rule of Law Abroad: The Problem of Knowledge, Rule of Law Series, Democracy and Rule of Law Project, Carnegie Endowment for International Peace, Available at https://www.jstor.org/stable/resrep12978?seq=1#metadata_info_tab_contents; On the issue of the World Bank's support for the Rule of law in emergent markets and economies in general, see *World Bank. 2002. World Development Report 2002 : Building Institutions for Markets. New York: Oxford University Press. © World Bank. https://openknowledge.worldbank.org/handle/10986/5984 License: CC BY 3.0 IGO* , Available at https://openknowledge.worldbank.org/handle/10986/5984; G. Baron, The World Bank and Rule of Law Reform, *Working Paper Series, Development Studies Institute,* London School of Economics and Political Science, (2005) Available at http://www.lse.ac.uk/internationalDevelopment/pdf/WP/WP70.pdf. C.W. Gray, Reforming Legal Systems in Developing and Transition Countries, https://www.imf.org/external/pubs/ft/fandd/1997/09/pdf/gray.pdf; F. Barson, Reforms under the World Bank Procurement and the Policy Implications for Developing Countries, *European Procurement & Public Private Partnership Law Review* Vol. 12, No. 2 (2017), p. 146

2 On the controversial subject of the surrounding context and politics of these reforms by multilateral donor agencies, see Y. Shin Tang, The International Politics of Legal Reforms: Hard Bilateralism, Soft Multilateralism and the World Bank's "Doing Business" Indicators, *Rev. bras. Polít. Int. Vol.60 No.1 Brasília 2017 Epub Oct 23, 2017*, Available at https://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-73292017000100215

3 While the broad failure of the reform approach adopted by multi-lateral agencies will be generally repeatedly treated and critiqued throughout this research, for an excellent treatment of the subject of judicial reform, see, M.C. Stephenson, Judicial Reform in Developing Economies: Constraints and Opportunities, http://www.law.harvard.edu/faculty/mstephenson/pdfsNEW/JudicialReformABCDE.pdf

implementation of these assistance instruments reflect an incipient trust in the capacity of Western-type institutions and legal norms to solve the quagmires plaguing third world developing countries, especially in Africa. Perhaps this is not surprising given that development theory has for decades emphasized the strong linkages between the rule of law (generally defined) and economic development.4 Inherent in this theoretical orientation has been the assumption that the prevalence of institutional failure, rampant corruption and other rent-seeking behaviour within given countries coupled with arbitrariness in decision making invariably lead to widespread poverty and underdevelopment. This belief has held sway not only within academic circles and substantially influenced the scholarship in the field, but also galvanized a model of thinking within international development agencies and spawned a sub-culture and ethos with the leading International Financial Institutions (IFIs) of the world. In a more concrete sense, this tendency has influenced the fashioning and deployment of development assistance policies and the relationships of the IFIs with assisted countries.

Yet while extant literature is broadly agreed (to varying degrees) on the nexus between the ROL and institutional functionality and development in general,[5] gauged

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4 M. Johnston, Good Governance, Rule of Law, Transparency and Accountability, https://www.researchgate.net/publication/267974525_Good_Governance_Rule_of_Law_Transparency_and_Accountability

5 D. Chen & S. Deakin, On Heaven's Lathe: State, Rule of Law and Economic Development, Centre for Business Research, University of Cambridge Working Paper No. 464; R.D.Cooter, The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development, Available at: h.ps://works.bepress.com/robert_cooter/48/; K. Pistor, The Standardization Of Law And Its Effect On Developing Economies Center For International Development Harvard University, G-24 Discussion Paper Series No. 4, June 2000; Kevin E. Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 Mich. J. Int'l L. 141 (2004). Available at:

especially from the governance perspective, existing literature and research stops short of investigating and evaluating the reality and causes of the gulf between the "ideal ROL"6 as conceived and conceptualized on the one hand, and the actual implementation of that version of the ROL executed in given contexts. This omission is especially surprising in the case of Ghana given the problem of persistent and rapacious practice of corruption and rent-seeking in the face of sustained law reform initiatives in these countries under the aegis of the IFIs. Thus, while the past 25 years has witnessed incremental improvements in law reform and rule of law initiatives, growth in the depth and scope as well as complexity of corruption in the country has continued to question the efficacy of these initiatives and effectiveness if not reality of the "ideal" or formalist ROL to uproot or rein in governance ills such as corruption. This not only creates a conundrum in the scholarship and assumptions underlying these policy instruments together with any existing explanatory theories proffered for the failure of law reform in this regard, but also that the ROL-corruption dynamic or quagmire in Ghana ought to force a rethink of fundamental hypotheses informing the ROL agenda in governance reform in Ghana in the face of the manifest sub-optimality.[7]

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h8p://repository.law.umich.edu/mjil/vol26/iss1/6; .K. Erbeznik, "Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries, *Indiana Journal of Global Legal Studies: Vol. 18: Iss. 2*, Article 9. (2011) Available at: http://www.repository.law.indiana.edu/ijgls/vol18/iss2/9

6 In this thesis, the term "ideal rule of law" is used to denote the term rule of law as universally and generally defined by various scholars some of which will be discussed in this work.

[7] On the dynamics of the literature or scholarship on the ROL-Corruption, see, A. Dische et al, Anti-Corruption Approaches: A Literature Review, Norwegian Agency for Development Cooperation – Norad, http://www.norad.no/en/Tools+and+publications/Publications/Publication+Page?key=119213

Yet, it bears pointing out that in many ways, the past research has succeeded in strengthening a ROL orthodoxy and a dogmatic paradigm championed mainly by development aid agencies together with scholars who shape their thinking and orientation. Proponents of this school fundamentally believe that the problem of corruption stems from the failure of the formalist ROL and existing legal institutions to curb the incidence of graft and the theft of public resources in the governance process. Proponents of this theory argue that the failure by governance institutions in itself also derives largely from the inadequacy or outmoded character of existing laws shaping and regulating these institutions. Consequently, advocates of the "ideal ROL" view have argued for the speedy but incremental build of laws and legal institutions through processes such as transplantation. Significantly, this view of the incidence and prevalence of corruption and the formalist "legalistic" mode of combatting it through the ROL model remains dominant in the narratives of the development assistance community in general and erstwhile law and development scholarship.

While belief in the confluence of the formalist ROL and optimal governance reform is not unique to Africa, the peculiarities of the history of the countries on the continent including Ghana, has meant that the results from the attempt at applying the "ideal" ROL to the corruption conundrum has been largely dismal. The explanations for Africa's peculiarities are many and hard to put down to a single factor. What is agreed however is the fact that the failure by development assistance to articulate

and implement a nuanced version of the rule of law may largely account for the still-birthed policies they implemented in countries on the continent such as Ghana. For example, a key outcome of the reform effort on the continent has been that many African countries including Ghana suffer from structural dualism in which sub-state spaces have come to exist independent but *pari passu* that of the state. While the former constitutes an informal regime, its operation and interaction with the state has tended to impact on, and in some cases, supplant the operation of the law and the success of law reform initiatives that have been designed over the years to counter corruption for example.[8] In the case of Ghana, other factors such as the systemic pluralism of the legal regime prevalent in the country demands that any reform will of necessity has to accommodate the multiplicity of sub-legal categories including customary law and the accompanying legal culture. The reality however has been that law reform initiatives in Ghana like other places in Africa, have sought to advance an ideal and nearly abstract version of the ROL and the net effect of this has been to render law reform initiatives based on this model of the ROL both ineffective and inefficient in regulating behaviour and enforcing a regime of institutional culture that promotes good governance.

On the other hand, the overarching imperative to achieve economic development by Ghana remains a dominant quest in the governance of the country. The attraction of the "ideal ROL" in the anti-corruption initiatives and general governance reform reflect a certain assumption in then cross-national belief in the efficacy of the

[8] See Generally, B. Van et al, A Fuller Understanding of Legal Validity and Soft Law*, In Legal Validity and Soft Law*, P. Westerman et al (Eds.), p145, Springer (2018).

formalist ROL and the age-old scholarship informing that mode of thinking.[9] On the other hand, the thaw in the intellectual foundations of the movement's following years of failed experiments in countries on the continent did little to undermine the formalist ROL agenda in development theory and the assistance community policy orientation. Thus, the rule of law conditionality implemented by development agencies including the World Bank as well as domestically inspired reform policies have all emphasized the values and features of the "ideal ROL" in the abstract without the needed contextual nuances necessary for its effectiveness.

Given the acknowledged role of law in the distribution of entitlements and rewards as well as the deployment of punitive sanctions for socially unapproved behaviour, the centrality of law to the combat of corruption and achieving the ends of redistributive justice in a regime of inequity and underdevelopment can hardly be overemphasized. Yet this point stands in isolation to the question of the identity, conceptual scope, clarity and even acceptance or effectiveness of the of "ideal ROL" in given situations and context in advancing the values law as a regulatory tool. Recognizing this fact is crucial given the malleability of the concept of the ROL and its susceptibility to be reinterpreted, confused, and even abused or exploited.

From a conceptual standpoint, the "ideal ROL" has been used in two broad senses namely the formalist and substantive conceptions with each use reflecting a certain emphasis of the concept. While the formalist conception dwells on the existence of a

[9] For an exploratory overview of the scholarship and the perspectives in the literature, see, M.M. Prado, What is Law and Development, *Revista Argentina de Teoria Juridica, Vol. 11, No. 1, 2010*

minimum content of certain procedural variables, the substantive conception emphasizes a value strand of the concept. Under the substantive concept, the ROL establishes a normative framework within which ascribing countries are expected to operate a legal regime that conform to minimum thresholds advanced by the rule of law. While the dichotomy between the formalist and substantive conceptions of the rule of law remains a functional aid to an operational understanding of the ROL, it is useful at this stage to recognize the sometimes-symbiotic relationship between these two versions of the theory. In their seminal work, Daniels and Trebilcock[10] forcefully reiterated this position when they argued that,

[A] minimalist, procedurally oriented rule of law is a necessary, albeit not sufficient, condition for a just legal system. That is to say, whatever one's substantive conception of a just legal system or its component parts might be, it is difficult to imagine any normatively coherent or defensible substantive conception of a just legal system that is not predicated on the pre-existence of a procedurally just conception of the rule of law…

This research undertakes an evaluation of the implementation of the "ideal ROL" as a combat mechanism or tool of corruption in the governance reform of Ghana. In this regard, I fundamentally question the application of a 'mythical' if idealistic conception of the ROL in the design strategy of the fight against corruption within the governance reform agenda of Ghana. I poignantly argue that while the rule of law as an instrument of development and good governance inevitably plays a critical

[10] R. Daniels & M. Trebilcock, The Political Economy of Rule of Law Reform in Developing Countries, *26 MICH J. INT'L L.99* (2004), p99, available at http://repository.law.umich.edu/mjil/vol26/iss1/5;

role in the progress of Ghana and its governance, the manner of its past, present and future deployment have contributed to the persistence of corruption and even in some cases, authoritarian rule in the country. In coming to this conclusion, I argue that far from achieving its proclaimed goal of regulating and substantially eliminating corruption, many acts of corruption are in fact unwittingly promoted by ROL reform interventions. In so doing, I situate my analysis within the context of the implementation of the "ideal ROL" reform in Ghana, the surrounding socio-political and constitutional context, and how these have shaped and impacted the governance dynamics of Ghana. My goal is to compel an epistemic shift in the analyses and evaluation of the role and capacity of the "ideal ROL" as presently conceived, to combat and even eradicate corruption as a social canker in Ghana, and in the end contribute to filling a critical gap in the scholarship.

A) BACKGROUND TO THE PROBLEM

The problem of corruption has been a social canker plaguing Ghana's governance since the attainment of independence in the 1950s. In recent times, the phenomenon has assumed more intrusive and complex forms, and the problem of grand corruption at the political level especially has been on the rise.11 In this regard, corruption has featured prominently in the governance discourse in Ghana and there have been incremental efforts over the last two and a half decades to

11 2009 Investment Climate Statement, Ghana, Bureau of Economic, Energy and Business Affairs, https://www.state.gov/e/eeb/rls/othr/ics/2009/117435.htm; Vhttps://www.myjoyonline.com/opinion/2016/January-5th/the-causes-consequences-and-control-of-corruption-in-ghana.php

stamp out the menace. Significantly however, anti-corruption strategies adopted during the reform period beginning in the late 1990s appear to have failed as the phenomenon of graft and rent seeking seem to be worsening by the years.12 Indeed in an independent evaluation assessment of the World Bank's anti-corruption strategies, it was noted that, [*D]espite great efforts over the past 10 years, there are indications that corruption is showing no signs of improvement, and could even be worsening.13* From petty bribery and minor corruption among police officers and employees of the civil service to grand scale corruption among politicians and high public officers, the act of corruption appears to have become routine and virtually normalized in state-related transactions. For example, businesses report of being asked for bribes and other favours in order to secure government contracts14 and this is in addition to the perennial public complaints to the over-invoicing of government contracts with the view to distributing corrupt gains among public and private officials involved in certain schemes.[15]

The reality of corruption in private and government business has been raised by some multinationals as a reason for their refusal to invest in the country.16 This is critical given the fact that Ghana, like many emerging economies has to compete to attract capital and global investments for its development. Fortunately, the situation has been recognized as pressing and by a combination of domestic and international

12 Significantly, the World Bank itself, one of the key proponents and architect of many of these reform initiatives has admitted that progress on the fight against corruption has at best been slow. Governance and Anti-Corruption, Ways to Enhance the World Bank's Impact, IEG, WBG, http://siteresources.worldbank.org/INTOED/Resources/governance_anticorruption.pdf
13 Id.
14 https://en.wikipedia.org/wiki/Corruption_in_Ghana
15 Act 663 An Antidote to Corruption in Public Procurement, Public Procurement Authority E-Bulletin, http://ppaghana.org/documents/Bulletins/PPAE-BulletinJulAug2013Final.pdf
16 Id

factors and pressures, Ghana has crafted and adopted a number of legislations designed to open up public procurement, contracting, and general commercial transactions at the governmental level to regulation and accountability. These laws cap existing institutional infrastructure as well as new ones established to promote public accountability and promote constitutional trusteeship. Yet, the failure of these laws and the panoply of institutional systems to rein in the problem of corruption in line with their original design creates a conundrum and raises questions implicated in the research questions of this work.

Yet despite this rather yawning reality, there is a paucity or dearth of scholarship on the critical links between the ROL as a controlling variable and corruption in a manner that reflect on not only the causal elements of corruption but also the performance of the ROL as an overarching anti-corruption strategy. This is particularly surprising given the relative importance accorded the subject in Ghana's governance discourse and reform initiatives. On the other hand, given that the scholarship has in some cases almost pinned the problem of corruption down to the issue of rational human behaviour and choices driven by incentives, it is conceivable that existing mechanisms will continue to fail unless subjected to contextual diagnostic analyses and remediation. Similarly, given the polemics surrounding the doctrinal conception of corruption together with questions of who is to blame for the prevalence of corruption in one part of the world and not another, there is an existential need to further bring some clarity on the subject from the standpoint of Ghana and situate the narrative in context. My research hopes to achieve that objective and accordingly contribute to the body of literature in the field.

B) METHODOLOGY

A work of this nature requires an appropriate methodology carefully designed to help answer the research questions posed and usefully fill-in the identified gap(s) in the scholarship. The project will therefore adopt a methodology that ensures the gathering and analyses of relevant empirical data together with black letter legal material. At the very outset however, this this research is mindful of the conceptual distinction that is often drawn between research methods and methodology and the dichotomy informed the design and implementation of the approach adopted in completing the work. Thus, while methodology has been said to be the overall strategy for achieving the goal set out in a particular research agenda or project, research methods is the means or medium used to achieve that agenda.17 For example, Henn *et al* explained that research methods represent the range of techniques that are available to us in a particular research work whereas the methodology represents the whole strategy in achieving the intended research goal.18

17 M. Henn, et al, 'A Critical Introduction to Social Research' (2nd Ed., Sage 2006) 10

18 Id

The methodology of this research will therefore be predominantly descriptive and analytical and would involve extensive evaluation of data and theoretical positions in the extant literature as well as new data generated in empirical field research. The library and desk review of the literature and scholarship will be fundamentally devoted to a study of the black letter law shaping core doctrinal arguments on the conception and implementation of the formalist or ideal ROL within the context of the prevalence of corruption in general. The library work will involve a detailed review of selected literature and focal experiences in which theoretical paradigms have been applied in real life cases especially in Ghana. The goal here will be to evaluate the doctrinal issues implicated in the research questions and discussed in the literature by critically examining existing positions and perspectives on the subject.

In addition, the work will benefit from empirical research, which will focus on the gathering of field data and testing of core hypotheses informing this work. The field data will be generated by the administration of specific interviews to identifiable persons and/or groups. In order to ensure that all relevant population for the research are captured, the research component of the work will map out the core actors or players in the ROL agenda and its implementation in the governance architecture of Ghana. The questionnaire instrument to be administered will be designed to reflect the vagaries of the research questions and the overall goals of the research project. The empirical research will however be qualitative and will

focus primarily on the dynamics of the subject being investigated rather than the quantitative dimensions of the population or respondents interviewed.

Ghana typifies the governance reforms of the '90s in Africa having been labelled a star pupil of the reform initiatives of the World Bank.[19] In addition, the country has been adjudged a leader following the third wave of democratization the continent.[20] On the other hand, Ghana's situation has proven enigmatic in the face of the canker of corruption and rampant rent-seeking behaviour in its body politic and governance. In this regard, Ghana significantly mirrors the experiences of many countries on the continent including Nigeria and would therefore in this context provide a useful template for understanding the issues on a continental level broadly speaking. In addition, the actual management and deployment of the empirical research will be managed in a manner as to reflect hopes of the research namely optimal precision, transparency and efficiency in data gathering and analyses. Thus, across the four transitional phases of data collection namely initiation, implementation, integration and interpretation21, the management and administration of the data collection will be guided by the need to ensure optimal efficiency within the context of the work without compromising on coverage and depth. This aspect of the research is essentially therefore qualitative in nature and seeks to understand the key question

[19] E. Hutchful, Why Regimes Adjust: The World Bank Ponders Its "Star Pupil", Canadian *Journal of African Studies / Revue Canadienne des Études Africaines,* Available at https://www.tandfonline.com/doi/abs/10.1080/00083968.1995.10804386
Vol. 29, No. 2 (1995)

[20] https://www.worldpoliticsreview.com/articles/15705/in-troubled-west-africa-ghana-leads-the-way-on-democracy-rule-of-law

21 J. W. Creswell, Research Design, Qualitative, Quantitative, and Mixed Methods Approaches, SAGE Publications, 2009

of the interaction between corruption and the rule of law as a combat strategy by asking the broad question whether the implementation of the rule of law helps reduce corruption.

In terms of strengths and weaknesses of the adopted research methods and methodology, it can be argued that the evaluation of the doctrinal theories through the black letter law invariably suffers from the intellectual blinkers contained in these works. Given the questions posed by this research, it is useful to recognize the fact that any review focused on library research would of necessity be bogged down by substantial orthodoxy and the possibility of any analyses being influenced by these blinkers is real. Again, the use of field research methods through the administration of questionnaires in this work has some traditional limitations that will have to be noted and borne in mind to minimize the effect of these ills. Thus, apart from the issue of biases that may affect the structuring and administration of the questionnaire, respondents interviewed and responses given may also be skewed and possibly given to placate the interviewer. Even more fundamentally, the difficulty of securing interview sessions with notable actors who often turn out to be leading personalities in the Ghanaian society can affect or undermine the coverage and efficiency expectations of the research.

Fundamentally, this research is a piece of scholarship in constitutional law but draws heavily on international development assistance and the scholarship on law and

development. Its core thesis rests on the proposition or hypothesis that the use of law as an instrument of governance reform has at best achieved sub-optimal results in the fight against corruption. It proceeds to argue that while this is baffling *prima facie*, a careful review of the implementation approaches of the rule of law will reveal the flaws inherent in the formalist model of the rule of law approach adopted within the context of the development assistance initiatives that were adopted in Ghana following the adoption of the 1992 Constitution and implementation of reform programs.

C) RESEARCH QUESTIONS

This work is informed by a main research question and sub-structured questions. The key research question informing the execution of this project is, *does the implementation of the "ideal ROL" within the context of governance reform succeed in curbing and possibly eradicating the menace of corruption in Ghana*? In order to fully answer this question however, other sub-thematic questions were examined and researched on as follows:

I. *Is the "formalist or ideal ROL" an effective tool or panacea for dealing with the problem of corruption in Ghana?* This sub-question was designed to elicit responses on the role of the rule of law as an anti-

corruption strategy or mechanism in general. Its contribution to the overall research outcome cannot be overemphasized as it helped shape the analysis and aided my answering the question whether the implementation of that version of the ROL is effective in fighting corruption in Ghana.

II. *Does the implementation of a particular version of the ROL affect the combat or control of corruption*? This research question is a more nuanced and narrower version of the earlier one. It in fact implicates the central question of the research as it sought to examine the more subterranean subject of the approaches to the implementation of the ROL and how that invariably impacts any outcome of given governance reforms in Ghana. Unlike the first one however, it sought to elicit from the participants an understanding of both the ROL as universal concept and the dynamics of its actual implementation in specific governance scenarios such as in the case of Ghana.

III. *Why does corruption survive and even thrive in the midst of the ROL reform in Ghana?* This question sought to evaluate the enigma on the persistence of corruption in the face the ROL reform. Its basic goal was to help gain insights on the dynamics of the ROL as an agent of controlling or eliminating corruption.

D) AIMS & OBJECTIVES OF THE RESEARCH

The broad aim and objective of the research is to contribute new learning to the scholarship and fill a critical gap in the literature by shedding light on the flaws inherent in the scholarship on anti-corruption strategies relative to the implementation of the ROL in Ghana's governance reform agenda. More specifically, the aims and objectives of the project are as follows:

1. To meaningfully contribute to the scholarship in the field and introduce a new path of thinking on the issue of corruption and ROL reform in Ghana, and to some extent, Africa in general.

2. To critique the existing scholarship and deployed policy which is based on the assumption that the ROL as presently implemented is a panacea to the eradication of corruption in Ghana, and Africa in general.

3. To generally review the impact of the use and implementation of the formalist ROL by development assistance agencies within the context of the law and governance reform initiatives in Ghana over the years.

4. To examine the specific causes of corruption in Ghana within the context and/or framework of past diagnostic and prescriptive works and research.

5. To review and analyse the apparent persistence of corruption in the midst of law reform initiatives in Ghana.

E) ORGANIZATION OF WORK AND CHAPTER BREAKDOWNS

GENERAL INTRODUCTION

CHAPTER ONE

THE POLITICAL ECONOMY OF THE RULE OF LAW AND DEVELOPMENT: REVISITING RECURRENT DEBATES

CHAPTER TWO

DEVELOPMENT ASSISTANCE AND THE RULE OF LAW CONDITIONALITY

CHAPTER THREE

GOVERNANCE REFORM, RULE OF LAW, AND CORRUPTION IN GHANA

CHAPTER FOUR

HUBRIS AND FOLLY: SITUATIONAL REVIEW, EMPIRICAL RESEARCH FINDINGS AND ANALYSES

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

F) STATEMENT OF CHAPTER CONTENT

GENERAL INTRODUCTION

The introduction provides a critical opening into the topic of the thesis and offers an opportunity for me to lay out the complex issues to be explored throughout the work. By evaluating foundational thematic aspects of the topic, the general introduction sets out the broad issues informing the research and reviews the problem to be investigated, the research questions, core methodological models used in the work as well as the general scoping of the work. The general introduction in a work of this kind will invariably also undertake a review of the theoretical framework and context within which the research is located and how that fits within the mandate of the overall research.

The general introduction will therefore afford an opportunity to strongly state the case and mission of the research by poignantly asserting that while there exists a vast array of works in ancillary fields, the research exploring and evaluating the

progress or regress of the ROL as an anti-corruption stratagem is novel and path-breaking and contributes to the existing body of knowledge in very important ways. This chapter will thus invariably open a preliminary conversation on the various fields of study and how these overall fits into the structure of the work and ultimately the thesis.

Chapter 1

THE POLITICAL ECONOMY OF THE RULE OF LAW AND DEVELOPMENT: REVISITING RECURRENT DEBATES

The chapter on the political economy of the ROL and development is central to the structural cohesion of the research in general. This chapter is fundamentally designed to review the surrounding context of the ROL, political and governance dynamics within the broader and overarching theme of development. The issue of law and development has been acrimonious among jurists and scholars of development studies for decades. Yet within the spheres of development planning and assistance, the contested formalist model of the ROL has been applied virtually uncritically. This chapter examines the debates on the subject of law and its role (if any) in development, often defined as economic development. A thorough research

in this field provides a useful template to ultimately assess the framework within which advocates of the ROL-corruption operates. It consequently questions whether that framework has or should have a future in development discourse, governance reform, and anti-corruption initiatives. The chapter will highlight the broad spectrum of debates, dialectics, contests and even seemingly settled positions implicated in the issue of law and development and how these have inspired a generation of scholarship and development assistance initiatives.

Chapter 2

DEVELOPMENT ASSISTANCE AND THE RULE OF LAW CONDITIONALITY

Chapter 2 will focus on the specific issue of the ROL conditionality as a tool in development assistance policy in the developing world including Ghana's. It will adopt a mixed theoretical policy anecdote in its review of the historical application of the ROL as well as the variables informing the preferences of multilateral institutions in their uses of the formalist ROL conditionality in development assistance programs in Ghana. As it is in chapter 1, this chapter will also undertake a critical examination of such core issues as the multiplicity and shifting conceptions of the rule of law

used in the various policy instruments deployed by development assistance bodies and how these both complicate and confuse the implementation of the ROL in Ghana. It will build on the analysis by critically questioning the imperatives of promoting a rule of law agenda in development assistance in general and the fight against corruption in particular. The chapter will build on the structure of the work by examining the influences of legally exogenous but *real politik* factors that shape the rule of agenda in development assistance and how these have in reality undermined the expected outcomes of the ROL agenda in general.

Chapter 3

GOVERNANCE REFORM, RULE OF LAW, AND CORRUPTION IN GHANA

Chapter 3 is the crux of the research and will explore the correlations prevalent between the rule of law as the preferred control tool on the one hand, and corruption on the other. In so doing, the chapter will also be dedicated to reviewing the complexities of policy frameworks fashioned in that guise. The belief in the ROL as a curative instrument for the malaise of corruption has been deeply entrenched and elevated to the level of a dogma. Yet decades after the globalization of the ROL project, certain cankers plaguing the governance frameworks of countries such as

Ghana have equally remained enigmatic and persistent in the face of reforms. This chapter will therefore focus on the synergies and contradictions inherent in the ROL-good governance narrative and how that has fared in the context of the combat of corruption. By adopting an intrinsically critically approach, the chapter examines prevailing hypotheses in the field and subject them to a critical review. In the end, the chapter's fundamental objective will be to deconstruct the existing narrative seeking to project an objective globalized version of the ROL as a sufficient panacea to the menace of corruption. The overall objective of the chapter is to assert that the one-size-fit-all model contained in the formalist approach has largely failed and accordingly an effective and sustainable model is called for.

Chapter 4

HUBRIS AND FOLLY: SITUATIONAL REVIEW, EMPIRICAL RESEARCH FINDINGS AND ANALYSES

Chapter four is central to the structure, theme and objective of this work. The chapter is in two parts with the first part focusing on the current state of play in Ghana in light of the theme of the ROL, corruption and governance, with the second part devoted to a consideration and analyses of the findings derived from the empirical research undertaken. In this chapter, I will examine the impact of the

structural outlay of Ghana's governance framework and the extent to which this promoted the values advanced by the regime in general. This is crucial, as it will enable our understanding of the systemic factors and variables and the role they play in fighting or facilitating the menace of corruption. On the other hand, understanding the contextual dimensions of corruption will afford me the needed springboard to discuss in some depth the character of corruption within the governance context and the dynamics impacting it.

This chapter will also be used to review the ROL as a factor of governance. Situating the ROL within governance context will help evaluate the theory earlier discussed in chapter three within Ghana's governance dynamic and its evolution in the country's reform. Crucially, this chapter will examine the peculiar phenomenon of "legal corruption" which is a concept developed to explain the use of systems and structures of state to corrupt ends. Discussing this under chapter four will allow an understanding and critique of the ROL orthodoxy in the fight against corruption. In this regard, the concept of state capture is examined and discussed as a correlative concept. The second part of this chapter is devoted to a discussion and analyses of the empirical research administered. These analyses of the empirical data and feedback are had in the context of the background literature and scholarship previously considered in the preceding chapters.

CHAPTER 5

CONCLUDING ANALYSES AND RECOMMENDATIONS

The final chapter draws on the extensive literature and research done to assert conclusions on the reality of corruptions and the stark failure of the implementation model of the ROL to effectively suppress and ultimately eliminate the phenomenon of corruption from Ghana's governance framework. The chapter then draws broad conclusions that can be extracted or extrapolated from the *status quo*. More crucially and within the context of the work, the second part of this chapter makes critical recommendations on the way forward on how to efficiently and effectively deploy the rule of law as an anti-corruption stratagem within Ghana's governance reform agenda and within the larger goal of development.

CHAPTER ONE

THE POLITICAL ECONOMY OF THE RULE OF LAW AND DEVELOPMENT: REVISITING RECURRENT ISSUES

I. Introduction

Belief in the nexus between law and development has assumed a topical position in both the scholarship and among development policy practitioners for decades now.22 While there has equally been sustained contestations on the reality if not character of this linkage between the two facets of social dynamics, it is clear that advocates of the law and development school have succeeded in advancing a rational dogma which of necessity, connects the law to development and makes the latter a function of the former.23 The spread of law as a tool of global development was an early project of the diffusion of Western ideas and systems to what was

22 For early scholarly interest in the subject from the colonial perspective, see J. S. Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India (*New York: New York University Press, 1957); Also see A. Smith, *Lectures On Jurisprudence,* The Glasgow Edition of the Works of Adam Smith (London: Oxford University Press, 1978); M. Weber, *Law In Economy and Society,* M. Rheinstein (Ed.), trans. by E. Shils & M, Rheinstein (Chicago: Harvard University Press, 1954).

23 R. Daniels & M. Trebilcock, "The Political Economy of Rule of Law Reform in Developing Countries," *Michigan Journal on International Law*, supra, note 5, J.E Campos et al. "The Impact of Corruption on Investment: Predictability Matters*," World Development,* vol. 27, (1999), 1059; P. Mauro, "The Effects of Corruption on Growth, Investment and Government Expenditure," In *Corruption and the World Economy*, K. Ann Elliot (Ed.) (1997), 83; P. Mauro, "Corruption and Growth," *Quarterly Journal on Economic Growth,* vol. 110, (1995), 681; S. Wei, "How Taxing is Corruption on International Investors?" *The Review of Economics and Statistics*, vol. LXXXII, number 1 (February 2000), 1.

considered peripheral and developing countries. Burgeoning academic work in the universities of Western countries on the transformative capacity of the on the fortunes of underdeveloped countries implied that real life experiments were needed to examine the empirical veracity of law and development theories and the extent of their applicability in differing contexts. Newly independent countries in Africa and Latin America in particular, presented opportunities to test key hypotheses of these academic works, which theorized that, in the minimum, law played a central role in the development of countries. This supposition was significantly shaped by the belief that the rational and regulating capacity of the law could be harnessed to promote a rational, rapid and constructed development of Third World countries.24

Consequently, legal transplantation and the reform of the rule of law became an obsession of legal scholars and the policy community who shared in that line of thinking. Law reform programs and projects became dominant in the overall policy structures of aid and assistance initiatives and the use of this as a conditionality has

24 See S. Kennedy, *The Dialectics of Law and Development, In New Law and Economic Development, A Critical Appraisal,* D.M. Trubek & A. Santos (Eds.) (New York: Cambridge University Press, 2006), 167; K.E. Davis & M Trebilcock, The Relationship between Law and Development: Optimists versus Skeptics, *American Journal of Comparative Law* Vol. 56, No. 4 (Fall 2008) 895; David M. Trubek, Law and Development 50 Years On, *University of Wisconsin Legal Studies Research Paper Series,* No. 1212 (2012), 1, http:// ssrn.com/abstract=2161899; see also Y. Lee, Call for a New Analytical Model for Law and Development, *Law and Development Review*, vol. 8, Rev. 2 (2015), 271; D.M. Trubek & M. Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, *Wisconsin Law Review*, 4 (1974), 1062-1103; J.M. Merryman, Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement, *American Journal on Comparative Law,* 25 (1977), 457; F.G. Snyder, The Failure of Law and Development, *Wisconsin Law Review*, 3 (1982), 373; see also F.G. Snyder, Law and Development in the Light of Dependency Theory, *Law and Society Review*, 14 (1980), 723; D.C. North, Institutions, *Journal of Economic Perspectives*, vol. 5, no. 1 (1991), 97-112; B.Z. Tamanaha, The Lessons of Law-and-Development Studies, *American Journal of International Law*, 89 (1995), 470, https://doi.org/10.2307/2204226; M.O. Chibundu, Law in Development: On Tapping, Gourding and Serving Palm-Wine, *Case Western Reserve Journal of International Law*, 29 (1997), 167; L. Yong-Shik, General Theory of Law and Development, *Cornell International Law Journal*, Vol. 50, No. 3, Article 2 (2017), 169, accessed on January 23, 2019, https://scholarship.law.cornell.edu/cilj/vol50/iss3/2.

remained an enduring feature of externally designed development planning programs in the Third World.25 Needless to add that this dynamic of situating the ROL within the development context has been the subject of serious academic disputes and has continued to attract both strong supporters and critics, the role of law in development has generally been taken for granted in the literature.26 Within the last two decades however, the use of law reform as a medium to development has implicated varied political economy issues and foundational questions on the nature and role of law in development, legal transplantation, and the globalization of law within the framework of the law and development movement in general.

On the other hand, the concept of political economy provides a framework within which to engage the subject of law in development, law reform and the agenda of governance reform and development. Indeed, the literature appears broadly agreed on the fact that the concept of political economy provides a conducive template within which to conduct scholarly enquiry on the political and economic life of a country and the linking instrumentality of law to development.27 The research in this regard has recognized the utility of framing the narrative on the rule of law reform in the context of political economy given that law and its reform are embedded within, and shaped by political and economic relations that interact albeit

25 It has been estimated that the World Bank has assisted 330 law reform programs within its overall aid and rule of law initiatives. See Alvaro Santos, *The World Bank's Uses of the 'Rule of Law' Promise in Economic Development,* In The New Law and Economic Development: A Critical Appraisal, D. Trubek & A. Santos (Eds.) (New York: Cambridge University Press, 2006), 253.

26 For a good summary of the debates and dialectics on law and development, see K.E. Davis & M Trebilcock, "The Relationship between Law and Development: Optimists versus Skeptics," *supra*, note 19.

27 D. Kennedy, Law and the Political Economy of the World, *Leiden Journal of International Law*, 26 (2013), 7-48.

varied from context to context.28 This systemic quality of law reform and the varied socio-legal, political and economic consequences that are engendered through its manifestation and operation implies that law reform analyses and a consideration of the role law plays in development should be predicated on a political economy pedestal given that as Kennedy notes, legal institutions and ideas have a dialectical or constitutive relationship to economic activity.29 The symbiotic quality of law and its implications within the overall political establishment inevitably forces an investigation into the extent, if at all, to which it plays a role in the development prospects of Third World countries, such as Ghana's. On the other hand, understanding and evaluating the complex evolution and interaction of law reform and the general context of path dependency theories30 as well as the subject of corruption will better position this work to achieve its goals. This chapter will accordingly review debates in law and development, the rule of law reform project in Africa, law reform and the globalization of law and legal institutions.

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28 L. Denney & P. Domingo, Political Economy Analysis, Guidance for Legal and Technical Assistance, *Rule of Law Expertise Guidance Note* (London: Role UK, January 2017), https://www.roleuk.org.uk/sites/default/files/files/PEA%20%20Guidance%20for%20legal%20technical%20assistance.pdf

29 D. Kennedy, Three Globalization of Law and Legal Thought: 1850-2000, In *The New Law and Economic Development: A Critical Appraisal*, D. M. Trubek & A. Santos, 19, supra note 20. https://doi.org/10.1017/CBO9780511754425.002; See also K.E. Davis, What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?, *Michigan Journal of International Law*, 26 (2004), 141, Available at http://repository.law.umich.edu/mjil/vol26/iss1/6.

30 Path dependence explains how the set of decisions one faces for any given circumstance is limited by the decisions one has made in the past or by the events that one has experienced, even though past circumstances may no longer be relevant. Path dependency theory therefore asserts that countries (especially third world countries) being prone to act in ways that are shaped by their previous experiences and acts tends to suffer in their development remain in the vicious cycle of underdevelopment. See D. Praeger, Our Love Of Sewers: A Lesson in Path Dependence, *Poop The Book Plumbing Blog*, June 15, 2008, accessed October 2011, http://poopthebook.com/blog/2007/06/15/sewers-path-dependence/

II. The Law and Development Movement: The Dialectics

The law and development movement is perhaps the most notable intellectual movement of the twentieth century within the field of law. From a pragmatic perspective, the movement presented an interesting line of enquiry for scholars seeking to unearth the instrumental utility of law in society and how this can be harnessed to solve the developmental quagmires of the Third World. The movement is based on the basic premise that there exist an inextricable interconnection between law and national economic development, and where absent, this can be achieved through an instrumental regime of law reform.31 This is summed up in the words of Posner and bears quotation here as follows:

A modernizing nation's economic prosperity requires at least a modest legal infrastructure centred on the protection of property and contract rights. The essential legal reform required to create that infrastructure may be the adoption of a system of relatively precise legal rules, as distinct from more open-ended standards or a heavy investment in upgrading the nation's judiciary. A virtuous cycle can arise in which initially modest expenditures on law reform increase the rate of economic growth, in turn generating resources that will enable more ambitious legal reforms to be undertaken in the future.32

31 See generally, T. Ginsburg, Does Law Matter for Economic Development? Evidence from East Asia, *Law and Society Review*, 34 (2000), 829.

32 R.A. Posner, Creating a Legal Framework for Economic Development, The *World Bank Research Observer,* Vol. 13, no. 1 (February 1998), 1-11,

Posner's position exemplified in the above imbues law with the quality of indispensability within the development equation. Needless to add that the line of thinking advanced in his school of thought assumes a lineal path in the development of countries, the law and development school essentially pursued the belief in this connection in the legal-development equation and could not contemplate an alternate reality and path to development.

As a movement however, its peculiarity is more remembered for the school's lack of an identifiable theoretical framework and doctrinal coherence shaping its ideological frame and scholarship. In this regard, it is generally agreed among scholars that law and development as a movement started in the 1950s and '60s with the inception and rise of newly independent countries in the African and Latin American regions.33 The general view was that, the structure and orientation of these countries created a *path dependency 34* situation, which could only be remedied by

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http://documents.worldbank.org/curated/en/362191468148521481/Creating-a-legal-framework-for-economic-development

33 See generally on this, Brian Z. , The Primacy of Society and the Failure of Law and Development, *Cornell International Law Journal*, October 2, 2009 and Washington U. School of Law Working Paper No. 10-03-02, 13, http://ssrn.com/abstract=1406999; J.K.M. Ohnesorge, Developing Development Theory: Law & Development Orthodoxies and Northeast Asian Experience, *University of Pennsylvania Journal of International Economic Law*, 28, No. 2 (2007), 219; G. Jessup, Development Law: Squaring the Circle, Advancing Human Rights for Africa, *Human Rights Review*, (2006), 96; M. Baderin, Law and Development in Africa: Towards a New Approach, *NIALS Journal of Law and Development*, (January 2010), 1, , https://www.researchgate.net/publication/256086798_Law_and_Development_in_Africa_Towards_a_New_Approach

34 Path dependency theory asserts that countries (especially third world countries) are prone to act in ways that are shaped by their previous experiences and acts and this tends to affect their development and keeps them in the vicious cycle of underdevelopment. See also, H. Trouvé et al, The Path Dependency Theory: Analytical Framework to Study Institutional Integration. The Case of France," *International Journal of Integrated Care*, vol. 10, Available at, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2916113. Note that even Douglas North argues that institutional evolution is essentially path dependent and that reforms in the legal or political order however well-intentioned and impactful are often unlikely to achieve a transformative effect on institutions**.** D. North, *Institutions, Institutional Change and Economic Performance*, (Cambridge: Cambridge University Press, 1990), .

an ascription to Western legal and institutional systems. The law and development school that developed around this time of its history was therefore fundamentally modernist in outlook and was influenced by the modernization theory pioneered by Rostow.35 Situated within the context of this theory, the movement emphasized a unilineal conception of development in which Western societies were generally deemed to have achieved a comparatively optimal developmental status that can and ought to be replicated by newly developing Third World countries. Thus according to Ohnesorge, the modernization theory was the most comprehensive of the theories given that,

[T]he modernization orthodoxy was not concerned only with economic development, but saw development as a process by which "traditional" or "backwards" societies would transform along a host of dimensions to become "modern." Scholars from a range of disciplines shared the modernization ethos- indeed interdisciplinarity was fundamental to the goal of developing a total theory of society- so they naturally produced traditional-modern schemas based upon their disciplinary concerns.36

Flowing from this, it can be argued that, the modernization theory of the law and development movement represents the pivotal aspect of the movement given its

35 W.W. Rostow, *Stages of Economic Growth: A Non-Communist Manifesto,* (Cambridge: Cambridge University Press, 1960).

36 J.K.M. Ohnesorge, Developing Development Theory: Law & Development Orthodoxies and Northeast Asian Experience, *supra*, note 28 Also see Rostow, *Stages of Economic Growth: A Non-Communist Manifesto*, *Id,* whose analyses of the stages of economic development contains an implicit theoretical suggestion of evolution towards modernization.

belief in the capacity of the law to transform and shape new societies along the lines of comparatively advanced Western societies. Looked at from another angle, the modernization theory can therefore be said to be both evolutionary and revolutionary at the same time in mind-set and outlook since law and development advocates tended to believe in the evolution of Third World countries towards the ideal or optimal state of development through the instrumentality of the law while stressing the adoption of such radical models such as legal transplantation and substantial law reform initiatives. The use of law reform was seen as an effective medium to achieve the critical goal of helping Third World countries develop modern legal systems and achieve development through the resultant ROL initiatives such as the protection of properties, contracts enforcement, and respect for investment, among others.

Analysed from this perspective, the modernization theory clearly conceived of development in expansive terms and the concept of development was not merely restricted to "economic development".37 This is the case although some will argue that the anticipated transformation of the legal system was merely seen as means to

37 For conceptions of development, see R.E. Gordon & J.H. Sylvester, Deconstructing Development, *Wisconsin International Law Journal*, 22, (2004), 9; See also D.M. Trubek, *The Rule of Law in Development Assistance: Past, Present, and Futur*e, In *The New Law and Economic Development: A Critical Appraisal*, D.M. Trubek and A. Santos (Eds.), 167 supra note 24; See also A. Santos, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development," *supra*, note 24 ; L. Yong-Shik General Theory of Law and Development, Cornell Journal of Internal Law, *supra*, note 24, in which the author draws attention to the increasing wider conception of development which represents an expanded version of the notion of development relative to the narrow "economic development" which was mainly the version of development referred to by advocates of law and development in the 1960s.

the ultimate end of securing economic development through the guarantee of justice from the standpoint of Western acceptation of that concept.[38]

The alternative theory to the modernization school is the dependency theory. This theory fundamentally states that the developmental prospects of a country depends on or is a function of that country's relationship with the developed countries of the west. According to Davis & Trebilcock, dependency theorists are either sceptical of or reject the whole notion of legal transplantation and the efficacy of transporting legal norms and institutions as a developmental strategy.39 This school of thought argue that to the extent that law has a capacity to shape development, its influence lies in the redistributive capacity of law to reallocate resources and rebalance entitlements and social justice in general.40 In contrast to the modernization theory however, the dependency school thus departed from the uni-lineal conception of development in which the legal systems of Third World countries were seen as undeveloped versions of these institutions. In other words, unlike the evolutionary mind-set characteristic of the modernization school and its belief in the capacity of these institutions to be modernized, the dependency theory stressed the autochthonous dimensions of legal institutions and rather chooses to emphasize the importance of international relationships as a core determinant of the development of Third World countries.

[38] See generally, J. Chulu, Modernization: Is it Pathway to Achieving Sustainable Economic Growth and Investments, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2717083

39 K.E. Davis & M.J. Trebilcock, Legal Reforms and Development, *Third World Quarterly*, *vol. 22, No. 1 (2001), 23.*

40 Ibid.

The dependency school combined belief in the peculiarities of local institutions and systems with a sceptical outlook on international order and argues that the economies of Third World countries suffer from a degree of "capture" by international capital in league with local elites who essentially conspire to exploit the resources of the state.41 The dependency theory thus asserts an alternative model of development for Third World countries in which emphasis is laid on the articulation of the interests of these countries as opposed to an attempt to modernize the institutions of developing countries to mimic those of developed Western societies.

The law and development model that emerged in the 1950s and '60s based on the modernization school however emphasized the use of Western legal education as a means of achieving the systemic transformation expected of emergent legal systems.42 Thus, the scholarly advocates of this era stressed the need to reform legal education in Africa and produce an optimal number of lawyers and legal professionals. Scholars of this ilk in the movement attacked the formalist characteristics of legal education and training on the continent and chided the quality of lawyers churned out in general. Trubek for example, argued that the instrumental conception of the movement seem to require an attack on four manifestations of formalism in African legal training and practice, namely, formalism

41 See generally, J.S. Valenzuela & Arturo Valenzuela, Modernization and Dependency: Alternative Perspectives in the Study of Latin American Underdevelopment,
Comparative Politics, 10 (1978), 535.

42 E.M. Burg, Law and Development: A Review of the Literature and a Critique of Scholars in Self-Estrangement, *American Journal of Comparative Law*, 25 (1977), 492.

in judicial reasoning, formalism in law making, formalism in legal practice and formalism in the teaching of law.43 This version of the modernization theory therefore reflects a conscious attempt at reconstructing the ethos and philosophy of legal education with the view to emphasizing practical hands-on and problem solving content in legal educational curricula. Scholars like Ohnesorge openly called this an Americanization project through which African and Third World law schools were to become "American-like" in their training and production of new lawyers.44

Having failed to achieve the requisite transformations of Third World economies and legal systems, the version of law and development modelled on the modernization theory stagnated and fizzled out especially in the 1970s.45 Beginning in the 1980s, this was replaced by a new school fashioned on neo-liberal ideals and crafted around a group of developmental economists and lawyers mainly of American persuasion or extraction. This group became known as the Washington Consensus and fundamentally believed in the privatization and deregulation of the economy within

43 See D.M. Trubek, The Rule of Law in Development Assistance: Past, Present, and Future, In *The New Law and Economic Development: A Critical Appraisal*, supra, note 37,, where the author describes the shortcomings of legal education in Latin America; Also see Ohnesorge, Developing Development Theory: Law & Development Orthodoxies and Northeast Asian Experience, supra note 33.

44 F. Ballmann, Legal Technical Assistance of the International Monetary Fund to Member Countries through Economic Development Legislation, *Journal of Law and Economic Development*, 3 (1968), 197, 202; See also R.E. Messick, Judicial Reform and Economic Development: A Survey of the Issues, *The World Bank Research Observer*, Vol. 14 No. 1 (February 1999), 117.

45 See generally for critical perspectives on the causal connection between law and development, O. Lobel, The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics, *Harvard Law Review*, 120 (2007), 938.

the larger framework of the ROL.46 This era like that before it was ideologically dogmatic in focus and believed in the use of neo-liberal tools including Western legal concepts and values as well as hard rules to transform the economies, governance systems as well as judiciaries of developing Third World countries. This era was therefore the "period of the ROL" developed as a successor to the "law and development" model pioneered under the movement in the 1960s and 70s. The use of the rule of law during this period represented a redefinition of the scope and ambit of the overall law and development movement given the relatively circumscribed scope of the former concept, and as will be discussed in other parts of this work, development agencies tended to emphasize the *intrinsic* and as opposed to the *instrumental* conception of the rule of law. On the other hand, the success of the rule of law model in terms of its replication in the developing world is largely attributable to its use as a conditionality in the lending policies of donor agencies.

It is important to mention at this stage that some scholars like Lee47 and Trubek48 identified a third wave of the movement represented by multilateral development initiatives anchored on the ROL such as the United Nations' Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs). It is noteworthy however that this third wave in reality lacked any substantive distinction from the second-generation law and development movement. For example, the so-called third

46 D.M. Trubek & A. Santos, Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice, In *The New Law and Economic Development A Critical Appraisal,* D.M. Trubek & A. Santos (Eds.) (New York: Cambridge University Press, 2006), supra note 24. See also L. Yong-Shik General Theory of Law and Development, *supra*, note 24.

47 Id.

48 Id.

wave emphasized the intrinsic value of the ROL and the fact that it was a desirable goal in itself given it contained values worth pursuing for the sake of those values *per se*. In the words of Lee, the rule of law has become *a development objective and not just a means to achieve development, which was how it was perceived in the two preceding movements.*[49] The ideological similarity between the second wave and third movement in terms of the character of the latter as captured in Lee's position is unmistakable. Under the second wave, law and development became replaced with the rule of law and development assistance entities used the latter as a conditionality and pressured developing countries to adopt reforms packaged within the framework of the concept. In so doing, the rule of law was trumpeted as an ideal in itself albeit admittedly in some cases it was also stated using instrumentalist words. In the end however, both the second and third waves employ a mixed intrinsic-instrumentalist wording in framing justifications for the use of the rule of law in development discourse. Accordingly, the phase of the ROL emphasizing value policies of the United Nations such as the MDGs is in reality a nuanced version of the second phase and is therefore a "proto-second" movement and not a third wave of the law and development movement as some have argued.

A significant feature of the use of the ROL during the second and "proto-second" movement is the extension of the ROL to the operation of legal institutions.[50] In this regard, development agencies essentially used the rule of law to reform and devise

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49 Id.

50 M.J. Trebilcock and R.J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, Cheltenham, Edward Elgar, 2008

legal institutions that that can and will promote good governance.[51] The focus on legal institutions led to the promotion of the reform of judiciaries and justice institutions within the Third World, which were fundamentally seen as having a capacity to affect the economic fortunes of these countries. Belief in the symbiotic impact of legal institutions on development has engaged the attention of the second and proto-second wave of the law and development movement and generated a host of scholarly research.52 The development of the rule of law reform agenda in Africa naturally follows for consideration in the next sub-unit of this chapter.

III. Law Reform in Africa

In their paper on the state of the political economy of the rule of law in Africa and Latin America, Ronald Daniels & Michael Trebilcock painted a dire picture of progress made in the institutionalization of the rule of law in Africa.53 The context of their work illustrates the inertia, stagnation and downright retrogression of legal

[51] J.K.M. Ohnesorge, Developing Development Theory: Law & Development Orthodoxies and Northeast Asian Experience, supra note 33.

52 F.B. Cross, Law and Economic Growth," *Texas Law Review*, 80 (2001), 1737. D. Kaufmann et al., Governance Matters, *World Bank Policy Research Working Papers,* No. 2196, (1999); See also D. Rodrik, et al, Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development, *Economic Growth*, 9 (2004), 131; See also, L. Yong-Shik General Theory of Law and Development, Cornell Journal of International Law *supra*, note 24.

53R. Daniels and M. Trebilcock, The Political Economy of Rule of Law Reform in Developing Countries, 26 MICH J. INT'L L *supra*, See also, H. Chodosh, *Global Justice Reform: A Comparative Methodology* (New York: New York University Press, 2005).

institutions and culture in the face of years of reforms effort and rule of law initiatives on the African continent in particular and in the Third World in general. Based largely on the instrumental conception of law and the modernization theory, law reform in Africa has been largely inspired by the belief in the transformative power of modern and appropriate laws and institutions to shape the developmental fortunes of African countries.54

It is significant to mention that the fundamental assumption behind the pursuit of law reforms in developing countries such as Ghana's is a belief that the ROL, defined as an ultimate end in itself or otherwise, can only be effectively achieved with changes made in the law and its administration in given countries.55 Thus, the World Bank for example, asserted that the reform of substantive laws and legal institutions represents an indispensable means of realizing the goal of establishing the ROL.56 This in essence derives from a formalist conception of the ROL, which requires that a certain threshold of formalization is necessary for the efficacy and effectiveness of the rule of law. Ibrahim Shihata of the World Bank, and Joseph Raz before him therefore itemized certain minimum values that ought to be espoused by the ROL and these constituted the broad building blocks for the regimes of law reforms that were embarked upon in Africa largely under the aegis of development

54 R.E. Messick, Judicial Reform and Economic Development: A Survey of the Issues," 14 WORLD BANK RES. OBSERVER, supra note 39.

55 K.W. Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington: Brookings Institution Press, 2006); O. Chukwumerije, Rhetoric Versus Reality: The Link Between the Rule of Law and Economic Development, *Emory International Law Review*, 23 (2009), 383; M. Prado, Should We Adopt a 'What Works' Approach in Law and Development? *North Western University Law Review*, 104 (2009), 174.

56 See G. Barron, The World Bank and Rule of Law Reforms, *London School of Economics Working Paper Series,* 70, (2005), http://www.lse.ac.uk/internationalDevelopment/pdf/WP/WP70.pdf

assistance institutions. From a definitional standpoint, not only did this itemization of the minimum content of the rule of law promote an intrinsic or substantive version of the rule of law but also that these stated indicia may have led to diffusion of a particular version of the rule of law at least in the formal sense.

Consequently, the contexts of many law reform initiatives were premised on the broad assumption that domestic laws and institutions that needed to be reformed were archaic, dysfunctional and out of tune with the demands of modern development and needed to be upgraded or changed altogether. Gauged from the perspective of the viability of legal transplantation as a reform strategy, it seems that the main proposers of law reform are motivated by historical empirical evidence under which the legal systems of virtually all countries have been the product of legal transplantation. Dubbed "transnational legal learning", it is argued that legal transplantation represents a shortcut yet effective way of borrowing best practice legal rules and institutions in the process of development.57 Dwelling on the historical reality of transnational experiences of transplantation, it has been argued that this model has proven effective over the years and can be revisited for the purposes of promoting development and advancing legal systems in general.

The other leg of the reform process has been the transformation or creation of new legal institutions. The reform of legal institutions has been seen as a fundamental determinant of the effectiveness of legal systems as a factor of development. The

57 See F. Upham, Mythmaking in the Rule of Law Orthodoxy*, In Promoting the Rule of Law Abroad: in Search of Knowledge*, Thomas Carothers (Ed.), (Washington DC: Carnegie Endowment for International Peace, 2006), 75.

reform of legal institution appears to borrow from the core principles of institutional economics whose scholars including Douglas North have argued that the main levers of change and development in society are institutions.58 Syllogistically speaking therefore, legal institutions play the pivotal role of advancing the goals of society by both constraining official action and promoting the objectives of national policy and ideals.

There is near convergence of the scholarship and evidence that the reform of legal institutions in Africa and for that matter Ghana, has been substantially focused on the reform of national judiciaries of countries given the perceived centrality of the institution's role in governance in general.59 According to Barron,60 focus on judicial reform has been premised on the attainment of four key objectives, namely, judicial independence, efficiency, access to justice and accountability. The key assumption is that the prevalence of these indicia will inevitably help in the ultimate realization of the rule of law given that each of these variables is a component of the rule of law and its values. The question whether reformers succeeded in building judicial institutions reflective of reform aspirations has generally been answered in the negative. More crucially, it is agreed that given that the subject of judicial reform exists within the vortex of highly charged and volatile political contestations, reformers have always found themselves in the middle of political disputes and this

58 D.C North, Institutions, *The Journal of Economic Perspectives*, Vol. 5, No. 1 (Winter, 1991), p 97 " *supra* note 24; Rodrick et al, The Primacy of Institutions over Geography and Integration in Economic Development, *Economic Growth*, 9 (2004), supra note 52.

59 R.E. Messick, Judicial Reform and Economic Development: A Survey of the Issues, 14 World Bank Res. Observer, Supra Note 44.

60 Ibid.

has constantly undermined the capacity and resolve of reformers to push through the ultimate agenda of reforms. In other words, the complicated nature of effecting reforms of legal institutions whose work impact the polities and political establishments of countries presents a difficulty which, may have been underestimated by reformers in Africa and invariably undermined the reform efforts in this regard.[61]

The reform of legal institutions in Ghana, just as in the case of substantive law, have emphasized legal formalism and the design and implementation of an architecture of legislation ostensibly conducive to justice delivery. Yet as the results have shown, these reforms have often paid scanty or no attention to the interplay between formal legal institutions and informal legal cultural orientations.62 This is especially important to note given that the prevalence of corruption and other mediating variables in the justice system reflect much more than just a case of systemic dysfunction. Legal cultural dynamics have inevitably influenced the preferences and willingness of the patrons of judicial institutions to respect the "rules of the game"63 and comply with systems laid down to promote efficiency, accountability, and

[61] R. Islam, Institutional Reform and the Judiciary: Which Way Forward? The World Bank Policy Research Paper Series, https://www.researchgate.net/publication/23549587_Institutional_reform_and_the_judiciary_which_way_forward/citation/download

62 See K. Pistor, "The Standardization of Law and Its Effect on Developing Economies, *G-24 Discussion Paper Series* (New York: United Nations, June 2000), accessed January 22, 2019, https://unctad.org/en/Docs/pogdsmdpbg24d4.en.pdf. In her paper, the author asserts that there is a cognitive aspect to law and thereby implying that the cultural mind-set and world view of a people inevitably influences or shapes the effectiveness of law reform.

63 D.C. North, Institutions, Ideology & Economic Performance, *Cato Journal*, vol. 11 (1991-1992), 477.

independence. Thus, in the case of Ghana, years of reform of the judiciary have not produced the projected outcome of delivering speedy, efficient and neutral justice.

The reality is that reformers have approached the question of legal and institutional reform from a simplistic angle and treated law reform rather as a superficial subject. Perhaps a starting point to putting this in some context is to recap the sentiments of Carothers who opined as follows:

Rewriting constitutions, laws, and regulations is the easy part. Far-reaching institutional reform, also necessary, is arduous and slow. Judges, lawyers, and bureaucrats must be retrained, and fixtures like court systems, police forces and prisons must be re-structured. Citizens must be brought into the process if conceptions of law and justice are to be truly transformed ***....*** *The primary obstacles to such reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law. Respect for the law will not easily take root in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure. Even the new generation of politicians arising out of the political transitions of recent years are reluctant to support reforms that create competing centers of authority beyond their control*[64]

Carothers' frustrations with the outcome of reform projects largely inspired by development assistance institutions is telling and needs to be deconstructed. First,

64 T. Carothers, The Rule of Law Revival, *Foreign Affairs*, 77 (1988), 95.

the critique reflects disillusionment with the law reform project steeped in legal formalism and transplantation. Carothers' position whittles down the impact of formal changes in the law and replacement of legal institutions with transplanted ones. His emphasis on the importance of fine-tuning any changes in the legal system to include the surrounding and exogamous factors such as 'political will' and leadership submission to the ROL is obviously a reference to the experience of Third World regimes in which political leaders and elites enjoy a certain degree of *de facto* immunity from the impact of the law and its operation within the realm. Carothers' critique is nuanced and recognizes the *real politik* variables influencing the implementation of the law together with surrounding environmental factors such as the vagaries of accountability and citizenship engagement in the implementation of the law. This critique also reinforces the intransigence of law reformers towards recognizing and accepting the impact of local factors and circumstances to the effectiveness of law reforms in general.

Significantly, both the scholarship and technical papers generated in the course of reforms have largely been silent on the causal linkages between the political subservience of judiciaries in Africa including Ghana's and the overall failures of reform efforts. For example, it has been asserted that the historical experience of governance on the continent is one in which colonial regimes established judicial entities not for the administration of justice *per se* but for the promotion of the overall colonial agenda. The early judicial institutions in colonial Africa were far from being independent and represented integral component of the executive machinery.

This historical reality led Yash Vyas to assert that,

[D]uring the colonial era, the judiciary was an integral branch of the executive rather than an institution for the administration of justice. The colonial administration was mainly interested in the maintenance of law and order. It had no respect for the independence of the judiciary or for the fundamental rights of the ruled. The judiciary was that part of the structure which enforced law and order. It was therefore identifiable as an upholder of colonial rule. To an average citizen, the judiciary, as an instrument of control of the executive power, lacked credibility and therefore enjoyed little respect.[65]

The truth remains that the existence of certain structural and systemic factors continues to weaken the judiciaries on the continent. In the case of Ghana, factors such as appointments to the courts and the fact that the executive remains the repository of police and military powers of state has ensured that the executive has remained dominant in the ultimate assertion of state authority and power.[66] Thus, given the widespread perception that judicial authority or effective judicial power exists at the sufferance of the executive, lower level reforms including the automation of the courts and the training and retraining of judges have been viewed by some as piecemeal and largely ineffective interventions in the empowerment of

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65 Y. Vyas, The Independence of the Judiciary: A Third World Perspective, *Third World Legal Studies*, 127 (1992), 131.

66 Constitution of the Republic of Ghana (1992). Note also that a clarion call for the reform of the Constitution has been the issue of executive powers and its overbearing influence in the general governance of Ghana.

the judiciary as an instrument of legal accountability in Ghana. This may also account for the persistence of corruption within the courts as litigants continue to believe in the relative wisdom of negotiating their cases through informal means and appealing to the favour of judges rather than exploiting legitimate legal means of pursuing their grievances.

Furthermore, the assumption that judicial reform can and will have a correlative systemic impact on other justice institutions is largely untested and remains doubtful if not out of sync with the outcome of many reform initiatives.[67] On the other hand, the fact that the operations of institutions such as the police and Bar associations often impact on the overall effectiveness of the courts can hardly be disputed although reform efforts have often not given as much attention to those bodies as they have the judicial institutions *qua* judiciary. The net effect of this narrow approach has been to permit a system in which the courts are impacted and influenced by the ills of the wider system of justice and legal institutions. In the case of Bar associations in Africa including Ghana's, their influence has been minimal and often disengaged. Daniels & Trebilcock captured it succinctly when they argued that,

[T]he role played by bar associations and law societies and other organizations representing the legal profession varies dramatically from country to country in Africa, including whether or not membership in a bar association or like organization

[67] J.C. Botero et al, Judicial Reform, *The World Bank Research Observer*, Vol. 18, No. 1 (Spring, 2003), p. 61

is required for practicing law. In many countries, the principal focus of bar associations and like organizations is providing continuing education services to their members. Some law societies have taken a more activist role, including the Law Society of Kenya which has adopted a major advocacy and legal assistance program with respect to economic reform, human rights, and public interest litigation. It has also been a severe and effective critic of judicial corruption. In a few cases, bar associations and law societies have sponsored legal aid programs by providing basic legal information to the public on a variety of matters ranging from rights upon arrest to wrongful dismissal.[68]

In the case of Ghana until fairly recently, the Bar association has been at the forefront of championing a return to democratic rule and preserving the ROL following years of military rule. In this historical role, the association became more of a pressure group and its political experience created internal fragmentations among members of the bar association and lawyers in general and this situation has lasted till this day.[69] On the other hand, that experience distorted the traditional role of the Bar in terms of its internal regulatory and disciplinary role of its members in addition to the important role of growing the legal profession in the country. This historical difficulty may in fact date back to the colonial era and the struggle for

[68]R. Daniels & M. Trebilcock, The Political Economy of Rule of Law Reform in Developing Countries, *26 MICH J. INT'L L, supra* note 10. For ten years between 1981 and 1991, Ghana was ruled by a military junta which concentrated legislative and executive powers in the hands of the military rulers and indulged in what has widely been agreed as human rights abuses and neglect of the ROL. This resulted in the Ghana Bar Association adopting an activist role in advocating for the protection of human rights and return to constitutional rule.

liberation in the then Gold Coast70 when lawyers in the group led the struggle for independence. But in another breath, the Ghanaian situation is peculiar and should have produced a Bar association which is probably more proactive and pragmatic than has been the case for other countries. For example, the Bar association in Ghana, although a purely private association, is constitutionally recognized even if only implicitly, and has been given representations on many constitutional bodies established under the 1992 Constitution.[71] This recognition constitutes the formalization of the place of the Bar and its role in justice administration in Ghana.

In addition to substantive and institutional changes effected in the legal systems of countries, law reform in Africa and Ghana has taken on the character of reforms in the orientation and curricula of legal education. Like the law and development movement of the 1960s, legal education reform has often taken the form of the introduction of best practice curricula and educational models that better prepares students and trainees for the complexities of globalization and the increasing interactions between African and international actors. Yet, the quality of legal education in Africa has been generally decried as being ultra-formalistic in outlook and is overly dependent on rote learning and black letter law *per se*.72 Ghana

70 Ghana's name during colonial rule was the Gold Coast. This name was changed to the current name upon the attainment of Ghana and was meant to reflect the ancient kingdom that existed in Africa called the Ghana Empire.

[71] The Ghana Bar Association is perhaps the only association of lawyers and the organization occupies a peculiar position and enjoys certain trappings and leverage in Ghana's governance framework. Although it is a private association of lawyers, the 1992 Constitution of Ghana recognizes it and accords it representation on key institutions of state including the judicial council and the National Media Commission. No other body has this level of recognition.

72 *See* M. Ndulo, Legal Education in Africa in the Era of Globalization and Structural Adjustment, *Pennsylvania State International Law Review*, 20 (2002), 487, 498.

mirrors a peculiar and more complex situation however. The confused application of precedent by the courts through importation and use of English precedent in spite of years of termination of the legal relationship between English courts and the Ghanaian judiciary has created a situation in which trainees of Ghana's law schools have often come out of the law schools with less than adequate training for life at the bar and professional practice. The dissonance in content, philosophy and goals have ultimately undermined the capacity of Ghanaian law schools to deliver on their mandate to train lawyers prepared to promote the ROL and defend a certain ethos of law. This may have accentuated the worries expressed by Ndolo and led to the many unresolved tensions in legal education ongoing in Ghana.73

IV. Law Reform and Development: Theoretical Positions

The connection between law and development has remained a dominant narrative in the legal literature and scholarship over the last many years even if the relationship has remained both hazy and tenuous.74 Both scholars and practitioners of the law and development community have asserted a regressive correlation between law and economic development and the prospects of harnessing the former for the

73 Id. Following the establishment of an independent examination board within the last six years, tension has been mounting among law students, teachers and regulators on the questions of the qualification to enter the professional phase of legal training or education.

74 T.F. McInerney, Law and Development as Democratic Practice, *Vanderbilt Journal of Transnational Law*, 38 (2005), 109.

benefits of the latter.75 The shift in terminology leading to an emphasis on the "ROL" instead of law *qua* law has narrowed the scope of the subject somewhat and the relevant variables to be investigated in the inquiry of this work. The ROL as a concept has within the last three decades years been studied and provided an analytical framework for examining the nature of law and its specific relationship to development policy. Having been employed as a lending conditionality of the main International Financial Institutions (IFIs) in their lending relationship with Ghana, the ROL remains perhaps the singularly most important variable to understanding the patterns of governance reform in a legal context. The contextual governance history in Africa has particularly resonated with advocates of the ROL in development and scholars have not hesitated to posit the indispensability of the concept to the vicissitudes of development on the continent. In the words of Curott,

The Rule of Law, by providing the framework for protecting private property and individual freedom, creates the stability and predictability in economic affairs necessary to promote entrepreneurship, saving and investment, and capital formation. It is nonsensical to expect . . . economic development in Africa without addressing the institutional factors, such as the lack of Rule of Law, which are responsible for Africa's failure to develop in the first place.76

75 See generally, R. Posner Creating a Legal Framework for Economic Development, *supra*, note 27; A. Chua, Markets, Democracy, and Ethnicity: Toward A New Paradigm for Law and Development, *Yale Law Journal*, 108 (1998), 1; F.B. Cross, Law and Economic Growth, *Texas Law Review*, 80 (2001), 1737; K.E. Davis & M.J. Trebilcock, Legal Reforms and Development, *Third World Quarterly,* supra note 34; R.E. Messick, Judicial Reform and Economic Development: A Survey of the Issues, *The World Bank Research Observer*, supra note 34.

76 N.A. Curott, Foreign Aid, the Rule of Law, and Economic Development in Africa, *University of Botswana Law Journal*, (2010), 3, 14.

This buoyant trust in the influence of the ROL on economic development particularly in the African situation is shared by other scholars too. In the view of many of these scholars, the ROL plays an instrumental role and the preferred definition of the theory is one that takes account of the functional utility of the ROL relative to development. For example, Daniels & Trebilcock amply speak on behalf of the scholarship when they poignantly assert that it is a,

truism that the "rule of law" is causally related to economic development [77]

These scholars advocate a value-laden application of the theory of the rule of law in a manner that guides the attainment of the goal of development. Devising and deploying a version of the ROL for governance reform in Africa affords the needed principled justification for differentiating governments and predetermining appropriate criteria for embarking on reforms of countries that are deemed to be poorly administered. Like proponents of the law and development school, advocates of the ROL-development model argue that the relationship between the ROL and development is virtually axiomatic. Daniels & Trebilcock reinforce their perspectives and put it aptly when they asserted that,

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77 R. Daniels and M. Trebilcock, The Political Economy of Rule of Law Reform in Developing Countries, 26 MICH J. INT'L L *supra*. note 5 Note that the authors also observe in their work that there is a strong negative correlation between perceptions of judicial unpredictability and the absence of investment; J.E Campos et al. "The Impact of Corruption on Investment: Predictability Matters*," World Development supra note 18*; ; P. Mauro, The Effects of Corruption on Growth, Investment and Government Expenditure, In *Corruption and the World Economy*, K. Ann Elliot (Ed.), supra note 18; P. Mauro, "Corruption and Growth," *Quarterly Journal on Economic Growth,* supra note 18; S. Wei, "How Taxing is Corruption on International Investors?" *The Review of Economics and Statistics, supra note 18* Brunetti et al., "Credibility of Rules and Economic Growth: Evidence from a Worldwide Survey of the Private Sector," *World Bank Economic Review*, 12 (1998), 353.

[a] definition of the rule of law for development can scarcely be indifferent towards the values inherent in development.[78]

This view has largely informed many a governance reform program on the continent. The scholarly orientation advanced by this thinking therefore articulates the position that, once identified and properly conceptualized, there is a role for the ROL in development. Yet, this view is contested if not altogether rejected by other scholars who point to contrasting empirical evidence contradicting the theoretical assumptions put forward by the law and development scholars. For example, Carothers poignantly notes that,

China . . . the largest recipient of foreign direct investment in the developing world happens to be a country notorious for its lack of Western-style rule of law. It is clear that what draws investors into China is the possibility of making money either in the near or long term. Weak rule of law is perhaps one negative factor they weigh in their decision of whether to invest, but it is by no means determinative [79]

While Carothers is anything but an opponent of the ROL-development school, the position he advances here illustrates missing links in the linear equation or

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78 M. J. Trebilcock and R. J. Daniels, Rule of Law Reform and Development: Charting the Fragile Path of Progress, *Revue Quebecoise de droit international,* 23.2 (2010), 249.

79 T. Carothers, Promoting the Rule of Law Abroad: The Problem of Knowledge, *Carnegie Endowment for Int'l Peace, Working Paper,* No. 34 (2003), 6, accessed on January 22, 2019, https://carnegieendowment.org/files/wp34.pdf; For a general review of the arguments in this regard, see also J. Isanga, Rule of Law and African Development, *North Carolina Journal of International Law and Commercial Regulation*, 42 (2016); Also note that Y.H. Jung found that the pervasive and paternalistic influence of the state, rather than law, was vital for Korea's economic development in Y.H. Jung, How Did Law Matter for Korean Economic Development? Evidence from 1970s, in *Korean Economic Association Conference* (Seoul: Korea, June 2012), accessed on September 6, 2014, http://www.kea.ne.kr/conf201206/papers/Jung%20Young%20Hoa-20120530.pdf; See also generally, David Kennedy, The Rule of Law, Political Choices, and Development Common Sense, *The New Law and Economic Development: A Critical Appraisal,* 95, D.M. Trubek & A. Santos (Eds.) (New York: Cambridge University Press, 2006).

regression of the strong ROL implying higher development and does presents a powerful counterweight to the theory that the rule of law is an indispensable factor in development. By demonstrating through empirical evidence that there are countries that do not prioritize the ROL but have made great strides in development, the ROL-development proponents are faced with the difficult task of finding alternative explanations to the role of law in development. Significantly however, the notion that the rule of law plays a lesser role in development as captured in the above quotation logically admits of a certain minimum albeit lower-level role played by the law in the process of a country's development. It is also significant to draw attention to the fact that the debates here have ignored one key point namely the fact that in the minimum, nearly all developing societies maintain a certain minimum regime of law which defines proprietary entitlement, enforcement of contracts and other conflict resolution with established commercial relations etc. Thus, even in countries where social relationships and good faith predominates in business engagements, legal regulations of these relations exist alongside formal legal systems for the ultimate enforcement of the legitimate expectations of the parties. Thus, the dynamic of law in given legal systems may either facilitate or retard development through the enabling environment created or in the opposite, the constriction of spaces for development. Thus according to Norton,

If the political regime facilitates contracting via private property rights, then wealth-maximizing behaviour through detailed specification of property rights and the resultant economic growth are more likely. If the political regime retards contracting via private property, then wealth maximizing behaviour [sic] through the entrepreneurial specification of property rights and the attendant economic growth

will likewise be less likely.80

Viewed from this angle, law invariably plays a role in development by either promoting or undermining it. While the exact nature and scope of this facilitation or obstruction remains unclear and may be subject to many contestations, it is generally agreed that law plays a role and could be appropriately manipulated for the attainment of the goal of development. On the other hand, studies have shown that there exists a strong correlation between the protection and guarantee of property rights and higher levels of human development as well as life expectancy in general.81 Indeed, other studies, mainly led by the World Justice Project, go as far as to assert that there is a positive correlation between adherence to the ROL and the per capita income of countries.82 Hayek's theory that law must play a predictability role in economic development offers a central thesis in the outcomes of these studies given the impact of the ROL in economic decision-making and investment choices made by domestic and international actors.83 Thus whatever other competing explanations that can be offered for the correlations between the ROL and economic or human development, it is clear that when deliberately

80 S.W. Norton, Poverty, Property Rights, and Human Well-Being: A Cross-National Study, *Cato Journal*, 18 (1998), 233.

81 Id; See also B.Z. Tamanaha, A Concise Guide to the Rule of Law, *Florence Workshop on The Rule Of Law, Neil Walker & Gianluigi Palombella, (Eds.), Hart Publishing Company, 2007*

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82 M. Agrast, et al, *The World Justice Project Rule of Law Index,* 21 (2011),https://worldjusticeproject.org/Sites/Default/Files/Documents/Wjp_Rule_Of_Law_Index_2011_Report.Pdf, accessed on January 23, 2019,

83 F. Hayek, *The Constitution Of Liberty* (Chicago: University of Chicago Press, 1960) and *Law, Legislation, and Liberty*, Vols. 1–3 (New York: Routledge, 1979).

structured to promote development, law can become a rational tool for the attainment of certain specific goals. Max Weber noted this a long time ago when he placed on law the impressions of a tool that can be rationally exploited towards the economic development.84

A suggested explanation offered by Ohnesorge on the perceived negative correlation that sometimes exists between regimes with the ROL and economic development is the issue of *enforcement*. According to him,

[A] useful way to think about the Rule of Law as used in this literature is to think of the classic gap of law and society scholarship: the gap between law on the books and law in action. If one thinks about the efforts of the early 1990s to transform Russia into a market economy, those early efforts focused primarily on the creation of private property through rapid, mass privatization. If one is guided only by the thinking of neoclassical economics, which tends to proceed on the assumption that property and contractual rights are clear and enforceable …, there is little need to focus on the legal system, beyond putting good laws in place. Simply creating private property and putting in place the laws of a market economy did not prove sufficient, however, introducing the would-be reformers of the Russian economy to the gap problem on a dramatic scale …. This realization likely helped drive the turn by 1990s law and development practice to North and New Institutional Economics, which at least recognizes that attention must be paid to the entire institutional

84 M. Weber, Bureaucracy, *From Max Weber: Essays in Sociology, (*Ed. and trans. H.H. Gerth & C. Wright Mills) *New York: Oxford University Press, 1958.*

setting within which legal rules operate. But what if seemingly reformed legal institutions themselves do not solve the gap problem? Or, put another way, what is lacking in a legal system that has good law and seemingly reformed institutions, but that still does not produce the desired result? In much of the literature, the Rule of Law concept seems to provide the answer to this gap problem, serving either as the magic something that animates the rules and institutions of a well- functioning legal system, or as the X factor that is missing in legal systems in which good law and seemingly adequate formal institutions nevertheless resist reform. Describing the problem in terms of the Rule of Law does not solve it, of course.[85]

This quote, while addressing the gap between theory and practice, and the fact that the claim by a regime to being "ROL oriented" does not of necessity imply that the core tenets of the concept enshrined in its laws and institutions are observed, does not deal with the fundamental problem of measuring the impact of the ROL in situations where the ROL has been optimally applied and has failed to produce desired results for economic development. In other words, how do we deal with situations where specific countries have met the various metrics for determining the prevalence of the rule of law and have nonetheless failed to achieve economic development? Ohnesorge's position importantly addresses our minds to the fact that while the ROL may contribute to development, differential applications of the theory together with the multiplicities of its conception can affect the nature and character of any level of economic development attained.

85 J.K. M. Ohnesorge, The Rule of Law, *Annual Review of Law and Social Science*, Vol. 3, (1 December 2007), 99-114, http://doi.org/10.1146/annurev.lawsocsci.3.011207.080748

On the other hand, it can be asserted that even where tenuous in its contribution to development, the ROL may offer ancillary benefits that ultimately conduces to the attainment of economic development in the medium to long term. For example, the prevalence of political stability, a respected justice system, and a regime on human rights invariably promote a country's development in the various facets of life that support and are reinforced by economic development. These may enhance the overall quality of life of the citizens and empower them to better participate in the governance and economic life of the country. It is also a truism that FDI's flow to countries with a record of strong political stability and the converse is equally true, namely that countries with weak systems of governance and general instability tend to struggle in attracting foreign investments. These examples do ultimately underlie Ohnesorge's advise that the measurement of the impact and influence of the ROL from a mutually exclusive perspective fundamentally distorts the picture and that a more pragmatic and appropriate way of looking at things is to reflect on the extent of effectiveness to which the ROL is applied. Looked at thus, the differing rates of prevalence of the ROL in different countries impacted by varying forces and vicissitudes will explain the different strength and appreciation of the ROL-development from one country to another.

V. Globalization of Law and Legal Institutions: General Overview

A dominant theme in contemporary narratives on political economy has been globalization and its influences on the various facets of life. Its centrality to the discussion on the political economy of the rule of law is even more pronounced given the impact of integrated legal systems and economies on the lives of both people and nations of today. Appreciating the context and role of globalization is crucial for an understanding of the complex dynamics of the law within the state and how global currents and factors shape and impact the overall effectiveness of the ROL. Yet it also bears saying that while globalization appears to have the coloration of a modern concept, legal institutions and norms seem to have globalized at much earlier eras at least defined from the standpoint of diffusion and institutional transplantation.[86] In this regard, it is suggested that the understanding accorded globalization in this sub-unit should be grounded in a more nuanced understanding and approach.

The earliest phase of legal globalization happened during the colonial era when hegemonic states of Europe actively exported their legal systems and cultures to their respective colonies.87 From the early nineteenth century, legal systems, institutions and norms have been copied and replicated in one European country or

[86] The inception of colonialism in the Nineteenth century led to the adoption of legal institutions of colonizing powers like France and the United Kingdom together with the legal traditions of those countries. See Sally Engle Merry, From Law and Colonialism to Law and Globalization, *Law & Social Inquiry* Vol. 28, No. 2 (Spring, 2003), p. 569

87see J. S. Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India (*New York: New York University Press, supra note 17; J.M. Merryman, Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement, *American Journal on Comparative Law* supra note 24; See also P.G. Mahoney, The Common Law and Economic Growth: Hayek Might be Right," *Journal of Legal Studies*, 30 (2001), 503.

another. The replication of legal institutions and/or substantive law has in part been inspired by the philosophical assumption that all legal thoughts are fundamentally universal even if with micro-level differences. But the core reasons behind the various epochs and phases of the globalization of law are not as homogenous and objective as some scholars argue. For example, according to Cassese,88

legal globalization is a consequence of the emergence of problems that no national legal order can solve on its own: the expansion of trade and the need for a "corpus" of rules to accompany it; the need to exercise control over some of the sources of environmental pollution; the need to regulate phenomena that escape the control of individual States, from air traffic to the use of the seas, postal transport, financial crises; the need to establish international criminal tribunals to compensate for the inertia of local judges in pursuing crimes that the whole international community regards as deserving punishment.

This characterization of the emergence and dynamics of globalization is overly simplistic and ignores a complex set of factors shaping and inspiring the exportation of legal institutions and cultures to other countries including the structural relations in the world. In other words, the fact of the existence of global centres and peripheries and charges of legal imperialism during and after colonialism cannot be ignored and Cassese's binary analyses which seeks to cast the subject of colonial globalization in the context of capacity and help both misses and distorts the point.

88 S. Cassese, The Globalization of Law, (lecture, Italian Institute for Human Sciences, Federico II University of Naples, March 11, 2005), accessed on January 23, 2019, www.globusetlocus.org/ImagePub.aspx?id=75933

Understanding this is all the more important in light of the forced manner of legal transplantations during the colonial era and the overwhelming dominance of receiving countries by the colonizing powers in the course of transplantations of legal institutions.

Kennedy's seminal work on the globalization of law represents a starting point to an analysis of the globalization of law and legal institutions.89 In his three-phased analysis of the globalization of law, Kennedy argued that classical legal thought, which was essentially neoliberal in character, emerged in the United States and was globalized either through diffusion and internalization or otherwise imposed through colonial subjugation. He contended that characteristic of this Western legal thought was the notion of *will* and the functional autonomy of the individual in his actions. In his view, contained within the fold of the classical legal thought are the various distinctions in law including that between international and municipal law and what he called 'the law of the market and household law', among others.

But more crucially for the purposes of the analyses here however, Kennedy noted in his piece rather poignantly that the colonial powers actively decided to maintain native laws in their colonies rather than replace these with the laws of the colonizers and accordingly sought to create the impression of a certain degree of benevolence and generosity on the part of the colonizing powers. Implicit in this is his suggestion

89 D. Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000. In The New Law and Economic Development: A Critical Appraisal, D. Trubek & A. Santos (Eds.), supra note 24*; M. S. Barr & R.S. Avi-Yonah, Globalization, Law and Development, *Michigan Journal of International Law*, 26 (2004), 1.

of altruism on the part of the colonial authorities to seemingly develop native law and thereby promote the legal needs and welfare of the natives. While he obviously limited his position in this regard to the specific category of family law, his central principle transcends family law and needs to be deconstructed and critiqued. Considered in its generality and widespread application, the position advanced by Kennedy is broadly inaccurate, especially in its contextual application to Africa, and the case of Ghana. The maintenance of pre-colonial laws by colonizing powers was largely driven by tactical and strategic considerations of the colonial powers and accordingly even where native laws were left untouched in their essences, they were subjected to the prescriptions and limiting influences of the new colonial authority. In the case of Ghana (then Gold Coast), the enactment of colonial legislation containing a repugnancy clause reflected this new reality under which all pre-existing native laws became subject to a "repugnancy" test.[90] Under this test, native customary laws that were deemed to violate "equity, good conscience and natural justice" were struck down and judicially excluded from enforcement. In addition, customary law as a genus or legal sub-category was stripped of its legal status and was subjected to a test of legality and proof in each case before being applied by a court of law whenever relied on by a party in legal proceedings.[91] Thus, a failure on the part of a native law to pass the repugnancy test immediately consigned it to a lower category of a sub-norm bereft any legal import within the context of judicial

[90] Supreme Court Ordnance, Supreme Court Ordinance (No. 4 of 1876), Section 19
S.K.B. Asante, Over a Hundred Years of a National Legal System in Ghana: A Review and Critique, J*ournal of African Law* Vol. 31, No. 1/2, Essays in Honour of A. N. Allott (Spring, 1987), p.7; V. Essien, Researching Ghanaian Law, https://www.nyulawglobal.org/globalex/Ghana.html

[91] See William B. Harvey, The Evolution of Ghana Law Since Independence, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2940&context=lcp

enforcement. The inception of British jurisdiction led to the de-institutionalization of native law in general and this resulted in the practice where all native or local laws had to be proven and accepted as law in specific cases in court before they could be enforced under the legal system put in place for the new colony. In this regard, the initial globalization of Western legal thought and substantive law in the African colonies did not exactly fit the model and ascribed intentions suggested by Kennedy in his work. In many ways however, the retention of local laws in Ghana during the colonial period broadly speaking was an incident of the overall colonial strategy designed to both 'modernize' the legal systems of indigenous people under colonial rule and more importantly advance the colonial agenda and keep these territories and people colonized and subjugated.

Kennedy's analysis of the post-war globalization of law and legal institutions is notable and reflects the dynamics of both the European and Third World experiences. Following the analytical path of many other scholars, he stated that this era of the globalization of law was effected within the framework of the import substitution industrialization (ISI) which essentially required the mobilization of the legal and regulatory capacity of a country to shape its economic policy. Yet throughout the various globalizing epochs of law in the Third World especially in Africa, the dominant role played by the legal culture of the West led by the United States was rather evident. As noted by Kennedy,

In each of these contexts, the influence of the United States was manifest. As in the analysis of the diffusion of CLT, we can distinguish more or less violent imposition

from imposition through superior bargaining power, and both from prestige. For constitutional courts, for example, the development begins with U.S victory over Germany, Italy, and Japan in WWII, and continues through victory in Cold War. Then there is the process by which regimes for financial bail outs, imposing rule of law reform as part of structural adjustment. U.S. courts have steadily expanded their "long arm" jurisdiction, and the way of thinking about law that goes with, through the implicit threat that if defendant multinationals refuse to accept U.S. jurisdiction, default judgments will make it hard or impossible for them to access the U.S. market.92

The idea that the United States literally imposed a version of law on the Third World is generally shared in the scholarship.[93] Taken on the face value however, this reality implicates two critical conclusions; First, the spread or globalization of a monolithic version law would of necessity imply a certain degree of homogeneity in legal thought and institutions across the world and cross-culturally. This inevitably led to the spread of neo-liberal ideas in the unipolar world established following the collapse of the Soviet Bloc in 1989. The development framework that was to follow was largely constructed and effected as part of global development assistance programs in which lending institutions foisted neoliberal legal thought and ideas within the overall development assistance regime. The attempt at globalizing Western legal thought and substantive law resulted in the transplantation of

92 D. Kennedy, Three Globalizations of Law and Legal Thought:
1850–2000. In D. *The New Law and Economic*
Development: A Critical Appraisal, D.M. Trubek & A. Santos (Eds), supra note 89.
93 See generally, T. Halliday and P. Osinsky, Globalization of Law *Annual Review of Sociology*, Vol. 32 (2006), p. 447.

institutions and governance models in developing countries and conscious attempts were made at generating matching legal cultures in these countries.[94]

The American-led export of law and legal thought was crystallized and concretized in the so-called Washington Consensus95 which is a set of ten economic policy prescription considered as curative for developing countries' economies in difficulty.96 Significantly, the list contains substantial prescriptions of law reform initiatives crafted as a response to the problem of path dependency in developing countries, which seek the support of American-oriented multilateral institutions including the World Bank. The use of law under this model helped design and articulate an economic policy anchored on the principles of neoliberalism. Thus, under the Washington Consensus, economists and lawyers of their calling advocated the use of law to create the requisite environment for the pursuit of economic activity and programs. The instrumental role of the law in driving economic progress of Third World developing countries was thus palpable in the development policy promoted through the Washington consensus.

[94] See J.F. Morin, An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries, International Studies Quarterly, vol. 58, https://www.researchgate.net/publication/259203702_An_Integrated_Model_of_Legal_Transplantation_The_Diffusion_of_Intellectual_Property_Law_in_Developing_Countries

95 The "Washington Consensus" is generally used to refer to a lose community of development experts and scholars who advance policies advocating the privatization of property rights and the liberalization of foreign direct investments. *See, e.g.*, J. Williamson, Preface: A Short History of the Washington Consensus, *15 L. & BUS. REV. AM*. 7, 10–11 (2009). See also, S. Seppanen, Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism? *51 VJLT, 101*

96 J. Williamson, The Washington Consensus as Policy Prescription for Development, (Washington: Institute for International Economics, 2004), accessed on January 23, 2019, https://piie.com/publications/papers/williamson0204.pdf

While the 'law' conceived of under the Washington consensus was indubitably neo-liberal in outlook, the contextual character and content of that law was generally not problematized. In other words, the reform of local laws in relation to imported or transplanted laws and institutions was gone about with minimal attention to context and the peculiarities of local needs and challenges resulting in the transmutation of laws without the accompanying shift in legal culture necessary for its effectiveness. While the subject will be explored in greater detail below, it bears mentioning at this point that the law reform project within the globalist agenda focused on legal formalism, which aims at converting largely informal customary and other laws into formal rules and streamlining their operations with modern but often transplanted rules and legislations. In this regard, formalism became in practice an end in itself and tended to distort and confuse the overall aims and goals of law reforms in the Third World.

The issue of the use of law in assistance initiatives will be explored in subsequent chapters but for now it suffices to say that while the spread of systemic models of the law as well as substantive and procedural rules from mainly Western countries to 'peripheral' states may have occurred in more diffused ways than one, the globalization of contemporary Western law occurred largely in an instrumental and deliberate fashion especially with the end of the duopolistic global power structure in 1989. Significantly however, the context and manner of the reception has impacted on both the content and effectiveness of the globalized law and the ancillary regime established in the various countries in Africa including Ghana.

LEGAL FORMALISM: DOGMA AND DISCONTENT

Legal formalism has provided somewhat of a jurisprudential blueprint for the construction and implementation of law reform in Ghana and many parts of Africa.[97] Seen as a uni-lineal evolution of the law from the state of informality and elementary customary modes of legal consciousness, legal formalism has been seen and largely treated as a superior version of legal reality and one in respect of which a developing legal regime should be introduced. In other words, the treatment of formalism reflects a deep seated belief in the transformative capacity of black letter law to innately change the direction countries undergoing reform and shift the levers of stagnation and underdevelopment in developing countries in general. Within the context of development, adherents of formalism tend to believe in the effectiveness of formal rules to overcome the difficulties of path dependency and correct the problems of the societies in which reforms are promoted. In other words, legal informality was treated as path dependent and in respect of which formalization was

[97] The literature on legal realism and legal formalism is well summarized in Comment, *Formalist and InstrumentalistLegal Reasoning and Legal Theory,* 73 CALIF. L. REV. 119 (1985). On formalism, Grey, *Langdell'sOrthodoxy,* 45 U. Prrr. L. REV. 1 (1983), is particularly good. On realism, see the authoritative collection of readings in Dennis J. Hutchinson, History of American Legal Thought II: The American "Legal Realists" (Uni- versity of Chicago Law School, mimeo., 1984), and the excellent brief summary in Altman, *Legal Realism, Critical Legal Studies, and Dworkin,* 15 PHIL. & PUB. AFF. 205-14 (1986). For an effort, somewhat parallel to my own, to relate formalism, realism, and interpretation see Moore, *The Semantics of Judging,* 54 S. CAL. L. REV. 151 (1981). Also see on this, Richard A. Posner, LEGAL Formalism, Legal Realism, And The Interpretation Of Statutes And The Constitution, Case Western Reserve Law Review, Vol. 37, No. 2 p 179.

deemed corrective. Legal formalism has accordingly been given a certain messianic impression in which the formal law has been seen as capable of transforming outcomes and behavioural tendencies on the part of legal institutions and people.

The version of legal formalism implemented in the construction and effectuation of the ROL in Ghana is *Dworkinian* and reflects the central tenets of Ronald Dworkin's theory on the nature of the law as an embodiment of rules and principles within the context of adjudication and the role played by judges in this vein. While this may appear counterintuitive at first glance to anyone with an appreciation of Dworkin's philosophy of law, it is important to remember that his theory essentially rests on the pre-existence of hard rules or black letter law partly composed of principles. His mythical Hercules whose intervention in hard cases helps us to overcome the deficit of law by filling the gaps seem on the face to transcend the shackles of formalism but this is only superficially. Dworkin's refinement of the role and competence of Hercules in his Laws Empire[98] reveals the theoretical paradigm of his theory under which the judge who draws on the virtues and values of Hercules must ultimately appeal to such overriding legal mores such as justice, fairness, and procedural due process.[99] Given however the central structure of Dwrokin's work which lays emphasis on the importance of rules and principles and the ideal role played by Hercules, it is evident that in appealing to higher norms as justice and procedural due process in the resolution of hard cases, Dworkin invariably expects that Hercules

[98] Ronald Dworkin, Laws Empire, Harvard University Press, (1986)

[99] J.W. Harris, Unger's Critique of Formalism in Legal Reasoning: Hero, Hercules, and Humdrum, *The Modern Law Review*
Vol. 52, No. 1 (Jan., 1989), p.42

will in the end by guided and limited by the rules and principles of surrounding laws. Harris aptly captures this when he noted,

In "Hard Cases," Dworkin insisted that the litigant was entitled to demand that Hercules treat the law as a seamless web. He could not advance a solution to a hard case, however right in terms of political morality, unless it could be shown to have institutional support, to have some degree of fit with the existing law[100]

Consequently, the constraints of formalism remains and sustains the discipline of the judge in adjudication within the context of legal formalism. In contrast, the preferences and other informal variables available to Hercules and his real life approximates are deemed inferior to prevailing rules. Thus, although Dworkin remained coy about his fidelity to formalism, defined as a preference for hard black letter law, his overall theory provides perhaps the best framework for legal formalism and the context within which law reform has been carried out largely in Africa.

In this regard, legal formalism was syllogistic in scope and content and rested on certain key assumptions including the fact that the law comprised of principles and substantive content that shaped its functioning and application. In the context of law reform in Ghana, belief in the application of logic as well as the internal coherence of law to resolve key problems through the medium of adjudication has provided both the intellectual justification and policy impetus for the conversion of informal legal variables into formal institutions and rules. The resultant exclusive prioritization of formalist rules in the reform process saw the crowding out of local law such as

[100] Id

customary. Dworkin's use of principles in his conceptualization of the law and his scoping of judge's role in adjudication reflects this view of formalism and its claim to the autonomy of the law in spite prevalent extraneous or other environmental considerations remains notable.

A modern variant of formalism promoted by such scholars as Landes and Posner,[101] which seeks to advocate what may be called "practical formalism" and assumes a pragmatic posture relative to the conventional approach to formalism. Rather curiously but poignantly, these scholars conclude that the law and adjudication is the outcome of judges preferences and that accordingly while the processes of adjudication may represent a series of deductive and syllogistic reasoning done by the judge incorporating the internal structure of the law, the ultimate outcome is one in which the judge makes the law and owns the process. While this may sound facially contradictory, Posner's own experience as a judge points to his attempts to reconcile the realities of judging *qua* judging with the general claim to judicial neutrality and legitimacy in terms of the application of the "law" in any given situation involving legal interpretation.

Within the context of law reform, the principles of formalism provided the template to review existing regimes and structure the legal system to reflect that idiosyncratic slant. In this regard, reforms have tended to generally attack prevailing legal culture which emphasized informality by stressing the functional quality of formal legal rules

[101] W. Landes & R. Posner, The Economic Structure Of: Tort Law , Harvard University Press, 1987.

in modern legal systems. The denunciation of customary law, informal transactional systems, and sub-legal modes of social engagements in favour hard ruled black letter law has meant that legal formalism fundamentally shaped the reform agenda of western institutions leading the effort. While this subject will be revisited later in the work, it bears at this stage some of the core weaknesses and critiques of this reform model.

Yet as will be argued throughout this work, the efficacy of legal formalism as the foundations of law reform in Ghana is at best doubtful and at worst false. In this regard, Ehrlich's work provide a more realistic sketching and understanding of the role of law within the Ghanaian legal system.[102] On the other end of the spectrum, his work offers greater insights into approaches to dealing with broad-base anti-social behaviours that undermine ROL. His concept of the "living law" provides a juristic framework for understanding the inevitable gulf that ensues in any regime premised on legal formalism. His definition of the living law as reproduced below is apposite:

The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages and of all associations, not only those that the law has recognised but also of those that it has overlooked and passed by, indeed even of those that it has disapproved[103]

. [102] *See* Kurt A. Ziegert, *Introduction* to EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF SOCIOLOGY OF LAW 19 (Walter L. Moll trans., Transaction Publishers 2001) (1936).

[103] Id. See also, David Nelken, Eugen Ehrlich, Living Law, and Plural Legalities, Theoretical Inquiries In Law, 9.2 (2008) Vol. 9: 443

Through the living law, Ehrlich argues that the lived experiences of a people through their conception of the law and the inevitable distinction that exists between law in fact or action and law on the books. While implicitly accepting the competence of the state to enact laws and rules, he suggests the futility of this authority whenever formal legal rules enacted by the state fail to reflect the practical realities and legal culture of the people. The "living law" invariably then becomes contrasted with the 'dead law'-the latter being the formal law that merely exists and satisfies an expression of the authority of the state to enact laws but in respect of which the routine breach and non-observance by the people is generally taken for granted. In other words, Ehrlich's work represents a powerful response to the formalist dogma and undermines the presumed or inherent propriety of legal formalism in the law reform project in Africa whose reality mirrors the schemata illustrated in Ehrlich's characterization of law. In this work, I use Ehrlich's conceptual framework to argue that the uncritical use of the formalist model has resulted in intractable wedges in the *means-end* nexus of law and its enforcement, and the frustrations encountered in the implementation of the ROL generally within the Ghanaian legal system. Dwelling on the works of other formalist critics such as Pound and Holmes, this work argues that the imperfections of legal formalism is reflected in the Ghanaian legal system and manifests in a variety of ways including the following;

First, the ensuing gap which often emerge out of the application of formal legal rules without regard to surrounding realities create regime detachment and insularity and renders any reforms instituted otiose. The failures of legal formalism largely stem

from the tendency towards self-gratification under which the measure of rules and their functional efficacy is often measured by their compliance with certain abstract preconditions often related through the legitimacy of its enactment and enforcement *per se.* Reforms borne out of legal formalism thus results in the enactment of ineffective and impotent rules and thus beclouds the critical weaknesses in the prevalent regime on the ROL in the meantime.

As clearly shown in Pound and Holmes' works, legal reality can powerfully counter the argument of formalists. In the case of countries like Ghana, this manifestation of reality cancan be in the form of judicial corruption whose influences can imply that the choices and preferences influencing judging and adjudication are informed by incentives offered and received through bribes. This point will be centrally canvassed later in this work and shows an important flaw in the conceptual narrative of proponents of legal formalism who focus on formalized norms and models in the structural and substantive reform of laws, the judicial institution and the contours of the legal system. In some ways the insensitivity of legal formalism to environmental factors is somewhat surprising given the known historical inseparability of law and culture. While the globalization of law and legal thought has been promoted or espoused in a manner as to denounce the peculiarity of legal culture as antiquated and backward, some contemporary works have chastened the across-the-board implementation and transplantation of law with little to no sensitivity for legal culture. [104] These works draw including those of Ehrlich and Pound,[105] draw

[104] Oscar G. Chase, Law, Culture, and Ritual: Disputing Systems in Cross-cultural Context, NYU Press (2005); Lawrence Rosen, Law As Culture: An Invitation, Princeton University Press, (2006)

attention to the functional space afforded by culture in the formation and deployment of law and accordingly, the futility legal formalism and any claim to the conceptual autonomy of law.

Within the context of pluralistic legal systems such as Ghana's, culture is a dispositive variable and as argued by Berman, culture could be deemed to be constitutive of law itself.[106] Taken thus from the standpoint of Ehrlich and Pound, formal law becomes a reflection rather than the harbinger of culture or social ethos. The failure of formalism to recognize this lineal reality undermines the model of law reform initiatives adopted under it and the tendency to treat these reforms as though they exist independent of the background social realities of the countries involved remains perplexing. Holmes' often quoted statement that the life of the law being experienced rather than logic speaks to a more fundamental problem with formalism and unearths certain functional realities affecting the law including the role played by rule internalization and enforcement, actor negotiation around rules, and the influences of incentives in driving compliance as well as institutional competence in the overall effectiveness of the law and reforms carried out in this regard.

Consequently, the distinctive peculiarity of customary law which has either been ignored or forced into the formalistic straight jacket of reforms is worthy of mention.

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[105] Roscoe Pound: A Sociological Jurisprudence? In: The Sociological Movement in Law. Palgrave Macmillan, London

[106] Paul Berman, The Enduring Connections Between Law and Culture: Reviewing Lawrence Rosen, Law as Culture, and Oscar Chase, Law, Culture, and Ritual https://www.researchgate.net/publication/228264260_The_Enduring_Connections_Between_Law_and_Culture_Reviewing_Lawrence_Rosen_Law_as_Culture_and_Oscar_Chase_Law_Culture_and_Ritual

Being a pluralist regime, customary law is a source of law guaranteed under the constitution of Ghana. As a legal sub-category, customary law responds to some unique features including its innate informality and unwritten dynamic, metaphysical properties and layered structure. In addition to these standard regime feature, Ghanaian customary law like other African customary laws reflect other historical and evolutionary indicia whose appreciation are critical to an understanding of the character of customary law as an evolved regime within the structured architecture of the colonial arrangement in the then Gold Coast. For example, following years of systemic distortions following the inception of colonial rule in the nineteenth century, customary law has undergone radical structural and systemic changes resulting in its transformation.[107] While it is crucial to mention at this stage that as an appendage of the law reform paradigm, customary law reform in Ghana has itself adopted the formalist model with little or no critique of the impact of formalism on the reform of customary law, the general project of law reform in Ghana has virtually ignored the effect and role of customary law in the ROL reform in Ghana. The use of formalist ideals in the reform process has meant that there has been a gradual and systematic attempt at incorporating customary law into formal rules of law and attempts made at subjecting it to the overriding limits imposed by formal law.[108] The effect has been to deepen the historical limits and weaknesses imposed on customary law and introduce implicit subsidiarity of the law to other sub-categories under the pluralistic regime of law prevalent under the 1992 Constitution of Ghana. This subject will be revisited subsequently in this work. For now however, it suffices to state that the

[107] Ernest Kofi Abotsi, Customary Law and the Rule of Law: Evolving Tensions and Re-Engineering, Arizona Journal of International & Comparative Law, Vol 37, No. 2, p137 (2020)
[108] Article 26, 1992 GHANA CONST.

element of informality and pragmatism inherent in the theories of Ehrlich and Pound is preferable and provide cross-systemic tools for law reform in varying contexts than the inflexibilities of legal formalism. The uncritical use and adoption of the latter in reform initiatives therefore poses foundational questions and implicates given the general failures of reformed law to achieve critical thresholds of compliance especially in the area of corruption.

In general therefore, my research *inter alia* fundamentally questions and critiques the use of the formalist approach in law reform within the context of corruption control, prevention and punishment, by emphasizing the flaws of structural and substantive formalism adopted in the reform strategy. By articulating a model that stresses the recognition of a complex of contextual factors, I argue and reiterate the positions of Ehrlich and Pound in this vein and advocate nuanced pragmatism in the fight against corruption and implementation of the ROL of law. Deviating from standard works in the field however, this work does not dismiss formalism or the important role of black letter law altogether, but logically argues for a mixed but tailored approach to in the fight against corruption as a multiple factor variable in the realistic sense of the concept . Thus, the model suggested under the recommendatory section of the work combines a variety of tools whose employment can better leverage the effectiveness of black law and its reform in combatting corruption.

CONCLUSION

The ROL dialectic remains thorny and beset with contestations of varying forms. The debates and scholarly controversies notwithstanding however, the fact remains that important policies formed around law reform have continued to be inspired by the ROL mainly inspired by conceptions of the theory adopted by the leading IFIs in their lending engagements. More critically, the rule of law has been deployed as an overarching concept whose necessity is not only taken for granted but is in fact elevated to the level of a dogma within the scheme of governance reform in Ghana and Africa in general. Yet as shown in this chapter, the complex mix of the dynamic of globalization as well as assumptions behind the transplantation of legal institutions have led to impositions of legal institutions and systems on Third World countries with the Ghanaian situation typifying an African dynamic.

Consequently, the nature and character of legal institutions and systems in these countries reflect the complexities and ills of the processes of law reform and the implementation of the ROL as a globalized phenomenon. Needless to add that while the assumptions informing law reform under the modernization theory of the ROL reform have historically shaped law reform in Ghana, the current trend presents a mixed picture with the re-adoption of customary rules that had traditionally been reduced to soft-social rules or sub-legal norms under colonialism. In seeking to correct this, the 1992 Constitution of Ghana, has re-accorded customary law the full

status of law. This does not resolve the complicated issue of distortions occasioned by the transplanted English common law however and the tensions posed by the plural legal region established however and this will be the subject of review in succeeding chapters.[109] On the other hand, the dominant role of legal formalism in shaping reform ethos has resulted in gaps between reformed law and the lived legal experiences of the people. Ehrlich's living law affords something of a prism for redirection moving forward even if it falls short of addressing all the core questions raised.

[109] For example, the Constitution provides that all customary practices which *dehumanise or are injurious to the physical and mental well-being of a person are prohibited.* In many ways, this provision appears to rearticulate the juridical difficulties that were inherent in the colonial rules on repugnancy. The weaknesses of constitutional repugnancy criteria such as the one in the Ghanaian Constitution is further accentuated by the absence of a mechanism for determining the constituent elements of repugnancy and the failure to itemize these invariably implies that the evaluation is left to judicial discretion which many find unsatisfactory.

CHAPTER TWO

DEVELOPMENT ASSISTANCE AND THE RULE OF LAW CONDITIONALITY

INTRODUCTION

Consideration of the role and place of donor aid and development assistance to the ROL reform and corruption in Ghana is germane to a fuller review and discussion of work topic of this work. Development aid played a central and significant role, and shaped the Ghana's development within the larger paradigm of globalization.110 Thus, largely starting from the 1980s, the twin reform projects of the Economic Recovery Program (ERP) and Structural Adjustment Programs (SAP) provided the requisite policy impetus and template for the major multilateral donors to provide donor assistance or support for Ghana's development. Significantly, this relationship between Ghana and the IFIs has mainly been predicated on the prescription of policy paths to be followed by the Ghanaian government. Indeed, so central is the dependence on aid that the current Ghanaian government has been compelled to

110 Indeed, Ghana has been said to be an aid dependent country and has been classified among the countries who receive a significant percentage of their GDP from foreign aid. See *ADB Socio-Economic Database,* AFR. DEV. BANK, http://afdbdp.prognoz.com/DataAnalysis.aspx (last visited Feb. 6, 2011) (click "Data Analysis" on the left-hand column; under the title "Fixed" on the left-hand column, click the drop-down box labelled "Indicators"; select the "Financial Flows" arrow; choose "Net Total ODA/OA (In %of GDP)").

wage a crusade against it by adopting a flagship program which seeks to end Ghana's dependence on aid altogether.111

The use of the ROL conditionality on the other hand has been an enduring feature of development assistance112 in Africa and for that matter Ghana for sometime.113 This trend was a cognate component of the larger conditionality strategy adopted by development agencies in their engagement with recipient countries designed to secure compliance within minimum goals of the assistance relationship.[114] Thus, it has been recognized that from the ashes of the law and development movement, the ROL became a handy toolkit for the promotion of neo-liberal ideals through

111 The Ghana beyond Aid initiative is a major program of the Akuffo-Addo-led administration and has passed a blueprint that seeks to improve on domestic revenue mobilization and thereby end the dependence on aid.

112 It has been asserted that over the last 42 years, over 500 billion dollars have been given to countries in Africa in aid. See William Easterly, *Was Development Assistance a Mistake?*97 AM. ECON. REV. 328, 330 (2007) . See also, K. Erbeznik, Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries, *Indiana Journal of Global Legal Studies: Vol. 18: Iss. 2,* Article 9. Available at: http://www.repository.law.indiana.edu/ijgls/vol18/iss2/9

113 Aid and donor conditionality is not new nor even akin to Africa. According to the Overseas Development Institute, the indexation of aid to donor conditionality started following the end of the cold war where countries committed to political reforms were offered more favourable terms of aid and donor support. For general perspectives on the international promotion of the rule of law, see B.P. Ederlof et al , *Rule of Law Promotion: Global Perspectives, Local Applications*. Uppsala: Iustus Forlag, (2009). R. Kleinfeld, (2012) Advancing the Rule of Law Abroad: Next Generation Reform. Washington DC (2012); Carnegie Endowment for International Peace; *The International Rule of Law Movement: A Crisis of Legitimacy and the way Forward,* Marshall, D. (ed.), Harvard University Press, Cambridge MA (2014), On the use of the rule of law and the surrounding political contexts and variables, see also, D. Kennedy, The Rule of Law, Political Choices and Development Common Sense, In The New Law and Economic Development, D.M Trubek & A. Santos (Eds.), supra note 24. On the subject of the general belief in the efficacy of the ROL in development, see Thomas Carothers, *The Rule-of-Law Revival, in* Promoting The Rule Of Law Abroad: In Search Of Knowledge 3 (Thomas Carothers (Ed.), (2006) [collection hereinafter PROMOTING THE RULE OF LAW ABROAD], Carnegie Endowment for Int'l Peace (January 10, 2006)

[114] On the subject of development assistance and aid generally, see, J. Svensson, When Is Foreign Aid Policy Credible? Aid dependence and conditionality, Journal of Development Economics, http://www.diva-portal.org/smash/get/diva2:327092/FULLTEXT01.pdf , P. Mosley et al, Aid, Poverty Reduction and the 'New Conditionality' *The Economic Journal*, Volume 114, Issue 496

development assistance initiatives around the world. The evolution of the 'law' in this new development paradigm as a value-laden variable is notable, reflecting as it were, a shift in emphasis from the objective reality of the law *per se* under the previous law and development movement, to a normative system in which the 'law' under the ROL model asserted a particular value and ethos orientation. It is this orientation that reinforced the belief of the proponents of the ROL conditionality to assert that there exist inevitable interconnections between the ROL and the development of countries.115

The use of this particular conditionality especially by the two biggest donor agencies namely the World Bank and the International Monetary Fund (IMF) in lending is perhaps the most controversial in development assistance initiatives.116 Many critics have viewed conditionality as an instrument through which development assistance agencies controlled and manipulated the governance and development dynamics of recipient countries and consequently conclude that conditionality harms and undermine the overall effect of aid and its ability to transform the circumstances of recipient countries.117 This view notwithstanding, development assistance bodies have stuck resolutely to the mechanism of conditionality and have provided a variety

115 Rule of Law, Justice Reform, and Development Cooperation, https://issat.dcaf.ch/Learn/Resource-Library2/Policy-and-Research-Papers/Rule-of-Law-Justice-Sector-Reforms-and-Development-Cooperation

116 Some argue for example that the use of the ROL in development assistance actually hurts the development of the ROL and undermines its evolution and stability in particular contexts. See K. Erbeznik, Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries, Indiana Journal of Global Legal Studies, supra note 99.

117 See generally, D. Booth. and S. Unsworth, Politically Smart, Locally Led Development. Discussion Paper. London: ODI. (2014); T. Carothers, Promoting the Rule of Law Abroad: In Search of Knowledge, (T. Carothers. Ed.) (2006), Washington DC: Carnegie Endowment for International Peace.

of practical and principled justification for its use in the deployment of aid. The World Bank for example argues that it

[U]ses conditionality for two reasons: to ensure that the assistance it provides contributes to the country's development objectives (development effectiveness rationale), and to ensure that the resources are used for the purposes intended (fiduciary rationale).[118]

These rationales which fairly represent the underlying objectives informing the use of conditionality in the assistance equation implicate two key sub-themes namely, an assumption on the part of lending agencies that recipient countries especially in Africa lacked the capacity to rationally and independently use and apply donor funds for the intended purposes for which they are given. Secondly, the proclaimed reasons for the use of conditionality as stated by the Bank reflect a certain desire by donor agencies to claim a greater stake in the development of the countries they support. In this regard, the use of the mechanism of conditionality reflects a desire to deepen not only the relationship between the donor and the recipient country, but also to ensure that the donor constructs and implements an anticipated outcome in the aid equation. Yet, an institution's conception and scoping of conditionality materially reflect on its deployment of the contingent variables comprising of its 'conditionality in any aid relationship. The World Bank for example defines the term conditionality as *the set of conditions that, in line with the Bank's Operational*

118 Review of World Bank Conditionality, Operations, Policies and Country Services, World Bank, 2005,http://siteresources.worldbank.org/PROJECTS/Resources/40940-1114615847489/webConditionalitysept05.pdf

Policy…. must be satisfied for the Bank to make disbursements in a development policy operation.[119] This definition highlights the contingency dimensions of conditionality and the embedded threshold requirements involved, the meeting of which a country needs to aspire in order to qualify for aid or development assistance in the first place. But the continued application of conditionality, and in this regard the ROL conditionality in aid relationships implicate foundational questions regarding the impact of these conditionality in the ROL reform agenda in developing countries such as Ghana, and the governance development of these countries. The use of conditionality in development aid has been chided for undermining the autonomy of governments and frustrating the preferences of independent countries in ultimately making choices in the best interest of their citizens. In a more critical sense, aid conditionality presupposes the immaturity of the governments and political establishments of aid recipient countries to effectively and efficiently utilize aid, and the need therefore to force the hands of these governments to accept certain minimum standards of behaviour.

The variables often imposed as conditionality reflect the fundamental assumptions behind the neo-liberal principles espoused by the Washington consensus. In this regard, the rule of law has featured prominently as a template for the pursuit of legal reforms in developing countries. This conditionality is highly contested due to its perceived intrusive and highly political nature, and the tendency to influence the governance choices of recipient countries. The ROL reform has been espoused as a core agenda of development assistance institutions and over the last three decades,

119 Id

the World Bank has supported many projects focused on judicial and general ROL reform in the Third World.[120] Yet assisted countries have generally resented the use of conditionality in aid initiatives for the reasons advanced above not the least of which is the constraints it exerts on their autonomies in maximizing the benefits and uses of aid. This chapter will review the use of the ROL reform conditionality in development assistance and how that has impacted the dynamics of the relationship between receiving countries such as Ghana and donor agencies such as the World Bank. Within the context of the research, the chapter seeks to evaluate how the ROL has been used as a vector and variable to shape the governance prospects of aid receiving countries.

I. MULTIPLE CONCEPTIONS OF THE RULE OF LAW

Given its centrality to this the research in general and this chapter in particular, an understanding of the meaning of the ROL is vital to a fuller treatment of the theme of this work. Yet like many concept of its ilk, the ROL is a protean concept and its open *texturedness* makes it liable to varying political contestations.121 Used as a

[120] A. Santos, The World Bank Uses of "The Rule of Law" Promise in Economic Development, in *The New Law And Economic Development: A Critical Appraisal*, supra note 24

121 D. Desai & M. Woolcock, (2015) Experimental Justice Reform: Lessons From the World Bank and Beyond' Annual Review of Law and Social Science, 11: 155; P. Domingo, Rule of Law, Politics and Development: The Politics of Rule of Law Reform. London, ODI Report, 2016, https://www.odi.org/sites/odi.org.uk/files/resource-documents/10420.pdf. P. Domingo et al, Women and Power, Shaping the Development of Kenya's 2010 Constitution. London, ODI Report 2016, https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/10292.pdf. See R.

tool of development policy in assistance projects however, the ROL has been seen as establishing an overarching normative framework through which to achieve the goals of governance and development.[122] From the outset however, it is imperative that this work defines what the ROL is or means within the context of its application and functional usage. While any review of the scholarship will reveal a multiplicity of understandings and conceptions of the ROL,123 there exists a broad consensus that the theory provides an analytical construct for measuring the legal dynamics of government within the context of a political establishment. This general conception pictures the ROL as a theoretical model defining the relationship between the governed, state institutions and the leaders under which the powers of the latter are invariably curbed and defined by the law. In terms of its application, the ROL has come to mean more than just the heedless or mechanistic rule of the law and this evolved understanding has been part of the contestation surrounding its use.

While various scholars have throughout history offered alternate definitions, the theory as explained by A.V. Dicey has generally been cited as providing a comprehensive framework for analysing the ROL and applying it to different governmental systems. In his 1885 book titled the *Introduction to the Study of the*

Kleinfield, Competing Definitions of the Rule of Law In Promoting The Rule Of Law Abroad: In Search Of Knowledge 3 (Thomas Carothers Ed., 2006), supra note 1.

[122] T. Ringer, Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and its Place in Development Theory and Practice, *10 Yale Hum. Rts. & Dev. L.J. (2007),* https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1063&context=yhrdlj

123 P. Craig, Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework, http://weblaw.haifa.ac.il/en/JudgesAcademy/workshop3/Documents/A/A/PL-Craig.pdf

*Law of the Constitution*124, Dicey argues a tripartite theoretical model in which the ROL comprised the following sub-components, namely, (1) the general application of the law to all persons, (2) the determination of disputes through the ordinary courts of the land, and (3) the respect for the fundamental human rights of citizens. 125 This early rendition of the ROL laid the foundation for notions of legal supremacy and the elimination of subjective preferences in the allocation of entitlements and the administration of justice. This *Diceyan* model of the ROL was virtually internationalized when the United Nations defined the ROL as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.126 In the view of Summers, the ROL implies the following namely, the prevalence of legitimate government performing legislative, judicial as well as executive functions, domestic peace and order, certainty and predictability of governmental action and of the legal effects of private law-making, respect for the dignity of the individual (e.g. citizens being responsible only for acts which they knew or reasonably could have known were somehow contrary to law at time of acting), citizen autonomy and choice duly effectuated, freedom from arbitrariness of official action.127 He further notes that

124 "A. V. Dicey: Law of the Constitution, *reproduced in Wikipedia at https://en.wikipedia.org/wiki/A._V._Dicey*

125 The general application of the law to all persons is also called the supremacy principle. The human rights component of the ROL was strongly re-articulated by the international commission of jurists at their 1959 meeting in New Delhi, India.

126 Report of the Secretary-General, The ROL and transitional justice in conflict and post-conflict societies (2004).

127 R.S. Summers, The Principles of the Rule of Law (1999), 74 Notre Dame L. Rev. 1691 (1999). Available at: https://scholarship.law.nd.edu/ndlr/vol74/iss5/1

the ROL imports notions of the ultimate imposition of remedies and sanctions for rule departures only by impartial and independent courts and similar tribunals after appropriate notice and opportunity to be heard. While generally similar to the model developed by Dicey, Summers' theory emphasizes the structural integrity of the ROL in its application to a given governance system and its normativity as an administrative or governance value. Indeed, the constituent elements of this definition finds expression within the lending conditionality of the World Bank and general reform prescriptions that are offered to countries who seek to access the Bank's assistance initiatives.128 That the Bank uses the ROL as an eligibility criterion is evident in the sheer number of Bank-financed projects built on the ROL.129 For this category of users or adherents, the ROL is an end in itself and influences political choices in a manner that benefits the ordinary citizenry. The institutional culture of the Bank relative to the ROL reflects a deep belief in the inherent goodness of the ROL and its capacity to influence change in the behaviours of bad governments seeking aid from the Bank.

Yet the varying conceptions of the ROL, and the heterogeneity of the intentions behind its uses have been well recognized in the scholarship130, the above definitions notwithstanding. For example, critics have questioned settled

128 For a comprehensive treatment of the issues from the perspective of the Bank, see The World Bank In A Changing World: Selected Essays and Lectures, I&II, I. Shihata (Ed), *Martinus Nijhoff Publishers, 1995.*

129 The Bank has itself indicated that it has supported 330 projects under the aegis of the rule of law

130 R. Fallon, The Rule of Law, As Concept In Constitutional Discourse, Columbia Law Review, Vol. 97, No. 1 (1997) p. 1. See also, J.H. Anderson and C.W. Gray, Transforming Judicial Systems in Europe and Central Asia, in Annual World Bank Conference On Development Economics, supra note 1; B.T. White, Putting Aside The Rule of Law Myth: Corruption and the Case of Juries in Emerging Democracies, *43 Cornell International Law Journal, 307.* See also, C. May, *The Rule of Law: The Common Sense Of Global Politics* (2014), Edward Elgar Pub (July 31, 2014).

assumptions by drawing attention to the fact that the content of the 'law' in the ROL needs to be deconstructed and critiqued.131 It is in this regard that Santos' redeployment of the theory gains added significance especially as regards the role of law in governance reform and development assistance in general. His work like others was teleological and forces an instrumental conception of the ROL as a governance theory.132 Santos conceived of the ROL as comprising of four key conceptions namely, institutional and substantive conceptions and instrumental and intrinsic conceptions, and each of these typologies reflects an understanding or use to which the theory is put at any given point in time.

Within the meaning of his classification, the institutional variant of the ROL reflects a more descriptive version or use of the theory under which no value judgment is passed on the character of the 'law' in the ROL as such. The institutional version of the ROL is a detached model in which the theory merely describes the prevalence of law and its operation within a given legal system without providing a corresponding normative framework for assessing the quality of the law and its functional utility within the country. The institutional model of the ROL is accordingly mechanistic and is sharply contrasted with the substantive conception of the theory which essentially asserts a value-laden model of the law. Santos' substantive conception of the law essentially structures the theory as a barometer for gauging the quality of legal systems and the extent to which they are inspired by certain overarching

131 Rule of Law, Good Governance and Development Cooperation in Turbulent Times', Government of the Netherlands, https://www.government.nl/latest/news/2007/09/17/rule-of-law-good-governance-and-development-cooperation-in-turbulent-times, accessed on 28th January 2018 at 10.48pm.

132 For more on teleological theory of legal argumentation, see Z. Harasic, More About Teleological Argumentation in Law, *PRAVNI VJESNIK GOD 31 BR*. 3-4, 2015. Also available at https://hrcak.srce.hr/file/229796.

subterranean values. In this context, the ROL fitted the prescriptive policies of the development assistance institutions such as the World Bank and the IMF, and further enabled the use of the ROL as a reform tool in many countries especially in Africa. In other words, given the prescriptive dimensions of the 'law' in the ROL under the substantive version of Santos' deployment of the concept, the ROL provided a feasible tool to shape the evolving legal and political systems of countries on the continent in which the Bank sought to shape the governance dynamics of aid recipient countries in one direction or the other.

On the other hand, the instrumental-intrinsic typology speaks more to a means-end nexus under which the law is either deemed to be a *means* to achieving an *end* or a goal desired for its own good. Consistent with the treatment of the concept in the governance reform equation, the ROL appears to have been elevated as a desideratum in itself regardless of any contextual factors that might stand against the use of a particular version or model of the theory. The former is regarded as describing the instrumental conception of the ROL whereas the latter defines the intrinsic conception of the theory. Within the context of the law reform project in developing countries, the instrumental conception of the ROL has essentially taken on the character of a *Weberian* philosophy of the law. Max Weber is an early advocate for the instrumentalist conception of the ROL and his theory on legal *rationalism* typifies a belief in the functional utility of law relative to economic

development.133 Weber's concept of law and its role in social organization has had a significant impact on development in Western neo-liberal values and economic models and belief in legal formalism in general.

The multiple conceptions of the ROL betray a certain degree of malleability in the theoretical boundaries of the concept coupled with a susceptibility of the ROL to political contestation. Thus, while countries have struggled with the adoption of the theory and further, given the fact that majority of the countries which claim to operate the ROL were influenced in its adoption by other more powerful countries and organizations, the utility and functional neutrality of operating the ROL has not altogether been free from suspicion or scepticism. The varying conceptions of the theory may therefore appear to have arisen mainly out of attempts at reinterpretations of the ROL and its place in the governance paradigms of these countries. On the other hand, development assistance agencies have applied a one-size-fit-all model of the ROL to aid recipient countries with the tacit assumption that the theory is both homogenously understood and applied cross-culturally to same effect.

133 See on this, JK.M Ohnesorge, The Rule of Law, https://law.wisc.edu/m/2g2zt/annurev.lawsocsci.3.011207.pdf; B.Z Tamanaha, How An Instrumentalist View of Law Corrodes the Rule of Law, 56 DePaul L. Rev. 469 (2007) Available at: http://via.library.depaul.edu/law-review/vol56/iss2/12 ; D. Kettler and V. Meja, Legal Formalism and Disillusioned Realism In Max Weber, Polity, *The University of Chicago Press Journals,* Vol. 28, No. 3 (Spring, 1996), pp. 307-331; C. Stewart, The ROL and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law, *2004 MqLJ, 7*. D.M. Trubek, The Rule of Law In Development Assistance: Past, Present and Future, https://www.researchgate.net/publication/285511572_The_Rule_of_Law_in_development_assistance_Past_present_and_future

Thus, beyond heightening the political undertones of the ROL, the effect of a universal application of the theory under the aegis of development assistance resulted in distorted versions of the ROL being implemented largely characterized by gaps between what is articulated in theory on the one hand, and practical application of the concept. One is therefore forced to conclude that far from the implicit assumption informing its deployment by the IFIs, the ROL is hardly a self-contained theory insulated from the vagaries of societal norms, mores, habits, tensions and even conflicts. The social dynamics of a given country invariably impacts and shapes the theory and its outcomes and how it is applied in given circumstances.

Within the context of law reform in transitional and emergent democracies, criticisms levelled against the formalist deployment of the ROL have been shaped by the seeming substantial failure of the ROL to rein in impugned social vices and leverage the expected developmental dividends.134 Even from the standpoint of an intrinsic understanding of the theory, the application of the ROL to different country settings would invariably have to respond to settled notions of what constitutes 'legal propriety', the place of class and domination, relationships between equity, individual will and community, among other factors. By applying a cross-cultural and one-size-fits-all version of the theory to emergent democratic states especially in Africa, many a law reform program floundered and eventually failed to achieve the

134 J. Faundez, Legal Reform in Transition countries: Making Haste Slowly, http://www.flacso.edu.mx/biblioiberoamericana/TEMPFTP/CATEDRA4TRIM05/Legal%20reform%20in%20developing%20and%20transition%20countries.pdf

transformative institutional development originally anticipated by program designers135

Needless to stress the abstract conception of the ROL has exacted a heavy price on the extent to which reform programs have succeeded in achieving their goals , it bears mentioning that the development assistance community spearheaded by the World Bank have over the years recognized the serious limitations attendant on the application of a strict version of the ROL by embracing a conception broader and more malleable in tone. For example, the Bank's leading voice on the subject Ibrahim Shihata,136 has laid out core indicia for measuring the prevalence of the ROL in a given polity as follows:

1) *there is a set of rules which are known in advance, 2) such rules are actually in force, 3) mechanisms exist to ensure the proper application of the rules and to follow for departure as needed according to established procedures, 4) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial body, and 5) there are known procedures for amending the rules when they no longer serve their purpose.*

135 While a revisited theme throughout this research, the failed model of the formalist approach implemented in the ROL agenda in Ghana implicates broader issues in the influences of the reform financiers to advance a particular agenda in the reform and this may have blinded them to prevalent local challenges that ultimately undermined the reform effort.
136 I. Shihata, *The WB and "Governance" Issues in its Borrowing Members*, in 1 The World Bank in a Changing World 53 (1991), 85, supra note 115. See also, F. Upham, Mythmaking in the Rule of Law Orthodoxy*, In Promoting the Rule of Law Abroad: in Search of Knowledge*, Supra note 16

The criteria expressed in Shihata's itemized version of the theory reveals the intended scope of the Bank's approach to the definition of the ROL. First, by stating the broad minimum factors for the prevalence of the theory as opposed to a hard and fast conceptual definition of the ROL in the abstract, the Bank's conception extols the *generic* character of the ROL and the variability of its application from one context to another. This is important given the wide diversity of countries and cultures that the institution deals with, and the need to calibrate its values to reflect that diversity.[137] But the broad formulation of the theory in Shihata's rendition implicates more fundamental issues of scoping and thresholds for the ROL as a governance theory. The totality of the factors enumerated in his formulation incorporates both institutional and substantive aspects of the ROL and represents in the main, a shift from an ideological orientation relative to the theory to a more nuanced but pragmatic deployment of the ROL in a manner that reflects the ultimate values championed by the theory. Yet as will be mentioned later in this chapter, the Bank's approach is not altogether as flexible as may appear and the use of the ROL in a conditionality fashion reflects an attempt at universalizing it as a neo-liberal tool in the promotion of the Bank's own work as a Western global institution.

The World Bank's uses of the ROL in development assistance has fundamentally focused on bolstering the transparency strictures heightening the accountability requirements incumbent on governments by constraining the powers of government

[137] S. Chesterman, An International Rule Of Law, T*he American Journal Of Comparative Law* Vol. 56, No. 2 (Spring, 2008), P. 331;P.P Craig, *Formal And Substantive Conceptions Of The Rule Of Law: An Analytical Framework*, Sweet & Maxwell Stevens Journals, London, (1997)

in the use and management of state resources within the framework of its assistance relationship.[138] Consequently, reform programs have tended to focus on shedding light on the commercial dealings and happenings in government, and promoting the strictures of transparency and accountability as well the value of trusteeship in public resource management. Using the ROL as an effective corruption control mechanism however raises more complicated issues and implicates much more nuanced questions than may seem on the surface. For example, by adopting the legal approach to combatting the menace, the ROL crusaders implicitly advocate that there is something inherently efficacious about the ROL in dealing with the socio-legal menace of corruption. This subject will be problematized and revisited in various guises throughout the work.

Significantly at this stage however, it bears mentioning that the formalist conception of the rule of law as deployed by development assistance agencies has been attacked and criticized for being naïve and narrow in its approach to governance reform within the development assistance context. In a scathing critique on the viability of the definition proffered by Shihata under the aegis of the World Bank, Upham chides the malleable and inexact dimensions of the constitutive elements of the ROL as used by the Bank to measure the eligibility of recipient countries for aid. In his words,

[138] See Development In Practice: Governance: The World Bank Experience, http://documents.worldbank.org/curated/en/711471468765285964/pdf/multi0page.pdf; See also https://databank.worldbank.org/databases/rule-of-law on data and information on the bank's orientation and focus regarding governance reform using the ROL.

First, these statements are platitudes, with no more precise meaning than "a well-educated citizenry is the first guardian of democracy" or "ask not what your country can do for you, but what you can do for your country." Second, they present an exclusive path to development, using phrases like "a government must ensure" and "investors need to know" and statements that legal systems "are the backbone of national economic and social development" without which "no equitable development is possible." They leave no sense that there may be other paths to development other than through an effective, efficient, and fair legal system, and they imply that nothing can happen until these institutions are perfected. There is no acknowledgment of the variety of types of development or the possibility of different sequences within the development process. Third, these statements are evangelical. They advocate a course of action based on faith in social perfection, in this instance, a perfect legal system, which in turn produces a transparent and equitable order. There is no room for ideological compromise, no hint that building such a system might be difficult and costly, or that other necessities of development might have to be sacrificed to build it.[139]

Upham's critique betrays a key problem with the uses and abuses of the ROL and its application as a development variable in general. By applying it as a conditionality, the ROL attained the status of a dogma within the development assistance context and this served to entrench the formalist model implemented by the bank. Yet given as Upham argues, that, a key assumption of the formalist ROL model under the

[139] F. Upham, Mythmaking in the Rule of Law Orthodoxy*, In Promoting the Rule of Law Abroad: in Search of Knowledge*, Thomas Carothers (Ed.), supra note 57

Bank's programs is faulty, namely, the Bank's belief in the perfection of social and political institutions premised on the ROL, the use of the ROL as a conditionality may ultimately lead to confused outcomes in the long run. In other words, the fact that legal systems are often premised on long standing ideological and historical factors which continue to shape and reshape the legal order should of necessity imply that the deployment of a formalist model of law with norms that are often transplanted may produce results that may be in tension with each other and the assumption that the ROL can exist as an insular variable in any reform model has been shown to be both naive and counterfactual.

In this regard, the application or implementation of the rule of law in Ghana has produced two versions of the regime. First, the guaranteed legal and regulatory framework of Ghana mirrors the ideal type or version of the ROL and this could be described as law-on-the-books ROL. Secondly, the practical implementation of the guaranteed provisions reflects a gaping shortfalls in the norms provided in the guaranteed regime (law-on-the-books ROL). In other words, the gulf between the guaranteed ROL and the ROL in action is both telling and unmistakable within the context of Ghana's governance paradigm especially as influenced by development assistance initiatives.[140] A number of reasons account for this; First, and from a purely jurisprudential point of view, the formalist conception of the ROL is quintessentially armchair and this model approaches law reform from an abstract

[140] See generally, J. Halperin, Law in Books and Law in Action: The Problem of Legal Change*, 64 Me. L. Rev. 45 (2011)*; M. Hertogh, Your rule of law is not mine: rethinking empirical approaches to EU rule of law promotion, Asia *Eur J* 14, 43–59 (2016). https://doi.org/10.1007/s10308-015-0434-x, K. Appiagyei-Atua, Ghana -- Justice Sector and the Rule of Law, https://www.researchgate.net/publication/275889958_Ghana_--_Justice_Sector_and_the_Rule_of_Law

comparative angle. Thus, while the values *qua* values of the ROL may apply cross-country and cross-culturally, it is arguable that the implementation of those values from one context to another must of necessity take account of local nuances and obstacles in order to succeed.141 Second, the regulatory competencies of the "law" in the ROL schema in given local contexts such as Ghana's inevitably depend on the political will of local actors to subject themselves and their hangers-on to the constraining and punitive dictates of the law. In the absence of this, political actors and influencers will, as is usually the case in Ghana, often negotiate around the law and avoid its regulatory impact on their themselves. Thirdly, the implementation strategy of the ROL reform adopted by Western aid institutions itself was faulty as the tools of assessment of the progress of implementation presented inaccurate if not distorted results. For example, given the formalist conception and methodology of the ROL implemented, the assessment tended to focus more on the prevalence and institutionalization of broad rules and legal programs to ascertain the extent of compliance with donor conditionality. In this regard, the disjuncture prevalent in the ROL on books per reform, and ROL in action may in fact be causally related to the very problem of the implementation of the ROL regime in Ghana under the framework of development assistance.

It may appear that beyond the Shihata model of the concept, which so shaped the use of the ROL as a conditionality in development assistance in the 90's, that the emergence of empirical studies verifying the linkages between the ROL and development influenced the adoption of the ROL conditionality especially in the

141 B.T. White, Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies, *Cornell International Law Journal, Vol. 43, 307*

lending instruments of the World Bank. For example, in different studies conducted, it was found that there existed a direct correlation between economic growth and legal development as well as there being a causal connectivity between specific legal variables such as contracts and the protection of property rights and development.142 These studies and findings may have provided the necessary empirical and intellectual impetus to the Bank-driven ROL projects in which the Bank appears to have articulated the formalist ROL as an overarching variable in development assistance in respect of which the prevalence of minimum laws and legal guarantees and institutions *per se* was equated to guarantee of the ROL in action. In this regard, the problem of the ROL reform in development assistance may be more related to the manner of its conceptualization and implementation than it may be to the utility or effectiveness of the theory itself in the overall governance reform agenda.

In order to concertize this argument, a few anecdotal scholarly positions can be called in aid. In his work on the nature and effect of the ROL in Mongolia, White powerfully recounts how the rule of law has evolved in that country and metamorphosed into a legal variable distinct from its classical Western legal theoretical orientation.143 The author proceeded accordingly to identify two variants of the ROL namely the positive and negative ROL in developing his argument. Of

142 R.J. Barro, Determinants Of Economic Growth: A Cross-Country Empirical Study NBER Working Paper No. 5698 Issued in August (1996), https://www.nber.org/papers/w5698; D. Kaufmann et al., Governance Matters, (The World Bank, Policy Research Working Paper No. 2196, 1999). C. Clague et al., *Institutions and Economic Performance: Property Rights and Contract Enforcement, in* Institutions *And Economic Development: Growth And Governance In Less-Developed And Post-Socialist Countries* 67, C. Clague (Ed.) (1997).

143 B.T. White, Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies, supra note 128

more interest in this vein is the negative version of the ROL, which he essentially defines as the capturing of the echelons of state authority by vested interest for corrupt purposes.144 The conceptual distinction between the positive and negative ROLs in White's work represents perhaps the first clear recognition of the manipulative if not rigged aspects of the ROL by which different countries and contexts exploit the legitimacy offered by the ROL as a fundamental regime indicia by developing their own versions of the theory in keeping with subtle or overt prevalent practices and aspirations. In other words, given the Mongolian experience with deployment of the theory, the ROL has come to mean a rule to be professed for its inherent legitimacy but exploited to opportunistic ends if necessary.

His description of the Mongolian case perfectly typifies the Ghanaian situation and reflects a nuanced conception of the ROL in emergent democratic settings. White was apt when he consequently asserted,

The lives of Mongolians are in effect controlled by the same negative rule of law myth that predominates in other post-Soviet states—that the state and its institutions are universally corrupt and everyone is on the take, including legislators, the president, judges, prosecutors, the police, tax collectors, and especially customs officials. In this social environment, individuals take the illegitimacy of the law and legal institutions for granted. Laws are assumed to benefit the elite, and legal institutions are not trusted for impartial resolution of conflict. Individuals thus direct their behaviour "towards the expectation of legal failure." Because they assume that

144 Id

everyone else is ignoring the law—whether by bending the rules, going through the backdoor, paying bribes, or misusing their public position for personal gain— they do the same.145

The reality of the negative ROL and its impact on any prevalent ROL regime on the books reflects a situation in which local actors and creeping institutional dysfunction gradually creates a legal sub-culture that subverts the very values and principles of the ROL. In this guise, the positive ROL becomes insulated and generally ignored in peoples' dealings with the state and its institutions. Where ostensibly applied, the law is manipulated and wider *margins of appreciation* are assumed by decision-makers than is ordinarily allowed where the law allows choices, preferences and general discretion to be exercised. In the regime of the negative ROL, the cost of legal remediation especially through the courts is equally heightened as cases tend to be delayed, judges are bribed, and the entire process high jacked by persons willing to corrupt and appropriate the legal system. Yet "the Mongolian situation" when asserted as being illustrative of the negative ROL can be deemed problematic. This anecdotal scenario may be challenged by some on grounds that it is merely a case of legal deviancy and does not assume the status of an identifiable exception to the effectiveness of the ROL as a regime in the Third World in general. These critics would argue that the given the standard-setting effect of the ROL, entrenched deviant behaviour is inevitable and the fact that these arise to the level of a sub-culture does not itself undermine the effectiveness of the ROL. The forgoing however leads to one truism however, namely, that the Mongolian example provides a powerful counterweight to the formalist model of the ROL implemented by

145 Id

development agencies in Ghana and the need therefore to reflect on that model particularly in the context of governance reform in Ghana.

II. DEVELOPMENT ASSISTANCE IN AFRICA: EVOLVING GOVERNANCE DYNAMICS AND THE RULE OF LAW

In this section, significant emphasis will be laid on the role played by development assistance entities, notably the World Bank in promoting an agenda of development anchored on the ROL.146 While by no means the only player in the field, the World Bank has been a leader in the assistance community and asserted a leadership niche few can dispute. On the other hand, and as noted by Faundez, the World Bank is perhaps the main if not the only such body, which has consciously provided an intellectual articulation of its involvement in judicial and the ROL reform.147 In this regard, the Bank's works provide both the template and context for an analysis and

146 See generally, *C. Sage et al, Taking the Rules of the Game Seriously: Mainstreaming Justice in Development - The World Bank's Justice for the Poor Program.* Justice and development working paper series, No. 7. World Bank, Washington, DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/18103 License: CC BY 3.0 IGO. K. Pistor, and P. Wellons, , The Role of Law and Legal Institutions in Asian Economic Development, 1960-1995. New York: Oxford University Press (1999); J. Gillespie, Law and Development in the Market Place: An East Asian Perspective, , In Law, Capitalism, and Power in Asia: The Rule of Law and Legal Institutions, K. Jayasuriya, (Ed.)New York: Routledge, 1999.

147 J. Faundez, Rule of Law Or Washington Consensus: The Evolution of The World Bank's Approach To Legal And Judicial Reform In A. Perry-Kesaris (Ed.), Law in the Pursuit of Development, London: Routledge 2010.

review of the nature and dynamics of the ROL reform in development assistance and how that has both shaped and been shaped by the various assistance relationships.

The use of the ROL as a development assistance imperative was fundamentally informed by pragmatism more than it is justified by principled research positions.[148] The World Bank especially found itself caught in the vortex of the global political economy and legal strictures the most notable of which was the issue of non-interference in the internal affairs of aid recipient countries to which it has committed itself in its articles of establishment.[149] Yet on the other hand, the Bank was concerned about the waste and general misapplication of Bank granted facilities and was desirous of devising a middle path that allowed it to exercise some superintendence over the assistance initiatives of the Bank. The development of the concept of governance and the legitimating role it played in ensuring that the general oversight exercised by the Bank in the use of its resources in developing countries especially cannot be overemphasized. Upham captures it best when he stated in reference to the specific role played by the General Counsel of the Bank that,

At the end of the 1980s, in an effort to increase the effectiveness of the World Bank's development loans, its legal staff began to address what it calls "governance" issues in borrowing countries. Concerned that the way power is exercised in developing countries may contribute to the inefficient use of World Bank funds, yet

[148] See generally, L. Cao, Culture in Law and Development: Nurturing Positive Change, Oxford University Press, (2016)

[149] IBRD Articles of Agreement, Article IV Section 3(b)

*constrained by its Articles of Agreement from considering political criteria in its lending, the general counsel of the World Bank, Ibrahim Shihata, drafted a memorandum that distinguished governance from politics and identified the former as a legitimate consideration in the awarding of bank loans.*150

The switch from the problematic concept of "government" with its openly political overtones to the more nuanced variant of "governance" by the Bank reflects the evolutionary difficulty faced by the institution in its dealings with aid recipient countries.[151] By de-emphasizing politics and stressing systems, processes and values, the latter concept provided a functional template for the exercise of oversight by the Bank in the disbursement and application of aid money and other

150 F. Upham, Mythmaking in the Rule of Law Orthodoxy, *Rule of Law Series Democracy and Rule of Law Project Number 30 September 2002,* note 57. See also on this, Y.K Sheng, What is Good Governance, United Nations Economic and Social Commission for Asia and the Pacific, https://www.unescap.org/sites/default/files/good-governance.pdf; L. Jan-Erik, Good Governance: The Two Meanings Of "Rule Of Law", https://www.tepav.org.tr/upload/files/haber/1275981556-2.Two_Meanings_of_Rule_of_Law.pdf; Joseph Stiglitz, Democratizing the International Monetary Fund and the World Bank: Governance and Accountability, *An International Journal of Policy, Administration, and Institutions 111* (2003), https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-0491.00207. On the changing or evolving dynamics of the roles and mission of the Bretton Woods institutions, see, M. Malloy, Shifting Paradigms: Institutional Roles in a Changing World (1994) 62 Fordham L. Rev. 1911, 1912. Available at, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3108&context=flr

151 See S. Guhan, World Bank on Governance: A Critique, *Economic and Political Weekly* Vol. 33, No. 4 (Jan. 24-30, 1998), p.185.; K.S. Lateef, Evolution of the World Bank's Thinking on Governance, World Development Report, (2017), http://pubdocs.worldbank.org/en/433301485539630301/WDR17-BP-Evolution-of-WB-Thinking-on-Governance.pdf; World Bank. 1992. *Governance and development (English)*. Washington, DC : The World Bank. http://documents.worldbank.org/curated/en/604951468739447676/Governance-and-development; G. Harrison, The World Bank, Governance and Theories of Political Action in Africa, *The British Journal of Politics & International Relations, Vol. 7 Issue 2, 200; See also, W. Hout, The Politics of Aid Selectivity: Good Governance Criteria in World Bank, U.S. and Dutch Development Assistance*, Routledge, (2012).

assistance given the body. This then ushered in an era of superintendence built on the mechanism of conditionality.[152] The ROL was a vital component of this conditionality arrangement and served to justify the Bank's intrusions into matters that would have otherwise attracted complaints from donor recipient states. The use of the ROL conditionality is especially telling and raises important issues that affect the effectiveness of aid and other ancillary matters in that regard. In adopting the ROL conditionality, the Bank was essentially informed by its inherent belief in the intrinsic and functional utility of the ROL as a tool in state administration. The position of the Bank on the ROL conditionality as a medium of economic development is succinctly articulated in the Bank's own statement as follows;

Legal and Judicial systems that work effectively, efficiently, and fairly are the backbone of national economic and social development. National and international investors need to know that the rules they operate under will be expeditiously and fairly enforced. Ordinary citizens need to know that they, too, have the surety and protection that only a competent judicial system can offer.153

By drawing a positive correlation between the ROL and economic and social development, the Bank succeeded in effectively justifying its insistence on the use of

[152] The World Bank's role in shaping the structural and economic transformations of developing countries and economies in transition have often proven controversial and somewhat tenuous. For a concise treatment of the Bank's role in the privatization of the economies of Third World countries, see, K. Reisman, 'The World Bank and the IMF: At the Forefront of World Transformation' 60 Fordham L. Rev. S349, S351, (1992). Available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2990&context=flr; S. Blanco & E. Carrasco, The Functions of the IMF and the World Bank, 9 Transnatl'l L. & Contemp. Probs. 67, 70; E. Mason & R. Asher, *The World Bank Since Bretton Woods: The Origins, Policies, Operations, and Impact of the International Bank for Reconstruction* (Brookings Institution Press 1973) pg. 27;

153 World Bank, <http://www1.worldbank.org/legal/legop_judicial.html>.

that conditionality given the logical necessity of doing so.[154] In a robust critique of the Bank's use of the ROL, Upham draws attention to critical weaknesses of the implementation of the ROL conditionality by stressing *inter alia* that the emphasis on the inevitable single-minded path of the ROL towards development advocated an untenable unilineal approach to development, which is counterproductive and cannot be countenanced. 155 Upham's critique of the use and deployment of the ROL by the Bank reflects the disenchantment of many other scholars who see the danger of narrowly applying the ROL for preconceived purposes.156 From a more general perspective however, and in the specific case of Ghana, it can be argued that the Bank and the development assistance community in general applied the ROL from a more simplistic perspective and ignored the complexity of exogenous and endogamous factors that shape or affect the effectiveness of any regime of the rule in given countries. This work therefore conceives of the Bank's implementation of the ROL as being formalist in outlook as contradistinguished from a pragmatic approach to the effectuation of the concept. In this regard, legal formalism is defined in this research more broadly than ordinarily obtains in the literature and

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[154] The World Bank, Governance and Development, (1992), http://documents.worldbank.org/curated/en/604951468739447676/pdf/multi-page.pdf; The World Bank, Conditionality Revisited: Concepts, Experiences & Lessons, S. Koeberle et al (Eds.) (2005); H. Cisse, Should the Political Prohibition in Charters of International Financial Institutions Be Revisited? The Case of the World Bank, In International Financial Institutions and Global Legal Governance, *The World Bank Legal Review*, Vol. 3, (2012); The World Bank, Justice and the Rule of Law, https://www.worldbank.org/en/topic/governance/brief/justice-and-rule-of-law. On the general *raison detre* of conditionality, see D. Woodward, *Debt, Adjustment and Poverty in Developing Countries* (Pinter Publishers 1992) p.31; *Review of World Bank Conditionality* (World Bank 2005) pg. 2； J. Gathii, 'Human Rights, the World Bank and the Washington Consensus: 1949- 1999' (2000) 94 Am. Soc'y Int'l L. Proc. 144, 145

155 F. Upham, Mythmaking in the Rule of Law Orthodoxy, *Rule of Law Series Democracy and Rule of Law Project,* supra note 57.

156 Alvaro Santos, The World Bank Uses of "The Rule of Law" Promise in Economic Development, supra note 107.

embraces both the narrow sense of formalism (normally contrasted from substantive conception of the ROL), and fundamentally includes an understanding that distinguishes paper or black letter ROL from what obtains on the ground. The Bank's implementation of the formalist model meant that the adoption of transplanted rules, systems and structures were essentially prioritized at the expense of customized versions of the ROL. Consequently, the Bank's formalist conception of the ROL[157] applied in Ghana's aid-driven governance reform appear to have been inspired by the likes of Hernando De Soto, who argued for the conversion of legal informality and the assimilation of informal rules and systems with the view to improving on their efficiency and effectiveness in general.158 It is evident that the, Bank-moderated ROL reform initiatives advocated legal and institutional transplantation in which mainly Western institutional models were adopted or replicated in aid recipient countries. Yet as earlier argued, legal formalism at its core, lacks the needed pragmatism required for the project of reform in the African context and for that matter, Ghana's. Again, Upham poignantly points this out when he asserted that,

The reason that advocates of the new rule of law orthodoxy are willing to take this risk, in my opinion, is that they view the rule of law as an indicator of social development. Such advocates hold a relatively unvarying vision of the end product

[157] The subject legal formalism within assistance initiatives and the law reform in general will be revisited in later part of this work. See at this stage however, M. Matczak, Why Judicial Formalism is Incompatible with the Rule of Law, SSRN Electronic Journal (2016), Available at https://www.researchgate.net/publication/307204552_Why_Judicial_Formalism_is_Incompatible_with_the_Rule_of_Law; L. Grenfell, Promoting the Rule of Law in Post-Conflict States, Cambridge University Press. (2013).

158 Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World*, trans. June Abbott (New York: Harper & Row, 1989). Also see Hernando De Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

of legal reform efforts, without requisite attention to the social, cultural, economic, and political contexts within which such efforts take place. Legal systems are so complex and so intertwined with these contexts that the chances of large-scale legal transplantation performing in the way intended, especially right off the bat, are slim. Because the reformers are focusing on the expected result—the formalist rule of law—rather than the new institutions' interaction with the social context, it is difficult for them to perceive problems and react effectively to the inevitable surprises, which are certain to arise, particularly if contextual factors are ignored.[159]

The contextual issues surrounding the rule of law reform are very important to an understanding of the failures of the ROL in development assistance initiatives. By promoting a formalist model of the rule of law reform, development assistance-led ROL may have unwittingly reinforced the effect of the negative ROL spoken of by White.160 In other words, the gulf created between the formalist ROL (positive ROL) and the on-the-ground or actual ROL (negative ROL) invariably led to the preference for the latter in people's dealings with the state. This has been put down to the 'transplant effect' of the formalist ROL and how the failure to appreciate and incorporate contextual issues tended to insulate the ROL and weaken its overall effectiveness as a regime.

Yet, the seemingly dogmatic use of the formalist ROL conditionality in development

[159] F. Upham, Mythmaking in the Rule of Law Orthodoxy, *Rule of Law Series Democracy and Rule of Law Project,* supra note 57; J. Goldston, Why Development Needs the Rule of Law, https://www.justiceinitiative.org/voices/why-development-needs-rule-law; I. Khan, How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World?, https://www.cisdl.org/wp-content/uploads/2018/05/How-Can-the-Rule-of-Law-Advance-Sustainable-Development-in-a-Troubled-and-Turbulent-World-I-Khan.pdf; K. Kocevska, Rule Of Law – Condition For Economic Development (Republic Of Macedonia), SEEU Review Vol. 11, Issue 1, (2016)

160 B.T. White, Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies

assistance notwithstanding, the donor community itself has struggled with outcomes of research findings on the complexities of the ROL and its contributions to national development.[161] In other words, while the use of the ROL by donor agencies may appear to have been based on some scholarship and research, it may seem that the relationship between ROL reform and development has all along been known to be tenuous. For example, studies contained in the Bank's own publication indicates that the causal relationship between judicial reform and economic growth is at best "modelled as a series of on-and-off connections, or of couplings and de-couplings".162 Combined with mixed fortunes of institutional reform in developing countries therefore, it is easy to assert that despite the stringency with which the particular conditionality has been implemented, the role played by the ROL in development is not a given especially within the context of development assistance and this argument will be further developed in the next sub-section.

III. IMPERATIVES OF A RULE OF LAW AGENDA IN DEVELOPMENT ASSISTANCE: THE WASHINGTON CONSENSUS & GHANA

[161] T. Endicott, The Impossibility of the Rule of Law Oxford Journal of Legal Studies Vol. 19, No. 1 (Spring, 1999), p.1; Thom Ringer, Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and its Place in Development Theory and Practice, *10 Yale Hum. Rts. & Dev. L.J.* supra note 109.

162 R.E. Messick, Judicial Reform and Economic Development: A Survey of the Issues, 14 World Bank Res. Observer 117, 123 (1999).

The emergence of the 'Washington Consensus'163 as a generalized set of indicators for gauging the effectiveness of reform in third world countries has remained a central feature of development assistance within the last three decades. While the development framework164 envisioned under the Washington Consensus was initially focused on the Latin American region, the Washington Consensus has become a global development strategy adopted by the multilateral development agencies including the World Bank and the International Monetary Fund (IMF). Significantly, the ten point indicators listed by Williamson[165] did not specifically include the ROL as an index or development criterion. The listed category approximating that field, "property rights" also does not generally speak to the necessity of law or any particular kind of law for the development of the country for which the law operates. Nonetheless, the subject has subsequently been broadly dealt with under the rubric of the ROL in which the latter has been treated as an indispensable prerequisite of economic development within the context of development assistance in general. Thus, it is easy to argue that while the concept was not actively canvassed as a conditionality within the framework of the Washington consensus, it has been nearly automatically used and applied in the policies of donor agencies and certainly in the context of the work of the World Bank and the IMF.

163 This term was coined by John Williamson to broadly describe the set of policy prescriptions for Third World development agreed on by the core development agencies and experts. Williamson J. (2000). *What Should the Bank Think about the Washington Consensus?*, http://documents.worldbank.org/curated/en/624291468152712936/What-should-the-world-bank-think-about-the-Washington-consensus

164 It is important to stress that in coming out with the concept of the Washington Consensus, John Williamson himself stated that he did not seek to state a development blueprint *per se.*

[165] Id

In this regard, the use of the ROL conditionality is a rather ubiquitous reality within the regime of the assistance initiatives of the World Bank. Although a contested concept in terms of scope and meaning, the ROL has been rampantly used as a conditionality to justify or refuse donor aid to recipient countries and the Washington Consensus has provided the neoliberal framework for the pursuit of the ROL conditionality in aid. Indeed, in the view of some scholars, the initial introduction of the ROL as a conditionality in the Bank was intended to have an institutional meaning and not the substantive effect that it subsequently came to encompass.166 This understanding of the concept within the Bank's usage is consistent with the very history of the ROL within the institution and how its deployment was specifically intended to achieve a tactical albeit narrow objective. The insistence on legal reform as a conditionality was a feature of the Structural Adjustment Program (SAP) of the Bank and the IMF167 under which the Bank employed the mechanism of reform as a tool to achieve its desired objectives under its lending relationship with recipient countries mainly in Sub-Saharan Africa. On the other hand, the frontal or explicit use of the ROL conditionality as an appendage of the governance epoch is a later culture within the Bank's work and does not appear to have been home-grown within the institution from the onset of development assistance. Analysing the various phases of the Bank's deployment of various policy models in its assistance initiatives, Santos succinctly captures the point when he notes as follows;

166 A. Santos, The World Bank Uses of the "Rule of Law" Promise *In Economic Development*, A. Santos, The World Bank's Uses of the "Rule of Law" Promise in Economic Development, D. Trubek & A. Santos (Eds.) supra note 57,

167 In Ghana, the SAP was launched in 1983 and was designed to turnaround the dismal performances of the Ghanaian economy at that time.

The "governance" period was inaugurated by the dismemberment of the Soviet Union, the dramatic political transformation of Eastern Europe and a severe political crisis in the African continent in the late 1980s and early 1990s. Indeed, the term governance is supposed to have emerged from a World Bank report evaluating the crisis in Sub-Saharan Africa and advancing recommendations for a minimum institutional "governance" to create stable conditions in these countries and assure the effectiveness of development assistance. In this context, the "rule of law" emerged as a central part of the strategy for transforming these countries into market economies. With the introduction of the rule of law as an area of legitimate Bank intervention, law reform became a priority and the Bank rapidly began to broaden its reach. During this period, the Bank favoured[sic] a long-term approach for projects of judicial and legal reform and created independent loans, in the form of investment or technical assistance that were not necessarily subject to conditionality. The current "comprehensive development" phase was inaugurated by President James D. Wolfhenson's strategy of a Comprehensive Development Framework (CDF). This strategy was launched as a response to the critiques of the neoliberal economic policies and sought to turn from a focus on economic growth to one of "interdependence" of all aspects of development. CDF seeks to reconceptualise[sic] development by going beyond its macroeconomic and financial aspects to focus on structural, social, and human concerns. The quest is for a stable, equitable and sustainable development. The reduction of poverty, or rather freedom from poverty, has been introduced *as a central part of the strategy.*[168]

[168] See Alvaro Santos, The World Bank Uses of the "Rule of Law" Promise in Economic Development, Alvaro Santos, The World Bank's Uses of the "Rule of Law" Promise in Economic Development, supra

From the above therefore, it is evident that the ROL conditionality represented a critical tool in the governance policy model phase of the Bank's assistance relationship. Given the importance of governance reform during this period of the Bank's lending to recipient countries, the ROL provided a powerful tool for effecting the necessary changes in the legal and institutional architecture of countries without incurring the critique that the Bank is interfering in the domestic political affairs of these countries. Unlike the use of law reform *qua* law reform however, the ROL provided a self-contained concept in which the Bank found the necessary components or indices that allowed it to influence the administration of aid recipient countries. But as can be seen from Santos' piece, the inception of the Comprehensive Development Framework represented a shift by the Bank from the neoliberal ideals stated in the Washington Consensus to a more inclusive regime in which a multiplicity of factors were considered in the evaluation of the effectiveness or viability of aid given to countries. The use(s) of the ROL in this phase was accordingly targeted at ensuring that law played a role in promoting aid effectiveness and the overall ends of development however defined from the standpoint of the Bank.

It is important to stress the inexorable *real politik* difficulties that the Bank faced in using the ROL as a conditionality in its relationship with aid recipient countries. Given the complexities of international relations during the cold war and in the

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note 57; See also generally on this, C.V. Rose, The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study, *Law & Society Review* Vol. 32, No. 1 (1998), p. 93

immediate aftermath of the collapse of the Soviet Union, many countries especially in Sub-Saharan Africa were ultra-sensitive to foreign interferences in their domestic political affairs.[169] Many of these counties saw the Bank as a tool in the hands of Western powers notably the United States and its allies and were apt to question the policy prescriptions of the Bank which were deemed intrusive. Consequently, the Bank devised the concept of "governance" as a conceptual antidote to the tensions posed in the Bank's relationship with its aid recipient countries and inherent in that rubric of governance is the ROL.

Similarly, the ROL acted as a handy toolkit in framing the governance agenda and legitimizing various degrees of interventions in the administrative and leadership aspects of a country's governmental system. Thus, its contested nature notwithstanding, the ROL was generally seen as speaking to an ideal to which developing countries assisted by the Bank, were to aspire and its application as an integral component of the development assistance initiative was generally accepted by these countries even if with muted protestations. As articulated by Shihata, General Counsel to the Bank between 1983 and 1998, the values of governance were reflected in,

[A] system, based on abstract rules which are actually applied, and on functioning institutions which ensure the appropriate applications of such rules. This system of

[169] A.A. Durokifa & E.C. Ijeoma, Neo-colonialism and Millennium Development Goals (MDGs) in Africa: A blend of an old wine in a new bottle*, African Journal of Science, Technology, Innovation and Development*, Vol. 10, Iss.3, 355, DOI: 10.1080/20421338.2018.1463654, Available at https://www.tandfonline.com/action/showCitFormats?doi=10.1080%2F20421338.2018.1463654.

rules and institutions is reflected in the concept of the rule of law, generally known in different legal systems and often expressed in the familiar phrase of a 'government of laws and not of men.[170]

Shihata's position shaped the Bank's use and application of the concept of governance and the centrality of law in his definition of governance is unmistakable. His deployment of the ROL within the framework of governance remains notable and illustrates the Bank's mind-set on legal and institutional reform in aid recipient countries. Consequently, the ROL as used by the Bank represented a set of values designed to attain certain objectives within the context of the assistance relationship. In a nutshell, Shihata reduced the ROL to four key conceptual pillars, namely,

1) [T]here is a set of rules which are known in advance, 2) such rules are actually in force, 3) mechanisms exist to ensure the proper application of the rules and to follow for departure from them as needed according to established procedures, 4) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial body, and 5) there are known procedures for amending the rules when they no longer serve their purpose.[171]

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170 I. Shihata, *The WB and "Governance" Issues in its Borrowing Members*, in 1 The World Bank in a Changing World 53 (1991), 85, supra note 115; See also I. Shihata, *Issues of "Governance" in Borrowing Members – The Extent of their Relevance under the Bank's Articles of Agreement*, In The World Bank Legal Papers 245 (2000), 268).

171 Id

As Santos rightly pointed out, the use of the ROL by the Shihata and the World Bank is *Weberian* in outlook, and reflects a quintessential belief in the logical rationality aspects of law and development. His summation of the minimum content of the ROL above indicates a fidelity to legal rationality and a preference for legal objectivity and detachment of legal rules from the prevalent political order of the day. The attraction of legal rationality within the context of the rule of law in development assistance may seem rather obvious especially when viewed from the angle of works done by scholars like De Soto172 and other advocates of his ilk. Situated however within the scope of the ROL, the principles of legal rationality reinforced the effects of key tenets of the ROL such as the "supremacy principle" which argued for the elevation of the law in the abstract, over and above rulers and ordinary citizens of the land.

Significantly however, Shihata recognized the shortcomings of transplanted legal institutions and laws and the limited extent to which borrowed rules and systems can advance the cause of development. Hence he argued that for the ROL to effectively contribute to development, it must fundamentally be indigenous to the system in which it is implemented, or in the minimum be domesticized.173 This effectively challenged the policy orientation of the Bank whose deployment of the ROL has been cross-border/cross-country in scope and content. Yet in a sense,

172 H. De Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else,* supra note 145; See also, J.M Otto, Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto, Hague Journal on the Rule of Law, Volume 1 Issue 1 (2009), Available at https://www.cambridge.org/core/journals/hague-journal-on-the-rule-of-law/article/rule-of-law-promotion-land-tenure-and-poverty-alleviation-questioning-the-assumptions-of-hernando-de-soto/2E677CF99BB8B587D22FF26303430B89

173 I. Shihata, *The World Bank and "Governance" Issues in its Borrowing Members*, supra note 115.

Shihata could be accused of dabbling in a contradiction given his recommendation to the Bank to assist countries design laws and went further to state that it was free to condition the disbursement loans on the extent to which countries complied with best practice prescriptions relative to the ROL.

The Bank's use of the ROL conditionality evidently therefore reflects a history in which the institution has been seeking to devise a less contested if not neutral path on which to chart an assistance relationship with aid recipient countries. In other words, given the evolution of global geopolitical arrangements coupled with the a clear desire by the Bank to overcome the strictures of "non-interference" asserted by Third World aid recipient countries, the use of the ROL afforded a feasible means of effecting the needed changes expected in these countries. Furthermore and as earlier mentioned, the ROL afforded a legitimate means of intervening and pressing home changes desired by the Bank in accordance with any reform policy it seeks to promote.

Specifically within the context of the use of the ROL as an anti-corruption strategy, the Bank evinced a clear intent in this regard and a series of pronouncements and express acts manifested this shift in emphasis and institutional agenda. As noted by Santos, the Bank goaded research in this area by pointing to strong correlations between the incidence of low levels of corruption and variables such as infant mortality, income per capita and low levels illiteracy rate.174 These are in addition to a variety of initiatives undertaken by the Bank to confront the menace of

174 A. Santos, The World Bank Uses of "The Rule of Law" Promise in Economic Development, supra note 107.

corruption head-on including the holding of seminars, symposia, and capacity building. These further complemented internal restructuring of the institution itself to make it better responsive and more adapted to the challenge of corruption in the areas of public procurements and loan disbursements.175

It is in this regard that Shihata powerfully articulates the position of the Bank on the ROL. In addition to concluding that there is something intrinsically and innately wrong with corruption given its corroding effect on the society in which it exists, he argues on behalf of the Bank that corruption undermines the ROL by substituting for the adherence to rules, preferences for the interest of the powerful and influential.176 Thus by a combination of substantive and institutional versions of the ROL, Shihata and the Bank promoted a version of the concept which advocated the use of the law to both constrain and empower government and in the process ensure that the trusteeship responsibility vested in leaders is maintained and not ultimately compromised. The enforcement of the law through the judicial process was consequently seen as an effective means of combatting corruption and enforcing the ROL in the governance of developing countries.

IV. DEMAND THEORY AND OTHER DYNAMICS OF RULE OF LAW REFORM

175 Id; *Postscript* of chapter eighteen, in 3 The World Bank in a Changing World 641 (2000).
176 I. Shihata, *Corruption-A General Review with an Emphasis on the Role of the World Bank*, in The World Bank in a Changing World 603 (1991), [hereinafter *General Corruption Review*]

Scholars like Francis Fukuyama177 and Katherine Erberznik178 assert a curious but intriguing theory that seeks to present an explanation for the failure of the ROL reform project in developing countries. Captioned the "demand theory" in this work, they broadly assert that the ROL cannot and have not succeeded in countries in which efforts have been made to replicate it because these countries lack a demand for the ROL and consequently past attempts at foisting or retrofitting the ROL on existing or transplanted systems have floundered in the absence of such demand. This theory characterizes local actors and 'consumers' of the ROL as the real levers of change and asserts that the lack of commitment and interest on their part has resulted in the inevitable failure of the ROL in those countries. Critical scholarship in this field chastise the approach adopted by ROL reformers working under the aegis of the multilateral donors in which reformers rather took for granted the role and impact of context and the interest of local actors in the reform process. In the view of Golub, these reformers adopted a "build it and they will come" approach which then goes to either suggest a sense of nonchalance, condescension, or downright ignorance of the surrounding environment in which these reforms took place.179

The lack of context in many of these ROL reforms is rather apparent. Not only were experts working on the reform predominantly engaged from countries otherwise

177 F. Fukuyama, *State-Building: Governance And World Order In The 21st Century*, Cornell University Press (April 7, 2004). Other scholars are even more blunt in their assertion in concluding that successful rule of law reform depends as much upon changing the beliefs that people have about the law as it does upon reforming legal institutions. See M. Prado & M. Trebilcock, Path Dependence, Development, and the Dynamics of Institutional Reform, *59 U. TORONTO L.J. 341, 360–61 (2009).*
178 K. Erbeznik, (2011) Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries, supra note 118

179 S. Golub, A House Without a Foundation*, In Promoting The Rule Of Law Abroad*, supra note 1

than those being assisted, but also the fact that the focus and methodology of these reforms were themselves external and extraneous to the local situation showed a lack of coherence and consistency in the Bank's implementation strategy of ROL reforms. In this regard, law reform supported by multilateral agencies mainly focused on the dual principles of formalization and the importation or transplantation of best practice standards or models of substantive or institutional law in other jurisdictions. Law reform under the former model is based on the belief that legal development can only be achieved by developing countries if informal rules and modes of doing things are transformed and rendered formal. This school therefore believes in the transmutation of informal legal rules and institution with the view to giving them better clarity and efficacy. In some countries, this led to the widespread writing and restatement of customary rules and general attempts to formalize as much of legal rules and modes of doing things. In the case of Ghana for example, the World Bank's support for the Land Administration Project[180] exemplifies this. Having given significant aid for the reform and systemization of the rules and institutions governing the management of land in Ghana, many observers conclude that that project has largely stalled if not entirely failed to impact the issues of ownership, management, and disposition of land in Ghana.[181]

[180] https://www.ghanaweb.com/GhanaHomePage/NewsArchive/World-Bank-gives-to-Land-Administration-Project-44665; https://www.myjoyonline.com/news/2018/november-22nd/world-bank-supports-ghanas-land-administration-services-with35m.php

[181] https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Land-Administration-Project-fails-to-address-key-land-bottlenecks-630385

Recounting the flawed reform models adopted by development assistance agencies relative to the ROL and corruption as a critique to the formalist approach, Katherine Erberznik poignantly notes as follows:

Formal and informal institutions determine the payoffs and, thus incentives that individuals face. Institutions, in this context, refer to rules and norms, including political and cultural norms, that act as constraints on human interaction. Both formal institutions, like written legal codes and judiciaries, and informal institutions, like the rewards and punishments of corruption, inform individual action by structuring incentives. "Institutions consist of formal rules, informal constraints (norms of behaviour, conventions, and self-imposed codes of conduct) and the enforcement characteristics of both. True institutional change, and not window-dressing change, is difficult. "But even more fundamentally, this institutional evolution takes time. [T]he single most important point about institutional change, which must be grasped if we are to begin to get a handle on the subject, is that institutional change is overwhelmingly incremental." Changes, particularly to informal constraints, tend to occur gradually because reformers or other entrepreneurial individuals take advantage of opportunities to introduce changes at the margin. One reason that true change tends to be at the margin is that the "larger the number of rule changes… the greater the number of losers and hence opposition." Attempts to impose new formal institutions by flat, such as by rewriting laws or holding formal elections for democratic government, impose new costs and benefits by changing the formal rules. Those who benefit from the old institutions face new costs and lose old benefits. Thus, those who would lose from the new

system are likely to mount a strong opposition to such changes. Furthermore, even those who desire such reform may lack the commitment to it because of the personal rewards inherent in the old system. This argument helps to explain why there are so many nominal, rather than true, democracies and why countries with similar legal codes seem to function so differently. As Douglass North pointedly notes, "Formal rules may change overnight, but informal constraints do not.[182]

The foregoing position sums up the complex dynamics and systemic interactions that impact any project in ROL reform. Indeed, the reality of winners and losers,183 and the maze of prevalent incentives and opportunities imply that beyond other objective obstacles to reform, the failure or otherwise of any reform package depend on a host of context-driven or dependent factors whose appreciation, mastery and adaptation will shape or determine the fate of particular reform projects. On the other hand, the models of formalization and transplantation used and often preferred by donor agencies ignore the complexities surrounding the enforcement of the version of the ROL implemented in developing countries such as Ghana. Being essentially donor-inspired and led, the lack of sensitivity demonstrated by the ROL model that was effected *qua* reform often led to tension between reform objectives and implementation outcomes. Eberznik has equally recognized the fact that changes implemented in these reforms often tended to be on the margins given that winners in any existing system of rules either opposed it or slowed the process of

[182] K. Erbeznik, (2011) Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries, supra note 118
183 Id

change with the view to negotiating new roles and opportunities in the nascent regime being implemented. Recognizing this reality is important for an understanding of the effect of the ROL on key governance reform initiatives ad the puzzling persistence of a vice like corruption in Ghana.

V. THE CHINA MODEL, THE RULE OF LAW & CORRUPTION

China has over the last decade emerged as a strong alternative to Western donor support given to Third World countries, and provided what has been said to be a counterweight to the pressures exerted by Westerns donor institutions through aid conditionality.184 As a model, Chinese aid has at least one fundamental distinguishing feature namely its complete detachment from the dynamics of domestic politics and government or governance of the recipient states. The ostensible reason informing China's 'unconditional' relationship with aid recipient countries is the belief in the equal partnership between it and the countries she helps.185 In this regard, China's aid regime in Africa has been described as *pragmatic experimentalism*186 and is informed by a desire to engage recipient countries with a model deemed alternative to Western aid mainly reflected in the policies of multilateral agencies such as the World Bank and the IMF.

184 According to a white paper issued by the Chinese State Council in 2016, China has given around 400 billion yuan ($58 billion, €47.4 billion) in development aid to 166 countries and international organizations over the past six decades. How Unconditional Is China's Foreign Aid, https://www.dw.com/en/how-unconditional-is-chinas-foreign-aid/a-43499703
185 Id
186 D. Brautigam, The Dragon's Gift: The Real Story Of China In Africa, Oxford University Press; Reprint edition (June 20, 2011)

Chinese development assistance relationship is typical of a development partnership in which China focuses on the economic needs of the recipient country and delivers customized aid without intervening in the governance dynamics of the country.187 Thus, unlike the orthodox model implemented by the World Bank and the IMF, Chinese aid emphasizes 'the economics of things' without considerations of exogenous factors such as governance, the rule of law or even political stability. The apparent policy justification proffered by defenders of China's aid policy is that issues of governance and local administration are things that should be left to the choices of governments and the people of the aid recipient country.[188] Thus, short of its standard conditionality under which an aid recipient country is expected to respect the one China Policy and also that inputs for Chinese funded projects are to be obtained from Chinese companies, China claims to offer a different model of aid in which the latitude of discretion afforded the receiving country is said to be greater than that offered under the traditional donor institutions.[189] Consequently, while Western aid has traditionally discriminated against certain countries which are deemed to operate oppressive regimes, China apparently deals with all regimes on

187 On this see generally, Information Office of the State Council, The People's Republic of China, China's Foreign Aid (2011), http://english.gov.cn/archive/white_paper/2014/09/09/content_281474986284620.htm (last visited Jan. 27, 2017) [https://perma.cc/XZ3VZBDT] (archived Oct. 23, 2017) [hereinafter 2011 White Paper]; Information Office of the State Council, The People's Republic of China, China's Foreign Aid (2014), http://english.gov.cn/archive/white_paper/2014/08/23/content_281474982986592.htm (last visited Jan. 27, 2017) [https://perma.cc/9F4A-Z3BC] (archived Oct. 23, 2017) [hereinafter 2014 White Paper].

188 R. Addo and S. Hess, Non-Interference 2.0: China's Evolving Foreign Policy towards a Changing Africa, *Journal of Current Chinese Affairs,* (2015) https://journals.sagepub.com/doi/full/10.1177/186810261504400105

189 See generally, A. Dreher, Rogue Aid? An Empirical Analysis of China's Aid Allocation, *The Canadian Journal of Economics / Revue Canadienne d'Economique Vol. 48, No. 3 (August / Août 2015), p. 988*

the African continent once the commercial and strategic factors justifying such a support are in place.

The logical outcome of this situation relative to the ROL cannot be ignored. Given the contested nature of the concept and its inextricable connection to governance, the ROL and governance reform are seen as intrusive and politically sensitive by many governments and China's posture of excluding non-commercial and economic matters from its assistance relations policy contains an obvious attraction to assisted countries and serves to undermine the leverage of Western IFIs and their governance agenda on the continent. This raises a number of questions, which includes the doctrinal basis or justifications for China's development assistance strategy, and its relationship if any, with Western aid. While the two questions present different degrees of complexity, a consideration of the second one is pretty straightforward. While admittedly, this subject has not received the depth of scholarly consideration as would be expected,[190] it can be asserted that China's aid policy, being late in coming, invariably has had to assume a competitive posture in order to win over existing aid recipient countries. In other words, given that when China started aggressively exporting aid, recipient countries have had to make a choice between sticking to Western aid or otherwise converting to the new offer made by China, the latter had to optimize the incentives of countries seeking to move away from the traditional Western aid with its trappings of conditionality. This

[190] See however, Y. Sun, China's Aid to Africa, Monster or Messiah? https://www.brookings.edu/opinions/chinas-aid-to-africa-monster-or-messiah/

inevitably presented a competitive scenario in which China had to reinforce the attractiveness of its aid and how this presented recipient countries better prospects.

Within the context of corruption and the control exerted on the recipient countries vis-à-vis the oversight exercised by the donor, Chinese aid was seen as especially attractive by African countries including Ghana. Thus, unlike Western aid, Chinese aid lacked all the legal strictures and stringencies such as donor auditing, legal reforms and enhancement of "sunshine legislations" in notable areas including in the field of public procurement. China, it seems has learned lessons on the difficulties if not flaws of traditional Western aid, and has perfected a model that seems both pragmatic and appealing to recipient countries. By dropping the ROL conditionality characteristic of Western aid, Chinese aid has provided an alternative for countries that have long contested the legitimacy of aid conditionality in general and the ROL conditionality in particular.

But this dynamic creates new challenges for the fight against corruption from the standpoint of the deployment and management of aid and resources granted by foreign countries. For example, China's model has been criticized for promoting grand corruption in countries such as Ghana, given the power it tends to concentrate in the hands of top government officials with minimal oversight on both internal and external accountability for its use.191 For example, in many highly significant infrastructural project financing, Ghana and other African leaders have

191 Suspicions surrounding Chinese Aid led Moises Naim in 2007 to coin the term "Rogue Aid" to describe Chinese Aid. M. Naim, Help Not Wanted, The New York Times, 2007, https://www.nytimes.com/2007/02/15/opinion/15naim.html?_r=0

been invited to China where negotiations are undertaken and very often the details of these deals are not altogether transparently disclosed or shared.[192] This is often worsened by the absence of any constituent accountability mechanism from the donor such as often obtains in the case of Western aid built on conditionality. The effect is that moneys given under Chinese aid has often been suspected to be the subject of corrupt deals in which high level political elites have benefitted at the expense of the aid recipient country and its people. On the other hand, the question as to whether it should be the business of an aid exporting country to be concerned about how aid is used or managed forces more complex or complicated considerations which clearly goes beyond the purview of this work. It only bears saying at this stage that the general view appears to support the impression that the aid model adopted by China strengthens the hands of corrupt government officials given its elimination of the ROL and other restrictive conditionality that have been known to guard against rent seeking, exploitative and corrupt use of aid resources.

CONCLUSION

The use of the ROL conditionality in development assistance is now clearly beyond doubt. What remains in doubt however is the functional utility of that conditionality in the ultimate economic development agenda advanced by the specific

[192] It has become customary for China to host investment summits for African leaders in China, far removed from the countries and continent of the investment destination and discussions between these leaders are often not transparently done.
https://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpcxesgjtfh/t1677638.shtml

conditionality used. From the totality of the above discussion however, it is clear that the use of the ROL conditionality was a central component of the development strategy used by the major multilateral financial institutions (IFIs) in their relationship with aid recipient countries and in this context, Ghana. The ROL conditionality not only defined the aid process but also inspired a certain degree of confidence on the part of the IFIs to 'interfere' in the domestic policy processes of countries in a manner not previously seen.

Yet as pointed out in this chapter, the regime on the ROL as a development conditionality was hardly based on any sound scholarly or doctrinal justification although the Bank in particular attempted to offer some intellectual responses to questions emerging from the use of the that conditionality. In many ways, the implementation of a ROL strategy without the needed research reflects the 'transplant mind-set' of the Bank and the reformers it used, coupled with the belief that best practices applied elsewhere could and should work cross-country. The resulting cleavage between the ideal ROL placed on the books from and the negative ROL subsistent on the ground has perhaps presented more complicated and unanswered questions than may appear on the face. This may seem to partly explain why years of reform have produced little results by way of substantive respect for the ROL in the governance of the country. As is evident from the above discussion, the scholarship is generally agreed on the fact that the failure of many of these ROL reforms could be put down to the fact that they tended to ignore many context-driven and context-dependent factors. It would seem from the totality of

scholarship and research therefore that the ROL reform could have optimized its gains with higher sensitivity to local situations and the demands of specific contexts.

CHAPTER THREE

GOVERNANCE REFORM, THE RULE OF LAW AND CORRUPTION IN GHANA

INTRODUCTION

Until its recent history under the fourth republic, Ghana has been notorious for being politically unstable and very susceptible to various forms of governance dysfunction.[193] Especially under the various episodes of military rule that the country experienced, human rights abuses, waste and mismanagement as well as the complete erasure of all accountability mechanisms were commonplace. It not surprising therefore that following the adoption of the 1992 Constitution with its

[193] D. Hitchens, Towards Political Stability in Ghana: A Rejoinder in the Union Government Debate, *African Studies Review* Vol. 22, No. 1 (Apr., 1979), p. 171; B. Hettne, Soldiers and Politics: The Case of Ghana, https://journals.sagepub.com/doi/10.1177/002234338001700206

panoply of rights, institutions and values, the subject of good governance and governance reform in general has assumed a topical status in the development discourse of Ghana. Situated within the context of the evolving global narratives on governance reform as symbolized in such United Nations' blueprints as the Millennium Development Goals (MDGs) later readopted as the Sustainable Development Goals (SDGs), good governance has come to represent a transnational virtue to which developing countries are to aspire.

More contextually, Ghana's return to constitutional governance following years of military rule was substantially influenced by the leading IFIs whose aid conditionality had the adoption and practice of good governance at its core.194 The insistence by the World Bank in particular on good governance as a conditionality reflected its desire to superintend the systems and processes shaping the use and deployment of aid resources. In this regard, governance has been operationally defined as the process of decision-making and the processes by which decisions are implemented.195 As noted in the previous chapter, the inception of the concept of governance marked a conscious effort to distinguish the 'political' from the objective processes of state administration in which the emphasis is on neutral principles of management and resource allocation. Thus, governance as used within the context

194 C. Santiso, Governance Conditionality and the Reform of Multilateral Development Finance: The Role of the Group of Eight https://www.researchgate.net/publication/255575623_GOVERNANCE_CONDITIONALITY_AND_THE_REFORM_OF_MULTILATERAL_DEVELOPMENT_FINANCE_THE_ROLE_OF_THE_GROUP_OF_EIGHT

195 Y.K. Sheng, United Nations Economic and Social Commission for Asia and the Pacific, https://www.unescap.org/sites/default/files/good-governance.pdf. See also, World Bank (1997). *Helping Countries Combat Corruption: The Role of the World Bank.* Washington DC: World Bank, p.3; On the issue of the Bank securing its projects from corrupt influences(a contrary point canvassed in this thesis) see, Aguilar, M, Gill, J. & Pino, L. (2000). *Preventing Fraud and Corruption in World Bank Projects: A Guide for Staff.* Washington DC: World Bank, p2.

of multilateral institutions has come to embody certain minimum content of variables. Thus among others, governance is said to reflect the following core values or standards namely, participation, accountability, transparency, responsiveness, effective and efficient systems of administration, inclusivity and consensus, etc.[196]

These values provide broad standards by which a country's leadership and institutions are assessed and determined on the basis of the extent to which its systems of government can meet certain optimal thresholds. Yet as can be facially gleaned from the listed factors, these values are not only broad but generally inexact in scope and orientation. For example, the extent to which a country's political system can be deemed to be consensus-driven will depend on the overall architecture of its political and constitutional system and the character of the participatory processes that undergird the political system. Thus, while in the case of Ghana the general freedom of speech and expression allows active participation in the political and governance process, deep fragmentation in the entire polity undermines the prospects of consensus across the spectrum of decision making. In this regard, the centrality of governance to the elimination of corruption cannot be underestimated. The installation of good governance principles will not only enhance the requisite structural and systemic dynamics that help combat corruption, but will also reinforce the legal and justice mechanisms that ensure and reinforce accountability. Thus, the laws and institutions put in place to fight corruption in

[196] M. Johnston, Good Governance: Rule of Law, Transparency, and Accountability, https://etico.iiep.unesco.org/sites/default/files/unpan010193.pdf

regimes with good governance represent normative systems that are designed to assure against maladministration and the prevalence of such canker as corruption, rent seeking and conflict of interest in general. The governance reforms embarked upon in the 1990s in Ghana were ostensibly informed by these expectations and the design principles used reflected the shift to a paradigm in which the application of ideals of state management were implemented with the tacit understanding that the values of good governance will invariably lead to the eradication of contrary vices such as corruption.

Consequently, and as argued in the preceding chapter therefore, the use of the ROL conditionality was generally seen as providing the requisite template for reforms through the institution of effective rules that either sanctioned or prohibited particular behaviour. In this context, the linkages between the ROL and good governance and the impact of these on systemic variables such as corruption is generally taken for granted in the scholarship and literature. While some studies have found some regression between the ROL and corruption, the scholarship has tended to treat the effect of the ROL on corruption as both axiomatic and inevitable.

This chapter will review the dynamic of governance reform and the ROL in Ghana within the context of the prevalence of corruption in the country. It will seek to deconstruct the ROL as a governance variable and how the implementation of one has impacted the other. In do doing, I intend to review the legal and constitutional framework put in place to deal with the menace of corruption.

I. GOOD GOVERNANCE AND THE RULE OF LAW REFORM IN GHANA

Ghana is a constitutional democracy and is a governed by a written constitution, which was adopted in 1992 following years of military rule. The constitution is generally characterized by key provisions on separation of powers and checks and balances, the ROL, constitutionalism, fundamental human rights and public financial management.[197] In this respect, Ghana's constitution is generally seen by governance watchers as a model one. The 1992 Constitution reflects a summation of the origins and dynamics of the concept of governance and embodies substantive and historical facts on its evolution.198 Given that the Bank was compelled to adopt "governance" as a tool in moderating the way Ghana as an aid recipient country used aid given it, the provisions of the Constitution reflect a response of the country to the demands and pressures of the IFIs following the changeover from military rule to constitutional governance and the completion of the Bank assisted programs of the 1980s.[199] In this regard, it is useful to recap the definition of governance within the usage of the Bank and other IFIs namely, as the exercise of authority, control, management, power of government or the capacity to define and implement

[197] See chapters 5,6, 8,10,11, 12, 13, & 18, 1992 GHANA CONST.

198 For example, the Constitution contains provisions on human rights but also constitutional indemnity, which shields alleged past human rights abusers from prosecution for historical offences committed.

[199] The introduction of transparency and accountability strictures reflect the shift from the former trend under the military regime in which there was minimal to no accountability and government processes were generally mired in secrecy.

policies.200 As earlier noted in the previous chapter, the concept of governance provided a neutral and alternative option by which the Bank operated and stayed out of the domestic political issues of assisted countries. By focusing on the systems and processes contingent on the management and use of aid resources, the Bank obviously legitimized its exertion of oversight in aid disbursement and aid-connected policy implementation. Building on the conceptual scheme initially adopted by the World Bank, the Asian Development Bank (ADB) defined governance to imply four interrelated minimum standards or elements namely, accountability, participation, predictability, and transparency.201 Each of these elements reflects the attempt at opening up the political and economic processes of government and ensuring that resources of state are applied to the optimal benefit of the citizens.

Kaufmann et al's work on the key indicators of good governance provide an analytical framework within which to interrogate the subject and evaluate their practical application within the context of Ghana202 and other countries on the African continent. In their work, the authors identified six functional components of the concept of good governance, namely, voice and accountability, political instability and violence, regulatory burden, rule of law and corruption. By qualifying

200 C. Santiso, Governance Conditionality and the Reform of Multilateral Development Finance: The Role of the Group of Eight, supra note 181.
201 Asian Development Bank (Report), Governance: Sound Development Management, August 1995, https://www.adb.org/sites/default/files/institutional-document/32027/govpolicy.pdf. Governance refers to the manner in which public officials and public institutions acquire and exercise the authority to provide public goods and services.
http://www1.worldbank.org/publicsector/anticorrupt/corecourse2007/GACMaster.pdf

202 D. Kaufmann et al, Measuring Good Governance, https://sites.hks.harvard.edu/fs/pnorris/DPI403%20Fall09/11%20DPI403%20Measuring%20good%20governance%20Kaufmann-Kraay.pdf

the concept of governance with the prefix "good", the Bank and its advocates have projected governance as a normative regime in which certain minimum standards have to be attained. In a more poignant publication, the World Bank categorically stated that the prevalence of corruption is antithetical to good governance given that corruption *can subvert the goals of policy and undermine the legitimacy of the public institutions that support markets.*[203] The Bank's treatment of corruption and its relationship to governance coincides with the approach adopted in this work, namely one which recognizes the inextricable interlinkage between corruption and the general development of countries.

Applying therefore the core indices of good governance to Ghana, it is apparent that Ghana approximates the thresholds necessary for good governance thereby leading some including the World Bank to conclude that Ghana is or was a model student of governance reform initiatives.[204] As a constitutional democracy, Ghana operates a written constitution that purports to operationalize constitutionalism through a plurality of checks and constraints on the exercise of executive authority. Thus, the Constitution contains rules on transparency and accountability on the management of public resources, in addition to sunshine provisions that require the presentation of an annual report on the state of the Ghanaian nation by the President.[205] Ghana also qualifies on the 'Kaufmann index' of voice and accountability under which a country is expected to permit free expressions and feedback in the governance

203 World Development Report, Building Institutions for Markets, supra note 1

[204] International Development Association, Country Assessment Strategy, (Country Assessment for Ghana, May 2017) http://documents.worldbank.org/curated/en/416451468030671072/pdf/39822main0GH0IDA1R200710158.pdf

[205] Article 34, 1992 Constitution of Ghana

process. Thus, the 1992 Constitution contains provisions on free speech and expression and promotes dissent. Significantly in this regard, Ghana decriminalized libel and consequently reversed a long-standing colonial practice of criminally penalizing free speech.[206] The repeal was designed to reinforce the voice component of governance and expand the space for expression and democratic accountability. This is in addition to sustained efforts at judicial reform,[207] a comprehensive regime on media rights,[208] passage of whistle-blower[209] and other sunshine legislations,[210] and a plethora of legislations on public financial management[211] and public procurement,[212] among others passed within the last two decades. This notwithstanding, Ghana's situation presents a mixed and somewhat problematic picture relative to the accountability aspect of the index. Thus, while as mentioned above the Constitution broadly makes provision for accountability in many areas including in the appointment of key functionaries of government, reporting on stewardship, judicial oversight and electoral accountability, the accountability mechanism in the Constitution has been said to be fragmented, deliberately thwarted (negative ROL), and ultimately rendered ineffective. A key example is called for. While Ghana's rules on accountability demand *inter alia* that Parliament (legislature) exerts checks and oversight over the exercise of executive authority and may appear therefore sufficient *prima facie*, the reality has been that Parliament has

[206] On 27 July 2001, Ghana's Parliament unanimously repealed the Criminal Libel and Seditious Laws, which had been used to incarcerate a number of journalists in the past, https://ifex.org/criminal-libel-law-repealed/
[207] Legal and Justice Sector Reform Program, http://www.mojagd.gov.gh/legal-and-justice-sector-reform-programme
[208] Chapter 25, 1992 GHANA CONST.
[209] Whistle Blower Act, 2006 (Act 720)
[210] Right to Information Act 201 (Act 989)
[211] Financial Administration Act, 2003 (Act 654)
[212] Public Procurement Act 2003 (Act 663)

largely condoned executive excesses over the years and rubber stamped its actions in a merely perfunctory fashion.

Ghana's situation thus raises questions of form over substance. While in general the legal and institutional architecture of the country mirror a near ideal type scenario in which the necessary laws and structures have been put in place to promote good governance achieved through incremental governance reform anchored on the ROL, the reality has been that a combination of sub-optimal enforcement of existing laws on governance and other systemic undercurrents have undermined the substantive effect of the index of accountability and good governance in general. Even more notable in Kaufmann's indexes within Ghana's experience are the dynamic of the rule of the rule of law and corruption. That will be the subject of the next sub-units of this chapter.

II. CORRUPTION AND ITS MANIFESTATION IN GHANA

Corruption is generally perceived to be endemic in Ghana and has been seen as a major obstacle to development in Africa.213 Particularly in the context of grand corruption, Ghanaian citizens generally perceive their leaders and political actors to

213 L. Adusei, 2009). Corruption in Africa: A Cancer that won't go away, https://www.modernghana.com/news/199975/corruption-in-africa-a-cancer-that-wont-go-away.html. Helping Countries Combat Corruption: The Role of The World Bank, The World Bank Group, September 1997. http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf; Susan Rose Ackerman, When is Corruption Harmful? A background paper for *World Development Report 1997,* August 1996. See also P. Bardhan, The Economics of Corruption in Less Developed Countries: A Review of Issues, Center for International and Development Economics Research Working Paper C76-064, February 1996; D. Kaufmann, Corruption: The Facts, *Foreign Policy*, June 1997

be corrupt.214 In this regard, corruption remains one of the central and topical themes in Ghana's governance paradigm and implicates many issues in accountability, constitutionalism and responsible governance.215 Its sheer pervasiveness and ubiquity in official dealings has meant that corruption has come to assume a certain character of normalcy and implicit social acceptance.216 Ghana's experience with corruption at all levels of the country's social life reflects the evolution of its economy and governance dynamics. Thus even though in a study contained in the TRACE Bribery Risk Matrix (2017) of the World Governance Index, Ghana was placed at the moderate risk level in the prevalence of bribery, Bertelsmann Stiftung's Transformation Index (BTI) 2018 assesses that corruption in the country has evolved into a pressing problem, especially with regard to high-ranking cases, which has diminished public trust in the government and is poised to have long- term, adverse effects on public attitudes toward the democratic system in general.217

The scholarship has generally distinguished between grand and petty corruption with the former being seen as lesser in scope to the latter. According to Arvind Jain, grand corruption is

214 https://en.wikipedia.org/wiki/Corruption_in_Ghana
215 Corruption has been seen as a problem of governance and the World Bank for example has linked the problem of corruption to the presence of weak governance institutions and practices in many emergent states, see The World Bank Development Report (1997). See also, Joel S. Hellman et al, Measuring Governance, Corruption, and State Capture: How Firms and Bureaucrats Shape the Business Environment in Transition Economies, The World Bank Institute Governance, Regulation and Finance and European Bank for Reconstruction and Development Chief Economist's Office, April 2000, Policy Research Working Paper 2312, http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/measure.pdf
216 On the normalization of corruption within democratic settings, see M. Jonhston, Corruption and Democratic Consolidation see, http://www1.worldbank.org/publicsector/anticorrupt/Princeton.pdf
217 K. Rahman, Overview of Corruption and Anti-Corruption in Ghana, Transparency International, https://knowledgehub.transparency.org/assets/uploads/helpdesk/overview-of-corruption-and-anti-corruption-in-ghana-2018.pdf

*the acts of the political elite by which they exploit their power to make economic policies.*218

Yet while the diversity of corrupt acts range from a complex set of actions within the spectrum of that distinction, it is evident that grand corruption remains particularly entrenched and probably the most problematic in this area costing the country some three billion United States Dollars annually according to some studies.219 With the conversion of its economy from a command and control regime to a laissez-faire or free market economic model, the incentives for private accumulation and rent-seeking behaviour grew to an all-time high.[220] Thus, while the incidence of political and grand corruption in Ghana clearly predates the inception of the neo-liberal economic regime of the 1990s, the complexity and spread of this type of corruption under the reformed economy is peculiar. It is in this regard that the steep rise in the perception of the incidence of corruption becomes critical. Over the years since the inception of constitutional rule, there has persisted a strong perception of the prevalence of grand corruption among the political elites of the country and their hangers-on. This has been the case in spite of the installation of a framework of legislations and institutions designed to combat and possibly eliminate the practice of corruption.

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218 A. K. Jain, *Corruption: A Review, 15* J. ECON. SURVS. 71 (2001). It is important to though to stress the point that this distinction can distort the picture on the impact of corruption as it fails to address the impact of the two kinds of corruption on the nature economy and the poor generally. See generally on this John M. Mbaku, Rule of Law, State Capture, and Human Development in Africa, 33*. 771, 836 (2018).*

219 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Ghana-loses-3-billion-annually-to-corruption-IMANI-438803. See also Assessing Ghana's Performance on Governance using the Mo Ibrahim Index of African Governance (IIAG), Imani Center for Policy and Education, July 2018

220 K. Rahman, Overview of Corruption and Anti-Corruption in Ghana, Transparency International, supra, https://en.wikipedia.org/wiki/Corruption_in_Ghana, V.L. Vine, Corruption in Ghana, *Transition* No. 47 p.48, Indiana University Press, (1975),

For the sake of conceptual clarity in this work, it is useful that a definition of corruption be considered and operationalized. Before proceeding any further however it is instructive to state that the precise boundaries of the term corruption are not only unclear, but also subject to some boundary issues contestations and accordingly the definitional aspects of these discussions are likely to reflect that fluidity.221 Drawing on the work of Machiavelli to illustrate the evolution of the term corruption, Hirschman asserted that,

Corruption" has a … semantic trajectory. In the writings of Machiavelli, who took the term from Polybius, corruzione stood for deterioration in the quality of government, no matter for what reason it may occur. The term was still used with this inclusive meaning in eighteenth-century England, although it became also identified with bribery at that time. Eventually the monetary meaning drove the nonmonetary one out almost completely.222

This terse evolutionary background summarizes the complexities surrounding the term 'corruption' and the scope of it's historical application. Rosseau defines corruption as the deviation of conferred public power from its original

221 G. Brooks et al, Defining and Corruption in Sport in Brooks G. et al, Fraud, Corruption and Sport, Springer (2013)
222 P. Bratsis, Corrupt Compared to What? Greece, Capitalist Interests, and the Specular Purity of the State, Discussion Paper No. 8, The Hellenic Observatory, The European Open Institute.

intendment.223 In other words according to him, corruption occurs when political actors abuse their powers and deviate from the mandate originally granted them by the people.224 Rose-Ackerman's conception of corruption builds on this by asserting that *corruption is misuse of public power for private or political gain.225* Ackerman's definition fundamentally emphasizes the illegitimate aspects of the gains derived from corruption and how actors involved in corrupt behaviour subvert and exploit entrusted authority for parochial gains. From the generality of the scholarship, this view of corruption holds sway among scholars and experts in the field and appears more nuanced given the complex mutations of the acts and behaviors that implicate the subject of corruption.226 This thinking has however been partially challenged by some scholars however who assert that the phenomenon of corruption encompasses behaviour some of which are not altogether illegal. In the view of these scholars, corruption can in fact be legal given the circumstances and underlying factors involved. Kaufmann accordingly distinguishes between legal and illegal corruption and proceeds to itemize the range of acts that may be grouped under the two heads.

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223 For a complete view of J.J. Rosseau's view on corruption and the political economy, see his works, Jean Jacques Roseau (1712-1778) The Social Contract, The Discourses on The Sciences and Arts, Origin of Inequality, and Political Economy

224 See on this Xi. Liu, A Literature Review on the Definition of Corruption And Factors Affecting the Risk of Corruption, *Open Journal of Social Sciences*, Vol. 04, No. 06, (2016), also at http://file.scirp.org/Html/191760972_67745.htm?utm_campaign=826331897_45235198987&utm_source=lixiaofang&utm_medium=adwords&utm_term=&utm_content=dsa295317350131_c__1t1__9067654_b&gclid=Cj0KCQjwoInnBRDDARIsANBVyAQHiCb6GU35PAQVP1kZHwHk24ZihpUwInhzTWcgCAPavnO99VU0p8EaAjhcEALw_wcB; Li, Y.L., Wu, S.J. and Hu, Y.M. (2011) A Review of Anti-Corruption Studies in Recent China. Chinese Public Administration, 11, 115-119.

225 S. Rose-Ackerman, *The Challenge of Poor Governance and Corruption*, https://www.copenhagenconsensus.com/sites/default/files/cp-corruptionfinished.pdf; A. Blums, Electoral Democracy and Corruption: A Cross-National Study, V-dem Working Paper Series, 2017-05. Note that this definition is preferred and has been adopted by the World Bank. See Helping Countries Combat Corruption: The Role of The World Bank, The World Bank Group, September 1997, http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf;
R. Klitgaard uses the equation C (corruption) = M (monopoly) + D (discretion) - A (accountability). See R. Klitgaard, "Cleaning Up and Invigorating the Civil Service," World Bank Operations Evaluation Department, November 1996.

In his work, Kaufmann concludes that *legal corruption arises in the context of investments in legal barriers aimed to undermine collective action on the part of the population.*227

While this classification sheds interesting light on the manifestations of inherent 'structural opportunities that exist in different countries for the pursuit of corrupt behaviour, designating corruption "legal" may seem to amount to a confusion in terms given that etymologically the corrupting character of a behaviour invariably renders it illegal.228 Yet it is equally defensible to argue in support of his position that by deliberately investing in systems and structures that are palpably designed to seek rent or enhance other corrupt behaviour, corruption does not only become normalized but in essence corrupt behaviour of this kind, by being embedded in official structures and enforcement schemes, become somewhat officially promoted and facilitated. In substantive terms however, it is useful to point out that "legal corruption" rather goes to the scale and complexity of corruption as opposed to the misleading impression that there exists a recognition of the legality or legalization of the act or acts of corruption. Yet Kaufmann's work directs our minds to the role of the state through its actors in intensifying or reinforcing the menace of corruption by exploiting the very mandate vested in it to install systems and structures designed to combat the vice of corruption. Particularly within the sphere of new and emergent

227 D. Kaufmann and P. C. Vicente, Legal Corruption http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal_Corruption.pdf
228 See for example the poignant position of Wayne and William who argue that corrupt acts are fundamentally improper or illegitimate. W. Sandholtz, and W. Koetzle, Accounting for Corruption: Economic Structure, Democratic Norms and Trade, CSD Working Papers, https://escholarship.org/uc/item/42w2c8b2

democracies in Africa such as Ghana, the deliberate exploitation of the state and its machinery to further the ends of corruption cannot be underestimated.

The diversity of perspectives regarding the definition of corruption reflects a general problem recognized in the scholarship and one whose effect impacts strongly on works seeking to understand and map out combative strategies.229 Looked at another way, disagreements in the scholarship on the definition of corruption demonstrates the inherently sociological aspects of corruption and how its manifestations reflect the exploitation of not only the legal and institutional framework of the state apparatus and the social dynamics of a people, but also deliberate and calculated investments in schemes by agents of the state in reforms with corrupt motives and twists. Corruption is therefore more than a superficial problem of governance but a seemingly cancerous problem that runs deep in the psyche of countries.230 On the other hand, it is a truism that the measurement of the prevalence of corruption in any given country has remained problematic and the metrics of its assessment have not attracted the needed universal consensus. Thus, while some instruments employ quantifiable statistical models of assessing the prevalence of corruption within a given country, the generality of studies in this field have tended to focus on the perception of corruption and are accordingly subjective in character. According to Blums, there are two key explanations for the prevalence of corruption in countries and these are the institutional and cultural

229 M. Steve Fish et al, Legislative Powers and Executive Corruption, V-dem Working Paper Series, 2015:7

230 See generally on this, M. Johnston, Corruption and Democratic Consolidation, http://www1.worldbank.org/publicsector/anticorrupt/Princeton.pdf; P. Bratsis, Corrupt Compared to What: Greece Capitalist Interests, and the Specular Purity of the State, Discussion Paper No. 8

explanations.231 The institutional explanation focuses on how individuals modify acts of corruption on the basis of the incentives they receive from the system in which they operate. In his words,

The institutional explanation focuses on how individuals modify the corruptness of their behaviour based on the incentives they receive from the system in which they operate... Democratization and changing power structures empower investigative journalism to expose corruption, and create means by which citizens and other public officials can act to penalize those who engage in corrupt activities. Since all the associated mechanisms with this theory assume that public officials will act rationally and respond to incentives, one would expect that corruption levels would change relatively soon after democratization takes place.232

The institutional explanation therefore focuses on the overall structural and institutional outlay of a given system and how the costs and benefits of engaging in corrupt behaviour are aligned within that system. Within the model proposed by Blums therefore, a given country could be said to have the requisite institutional system that encourages corruption if that country has the necessary variables including the lack of a free press, a subjugated judiciary and concentrated political and constitutional power that ultimately encourage corruption.

231 A. Blums, Electoral Democracy and Corruption: A Cross-National Study, supra note 212. Other studies have argued that corruption correlates with the levels of economic development. See According to this theory, conflict exists between principals on the one hand (who are typically assumed to embody the public interest) and agents on the other (who are assumed to have a preference for corrupt transactions insofar as the benefits of such transactions outweigh the costs). Corruption thus occurs when a principal is unable to monitor an agent effectively and the agent betrays the principal's interest in the pursuit of his or her own self-interest. Why corruption matters: Understanding Causes, Effect and how to address them., January 2015, DFID

232 Id

On the other hand, his cultural explanation is nuanced. In his work, the cultural explanations for corruption are founded on a belief in the culturally determinative aspects of corruption and the general impact of human behaviour on the practice.233 Again for its effect, Blums' words are apposite:

The cultural explanation proposes that an individual's willingness to engage in corrupt activities is driven by the culture of corruption surrounding that individual. The mechanisms by which culture motivates individuals to engage in corrupt behaviour are many and can be best identified through case studies.234

These explanations notwithstanding, the constituent causes of corruption reflect certain nuances from one country to the other. Ghana's experience with corruption typifies the African situation with the menace, and continues to pose significant risks to its governance prospects. According to Transparency International, corruption is rife in Ghana and permeates the various facets of its governance and institutional structures.235 This is in addition to other estimates, which suggest that Ghana loses about Three Billion United States Dollars annually to corruption and this represents over Three Hundred Percent of all amounts the country receives in foreign aid. Thus, beyond the other effects of corruption on the national psyche and polity, corruption has a huge deleterious impact on the Ghanaian economy and the

233 A. Saleim, The Relationship between culture and Corruption: A Cross-National study, Emerald Group Publishing Limited.
234 A. Blums, Electoral Democracy and Corruption: A Cross-National Study, supra
235 https://knowledgehub.transparency.org/helpdesk/overview-of-corruption-and-anti-corruption-in-ghana-1. See also, K. Rahman, Overview of Corruption and Anti-Corruption in Ghana, CHR Michelsen Institute

allocation of resources in general.236

TYPES OF CORRUPTION

While it seems clear that the various types of corruption generally play out in the Ghanaian scenario, research has shown that Ghana's experience with corruption makes political corruption, corruption in business, and bureaucratic corruption the most notable and prevalent of the lot.237 Political corruption comes in variety of ways and ranges from more innocuous and benign gifts-giving to persons in high and sensitive political positions, to more direct payments to politicians for a variety of favours expected mainly in the character of the award of contracts and other favours in commercial dealings with the state. In addition, other forms of corrupt behaviour mainly prevalent in Ghana are in the form of payments by political actors to electorates with the view to gaining electoral advantage in voter preferences during elections as well as over-invoicing in government contracts mainly spearheaded by political appointees and high ranking civil and public servants.

Due to the sheer amounts involved, politically-induced grand corruption in particular tends to sophisticated in character and is often system-wide in nature. Thus, from

236 The main constitutional anti-corruption agency in Ghana, the Commission for Human Rights and Administrative Justice (CHRAJ) and a leading Think Tank (IMANI) have both estimated the losses in the region of $3bn. A study showed that corruption slows the rate of poverty reduction by reducing growth and increases income inequality. See S. Gupta et al, Does Corruption Affect Income Inequality and Poverty? 3 Economics Of Governance 23, 25 (2001). See also Daniel Kauffman, Rule of Law Matters: Unorthodoxy in Brief, Brookings Report, January 21, 2010, available at http://www.brookings.edu/research/reports/2010/01/21-governance-kaufmann. V. Tanzi, Corruption Around the World: Causes, Consequences, Scope and Cures, INTERNATIONAL MONETARY FUND STAFF PAPERS 571 (1998). See also Susan Rose-Ackerman, Corruption and Development 40 (1997), paper prepared for the Annual Bank Conference on Development Economies, Washington, D.C.

237 K. Rahman, Overview of Corruption and Anti-Corruption in Ghana, Transparency International, supra note 204.

mainstream payments to contractors in opaque transactions to payments by investors in order to gain access and influence over political actors and decision-makers, political corruption has dominated the narrative in Ghana's governance paradigm. Besides the quantum of moneys involved, the prominence of political corruption also derives from the contagion effect it tends to have on other sub-sectors of the economy given the network of persons involved in any given case of political corruption. In other words, given the influence exercised by the political class on the various facets of national life, corruption involving that class and group tend to permeate the other spheres of national life in general besides the corrosive effect it has on the national psyche.

Corruption in business is also important within the context of the dynamics of corruption in Ghana. In a sense, designating this manifestation of corruption as "business corruption" "creates" the misleading impression that this type of corruption is prevalent only within the sphere and scope of private sector-led business. In fact, business corruption straddles the spectrum of business entities, regulatory bodies and state parastatals, and political actors. Quoting a study conducted by Freedom House in 2018, Rahman asserted that the payment of 'facilitation fees' and other rent payments for the issuance of licenses was rampant and common within the business community in Ghana.238 These have inevitably created a rent economy in which official actors routinely demand bribes and assert a right to receive private payment for the performance of their work. The quantum of moneys involved in this area also ranges from petty payments to huge sums especially in cases involving license approval and renewals for large companies and

238 Id

multinationals. These have many effects on the country including spawning a regime of regulatory connivance, heightened transaction costs for businesses and a state of general uncertainty for investors.239

Another manifestation of corruption is what has been designated by the Transparency International as petty and bureaucratic corruption. 240 In a study by Bertelsmann Stiftung241, it was discovered that bureaucratic corruption was rampant in the Ghanaian civil service and allied institutions. This category of corruption is reflected in the routine payment of bribes to civil and public servants in order for them to provide specific services required of them by the public. Many studies have over the years rated institutions deemed to be most corrupt and the Ghanaian judiciary and the police have often been touted among the most corrupt institutions in the country.242 Bureaucratic corruption is peculiarly akin to legal corruption identified by Kaufmann given the deliberate exploitation of institutional rules as well as the general bureaucracy for private gain. In other words, in an attempt to induce the payment of bribes and other corrupt benefits, officials are wont to deliberately apply rules in ways that favor *clientelist* preferences and

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239 The effect that corruption has been the subject of substantial scholarly work and generally corruption has been said to have a negative effect on the growth of a country's economy. See generally, Pak Hung Mo, Corruption and Economic Growth, Journal of Comparative Economics, Vol. 29 Issue 1; P.A. Voyer & P. Beamish, The Effect of Corruption on Japanese Foreign Direct Investment, Journal of Business Ethics, March 2004 Vol. 50; E. Asiedu and J. Freeman, The Effect of Corruption on Investment Growth: Evidence from Firms in Latin America, Sub-Saharan Africa, and Transition Countries, Review of Development Economics, https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-9361.2009.00507.x

240 Id
241 Supra
242 Police-Judges Most Corrupt in Ghana-CDD Ghana, https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Police-judges-most-corrupt-in-Ghana-CDD-606694 ; GII Survey, Police Judiciary Most Corrupt Institutions in Ghana, https://www.ghanaweb.com/GhanaHomePage/NewsArchive/GII-survey-Police-judiciary-still-most-corrupt-institutions-in-Ghana-517229

encourage others to atone tenancy to these officials whenever they patronize public institutions.

In the context of mainstream governance, World Bank identifies yet another manifestation of corruption namely systemic corruption. In a publication by the Bank, the institution asserted that,

[C]orruption is systemic (pervasive or entrenched) where bribery, on a large or small scale, is routine in dealings between the public sector and firms or individuals. Where systemic corruption exists, formal and informal rules are at odds with one another; bribery may be illegal but is understood by everyone to be routine in transactions with the government. Another kind of equilibrium prevails, a systemic corruption "trap" in which the incentives are strong for firms, individuals, and officials to comply with and not fight the system.

As an antithesis of good governance, this category of corruption is perhaps the most notorious given its breadth and impact on the governance of Ghana. By its character, systemic corruption permeates the fabric of the political economy and undermines the operation of institutions set up to deliver public goods. As noted by the World Bank, systemic corruption often creates a psyche of graft in which the payment of bribes and other illicit benefits become normalized and often taken for granted. As has been the experience with Ghana, the widespread nature of systemic corruption makes it complicated to deal with particularly from the standpoint of law enforcement and prosecution. In this regard, the sense of normalcy not only removes the element of guilt felt by perpetrators but also that persons who do not

indulge in corrupt acts rather assume the position of deviants who are seen as obstacles to be generally avoided in various dealings and transactions. For these persons, the cost of avoiding corrupt behaviour becomes often burdensome as they negotiate their engagement with state institutions and actors.

The taxonomy of corruption enumerated above have been neatly and excellently reclassified by Alam into the following, namely, (i) Cost-reducing corruption (ii) cost-enhancing corruption (iii) benefit reducing corruption, and (iv) benefit enhancing corruption.243 Cost –reducing corruption occurs where bureaucrats exploit their vested authority to illegally and unjustifiably reduce the liability of private persons to the state. This usually occurs in the area of financial liability in respect of which amounts owed and due to the state are often negotiated and reduced in expectation of corrupt payments made to civil servants involved. Cost reducing corruption affects the resource base of the state and perversely augments the incentives of bureaucrats to exercise their state-given powers in ways that maximizes their own private benefits at the expense of the state. In a similar vein, cost-enhancing corruption occurs when civil servants exploit the populace by commercially benefitting from the disbursement or distribution of state resources entrusted into their care in the line of their work. The moneys or other gains realized from these dealings are then privately appropriated and not placed in the official treasury of the state.

243 M.S. Alam, *Anatomy of Corruption: An Approach to the Political Economy* 70 *of Underdevelopment*, 48 AM. J. ECON. & SOC. 441, 442-43 (1989). For an excellent and simplified treatment of this classification, see John M. Mbaku, International Law and the Fight Against Bureaucratic Corruption in Africa, Arizona Journal of International & Comparative Law, Vol. 22, No. 3, 2016.

Benefit-enhancing corruption on the other hand focuses on the enlargement of existing rights or entitlements accruing to citizens by corrupt public officials or civil servants in anticipation of they benefitting from the resources given. Mbaku cites the example of the transfer of excess sums in a scholarship or retirement scheme in which the civil servant hopes that a portion of the excess funds or other resources deployed will be shared with him. Finally, in this regard, benefit-reducing corruption is the category of corruption that thrives on the information asymmetry prevalent between civil and public servants and the ordinary people. Thus, civil servants may take advantage of unclaimed benefits and appropriate these for themselves or simply take advantage of the ignorance of persons entitled to certain benefits and exploit the information deficits or gaps in knowledge to convert these to their private and personal use.

The foregoing classification of corruption encapsulates the broad distinctions between grand and petty corruption although they substantially describe the latter kind of corruption. Their main attributes however are their description of the impact and subject of specific corrupt acts. In general, they aid an understanding of the conceptual ramifications and dynamics of corruption in different contexts and the incentives driving corruption as a social vice.

Other classifications have distinguished between beneficial and harmful corruption with the former being said to improve the overall transactional or commercial

relationship between its participants. David Osterfeld244 is the chief proponent of this categorization and argues rather counterintuitively that corruption can be beneficial to the private sector. While any benefit of corruption can at best be considered superficial in real terms, the recognition of possible "winners" in any scheme involving corruption simply respond to the overall dysfunction of given political and economic system and how actors consciously order their affairs to exploit or benefit from the act of corruption. On the other hand, the totality of the various classifications considered in this work reflect the nuances and complexities involved in the act of corruption within varying context as well as the systemic mutations of corruption within a complex host of circumstances. The next sub-unit takes a more micro view of the incidence of corruption in Ghana.

MODES OR INSTRUMENTS OF CORRUPTION IN GHANA

The vehicles through which acts of corruption are carried are numerous, complex and shifting to attempt a complete or exhaustive itemization of all in this work. As noted in the broad categorization above however, corruption takes on a dynamic form and manifests in a variety of ways. In this sub-unit, I will review some of these forms with the view to clarifying in concrete terms the instruments or means by which corrupt acts are perpetuated in Ghana.

244 D. Osterfeld, *Prosperity Versus Planning: How Government Stifles Economic Growth*, Oxford University Press (1992).

Gift Giving

The giving and receiving of gifts is generally accepted as an integral part of Ghanaian social mores and practices.[245] It is therefore common to see people giving and receiving gifts for a variety of reasons and in different contexts. Limited to purely social engagements however, gift giving and its receipt pose no problem or challenge to Ghana's governance. Regrettably over the years however, gift giving has become accepted as a standard practice between political actors and citizens, contractors undertaken projects on behalf of the state, as well as other persons whose peculiar relationship with the state puts them in a conflict of interest difficulty relative to the actors to whom they give gifts. Considered from the standpoint of the prospect of inducement in the exercise of state authority, the giving of gifts become problematic given its effect on corruption as a whole. In other words given the twilight boundary existent between the socially accepted practice of giving and receiving gifts and the opportunistic giving of gifts with hidden ulterior motives, the practice and acceptance of gift giving tends to provide a comfort space within which to indulge in corrupt practices and this situation has been on the rise in Ghana for decades. The act of gift giving has been used to establish exploitative networks that are often leveraged on by both private and public actors during public contracting and procurement transactions to the detriment of the state. While the menace has clearly had significant impact on the country, Ghana has not legislated against the general practice of gift giving due to the complex socio-cultural underpinnings of the

[245] See on this, Joseph Osei Agyena, Public Offifficials' Defense of Bribery as a Culturally Acceptable Behavior in Ghana, (Dissertation), Walden Dissertation and Doctoral Studies, https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=8944&context=dissertations

practice and the potential futility of passing black letter law which is likely to be observed in breach than observance.

Payment of Pre-Agreed Kickbacks

The payment of kickbacks by politicians for the favourable award of government contracts is now generally accepted as widespread within the Ghanaian polity and business community and is discussed throughout this work. In this sub-unit however, an attempt is made to briefly sketch the nature and manifestation of the problem and how it promotes corruption in general. The routine payment of kickback represents a substratum of the rent economy under which holders or actors operating on behalf of the state demand and receive payments made in consideration of roles they played in ultimately awarding or securing a given contract. In other words, the payment of these moneys are often made against the backdrop of either an expectation or accomplishment of certain goals in pursuance of the award of contracts on behalf of the state. In other words, payment of kickbacks often follows the award of contracts and payment of contractual sums and the payment is often premised on the need to create a "goodwill" for the future award of more contracts.

The complexity of the kickbacks cannot be understated. Thus, while the payment of kickbacks is often driven by demands by state actors for rent for their role(s) in the award of contracts, this is not always the case. Indeed, it is not uncommon for "victims" or contractors to insist on the payment of rent through kickbacks given the

opportunities opened through compliance with 'the rules of the game. In other words, by paying kickbacks, contractors dispose favourably themselves towards political actors and civil servants for the award of future contract and enhance their prospects of being considered for other commercial transactions. The most common mode of perfecting payments through kickbacks is the inflation of state contracts or over-invoicing of materials and inputs in these contracts.[246] At its height, the routine and accepted payment and receipt of kickbacks can lead to a regime of state capture, in which the kickback paymasters often exert undue influence in the deployment of state commercial contract and shape the overall management of public finances and issues surrounding accountability.

Campaign Financing

As discussed elsewhere in this work, campaign financing is a major and significant source of corruption in Ghana. While the constitution of Ghana provides for the establishment of political parties, the document fails to provide for the resources for the running of these parties. As a result, political parties in Ghana have often turned to members of the business community particularly road, building and other contractors to donate in order to finance the campaigns of political parties. This has resulted in the exploitation of political party financing by certain individuals and business interests who exert pressures on the parties to accord them preferential treatments in the award of contracts when they win power. The delicate aspects of

[246] See Corruption at DVLA, GRA, Passport Office 'very real'-GII Survey, http://www.gaccgh.org/details.cfm?corpnews_scatid=7&corpnews_catid=7&corpnews_scatlinkid=221#.X6L0oa2caUk

campaign financing and its role in corruption in Ghana is further manifested in the fact that it also contributes to state capture given the *de facto* power it tends to vest in the hands of party financiers and how this power is used to advance selfish corrupt ends.

Payment of Facilitation Fees

One of the rampant means of corruption in Ghana is what is generally known as the payment of facilitating fees. As a practice, facilitating fees is pervasive and remains prevalent at the various levels of the civil and public services as well as agencies and state parastatals.[247] Research has shown that in addition to the endemic character of facilitation fee within the civil service and state agencies at all levels, both judges and court officials have also been known to accept bribes routinely in order to deliver favourable judgment. Even more benign is the demand and payment of amounts considered facilitating fees to court officials in order to have them prioritize the filing or service of court document on behalf of parties to a case.[248] This has created a culture of bribery within the judiciary and undermined confidence in the judicial process and legal system as a whole. While the theme of this subject is scattered across the work, it bears mentioning at this stage, that the persistence of judicial corruption in the midst of reform concentration in the area further attest to the failings of the reform model largely carried out under the aegis of legal formalism.

[247] See Ghana Corruption Report, https://www.ganintegrity.com/portal/country-profiles/ghana/
[248] Id

IV. EFFECT OF CORRUPTION IN GHANA: GENERAL OVERVIEW

The ubiquity of corruption has both been recognized and well documented in the scholarship.249 Studies have repeatedly shown that the canker has a significant deleterious impact on the global and the Ghanaian economy and hinders the growth of developing economies in many ways.250 For example, some studies have concluded that corruption increases transaction costs and acts as a constraint on the smooth operations of businesses. As a developing economy, corruption undermines investor confidence and weakens the attractiveness of Ghana as a destination of global capital. The research in this area has argued that corruption leads to uncertainties in the environment for doing business given the obstacles created by private interests and rent seekers, and how these in turn reduce the effectiveness of legitimate expectations in developing economies.251

249Transparency International, Corruption Perception Index 2016, https://www.transparency.org/news/feature/corruption_perceptions_index_2016?gclid=CjwKCAjw8r_XBRBkEiwAjWGLlIbedGcCi7Rrt1eBMhxPRPkpGcNFhsZrMlSa7zpy1fpKiblRrIm5qBoCdwsQAvD_BwE. For general reading on the subject of corruption and its effect on governance and development, see J.P. Ganahl, Corruption, Good Governance and the African State, https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/6664/file/pes02.pdf.

250 According to the World Bank corruption costs the world economy up to $2 trillion annually. https://www.devex.com/news/one-woman-s-fight-ngozi-okonjo-iweala-memoir-offers-guide-to-fighting-corruption-92570.

251 A. Schleifer and R.W. Vishny, Corruption, *The Quarterly Journal of Economics*, Vol. 108, No. 3. (Aug., 1993), pp. 599-617.

As it is in many countries on the African continent, rampant corruption, or at least the perception of it, has been a pervasive reality in Ghana.252 In addition to this, studies have shown that the complexity of the phenomenon has been evolving and taken on more complicated and benign outlooks.253 In a 2016 report published by a leading think-tank in Ghana, it was discovered that of the respondents interviewed, over seventy-two percent (72%) believed that the prevalence of corruption in Ghana was very high.254 To the passive observer this is perplexing given the perceived positive correlation which is deemed and often expected to exist between liberal democracy exemplified in Ghana by the 1992 Constitution and low levels of corruption.255 While considered tenuous by some, the research seems to generally suggest that the constraining effect of legal rules in liberal democracies tend to help eliminate corruption as a quintessential social vice. Proponents of this view argue that in addition to the standard-setting effect of legal rules, laws fundamentally have the character of shedding light on grey areas of human behaviour through *inter alia*, the elimination of unrestrained discretion and the clarification of entitlements and liabilities. On the other hand, when present, corruption tends to undermine

252 The IEA Corruption Survey, November 2016, http://ieagh.org/wp-content/uploads/2017/05/IEA-CORRUPTION-SURVEY-REPORT.pdf. The historical reality of corruption is also extant in the literature and is widely documented in both scholarly and other materials on the subject; See David E. Apter, Ghana in Transition (New York, 1963;); H.H. Werlin, The Roots of Corruption-The Ghanaian Enquiry, *The Journal of Modern African Studies*, Vol. 10, No. 2 (Jul., 1972) pp247-266. Indeed , Werlin goes as far as to suggest that the persistence of corruption may have its roots in colonial antiquity during which period it was used a sabotaging tool against the colonial state by the natives and their freedom fighters.

253 R. Calderón & J.L. Álvarez-Arce, Corruption, Complexity and Governance: The Role of Transparency in Highly Complex Systems, *Corporate Ownership & Control, 8(3-2),* 245-257. http://dx.doi.org/10.22495/cocv8i3c2p1; R. CalderÃ³n & J.L. Alvarez, *The Complexity of Corruption: Nature and Ethical Suggestions,* Faculty Working Papers 05/06, School of Economics and Business Administration, University of Navarra.

254 See Findings from Afrobarometer Round 7 Survey in Ghana, https://afrobarometer.org/sites/default/files/gha_r7_presentation_2811017.pdf;

255 See A. Blum, Electoral Democracy and Corruption: A Cross National Study, https://www.v-dem.net/media/filer_public/5c/75/5c7513f8-5322-4a44-a7d3-fd467590c57f/users_working_paper_5.pdf

democratic institutions and the implementation of substantive law through a variety of schemes used by the corrupt actors involved.256 In other words, corruption affects democratic governance and neo-liberal systems through the distortion of incentive structures and their realignments to parochial interests of corrupt state officials.257 In this regard, corruption undermines the very values of liberal democracies and their claim to substantial meritocracy in the distribution of entitlements and public goods. Particularly within democratic settings where governments are presumed to owe their legitimacy to the people as a constitutive group, corruption creates confusions as to the exact allegiance of governments given that the power vested in governments tend to be hijacked by vested groups and special interests whose moneys fund the political activity of public officials.258 As has been evident in Ghanaian politics for well over two decades, corruption through campaign finance schemes leads to the perpetuation of compensation systems in which public officials become beholden to the whims of their present or erstwhile financiers through the award of contracts and other commercial benefits upon the attainment of political power.

The persistence of *clientelism* within Ghana's body politic gravely undermines the essence and effectiveness of the franchise in democratic states and this reality has led to corrupt behaviour and worries on transparent and accountable governance including as already mentioned, the incidence of negative influence peddling and

256 P.B. Heymann, Democracy and Corruption, *Fordham International Law* Journal, Vol. 20, 323.

257 M. Skladany, Buying Our Way Out of Corruption: Performance-Based Incentive Bonuses for Developing Country Politicians and Bureaucrats, *12 Yale Hum. Rts. & Dev. L.J. (2009).* Available at: https://digitalcommons.law.yale.edu/yhrdlj/vol12/iss1/4

258 Id

distortion of incentives. C*lientelist pressures* on the governance framework have meant that choices and decisions of government have often been deemed to have been hijacked by vested interests with parochial objectives. This has resulted in a situation in which campaign financiers have often blackmailed incumbent governments by threatening the withdrawal of their support unless they secured certain appointments or are otherwise awarded certain contracts whether or not they qualify for these. The resultant compromises on the part of public officials in seeking to accommodate the interests of these financiers have created spaces for corruption within the rank and file of the Ghanaian body politic through special and preferential treatment of persons with special ties to sitting governments. In other words, the design and general architecture of Ghana's governance framework seem to both nurture and incentivize corruption given the nature of political financing dynamics under the 1992 Constitution and the incentive structures unintendedly perpetuated under the Constitution.259

The aforementioned has inevitably heightened the stakes inherent in the seizure of political power and its concomitant trappings of patronage and rent-seeking opportunities within Ghanaian politics. Consequently, the endurance of the practice of "winner-takes-all" and political exclusion260 within Ghana's political culture reflects the broader problem of incentives misalignments within the governance

259 While under article 55 (15) only a citizen can make a donation or contribution to a political party, the constitution stops short of addressing the added issue of the effects and fallouts of campaign financing. The Ghanaian experience teaches one lesson, namely the fact that contributions by political party supporters have been treated by contributors as some form of investment in return for which the latter have often expected some compensation following success at the polls.

260 This is the practice where persons of contrary political views or persuasions are excluded from the governance and political processes as well as in the distribution of resources and other entitlement and it usually happens upon the change in government from one political party to another.

framework and how existing legal arrangement continue to create spaces, which are exploited by political actors with selfish interests.261 Gauged within the vortex of this complexity, the situation assumes a complicated effect. For example, given the vested interests of high officials of state in specific acts of corruption, it follows *ipso facto* that corrupt agents are more likely than not to be shielded from identification or detection and punishment by the police and prosecutorial authorities of state charged with the mandate of criminal justice administration. This not only undermines the prospects of effectively fighting and ultimately eliminating corruption but also gravely discourages a neutral and dispassionate confrontation of the canker.262

The tacit legitimation of corruption through campaign and political financing raises peculiar issues in governance, the ROL, and corruption in general. For example, the persistence and routine tolerance and even encouragement of donations of ill-gotten money for political activity implicitly suggests an acceptance of the cycle of corruption by the governance regime operative in the country. Thus, where a donor gives an amount to a political party, this donation would have been made with an invariable expectation that upon the successful capture or retention of political power, the beneficiary political party would compensate that donor for his donation through the award of a contract, or appointment of him or his cronies to a public

261 World Bank, World Development Report, 2017, http://www.worldbank.org/en/publication/wdr2017

262 For example, in her memoir, the former Minister of Finance in Nigeria (who was also a former Managing Director of the of the World Bank) noted that corruption can only be fought from within and not by outsiders. https://www.devex.com/news/one-woman-s-fight-ngozi-okonjo-iweala-memoir-offers-guide-to-fighting-corruption-92570. Where the agents of corruption include the very top officers of the state and its law enforcement the prospects of any effective combatting of the phenomenon becomes bleak.

position or office etc. The cyclical effect of this cannot be ignored. For political parties, the strategic advantage of indulging the corrupt behaviour of its members lies in the need to 'help' them amass adequate resources which would in turn enable them further donate to the party to fund its future political activities and campaigns in the future. This rent-seeking practice not only weakens confidence in the public offices established under the Constitution but also undermines the legitimacy of the overall governance system and could threaten its stability.263 This has resulted in a situation in which there exists a gaping gulf between the practical tolerance of corruption and the legal prohibition or allowance of the act. Ghana's situation raises even more baffling constitutional questions such as the very legal justification for campaign contributions in face of the provisions on conflict of interest which require that public officials shall do all they can to avoid acting in ways that put their personal interests at odds with the interests of the state.264 Given the nature of campaign financing and contributions however, it is easy to argue that the award of contracts to and appointment of known political party financiers fits squarely into the character of the kind of behaviour contemplated and prohibited by the Constitution. For example, it is conceivable that by contributing significantly to the electoral fortunes of a political party through campaign financing, a person or company bidding for the award of contract will invariably benefit from preferential treatment, which will not be extended to other persons not in similar standing. It can therefore even be argued *a fortiori* that given that the offence of conflict of interest under the Constitution fundamentally rests on the perceived clash or 'conflict' of public and

263 J.G. Lambsdorff, Corruption and Rent Seeking, Vol. 113, No. 1/2 (Oct., 2002), p. 97, Springer.
264 Chapter 24, 1992 GHANA CONST.

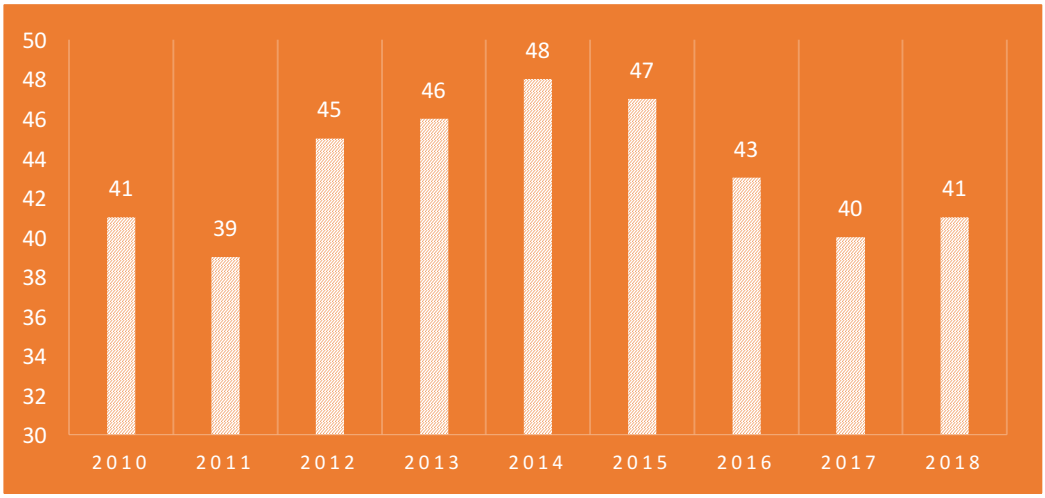
private interests, the issue of campaign financing and the commercial benefits that flow from it remains an enduring problem for the constitutional regime in general.

CORRUPTION PERCEPTION IN GHANA

The corruption perception index represents a mechanism adopted by Transparency International to determine the extent or degree of corruption prevalent in different countries from the standpoint of the perception of its citizenry.[265] This mechanism therefore affords an opportunity to measure the prevalence of corruption in a country at least from the perspective of citizens and accordingly provides a framework for evaluating government's responses to the subject of corruption. This model has been vital in the ascertainment of the state of corruption in given countries given the difficulty of determining the actual prevalence of the act within official circles. Ghana has consistently participated in the assessment process and faired rather dismally within the period of evaluation. Thus, the research has been poignant in its conclusion that*, [T]he country was rated 41% (below the minimum standard of 50% mark and below 9 other African countries) and the third lowest score since 2010. It is instructive to note that since Ghana's inclusion in the survey in 1998, the country has consistently performed below average; its CPI has never*

[265] Transparency International, https://www.transparency.org/en/cpi

reached 50%. The figure below shows Ghana's performance on the CPI from 2010 to 2018.[266]



Corruption perception in Ghana since 2001. Culled from Policy Paper on Corruption and Business in Ghana: Towards a Better Anti-Corruption Agenda

Being arguably the major public research instrument and model for gauging the prevalence of corruption among the various facets of the Ghanaian society, the Corruption Perception Index (CPI) acts as a prism into official policy and an active feedback from the citizenry on the extent to which the government's policies on anti-corruption and graft in general is either working or failing. Discussions surrounding this report when annually released have often provided the relevant fulcrum for critiquing the state of corruption in Ghana and how significant failures in various policy instruments and systems continue to undermine the fight against corruption in Ghana.

[266] Policy Paper on Corruption and Business in Ghana: Towards a Better Anti-Corruption Agenda, The Private Sector Anti-Corruption Group (PSACG)

The performance of Ghana on the CPI illustrates the nature of citizen feedback concerning the subject of corruption and the management of public resources in general. Representing a major exercise in the external accountability of Ghanaian institutions and officials in public resource management, the CPI provides a barometer in evaluating the performance of the Ghanaian government and its institutions in the enforcement of key legislations and combat of corruption within the context of public perceptions and citizenry opinion. By employing the mechanism of data collation directly from the public, the index affords the citizens of Ghana a voice and deepens the democratic accountability of Ghana's constitutional system. Being external in nature, the index is largely free from the perceptions of bias that is often levelled Ghanaian civil society entities that public critical data on the perception or reality of corruption in Ghana.

The work of Transparency International through the index has reinforced the perceptions of the depth and scope of corruption within the governance system of Ghana and contributed to heightening the topicality of the subject within the governance discourse in Ghana. This has compelled the various political parties to address their minds and campaign manifestoes to the issue. This development highlights the trend of its evolution in the country and to a lesser degree actual official reactions to the menace.

V. CORRUPTION AND THE RULE OF LAW: COMPLEX INTERACTIONS

While combatting corruption has invariably proven enigmatic in Ghana's governance history, it is generally taken for granted both in the scholarship and policy community that the ROL presents an indefeasible tool in the suppression and ultimate elimination of corruption.267 In other words, belief in the potency of the law to fight and eliminate corruption is widespread and has informed the design of combat strategies against the menace over time. This is true for Ghana as it is elsewhere.

For the purpose of the discussion in this sub-unit and chapter however, proponents advocating a linkage between the ROL and corruption can be grouped into three categories namely, scholars who believe in the *punitive efficacy* of the ROL as a deterrent factor in the perpetration of corruption; those who argue that the ROL advances *institutional effectiveness and efficiency* and by which corruption is or can be reduced if not altogether eliminated in transactional dealings between governmental actors and private citizens; and finally, advocates who argue that the ROL regulates *entitlement ordering* and reinforces good behaviour and accordingly serves as an antidote to the perpetration and spread of corruption.268

Proponents of the *punitive efficiency* theory argue that the ROL provides a framework for overcoming corruption in a given regime by punishing errant public

267 J.M. Mbaku, International Law and the Fight Against Bureaucratic Corruption in Africa*, 33 ARIZ. J. INT'L & COMP. L. 661, 683 (2016*).

268 See generally on this, E. Kofi Abotsi, Introspecting The Office of the Special Prosecutor's Act and Ghana's Constitutional framework on Anti-Corruption, *,AJICL, Vol. 28, Issue 2 (2020)*

officers who indulge in corrupt behaviour.269 Under this school therefore, it is argued that by penalizing actors or officials of state who behave in ways deemed corrupt, the state would have succeeded in discouraging or deterring corruption. The punitive efficacy school therefore derives from the deterrence theory of punishment in criminal law, which fundamentally advocates for the application of punishment as a negative reinforcement mechanism against the future commission of the offence of corruption. In this regard, the construction and design of the ROL in many emergent governance regimes including Ghana's have been premised on the assumption that by putting in place legal regimes for preventing, identifying and punishing corruption in different contexts, would-be corrupt officers may be deterred through the reduction of incentives. In other words, by identifying and penalizing corruption and reducing the subsistent incentive structures inducing it, the costs of the practice become invariably heightened and the act discouraged.

Under the *institutional efficiency* school on the other hand, the ROL is conceived of as an effective remedy for institutional dysfunctions and sub-optimality in general.270 There is ample research and scholarship on the issue of institutional dysfunctionality and the prevalence of corruption, and this informs the remedy that is proposed under this theoretical model.271 Proponents of this school assert that there exists a direct correlation between the optimal level of efficiency in an

269 See generally on this, J. Zhu, Do Severe Penalties Deter Corruption? A Game Theoretic Analysis of the Chinese Case, *The China Review, Vol. 12 No. 2, pg. 1*
270 CRU Report, June 2017, https://www.clingendael.org/pub/2017/a_shotgun_marriage/1_problematising_the_rule_of_law_as_a_concept/
271 M. O'Donnell, Post Conflict Corruption: A Rule of Law Agenda? http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/1740479-1149112210081/2604389-1149699443576/2628502-1150401005955/corruption_conflict_and_rule_of_law.pdf

institution's functionality and the prevalence of corruption within the context of that institution's work or operation. This school therefore advocates the use of the ROL as a strategic legal toolkit to redress the incidence of corruption occurring through institutional dysfunction. Just as the instrumental conception of the ROL was likened to Weber's philosophy of law and bureaucratic rationality, the institutional efficiency school applies the principles of legal rationalism and derives its attraction from the claim to neutrality and objectivity introduced in the functioning of institutions modelled on the ROL. Thomas Carothers is a key proponent of this model and poignantly states that the ROL could help attain efficiency and predictability in the functioning of institutions especially those in transitional economies.272 As he rightly recognizes however in his works, this rather dominant view has been a driving force behind development assistance policies largely modelled around the *Washington Consensus* and reflects a belief in the capacity of the ROL to bridge the cultural gaps and variations in the design and functioning of institutions. The institutional efficiency school of the ROL-corruption dynamic therefore focuses on the processes and ethos components of institutions and how these can be structured and deployed as mechanisms of anti-corruption.

Finally, the *entitlement ordering* and reinforcement model stresses the use of the ROL to define and determine entitlements and reinforce the legitimacy of rights as a means of combatting and preventing corruption.273 This has been done in a variety

272 T. Carothers, Rule of Law Temptations, https://carnegieendowment.org/files/Rule_of_Law_Temptations.pdf, accessed on 2nd February 2018 at 6.58pm

273 H.W. Jones, The Rule of Law and the Welfare State, *Columbia L. Rev. Vol. 58, No. 2 (Feb.1958) pp. 143-156*; Also see B. Tamanaha, A Concise Guide to the Rule of Law, *Legal Studies Research Paper, # 07-0082, 2007.*

of ways such as the clarification and articulation of legal rights through legislations and adoptions of constitutions, the establishment of independent judiciaries and appointment of tenured judges, as well as the enforcement of contracts. This school on the ROL-corruption dynamic focuses on the substantive capacity of law to define and clarify entitlements and in the process, ensure that the allocation of resources and rights are not hijacked by vested interests or political authority. In many ways, the entitlement ordering and reinforcement school have been highly influential in the design of assistance projects given the preference of donor agencies for law reforms in the areas of contract enforcement, judicial neutrality, regulation of discretionary authority and the removal of all forms of judicial corruption, including interventionist reforms such as the incorporation of arbitral processes in trials, etc. These various conceptions of the ROL as a tool to combat corruption reflect a fundamental belief in the law as a corrective tool and its preeminent capacity to suppress and ultimately eliminate corruption.

While the ROL has generally been used as an anti-corruption strategy and mechanism, its use has generally been limited to two main areas namely, substantive legislative reforms on the one hand, and the establishment of the legal institutional framework for the implementation of the rule of law. ROL reforms have therefore focused on changing aspects of the operation of the law within the legal system. Within the context of reforms of the 1990s, changes in the application of the ROL has also meant its use as a development strategy also became adapted to the evolving usage of the term. Thus beyond the notable reforms in the police and justice institutions as well as prosecutorial services, the ROL was used as a

governance tool designed to create the requisite environment for economic development. It is in this context that corruption has been seen as a major impediment to development and sustenance of the principles of good governance. It is also in this vein that the ROL has been used as a combat tool against corruption and by necessary implication a variable of good governance. As a governance value thus, the ROL has been used in Ghana to shape the architecture of the governance system and create a pathway for the country out of the vices that plague good governance, notable of which is corruption. In general, the ROL reform within the Ghanaian governance paradigm has proceeded from three main regime angles namely, procedural processes,[274] institutional processes[275] and legitimacy values[276]. These are reflected in the work of Trebilcock and Daniels,277 whose taxonomy stressed the dynamics of the deployment of the ROL in governance reform. Thus, the values encapsulate such variables as transparency, predictability, enforceability and stability, whereas the institutional values stress independence and accountability.278 On the other hand, legitimacy values articulate such principles as the means and propriety of exercising legal authority.

[274] AfriMAP, OSIWA and IDEG, 2007, 'Ghana: Justice Sector and the Rule of Law', Discussion paper by AfriMAP, *Open Society Initiative for West Africa and the Institute for Democratic Governance*, Dakar, https://gsdrc.org/document-library/ghana-justice-sector-and-the-rule-of-law/; Sandra Cofie, Ghana-Establishment of the Commercial Court, https://www.doingbusiness.org/content/dam/doingBusiness/media/Reforms/Case-Studies/Smart-Lessons/DB07-SL-Ghana-Commercial-Court.pdf

[275] Uses and Users of Justice in Africa: The Case of Ghana's Specialized Court in Africa, http://documents.worldbank.org/curated/en/761881468003039365/pdf/579870ESW0P1121Ghana0pub09115110web.pdf

[276] Many laws were passed to support the ongoing governance reform process, including sunshine legislations, accountability rules and oversight laws, supra

277 M.J. Trebilcock and R.J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, Cheltenham, Edward Elgar, 2008

278 D. Kosar, Michael J. Trebilcock And Ronald J. Daniels, *Rule Of Law Reform And Development: Charting The Fragile Path Of Progress*, Cheltenham, Edward Elgar, 2008, *Revue Québécoise De Droit International*, P 249 (2010), Available At Https://Www.Persee.Fr/Doc/Rqdi_0828-9999_2010_Num_23_2_1203

Yet the implementation of the rule of law in Ghana mirrors a complex and complicated picture. Thus, while years of incremental legal reforms have resulted in key legislations being passed and institutions established, the implementation or enforcement of the ROL remains sub-optimal at best. Carothers recognized this prospect in the law reform experiences of developing countries when he noted as follows:

Rewriting constitutions, laws, and regulations is the easy part. Far-reaching institutional reform, also necessary, is arduous and slow. Judges, lawyers, and bureaucrats must be retrained, and fixtures like court systems, police forces and prisons must be re- structured. Citizens must be brought into the process if conceptions of law and justice are to be truly transformed ***....*** *The primary obstacles to such reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law. Respect for the law will not easily take root in systems rife with corruption and cynicism, since en- trenched elites cede their traditional impunity and vested interests only under great pressure. Even the new generation of politicians arising out of the political transitions of recent years are reluctant to support reforms that create competing centers of authority beyond their control.*[279]

Brutally honest as this quote is intended to be, it still falls short in stating the gravity and complexity of the "discrepancy problem" of the ROL in Ghana. The reality of

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279 T. Carothers, The Rule of Law Revival, *77 Foreign Affairs 95, (1998)*

shortfalls in training and capacity of personnel and key officers invariably plays a central role in the problems of the implementation of the ROL in Ghana. But as is patently evident in many studies in the field, the failures of the ROL as a combat stratagem transcends the issue of training or institutional design. For as it often is the case, the law on the books and reform designs tend to mirror ideal type models usually operational in other jurisdictions and these are often replicated in ongoing reforms. Consequently, the failure to implement a ROL model that effectively combats corruption continues to raise and sustain unanswered questions. In the case of Ghana, attempts at implementing the ideal type ROL through deliberate law reform has resulted in tensions between anti-corruption legislations adopted through reforms and local norms and acceptable standards of behaviour. For example, White puts it starkly when he asserted that

The external legal culture can interfere with efforts to contain corruption in the judiciary in two primary ways. First, external legal culture may contain social norms that require judges to engage in practices that would be considered corrupt according to "rule of law" norms. Second, the external legal culture may legitimate corrupt behaviour such as bribery, not because the behaviour is viewed as socially desirable but because such behaviour is deemed a reasonable response to socio-economic and political realities. 280

280 B.T. White, Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies, *Cornell International Law Journal* , supra note 128.

The fact that corruption although recognized as wrong could be justified on socio-economic grounds presents a conundrum for any regime designed to fight and possibly eliminate corruption in regimes undergoing reforms and legal transitions. In the main, this fact raises key questions of the extent to which legal anti-corruption strategies ought to take pragmatic and culturally prevalent factors into consideration in the design of reform strategies. Indeed, the fact that corruption generates its own set of incentives including the ill-gotten benefits from the acts of bribery and the incidental networks involves, combatting it through the ROL comes with its own challenges. In addition to the perception that some of the norms and orientation of transplanted or reformed laws are external to the legal systems in which they are planted, the ROL has sometimes been viewed as an obstacle which must be negotiated around rather complied with. In other words, from high ranking officials to regular citizens, sub-cultures get formed around the implementation of laws and these sub-cultures are either directly opposed to the law or represent some degree of deviation from the core values or intendments of the reformed law.

The complexity of fighting corruption through the ROL is further accentuated by the surrounding social circumstances of a country and its mores. The network of friends and cronies and the dynamics of informal relationships significantly shape the likelihood and prospects of corruption from one country to the other. The context of Mongolia as reflected in White's work is especially telling and coincides with the situation in Ghana. As he recounts,

In societies such as post-socialist Mongolia, characterized by scarcity, economic

deterioration, and social segmentation, networking becomes an increasingly important means of "coping and grabbing." It is, of course, not just in securing health care that Mongolians must rely on connections and reciprocal favors to cope and grab. It is instead a way of life. Moreover, "the loosely coupled networked nature of contemporary society means that social support does not come reliably from one group." "Rather, it comes contingently from a variety of ties and networks, which people must navigate nimbly through partial involvements in multiple networks, giving and getting network capital. 281

The structuring of claims and entitlements around given network groups in Ghana represent a powerful yet informal means of legitimately perpetuating corruption.[282] Thus, it is commonly suspected or perceived in Ghana that tenders are formally advertised and competitively bided for are often shams as these are superficially engaged in just to comply with statutory requirements for mandating the completion of competitive processes. Indeed the popular belief is that more often than not these contracts are privately awarded to cronies and friends before any such advertisements are published. Therefore, by making laws such as public

281 Id

[282] The the influence of social networks and corruption generally, see, S. Gehlbach, Social Networks and Corruption, https://www.researchgate.net/publication/239791408_Social_Networks_and_Corruption Joseph Phiri & Pinar _Guven-Uslu, Social networks, corruption and institutions of accounting, auditing and accountability, Accounting, Auditing & Accountability Journal (2019), Available at https://www.emerald.com/insight/content/doi/10.1108/AAAJ-07-2017-3029/full/html

procurement rules in the abstract that do not take these surrounding complexities into account, the ROL project on corruption fails to devise pragmatic remedies against that factors that shape and drive corruption in Ghana.

This situation is further complicated by the rampant conferment of discretionary authority under Ghanaian law to officials of state predicated on a belief in utility of discretion and the overall efficacy of law and the legal system to constrain official action exercised under them and promote the ROL. Yet, it is a truism that when not counterbalanced by effectiveness regulation, discretionary power is often liable to abuse.[283] In the absence of efficacious safeguards thus, the prevalence of widespread discretionary powers in many statutes provide opportunities for decision-makers to reinforce their powers by seeking rent in the exercise of their powers and making preferences that advance their personal and selfish interests rather than the purposes for which these powers were conferred in the first place. The abuse of the exercise of discretionary powers in key areas of state administration including in the exercise of appointment powers,[284] law-making powers,[285] award of high-level contracts,[286] etc reflect yet another failing of a key assumption of the formalist model regarding the axiomatic capacity of law ROL model implemented in Ghana to deal with the problem of corruption.

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[283] B.W. Braesser, *The Abuse of Discretionary Authority*, In: B.C Scheer & W.F.E. Preiser W.F.E. (Eds) Design Review. Springer, Boston, MA

[284] R. Gyampo and E. Graham, Reviewing the Powers of Ghana's President As a Solution to the Winner-Takes-All Politics, *Ghana Social Science Journal, Vol. 14 Issue 2 2019.*

[285] List of Corruption Allegations Against Parliamentarians in Ghana, https://en.wikipedia.org/wiki/List_of_corruption_allegations_against_parliamentarians_in_Ghana

[286] M. Dza et al, Corruption in Public Procurement in Ghana: Societal Norm or Deviant Behavior,https://www.researchgate.net/publication/329543180_Corruption_in_Public_Procurement_in_Ghana_societal_norm_or_deviant_behaviour

Another key area in which the ROL-corruption conundrum seems prominent is in the mind-set or psychological aspects of corruption. This involves the implicit or nascent belief in the propriety or otherwise of corruption and the extent to which this affects or influences corrupt behaviour in a given country. In other words, the belief in the normalcy, inevitability, or impropriety of corruption has a direct bearing on the sporadic or systemic character of corruption in a given country. Again, Mongolia provides a template to reflect on the Ghanaian situation and this is clearly brought home in White's work. He notes,

Most Mongolians who pay bribes do so in contradiction of their own moral preferences and out of the belief that bribes … are necessary to get anything done in the corrupt state bureaucracy.[287]

Thus, besides the groupthink mentality inherent in systemic corruption, it is clear that many people feel compelled to engage in corruption as a result of structural and systemic factors as well as environmental factors. In this regard, the bureaucratic state in countries like Ghana either deliberately or unwittingly heightens the cost of compliance and in the process, create incentives for corrupt behaviour. In other words, given the slow pace at which things move within these bureaucracies coupled with the exploitation of official authority by bureaucrats, people are compelled to indulge in corrupt behaviour by calculating the cost-benefit effect of not so doing or

[287] Id

indulging in rational choices so to speak . Consequently, the prevalence of extensive regulation and substantive legal rules may sometimes in fact breed corruption (legal corruption)[288] and render difficult or impossible the fight against the menace by placing on corrupt acts, the impressions of legality or legitimacy.

The failures and ineffectiveness of the ROL in Ghana in the face the adoption of relevant laws and regulatory regime remains puzzling and forces deeper reflection and new research in this vein. In seeking to disentangle or deconstruct this quagmire, Wagonner argues that politicians' conflict of interest is negatively causally related to the lack of rule of law in emergent democracies.289 Her argument that the conflict of interest of political actors directly contributes to the deficiency of the ROL in a particular political system is sound as it rests on clear conceptual and empirical grounds regarding the experience of the ROL reform in different cultural and political economy contexts. In a rather pragmatic way, the conflict of interest of politicians undermines not only their capacity and will to fight corruption given their vested interest in acts or transactions impugned by law, but also the perverse incentive inherent in these abuses create a race to the bottom scenario in which political actors exploit spaces within any existing legal or regulatory region to corrupt ends with the view to maximizing the returns on these for their personal and political gains. In other words by undermining the ROL, political actors reinforce their own

[288] The World Bank, Egypt: Too Many Regulations Breed corruption, https://www.worldbank.org/en/news/feature/2014/12/09/egypt-bureaucracy-regulations-and-lack-of-accountability-inspire-corruption?hootPostID=d40b20a9b747d368512f5d731bdd880d.
289 C. Wagonner, Rule of law and democracy precluded by political corruption, a study of new democracies, https://www.academia.edu/5641853/Rule_of_law_and_corruption_clarifying_the_relationship

power and thereby ensure that their interests and preferences remains dispositive in key and important issues affecting the management of the resources of the state.

She puts it more succinctly when she asserts as follows,

[P]oliticians weight against reform; that is, because they misappropriate public funds for private gain illegally, and they want to stay free despite illicit behaviour, they will not reform the enforcement mechanisms. This is a time of institution building when elites have extra power to design the much needed enforcement mechanisms. In this context political corruption precedes rule of law establishment[290]

Recognizing this reality is crucial for an understanding of the *real politik* dimensions of the ROL reform in Ghana. Given that political actors are in a trusteeship position having been invested with the power to make and enforce laws, any behaviour which places them in the category of the "offender" invariably puts them in a conflict of interest mode. Thus, it comes across as wishful thinking and indeed counterintuitive to suppose that these same actors can assume a detached and disinterested role and effectively enforce the rules against the very acts they benefit from and perpetrate. By creating a system in which *clientelism* and patronage thrive, politicians in Ghana have come to preside over a regime in which exploitative behaviour through political power yields and maximizes benefits and the greatest rewards for its participants and actors.

This issue needs further examination. The relationship between the legal on the one hand, and "political" and economic variables and regimes on the other present a complication that is perhaps often glossed over in the law reform agenda. The reality

290 Id

is that the ROL is heavily politicized in Ghana and presents itself as a tool among others in the arsenals of political actors wielding state power. As argued elsewhere in this work, it comes in handy when enforced against perceived political opponents and serves to legitimize the use of force and state authority to suppress dissent or secure compliance as the case may be. Given its inherent susceptibility to discretionary deployment, the ROL is inevitably made subservient to the limitations imposed by politics. This serves to fundamentally weaken its objective use and application and undermines its legitimacy. Ignoring the supplanting influence of the "political" over the legal distorts any reform package constructed to deal with the challenges of the ROL in Ghana. Used as the overriding conceptual approach, legal formalism lacked both the understanding, flexibility and needed finesse to deal with the practical inferiority of the law in the grand ordering of things in Ghana.

In a similar vein, considerations of economic benefits play an important role in shaping the impact of laws made to fight corruption. Given that the actors who operate on behalf of the state often indulge in corruption out of a desire to enrich themselves beyond their legitimate entitlement. In this regard, poverty and inadequacy of earnings from employment have often been set up as a justification by persons indulging in petty corruption often within the civil service for the act. In another context, economic expediency has been used as a basis for the government of Ghana and its actors to embark on self-serving projects designed to provide spaces and opportunities for exploitation and corruption. The dominance of the political economy surrounding the ROL over the formalist model of the ROL is now self-evident.

The reality of the above illustrates the prevalence of the practice of the "winner-takes-all" within Ghana's governance system. The quantum of power conferred on elected officials in Ghana has heightened the very stakes of elections and reinforced the incentives for political exclusion of opposing views and actors. In this vein, elections and the Ghanaian electoral system has itself become an instrument for the perpetuation of corruption as it tends to be used as a legitimating tool in terms of the mandate conferred.

Despite the attraction of this argument however, it does not of itself address the conundrum as to why these laws are passed in the first place. For example, Ghana typifies the system in which ideal laws in public contracting, state financial administration, public procurement and independent public prosecution have been passed and institutionalized to reflect what obtains in mature governance regimes. Yet in the midst of these legislations and accompanying institutions, enforcement is lax and in many cases downrightly subverted. This scenario forces the hypothesis that, far from being inspired by local motivations, the making of these laws in the frame of law reform, and the establishment of accompanying institutions may represent responses to certain exogenous factors far removed from the innate will or desire of political actors to fight corruption from the standpoint of the ROL.

The complex interaction between the ROL and the prevalence of corruption in Ghana is further captured in the scholarship in another way. A strand of the scholarship has suggested that political corruption is directly correlated to the issue of campaign financing and the monetization of politics. Thus, adherents of this scholarship

suggest that a strategic and effective way to combat political corruption (which is mainly grand corruption) is to curb or limit the nature and dynamic of campaign and political financing in general. According to Calla Hummel et al,291

[*T]o the extent that the role of private money in electoral campaigns is minimized, opportunities for corruption decrease. This may be accomplished by regulation, e.g., limiting the amount of money that candidates or parties can obtain from private sources, the kinds of donors that can contribute to campaigns, the amounts that each donor can contribute, and the transparency of these transactions.*

The correlation between campaign finance regulation and grand corruption is generally taken as a given in Ghana and is generally confirmed in studies and research on the subject. 292 In this regard, it bears arguing that campaign and political financing is often seen by 'donors' as investments being made in a nascent political project and in respect of which they expect rewards and returns in the character of the award of contracts, appointment to positions, and other direct rewards once political power is captured or retained. Given the inextricable inter-linkage between political nepotism and corruption, the effect of campaign and political party financing on corruption has been pronounced within Ghana's body politic for sometime now. Thus, in advocating for a strong ROL regime through political finance laws, Hummel et al argue that,

291 C. Hummel et al, Do Political Finance Laws Reduce Corruption, V-Dem Institute Working Paper, Series 2018:60, January 2018, https://www.v-dem.net/media/filer_public/76/05/76052b02-ff12-4a61-ac40-7bb2e5993679/v-dem_working_paper_2018_60.pdf
292 CDD Ghana, 2October 2018, https://www.myjoyonline.com/opinion/2018/october-23rd/what-we-know-about-political-party-financing-corruption-in-ghana.php

political finance laws attenuate the likelihood of a politician engaging in corrupt activity insofar as they (a) reduce the role of private money in campaign finance, (b) clarify the legal status of campaign finance activity (i.e., the line between what is legal and illegal), and (c) enhance the risk of discovery – and hence of negative publicity and possible legal sanction.293

The inverse analyses of the foregoing will reveal that the absence of the requisite legal regime on political financing breeds a situation in which private money dominate political activity and in the process, reinforce the claims and control exercised over political actors by donors who continue to expect returns on their donations. Hummel et al's study and the resultant dataset generated concluded that Africa lagged behind the rest of the world in putting in place political party finance legislation and establishing appropriate interventions in the character of subsidies for political financing. The resultant ubiquity of private donations in political and campaign financing has meant that the levels of grand corruption have equally been high in countries such as Ghana. Elections and electoral seasons have consequently provided key flashpoints at which private money have strongly infiltrated the political space and impact the post-electoral agenda and dynamics of government. The work by Hummel et al accordingly underlie the key argument in this work, namely, the fact that in the absence of local inspiration for the reform process, laws tend to both reflect indices external to the country and the most important laws will not be

293 Id

necessarily passed. The failure by many African countries including Ghana to pass campaign finance laws reflect the difficulty with the conflict of interest argument raised by Wagonner[294]in which the key actors leading any reform tend to focus on rules and regulations whose overall impact remain both manipulative and cosmetic. The experience with political party financing like the right to information legislation reflect this theory.

VI. LEGAL AND INSTITUTIONAL FRAMEWORK FOR ANTI-CORRUPTION IN GHANA

This section of the chapter reviews the compendium of legal and institutional systems and structures that have been put in place to combat the menace of corruption. Since returning to constitutional democracy in 1993, Ghana has incrementally built a framework of legislations and institutions designed to promote government accountability and fight corruption. Thus, from sunshine legislations to investigative and prosecutorial bodies, these laws and institutions provide avenues for fighting the menace of corruption and reinforcing the strictures of trusteeship in public office. Yet, the persistence, if not growth of the canker of corruption compels a re-examination of their mandate, design, and role as instruments of anti-corruption in Ghana.

[294] C. Wagonner, Rule of law and democracy precluded by political corruption, a study of new democracies Supra note 272

A. **THE 1992 CONSTITTUTION AND THE RULE OF LAW**

The 1992 Constitution of Ghana is peculiarly structured to reflect, if not promote the ROL as an overarching regime ethos.295 The text shows a conscious attempt to not only to constrain the powers of government through express restrictions and procedural compliance requirements imposed on the actions of the government, but also that the document incorporates provisions on standards of treatment for the individual in his dealings with institutions of state and the assertion of his rights.296 These are in addition to the provisions on the functional autonomy of institutions and the regulation of discretionary authority designed to circumscribe the powers of government.

Any reviewer of the document will discover that the Constitution contains key elements of the ROL including the elements of legal supremacy, equality and certainty. 297 For example, it is expressly provided that the Constitution shall be the supreme law of Ghana and further that all persons are subject to the overriding powers of the Constitution.298 In addition to this, the nullification clause establishes a baseline provision in the Constitution, which essentially elevates the constitutional document to the status of a regime *grundnorm* and nullifies any act or

295 In addition to the provisions of Article 1, the Constitution is replete with numerous provisions incorporating the key tenets of the theory. For example, fundamental aspects of Diceyan model of the ROL can be found in the following articles, 1(2) (legal supremacy), 19(5) (non-retroactivity), 19(11) (certainty), chapter 12(fundamental human rights) etc
296 See chapter 5 of the 1992 Constitution in general dealing with fundamental human rights
297 Ghana is often touted as a success story of the operation of ROL in Africa and that is largely due to the regime established under the 1992 Constitution. See "Ghana Tops Africa in 2018 Rule of Law Index, https://www.ghanabusinessnews.com/2018/02/01/ghana-tops-africa-in-2018-rule-of-law-index/
298 Id

omission, which is deemed to be inconsistent with the Constitution. In a similar vein, the Constitution makes provision for the equality of all persons and the avoidance of discrimination in a way that not only import the neo-liberal dimensions of the ROL but also promotes equal opportunity for all persons contemplated under the supremacy clause of the Constitution. The indicium of discrimination as a legal tool for combatting corruption is peculiarly worthy of note given the fact that corruption often results in discrimination and creates entitlement disorders in the allocation of resources and deployment of public goods. In other words, given that corruption usually results in the situation where underserving persons either unlawfully take or are allocated benefits to which they are not entitled, the prohibition of discrimination represents a powerful tool for fighting the menace.

The Constitution's treatment of the ROL can be analysed along the typological framework suggested by Santos.299 From the scope of the texts in the Constitution, the substantive provisions focus on prohibitory, prescriptive as well as baseline and threshold issues such as the supremacy of the Constitution, mandatory obligations of government including the responsibility to pass certain legislations within sunset timeframes, and concrete limitations on the exercise of legislative and executive power, etc all reflect key aspects of the ROL. The substantive provisions of the Constitution therefore reflect the neo-classical formulation of the theory in its attempt to elevate the law as a governance desideratum. It is instructive to note however that the principle of constitutional supremacy occupies an important position in Ghana's constitutional jurisprudence and this has been given expression

299 A. Santos, The World Bank's Uses of the 'Rule of Law' Promise In Economic Development: A Critical Appraisal, D. Trubek & A. Santos (Eds.) supra note 25

in the decisions of the apex Court. Thus, in the case of *Ghana Bar Association v. Attorney*300, the Supreme Court held as follows:

...The Constitution, 1992 has established a new legal order for this country. Ghana is now in an era of constitutional supremacy as opposed to parliamentary sovereignty as exists in Britain. ... In this country, however, under the new order of constitutional supremacy, the Constitution, 1992 has vested the power of supervising and the enforcement of the Constitution in the Supreme Court, the judges of which have sworn to uphold and defend its provisions without fear or favour. Parliamentary sovereignty as practiced in Britain is alien to our new legal order. The Constitution, 1992 has vested the power of judicial review of all legislations in the Supreme Court. It has dealt away with either an executive or parliamentary sovereignty and subordinated all the arms or organs of state to the Constitution. The court as the repository and watchdog of the Constitution, 1992 is enjoined to protect, defend and enforce its provisions and should not allow itself to be diverted to act as an independent arbiter of the Constitution, 1992.

The position of the Court in this case sums up the basic structural framework of Ghana's Constitution within the context of the deployment of the ROL. In essence, the Constitution creates a system of laws in which its own rules are situated at the

300 Ghana Bar Association v. Attorney General [1995-96] 1 GLR 598

apex of the legal hierarchy and regulates other laws within the legal system.301 In order however to ensure that the laws of the Constitution are effectively enforced, the rules on supremacy are anchored on a system of reciprocal checks and balances and judicial review of legislative and executive action. Like the substantive provisions, the institutional aspect of the theory is scattered across the constitutional document and manifest in the establishment of institutions designed to advance the principles of the rule of law. Among these institutions are the Commission on Human Rights and Administrative Justice (CHRAJ) and other independent constitutional bodies, the traditional branches of government and other systemic structures such as para-executive institutions including police structures and other investigative authorities. These institutions represent a network of constitutional bodies primarily established to advance the values of the ROL and constitutionalism, and thereby constrain the deployment and exercise of constitutional authority. Understood therefore as a system of rules, structures and values, these institutions can be viewed as both facilitative and restrictive on actor behaviour.302

The institutional ROL dynamic of the Constitution fits a general pattern in the governance architecture through which the framers of the Constitution appear intent on promoting the values of certainty and predictability.303 This aspect of the ROL manifests under the Constitution in the application of these laws through constitutionally sanctioned traditional and autonomous institutions as mentioned

301 See chapters 13, 18, & 19, 1992 GHANA CONST.
302 G.M. Hodgson, What are Institutions? *Journal of Economic Issues, Vol. XL, No. 1, March 2006*.
303 Also see on this, G. Palombella, The Rule of Law as an Institutional Ideal, psc.uva.nl/binaries/content/.../palombella-the-rule-of-law-as-an-institutional-ideal.pd

above. This objective finds expression in the admixture of substantive constitutional provisions with institutional responsibility and authority. For example, a substantive provision in the constitution dealing with the subject of legal certainty (a neo-classical principle) contained under article 9(11) compels nearly all criminal laws of Ghana to be in writing for purposes of enforcement. In this regard, the judiciary can strike down legislation, which seeks to punish a person without the legislation first defining in writing the nature and scope of the intended punishment. This is then a clear illustration of the interplay between substantive and institutional norms of the ROL within the Constitution designed to promote a balanced operation of the document.

The plethora of institutions established under the constitution such as Parliament (legislative body), the National Commission on Civic Education, and the Auditor General's office collectively serve as a buffer against the wrongful exercise of constitutional power by the mainly political branches and in this regard, succeeds in curbing constitutional excesses on the part of these agents and agencies of government. As regards the instrumental or intrinsic dimensions of the theory, the 1992 Constitution emphasizes the former with a preponderance of the provisions inserted in the Constitution to achieve a functional goal. Thus, from provisions on human rights to the more developmentally oriented contents of the Constitution, the provisions reflect an instrumental approach to using the law and applying it to the governance and developmental needs of Ghana while reinforcing the accountability and trusteeship dimensions of the Constitution. In an apparent recognition of this,

the Supreme Court in the case of the *Lotto Operators Association & Ors. v. National Lottery Authority*304, reversed its earlier stance on the effect of the directive principles of state policy by declaring that the principles contained in the Constitution constituted a set of justiciable provisions within the cognizable and enforceable by the Court. In other words, by this decision, the court held that the provisions contained under chapter 6 represented legally binding obligations on the basis of which claimants can prosecute cases against the government. This decision highlights the instrumental dimensions of the ROL under the 1992 Constitution and the attempt by the framers to promote a functionalist agenda within the context of the ROL.

The above notwithstanding however, the ROL may seem to promise more than it delivers under the 1992 Constitution. More often than not, institutions that reflect ideal types in their design, structuring, and orientation have failed to function and deliver the public goods expected of them. The result has been that the exploitative and parasitic uses of both substantive laws and institutions have persisted. On the other hand, ROL accountability institutions have routinely demonstrated impotence in the face of gross violations of law thereby promoting a sense of impunity particularly on the question of corruption and rent-seeking behaviour of public officers in Ghana. This reality raises foundational questions on the efficacy of the ROL implemented within the law reform initiative in Ghana and its unique interactive dynamics with corruption in the country.

304Lotto Operators Association & Ors. National Lottery Association, [2007-2008] 2 SCGLR 1088

B. THE OFFICE OF THE SPECIAL PROSECUTOR: THE POLITICS OF THE RULE OF LAW AND CORRUPTION IN GHANA

The passage of the law establishing the Office of the Special Prosecutor (OSP) represents in all ways a watershed moment within Ghana's constitutional governance and the ROL.[305] Within the labyrinth of ancillary legislations in Ghana, this law is perhaps the most serious attempt yet at professionalizing and depoliticizing the fight against corruption. By situating the institution within the context of autonomous statutory agencies, the new law may have just succeeded in providing a transcendental and sustainable machinery for the fight against corruption as an overarching goal of the ROL. In many ways, the legislation can be seen as a triumph for popular calls and growing public demands for greater accountability and retribution against officers of the realm who abuse the public trust mainly through corrupt behaviour.[306]

The Act establishing the OSP307 was primarily designed as a legal tool to combat corruption and is targeted at a class of persons who are most at risk of indulging in

[305] Office of the Special Prosecutor Act 2017 (Act 959) was passed following years of public pressure to remove the power of prosecuting corruption from the office of the Attorney-General and consign same to an independent entity
[306] Id
307 Id

grand corruption and with the opportunity to exploit public office for private gain. In other words, the law targets public officials and private persons who have both the incentive and opportunity to indulge in corrupt behaviour for purposes of investigation and prosecution. This finds ample expression under the long title of the law which goes further to narrowly circumscribe the targeted group defined as 'politically exposed persons' and other persons within the private sector who indulge in corrupt practices. In this regard, the ambit of the law is sufficiently wide as it seeks to rope in the full spectrum of potential actors within its fold.[308]

The significance of the prosecutorial authority created under the law can hardly be overemphasized. Thus, while past prosecutions of corruption have largely been limited to offences committed by or in connivance with other public officials, a cursory review of the scope of the new law will reveal that the OSP Act is broader in scope relative to past attempts at combatting corruption. This expansive scope equally targets corrupt behaviour, which begins and ends in the private sector thereby taking a systemic and contagion view of corruption within Ghana.

Thus, under section 3 of the law, it is provided that,

308 L. Ndikumana, The Private Sector as Culprit And Victim of Corruption in Africa, *University of Amherst Political Economy Institute,*
https://pdfs.semanticscholar.org/a3b7/6f5463196cd4b3ada11f6f61b112cba0f1bb.pdf

> In *order to achieve the object of the law, the office shall investigate and prosecute alleged or suspected corruption and corruption-related offences involving public officers, politically exposed persons, and persons in the private sector involved in the commission of the offence under any relevant law.*

The significance of this provision lies in its recognition of the cross-sectoral and systemic origin and impact of corruption. By empowering the special prosecutor to investigate cases involving actors in the private sector, the law takes the pragmatic view that the issue of corruption is both widespread and systemic. In the case of Ghana, this reality cannot be ignored given the blurred lines defining the public and private spheres of action and governmental business in general. In many cases, the subjects that usually occasion corrupt behaviour include the award of government contracts to private interests, public procurements contracts, and the distribution of various entitlements under budgetary allocations. The management of these processes result in substantial contestations due to allegations of corruption and other improper influences exerted on public officials by private actors.

In order to ensure that the prosecutor's office is able to effectively discharge its mandate free from various external pressures, the law purportedly insulates the special prosecutor from political manipulations and other controls by making the

office independent. For a fuller appreciation of the character of the independence conferred, it is apposite to reproduce the wording of section 4 *in extenso* as follows:

> *… the Office is not subject to the direction or control of a person or an authority in the performance of the functions of the office…*

Prima facie therefore, the law grants the prosecutor the needed freedom of action in the performance of his duties and by so doing preserves the neutrality of his judgment in the exercise of the prosecutorial discretion. By insulating the office from third party influences, the law has reinforced the sense of detachment of the institution and for that matter the apolitical character of its decisions. The independence granted the OSP is also to avoid the tendency of its prosecutorial decisions becoming rendered merely perfunctory where the exercise of his discretion is made subject to the overriding approval of another body or entity such as the Attorney General.

Yet the treatment of the independence of the OSP within the law presents more complexities than may seem to appear *prima facie*. For example, under section 4(2), the office is required to seek the authorization of the Attorney General before it initiates or commences prosecution and the ostensible goal for inserting this provision is to cure a constitutional difficulty which essentially mandates that all criminal prosecution shall be initiated by the Attorney-General as the preeminent constitutional law officer and actor. The language of article 88 of the Constitution is

telling and bears quotation here as follows,

> *The Attorney General shall be responsible for the initiation and conduct of all prosecutions of criminal offences.*[309]

The effect of this provision relative to the functional and operational autonomy of the OSP has inspired a lot of debate among constitutional scholars and the policy community in Ghana. Thus, it has been argued that the OSP Act represents a gross violation of the Constitution in so far as it is intended to establish an independent and structurally separate institution within the corpus of other statutory agencies under the Constitution with a mandate to undertake prosecutions on behalf of the state. In other words, critics of the new law argue that, given that the Constitution requires that the Attorney-General should exercise prosecutorial monopoly, the attempt to hive-off a portion of that authority to an independent entity represents a direct assault on the structural and juridical integrity of Article 88 and this serves to undermine the very legitimacy of the OSP as a statutory agency.

It is therefore arguable that Section 4(2) of the law represents a compromise provision designed to deal with the legality and legitimacy challenges posed by the scope of article 88 of the Constitution. Thus, the provision contained in Section 4(2) is at best inspired by pragmatism and seeks to give the Attorney General a largely

309 Article 88(3), 1992 GHANA CONST.

back-end role in the process of initiating and conducting the criminal prosecution of corruption. The key questions that invariably arise for consideration in this regard are whether this role is in fact an active and effective one or merely ministerial in character as intended by the drafting history of the legislation.310 And assuming the answer to this question concludes that the authorizing powers of the Attorney-General under Section 4(2) is merely *pro forma* in nature, a further problem remains to be dealt with, namely how is the independence of the OSP to be guarded against the dangers of erosion and abuse by the Attorney General in cases where the authorizing power routinely interferes in an active manner with its exercise? The importance of determining the boundary issues in the roles and powers of the Attorney General and the OSP remains crucial for the future development of the OSP. Reviewing the interactive effect of one on the other necessarily invites us to review the controlling values informing the structure of the law in general in light of the principle of independence altogether.

Resolving the nascent tension in the relationship between the Attorney-General and the prosecutor on the issue of whether the former can block the initiation and/or order the discontinuance of prosecution by the special prosecutor is central to the effectiveness of the regime and the substantive impact of the reform in this vein to the ROL agenda. Before delving into a discussion of this however, it is useful to recognize the fact that any limitation on the powers of the OSP contained under section 4(2) is restricted to the commencement of prosecution itself and does not

310 This provision was the subject of much public discussion and engaged the attention of legal scholars in terms of the law's overall compatibility with the Constitution and how there was the need to, in the minimum ensure that any autonomy guaranteed the OSP is tampered with intersecting oversights exercised by the Attorney-General pursuant to the constitutional role and powers of the latter.

extend to acts that are antecedent thereto such as investigations. This is important given the fact that since the decision to prosecute or otherwise largely depends on the outcome of prior investigations, the character of any investigative outcome can significantly impact on how the discretion is exercised either by the Attorney General or the special prosecutor.

Dealing with the nagging questions surrounding the effect of Section 4(2) is important for the effectiveness of the regime established under the law. In this regard, it will be useful to consider two scenarios presented in the question posed above. First, any conclusion to the effect that the supervisory powers of the Attorney-General in granting authorizations before prosecutions are initiated is merely perfunctory will invariably lead to the added question of the imperatives informing the insertion of such a provision in the law in the first place. Of course, proponents of the model will revisit the constitutional difficulty mentioned above and the need to ensure that perceived violations of Article 88 are reduced to the barest minimum through the insertion of moderating clauses like Section 4(2). Others will go as far as to assert that by inserting this provision in the law, Parliament may have just succeeded in curing the seemingly intractable constitutional difficulty posed by article 88 altogether by introducing a model of "independent agency" under which the principal institution (Attorney General) can merely 'authorize' and supervise the actions of the 'subordinate' agent (OSP), but cannot manipulate its actual operations given the existence of the strictures of independence surrounding the operations of the agent. The difficulty inherent in this argument lies in the fact that it fails to deal with the impact of the authorizing powers of the Attorney General in real terms, and

how its potentially opportunistic uses can ultimately frustrate the commencement of prosecutions.

On the other hand, the second question or scenario implicates even direr prospects for the law. The admission that the provision has substantive effects and impacts on the power of the special prosecutor to make prosecutorial decisions undermines the very essence of the law and will only serve to obliterate the very reason for the entire reform. An acceptance of the proposition that the authorizing powers of the Attorney General does substantively impact the prosecutorial discretion of the special prosecutor and that the former can in practice stultify the efforts of the latter to commence prosecutions can be disastrous for the law and its significance to the justice and accountability regime in general. The reason for this conclusion is not hard to see. Given that the historical impotence of the Attorney General as a prosecuting officer in the area of corruption-related offences has been attributed in large part to her lack of independence in the wake of the political character of that office, it goes without saying that the law would have indeed succeeded in preserving the *status quo* if she is allowed to make decisions on the ultimate exercise of the prosecutor's power to prosecute. Any functional articulation of the law will have to of necessity accept the fact that the prosecutor enjoys operational autonomy and accordingly provisions the granting of a "prior approval" by the Attorney General are merely perfunctory designed to instil a modicum of oversight and checks and balances and nothing more.

The passage of the Office of the Special Prosecutor Act is a summation of the complex politics and the political economy of the ROL in Ghana. Many argue that the widespread prevalence of corruption in Ghana311 and the deepening problem of poverty invariably compelled the mainstreaming of the subject of corruption and the ultimate passage of the law establishing an independent prosecutor's office312. In the particular case of the new law establishing the OSP, scholars of the ROL and economic development will predictably conclude that its passage is a reflection of the incremental growth and development of the Ghanaian legal system and the system's inherent predisposition towards the formalist ROL and legality in general.313 While this may be true to a large extent, that conclusion may seem simplistic when gauged from the standpoint of the Ghanaian experience *per se*. A combination of political pressures and electoral enlightenment have indubitably played a role and forced political actors to confront the issue of corruption as a priority reform and policy agenda. In this guise, the impunity of the past has been replaced with at least a semblance of marked accountability characterized by specific policy interventions to address the problem.

Viewed from the standpoint of responsive governance therefore, the passage of this law within the first year of the incumbent government's administration testifies to

311 Supra W. Agbodohu, Corruption in Ghana: Causes, Consequences and Cures, International Journal of Economics, Finance and Management Sciences Vol. 2 p92, Available at https://www.researchgate.net/publication/275567570_Corruption_in_Ghana_Causes_Consequences_and_Cures.

312 The subject was perhaps the most trumpeted in the last elections and a foremost agenda in the promises of the government in power.

313 See D.M. Trubek, The Rule of Law in Development Assistance: Past, Present and Future' In D.M. Trubek & A. Santos, (Eds.) *The New Law & Economic Development: A Critical Appraisal*, supra note 120

the impact of legally exogenous variables in the character of political and electoral pressures on the ROL agenda. Having been a core campaign promise of the ruling political party, it is accurate to assert that the passage of the OSP Act is the outcome of complex political tensions and compromises mainly ulterior to the ROL reform *qua* ROL. This assertion is made mindful of its seemingly obvious undertones given that that nearly all laws made reflect multiplicities of adjustments many of which are political in character. In the case of the law establishing the OSP however, its overall structure and content deeply reflect a degree and intensity of systemic tensions which deserve special mention in a work like this. The adjustments and compromises of the contours of the law in the light of outcries and objections made by political actors in the lead up to its passage however reflect a certain degree of bi-partisan reticence to fashion out a law that truly bites and impacts the fight against corruption. This dynamic is especially reflected in the initial Bill which contained provisions that created threshold levels of corruption that could be prosecuted and thereby eliminating from its fold corrupt acts deemed of lower degree on the basis of the quantum of sums involved.[314] These realities point to one fact namely that while the passage of Act 959 is no doubt a highly significant step forward in the fight against corruption as a national menace, the background obstacles in the nature of parochial political interests will continue to impact its effectiveness.

The failure to conduct prosecutions after nearly two years of its existence may seem to betray the hypothesis of this work, namely the failure of the formalist ROL reform

[314] The initial formulation of the provision included provisions that prevented the special prosecutor from commencing prosecution unless the alleged instance(s) of corruption were of such a magnitude as impact the Gross Domestic Product of Ghana.

to achieve transformative effect in Ghana is often down not to a failure of conception but of implementation design coupled with the impact of extraneous but surrounding context of the reform. While some will argue that it still remains too early to judge, the preponderance of opinions converges on the seeming still birth of the reform on the prosecution of corruption in Ghana.[315]

C. ECONOMIC AND ORGANIZED CRIME OFFICE

One of the key institutional innovation of the fourth republic in Ghana relative to the fight against corruption is the establishment of the Economic and Organized Crime Office. The passage of the Economic and Organized Crime Act or law316 was a culmination of efforts by the then government to deal with organized criminal enterprises inspired by corruption. The law is especially important considered from the standpoint of grand corruption and its characteristic of often being a concerted action by like-minded persons and syndicates. Under the Act, the office is established to prosecute crime under the authority of the Attorney General. In this regard, the Office is both set up as an investigative and prosecutorial body relative to economic crimes and corruption.

[315] K. Asante, An Assessment of the Office of the Special Prosecutor, one year on, https://www.cddgh.org/wp-content/uploads/2019/05/OSP-AFTER-ONE-YEAR_ASSESSMENT-1.pdf

316 Economic and Organized Crime Act, 2010, Act 804. The Office is an institutional successor to the Serious Fraud Office, which was previously in existence set up to combat fraud related activities relative to official action.

Within the panoply of legal and justice institutions in Ghana, the Office is structured to complement the regular police service and the Commission on Human Rights and Administrative Justice and ultimately the Attorney-General in the performance of her work. Its operational experience demonstrates a clear dependence by the Office on these institutions mainly in terms of personnel, and the Office has over the years adopted a cooperative strategy that allows it to leverage on the work and experiences of other bodies for its work and successes.

Under the Act, the Office has two key objects namely, to detect and prevent the incidence of organized crime, and secondly, to facilitate the confiscation of assets derived from the impugned act of organized crime. This mandate is instructive and demonstrates a recognition of organized economic exploitation of the state and concerted criminal enterprise worthy of punishment. Even more crucially, the law departs from previous approaches and fills in the gaps in Ghanaian legal arrangements and charges the Office with the mandate undo unjust enrichment by empowering it to facilitate the retrieval of moneys gained from organized crime. This novel mandate is topical within the context of corruption as it promises to not only deal with the issue of impunity from the standpoint of *ex post facto* ROL accountability, but more fundamentally deal with the problem of the incentives driving corruption and the consequential rewards thereof. In other words, given that corrupt officials of state often get to keep the proceeds of their loot and thievery, past laws that merely punished them but stop short of confiscating assets failed to deal with the incentives of corruption and the law establishing the Office appears to have for the first time recognized that problematic reality. This law establishing the

Office does well in focusing on the recovery of assets and income derived from organized economic crime including corruption.

The functions of the Office are broad and malleable, and range from the investigation and prosecution of offences that cause financial and economic loss to the state, to any offence(s) deemed serious enough and worthy of investigation and prosecution. This has empowered the Office to deal with both public and private sector offences impacting on the public purse in general. Together with legislations prohibiting the causing of financial losses to the state,317 the legislation establishing the Office reinforces the capacity of the state, from an institutional standpoint, to deal with the subject of organized economic crime and corruption.

This legislative facilitation notwithstanding, the history of the Office and its operation has been generally critiqued as being less than optimal.[318] For example, critics have suggested that the Office hardly completes any investigation and prosecution. In this regard, the work of the Office is seemingly littered with instances of investigations which never really terminated in prosecutions in the law courts and this is seen by many as largely due to political influences under which the Office operates.[319] This is partly compounded by the closed nature of the investigative model adopted by the Office and the near complete absence of feedback and routine public briefings on the progress of major investigations undertaken by the Office. These remain remains

317 Criminal Offences Act, (1960) Act 29.

318 I. D. Norman, Is the Economic and Organized Crime Office Now the Umpire for Corruption in Ghana?https://www.researchgate.net/publication/298738103_Is_the_Economic_and_Organized_Crime_Office_Now_the_Umpire_for_Corruption_in_Ghana

319 Id

major fault lines which continue to gravely impact the work of the Office. In this regard, the fact that the inception of the Office was not accompanied by the corresponding increase in the number of prosecutions in organized economic crime reflects failures of that Office. More substantively, the law establishing the Office has been criticized for lacking in safeguards for the protection of the rights of persons who are the subject of investigations by the institution. Scholars have for example pointed to the fact that the mere suspicion, the mere hunch that a crime is about to be committed or is being committed seems to be enough probable cause to activate the police and subpoena powers on persons suspected of crime by the Office.320 This critique draws attention to the tendency for the police and quasi-judicial powers of the Office to be abused especially given the usually political undertones of the contemplated organized crimes falling under the jurisdiction of the Office. In other words, drafted as it is, the law can encourage exploitation and abuse and this will fundamentally affect and undermine the legitimacy and capacity of the law to realize the neutral objective of uprooting corruption within the governance of Ghana through the model of fighting organized crime.

320 I.D. Norman, Is the Economic and Organized Crime Office the Umpire for Corruption in Ghana, supra note 301.

D. THE COMMISSION ON HUMAN RIGHTS & ADMINISTRATIVE JUSTICE

The Commission of Human Rights and Administrative Justice (CHRAJ) is the apex ombudsman and anti-corruption body established under the 1992 Constitution as an independent agency to complement the work of the courts and other adjudicatory bodies in the defence of human rights and abuse of office.[321] The mandate of the Commission is itemized in article 218 of the Constitution as follows:

(a) to investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties;

(b) to investigate complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the Armed Forces, the Police Service and the Prisons Service in so far as complaints relate to the failure to achieve a balanced structuring of those services or equal access by all to the recruitment of those services or fair administration in relation to those service;

(c) to investigate complaints concerning practices and actions by persons, private enterprises and other institutions where those complaints allege violations of fundamental rights and freedoms under this Constitution.

[321] See generally the mandate of the Commission contained under chapter 18, 1992 GHANA CONST.

In order to ensure that the Commission is effective in the performance of its work, the CHRAJ is imbued with quasi-judicial powers, which allows it to compel the attendance of witnesses and their examination on oath as well as bringing proceedings in court to terminate offending behaviour in respect of which it has conducted an investigation.322 These powers enable the Commission to not only open investigations into particular subjects, but also secure compliance to its orders during any investigations and collaborate with the courts in punishing offending behaviour directed at it. The totality of these provisions is then to constitute the CHRAJ into an anti-corruption body together with the traditional duty of acting as an ombudsman. Its work on anti-corruption work has come to be a defining characteristic of the Commission and forced it into the fray of politics and equally compelled judicial intrusion on its work. Allegations of corruptions made against public officials and public actors have attracted the CHRAJ's intervention and forced investigations into these allegations in a manner previously unknown in Ghanaian constitutional governance.

Even more objectionable to alleged culprits of corruption was the open-door policy of the Commission under which technical restrictions that ordinarily narrowed access to parties in court litigations such as demonstrating standing or *locus standi* and jurisdictional invocations were normally not insisted upon in the case of the Commission's work. Consequently, the application of lax and party-friendly processes within the confines of the Commission's work have led to challenges being mounted

322 Article 219 (1), 1992 GHANA CONST.

in Ghana's constitutional court to determine the scope of authority of the Commission and its relationship with the regular courts in the country. Thus, in the decision of the Supreme Court in the case of The Republic v. the High Court (Fast Track Division); Ex Parte Commission on Human Rights and Administrative Justice (Richard Anane Interested Party)[323] the Court handed down a decision which constricted the hitherto expansive approach to the exercise of its jurisdiction by holding that the previous exercise of jurisdiction by the body was an improper exercise of its authority and accordingly the CHRAJ was ordered to limit its jurisdiction to cases involving the lodgement of official complaints before it in cases involving allegations of abuse of office. This case was brought against the backdrop of investigations conducted by the Commission in respect of widespread public allegations of corruption and abuse of office levelled against certain identifiable public officials. The Plaintiff brought an action in the Supreme Court challenging the capacity of the CHRAJ to conduct or open investigations against him without the pendency or initial submission of a formal complaint made before it. The Court agreed with the objections of the Plaintiff and ruled that the Commission cannot commence investigations merely from media reportage and public outcries but that the CHRAJ needed the lodgement of a formal complaint in order to have its investigative jurisdiction properly activated. This decision has two fundamental consequences for the operation of the Commission namely, that it reduced the Commission to a reactive institution, which has since become dependent on specific individual efforts and complaints in order to commence investigations. Secondly, the decision has had the enduring effect of removing issues of corruption from the

[323] The Republic v. the High Court (Fast Track Division); Ex Parte Commission on Human Rights and Administrative Justice (Richard Anane Interested Party) (2007-2008) SCGLR 213

purely public domain *qua* the Commission and entrusting it in the hands of interested individuals who present complaints or challenges on identifiable acts of corruption.

Beyond the jurisdictional difficulties of the Commission, CHRAJ is plagued with mainly systemic and structural factors that affect its operations. Pivotal among these is the question of the will and support for the Commission's work from the main political branches and this is spurred on by embedded constitutional provisions on financing and appointment that often exploited by these branches. For example, in the matter involving Retired Colonel Osei Owusu (the Minister of Interior), Ibrahim Adams (the Minister of Food and Agriculture), the Presidential staffer on Cocoa affairs, Dr. Adjei Marfo and P.V. Obeng – the Presidential Adviser on Governmental Affairs, the Commission conducted investigations against these top-level government officials following media allegations of corruption against made against them.[324] The Commission significantly made adverse findings against the said officers and further went ahead to order some of them to refund certain moneys that were deemed to have been misappropriated by them. In a rather bewildering twist of events however, the government issued a white paper in which it purported to clear the officers of some of the findings. It is instructive to mention at this stage that while the action of the government was broadly criticized, it was legally justified as this was permitted by the Constitution. In this regard, the Constitution permitted the

[324] R. Dowuona, CHRAJ and the Constitution of Ghana, https://www.academia.edu/15227812/Chraj_and_the_constitution_of_Ghana

government to, at the conclusion of investigations by the Commission, issue white paper determining its position on the outcome of the investigation.

The developments following the investigation and report issued affected the standing and institutional effectiveness of the Commission particularly given the fact that the institution was in its infancy at the time of this development. By openly defying the findings of the Commission through its white paper, the government exhibited its disdain for the Commission's work and this tendency came to characterize the reactions of succeeding governments to the Commission and its work. The subtle obstructions of the Commission's growth and development continued in various guises and these culminated in the decision of the Supreme Court in t*he Ex Parte Commission of Human Rights and Administrative Justice Case*.[325] The effects of these developments together challenge the robust development of the regime of accountability Ghana. From the perspective of negative influences exerted on the institution, CHRAJ continues to be manipulated in subtle ways and this continues to erode the capacity of the Institution to assert an authority over the persons and institutions it is expected to keep in check through its accountability mandate. For example, upon the retirement of the first Commissioner from office, it took many years before a substantive replacement was announced for the headship of the Commission and many analysts speculated that the reason for this development was to weaken the independence of the Commission and to ensure that acting commissioners remained loyal to sitting governments in the exercise of their investigative discretions.

[325] The Republic v. the High Court (Fast Track Division); Ex Parte Commission on Human Rights and Administrative Justice (Richard Anane Interested Party) Supra note 306

These notwithstanding, the inception of the CHRAJ and its work since its establishment has been generally seen as marking a major landmark in the fight against corruption in Ghana. Its relatively open-door policy and procedurally friendly approach to investigations as well as the cheaper access it offers to complainants have acted as viable means to help combat corruption in Ghana. Key weaknesses identified over the years have included its lack of prosecutorial autonomy and the fact that it nearly always has to resort to the courts to enforce its decisions. In addition, and as noted above, decisions of the Supreme Court have either directly or unwittingly whittled down its overall effectiveness and made it less proactive in its capacity to commence and complete investigations. The ROL model experimented under the CHRAJ exposes yet the deficiency of an insular regime of the ROL in the absence of other more nuanced and systemic sub-structures and approaches. While the law and structural design of CHRAJ appeared from the onset of the constitutional system appeared a model regime and was generally touted as the hope of the regime, experience and realities have shown otherwise and exposed the practical shortcomings of the institution.

E. SUNSHINE LEGISLATIONS

Over the years, various legislations have been passed in Ghana designed to strengthen constitutional accountability and ensure that corruption in public life is minimized, and altogether eliminated in the medium to long term. The passage of some of these laws is constitutionally mandated and as such there exist express statutory obligation on the legislature to create the needed legal framework in order to as an elaboration on core constitutional provisions.[326] Others, have mainly been inspired by good governance initiatives and are either domestically engineered or borne out of conditionality requirements from foreign donor agencies within the context of assistance relationships.

Included in the former group is the Right to Information legislation which has just recently been passed327 and the Whistle Blowers' Act.328 The Right to Information law as contained under the Constitution is designed to provide the citizenry with the legal authority to access certain important information pertaining to the administration of the state and is steeped in the principle of democratic accountability. In its absence, the default option has been not only a monopoly of information on the part of government, but also the complete or virtual blockade of

[326] See for example, article 22, of the 1992 Constitution mandating that Parliament passes a law on the regulation of spousal property distribution upon the coming into force of the Constitution.
327 Right to Information Act (2019) Act 989; Article 21 of the Constitution provides for a general right to information. It is instructive to state at this stage that the right to information is a cardinal right that is in fact granted under the African Union Convention on Preventing and Combatting Corruption adopted in Maputo, Mozambique in 2003, discussed next in this chapter.
328 Whistleblower Act (2006) Act 720

all access to sensitive information pertaining to the management of the affairs of the state. This default position is not only facially untenable in a functioning democracy, but gravely impedes the capacity of the citizenry to demand accountability from the government and thereby ensure responsible governance.[329] Thus, from the award of contracts to the deployment and allocation of national resources under the state budget, the government of the day chooses the nature and scope of information it wishes to release to the public and the public can only dabble in speculation on all matters in respect of which the public seeks information.

Significantly, the Constitution itself makes provision for a framework law on the Right to Information by asserting that all persons shall have a right to information.330 Encapsulated in this right is the authority of the individual to demand the production of specific information pertaining to the management of the state, on the officers tasked with state administration. By inserting it within the Constitution itself,331 the framers of the document elevated this right to an apex obligation, which cannot be derogated from unless permitted within the confines of the broad constitutional provision. In other words, by expressly inserting a right to information in the Constitution itself, the framers of the Constitution have created a higher obligation on the part of the legislature to pass a law on it elaborating on the

[329] This was what the American founding father James Madison had in mind when he asserted that "[a] popular government, without popular information or the means of acquiring it is but a prologue to a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own governors must arm themselves with the power which knowledge gives…" Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt Ed. 1910).
330 Article 21, 1992 GHANA CONST.
331 Id

right and defining the permissible circumstances of deviation on the part of the state or government. Thus, the requirement for an additional parliamentary enactment in this vein is to allow for the attainment of two ends, namely, an expatiation on the framework statutory provision contained in the Constitution, and secondly, the statement and refinement of clear circumstances of exception under which the right to information could be derogated from without undermining core constitutional norms informing the adoption of the right in the first place. It is in this light that the right to information legislation becomes topical. Before embarking on a discussion of the law however, it bears mentioning a word or two on the political and advocacy backgrounds to the legislation. Having first reared its head sometime in 2003, the bill that ultimately came to the legislative chamber stalled for nearly two decades in spite of intense civil society activism for its passage. Critics argued that the legislative body (Parliament) and the broad masses of political actors did not want the law to be passed given the exposures of underhand dealings within government and the larger public service that it threatened. While the legislature repeatedly deflected these accusations by stressing the need for further consultations before its passage, the fact that the law which was passed in the end reflects an adjustment of these tensions goes to support some of the claims of critics.332

From a substantive standpoint, the law contains the broad restatement of the constitutional provision and proceeds to indicate the exceptions to the right. In this regard, the law operates more at the *regulatory* sphere relative to the general

332 The law as passed contains significant claw-back provisions that allows the government to exercise a margin of appreciation in specific cases of request for information.

constitutional right granted. In other words, given that the law passed by the legislature mainly appears to regulate as opposed to elaborating on the guaranteed rights, it is arguable that the recently passed law is largely designed to regulate the exercise and enjoyment of the broader constitutional right. The utility of the Right to Information Act *qua* legislation remains limited. In the form in which it is, the Act can be asserted as a restrictive tool against the assertion of a right to information and this could undermine the ultimate goals and values informing the constitutional provision on the right. From the perspective of sunshine statutes therefore, the constitutional provision itself[333] may therefore appear to be both enabling and determinative of the right *per se*. Being framework in its dimensions however, the constitutional provision itself does not contain limitation and asserts a general right of the individual to information against the realm and machinery of government. The enactment of a law in consequence of that would ordinarily therefore be expected to further elaborated on the framework law contained in the Constitution and which serves as its parent legislation. The development would therefore appear baffling and opportunistic on the part pf Parliament which exercised its legislative discretion in the ultimate framing of the legislation.

A right to information is an important and viable means of combatting corruption as it provides a spectrum through which to challenge the proclaimed basis for the use and management of national resources. By creating a facilitative environment for its exercise, the Right to Information can serve as an advance warning to would-be corrupt officials of state that their actions can set in motion a chain reaction of

[333] Article 21, GHANA CONST. 1992, Supra

questions and queries inspired by access to information by the larger public. Given the fact that it was only relatively recently passed, the law is yet to be fully tested in practice. Yet, in order to ensure an effective regime on the Right to Information, there is the need to ensure the establishment of facilitative framework within which to assert and articulate the right, mechanisms of evaluating claims to information and systems of processing access need to be put in place.[334] This will of necessity have to include a bureau which receives and processes claims and mechanisms of resolving disputes in situations in which applications for information are denied, etc. The particular issue of dispute and its resolution is central to the prospect of an effective regime given the likelihood of the entire regime being bogged down by issues of interpretation on the right in addition to exceptions for deviation within which the state and government can refuse the individual access to information. Particularly within the scope of the intolerable delays within the Ghanaian court system, a failure to devise a pathway for the resolution of these disputes can destroy the right and its overall assertion as judicial alternatives are both limited and largely inaccessible to the large majority of people.

Another sunshine legislation in Ghana worthy of consideration is the Public Procurement Act.335 Like the Right to Information law, the Public Procurement law remains in principle a critical tool for combating corruption in governance regimes

[334] Upon the passage of the law, the President of Ghana promised that the mechanisms of implementation of the law and the right therein will be operational by January 2020. It does not seem from all indications that that promise has been realized.
https://www.graphic.com.gh/news/politics/ghana-news-president-assents-to-rti-act-it-comes-into-effect-in-january-2020.html
335 Public Procurement Act 2003, (Act 663)

underpinned by the ROL. In general terms, the law is a model legislation as it incorporates broad baseline provisions necessary to ensure the prudent and effective management of public procurement and contracting in Ghana. The law establishes the Public Procurement Authority and mandates that the procurement of goods and services on behalf of the state shall be generally subject to a predetermined process that requires tendering and competitive bidding.[336] The goal is to maximize the overall benefit and interest of the state in getting the best possible offers on the side of pricing, quality of goods and services as well as competence in delivery. By prioritizing and insisting on competitive bidding as the overarching norm, the law seeks to promote the interest of the state by compelling officials acting on its behalf to source from the gamut of options available in the market on any given project. In spite of its utility, critics have decried the implementation of this law and generally chastised the exploitation of exceptions created under the law to corrupt ends. For example, while the law mainly requires that public contracts are generally supposed to be subjected to public competitive tendering with the limited option of undertaking sole sourcing of contracts in necessary situations as mentioned above, the latter has become the norm with many important contracts being undertaken through the medium of sole sourcing. In this regard, they have pointed out that given that the option of sole sourcing provides opportunities for the completion of transactions tainted with corruption between key state actors with vested interests in particular or given transactions, this exception has by practice been elevated to

[336] Id. The law establishes oversight sub-structures such as the Board to both regulate the implementation of the law as well as ensure that the right systems and updated processes are applied in public procurement.

the status of the main norm thereby defeating the very reason for the introduction of competitive bidding and the procurement regime in general.

As it is in the case of established institutions like the CHRAJ, experiences with sunshine legislations like these reflect the impotence of the formalist ROL *per se* with its obsession with the black letter law and lack of recognition of context and socio-cultural and political economy realities. The agency dimensions of the law's implementation and the overall complexity of the legal and regulatory environment of Ghana combine to undermine these legislations and render them ineffective in spite of the fact that their conception and design may appear optimal or ideal *prima facie.*

VII. AFRICAN UNION CONVENTION ON PREVENTING AND COMBATTING CORRUPTION

The adoption of the African Union (AU) Convention on Preventing and Combating Corruption (the Convention) represents a continent-wide statement of intent to fight corruption as a cross-national reality and canker. Given the ubiquitous character

corruption and the governance challenges confronting countries on the continent, the adoption of this convention has been hailed as marking a watershed moment in the fight against impunity and misrule in Africa.337 Consequently, the Convention stated in its preamble the intentions of the African Union to use the instrumentality of the Convention to address core governance deficits prevalent on the continent and which continue to hamper the development of its countries. Crucially and from the standpoint of regime ethos, the coming into force of the Convention reflects a principled determination by leaders on the continent to promote accountability and address the problems of looting of public resources for private gain as has been prevalent for years on the continent.

Consequently, article 2 of the Convention palpably signals that intention by *inter alia* providing that countries on the continent are obligated to install and establish systems, structures and institutions for the prevention, detection and punishment of corruption in all its forms and manifestations.338 The imperative for this provision cannot be overemphasized. By concretizing this is in law, signatories to the Convention have come under the legal obligation to put in place active mechanisms to fight corruption within the plethora of national laws and institutions. By adopting an intra-continental approach to the menace, the AU invariably delegitimized the practice of exploiting public offices for private gain and the routine normalization of corruption in public life. In order to ensure the effective articulation and

337 K. Olaniyan, Introductory Note to African Union (AU): Convention on Preventing and Combating Corruption, *International Legal Materials* Vol. 43, No. 1 (2004), pp. 1

338 Article 2, AU Convention on Prevention and Combating Corruption, https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption

internalization of the prohibition of corruption, the Convention adopts certain key values such as accountability, transparency and participation in governance processes.339 These "principles" represent regime values that undergird the framework adopted under the Convention and within the context of statutory interpretation by the courts, they can play a pivotal role in determining the nature, scope and functional utility of the provisions of the Convention.

In comparative terms, the Convention appears more pragmatic and even somewhat intrusive on domestic policies than many conventions adopted on the continent. Thus, its requirement for member countries to adopt domestic legislations prohibiting things forbidden by the Convention is peculiar and shows a bold attempt to unravel the menace of corruption using the influence of continental diplomatic leverage. This provision ostensibly contemplates the passage of laws criminalizing corruption and instituting clear punitive regimes for the practice. While it understandably remains silent on the specifics of the national actions needed to be taken to deal with the problem of corruption in this vein, the obligation created invariably tasks the legislative, police and judicial authorities of state to fight corruption using the mechanism and methodology of the formalist ROL. It is significant to state at this stage that even though Ghana has been a member of this multilateral treaty arrangement since 2007, the country has failed to enact a composite legislation dealing with corruption. Existing legislations are scattered and fragmented and lack the overt focus needed to deal with the complex manifestations of corruption in the modern political economy. The major legislation on corruption in

339 Id

Ghana being the Criminal Offences Act or law tackles corruption in a piecemeal approach and narrowly circumscribes its general operation as a law relative to the offence of corruption.340 Thus, while the passage of pieces of sunshine legislations as well as the Office of Special Prosecutor law represent important steps in that direction, it is useful to recognize those kinds of legislations as being more procedural in nature as contradistinguished from the substantive punitive legislations contemplated by the Convention. Even so, procedural legislations like asset declaration laws which have been in existence since the early formative years of the constitutional regime in Ghana have been largely observed in breach.341

Even more noteworthy of the Convention is the insertion of pragmatic provisions on extradition designed to nib the problem of impunity truly in the bud. This provision was ostensibly adopted to overcome the practice where fugitives of justice hid in other countries on the continent who shield them against requests for extradition. On the other hand, the subject of extradition under general international law tends to be further complicated by the mutuality requirements of the law in respect of which a country against whom an extradition request is made is only bound to honour the request where there exists an extant extradition agreement with the country making the request in the first place. The approach adopted is novel. Under the Convention, a country making a request for extradition can rely on the Convention *per se* and the country against which the request is made is obliged to

340 The subject is treated rather narrowly and limited to engagements or dealings with public officers. See Sections 296(5), 145, and 252, Ghana Criminal Offences Act, (1960), Act 29.
341 See, Asset Declaration In Ghana: Public Deception or Reality? http://www.gaccgh.org/details.cfm?corpnews_scatid=7&corpnews_catid=7&corpnews_scatlinkid=115#.XtWEjS-cZQI

honour it and to treat the Convention as an extradition treaty for purposes of the mutuality requirement. This provision, together with the provision on mutual legal assistance, removal of banking secrecy relative to corruption investigation, and confiscation of assets, fortifies the Convention in its overall goals and objectives of fighting to prevent and eradicate the canker of corruption in Africa.

These core provisions notwithstanding, it bears mentioning that the Convention has certain deficits in some areas that needs attention. Provisions with key claw-back clauses remain problematic and pose internal problems for the Convention and the otherwise noble intentions motivating its adoption. For example, the removal of the immunity of public officers to prosecution contained in the Convention is fundamentally made subject to domestic laws, which may impose these immunities, and thereby shield alleged perpetrators of corruption from prosecution. This provision in the form it is remains defeatist and undoes any strides made to root out impunity once and for all within the body politic of African governments. Even more disturbing in this vein is the Convention's provision criminalizing the making of false claims of corruption against public officers and further penalizing such claims. This provision undermines the public interest dimensions of corruption-related complaints and the need therefore to safeguard initiatives by persons lodging these complaints. By criminalizing the making of false complaints, the law is unwittingly de-incentivizing the practice of making complaints that may ultimately lead to the prosecution of corrupt officials of state. This provision is especially problematic in a country like Ghana where established state institutions depend on the initiatives of private citizens to investigate and prosecute corruption. From the standpoint of

policy, this provision weakens the resolve of the AU and the Convention to shift the balance of blame from alleged culprits of corruption to the complaining public instead. This is because by punishing the making of 'false claims' or complaints of corruption, this provision invariably imposes a minimum cost of due diligence on the complainant or person lodging a complaint of corruption and this is unduly burdensome within the context of the making of public interest complaints.

The extent or degree to which the Convention has been applied in Ghana however remains unclear at best. Yet at different thematic levels of application, it would appear that the implementation of the Convention and its values suffers at the institutional, substantive and policy levels of governance. Institutionally, the failure to build and/or strengthen key institutions in the fight against corruption deviates from expectation of a progressive realization of the Convention's goals by Ghana as articulated in the treaty. For example, while the main bodies on anti-corruption in Ghana predate the adoption of the Convention, these institutions have by and large been weakened or starved of support by the creeping erosion of resources and authority. The case of the CHRAJ as earlier discussed in this chapter, typifies a policy and systemic trend in Ghana and this has served to undermine the fight against corruption. Even more surprising is the case of the office of the special prosecutor whose establishment was hailed as marking a historic moment in the fight against impunity and corruption yet has struggled to officially take-off in practice. Critics are united in their conviction that the failure of that body to mount the requisite number of investigations and/or prosecution is due to the lack of the needed political and

financial resources necessary for its work.342 Thus, while the legal landscape fairly reflects a sufficiency of institutions dedicated to combat the menace of corruption, it is arguable that these institutions continue to grapple with the problem of scarcity of resources, inadequate supply of manpower, dwindling scope of mandate and authority, and the lack of political support in addition to a host of other systemic obstacles and difficulties.

Substantively, Ghana has largely failed to implement provisions of the Convention which advocates the adoption of legislations implementing the provisions of the Convention. As earlier argued, the laws of Ghana on corruption are both scattered, benign in outlook and generally ineffective in combatting corruption as a national vice. In other words, in addition to the absence of a compendium of legislation dealing with corruption, existing rules on the subject are very backward and antiquated in orientation and lack the needed scope to deal with the complexity of corruption in the modern world. The principal legislation on the subject343 lacks the core features of an anti-corruption legislation, namely, responding to the complexity of gifting, bribery, conflict of interest, benefit tracing and exploitation of office. Significantly, the aspects of the law dealing with corruption have not been modified for well over forty years and its impotency is telling in both the number of people prosecuted under it and the convictions secured or the lack of it.

342 See United States Department of State, Country Reports on Human Rights Practices 2011, https://books.google.com.gh/books?id=em16JXDkuUgC&pg=PA265&lpg=PA265&dq=chraj+lacks+resources+to+do+its+work&source=bl&ots=7L-bGmY9V7&sig=ACfU3U0bTrfbQxbtEZZ-avCOOmvwxRRV6Q&hl=en&sa=X&ved=2ahUKEwiG6YCy2eHpAhU0pnEKHeCgAkIQ6AEwCXoECAkQAQ#v=onepage&q=chraj%20lacks%20resources%20to%20do%20its%20work&f=false

343 Criminal Offences Act, (1960) Act 29

From the standpoint of policy, the paucity of corruption-related policy instrument within the governance of Ghana framework remains instructive. While it may be argued that recent attempts at passing sunshine legislations and establishing institutions designed to fight corruption all represent policy overtures of the government of Ghana, it is equally important to note that with the notable exception of the current NPP government which, while in opposition, made it a priority agenda to combat corruption when elected, the subject of corruption have only recently been forced onto the priority policy conversation and governance discourse. This is further reinforced by the posture of government towards the complaints or accusations of corruption normally levelled against political actors and officers of state. The normal practice has been for government to demand that persons making complaints against sitting officials of state should provide evidence rather than these governments taking the proactive step of investigating the alleged offences. Mixed with the near absence of the culture of resignations pending the completion of these investigations, the policy posture of governments in Ghana to the combat of corruption has been one which can at best be described as laid-back and at worse indifferent. The policy dynamics of government in Ghana on corruption is a reflection of its reticence to fight the menace in the face of the obvious benefits and perverse incentives that corruption generates for the political fortunes of any given ruling party in the country.

CONCLUSION

It is clear from the discussions above that the menace of corruption remains not only pervasive but entrenched in Ghana. Its manifestation in this regard remains complex and evolving and so is there a constant mutation and transformation of the actors and subjects of corruption. On the other hand, legal and regulatory variables exist and continue to be implemented to deal with the vexed phenomenon of corruption with sub-optimal rates of successes in the extent to which they control and suppress corruption in general. Thus, while the formalist ROL stratagem has indubitably been used as a primarily preferred, and in many cases, a unilateral approach to solving the problem of corruption in Ghana, the evidence shows that the combat tool reflected in the ROL has lagged behind the social manifestation of the menace of corruption in Ghana and the regime has consequently failed to regulate or nib the phenomenon in the bud. Consequently, the plethora of legislations and other ROL reform strategies continue to falter in the face of the growing incidence of corruption and this merely speak to the insularity of the implementation model of the ROL adopted within the context of the other complementary tools that could have been harnessed in the fight against corruption. This subject then addresses a fundamental problem dealing with not only the poverty of the formalist ROL strategy adopted, but also how that approach may have in fact impeded a broader contextualization of corruption and the adoption of effective and efficacious combat tools for its suppression and eradication.

CHAPTER FOUR

HUBRIS AND FOLLY: SITUATIONAL REVIEW, EMPIRICAL RESEARCH FINDINGS AND ANALYSES

INTRODUCTION

The gulf between regime layout and the realities of its operation continues to widen and deepen in Ghana. From the establishment of constitutional bodies to sporadic reforms that are instituted from time to time, Ghana's governance framework and legal regime reflects ideal systems, structures and norms designed to promote optimal governance and the ROL in general. On the other hand, the persistence of the ills of good governance including corruption presents a complexity that demands a deconstruction and critique. The context of this work especially presents an opportunity to review the various antinomies of "regime ideals" and "reform outcomes" and how this impacts the effort at fighting corruption. These deficits reflect in the workings of institutions established in the wake of reforms, as well as prevalent rules enacted. The effect shows at various analytic levels and presents opportunities for review and examination within the context of this research.

While the dynamics of the ROL and the relationship of the aid community involved in the fray of the ROL-corruption polemic has been explored in the preceding chapters, it is important to restate the fact that reforms in the ROL intended to optimize the

benefit and impact of the law as a tool in fighting corruption has generally been deemed to have failed in realizing the intended goals and objectives of utilizing the ROL to combat corruption and help in the ultimate elimination of the canker. Again, as argued in this work, the failures may have rather dangerously beclouded the ills and weaknesses of the governance system in Ghana given that past diagnostic initiatives have proceeded on wrong footings and resulted in distorted conclusions on the causes of the failures.[344] This state of affairs has inspired two parallel strands of arguments in the scholarship with the aid community advocating for an aspiration towards ROL perfection for countries with weak ROL regimes within democratic establishments. This view essentially the argues that democracy is imperfect without an efficient regime of the ROL. The other view held by scholars like Carothers argues that a reasonable degree of imperfection in the ROL regime is or should be deemed acceptable for purposes of the democratic setting in a country.345 For scholars of this calling, prevalent weaknesses in the implementation of the ROL should be both anticipated and tolerated in any governance framework and design. Yet these two views fail to address the gaps in the literature that inform this research. The encouragement of weak ROL regimes to aspire towards perfection falters given the path dependency of ROL reforms and the repetitive cycle of failed models in its quest to reform and improve on the state of governance in any given country.

On the other hand, the suggestion by scholars Carothers' ilk that an acceptable degree of imperfection should be accepted in the design states an obvious truth

[344] M.H. Khan, Governance and Anti-Corruption Reforms in Developing countries: Policies, Evidence and Way Forward, *G-24 Discussion Paper, No. 42. November 2006*, https://unctad.org/en/docs/gdsmdpbg2420064_en.pdf

345 T. Carothers, Promoting The ROL Abroad: The Problem of Knowledge, Working Papers, Rule of Law Series, *Carnegie Endowment for International Development*.

about the shortcomings of all human institutions but fails to offer any comfort in terms of the threshold of failure that can or should be considered acceptable.

Furthermore, the modern history of the ROL in Ghana shows that the regime has been evolving and taking on shifting meanings. Beyond the formalist ideal of facial compliance, the exploitative use of institutions and the wide conceptions of power have led to new thinking and application of the ROL in Ghana. The culture of legislative reforms in the midst of rampant abuse of authority and manipulative implementation of the law reflect nuances in the weaknesses or failures in the formal model of the ROL as conceived and implemented within Ghana's governance reform framework.

In first part of this chapter, I will review the dissonance and deniability prevalence in systemic structuring and end-values of the governance system established in Ghana. This is especially crucial given the litany of regime ideals versus reality gaps that obtain in Ghana. The chapter will also review the application of the ROL in varying contexts and how that impacts on the fight against corruption. In this context, the chapter proceeds to further examine the dynamics of corruption management and regulation in Ghana. Discussions of these topics will provide the needed template for an evaluation and synthesizing of the responses of the empirical research in the second part of the chapter. Consequently, and more crucially, the chapter will analyze the empirical data collected in the course of this work and seek to connect them to the thematic subject of this research. Given that the methodology adopted in the work is qualitative, the research was mainly exploratory in outlook and sought

to gain insights into the complex synergies and tensions between the governance framework prevalent in Ghana on the one hand, and the ROL and corruption, on the hand.

I. SYSTEMIC STRUCTURING VERSUS REGIME VALUES

Ghana's governance framework mirrors an ideal type in many ways, at least at the superficial level. In general, the basic laws and institutions needed to ensure that good governance obtains are present within the plethora of legislations, systems and structures that have been put in place to promote efficient administration and management of state resources. From the standpoint of democratic governance, the 1992 Constitution provides broad guarantees of responsible governance by making universal adult suffrage the basic medium of promoting feedback and responsibility of political office holders. This is capped with the representation of the people in critical decision-making processes and institutions including the election of members of parliament, and this is designed to provide a means of ensuring that the broad interests of the various constituents of Ghana are represented in the legislative process.

Beyond this, the Constitution has deliberately structured and put in place key constitutional bodies with mandate to mediate the general deployment of power

within the established system. So for example, the establishment of the CHRAJ[346], like other quasi-judicial bodies is designed to create a constitutional buffer and ensure that the powers vested in them are harnessed to promote the ultimate justice delivery mandate of the judiciary in Ghana. At the macro level, institutions like the judiciary and the legislature are specifically structured to promote the mandates of administering justice and making laws respectively. Put together thus, the overall architecture of the Constitution is designed to ensure that legal and justice institutions promote the ROL and advance the causes of the values espoused by the concept. Viewed from the angle of the fight against corruption and its dynamics in Ghana, the Constitution exemplifies a regime which both suppresses and penalizes the vice. In the specific case of the 1992 Constitution, the regime caps this by imbuing the constitutional frame with soft norms like the code of conduct for public officers[347] and other systemic values designed to inform official action and constrain the preferences of elected officials.

These notwithstanding, the operational deployment of constitutional bodies and the general bureaucratic apparatuses in Ghana is marked by a mismatch between regime expectations or ideals and the realities of things. For example, while the Constitution establishes a strong executive and empowers the president to appoint as many ministers of state in addition to establishing institutions in that vein, this power has been routinely abused for ends that stand out of sync with the original intentions of the constitutional framers. This is further compounded by the excessive bureaucratization of the public and civil services in which the layers of structures and

346 Article 216, 1992 GHANA CONST.
347 Chapter 24, 1992 GHANA CONST.

strata have been augmented and opportunities for abuse enhanced.[348] The net effect of this has been increases in rent-seeking and corrupt behavior. While this may be hard to explain within the context of the years of donor-inspired reforms, the opportunisms presented to local elites and political actors cannot be discounted and remains palpable even. The combined use of conferred discretionary authority and executive power illustrates a general problem in Ghanaian governance culture in which political actors keep pushing the bounds of constitutional authority with the view to amassing power at the expense of regime values. The failures of constitutionalism in practice reflect a deeper but subterranean flaw in the political and constitutional arrangements of Ghana. In many ways than one, while the provisions of the Constitutions and other laws of the country reflect ideal types as obtain elsewhere, their deployment seem to fly in the face of hard contextual variables. A cursory review of the design and provisions of the Constitution will indicate that the document is modeled to reflect best practices in system ordering and structural arrangement as obtains in countries with mature models. Yet, it is a truism also that the laws and constitutional processes of countries must often be underlain by attitudes and social norms that are congruent to the laws and institutions.349 After nearly three decades of establishing a constitutional system,

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[348] F. Cudjoe, Bureaucracy Encouraging Corruption in Ghana, https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Bureaucracy-encouraging-corruption-in-Ghana-Franklin-Cudjoe-606561; S. Brierly, Local Government Corruption in Ghana: Misplaced Control and Incentives, https://www.theigc.org/blog/local-government-corruption-ghana-misplaced-control-incentives/; See also, H. Faruq, Corruption, Bureaucracy and Firm Productivity in Africa, *Review of Development Economics*, Vol. 17 Issue 1, February 2013, https://www.researchgate.net/publication/256045140_Corruption_Bureaucracy_and_Firm_Productivity_in_Africa.

349 K. Rahman, Overview of Corruption and Anti-Corruption in Ghana, Transparency International supra note 204. The author notes that corruption in Ghana is endemic partly because of the expectations of Ghanaians to amass wealth for the sake of helping family members and other dependents.

the reality in Ghana has been one in which the laws and powers conferred by them have been exploited to advance the objectives of official actors towards corruption.

This then exposes a fundamental means-end conundrum in which the original intent of the designers or framers has been hijacked and exploited to parochial ends by actors with ulterior motives. Needless to state the obvious and assert that the original intent of the constitutional framers is to establish strong institutions anchored on the ROL and mediated by such values as ethics and integrity in public life, the reality has been that allocated powers have been applied and enhanced at the expense of the state and its overall interest. It is obvious from the design of Ghana's laws and institutional structuring that the certain proclivities and dynamics were ignored in the framing of official authority and this has ultimately served to promote exploitative behavior on the part of public officials leading to the normalization of corruption in state and public affairs in the country.

The incidence of red tape and heedless bureaucracy deserves particular mention in this regard. The complexity and sheer scale of the situation gauged from structures and human interface scenarios have defied many a hypotheses and remains the subject of ongoing research.350 From the prevalence of endemic corruption and rent seeking at major levels of the civil service to the pervasive pandering to politicians for favors, the causes and influences of corruption within the bureaucratic set of Ghana remain complicated. Given however that the bureaucratic

350 A research funded by the International Growth Center (IGC) found that levels of corruption in the Ghana Police Service was in fact seen to have risen when salary levels went up within the institution. https://www.theigc.org/news-item/higher-salaries-worsened-police-corruption-in-ghana-according-to-igc-funded-research/

establishment represents a substantial portion of the public service in general, the incidence of corruption undermines the regime values undergirding that system of service. In the absence of the service culture within public service institutions, rent-seeking and personal gain has come to define the work of official actors within the public service. This state of affair runs deep and is reflected in many incidences of graft and corruption characterizing the work of important actors and institutions within the public service.351

While the character of the bureaucratic structure and its ROL in promoting corruption will be treated in the conclusion portion of this work, it bears mentioning at this stage that the state of corruption within the official bureaucracy is mainly contributed to by such factors as structural overlaps in the functions of institutions, multiple layers of offices and institutions often granting approvals coupled with the wide latitude of discretions exercised at the behest of official actors. These inevitably not only make the bureaucracy clumsy and unwieldy, but a veritable ground fomenting corruption and rent-seeking. The Ghanaian bureaucracy is therefore a good reflection of the means-end tension in which the very institutions designed to lead in the delivery of public goods champions the exploitation of the state, even if unwittingly, institutionally speaking.

The failures of the governance regime to constrain the rent-seeking economy and surrounding habits of exploitation points to a disconnect between regime values and the actual output of institutions and laws established to deliver the goals of the

351 For example, members of parliament, judges, ministers of state, directors of state agencies etc. have all been accused of indulging in corruption and exploiting their offices for private gain.

governance regime. The persistence of the governance counter-cultures on the other hand, undermine the claim to regime stability and the general prospects of the rule of law. This point remains crucial given the superficial positive assessment often made of the governance system in Ghana. In other words, the fact that Ghana has been highly rated as one of the few countries in Africa with a stable and functioning good governance beclouds deeper fault lines in the operational structure and efficiency of the system of the prevalent system of governance. Just as has been repeated in many parts of this work, this flawed conclusion is the outcome of an overly formalist approach to measuring the governance system under which emphasis is placed on the existence of laws and institutions conducive to good governance and democratic rule *per se* without adequate corresponding emphasis laid on the surrounding context of the implementation of the ROL. In this regard, the existence of these variables have wrongly often been deemed as sufficient indication of their actual workings and effectiveness usually by external reformers and exploited by local actors. Indeed, it is arguable that the tendency to rate Ghana's governance system positively notably by donor agencies perpetuates the negative aspects of the regime as these become entrenched and resist any attempts at real or substantive reforms. Put differently, by endorsing the extant *status quo*, the donor agencies who have perennially rated Ghana's governance system highly may have unwittingly promoted the incidence of corruption which has for the most part been deemed to be an integral part of the actual functioning of bureaucracies in Ghana.

The means-end nexus in the light of the values of the governance regime in Ghana needs to be further problematized in the scholarship in order to create an understanding why corruption survives in seemingly perfect Ghanaian governance settings in general. The fullness of that enquiry is well beyond the scope of this work however. Nonetheless within the context of the relationship of the ROL to corruption in a governance reform setting, an appreciation of the role the ROL plays within governance as an anti-corruption tool remains a focal task. As can be seen from the generality of the analyses in this work, the hopes of using the ROL as a combat strategy is not only overrated and wrongly deployed, but in many cases misconceived given the implementation strategy adopted. The detached formalist implementation approach which informed the structuring and implementation of the ROL in Ghana has clearly failed to rein in corruption and curb its incidence at all levels of the governance framework.

II. **EVOLUTIONARY MUTATION: THE RULE OF LAW IN A GOVERNANCE CONTEXT**

As earlier noted in this work, the ROL constitutes a central strategy in advancing the values of the governance framework established under the 1992 Constitution of Ghana. *A fortiori*, the ROL has been used and adapted to curb emerging challenges

confronting the constitutional system including the increasing spate of corruption both in depth and scope within the Ghanaian political and governance space. This notwithstanding however, and as stated elsewhere in this work, the implementation model of the ROL adopted in Ghana is inherently formalist and that has led to a wedge being created between the ROL on the books and what actually prevails on the ground. This creates a conundrum in which an optimum version of the ROL is articulated in reform packages and subsists side-by-side practices and acts that are not in tandem with the values and virtues of the ROL.

Another way of reflecting on the Ghanaian ROL difficulty is to view the regime practiced in Ghana as embodying the generic concept of the ROL with shifting but subjective and exploited application and interpretation. As a starting point of reviewing the evolutionary mutation of the ROL in Ghana, it is noteworthy that the 1992 Constitution makes provisions for the core ROL principles of supremacy and certainty by situating the Constitution at the apex of the legal and political arrangements. Provisions in the Constitution on certainty stress the requirements of legal clarity in the regulation of the rights and liabilities of the citizen. While the constitutional court has struck down some legislations on grounds of failing the test of certainty, many laws still remain on the books in spite of the fact that they embody fluid language which ordinarily can be deemed to permit wide discretionary authority and shifting meanings from time to time.[352] In short, both the textual dimensions of the ROL and the judicial interpretation of the law reflects significant degree of uncertainty on the practical boundaries of the ROL as implemented on the

[352] See generally the Criminal Offences Act ,1960 (Act 29) as amended.

ground, and in the case of corruption, its viability as a tool in fighting the menace remain even more doubtful.

At the other end of the spectrum however, the Ghanaian Supreme Court has been churning out jurisprudence conducive to the development of the ROL as an anti-corruption tool. Thus, in a series of cases decided by the court, the judiciary has been making a conscious attempt at constructing a principled path for bolstering the accountability of government and shedding light on the operations of government business. Thus, in a case involving the execution of contracts on behalf of government per international business transactions, it was decided that, while it was the prerogative of government to enter into deals on behalf of the Ghanaian state, these transactions had to be submitted for prior parliamentary or legislative approval.[353] In a similar vein, the Court has decided that in instances where certain persons have been found by the Auditor General to have embezzled or misappropriated some moneys, the latter has the authority to surcharge these persons with the known amount and enforce its payment against them.[354] This particular decision is crucial in the annals of the accountability regime in Ghana as it strongly rejects the triumph of impunity by promoting a regime based on institutional and systemic accountability. Together, these decisions constitute a pattern and direction of the judicial approach towards accountability and the fight against corruption in Ghana. Conversely, these decisions of the Supreme Court demonstrates a shift from the traditional approach in which the open and flagrant

[353] Yeboah v. Electricity Company of Ghana & Ors., (J1/7/2016) [2016] GHASC 42 (28 July 2016); John Akparibo Ndebugri v Attorney General & 2 Ors, Writ No. J1/5/2013 The Attorney General vrs. Balkan Energy Ghana Ltd And Others (J6/1/2012) [2012] GHASC 35 (16 May 2012)

[354] Occupy Ghana v. Attorney-General, Writ No. JI/19/2016, 14th June 2017

dissipation and waste of public resources is left to go without any measure of accountability. The emergent trend developing in the decisions of the Court is fortified by the Court's change of position in the question of the justiciability or enforcement of the directive principles of state policy contained in the Constitution. From previously holding that the set of provisions contained under the Directive Principles of State Policy contained under the Constitution were non-justiciable, the court has now held that the said principles are in fact justiciable unless otherwise held. Its new stance on the provisions are both pragmatic and constructive and serves to thrust the court in the fray of contested issues of policy.[355]

In light of these decisions thus, some will argue that the ROL remains the most effective tool in the fight against corruption in Ghana. While this subject will be addressed in some detail in the conclusions to the work, it bears stressing at this stage that these decisions notwithstanding, the implementation of the ROL in Ghana as a combat strategy suffers from multiple enforcement deficits. Indeed, these decisions and the entire judicial enforcement model obscures underlining structural and systemic challenges which ultimately affect the use of the courts in the implementation of the ROL and the fight against corruption. The challenges in this regard are many and range from the costly aspects of litigation, delays, and time consuming nature of the judicial process, and the selectivity of prosecutions and and state-driven suits. These factors challenge the general impact or effect of the judicial process and undermine the efficacy of using the judicial machinery as a broad-based

[355] Lotto Operators Association v. National Lottery Authority, (2008) JELR 68447 (SC), SUPREME COURT · REF. NO. J6/1/2008 · 23 JUL 2008 ·

machinery or tool in the fight against corruption. Thus although the emerging judicial activism on the subject of corruption seem to deviate from the gnawing trend in the fight against corruption, the approach remains inconsistent and appears sporadic in character and lacks that sustained drive to amount to a shift in trend and emphasis.

III. A THEORY OF LEGAL CORRUPTION AND ILLUSIONS OF THE RULE OF LAW

The foregoing illustrates a reality, namely that the implementation of the ROL as a combat too against phenomenon of corruption in Ghana needs to be deconstructed, analyzed and finally repackaged. On the face of it, the acts, which are ultimately deemed, corrupt in Ghana, present no difficulty as they exude the features of legality and indeed permissibility. Clothed with authority to undertake transactions, which encapsulate corrupt and rent-seeking behavior, public officials often act with legal authority and exploit gaps and holes in the law to do and advance the private interests for which they act. Kaufmann *et al's* concept of legal corruption provides a useful theoretical framework and starting point for an understanding of the layered complexity of the phenomenon of corruption in Ghana in the face of the use of the ROL as a remedy or combat tool.356 As earlier noted in this work, their theory prima facie presents a paradox as the phenomenon of corruption is quintessentially

356 D. Kaufmann and P.C. Vicente, Legal Corruption, supra note 214

deemed to be an illegal act in Ghana as it is in many countries, and accordingly the idea of classifying corruption as 'legal' would invariably represent a contradiction in terms. Yet, his typology recognizes the nuances and subtleties of corruption in countries as Ghana and its evasions of the ROL from one context to another. In their words,

Our theoretical model proposes a new (to the best of our knowledge) explicitly micro-founded definition of corruption: it is viewed as a collusive agreement between a part of the agents of the economy who, as a consequence, are able to swap (over time; we present a repeated game) in terms of positions of power. …This is the idea underlying high-level corruption or "influence", and is broader than the notion of bribery, which corresponds to a particular sharing pattern of the joint payoff from the referred relationship.[357]

This view of corruption recognizes the concerted character of the act and how therefore the dynamics of the vice takes on varying shapes and forms. Kaufmann et al's work sheds light on the calculated variables that drive corruption and how agents of the state through crafted official action are able to advance their private interest at the expense of the state. More crucially in the case of the subtleties of the phenomenon and its conceptual complexity in Ghana, Kaufmann et al's theory of legal corruption helps explain the "peri-offcial" or "peri-legal" character impressed upon acts of corruption over time by persons occupying official positions in the administration of state. Thus, very akin to rent seeking, the theory helps our

357 Id

understanding the persistence of corruption in the face of sustained initiatives of law reform under the aegis of the ROL. They expatiated on their model when they stated as follows:

…[W]e regard Legal Corruption as arising when the elite prefers to hide corruption from the population (what we will call ahead as investments in "legal barriers"). We specifically model this as a decision of the elite to reduce the horizon of analysis of the population, which can be interpreted as undermining collective action. This entails a cost for the elite. Red tape may be seen as a good example of a device implemented by an elite to obscure allocations from the population…358

Legal corruption thus occurs when the state, through official actors, deliberately invest in systems and structures designed to maximize their capacity to exploit public offices for private gain. In this regard, institutions of state are structured and erected with the parochial motive of utilizing their operation for corrupt purposes. The enhancement of bureaucratic systems exemplifies this practice under which the creation of new offices and entities of approval represent a deliberate strategy to create spaces in which official actors can exploit their powers for private gain through the enhancement of official authority at the expense of patrons of state institutions. Legal corruption can be viewed as the use of the state machinery as an

358 Id. Also see generally, G.G. Maciel Legal Corruption: a way to explain citizens' perceptions about the relevance of corruption, https://www.researchgate.net/publication/307547473_Legal_Corruption_a_way_to_explain_citizens%27_perceptions_about_the_relevance_of_corruption; A, Apathe, Unravelling the Anatomy of Legal Corruption: Focusing on 'Honest Graft' by Politicians, *Economic and Political Weekly* Vol. 47, No. 21 (MAY 26, 2012), p.55;

instrument of legitimation in the perpetration of corruption. This act of corruption is classified as legal given that the impugned acts are *prima facie* deemed legal having complied with all standard ROL requirements. Thus, unlike conventional forms of corruption which entail the circumvention of rules and breaches of law, legal corruption often involves the manipulation of prescriptive options laid down by law in a manner that leads to a predestined outcome and in favor corrupt actors. In other words, legal corruption involves the appropriation of state institutions deliberately installed to achieve corrupt ends by actors vested with the authority to manage the affairs of these institutions. Although the authors stated that this category of corruption is predominantly prevalent in developed countries, this is the commonest form of corruption in Ghana and it is also the most difficult to combat given its benign and peculiar dynamics. Multiple instances of this type of corruption have resulted in high level national scandals involving senior political figures in Ghana who had exploited and benefitted from transactions involving their offices in ways that appear legally permitted but substantively opportunistic.[359]

Given that the ROL orthodoxy is based on the assumption that the impugned acts of corruption will overtly be in breach of specific provisions of the law, legal corruption presents a peculiar complexity. Being often perpetrated by persons in authority who

[359] See, Corruption Scandals in Ghana, https://www.modernghana.com/corruptions/; Ghana Loses $3billion to Corruption Every year, https://www.occrp.org/en/daily/10498-ghana-loses-us-3-billion-to-corruption-a-year; Notable corruption scandals that hit the Akufo-Addo government, https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Notable-corruption-scandals-that-hit-the-Akufo-Addo-government-811123; See further on this, The Republic vrs. Eugene Baffoe Bonnie, Suit No. Cr/904/2017, Available at https://www.myjoyonline.com/news/national/former-nca-boss-board-chair-and-one-other-jailed-for-causing-financial-loss-to-the-state/

take advantage their positions of authority and allocated powers of discretion, legal is usually entrenched and remain harder to deal with. As a manifestation of corruption, legal corruption is intrinsically prohibited but legally justified at least looked at from formalist-literalist standpoint. In other words, the fact that a particular transaction may appear to facially comply with the law in Ghana is usually enough reason to pass it off as lawful. These kinds of acts are therefore often not the subject of investigations let alone prosecution. Another reason for the peculiar difficultly of dealing with this category of corruption is the character of actors often involved in this category of corruption. The mere fact that corruption of this kind entails the manipulation of legal rules and institutional process implies that the persons with the greatest incentive and opportunity to engage in it are likely to be high level political actors, senior managers in state owned enterprises and other politically exposed persons.

Legal corruption therefore challenges the efficacy of the formalist ROL orthodoxy as it represents something of an enigma to that model's focus in the fight against corruption.[360] The fact that legal corruption as a specie of corruption survives by latching onto the law itself through its scheming and exploitation of existing legal instruments, suggest that solutions to this vice must lie in a model extraneous to the offence. In other words, the use of the implementation model of the ROL in seeking to uproot legal corruption invariably fails as the rational evolution of legal corruption

[360] For an interesting perspective on the situation in Kenya relative to formalism and corruption, see M. Mutua, Legal formalism is the pagan's sword against war on corruption, https://www.standardmedia.co.ke/article/2001310032/legal-formalism-is-the-pagan-s-sword-against-war-on-corruption

has of necessity mastered the evasion of legal detection and remediation. Thus, past attempts to deal with this category of offence through the old approach of legal *incrementalism* or built up ROL have largely floundered due to conception flaws of the reforms and the very deliberate manner in which actors exploit spaces in the ROL approach in general.

It is important to note however that Kaufmann *et al's* work while broadly useful in drawing our attention to the distinctive dynamics and nuances of corruption, presents a distorted picture to the extent that it suggests that legal corruption could be intrinsically legal citing the example of the work of lobbyist in the United States. This conclusion is problematic and would appear broadly inapplicable to the Ghanaian situation. The prevalence of legal corruption exists within the context of acts that are substantively prohibited but which are facially allowed given the spaces in the formal law and weaknesses in the implementation process. Indeed, the example they cite of an auction in which an auctioneer and a bidder colludes to rig the auction typifies that category of corruption albeit at a more official level. In this regard, while favors to given to a party and discriminations against another in official transactions embedded in discretionary authority may seem perfectly legal, the reality stands that these acts constitute an exploitation of existing legal institutions and structures sometimes installed with the tacit motivation that these benefit elites and high level actors managing these institutions.

IV. STATE CAPTURE

This research will be incomplete without some discussion of the concept of state capture, which phenomenon has been topical in the governance experiences of countries in Africa. The practice of state capture has been said to be one of the most dangerous threats to the future of good governance in African countries. Conceptually defined, state capture represents a corruption of the state in which its agents and actors unofficially cede control over institutions and laws of the realm to groups and persons who often are their financiers.361 According to Mbaku,

State capture involves the appropriation of state institutions, organs, and functions by individuals or groups.362

In a similar vein state capture has been defined as,

Efforts of firms to shape the rules of the game to their advantage through illicit, non-transparent provision of private gain to public officials.363

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361 Government Anti-Corruption Strategies: A Cross- Cultural Perspective Vii, Y. Zhang & C. Lavena (Eds. 2015) (examining, inter alia, political corruption in various cultural locations and how it relates to state capture)

362 J.M. Mbaku, Rule of Law, State Capture and Human Development in Africa, 33 Am. U. Int'l L. Rev. 771 (2017-2018)

363 J.S. Hellman et al, The Dynamics of State Capture in Transition Economies, http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/1740479-1149112210081/2604389-1149274062067/2613434-1149276254021/quinghua_presentation_hellman.pdf. Also see I. Chipkin who argues that state capture occurs when "state institutions, potentially including the executive, state ministries, agencies, the judiciary and the legislature, regulate their business to favor private interests", I. Chipkin, *Corruption's Other Scene: The Politics of Corruption in South Africa, in* Governance, Resistance And The Post-Colonial State: Management And State Building 21 J. Murphy & N. Jammulamadaka (Eds. 2017).

A more comprehensive definition of state capture is given by the World Bank which defines the practice as,

[T]he actions of individuals, groups, or firms both in the public and private sectors to influence the formation of laws, regulations, decrees, and other government policies to their own advantage as a result of the illicit and non-transparent provision of private benefits to public officials.[364]

These definitions recognize the capacity of state capturers to hijack the structures of state and convert the role of these entities as deliverers of public goods for their own private gain. This implies therefore that state capture involves the subtle taking over of the state by elements and groups with defined agenda and parochial ends. These like other definitions have emphasized the externality of the persons or groups from the state institutions and structures influenced. Central to the definition of state capture by the Bank is the element of private benefit as the overriding motivation for the expropriation of the state apparatus and misallocation of public goods in that regard.[365] One feature which remains common to the various definitions however is the private character of the group or persons who appropriates the state and its authority for their private benefit. In this regard, the state becomes a vehicle and enterprise for the ultimate realization of the commercial

364 World Bank, Anticorruption In Transition: A Contribution To The Policy Debate Xv (2000), http://documents.worldbank.org/curated/en/825161468029662026/Anticorruption-in-transition-a-contribution-to-the-policy-debate

365 https://en.wikipedia.org/wiki/State_capture

goals and objectives of the individuals seeking to hijack or capture the state. For example, Pesic defines state capture as any group or social strata, external to the state that seizes decisive influence over state institutions and policies for its own interests and against the public good.366 The opposition of the actors involved in the practice of state capture to the interest of the state is clear given the tendency of these actors to exploit the public interest dimensions of state policy by appropriating these for private gain.

This notwithstanding, scholars disagree on the exact character of the practice especially on its dimensions as a genus of corruption.367 Thus, while some contend that state capture is not corruption and seek to distinguish the act from mainstream corruption, the generality of the scholarship seems to accept the sameness of the two acts. The World Bank, which invented the concept, however views corruption as incorporating state capture.368 In so doing, the Bank urges the adoption of a wider lens in the definition of corruption.

366 V. Pesic, State Capture and Widespread Corruption in Serbia. CEPS Working Document No. 262/March 2007. www.ceps.eu/ceps/download/1309. See also Lily Evelina Sitorus, State Capture: Is It A Crime? How the World Perceived It. https://www.researchgate.net/publication/280843044_State_Capture_Is_It_a_Crime_How_the_World_Perceived_It

367 The dimensions of state capture invariably incorporate many acts that could be considered corrupt practices. According to Mbaku, supra, 'there is a special type of state capture called "prebendal predation," which does not directly involve private business interests but within which a system is created and directed by civil servants (i.e., state bureaucrats), and these civil servants use their official positions to directly extract extra-legal income from citizens. Specifically, civil servants, "organized in pyramidal prebends, [are] able to extract resources from officials occupying a lower hierarchical position. Going down the ladder, the lowest-placed officials abusively [extract] bribes and illegal fees directly from. Clearly the scenario depicts a vicious cycle of corruption given the manifest exploitation of public office for private gain by officials appoint by the state.

368 Y. Zhang & J. G. Vargas-Hernindez, *Introduction: Corruption and Government Anti- Corruption Strategies, in* Government Anti-Corruption Strategies: A Cross- Cultural Perspective xiii, xiv Y. Zhang & C. Lavena (Eds.), 2015. Yet it is significant to point out the fact that, while large or grand forms of corruption invariably involve elements of capture, the dynamics in petty corruption needs to be contextualized as often moneys and payments made in this regard are extracted by officials in

Significantly however, the conceptualization of the practice appears to widely limit state capture to the firms, ethnic groups, the military and politicians. In Africa, the phenomenon transcends these actors and includes individuals with network and influence who shape the direction of legislation, policy and reform in defence of private interests. State capture has become a critical problem of governance and threatens to undermine the stability and legitimacy of democratic governments. Given its core feature of "hijack" of the legal and institutional echelons by vested interests, state capture carries with it the biggest risk and prospect of distorting the democratic mandate by giving unelected persons the ultimate power of decision-making and allocation of resources in addition to other risks.369 In other words, by ultimately divesting state power and vesting it in certain identifiable but informal influencers, state capture undermines democratic regimes by depriving elected officials of the needed freedom of action and in the process disabling their capacity to respond to the needs of the public for which they were elected into office in the first place. Furthermore in this regard, it has been argued elsewhere that state capture can exacerbate income and wealth inequalities thereby reinforcing the economic impact of practice on the generality of the poor.370 This therefore brings

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contradistinction to the concerted character of grand corruption and corruption involving state capture.

369 *See* A. Noman & J.E. Stiglitz, *Strategies for African Development, in* Good Growth and Governance In Africa: Rethinking Development Strategies 3, 21, A. Noman et al. (Eds.) 2012 (discussing how deregulation, market liberalization, and privatization are susceptible to state capture).

370 J.M Mbaku, Rule of Law, State Capture, and Human Development in Africa, supra note 205

to the fore the concrete impact of state capture on the governance fortunes of a given state, such as Ghana.

Ghana's situation needs further reflections. Inherent subterranean factors like political party financing and compensation for private financing of parties tend to reinforce the prevalence and effect of state capture. By sponsoring candidates and whole parties in elections and in-between electoral ventures, political parties become beholden to these financiers who become godfathers of sitting governments and dictate the direction of policy and entitlement allocation.

Just as it is in the case of corruption, advocates of the formalist ROL orthodoxy argue that where the ROL exists, state capture as a phenomenon will either be reduced or completely eliminated. Scholars like Mbaku argue that, the direct correlation between these two variables stems from the efficacy of the ROL in curbing and completely prohibiting the act of state capture through the enforcement of the law and structured institutions.371 In his view,

Governing elites-civil servants and politicians-like their fellow citizens, must accept and respect the country's laws, subject themselves to these laws, and refrain from engaging in corruption, rent seeking, and other forms of opportunism. Thus, where the law is supreme, state capture is likely to be minimized.372

371 Id
372 Id

Mbaku's position reflects a deep-seated belief in the principle of legal supremacy and its capacity to deal with the differential standards in resource allocation that is often introduced by state capture. The seemingly obvious aspect of this notwithstanding, this position fails to deal with the difficulties posed by the passive or objective adherence to the law by government and its officials in a formalist ROL context and how that may perpetuate inequalities and capture scenarios in a state. As will be further highlighted in the conclusions portion of this work, the Ghanaian example poses this difficulty and answers to this are barely provided in the existing literature. Thus, it is commonplace to see instances of capture in the face of legal supremacy and sufficiency, and in this regard, it is arguable that the principle may in fact even be used to advance the interests of the capturers as things are done in the name of the law and facial compliances with the law makes it difficult to detect and eliminate acts or elements of capture in specific transactions.[373]

The reality of state capture and its developing effects on the Ghanaian polity cannot be overemphasized. As noted above, the practice distorts the legitimacy of the state itself and its actors by vesting financiers and power brokers with *de facto* but ultimate power in the passage of legislations, policy deployment, as well as design of national development programs. Dealing with the menace of corruption from a sustainable standpoint will indubitably have to involve a strategy to contain and ultimately eliminate the practice of state capture from the governance paradigm of Ghana.

[373] Earlier discussions on the exploitation of the rules on public procurement in Ghana amply illustrate this.

EMPIRICAL RESEARCH

This research begun with three different but interrelated set of research questions implicated in the topic. These questions probe the gaps in the scholarship and are designed to help in unearthing the complexities surrounding the implementation of the ROL in the governance reform initiatives in Ghana. The research questions are as follows;

1. *Is the implementation of the "formalist or ideal rule of law" an effective tool or panacea for dealing with the problem of corruption?*

2. *Does the implementation of a particular version of the rule of law affect the combat or control of corruption*?

3. *Why does corruption survive and even thrive in the midst of the rule of law reform in Ghana?*

METHODOLOGY

In order to gather adequate and relevant data that helps in critiquing the scholarship and answering these questions, I adopted a methodology which is hybrid in nature and combines methods of data collection involving desk and library research with field work empirical research. Given that the work involves substantial doctrinal and theoretical analysis of concepts and relationships, the desk research provided a useful means of reviewing the literature and scoping the scholarly positions on the themes covered by the research. The focus of the preceding chapters on doctrinal subjects was designed to provide the requisite background and theoretical rigour for the research contained in this chapter. The foregoing chapters have also been structured to give the research the needed intellectual context and advance a principled justification for the recommendations made in the final chapter of the work. In this regard, the research employed such primary research instruments like questionnaires and secondary data like that contained in the available scholarship on the topic being investigated. In this regard, this work benefitted from methodological triangulation as I employed the multiple means of data collection like interviews, questionnaires, and desk research.

The research was essentially a qualitative one and in this context, qualitative research is defined as,

the interpretative study of a specified issue or problem in which the researcher is

central to the sense that is made.374

The population to whom the interviews and questionnaires were administered were carefully chosen to reflect the information sought and in light of certain strategic and relevant indices affecting the respondents to the research. In this regard, respondents came from carefully selected and high impact sectors that reflected the broad scope of actors in the field of the research or investigation including the following;

1. A former Chief Justice

2. A former Ombudsman and former judge of the International Criminal Tribunal for Rwanda

3. Members of Parliament,

4. The Executive,

5. Independent constitutional bodies,

6. The Police Service,

7. Civil society,

7. IGOs,

8. Judges, and,

374 I. Parker, 'Qualitative Research' in P. Banister et al, (Eds.), Qualitative Methods in Psychology: A Research Guide, *Open University Press*; 1 edition (1997)

9. Academics.

The reason for the choice of a qualitative model of research lies among others in the fact that the investigation is primarily informed by the orientation of the work which focuses on eliciting the views of core actors whose work and experience impinge on the subject of this work and not necessarily to undertake an investigation designed to unearth the empirical scope and depth of extent of the problem of corruption within the context of the ROL and governance. This justification notwithstanding, the choice of the qualitative approach entails some notable weaknesses to which I was mindful throughout the research and writing of this thesis. For example, the smaller population size and close personal involvement of the researcher in the qualitative research had the prospect of introducing bias which may undermine objectivity in the data collection process. In order to deal with this situation and reduce the likelihood of interferences with the objectivity of research output to the barest minimum, the administration of questionnaires was sometimes done through third party assistants or remotely. On other occasions, respondents were themselves allowed to provide responses to questions in the questionnaires and same submitted when completed. This combination of structured interviews administered and self-administration of questionnaires enriched the outcome of the research and reduced the prospects of subjectivity and biases being introduced into the research process.

In addition, the questionnaire employed a combination of closed and open-ended questions in addition to open spaces provided for the expression of expansive views. The latter opportunity enabled respondents to freely express views on the themes of

the research without being inhibited by the slants adopted in the various questions asked.

In order to ensure that the respondents felt the necessary freedom of thought in expressing themselves given their backgrounds, the questionnaire employed an anonymity approach and accordingly kept blind the names and other bio-data of the respondents who volunteered in the research. Each respondent was informed and assured of this.

PROFILE & JUSTIFICATION OF PERSONS/ENTITIES INTERVIEWED

1. **Government/State Officials**

The structured and approved questionnaire was administered to state and government officials including a former Chief Justice, former ombudsman, members of parliament and ministers of state. The select officials of state were so chosen on the basis of their experiences in the application of the ROL to the subject of corruption within the context of governance. These officials were also selected on the basis of their knowledge and experience with the ROL reform in Ghana over time and their on-going participation at various levels of government policy.

2. Civil Society

The questionnaire was also administered to leading civil society organizations and think-tanks in Ghana. In this respect, officers of at least the two leading organizations provided responses to the questionnaire and their inputs yielded comparative perspectives of the implementation of the ROL and the prevalence of corruption in Ghana. The input of civil society and think-tanks was important for at least one fundamental reason, namely, the need to enrich the findings in this work by providing a detached and disinterested perspective of the subject from watchers and observers of governance. The views of civil society therefore provide a sort of external accountability viewpoint or barometer against which those given by state officials were evaluated.

3. IGOs & Academics

As in the case of the civil society organization, the questionnaire was administered to persons working in international governmental organizations (IGOs) as well as academics. Given that a focal aspect of this work dwelt on the role of development assistance entities in the fostering and promotion of the implementation of a particular brand of the ROL, the input of actors in that field is crucial to gaining an accurate and balanced view of the thinking and impressions of these institutions in the context of the state and the role played the ROL in governance reform and

corruption. The key respondent sampled within the World Bank is a very senior officer of the World Bank who leads projects on public sector reform for that institution and has had an extensive global experience in the area of public sector reform. The research benefitted immensely in this engagement in terms of gaining an understanding of the institutional background and context informing the ROL reform in Ghana and its predilection for the types of legal reform initiatives used to fight the menace of corruption.

MAIN FINDINGS OF RESEARCH

The research questions stated at the outset of this work and repeated in this chapter were informed by two critical hypotheses, namely,

1. The adoption and implementation of 'mythical' but formalistic model of the ROL, has proven ineffective as a tool in fighting corruption and promoting good governance or effective governance reform;

2. Corruption remains a growing problem in Ghana in spite of an incremental improvement in the legal and institutional framework.

I will at this stage of the work point out rather poignantly that the research conducted in this work broadly confirms these hypotheses. For a more complete processing and evaluation within the context of the research, the data collection and analyses process in the research went through the four transitional phases considered standard for such work, namely research initiation, implementation, integration and interpretation.375 In the end, the conclusions reached from the interpretation and analyses of the responses generated reflect the integration of the responses with the structured questions and the context of the overall research and the literature.

THEMATIC ASPECTS OF RESPONSES ELICITED

I. THE RULE OF LAW

Respondents to the research were substantially agreed that while the ROL was guaranteed as a constitutional norm within Ghana's governance framework, there are serious operational difficulties with the regime in the country. For example, while nearly all respondents agreed the ROL is broadly applied in Ghana's governance, they were equally convinced that the regime is largely ineffective in its application of

375 J. W. Creswell, Research Design, Qualitative, Quantitative, and Mixed Methods Approaches, *SAGE*, (2014).

core norms especially in its enforcement of the law as an anti-corruption instrument. To this end, respondent stressed that, there is dearth of legal accountability relative to corruption and the use of the ROL has failed to promote accountability in Ghana. Responded particularly chided justice institutions in their selective application of the law in specific matters involving accountability and punishment often based on biases and personal preferences. A common thread that run through this conclusion was the frustration shared by respondents on the capacity of both state officials and influential citizens to negotiate the implementation of the ROL by either securing the enforcement of the law in a manner that favors them or altogether suppressing its enforcement in order to preserve an unlawful activity being pursued by them.

In a similar vein, respondents were nearly unanimous in emphasizing the widespread prevalence of prosecutorial and judicial inequality in the enforcement of the law. A significant number of respondents argued that the exercise of the prosecutorial discretion has been used to shield political elites and thereby promote a regime in which there is deep political interferences in the prosecution of corruption-related offences. Some of the responses in this regard is even more nuanced as some of the high-level actor-respondents went further to suggest that the interference results in the skewed exercise of the legal or judicial discretion against political opponents of sitting governments in hard cases.

Another significant finding in the research was the universal agreement among respondents that the use of legislation as a combat strategy against corruption has generally failed to secure the intended effect of the reforms. To this end, some of

the respondents were agreed that the establishment of an office of a special prosecutor was both unnecessary and ineffective in contributing to the fight against corruption in Ghana. Thus, while some respondents believed that the use of legislation has failed and would continue to wobble in the face of the *real politik* dynamics of Ghana's governance, others suggested that the lack of political will is in reality the biggest deficit against the ROL regime applied in the context of the menace of corruption. Respondents of this persuasion stressed that the fact that the prevalent legal and institutional framework for combatting corruption in Ghana remain broadly adequate raises some curious questions for consideration in light of the conclusion that the ROL fails in operation and is accordingly sub-optimal in application. Respondents however suggested in their answers that the reason for the paradox of regime ineffectiveness in the face of adequacy lies in the integrity deficits of the personnel manning these institutions. In other words, while the fact of the scope and breadth of these institutions themselves may not be in doubt, these entities may be the subject of operational manipulation and exploitation by the officials whose job it is to man them. To this end, respondents suggested that the reason for the paradox may lie in the implementation process of the ROL through the work of the personnel manning the institutions of state.

An important revelation that came up in the course of the research was the role of lawyers and judicial corruption in the stultification of the implementation of the ROL and its values in Ghana. The former was forcefully highlighted as a major cause of impunity in Ghana given the ability of persons charged with the offence of corruption to engage quality legal representation and evade responsibility and judicial penalties

for their offences. This response was notable given the recognition of this reality in the doctrinal analyses portion of this work which said literature also converges with a hypothesis of the research. This fact underlies the impact of sub-systemic variables on the fight against corruption in Ghana. In the case of the latter, an important respondent being a former Deputy Attorney-General noted that the endemic nature of judicial corruption in Ghana challenges the effective combat of the menace. The import of this feedback cannot be overemphasized as it stresses the intractability of ROL reforms, and the general manner in which the formalist implementation model has been gone about.

The foregoing findings on the ROL reaffirm the hypothesis of this work in light of the state of the ROL in Ghana and its impact on the fight against corruption. Broken down in parts, the findings conclude as follows, namely (i) that the state of the ROL in Ghana is ultra-formalist and is largely legislative driven, (ii) there exists a gap between substantive provisions and guarantees of the laws on the one hand, and the implementation and actor preferences and manipulation of the law on the other, and (iii) the use of legislation as a combat strategy has largely failed given the absence or low levels of political.

The first conclusion confirms the core hypothesis of this work namely, the fact that the implementation strategy adopted in the reform and deployment of the ROL is the formalist and insular in approach. Thus, legislations have been repeatedly used as the first panacea to solving social and political vices, and the passage of these laws have been taken as a prima facie solution to the problems for which they were

passed. While some of the respondents even doubted the need for some of these laws and institutions established, it is clear that the overconcentration on legislations and laws *per se* betrays a certain lack of appreciation of the complexity and dynamics of corruption in Ghana. Indeed, the excessive use of legislation as may seem to be the case in Ghana, can in fact becloud the failures of the ROL by creating an impression of regime adequacy. In many ways, as is evident in the responses given, legislations have been treated as ends in themselves and the mere passage of laws have become equated with reform success in the evaluation of law and governance reforms relative to the problems of corruption. That tendency reflects the orthodoxy of legal formalism as applied in Ghana's governance reforms and sits out of sync with legal pragmatism.

II. GOVERNANCE

Responses generated in respect of the state of governance institutions, systems and practices in Ghana reflected broad agreements among respondents to core areas elicited in the questionnaire administered. For example, while respondents were generally agreed on the structural and systemic adequacy of the governance regime in Ghana, they were equally emphatic on the fact that governance codes and

principles are not followed in practice, and are mainly observed in breach.[376] This is significant as it reflects the regime guarantee versus practical reality disparity or anomaly in Ghana.

Another core finding that was near common to the responses generated is in the area of the practice of "winner-takes-all" which has remained endemic in Ghanaian politics since the inception of the current governance framework in 1992. Under this system, political parties who win elections deliberately embark on policies designed to rid or cleanse the public and civil services in addition to state parastatals of persons deemed to be politically loyal or sympathetic to the erstwhile government.[377] This is in addition to the creation of a political and business class, defined by allegiance to the ruling party who become solely entitled to the distribution and allocation of public resources to the exclusion of all other persons not deemed members of that class, officials down the rungs of the civil and public services get removed from office on grounds of their supposed sympathies for the defeated party. In order to reward the loyalties of their own followers and members, these positions are then filled by their own party members whether or not these persons possess the requisite qualifications for the positions involved. In addition to the dangers of patronage and *clientelism* promoted by the practice of "winner-take-all" policy, this practice enhances and entrenches a culture corruption through the

[376] Respondents were keen to draw attention to the discrepancies between proclaimed goals of the governance regime and the actual governance culture of officials and government. For example, it was printed out by a number of the respondents that while the governance system symbolized in the constitution and a plethora of legal rules mandates transparency and constitutionalism, in practice political actors gravitate towards acting in opaque ways while seeking to accord wide powers to themselves and even evading judicial orders.

[377] It has thus been the practice that following after every election, pubic and civil servants are often dismissed on suspicion of their political affiliation.

embedded patronage and loyalty of the practice. In other words, in addition to the incompetence of persons usually allocated resources or appointed to these positions, the "winner-takes-all" model engenders corruption through its protection of members of the class of persons who feel a sense of security against prosecution or other public sanctions and this fact was not lost on the respondents to the research.

Finally, and as earlier noted in this regard, a notable deduction to be made from the responses generated in the research is the feedback that while the ethos and values shaping the governance framework in Ghana is good in theory, these are routinely and cleverly manipulated and undermined by political actors. While also supporting the hypothesis of the work, this conclusion coincides with the literature and scholarly positions advanced in the doctrinal section of this work in which it was stressed that the structures and laws designed to promote good governance and transparent management of state resources are often hijacked and exploited for the sectional and parochial interests of mainly the political class.[378] As noted by Cox therefore, democratization, and in this regard, governance reform *per se,* is not tantamount to economic growth or development as governments can move to the left or right and usher in regimes opposed to the foundational ethos of democracy and good governance.379 Responses to the research in this vein reflect both the literature and

[378] O. Afolabi, Political Elites and Anticorruption Campaigns as "Deep" Politics of Democracy A Comparative Study of Nigeria and South Africa, https://www.researchgate.net/publication/334119621_Political_Elites_and_Anticorruption_Campaigns_as_Deep_Politics_of_Democracy_A_Comparative_Study_of_Nigeria_and_South_Africa

379 R.W. Cox, *Political Economy and World Order: Problems of Power and Knowledge at the Millenium, In* Political Economy and the Changing Global Order, *R Stubbs*, & G. Underhill, (Eds.), (2nd Ed.), *Oxford, Oxford University Press*, p29

hypothesis and support the need for a nuanced approach to governance reform moving forward.

III. **CORRUPTION**

On the theme of corruption, respondents were generally agreed that the menace remains a key and major problem in the governance of Ghana and management of the country's resources. Respondents were particularly of the view that corruption undermined the development of the country and destroyed the prospects of distributive justice and equity within Ghana.[380] On the question of the prosecution of corruption related cases, some of the respondents challenged the basis of complaints by citizens on the slow pace of prosecutions and argued that the mechanics and dynamics of prosecutions are affected by a variety of factors which may not necessarily be taken into account by the average citizen in his assessment of the prosecution of corruption-related cases in Ghana. In other words, while the objective reality of the prosecution of corruption-related cases may be affected by certain variables, social perception of the pace and number of prosecutions may overall be ill-informed. While this view was by no means unanimously held by the respondents, it forcefully presses home the belief and conviction of certain high

[380] See also, K. Rahman, Overview of Corruption and Anti-Corruption in Ghana, supra note 204

stakeholders in the governance process and the claim to concede a certain "margin of appreciation"[381] to the implementers of the regime on anti-corruption and laws passed in that vein.

Respondents also referred to the normalization of corruption within the body politic and governance of Ghana. In the view of this respondent(s), corruption has become acceptable as a legitimate way of recouping one's investment in the political process. Embedded in this notion is the difficulty of political compensation and how financiers of political parties have always expected returns on their support or "investment" by way of appointment to political office, the award of contracts or other benefits conferred for which they may otherwise not be qualified or entitled. This response again confirms the position addressed in the literature,[382] namely that the issue of political compensation represents one of the core levers of corruption in Ghana given the incentives attached party financing and the concomitant feelings of obligations and loyalty to these financiers by any given government in power in Ghana.

In a similar vein, respondents indicated that part of the reason for the failure of prosecution of corruption-related cases is the issue of executive dominance in the criminal justice administration especially from the standpoint of criminal prosecutions. This view stressed the fact that, the executive tends to interfere with

[381] The margin of appreciation (or margin of state discretion) is a legal doctrine with a wide scope in international human rights law. It was developed by the European Court of Human Rights, to judge whether a state party to the European Convention on Human Rights should be sanctioned for limiting the enjoyment of rights. The doctrine allows the Court to reconcile practical differences in implementing the articles of the Convention, https://en.wikipedia.org/wiki/Margin_of_appreciation

[382] See also, K. Anning and F. Edu-Afful, Regulating the Behavior of Politicians and Political Parties in Ghana, https://www.idea.int/sites/default/files/publications/regulating-politicians-and-political-parties-in-ghana.pdf

criminal prosecutions when it affects members of the ruling party. This view not only weakens the perceptual aspects of the fight against corruption, but that it also endangers institutional morale as persons tasked with the obligation to fight corruption feel a sense of dejection in their bid to suppress or eliminate the menace across the civil service and governance spectrum.

IMPLICATIONS OF FINDINGS

I. DYNAMICS OF THE RULE OF LAW

The foregoing findings from the qualitative research conducted implicate the core hypothesis underlying this work, namely the implementation model of the ROL in Ghana being the formalist ROL as the main strategy of combatting the menace of corruption, has substantially failed. In the same vein, the findings support the other sub-themes namely, the failure of the legislative strategy to effect change, and the triumph of the "political" over the legal in the prosecution of corruption cases in Ghana. These findings have dire implications for the state and the future of the ROL in Ghana, not the least of which includes the principles of equality and avoidance of discrimination, the dissonance between law making and its implementation, and the potency of the sub-cultural ROL regime.

The perceptions of interference in the enforcement of the law and in the prosecutions of cases of corruption invokes questions of the equality and generalized enforcement of legal rules against all persons without regard to considerations of extrinsic factors such as connections to political authority, economic influences etc. These findings demonstrate the continuing weaknesses of the ROL at least from the standpoint of core regime values and foundations as a concept in Ghana, and the need to reform the application of the ROL as a pivotal tool of good governance. As mentioned above, the finding bordering on the perception of discriminatory enforcement remains debilitating for the legal regime and especially so for the fight against corruption given the crisis of legitimacy and loss of morale it seems to have sown within the ranks of anti-corruption bodies. Viewed from the angle of engagement with the citizenry, this tendency may have had the effect of creating a sense of impunity among the citizenry who may have come to ascribe to the state, its endorsement and normalization of the negative exploitation of political and economic power and for that matter corruption in general. At the other end of the spectrum, ordinary citizens have come to feel both disenfranchised and victimized by the exercise of the prosecutorial powers and other punitive powers of the state. The implications of this situation cannot be overemphasized and gravely obstructs the optimal application of the law as well as the present and future state of the ROL.

In a similar vein, the reality and potency of the sub-cultural ROL regime as discussed in the doctrinal and literature phase of this work and confirmed by the research remains problematic. The expression "sub-cultural" is operationally used to denote

practices, behaviours, and informal policies that form, coalesce or percolate in the shadows of the formal ROL regime but impacts on the overall effectiveness of the ROL. The fact that the implementation of the formalist version of the ROL hides and masks the shadow world that subsists around it resulting from the daily negotiation of the law by powerful and influential people is a theme that has been earlier discussed. Suffice it to say however that the persistence and spread of both legal informality and the manipulation of legal provisions for parochial interests have tended to imply that the ROL has nearly always existed side-by-side with a competing albeit subverted regime of the ROL which is grounded in solidarity and a shared network and this operates at the level of informality. As earlier analysed in this work, this regime survives on a facial compliance with the ultra-formalist ROL although in reality and substantively speaking, the former trumps the intended ideal regime contemplated in the formalist ROL implemented. By confirming the reality of this ROL sub-culture, the findings of this work have in fact, merely reinforced the perception of political manipulations of the ROL and how this fact creates multiple versions of the ROL within the context of the implementation of the formalist version of the ROL.

Finally, under the ROL, these findings shed further light on the gaps and dissonance between law making and its implementation Respondents to the questionnaire were virtually unanimous in their view that there exists copious and manifest disparity in the enforcement of laws in Ghana. Notably in this regard, respondents noted that the equality principle is abused by the differential standards that are applied to different people in the enforcement of the law with considerations of social status

and connections to political authority playing important roles in the enforcement of the law. Again, as discussed in the theoretical section of this work, the issue of law making and its implementation represents one of the most important and problematic themes in the ROL regime in Ghana as this implicates key weaknesses in the formalist regime of the ROL implemented in Ghana and its ultimate weaknesses and sub-optimality.

II. CORRUPTION AND GOVERNANCE

Respondents were generally agreed that the prevalence of corruption was both a reality and an extant or existential threat to the governance regime in Ghana. This feedback coincides with the position assumed in the doctrinal analyses to the effect that corruption constitutes a central fault line in the governance architecture and undermines the stability of the regime in Ghana. Even more poignantly, respondents were explicit and overtly stated that corruption presents a problem for economic development given the sheer distortions in resource allocation and how public goods get exploited and expropriated into private hands and ownership. In this regard, respondents confirmed the widespread prevalence of both petty and grand corruption within the body politic of Ghana and stressed the need to fight or combat the practice.

Crucially and from a diagnostic point of view, respondents identified the absence of political will to fight the menace as the reason accounting for puzzling persistence of corruption within the governance system of Ghana. The issue of political will has already featured in the previous discussion in this work but remains topical in the fight against corruption in general as it provides an a seemingly intractable challenge to the effort at fighting corruption through the ROL. Given that this dynamic affects the capacity of state institutions to enforce the law and deploy policies to nib the practice in the bud as well as devise system-wide interventions that address corruption, its absence or the lack thereof gravely undermines the fight against corruption at the highest level.

This feedback in the research betrays a major problem in the fight against corruption in another way. The impact of politics and political leadership on general administration in Ghana permeates any reform instituted and defeats reform initiatives to the root. The failure of strong political support has a chilling effect on the desire and capacity of state actors to enforce rules and sanction corrupt behaviour and accordingly impacts any such reforms from both the substantive and psychological levels. Political will assures lower level actors of security and freedom of action in the enforcement of the rules against corruption. The dearth or paucity of the necessary will on the other hand within the context of Ghana has dire consequences for the state of corruption in the country given how this tends to undermine accountability and goad impunity. Thus, beside the dampening of morale of state actors, the failure of political will weakens the capacity of the Ghanaian state to follow through with its laws and policies on corruption by way of enforcement and

ensure a regime of zero tolerance for the vice in general. To put it more starkly, the absence of political will in fact operates in a more active way through the deliberate steps undertaken by officials to frustrate the implementation of the ROL through the removal of incentives for its enforcement and the heightening of the cost of any such enforcement. By removing and/or transferring officials tasked with the mandate of enforcement, labelling neutral civil servants as agents of opposing political parties, and generally demonstrating active and tacit disapproval of the enforcement of the ROL, these officials undermine and ultimately eliminate the prospects of the enforcement of any such as enforcement.

The wedge therefore, between the formalist ROL and its practical enforcement become palpable and rather obvious. By insisting a standard measurement of the governance reform which emphasizes the black letter law and institutional structuring aspects of the reform, the implementation model adopted in the governance reform in Ghana succeeds in creating a misleading picture of the ROL. The regime's inability to account for the persistence of the problem of corruption however exposes a quagmire that betrays regime effectiveness. In thrusting the ROL within the vortex of politics qua governance reform and the elimination of wrongful incentives such as corruption, reformers assumed rather wrongly, political and governance actors will act neutrally and with a disinterested sense of duty. That belief was not only simplistic but rather strangely naïve given the fact that the very objective of these reforms using the ROL stood in opposition to the gains being made and enjoyed by the actors who stood to lose from the nascent changes introduced in the reforms. This then leads to the next point namely, the fact that

there exists an inherent conflict albeit hardly curable situation of conflict involved in the drivers of the reform process and the change intended under the reforms. As has already been mentioned, the single largest group of people who often indulge in the act of grand corruption are political actors who operate at the highest echelons of political power. These actors are often placed at the apex and forefront of reform programs with the implicit assumption that being the legally mandated officials of state, they will with the appropriate motivation and drive. Ghana's experience mirrors a situation in which proclaimed official position symbolized in the formalist ROL and actual behind-the-scenes behaviour and actions of government officials tasked with the implementation of the ROL. Consequently, and as will seen in the last chapter of this thesis, the remedy for this situation lies in the adoption of a holistic approach which recognizes the weaknesses and shortcomings of the implementation model adopted in the use of the formalist ROL in the governance reform in Ghana.

III. ADEQUACY OF INSTITUTIONS

Respondents generally agreed that the labyrinth of institutional architecture put in place to fight corruption and to promote the ROL are broadly adequate. In this regard, the scope of the institutional framework is deemed adequate overall in advancing the cause of good governance and eradicating or suppressing the factors of corruption. As was mentioned in the doctrinal section of this work, these

responses confirm the argument that the panoply of rules, institutions and systems established under the Constitution and other statutes are adequate and prima facie do not appear to be the source of the problem, at least in terms their of numerical and diversity adequacy. It is therefore noteworthy that at least one pivotal respondent who was a former Attorney-General went as far as to say that institutions such as the Office of the Special prosecutor was an unnecessary addition to the totality of institutions already existing given there are others already tasked with the mandate of prosecuting corruption.

A carefully analyses of the responses given will however show that respondents doubted the quality and depth of these institutions. For example, respondents took issues with the ethos and commitment of personnel or actors manning these institutions. In some cases, their concerns cast doubt on the substantive efficacy and capacity of the institutions to deliver on their mandates and this may go to reflect a systemic malaise on the functioning of these institutions. Respondents accordingly drew attention to the problems of "institutional capture" and the exploitation of these institutions by state actors for the advancement of their personal interests and to the detriment of the state and its interests. In diagnosing the causes of these situations of institutional failure, some respondents pointed to the issue of the lack of actor integrity of the management of public institutions.

The implications of these findings are grave given the role of institutions. As recognized by North and discussed earlier in this work, institutions are the *rules of the game* and in this regard their failure to rein in corruption go to the very root of

the failure of the reform effort. The manipulation and deliberate subversion of institutions creates a "capture" scenario, which renders the fight against corruption virtually unwinnable. The "rules of the game" import of institutions imply that institutions remain central to the promotion of the ROL. This then questions the argument of the respondent above who challenged the necessity of the new office of the special prosecutor. The argument that there exists institutions tasked with a similar or same mandate falters on the same argument of the formalist model of the ROL implemented in Ghana. That argument merely reiterates the status quo and rather curiously fails to deal the failure of those institutions that have been charged with the mandate of fighting corruption but had failed in the past. Indeed, the fact that the establishment of the prosecutor's office had been substantially influenced by popular agitations a shift in the fight against corruption and impunity in general testifies to the failure of the existing arrangement centred in the office of the Attorney General. While the very establishment of the prosecutor's office itself further continues the trend of implementing a formalist agenda of the ROL, its denunciation in favour of existing arrangements fails to address the issue of institutional failure and the survival of corruption in the meantime.

CHAPTER 5

CONCLUDING ANALYSES AND RECOMMENDATIONS

INTRODUCTION

The surveyed scholarship and literature on the relationship between the implementation of a formalist model of the ROL and corruption within Ghana's governance reform agenda presents a mixed picture on the effect of the former on the dynamics of corruption as a social vice and governance problem. Empirical research conducted in this work further reveals the complexity of that scenario and the failure to problematize the peculiar character of corruption in the ROL equation has gravely undermined the capacity of the reform to effect real change and deliver on its promise. The need for clarity in the scholarship is therefore beyond dispute. In a more nuanced way, the empirical research shows that the prevalent gulf between the articulated values of the formalist ROL within the scope of legal formalism, and the actual implementation of the theory in the governance reform and general development agenda of Ghana continues to impact on the overall dysfunction of the governance system and remains enduring. In other words, the persistence of the shadow regime spawned by implementation failures of the formalist ROL continues pose serious systemic tensions and opportunities for maladministration, and the spaces created thereby have nurtured and sustained the practice of corruption.

On the other hand, the foregoing chapter reveals a reality. While the scholarship supports the hypothesis that the ROL *qua* the values inherent in the ideal concept could be a panacea to the problem of corruption when optimally implemented, the empirical research highlights the disjunction prevalent in the theoretical values of the transplanted formalist ROL and the actual implementation or effect of those values on the ground.383 In other words, the research has clearly shown that the existence of practical difficulties and a lack of sufficient attention to exogenous factors in the implementation process appears to significantly account for the failures of the formalist ROL model implemented to achieve its set goals of minimizing and eventually eliminating corruption within the governance paradigm of Ghana. Furthermore, like the trend at the inception of the reform effort, the research has shown a persistent and dominant use of an insular legislative strategy in design of recent reforms targeted at combatting and eliminating corruption in Ghana thereby intensifying the use of the formalist orthodoxy.384 This approach creates not only regime insularity which undermines the optimal effectiveness of the ROL, but also understates the complexity of the problem of combating corruption as a quintessential socio-legal vice to be both moderated and eventually eliminated.

It is important at this stage that this work has avoided indulging in any normative analysis or claims on the validity or even propriety of the ROL as regime being employed as a combat tool *per se* against corruption in Ghana's governance reform agenda. The research has equally avoided an examination of the use of the ideal

383 F. Upham, Mythmaking In The Rule of Law Orthodoxy, *In Promoting the Rule of Law Abroad: in Search of Knowledge*, Thomas Carothers (Ed.) supra note 57
384 The Office of The Special Prosecutor Act, supra note 288.

ROL as a combat mechanism in the abstract whether situationally or in comparative context globally. This is important in order to clarify the projected thesis which distinguishes the effectiveness and utility of the ROL *per se* as a conceptual norm from its implementation challenges and the challenges that can arise from that process alone.385 In this regard, the functional utility of the ROL has throughout the this research been taken for granted and the concept has been assumed to be a useful tool in the fight against corruption broadly speaking given the trend of the scholarship and axiomatic dimensions of its values.[386] Yet, the discussion in the work has consistently shown in its analyses the existence of a degree of structural and systemic dualism, which has been occasioned by the implementation strategy of the ROL adopted by reformers, and the preference for an insular formalist model ultimately worked to undermine its overall effectiveness. This dualism was characterized by the structured operationalization of the formalist ROL at the theoretical and guaranteed level on the one hand, and the existence of sub-cultural informality and general deviation from the formalist ROL at a subterranean level, on the other.

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385 Simon Chesterman, An International Rule of Law?, *56(2) AM. J. COMP. L. (2008)*

[386] Ricardo Bosalbo Bono, The Significance of the Rule of Law and its Implications for the European Union and the United States, *University of Pittsburgh Law Review, [S.l.], v. 72, n. 2, may 2010. ISSN 1942-8405*. Available at: <https://lawreview.law.pitt.edu/ojs/index.php/lawreview/article/view/159>. Date accessed: 24 may 2020. doi:https://doi.org/10.5195/lawreview.2010.159.; See also, T. Bingham, The Rule Of Law 3 Et Seq. Allen Lane Penguin (2010). See also the three-volume work by S. Holovaty, *The Rule Of Law,* Kyiv, Phoenix Publishing House (2006); B.Z. Tamanaha, The Rule of Law for Everyone?, *55 Current Legal Probs. 97 (2002)*. Colleen Murphy, Lon Fuller and the Moral Value of the Rule of Law, *Law and Philosophy Vol. 24, No. 3 (2005*), pp. 239, available at https://www.jstor.org/stable/30040345?seq=1#metadata_info_tab_contents

This chapter will state and evaluate the broad conclusions to be drawn from the analyses of the literature and empirical research conducted in the foregoing, reinforce the critiques offered in the preceding chapters, and offer workable suggestions for the ongoing reform the governance approaches to dealing with the problem of corruption in Ghana. Consequently, the chapter will cap the generality of the preceding analyses with recommendations on the path to be adopted both in the scholarship and by way of reforms for a more comprehensive and measurable approaches to dealing with the corruption difficulty. More particularly within the context of the suggested pathways forward, I will emphasize the adoption of more nuanced models including soft, inclusive, and participatory models that stress and incorporate value internalization as a means of creating a comprehensive combat strategy against corruption. In addition, the approaches suggested will also emphasize the structured alignment of incentives in a manner that respond to behavioral dynamics relative to corruption. Overall, suggested approaches will reflect an attempt at overcoming the identified weaknesses of the extant and conventional approaches adopted under the current formalist ROL model and its struggles to overcome sub-optimality.

CONCLUSIONS

I. THE RULE OF LAW AND CORRUPTION: THE CONUNDRUM OF LAW CREATION AND APPLICATION

The jurisprudence on the distinctions between the creation of law *per se* and its application remains an enduring feature of the raging controversy on lawmaking and

its operational effectiveness in practice.387 Throughout this work, that theme has informed the research in seeking to unearth the relationship between the ROL and corruption and how the latter appears to have triumphed over the former. The scholarship in this field has spawned emergent thinking on the multiple dynamics of law through the process of creation, execution and adjudication. This continuum has been said to involve complex variables that needs appreciation and understanding if law and for that matter the ROL is to be effective. Indeed, while this distinction may appear largely epistemological to some, the taxonomy has practical consequences for a regime of legal sub-optimality in which law is often made but not applied, and in which a puzzling triumph of impunity exists in the face of a comprehensive regime of the ROL. In this regard, it is instructive to note Kelsen's important qualification on the effectiveness of law when he asserted that the a legal norm *qua* law is not valid unless the whole legal system on which it rests is effective in regulating or controlling behavior implicated by the legal norm.388 Holmes' poignant position that the real law is the outcome of application and evolution rather than logic reflects a clear understanding of the dichotomy between creation and application and the routine disconnect that obtains between creation and application.389 His theory of legal realism, which represented a critique of formalism, emphasized the role of the courts in the life of the law and its impact on legal development. Holmes' theory reaffirms the reality of legal impotence in insular regimes and the *real politik* weaknesses and implications of its application once law is made or enacted.

387 B.T. White, Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies, *Cornell International Law Journal, supra note 117*

388 H. Kelsen, Law, State and Justice, In The Pure Theory of Law, *57 Yale L.J, 377*
389 O.W. Holmes Jr. (1881). *The Common Law*. I. *Little, Brown and Company, Boston*

Significantly however, Kelsen's theory blurs this distinction by stating that every law-applying act is also an act of law creation. Taken on the face value thus, Kelsen seems to be suggesting the assumption of legislative authority by executive and judicial institutions or actors whenever they purport to apply the law by their creation of a new law. Yet, it has been suggested that in reality, Kelsen accepts a subordination of the judiciary to legislative supremacy in the area of lawmaking at least.390 This notwithstanding, the tensions inherent in the creation-application nexus in law has been clearly shown to be prevalent in the Ghanaian scenario where the preponderance of law made or enacted has not been matched by its application or enforcement in fact. The many institutions and laws designed to ensure transparency in public procurement, uniform enforcement of laws on criminal justice administration, regulatory and oversight bodies in public commercial transactions etc, have generally failed to rein in the menace of corruption not to talk of eliminating the practice altogether. This implicates the theory on creation and application and reflects a certain flaw in the formalist model of the ROL constructed and implemented in Ghana. Implicit in both Kelsen's and Holmes' theory is the recognition that for law to be effective, it ought to recognize context and inherent obstacles in its way to being operationalized. This view embraces the hard reality of context-dependent variables and the ultimate fact that law operated as an insular factor will largely fail in practice. The ubiquitous failure to implement the laws on corruption in Ghana exemplify the situation in which lawmaking has become habitual and a desired goal in itself the satisfaction of which is deemed tantamount to regime success. Not only does this serve to distort the goals and values of the governance

390 E. W. Patterson, Hans Kelsen and His Pure Theory of Law*, 40 Calif. L. Rev. 5 (1952).*

system in Ghana, but the tendency to keep piling laws in reaction to any governance deficit particularly in the area of corruption tends to becloud the actual gaps in the regime in need of remediation.

This research has uncovered the fact that the implementation of the ROL has led to a marked degree of systemic dualism in Ghana with the law operating at two levels of functionality. At the one level, the guaranteed ROL (ROL per statutes and institutions or paper ROL) reflects an ideal situation in which all the needed laws have been passed and institutions established to guarantee a regime based on the ROL. At this level of the systemic dualism, the adequacy of the law is undoubted and the broad provisions on prohibitions and punishments are guaranteed. In addition, institutions have been established to provide the structural back-up to the laws and their implementation. Furthermore, at this strata of the ROL, legal formalism is at its best as the measuring instruments focus on the prevalence of theoretical guarantees of the relevant rules and laws *per se*, and in which the quality of the legal system is rated based on the prevalence of the relevant laws and institutions guaranteeing the ROL. This level of the ROL accordingly have masked the inherent weaknesses in the implementation of the ROL in Ghana in terms of enforcement and ultimately undermined substantive efforts at law reform in the country. In other words, by overwhelmingly dwelling on the legal enactments and institutional structuring, and ignoring enforcement failures and regime insularity, the ROL regime has failed to effectively translate regime values into substantive outcomes in line with legislative intents of reformed laws. In addition to this, the ultra-formalist model advanced by the implementation strategy adopted in Ghana tended to promote reform

opportunisms on the part of key political actors. In this regard, and particularly within the context of laws on corruption, selective enforcement by actors has been common and this has been inspired by the desire of state officials to exploit the laws to the parochial advantages of themselves and maximize certain vested interests who deeply connected to and embedded in the establishment. Thus, the exploitative use of exceptions and exemptions under Ghanaian procurement rules, and the unjustifiable deployment of the prosecutorial discretion in criminal justice administration represent just a few instances of enforcement challenges and how these impact the ultra-formalist model of the ROL as implemented in Ghana.

The failure of enforcement of reformed laws in Ghana creates a state of impunity which frustrates the very essence of the implemented ROL as a transplanted regime predicated on legal supremacy, equality and certainty. The absence or laxity of law enforcement of the ROL in the dualist system represents a conundrum and serves to perpetuate and promote corruption within both levels of the regime and the governance system as whole with the informal regime in the dualist status quo impacting and negatively influencing the implemented ROL. Informality holds sway at this level and legal provisions on the ROL ways of doing things are ignored and altogether abandoned.391 Among a range of behaviors in a spectrum of other acts, winners of contracts are predetermined during the pendency of advertised tenders, the legislature continues to rubber stamp executive decisions without needed scrutiny contrary to constitutional requirements and expectations to that effect, over-invoicing of government contracts and transactions are rampant done with

391 While the law states the standard ways of doing things, social networks and ties influences the way the formal law is facially obeyed and enforced.

official collusion, and award of contracts to companies in which state officials have shares and other interest is commonplace, etc. The actions of official actors not only defy existing laws prohibiting these behaviors, but that there often exist deliberate and concerted efforts to stultify and render blunt the effect of the labyrinth of legislations and laws instituted to deal with the issue of corruption. The informal stratum within the *de facto* dualist arrangement is therefore heavily characterized by cronyism and familial networks and other relationships connected by social affinities. More fundamentally, the informal regime, while living in the shadows of the formal system of the ROL, trumps and triumphs over the formal regime in practice as the latter's preferences and expectations are invariably shaped by the actions and schemes formed in the former.392

This dynamic therefore implicates the wide disparities and inequities inherent in the enforcement of the law which in turn undermines the *equality principle* of the ROL under which the law is expected to be equally applied to all persons without discrimination of any kind.393 By maintaining a sphere of informality and sub-legal culture in which official action is mediated by networks and groups motivated by corruption and exploitation of official authority, the implementation of the official ROL is used and leveraged upon in a subverted way to advance the causes and interests of a few. The complexity of this cannot be appreciated without a corresponding recognition and interlinkages of the concept of state capture under which private persons with vested interests are able to influence official actors to act

392 Id
393 A.V. Dicey, Introduction to the Study of the Law of the Constitution, supra note 111.

in accordance with their dictates or expectations. In other words, through state capture, government officials become vassals or agents of private interests and groups who exploit the state machinery for and to the benefit of those private interests. The absence of a viable campaign finance law in Ghana combined with the exploitative role of various influencers has meant that state capture by those vested interests has become virtually uncontrollable within the Ghanaian political space. It is widely believed and acknowledged, and this view was shared by respondents to the research, that persons who support political parties in Ghana have invariably expected compensation in return for their efforts and loyalties, and the award of state contracts and appointments to political offices have been used as tools of compensation in this respect.

The scholarship has not altogether been oblivious of this prevalent dichotomy of structural dualism in many emergent countries both in and outside of the African continent.394 Indeed, some scholars like Upham395 argue that adopting a mix of the formalist ROL advocated and implemented by the World Bank, and legally informal systems is a useful goal to be pursued by countries undergoing reform. It is evident from the writings of Upham that his version of legal informality advocated is not the variant described above as the sub-legal informality is clearly a vicious system created by actors with interests opposed and antithetical to the interests and goals of the state. Upham's model envisages the maintenance of customary law and

394 R. H. Graveson, The Dualism in Law, *Journal of Comparative Legislation and International Law* Vol. 31, No. 3/4 (1949), p. 65; G. M. Silverman, Dualistic Legal Phenomena and the Limitations of Positivism, *Columbia Law Review Vol.* 86, No. 4 (May, 1986), pp. 823-851; See also, *Barbier, Edward B. 2013. Structural Change, Dualism and Economic Development: The Role of the Vulnerable Poor on Marginal Lands. Policy Research Working* Paper; No. 6456. World Bank, Washington, DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/15596 License: CC BY 3.0 IGO."

395 F. Upham, Mythmaking in the Rule of Law Orthodoxy, supra note 57

other traditional modes of pursuing informal adjudication *pari passu* the formalist ROL in any dispensation in which the ROL is transplanted into another country such as Ghana. Consequently, and viewed from the prism of Upham's suggestion, countries like Ghana can best be described as having a plurality of regimes in which the legal formalism subsists within a regime with multiple layers of informality, whether legal or otherwise.

Furthermore, legal informality as described by Upham, is entrenched and reinforced by existing cultural norms and values, which act as external pressures on the ROL and its effectiveness. Thus, dynamics in the overall socio-economic environment and the subtle acceptance or tolerance of certain behaviors may impact on the extent to which sub-cultures formed by sub-legal informality can be tolerated. This was poignantly pointed out by White when he noted that,

[T]he external legal culture can interfere with efforts to contain corruption in the judiciary in two primary ways. First, external legal culture may contain social norms that require judges to engage in practices that would be considered corrupt according to "rule of law" norms. Second, the external legal culture may legitimate corrupt behaviour such as bribery, not because the behaviour is viewed as socially desirable but because such behaviour is deemed a reasonable response to socio-economic and political realities. 396

396 B.T. White, Putting Aside the Rule of Law Myth: Corruption and the Case of Juries in Emerging Democracies, supra note 117

Consequently, the taking of bribes and gifts within judicial circles has been deemed by certain judges as a justifiable response to the low levels of salaries of judges, and a general culture tolerant of gift giving and acceptance in the line of professional work in the case of Ghana. This provides yet another powerful rationale for the need for contextual sensitivity in the design and implementation of any ROL model or strategy. Thus, the implementation of a ROL model that merely spells out rules of the law and codes of ethics without efforts at ensuring a corresponding integration and internalization of regime values only reinforces the gulf between the informal but sub-legal ROL which perpetuates negative practices and corrupt behavior in general, and the formalist regime of the ROL in which the former inevitably holds sway and protects corruption rather than fight it. White's work only confirms the reality and indeed potency of the sub-legal informal regime that subsists with the formal ROL in the governance reform in Ghana started mainly in the 1980s and 1990s. This has inevitably created a situation in which many laws made are often not enforced and merely remain on the books. From the standpoint regime evaluation, the incremental passage of laws and establishment of layers of institutions created the appearance of regime stability and functionality. In other words, by using the wrong metrics of assessment of the progress of reform, namely the passage of laws and establishment of institutions in the reform effort, both watchers and reformers conclude that governance reform in Ghana have largely been successful although some remain baffled by the persistence of corruption.

Both the theoretical and empirical researches have shown that the creation-application nexus and dissonance is strongly pronounced in Ghana and is reflected in

the failure and/or refusal of official actors and law enforcement institutions in general including the police and judiciary to implement the law when the latter is breached especially by official actors and their network of rent paying collaborators. The effect has been the prevalence of impunity and low levels of accountability in the face of significant breaches of the law and appropriation of state resources into private hands without justification. It is easy and defensible therefore to conclude that the implementation of the ROL in Ghana has failed given the manifest weakness, insularity and general sub-optimality that affects the ROL in the country and the failure of the latter to effectively regulate and punish corruption. Within the context of corruption, enforcement sub-optimality reinforces the prevalence of the menace as a false sense of regulation and control created by the existence of the law on the books undermines any real effort at combatting the menace.

The reticence towards a change of course in the evolution of the reform mirrors a path dependency difficulty and unless reversed, the battle between the ROL and corruption appears to set to be lost. The current de facto arrangement appears to favor the shadow regime undergirded by sub-legal informality in which the ROL in fact provides a cover and shield for the perpetration and perpetuation of corruption and the entire rent seeking economy.

II. GRAND CORRUPTION, ACTOR INCENTIVES, AND THE RULE OF LAW

The forgoing chapters have exposed one hard truth: ROL reformers in Ghana have been fixated on replicating the models of legal formalism and correlative legal transplantation, and have accordingly been entrenched in their belief that by passing the right laws and establishing requisite institutions, the ROL culture will gain roots and take hold in the country. In the words of Erbeznik,

Rule of law reform efforts that embody this myth assume a "build it and they will come "approach, meaning if the "right" formal institutions are in place, the rule of law will simply emerge.397

It is evident from the foregoing chapters that this approach to the ROL has been dominant in reform strategies and this has generally roundly failed in many countries especially in Africa. Ghana typifies this trend. This approach to building formal institutions and systems of the ROL survives on the notion that once established or enacted, a culture of the ROL will inevitably form and coalesce around any ROL regime, and become consolidated overtime. Proponents of the model including the World Bank have operated on the implicit assumption that the ROL is culture-inducing and will generate the requisite congruent behaviour that will become a "ROL culture" with time. In their view, this culture is both formed by the ROL and sustained by it, and the pervasive assumption made by proponents of this view is

397 K. Erbeznik, Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries," Indiana Journal of Global Legal Studies, supra note 5

that the ROL is a self-contained regime, which has the capacity to generate the appropriate behavioural trends which reflect the injunctions contained in the regime. These lofty suppositions notwithstanding, the formalist model of the ROL as implemented in Ghana has shown manifest impotence in the face of the persistence and growth in corruption. Generally, as earlier mentioned, this has resulted in substantial regime sub-optimality leading to the gross failures of the law to regulate behaviour and curb menaces like corruption. The ubiquity of under-enforcement has meant that the in the case of corruption, impunity has been rife as laws on corruption have not been ignored in the face of the practice. This may have further heightened the sense of impunity and inversely encouraged corrupt behaviour.

The persistence of grand corruption in the face of years of proclaimed determination and policies to eliminate the menace is baffling from the standpoint of law reform and should force new conclusions on the dynamics of the practice and its regulation. The starting point should be an evaluation of the overall regulatory architecture and how this fits in an effective system designed to check the incidence of corruption. The fact that the actors or culprits of grand corruption are substantially persons in positions of authority or power has meant that regulatory and penal reforms put in place have therefore been" culprit-led" in character. In other words, by vesting the legal authority to enforce the laws in the hands of officials, many of whom are culprits in the acts sought to be regulated and eliminated by the law, the situation becomes anomalous and the resulting conflict of interest only serves to benefit the agents of corruption and frustrate the ends of the law. This creates an incentive difficulty given that the political establishment being the group most likely targeted by any anti-corruption regime installed, albeit unwittingly, are the very group who

must design, institute and enforce any system aimed at combatting corruption. This is very much akin to the system of self-policing which traditionally only works in environments where the culture of self-restraint is internalized and routinely followed. Thus, in the absence of higher incentives or values motivating the adoption and implementation of effective and enforced legal reforms, commitment to the elimination of corruption through the ROL in Ghana has remained lukewarm at best, and in the worse cases, legal rules and systems put in place have been exploited to negative ends through official action. In other words, given that political actors whose remit it is to moderate the passage of legislations and enforce these laws once passed are also the most affected group by the effective operation of these legislations and institutions, they tend to suffer from conflicted motivations relative to the incentives of doing their official work while privately benefitting from any failures in that vein. The inevitable result has been that the use of the law as a combat strategy has largely wobbled and ultimately failed. Given that a fundamental feature of any effective regulatory and penal system rests on its detachment from the preferences of those persons or subjects who are regulated, the current "culprit led" model implemented by the reform in Ghana is bound to remain ineffective and bereft of any substantive efficacy so long as the incentives are improperly or wrongly aligned. On the other hand, resolving this actor-subject dilemma in the meantime is central to the prospects of the current penal and regulatory approach. This is especially crucial in the face of the perceived inevitability of the "official culprits" leading enforcement in any reform approach designed at the macro level to fight or combat corruption.398

398 Given that the ROL still remains a viable tool in the fight against corruption and cannot be

While dealing with the interstices of grand corruption within the scope of actor incentive will be and remain problematic in the meantime, the issue of connivance by high state functionaries in the non-enforcement of rules on corruption threatens any prospects of suppressing and ultimately eliminating the menace of corruption. In the main, actor collusion leading to the neglect of rules reinforces impunity and shatters the efficacy of law in general. Grand corruption at the highest levels of political authority leads to negative influences and pressures being exerted on state institutions charged with the mandate of combatting and punishing corruption. This ultimately leads to reinforcing the sense of impunity in the midst of prevalent laws on corruption and extinguishes accountability as a regime value within a regime anchored on the ROL. In the absence of nuanced structures and systems designed to reflect this structural and systemic reality, seemingly cogent reforms on paper will only achieve piecemeal results.

The situation is compounded by the perverse incentives offered by foreign aid packaged within assistance development initiatives. Foreign aid is often directly given and administered through official government official agencies with minimal accountability requirements. Thus, while the implemented formalist ROL was largely constructed and implemented under the aegis of these development assistance bodies, their failure to craft a workable ROL regime which is able to exact accountability and punish corruption-related wrongs, created the requisite spaces for exploitation and misappropriation of the resources given under any aid package. In

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discarded in favour of others, there is the need to fine-tune it and adapt it in a manner that optimizes its benefit.

the absence of the optimal implementation of enacted oversight legislations, moneys given under assistance development initiatives have been misappropriated and ended up in private hands.[399] In this vein, foreign aid became a fertile ground for corruption as grants have been misappropriated with minimal legal or external accountability. The case of corruption relative to foreign aid is particularly pronounced given the near absence of internal political checks in practice. In this regard, the use of the ROL mantra within the World Bank in itself generated the perverse incentive that enabled the exploitation of Bank funded projects and other aid moneys to be applied to corrupt ends and undermined the purposes for which they were disbursed.400 While the declared policy of the government of Ghana is to shift the emphasis from aid to other modes of generating revenue for the state, it is clear that the prevalence of spaces within aid programs continue to provide opportunities for corruption and there is the need to plug these incentives in any future combat strategies.

Closely related to this is the problem of what Carothers calls the *problem of lessons learned not actually being learned.* Adjusting aid programs to the needs of the countries assisted such as Ghana has implied that donor agencies have routinely evaluated their strategies and learned lessons, at least officially speaking. Yet the lessons learned in the works of these bodies especially by the Bank have largely appeared predetermined and not country specific nor context inspired. Carothers'

[399] J. Forson, Corruption, EU Aid Inflows and Economic Growth in Ghana: Cointegration and Causality Analysis, https://ideas.repec.org/h/tkp/mklp15/127.html

400 J. Lyons, Foreign Aid is Hurting, Not Helping Sub-Saharan Africa, https://www.lejournalinternational.fr/Foreign-aid-is-hurting-not-helping-Sub-Saharan-Africa_a2085.html

critique touches on the failure of these institutions to truly domesticize their programs to fit the peculiar local circumstances of the countries assisted. Carothers' critique raises a foundational problem with the development assistance and the calibration of aid strategies to country needs. The use and implementation of the formalist ROL in the fight against corruption has failed to deal with the problem of corruption due to its insensitivity to surrounding contextual factors. Ironically, the response of many development agencies to the corruption conundrum is to call for the passage of more laws and establishment of new institutions to deal with the menace.

A related issue in the ROL-corruption quagmire in Ghana is the nature and dynamic of the legal and institutional framework establish on anti-corruption. The problem manifests in two key ways namely, the obvious capacity issues confronting these bodies in the fight against corruption relative to the sophistication of the culprits of corruption coupled with the complexities of the offence. Secondly, the sheer breadth of the offence of corruption implies that many of these criminal justice institutions are themselves caught in the web of the practice of corruption.401 At the first level, the established legal framework remains scattered, piecemeal in depth, lack coordination and demonstrates a marked degree of incapacity that challenges the future of the prosecution of corruption.402 From the point of investigation through

401 An investigative journalist's documentary which aired in Ghana in 2015 implicated about 34 judges of the Ghanaian high in various incidents of bribery and corruption and led to the impeachment of many judges. https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Anas-uncovers-34-Judges-in-corruption-scandal-380603; Also see A. Amankwai et al, Media Expose of Judicial Corruption in Ghana: Ethical and Theological Perspectives, *Legon Journal of the Humanities,* (2017), 1. https://www.ajol.info/index.php/ljh/article/viewFile/157922/147520

402 The Office of the Special Prosecutor that was recently established has on many occasions complained of the lack of resources to do its work. Even before its establishment, its parent ministry (the Ministry of Justice), has perennially complained of the lack of resources and coordination issues involving its collaboration with the police and allied entities in the prosecution of criminal offences.

prosecution to conviction, the criminal justice system in Ghana reflects this incapacity and lack of efficiency problem. The enduring character of this problem is further shown in the operation of the recently established Office of the Special Prosecutor, which has openly complained of the lack of cooperation it encounters in its work and the general discordance prevalent in the environment of its operation.403 This reality gravely affects the ability of the institutions established and laws passed to deal with the problem of corruption and stamp out the menace altogether.

Bearing in mind the grave importance of institutions and rules in national development, the operation of ineffective legal institutions and rules against the canker of corruption presents complicated sets of complex challenges. On one level, by operating a pretentious model of legal accountability through the implemented formalist ROL, the current framework may seem to reinforce a sense of impunity and the perpetration of official exploitation.404 The current framework of rules puts a higher standard and burden of proof in criminal cases and proceedings on the state and its institutions balanced against the lower obligations incumbent on criminal defendants and this implies that very often cases brought against alleged corrupt actors are lost405, leading to higher acquittals in criminal trials involving corruption. On the other hand, higher acquittals in prosecutions could induce a

403 Indeed, respondents in the empirical research in this work challenged the importance of establishing an office of a special prosecutor as they indicated that there exist adequate legal and institutional frameworks for combatting corruption, at least in theory.
404 As has been already argued, by focusing on the prevalence of laws on the books as the barometer of the ROL, the regime has largely been hijacked and the false sense of legal optimality makes real reforms harder to implement.
405 Ghana follows the common law trend of upholding the presumption of innocence and requiring that the guilt of the accused be proven beyond all reasonable doubts. Consequently, an iota of doubt is all the accused person needs to establish in order to secure an acquittal

sense of greater impunity as actors begin to reevaluate the cost–benefit dynamics of indulging in corrupt practices when confronted with choices involving transactions hinged on corruption. The resultant low levels of ultimate accountability through the judicial process has the prospect of heightening the incentives for corruption and inversely removing the cost aspect of engaging in the practice.

Further complicating the situation are complaints or allegations of witch-hunting and political vindictiveness leveled by political actors in opposition against sitting or ruling governments. It is not unusual for laws and institutions to be exploited by sitting governments to their advantage with the view to suppressing opposing elements using the penal machinery of the state. In this regard, a traditional complaint by political actors against sitting governments has been that ruling governments routinely use the criminal justice administration machinery against opposition party agents designed to weaken the prospects of they mounting a successful challenge for the political office(s) for which they aspire. In other words, critics of government's use of criminal trials and sanctions have accused sitting governments of interference in the judicial process designed to both delegitimize opposition elements and decapitate the leadership of political parties as a way of frustrating their capacity to win political power in the end.

This dynamic in criminal justice administration relative to corruption gravely weakens the fight against the menace in Ghana. It has many implications and serves to both benefit and undermine different actors of the legal and political space in the country. In terms of regime effectiveness, these complaints, whether true or false at any

given point in time, operate to undermine the legitimacy of the criminal justice system in terms of its claim to neutrality and political detachment and its capacity to protect persons undergoing the process of criminal trials. This dynamic then enables legitimate proceedings against corrupt former officers of state to be challenged by accused persons on grounds of the illegitimacy of the process arising out of the prevalence of political interferences. On the part of the state criminal justice machinery, this charge leads to the adoption of an overly skewed criteria in case selection in corruption-related cases. The perceived politicization of the criminal process in the area of corruption trials fundamentally affects the effectiveness of the fight against corruption from the standpoint of the rule of law, and this forces concessions on the part of the state in a manner that affects not only the effectiveness of ongoing trials, but also the central principle of equality of all persons before the law in criminal justice delivery.

III. SYSTEMIC INERTIA: THE CASE OF THE 1992 CONSTITUTION AND CORRUPTION

The inception of the 1992 Constitution marked an important moment in Ghanaian constitutionalism and responsible governance in the country. In this regard, the Constitution is seen as a blueprint against the dissipation

of national resources and wanton exploitation of the assets of state. As an apex set of norms in the legal ordering of the sources of Ghanaian law, the 1992 Constitution is the single most comprehensive piece of law in the governance reform agenda. Yet since its commencement, and as seen in the generality of the analyses in the foregoing chapters, the regime has been fraught with operational weaknesses in core areas of accountability and systemic effectiveness. This is in spite of the prevalence of what some might consider as potent set of institutions and norms contained within the constitutional frame and established to guarantee the ROL and accountability in general.406

It is therefore inescapable, in the concluding part of this work, to discuss the issue of systemic inertia prevalent under the Constitution within the context of the core conclusions on the state of the ROL and corruption in Ghana. This is especially important given the need to draw attention to the factors that may be either overtly or unwittingly promoting corruption and impunity in the face of the broad and seemingly comprehensive constitutional provisions on the subject. Reviewers have taken turns in the past to point to aspects of the Constitution that do in fact undermine constitutionalism and accountability and promote corruption through the accumulation of political and constitutional power. The interactive

406 The Constitution contains provisions on the ideal ROL including article 17, which guarantees the principle of legal equality and avoidance of discrimination, and article 19, which provides for a broad range of principles on the theory including the principle of constitutional certainty.

operation of these provisions serves to reinforce and expand the scope of conferred or allocated power and by implication narrow the effect of limitations that are placed on agency rules.407 This sub-unit of the conclusions will highlight the key structural and substantive aspects of the Constitution on corruption whose operation continue to impinge negatively on the fight against corruption. As will be evident in the discussion below, the totality of these provisions shapes the legal and institutional framework on anti-corruption in the country and their effectiveness or otherwise invariably determines the state of the fight against corruption in Ghana.

a) Parliament

Parliament represents the legislative arm of government and is structured as a representative body, which is comprised of persons elected on a universal suffrage from across various constituencies in the country.408 By the constitutional framework established, Parliament is tasked with a variety of functions not the least of which is to promote and ensure the accountability of public institutions and the persons tasked to manage them. In delivering on its accountability mandate, Parliament has established the Public Accounts Committee, which holds annual

407 Constitutional rules on discretion for example have been chastised for allowing too much room for deviation and these rules have been permissively interpreted by official actors. Also see on this, K.B Mensah, Legal Control of Discretionary Powers in Ghana: Lessons from English Administrative Law Theory, *Afrika Focus Vol. 14, Nr. 2, 1998 (1998*)
408 Article 93, 1992 GHANA CONST.

public meetings or sittings on issues affecting the management of the finances of public entities, and state enterprises. During its sittings, the management of pubic finances are reviewed and statements taken from interested persons. Like Parliament itself, this committee has *quasi*-judicial powers which enables it to summon persons of interest to attend its proceedings and testify on the issues being investigated. This committee of Parliament is perhaps the most important of the committees given the impact of its work on the management of public finances and the sheer level of interest it generates in its work whenever it sits.[409]

Given that its sittings are held in public, the Public Accounts Committee's work implicates important issues in public accountability, transparency and responsible governance in Ghana. Yet in substantive terms, the work of the Committee has been criticized for failing to advance or attain the core principle of accountability through constraining the wasteful and corrupt use of public resources. While boasting of important judicial powers necessary to do its work, the Committee has been accused of failing to transform its work into an exercise in real prosecutorial accountability as far as the use of public resources is concerned. In other words, by stopping short of ensuring the retrieval of moneys not accounted for and the prosecution of responsible officers, critics has accused the Committee of being a toothless bulldog and deepening perceptions of impunity. The work of the Committee has therefore been fraught with allegations of waste and stolen moneys, which go without prosecution and stolen moneys unrecovered.

[409] See, Enhancing Parliamentary Oversight Over Public Spending-The Role of the Public Accounts Committee, https://ghanatalksbusiness.com/2017/03/enhancing-parliamentary-oversight-public-spending-role-public-accounts-committee/

The dynamic of the Committee's Work sums up the general failures of Parliament as a corporate accountability institution and its perennial unwillingness to exert constraints and oversight over the management of public finances on behalf of the Ghanaian state. While the specific case of the Committee remains baffling in many respects given its bi-partisan composition, and often the non-political character of its sittings, other weaknesses of Parliament in the area of public financial management and accountability are less surprising. For example, while this work has critiqued the tendency towards legislative incrementalism, the paucity of nuanced accountability and corruption-related legislations is especially telling in this regard and this has been traced in part to the structural weaknesses of the Parliament in legislation. For example under the Constitution, Bills whose implementation will impose financial obligations on government cannot be introduced in Parliament unless these bills are brought or introduced on behalf government.410 This provision has been generally operated and interpreted as implying that only government can introduce and sponsor legislations in Parliament and accordingly since the commencement of the 1992 Constitution some twenty-seven years ago, there has not been a single private member's legislation introduced or passed in the legislature. This situation gravely undermines the capacity of Parliament to fight corruption through the medium of legislation. In a broader sense, by restricting the passage of all legislations including corruption-related legislation to the government, the law implicitly promotes impunity and reinforces the scepticism surrounding the "culprit-led" model of accountability given that the actors with the greatest incentive and prospect of

410 Article 108, 1992 Constitution, supra

indulging in grand corruption are the very members of the executive arm of government and the larger public service. By reserving the passage of legislation solely at the behest of the executive, even Parliament itself is rendered impotent in the exercise of legislative authority in Ghana in fighting corruption.

In addition to this, the internal fragmentation of Parliament along partisan lines when coupled with executive influences in legislation, continues to undermine the overall effectiveness of Parliament in the performance of its legislative responsibility. For example, the stalling of the Right to Information411 law was largely attributed to the political influences of the executive and its general antipathy to the passage of legislation compelling the production of information on demand or request by ordinary citizens.

b) Auditor General and Public Accounts

The office of the Auditor General is perhaps the most important constitutional body established within the framework and architecture of public financial management in Ghana.412 The Auditor General is a constitutionally independent body, which is primarily tasked with the mandate of auditing all public accounts of Ghana and reporting on them. That responsibility sees the Auditor General examining the books of accounts and ancillary documents, and questioning relevant officers in connection with the performance of his audit work. In order to ensure or facilitate the

411 Given that parliamentary business in Ghana is largely conducted at the behest or sufferance of the executive, many argue that the inordinate delays in the passage of the bill until its recent enactment was largely influenced by the executive.
412 Chapter 24, 1992 GHANA CONST., supra note 247

performance of this work, the Auditor General is clothed with the necessary legal authority to demand the production of appropriate documents and books for his examination and review. By this constitutional authority, the Auditor General is granted access to all documents that have a material connection to any audit being conducted and for the general the performance of his work.

Another significant aspect of his authority is the Auditor General's powers to draw attention to irregularities identified in the course of his examination of appropriate books, documents and other data in the preparation of his audit. This could be in the character of unexplained expenditure, shortfalls in the use of moneys voted for specific projects, unlawfully awarded contracts awarded or in violation of tendering and general breaches of compliance rules in public procurement and contracting, etc. This aspect of his work is designed to ensure that financial malpractices in the management of public accounts are not only checked but also brought to book. Consequently, the law mandates the Auditor General to report his audit findings to Parliament which body can discuss the findings and enforce his recommendations. Accountability is therefore a fundamental linchpin of the auditor general's work. A key aspect of the Auditor General's work, which is in the character of recommendations, is the powers of disallowance. Under this power, the Auditor General can refuse the payment of an amount which has been approved to be paid and if already paid he can reject the basis of the payment and demand a refund of the said amount to the state. The power of disallowance is a useful tool used in the recovery of moneys improperly paid to third parties either in breach of administrative

rules for the payment of such moneys or in violation of other regulation governing contracts etc.[413]

In order to ensure that the Auditor General performs his work without any let or hindrance from any source or authority, the office is made independent and not subject to any body or entity in the performance of its work. This feature is very important given the deleterious impact that any interference can have on the performance of the work of the Auditor General. The nature and scope of financial audits and the examination of sensitive books of accounts require that the Auditor General be protected against the pressures that may likely emanate from political authority and other quarters and the only way to ensure that this is achieved is by imbuing the Auditor General with the statutory independence that safeguards his work against manipulations and pressures.

c) Asset Declaration Regime

A notable feature of the Ghanaian Constitution is the provision on asset or proprietary declaration before the assumption of office designed to ensure that the trusteeship inherent in public office is not exploited for private and selfish gain. These provisions together with the derivative statute collectively establish a regime which mandate specified public officers to declare their assets and place the

[413] See generally, Article 187, 1992 GHANA CONST.

declaration with the Auditor General for safe keeping and retrieval for appropriate future use. Thus article 286 (1) provides *in extenso* as follows:

A person who holds a public office mentioned in clause (5) of this article shall submit to the Auditor-General a written declaration of all property or assets owned by, or liabilities owed by, him whether directly or indirectly

The declaration to be made by persons holding public office is expected to be in writing specifying the scope of assets owned or acquired before the assumption of office. More crucially in this regard, and in order to ensure that there is a marked degree of responsibility under the law, the provision shifts the burden of proof by raising a presumption of guilt against the declarant in respect of assets acquired after the assumption of office which cannot be attributed to the income of the declarant or other justifiable source. Thus, it is provided in clause 4 of article 286 as follows:

Any property or assets acquired by a public officer after the initial declaration required by clause (1) of this article and which is not reasonably attributable to income, gift, loan, inheritance or any other reasonable source shall be deemed to have been acquired in contravention of this Constitution.

The essence of this provision is to avoid the prospect of public office holders amassing wealth at the behest and expense of the state. Indeed, it is easy to assert that the law constitutes a direct and important intervention against the menace of corruption. By compelling the declaration of assets prior to the assumption of office,

the law promotes the accountability of public officers for assets acquired during their work as public servants.

Even more fundamentally, the shifting of the burden of proof to the office holder to establish the fact that an asset acquired following the assumption of public office is legitimately acquired is ostensibly designed to counterbalance the asymmetry of information on the part of the office holder as owner of the asset and the state seeking to investigate the propriety of the acquisition. This is crucial to ensure that the state is not saddled with the difficulty of proof especially given the need to ascertain various factors including the source(s) of income, value of asset, among others which information are substantially likely in the personal knowledge of the asset acquirer. It is therefore conceivable under this law that a person holding office in one of the contemplated positions under the law can be deemed presumptively guilty under the law if he fails to adequately explain the basis or source of his newly acquired property or where he fails to connect a new asset acquisition to his legitimate income earned as such public office holder, or other legitimate source of income.

This provision takes a pragmatic view of the enforcement of laws and rules on the investigation and prosecution of corruption. The deficit of information on the part of investigators in criminal prosecutions relative to alleged culprits often results in the loss of prosecutions, which should have otherwise resulted in convictions. By placing the obligation to dispel suspicions of impropriety on the alleged culprit, the law ensures that public office holders explain the source(s) of their wealth and upholds

the principles of public interest accountability within the context of wealth creation and accumulation.

These virtues of the law notwithstanding, the provision have been criticized for lacking in both substantive and procedural effectiveness. From a substantive standpoint, the law remains a bare mandatory provision, which merely obliges declarants to state the extent of their assets without providing a corresponding guidepost on the character of the declaration. This has inevitably led to declarations that barely meet a standard threshold. For example, by being shorty on detail, the law fails to spell out the mechanics of ensuring that declarations correspond to the realities of asset ownership with correlative processes for ascertaining the veracity of declarations. The absence of a stated substantive requirement of what the content of the declaration should be relative to the properties of the declarant represents a major weakness in the operations of the law and the historical experience in this regard betrays the gravity of this weakness in the law.[414] Another substantive weakness attending the implementation of the law is the fact that declarations appear to focus primarily on real estate assets and seems to ignore "assets" like bank accounts, securities, and other instruments in which commercial or economic interests of persons are held.

The substantive deficit of the law is reinforced by the procedural lapses in the operation of the law. The current model under which the declaration is made in secret and kept confidential unless requisitioned pursuant to a formal judicial or

[414] Asset Declaration in Ghana: Public Deception or Reality? Ghana Anti-Corruption Coalition, http://www.gaccgh.org/details.cfm?corpnews_scatid=7&corpnews_catid=7&corpnews_scatlinkid=115#.XszjVy-cZN0

quasi-judicial proceeding is highly unsatisfactory. Not only does it undermine the very transparency principle it seeks to advance, but also that this model denies the 'audit' process an opportunity to interrogate the accuracy of any declaration made in the process. The fact that declarations are expected to remain sealed until requisitioned in a recognized judicial proceeding or other legitimate inquiry fundamentally weakens the public participatory dimensions of the regime and renders it largely marginal as an anti-corruption strategy. From the standpoint of the declarant, this may appear to be a legitimate protection of his/her human rights to privacy and proprietary interest from public intrusion. But gauged from the perspective of sunshine legislations and the external accountability of public officers within the context of the fight against corruption, the procedural model adopted in the declaratory process defeats the principled intent of the provision of the Constitution and the regime in general as one designed to promote transparency in public life. This position is borne out on a number of grounds; First, by rendering the initial declaration secrete subject only to legitimate requisition, the law unwittingly promotes inaccurate declarations given the absence of public input in ensuring that accurate declarations are made by presumptive office holders. It is therefore a generally held view in Ghana that there exists a wide discrepancy between assets declared by public officials and the actual properties held by them at the time of the declaration and their exit from public office. Public office holders have been said to generally make declarations, which often included anticipated acquisitions of asset and these are added in contemplation of assets to be acquired while in office thereby making mockery of the regime. This is further compounded by the absence of a system of verification and audits under which submitted declarations will be

scrutinized to ensure their truthfulness and accuracy. The result has been that declarations submitted under the asset declaration law have often been unhelpful in tracking asset acquisitions through corruption by public office holders.

RECOMMENDATIONS

The foregoing illustrates a fundamental reality, namely, that the persistence of corruption in the face of years of ROL and institutional reform remains baffling and unaddressed. What is clear however is the fact that the persistence and growth in the canker of corruption is symptomatic of flaws in the past and current strategy adopted through the implementation of the ROL under the larger governance reform strategy, which has been implemented over the years. The situation and circumstance of corruption in Ghana vis-à-vis combat strategies employed over the years as relayed in this research demonstrates the preeminence of the formalist ROL employed as the primary tool in the fight against corruption. Yet, analyses in previous chapters have shown that not only was the implementation strategy of the ROL in Ghana's governance system problematic, but also the fact that various nuances of its failures as an implanted governance value further complicated the fight against corruption and in some ways may have actually succeeded in entrenching the practice. The need for new thinking and fresh insights on the fight

against corruption can therefore hardly be overemphasized given the growing complexity of the phenomenon and its impact on the governance fortunes of Ghana.

Under the following recommendations, I offer proposals for combatting corruption taking into account contextual variables and background recognition of reasons informing failures of past efforts. In so doing, I will propose and analyze recommendations for effecting changes in the strategy that reflect the Ghanaian situation and the ubiquity of corruption both in scope and in depth. Informed by the overall theme, data and literature of this work, the findings in the empirical research have provided a contextual template for deconstructing the current situation and the proposals made in the recommendations accordingly reflect the need for a seismic shift in the regime designed and structured to fight corruption. It is significant to recognize at this stage that the suggestions or recommendations made here are meant to be complementary and are not made to be applied as substitutes for the ROL. It bears mentioning therefore in this vein that when implemented as an integrated whole together with the ROL, the combat strategy becomes more effective against the menace of corruption.

I. NUDGE THEORY

Existing approaches to fighting corruption adopt the hard law approach. This strategy is built on the assumption that the law is efficacious to deal with all social vices and also on the supposition that legal institutions and rules have the quality of

regime omnipotence and omnipresence in which the law has a long arm that will reach and punish all vices. In a sense, the ROL model is built on this background logic and seeks to combat corruption through the instrumentality of law. The shortcomings of this model have been repeatedly mentioned in this work and forces a fresh look at the formalist ROL orthodoxy strategy moving forward. Richard Thaler et al's nudge theory offers critical insights into the subject of fighting corruption within the larger paradigm of governance reform.415 Their work provides a framework for developing differing responses to social and behavioral vices like corruption over and above the conventional tool of hard law. Nudge theory therefore provides a powerful counterweight to the preponderant and isolated use of the formalist ROL and the penal strategy in the fight against corruption. On the other hand, the fact that corruption is the product of complex decision-making processes and rational choices by the actors involved compels us to recognize the basis of those decisions made and how psychosocial responses can be developed to combat the menace and possibly eradicate it.

Thaler at al's work in 'Nudge' offers alternative means of securing compliance with desired policy outcomes and regulatory expectations through the use of more subtle goading and incentive schemes that encourage behavior in desired directions. According to Opoku et al,

415 R.H. Thaley & C. Sunstein, Nudge: Improving Decisions About Health, Wealth and Happiness, 2009

A nudge is any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives[416]

A nudge therefore fundamentally represents a factor of choice and deviates from the orthodoxy of legal regulation in which mandatory rules shape and fosters preventative and combat strategy. In Cass Sunstein's work on Nudges,[417] he argues that they have the fundamental quality of preserving liberty and freedom of choices of the individual and accordingly further makes life simpler in that vein. Given their subtle nature and the tendency of nudges to gently goad the individual into action, nudges invariably preserve the scope of action of the individual. In other words, by seemingly couching the incentives in permissive terms, nudges allow room for operation of individual action and merely manipulate the preferences of the individual through a variety of incentives deployed.

In the words of Sunstein,

It is important to see that the goal of many nudges is to make life simpler, safer, or easier for people to navigate. Consider road signs, speed bumps, disclosure of health-related or finance-related information, educational campaigns, paperwork reduction, and public warnings. When officials reduce or eliminate paperwork requirements, and when they promote simplicity and transparency, they are

416 P. Opoku et al, Institutionalizing Nudge to Fight Corruption and Promote Economic Development in Developing Countries: The Case of Ghana, International Journal of Science & Research, https://pdfs.semanticscholar.org/e96c/e4217cbc1f2d72a2d5e8893be2ad0687a5d6.pdf
417 C. Sunstein, Nudging: A Very Short Guide to, *37 Journal of Consumer Pol'y* 283 (2014)

reducing people's burdens. Some products (such as cell phones and tablets) are intuitive and straightforward to use. Similarly, many nudges are intended to ensure that people do not struggle when they seek to interact with government or to achieve their goals.[418]

Nudges are therefore essentially "soft guides" in the nature of incentives that are carefully tailored to drive individual choices and actions in particular directions. As noted by Sunstein above, the use of nudges provides cheaper options to legal regulations. Indeed, studies in other disciplines have shown that legal regulations in subjects like corruption can prove counterproductive, as this tends to induce rebellion in the actors regulated.[419] The subtlety of nudges can provide a powerful means of gently shaping behavior moderated by the incentives put in place. For example, the use of default settings in various programs including in the payment of taxes and filing of returns can heighten the negative incentives that will encourage actors affected to ensure that they comply with mandatory rules for the payment of taxes and the filing of returns at the company registry. Thus, while the penal deterrence of hard law can compel compliance generally speaking, default mechanisms in nudges tend to bite in subtle but effective ways given their incentive-laden tendency. This reduces the extent and prospect of resistance against compliance to nudges and tends to enhance their overall effectiveness. On the other hand, hard laws on corruption tend to generate covert resistance and reactions that

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418 Id

419 A. Disch et al, Anti-Corruption Approaches: A Literature Review, Norwegian Agency for Development Cooperation – Norad and can be ordered from: http://www.norad.no/en/Tools+and+publications/Publications/Publication+Page?key=119213 This digital edition is a special version only published in Sida's publication data base and can be downloaded from: www.sida.se /publications.

are often inspired by the desire to avoid the law and devising schemes around its enforcement.420

Nudge theory therefore provides us with useful insights on the fight against corruption. As a recommendatory theory, nudge theory seems to be built on the view that legal regulation of behavior *per se* tends to deal with the symptoms of antisocial behavior such as corruption and that in order to suppress or eradicate the root causes of a particular behavior, combat strategies must tackle the root causes by focusing on the incentives that ultimately drive these behaviors. Given that actors who engage in corruption are often motivated by the desire to enrich themselves albeit through illegal means, investing in incentives aimed at redirecting actor preferences is likely to have a more effective and lasting effect than one that merely forces them through threat of punishment to avoid indulging in the impugned act through hard law.

Given Ghana's experience with corruption, nudges are a vital tool that can be employed to deal with the deficits of legal regulation and the orthodoxy of the formalist ROL in general. Through a combination of nudge factors such as warnings, advertisements, default consequences, etc, Ghana can leverage on the tools and levers of nudges in the fight against corruption. Sunstein's suggestion of a pre-commitment strategy under which people can be encouraged to sign up to ethical values that denounce corruption for example, can provide an important

420 The character of corruption as a 'conspiratorial offence' in which actors behave in concert against the state is especially noteworthy in this regard and it is that feature that usually gets the parties adjusting their ways in order to undermine any law that seeks to regulate their corrupt behaviour.

psychological tool for the fight against corruption. As a nudge, pre-commitment has the attribute of engaging the pledger to live up to the promise made and to strive towards sustained compliance. Its consensual character creates the requisite bond and contract in the individual undertaking to comply and in this case the state, to respect the essence of the pledge. In the case of Ghana, pre-commitment nudging strategies may further achieve the added advantage of creating a sense of ownership on the part of the person undertaking to comply with the principles of integrity and trusteeship in public office while denouncing the vices of exploitation and theft inherent in corruption.

Other nudges such as default settings, which have the effect creating default liability in circumstances where action was expected or required of the individual are effective ways of inducing action and responsibility on the part of the individual. Default liability nudges are distinguishable from regular legal default liability in at least one fundamental respect. Whereas legal default liability requires action arising out of a preexisting obligation, nudges which create default liability sometimes create incentives arising out of default thereby often inducing the intended action in a particular direction spurred on by the background incentive. In another sense, legal default liability nudges heighten the cost of inaction in respect of a preexisting legal liability whereas default liability nudges focus on merely goading action in particular directions while discouraging inaction through a combination of incentives and disincentives. This category of nudges is very much akin to regulatory compliance rules with default liability obligations and often compels an actor to

behave in a certain way in respect of his/her legal obligation failing which certain consequences follow. For example, while it is a legal obligation of citizens and corporate entities to file tax returns, a nudge could be fashioned in the character of fixing tax liability at a heightened cost in the event of a default on the part of the individual or entity to ensure that he complies with the requirement to file his returns. This example combines the effect of legal obligation (ROL) and a default liability nudge whose heightened cost incentivizes action on the part of the individual with the view to avoiding the consequences of default. Combined with more positive nudges such as the giving of tax rebates for early and timely payments of taxes, the incentives offered through the mechanism of nudges enable rational choices to be made by the individual in his decisions on complying the legal and institutional obligations incumbent on him.

The need to rethink existing approaches to the fight against corruption within the context of nudge theory cannot be overemphasized. First, the current ROL approach has largely failed to regulate corruption and create a regime that enjoys substantial compliance. Given the widespread nature of corruption with the governance and social fabric of Ghana, the use of law *qua* formalist ROL over the years has not succeeded in discouraging let alone suppress and eliminate corruption. Thus, unlike hard law in an insular fashion, which focuses on penal deterrence *per se*, the use of nudges with its incentive stratagem can be leveraged upon in the fight against corruption. Ghana especially presents an interesting scenario for the application of nudges. The general preference for informality by the populace and even officialdom in the affairs of state has been one of the key reasons for the failures of the

formalist model of the ROL. Nudges respond to the incentive dynamic that inform actors who indulge in corruption in the first place by presenting would be culprits with more preferred options. For example, nudges that compel the publication of the names of entities or persons who pass government integrity or anticorruption certification programs, reduces tax liability on certain grounds, encourage transparency in public procurement etc., tend to deal with the rational choices made by persons who indulge in corruption and many will seize the advantages offered by nudges rather than risk the heightened penalty of non-compliance. On the other hand, the attractiveness of corruption as a widespread vice in the absence of nudges makes regulation of the practice through hard law alone difficult if not impossible. In this vein, the result has been that corrupt officials rather merely tend to become more inventive and creative in their skirting around the law rather than obeying its letter and spirit.

Yet, the shortcomings of nudges within the Ghanaian context must equally be recognized and problematized. Given the psychosocial dimensions of corruption, any proposed model of solution must deal with the various variables shaping the practice. In this regard, while nudges are highly effective in dissuading wrongful behavior in one direction while encouraging another in a different direction, its overall effectiveness is still attenuated by other factors. For example, within the context of corruption, the incentives offered by nudges, while broadly helpful as an inducement towards good behavior, will often only be effective in cases of petty corruption. This is essentially because of the incentive mismatch, which tilts the balance in favor of corruption. In other words, given that the amounts involved in

grand corruption are often large and the rewards great, the inducements offered by nudges tend to pale in significance to the prospects of enrichment offered by specific acts of corruption. This reality represents a significant limitation on the effectiveness of nudges and the work of behavioral scientists from whom legal academics like Thaler and Sunstein borrowed in their seminal scholarly work. The inescapable conclusion that can be drawn from this is that the inducement factor in nudges largely applies to petty corruption and would often prove ineffective in the face of grand corruption where large sums of moneys are involved.

In order to overcome this deficit, nudges in Ghana must accordingly reflect certain nuances peculiar to Ghana's circumstances. In order to optimize their effectiveness, the following are recommended in its application as an anti-corruption tool in Ghana. First, when used or applied to grand corruption, significant emphasis must be made of the pre-commitment strategy and efforts made to reinforce the internalization of the values and mores of public service and constitutional trusteeship. Secondly, it is recommended that when used in Ghana, nudges must be applied in combination with other rules of law on corruption. In other words, for complete and holistic effectiveness, the application of nudges cannot dispense with the ROL orthodoxy although the latter remains both ineffective and inefficient in the absence of nudges. In this regard, the ROL and nudges can be applied in a manner that makes them mutually reinforcing in terms of their respective impacts relative to corruption. Thus, the penal impact of the ROL when deployed in combination with the incentives promised in nudges can heighten the cost of disobedience to the law on the one hand, and deepen the effect of the incentives on the other. For example, nudges

that encourage a pre-commitment to integrity codes and which promise reliefs from certain obligations in consequence can be used in combination with hard law obligations that penalizes corrupt practices and violations of those integrity codes. The symbiotic implementation of the rules and laws on corruption and nudges will help avoid the dangers of insularity and help bridge the gaps in compliance.

The use of nudges as a complementary tool in the fight against corruption promises to deliver better results given the soft and hard orientations of the two approaches and how together they reflect the very character of corruption as a socio-legal phenomenon. By nudging people in preferred directions through the medium of incentives and implicit costs of non-compliance, nudges will avoid the element of coercion or force and the resistance or avoidance these tend to generate. In addition, the incentives will deal with the rational aspects of corrupt behavior as people will inevitably recalibrate their choices on the basis of the new incentives offered by the nudges. On the other hand, the complimentary use of hard law will provide the needed deterrence and further reinforce the impact of the incentives offered through any existing nudges.

II. EDUCATION TO COMBAT CORRUPTION

The complexity of corruption requires a multifaceted approach in any combat strategy devised. The dynamic of the practice reflect a phenomenon which is not

only comprised of a *corpus* but indeed one that initially derives from a mindset steeped exploitation and belief in illegal gain.(*animus*) It is therefore recommended that for Ghana to better fight and prevent the menace of corruption, the combat strategy must harness and leverage on the opportunities offered through the means of education. As a preliminary point however, it bears mentioning that education as a combat tool on corruption and its capacity to shape the national psyche in this regard is largely taken for granted and even ignored. The gradual erosion of the subject of corruption in the syllabi of schools, coupled with the dearth of structured educational programs on corruption has meant that the internalization of the values concerning corruption has been low or nearly absent in Ghana's educational system. The situation remains the same as far as the issue of public education on the dangers and problems of corruption are concerned. This notwithstanding, education has been generally recognized the world over as an essential combat tool for fighting corruption. Given that corruption is fundamentally a vice partly perpetuated by social systems, ignorance, poor sense of mores and structures, education provides a powerful tool to challenge the systems and structures undergirding the existence and growth of corruption. In other words, the fact that corruption may be ubiquitous among the populace speaks to an obvious ineffectiveness of the law enforcement and detection systems put in place to identify and punish corruption. On the other hand, the generality of the practice of corruption points to the importance of adopting a *root-based model* for fighting corruption which is preventative in nature and seeks to uproot corruption as a cognitive variable. 421

421 The ROL orthodoxy and approach merely seem to tackle the symptoms of corruption given that the act itself is largely symptomatic of a flawed system which includes not only weak legal ordering

The proposed educational model invariably involves the redesigning and reformulation of educational curricula and syllabi incorporating integrity values, civic and ethical responsibility of citizenship, social responsibility of preventing and combatting corruption, among others.422 It is important to note however that using the model of education in corruption prevention and combat transcends the propagation of integrity ideals and civic responsibilities in students through the formal educational system. Education as a strategy must incorporate both formal and informal models of transmitting information on corruption and its vices to the country's development. In this regard, an efficacious mode of educating the citizenry against the menace of corruption is the use of the mass media. This takes a variety of forms including the print and electronic media of the radio and television as well as newspapers in addition to opportunities presented on social media platforms. In addition, advertisement boards displayed in vantage public places and other forms of social dissemination of information could collectively help in carrying anti-corruption messages to the general populace. The functional importance of using education to combat corruption is rather obvious; First education is a comparatively cost effective method of fighting corruption given that it involves the expenditure of low sums to achieve relative to the revenue loss to the state incurred through corruption.423 For example, when carried out through schools, students can be educated without the state incurring extra costs in teaching students given the existing infrastructure and

and absence of ethics, but also the lack of education and intrinsic recognition of the problems posed by corruption.

422 See also, Chapter 19, 1992 GHANA CONST.

423 Because of the preventative nature of the educational model, it tends to save the state the cost of corruption and the need to cure it after it had occurred. As already shown in the literature and argued in this work, corruption costs the country three billion dollars every year and this dwarfs any sum spent in public education.

personnel employed to deliver whatever formal educational model is put in place against corruption. Thus, besides the design and production of new curricula and specific personnel hired, fighting corruption through formal education remains a comparatively cost-effective exercise. In a similar vein, public education tends to reduce the cost of corruption by tackling the menace from its base or roots. Education as a combat model therefore represents a preventative strategy, which focuses on stopping the future occurrence of corruption through the inculcation of the right ethos of public service and the principles of trusteeship in official actors who either indulge in or are likely to engage in future acts of corruption.

The effectiveness of public education as a strategy can hardly be doubted; First, given that corruption as a social canker thrives on the "group think" of the participating public (herd mentality), public education has the effect of generating the needed information on the cost- benefit dynamics of corruption and the overall dangers posed by corruption for the Ghanaian state and its governance. In this regard, education allows the propagation of the shared values of accountability and trusteeship and helps highlight the negative impact of corruption on national development including its effects on the distribution of social amenities and infrastructure. Furthermore, education enlightens the populace on the opportunity costs of the provision of social amenities and utilities and the general welfare of the citizenry. Secondly, public education enhances the participation of the citizenry in the fight against corruption and therefore represents a participatory and inclusive model. By promoting information symmetry, citizens are empowered to challenge corrupt actors and systems, and for that matter the whole establishment hinged on

official exploitation of state resources. Public education intervention can be designed as an admixture of interventionist policies combining education *per se* with nudges strategically fashioned to induce specific behaviors or behavioral reaction from the populace. The interaction between education and nudges can be conducive to the overall combat effort given that the former both promotes and reinforces the latter. From a conceptual standpoint, education and nudges both share the factor of focusing on the mental element of the actor and this invariably increases the prospects of compliance as citizens internalize the values and virtues of integrity as a lifestyle and culture.

This recommendation is however also not without pitfalls. Interventions models built around education tend to be themselves liable to the very corruption they seek to eradicate. For example, given that educational models require the redesigning and creation of new syllabi etc, these can be exploited to fashion a version of education that either understates the negative impact of corruption as perpetrated by the societal elites. In other instances, the subject of corruption gets altogether politicized and blamed on a segment of the populace and the prospects of this in the Ghanaian scenario is high given the over-politicization of nearly every subject in the country. For education to be used as an effective tool against corruption thus, it is crucial that this difficulty is recognized and avoided in any educational model designed in order to avoid jeopardizing and delegitimizing the intervention instituted.

III. DE-BUREAUCRATIZATION

An important recommendation or proposal for fighting and eliminating corruption from the body politic of Ghana is the substantial reduction in the layers of bureaucracy prevalent in the public and civil services of Ghana. The inter-linkages between complex bureaucracy and corruption is all too well established in the scholarship to merit specific and detailed treatment in this research.[424] Kaufmann's work and his concept of legal corruption typifies the practice of instituting legal barriers in the operations of the state with the view to exploiting those barriers for private or sectional gain. Excess bureaucratic layers deliberately designed to provide opportunities for patronage, rent payment, and general exploitation exemplifies Kaufmann's concept of legal corruption and in this regard, the situation of bureaucratic corruption in Ghana has remains endemic. It only bears mentioning here the fact that the complexity of bureaucracy in the public and civil services of Ghana provides spaces for corrupt behavior and any response strategy to fighting corruption in Ghana must deal with the problem of bureaucratic corruption in order to stand any chance of suppressing and possibly uprooting the menace from Ghana's governance system. In the Ghana's particular case, the mixed use of complicated bureaucratic rules and procedures and within a ROL setting and governance reform agenda provides a perfect setting for rent-seeking and abuse of authority as official

[424] D.J. Gould et al, Bureaucratic Corruption in Africa: Causes, Consequences and Remedies, International Journal of Public Administration, Available at https://www.tandfonline.com/doi/abs/10.1080/01900698908524633?journalCode=lpad20; O.P Dwivedi, Bureaucratic Corruption in Developing Countries, *Asian Survey* Vol. 7, No. 4 (Apr., 1967), pp. 245, Available at https://www.jstor.org/stable/2642478?seq=1#metadata_info_tab_contents

actors leverage on powers vested in the various offices to maximize their own power and induce the payment of rent. Given that compliance with these rules invariably exact a heavy cost and burden on the individual, negotiating around them through the payment of bribes and rents becomes a plausible option.

Any policies designed to fight against corruption in Ghana will of necessity have to actively work at dismantling the structures of bureaucratic systems, which invariably promote corruption without contributing to the operational efficiency and effectiveness of governance. In other words, these reforms will have to conduct audits designed to ascertain the extent to which specific bureaucratic arrangements contribute to the operational functionality of the public and civil service failing which these must be dismantled. For example, the existence of multiple layers of approvals only serve to promote rent-seeking and corruption and have hardly advanced the purpose of reinforcing the proclaimed oversight and checks and balances.

Thus, while it is important to maintain the strictures of dispersion and limitation on authority in the administrative structuring of these entities, the operations of many bureaucratic structures must be subject to situational audits with the view to eliminating layers of its operations that only induce or promote corruption and rent seeking and payments. Splintering the structures of approval, licensing, certification, registration, etc, only promotes rent seeking and corruption. Reducing these multiple

layers to their barest minimum is a functional approach to fighting the menace of corruption in Ghana. Bureaucratic reform is central to meaningful governance reforms given the prominent role it plays in promoting corruption in general in addition to its permeable influence in other systemic variables of corruption.

As suggested, a starting point could be to conduct an audit of the structural integrity of the civil and public services of Ghana and to determine the extent to which the layered strata contributes to the overall performance of the institutions comprising the public services of Ghana. While some work have been done in the past reflecting this recommendation, it is important to distinguish and point out the peculiarity of this suggestion. Under this proposal, it is suggested that the audit to be conducted ought to be both nimble and narrow focusing on the specific case of corruption and how the menace is fomented and sustained by the structuring and layout of the bureaucratic system. More narrowly, it is recommended that the reform should focus on the structures and systems of legal corruption as promoted through the mechanism of bureaucratic structuring and the general administrative layout.

In order to effectively do this however, it is imperative that the restructuring and recalibration of the bureaucratic set-up be deployed against the background of the appropriate nudges as earlier discussed above in order to maximize the outcome of any actor responses following the reform. This proposal also invariably incorporates a fundamental aspect of nudges as identified by Sunstein, namely the factor of 'simplicity' and its role in promoting compliance. Thus, in this context, the removal of the complex bureaucratic layering advances the dual goal of promoting compliance

with core institutional rules while eliminating the spaces for corruption and rent-seeking. The factor of simplicity patent on Sunstein's articulation of nudges reflects an obvious reality namely the fact that complexity in any establishment presents an opportunity for exploitation and rent seeking by actors or officials who maximize their power at the expense of ordinary citizens who appeal to their "superior status and knowledge" for assistance. By riding on the back of complex rules and procedures, official actors merely exploit the opportunities presented in the existing bureaucratic system to indulge in corrupt behavior. Simplifying the systems, rules and structures will inevitably remove the available spaces for exploitation and empower citizens who patronize the work of public institutions.

IV. CONSTRUCTING A MODEL OF DECENTRALIZATION

A further recommendation for reform worth considering in this work hinges on decentralization and empowerment of local communities in decision-making. A key reason that has generally been touted as explaining the prevalence of corruption in Ghana is the issue of over-centralization and concentration of power at the center forcing critical decision-making to coalesce around officials in the national capital. In this regard therefore, centralization and excess bureaucratization combine to enhance the complexity of corruption and promote its sustenance in general. In order to deal with this problem, decentralization has been proposed as a viable

solution. Yet the general treatment of decentralization in the scholarship[425] has stopped short of identifying and stressing the peculiarity of that system in its perpetuation of legal corruption. For example, the research has tended to stress the transfer of authority from the center to the periphery *per se* as the very solution for the elimination of the canker. In truth, decentralization provides a viable remedy to the corruption challenge through the sense of ownership it confers on decision-makers in the deployment of public resources when power is transferred to local authorities. This is fortified by the correlative sense of loss to be felt by actors who act improperly by exploiting resources voted for the development of local areas. The fact that local officials in any administrative set up of decentralization often tend to be indigenes of the places implies that there is often a sense of shared commonwealth in which decision-makers feel invested in the areas under their jurisdiction and are accordingly better likely to protect resources meant for its administration.

This scenario stands in contradistinction to prevalent trends at the national level, in situations of concentration of power at the center, where decision-makers often feel detached and far removed from the areas or subjects in respect of which they administer. Thus, while the variable of transferred power invariably plays a role in the impact of decentralization on the fight against corruption, it is important to

[425] R. Fissman & R. Gatti, Decentralization and Corruption: Evidence Across Countries,http://documents.worldbank.org/curated/en/264891468780583449/820140748_20040413111100411/additional/28202.pdf; F. Odd-Helge, Decentralization and Corruption, A Review of the Literature, https://www.researchgate.net/publication/37166486_Decentralisation_and_Corruption_A_Review_of_the_Literature

stress that the sense of ownership and attachment of local actors can play a pivotal role in the overall combat strategy adopted under decentralization. The proposed reform will have to fundamentally invest in the removal of excess bureaucratic structures and dismantle opportunities for corrupt behavior. More broadly as an effective anti-corruption tool however, the model of decentralization to be constructed must of necessity incorporate such factors as minimum local content participation in local governance, tender boards composition at the local level reflecting residency, and contract implementation with the view to maximizing the sense ownership and protection of public resources at the local level. This recommendation indubitably blends the ROL model and *real politik* factors as well as relevant social and demographic factors in responding to the issue of corruption through governance reform. The multiple factor dimension of the recommendation overcomes the deficits of the purely ROL orthodoxy and its preference for legal rationality over reality. Redesigning a decentralization scheme anchored on the need to stop corruption will disperse authority and thereby remove excess power from the hands of state actors and by so doing their incentives towards rent seeking and bribery.

V. LIMITING THE USE OF DISCRETIONARY POWERS

The use of discretionary powers, its complexities and the varying implications presents a tricky scenario for consideration relative to recommendations on the fight

against corruption and the formalist ROL orthodoxy. Consideration of the role and dynamics of discretionary powers in the recommendation section of this work is important given the role played by the exercise of discretionary authority in the entrenchment of rent seeking and corruption in general. In its ideal application, discretionary powers play a key role in mainstream governance and public administration. The need for flexibility in decision-making represents a fundamental reason for the conferment of discretionary authority and the prevalence of this power in Ghanaian constitutional and administrative jurisprudence. Thus, a major feature of both the 1992 Constitution and the general laws of Ghana is the grant of discretionary powers to official actors and agencies of state. These include in areas of granting contracts, licenses, employments and appointments, procurements, among others.

A natural outcome of the exercise of discretionary powers is that the overall powers of officials tend to be generally augmented given the option to choose between alternative courses of action.426 In order to curb the potential for abuse, the

426 K.C. Davis, *Discretionary Justice: A Preliminary Inquiry.* Champaign, University of. of Illinois Press, Fifth Printing edition (1976); M.S. Feinstein, *American Cetacean Society v. Baldrige*: Executive Agreements and the Constitutional Limits of Executive Branch Discretion in American Foreign Policy, *Brooklyn Journal of International Law* 12 (1986).; A.S. Goldstein, *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea.* Baton Rouge, La.: *Louisiana State Univ. Press (1981);* M.G.Heyman, Judicial Review of Discretionary Immigration Decisionmaking. *San Diego Law Review* 31 (1994); C.H Koch,. Judicial Review of Administrative Discretion, *George Washington Law Review* 54 (1986); D. Maranville, Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism. *Vanderbil t Law Review* 39 (1986); L.G Mills, A *Penchant for Prejudice: Unravelling Bias in Judicial Decision Making,* Univ. of Michigan Press, Ann Arbor (1999); C.S. Neuren, Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974, *Texas Law Review* 6; (1984); J. Paquette and D. Allison, Decision-Making and Discretion: The Agony and Ecstasy of Law and Administration. *Education & Law Journal* 8 (1997.), 161-81; S.A. Shapiro, and R.L. Glicksman. Congress, the Supreme Court, and the Quiet Revolution in

Constitution of Ghana has instituted measures designed to regulate the exercise of these powers by subjecting the exercise of discretionary powers to standard criteria including a requirement to be "fair" and "candid" and to avoid "prejudice" in general.427 *Prima facie* therefore, the constitutional regime on discretionary authority appears adequate given the ostensible safeguards put in place under the Constitution itself.428 This notwithstanding, any objective observer will conclude that the regime has generally been observed in breach than in practice. The rapid violations of official power arising out of the exercise of discretionary authority coupled with the spaces provided for negotiating personal interests of official actors through its exercise, challenge the assertion that the legal regime in Ghana adequately regulates and curbs the wrongful use of discretionary power. The need for reform in this regard cannot be overemphasized.

The failure of the prevalent constitutional safeguards points to the issue of the cost aspects (financial and otherwise) of litigating the breaches of discretionary powers and how official agents of state seize the opportunities presented in the slow-paced justice system to expand their powers conferred through discretionary authority. In other words, the cost of litigating breaches of discretionary authority acts as a perverse incentive for officials to amass extra authority beyond what is conferred spurred on by the absence of efficient remedies through the judicial process. Given the time-consuming nature of the judicial process and the wide 'margin of appreciation' given official actors in their conception of accorded discretionary

Administrative Law, *Duke Law Journal* (1988). M.I. Vila. *Facing Judicial Discretion: Legal Knowledge and Right Answers Revisite,* Dordrecht, Netherlands, Boston: Kluwer Academic, (.2001)

427 Article 296

428 Id

powers, the constitutional guarantee becomes meaningless in practice.429 Considered another way, the existence of the discretionary power in fact appears to hinder the regulation and suppression of corruption, and rather unwittingly promotes the act or practice given the permissibility of official action and the spaces it provides such authority relative to corrupt practices. Consequently, the general use of discretionary powers under the Constitution presents a problem relative to the problem of corruption as public officials have routinely exploited discretionary authority to advance private advantage and gain by adopting elastic interpretations on conferred power. The fact that state officials are empowered through discretionary authority to assert preferences from a range of options tends to allow corrupt officers to exploit the spaces afforded by the guaranteed discretion.

The problematic situation with the abuse of discretionary power is compounded by the very structure of the constitutional safeguards put in place. The use of words such as *fairness* and *prejudice* within the 1992 Constitution perhaps heightens the uncertainties inherent in the application of the safeguards.430 These words are inherently subjective and liable to open textured interpretations not only by courts but also officials applying the rules in the first instance. When this uncertainty combines with the overall cost aspects of litigation and justice administration, the weaknesses inherent in the discretionary regime becomes clearer and indeed untenable.

429 Article 296 uses variables that are initially subjective and liable to abuse and this combines with a lengthy and slow judicial process to optimize its cost inefficiency as a safeguard tool.
430 E.K Abotsi, Introspecting the Office of the Special Prosecutor's Act and Ghana's Constitutional Framework on Anti-Corruption, *AJICL Vol. 28* Iss 2, supra note 251

It is in light of this that the recommendation of the reform of the law on discretionary powers should be deemed a priority in the governance reform agenda. It is recommended that the current regime should be reformed at two levels of generality and spread. First, discretionary authority should be reformed in a manner that substantially reduces the scope and spread of corruption by detailing and circumscribing the circumstances for the exercise of power and in general decision-making within the public sphere. Detailing the nature and scope of official authority will of necessity remove the wide latitude of discretion and the margin of appreciation availing decision-makers, which has usually been abused and appropriated for private gain. While this proposal may introduce a marked degree of rigidity in public decision-making if improperly carried out, it will invariably imbue the decision-making process with appreciable certainty than currently exists. It is however crucial to reemphasize that the suggested reform will however not fully remove discretionary authority but will merely reduce discretionary power to decisions that are guided by detailed rules for ascertainment by persons affected by the exercise of power. This will also minimize the prospects of abuse as conflicts on the wrongful exercise of those powers will be likely resolved by reference to the rules. At the second level of the reform of discretionary powers, it is recommended that the number and spread of officials exercising discretionary power should be limited in order to curtail the levels at which a person seeking an administrative facilitation of one kind or the other gets subjected to the exercise of administrative discretion. The existence of multiple layers of authority all exercising discretionary authority increases the prospects of corruption and rent seeking and a useful

response in this vein is to reduce the number of persons with authority to exercise discretion in given decisions.

VI. MAINSTREAMING ETHICS

Ethics have been known to be a potent medium of fighting corruption.431 Being essentially soft law in character and content, ethics helps to forge a habit of propriety in public behavior and facilitates an internalization of core values of integrity and anti-corruption. It is therefore generally agreed in the scholarship that ethics is an anti-corruption variable and often has a higher leverage in combatting the menace.[432] Yet over the years, ethics as a regulatory and combat tool has been largely relegated to the background. While the reason accounting for this has been generally left to the realm of speculation, it would appear that the ascription to the formalist ROL orthodoxy has created a situation in which there has been a preference for hard black letter law over and above ethics in governance of Ghana. Yet given the general failure of the law to deal with the problem of corruption in the face of the collusive nature of the act, the use of the purely formalist ROL model is

431 World Bank, Development Outreach: Putting Knowledge to Work for Development, September 2006, World Bank Institute, http://documents.worldbank.org/curated/en/573111468314083144/pdf/436210NEWS0BOX0327375B01PUBLIC1.pdf

432 A. Dindi et al, Ethics as a Solution to Corruption: A Case Study of the Construction Industry in Kenya, https://www.researchgate.net/publication/330702850_Ethics_as_a_Solution_to_Corruption_A_Case_Study_of_the_Construction_Industry_in_Kenya

unsustainable.433 The fact that unlike ethics, law is mainly curative in nature and seeks to punish prohibited acts itself presents a cost problem in the fight against corruption, particularly given the ubiquitous nature of corruption and the sheer inadequacy of remedial legal institutions to deal with the problem assuming there even exists sufficient prosecutorial capacity of the state.

The Organization for Economic Cooperation and Development (OECD) has accordingly and rather poignantly recognized the use of ethics as a primary tool of fighting corruption.434 This was especially urged in the wake of the multiplicity of corporate scandals in the United States and Europe linked or connected to massive breaches of conflict of interest rules and principles with connections and network with the state establishment.435 In the assessment of the OECD, the persistence of these scandals undermine confidence in government and public institutions and challenges the capacity of these institutions to deliver the needed public goods expected of them and their establishment.436

Significantly, the 1992 Constitution incorporates provision on ethics and requires compliance with certain minimum threshold of ethical behavior in public life. Thus, under chapter Twenty-Four of the Constitution, a comprehensive set of provisions containing code of conduct for public officers are stated within the constitutional

433 N. Preston et al, *Encouraging Ethics and Challenging Corruption: Reforming Governance in Public Institutions,* The Federation Press, 2002
434 Building Public Trust: Ethics Measures in OECD Countries, https://www.oecd.org/gov/ethics/Principles-on-Improving-Ethical-Conduct-in-the-Public-Service.pdf
435 A. Cornford, Enron and Internationally Agreed Principles for Corporate Governance and the Financial Sector, No. 3, June 2004, G-24 Discussion Paper series, UNCTAD, https://pdfs.semanticscholar.org/7633/44dc5f6f83bf7b2abf7820d690f440134762.pdf
436 Building Public Trust: Ethics Measures in OECD Countries, supra note 417

frame and these mandate public officers to live up to minimum threshold norms. Of critical significance is the provision against conflict of interest which mandates that a public officer should not conduct himself in a manner in which his private interest conflicts with his official duties to the state.437 Having been elevated to the apex status of a constitutional norm, this provision charges public officers to uphold the principle of *detachment* and avoid mixing their personal and parochial interests with that of their official assignments or duties. The prohibition of conflict of interest as a as a corruption avoidance tool speaks to a recognition of the role played by conflated interests in corruption in which the interest of the state which is often at odds with that of the personal interest of the official agent acting on behalf of the state tends to be confused with the latter.

The constitutional provisions notwithstanding, it is equally important to state that that the point has been stressed that the mere publication of a code of ethics of itself does little to transform behaviors and achieve ethical compliance. Accordingly, the mere guarantee of ethical provisions within the Constitution of itself will do little to ensure the enforcement and application of ethically congruent behavior in Ghanaian public officials. This is borne out by the rampant prevalence of corruption in the Ghanaian public service in spite of the regime established under the constitution.

In the case of Ghana therefore, the effectiveness of ethics cannot be assured without dealing with other sub-systemic factors such as culture and mainstreaming

437 Chapter 24 1992 GHANA CONST., supra note 247

the ethics-based behavior. The importance of fine-tuning ethics to the surrounding context of its application lies *inter alia* in the fact that more often than not, ethics gets stymied by extraneous environmental factors.438 For example, there needs to be a shift in cultural notions surrounding gift giving and receiving in order to ensure the optimal effectiveness of ethics as a cure to corruption. In other words, given that ethical rules depend a lot on the internalization and subjective interpretation of the rules on propriety, confronting cultural attitudes that impact ethical compliance remains critical in ensuring optimal effectiveness of this tool in the fight against corruption. Furthermore, internalizing ethical rules and values represents a strategic means of eliminating corruption from the roots and is therefore a comparatively a much more enduring and sustainable option for fighting and eliminating the menace in Ghana. Thus, while the statement of the core ethical rule of conflict of interest in the Constitution represents a viable first step in the fight against corruption, there is the need to integrate cultural dynamics with ethical rules in a manner that ensures that the former is transformed to reflect the expectations of the latter. This recommendation therefore proposes the use of ethics as a complimentary tool in the fight against corruption and when so employed, ethics reinforces the formalist ROL and optimizes its overall effect.

VII. TOWARDS AN OUTCOME-BASED ROL

This research has fundamentally cast doubt on the effectiveness of the orthodoxy of the formalist ROL implemented in the governance reform in Ghana and more

438 A. Seleim, The Relationship Between Culture and Corruption: A Cross National Study, *Journal of Intellectual Capital (10) 01, January 2009.*

particularly in its use as a tool fight against corruption. In addition to others already noted, legal formalism as applied in Ghana as elsewhere is neither consequentialist nor outcome based in focus and dwells on the mere enactment of rules and to a limited degree, their application to different situations. In this regard, although the formalist ROL has remained dominant but largely ineffective in the fight against corruption in Ghana, reformers have been slow or even nonchalant towards reforming the implementation model adopted for the ROL. As earlier mentioned in this work, the formalist model of the ROL emphasizes the passage of relevant laws and the adoption of rules, institutions and systems largely replicated from other jurisdictions. This model assesses the effectiveness of the legal system based on the prevalence of those laws and institutions *per se* and largely excludes from its purview, post institutionalization issues. The implementation model of the formalist approach in Ghana has resulted in the creation of an insular regime of the law based essentially on the rules of legal deterrence.

But as has been pointed out in this work, the deterrence approach implemented in the insular fashion it has been under the ongoing reforms, has failed to work for at least two fundamental reasons; First, corruption is a social malaise that is driven by rational if perverse economic incentives. On the other hand, attempts at applying deterrent legislation without more has only driven its perpetrators to readjust their ways not to stop the act. Second, institutions set up to fight and eliminate corruption have themselves become caught in the web or vortex of corruption and have confronted the moral dilemma of implementing the ROL in this regard.439 In other

439 Documentary on Judicial Scandal in Ghana, supra note 384

words, these institutions including the judiciary by being enmeshed in the menace of corruption have lacked the moral courage and willingness to punish the act through the ROL given their own experiences with the menace of corruption. The obvious conclusion to be drawn from this experience is that while still a very important tool in the fight against corruption, the formalist ROL in its operation fails to achieve much by way of outcome. For example, standard measurements used to ascertain the prevalence and/or effectiveness of the ROL have largely focused on formalist variables which asks such questions as, whether there are the requisite legislations, whether there exist mechanisms for the enforcement of those laws, and whether facial compliance exists as far as the implementation of those laws are concerned, etc. These considerations are limited and only evaluate the symptomatic aspects of the application of the substantive ROL, and this largely accounts for the gulf between the ROL on paper and its substantive impact on the ground. It also explains, to a large degree, the failure of the ROL to fight and keep the menace of corruption in check. The discussion in this work has clearly shown that focusing attention nearly exclusively on the ROL as articulated in formalist model ignores the impact of extraneous factors such as governance culture and other manipulative and exploitative tendencies of public officials and other actors in emergent democratic settings such as Ghana's. This status quo should invariably force a rethink of the nature and operational dynamics of the ROL and ways of optimizing its effect on the fight against corruption in Ghana.

The experience of the ROL in Ghana therefore calls for a pragmatic reorientation of the formalist ROL orthodoxy in favor of an *outcome-based assessment* of the model.

This schema differs from the current approach which emphasizes form over substance and advocates a substantive approach to the ascertainment of the effectiveness of the ROL in the context of its operations in Ghana. This model dwells on the reengineering the ROL to fit the nuances of the governance regime of Ghana especially within the scope of the fight against corruption. For example, the establishment and operation of anti-corruption institutions and laws will of necessity have to incorporate expectations of institutional collusion with culprits and in some cases the political regime, and the general trumping effect of politics over law.

An outcome-based framework will therefore guide both lawmakers and constitutional agencies in framing a system of reciprocal checks and balances in respect of the regime's operation by focusing not only on ideal values of the ROL but anticipated *real poliitk* barriers to their optimal operation. An outcome-based ROL will inevitably adopt a pragmatic approach to the implementation of the ROL by tweaking the ROL to influencing the realities and vicissitudes of governance and tackling the challenges of corruption. For example, whereas the current model asks the question what laws and institutions ought to be put in place in order to deal with problem of corruption, an outcome-based ROL will evaluate the quality and effectiveness of the ROL based on the system's capacity to actually deal with vices such as corruption. In this regard, an outcome-based model will address the anomaly in which the ROL is said to exist although preponderance of rules and institutions do not match the realities of practice.

The obvious practical importance of this recommendation notwithstanding, it is critical to note that this recommendation is likely to face resistance and suffer the very consequences it seeks to rectify, is made against the backdrop of the need to shift the narrative on the implementation assessment and evaluation of the ROL.

An outcome-based ROL will help the scholarship and policy community better assess the prevalence and extent of effectiveness of the ROL on the ground. This proposal is akin to Ehrlich's living law[440] or Pound's sociological approach to the definition of law[441] whose jurisprudential effect was to demonstrate the functional futility of black letter law in the absence of the social dynamics of the law backing its implementation. This shift in narrative is important for at least two fundamental reasons: The current framework for assessing the ROL which emphasizes formalist variables presents a distorted picture of the reality of the ROL, its successes and failures and the public goods that are delivered through its implementation. This serves to undermine attempts at realistically enforcing the ROL as an anti-corruption tool and strategy and does indeed block the prospects for the nurturing and growth of the ROL in practice. Bridging the dualism inherent in the ROL brought on by the implementation of the formalist ROL regime is utterly important for the future of the ROL in Ghana and the fight against corruption in general. Secondly, an outcome-based ROL will facilitate the development of effective rules and institutions with

440 J.F. O'Day, Ehrlich's Living Law Revisited--Further Vindication for a Prophet without Honor, *18 W. Res. L. Rev. 210 (1966)* Available at: https://scholarlycommons.law.case.edu/caselrev/vol18/iss1/12
441 Hunt A. (1978) Roscoe Pound: A Sociological Jurisprudence? In: The Sociological Movement in Law, supra note 105

capacity to translate the goals and values of the ROL into substantive outcomes that benefit the citizenry as a whole.

FINAL CONCLUSION

The implementation of the formalist ROL has proven problematic in Ghana and the menace of corruption within governance rages on. This work begun with a clear statement of the problem of implementing the formalist ROL within the governance reform in Ghana using an insular strategy of law and legal institutions against corruption. Indeed, so entrenched and deeply ingrained is this tendency that even as the government of Ghana broadens its combat tools to overcome the perennial deficits in the enforcement of laws relative to corruption, its new models continue to stress and prioritize 'law' without leveraging on the coordinating influences of other important variables in the fight against corruption.[442] The analyses in this work have shown that the open-textured complexities of the concept of the ROL borne out of the implementation of a formalist version of the concept in the Ghanaian context has complicated the fight against corruption and weakened the capacity of the law as a preeminent tool of combatting corruption given the shadow regime(s) that get created in its wake. Again as shown in the foregoing analyses, this has further

[442] National Anti-Corruption Action Plan, 2015-2024 (December 2011)

worsened the failures of the ROL and the correlative impact of other informal sub-legal regimes on the official governance and legal regime installed under the ROL.

The doctrinal research and empirical findings confirm the initial hypotheses informing this work and demonstrate that the deployment of a formalist version of the ROL has failed to deal with the menace of corruption and provide an effective antidote to the incentive systems driving the offence or social vice. Consequently, the research sketched the background problem by examining the context of corruption within the development paradigm or equation and asserted *in extenso* that corruption is both rife and ubiquitous within the body politic of Ghana and continues to pose grave and fundamental challenges to the governance dynamics of the country. The thesis accordingly gave a thorough exposition of the law and development polemic and reviewed the scholarship, debates and polemics shaping conversations in the field. Building on this but critiquing the existing scholarship, I asserted, somewhat implicitly, that the uni-lineal conception of the "law" conceived in the law and development movement followed by the globalization of law and legal institutional agenda pushed mainly by transnational financial institutions may have been an early starter of a formalist agenda which is to ultimately come and influence the implementation of the ROL in Ghana's governance architecture. Significantly in this vein, the core hypotheses made at the outset of this work and largely informed by the scholarship and prevalent general impressions were substantially confirmed by the empirical research conducted whose findings illustrated the character and depth of the problem of corruption in Ghana in the face of the implementation challenges of the ROL. My research in this thesis has emphatically demonstrated that

the persistence of legal formalism under the current regime of the ROL is unsustainable in the long term as a tool to fighting corruption.

More importantly, the research uncovered the scepticism of key actors towards the version of the ROL implemented in Ghana. This finding reflects a variant of the position adopted in the scholarship in which it is asserted that a key antinomy to the ROL is the phenomenon of state capture and the appropriation of the state and its instrumentalities for the advancement of private interests. These findings were notable in not only validating the hypotheses of the work but also reinforcing the recommendations subsequently made. In this regard, the plethora of recommendations made above were crafted to reflect the multi-faceted nature of the problem and the need to devise solutions that respond to the complexity of the problem. The recommended application of the "nudge theory" emphasizes this dynamic and articulates an incipient approach to the implementation of the ROL.
Accordingly in this work, emphasis has been laid on the need for a reorientation in the toolkit and focus of the governance reform and the ROL agenda in Ghana. This is utterly imperative in order to maximize the gains from implementation the ROL as a priority governance value. Given the inefficiency of the formalist model of the ROL currently being implemented, it is important that the reform adopts an expansive approach to tackling the problem of corruption by shunning the failed insular method that has thus far been preferred but has failed.

In terms of the scholarship and literature, this research should lead to an epistemic shift in the doctrinal and empirical analyses of the ROL in terms of the assessment of

its contribution to the governance efforts. The research and analyses in this work have shown that 'on-paper' successes may not equate an on the ground success of the law in terms of its regulation or modification of behaviour. Indeed, the central thesis of the work has shown that implementation of formalist ROL has created a sub-legal informal regime populated by official actors and other beneficiaries and the operation of that regime supplants and undermines the official formalist ROL in practice. Consequently, as has been shown in this work, the orthodoxy of equating formal guarantees of law *qua* the ROL to regime effectiveness has produced a distorted picture in which the ROL has rather erroneously been deemed prevalent once official guarantees exist. On the other hand, while attempts at redirecting the focus of the scholarship has been largely successful elsewhere, this work bridges the critical gap in the scholarship by narrowing the discussion to the failures of the implementation process of the ROL in devising an appropriate tool for combatting corruption in Ghana. By so doing, and as analysed in the foregoing chapters, this work crucially addresses the mind of the scholarship to the subterranean factors that impact the implementation of the ROL in Ghana and the need to ensure that whatever design model is executed reflect the vicissitudes of these factors moving forward. This will then the tendency towards facial compliance with the ROL in the midst of the subversion of the substantive values of the regime coupled with the expropriation the ROL in favour of the informal sub-legal ROL and to the detriment of the larger governance agenda intended.

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