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Good Governance: The Old, the New, the Principle and the Elements

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GOOD GOVERNANCE: THE OLD, THE NEW, THE PRINCIPLE, AND THE ELEMENTS

*Francis N. Botchway**

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I. INTRODUCTION

Much of the hostility towards the state in economic and related aspects of national and international life in the wake of the end of the cold war

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appear to be tempering.[1] It is now generally accepted that the state must do comparatively less, but more effectively. What is less can be contested, but the processes for state activity should not be as controversial. Much of the literature on governmental process is cast in generalities sometimes based on simplistic assumptions.

This work aims to clarify, simplify and give some coherence to the discourse. It argues that the operation of the state in national and to some extent, international, economic activity in developing countries must be through effective governing structures and processes, or what is generally referred to as "good governance." The principal objective is to identify and delimit the central features of what constitutes good governance. The article postulates four positions. First, that it is Herculean to have a value-free, all embracing, but workable definition of good governance.[2] Second, that the idea of good governance does not owe its genesis to the international development institutions, nor to the post cold war era. Third, that there are differences and similarities between the concept, articulation and practice of governance before the late 1980s and the period thereafter. The final argument here is that governance is a principle which gives rise to appendages such as democracy, rule of law, effective bureaucracy, decentralization and discretion. In varying degrees, these elements may be needed and are also evidenced not only in an effective central political regime but also in sectoral economic management. For the purposes of practicality and coherence, the energy industry would be used wherever an illustration or example is needed in this work.

II. DEFINITION OF GOOD GOVERNANCE?

The term governance has not as yet been deeply articulated. It has been used mainly by international financial and development institutions to depict improper or unsatisfactory functioning of governmental machinery or the need for more efficient administration.[3] There has been varied, if

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1. *See* WORLD BANK, WORLD DEVELOPMENT REPORT: THE STATE IN A CHANGING WORLD (1997) [hereinafter WORLD DEVELOPMENT REPORT]. Contrast this with earlier World Development Reports and other publications by the World Bank, especially those for 1989 and 1996. *See also* TONY KILLICK, DEVELOPMENT ECONOMICS IN ACTION (1978) [hereinafter KILLICK, DEVELOPMENT ECONOMICS]. *But see* TONY KILLICK, A REACTION TO FAR: ECONOMIC THEORY AND THE ROLE OF THE STATE IN DEVELOPING COUNTRIES (1990). *See also* JONATHAN H. FRIMPONG-ANSAH, THE VAMPIRE STATE IN AFRICA (1991).

2. Unless the context suggests otherwise, governance and good governance would be used interchangeably throughout this work without an implication of a change in meaning.

3. For example, in explaining Africa's development problems, the World Bank stated that "Underlying the litany of Africa's development problems is a crisis of governance." *See* WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH 60 (1989) [hereinafter SUB-SAHARAN AFRICA].

perfunctory, definitions of the term governance. The World Bank argued that "by Governance [it] is meant the exercise of political power to manage a nation's affairs."[4] This might be a definition aimed more for general consumption than for the World Bank's own purposes. This is because, by its legal mandate, the World Bank is restrained from delving into political matters and so in "analyzing governance, the World Bank draws a clear distinction between the concept's political and economic dimensions."[5] In a more measured approach, the World Bank defined governance in terms of the manner of exercising power for economic and social development.[6] Although effort is made at emphasizing the economic and social aspects while excluding the political undertones of governance, the World Bank is unable to effectively distance its conception of governance for its specific purposes, from the political paraphernalia of the term. Furthermore, the definition is silent on the operation of governance in small micro contexts as energy management, local government and international relations. Another attempt, which is more descriptive than definitional, is that which states governance as "the conscious management of regime structures with a view to enhancing the legitimacy of the public realm."[7] This definition appears sensitive to normative values in the prescription for governance. It places emphasis on the attainment of legitimacy without delving into the methods of attaining that legitimacy. The merit of this approach, for the purposes of this work, is that sub sectors like energy may not be satisfactorily managed in isolation of the broader political and institutional structures. The drawback, however, is that it places less emphasis on the style of management so far as it ultimately realizes the goal of legitimacy.

Most of the work on governance appears satisfied with a description or provision of a shopping list of ingredients for good governance.[8] Such elements include accountability, transparency, anti-corruption, rule of law, advancement for women, democracy and decentralization.[9] These concepts are themselves colossal and have not been subjected to sophisticated

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4. *Id.*

5. WORLD BANK, GOVERNANCE: THE WORLD BANK'S EXPERIENCE vii (1994).

6. *Id.* at xiv. This definition was first propounded in WORLD BANK, GOVERNANCE AND DEVELOPMENT 1 (1992).

7. GORAN HYDEN & MICHAEL BRATTON, GOVERNANCE AND POLITICS IN AFRICA 7 (1993).

8. *See* United Nations Development Program, Governance Policy Paper (last modified Jan. 1997) <http://magnet.undp.org/policy/> [hereinafter UNDP]. An exception to this trend is Ann Seidman et al., *Building Sound National Frameworks For Development and Social Change*, 4 CEPML & P. ONLINE J. 1 (last modified May 1999) <http://www.dundee.ac.uk/cepmlp/journal/html/article4-1.html> (providing *a* synthesis of these articles).

9. *See* UNDP, *supra* note 8.

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analyses in the light of governance. There are a number of reasons why attempts at a definition of good governance may be infirm at birth. For one thing, the idea is heavily value-laden. It is also very general in its orientation, thereby admitting of a multiplicity of issues and pains at rejecting anything. The elements of good governance are also not without contestation in themselves. Beyond that, elements such as rule of law and equity or efficiency may run counter to each other in certain circumstances. For example, a policy to provide electric power to an economically depressed part of the country may be inefficient in the short run but may be equitable. It is for these reasons that this work would not define the term "good governance" at this stage. It would, however, suggest a limitation of the essentials of good governance to the following concepts- democracy, rule of law, effective bureaucracy, discretion, and decentralization. It is contended that these concepts have sufficient capacity to accommodate such issues as transparency, accountability, anti-corruption, civil society, human rights and others. More importantly, the proposed elements would provide an adequate and interesting framework for the application of good governance to energy resource development. First, a brief outline of the origin and chronological development of the term good governance.

III. GOOD GOVERNANCE: ORIGIN AND DEVELOPMENT

The contemporary origin of the term is attributed to the World Bank.[10] In his foreword to the 1989 World Development Report, the Bank's President stated that "private sector initiative and market mechanisms are important, but they must go hand-in-hand with *Good Governance*."[11] This is said to represent the first significant mention of the term.[12] Indeed, the entire report contained an extensive reference to what can be described as the substance of the term.[13] In 1992, the World Bank published a report — Governance and Development — which in many respects can be said to represent the promulgation of good governance as a major variable in

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10. *See* Amado Tolentino, *Good Governance Through Popular Participation in Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE 136 (Konrad Ginther et al., eds., 1995) [hereinafter *Sustainable Development*]; WORLD BANK, GOVERNANCE: THE WORLD BANK'S EXPERIENCE vii (1994).

11. SUB-SAHARAN AFRICA, *supra* note 3, at xii.

12. *See* WORLD BANK, *supra* note 5, at vii. Besides reports or works which had Good Governance as its subject or theme.

13. The substance of Good Governance includes transparency, public accountability, decentralization, working judiciary, etc. *See* WORLD DEVELOPMENT REPORT, *supra* note 1. These matters are discussed in detail below. *Id.* It was almost ten years after the issue of governance was broached by the World Bank that it formed the subject of its development report. *Id.*

economic development. It discussed in more detail some of the signposts of good governance as perceived by the World Bank. These include public sector management, legal framework, accountability and transparency. Following closely to the 1992 publication, the World Bank in 1994 described some of its experiences with the working of the term in concrete situations.[14] In that material, the World Bank indicated its sensitivity to the political dimensions of governance and its restraint in that regard. It did, however, confirm the consultative role it plays with various governments and other funding agencies in governance matters. Finally, in a bold acknowledgment of the critical role the state plays in economic development, the World Bank in 1997 announced that the state apparatus, combined with good governance is a *conditio sine qua non* to development.[15]

Apart from the World Bank, a number of development-oriented institutions have paid attention to the issue of governance. At about the same period as the World Bank was concerned about good governance, so also was its sister organization, the International Monetary Fund (IMF). Admittedly, given its preoccupation with macro economic management issues, the IMF has been less conspicuous in its interest in good governance. In 1997, however, the IMF decided to incorporate governance as a criterion for assistance.[16] It further proposed to coordinate its concerns on governance with other bilateral and multilateral funding sources.[17] Some of these funding agencies have themselves touched on the issue of good governance. The United Nations Development Program (UNDP) declared that "it is only with good governance that we can find solutions to poverty, inequity and insecurity."[18] The Organization for Economic Co-operation and Development (OECD) also stated its preparedness to rely on governance as a test for assistance to poor countries.[19] The African

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14. *See* World Bank, *supra* note 5.

15. *See* WORLD BANK, THE STATE IN A CHANGING WORLD (1997). Besides these publications, the World Bank also released materials dealing with governance at various times. Examples include, LEILA FRISCHTAK, ANTINOMIES OF DEVELOPMENT: GOVERNANCE CAPACITY AND ADJUSTMENT RESPONSES (1993); LANDELL-MILLS & ISMAIL SERAGELDIN, GOVERNANCE AND THE EXTERNAL FACTOR (1992).

16. *See generally* IMF, Good Governance: The IMF's Role (last modified July 2, 1997) <http://www.imf.org/external/pubs/ft/exrp/govern/govindex.htm> [hereinafter IMF]; International Monetary Fund: Code of Good Practices on Fiscal Transparency—Declaration of Principles, April 16,1998, 37 I.L.M. 942, 942 (1998) [hereinafter IMF Code of Good Practices].

17. *See* IMF, *supra* note 16; IMF Code of Good Practices, *supra* note 16, at 942.

18. *See* UNDP, *supra* note 8, at 1.

19. The European Union also resolved in 1991 to condition its development relationships with poor countries on good governance. *See* P.J.I.M. de Waart, *Securing Access to Safe Drinking Water through Trade and International Migration, in* THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES 116-17 (Edward Brans et. al., eds. 1997).

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Development Bank, the Asian Development Bank, bilateral development agencies such as the British Overseas Development Agency, the Danish Development Agency, the United States Development Agency and others, have all, at various times and occasions since the late 1980s, stressed the importance they attach to governance as a critical factor in development.[20]

Compared to the heyday of the Law and Development movement in the 1960s and 1970s, there appears to be a dearth of academic constituency for a lively discourse on good governance.[21] This hypothesis notwithstanding, there is a noticeable corpus of research work on the subject.[22] There appear to be two trends in the discussion: those who emphasize the domestic dynamics of good governance, and others who point to the international dimensions. The first group argues for stringent reforms in developing countries which are seen not to be making sufficient progress towards good governance.[23] The second category sees an emerging international juridical requirement for democratic governance.[24] Both positions do stress a patent, and to a certain extent, passionate husbandry of developing countries by the industrialized ones using good governance as a critical benchmark.

It is hardly controvertible that the principle or concept of good governance, as understood in the 1990s owes its flourish largely to the international financial and development institutions. It is, however, misleading to say that the idea was conceived or originated from these

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20. *See* THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW 83-139 (1995).

21. One reason for the apparent lack of enthusiasm in academia for the debate on good governance is the virtual absence of an opposing wing to the proposition that good governance is essential for development. Another reason may be that the features of good governance are almost identical to those already discussed by modernization theorists. A third factor could be the fairly recent focus on *good governance per se*.

22. Tolentino, *supra* note 10.

23. Patrick McAuslan, *Good Governance and Aid in Africa*, 40 J. AFR. L. 168, 168-82 (1996).

24. *See* FRANCK, *supra* note 20. In 1994, the UN and the Organization of American States refused to recognize the military junta that overthrew the democratically elected government of Haiti and called for the forcible removal of the junta. See Peter Uvin & Isabelle Biagiotti, *Global Governance and the "New" Political Conditionality, in* 2 GLOBAL GOVERNANCE: A REVIEW OF MULTILATERISM AND INTERNATIONAL ORGANIZATIONS 377, 384-88 (1996). The international wing of the governance discourse can be seen beyond the political or individual countries' or regional responses to events in any one country. The UN, the ICJ, the WTO, the World Bank, IMF and regional organizations such as the EU, MERCOSUR, OAU, OAS, the Commonwealth, and ECOWAS, may all be seen as institutions of global governance seeking to facilitate the harmonization of national policies in various fields. *See* Michael J. Trebilcock, *What Makes Poor Countries Poor?: The Role of Institutional Capital in Economic Development, in* THE LAW AND ECONOMICS OF DEVELOPMENT 15 (Buscaglia et al., eds., 1997); *see also* The Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190, 193.

bodies.[25] The substance or elements of governance have immemorable origin.[26] In the early twentieth century, without necessarily using the term governance, Max Weber for example, outlined the functions of a bureaucracy that would facilitate development.[27] He called for the strict observance of rule of law and legal rationality and advised against admixture of private interests with the public responsibilities of the bureaucrat.[28] In the 1960s, the modernists, largely under the sponsorship of the United States, researched and took the message of the place of law in efficient administration to the newly independent developing countries.[29] To the extent that law is passed and enforced by a branch of government, an advocacy for a place for law in economic and social development is a discourse about governance. Indeed, academic works were done not only on the substance of law and development, but some have also explicitly used the term 'governance' in their titles and other significant parts.[30] Contrary to the assertion that the IMF and the World Bank invented or inaugurated good governance, the two institutions have traditionally argued against, or resisted calls for roles that they interpreted as political and beyond their respective mandates, which in fact border significantly on governance.[31] The "new" good governance championed by the international development institutions may be described as the third phase of the discourse. The first in the twentieth century was the Weberian phenomenon and the second, the Law and Development or Modernization movement.

25. The introduction of the concept of good governance is credited to the World Bank. *See* Tolentino, *supra* note 10. *Cf.* HYDEN, *supra* note 7, at 5 (accepting that the popularity of the term is owed to the World Bank's 1989 publication but also that the term "has been around in both political and academic discourse for a long time").

26. The works of classical philosophers such as Thomas Hobbes, Jean J. Rousseau, Montesquieu, Machiavelli, Plato, Confucius, J.S. Mill, Adam Smith, Karl Marx and many others, have all hinged on the idea of proper governance of society. *See* GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY (1966); DAVID HELD, MODELS OF DEMOCRACY (1987).

27. For an interesting discussion of Weber, *see* WOLFGANG J. MOMMSEN, THE AGE OF BUREAUCRACY: PERSPECTIVES ON THE POLITICAL SOCIOLOGY OF MAX WEBER (1974).

28. *See generally* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (Guenther Roth & Claus Wittich eds., Eprhaim Fischoff et al. trans., 1968).

29. *See* Thomas Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 WIS. L. REV. 767, 788.

30. *See e.g.*, Yash Ghai, *The Rule of Law, Legitimacy and Governance, in* THE POLITICAL ECONOMY OF LAW 253 (Ghai et al. eds., 1987); J. S. FURNIVAL, THE GOVERNANCE OF MODERN BURMA (1958).

31. *See* WORLD BANK, *supra* note 5, at viii.

IV. LAW AND DEVELOPMENT: REVISIONISM AND REVIVALISM

Debate on the existence of a relationship between law and economic development assumed a salience in the second half of the twentieth century. Prior to that period, however, the interconnectedness of the two disciplines has had a quiet existence. There was little controversy as to whether law begets or manages development, or that development engenders the need for law either to manage its expansion or to control its excesses. In the twentieth century, the relative prominence of the nexus between law and development was accentuated by this controversy as well as by the rapid global political and economic changes after the Second World War. This phenomenon largely gave birth to a movement or school of thought that came to be known as the Law and Development fraternity.[32] To be sure, the roots of the movement cannot exclude the works of classical legal and social philosophers like Adam Smith, John Locke, Karl Marx, and Max Weber, but for the purposes of the present work, the focus would be on relevant twentieth century work.[33] In this section of the work therefore, the chronological development of the law and development school is highlighted, and its main themes and theses discussed. The primary objective for this is to establish the proposition that the current preoccupation with "governance" is not a departure from, nor unrelated to the tenets of the law and development movement.

32. Franck, *supra* note 29, described law and development as a "fraternity." Bruce Zagaris termed it a "movement. *See* Bruce Zagaris, *Law and Development or Comparative Law and Social Change: The Application of Old Concepts in the Commonwealth Caribbean*, *in* LAW AND DEVELOPMENT 121, 123 (Anthony Carty ed., 1992). It did not become a full-blown category of legal philosophy in the mode of, for example, the Realists or Positivists. The term "school" or "movement" is therefore used in this work only to help categorize the group and to delimit the boundaries of the discussion.

33. Though Karl Marx, for example, focused on issues that may be central to this work, the main thrust of his work is cynical of the role of the state and law in social and economic development, and predicts the "withering of the state." Weber accepted some of the Marxian inclinations but described them as "ideal types." STEPHEN TURNER & REGIS FACTOR, MAX WEBER AS A SOCIAL THINKER 120 (1994).

A. *Max Weber on Law and Development*

One of the most widely acclaimed classical works on the relationship between law and development is that of Max Weber. In a number of writings, particularly that on "Economy and Society," Weber discussed the role of the law in capitalist economic development.[34] The aggregation of individuals and communities to form the state has been precipitated by economic and political factors, but these factors found veneration and outlet in generally applicable norms and law, either forcibly imposed or negotiated and accepted. The strengthening and integration of these units have also been facilitated by an extension of market economy and bureaucratization of the interactions of the groups or state. This was in turn accentuated by the power needs of the rulers and the officials of state as its capacity expanded, and also by the interests of those in the society who are oriented towards power in the market.[35] The "Prince" wanted order, unity and cohesion of his realm, at the same time, "the bourgeois interests [demanded] unambiguous and clear legal system, that would be free of irrational administrative arbitrariness . . . that would also offer firm guarantee of the legally binding character of contracts, and that, in consequence of all these would function in a calculable way."[36] In this context therefore, the main themes of Weber's work can be categorized into two: rationality and bureaucracy.

1. Legal Rationality

He identified three main forms of centralized governance: traditional rule based on blind faith in tradition and the inviolability or infallibility of the rulers; charismatic authority based on an acknowledgment of special or unique qualities of the leader and of the normative order established at his behest. In both cases, there is an unquestioning obedience to the dictates of the ruler.[37] The quality of the particular leader and the efficiency with which his wishes are absorbed determine whether the governance is good or otherwise. The third form of governance —

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34. *See* WEBER, *supra* note 28.

35. Max Weber, *Legal Foundations of Modern Capitalism*, *in* THE POLITICAL ECONOMY OF LAW 48-55 (Yash Ghai et al., eds., 1987).

36. *Id.* at 52. Apart from that, the rulers wished to curry favor from the bourgeois groups because they served their financial and political interests, so there was a mutual dependency between the ruling classes and their staff (who wanted more job security) on the one hand and the economically powerful groups on the other. *Id.*

37. WAYNE MORRISON, JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM 280 (1997).

Rational Legal — radically departs from the previous two in that it is based more on a systemic arrangement than personality. The essential characteristics of the rational legal system include the following: a legal code consisting of rationally accepted norms and obeyed by the relevant members of the society; a generalized system of abstract rules having the qualities of logic and consistency; finally, obedience, which is based on membership of the society and not owed to the individual ruler.[38] To Weber, there is comparatively less arbitrariness, dictation, abuse and uncertainty in the rational legal system. Law is therefore important in establishing order and promoting predictability, as the will of the individual is replaced by the collective aspiration of the people.

In some circles, Weber is seen as the first social scientist to have articulated the indispensable role of law for economic and social development. Notwithstanding the fact that the Weberian analyses have been nuanced into social and economic imperatives, its articulation of law as a basis for development is akin to the formalism expressed by the legal positivists. The pristine function of legal formalism, however, is evidenced by the writing of legal thinkers such as Austin and Kelsen.[39]

It is also this conceptual origin of the Weberian position that offers one of the most patent criticisms of legal rationality. Formalism in this circumstance does not admit of measures to address substantive developmental issues. For example, privileged classes who had control over property and even over fellow human beings would rely on formal law to entrench and protect their positions. Therefore, interpreting the law to redirect resources to exploited or depressed areas such as Chiapas in Mexico or extension of electric power to economically unattractive areas may not be possible. It can be argued that the Weberian emphasis is on process and that the formal law is identified by established characteristics of its promulgation. To that end, the substance of the law could be to reallocate resources, except that it must be done formally. The contradiction here is that the law protects and reorders the status quo concurrently. It freezes development while it can also revamp it. The rationalized formal law also enacts unquestioning obedience, at least as to substance, and allows little room for discretion. For, if questioning of substance and discretion is permitted in the application of the law, it would undermine the benefits of certainty, detachability and predictability.

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38. *Id.*

39. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (I. Berlin & S. Hampshire eds., 1832); HANS KELSEN, PURE THEORY OF LAW (1989); H.L.A. HART, THE CONCEPT OF LAW (1994).

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2. Bureaucracy[40]

For formal rationality to operate effectively, there must be in place a specialized administrative staff to process the mechanics involved. That administrative apparatus is what is described as bureaucracy. The principal characteristic of the Weberian bureaucracy is the abstract regularity with which authoritative edicts must be executed.[41] That is, it must ensure the inherent guarantee of reliable formal expectations of the political authority without becoming integrated or identified with the politicians.[42] The bureaucracy is formally charged with the husbandry of the interests of the state or community but within clearly defined legal limits. There must be a clear legal foundation for the civil service. That law must be based on the ultimate validity of the entire legal order.[43] The reason is that recognition and appreciation of the validity of the legal order facilitates the acceptability, compliance and enforceability of legal prescriptions by the government.

The power of the bureaucrat is attached to the legal office and not to the individual. Public monies must be distanced from private property of the official, executive office removed from the household, and business from private fortunes. This is one major distinction between the rational legal bureaucracy and patrimonial or neo-patrimonial administrative systems that tend to exist in many less industrialized countries.[44] Loyalty in a modern bureaucracy is impersonal and the units are functionally oriented. The bureaucrat's sense of duty must take priority over his personal views and his ability to do this well is ideally a part of his professional ethic.[45] This is why the bureaucrat must be well trained to function in technically relevant roles.[46] The more specialized the subject, the more the need for the professional to serve as a bureaucrat. The emphasis on the pristine distinction between official and private matters is to avoid the possibility of confusing and sacrificing the larger expectations of the society for the private interests of the individual. This

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40. Effective bureaucracy is taken to be an element of good governance and its discussion here would preclude further argument at the third section of this chapter concerning the elements of good governance.

41. *See* PAUL CRAIG, ADMINISTRATIVE LAW 398 (1994).

42. But civil servants, in reality, wield enormous political power. *See* EDWARD C. PAGE, POLITICAL AUTHORITY AND BUREAUCRATIC POWER 1-3 (1985).

43. WEBER, *supra* note 28, at 31.

44. *See* Trebilcock, *supra* note 24, at 291 (discussing corruption and inefficiency in judicial administration in Latin America). Corruption in the bureaucracies of Latin American countries is attributed to its Spanish colonial heritage.

45. WEBER, *supra* note 28, at 456-58.

46. *Id.* at 458-67.

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would not do for efficient and rational planning and execution of state policy. "For modern bureaucracy, the element of calculability of its rules has really been of decisive significance. The nature of modern civilization especially its technical-economic substructure, requires this calculability of consequences."[47]

As the economy expanded and the role of the state for rapid modernization became more prominent, the bureaucracy also magnified and increasingly asserted control over economic activity. This was accepted as necessary for social harmony especially in the light of the internationalization of economic activity. Weber, however, cautioned against extending the functions of the bureaucracy to cover economics.[48] This is because he feared such an extension would engender state socialism and constrain efficiency.[49] More directly, since the bureaucracy is a status group with an interest to seek and protect, giving it unchecked powers over economic activity could sow the seeds of corruption.[50] He also argued that although expansion of the bureaucracy is a common feature of all civilizations, hydra-headed, assertive or unwieldy bureaucracy can paralyze private economic activity.[51]

The Weberian model of bureaucracy is sound, viable and can be seen as a function of modern capitalist economic development. Its merits include coordination, consistency, speed, precision, records, objectivity, secrecy and technical expertise. That ethic would be an essential requirement for the inevitable regulation of an industry as technical as energy with wide ranging national and international implications.[52] It is, however, amenable to two internal and external critiques. The model does not indicate how the bureaucrats are to be recruited, trained, and the levels of motivation offered. This is important if there should be no implication of coercion or non-existence of choice. For, if that is the case, the efficiency of the bureau cannot be guaranteed in the long term. Also, the professional and routine bureaucracy may not admit initiative, discretion and personal responsibility. Further, Weber does not explain how the

47. Weber, *supra* note 35, at 53.

48. WEBER, *supra* note 28, at LII-LIII.

49. *Id.*

50. *Id.* at LXXXVII; *see also id.* at LXXXIV [where the editors, Roth and Wittich, postulate that the bureaucrat (staff) "acts on the basis of habit, legitimacy and self-interest"].

51. *Id.* at LII-LIII. He strenuously opposed nationalization of major industries. *Id.* at XCVIII.

52. In Russia, contradictory and uncoordinated bureaucracy hindered electricity development. *See* JONATHAN COPPERSMITH, THE ELECTRIFICATION OF RUSSIA 1880-1926, at 11 (1992). Export of gas from Bangladesh to India was fraught with difficulties due to inefficient bureaucracy, lack of transparency and political interference. Robert Corzine & Mark Nicholson, *Oilmen Fear Bangladesh Politics May Cloud Development of Natural Gas Riches*, FIN. TIMES, Apr. 27, 1998, at 4.

bureaucracy contributed to the varying degrees of development of different countries even within Western Europe. In other words, detached and professional bureaucracy is important but is not the panacea or the linchpin for development. Factors such as resource endowments, ideology, motivating circumstances such as war and empire building, culture, and religion are all crucial. All these were not lacking in the era in which Weber lived and worked, and no doubt influenced his thinking.[53]

To conclude, it can be argued that Max Weber discerned the role of law and the state apparatus for economic and social development.[54] His work is interesting for its outline of the interlocking relationship between law and development, and it is trailblazing in its detailed exposition of the functioning of the bureaucracy. The major failing of the work is its inability to descend into essentialism, at least, modestly, and its uncompromising faith in formalism. Be that as it may, Weber helped lay a foundation for the later emergence of the law and development movement in the 1960s and ultimately, it would be argued, for the contemporary discourse on Governance. A common feature of all three phenomena — Weber, Law and Development, and Good Governance — is the search for the proper role of the law, mainly via the state, for the economic and social modernization of society.

B. *The Law and Development Movement in the Middle Twentieth Century*

Law and Development as a discipline either for curricula, research or as an agenda at all, was first articulated in the mid-1960s with the passage of the U.S. Foreign Assistance Act and the institution of the

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53. Otto Von Bismarck achieved unification of more than two hundred city-states into one German state under Prussia in 1871. *See* BENDALL COLLINS, MAX WEBER: A SKELETON KEY 9-41 (1986). The consolidation and operation of the new state had gotten underway at the time when Max Weber was a student of Law and later Political Economy. *Id.* It was also the period when Weber began intense studies of the workings of the new state and its prospects. *Id.* It was crucial for the survival of the state to fashion a system that would hold the formerly independent states together. *Id.* That required a strong centralized state and a unifying and universally desired goal. *Id.* The latter was found in industrialization. *Id.* These objectives had to be pursued with minimal tolerance for sectional or regional interests. Hence the resort to, or the need for, breathless formality. *Id.*; *see also* STEPHEN TURNER & REGIS FACTOR, MAX WEBER: THE LAWYER AS A SOCIAL THINKER 3-7 (1994). The Weberian period (1864-1920) saw Germany as the fastest industrializing country in Europe. When he served as advisor to the Weimar Constitutional Commission, his suggestion for strong Presidential powers was incorporated into the Constitution. *Id.* at 6.

54. For an insightful and succinct outline of Weber's thoughts on law and development and its relationship to the work of modernists, *see* David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 11-16 (1972).

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Administration of Justice Program.[55] It has been defined as a "specialized area of academic study . . . concerned with the relationship between the legal systems and development"[56] with particular reference to the social, political and economic transformation of the developing world.[57] The factors that contributed to the rise of the movement include the notion, which gained currency at the time; of social engineering through law; growing interest in law and society; post World War Two U.S. commitment to foreign assistance as means of advancing American security and economic interests; and the experience gained from colonial administration.[58]

After the Second World War, it became increasingly untenable to hold colonies or dependencies when the war was fought in part to liberate people and territories under Nazi or fascist domination. The move towards political independence of the then colonies was therefore irresistible. The struggle for, and attainment of, independence itself engendered severe controversies for economic development. On the one hand, there was the argument for the need to maintain the status quo in its economic form and to entrench it with law.[59] The second argument was for the need to reorganize the post-colonial economy, and in the process, change or renunciate legal principles like *pacta sunt servanda* that reinforce the colonial underpinnings of the economy. Both arguments provided sufficient basis for the examination of the relationship between law and development.

Further to the foregoing, however, economists had started re-examining economic principles for the development of the newly decolonized states. It was at this time also that the discipline — Development Economics — emerged.[60] That provided the platform for the proliferation of literature on economic models that should speed up the development of the less developed countries.[61] The Development Economists pursued two questions: why is it that some countries are poor and others rich, and how can poverty be alleviated? In explaining poverty, Nurkse, one of the most influential writers in the field at the time, argued that the size of the market limited the scope of expansion and also that low incomes lead to low savings and low investment.[62] This is a self-perpetuating circle. Others like

55. *See* Zagaris, *supra* note 32, at 123.
56. *Id.*
57. *Id.*
58. *Id.* at 125.
59. *See generally* KILLICK, DEVELOPMENT ECONOMICS, *supra* note 1, at 11-29.
60. *Id.*
61. *Id.*
62. *Id.*

Myrdal, Rostow, Leibenstein, Scitovsky and Lewis all pursued almost the same line.[63] They were also fairly unanimous in their prescription for poverty alleviation. They suggested what has since become known as structuralist or "Big Push" approach to development.[64] To break the cycle of underdevelopment, it is crucial that there be a decisive external intervention. This could be in the form of substantial state involvement directly in economic activity or massive foreign investment. Beyond the projected macro economic benefits, such an intervention is necessary due to the dearth of private indigenous capital and entrepreneurship in the newly decolonised states.[65] Intervention in that form, it was contended, would also move the economy away from its colonial function of supplying primary products and consumer of goods finished in the industrial countries. Though there were some dissident voices, there was consensus centered around the foregoing analysis.[66] That consensus, to a large extent, provided an impetus for the delineation of the role of law. Both in its diagnosis of poverty and in its prescription for solution, development economics of the mid-twentieth century had much in common with the main tenets of the law and development or modernization movement.[67]

C. *Modernization Theory*

The modernists accept the challenge of development and believe that structures, concepts and mechanisms which have been developed in the industrialized countries can be successfully adapted to the circumstances of the less developed countries "in the hope of producing convergent economic, social, and political development."[68] The movement which is largely of American origin, blossomed in the 1960s and has since had an undulating life.[69] It started off in an investigative mode, then transformed into a prescriptive and training project for law students from the developing world. The entire program was encapsulated and consummated in the 1966 U.S. Foreign Assistance Act. It provided for optimum local

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. However, the two factors hardly worked together. *See* David Trubek, *Law and Development: Then and Now*, 90 AM. SOC'Y OF INT'L LAW PROCEEDINGS 223, 223 (1996).
68. *See* David Greenberg, *Law and Development in Light of Dependency Theory*, *in* LAW AND DEVELOPMENT, *supra* note 32, at 90.
69. The modernist movement which started off as the U.S. government and U.S. based private foundations, such as the Ford and Rockefeller Foundations, sought non-communist ways for modernizing the newly independent states of Africa, Asia and Latin America. *Id.*

participation in the economic development of the developing countries by means of support for democratic, private and local governmental institutions.[70] The central question was "which combinations of norms and institutions would impede, and which could facilitate development."[71]

A number of institutions were charged with the responsibility to investigate these and related questions. They included the United States Agency for International Development and the Center for International Studies at New York University.[72] The latter body had the task of examining the feasibility of realizing or implementing the objectives of the Act as far as law was concerned.[73] Teams were sent to selected countries to examine the relationship between legal institutions and the processes of development. They were also to investigate the possibility of adapting the technique and experience of American institutions, lawyers and law-oriented private and public bodies to assist in the development effort.[74] It was also at this time that a number of western, and to some extent, eastern countries started establishing agencies for co-operation and international development with the aim of accelerating the rate of development of the poor countries.[75] The assistance towards modernizing the newly independent states was, at least initially, at the behest of the industrialized states with no apparent conditions.[76]

The modernization theory postulates that all nation states go through three stages of development.[77] These are unification of smaller units into a nation, the pursuit of industrialization as an economic goal, and the institution of welfare mechanisms to handle the fall-out from the industrialization process.[78] If this was the case with the industrialized countries, it would be the same for the former colonies. However, the process in the newly independent states can be hastened by help from the more experienced industrialized states.[79] In unifying smaller components

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70. 22 U.S.C. § 2218 (1970).

71. DAVID E. APTER, RETHINKING DEVELOPMENT: MODERNIZATION, DEPENDENCY, AND POSTMODERN POLITICS 13 (1987).

72. *See* Franck, *supra* note 29, at 767.

73. *Id.*

74. *See id.*

75. Some see these agencies as means of advancing super powers' ideological and other interests. *See* Hunter R. Clark, *African Renaissance and U.S. Trade Policy*, 27 GA. J. INT'L & COMP. L. 265, 274 n.38 (1999).

76. *See generally* A.F.K. ORGANSKI, THE STAGES OF POLITICAL DEVELOPMENT (1965).

77. *See generally* Tariq Banuri, *Development and The Politics of Knowledge: A Critical Interpretation of the Social Role of Modernization Theories in the Development of the Third World*, *in* FREDERIQUE APFFEL & STEPHEN A. MARGLIN, DOMINATING KNOWLEDGE (1990); *see also* Franck, *supra* note 29, at 770-78.

78. *See generally*, Banuri *supra* note 77; *see also* Franck, *supra* note 29, at 770-78.

79. Franck, *supra* note 29, at 770-78.

into a nation state as well as in developing the political market,[80] lawyers adept at or inclined to constitutional law and process, would be needed to guide, direct or translate the political or social process into law. In brief, consistent with Weberian thinking, stability and legitimacy are inherent in the pursuit of unification. The law is also important in the industrialization process. Industrialization implies investment from private or public sources. Due to the inadequacy of local capital, most private investment in the developing world is from industrialized countries. Apart from a conducive political and constitutional environment, there is the need for appropriate legal framework for attracting and sustaining investment. Issues such as taxation, expropriation, profit repatriation, planning and environmental regulation have to be addressed and this is a proper domain for the law and lawyers. The final stage of modernization equally requires the legal profession. Drawing on constitutional provisions on civil liberties and rights, lawyers develop legal principles for protecting the factory floor worker, environmental protection, housing, health care, etc. Law, located in an appropriate legal culture, with its quality of consistency and stability, can operate to legitimize and manage these potentially destabilizing transitions in ways that would give, at least, an appearance of order and tranquility.

The task of development, in the modernist thought, requires new kinds of law and a "new" kind of lawyer and more rigorous legal institutions. Customary law was regarded as too lethargic, unpredictable, localized and inflexible to develop new laws and norms crucial for development.[81] The replacement of traditional pluralistic legal institutions by a centralized monolithic legal system could facilitate unification and consolidation of a nation, weaken conservative old-fashioned traditional elites who obstruct modernization, and foster political democracy. The law that relates to political participation has to be participatory and not merely representative. It has to create multiple avenues for redress, competition and challenge. The law governing business activity must be transparent and in tandem with practices elsewhere. It is important to have institutional or procedural alternatives to the existing formal structures of mainly vertical representation. Judicial and quasi-judicial bodies such as tax courts, ombudsman, legal aid or public defender scheme, trade and other commissions would facilitate both constitutional and commercial growth. There is need for lawyers who are experts in particular fields, but

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80. APTER, *supra* note 71, at 24.

81. Customary law is defined in Article 11(3) of the 1992 Ghana Constitution as "the rules of law which by custom are applicable to particular communities in Ghana." *See* GHANA CONST. of 1992, art. 11(3), *in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz eds., Oceana Pubs. Vol. VII 1998).

since law is not inherently developmental it is also important to have lawyers with broad-based and interdisciplinary knowledge.[82] Hence the training of judges and lawyers to use newly enacted codes, and in a departure from Weberian thought, to take a more functional or instrumentalist approach to the law and be less formalistic.[83]

Notwithstanding its inspirational message, the modernization theory has been criticized as being breathlessly optimistic.[84] It is unable to explain upheavals such as the Nazi war in Europe, genocidal revolts as in Bosnia-Herzegovina, Rwanda and Cambodia. If it had more interest in historical dialectics, it would have contextualised the stages of development, the role of law and what has to be done at each stage. The faith in the role of law in development is undermined by the fact that countries in Latin America who since the nineteenth century had constitutions based on the U.S. model, and civil codes derived from the French Code lagged in their development. While the modernists focused on the guiding hand of the law in promoting development, they did not consider the impact of non-legal factors on development generally nor legal development in particular. These omissions have been blamed for the failure of the optimistic expectations of the modernists.[85]

Another factor that explains the failure of the modernization theory is the contradiction inherent in the theory. On the one hand, it calls for transparency, facilitation of public participation in political institutions and the protection of citizens against governmental arbitrariness and abuse of human rights. At the same time, the theory is contemptuous of traditional or customary institutions and would like to see the influence of traditional elites weakened. A result of this contradiction is seen in the rise of totalitarian regimes between 1965 and 1990 in Brazil, Uganda, Chile, Congo, Zambia, Ethiopia and others.[86] Three problems emerge from the

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82. *See generally* Franck, *supra* note 29, at 777-800.

83. *See id.* at 788.

84. Trubek, *supra* note 54.

85. *See* Greenberg, *supra* note 68, at 94. Banuri points to other factors including the Vietnam War, OPEC and the energy crisis of the 1970s, Watergate, prolonged depression in the West, and revelations of Stalinist excesses. *See* Banuri, *supra* note 77, at 30-32. The central thrust of the modernists was action-oriented, and not inquiry. To that end, they had little theoretical interests and almost no interests in learning about or from other cultures. No consistent and encapsulating theory has been formulated and tested; and in the process they "suffered from an unfamiliarity with the target culture[s] and societ[ies] (including [their] legal system[s]), lack of theory, artificially privileged access to power, and relative immunity to consequences." Zagaris, *supra* note 32, at 127. This is why it would be important to locate models of energy reform within the relevant national or regional contexts. *See* Mike Parker, *General Conclusions and Lessons*, *in* BRITISH ELECTRICITY EXPERIMENT PRIVATISATION: THE RECORD, THE ISSUES, THE LESSONS 304 (John Surrey ed., 1996).

86. Some of these countries were targets of the initial modernization efforts. *See* Franck, *supra* note 29, at 768.

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foregoing analyses. One is the tension between a strong centralized government and the imperative of decentralization of public institutions and functions. Second, the possible unease between law as a protector of civil rights and a technocratic instrumentalist conception of law. Finally, the tension between enthusiastic promotion of foreign investment and the power and influence of multinational corporations by themselves and governments. Some of these corporations such as Kaiser Aluminum, have their own Form Contracts which serve as the model of their agreements with developing countries. This is hardly surprising in view of the limited administrative capacity of developing countries.[87]

These problems can be described as the internal causes of the decline of the modernization theory and the entire Law and Development movement in the 1980s. There were other reasons that were exogenous to the movement which also hastened its decline in the 1990s. The single most important external factor was the end of the Cold War and the demise of Stalinist-Leninist Communism.[88] There is little doubt that the reaction of the dependencists against the modernists had left-wing undertones.[89] The modernization theory itself was embedded in neo-liberal or capitalist philosophy of economic and political development. Beyond that, the modernization project largely emerged as an American way of entrenching capitalism, systems of government supportive of the West and repelling of communist hegemony. The American modernists derived legal basis and support from Acts of Congress and State department programs. They also received funding from the U.S. government and private foundations based in the U.S., all in the fight against communism.[90] With the fall of communism therefore, the incentive for modernization as originally conceived has been removed. Further, the West does not need to persuade any country or government to think western anymore. Modernization as operated in the 1960s and the 1970s was thus moribund or comatose. This work contends, however, that the modernization ideas reappeared in the 1990s in the form of good governance discourse, but with significant differences.

Although the substance of governance may not be difficult to identify and fairly indistinguishable irrespective of the perspective taken, there are discernible differences between the discourse of governance as advanced by the modernists on the one hand, and international development institutions on the other. The first is terminology. The Modernists, or Law

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87. *See* Greenberg, *supra* note 68, at 768.

88. This can also be described as a crucial landmark in the rebirth of the law and development movement. *See* Trubek, *supra* note 54, at 223-26.

89. *See* Banuri, *supra* note 77; *see also* APTER, *supra* note 71, at 9.

90. *See* Zagaris, *supra* note 32; *see also* Greenberg, *supra* note 68.

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and Development theorists, notwithstanding occasional references and use, laid no emphasis on the term "governance." More clearly, the Law and Development practitioners did not characterize or emasculate their ideas and work under "Good Governance." This may be because the patently political character of governance would have invited vociferous responses in the then cold war environment and stultify the prosecution of the project. Good Governance is a terminology that is largely popularized by the international development institutions.

The second point of departure between the modernists and the international development institutions is the sponsorship and management of the governance project. In the 1960s and the mid-1980s, the law and development program was sponsored directly by the United States mainly through the Agency for International Development and the State Department.[91] The participants and managers of the program were mainly drawn from American institutions.[92] In the contemporary governance program, however, the sponsors are mainly multilateral development institutions like the IMF,[93] the World Bank, the United Nations Development Program,[94] The Asian Development Bank,[95] African Development Bank,[96] as well as development agencies in individual countries of the west.[97] The managers of the program are also drawn from these institutions or hired by them. It can be argued, however, that to the extent that the multilateral institutions are largely funded and controlled

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91. Greenberg, *supra* note 68, at 90; Zagaris, *supra* note 32, at 124-25, 133-35, and 163-64. In fact, the U.S. Congress provided expressly for this support in the Foreign Assistance Act of 1961. It was also supported by U.S. based foundations such as the Ford and Rockefeller Foundations.

92. For example, Thomas Franck, a Professor of Law at New York University was the head of a team that toured a number of countries on the modernization mission. *See* Franck, *supra* note 29, at 767-69.

93. *See* IMF, *supra* note 16.

94. *See Governance for Sustainable Development*, UNITED NATIONS DEVELOPMENT PROGRAM (1997).

95. *See* Shoji Nishimoto, *The Bank's Governance Policy, in* ASIAN DEVELOPMENT BANK (ADB), GOVERNANCE: PROMOTING SOUND DEVELOPMENT MANAGEMENT 9-11 (Record of Proceedings of a Seminar in Fukuoka, Japan, May 1997); Barry Metzger, *Law and Development: An Essential Dimension of Governance, in* ASIAN DEVELOPMENT BANK (ADB), GOVERNANCE: PROMOTING SOUND DEVELOPMENT MANAGEMENT 15-19 (Record of Proceedings of a Seminar in Fukuoka, Japan, May 1997).

96. *See generally* AFRICAN DEVELOPMENT BANK, GOVERNANCE AND DEVELOPMENT IN AFRICA: ISSUES AND THE ROLE OF THE AFRICAN DEVELOPMENT BANK AND OTHER MULTILATERAL ORGANIZATIONS (1993).

97. The Carter Center at Emory University has also been recognized for playing a pioneering role in the focus on governance. *See* HYDEN, *supra* note 7, at 6.

by the rich countries, they can be said to be the indirect sponsors of the governance project.

Another important difference between what in essence are two phases of the governance project, lies in the style adopted by the two sides. To a large extent, both were not very interested in critical inquiry or research. Neither were they keen on learning from their subjects. They agreed on the diagnosis of the cause or reason for the underdevelopment and were ready with the governance prescription. However, in administering the project, the modernists showed, at least in language, some respect for the views of their subjects and were prepared to "negotiate" with them. As Franck put it:

> Oversensitivity and overfastidiousness in this respect may be no more helpful to Africa and Asia than was the earlier phase of insensitivity and condescending paternalism. What is needed is help given and taken, with mutual respect, without strings, to promising projects, backed by responsible individuals and institutions in recipient states.[98]

On the other hand, the multilateral institutions and the advocates of good governance in the 1990s do not appear willing to persuade their clients. Some of the advocates would even go as far as to suggest auditing and sanctioning poor countries which are not in tune with the good governance line.[99]

Finally, international development institutions, particularly the IMF and the World Bank, show some sensitivity to the letter of their founding instruments in their pursuit of good governance. To this end, they prefer to emphasize the economic aspects of good governance. In analyzing governance, the World Bank draws a clear distinction between the concept's political and economic dimensions. The World Bank's mandate is the promotion of sustainable economic and social development. The World Bank's Articles of Agreement explicitly prohibit the institution from interfering in a country's internal political affairs and require it to take only economic considerations into account in its decisions. Thus, the World Bank's call for good governance and its concern with accountability, transparency, and the rule of law have to do exclusively with the contribution they make to social and economic development and to the World Bank's fundamental objective of sustainable poverty reduction in the developing world.[100]

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98. *See* Franck, *supra* note 29, at 770.
99. *See generally* McAuslan, *supra* note 23.
100. *See* WORLD BANK, *supra* note 5, at vii.

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The modernists on the other hand did not show any such preference. Given the cold war context in which they operated, the modernists leaned on the adoption of western political institutions.[101] It was, therefore, not surprising that the modernization work drew a response, or at the very least, encouraged the growth of the dependency movement which was of left-wing persuasion.[102]

All these differences and similarities[103] between the modernization and good governance projects are very important for the implementation or working of the idea in the lives of the developing country subjects. For one thing, the involvement of the international development institutions means that the orientation of the program is more practical than academic.[104] It also means that there would be more interest in specific sectors of a subject country's economy as for example in the drive for the deregulation of the energy sector.[105] At a general level, the metamorphosis of the ideals of effective functioning of government and its relationship to economic development point to its inexorable indispensability. The status and implications of good governance for both its practice and sophisticated academic discourse would be significantly impacted by a characterization of good governance as a principle, concept, policy or rule.

V. GOOD GOVERNANCE AS A PRINCIPLE

Whatever its origin, the idea of governance has not been consistently formulated or described in a way that could assure both rhetorical and substantive coherence. It has variously been mentioned as a principle, concept and policy.[106] It appears an issue, if any, regarding the theoretical

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101. *See* Franck, *supra* note 29, at 767-69.

102. *See* Banuri, *supra* note 77, at 49.

103. The similarities include the fact that the substance of modernism and good governance are largely the same: democracy, rule of law, transparency, civil society. They focus on the same targets: developing countries, except that in the 1990s, Eastern and Central European Countries are also subjects of governance work; they use western systems as models.

104. It has been suggested that as of 1998, there were over fifty publications by the World Bank on privatization alone. *See* Jacques Girod & Jacques Percebois, *Reforms in Sub-Saharan Africa's Power Industries*, 26 ENERGY POL'Y 21, 21 (1998).

105. *See id.* Apart from emphasizing that the World Bank is the leader in the reforms, the two authors argue that the near total dependence on foreign financial sources by African countries strengthens the latitude of recommendations put forward by the international financial organizations concerning the necessity of reform. *See id* at 24.

106. Ruth Richardson describes the substance of good governance as "principles." *See* Ruth Richardson, *Governance: Promoting Sound Development in* ASIAN DEVELOPMENT BANK, *supra* note 95, at 33. Okoth-Ogendo calls governance a concept. *See* H. Okoth-Ogendo, *Governance and Sustainable Development in Africa, in* SUSTAINABLE DEVELOPMENT, *supra* note 10, at 107. *See* Tolentino, *supra* note 10, at 137. Shoji Nishimoto refers to it as "policy." *See* Shoji Nishimoto,

status of governance has been taken for granted. For, nowhere in the existing literature has an issue been taken as to the consequences of characterizing governance as a principle, concept or policy.[107] Such a clarification is important for two reasons. First, as noted, governance is now being heralded as an emerging international law issue in a manner that could take the shape of an *erga omnes* obligation.[108] Second, the legitimacy of good governance claims and procedures such as democratization, decentralization, liberalization, accountability need to be explained to and accepted by the relevant constituency. The achievement of these objectives would, at least, be facilitated by a clarification of governance as a principle, policy or a concept. The strength of the idea, it is contended, is enhanced or weakened by its classification and characterization. This part of the work explores that angle of the discourse and suggests that for its long-term endurance, at least a tentative understanding of governance as a principle would be helpful. Such a characterization would also facilitate a clearer discernment of the derivatives of governance, its practical working as well as an exposition of latent or inherent difficulties.

Black's Law Dictionary defines principle as "a fundamental truth or doctrine as of law."[109] If it is a fundamental truth or doctrine, principle can hardly be distanced from normative values that may inhere in its practice. At the same time, it might not admit of flexibility or variety in its content. From that perspective, principle may appear to be a rigid, time-resistant position. However, if principle is a "comprehensive rule or doctrine which furnishes a basis or origin for others,"[110] then it makes room for derivatives. Such offshoots may be malleable and could develop in tandem with time and societal development. It is, however, not clear yet what the ideas derived from a principle would be and how they would relate to each other. This is especially troubling where principle is said to denote a general guiding rule whose directions could be determined by the relevant subject matter.[111] Does it mean then that governance can be directed to

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Opening Remarks, in ASIAN DEVELOPMENT BANK, *supra* note 95, at 7.

107. *See* Philippe Sands, *International Law in the Field of Sustainable Development: Emerging Legal Principles*, *in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 54 (Winfried Lang ed., 1995). Sands asks a similar question and posits that "principles can have a range of practical consequences." *Id.* at 56.

108. *See* FRANCK, *supra* note 24, at 83-84.

109. *See* BLACK'S LAW DICTIONARY 1193 (6th ed.1990).

110. *See id.*

111. *See* McGreagh v. Fearson, (1922) 91(2) L.J.R. 365, 366 (Shearman, J.); *see also* STROUD'S JUDICIAL DICTIONARY 2044 (6th ed. 2000); TOM BEAUCHAMP & JAMES CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 38 (1994). *Cf.* Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 2 (STEPHEN

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promote the development and management of energy resources? It is clear nonetheless that a principle connotes a standard to be observed in pursuit of a desirable state of affairs as may be required by a higher *raison d'etre*.[112] This would be the case for the efficient and equitable exploitation of energy resources and the general development of a country.

"In a legal sense principles are juridical generalities,"[113] which require more specific normative rules and procedures to operate. Thus by their hollow nature, principles may function to assemble or intermediate conflicting ideas including those derived from the particular principle such as the pursuit of efficiency and equity concurrently in resource development. Secondly, principles generate and provide validity to norms which operationalise them. To that end, an idea derived from a principle cannot be divorced from or be inconsistent with the principle itself.[114] Finally, considering the contingent nature of the operational rules in the dynamics of societal development, "principles — to the extent that they are foundational — define the core personality or identity of the normative superstructure applicable[115] to the activity they" govern. Principle also gives credence to rules. That is, rules may be traced ultimately to principles. Principles need rules to operate and at the same time provides the rationale for the rule. For example, the rule that contracts for the construction of power plants must be on open tender can be traced to the principle of good governance requiring transparency. In that case, good governance is the *principle* calling for a *policy* of transparency which is manifested in the *rule* of open tender. At the same time, the idea of good governance also requires that businesses, including the award of contracts, must be seen to be transparent. It is therefore the function of principle to preside over the relative strengths of rules when two or more rules conflict. If the rule of open tender conflicts with the use of discretionary powers by the Minister, the principle of good governance would anchor the resolution of the conflict in each such circumstance.[116] Governance as a principle

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KRASNER ed., 1983). Krasner speaks of principles as "beliefs of fact, causation and rectitude." *See id.* This might accord with the general view that bad governance is cause of underdevelopment and good governance is a necessary factor in the rectification of underdevelopment. *See* Okoth-Ogendo, *supra* note 106, at 107-10; *see also* McAuslan, *supra* note 23, at 168.

112. *See* David Dzidzornu, *Four Principles in Marine Environment Protection: A Comparative Analysis*, 29 OCEAN DEV. & INT'L L. 91, 93 (1998).

113. *See id.*

114. This is akin to the Kelsenite postulates on legal theory particularly relating to the Grundnorm and other norms. *See* R.W.M. DIAS, JURISPRUDENCE 361-63 (1985). Another effective analogy is Chief Justice Marshall's rationalization of the basis for judicial review of legislation in the United States. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 137 (1803).

115. *See* Dzidzornu, *supra* note 112, at 94.

116. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 27-28; *see also* D.J. GALLIGAN,

could only incline a decision or policy one way or the other. Principles on their own do not necessarily determine results. Rules perform that unique function.[117]

A result that is at variance with the originating principle would imply that the rule has been amended or abandoned but not necessarily the principle. This is because the survival of principles is not conditioned on whether they prevail or not.[118] Herein lies a support for an argument that good governance as a principle does no harm and if it does not lead to rapid development in any particular case, would not devalue or erode its authenticity, significance or endurance. The fact that India, for example, is not as industrially advanced as Japan does not assail the fact that good governance is a vital principle of societal management and development.[119] This also gives reason for caution in the euphoric enthusiasm in the propagation of bad governance as the cause for underdevelopment and good governance as a panacea for underdevelopment.

In all these, nothing is said as to the origin of principle nor the relationship between one principle and another. For, if principle gives rise to varied ideas, it is important to hint at the deferential or hierarchical order of the ideas originating from it. Failing that, it might be difficult to reconcile the possible contradictions between formal requirements of rule of law and the necessity for discretionary powers. First though, it is important to assert the terminological quality of the ideas derived from a principle. Would it be appropriate to call such ideas concepts?

Concept is something conceived or a general notion. It is also the formation of a plan, or thought.[120] It might thus be easier to discern the origin of a concept than a principle. It is possible that a concept may owe its origin to a principle.[121] This is because the process of concretizing a principle, which is general, inevitably entails the employment or formation of concepts.[122] For one thing, the conceptual analyses would help establish

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DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 56 (1986).

117. *See* DWORKIN, *supra* note 116, at 35.

118. *See id.*

119. India and Japan are cited primarily because India became an independent country in 1947 and Japan began a process of reconstruction after the Second World War. Though they have both practiced pluralistic democracy (a significant element of good governance), Japan is an industrialized country while India is considered a third world country.

120. *See* CHAMBERS TWENTIETH CENTURY DICTIONARY 269 (1972).

121. Principle may provide the conditions necessary and sufficient for the proper use of concepts. *See* MEDICAL TECHNOLOGY AND SOCIETY: AN INTERDISCIPLINARY PERSPECTIVE 92 (Joseph Bronzino et. al. eds. (1990)) [hereinafter MEDICAL TECHNOLOGY].

122. *See* RONALD DWORKIN, LAW'S EMPIRE 70-71 (1986). Concepts in that circumstance perform an interpretive function. *See id.* Dworkin's distinction of concept and conception would mean for our purposes, a connection of concept (the branch) to principle (the trunk). *See id.*

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the completeness and precision of the concepts themselves and the critical environment in which they operate.[123] This is because "abstract principles ... must be developed conceptually and shaped normatively to connect with concrete action-guides and practical judgments."[124] It may therefore be argued that, in the event of a conflict or in a hierarchical arrangement, principle might hold priority over concepts. To that end, governance may be described as a principle which engenders the emergence, or need the operational qualities of concepts like democracy, rule of law, decentralization, discretion, equity and efficiency.

Governance is a term which may have varied meanings and flexible application. It is a general principle or standard which may require flexible interpretation and application in various circumstances. In that application, it would be necessary to resort to concepts and rules. In other words, governance is hollow and needs content. The content when ascertained, cannot be said to override the mother agency. This is another reason why it is not inappropriate to describe governance as a principle. Though it is a word,[125] governance is not a concept mainly because, in its general orientation and when divorced from its contemporary value-laden implications, good governance is self-evidently necessary that it is a *principiorum non est ratio*.

Nor is it a policy. Policy connotes a tentativeness that may at best originate from a principle.[126] Principle as already noted, is general, abstract and in the nature of a standard whose realization requires policy as an instrument. Decentralization for example, may be a policy that originates from good governance. Policy can handle peculiarities without doing violence to principle. The principle to electrify an entire country would not be subverted by a priority attention to most economically viable or most depressing regions. Furthermore, policy connotes a result from deliberations by a superior agency. Although the language of good governance is dominated by paternalistic and ethnocentric patrons in industrialized countries, international development institutions and

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123. *See* MEDICAL TECHNOLOGY, *supra* note 121, at 94.

124. BEAUCHAMP, *supra* note 111, at 38.

125. Good governance is also considered a phrase by some.

126. *But Cf.* Dzidzornu, *supra* note 112, at 104. Speaking in terms of marine environment protection, Dzidzornu sees policy as parallel to principle in some respects, but concludes that policy is superior to principle because policy is more general. *See id.* As far as the comparison is between the two, a reversed conclusion is more logical and reasonable. *See id.* Principle is abstract and needs the practical quality of policy to operate. *See id.* Goran Hyden also argues that governance and policy making are separate entities but in practice often affect each other. *See* HYDEN, *supra* note 7, at 7. The main difference, he contends "is that governance deals with 'metapolicies'." *See id.* This accords with our general position that governance as a principle is of a higher order than the policies derived from it. *See id.*

academia, the need for it, even if varied and contested, is appreciated by the subject countries and other stake holders.[127] In other words, notwithstanding its external influences, good governance is also inherently internal, or at least, has a significant domestic constituency and relevance. For that reason, it would not be accurate to describe it as a policy. To say so would invite the question — whose policy? The theoretical relationships among the ideas derived from good governance can be illustrated as follows:

127. This may be deduced from the general upheavals against totalitarian rule in the former Eastern Europe, Ethiopia, Zaire, and the referenda in favor of constitutional democracy in Ghana, Malawi, Zambia and others. *See* Michael Bratton & Nicolas Van De Walle, *Toward Governance in Africa: Popular Demands and State Responses*, *in* GOVERNANCE AND POLITICS IN AFRICA, *supra* note 7, at 27-54. It might be added that low voter turn-out in general elections in countries like Britain and United States of America does not necessarily mean a rejection of the political systems in those countries. *See* ANTHONY BIRCH, THE CONCEPTS AND THEORIES OF MODERN DEMOCRACY 81 (1993).

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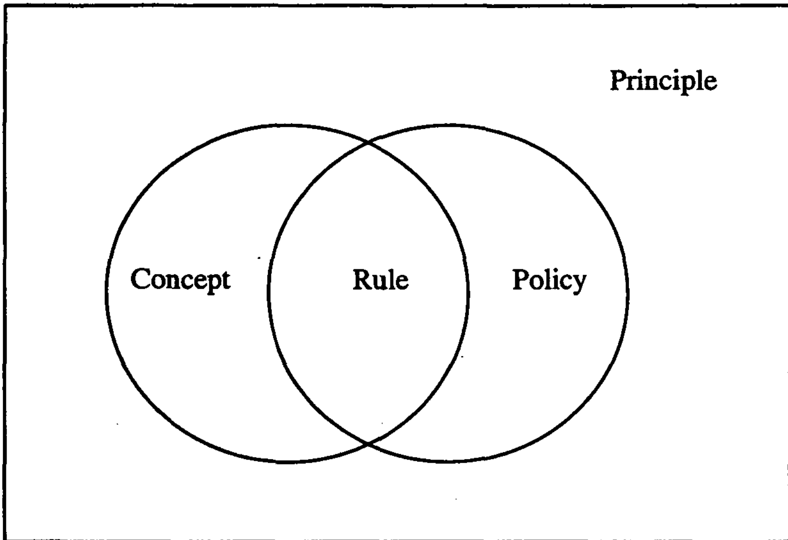

Figure 1. Venn diagram showing the relationship between Principle, Concept, Policy and Rule.

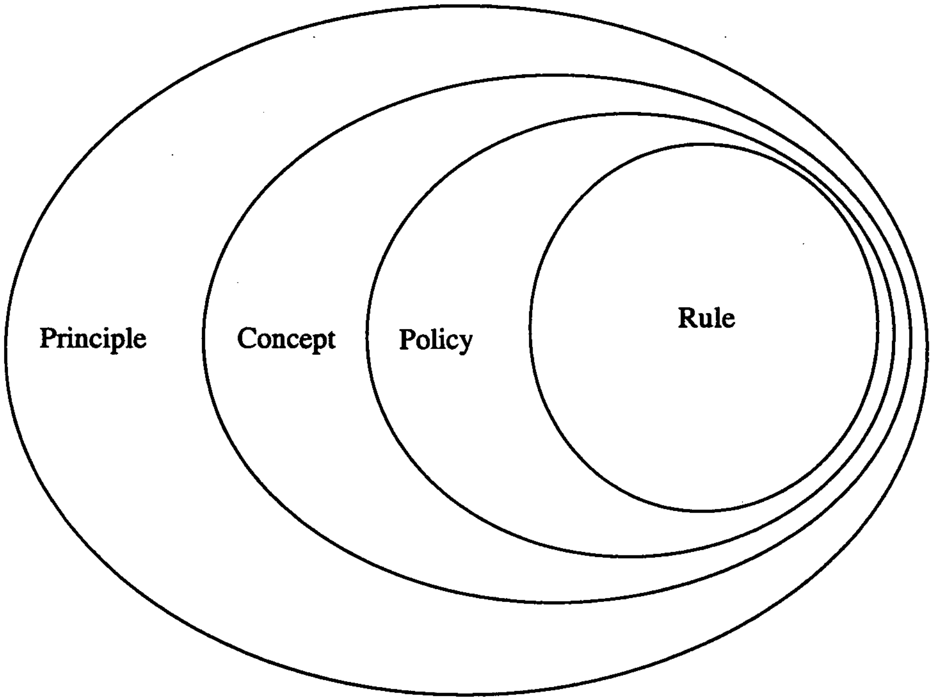

Figure 2. Venn diagram showing Principle and its derivatives.

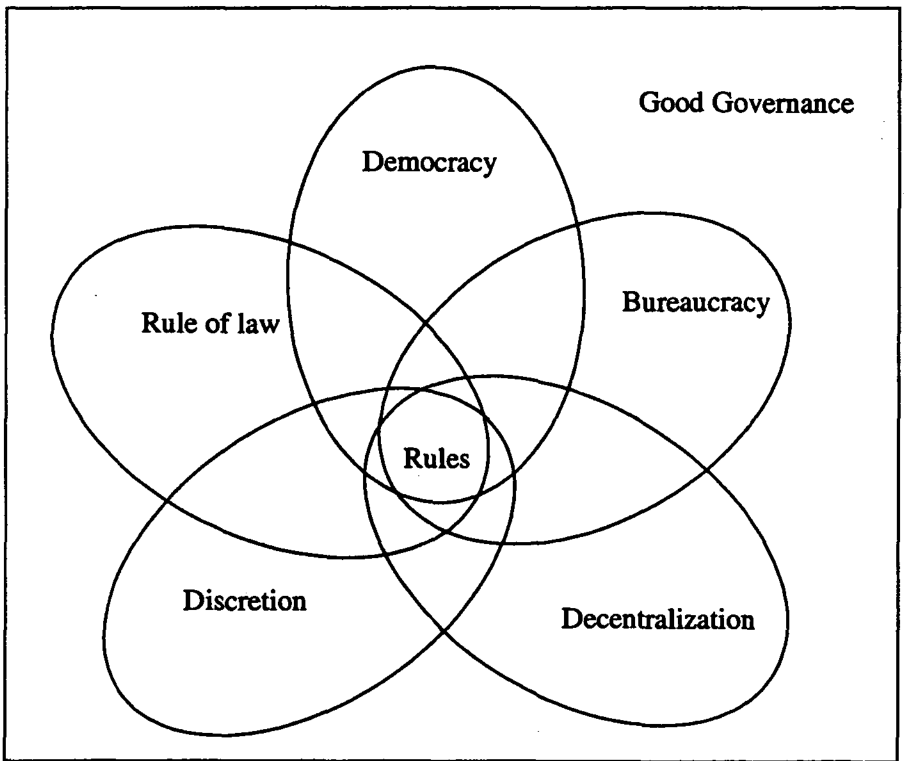

Figure 3. Venn diagram showing good governance and its derivatives.

In sum therefore, good governance is a principle because it has an enduring feature. It is also general and all-embracing as to cover not only macro management of a society but also micro management of economic sectors including energy, international relations and trade. Further, good governance needs norms and ideas to concretize and enrich it. It is argued subsequently that subjects such as democracy, rule of law, decentralization and discretion perform the filling function. The rest of the article discusses these as elements of good governance. The discussion of these specifics would expose the problems, contradictions, as well as strengths inherent in their composite application. It would also highlight their relevance and application for the stable, efficient and equitable exploitation, management and trade in energy resources.

A. *Democracy*

This section focuses on democracy at three levels. First, the place of democracy as a constituent element of good governance; second, the meaning of democracy for economic development; and third, democratic governance as a bedrock for the stability and legitimacy of the national and international political system. The principal argument therefore is that democracy in all its forms is essential for stable and legitimate polity. A brief overview of the concept of democracy may be in order.

The origin of the concept and practice of democracy is a subject of controversy among theorists and practitioners of the social sciences. Some argue that it is inherent to the nature of human beings, while others contend that it requires conscious effort by a group of people to forge a democratic ethic.[128] Although processes such as elections are essential, that, *simpliciter,* would not guarantee the durability of the legitimacy so conferred. It is for that reason that the tangible manifestations of the benefits of the processes, such as equitable economic development, would be necessary. This is because dire economic conditions can create conditions conducive for the emergence of a populist autocrat.[129] The position taken here therefore is a median one. Processes and economic development must move in tandem. The pursuit of democracy and its progress must be based on processes such as elections, institutions, dialogue as well as the promotion and realization of improvement in the

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128. *See* GEOFF HODGSON, THE DEMOCRATIC ECONOMY: A NEW LOOK AT PLANNING, MARKETS, AND POWER 17 (1984); *see also* CLARK NEHER & ROSS MARLAY, DEMOCRACY AND DEVELOPMENT IN SOUTH EAST ASIA: THE WINDS OF CHANGE xii-xiv, 1-10 (1995).

129. Niskannen argued that a government that served only the interests of the majority is neiher desirable nor stable. *See* HODGSON, *supra* note 128, at 35.

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material conditions of the people.[130] The two in essence amount to participation.[131] In other words, the binary positions that see either as antithetic to the other or tangential, is devalued.[132] The most important segment in the democratic process is the holding of free and fair elections for local, regional and national leadership at predetermined periods.[133] Though "town hall" assemblies can be organized and may be useful as fora for deliberations on matters affecting a community,[134] the growing size and cosmopolitan nature of human societies in the twentieth century and beyond, makes "town hall" or direct democracy unrealistic and unsatisfactory.[135] The election of representatives therefore remains the more viable means of conferring legitimacy on the rulers and also enabling some participation of the people in their governance.[136] The comparative merits of the exact form of the election process, for example proportional representation, first past the post, is not the primary concern here.[137] What is important is that people have a meaningful participation in the election of their representatives. In that case, they may be able to elect representatives who reflect their ideals and concerns.[138] This requires the removal of tangible and latent obstacles to the emergence of candidates. Requirements based on wealth, ethnicity, education, sex, religion and

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130. *See generally* JOHN D. MAY, OF THE CONDITIONS AND MEASURE OF DEMOCRACY 1-27; APTER, *supra* note 71, at 7.

131. *See id.*

132. Rhoda Howard outlines the argument proffered by some dictators for economic development before democracy. *See* Trebilcock, *supra* note 24, at 20-25 (for a synthesis of the debate).

133. *See* HELD, *supra* note 26, at 166.

134. This is what Max Weber described as "direct democracy." *See* ROTH, *supra* note 28, at LXXXV; *see also* KOFI A. BUSIA, THE POSITION OF THE CHIEF IN MODERN ASHANTI POLITICAL SYSTEM XII(1958); JOHN MCALISTER JR, SOUTH EAST ASIA: THE POLITICS OF NATIONAL INTEGRATION 252 (1975). McAlister asserts that majority of South-East Asians lived in villages. *See id.* This would not be the case after three decades.

135. *See* MCALISTER, *supra* note 134, at 252, describing it as inherently unstable.

136. *See* Nancy Bermeo, *Civil Society, Good Government and Neo-Liberal Reforms*, *in* GOOD GOVERNMENT AND LAW 83-4 (Julio Faundez ed. 1997); *see also* HELD, *infra* note 174, at 166.

137. *See generally* ALISTAIR COLE & PETER CAMPBELL, FRENCH ELECTORAL SYSTEMS AND ELECTIONS SINCE 1789 (1989) (For a discussion of electoral systems). EUROPEAN ELECTORAL SYSTEMS HANDBOOK (Geoffrey Hand, et al., eds. 1979).

138. The hypothesis that politicians reflect the concerns of their constituents is a controversial one. *See generally* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957). In this instance, it might be difficult for a local representative not to respond to the concerns of the community affected by a resource project. *See id.* Admittedly, a national leader has to respond to diverse interests and in the circumstances, may "sacrifice" interests that fetch lower political gains for those with higher political premium. *See id.* The issue of political self-interest environmental protection has been raised in the U.S. *See* Michael Lyons, *Political Self-Interest and U.S. Environmental Policy*, 39 NATURAL RESOURCES J. 271, 271-94 (1999).

publicity can frustrate the emergence of competent candidates and thereby limit the options available to the electorate.

Although the election of candidates based on their own merit has been experimented within different countries,[139] the party mechanism with ongoing innovations remains the most realistic, effective and inevitable institution for the election of governors. Electors would invariably line up behind a candidate with the most favorable program and if that pattern persists for sometime, groups coalesce around the candidates and their programs and partisan politics is the unavoidable result. Admittedly, the elected representative may deviate from the platform on which he or she was elected or may be "forced" to go with the party line or constrained by special interest even where that position is unacceptable or inimical to the interests of his or her constituency. This can affect the faith of the electors in their representative and the viability of the entire system. Some consolence can be taken in the fact that future election dates are certain and there is the opportunity to change the representative at the next election or provisions exist for recalling him or her.

It means that the electorate must be alert to its interests and the imperative of democratic ethos. They must be very well informed and develop reasonably independent thought processes.[140] To facilitate this, mass media facilities must be available in a fair manner to all candidates as well as to opinion leaders of communities. This would help promote a two-way communication between candidates and electorate. The high-point of the communication process must be located within the specific social and cultural context of the people concerned.[141] It is also important for the electorate to realize that their representative is one among many and also the national leader is to respond to the needs of all. This consciousness would moderate the expectations of the voters and preserve the legitimacy and stability of the system.

The moderation of expectations would largely depend on an understanding of economic development and its relationship to social and political issues. Indeed, the legitimacy conferred on the government by the electoral processes would not be firm or durable if the economic and social

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139. District or local level elections in Ghana are required under the Constitution to be held on a no-party basis. *See* GHANA CONST. art. 248 (1992), *in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz eds.; Oceana Pubs. Vol. VII 1996). Uganda under Yoweri Museveni operates "No Party" system of elections and government. *See* Quentin Peel, *Seeds of Stability*, FIN. TIMES, Jan. 27, 1997, at 16. In Ghana, the Rawlings regime which preferred the no party elections is accused of operating a defacto party system at the local level.

140. APTER, *supra* note 71, at 30.

141. In certain communities, there are specified dates when activities such as farming, fishing or mining are not permitted. In other words, those dates may be considered vacation periods and that may have to be taken into account in mass education programs.

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aspirations of the people are ignored. In countries like Ghana, Sierra Leone, Nigeria and Chile, democratically elected governments were overthrown by military adventurists when it was thought that the elected governments were not dealing with economic problems with alacrity.[142] Beyond the subversion of the government at the national level, inadequate attention to economic needs generally and the particular needs of a region or community can create fertile grounds for secessionist tendencies.[143] Economic demands have been cited in the secessionist drives in the Niger Delta-Nigeria, Aceh-Indonesia, and Southern Sudan.[144]

It has been argued that liberal democratic ethos like freedom of speech, press, elections, and political pluralism, are irrelevant to a person who has no food, clothing and shelter, or that such freedoms must come in the wake of development.[145] In the words of a former Ghanaian military ruler "one man one vote is meaningless unless accompanied by one man one bread."[146] Although it can be argued that these leaders used the "full belly thesis" to perpetuate their hold on power, the essence of their argument is that their legitimate hold on to power is derived from or predicated upon a continuing delivery of economic development. The economic "miracle" achieved by South East Asian countries under autocratic or totalitarian regimes may lend some credence to the forgoing argument. Besides, the correlation between democracy and development is not emphatically positive.[147] Two points must, however, be made. First, the absence of democracy in most African countries has not produced development. In fact, indicia of development such as GDP growth rate, per capita income, energy and steel consumption, showed negative values in African

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142. *See generally* ANTON BEBLER, MILITARY RULE IN AFRICA: DAHOMEY, GHANA, SIERRA LEONE AND MALI (1973).

143. *See* Susan Rose-Ackerman, *Corruption and Democracy*, 90 AM. SOC'Y INT'L LAW PROCEEDINGS 219 (1996); HODGSON, *supra* note 128, at 35. Sometimes, discontent may not manifest in absolute secessionist revolt but internecine violence that would undermine long term projects. *See e.g.*, Sani Siddiq, *WARRI Warriors Target Crucial Gas Project*, THE GHANAIAN CHRONICLE (last modified Mar. 26, 2000) <http://www.ghanaian-chronicle.com/200324/page2.html>.

144. *See* Barbara Slavin, *3 Hot Spots of the New Millennium*, USA TODAY, Nov. 2, 1999, at 11A.

145. *See* JULIUS NYERERE, FREEDOM AND DEVELOPMENT 340, 370-73 (1973).

146. Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467, 467 (1983). In his first broadcast after usurping power from the constitutionally elected government in Ghana on 31 December 1981, Captain Jerry Rawlings described the constitution as "paper guarantee for abstract liberties." EMMANUEL DOE ZIORKLUI, GHANA: NKRUMAH TO RAWLINGS 525 (1993).

147. It has been argued that most rich countries are also democratic and most poor countries are not. *See* Trebilcock, *supra* note 24, at 20. *See generally* G. W. SCULLY, CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH (1992); MAY, *supra* note 130, at 1-27.

countries under dictatorship.[148] Furthermore, such countries showed evidence of blatant corruption, cruelty, inertia and mismanagement.[149] For example, Houphoeit Boigyny of Ivory Coast built a multi-billion dollar cathedral in an area that is hardly accessible, Mobutu Seseko was reputed to have kept billions of dollars of his country's money in private European and American Banks,the same goes for the Duvaliers of Haiti.[150] In other words, democracy is, at least necessary to constrain corruption and policy errors.[151] This is because the competition between political parties for power gives an incentive for reasonably ethical conduct and also provides the ground for debate and the exploration of ideas.[152] Secondly, even in countries which achieved significant levels of economic development under totalitarian rule, the call for democratic norms get louder by the day and the response from the rulers is passive at best.[153] Some such countries witnessed violent overthrow of their regimes.[154] It means then that democratic practice is still necessary as a legitimating factor even when economic development appeared to have done so.

Sometimes, perception of threats to the stability and legitimacy of a government or state in the nature of ethnic allegiances or secessionist maneuvers are cited as the reason for the need to postpone the enjoyment of freedoms such as association, speech, religion and press, that under-gird democracy.[155] The post-development democracy argument is that in many developing countries, national allegiance or identification is subordinate to ethnic or regional identity.[156] For that reason, the grant of democratic

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148. *See* SCULLY, *supra* note 147. Scully found, in his empirical study of 115 economies between 1960 and 1980, that societies with high levels of political, civil and economic liberty grew at three times the rate of societies in which such rights were constrained. *See id.*

149. *See* Clark, *supra* note 75, at 299-306.

150. *See id.* Countries with a long history of liberal democracy have also been victims of corruption and mismanagement by their governments. For example, Brian Mulroney of Canada was alleged to have stashed public money in private bank accounts; *see id.* STEVIE CAMERON, ON THE TAKE: CRIME GREED AND CORRUPTION IN THE MULRONEY YEARS (1994).

151. *See* Rose-Ackerman, *supra* note 143, at 83-107; HODGSON, *supra* note 128, at 36.

152. *See generally* A. POSONBY, DEMOCRACY AND DIPLOMACY 1, 29 & 116 (1915).

153. *See* CLARK NEHER, DEMOCRACY AND DEVELOPMENT IN SOUTHEAST ASIA: THE WINDS OF CHANGE (1996).

154. *See generally* N.T. UPHOFF & W.F. LICHMAN, THE POLITICAL ECONOMY OF DEVELOPMENT (1972); Banuri, *supra* note 77, at 48. The recent political upheavals in Indonesia and Malaysia support this point.

155. For a discussion of the democracy-secession dilemma, *see* Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1 (1998).

156. *See* JEAN-FRANCOIS BAYART, THE STATE IN AFRICA: THE POLITICS OF THE BELLY 41-59 (1993). Industrialized countries like the United Kingdom and Canada also face secessionist problems. *See e.g.*, Rhoda Howard, *The National Question in Canada: Quebec*, 13 HUM. RTS. Q.

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freedoms may exacerbate ethnic divisions and possibly sound the death knell of the nation state.[157] The reconstruction of the colonial and post-colonial state therefore required holding democracy in abeyance. Though there has been cases where countries voted themselves into separation,[158] imposition of totalitarianism is not necessarily known to have promoted durable harmonious ethnic relations. In many cases, it can be said to have postponed open ethnic hostility.[159] A stability and legitimacy predicated upon dictatorship is ephemeral, tenuous, and illusory.[160]

One fairly incontrovertible means of ensuring the stability and legitimacy of the state is the promotion of equitable or balanced development of the entire country.[161] Studies have shown that although democracy does not show an emphatic positive correlation to development, equitable development is more visible in countries with a history of democratic governance.[162] It can be reasoned therefore, that the more sustainable means of building a united and cohesive nation state is through the employment of democracy as an instrument. The contribution or efficacy of democracy in this regard is in two main forms: one by the election of candidates whose programs respond to or strike a chord with the aspirations of the people. Second, through such participation, the people may be socialized into accepting the reasons for a gradualist approach that may defer the needs or wishes of a constituency in the interest of a national priority.[163] For example, the extension of electric

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412, 412-19 (1991). In November 1995, just under 50% of the people in the province of Quebec voted to secede from Canada. *See id.*

157. *See* BAYART, *supra* note 156. *See e.g.*, Howard, *supra* note 156.

158. For example the Czech and Slovak Republics opted for separation after the fall of communism.

159. The cases of the former Czechoslovakia, U.S.S.R, Yugoslavia, Ethiopia, Indonesia and Rwanda illustrate this point. *See generally* Slavin, *supra* note 144.

160. Perhaps this is what U.S. President Woodrow Wilson meant when he declared that "no peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed . . . ." Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 2, 2 (1976).

161. *See* APTER, *supra* note 71, at 33 (noting that economic failure and inequity are fertile grounds for revolution).

162. *See* GEORG SORENSEN, DEMOCRACY, DICTATORSHIP AND DEVELOPMENT 164-91 (1991).

163. *See* HODGSON *supra* note 128, at 31-32. Stressing the educative value of democratic debate. The second democratic elections in South Africa illustrate this point where the majority of the people, including the unemployed and economically deprived, accepted the ANC government's explanation that the eradication of poverty and its consequences would take time. *See Mbeki's South Africa*, THE ECONOMIST, May 29, 1999; *see also Africa's Democratic Joys and Tribulations*, THE ECONOMIST, June 5, 1999. In environmental protection, basic freedoms such as speech, press and association would facilitate the discussion of the environmental impact of projects. The constraining of such discussion could sow the seeds of instability for the project. The Gabcikovo-

power from the main grid to some remote parts of Ghana had to be suspended because of low water level in the hydro-electric dam.[164] The credibility of that priority setting would be enhanced considerably by the participation of the people, at least, in electing those who set the priority. On the other hand, if the needs of an identifiable and "significant " section of the country are deferred indefinitely, despondency, and apathy may result and ultimately disenchantment and secessionist thinking.[165] In centrally planned economies, such needs may be responded to in an overall development plan. In market economies, the state must at the very minimum, facilitate the development of *laissez faire* basic infrastructure including energy, transport, and education which have significant multiplier effect on overall national development. Thus the existence of a democratic environment, without more, would also not guarantee the long term stability and equitable development of the state.

Another dimension of the democracy-development debate is its international or regional implications. The argument that democracies hardly go to war with each other is yet to be strongly challenged.[166] For the purposes of this work, however, our interest lies principally in the international economic implications of democratic governance. Since totalitarian regimes are inherently unsustainable in the long run, economic relations involving any such regime is likely to be tenuous and unpredictable. The East African Community flourished and progressed faster than the European Community in the 1960s and early 1970s,[167] but its progress was largely halted by the Idi Amin Military dictatorship in Uganda.[168] In West Africa, the removal of the democratic government under President Limann by the Rawlings military group in 1981 saw the withholding of crude oil supplies by Nigeria to Ghana.[169] Furthermore, the

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Nagymaros project is a classic example. *See* F. Nii Botchway, *The Gabcikovo-Nagymaros Case: A Step Forward for Environmental Considerations in the Joint Development of Trans-boundary Resources?*, 8 EUR. ENVTL. L. REV. 78, 78-79 (1999). Amartya Sen argues that famine and environmental disasters reflect institutional breakdown in accountability and feedback mechanisms. Amartya Sen, *Freedoms and Needs: An Argument for the Primacy of Political Rights, in* NEW REPUBLIC, Jan. 10, 1994 at, 31-38.

164. *See* A. BREW-HAMMOND, THE POWER SECTOR IN GHANA (Amer. Assoc. for the Advancement of Science 1994).

165. *See generally International Responses to Secessionist Conflicts*, 90 AM. SOC'Y OF INT'L LAW PROCEEDINGS 266, 296-318 (1996); *see also* Slavin, *supra* note 144.

166. *See* Pomerance, *supra* note 160; *see also* NEHER & MARLAY, *supra* note 153, at 1. The continued tension between Pakistan and India even under democratic governments seems to undermine this hypothesis.

167. *See* INGRID DETTER, THE EAST AFRICAN COMMUNITY AND THE COMMON MARKET (1970).

168. *See* NYERERE, *supra* note 145, at 370-733.

169. *See generally* KEVIN SHILLINGTON, GHANA AND THE RAWLINGS FACTOR (1992).

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proposed West African Pipeline project has stalled mainly due to the rule of dictators and consequent instability in the West African region.[170] The absence of clear, established and ascertainable governmental mechanism, procedures for changing governments, lack of faith in the rule of law and so on, makes it difficult to ascertain the legitimate authority to do business with. The conclusion ultimately is that, a holistic view of society engenders both democratic and economic methods of development. That in the end is what guarantees stability, participation, and legitimacy.

B. *Rule of Law*

Thus conferred, legitimacy through democracy must also be nurtured in the context of economic development and by respect for the rule of law.[171] The meaning of the doctrine of rule of law as an element of good governance and its operation or significance for economic development is the subject of the discussion in this section. The modern articulation of the concept is attributed to Dicey.[172] He postulated that the rule of law entails three crucial elements. These are; a) supremacy of the law and absence of arbitrariness, b) equality before the law, and c) constitutional law as part of the ordinary law of the land.[173] Since then, the exposition of the concept has largely revolved around subjecting the government and in particular the law-makers to the same laws as ordinary people. That is, the effectiveness of the law in restraining and where necessary punishing abuse of political power. Considering the historical context in which the concept was propounded, it is not surprising that its focus was political. Though some effort has been made since the 1960s to direct the concept to economic issues, it has largely remained a political imperative.[174] This part of the work re-examines the concept with the aim of giving it an economic development content.

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170. *See Resolve Pipeline Issues*, DAILY GRAPHIC, (visited Aug. 17, 1999) <http://www.graphic.com.gh/dgraphic/business/buseco.html>. For a discussion of some of the political issues in the region and its consequences for the energy industry, *see* Terry Hallmark, *Political Risks in West Africa: A Comparative Analysis*, *in* 11 OGTLR 399-403 (1998).

171. See the various conceptions of "rule of law" in GEOFFREY DE Q. WALKER, THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY (1988); *see also* O. HOOD PHILLIPS & PAUL JACKSON, CONSTITUTIONAL AND ADMINISTRATIVE LAW 33-38 (1987).

172. *See* A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION Part II (1958); WALKER *supra* note 171, at 19. But rule of law was long conceived and used before Dicey, PHILLIPS & JACKSON, *supra* note 171, at 33.

173. *See* DICEY, *supra* note 172.

174. Rule of law must also involve a primary concern with distributional questions and matters of social justice. *See* HELD, *supra* note 133, at 285.

One of the primary elements of rule of law is that all laws must be open and clear.[175] Clarity may be a matter of interpretation and degree, but secretive law would not enhance good governance since it can easily be abused by those who enact and apply it.[176] For law to be obeyed, it must be published and known to the general public particularly those who are to be guided or affected by it. The establishment of the stock exchange, for example, must be known, for it to mobilize the necessary interest and resources. Furthermore, the rules of participation on the market must leave no doubt as to the consequences of violation. If such rules are not clear and open, confidence in the stock market and its operation would be undermined. In addition, the publication of the law must be contextualised in the particular social economic circumstances. For instance, where multiple languages are used in a country, it might be necessary to translate or write the laws in all languages.

Closely related to the foregoing element is the categorical imperative of the prospectivity of laws. Although business decisions can be taken that have retrospective effect, for example the remuneration for employees, the prospect of such decisions are often anticipated at the initiation of the business or at the beginning of the particular business cycle. If that happens to be the case with law or a law "confirming" the business plan, the spirit of the principle is not compromised. Generally, however, business needs time to adapt to new obligations. Investment decisions are also made primarily on the basis of the law as it exists and not as it may be in the future. Where the government, for instance, insists on the location of energy project in any particular region in response to national priority demands, this must be made known to prospective independent power producers by way of laws that look into the future.

In addition, both the legal system and individual laws must be reasonably stable.[177] This point derives directly from the discussion on democracy as a means of attaining and sustaining stability in governance. If the legitimacy and stability of the governmental system is predicated on democracy, that in itself engenders hope for reasonable stability in laws. Uncertainty regarding the life of a regime discourages long-term business planning. In Ghana, for example, the Military junta that ruled from 1967

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175. The eight-point formulation by Joseph Raz is the primary guide here. *See* Joseph Raz, *The Rule of Law and Its Virtue*, 93 LAW Q. REV. 1, 1 (1977). For a discussion and critique of the Raz's formulation, *see* WALKER *supra* note 170, at 21-23. The primary formulation by Dicey and Raz has been revamped in broader contexts. *See e.g.*, RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION 4-5, 55-56 (1998).

176. In the case of *Merkur Island Shipping Corp. v. Laughton*, 2 AC 570 (1983), Lord Diplock said "absence of clarity is destructive of the rule of law."

177. Raz, *supra* note 175, at 199.

to 1969 pursued massive privatization of state owned enterprises. Two years later, another Military junta reversed the policy and passed laws requiring majority state interests in big business enterprises.[178] Apart from that, the government's annual budget often contains changes to the tax regime. Such frequent and unpredictable changes discourage long term business planning as well as blunt the effectiveness of the law itself.[179] Energy projects are generally long gestation requiring huge capital with associated high risks. Investors need broad national stability grounded in the rule of law.[180] Laws on taxes, wages, the environment, etc. need to be reasonably stable and predictable. This may not necessarily mean the perpetual freezing of the relevant law or restraint on Parliamentary sovereignty and supremacy, but broad consultative processes where basic freedoms as association, speech and competitive democratic practice exist. To sustain the long term stability of the legal regime without compromising the inviolability and stability of specific statutes, it would be necessary to have general and broad outlines of a principal legislation which make room for more detailed subsidiary legislation in the nature of legislative and executive instruments or orders.[181] The subsidiary legislation may be more suitable and convenient for the regulation of economic activity as it can be reasonably amended without necessarily affecting the stability of the principal legislation. The amendment can also be much more specifically done without necessarily opening up the entire legislation. It must be pointed out, however, that the process of amending subsidiary legislation may be less open depriving it of the publicity, debate and educative quality that accompany the main statute. At the same time, for the purposes of consistency and stability, the subsidiary legislation or order must not derogate from or be inconsistent with the principal law.

It has been postulated that an essential quality of the concept of rule of law is that laws must apply equally to everybody. This idea is inherent in the original political conception of rule of law.[182] It was aimed at preventing abuse of power by those who govern.[183] If applied literally in modern times, its benefit would be the maintenance of the status quo. Its

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178. *See* Amy Chua, *Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223, 223 (1995) (recounting similar practices in Asia and Latin America).

179. This may also implicate insufficient debate, consultation and feedback, improper design of implementing institutions and therefore erratic or improper implementation. *See* Trebilcock, *supra* note 24, at 40; *see also* WORLD BANK, GOVERNANCE AND DEVELOPMENT REPORT (1992).

180. *See* INTERNATIONAL COMPARISONS OF ELECTRICITY REGULATION 4 (eds. 1994).

181. *See* Raz, *supra* note 175, at 200.

182. *See* Walker, *supra* note 171, at 1-42.

183. Governments must be subject to the law like everybody else. So governments can be held to contracts they voluntarily entered into, as for example the construction of power stations. *See id.*

location in formalism assumes that everybody is substantively equal. The passage of laws to promote or support businesses that are vital for national security or progress may be seen as violative of the principle. To that extent, the principle is limited and anachronistic. There are many examples of laws dealing with specificities rather than general matters. Not only are such laws necessary but they may also be desirable to address the particular issue. In order to ameliorate the possible excesses of the review of the foregoing principles, the resort to principal and subsidiary legislation would be helpful.

Of course where disputes arise in the general application of the law or the consistency or otherwise of the principal law to the subsidiary law, the courts must be in a position to pronounce on the relative merits and legality of the issue. This implicates four imperatives. The courts must be competent, independent, and accessible and their judgements must be respected and enforced.[184] The competence of the courts principally relates to the judges being well trained and have access to up-to-date relevant material. The element of rule of law that proscribes expert tribunals is anachronistic in the context of the late twentieth and the twenty-first century development models which are largely technology driven.[185] Where necessary, specialized courts such as for tax, industrial disputes, rent and property rights should be established to speed up the resolution of such cases.[186] The process that is established for general judicial administration with judges trained for general legal practice may not be facilitative of specialized economic disputes that directly impact investment and development. Judges in general, however, must be willing to examine the law from multi-disciplinary perspectives. That would help locate the law, for example, in the centrality of development goals. The desirability of an independent judiciary goes without saying. Since the courts must have the last word on the legal merits of cases before them, it

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184. "In the long run, the absence of an independent, professionally competent, and well respected judiciary represents a serious deficiency in a country's social and economic capital and is likely to be a significant impediment to economic development." Trebilcock, *supra* note 24, at 43; D.C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); O. WILLIAMSON, THE INSTITUTIONS AND GOVERNANCE OF ECONOMIC DEVELOPMENT AND REFORM (UCLA-Berkeley Working Paper, 1994).

185. *See* PHILLIPS, *supra* note 171, at 38. For a critique of Dicey's abhorrence for administrative or specialized courts, see E.C.S Wade, *Introduction*, in DICEY, *supra* note 172, at CXXXV-CL.

186. This has been suggested for the Latin American situation. *See generally* William Ratliff & Edgardo Buscaglia, *Judicial Reform: Institutionalizing Change in the Americas*, *in* THE LAW AND ECONOMICS OF DEVELOPMENT, *supra* note 24, at 291. Edgardo Buscaglia & Pilar Domingo, *Impediments to Judicial Reform in Latin America*, *in* THE LAW AND ECONOMICS OF DEVELOPMENT, *supra* note 24, at 313.

is important that extra judicial influences be reasonably held in check.[187] The traditional means of guaranteeing the independence of the judiciary include methods of appointment, security of tenure, ways of determining their salaries and conditions of service.[188] Accessibility to the courts is crucial for the operation of rule of law. Courts with summary jurisdiction in relatively minor matters should exist in areas that are convenient to the ordinary person. It cannot be over-emphasized that high costs, tedious processes and long delays may effectively make the rule of law an illusion.[189]

Respect for court judgments would come from a combination of factors — competence, independence, fairness, etc. In general, courts cannot enforce or execute the judgments they render. They have to rely on the executive arm of the government to enforce their decisions. It is in this context that Dicey called for a separation between the Executive and the Judiciary. In the context of energy management, not only is the general judicial system necessary but the establishment of independent or quasi-independent institutions for regulating the industry has become a fairly common phenomenon.[190] Although many of these institutions may be associated with the Executive arm of government, they are given significant judicial or quasi-judicial functions. They, for example, have powers to determine tariff and related disputes, hear the merits of investment initiatives and conduct inquiries into competition issues.[191] In the performance of these functions, the regulatory body must be competent, independent, fair, and realistic. In other words, the trappings of an effective judiciary must attend the operations of the regulatory body.

Rule of law means the subjection of every facet of life to previously enacted laws, equally and fairly administered and effectively enforced. It is, however, unrealistic to expect law to cover every conceivable situation

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187. *See id.*

188. *See id.*; *see also* MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE: DELHI APPROVED STANDARDS, INT'L BAR ASSOC. (1982).

189. *See* Ratliff, *supra* note 186.

190. ASIAN DEVELOPMENT BANK, GOVERNANCE AND INFRASTRUCTURE DEVELOPMENT (1997).

191. *See* Gordon Mackerron & Isabel Boira-Segarra, *Regulation*, *in* BRITISH ELECTRICITY EXPERIMENT PRIVITASATION: THE RECORD, THE ISSUES, THE LESSONS, *supra* note 85, at 112; *see also* Utilities Act,(c 29) 2000 (England and Wales); Public Utilities Regulatory Commission Act, (Act 538), Section 29-31, 1997 (Ghana). For a classic example of quasi-judicial functions of Regulatory bodies, see Simon Holberton, *Regulator Rejects Electricity Users Pricing Scheme*, FIN. TIMES, March 12, 1997, at 9; Simon Holberton, *Northern Electric's Fate Hinges on Appeal Outcome*, FIN. TIMES, Dec. 23, 1996, at 1. More generally, see S.C. Littlechild, *New Developments in Electricity Regulation*, *in* MAJOR ISSUES IN REGULATION, 119 (M.E. Beesley ed. 1993); Sir Sydney Lipworth, *Utility Regulation and the Monopolies and Mergers Commission: Retrospect and Prospect*, *in* MAJOR ISSUES IN REGULATION 39 (M.E. Beesley ed. 1993).

or fact of life. That could give room for the extreme formalism that is blamed for totalitarianism which could subvert democracy itself. New situations arise that law has to catch up with. For example, technological advancements in information and communication systems, evolving methods of economic management, regional and international integration schemes, new systems of tax administration often tend to be ahead of law as it exists. At the same time, it is on the basis of the law as it exists that decisions are made. A grey area of law, and no law, or even in the application of law, has been identified, and that is discretion.

C. *Discretion*

Following from the discussion on rule of law, the analysis of discretion would be done in the context of executive policy, legislation and judicial decisions. In the broader framework of discretion as an element of good governance and also as an instrument of economic development generally, and energy management specifically, discretion can be described as the space between or within rules.[192] It is a recognition of the limited capacity of rules to deal with every conceivable situation.[193] There has been two extreme positions regarding discretion both as an element of good governance and as an ingredient of development.[194] The first perspective sees discretion as an aberration on rule and a springboard for arbitrariness, corruption and unpredictability.[195] The second view sees discretion as both inevitable in a body polity and an efficient and realistic mechanism for development.[196] These two perspectives largely underpin the discussion of discretion in this section of the work. The main argument falls in tandem with the latter view on discretion. It goes further to evaluate the means of controlling or ameliorating the excesses of discretionary power. The focus here would be more on discretion for administrative practice and less on judicial discretion.[197]

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192. Craig describes discretion in terms of situations where there is power to make choices between courses of action or where the end is specified but a choice exists as to how it should be achieved. *See* CRAIG, *supra* note 41, at 384. Craig also discusses the interface between discretion and rules. *Id.* at 396.

193. *See id.* describing purely rule-based government as an ideal which could never be attained in any country.

194. *See e.g.*, PHILLIPS & JACKSON, *supra* note 171, at 37.

195. *See* JEFFREY JOWELL, LAW AND BEAURACRACY 11 (1975) (giving an overview of this debate); *see also* D.J. GALLIGAN, DISCRETIONARY POWERS 177-83 (1986).

196. *See* CRAIG, *supra* note 41, at 396; *see also* KENNETH DAVIS, DISCRETIONARY JUSTICE (1969) (giving an insight into the debates).

197. With the exception of works such as DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (Kenneth Davis ed., 1976), most of the works on discretion looked at it from the perspective of the judiciary.

Provision for discretion can be made explicitly in a statute, rule or order. It can also be implied or read into statute or administrative or business practice. Dworkin has propounded three types of discretionary power:[198] first, weak discretion, where standards exist but there is room for choice;[199] second, another weak discretion, where an official has the final authority and final say on the matter;[200] and third, strong discretion, where no standards are prescribed for the official to follow.[201] Most of the critiques of discretionary power have to do with the last two senses of Dworkian discretion.

The merits of discretion, however, lie beyond its characterization, its inevitability or realism. In the first place, discretion responds to some of the shortcomings of rules. It must be pointed out, however, that the accommodation of discretion is not incompatible or subversive to the principle of rule of law.[202] After all, discretion is mainly provided for by rules. By far, the most important utility of discretion is its flexibility. The processes of making rules are often elaborate and time consuming, as is the process for changing them. Once promulgated, the rules take a long time to be amended or changed. Unless otherwise stated or implied, the rules themselves provide for strict application. In the circumstances, the all-time strict application of the law to all relevant situations is likely to be unjust, time-consuming and inefficient. To forestall this, the legislature provides for the exercise of discretion by the persons applying the law in the light of the particular facts before the decision-maker. For example, with the rapidly evolving models of infrastructure development such as Build Operate Transfer (BOT), Build Own Operate and Transfer (BOOT) and Build Own and Operate (BOO), it would be inefficient for the law to hold constant a particular form of contractual arrangement.

Closely related to the foregoing is the fact that discretion fills the vacuum where rules malfunction or work adversely as in cases where the consequences of the application of rule is patently inconsistent with the stated purposes of the legislature. Discretion also fills the gap left by legislators as well as situations where two or more rules contradict each other. It is impossible for the law-maker to anticipate and provide for all possible cases where the particular rule covers.[203] Besides, the very use of

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198. *See* DWORKIN, *supra* note 116, at 31-39, 68-71.

199. *See id.*

200. *See id.*

201. *See id.*

202. Admittedly, benefits such as predictability bestowed by strict adherence to rule of law are somewhat tempered by unstructured discretion or discretion in the third sense stated by Dworkin. *See id.*

203. *See* A.A.M.F. Staatsen, *General Assistance in the Netherlands*, *in* DISCRETIONARY

language is susceptible to ambiguity or omissions.[204] Furthermore, with the multiplicity of laws on many varying but interlocking sectors of the national and international economy, the possibility of conflict between rules, for example environmental protection and investment promotion, is real. In such cases, the grant of discretion is a realistic means of dealing with the matter.

Notwithstanding its utility, if taken too far or granted carte blanche, discretion can be inimical to efficiency, stability and transparency. Discretion is prone to ad hoc decision-making. In that case, it does not lend itself to long term planning and certainty. It is in such circumstances that it runs counter to the doctrine of rule of law. Besides, it can confer too much power which could corrupt and be abused. Factors other than transparent scientific considerations could infect the decision-making process. For example, major decisions like the extension of electric power to a rural area could be made on political or sectional motivations instead of economic basis.[205] At the same time, collection of outstanding bills can be deferred in ways that could devalue the amount ultimately retrieved.

Fundamentally, the very basis of discretion may be questioned if it is seen as derogating from the tenets of democracy. As already noted, one of the principal reasons for democratic political system is the attainment of legitimacy and stability. That legitimacy conferred by the election of legislators would be undermined if the connection between the persons exercising the discretion, and the exercise of the discretion itself, is viewed as tenuous or weak. This is because there could be significant shifts in power bases between the elected representatives and un-elected bureaucrats by virtue of discretionary power. The issue then is how much of discretionary power is sufficient. The answer lies in an admixture of rules and discretion with major emphasis on rules.

Beyond emphasis on rules, discretion can be controlled in a number of ways. Three main means of restraining discretion have been identified as Confining, Structuring, and Checking.[206] Discretion, to be effective and

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JUSTICE IN EUROPE AND AMERICA, *supra* note 197, at 139.

204. *See* Karl Meesen, *The Application of the Antitrust Rules of the EEC Treaty by the Commission of the EC, in* DISCRETIONARY JUSTICE IN EUROPE AND AMERICA, *supra* note 197, at 79-80, outlining some words in EC legislation that are suggestive of discretion.

205. This happened in Kenya and the Ivory Coast. *See* F. Nii Botchway, *The Role of the State and Governance in Energy Resource Management: Comparative Antecedents and Current Trends,* 21 U. PA. J. INT'L ECON. L. 781, 781 (Winter 2000). A similar situation was averted when the UK government withdrew its insistence on locating a well on its half of the Frigg gas field on political grounds. *See* Ian Townsend Gault, *Offshore Petroleum Exploration, in* PETROLEUM INVESTMENT POLICIES IN DEVELOPING COUNTRIES 147 (Nicky Beredjick & Thomas Walde eds., 1987).

206. *See* DAVIS, supra note 196. See application of the three methods in the European context in Meesen, *supra* note 204, at 81-90.

tolerable, must be confined within necessary bounds and those aspects of discretion that may not be necessary, pruned. First, this may be achieved by establishing standards and rules for the exercise of discretion.[207] Second, discretion can be structured by prescribing the processes for the exercise of discretion. These can be done by requiring reasons to be given, open and transparent policies, rules, findings, and resort to precedents.[208] And third, some of the excesses of discretion can be checked by a process of hierarchical supervision. The common structure for supervising discretion is by the court system or administrative tribunal. In other words, finality of discretionary power would not rest with the primary decision-maker.[209] The courts have established three main grounds for reviewing discretion.[210] These are the way in which the discretion has been exercised or non-exercise of discretion, factors that were considered or implicated in the discretion, and whether the exercise of the discretion is reasonable.[211]

Discretion can be further managed by a variety of mechanisms. These include the power of appointment of the decision-maker. Generally, people who are expected to reason in a certain way or in a manner that the person appointing approves of, are appointed to positions where they have to exercise discretion.[212] Direct or indirect pressure can be brought to bear on the decision-maker as for example budgetary or disciplinary controls. Procedural requirements such as the type of evidence to be presented or relied upon and the manner of publishing the decision can fetter discretion. Social processes can also affect discretion significantly. The training of lawyers, organizational sub-culture, inter-organizational coordination and the possibility of criticisms of decisions, can all direct the manner of exercising discretion.[213]

The outlined means of restraining the excesses of discretionary power should make its working more acceptable without constraining the efficiency of the operations of the energy sector. Discretion is visible and somewhat necessary at varying junctures of energy resource development

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207. *See id.*

208. *See id.*

209. *See id.*

210. For an exhaustive and recent analysis of these grounds, see P.P. CRAIG, ADMINISTRATIVE LAW 579-654 (4th ed. 1999).

211. *See* CRAIG, *supra* note 41, at 384; *see also* MARTIN LOUGHLIN, LOCAL GOVERNMENT IN MODERN STATE 70-80 (1986).

212. This is very common in appointments to the judiciary. There are rare examples where the appointee did not exercise the discretion in the direction expected by the person who appointed him or her. *See* Carl Schneider, *Discretion and Rules: A Lawyer's View, in* THE USES OF DISCRETION 79-80 (Keith Hawkins ed., 1992).

213. *See* HAWKINS, *id.* at 5.

and management. The fundamental question of domestic generation of power as against buying from another country, or more commonly, the determination of the source to be tapped for the energy, whether from hydro, gas, geothermal, nuclear or solar, though grounded in engineering and technical circumstances, also invites discretionary tendencies. The exercise of that discretion may be influenced by not only economic and technical considerations but also by political motivations. For example, the first assessment of the Volta River in Ghana for hydro-electric energy resulted in a determination by the colonial government that it was not feasible.[214] About a decade later, the Nkrumah independence government reassessed the project and determined it to be viable and feasible. Similarly, the British government initially insisted on having, at least, a well drilled and a rig located on its side of the North Sea energy field which it shares with Norway, for largely political reasons, though it was technically unnecessary.[215] The location of the plant, or of the major part of the project, is therefore another point where discretion is exercised. Thirdly, determination of the priority of access to energy resources though significantly based on economic and technical considerations is also a discretionary exercise. For example, Akosombo township was the first to receive electricity from the Volta hydro electric project and to date enjoys uninterrupted power supply even when the rest of Ghana is having power rations, mainly because it bore the environmental and social brunt of the construction of the dam and its maintenance. Similarly, the decision to accord priority of power supply to Togo, Benin, Burkina Faso and the Volta Aluminum Company is both an economic as well as political decision with patent discretionary flavor. Finally, the formula for determining the tariffs for electricity is not without discretionary elements. Three methods can be used in power tariff determination: efficiency (RPI-X) method, rate of return, and marginal costs plus fixed operating costs.[216] The third method may lead to comparatively higher rates.[217] In economies where consumption surplus is almost non-existent, reliance on that formula could result in low patronage of the power services and/or political tensions. Such countries therefore tend to rely on the short run marginal cost formula. This may prolong the recovery of the initial investment and consequently unattractive to private investors in energy. The choice is therefore technical, economic, as well as a political and social one with far

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214. *See generally* JAMES MOXON, VOLTA: GREATEST MAN MADE LAKE (1984).

215. *See* Gault, *supra* note 205.

216. *See* CHARLES J. GICCHETTI & WILLIAM GILLEN, THE MARGINAL COST AND PRICING OF ELECTRICITY (1977); Mackerron & Boira-Segarra, *supra* note 191, at 101.

217. *See* GICCHETTI & GILLEN, *supra* note 216; *see* Mackerron & Boira-Segarra, *supra* note 191, at 101.

reaching ramifications. The legitimacy of making choices as exercise of discretion can be enhanced by the involvement of the stakeholders in the subject matter. One way of accessing their participation is by decentralizing the structures of operation.

D. *Decentralization*

The discussion of discretion and its practical exercise in itself implies or assumes the delegation or decentralization of authority and responsibility.[218] This may manifest in a variety of contexts. In the light of the instant work, using governance as a framework for analyzing energy resource management, we would examine delegation or decentralization from two primary perspectives. These are decentralization as a conceptual element of governance and decentralization as a possible mechanism for efficient and equitable energy resource development. First, a brief of two viewpoints on decentralization.

In the contemporary discourse on decentralization, two main strands are outstanding. These are the neo-liberal or mainstream economic approach, and a political economy approach.[219] The former commences its conception of decentralization with a search for the form of government that would attain the most equitable distribution of income, the maintenance of stable economy and the efficient allocation of resources.[220] To that end, they first make the case for centralization on the basis of its stabilizing function, for example in monetary policy, its co-ordinative and standardizing benefits. Decentralization is permissible to the extent that it reduces costs, promotes or facilitates optimum production and does not subvert the supra structural arrangement for stability and predictability. The political economy school's view of decentralization appears to be more broad-based. The school examines decentralization not from merely a narrow economic perspective, but also takes account of its political implications.[221] Decentralization is seen as a means of allocating political and economic power to central and local government and institutions.[222]

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218. LOUGHLIN, *supra* note 211, at 3.

219. *See* RATHIN ROY, ON THE THEORY OF DECENTRALIZATION: A CRITIQUE OF MAINSTREAM ECONOMICS AND TOWARDS AN ALTERNATIVE POLITICAL ECONOMY APPROACH 1-4 (SOAS, Dept. of Economics, Working Paper Series No. 69). Others classify it in terms of tradition, function, and autonomy. See LOUGHLIN, *supra* note 211, at 1-4.

220. *See* ROY, *supra* note 219, at 1-4.

221. *See id.*

222. This is especially so in modern complicated governance. *See* LOUGHLIN, *supra* note 211, at 1. The reasons or goals of decentralization include diffusion of political power including the raising of political awareness, distribution, improvement and accountability in public services. *See* Robin Hambleton & Paul Hoggett, *Decentralization: Theses and Issues*, *in* THE POLITICS OF

Specific issues, for instance, local revenue mobilization in the form of taxes could be ceded to the local political base. There is a recognition by both schools of the possible and often real conflicts and tensions between the powers and functions of the central government and those of the local government.[223] The settlement of these tensions in societies that are economically, politically, and socially diverse, is at best a continuum that defies universal solution.[224]

Notwithstanding this recognition, the two schools on decentralization fail in other major respects. First, they do not allocate sufficient consideration to decentralization as a means of countervailing political and economic corruption which largely results from absolutism. Absolutism is often a feature of centralization and manifests in the form of dictatorship, economic imbalance and ultimately political and economic instability. As already noted, one reason for this is that dictatorship may produce growth but hardly meaningful development. In that regard, with the limitation on debate and other freedoms, local peculiarities may be unaddressed and therefore suppression becomes an important tool of short-term stability. Decentralization in the form of local autonomy and power sharing could work as a counter weight to central absolutism and ensure the long-term stability of the state.[225] Additionally, decentralization can facilitate accountability from both central and local leaderships.

Secondly, the economic and political economy approaches to decentralization are conspicuously silent on the role of law in the decentralization arrangements.[226] Admittedly, most of the theorists come to the subject from non-law background and their objective also appears less law focused. If they did otherwise, they would have realized that the first step in the decentralization process is a fundamental rearrangement of the existing constitutional order.[227] This is what is described in some circles as devolution- the legal process of shifting responsibilities and functions from the center to the periphery.[228] Furthermore, the operation

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DECENTRALISATION: THEORY AND PRACTICE OF A RADICAL LOCAL GOVERNMENT INITIATIVE 5 (Robin Hambleton & Paul Hoggett eds., 1984).

223. This is the autonomy issue that Loughlin pursues. *See* LOUGHLIN, *supra* note 211, at 70-80.

224. The problems in Northern Ireland (UK), Quebec (Canada), Aceh (Indonesia) and Niger Delta (Nigeria) illustrate the complex and diverse nature of the circumstances that may under-gird decentralization.

225. *See* LOUGHLIN, *supra* note 211, at 1.

226. *See id.*, at 2-4; *see also* James Paul & Clarence Dias, *State-Managed Development: A Legal Critique*, *in* LAW AND DEVELOPEMENT, *supra* note 32, at 279-302.

227. Loughlin notes the fact that local government or decentralized units are statutory bodies and therefore come within the purview of judicial review. *See* LOUGHLIN, *supra* note 211, at 2.

228. *See generally* J.P. MACKINTOSH, THE DEVOLUTION OF POWER (1968); GORDON BROWN

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of the decentralized mechanisms must be firmly grounded in law. This would engender the cultivation and realization of all the benefits of rule of law. In sum, the reasons for decentralization are political legitimacy through participation, sensitivity to local peculiarities and efficiency.

A common denominator of all democratic systems of government is participation by the governed in the appointment and removal of their governors. This can be argued to be insufficient for the continuing reconciliation or harmonization of diverse interests. Structures — variously referred to as councils, boroughs, counties, cantons, wards etc. — are therefore created as fora for the continuing engagement of both local and national politics. These structures may serve as channels for a two-way communication between the governed and governors. Secondly, it can help check abuse of power by the central government by serving as both point for organizing and as buffer against the weight of government. Thirdly, the local structures would help mobilize opinion and resources for the community's development.

Closely related to the foregoing, the establishment of structures for decentralized governance helps sensitize the central government to local or regional peculiarities. In other words, local problems may be addressed by the community and central government in ways that are not inconsistent with the aspirations of the people. The needs of people in a country can vary widely. For instance, in Mexico, ninety percent of the population in urban areas have access to potable water, but only forty-nine percent of rural dwellers have clean water.[229] Industries like electricity can be a response to local demands by either an extension of existing grid or by the construction of a facility geared towards the circumstances of the region or community. It is situations like these that result in multiple sources of electricity in one country.

Decentralization of electricity services can come about either by autonomous power utilities establishing in outlying areas of the country, or by major, often monopolistic utilities establishing branches in areas outside the big cities. It is not clear which of the two systems is more efficient in terms of profitability, stability or security of supply and accessibility. The merit of a major utility establishing regional branches lie in the comfort of the existence of reserve capacity, established national or international reputation and possibility of cross subsidies to enhance price

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& H.M. DRUCKER, THE POLITICS OF NATIONALISM AND DEVOLUTION (1980).

229. *See* Jose Esteban Castro, *Decentralization and Modernization in Mexico: The Management of Water Services*, 35 NAT. RESOURCES J. 466-67 (1995). High on the priority of needs of the rural communities in Ghana are electric power, piped water, education facilities and industries. These are remarkably different from those of the urban areas which include telephones, traffic decongestion, and jobs.

accessibility in less economically prosperous regions. On the other hand, its size may preclude detail and regular attention to local peculiarities. Autonomous utility units may also have the advantage of fostering a sense of community ownership and sensitivity to local needs. The concern, however, is the possibility of local utility units becoming loci for local political power play. This was obtained in France prior to nationalization in 1946, and the determination to prevent a repetition resulted in a horizontal integration of EDF and Gaz de France for the purposes of power distribution.[230] Whatever the case, it is crucial that national efforts be made towards universal accessibility to electricity services.[231] These efforts must have legitimacy not only in the political process, but also consolidated in the national legal ethic, constitutionally or by means of legislation. That, in the end would manifest a realization of the good governance ideal of political and economic participation through law.

VI. CONCLUSION

This article discussed governance mainly at a theoretical level. It established that the idea of good governance is not new to the last decade of the twentieth century nor attributable to the World Bank and other development institutions. What constitutes the ingredients of good governance — elected government, effective bureaucracy, rule of law, discretion, decentralization — were very palpable in Weberian work and the work of the Law and Development, or Modernization movements. Notwithstanding that finding, important differences between the "two phases" of good governance were noted. This work also attempted to limit what should be the elements of the contemporary good governance discourse. The "elevation" of good governance to the position of a principle not only legitimizes its status as an inexorable and self-evident truth or standard but also grounds the emanation of constituent elements to concretize it. The elements considered important include competitive democracy, the rule of law, effective bureaucracy, discretion and decentralization.

Democratic governance allows for the election of representatives who may reflect the concerns of the particular electorate. In that case, a

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230. *See* EUGENE CROSS, ELECTRIC UTILITY REGULATION IN THE EUROPEAN UNION 39-42 (1996); ROBERT L. FROST, ALTERNATING CURRENTS: NATIONALISED POWER IN FRANCE 1946-1970, at 79-80 (1991).

231. This can be, as in the case of Malaysia, by means of encouraging private utility interests to locate in outlying or otherwise deprived areas, or, as in the case of Ghana, by encouraging the national power utility to operate or establish branches in hitherto deprived areas. *See e.g. Japan Will NOT Give Loans to Ghana under HIPC,* (last modified Mar. 27, 2001) <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=14362>.

community which is uniquely impacted by an energy project or which reckons that benefits they receive from the project is disproportionate to its location and contribution may have avenues for expression and redress. At the same time, they could also be socialized into accepting the practical realities of the national economy and the functional imperatives of the project. This would help strengthen the stability and legitimacy of the state and government without sacrificing broad equitable ends. Democratic governance would be underpinned by the rule of law, which would ensure stability of the relations that impact on an energy project. Although, the concept of rule of law requires the "codification" of the law, it does not preclude discretion vested in the governing or administrative authorities. In the energy industry, discretion is necessary for the choice of the source to tap the energy from, the determination of the corporate vehicle or method to exploit the resources and crucially, the regulatory trajectories of the industry as for example the determination of the method for regulating tariffs. Furthermore, administrative or governmental discretion must be subject to review by an independent judiciary. All these, would undoubtedly, be facilitated by an effective, and for the particular purposes of the energy industry, technically proficient, and independent bureaucracy.