

Corporatizing Administrative Law In Ghana: Lessons From US and UK

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Abstract

This paper adopts a functionalist comparative law method to put forward a corporatized administrative law theory in comparative administrative law. It examines how different administrative law systems corporatize administrative law. It looks specifically at how English and American Administrative law systems, as comparators for Ghana, address corporatisation. Ghana's industrialization drive is the background to this study. This industrialization policy is intended to be private-sector-led. But the private sector is excluded from the policy making process in the country. Therefore, by corporatization, the paper makes a case for the formal recognition of industry in the policy making process. In

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hybridizing between the US and the UK, it argues for the establishment of a Public Business Tribunal, and adoption of an Administrative Procedure Act (APA) in Ghana.

Introduction

Like many African countries,¹ Ghana is pushing through an aggressive industrialization policy popularly referred to as ‘One District One Factory’ (1D1F) to attract foreign direct investments. Whilst this policy program is intended to be private-sector-led, it is evident that the private sector is critically excluded in the policy process. Since transitioning from the empirical to the normative continues to be a puzzle,² I adopt a functionalist comparative law method to put forward a corporatized administrative law theory in comparative administrative law by examining how different administrative law systems corporatize administrative law. In this case, how do English and American Administrative law systems, as comparators for Ghana, address corporatisation? By way of justification,³ these countries are chosen for comparison because they share a common law tradition. The US and UK are particularly relevant here, first, because they are the heart of Anglo-American administrative law theory, and second, because Ghana’s governmental system hybridizes between these two.

¹ See BERHANU ABEGAZ, *INDUSTRIAL DEVELOPMENT IN AFRICA: MAPPING INDUSTRIALIZATION PATHWAYS FOR A LEAPING LEOPARD* 36–39 (2018).

² See generally EVELINE T. FETERIS, *THE FUNDAMENTALS OF LEGAL ARGUMENTATION: A SURVEY OF THEORIES ON THE JUSTIFICATION OF JUDICIAL DECISIONS* (2nd ed. 2017). See also Christian Dahlman & Eveline T. Feteris, *Introduction*, in *LEGAL ARGUMENTATION THEORY: CROSS-DISCIPLINARY PERSPECTIVES* (Christian Dahlman & Eveline T. Feteris eds., 2013); CHAIM PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (1969); NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969); JOEL P. TRACHTMAN, *THE TOOLS OF ARGUMENT: HOW THE BEST LAWYERS THINK, ARGUE, AND WIN* 21–24 (2013).

³ As a general rule of justification, every speaker must give reasons for what he or she asserts when asked to do so, unless he or she can cite reasons which justify a refusal to provide a justification. See generally ROBERT ALEXY, *A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION* 15–18, 180–87, 188–208 (2010), where the author, among others, discusses the relationship between general practical argumentation and legal argumentation and argues that legal argumentation is a special case of general practical discourse because of the restraining limits within which it operates. The author makes the point that a theory of discourse can be empirical, analytical, and/or normative, and that there is a connection between these three. Analytical is the logical structure of argument, and it often goes together with normative, but empirical does not always go together with normative. Empirical is when one is describing the situation of discourse, and normative is when justifying the discourse. The justification process could be a blend of technical, empirical, definitive, and universal pragmatics approaches that are discernible in the rational discourse literature. See also STEPHEN E. TOULMIN, *THE USES OF ARGUMENT* 92 (Updated ed. 2003); See generally WAYNE C. BOOTH ET AL., *THE CRAFT OF RESEARCH* Pt. III, locs. 1903–3005 of 5909 (4th ed. 2016) (Kindle); ANTHONY WESTON, *A RULEBOOK FOR ARGUMENTS* (5th ed. 2017).

Corporatizing administrative law simply means getting industry to be formally recognized in the administrative law system of Ghana.⁴ I argue that we need to rehash the institution, organization, and mechanism⁵ of the 1D1F or similar projects to formally recognize the private sector through a Public Business Tribunal that would incentivize collective actions, information disclosure and enforcement. And with this, businesses would benefit from a corporatized administrative law in terms of gaining advantages before public institutions, privately creating laws and enforcing them, and getting public law to be responsive to business needs.⁶ The paper is constructed in two main parts. Immediately after this introduction is a discussion of functionalist comparative law method, as part one. The second part is a discussion of comparative administrative law for corporatizing effects.

A Functionalist Comparative Law Method

In one comparative law account, it is understood that the differences and similarities among the broader systems of government account for the differences and similarities between the administrative control regimes in the UK, US, and Australia.⁷ Thus, the main reason for utilizing a functionalist comparative law method herein is the practical question of how different administrative law systems respond to procedural problems. Traditional comparative

⁴ For a general discussion of corporatism, see Jingjing Huo & John D. Stephens, *From Industrial Corporatism To The Social Investment State*, in THE OXFORD HANDBOOK OF TRANSFORMATIONS OF THE STATE 410 (Stephan Leibfried et al. eds., 2015).

⁵ See ANTHONY M. BERTELLI, THE POLITICAL ECONOMY OF PUBLIC SECTOR GOVERNANCE 2–3 (2012).

⁶ See Gregory C. Shaffer, *Law And Business*, in THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT 63 (David Coen, Wyn Grant, & Graham Wilson eds., 2010), discussing how business shapes law instead of just securing legal compliance, and arguing that there are three sets of institutional interactions namely: horizontal public institutional interactions (legislative, executive & and judicial processes); vertical public institutional interactions (national and transnational institutional processes); and interactions among these public institutions and parallel private rule-making, administrative, and dispute resolutions of businesses at different level of social organizations. Thus, it is important to assess the relation between business and law. And in doing this, one has to examine how law is created and applied through public institutions, and through private entities, and how these systems interact, including interactions at national and transnational levels.

⁷ See PETER CANE, CONTROLLING ADMINISTRATIVE POWER: AN HISTORICAL COMPARISON 2 (2016).

law,⁸ as seen in such works as Zweigert and Kotz,⁹ typically employs a functional method even though there are other methods of comparative law.¹⁰ Indeed, a critical review of functionalism across disciplines shows that the functionalist comparative lawyer must choose from a plethora of models including equivalence functionalism, as functionalism has evolved from a positivist appeal to a constructivist one.¹¹

Talking about positivism and constructivism, the methodological issues in comparative law,¹² show that scholars continue to strive with ontological and epistemological explanations for how law and institutions address similar or different problems.¹³ Here, equivalence functionalism offers the best practical explanation of functionalist comparative law. Even though there is some connection between problems and their solutions, it is not clear whether this relationship is causal or otherwise. So, scholars with deterministic and teleological views argue that similar problems trigger similar solutions, and that similar institutions perform similar functions. But the essence of equivalence functionalism is that since institutions differ

⁸ For general introduction, see JOHN HENRY MERRYMAN, DAVID S. CLARK & JOHN OWEN HALEY, *COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA, AND EAST ASIA* 1–3 (2010).

⁹ See KONRAD ZWIEGERT & HEIN KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 31 (2d ed. 1987) where the author wrote thus: “The basic methodological principle of all comparative law is that of functionality. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function.... The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results. The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concepts of one’s own legal system... One must never allow one’s own vision to be clouded by the concepts of one’s own national system; always in comparative law one must focus on the concrete problem.”

¹⁰ See MATTHIAS SIEMS, *COMPARATIVE LAW* locs.1312-2332 of 29054 (2d ed. 2018) (Kindle), where the author challenges traditional comparative law methods.

¹¹ See generally Ralf Michaels, *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 345, 346–368 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019), where the author proposes an interpretative functionalism by reconstructing functionalism in terms of equivalence functionalism. See also Ralf Michaels, *The Functional Method Of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 339, 340–63 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

¹² See GEOFFREY SAMUEL, *AN INTRODUCTION TO COMPARATIVE LAW AND METHOD* locs. 365-403 (2014) (Kindle). For a shorter version of the same author’s work, see Geoffrey Samuel, *Comparative Law and Its Methodology*, in *RESEARCH METHODS IN LAW* 122, 122 (Dawn Watkins & Mandy Burton eds., 2d ed. 2018).

¹³ See Gerhard Dannemann, *Comparative Law: Study Of Similarities Or Differences?*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 390 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019). See also Gerhard Dannemann, *Comparative Law: Study Of Similarities Or Differences?*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 383 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

in detail, similar institutions in different societies may perform different functions, or similar functional needs may be met by different institutions.¹⁴

Thus, equivalence functionalism helps in understanding law, comparing laws, making assumptions about similarities and differences, building systems and paradigms, determining which is a better law, unifying law, and critiquing legal orders.¹⁵ And such effects of comparative law may be assessed for their utility. Legal positivism is understood to have dislodged the dominance of classical natural law¹⁶ beginning with the works of Bentham¹⁷ through Austin¹⁸ to H.L.A Hart.¹⁹ But this does not mean that functionalist comparative law is exclusive to legal positivism. This is because modern natural law and legal positivism share a lot in common as modern natural law scholars like Fuller,²⁰ Finnis,²¹ and Dworkin²² have reacted to legal positivism by blending law and morality in terms of moral political theory and legal social theory.²³ As Unger observed, society is often saddled with the past and needs to free itself.²⁴ The conflict²⁵ between natural law and legal positivism appears to be waning in contemporary legal theory with the emergence of inclusive legal positivism²⁶ as against exclusive legal positivism.²⁷ Thus, there are attempts at understanding legal positivism within a grand context of law that includes natural law, whilst not reducing the significance of positive

¹⁴ See Michaels, *supra* note 11; See also Michaels, *supra* note 11.

¹⁵ See *id.* at 368–87; See also Michaels, *supra* note 12 at 364–81.

¹⁶ See John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1 (Jules L. Coleman, Kenneth Einar Himma, & Scott J. Shapiro eds., 2012).

¹⁷ See H.L.A. HART, *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL PHILOSOPHY* (1982).

¹⁸ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

¹⁹ See H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012).

²⁰ See LON L. FULLER, *THE MORALITY OF LAW* (1964).

²¹ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed. 2011).

²² See Ronald Dworkin, "Natural" Law Revisited 34 FLA. L. REV. 165 (1982).

²³ See Brian H. Bix, *Natural Law: The Modern Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 61 (Jules L. Coleman, Kenneth Einar Himma, & Scott J. Shapiro eds., 2012); See also JOHN COGLEY ET AL., *NATURAL LAW AND MODERN SOCIETY* (1963).

²⁴ See ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 1–3 (1976).

²⁵ See Barney Reynolds, *Natural Law Versus Positivism: The Fundamental Conflict*, 13 OXF. J. LEGAL STUD. (1993).

²⁶ See Kenneth Einar Himma, *Inclusive Legal Positivism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 125 (Jules L. Coleman, Kenneth Einar Himma, & Scott J. Shapiro eds., 2012).

²⁷ See Andrei Marmor, *Exclusive Legal Positivism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 104 (Jules L. Coleman, Kenneth Einar Himma, & Scott J. Shapiro eds., 2012).

law.²⁸ And this means a move away from straitjacket categorization of what Dworkin refers to as semantic jurisprudence.²⁹ Posner states this phenomenon as follows: “The line between positive law and natural law is no longer interesting or important and the concepts themselves are jejune.”³⁰ And that what is needed is a pragmatic approach to law that is interlaced with economics and liberalism to effectively understand and improve on law and social institutions.³¹ Meanwhile, a common understanding of law continues to be elusive as there are differing theories of legislation, adjudication, and enforcement as seen from the perspectives of the law maker, judge, and public. In discussing these perspectives, Dworkin argues that rights must be taken seriously in terms of a natural right to adjudicative decisions.³²

²⁸ See BRIAN M. MCCALL, *THE ARCHITECTURE OF LAW: REBUILDING LAW IN THE CLASSICAL TRADITION* 2, (2018).

²⁹ See RONALD DWORKIN, *LAW’S EMPIRE* 94–96 (1986) Dworkin adopts an interpretive and not a semantic approach to law. He introduces three conceptions of law to test three key issues. He identified these three conceptions as conventionalism, legal pragmatism and law as integrity, and explains that these three conceptions essentially capture the themes and ideas prominent in the literature on the so-called schools of jurisprudence. The three issues raised for discussion with the three conceptions are: (a) whether the supposed link between law and coercion is justified at all? whether there is any point to requiring public force to be used only in ways conforming to rights and responsibilities that “flow from” past political decisions; (b) If there is such a point, what is it?; (c) what reading of “flow from”-what notion of consistency with past decision best serves it? He argues that past political decisions provide a necessary condition for the use of public coercion, and this is how legal theory should be understood. But how far and in what way should past political decisions provide a necessary condition for the use of public force has to be tested with the three conceptions outlined above. In the end he argues that the law as integrity is the best conception of law. His theory of law as integrity is discussed throughout the book in the context of legislation, precedent, and constitutional.

³⁰ See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 575 (1993).

³¹ See RICHARD A. POSNER, *OVERCOMING LAW* viii, 4, 11–29 (1995).

³² See generally, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* chs. 1-4 (1977) Dworkin discusses three forms of liberal legal theories constructively and critically. Constructively, he defines and defends individual rights as a liberal theory, and critically, he critiques what he referred to as the ruling theory of law because of its popularity at a time when liberalism was engendering different political attitudes among both the young and the middle aged. This ruling theory of law has two components namely; legal positivism and utilitarianism. These two components both address the question of law and its compliance respectively in terms of ‘is’ and ‘ought’. Legal positivism discusses the facts about rules that specific institutions of state have adopted, and utilitarianism looks at what law and institutions ought to be, he explained. Dworkin then argues that various forms of collectivism oppose legal positivism and economic utilitarianism because they ignore the corporate will in the creation of legal institutions. He also criticized the two as being rationalistic. And both the political left and political right criticize the ruling legal theory’s idea of social engineering as against the influence of established social culture in decision making. Thus, for Dworkin, one key criticism against the ruling theory of law is that it ignores the fact that individuals can have natural rights or rights that pre-exist legislation, and this is what he sets out to defend in this work. But Dworkin’s idea of rights are political rights which he categorizes as background rights (i.e. right held against entire community) and institutional rights (i.e. rights held against particular institutions like courts). Thus, Dworkin looks beyond the rights created in legislation as adopted by designated political bodies and practices to such rights as right to specific adjudicative decisions in hard cases as analogized in the reasoning of a metaphorical judge, ‘Hercules.’

If rights are to be taken seriously, then law must equally be taken seriously for its role in society,³³ and also for its multiple dualities including change and stability, and morality and power.³⁴ This means that an examination of the authority³⁵ or force of law³⁶ is unavoidable in legal theory.³⁷ And hence a functionalist approach is also unavoidable herein because of its emphases on legal effects.³⁸ Not only is the comparison here about administrative law rules (law in books), but it is also about administrative law effects (law in action) and non-legal responses to societal needs in terms of the so-called macrocomparison and microcomparison in the comparative law literature.³⁹ The comparators herein are therefore chosen to reflect a macrocomparison within ideological communities, legal families, and topical issues in comparative law, and a microcomparison of specific administrative law rules on executive power, procedures, and remedies.⁴⁰

³³ See D.J. GALLIGAN, *LAW IN MODERN SOCIETY* 6 (2007).

³⁴ JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 1 (2009).

³⁵ See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 5 (1979).

³⁶ See FREDERICK SCHAUER, *THE FORCE OF LAW* (2015); See also KENNETH EINAR HIMMA, *COERCION AND THE NATURE OF LAW* (2020).

³⁷ See DWORKIN, *supra* note 29 at 110–11 where the author wrote at page 110 as follows: “A full political theory of law, then, includes at least two main parts: it speaks both to the grounds of law-circumstances in which particular propositions of law should be taken to be sound or true - and to the force of law - the relative power of any true proposition of law to justify coercion in different sorts of exceptional circumstance.” He later explained at page 111 that political philosophers consider problems about the force of law, and academic lawyers and jurists study issues about its grounds. Therefore legal philosophy is often mute about the force of law but instead on the ground of law. And it only abstracts from the problem of force of law to study the problem of ground more closely; Indeed, coercion is an essential element in defining law or characterizing law as a normative system, as understood in Austinian terms. This means that without force, it is hard to characterize law as a normative system which has both sanctions and rewards or compensation. But it is not the case that coercion is all there is to law. There are other characteristic features of law that are not coercive. And this include information sharing and giving of warnings or notices. See MARK TEBBIT, *PHILOSOPHY OF LAW: AN INTRODUCTION* 28 (3d ed. 2017).

³⁸ See SAMUEL, *supra* note 12 at 1615-25.

³⁹ See ZWEIGERT AND KOTZ, *supra* note 9 at 4–5 where the authors explained that comparison may take one of two forms; macrocomparison and microcomparison. Macrocomparison looks at that style and spirit of the laws, and the thoughts process used in the legal system. In other words, it looks at the general institutional context of the legal system. Microcomparison deals with the specific problem or institution. But it is important to stress that the division between the two is very flexible. It is possible to engage in both types at the same time.

⁴⁰ See generally JOHN S. BELL, *Comparative Administrative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 1250 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019).

Comparing Administrative Laws for Corporatizing Effects

A holistic view of law,⁴¹ thus presents a mixed bag of several issues for consideration in comparative administrative law study. First, is the definition of administrative law. Here, one may choose to view administrative law from the perspective of either executive power or administrative litigation, which in common law countries is understood in terms of judicial review.⁴² Next is the avenues for comparison in comparative administrative law. It is okay to conduct comparative studies with countries that share common political ideology as in comparing countries with liberal political ideology or socialist political ideologies. And here, one can compare rules and procedures for controlling and redressing wrongs of public administration in these countries. Indeed, there are legal codes in several countries that govern the decision-making procedures of administration. Examples are the US, Austria, Germany, Italy, and The Netherlands. But in other countries, especially those based on English common law, like Nigeria and Ghana, there is a mixture of judge-made principles and sector-specific rules. There are also transnational standards which provide soft laws. This means two options for the comparatist: either a horizontal comparison of administrative procedure laws of countries; or a vertical comparison of administrative procedure laws of countries and global administrative law,⁴³ especially as seen in terms of the EU and its member countries.⁴⁴ What is chosen here is a horizontal comparison.

Possible areas of comparison at the horizontal level are: (a) general principles of administrative procedure; (b) specific administrative processes, and procedural duties like the duty to provide reason and public access to information; and (c) legal redress in terms of three redress mechanism namely, ombudsman concept, hierarchical review procedures, and

⁴¹ See PATRICIA SMITH (ED), *THE NATURE AND PROCESS OF LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 9 (1993).

⁴² See, e.g., HARRY WOOLF ET AL., *DE SMITH'S JUDICIAL REVIEW* (8th ed. 2018).

⁴³ See Sabino Cassese & Elisa D'Alterio, *Introduction: The Development Of Global Administrative Law*, in *RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW 1* (Sabino Cassese ed., 2016); See also PAUL CRAIG, *UK, EU AND GLOBAL ADMINISTRATIVE LAW: FOUNDATIONS AND CHALLENGES* 566 ff. (2015).

⁴⁴ See generally PAUL CRAIG, *EU ADMINISTRATIVE LAW* 375 (3d ed. 2018).

mediation.⁴⁵ Indeed the literature shows that some views advise against developing a common administrative procedure because of the diverse nature of the purposes and activities of public administration. But others also think that it is okay to have a common standard, grounds of fairness as it is also important to simplify procedure for the citizenry. Therefore, the selected comparators are compared along these three areas. And as suggested in the comparative law literature, the issue here is a practical one; how do the US and UK administrative law systems respond to the problems of administrative power, procedure, and redress in relation to corporatization?

The concept of corporatization has three meanings which sum up as: arms-length administration, business-like public service delivery, and public-private integration. The first understanding essentially captures the idea of depoliticising or ring-fencing agencies against formal politics. The second sense is a variant of the New Public Management.⁴⁶ The third also raises such issues as the possibility of the private sector dominating the public sector and regulatory capture by industry.⁴⁷ Of particular interest is the third understanding of the concept because of the increasing reach of the administrative state, vis-à-vis the proper function of the state.⁴⁸ Moreover corporatization is gaining grounds around the world in different public

⁴⁵ See Bell, *supra* note 40 at 1269–70.

⁴⁶ See Erik Hans Klijn, *New Public Management and Governance: A Comparison*, in THE OXFORD HANDBOOK OF GOVERNANCE 201 (David Levi-Faur ed., 2012); See also Chris Ansell, *Collaborative Governance*, in THE OXFORD HANDBOOK OF GOVERNANCE 498 (David Levi-Faur ed., 2012).

⁴⁷ See Jamie Brownlee, Chris Hurl & Kevin Walby, *Introduction: Critical Perspectives On Corporatization*, in CORPORATIZING CANADA: MAKING BUSINESS OUT OF PUBLIC SERVICE loc. 47 of 6692, locs. 66-164 (Jamie Brownlee, Chris Hurl, & Kevin Walby eds., 2018) (Kindle).

⁴⁸ For a libertarian view about the function of the state see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 232 (1978) (discussing the minimal night-watchman state. In countering the view that an extensive state is needed to produce distributive justice among its citizens, the author developed his theory of justice called “the entitlement theory” to argue against the extensive state saying that the functions of the minimal state are narrowly circumscribed to such activities as protection against force, theft, fraud, and enforcement of contracts. Anything more than these are likely to violate rights of individuals); For an egalitarian view see JOHN RAWLS, A THEORY OF JUSTICE 1–21 (1971) (discussing the authors justice as fairness theory as a higher abstraction of social contract to examine the role of justice in social cooperation by emphasizing how basic social structures distribute rights and duties, assuming a situation of equality among members of society in a contract theory; Needless to add that the structure of liberty has been a subject of study in recent times, and it has been argued that liberty is structured with principles that are clustered in the concepts of justice and the rule of law.). See RANDY E. BARNETT, THE STRUCTURE OF LIBERTY; JUSTICE AND THE RULE OF LAW 3 (2d ed. 2014).

services,⁴⁹ leading to the so-called public law of privatization,⁵⁰ even though privatization is not necessarily synonymous with corporatization.⁵¹ But here, I suggest that a deference theory that respects the views of public-private actors⁵² is useful for containing the effects of

⁴⁹ See, e.g., Mary M. Shirley, *Bureaucrats In Business: The Roles Of Privatization Versus Corporatization In State-Owned Enterprise Reform*, 27 *WORLD DEV.* 115 (1999); See Jørgen Grønnegård Christensen & Thomas Pallesen, *The Political Benefits Of Corporatization And Privatization*, 21 *J. PUB. POL'Y* 283 (2001); See Laurence Ferry et al., *New Development: Corporatization Of Local Authorities In England In The Wake Of Austerity 2010–2016*, 38 *PUB. MONEY MANAG.* 477 (2018); See Andreas Bergh et al., *Municipally Owned Enterprises as Danger Zones for Corruption? How Politicians Having Feet in Two Camps May Undermine Conditions for Accountability*, 21 *PUB. INTEGR.* 320–52 (2019); See Bart Voorn, Sandra van Thiel & Marieke van Genugten, *Debate: Corporatization As More Than A Recent Crisis-Driven Development*, 38 *PUB. MONEY MANAG.* 481–482 (2018); See Giuseppe Grossi & Christoph Reichard, *Municipal Corporatization In Germany And Italy*, 10 *PUB. MANAG. REV.* 597–617 (2008).

⁵⁰ See Daphne Barak-Erez, *Three Questions Of Privatization*, in *COMPARATIVE ADMINISTRATIVE LAW* 533, 538–550 (Susan Rose-Ackerman, Peter L. Lindseth, & Blake Emerson eds., 2017). The author raised three issues for discussion, namely; (1) whether there are limits on the type of actions or powers that can be privatized, (2) what constraints should apply in implementing the privatization decision, (3) and which legal regimes should apply to privatized activities. The author proposed a public law of privatization to address these three issues, and challenged the idea that the decision to privatize is only a policy decision. She argue that the traditional view that privatization does not raise constitutional concerns suggests that public law doctrines do not address privatization fully, as the public aspect of privatization is neglected for more focus on the relationship between the privatizing agency and the participants in the privatization process. Her proposed public law of privatization addresses the first issue with ultra vires principles and constitutional boundaries defined by two types of analysis; institution-based analysis and rights-base analysis. This public law of privation also tackles the second issue by prescribing such requirements as privatization policy formulation, participation rights, transparency and information rights, judicial review of tenders and contracts, and securing competition. Last but not the least, constitutional standards, statutory and contractual regulations are also prescribed to tackle the third issue.

⁵¹ See Brownlee, Hurl, and Walby, *supra* note 47 at loc. 203.

⁵² See PAUL DALY, *A THEORY OF DEFERENCE IN ADMINISTRATIVE LAW: BASIS, APPLICATION AND SCOPE* 1–11 (2012) in distinguishing between epistemic and doctrinal deference, the author defined deference simply as the weight that courts should attached to the decisions of non-judicial institutions. In other words, it is paying respect to the decisions of others by giving weight to such decisions, and this is the idea of epistemic deference. But it is not enough to give weight. It is equally important to give some authority to another to make a decision even though such authority is limited. And this is the idea of doctrinal deference. The author's chief argument is about finding the proper means for allocating decision-making authority between courts and administrators. He argues that judicial deference or what he termed as curial deference is indispensable in modern legalism. He develops a broad doctrine of curial deference around three questions of; why, how, and when should courts defer to agencies? He chose to use the term "curia deference" to cover not only law courts but also court of expert advisors. He explained that using curia deference allows for both epistemic and doctrinal deference, and that that the choice of 'curial deference' is not judicial submission to non judicial bodies. But instead judicial respect for nonjudicial decisions even though it includes doctrinal deference; This is what another scholar refers to as "deference as respect". See David Dyzenhaus, *Politics Of Deference: Judicial Review And Democracy*, in *THE PROVINCE OF ADMINISTRATIVE LAW* loc 8607 of 12063, at locs. 8757-59 (Michael Taggart ed., 1997) (Kindle), where the author argued that the concept of deference as respect does not require submission, but instead requires that a respectful attention is given to reasons given in support of a decision irrespective of the source of that decision. Thus, it is immaterial whether that is statutory decision, judicial, or decision of administrators; For a similar view elsewhere, see ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* 21–22 (2016) where the author uses three key concepts of abnegation, thin rationality review, and indefensible decision-making, to explain why there is a voluntary judicial self-restraint, arguing that the administrative state is itself a creature of both the courts and the legislature. And that the courts and legislature have combined to check the works of agencies. Therefore the idea of judicial deference to agencies is not only natural but also beneficial to the courts themselves. Therefore so long as agencies are compliant with thin rationality reviews, and do have reasonable or defensible decisions, there is no point for courts to increase their oversight responsibilities over agency actions.

corporatization,⁵³ or what is sometimes called ‘corporatism’,⁵⁴ as seen in the interchange of ideas and people between public and private sectors. Thus, ‘corporatizing administrative law’, as used in this paper, builds on the idea that the challenges of directing large corporations are comparable to that of running public bodies,⁵⁵ and so the enterprising state ought to follow an industrial analogue, as suggested by Professor Landis, who argued that the administrative state is not an extension of the executive, but a gap filler in the judicial process,⁵⁶ and the judicial process, according to Lord Denning of England, ought to be kept pure.⁵⁷

United States

Like Ghana, the US retained much of the received English common law system in the first hundred years of independence.⁵⁸ But significant changes were recorded in the second hundred years with some qualified Congressional approval for the administrative state.⁵⁹ Interestingly, Ghana is also in its first hundred years of independence from the UK and is yet

⁵³ See generally David A McDonald, *Learning From Corporatization: The Good, The Bad, And The Ugly*, in *CORPORATIZING CANADA: MAKING BUSINESS OUT OF PUBLIC SERVICE* loc. 4065 of 6692 (Jamie Brownlee, Chris Hurl, & Kevin Walby eds., 2018) (Kindle) (discussing the problems of myopia and commodification in corporatization); see also David A McDonald, *To Corporatize Or Not To Corporatize (And If So, How?)*, 40 *UTIL. POL’Y* 107 (2016).

⁵⁴ See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 311 (1989).

⁵⁵ See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 10 (1938).

⁵⁶ *Id.* at 11–12, 15–16, 46. where he wrote as follows: “As the governance of industry, bent upon the shaping of adequate policies and the development of means for their execution, vests powers to this end without regard to the creation of agencies theoretically independent of each other, so when government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue. It vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of governmental organization. The dominant theme in the administrative structure is thus determined not primarily by political conceptualism but rather by concern for an industry whose economic health has become a responsibility of government.” The learned author, then used the history of the Interstate Commerce Commission to illustrate this argument. First was the Elkins Act of 1903 initiated by railroads to control tariffs. Next was broadening the Commission’s jurisdiction to cover related sectors like express companies, sleeping cars, and pipe lines. Then the 1910 reforms which addressed rate structure. The Transportation Act of 1920 following the WWI also added impetus for control powers both fostering and proscribing.

⁵⁷ See ALFRED DENNING, *THE DUE PROCESS OF LAW* 5 (1980) where he used the term ‘due process’ not in strict legal terms, but as human centered idea to mean “the measures authorised by the law so as to keep the streams of justice pure: to see that trials and inquiries are fairly conducted; that arrest and that trials and inquiries are fairly conducted; that lawful remedies are readily available and that unnecessary delays are eliminated.” Lord Denning then used stories to illustrate this view.

⁵⁸ See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, 1 (1985) generally giving a critical account of the performance of the US Supreme court in the first century.

⁵⁹ See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986*, 208, 214 (1990).

to see any significant departure from this English common law practice. Thus, the historical development of US administrative law has interesting issues that are like those in the first hundred years of Ghana's administrative law. This means that as lessons in the US administrative law history play out in Ghana, one can expect to see Ghana adopting an Administrative Procedure Act (APA) even sooner than the end of the next century of Ghana's independence. And with this, I argue that Ghanaian administrative law ought to delegate legislative and adjudicative powers to public-private programs like the 1D1F, and it could do so with lessons from the nondelegation doctrine and agency control in the US.

Against this backdrop, and given that it is difficult to list all the required procedural elements,⁶⁰ the discussion now proceeds to examine some aspects of US administrative law, which is chiefly concerned with the relationships within and outside the agency walls.⁶¹ As understood from some instructive historical accounts, US administrative law evolved from both statute law and judicial precedents that promoted trial-type administrative hearing and judicial review of administrative hearing records.⁶² Of particular interest here are events leading to the

⁶⁰ See PETER L. STRAUSS, *ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 91 (3d ed. 2016).

⁶¹ Borrowing from Professor Aman who structured his book into "within agency walls" and "outside agency walls." See ALFRED C. AMAN JR., *ADMINISTRATIVE LAW AND PROCESS* (3d ed. 2014); Within and outside the agency walls thus suggests that the primary focus of administrative law is the administrative agency. Thus, administrative law invites us to look within the agency walls to see the agency's authority and structure, its procedures, and its valid or invalid decision, and also to look outside the agency walls to see the relationship between the agency, the reviewing courts, legislature, executive and other governmental bodies. This idea also reflects the narrow and broad definitions of administrative law as seen in most of the textbooks. For example, one broad definition extends administrative law to cover the decision making processes of all governmental entities excluding the legislature and the courts. See WILLIAM F. FOX, *UNDERSTANDING ADMINISTRATIVE LAW* 1 (6th ed. 2012); Similarly, Justice Breyer and his colleagues defined administrative law narrowly to focus on "those legal principles that define authority and structure of administrative agencies, specify the procedures agencies must follow, determine the validity of administrative decisions, and define the role of reviewing courts and other organs of government in relation to administrative agencies." See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY; PROBLEMS, TEXT, AND CASES* 2 (8th ed. 2017); It is generally understood therefore that administrative law is not about the substance of what agencies do, but instead it is about the structures and processes that agencies use to carry out what they do. See ALFRED C. AMAN JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 3 (3d ed. 2014); And that administrative processes differ from judicial litigation process. In other words, civil procedure law is to courts, as administrative law is to agencies. See ALFRED C. AMAN JR., WILLIAM PENNIMAN & LANDYN WM. ROOKARD, *ADMINISTRATIVE LAW AND PROCESS* xxxii (4th ed. 2020); Indeed, the subject matter of administrative law is administrative actions that alter the legal rights and obligations of individuals. See KEITH WERHAN, *PRINCIPLES OF ADMINISTRATIVE LAW* 2 (3d ed. 2019) where the author also describes the APA as a sub-constitution for agencies.

⁶² See generally BREYER ET AL., *supra* note 61 at 29–44; The English common law system that influenced American administrative law in the antebellum years saw crown officials only liable in damages for common

enactment of the APA in the US during the New Deal era even though the enactment of the APA does not necessarily mark the start of American administrative law.⁶³

During this time, judicial attitude changed from hostility towards administrative discretion to judicial deference to agencies. And there was also a general agreement on the need for standardized procedures for agencies. But opinions differed on separating agencies' adjudication, legislative and executive functions. What emerged as a compromise was the enactment of the APA in 1946, specifying, among others, procedural requirements for agency rule making and formal adjudication. Trust for agencies however waned in the rights revolution period of the 1960s and 1980s. And agency critics sought administrative law protection for consumers, welfare beneficiaries, and deregulation. In the end, the courts extended administrative law from common law protection of private interests to relevant interests and extended procedural formalities to require agencies to document informal decisions for judicial review. American administrative law is now understood as thriving in an era of presidential administration and cost-benefit balancing state with some of the old issues re-emerging in different forms regarding the role of the administrative agency.⁶⁴

law wrongs not legally justifiable. And this was the English idea of rule of law according to AV Dicey. *See* A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 107 (1982 ed. 1885); As common law damages proved defective, prerogative writs including mandamus, certiorari, prohibition and equitable reliefs as developed by the chancery court were used to control administrative actions. If this English common law resembled the continental civil law practice in some way, then it was the establishment of the Court of Star Chamber in the 16th century. But this was abolished in the 17th century. *See* Edward P Cheyney, *The Court Of Star Chamber*, 18 AM. HIST. REV. 727 (1913) generally describing the time of meeting, constitution, functions and procedures of the Court of Star Chamber.

⁶³ The New Deal era saw a new conception of rights, rise of dominant interest groups, and a much stronger federal government vis-à-vis the states. This translated into more federal regulations. *See generally* Robert L. Rabin, *Federal Regulation In Historical Perspective*, 38 STAN. L. REV. 1189 (1986); The increase in federal regulation meant creating more agencies with unseparated powers. New Dealers like James Landis argued that the administrative state is not an extension of the executive but is a gap filler in the legislative and judicial processes. *See* LANDIS, *supra* note 55 at 15, 46 where he wrote at page 46 as follows: "The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes"; The combination of powers in agencies were however criticized by some as unlawful and they asked that independent tribunals performed the adjudicatory functions with detailed procedures and strict judicial reviews. But others defended the combination insisting on the need for expertise and flexibility. In this respect, three models of administrative legitimacy described on the basis of democratic theory, expertise, and participatory administrative procedure, can be identified. *See* JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 16–31 (1985).

⁶⁴ *See* BREYER ET AL., *supra* note 61 at 36–44.

Most American administrative law text writers and commentators discuss the constitutional position of the administrative agency in the US.⁶⁵ Indeed, there is a huge body of literature devoted to the administrative agency in the US, often referred to as the administrative state or the ‘fourth branch’ of government.⁶⁶ Agencies wear three hats of legislative, executive and judicial functions, and these three hats accordingly implicate constitutional issues,⁶⁷ in terms of agencies’ relationship with the US Constitution Article I-Congress, Article II-Executive, and Article III-Judiciary under the nondelegation doctrine⁶⁸ and control of agencies.⁶⁹ This study’s idea of corporatizing administrative law therefore add to the large body of literature on the constitutional position of agencies⁷⁰ by corporatizing

⁶⁵ *Id.* at 84–87; see RICHARD J. PIERCE JR., *ADMINISTRATIVE LAW* 7 (2d ed. 2012); see AMAN JR. & MAYTON, *supra* note 61 at 9; See WERHAN, *supra* note 61 at 39; see also WILLIAM F. FUNK & RICHARD H. SEAMON, *ADMINISTRATIVE LAW* 23 (6th ed. 2020); see also WILLIAM D. ARAIZA, *A SHORT AND HAPPY GUIDE TO ADMINISTRATIVE LAW* 13 (2018).

⁶⁶ See, e.g., RICHARD A. EPSTEIN, *THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW* (2020); CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (2020); SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* (1992); JOHN MARINI, *UNMASKING THE ADMINISTRATIVE STATE: THE CRISIS OF AMERICAN POLITICS IN THE TWENTY-FIRST CENTURY* (2019); PETER J. WALLISON, *JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE* (2018); EMMETT MCGROARTY, JANE ROBBINS & ERIN TUTTLE, *DECONSTRUCTING THE ADMINISTRATIVE STATE: THE FIGHT FOR LIBERTY* (2017); PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* (2017); DANIEL R ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014).

⁶⁷ A key constitutional issue is to what extent is separation of powers secured through judicial review? Professor Strauss argues that the combination of the three governmental functions in agencies is not as threatening to the citizenry as in where the three functions are combined in say the President, Congress or the courts. Now, this conflation of executive, legislative and judicial functions in the hands of agencies without the strictures of separation of powers, implicitly means that administrative processes differ from legislative and judicial processes. For instance, procedural due process applies to formal or informal adjudication, but not to rule making. See STRAUSS, *supra* note 60, at 41, 75; This difference also raises the issue of how much judicial deference should be accorded to agencies’ interpretation of their constitutive statute, their records, and explanations justifying their action. See AMAN JR., PENNIMAN, AND ROOKARD, *supra* note 61, at xxxii.

⁶⁸ See FOX, *supra* note 61, at 25 where the author defined the doctrine as “a principle based on the premise that under our Constitution a legislature may delegate its powers to an agency only under carefully controlled conditions and that those conditions are to be expressly set out in the agency’s enabling act.”

⁶⁹ See, e.g., BREYER ET AL., *supra* note 61, at 45–207; ARAIZA, *supra* note 65, at 11–30; FUNK AND SEAMON, *supra* note 65, at 23–70.

⁷⁰ There is an ongoing debate about the constitutional position of the administrative state. Some think that the administrative state is a necessary response to the industrial and post-industrial economies that brought about challenges not envisaged by the drafters of the constitution. And that it is okay to use judicial decisions to bring the written character of the Constitution up to speed with modern realities. See STRAUSS, *supra* note 60, at 23, 28; Such judicial update described by others as constitutional revolution is, however, rejected as unconstitutional. See Gary Lawson, *The Rise And Rise Of The Administrative State*, 107 HARV. L. REV. 1231 (1994), where he rejects a broad interpretation of the phrase “the Constitution of the United States” to include, just like England’s unwritten constitution, a set of practices and traditions that have evolved over time; For some, the US administrative law is unlawful, See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?*

agency ruling making and adjudication within the specific context of private delegation.⁷¹ In this regard, three key issues arise and these are: (1) to what extent is Congress permitted to delegate its Article I legislative function to agencies and/or private entities; (2) to what extent are agencies permitted to exercise Article III judicial function; and (3) to what extent are regulatory agencies independent from the President when exercising Article II executive functions? Subsumed in the first two issues is the issue of whether agencies are adjuncts of the legislature or judiciary when exercising legislative or judicial functions? Given the limited space and the focus on delegation herein, only the first two issues are discussed herein. And it

(2014); *See also* HAMBURGER, *supra* note 66; Partly because of its roots in 17th century English common law, *See* OLIVER WENDELL HOLMES JR., *THE COMMON LAW* (1991 ed. 1881); *See also* MICHAEL LES BENEDICT (ED), *SOURCES IN AMERICAN CONSTITUTIONAL HISTORY* (2d ed. 2018); and Diceyan suggestion that administrative law as practised in continental Europe was unknown in England. *See also* DICEY, *supra* note 62, at 214–218; *See also* A.V. DICEY, *INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION* 180–207 (1885); But for others like Professor Craig there is evidence of a well-developed English administrative law in the 17th century. *See* Paul Craig, *The Legitimacy Of US Administrative Law And The Foundations Of English Administrative Law: Setting The Historical Record Straight*, SSRN (2016); Indeed, until recently, the view was that American administrative law was absent in the first hundred years of US independence because there was no legal control of the national government at that time. This position led some to identify the establishment of the Interstate Commerce Commission (ICC) as the baseline for American administrative law. *See* Rabin, *supra* note 63, at 1191–1192, where he wrote as follows: “My account begins with the Populist era because of the formative influence of the Interstate Commerce Act on the development of the federal regulatory system. Beginning then, and in the ensuing years until the New Deal, a policing model of regulation invariably triumphed over efforts to elicit government support for various forms of business price-fixing, information-sharing and market-allocating schemes-regulatory initiatives which I will refer to as associational forms of regulation”; But in a series of articles, *see, e.g.*, Jerry L. Mashaw, *Recovering American Administrative Law: Federalism Foundations, 1787-1801*, 115 *YALE L. J.* 1256 (2006); Jerry L. Mashaw, *Administration And The Democracy: Administrative Law From Jackson To Lincoln, 1829-1861*, 117 *YALE L. J.* 1568 (2007); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration And Administrative Law In The Republican Era, 1801-1829*, 116 *YALE L. J.* 1636 (2007); Jerry L. Mashaw, *The American Model Of Federal Administrative Law: Remembering The First One Hundred Years*, 78 *GEO. WASH. L. REV.* 975 (2009); Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 *MICH. ST. L. REV.* 7 (2009); *See also* Jerry L. Mashaw, *Federal Administration And Administrative Law In The Gilded Age*, 119 *YALE L. J.* 1362 (2010); Culminating into a book, Jerry Mashaw has refuted this claim, arguing that even though there was nothing like an APA in the first hundred years of the U.S., national government at that time was controlled by law. *See* JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012); Indeed, US administrative law and government has evolved through a history of improvisations. *See* WERHAN, *supra* note 61, at 10; And it is in this context that the current debate about the administrative state ought to be understood. *See* JOSEPH POSTELL, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO CONSTITUTIONAL GOVERNMENT* (2017).

⁷¹ *See generally* Gillian E. Metzger, *Privatization As Delegation*, 103 *COLUM. L. REV.* 1367 (2003); *See also* Gillian E. Metzger, *Private Delegations, Due Process, And The Duty To Supervise*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 291 (Jody Freeman & Martha Minow eds., 2009); *See* Gillian E. Metzger, *Delegation, Accommodation, And The Permeability Of Constitutional And Ordinary Law*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 409 (Mark Tushnet, Mark A. Graber, & Sanford Levinson eds., 2015); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 *COLUM. L. REV.* 1739 (2015).

suffices here to say that even though independent regulatory commissions and executive agencies are extensions of the executive, the two are somewhat different because independent regulatory agencies tend to have fixed term appointments and can only be dismissed for cause.⁷²

The trend of privatization and marketization of government is now established in the US,⁷³ and this implicitly justify the need to extend public law values to private actors.⁷⁴ It is evident from leading Administrative law casebooks that forms of privatization particularly outsourcing is allowing private actors to make inroads in the administrative process,⁷⁵ as this is a national obsession in the US.⁷⁶ But in deciding on what to commit to the public and private auspices, Professor Wilson, whilst noting that bureaucracies are complex and varied in nature, argues that a bottom-up understanding of bureaucratic behavior,⁷⁷ is as important as its top-down understanding seen through legislative, executive and judicial control.⁷⁸ Thus, organization matters.⁷⁹ Organizational theory⁸⁰ thus extends to governmental agencies, and this phenomenon is engendering private delegation.⁸¹

⁷² See STRAUSS, *supra* note 60, at 35.

⁷³ See AMAN JR., PENNIMAN, AND ROOKARD, *supra* note 61, at xxxv.

⁷⁴ *Id.* at xxxvi.

⁷⁵ *Id.* at 975–78.

⁷⁶ *Id.* at 456.

⁷⁷ See WILSON, *supra* note 54, at 10–13.

⁷⁸ *Id.* at 235–94.

⁷⁹ *Id.* at 23–28.

⁸⁰ See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS; A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION* (1975); See CHESTER I. BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* (1968 ed. 1938); See also HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS* (4th ed. 1997).

⁸¹ See generally Metzger (2003), *supra* note 71 at 1437–45. Problems of delegation raise constitutional issues for US administrative law, and this is best explained in terms of the organization of US government. As many countries do not define government in their constitutions, See Paul Craig & Adam Tomkins, *Introduction, in THE EXECUTIVE AND PUBLIC LAW: POWER AND ACCOUNTABILITY IN COMPARATIVE PERSPECTIVE 1* (Paul Craig & Adam Tomkins eds., 2006), it is not surprising that the American Constitution does not also define government. In the absence of constitutional definition of government, the organization of government in the US is a matter of statute law. It is statute that authorize how government may be constituted in the US. This means that there are varying forms and characteristics of the departments that Congress has created by statute. Administrative law in the US is therefore about governmental decision making and their legality, as it is concerned with the institutions and operation of the American bureaucracy rather than the courts in normal times. See STRAUSS, *supra* note 61 at 10–11, 32. For a discussion of extraordinary administrative law situations, See Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115

This leads me to discuss the first issue. But the related issue of agencies as adjunct of Congress is in itself a minefield of issues on Congressional oversight of agencies including legislative veto and the Congressional Review Act that deserve a separate study, and is therefore excluded in this account.⁸² Now, to what extent is Congress permitted to delegate its Article I legislative function to agencies or private entities? Generally, judicial attitude towards delegation is context specific. As Professor Aman and his co-authors write, delegation to private entities is delegation twice removed.⁸³ Therefore, one can expect the courts to uphold delegation to an agency in matters of foreign affairs but reject delegation in matters involving private entities,⁸⁴ unless there was public supervision⁸⁵ or the private entity is actually public.⁸⁶ This was evident when the Supreme Court last upheld nondelegation doctrine in two 1935 cases that involved trade or industrial associations codes developed under the National Industrial Recovery Act (NIRA) in 1935. In *Panama Refining Co. v. Ryan*⁸⁷ the US Supreme Court struck down the President's ban of interstate shipment of oil produced in breach of state

COLUM. L. REV. 1789 (2015); *See also* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress*, 129 HARV. L. REV. 62 (2015).

⁸² The point is that Congress is able to check the agency through the design of the agency's constitutive legislation. It may choose to cloth it with more discretion or limit its discretion. And again, the structure of the agency also shows how much discretion it can exercise. In essence, the more independent an agency is from the executive, the freer it is able to exercise much discretion and vice versa. Congress may also use budget and other reporting requirements to check agencies, but as seen in *Pillsbury Co. v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966), Congress' control over an agency is limited, as it cannot interfere with a pending adjudication matter before an agency. But it appears the matter is not that simple as Professor Aman and his colleagues tease out challenging issues in their casebook as regards the instances of hybrid rulemaking. *See* AMAN JR., PENNIMAN, AND ROOKARD, *supra* note 62 at 395, 400–03.

⁸³ The point here is that after Congress has delegated to agencies, they in turn delegate to private actors by contracting. Much as procurement laws deal with such contracting, there are concerns about extending some aspects of administrative law to such outsourcing. The issue then is; should administrative law that applies to public bodies also apply to private actors carrying out public functions? This depends on one's approach to PPP. If one uses a laissez-faire approach, then PPP minimizes the role of the state. But if one views PPP as an extension of the state, then PPP is seen as a new way of government executing its mandate, and therefore administrative law values of transparency, participation and fairness ought to apply. *Id.* at 468–74, 975.; *See Metzger* (2003), *supra* note 71; *See also* Paul R. Verkuil, *Public Law Limitations On Privatization Of Governmental Functions*, 84 N. C. L. REV. 397 (2006); *See* Dan Guttman, *Governance By Contract: Constitutional Visions; Time For Reflection And Choice*, 33 PUB. CONT. L. J. 321 (2004).

⁸⁴ *See* AMAN JR. AND MAYTON, *supra* note 62 at 23.

⁸⁵ *See* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

⁸⁶ *See* *Association of American Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013), *rev'd*, 135 S. Ct. 1225 (2015).

⁸⁷ *See* *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (popularly called 'Hot Oil case').

laws because the NIRA did not provide an ‘intelligible principle’ to guide the President’s action. Similarly, in *A.L.A Schechter Poultry Corp. v. United States*⁸⁸ the Supreme Court held that Congress may not delegate legislative power to the executive without outlining strict standards for how the executive is to exercise that power.

But the situation in the US is not as simple as it may seem here. Now, the ‘intelligible principle’ as applied in the two cases above, and first developed in the 1928 case of *J.W. Hampton v. United States*,⁸⁹ has survived a departure from the traditional to the modern understanding of the nondelegation doctrine as discussed in case law. Indeed, since the New Deal era, all nondelegation challenges have been unsuccessful in the Supreme Court. And a very recent attempt equally failed in the case of *Gundy v. United States*,⁹⁰ which was about the Sexual Offender Registration and Notification Act (SORNA). An offender convicted of sex offence before the SORNA was enacted challenged the Attorney-General’s rule making authority under the SORNA which affected such sex offenders as impermissible delegation of legislative authority. But the court held that there was no violation of the nondelegation principle because the act had ‘intelligible principle’ for the Attorney General to follow. Thus, even though the doctrine of nondelegation has changed overtime,⁹¹ it continues to be relevant today at least as a canon of interpretation in the ever-growing body of literature.

The nondelegation doctrine literature may be categorized into three groups namely:⁹² (1) those supporting the view that the Article 1, Section 1 of the US Constitution vests final legislative power in Congress;⁹³ (2) those holding that Congress delegates its Article 1

⁸⁸ See *A.L.A Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (popularly called the ‘Sick Chicken Case’).

⁸⁹ See *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394 (1928).

⁹⁰ See *Gundy v. United States*, 139 S. Ct. 2116 (2019).

⁹¹ See STRAUSS, *supra* note 61 at 42.

⁹² See generally BREYER ET AL., *supra* note 61 at 47–48.

⁹³ See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); see also David Schoenbrod, *From Chevron to “Consent of the Governed.”* 41 REGULATION, 2018, at 34 arguing that courts must get lawmakers to take responsibility for agency-made laws.

legislative power when it enacts statutes with broad discretion;⁹⁴ and (3) those holding, in consistence with view (1), that when agencies act *intra vires* their organic statutes they are not exercising any legislative power but their executive powers.⁹⁵ Whereas views (1) and (3) similarly produce nondelegation effects, view (2) produces a delegation effect.⁹⁶ And it is under view (2) that most scholarships parse the ‘intelligible principle’ conception of modern nondelegation.

Now, it is submitted that the New Deal period, during which the NIRA empowered the President to approve fair competition codes developed by industrial associations, has some useful lessons for Ghana’s industrial development. In comparison to Ghana, it is argued that this New Deal industrial recovery lesson is consistent with the vision of Article 109(1) of Ghana’s 1992 Constitution. Therefore, the Parliament of Ghana, in regulating professional, trade and business associations under Article 109(1), is urged to encourage and approve codes

⁹⁴ See Larry Alexander & Saikrishna Prakash, *Reports Of The Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 UNIV. CHI. L. REV. 1297, 1298 (2003) where they wrote; “if one concludes that Congress cannot delegate legislative powers...one must be worried that at some point, the delegation of large amounts of discretion might constitute a delegation of legislative power”; see also Gary Lawson, *Discretion As Delegation: The Proper Understanding Of The Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 236–37 (2005) where the author argues that Statutes vesting broad discretion in agencies are not necessary and proper for execution of federal power, and they exceed Article 1 of the Constitution. And that the traditional nondelegation doctrine has constitutional foundation contrary to what Posner and Vermeule think. But he does not defend the dominant modern ‘intelligent principle’ conception of the doctrine; Similarly, in an earlier work, the same author argued that that the Constitution contains a discernible, textually grounded nondelegation principle that is far removed from the modern ‘intelligible principle’ formulation of the doctrine. See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 333 (2002).

⁹⁵ See Eric A Posner & Adrian Vermeule, *Interring The Nondelegation Doctrine*, 69 UNIV. CHI. L. REV. 1721 (2002).

⁹⁶ See Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2099–2102, 2140–58 (2004) Here, the author interprets Article 1, Section 1 of the US Constitution as suggesting two doctrines of nondelegation and exclusive delegation and argues that much attention has been given to the nondelegation doctrine relative to the exclusive delegation doctrine. But the preferred nondelegation is largely unenforced, and this in turn has created problems of governance as all three organs of government are seen to be engaging in unconstitutional activities. Thus, upholding the nondelegation doctrine means that Congress is not delegating, and yet the executive is exercising unauthorized legislative authority, whilst the judiciary is also violating its oath by allowing the other two to continue in that illegality. Therefore, one clear solution to the administrative legitimacy problem is to recognize the doctrine of exclusive delegation. This is the key argument of the article. The author therefore urges an interpretation of Article 1, Section 1 of the US Constitution that allows for exclusive delegation instead of nondelegation because the exclusive delegation doctrine is superior to the nondelegation doctrine consequentially whether the nondelegation is applied strictly or laxly. The article therefore identifies three understandings of the constitutional allocation of legislative powers namely, strict nondelegation, lax nondelegation, and exclusive delegation.

developed by industries under a common legal framework based on the corporatized administrative law theory herein. This means corporatizing agency rulemaking and agency adjudication by getting the Parliament of Ghana to pass this common legislation to delegate legislative and adjudicative functions to public-private programs.

This leads to the second issue raised above namely, to what extent are agencies are permitted to exercise Article III judicial function?⁹⁷ Subsumed in this issue is whether agencies are adjuncts of the judiciary when exercising judicial functions. The general rule is that agencies are delegated adjudication in only public rights and not private rights, which is the preserve of the courts, but there are exceptions to this general rule. This general rule is obviously a summary of a line of decisions beginning with *Crowell v. Benson* (henceforth *Crowell*),⁹⁸ through *Northern Pipeline Construction Co. v. Marathon Pipeline Co.* (henceforth *Northern Pipeline*),⁹⁹ *Thomas v. Union Carbide Agricultural Products Co.* (henceforth *Thomas*),¹⁰⁰ *Commodities Futures Trading Comm'n v. Schor* (henceforth *Schor*),¹⁰¹ to *Stern v. Marshall* (henceforth *Stern*).¹⁰²

In *Crowell*, a maritime employer challenged the assigning of judicial function to the United States Employees Compensation Commission (USECC) as unconstitutional because it

⁹⁷ Put differently, the issue here is whether Congress can delegate judicial power to administrative agencies to resolve adjudicatory disputes as 'courts' of first instance? And if it does that, is it a violation of Article III? Article III requires that "judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish". And so, the issue is whether such "inferior courts" are understood only as Article III courts and if not, whether there is any limit on Congress in establishing non-Article III courts?

⁹⁸ *Crowell v. Benson*, 285 U.S. 22 (1932). The background to this case was that Congress introduced a major social initiative by establishing a workman's compensation scheme and takes an agency to implement it. This agency was the United States Employees Compensation Commission (USECC). Under the Longshoremen's and Harbor Workers' Compensation Act, maritime employers were liable to their employees for their on-the-job injuries "irrespective of fault" and in line with a fixed schedule of damages. The USECC determined "the circumstances, nature, extent and consequences of the injuries sustained by the employee" and awarded compensation according to a table of damages for those injuries. This determination is obviously a judicial function.

⁹⁹ *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

¹⁰⁰ *Thomas v. Union Carbide*, 473 U.S. 568 (1984).

¹⁰¹ *CFTC v. Schor*, 478 U.S. 833 (1986).

¹⁰² *Stern v. Marshall*, 564 U.S. 462 (2011).

is only the federal courts that are vested with judicial power under Article III.¹⁰³ As with the common practice of using assessors in civil trials, the Supreme Court held that the USECC's fact finding role was like that of commissioners and assessors in determining the award of damages.¹⁰⁴ In analyzing the issue in dispute, the Supreme Court underscored the fact that the USECC's compensation orders were appealable to an appropriate federal district court, and this right of appeal effectively reserved judicial power to an Article III court.¹⁰⁵ Furthermore, this judicial review of the USECC orders was undertaken by distinguishing between issues of law and of fact.¹⁰⁶ Review of questions of law was *de novo*, and facts were reviewed for 'substantial evidence'.¹⁰⁷ Again, in determining when to allocate judicial powers to agencies, the *Crowell* decision distinguished between public rights and private rights,¹⁰⁸ following the

¹⁰³ See *Crowell v. Benson*, *supra* note 98 at 37

¹⁰⁴ *Id* at 54

¹⁰⁵ *Id* at 80

¹⁰⁶ *Id* at 81

¹⁰⁷ This means that whereas a reviewing court had power to determine matters of law and to reverse contrary agency decisions, it was bound to respect the USECC's determinations of facts unless such determinations were without substantial evidence. In essence, agencies have judicial power over matters of facts or policy, and the court had to determine whether this was consistent with Article III?

¹⁰⁸ This case thus distinguished between two types of adjudicators: executive adjudicators and judicial adjuncts. Executive adjudicators dealt with cases of "public right" character in which the courts are not constitutionally permitted to participate. And the judicial adjuncts dealt with cases involving private individual disputes as special masters, commissioners and assessors are. But given that such commissions are performing other functions, later decisions dropped this idea of commissions as adjuncts of the judiciary as the expanded understanding of due process defeated this "public right" analysis of *Crowell*, as well as the several functions that agencies assumed. See STRAUSS, *supra* note 60 at 55–57.

1856 case of *Murray's Lessee v. Hoboken Land Improvement Co.*¹⁰⁹ Meanwhile, *Crowell* has been criticized as being problematic in its reasoning.¹¹⁰

Several cases including *Hearst*,¹¹¹ *Skidmore*¹¹² and *Chevron*¹¹³¹¹⁴ have also undone *Crowell's* law-fact distinction.¹¹⁵ But public-private distinction reappeared¹¹⁶ in *Northern Pipeline*¹¹⁷ and *Schor*¹¹⁸ *Thomas*,¹¹⁹ and *Stern*¹²⁰ decisions.

¹⁰⁹ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856).

¹¹⁰ Professor Aman and others described its reasoning as unfortunate even though its outcome was reasonable. See AMAN JR. AND MAYTON, *supra* note 62 at 91–93; See also AMAN JR., PENNIMAN, AND ROOKARD, *supra* note 62 at 500–01; Professor Vermeule described it as internally conflicting. See VERMEULE, *supra* note 53 at 27–28; and Professor Currie similarly noted that it is self-refuting. See CURRIE, *supra* note 60 at 215.

¹¹¹ *National Labor Relations Board vs. Hearst Publication* 322 U.S. 111 (1944). The issue was: When a court considers a question of statutory interpretation during the review of an agency decision, must the court give weight to the judgment of the agency that administers the statute? It was held that yes, when reviewing an agency decision involving a mixed question of law and fact, courts review (1) the facts found by the agency to determine whether the agency's conclusion has "warrant in the record" and (2) the agency's explanation of its decision to determine whether the decision has a reasonable basis in law. *Id.* at 131. Although questions of statutory interpretation are for courts to resolve, such resolution must consider the judgment of the agency that administers the statute at issue. Where the question involves the specific application of a broad statutory term in an agency proceeding, a reviewing court's function is more limited. Here, a review of the record and the NLRB's findings demonstrates that the board's determination that specified persons were "employees" under the Act has warrant in the record and a reasonable basis in law. Two situations are possible under the principle from this case. An agency may consider certain factors in arriving at its decision. It may also reject certain factors in arriving at the disputed decision. In both cases whether those factors considered or rejected are permitted by the law, and what weight to attached to those factors are all questions of law for the court to determine. The extent to which the court will defer to the agency's determination of what these factors are and the weight to attach lead a discussion of the *Skidmore* case.

¹¹² *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹¹³ *Chevron USA v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The issue in this case was whether a court, in reviewing an agency's construction of a statute that it administers, can impose its own construction on the statute if the statute itself is silent or ambiguous regarding the specific question at issue? *Id.* This is a case where the U.S. Court of Appeals for the D.C. Circuit recognized that Congress had not expressed an intent regarding the applicability of the bubble concept and goes ahead to substitute its own interpretation for that of the EPA. The Court of Appeal viewed the statutory definition of the term "source" as a sufficiently flexible to cover either a plantwide definition, a narrower definition covers each unit within a plant, or a dual definition that could apply to both the entire "bubble" and its components. *Id.* at 859. It interpreted the policies of the statute, however, to mandate the plantwide definition in programs designed to maintain clean air and to forbid it in programs designed to improve air quality. *Id.* The U.S. Supreme Court however held that when a court reviews an agency's construction of a statute, it faces two questions. First, the court must consider whether Congress directly addressed the precise question at issue. *Id.* at 842. Second, if the court finds that the statute is silent or ambiguous regarding the specific issue, it must consider whether the agency's answer was based on a permissible construction of the statute. *Id.* at 843. Here, Congress did not express an intent regarding the applicability of the bubble concept to the permit program. *Chevron USA*, 467 U.S. at 861-62. Given the many competing interests at stake, the EPA's use of the bubble concept was a reasonable policy choice for the agency to make. The background facts are that a 1977 Amendment to the Clean Air Act (CAA) required polluters in certain areas to obtain a permit from a state regulator before building any new or modified stationary sources of air pollution. *Id.* at 840. The state regulator could only grant the permit if the polluter met specific requirements regarding the abatement of new pollution. *Id.* The Environmental Protection Agency (EPA) promulgated a rule interpreting the term "stationary source" to include what the agency called a "bubble" policy. *Id.* Under this policy, an existing plant containing several pollution-emitting devices could install or modify one piece of equipment without a permit if the alteration did not increase the total emissions from the plant. *Id.* The Natural Resource Defense Council (NRDC), as plaintiffs, challenged the EPA's interpretation of the word "source." Specifically, the NRDC argued that the word referred to each individual pollution-emitting piece of equipment,

which meant that a plant would need to obtain a permit any time it created a new source of pollution or modified an existing source if the effect were to increase the pollution from the source. *Id.* at 864, n. 38. Finding that this interpretation best served the goals of the CAA, the court of appeals agreed with the NRDC. *Chevron USA*, 467 U.S. at 841. In reaching this decision, the court recognized that Congress had not expressed an intent regarding the applicability of the bubble concept to the permit program. *Id.* The United States Supreme Court granted certiorari to review the lower appellate court's decision. *Id.* at 842.

¹¹⁴ Meanwhile, the Chevron deference has been critiqued in several scholarships. One criticism is that it has occasioned less clarity than it was meant to achieve in the area of judicial review of agency statutory interpretation. And that judges disagree not only on the role of the agencies and the courts, but also on the methodology for interpreting the statutes involved using; (1) textualism, (2) hypertextualism, and (3) contextualism. Similarly, judges also differ on regulatory context and that there are four answers to the question of whether and how a court should defer to an agency interpretation of a statute. Thus: (1) there might be no deference given; (2) there might be Chevron deference; or (3) Skidmore deference also associated with Hearst, and (4) Auer deference, (i.e., *Auer v. Robbins*, 519 U.S. 452 [1997]), that is judicial deference to an agency's interpretation of its own regulation. See Paul Craig, *Judicial Review Of Questions Of Law: A Comparative Perspective*, in *COMPARATIVE ADMINISTRATIVE LAW* 389, 394–99 (Susan Rose-Ackerman, Peter L. Lindseth, & Blake Emerson eds., 2d ed. 2017); See also Christopher J. Walker, *Attacking Auer And Chevron Deference: A Literature Review*, 16 *GEO. J. L. PUB. POL'Y* 103 (2018); See Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 *NOTRE DAME L. REV.* 1441 (2018); See Richard M. Re, *Should Chevron Have Two Steps*, 89 *IND. L. J.* 605 (2014); See Samuel L. Feder, Matthew E. Price & Andrew C. Noll, *City Of Arlington v. FCC: The Death Of Chevron Step Zero*, 66 *FED. COMM. L. J.* 47 (2013); See Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 *BROOK. L. REV.* 1241 (2010); See also Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187 (2006).

¹¹⁵ See SUNSTEIN AND VERMEULE, *supra* note 67 at 104, 107.

¹¹⁶ See generally Gordon G. Young, *Public Rights And The Federal Judicial Power: From Murray*, 35 *BUFF. L. REV.* 765 (1986); See also Martin H. Redish, *Legislative Courts, Administrative Agencies, And The Northern Pipeline Decision*, 1983 *DUKE L. J.* 197 (1983).

¹¹⁷ *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). This case was about the constitutionality of the Bankruptcy Act of 1978. A bankruptcy reorganization company filed an ordinary state law contract claim before a bankruptcy court established under the Bankruptcy Act of 1978. But the bankruptcy judges did not enjoy life tenure or salary protection like Article III judges. And the issue was whether Congress could constitutionally assign the resolution of such a dispute to non-Article III court. Justice Brennan in his plurality opinion outlined three instances of permitted delegation of adjudication as; (1) delegation to “territorial courts”, (2) delegation to “courts martial”, and (3) delegation to “legislative courts and administrative agencies” in matters of ‘public rights.’ And he held that Congress could not assign the adjudication in this dispute to non-Article III court, even though the bankruptcy judges’ decision was reviewable by Article III judges. He reasoned that the state law contract claim in this matter was not a public right as it was not between the government and Northern Pipeline. He distinguished *Crowell* from this case by noting that, unlike this case, *Crowell* involved a private right created by Congress, and that it also involved greater participation and supervision of Article III court. Thus, Justice Brennan pointed out two types of private rights; Congress created private rights, and common law or state law created private rights. And whereas Congress determines everything about the Congress created rights including assigning specialized adjudicative task to particular tribunals, Article III forbids assignment of adjudicative power to non-Article III courts in the case of the common law or state law rights.

¹¹⁸ *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). This was a case about the constitutionality of the Commodity Exchange Act (CEA Act). As in *Northern Pipeline*, the issue was whether Congress can constitutionally grant to an agency, CFTC, power to adjudicate ordinary state law contract between two private persons. The CEA Act allowed customers of a commodities broker to either initiate an action before the CFTC for damages or sue in the federal courts where the broker violated the Act. Where the customer opted to use the CFTC procedure, the CFTC could decide on any state law counterclaim by the broker. And this is what happened between a customer and a broker in this case. The customer initiated a CFTC process and the broker counter-claimed in a federal court. But at the request of the customer, the broker voluntarily withdrew the matter before the federal court and file it before the CFTC. When the customer lost before the CFTC, the customer challenged the CFTC decision before the federal court on grounds that the CFTC could not constitutionally adjudicate the state law contract claim. The Supreme Court majority decision reaffirmed *Crowell*. It reasoned that Article III ought to be construed purposively to determine the constitutionality of delegation of adjudicative power to non-Article III bodies. Thus construed, Article III protects both structural and personal interests. As regards personal interest, litigants have the right to litigate before independent judges, but in reliance of *Crowell*, there is no absolute right to litigation before Article III courts. Therefore, by opting

Indeed, the wisdom behind this distinction between public rights and private rights is that because agencies are not courts, they must not be seen to be exercising judicial powers. And technically Congress cannot delegate adjudicative powers because of separation of powers. But in practice Congress does delegate adjudication to agencies, and the courts allow this delegation to stand so long as judicial review of such agency's adjudication is allowed.¹²¹ This means any statute delegating adjudication to agencies without allowing the courts to review such adjudication is a danger to separation of powers, and the courts do not countenance such delegation. Again, as agencies are not courts, agency adjudication excludes jury trials which is only available in common law trials. Thus, agency adjudication also raises concerns about Article III and the 7th Amendment of the US Constitution as seen in *Atlas Roofing, Inc. v. Occupational Safety and Health Review Commission*.¹²²

In applying this to Ghana, it is submitted that the jury and assessor system, which is a feature of Ghana's legal system, as received from the English common law, ought to be extended to industry by formalizing them as courts. But unlike *Crowell* and other cases, it is argued that there is no need to distinguish between public and private rights because the two

for the CFTC proceedings, the customer effectively waived the right to litigate before state or federal court. But as regards the structural interest, the parties' consent or waiver do not cure any constitutional difficulty, which is measured by balancing four factors namely, (1) the extent to which the essential judicial power attributes are reserved in Article III courts, (2) the extent to which non-Article III courts exercise judicial powers, (3) origins and importance of the rights in dispute, and (4) the mischief that Congress meant to address by departing from Article III. The court held that this case was on all four with *Crowell* except the jurisdiction over common law counterclaim, and that there was no substantial threat to separation of powers. Therefore, just as Congress could encourage out of court settlement through ADR, Congress could also establish quasi-judicial mechanism subject to judicial review.

¹¹⁹ *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985). Where a mandatory arbitration with limited judicial review was held constitutional.

¹²⁰ *Stern v. Marshall*, 564 U.S. 462 (2011). This was a dispute between a stepmother and stepson in a bankruptcy action brought by the stepmother before a federal bankruptcy court. When the stepson also filed a defamation claim, the stepmother counterclaimed for fraudulent interference with the testamentary dispositions of the parties' deceased husband and father. Thus, the federal bankruptcy court had to decide on two state tort claims. The Supreme Court held that the bankruptcy court lacked jurisdiction over defamation, but it had jurisdiction over the tortious interference claim and therefore had to decide whether the bankruptcy court's adjudication of the tortious interference claim was constitutional? The Supreme Court distinguished this case from the agency cases as seen in *Crowell*, *Thomas*, and *Schor* by noting that this was a case dealing with a court and not an agency. And therefore, rejected the argument that bankruptcy court's judgment was constitutional.

¹²¹ See generally Richard H Fallon, *Of Legislative Courts, Administrative Agencies, And Article III*, 101 HARV. L. REV. 915 (1988).

¹²² *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977).

are patently merged in the literature. What is needed is a legislation creating administrative rules and remedies to lessen the caseloads of the courts. But as earlier stated, the Ghanaian situation continues to be based on English common law system with insignificant changes. And this ropes in the discussion below about how the English administrative law system answers to this study's corporatized administrative law.

United Kingdom

Many comparative studies on the US and UK administrative law systems show that the two systems resolve similar issues although with different institutions. For instance, in the UK, De Smith's classification of (i) legislative, (ii) administrative (executive), (iii) judicial (or quasi-judicial), and (iv) ministerial,¹²³ functions shows that UK administrative agencies also exercise legislative, executive, and judicial functions like their US counterparts. But the eighth edition of this De Smith's work lumps these functions together as public functions, and thus extends the focus of judicial review from administrative actions to cover all public functions.¹²⁴ This means that, unlike the US, English administrative law is not agency-centered especially where the 'Crown'¹²⁵ is a substitute for 'executive'.¹²⁶ As English administrative law is given an 'all public functions' focus, it is axiomatic that it also covers the actions of private actors in the public sphere.¹²⁷

¹²³ See J.M. EVANS (ED.), *DE SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 68–89 (4th ed. 1980); See also WOOLF ET AL., *supra* note 42 at 1075–90.

¹²⁴ See WOOLF ET AL., *supra* note 42 at 10–11 noting that formerly, administrative law was concerned more about statutory bodies, but now, even non-statutory bodies or quasi-governmental nature are subject to administrative law.

¹²⁵ See generally Janet McLean, *The Crown In Contract And Administrative Law*, 24 *Oxf. J. Leg. Stud.* 129 (2004).

¹²⁶ See generally TERENCE DAINITH & ALAN PAGE, *THE EXECUTIVE IN THE CONSTITUTION: STRUCTURE, AUTONOMY, AND INTERNAL CONTROL* (1999); See also Craig and Tomkins, *supra* note 81 at 4–7 where the authors note that constitutional definitions of executive power is inadequate as seen in respect of defining executive functions and executive institutions. The extent to which the executive makes law is a problem for most countries. And this may be delegated legislation by ministers or rule making by independent agencies. But where the executive exercises judicial functions is generally not widespread. They identified three approaches in confining or delimiting executive power. These are "subordinate", "bit and pieces" and "residual" approaches. The subordinate approach conceives the executive as the agent of the legislature. The bit and pieces approach allows the pragmatic choices of the legislature to set the boundaries of executive powers. The residual approach sees executive power as one not exercised by anyone, and it is what is neither legislative nor judicial.

¹²⁷ See PAUL CRAIG, *ADMINISTRATIVE LAW* 5–006 & 5–013 (6th ed. 2008).

This privatized public triggers this study's controlling idea of corporatizing administrative law, and in this regard, it is submitted that the corporatized administrative law in the UK are the many regulatory structures and competition law that regulate privatized public enterprises in the UK.¹²⁸ For as Professors Craig and Tomkins wrote; "The move towards 'new public management'...has resulted in numerous formerly governmental functions being transferred to the private sector through processes of corporatization and privatization."¹²⁹ In issue therefore is whether and how does privatization allow agencies and/or private actors in the UK to exercise legislative and judicial powers?

A key idea from one study on privatization is that privatization is largely driven by the degree of state autonomy in policy making than by economic forces.¹³⁰ And in the UK, the Government is given a free hand in privatization with practically no resistance from Parliament or the courts. Despite this, there are various legal techniques that allow the state to control the privatized enterprise after privatization.¹³¹ As scrutiny is undertaken solely with the view to learning from the criticism of past actions, UK privatizations are subject to *ex post* procedural

¹²⁸ See Cosmo Graham & Tony Prosser, *Privatising Nationalised Industries: Constitutional Issues And New Legal Techniques*, 50 MOD. L. REV. 16 (1987) where the authors generally assess the legal issues raised by privatization in the UK, and challenge the generally held idea that after privatization there is no state control over the privatized enterprise by arguing that the state retains control through several mechanisms including shareholding and contractual relationships.

¹²⁹ See Craig and Tomkins, *supra* note 81 at 5.

¹³⁰ See generally COSMO GRAHAM & TONY PROSSER, *PRIVATIZING PUBLIC ENTERPRISES: CONSTITUTIONS, THE STATE, AND REGULATION IN COMPARATIVE PERSPECTIVE* 3–4, 59–64, 185–209, 210–40 (1991) In discussing how the new institutionalism literature analyse the effect of political and legal institution on economic policy formulation and implementation and noting that too much attention is given to forces outside the state, particularly civil society, the authors call for bringing in the state. This is because both state and society shape each other. Politics equally shapes privatization as much as market liberalism. So, the emerging new institutionalism literature is concerned with the autonomy of state from civil society. And in this respect, Graham and Prosser wrote about the need to bring in the constitution in the privatization process because the design of state institutions matter. Their concern was about how different legal constraints from different constitutional arrangements affect the implementation of privatization as economic policy. Three forms of such constraints are identified. And these are substantive, procedural and constitutional culture. Of particular interest is the first two types of constraints. These are studied in the context of Britain, France and the US. Thus, whereas formal constitutional rules apply *ex ante* in France, in the UK procedural constraints apply *ex post facto* such as the use of the Audit Office and the Public Accounts Committee to scrutinize privatization. New institutional arrangements are in place to check abuse of monopolies following privatization in the UK. France has not had to grapple with regulating natural monopolies and so the US comes in as the best comparator to the UK. In the US, two constitutional constraints of the second and third type are important. These are due process and separation of powers.

¹³¹ *Id.* at 138–39.

requirements, as against the *ex-ante* constraints under the US federal APA.¹³² And these include golden shares and restrictions on shareholding, competition law and shareholding, contractual relations, and consumer protection.¹³³ The key institution for scrutinizing privatization is the Monopolies and Mergers Commission (MMC). Other institutions of parliamentary scrutiny are the Public Accounts Committee, National Audit Office, and other parliamentary select committees replacing the Select Committee on Nationalised Industries that was established in 1979.¹³⁴ Now, as the executive and the legislature are inseparable in the UK,¹³⁵ the two organs of government combine to control the formulation and introduction of legislation whilst the courts control adjudication.¹³⁶ This means that the two key oversight mechanisms in the UK are ministerial responsibility and judicial review. The executive-controlled-Parliament in the UK also controls agency rule-making or subsidiary legislature by building control mechanisms into enable legislation to require; (a) a laying before Parliament, (b) an affirmative vote by Parliament, and (3) a negative resolution by Parliament. Other controls include parliamentary committee scrutiny of the subsidiary legislation, prior publicity, consultation, publication, and public inquiry.¹³⁷

The courts also review subsidiary legislation by utilising two doctrines of sub-delegation and non-fettering of discretion. The sub-delegation doctrine means that where parliament has, in a subsidiary legislation, granted the agency concerned the power to sub-delegate, the agency can only do so under very restrictive conditions.¹³⁸ The non-fettering doctrine also means that where Parliament has conferred discretion on an agency within a

¹³² *Id.* at 59–62.; For a general explanation of the concepts of *ex ante* and *ex post*, see WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* loc. 103 of 5016 (2007) (Kindle).

¹³³ See GRAHAM AND PROSSER, *supra* note 126 at 138–151, 160–174, 231–235.

¹³⁴ *Id.* at 3–7, 59–62, 185–210, 213–20, 231–35, 239–40.

¹³⁵ See HILAIRE BARNETT, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 80 (13th ed. 2020).

¹³⁶ See D.J. GALLIGAN, *DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES* 484–87 (1996); See also Jack Beatson, *Legislative Control Of Administrative Rulemaking: Lessons From The British Experience*, 12 CORNELL INT'L. L. J. 199 (1979).

¹³⁷ See MIGAI AKECH, *ADMINISTRATIVE LAW* 122–23 (2016).

¹³⁸ See WOOLF ET AL., *supra* note 43 at 321–39.

subsidiary legislation, it must seek to exercise this discretion each time it is called upon to do its work under the subsidiary legislation and cannot use its internal policy in place of exercising its discretion or unnecessarily restrict the exercising of this discretion.¹³⁹ This means that the nondelegation doctrine as seen in the US discussion above, is treated differently in the UK. In the UK, nondelegation is seen in terms of discretionary power, delegation of power, and law of agency. And related to the concept of delegation are the concepts of surrender, abdication, and dictation. The general principle of delegation is that civil servants act not as delegate, but as the alter ego of the minister, except where a civil servant acts in his or her own behalf and not that of the minister. But this rule applies only to departments of the central government, and not to local government authorities, other statutory bodies, and private persons.¹⁴⁰

Again, the idea of lumping administrative actions into an omnibus 'public functions' also means that delegations of legislative and judicial powers are not easily divined. Therefore, on delegation of judicial function, the courts tend to distinguish between administrative function and judicial function. And they normally allow delegation of administrative function only where it involves the exercise of discretion, even though there is no general principle that administrative functions are delegable. Occasionally, the courts allow delegation where the matter is merely administrative. But as regards judicial functions, there is a general objection

¹³⁹ *Id.* at 515–34.

¹⁴⁰ By the Latin maxim *delegatus non potest delegare*, the general principle of law is that power must be exercised by the person or body of persons entrusted with it. Therefore, generally, a statutory power cannot be delegated. In issue then is whether a committee can delegate its power, or whether a non-member of a committee can participate in the decision of the committee? And if not, what is the legal effect when a non-member participates in the committee's decision-making process? Here it seems a strict application of this nondelegation maxim, as understood in private of law agency, does not apply. As doing so would hamper the work of public officials or public institutions who must, by necessity, work through committees, executive officers and other. Therefore, a public institution, vested with statutory powers, is not considered to have delegated its powers when it acts within its statutory powers to allow others to act on its behalf. And anyone so acting is only seen as an agent of the public institution. Therefore, where the body specifically empowered only receive recommendation from the subordinate agencies and exclusively undertake the legal act of decision making, this is not considered as violation of the law. Moreover, the valid exercise of discretionary power requires that the correct body applies its mind and make a conscious choice. But where the public institution only rubber stamps the recommendation of the subordinate agency, this is not a valid exercise of the discretionary power, and it is thus held to have surrendered or abdicated on its power. *See generally* H W R WADE & C F FORSYTH, *ADMINISTRATIVE LAW* 259–476 esp. 259–64 (11 ed. 2014); *See also* WOOLF ET AL., *supra* note 43 at 321–39.

to delegation especially where matters of personal liberty and discipline are involved. Furthermore, since delegation also imply that statutory powers must be exercised reasonably, the courts also undertake substantive judicial review of this reasonableness in terms of the so-called *Wednesbury*¹⁴¹ principle, which is sometimes referred to as *Wednesbury* unreasonableness or *Wednesbury* grounds, or irrationality, and needless to add arbitrary or capricious, frivolous, or vexatious. And they also review the procedure adopted along the lines of natural justice. Thus, the concept of reasonableness goes to the core of substantive judicial, and natural justice goes to procedural judicial review.¹⁴²

On the issue of whether and how privatization allows agencies and/or private actors in the UK to exercise legislative and judicial powers, it is evident from the foregoing discussion that any exercise of legislative and judicial powers by agencies and/or private actors are nonobvious. Any rulemaking functions may be informal because formal rulemaking is by delegated legislation. Departments instruct the Parliamentary Counsel Office in the drafting of laws. But compared to the making of primary legislation, no central co-ordination and control is in place for subordinate legislation. And because of a decentralized system of law making, the procedures departments follow in making subordinate legislation differ from one department to another.¹⁴³ Similarly, their role in adjudication is evident in the tribunal system in the UK. There is an administrative court which is a division of the high court, and the Tribunals, Courts and Enforcement Act of 2007 which has introduced an elaborate system that caters to the needs of everyone including private actors.¹⁴⁴ Thus, the spotlight now turns on Ghana below.

¹⁴¹ *Associated Provincial Picture Houses Ltd. vs. Wednesbury Corp.* [1948] 1 K.B. 223.

¹⁴² See generally WOOLF ET AL., *supra* note 43 at 341–79, 591–671.

¹⁴³ See DAINTITH AND PAGE, *supra* note 123 at 240–86 esp. 258–64.

¹⁴⁴ See WOOLF ET AL., *supra* note 43 at 4–7, 41–61, 118, 122–52, 877–988, esp 965–988 where the authors generally explain that before the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007), a wide range of grievances against public authorities were dealt with by a system of about 70 statutory tribunals. And that the structure of the tribunal system was largely haphazard and unnecessarily complex. Thus, the TCEA 2007 was introduced to harmonise almost all the previously separate tribunal jurisdictions into a new structure of First-Tier Tribunal and Upper Tribunal. The Upper Tribunal is a superior court of record and it may be constituted by

Ghana

The focus here also anticipates a future comparative study with Ghana, South Africa,¹⁴⁵ which attracts attention in prominent comparative administrative law studies,¹⁴⁶ Nigerian¹⁴⁷ and Kenya,¹⁴⁸ to unpack the varied influences of English common law in Africa. Ghana's 1992

High Court judges. It deals with appeals from the First-Tier Tribunal. Supervising the tribunals is the administrative court, which exercises jurisdiction over courts and tribunals of "inferior jurisdiction." But decisions of the "superior courts of record" (i.e., Supreme Court, Court of Appeal, and the High Court) are outside the scope of judicial review in the administrative court. Now, even though the Upper Tribunal is designated as a "superior court of record" under Section 3(5) of the TCEA 2007, its decisions are subject to judicial review where there is no appeal to the Court of Appeal. Thus, judicial review claims lie against tribunals, ombudsmen, and public inquiries. Indeed, there are several grievance-handling schemes in place, some of which are established by statute, some non-statutory schemes by public authorities, and others are self-regulatory schemes by particular private sector industries. These schemes tend to be independent of the public authority or private enterprise against which a complaint is made. And the term "ombudsman" is informally attributed to three main public sector bodies namely, the Parliamentary Commissioner for Administration (PCA or Parliamentary Ombudsman), the Health Service Commissioner for England (HSO or Health Service Ombudsman) and the Commission for Local Administration in England (CLA or Local Government Ombudsman [LGO]). Now the Civil Procedure Rules (CPR) govern all civil litigation including judicial review. At the heart of the CPR is the notion of proportionate dispute resolution that is aimed at transforming civil and administrative justice in the UK. Proportionate dispute resolution means dealing with the case in a manner that is cost effective to litigants and proportionate to the importance and complexity of the case. Furthermore, it is intended to reduce administrative errors by clarifying rights and responsibilities in the process. And public authorities are encouraged to offer internal methods to handle complaints. A pre-action protocol for judicial review annexed to the CPR Pt 54 is equally targeted at this end; *See also* Michael Adler, *Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice*, 69 MOD. L. REV. 958 (2006).

¹⁴⁵ *See* CORA HOEXTER, *ADMINISTRATIVE LAW IN SOUTH AFRICA* 51–52 (2d ed. 2012); *See* LAWRENCE G. BAXTER, *ADMINISTRATIVE LAW* 189–214 (1984).

¹⁴⁶ For example, the authors of the 8th edition of De Smith's *Judicial Review* included South Africa in their list of common law countries that included Australia, Canada, India, Ireland, and New Zealand, as comparative perspectives for understanding judicial review in the UK. *See* WOOLF ET AL., *supra* note 43 at 9; *See also* Cheng-Yi Huang, *Judicial Deference To Agency's Discretion In New Democracies: Observations On Constitutional Decisions In Poland, Taiwan, And South Africa*, in *COMPARATIVE ADMINISTRATIVE LAW* 478 (Susan Rose-Ackerman, Peter L. Lindseth, & Blake Emerson eds., 2017).

¹⁴⁷ *See generally* P.A. OLUYEDE, *NIGERIAN ADMINISTRATIVE LAW* 326–358 esp. at 341–43 (1988). Considering that this book was written around the time of military rule in Nigeria, it discusses law making in both democratic and military governments. It notes a lack of institutional distinction for law making and law execution during the life of military governments as against democratic governments in Nigeria. Whilst referring to agency rulemaking in civilian democratic rule as administrative legislation, it notes that administrative legislation is unavoidable in modern governments. And in the context of Nigeria, this is seen as delegated legislation which is sometimes referred to as subordinate or subsidiary legislation. And this allows the executive to fill in the gaps of a statutory scheme. The author then compares modes of enacting delegated legislation in Britain, Kenya, Nigeria, Uganda, and Tanzania noting four common trends. These are affirmative resolution, where the enabling statute requires legislature to approve the subsidiary legislation before it comes law; negative resolution, where the enabling statute requires legislature to annul the subsidiary legislation; approval in draft form, where the legislature is required to approve the draft; and mere laying before legislature, where the legislature chooses to act or not to act within specified timeframe after which the subsidiary as laid before the legislature becomes law or not. This is noted as the practice in Nigeria, and it is similar to the practice in Ghana under Article 11(7) of the 1992 Constitution of Ghana; *See also* CHARLES MWALIMU, *THE NIGERIAN LEGAL SYSTEM; VOLUME 1 PUBLIC LAW* 19–21 (2005); And for general discussion of adjudication in Nigeria, *see* CHINUA ASUZU, *FAIR HEARING IN NIGERIA* (2007).

¹⁴⁸ *See generally* AKECH, *supra* note 133, at 117–51, esp. at 135–36. The claim of this book is that administrative law plays a vital role in the promoting democracy, and it therefore looks at democracy from the perspective of

Constitution hybridizes the US presidential and UK's parliamentary models¹⁴⁹ so that constitutional constraints on agencies are not so clear in terms of separation of powers and due process, and it is argued that this Ghana hybrid ought to be retrofitted with more of the US model because the US model is relatively open to public scrutiny.¹⁵⁰ Moreover, whereas US agency powers raise such constitutional issues as separation of powers and due process under the written US Constitution, UK agency powers raise issues of common law constitutional

administrative law. It adopts a case study methodology to study administrative law in Kenya. The six case studies are local government, central government, tax administration, environmental laws, prosecutorial powers, and election administration. It discusses the rule making procedures and adjudication in these six areas. In other words, it looks at how laws are made and enforced within particular contexts in an African country. And just like many textbooks on administrative law, it also discusses the issue of private entities performing public functions and how to hold them accountable and defines administrative law to cover both public and private sector. This book shows that like the US and South Africa, Kenya has adopted a codified administrative procedure called the Fair Administrative Action Act (2015) to operationalize Article 47 of the 2010 Kenyan Constitution. In noting that Kenya follows after the UK, the author wrote to the effect that subsidiary legislation is a key feature of rule making in Kenya just like the UK. And that the executive has monopoly in this respect. Pieces of subsidiary legislation have different names, mode of enactment, enacting authority, and contents of the statutory prescription. Some are binding and others are not binding. In most cases, the legislation spells out the rule making authority which is mostly the minister. But poor drafting might omit this, and this tend to create confusions for ministries. The enabling acts seldom provide that public notice and hearing be conducted although in practice some do publish the notice.

¹⁴⁹ For example, Article 78(1) of the 1992 Constitution requires the President to appoint majority of Ministers of State from among members of Parliament. This was proposed by the Committee of Experts. At paragraph 16 on pages 14-15 of the report, the Committee of Expert wrote: "The Committee recommends that the majority of Ministers of State be appointed from among members of Parliament. We recognize that this is a departure from the strict doctrine of separation of powers between the Executive and the Legislature as practiced, for example, in the United States; but we are not convinced that a rigid adherence to this aspect of separation of powers is essential to a democratic order or the rule of law." See COMMITTEE OF EXPERTS, REPORT OF THE COMMITTEE OF EXPERTS (CONSTITUTION) ON PROPOSALS FOR A DRAFT CONSTITUTION OF GHANA PRESENTED TO THE PNDC 9-24 esp. 14-15 (1991); In the Consultative Assembly, the Committee on Powers of Government and the plenary accepted this recommendation of the Committee of Experts but rejected the Committee of Experts' proposal for a split executive between the President and a Prime Minister along the lines of British parliamentary practice. Thus, framers of the Constitution debated the Committee of Experts proposal for a split executive and opted for an executive president. Explaining the rationale in column 1386 of the report on the January 14, 1992 proceedings, the chairperson of the Committee on Powers of Government, Dr. I.K, Chinebuah, stated as follows: "Under Article 65, clause (2) of the 1979 Constitution, such Members of Parliament as are appointed Ministers of State have to resign from membership of Parliament. In the view of the Committee, such members of Parliament as are appointed Ministers will continue to remain Members of Parliament and do not have to resign from Parliament. Such an arrangement we were convinced, will provide a link between the Executive Presidency and the Legislature." See CONSULTATIVE ASSEMBLY, PROCEEDINGS OF THE CONSULTATIVE ASSEMBLY OFFICIAL REPORT Cols. 1382-1386, esp. 1386 (1992) (14 Jan. 1992 Proceedings); See also S.K. DATE-BAH, REFLECTIONS ON THE SUPREME COURT OF GHANA 17-22 (2015), discussing the influence of English and American legal education in the training and recruitment of judges in Ghana.

¹⁵⁰ See GRAHAM & PROSSER, *supra* note 126, at 7-8, where in comparing the regulatory procedures in the US and the UK, Graham and Prosser wrote that: "The American experience can help us by suggesting ways in which government influence can be made more open to public scrutiny, thus demonstrating the true level of independence of agencies and, perhaps, enabling the true decision-makers to be held to account...The British decision-making procedures are ad hoc and generally secretive, perhaps exacerbating such problems. The American experience provides suggestions for making the procedures more structured and open to a wider range of interests, thus addressing issues of legitimation."

rights¹⁵¹ base on the largely-non-written UK constitution,¹⁵² despite recent reforms.¹⁵³ Similarly, US agencies are controlled by a complex oversight mechanism based on the APA.¹⁵⁴ But in the UK, the judicial review mechanism, believed by some to be based on *ultra vires*,¹⁵⁵ provide uncodified fair procedure principles.¹⁵⁶ In both UK and US, these constraint mechanisms translate as substantive review and procedural review, where the former is about review of law, facts and discretion, and the latter is about fair procedures.¹⁵⁷ Thus, in the UK, questions of law are for the courts, who substitute their judgments for that of the primary decision-maker, but in the US, as seen in the *Crowell* discussion above,¹⁵⁸ the courts accord a degree of autonomy to agencies through a two-step *Chevron* deference.¹⁵⁹

¹⁵¹ See Joanna Bell, *Common Law Constitutional Rights And Executive Action*, in COMMON LAW CONSTITUTIONAL RIGHTS loc. 7086 of 11151 (Mark Elliott & Kirsty Hughes eds., 2020) (Kindle), exploring the relationship between common law constitutional rights and judicial review of executive actions.

¹⁵² Whilst the UK exported written constitutions abroad, it did not consider adopting one at home as the Magna Carta is believed to be part of the hidden wire of the UK constitution. See MARY ARDEN, COMMON LAW AND MODERN SOCIETY: KEEPING PACE WITH CHANGE (VOL. II) 101, 107 (2015).

¹⁵³ See DAWN OLIVER, CONSTITUTIONAL REFORM IN THE UK (2003).

¹⁵⁴ See Dominique Custos, *United States*, in CODIFICATION OF ADMINISTRATIVE PROCEDURE 644 (Jean-Bernard Auby ed., 2013).

¹⁵⁵ For the debate on *ultra vires* as basis of judicial review, see generally CHRISTOPHER FORSYTH (ED), JUDICIAL REVIEW AND THE CONSTITUTION (2000).

¹⁵⁶ See GALLIGAN, *supra* note 132, at 167–86.

¹⁵⁷ Indeed, in the UK, the substantive and procedural reviews relate respectively to discretion and natural justice which are considered as the two pillars of English administrative law. This means that the substance of discretionary decisions and the procedures used in arriving at such decisions are very critical in English administrative law. The law can control to a limited extent the substance of a discretionary decision and the procedure by which such a discretionary decision is arrived at. See WADE & FORSYTH, *supra* note 136 at 259–476, In Part V of this book, the authors discuss discretionary powers in terms of the retention and the abuse of discretion. Under retention of discretion, the learned authors look at those body of rules which ensure that discretionary powers are exercised by those properly vested to exercise them without any let or hindrance from external entities. Under abuse of discretion, they discuss the substance of administrative discretion. And the discussion in Part VI has to do with procedural requirements of natural justice.

¹⁵⁸ See *supra* notes 106-109.

¹⁵⁹ See generally Craig, *supra* note 110. It is understood from this work that for a long time in UK substantive administrative law was based on jurisdictional or preliminary or collateral legal-fact determination. It was difficult to determine issues that were jurisdictional and those that were not jurisdictional because the texts of statutes were couched in conditional terms. Courts attempted to resolve this difficulty by distinguishing between the type and situation of case before the tribunal. First, where the kind or type of case in dispute was one which a statute commits or does not commit to a tribunal to resolve, and where in construing the said statute, a tribunal makes a mistake, such a misconstruction of the statute was considered as an error going to the root of jurisdiction and so the reviewing court could substitute the judgment. But where a statute described a situation for a tribunal to determine, and where in determining the situation, the tribunal misconstrued the statutory description, such misconstruction was considered as error of law within jurisdiction and would only be reviewed if it was on the face of the record. There were obvious difficulties in differentiating ‘type’ from ‘situations’ and the law was uncertain ex-ante or could not be rationalized ex post facto. And this was the situation until the decision in *Anisimic Ltd v. Foreign Compensation Commission* [1968] 2 Q.B. 862 or [1969] 2 A.C. 147, sought to undo the collateral law-fact distinction.

Substantive review of administrative acts in Ghana follows English practice although with local variations. Thus, in a line of cases including *Republic v. Court of Appeal, Accra; Ex parte Tsatsu Tsikata*,¹⁶⁰ and *Republic v. Court of Appeal, Accra; Ex parte Ghana Cable Ltd (Barclays Bank Ghana Ltd (Interested party))*,¹⁶¹ Ghana's Supreme Court has held that judicial review process only applies to correct mistakes of law and not mistakes of fact. Similarly, procedural review is based on the 1992 Constitution Article 296 due process clause and natural justice principles as seen in *Republic v High Court, Kumasi Ex parte Mobil (Ghana) Ltd (Hagan Interested Party)*¹⁶² where the Supreme Court also excluded private enterprises not engaged in public functions from the reach of administrative law. This is indicative that Ghanaian courts are open to extend administrative law values to private actors operating in the public spheres. And it is for this reason that the case is made herein for a corporatized administrative law in Ghana.

Indeed, the Ghanaian case of *Republic v. High Court, Accra; Ex parte Industrialization Fund for Developing Countries*,¹⁶³ shows how English judicial review has impacted on the development of judicial review in Ghana,¹⁶⁴ so that Ghanaian administrative law can be described as almost synonymous with judicial review.¹⁶⁵ But as a country with a written

¹⁶⁰ [2005-2006] SCGLR 612.

¹⁶¹ [2005-2006] SCGLR 107.

¹⁶² [2005-2006] SCGLR 312.

¹⁶³ [2003-2004] 1 SCGLR 348 at 356 where Justice Dr. Justice Seth Twum stated that "Whereas the King's Bench Division invented judicial review, our High Court acquired the power of review as part of the received law. Since then, the development of judicial review in this country has followed developments in England. Without putting too fine a gloss on it, our Supreme [High] Court (Civil Procedure) Rules, 1954 were copied from the English rules and the substantive law was English. An examination of our case law makes that abundantly clear. After all, that is what the enabling 1876 Ordinance ordained of our High Court. Therefore, successive legislation has maintained that posture. All this time, supervisory jurisdiction was conferred only on the High Court just as that jurisdiction is exercised by the High Court in England. Then in 1969, there was a change. The 1969 Constitution of Ghana conferred supervisory jurisdiction also on the Supreme Court. This was repeated verbatim in the 1979 Constitution. The current law is contained in Articles 132 and 161 of the 1992 Constitution."

¹⁶⁴ See C. E. K. Kumado, *Judicial Review Of Legislation In Ghana Since Independence*, 12 REV. GHANA L. J. 67 (1980); See also E. V. O. Dankwa & C. Flinterman, *Judicial Review In Ghana*, 14 UNIV. GHANA L. J. 1 (1977).

¹⁶⁵ For a discussion of how judicial review has been applied in various contexts, See S.A. BROBBEY, *THE LAW OF CHIEFTAINCY IN GHANA: INCORPORATING CUSTOMARY ARBITRATION, CONTEMPT OF COURT, JUDICIAL REVIEW* (2008).

constitution, Ghana's judicial review is characterized as "supervisory jurisdiction" and defined by Article 161 of 1992 Constitution to include prerogative writs and others.¹⁶⁶ Furthermore, several provisions of the 1992 Constitution and statute law clothe the Supreme Court and the High Court of Ghana with this "supervisory jurisdictions".¹⁶⁷ Now the emphasis on adversarial as against conciliatory dispute resolution in Ghana translates into more dependence on court-centered adjudication,¹⁶⁸ and agency adjudication is nonobvious. And as seen in two Ghanaian cases of *Captan* and *Popular Party*,¹⁶⁹ the Ghanaian Supreme Court characterises administrative actions along the perceived distinction between administrative and quasi-judicial as suggested in the above cited work of De Smith.¹⁷⁰ Similarly, agency rulemaking in Ghana is also nonobvious. This is because law making continues to be based on subsidiary legislation by ministers as against rulemaking by independent regulatory agencies.¹⁷¹ And Article 11(7) of the 1992 Constitution requires the laying of subsidiary legislation in Parliament for twenty-one sitting days of Parliament before they become law. Moreover, law making in Ghana is the preserve of the Legislature and Executive with nominal private member bill practice. Thus, it is evident that not much has changed with agency rulemaking in Ghana when the current practice is compared with the received English practice.

Conclusion

The key idea from the discussion so far is that no two administrative law systems can be said to be the same in how they are respectively perceived and enforced as there are local

¹⁶⁶ See generally S.K. Date-Bah, *Judicial Review Of The Decisions Of The Superior Courts: New Developments*, 21 REV. GHANA L. J. 96 (2005).

¹⁶⁷ See e.g., Article 132 and 141 of the 1992 Constitution, Sections 5 and 16 of the Courts Act, 1993 (Act 459) (as amended); Part VI of the Supreme Court Rules, 1996 (CI 16) (as amended); and Order 55 High Court (Civil Procedural) Rules, 2004 (CI 47) (as amended).

¹⁶⁸ See A.N.E AMISSAH, *THE CONTRIBUTION OF THE COURTS TO GOVERNMENT; A WEST AFRICAN VIEW*. 5–15 (1981).

¹⁶⁹ *Captan v. Minister for Internal Affairs (Minister of Interior)* (1970) C.C. 35; *People's Popular Party v. The Attorney-General* [1971] 1 G.L.R. 138

¹⁷⁰ See EVANS (ED.), *supra* note 123 at 68–89; See also WOOLF ET AL., *supra* note 43 at 1075–90.

¹⁷¹ See F.A.R BENNION, *THE CONSTITUTIONAL LAW OF GHANA* 262–69 (1962).

variations.¹⁷² And to understand these, a functionalist comparative law approach is necessary to examine their legal effects with practical questions. As between the US and the UK, Ghana's administrative law system identifies more with the UK in its effects. And it is argued that it can benefit a lot by retrofitting its administrative law system by encouraging industrial codes, as in the industrial recovery era in the US, and by establishing more administrative tribunals through a corporatized administrative law based on the US federal APA model. Luckily, there is constitutional support for this idea of industrial codes although a common legislative framework is missing. Again, the tribunal system in the UK is equally noteworthy when it comes to establishing more administrative tribunals in Ghana, although this should be done through a corporatized administrative law to rationalize an open and participatory agency rulemaking and adjudication.

The policy implication of this is that, in the short run, existing laws like the Companies Act 2019 (Act 992), the State Interests and Governance Authority Act, 2019 (Act 990), and the Public Private Partnership Act 2020 (Act 1039) ought to be reviewed for the purposes of establishing a Public Business Tribunal to be supervised by the High Court. With this, businesses would benefit in terms of gaining advantages before public institutions, privately creating laws, and enforcing them, and getting public law to be responsive to business needs. And this structure would feed into the corporatized APA to be adopted later. It is submitted that such a corporatized administrative law would, in the long run, project Ghana favourably on the African continent when it is studied in comparative terms with other common law African countries like South Africa, Kenya, and Nigeria. And such a comparative study is the future build-up or the next stock of this study.

¹⁷² See Robert B. Seidman, *Administrative Law And Legitimacy In Anglophonic Africa: A Problem In The Reception Of Foreign Law*, 5 L. SOC. REV. 161, 162 (1970).