

# Corruption and the Law: A Case of Unequal Justice?

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*Text of Lecture Presented by Dr. Sam Amadi at the 2nd Lecture on Law and Social Development Organized by Bamidele Aturu & Co. at the Lagos Airport Hotel, Ikeja, Nigeria on Monday, October 26, 2009*

## **Preamble:**

The organizers of this public lecture, Bamidele Aturu & Co. have asked me to speak on the topic: "Corruption and Rule of Law: the Case of Unequal Justice". I was tempted to modify this topic to suit my own augmentative inclinations. But I decided to stick to the topic as proposed by Bamidele & Co. because I reasoned that in posing the relationship between corruption and law essentially in terms of unequal justice they intend a more ideological critique of the rule of law framework for fighting corruption in Nigeria. I hope I will satisfy their expectation on the ideological critique of role of law in the fight against corruption.

I will take a theoretical rather than a technical approach. I will try to think about the role of law in fighting corruption rather than analyze anticorruption statutes and the decisions of the courts on corruption cases. In other words, this lecture will read more like an exercise in legal theory and jurisprudence casting broad glances and reflections on the workings of law and the legal institution in the fight against corruption. My main argument is simple: law is too political and too limited to constitute the only strategy for fighting corruption. Therefore, an exclusive focus on law and what judges and lawyers do in the fight against corruption, which I call legalism, will result in frustration. Law is political because men and women of power and means find in it a strong instrument to protect their interests. This appropriation of law as an instrument of personal or group aggrandizement explains the unequal justice which law oftentimes produce. Therefore, to effectively fight corruption with the law we must re-politicize the law so it empowers rather than demobilizes the victims of corruption. This requires the creation of social consciousness and social engagement which can harness the liberating potentials in the law framework.

Since 2003, Nigeria has officially declared the fight against to be a priority. This fight is spear-headed by the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC), two agencies established through by law with powers and functions provided in their establishing laws. Both agencies have the power to investigate, arrest and prosecute persons alleged to have committed corrupt practice. The EFCC is given a somewhat more restricted jurisdiction over economic and financial crimes which the law defines broadly. They also have power to engage in public education on prevention of corruption. Let's take some anecdotes as a background to the inquiry into the relationship between law and corruption in Nigeria. Oftentimes you hear someone say, 'There is no war against corruption in

Nigeria. It is only the small man they arraign to court. The big thieves are walking about freely'. You also hear 'They have bought over the court. It is no use. The judges are protecting these criminals'. Someone else may shout, 'EFCC is shielding the Governors. Why is it not sending evidence to the Metropolitan Police to convict Governor Ibori and his associates in crime'. Those who are more inclined to support the anticorruption agencies will argue that 'Oh, why is the law limiting the agencies? Why can't the government set up special courts for the EFCC and the ICPC? Why can't the rules of court be interpreted to aid the agencies to tackle corruption'. These statements may not be fully reasoned but they reflect popular views about how law have under-served equal justice in the matter of corruption in Nigeria. I will try to explain to these interlocutors why the law works in this frustrating manners in the fight against corruption.

### ***Why Do We Care About Corruption:***

It used to be that corruption was the concern of some moral saints and some incurable social activists like Gani Fawehinmi. Corruption did not registered much in the discourse of development and political transformation. When the leading neoclassical economists postulated about how to get Africa out of underdevelopment strait-jacket, fighting corruption was not one of the must-dos. Corruption was not considered a serious challenge to economic development. It was simply a moral and political problem. But that era is now gone. The discourse of economic development has become largely a discourse about how to institutionalize anticorruption regimes and ensure transparency and accountability in both public procurement and revenue management. Today, fiscal responsibility and establishment of strong and independent anticorruption agency are standard recommendations to every developing country in need of World Bank or IMF technical and financial assistance. These multilateral financial institutions now recognize that corruption is a real constraint to economic development.

It will be difficult to date when corruption got mainstreamed into the discourse of development and democratization. But the World Bank began to take corruption seriously in its support programs during the presidency of James Wolfensohn who began to demand greater transparency in World Bank projects. It is also as a result of pressure from State Department officials who were getting worried about the scale of corruption in projects financed by the Bank. As the Bank got concerned about corruption in projects it managed it also began to evaluate the economic costs of corruption to development initiatives. Soon deeper theoretical linkages were made between corruption and economic stagnation and general underdevelopment. It was no longer sufficient to say to African and developing countries to establish policy framework for market economy and to reduce the size of their public sector in order to develop. Governance issues were recognized as also critical. The growth and the influence of New Institutional Economics led by Douglas North influenced the greater focus on governance issues in economic development. Greater insights about the role of transactions costs and institutions in shaping economic growth mean that those factors that increase the cost of transactions in economic relationship and that provide negative incentives for inefficient behavior now matter seriously in designing and implementing economic reform policies.

From this perspective, corruption was no longer perceived only with the lenses of sociological or political theoretic. Those lenses probe why corruption exists, the nature of corruption and the social and political dynamics reinforcing corruption as an opportunistic behavior. These lenses did not directly relate corruption to the crisis of development in any substantive manner and did not consider strategies against corruption as prime policy responses to economic stagnation.

All that has now changed. The World Economic Report of 2001 set the pace for theoretical and empirical work on the relationship between corruption and economic development. In a 1998 article in *Finance and Development*, World Bank economists and social scientists, Cheryl W Gray and Daniel Kaufman, elaborated the relationship between corruption and development with theoretic and empirical groundings. First, corruption increases transaction cost and uncertainty in the economy. It also “impedes long-term foreign and domestic investment, misallocates talent to rent-seeking activities, and distorts sectoral priorities and technology choices (by, for example, creating incentives to contract for large defence projects rather than rural health clinics specializing in preventive healthcare); it pushes firms underground (outside the formal sector), undercuts the state’s ability to raise revenue and lead to ever higher tax rates being levied on fewer and fewer taxpayers. This in turn reduces the state’s ability to provide essential public goods, including the rule of law”. The duo observe that corruption also compound poverty of the many by constituting an indirect taxation on the poor. The result of these fall-out of corruption is the weakening of the legitimacy of the state and the frightful prospect of state failure. It is difficult to find a failed or failing state that does not at the same time suffer the blight of pervasive corruption.

There used to be a sniggering thought that corruption may not be completely a bad thing after all. Some analyses of some Asian countries suggested that corruption could actually be a grease to the wheel of economic development by allowing investment without time wasting due process. Some kind of corruption- small-scale bribery-is also perceived as supplementing non-existing social security. But these arguments are no longer respectable. As Gray and Kaufmann argue, actually, even small-scale corruption like bribery is inefficient in every circumstance because it soon constitute a cost to business. Today, corruption is considered a major constraint to competitiveness and a foremost bottleneck to be removed if an economy wants to be truly competitive. But, expectedly, many countries are ready to remove every supposed bottleneck to business except corruption.

I am writing this lecture in Paris after meeting with French legislators. One of them asked me why Nigeria, a country with enormous natural resources could remain so poor. I tried to explain this paradox of poverty in midst of plenty as a failure of governance in decades of military government that did not prioritize investment in human development. I could as well have said corruption and shut up. Corruption is mainly the reason why about \$400billion dollar realized from sale of oil in Nigeria since 1958 has resulted in a few hundred millionaires and millions of starving and sick citizens. Mr. Nuhu Ribadu, the former boss of the EFCC, did not mince words in telling a Congressional Committee that why Nigeria continues to tug along with the poverty ravaged countries of Africa in spite of enormous oil revenue is pervasive and state-sanctioned

corruption. In spite of its narrow neoliberal perspectives and the ideological underpinning of how the World Bank and sister institutions have narrowed the discourse of governance and corruption its major insight about how corruption, described more generally as deviations from proceduralized or routinized behavior, negatively impacts on economic development cannot be faulted. Some scholars have objected that this discourse have been manipulated to weaken the states in Africa and to engender appendages and sustain center-periphery relationship between these states and the Washington institutions. This critique may have its merits in other circumstances. But in the catastrophe of economic regression in Africa it should be rightly dismissed. So, we should embrace the emergent discourse that establishes pervasive corruption as one of the main causes of poverty and underdevelopment in Africa.

Now it remains to briefly examine how corruption, as a structure and culture, undermines democratization and, ultimately, statehood in Africa. Corruption does its most pervasive damage in the politics of the state. If corruption undermines the ability of the state to make the right kind of economic decisions it may overtime result in the failure of the state. Economic stagnation or regression contributes immensely to making a state fragile and propone to failure. Many of the world's fragile states suffer serious negative economic growth. It is almost impossible to mention a state that failed or show critical signs of failure whose economy is growing at a significant rate over a long period. Whatever drastically slows economic growth over a long period of time contributes to possible state failure or at least makes the state more fragile. So the economic consequence of corruption may ultimately result in political instability.

But, corruption has a more direct impact on the weakening of democratic governance. Let's not forget that corruption is in many ways a deviation from the rule of law. Corruption is a transaction mediated through money (monetary corruption) or power (bureaucratic corruption) to set aside the rule of law in a society. It involves the truncation of the social contract in as much as that contract is embedded in the notion of fairness and fair-dealing amongst citizens. Where corruption is pervasive there is a massive failure of justice. In a very corrupt society citizens do not treat themselves as equals and the sense of justice as equality or fairness collapses. A thoroughly corrupt country does not treat its citizens as citizens. It discriminates between those who can pay bribes in providing access to social services and those who cannot. In terms of delivery of civil and criminal justice, corruption rigs the process in favor of those who wield bureaucratic power or who capture power through bribery and other influence-mongering.

The most notorious and ruinous of the effects of corruption is state capture. Ultimately, pervasive corruption leads to the capture of the state by some elites. When a state is captured by the rich and powerful few its legitimacy is continually weakened. To maintain its dominance the captors need to resort to illegitimate use of violence. When the state is fragile its capture will unleash multiple opportunistic behaviors that can destroy the possibility of elite consensus necessary for democratic negotiation of power. Such opportunistic behaviors may lead to war-lordism which may eventually result in civil war. Bureaucratic corruption is a coercion against its victims and a provocation that may soon result in self-help, especially where it blocks access to

social or political justice. Imagine how electoral corruption blocks the process of negotiating claims to power. Those who are continuously excluded from access to political power through capture of electoral commission and the electoral system may resort to violence against the system and its captors. In the situation, corruption could lead to violent conflicts for political power which may destroy the legal framework and political conventions which legitimize competition for and use of political power. Corruption also destroys the very essence of citizenship and challenges the social basis of justice which is fairness. So, corruption is danger to the economic and political foundations of a state.

### ***Corruption and the Law:***

As you may have noticed, we have assumed that we know what corruption is and how it manifest. I should have defined corruption at the beginning but delayed to do so because corruption is what everyone knows when they see it. I should say a few words about the nature and forms of corruption before we proceed further. Let me say that corruption appears in various forms. But one common feature of all its manifestations is that it involves the transgression of accepted norms of behavior in quest for personal or group advantage. Corruption involves in the least unfair treatment of others and abuse of established procedure. The World Bank defines corruption as abuse of public office for private gain. Robert Klitgaard defines corruption as monopoly plus discretion minus accountability. The most famous forms of public corruption are bribery of public officials and stealing of public funds by public officials. They also include collusion between government officials and the private sector to defraud the state through various fraudulent private public partnership schemes. Corruption also extends to activities to capture state power outside the framework of the constitution and the rule of law. This includes all forms of electoral rigging and the capture of public policy machinery to serve personal and sectional interests. It is a long list.

Now we get to the real issue. How does corruption relates to law? The title of this lecture presumes rich relationship between law and corruption. Its focus on unequal justice seems to place emphasis on the negative aspects of this relationship. I think law relates to corruption in three basic ways. First, a basic notion of law or the regularity which law creates is required before we can even describe activities as corrupt in any sense that is thicker than merely moral. Even in the case of religious or other moralistic communications, a sense of rule infraction is implicit in the claim that any act is corrupt. In the context of socio-political communication, when we describe actions as corrupt we imply a strong sense of rule infraction, usually written rules. In another sense, corruption is facilitated by the weakness of law and law institutions. Corrupters essentially game the system, exploiting the corruptibility of the other persons and the weak structure of social relations. If the system was strongly designed it could rebuff the opportunistic behavior of the corrupter. In yet another sense, corruption is essentially redressed through the reassertion of the efficacy of law and law institutions. I use the word 'essentially' because corruption could be redressed through other interventions that are not law-based, although such interventions may be costly in the long-run. So, basically, law matters for

corruption because without law we do not really know what is corrupt and may not understand how it has happened and how to deter its future occurrence.

Law is the basic raw material for organizing modern society. Today, social life will be highly impossible without the interactive and communicative processes which law underwrites. The importance of law to social relations has made its discourse no longer the preserve of legal mechanics—those men and women trained in the technique of law. Moral and political philosophers are today even more concerned about law than most lawyers. Economists, especially those focusing on transaction cost economizing, look onto law to enable them build efficient institutions. The seed which Max Weber sowed in theorizing about the bureaucracy and its legalistic character has borne fruits in the overreaching discourse of law. But what is the discourse of law? How does law function in a society?

Law now functions predominating as the discourse of rule of law. Every country in the world now take the rule of law as the touchstone of political legitimacy. It used to be that that a few countries prided themselves with being rule of law state. Some other countries that deviated from the western liberal system did not bother to claim to be rule of law states. But, times have changed. The triumph of western liberalism has ended in the dictatorship of no-alternative to the rule of law. A pointer to how much important the rule of law is to modern governance can be seen in how quickly the Chinese President, Hu Jintao, upon assuming power assured the world that China is a rule of law. It is fashionable for even the most tyrannical state to claim commitment to rule of law. But what is the rule of law?

The rule of law has undergone transformation while retaining its core. The concept started its voyage as the simple claim that a good society is one which is governed according to law and not the whim of the mighty or powerful. As early as the Greek civilization philosophers and orators have advanced the notion that a good society must have a way to subordinate the whim of the king to the ideals of law. In the Roman Empire, at the height of the Justinian Code it was clearly acknowledged that while the Monarch can make whatever laws he wished he was bound to the decrees he had issued. This was a powerful concept which the English jurists and legal theorists advanced further in the Anglo Saxon world as the idea of the supremacy of the law. The classical rendition of the rule of law also emphasized several qualities of the law, including that it must proceed from a legitimate authority, it must address people generally and not in their particularity and that the law must speak prospectively and not retrospectively. All these form the formal conception of the rule of law.

The formal ideals of the rule of law were promoted as standard benchmarks of the good society. But the horror of the Third Reich when German judicial officers and state officials applied the law to commit egregious violations of human rights exposed the inadequacy of the formal ideals of the rule. Was Nazi Germany a rule of law state considering that the application of its regularly made laws resulted in Holocaust and other heinous crimes. Efforts were made to deal with the scandal of Nazi law by reinterpreting the formal conception of rule of law. The foremost efforts were those of Lon Fuller who formulated the 'internal morality' of the law to argue that system

of law does not satisfy the rule of law requirement except it has some internal morality to its positivist exposition. So, rule of law requires that laws acquire some moral virtues. The problem is that these virtues are expressed like legal, not moral, excellences. In Lon Fuller's terms, six legal excellences define law (specificity, publicity, prospectivity, non-contradictory, consistent and constancy). This effort to save the law from the scandal of Nazism fails. Joseph Raz launched a vicious attack on this theory of law and ended on the note that what matter for law was that it was effective in doing what it is meant to do. Just as a good knife is expected to cut well, a good law satisfies its essence if it has instrumental value. This is the inherent, not moral value of law. Raz is famous for arguing that a rule of law state might still even end up violating the right of the citizens and still pass the test.

Today, the rule of law has acquired a respectable image. It is now expressed within a large conception of justice. The new formulation of rule of law predicates the law to more than the requirement to be purposive and manifest internal integrity and institutional coherence. The purpose which law pursues by its authorizations and prohibitions are even more important than its efficiency. We cannot talk about the rule of law except as we recognize that law must, as articulated by the International Commission of Jurists in 1961, protect civil and political and economic and social rights of citizens. Under this proposition there would be no hesitation in denouncing the Nazi legal system. Also, many political systems in the world today will also not pass muster. Any legal system that does not promote substantive justice would flunk the test of rule of law. This is where the rule of law discourse stands today. Law must promote explicitly in its expressions the ideals of a free and equal society without discrimination. Law must promote liberty and freedom of the citizens. It is rule by law but rule of law. Of course there is a bigger debate between liberals and conservatives on the real merits of the rule of law. The economist, Hayek, was famous for thumping down on the substantive concept of the rule of law. In his view, such conception defeats the rule of law as it authorizes the intrusion of government into the private domain of citizens. Notwithstanding this challenge, the substantive conception dominates. It is easier to articulate this wonderful idea than implement it. How do we know when law has achieved this substantive notion of justice? And what is substantive notion of justice? The answer to the question what is just has not been answered beyond reproach throughout history. So, we do well to leave it as it is.

To discuss the relationship between law and corruption means discussing how the rule of law institutions impact on corruption. This is what I will proceed to discuss.

### ***Which Rule of Law and Whose Rule of Law:***

'Which rule of law and whose rule of law' is an invocation of 'law is politics'. The first challenge to using law to fight corruption is understanding that corruption is politics and law is also politics.

First, I ask, how does the rule of law function? There are three critical points at which we can assess the rule of law. These three points correspond to the three branches of government. The

rule of law means that the exercise of state power must be directly or indirectly authorized by the law. It is the legislature that makes laws in present day constitutional governments. In the case of the Nigeria it will be the National Assembly. So, an analysis of the rule of law would look at what legislators do. The other point is the executive whose responsibility basically is to enforce (execute) the laws enacted by the legislature. We will need to ask how the executive implements the law. And because both the enactment of law and their implementation may result in disputes as to legality or fairness the judiciary is called upon to interpret the law. So, we should know how the judiciary interprets and enforces the law. This is the story of the rule of law. It is the story of law as it relates to corruption.

Looking at these three action points on the journey to the rule of law one may ask whose interests does the law serve? We cannot know for sure until we first understand how these various actors make, implement and interpret the law. Often we hear the deprived, the cheated and oppressed thump down the law as 'an ass which the rich and powerful ride'. How does the law become an ass? First, we need to understand that law is ideological. That means law is not just a piece of objective material that describes the objective world. The law is both descriptive and normative. Law is justificatory and moralistic. It tells us what to do or not to do not just in an indicative manner; but also in a justificatory manner. It is something like this: "You should do X because doing X is the right thing to do". Both positivists and naturalists recognize the ideological character of law in the sense I am using ideology to represent values that are posited as imperative. Because law is ideological in the Gramscian sense it legitimizes and de-legitimizes actions. The rule of law has become a hegemony. Some forms of social relations are no longer permissible. On whose account? By the legitimizing role of the rule of law.

If law is an ideology and a hegemony, then the rule of law itself is also ideological and hegemonic. As we shall see later, the rule of law is not coterminous with law as legislations. The rule of law extends to the legal analysis which is chiefly produced by the court to understand what the law says or should say. Judicial interpretation of law constitutes an important component of the rule of law. When we say that the rule of law in a society prescribes a particular treatment for citizens we are not just speaking about what is contained in, say, Chapter 2 of the constitution. We are speaking about the rights the legislature has enacted in Chapter 2 as well as the interpretations which the courts have given to those rights. For example, when we talk about the rule of law guarantee of freedom of movement we are talking about Section 42 of the constitution and the decision of the Supreme Court in *Agbakoba v. Director, SSS* that the state cannot arbitrarily withdraw the passport of a citizen because the passport is a critical facility for enjoy the right to freedom of movement in Section 42.

Looking at the law from both its indicative and justificatory perspectives it become clear how the three branches of government make, execute and interpret the law and for whose interest they act. How does the legislature make law? Whose interests is promoted by the legislature in making law? And how does the law made by the legislature stand in relation to menace of corruption and the various response to it? First, we need to understand how the legislature fits into the theories of liberal democracy.

Liberal democracy, which is what is practiced across the so-called democratic world today, with insignificant variations, is established on two core principles of human nature. First, it is generally believed that humans have multiple and oftentimes conflicting values. These values also protect different strategic interests. Sometimes, these conflicting values may be harmonized. Some other times, they are irreconcilable. The other core principle is the priority of freedom over the good. This means that liberal democracy deems the protection of right more important than the promotion of what is true or right. These principles underwrite the basic institutions of liberal democracy. In the case of the legislature, it means that the legislature exists to aggregate the views and interests of the people. The legislature functions by deliberation and voting in the chambers. Because there are always a multiplicity of views, values and interests in a society and it is unreasonable to believe that there will always be a way to reconcile them, it is permissible that various factions bargain for the triumph of their view, values and interests in the assemble of the representatives of the people. This legitimizes interest politics which public choice theorists have used to show how politics works for special interests and not for the common good. The message is that when the legislature meets to enact laws there is no guarantee that what comes out of the legislative crucible serves the interests of the majority of the people or the interest of justice (whatever is justice). So, doing justice is not necessarily the responsibility of the legislature. Its responsibility is to serve the people. And since the people do not have uniformed or commensurable values and interests, negotiation becomes the acceptable ritual of legislature enterprise. The currency of negotiation includes money and various forms of power. Ultimately the winner of the legislative bargain is the most powerful and influential. This is one aspect of the law being an ass which the most powerful negotiates to ride. Of course, the legislators will never agree that law is for the highest bidder. But by now you know better.

If law-making is a competitive negotiation between unequal powers how does the product of law promote the common good? I will say, by two principal means. First, in legislature the majority always have their way and the minority their say. So, when a law is enacted it means that it manifests the will of the majority of the people. And based on the long established correspondence between the will of the people and the common good, when the majority votes in support of a policy, then that policy is in public interests, at least so says the most dominant liberal democratic theory. But of course there are some caveats and this is where the judiciary comes in.

Whereas liberal theory of law openly associates the legislature with interests negotiation, it does not so associate the judiciary. The job of the judge is to declare the law. But, what is the law? Is it possible that what the law says in a particular circumstance is ambiguous such that the judge may look elsewhere for insights in order to do justice? This has been the classic controversy in jurisprudence and legal theory. Theorists from HLA Harts, Ronald Dworkin, Joseph Raz, Roberto Unger and Duncan Kennedy as well as Jurists like Justice Holmes and Justice Scalia have offered differing views on the question. Most of the theorists and jurists admit that the formal law material do fail to offer determinative result in some difficult circumstances

called 'hard cases'. But, they diverge as to how judges solve hard question. The dominant narrative seems to be the one which is promoted by Ronald Dworkin in his books, *Taking Rights Seriously* and *Law's Empire*. He uses the myth of Hercules to show how judges decide hard cases. His ideal judge, Hercules, is capable of doing the extraordinary. He can turn the law generated through unrestrained interest bargaining through integrity in interpretation. How does this happen. Hercules uses the principles of right and justice to interpret what the law says even in hard cases. Judges does not legislate their hunches or their ideological commitments in hard cases. They simply resort to principles of rights which themselves are inherent in the moral universe of adjudication. This explanation does not satisfy some other theorists. It is evident that some of the legal materials are so contradictory that only a real Hercules could get them together in a coherent manner. Besides, are these principles of right not in themselves tainted by self-interests and values?

Dworkin's resort to the doctrine of principles and purpose in description the judicial act is an attempt to answer to the critique of the legal realists who from the time of Jerome Frank show that law is political and adjudication is politicking. Justice Holmes who is one of the most famous American realists argued that the life of law is experience as well as logic. This insight was radicalized by the Critical Legal Studies movement which argue that there is an ideological structure to adjudication. The idea here is that when judges interpret the law they don't do so in a value-neutral way. They do so under an ideological structure that legitimizes and de-legitimizes some interpretations. For example, a judge who reads into the right to life the requirement of sanitary pads for women prisoners in India is not just resorting to Hercules's principle of right because there are many conflicting principles of rights. He is reading into that right an understanding of political economy of inequality and injustice in the society.

If we map what results from interests-driven legislature onto adjudication we begin to see the whole picture of the working of the rule of law. How do judges ensure that the laws made by legislators who freely bargain on interests would serve the cause of justice? The popular explanation from the stable of liberal legal theory is that judges using their interpretive power and drawing from a Archimedean insights, available to only a Hercules, rectify the waywardness of the legislator by making law protect rights and welfare. Roberto Unger has pooh-poohed this claim. He argues that this involves two conflicting genealogies of law: the prospective and retrospective genealogies of law. The prospective genealogy tells us laws are made by legislators who are unrestrained in bartering interests. The retrospective genealogy tells us that once the law gets into the hand of the judge it is purged of its taints through a process of judicial reconstruction. But the judges are not immune to the conflict of values and interests as the rest of us. There is no Archimedean high ground to avoid the subjectivity of values and interests. As Duncan Kennedy, the Moses of Critical Legal Studies puts it, "we are divided amongst ourselves and within ourselves between irreconcilable visions of humanity and society, between radically different aspirations for our common future". It is not clear how judges escape this division. In fact, they do not hence adjudication is another form of politics.

It remains to get to the executive branch of government. The executive is the technical arm of government. The judicial attitude to the executive branch of government is due deference because they have the proximity to the technical issues of the day as to apply the best judgment. In the jurisprudence of the US Supreme Court, which has come down to us in the form of judicial review, the court does not second-guess the decision of the executive except it acts beyond the express grant of the legislature, is perverse in logic and fact or grossly unreasonable. The executive is granted enormous discretion in executing the law. This is both a matter of judicial attitude and practical necessity. The technical details involved in executing the law are better left to the public officials who stay close to the fact. Because the executive is a political organization promoting the political advantage of the ruling clique, its execution of the law will obviously respond to political stimuli.

We have come a full circle. The rule of law framework hides the reality and pervasiveness of interests mongering in the polity. In enacting, executing and interpreting the law the various branches of government cannot escape the constrain of power and influence mongering. It is not therefore difficult to see why the rule of law may underwrite unequal justice. With respect to law and corruption we can then see why the anticorruption laws are the way they are; why judges may be lenient or harsh to persons accused of corrupt practices; and why anticorruption agencies may prosecute certain kinds of public officials and not the others. These hallowed institutions are penetrated by self-serving politics. Of course, there are ramparts erected to minimize the sway of influence and power in the polity. Judges, legislators and executives do not act completely unrestrained. The most powerful restraint is the potential of those left out of the bargain to mobilize and impose their agenda on the agencies and force a compromise. Another rampart is human rights framework. Human rights empowers people to make counter claims and hold officials to account according to their interpretations of these rights. The restraints may not fully constrain these officials but it works good enough to stabilize the conflicting nature of interest politics.

### ***The Limitation of Rule of Law:***

Having dealt with the politics of law let me turn to the limitation of law.

Most anticorruption activists look unto the rule of law as a perfect framework to fight corruption. This makes sense. After all, corruption in the main entails violations of law. The focus of the war against corruption is now on legal reform. Either we ask for new laws granting independent agencies powers to investigate, arrest and prosecute corrupt officials or we ask for fiscal responsibility and public procurement regimes that deter corrupt practices. But the question is whether an exclusive focus on law reform is the best way to fight the menace of corruption going by what we know about the actual nature of law and how those who supervise the law enterprise work.

I argue that although strengthening the rule of law framework is very important approach to fighting corruption if this focus descends into religious belief in the potency of law and legal

institutions then the fight against corruption might be defeated. When the rule of law manifests as legalism then it imposes danger to efforts to fight corruption. Legalism, as I use it here, focuses on the fixation with law and legal institutions in liberal politics to the detriment of other political mechanisms. Legalism negatively refers to an excessive fixation with the rigidity of codes and rules in negotiating consensus in conditions of pluralism. As Judith Shklar defines it, 'legalism' is the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." Legalism emphasizes that "the court of law and trial according to law are the social paradigms, the perfection, the very epitome, of legalistic morality". Legalism takes the law and legal institutions as *the* phenomenon.

How does legalism manifest in the fight against corruption. First, it manifests as a determination to contain corruption through the enactment of an anticorruption law even without a strong realization on the part of the ruling elite that corruption undermines its long term interests and a determination to fight it. Most anticorruption laws are products of a drive towards legal convergence. Globalization fosters convergence of legal institutions towards an ideal type envisioned in the prevailing institutions in western democracies. Whereas the laws in those democracies were product of intense political struggle and capture essentially the compromise which history has imposed on those societies, ours are the enterprise of do-good westerners and their local collaborators. The implication is that the law does not change consciousness and mobilize consciousness. That is legalism: a belief that merely creating a new law has the magic to change behavior without regards to the nature of the social and economic interactions in the society. So more or better laws may not translate to better control of corruption.

Another manifestation of legalism is the commitment to establish anticorruption agencies even before political mobilization is undertaken to build a constituency demanding for probity in governance. It is not just incidental that the two anticorruption agencies were established under President Obasanjo. The Obasanjo administration was the most reformist of administrations in Nigeria. Mr. Nuhu Ribadu, the founding Chairman of the EFCC recently revealed that it was foreign interests that forced the formation of the EFCC on President Obasanjo. Obasanjo wanted certification that Nigeria stands right in drugs and crime which will aid the drive for foreign investment. He was required to establish an anticorruption agency as part of complying with existing international conventions. He had no option. So, the EFCC was not an indigenous outcome of Nigerian politics. It was not produced via contestation about the management of the public space. Of course, Nigerians know that corruption was the main reason why they are one of the poorest inhabitants of the world. They realize that corruption needs to be fought. But there was yet no political movement against corruption.

Legalism foists a wrong understanding of institutions and their relevance to real outcomes. The most dominant philosophical tradition in liberalism dating from Thomas Hobbes, Immanuel Kant and lately, John Rawls, is transcendental institutionalism; which Amartya Sen defines as a search for "perfectly just institutions", it focuses on getting the institutions right without bothering about the actual nature of the society that is or will emerge. This tradition gives short shrift to

social psychology and behaviorism. It denatures human beings into ideal characters. In the form of legalism it manifest as an understanding of institution away from the social interactions that create them. So the institution of public procurement is the Public Procurement Act and the bureaucracy created to administer the law. It has nothing to do with the political and social environment in which the incentive to execute the law or to effectively demand execution may not exists. An illustrative case will be that although there is a Public Procurement Act the Presidency has refused to inaugurate the council required by law because it does not want civil society representation on the council. The law of public procurement exists. But does the institution of public procurement really exist?

Legalism gives us the shell without the substance. It is an error which lawyers, partly from ignorance of social dynamics and partly from professional interest foster whenever they describe the answer to every social and political pathology as more and more laws. It could be that the law and the institutions they create could be a way of letting political elites off the hook quickly. Tokenism may be the best relief for a beleaguered political elite. Give them the law and continue with business. Michela Wrong pinpoints this issue in her book on the travails of the Kenyan anticorruption warrior, John Githongo. John Githongo was excited when he was appointed into a special anticorruption commission established by President Mwai Kabaki as a response to the politics of corruption. He went to work with great passion. He was total scandalized and frightened when he discovered that it was fellow cabinet members and his bosses who were the corrupters he was supposed to fight. When he assessed the situation he knew that he was not just demobilized but his own life was in danger. He went on exile. The tale is that in spite of good laws and new bureaucracy in Kenya, the anticorruption war came to nothing in that country. This could be the story of Nuhu Ribadu and the EFCC.

Michela Wrong helps us draw important lesson on the limitation of legalism in fighting corruption. I quote her in full: "One of the many lesson of John Githongo's story is that the key to fighting graft in Africa does not lie in fresh legislation or new institutions. To use the seemingly counter-intuitive phrase of Danny Kaufmann, expert on sleaze: "You don't fight corruption by fighting corruption". Most African states already have the gamut of tools required to do the job. A Prevention of Corruption Act has actually being on Kenyan Statutes since 1956. "You don't need any more bodies, you just need good people and the will", says Hussein Were. In Kenya, as in many other countries, the KACC is part of the grand corrupters' game, providing them with another bureaucratic wall behind which to shield, another scapegoat to blame for lack of progress. Rather than dreaming up sexy-sounding short cuts, donor should be pouring their money into the boring old institutions African leaders have deliberately starved of cash over the years: the police force, judicial system and civil service". This is a powerful statement of the problem of legalism that I am stating.

Legalism also gives us the false hope that once we have a whistle-blower protection law then people who hear, see and know about corruption will have the motivation to report corruption. This is institutional fetishism at its worse. No whistle will be blown in a society where those who have blown whistles in the past are not well regarded by their compatriots. If we allow those

who stick out their necks against corruption to be harassed out of dignified existence and they do not feel the secured community of fellow compatriots, it does not matter how many whistle-blower's protections you have in the law, reasonable people will not blow the whistle. Michela Wrong tells a story in her book of this little known Kenya who could not stand how top officials were fleecing the state of millions of dollar through false importation document at the Kenyan Central Bank. He blew the whistle and was sacked from his job. He could not find another job in the city and moved to the village to farm. When Kibaki announced antic-corruption policy he was overjoyed that his ordeals were over. But it was false dream. He was invited and a little formality of investigation was staged. The matter died. He was not reinstated or given another job and no one was brought to book for the fraud. He died of pneumonia in the village where he had no access to health services. His greatest regret was that even during the ritual of investigation his feat was not even acknowledged. Michela Wrong concludes that it is better to financially support these lone-ranger whistle blower than funding smokescreen anticorruption agencies.

It works like magic if the society sees one citizen take on the behemoth of a state and succeed. If whistle-blower has the last laugh; if he or she does not decompose of hunger and frustration then a lot more people will step up to blow the whistle whether there is a whistle-blower protection law or not. This is the reason that it will be disastrous to the war against corruption if someone like Ribadu, in spite of his many shortcomings, is allowed to have a bloody nose from the grand corrupters.

The law can help. But it must be a particular kind of law and law working together with other non-legal variables within a more convenient environment.

### ***Counter-Strategies for Fighting Corruption:***

The first strategy to fight corruption is to recognize that corruption, especially public corruption, is politics. The politics of corruption by which strategic interests buy up privileges against the rules of the game or natural justice is grand corruption. And the grand corrupters work by capturing the political process. If corruption is politics then the answer to corruption is politics. The resort by development practitioners and reformers to establish strong institutions of vertical and horizontal accountability should not obscure the fact that politics is the answer. Those who are victimized by corruption must be organized and strategized to overcome the transaction cost of getting their voice heard in a way that the bargain that goes in legislative houses and in the executive mansions changes. Except the people organize politically, they cannot impose sanctions against corruption and incentives for behaviors in support of probity. Take for example, the example of fiscal responsibility. The Nigerian former Minister of Finance, Mrs. Okonjo-Iweala initiated the practice of publishing monthly allocations to the different tiers of government. The idea is to let the people know so they can demand accountability from the governors and local government chairman. In spite of this innovation, Governors and Chairman continue to embezzle monthly allocation. They are no widespread protests and demonstrations in the states demanding for accountability. What is wrong? Legalism! The false belief that

because allocations are published a new consciousness will follow. No! Someone has to organize the people to use these information and turn them into political instruments of accountability. Without high energy politics such consciousness will not come. This is where liberal politics in its promotion of democracy, as the late Claude Ake puts it, as correlates of the market economy with its narrow sets of institutions has undermined the emergence of high energy politics. The politics that can counter the pernicious politics of corruption is the one that energizes the grassroots and confronts the conspiratorial political class with the demand of the people. We have witnessed some foretaste of this politics in the Obama movement in the US.

Another strategy for countering corruption is to deepen the institutional anchoring of transparency and accountability. Liberal democracy puts much emphasis on the importance of a freedom of information law. But freedom of information come in different forms. There is a freedom of information regimes that empowers the underclass and one that rarifies the crisis. Also, as Obama showed when upon being sworn in as President he reauthorized that implementation of the freedom of information regime in US presume in favour of seekers of information, freedom of information bill needs further authorization to be able to guarantee access. The executive may implement the law in a manner that leans against openness. Again, it is politics that comes to the rescue. As we effectively advocate for greater openness public officials become more inclined to respond to the demand for more quality access to information.

Now, information by itself does not translate to freedom. It must be accompanied by a structure of social relationship that empowers. If we have access to information and there is no community to use information to mobilize intelligent action we end up as if there was no information. Information is important but what people do with information, the accretions, is knowledge. And knowledge is power. If there is no learning community information does not become knowledge. And the knowledge that matters most for social liberation is social knowledge: the knowledge produced by social entities organized for action. We can illustrate with the recent report by the Nigerian Extractive Industry Transparency Initiative (NEITI). The report launched with considerable fanfare states that about N40 billion of oil revenue could not be traced. This is hot news. You would expect many groups and individuals would be organizing for urgent action on this. By now the cell-phones of legislators would be abuzz with calls from different constituencies. Various legislative committees would be summoning officials of the Department of Petroleum Resources and the Accountant General of the Federation to explain what happened. Nothing like that is happening. The report lies coolly on the desks of NGO workers and their co-travelers. This is what happens when legal reform misaligns with other social-political variables. If there is free and fair election and legislators know they could risks reelection if they do not act on this sort of report; if the grassroots of Nigeria are not politically dead and disconnected from public governance; if the Nigerian people are not so poverty beaten that people are more concerned with making a life than the lofty issues of fiscal responsibility; then the report may have instigated significant political action.

The point is that you must look before the obvious in fighting corruption. Daniel Kaufmann is right that to fight corruption do not fight it. Overlook what appears to be the problem and fix the environmental problems. Fix the electoral system so you can establish real accountability of political office-holders to the citizens. Fix the perverse political system so that political parties can become the carriers of consciousness not an open market of patronage. Fix the economic crisis through social security so that the people can be freed from the tyranny of necessity so that they can indulge in the little 'luxury' of freedom. As Lord Baghwati puts it, a necessitous people cannot be free people. Fight corruption by fighting social inequality.

What is the role of a lawyer in creating the enabling environment for social knowledge and social action? The lawyer must see himself or herself as social revolutionary before he can effectively use the law to advance any social project like anticorruption. What sets the Gani Fawehinmis apart from the Rotimi Williams of the world is first an understanding of the social dialectic of the production of legal knowledge and a commitment to interpret the laws produced by the politicized agencies of governance in a manner that support freedom for the marginalized groups. These men and women understand that law is politics. They also recognize the limitations of legal framework for fighting against hegemony hence they easily incorporate other forms of consciousness and actions. They politicize law and by so doing create a community able to re-politicize law in the quest for freedom from the politics of corruption.

***Conclusion: Solving the Puzzle:***

What is the relationship between the rule of law and corruption? The relationship depends on the politics that produces the law and whose interests and values underwrite the framework of rule of law: the interests of the conspiratorial elites or of the victimized majority, or a mixture of both.

***Appreciation:***

Let me begin by commending Bamidele Aturu and his colleagues for conceiving and sustaining this ritual of intellectualization of social problems. They have taken a path away from the orthodoxy of Nigerian lawyers who constrain themselves to be just masters of the bolts and nuts of the legal process without serious consideration of the architecture and landscape of law. Bamidele Aturu and Co. are pioneering a new development in legal practice where law firms become the site for legal theory and applied jurisprudence. Let me say that this function should be embraced by many more law firms, especially those with deep pockets, seeing that our law schools seemingly lack both the disposition and resources to engage in any serious legal theory and applied jurisprudence. I think Mr. Bamidele Aturu, the principal of the firm has continued in the tradition he began quite early in his career as a student union leader. I am sure we still remember his courageous expression of disgust at military dictatorship when he refused to accept a much deserved medal as the best Corp member on national service because it was offered by a military governor at the height of Gen. Ibrahim Babangida's heist against the people. Mr. Aturu has kept faith with the tradition of engagement with social crisis of the state.

I seek the indulgence of the organizers of this lecture to utilize it to commend Chief Gani Fawehinmi who died a month ago. I am sure this indulgence will be easily granted because both Mr. Aturu and myself have come under the tutelage of Chief Gani Fawehinmi at different points in our career and it would not be out of place to use this public lecture to celebrate someone whose unprecedented vibrancy in thinking, writing and using the law to fight corruption is unrivaled in Nigeria.

Gani stands in the pack of those who recognize that law should be used to fight corruption. Long before anti-corruption or the war against corruption became a sexy phrase for wannabe democratic regimes Gani has identify corruption in public governance as a scourge that demands all the arsenals of the legal practitioner. Long before we recognized the relationship between corruption and poverty and underdevelopment, Gani was in court fighting corruption. Gani understood the politics of corruption. He also understood the politics of law and how to re-politicize law to defeat the politics of corrupt. And because when you fight corruption it fight you back Gani could not achieve as much as he intended. But he left us a roadmap of what works and does not. Gani deserves great respect for his faith that law- that the rule of law in hand of a politicized combatant-has the potential to defeat the menace of corruption. Little wonder Professor Eskor Toyo described him as the greatest Nigerian politician. I believe he is resting in the Lord, the one who asked for justice and righteousness to cover the earth like the waters.

Thanks you

**October 26, 2009**

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