

## UBER IN GHANA: MARKETS AND INSTITUTIONS IN THE EMERGENCE OF RIDE-SHARING TAXIS

Forthcoming 5 Lancaster University of Ghana Law Journal (2019)

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### INTRODUCTION

Licensed taxi drivers in Ghana are under increasing attack by rivals – both legal and illegal - for a share of the taxi market. For instance, over the past 10 years, motorcycles carrying fare-paying passengers in breach of legislation on the carriage of persons for commercial purposes have competed with licensed taxi drivers for customers.<sup>1</sup> Recently an additional group of actors has emerged to challenge Ghana's licensed taxis for a share of the transport market. This new challenge comes from Uber.<sup>2</sup> Uber is borne out of fundamental changes in technology; it is part

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<sup>1</sup> On this development see Kofi Oteng Kufuor, "The Struggle for Entry into Ghana's Commercial Transport Sector", 1 *Global Comparative Law Journal* (2013), pp.1-22. Motorized tricycles are another instance of an unauthorized challenge to licensed taxis: see Cecil Mensah, "Why Tricycles are edging Taxis in Northern Ghana", (19 June, 2017) available at <http://businessdayghana.com/tricycles-edging-taxis-northern-ghana/> (last visited 13 April 2018); and Samuel Duodu & Zadok Kwesi Gyesei, "Tamale Drivers Demonstrate against Tricycle "Taxis" (1 December, 2015) available at <https://www.graphic.com.gh/news/general-news/tamale-drivers-demonstrate-against-tricycle-taxis.html> (last visited 13 April 2018).

<sup>2</sup> Uber is an integral part of the so-called gig economy. The gig economy is that network of business relations which employs a mainly fluid workforce. In the gig economy, workers tend not to have a long-

of a wave of what Joseph Schumpeter termed “creative destruction”. Creative destruction is the re-calibration of economic systems based on the impact of new technology.<sup>3</sup> It is a revolutionary development and is seemingly, for Schumpeter, an inevitable and necessary process that destroys an old economic structure and establishes a new one in its place. Consistent with Schumpeter’s theorizing, Uber is rupturing the old taxi order in Ghana via an innovative form of technology.<sup>4</sup> This destructive process is likely to continue as the market place becomes more receptive to ride-sharing firms. The attraction of the taxi market rests, partly, in the ease of starting ride-sharing firms. With their low financial overheads and low start-up costs, the ride-sharing economy makes it easy for new entrants to commence the provision of services. This paper examines

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term connection. Gig workers do not have a close interest in the well-being of the firms that use their services; this is because of hiring arrangements. Gig workers are not employees of the firm in the strict orthodox sense. Rather gig economy workers have a flexible employment contract, working as independent contractors for a set period and for a set task. Once the task is up the working relationship ends unless both parties seek to renew the same: see Gerald Friedman, "Workers without Employers: Shadow Corporations and the Rise of the Gig Economy", 2 *Review of Keynesian Economics* (2014), pp.171-188, pp.171-172. The gig economy has other names such as the "the sharing economy," "the disaggregated economy," "the peer-to-peer economy" "the human to-human economy" "the community market place" "the on-demand economy" "the App economy," "the access economy," or "the mesh economy," and "the Uberization of everything": see Orly Lobel, “The Law of the Platform”, 101 *Minnesota Law Review* (2016), pp.87-166, p.89.

<sup>3</sup> See Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (1942, 2003) Routledge: London and New York, chapter 7.

<sup>4</sup> See Stan J. Liebowitz, "File Sharing: Creative Destruction or Just Plain Destruction?", 49 *Journal of Law and Economics* (2006), pp.1-28; and Raymond Shih Ray Ku, "The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology", 69 *University of Chicago Law Review* (2002), pp.263-324.

Uber's challenge to the established order in the taxi industry in Ghana from the perspective of the New Institutional Economics (NIE).

NIE is an interdisciplinary research programme that pulls together scholars and research methods from an array of social science disciplines that include law, organization theory, political science, economics and sociology. The purpose of the NIE research programme is to expound on the rise, development, success or failure of institutions. Institutions from the NIE standpoint of view are the rules of the game - the humanly created constraints that structure human interaction. They include formal constraints (for instance statutes or constitutions), informal constraints (for example social norms) and their enforcement characteristics.<sup>5</sup> In sum, institutions are the laws that govern individual and collective economic, social and political interactions. The significance of the NIE agenda therefore is that, *inter alia*, it examines the role that law plays in the working of economic systems.<sup>6</sup> This strand of NIE, how the legal system influences economic systems, is the most developed aspect of NIE thought.<sup>7</sup>

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<sup>5</sup> See the following: Douglass C. North, *Institutions, Institutional Change and Economic Performance* (1990), Cambridge: Cambridge University Press, chapter 1; Avner Greif and Christopher Kingston, "Institutions: Rules or Equilibria?", in N. Schofield and G. Caballero (eds.) *Political Economy of Institutions, Democracy and Voting* (2011), Springer-Verlag, Berlin Heidelberg, pp.13-43.

<sup>6</sup> The main dividing line between NIE and Old Institutional Economics (OIE) is in the NIE proposition, a proposition that OIE scholars regards as implausible, of the individual as a utility maximizing person as erroneous": see Geoffrey M. Hodgson, "Institutional Economics: Surveying the 'Old' and the 'New'" 44 *Metroeconomica* (1993), pp.1-28; Geoffrey M. Hodgson, "Institutional Economic Theory: the Old Versus the New", 1 *Review of Political Economy* (1989), pp.249-269; and Malcolm Rutherford, "*Institutions in Economics: the Old and the New Institutionalism* (1996), Cambridge University Press: Cambridge. However, some NIE scholars seem to be moving away from this rigid distinction or characteristic of the

The paper now develops as follows: Part I of the paper is an introduction to Uber. Part I also outlines the features of the operations of taxis in Ghana – both established licensed taxis and Uber taxis - with a particular focus on Accra, as this is where as at writing Uber is largely concentrated. Part II provides the theoretical basis for the paper. Part II expands on NIE and focuses mainly on the NIE concept of transaction costs in commercial relationships. Part III applies NIE methods to explain why Uber is emerging as rival performer in the Ghana taxi market. The thrust of the argument in part III is that Uber is able to overcome transaction costs in the market while licensed taxis are currently are unable to do so. Part IV examines a puzzle derived from NIE scholarship and which should normally apply to the business tensions between Uber taxis and established licensed taxis. The puzzle is why the licensed taxi industry has not used law as a tool to stunt the growth of Uber or even eliminate it completely from the Ghana taxi industry. Part V concludes.

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individual: see David Dequech, "The Demarcation between the" Old" and the" New" Institutional Economics: Recent Complications", 36 *Journal of Economic Issues* (2002), pp.565-572.

<sup>7</sup> On the discussion of strands of NIE see Rudolf Richter, "The New Institutional Economics: Its Start, Its Meaning, Its Prospects", 6 *European Business Organization Law Review* (2005), pp.161-200.

## PART I

### UBER AND THE GHANA TAXI INDUSTRY

The 1993 Local Government Act regulates taxi services in Ghana. This Act requires operators of taxis to obtain a permit from a District Assembly before plying their trade.<sup>8</sup> On its face, this is a very low regulatory entry barrier.<sup>9</sup> Unlike in some other countries it is not a rule of the District Assemblies that a driver has knowledge of the area within which he intends to operate.<sup>10</sup>

Moreover, once a District Assembly in Ghana issues a permit this allows the taxi to operate in

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<sup>8</sup> See Local Government Act (Act 462) (1993), section 76 (1).

<sup>9</sup> Not only are there low entry barriers to the licensed taxi order, it does seem that there has been a gradual disregard for the enforcement of existing barriers through lax enforcement of rules or practices. For instance, local government officials have stopped the practice of interviewing potential taxi drivers to ascertain if they had reasonable knowledge of their planned area of operation. Other rules that have been ignored are the rule that shared taxis are prohibited and touting for passengers is forbidden: see IBIS Transport Consultants Ltd, *Study of Urban Public Transport Conditions in Accra, Ghana*, (2005), p.16. The lowering of barriers seems to be designed to attract as many drivers as possible and thus provide as much revenue as possible for local authorities: see Isaac Yeboah, “The Case of the Floating Taxi Driver”, (2 October 2013), available at <https://www.graphic.com.gh/daily-graphic-editorials/the-case-of-the-floating-taxi-driver.html> (last visited 15 May 2018).

<sup>10</sup> For instance in London in the United Kingdom, to operate a so-called Black Cab requires, *inter alia*, that prospective drivers pass “The Knowledge” before they are issued permission. The Knowledge is an examination that demands prospective taxi drivers have knowledge of all the streets and landmarks within a six-mile radius of Charing Cross in London. The Knowledge unfolds over seven stages and usually requires 3-4 years of learning and examination: see <https://tfl.gov.uk/info-for/taxis-and-private-hire/licensing/learn-the-knowledge-of-london> (last visited 15 June 2018). Operating a minicab also requires applicants pass a topographical skills test: see <https://tfl.gov.uk/info-for/taxis-and-private-hire/licensing/private-hire-driver-licence> (last visited 15 June 2018).

areas beyond the Assembly's jurisdiction<sup>11</sup> and thus taxis have no limits on their commercial reach. Thus is unlike other jurisdictions where a taxi's range of operations might be circumscribed by a regulatory body.<sup>12</sup> Presumably, the only other noticeable formal regulatory barrier is in Ghana is that non-Ghanaians cannot enter the taxi trade unless, as provided for under the Ghana Investment Centre Promotion Act, they own a fleet of at least twenty-five taxis.<sup>13</sup> However, informal entry barriers do exist as in practice, an intending operator normally needs to join a branch of one of the controlling unions to access the right to operate its designated routes.<sup>14</sup>

Taxi drivers either own their cars outright, they work as employees for an owner for as long as they can agree to do business together or, they are engaged in the so-called work-and-pay method<sup>15</sup> under which drivers acquire vehicles from persons who own cars while making

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<sup>11</sup> See IBIS Transport Consultants, *Study of Urban Public Transport Conditions in Accra, Ghana*, supra, p.12.

<sup>12</sup> For instance, in New York City, the so-called Boro Taxis can pick up fares from the street in northern Manhattan, the Bronx, Queens (excluding the airports), Brooklyn and Staten Island and they may drop fares off anywhere. However, they are excluded from picking up or dropping off fares – pre-arranged or street hail – in the Manhattan exclusionary zone. This exclusionary zone is the preserve of yellow taxis: see NYC Taxi & Limousine Commission, “Your Guide to Boro Taxis” (no date), available at [http://www.nyc.gov/html/tlc/html/passenger/shl\\_passenger.shtml](http://www.nyc.gov/html/tlc/html/passenger/shl_passenger.shtml) (last visited 17 June 2018).

<sup>13</sup> See Ghana Investment Promotion Centre Act (Act 865) (2013), Section 27 (1) (b).

<sup>14</sup> See IBIS Transport Consultants, *Study of Urban Public Transport Conditions in Accra, Ghana*, supra, p.12.

<sup>15</sup> The work-and-pay arrangement is a commercial agreement between car owners on the one hand and a driver on the other in which the driver makes regular predetermined weekly sales to the owner over an agreed period. After the agreed period expires, and subject to satisfactory performance, the driver takes possession of the car. Normally for the duration of the agreement, the taxi driver shoulders the

payments for the vehicles within a period.<sup>16</sup> After a set period under this arrangement, usually between two-and-a-half to four years, the driver owns the car having paid the owner its full cost.<sup>17</sup>

The Ghana Private Road Transport Union (GPRTU) is the main transport union with approximately 90 percent of the commercial drivers under its umbrella<sup>18</sup> with other drivers and

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responsibility of all repairs and maintenance: see Dortis Research, “Work and Pay Transport in Ghana”, (10 May 2016), available at <http://dortisresearch.com/2016/05/10/work-n-pay-transport-in-ghana/> (last visited 29 May 2018).

<sup>16</sup> See “Work & pay schemes killing us - Taxi drivers cry out”, (29 October 2014), available at <https://www.graphic.com.gh/news/general-news/work-pay-schemes-killing-us-taxi-drivers-cry-out.html> (last visited 29 May 2018).

<sup>17</sup> See Sharon Benzoni, “Work-for-Pay” System Lets Young Cabbies Drive Now and Buy the Taxi Later”, (26 June 2013), available at <https://nextcity.org/informalcity/entry/work-for-pay-system-lets-young-cabbies-drive-now-and-buy-the-cab-later> (last visited 20 August 2017).

<sup>18</sup> See Brendan Finn, Bernard Abeiku Arthur, and Samson Gyamera, *New Regulatory Framework for Urban Transport in Ghanaian Cities*, 11<sup>th</sup> Conference on Competition and Ownership in Land Passenger Transport (20-25 September 2009), Delft University of Technology (The Netherlands), p.3. However, rival unions like the Progressive Transport Owners Association have been formed to represent taxi owners’ interests in particular as this class of persons felt they were neglected by the GPRTU: see Billie Adwoa McTernan, “Ghana: Taxi Drivers Fight New Law”, (9 October 2013), available at <http://www.theafricareport.com/West-Africa/ghana-taxi-drivers-fight-new-by-law.html> (last visited 19 August 2017). Furthermore, the figure of 90 percent membership of the GPRTU is questioned by the figures from Kumasi that suggest the GPRTU has only about 48 percent of the commercial drivers: see Michael Poku-Boansi, *The Determinants of Urban Public Transport Service Pricing in Ghana – A Case Study of the Kumasi Metropolitan Area* (2008), a Thesis Submitted to the Board of Postgraduate Studies,

taxi owners belonging to rival transport unions such as the Ghana Cooperative Transport Union and the Progressive Transport Owners Association.<sup>19</sup> The GPRTU plays the predominant role in setting private road transport fares by negotiating fares for its affiliated taxi with the government and thus customer and driver do not agree fares at the point of contact.<sup>20</sup> However, the exception to this rule is that so-called floating taxi drivers (those taxis that do not operate from a fixed union-controlled taxi station<sup>21</sup>) negotiate their own fares with customers at the point when they encounter each other away from designated taxi stations.<sup>22</sup> Also station taxis are free to operate as floating taxis as there is no obligation for them to return immediately to their station after having dropped off all their customers and here too, fares are subject to negotiations between driver and customer when the two come into contact.

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Kwame Nkrumah University of Science and Technology in partial fulfillment of the requirement for the degree Doctor of Philosophy, Department of Planning, p.77.

<sup>19</sup> See Finn, Arthur, and Gyamera, *New Regulatory Framework for Urban Transport in Ghanaian Cities*, supra, p. 3.

<sup>20</sup> For instance see “Transport fares go up by 15 percent in Ghana”, (April 4 2017) available at <https://www.newsghana.com.gh/transport-fares-go-up-by-15-percent-in-ghana/> (last visited 29 May 2018).

<sup>21</sup> See Jennifer Hart, *Ghana on the Go: African Mobility in the Age of Motor Transportation* (2016), Indiana University Press: Bloomington, Indiana, p.182. However, the Accra Metropolitan Authority (AMA) has tried to compel all taxis to register with a lorry station or join one of the transport unions to qualify as commercial taxi drivers: see “AMA Vows To Flush Out Floating Drivers”, (4 October 2013) available at <http://www.ghanaiantimes.com.gh/ama-vows-to-flush-out-floating-drivers/> (last visited 29 May 2018).

<sup>22</sup> See Pius Amihere Eduku, “Taxi drivers increase fares by 20 percent”, (January 10 2017), noting that floating drivers negotiate fares with customers as opposed to accepting fixed fares for taxis that operate directly from taxi stations; available at <http://citifmonline.com/2017/01/10/taxi-drivers-increase-fares-by-20-percent> (last visited 13 October 2017).



As part of Uber’s operations in Ghana, it has signed an agreement with the Ministry of Transport that permits ride-sharing technology and regulates its use and adoption by both riders and the individual drivers and companies.<sup>23</sup> Ghanaian taxi drivers are against this relationship between Uber and the Transport Ministry. The drivers insist that the emergence and increasing consolidation of Uber has had a negative impact on their daily sales<sup>24</sup> with some drivers claiming that they are incurring daily losses of between 20 percent and 30 percent of their pre-Uber revenue.

Moreover, they claim, Uber drivers do not compete on fair commercial terms: for instance, Uber taxis are able to charge lower fares because their drivers do not pay the kind of taxes required of commercial drivers.<sup>25</sup> Again, because Uber drivers use private cars they are not obliged to pay insurance charges that commercial taxi drivers have to pay,<sup>26</sup> all that Uber drivers need is a valid non-commercial driver’s licence and a valid roadworthy certificate. In addition, while floating

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<sup>23</sup> See Claude Ayitey, “Uber Accra Gains Grounds, Signs up Local Taxis”, (15 August 2016), <https://gharage.com/2016/08/15/uber-accra-signs-local-taxis-gains-grounds/> (last visited 29 May 2018).

<sup>24</sup> See Michael Bediako, “Uber killing our business – Taxi drivers”, (21 April 2017), available at <http://www.accrafm.com/1.10951334> (last visited 18 August 2017).

<sup>25</sup> See “Taxi Drivers threaten to Join Uber to avoid Taxes”, (1 June 2017), available at <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Taxi-drivers-threaten-to-join-Uber-to-avoid-taxes-543568> (last visited 18 August 2017).

<sup>26</sup> As at 2015 the annual premium for the lowest motor insurance policy -- third party insurance – is GH¢471 per annum for private cars, while that of commercial taxis is GH¢576 per annum: see “Insurers charge GH¢1.30 a day ...for third-party insurance”, (8 June 2015), available at <http://www.myjoyonline.com/business/2015/june-8th/insurers-charge-gh130-a-day-for-third-party-insurance.php> (last visited 31 August 2017).

drivers have to search for their customers,<sup>27</sup> technology brings Uber drivers and their customers together. The view in this vein is that technology enables Uber drivers to save considerable sums on fuel costs that licensed floating taxis expend searching for customers.<sup>28</sup> Thus, it would seem that at the heart of the reservations about Uber's entry into the Ghana taxi market is that its drivers do not have to shoulder the kind of financial burdens that licensed taxi drivers have to bear and that here is the key to the ability of Uber to outperform licensed taxis.

I do not discount the difference in financial obligation as being important for Uber's ability to gain a foothold in Ghana's taxi market. Nonetheless, and as I explain in the forthcoming parts of this paper, we should not ignore the difference in non-market costs, transaction costs so to speak, as an equally plausible explanation, if not a superior explanation for Uber's threat to licensed taxis in Ghana. Transaction costs are lessened by the nature of the formal and informal relationships subsisting between parties to a bargain. We thus claim that institutions, laws, are at the heart of Uber's advantage and this should not be overlooked when explaining Uber's efficiency in the Ghana taxi market.

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<sup>27</sup> Floating taxis are not attached to a particular station. Rather they pick up passengers from along the streets and roads: see "AMA Vows to Flush out Floating Drivers", supra. Also some taxis that operate from stations do not automatically return to their bases upon completion of their journeys as some of them can act as floating drivers when the opportunity presents itself.

<sup>28</sup> See Joseph-Albert Kuuire, "Backseat Driver: Can Ride Sharing Apps Make the GPRTU in Ghana Obsolete?", (11 April 2017), available at <https://medium.com/@jakuuire/backseat-driver-can-ride-sharing-apps-make-the-gptru-in-ghana-obsolete> Backseat Driver: Can Ride-Sharing Apps Make the GPTRU in Ghana Obsolete? (Last visited 29 May 2018).

## PART II

### NEW INSTITUTIONAL ECONOMICS

NIE grew out of Ronald Coase's 1937 paper entitled "The Nature of the Firm".<sup>29</sup> In this paper, Coase did two things that are central to the rise of Uber in the Ghana taxi market. First, he challenged the assumption that a firm is an organization that converts inputs into outputs. Rather, as Coase stated, a firm was a governance structure that regulated the relationship between entrepreneurs on the one hand and persons they are transacting with on the other hand. Second, Coase claimed that ideally entrepreneurs should rely on the price mechanism in the execution of their business mandate; nonetheless, in some instances and because the cost of transacting can affect market efficiency, it is more profitable for the entrepreneur to establish a firm and so bring as much of his market transactions under the firm's canopy.<sup>30</sup>

Coase argued further, in another path breaking paper that forms another pillar of the NIE research programme entitled "The Problem of Social Cost"<sup>31</sup> that the institutional framework of a society was vital to appreciating the conduct of economic activity. In the entirely theoretical world of a perfectly functioning market, with no transaction costs and everyone in possession of correct information, individuals and businesses would engage in frictionless and efficient market

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<sup>29</sup> See R.H. Coase, "The Nature of the Firm", 4 *Economica* (1937), pp.386-405.

<sup>30</sup> Ibid.

<sup>31</sup> See R.H. Coase, "The Problem of Social Cost", 3 *Journal of Law and Economics* (1960), pp.1-44.

transactions. In the real world, of course, parties to potential bargains face the prohibitive transaction costs of continually working out with whom to do business and which goods and services they need to obtain.

The large body of legal scholarship on Ghana seems to have missed the NIE revolution. The proclamation by Judge Richard Posner that law is no longer an autonomous discipline appears to have been ignored (or maybe rejected), by the Ghanaian professoriate.<sup>32</sup> Posner, one of the paramount scholars of law and economics (an integral part of the NIE research agenda) explains this decline by pointing to a confluence of factors across academia.<sup>33</sup> However, while Posner articulated this approach to studying law in 1987, long before him, scholars were adopting trans-disciplinary approaches to understanding law.

The English historian and jurist Henry Sumner Maine is noted for his anthropological jurisprudence in his book in 1861 entitled *Ancient Law*, and its narration of the progress of legal systems from primitive ones to modern ones.<sup>34</sup> So too did the 19<sup>th</sup> century German historicist Karl von Savigny argue that law is not something imposed on a community from above or from

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<sup>32</sup> See Richard A. Posner, "The Decline of Law as an Autonomous Discipline: 1962-1987", 100 *Harvard Law Review* (1987), pp.761-780.

<sup>33</sup> *Ibid.*, pp.766-777.

<sup>34</sup> See Henry Sumner Maine, *Ancient Law* (1861, 2017), Routledge: Abingdon, Oxon. Maine's significance is that he was the first to appreciate and call attention distinctly to the reverence for law in early communities, the thoroughgoing formalism of archaic law, the predominance of procedural over substantive rules in early legal systems, the wide discrepancy between ancient and modern standards of legal proof, the essentially modern character of individual property rights and ability to dispose of property by will, and the late appearance of the distinction between tort and crime

without, but is an inherent part of a community's ongoing life, an emanation of the spirit of the people. Hence, to understand law requires a broad understanding of society, custom and history for it is here that one can locate law since law has no separate existence from the society it purports to manage.<sup>35</sup>

NIE has progressed as economists have engaged with law, just as the legal academy has grappled with economics. For instance Friedrich Hayek trained as a lawyer yet a large body of his scholarship brings together law and economics. The thrust of a considerable part of his research was that law was essential in securing economic freedom.<sup>36</sup> Avner Grief an economics Professor at Stanford University has examined the development of contractual relations among Maghribi traders in the 12<sup>th</sup> century.<sup>37</sup> Daron Acemoglu and James Robinson, economics Professors at the

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<sup>35</sup> See Frederick Charles Von Savigny, *Of the Vocation of our Age for Legislation and Jurisprudence* (Abraham Hayward trans., Littlewood & Co. 1831). We can find in my work historical jurisprudence and its limitations on rational law in the difficulty associated with the attempt by pan-Africanists to mimic the rules on European unification. Discounting history as an explanation for the development of the European unification movement, ration man in Africa has repeatedly transposed European treaty law to his quest for similar (and relatively successful) unification. This effort keeps failing and Von Savigny's work is a plausible explanation for this. See Kofi Oteng Kufuor, *African Unification: Law, Problems and Prospects* (2016), Carolina Academic Press: Durham, North Carolina, chapter 3.

<sup>36</sup> See F.A. Hayek, *The Road to Serfdom* (2001, 2<sup>nd</sup> edition) Routledge: London (2001); and F.A. Hayek, *Law, Legislation and Liberty: a New Statement of the Liberal Principles of Justice and Political Economy* (1973) London: Routledge. See also Paul G. Mahoney, "The Common Law and Economic Growth: Hayek Might be Right", 30 *Journal of Legal Studies* (2001), pp.503-525.

<sup>37</sup> See Avner Grief, "Institutions and International Trade: Lessons from the Commercial Revolution", 82 *American Economic Review* (1992), pp.128-133 and Avner Grief, "Contract Enforceability and Economic

Massachusetts Institute of Technology and the University of Chicago respectively, have incorporated law into their dissection of why some societies fail and others prosper.<sup>38</sup>

Behavioural economists such as Professor Richard Thaler of the University of Chicago have seen fit to build bridges to law as a means of construing human decision-making in socio-economic settings.<sup>39</sup> In a paper published in the *Yale Law Review*, Professor Yochai Benkler of Harvard Law School has demonstrated how legal academics can cross over from doctrinal approaches to research and scholarship and engage with the new mode of production that he calls commons based peer production.<sup>40</sup>

International organizations and international law have also come under the lens of the revolution that Coase started. For instance, Bruno Frey<sup>41</sup> a visiting Professor of political economy at the University of Basel, and Roland Vaubel<sup>42</sup> a Professor of economics at Mannheim University are

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Institutions in Early Trade: The Maghribi Traders Coalition”, 83 *American Economic Review* (1993), pp.525-548

<sup>38</sup> See Daron Acemoglu and James Robinson, *Why Nations Fail: Origins of Power, Poverty and Prosperity*, (2012) Crown Publishers (Random House): New York

<sup>39</sup> See Christine Jolls, Cass R. Sunstein, and Richard Thaler, "A Behavioral Approach to Law and Economics", 50 *Stanford Law Review* (1998), pp.1471-1550.

<sup>40</sup> See Yochai Benkler, "Coase's Penguin, or, Linux and The Nature of the Firm", 112 *Yale law Journal* (2002), pp.369-446.

<sup>41</sup> See Bruno Frey, "International Organizations" Perspectives on Public Choice, Cambridge (1997) pp.106-123; Bruno S. Frey, "The Public Choice View of International Political Economy", 38 *International Organization* (1984), pp.199-223.

<sup>42</sup> See Roland Vaubel, "A Public Choice approach to International Organization", 51 *Public Choice* (1986), pp. 39-57.

have both used public choice theory, a theory forged in the economics departments of Virginia Polytechnic University and the University of Chicago to explore international treaties and treaty bureaucracies.<sup>43</sup> Joel Trachtman a Professor of law at Tufts University and William Aceves a Professor of law at California Western University have both used Coase's transaction cost theory to examine and understand the role of international organizations in international governance.<sup>44</sup>

A number of law journals have enabled the NIE revolution. There is the *Journal of Law, Economics, & Organization* that publishes interdisciplinary papers that draw on a range of social science disciplines.<sup>45</sup> The *European Journal of Law and Economics* focuses on research in law and economics stressing in particular the impact of legal interventions into economic processes by legislators, courts and regulatory agencies.<sup>46</sup> The *Journal of Law and Economics* publishes papers on the economic analysis of law, the regulation of firms, and the political economy of legislation.<sup>47</sup> The *Supreme Court Economic Review* is another interdisciplinary periodical with a

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<sup>43</sup> See Peter J. Boettke and Alain Marciano, "The Past, Present and Future of Virginia Political Economy", 163 *Public Choice* (2015), pp.53–65.

<sup>44</sup> See Joel P Trachtman, "The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis", 17 *Northwestern Journal of International Law and Business* (1996), pp.470-555; and William J. Aceves, "The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice", 17 *University of Pennsylvania Journal of International Economic Law* (1996), pp.995-1068.

<sup>45</sup> See <https://academic.oup.com/jleo> (last visited 10 August 2018).

<sup>46</sup> See <https://www.springer.com/economics/law+%26+economics/journal/10657> (last visited 10 August 2018).

<sup>47</sup> See <https://www.journals.uchicago.edu/toc/jle/current> (last visited 10 August 2018).

stress on, *inter alia*, economic and social science analysis of United States Supreme Court decision-making.<sup>48</sup> The *Journal of Institutional and Theoretical Economics* is another periodical that deals with the problems of economics, social policy, and their legal framework.<sup>49</sup>

However, and compounding the general lack of interdisciplinary research by the legal academy to include NIE, the leading journals on African law hardly feature papers on NIE. The prominent periodicals are the *Journal of African Law*, the *South African Law Journal*, the *South African Mercantile Law Journal*, the *African Journal of International and Comparative Law*, and the *African Yearbook of International Law*. They contain an abundance of excellent papers on commercial law, environmental law, tort law, family law, human rights law to mention a few areas – yet they stick to the black letter approach of dissecting statutes, treaties, and judicial decisions. The papers published here hardly cite those scholars who pioneered the NIE revolution. The *University of Ghana Law Journal* is a casualty of the same academic isolation as the papers published in this journal is in the black letter cast.

What this paper on Uber seeks to do therefore is to help point the Ghanaian (and African) legal academy in the direction of the NIE programme, an intellectual enterprise that is arguably the most influential scholarly movement in academic and policy circles since the 1960s producing at least ten Nobel Laureates to date.<sup>50</sup> As at writing the “Problem of Social Cost”, remains the most

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<sup>48</sup> See <https://www.journals.uchicago.edu/toc/scer/current> (last visited 10 August 2018).

<sup>49</sup> See <https://www.mohr.de/en/journals/journal-of-institutional-and-theoretical-economics-jite> (last visited 10 August 2018).

<sup>50</sup> Writing in 2000 Oliver Williamson identified six Nobel Laureates among the key NIE figures: Kenneth Arrow, Friedrich Hayek, Gunnar Myrdal, Herbert Simon, Ronald Coase, and Douglass North: see Oliver



cited law review paper<sup>51</sup> Thus NIE is too influential to remain on the sidelines when unpacking legal issues in Ghana. Hence, it is in this vein that our paper on Uber cuts across law and economics. In dissecting Uber, our call to scholars of Ghanaian law is to go beyond the frontiers of black letter methodologies and search for additional approaches to understand how economic and social relationships are ordered.

Uber also suggests an instance of order without law. Robert Ellickson in his paper on cattle ranchers in Shasta County, California has set out an account of order without law. Ellickson argues that while persons engaged in commercial relationships hope for a beneficial outcome they are not influenced by the shadow of formal law as is claimed.<sup>52</sup> Rather, they largely govern themselves by means of informal rules—social norms—that develop without the aid of a state or

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Williamson, “The New Institutional Economics: Taking Stock, Looking Ahead”, XXXVIII *Journal of Economic Literature* (2000), pp.595-613, p.600. Professor Williamson excludes James Buchanan, pioneering public choice scholar from this list although public choice theory features heavily in NIE discourse. Moreover, nine years after he published this paper Williamson himself and Elinor Ostrom (both of them acknowledged NIE scholars) were jointly awarded the Nobel Prize in Economists bringing the number of NIE laureates to nine. Professor Williamson also excludes George Stigler, an economist whose paper on regulation is the seminal piece of work on rent-seeking – the use of law to suppress or destroy a business rival’s output. Stigler would seem to fall into the category of law and economics strand of NIE.

<sup>51</sup> See Fred R. Shapiro and Michelle Pearse, “The Most-cited Law Review Articles of All Time”, 110 *Michigan Law Review* (2012), pp.1483-1520, p.1489; Brett M. Frischmann and Alain Marciano, “Understanding the Problem of Social Cost”, 11 *Journal of Institutional Economics* (2015), pp. 329–352, p.332. See further R.H. Coase, “The Problem of Social Cost: The Citations”, 71 *Chicago-Kent Law Review* (1995), pp.809-812.

<sup>52</sup> The assertion that bargains taking place in the shadow of the law is developed by Mnookin and Kornhauser: see Robert H. Mnookin and Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce”, 88 *Yale Law Journal* (1979), pp.950-997.

other central coordinator. Ellickson suggests that order without law is not a break with the norm; rather it is a fairly normal facet of commercial relationships.<sup>53</sup> Thus social norms often order human conduct and reduce in importance, the need for formal law.<sup>54</sup> In his account of cooperation among the cattle ranchers of Shasta County Ellickson shows how, paradoxically, parties are able to execute transactions because these costs are high and not because they are low, as enthusiasts for low-transaction costs that explain economic performance assert. The import of this assertion is that it is contrary to the Coasean assertion that high transaction costs stunt bargains. Driving home his hypothesis Ellickson avers that formal laws are costly to learn and enforce and therefore under these conditions parties to a bargain, disinclined to study and observe the law, or be encumbered by legal complexities in the future, seize opportunities to ignore or avoid formal law.<sup>55</sup> We should note here however, that under no circumstances did

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<sup>53</sup> See Robert C. Ellickson, "Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County", 38 *Stanford Law Review* (1986), pp.623-687, p.628. He expands his thesis in his book on the same topic: see Robert C. Ellickson, *Order Without Law: How Neighbours Settle Disputes* (1994), Harvard University Press: Cambridge, Massachusetts.

<sup>54</sup> See Fergus Lyon, "Trust, Networks and Norms: the Creation of Social Capital in Agricultural Economies in Ghana", 28 *World Development* (2000), pp.663-681; Fergus Lyon, "Trader Associations and Urban Food Systems in Ghana: Institutionalist Approaches to Understanding Urban Collective Action", 27 *International Journal of Urban and Regional Research* (2003), pp.11-23; and Sabaheta Ramcilovic-Suominen, Jukka Matero, and Margaret A. Shannon, "Do Forest Values Influence Compliance with Forestry Legislation?: The Case of Farmers in the Fringes of Forest Reserves in Ghana", 12 *Small-scale Forestry* (2013), pp.235-256.

<sup>55</sup> In some instances, and paradoxically, transaction costs are actually essential to a bargain. If transaction costs are high, they compel actors to undertake the work required to correct for information asymmetries or improve on information deficits. High transaction costs end up enabling the parties to a bargain to avoid a bad transaction. This does not mean transaction costs are desirable and hence should be overlooked; however, perhaps the sweeping assertion that all transaction costs are bad needs to be

Coase assume costless transaction. The difference between Coase and Ellickson lies mainly in Ellickson asserting that parties ignore the law completely when bargaining. Order without law therefore, does not seek to overturn the Coase and his concept of transaction costs. It rather builds on the theory, it accepts transaction costs exist, (just as Coase insist they do) but Ellickson says the solution does not always lie in Coase's clarification of property rights. Rather parties ignore the legal rights and bargain to resolve social and commercial dilemmas on terms they deem fit.

The part of Ellickson's work that has implications for Uber in Ghana and as we set out in part III of this paper is his attack on legal centralism, the doctrine that gives law a dominant role in determining how people cooperate with each other.<sup>56</sup> For legal centralism, law has a number of properties: first law is the product of the state; second, law is applicable to all persons to whom it

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revisited: see David M. Driesen and Shubha Ghosh, "The Functions of Transaction of Transaction Costs: Transaction Cost Minimization in a World of Friction", 47 *Arizona Law Review* (2005), pp.61-111.

<sup>56</sup> While Ellickson sees a rival legal order as just as efficient as a state developed and centralized one, some scholars go further and actually assert that centralized law as increasingly redundant in a progressively technologically advanced world. The argument is that just as technology destroyed the centrally planned economies of the Soviet bloc, so too will technology destroy legal centralism. The pace of economic change and the multiplicity of goods and services produced in modern economies make central planning virtually impossible lest economies stagnate and under-perform. Economic efficiency therefore demands decentralization to meet the challenges of complex economies. This assertion of the role decentralization plays applies to business communities as supposedly, business customs, norms and regular informal practices are more efficient than state law in holding together these communities: see R.D. Cooter, "Decentralized Law for a Complex Economy", 23 *Southwestern University Law Review* (1993), pp.443-451, p.444.

is addressed, and third, only state institutions oversee the law. Legal centralism does not completely exclude hierarchically lesser bodies such as churches, from producing laws, but these bodies are embedded in an order at the top of which sits the state. In effect, the state and its law outrank any other law-making organizations.<sup>57</sup> Ellickson's thesis is that interdependent groups have a tendency to cultivate efficient norms. He claims that although official law is vital and useful in human affairs, it is less significant and less expedient than normally assumed. In widespread circumstances, people not only succeed in resolving their conflicts without resort to law, they do it by devices that work considerably better than the formal legal system.

Uber minimizes the role of centralized state authority in transport markets. The licensed taxi order on its part however, involves compliance with state law and the diktat of state actors. In this setting the District Assemblies and Ministry of Transport, both have a role to play in licensing taxis and setting fares. Although not state organs the transport unions also collaborate with the state apparatus to set prices, they have a role in mapping out taxi routes and they run the taxi stations. On the other hand, Uber exists outside the licensed state system. As at writing, Uber drivers require no commercial licenses, they do not have stations, routes or prices imposed on them by the state and yet the order does not just exist, it continues to grow.

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<sup>57</sup> See John Griffiths, "What is Legal Pluralism?", 24 *Journal of Legal Pluralism and Unofficial Law* (1986), pp.1-55.

### **PART III**

#### **UBER, LICENSED TAXIS AND TRANSACTION COSTS IN THE GHANA TAXI MARKET**

Uber is not in the cast of the classical conception of a firm where the physical production of tangible goods takes place. Rather, it is evidence of the firm as described by Coase in his paper “The Nature of the Firm”; it is a governance relationship between Uber drivers on the one hand and Uber itself on the other. This governance relationship is essential to understanding the second implication of Coase’s work for Uber in Ghana: with the establishment of a firm, Uber drivers provide services with a lower level of transaction costs than licensed taxi drivers do.

Leading NIE scholar Douglass North has incorporated the Coasean concept of transaction costs into his work. North has asserted that to execute a market transaction requires the following tasks: discovering business partners and conducting negotiations with them; drawing up a written contract if an oral one will not suffice; inspecting merchandise to be bought or sold to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to stunt potential transactions if business partners cannot construct strategies or mechanisms to reduce or eliminate them.<sup>58</sup> Hence, from this we can stress that for a market to perform efficiently tends to rise and fall on decreasing

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<sup>58</sup> See North, *Institutions, Institutional Change and Economic Performance*, supra, p.114.

transaction costs and in the world of the sharing economy - digital platforms minimize transaction costs such as search costs or negotiating costs.

Licensed taxi operations in Ghana tend to be devoid of Uber's transaction cost reducing relationships; in the absence of well-organized hierarchy, there is hardly ever a central point that controls the driver. Therefore, there is virtually no space where customer and driver interact in a non-market situation and once the parties execute the market transaction they have no further business.<sup>59</sup> In a study on urban transport in Accra 79 percent of taxi owners only had the single vehicle and that just 12 percent drove their own vehicle.<sup>60</sup> The rule regarding taxis where the owners employ drivers is that the owners just demand that drivers makes daily sales to them either under the employer-employee relationship or the work-and-pay relationship.<sup>61</sup> Thus, generally, the taxi services market is a just that – a market economy where either taxis respond to demand at the station or when hailed as a floating taxi and as stressed above the consequence of this arrangement is there are virtually no firms to minimize transaction costs that arise in the conduct of their business.

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<sup>59</sup> See IBIS Transport Consultants Ltd, *Study of Urban Public Transport Conditions in Accra*, supra p.25.

<sup>60</sup> See Martin Oteng-Ababio and Ernest Agyemang, "Virtue out of Necessity? Urbanisation, Urban Growth and Okada Services in Accra, Ghana", 4 *Journal of Geography and Geology* (2012), pp.148.

<sup>61</sup> There are four categories of vehicle ownership: there are owners who are essentially transport investors and this category of owners tends to have one or two taxis but it is possible that in rare instances they own a fleet of taxis. A second category is that of the owner-driver. Here the owner of the taxi also serves as the driver. Then there are non-transport investors, who own taxis to supplement income from their main employment. Finally, in some cases Ghanaians resident abroad purchase taxis and ship them to Ghana in order to provide a means of livelihood for their relatives: see IBIS Transport Consultants Ltd, *Study of Urban Public Transport Conditions in Accra*, supra p.22.

Developing further the implication of the absence of firms for licensed taxis, for scholars writing in the law and economics tradition, (a tradition that has overlap with the NIE School),<sup>62</sup> minimizing central planning and control produces a far more efficient economic outcome than an arrangement where taxis would be subject to commands by firms or owners.<sup>63</sup> However, markets are not perfect - riddled, as Coase has noted, with transaction costs.<sup>64</sup> Therefore, central organizations with their planning and direction enable market participants to adapt rapidly to changes in particular circumstances of time and place.

Compared to traditional taxi services with their absence of firms, Uber provides a means to minimize transaction costs. First is in regards to negotiating taxi fares. So-called floating taxis, and notwithstanding prices set in advance by negotiations between the GPRTU and the government, can always vary their fares depending on the circumstances of the bargain they seek

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<sup>62</sup> A number of shared attributes make the two disciplines very similar. For instance, there is the fact that both disciplines are rooted in the work of Ronald Coase. Much of modern law and economics scholarship rests on Coase's ideas, just like NIE scholarship. In comparing the two disciplines, Richard Posner has noted that scholars in both disciplines have interests in common fields such as contracts, corporate governance, vertical integration, transaction costs, and property rights. The two also share common analytical techniques, such as case studies, and historical analysis. The two disciplines are so intertwined that Posner views NIE and law and economics as "two sides of the same coin": see John N. Drobak, "Introduction: Law & The New Institutional Economics", 26 *Washington University Journal of Law and Policy* (2008), pp.1-11.

<sup>63</sup> For instance see F.A. Hayek, "The Use of Knowledge in Society", XXV *American Economic Review* (1945), pp.519-530.

<sup>64</sup> See Coase, "The Nature of the Firm", supra and, Coase, "The Problem of Social Cost", supra.

to agree with customers.<sup>65</sup> One problem compounding this kind of bargain is the information deficit that customers face – they are not likely to have the information on price and service offerings essential to forming a competitive market between them on the one hand, and the licensed taxi driver on the other hand. A customer will therefore have an incentive to take the first floating taxi encountered because the waiting time for the next taxi is unknown and so is its fare. In effect this situation of high transaction costs has financial implications for the customer as given they cannot engage in efficient comparison of price and quality of service, floating taxis have little or nothing to gain from reducing their prices.<sup>66</sup> However, Uber customers have full disclosure of the cost of the journey beforehand via the Uber platform and they can therefore reject the offer and seek alternative transport if they so wish. Hence, there is no haggling when dealing with Uber drivers and this makes negotiating, one of Coase’s transaction costs, less difficult when compared to dealing with licensed taxis. By reducing transaction costs Uber enhances certainty in the market place.

Second, Uber contracts are more of a relational contract than a classical contract or neoclassical contract, these latter two being the type of relationship between customers and licensed taxis. A relational contract is one in which parties to the bargain are framed within social variables. Relational contract theory focuses on the relationship between parties bounded by repeated

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<sup>65</sup> See “Taxi drivers increase fares by 20 percent”, (January 10 2017), available at <http://citifmonline.com/2017/01/10/taxi-drivers-increase-fares-by-20-percent/> (last visited 1 January 2018).

<sup>66</sup> See Roger F. Teal and Mary Berglund, "The Impacts of Taxicab Deregulation in the USA", 21 *Journal of Transport Economics and Policy* (1987), pp.37-56, p.38.



interactions such that overtime norms they generate come to govern their relationship. Variables such as repeat play among the parties, the shadow of the future, or past relationships, constrain the behavior of the parties.<sup>67</sup> As the parties are likely to meet each other in the future they gradually develop a relationship which lowers non-market costs of doing business – such as post-contract opportunism by drivers. A good example of this is the return of property left by a customer in an Uber taxi as failure to do so will probably prevent the customer from engaging the services of the same Uber taxi. Moreover, the driver’s reputation can suffer with Uber if he is dishonest. Ride sharing therefore allows for repeat play as it is easy to keep encountering Uber as a firm and through this interaction, there is space for mechanisms such as reputation and feedback systems to ascertain customer satisfaction.<sup>68</sup>

Uber is in the matrix of a relational contract with its customers and this embedding is reinforced through the Uber feedback mechanism. NIE scholars assert the importance of feedback for economic efficiency. For example, Douglass North’s interpretation of a society’s economic success stresses the role of a feedback as a channel for messages to economic actors. Societies or organizations that use feedback to adapt to changes such as new technology, new tastes, or changing social structure are more likely to be efficient than those societies that refuse to create efficient institutions for the same.<sup>69</sup>

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<sup>67</sup> See Ian R. Macneil, “Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational; Contract Law”, 72 *Northwestern University Law Review* (1977-1978), pp.854-905, pp.886-900.

<sup>68</sup> See Abbey Stemler, “Feedback Loop Failure: Implications for the Self-Regulation of the Sharing Economy”, 18 *Minnesota Journal of Law, Science & Technology* (2017), pp.673-712.

<sup>69</sup> See North, *Institutions, Institutional Change and Economic Performance*, supra, p.80.

Uber's feedback loop uses customer reviews to eliminate drivers if their performance falls below Uber's standards and its drivers have access to the customer reviews. After every Uber ride passengers are encouraged to anonymously rate their driver's performance with the extra option of adding particular comments on the nature of the ride. This feedback produces immediate appraisals that let Uber sift out poor drivers and devise strategies for them to improve their performance or to strike off a driver for persistent underperformance. Thus through this mechanism Uber can continue to provide a good level of service.<sup>70</sup>

The licensed taxi order on the other hand is rooted in the classical and neoclassical modes of contracts as because parties do not exchange information via a platform, there is no written record of their transactions with customers and there is very little likelihood they will encounter each other again.<sup>71</sup> As noted above there are virtually no fleets of taxis in the licensed taxi industry and hence there are very limited centralized feedback mechanisms that is easy to access. Hence, there is no opportunity for customers to communicate their views on services they have used. The transport unions and the local authorities also do not have a robust mechanism for monitoring service delivery even on an *ad hoc* basis to monitor an offending service.<sup>72</sup> In sum, there is no high command that receives feedback and this lacuna in the licensed taxi industry

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<sup>70</sup> See Alex Rosenblat, Karen E.C. Levy, Solon Barocas, and Tim Hwang, "Discriminating Tastes: Uber's Customer Ratings as Vehicles for Workplace Discrimination", 9 *Policy & Internet* (2017), pp.256-279.

<sup>71</sup> Perhaps this is possible in a very small town and a limited number of taxis and as well as customers who know each other.

<sup>72</sup> See A. Kumar, E.A. Kwakye and Z. Girma, *What Works in Private Provision of Bus Transport Services—Case Study of Accra and Addis Ababa* (no date) The World Bank, Washington DC, p.46.

raises the cost of doing business. Thus, while a decentralized market order is superior to a state-directed one<sup>73</sup> this does not rule out completely the importance of a centralized organization to co-ordinate activity and thus allow for better performance compared to economic actors that have no effective means of overcoming transaction costs.

The upshot of the above is that a responsive-to-consumers market that has its own internal policing mechanism; that has its systems for generating information; and with incentives for actors to foster sterling reputations creates a well-functioning, self-regulating arrangement. This set up is more likely to produce better outcomes than a market that lacks these traits. Reputation, feedback and speed of adapting to changes amounts to what one scholar has referred to as a "secondary invisible hand"; a mechanism which enables consumers make beneficial decisions as information available steers consumers towards transacting with the best providers.<sup>74</sup>

Uber in Ghana also suggests an instance of order without law. Robert Ellickson in his paper on cattle ranchers in Shasta County, California has set out an account of order without law.

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<sup>73</sup> See Hayek, "The Use of Knowledge in Society", supra.

<sup>74</sup> See Eric Goldman, "Regulating Reputation", in Hassan Masum & Mark Tovey (eds) *The Reputation Society: How Online Opinions are Reshaping the Offline World* (2011), MIT Press: Cambridge, Massachusetts, pp.51- 61, p.53.

outcome they are not influence by the shadow of formal law as is claimed.<sup>75</sup> Rather, they largely govern themselves by means of informal rules—social norms—that develop without the aid of a state or other central coordinator. Ellickson suggests that order without law is not a break with the norm; rather it is a fairly normal facet of commercial relationships.<sup>76</sup> Thus social norms often order human conduct and reduce in importance, the need for formal law. In his account of cooperation among the cattle ranchers of Shasta County Ellickson shows how, paradoxically, parties are able to execute transactions because these costs are high and not low, as enthusiasts for low-transaction costs that explain economic performance assert. The import of this assertion is that it is contrary to the Coasean assertion that high transaction costs stunt bargains. Driving home his hypothesis Ellickson avers that formal laws are costly to learn and enforce and therefore under these conditions parties to a bargain, disinclined to study and observe the law, or be encumbered by legal complexities in the future, seize opportunities to ignore or avoid formal law.<sup>77</sup>

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<sup>75</sup> The assertion that bargains taking place in the shadow of the law is developed by Mnookin and Kornhauser: see Robert H. Mnookin and Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce”, 88 *Yale Law Journal*, (1979), pp.950-997.

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revisited: see David M. Driesen and Shubha Ghosh, "The Functions of Transaction of Transaction Costs: Transaction Cost Minimization in a World of Friction", 47 *Arizona Law Review* (2005), pp.61-111.

<sup>78</sup> While Ellickson sees a rival legal order as just as efficient as a state developed and centralized one, some scholars go further and actually assert that centralized law is increasingly redundant in a progressively technologically advanced world. The argument is that just as technology destroyed the centrally planned economies of the Soviet bloc, so too will technology destroy legal centralism. The pace of economic change and the multiplicity of goods and services produced in modern economies make central planning virtually impossible lest economies stagnate and under-perform. Economic efficiency therefore demands decentralization to meet the challenges of complex economies. This assertion of the role decentralization plays applies to business communities as supposedly, business customs, norms and regular informal practices are more efficient than state law in holding together these communities: see R.D. Cooter, "Decentralized Law for a Complex Economy", 23 *Southwestern University Law Review* (1993), pp.443-451, p.444.

<sup>79</sup> See John Griffiths, "What is Legal Pluralism?", 24 *Journal of Legal Pluralism and Unofficial Law* (1986), pp.1-55.

only succeed in resolving their conflicts without resort to law, they do it by devices that work considerably better than the formal legal system.

Uber minimizes, if not eliminates the role of centralized state authority in transport markets. The licensed taxi order on its part however, entails compliance with state law and the diktat of state actors. In this setting the District Assemblies and Ministry of Transport, both have a role to play in licensing taxis and setting fares. Although not state organs the transport unions also collaborate with the state apparatus to set prices, they have a role in mapping out taxi routes and they run the taxi stations. On the other hand, Uber exists outside the licensed state system. As at writing, Uber drivers require no commercial licenses, they do not have stations, routes or prices imposed on them by the state and yet the order does not just exist, it continues to grow.

## **PART IV**

### **RENT-SEEKING AND THE RISE OF UBER**

Despite the power of the GPRTU<sup>80</sup>, and other transport unions, why did they not mobilize to prevent Uber's entry into the Ghana market or why have they not complicated its ability, post-

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<sup>80</sup> See Jørgen Burchard, *Order out of Chaos Self-management and Public Control of the Paratransit Sector: case Ghana* (September 14-17, 2015), conference paper presented at the International Association for the History of Transport, Traffic and Mobility (T2M) and the Cosmopolitanities Network. Santa Maria C.V. (Caserta), Italy; and Hart, *Ghana on the go: African Mobility in the age of Motor Transportation*, supra, pp.174-175.

entry, to do business through the imposition of transaction costs? This question draws attention to rent seeking as a tool to manipulate economic outcomes in favour of powerful interest groups.

George Stigler's contribution to law and economics lies in his work on regulation, work which has implications for the NIE concept of rent-seeking. Rent-seeking is the ability of organized interest groups to use the legislative process to prevent rivals from entering a market. Rent seeking happens when interest groups lobby government to take decisions to enhance their wealth at the expense of consumers. There is normally deliverance for economic actors when their dominant role in a market is challenged by new entrants. Instead of embracing new technology or reforming business practices, redemption can be found in the form of legislation to destroy the power of new market entrants. Law thus serves as the ideal tool ensure protection from technologically advanced and better organized rivals. Thus, interest groups can use the state apparatus to serve their private agendas. With its power to prohibit or compel, to levy taxes, grant tax relief, provide subsidies etc. the state can and does selectively help or hurt industries. Accordingly, firms seeking profitability need not invest too much in, for example new plant, when they can lobby the state apparatus for shelter from competitors.<sup>81</sup> Legislation then becomes a commodity of sorts and the state apparatus, normally the legislative assembly, becomes the broker – selling protection to those organized interests willing to pay for the privilege.

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<sup>81</sup> See George J. Stigler, "The Theory of Economic Regulation", 2 Bell Journal of Economics and Management Science (1971), pp.3-21.

There is a wealth of research about how organized interests have tried to use the law to stunt the emergence of new challengers. The contest between producers of butter and producers of margarine,<sup>82</sup> the struggle in Ghana between timber firms and chainsaw operators<sup>83</sup>, attempts by the equine to roll back the threat from the automobile industry<sup>84</sup>, and the struggle to replace gas lighting with electricity<sup>85</sup> bear out George Stigler's thesis. Hence, a route open to the licensed taxis is that they can lobby the government for protection from Uber (and any other ride-sharing firms.) Moreover, protection is feasible for the following reasons: first, the GPRTU (and other unions) can overcome the classical collective action problem that faces large groups because it is sufficiently organized. Actors overcome collective action problems when they are in a small cohesive group relative to the mass of consumers. This is the hypothesis advanced by Mancur Olson in his work on collective action in pursuit of favourable public policies.<sup>86</sup>

Olson's key insight is that public policy is itself a public good, and is thus vulnerable to the free-rider problem. In order to get a law passed, people need to overcome the free-rider problem to lobby the government. A single person or firm will not want to devote the money and resources to lobbying if they can just benefit from campaigns launched and funded by others. Therefore, in

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<sup>82</sup> Geoffrey P. Miller, "Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine", 77 *California Law Review* (1989), pp.83-131.

<sup>83</sup> See Kofi Oteng Kufuor, "New Institutional Economics and the Failure of Sustainable Forestry in Ghana", 44 *Natural Resources Journal* (2004), pp.743-760.

<sup>84</sup> See Dorothy V. Walters "Devil-Wagon Days" 30 *Wisconsin Magazine of History* (September, 1946), pp.69-77.

<sup>85</sup> See Andrew B. Hargadon, and Yellowlees Douglas, "When Innovations meet Institutions: Edison and the Design of the Electric Light", 46 *Administrative Science Quarterly* (2001), pp.476-501.

<sup>86</sup> See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1971), Harvard University Press: Cambridge, Massachusetts.



most cases the only legislation and policies adopted will be those that benefit relatively small and disciplined interest groups.

Hence, with their income at stake it is reasonable to expect lobbying by the taxi unions to stunt Uber's advantages. In addition, even if Uber's organizational advantages are beyond the reach of state power, lobbying can impose such a huge economic burden to frustrate Uber's progress in the Ghana taxi market. Taxis have a business stake in dominating the market and they have the added advantage of facing a large pool of consumers who must confront the classical problems of collective action that we have noted above – the problems facing large and heterogeneous disorganized groups. Thus in these circumstances there is an incentive to free-ride which in turn paralyzes collective action as disordered consumers lack the wherewithal to countervail the power of organized producers. It becomes evident that in evaluating the problems of the urban transport sector in Ghana, that the voice of the consumer is not heard. Consumers have no representation on bodies such as the Urban Transport Working Group, and are powerless in the face of the operating industry effectively controlled by the GPRTU.<sup>87</sup>

However, so far there are no measures by the transport unions to ban Uber and this is a conundrum that, perhaps, further research can solve. Yet, we can engage in conjecture here based on challenges to some of the underlying assumptions of the NIE School. At the crux of rent seeking is that economic actors seek pecuniary advantage at all times and thus they are rational in their calculations, pursuing wealth at the expense of other interests. This is where the rent-

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<sup>87</sup> See IBIS Transport Consultants Ltd, *Study of Urban Public Transport Conditions in Accra, Ghana* supra, p.46.

seeking hypothesis intersects with rational choice theory. Gary Becker expounds upon the main properties of rational choice theory. Becker asserts that all humans seek to maximize their utility, they have a “stable set of preferences” and that they accumulate an optimal amount of information to make decisions.<sup>88</sup> Becker traces rational choice theory back to Adam Smith, claiming Smith used this analysis to construe human behavior in the market place. However, Becker is quick to state that this approach to understanding human behavior was not to downgrade contributions of others in the range of social sciences.<sup>89</sup> Nevertheless, the economic approach, which is the awning for rational choice theory, provides, according to Becker “a valuable unified framework for understanding all human behavior.”<sup>90</sup>

A challenge to this rent-seeking construed “economic man” comes from Herbert Simon and other scholars who suggest that humans are boundedly rational when making decisions and this bounded rationality modifies the concept of pure economic rationality. Bounded rationality is the supposition that there are limits to human calculations, limits on the ability of the mind to dissect problems and conjure solutions for the same.<sup>91</sup> Herbert Simon claimed that the capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problems whose solution is required for objectively rational behavior in the real world — or even for a reasonable approximation to such objective rationality. This is his “administrative

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<sup>88</sup> See Gary S. Becker, *The Economic Approach to Human Behavior* (1976) University of Chicago Press: Chicago, p.14.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> See Herbert A. Simon, "A Behavioral Model of Rational Choice", 69 *Quarterly Journal of Economics* (1955), pp.99-118.

man” – the person who in an organizational context deviates from the theory of human behavior postulated by strict economic rationality. Administrative man is not ruthlessly calculating - rather when taking decisions he “satisfices”.<sup>92</sup> Thus, the boundedly rational, satisficing, administrative man is the type of person that is consistent with our knowledge of actual human behavior. He has incomplete and inaccurate knowledge about the consequences of actions, and chooses satisfactory actions instead of pursuing his preferences interminably.

In addition to the difficulty of information overload, Geoffrey Hodgson has claimed that the very nature of human society itself undercuts the classical concept of rational economic man that is at the heart of rational choice theory.<sup>93</sup> Hodgson grounds the concept of rationality in observations based on non-human interactions – i.e. animals were economically rational and so were humans. However, as Hodgson notes there are marked differences between human societies and animal society as the former have institutions and cultures while animals do not. Institutions and cultures shape interactions and influence decision-making and thus when analyzing decision-making we must consider these variables. Economic rationality does not incorporate these variables into the study of decision-making and this limits its value in understanding decisions.<sup>94</sup> Therefore, in seeking an explanation for the failure to challenge the ride-sharing phenomena we need not assume away bounded rationality by the transport unions. While they might have

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<sup>92</sup> See Herbert A. Simon, “Rational Choice and the Structure of the Environment”, 63 *Psychological Review* (1956), pp.129-138.

<sup>93</sup> See Geoffrey M. Hodgson “On the Limits of Rational Choice Theory”, 1 *Economic Thought* (2012), pp.94-108, pp.95-96.

<sup>94</sup> *Ibid.*, p.99.

reservations about new competition does not automatically mean the unions marshalling the tools at their disposal to counter this threat.

While rent-seeking inspired regulation is possible it is interesting to note that so far, none of this has happened and this inaction seems to have encouraged new ride-sharing firms to enter the Ghanaian market.<sup>95</sup> Arguably, therefore there is some validity in the hypothesis that rent-seeking behavior is not always prevalent in human economic behavior. Moreover, in some instances economic actors realize the futility of rent seeking and therefore decide conserve resources. Therefore, instead of lobbying to exclude rivals from the market, they adopt new market strategies to recover lost advantage. This does not mean rent- seeking ends but, rather, taxi drivers can obtain other government favours such as subsidies, or seeking tax relief.<sup>96</sup>

## CONCLUSION

Ride sharing is a recent and growing development in the provision of taxi services in Ghana. While not a complete interpretation of this development, the NIE research programme offers some insights into why Uber is eroding the market share of established licensed taxis. At the

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<sup>95</sup> In addition to Uru and Easy Taxi other firms, Enshika, Droppin, Taxify and Hello Ride have also entered the market: see Enam Kumi, “6 Uber Alternatives You Didn’t Know Existed”, (January 19 2018), available at <https://accraconnect.com/uru-uber-yenko-hello-delivery-ride-enshika-taxify-ghana/> (last visited 30 April 2018).

<sup>96</sup> See Michael Lutz, “The Limits of Rent Seeking: Why Protectionists Become Free Traders”, 5 *Review of International Political Economy* (1998), pp.38-63, p.42.

heart of NIE is the intersection between law and economic order. The purpose of NIE is to try and explain why some rules are more efficient than others and hence lead to efficient and productive economic arrangements. In this paper we have sought to do so by asserting that the very nature of the so-called Gig economy, of which Uber is a manifestation, permits for faster, flexible arrangements that minimize or eliminate transaction costs. On the other hand the institutions that structure relationships between licensed taxis and customers do not address transaction costs as swiftly as Uber institutions do. We claim also that the nature of the contractual bargain between Uber and its customers creates conditions for a more favourable relationship between the two when compared to the nature of the contract between taxis and their customers. This difference in contract types reinforces Uber's advantage in the taxi market. Together, these two perspectives suggest that a successful economic order requires "good" institutions.