

LAW, GOVERNANCE AND THE CHALLENGES FOR DEVELOPMENT

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Abstract

A definition of law for the purpose of this discourse can be adopted as an instrument for the maintenance of order, a means to ensure good governance and a tool for the purpose of social engineering within a society; the maintenance of order in this definition is intended to include economic order as an inalienable concept in the consideration of development

Certain concepts jump right out for attention on governance: government, the citizens, 'involvement of the citizens in the decision making process', response on government policies and decision making, faith and belief in the ability and willingness of government to act in the public interest, fiscal responsibility of government on the finance and other resources of the state, enforceable and justiceable right of access to information by the citizens, a higher degree of transparency and accountability in the public process and in 'the manner in which the business of the state are managed'.

The challenges for development would include stretching the elasticity of governance on intellectualism, inclusion of quality and proven technocrats, robust but not necessarily big government, taking on of the services of academics and technocrats as office employees for legislators, national and state, as think-tank operators on legal research, comparative policy reasoning and position taking on core development issues affecting society.

Introduction

The inability of law to fit into a one-size-fit-all definition has proven to be a good thing in the light of social dynamism, economic challenges and the quest for development else it would have been an easy thing for law to be straddled out of the considerations involved in the development of society; societal development being driven by the dynamism and idiosyncrasies of both the citizens and the institution of government.

A definition of law for the purpose of this discourse can be adopted as an instrument for the maintenance of order, a means to ensure good governance and a tool for the purpose of social engineering within a society; the maintenance of order in this definition is intended to include economic order as an inalienable concept in the consideration of development. The \$700bn bailout bill approved by the US Congress during the recent global recession was an instrument not only geared towards the economic revival of the US and global economies but was also one that carried burdens to ensure economic order against such and similar future occurrences. The redistribution of lands in Zimbabwe from the Whites to blacks by President Mugabe was a legal attempt to redefine the concept of social engineering through the economies of land redistribution to achieve the end of social and economic development.

Governance has equally not lent itself to a strict definition and attempts have only been made of its meaning. Wilkinson (2002) considers governance from the global angle as ‘a complex and dynamic process of interactive public decision making that constantly responds to the circumstances of an environment in continuous change’ⁱ.

Apahideanu (2006) proceeds on the footing that if governance is the way to exert power, good governance implies the ‘imperative consensus of those governed towards the objective and methods of governing, the responsibility of those governing, the efficiency of governing and the rights of the citizens to be informed in the first place of what concerns the use and distribution of the financial resources of government’ⁱⁱ.

Of these two views on governance, certain concepts jump right out for attention: government, the citizens, ‘involvement of the citizens in the decision making process’ⁱⁱⁱ, response on

government policies and decision making, faith and belief in the ability and willingness of government to act in the public interest, fiscal responsibility of government on the finance and other resources of the state, enforceable and justiceable right of access to information by the citizens, a higher degree of transparency and accountability in the public process and in ‘the manner in which the business of the state are managed’^{iv}.

However beautiful these definitions may be, global experience favours the view that governance can be better defined by state practice and the vagaries of state peculiarities are an argument in favour of this view. The conditionality prevalent in state A is different from those in state B hence a strict definition of what and how governance can be achieved would merely be academic. Nevertheless, certain cores are indispensable attributes of good governance. One, the fallible supposition that no idea prevails without the support of the majority makes democracy an indispensable attribute for the continuous existence of society in an orderly manner. Two, the idea that holds the actions of public officials under public microscope and demands an account of stewardship makes transparency and accountability a second twin-attribute. This twin-attribute condemns absolutism, autocracy, arbitrariness, corruption, nepotism, conflict of interest, misappropriation and other derivatives. Three, Dicey’s conception that brings all men, including public officials however high, under the law makes observance of the rule of law a third attribute. This would impose a moral obligation on a serving President to resign and bring a serving President before the interrogation of Congress and the Court, both of American origin, among a host of other examples. The fact of public service was not intended by Dicey and is not intended by the concept’s proponents and observers to endow a cloak of exemption on public officials which would only be a one-way street to the mockery of the concept of good governance. Four, Montesquieu’s separation of powers of the three arms of government and the checks and balances of each on each other makes the fourth attribute. The ability of an arm to scrutinize and check the activities of the other puts a peg on absolutism and puts a human face on the government’s development plan.

These and aforementioned concepts derived from the definitions of Wilkinson and Apahideanu form the basic core of good governance and are indispensable to the proper functioning of any government in an ordered society. In fact, Negrut V., et al adds that they represent a basis for democracy and respect of law^v. Hence, we may safely conclude that

although governance may not lend itself to a universal definition and acceptance of what it should be, regard being had to societal differences, the type of government practiced in a society, governmental culture within a state among others, yet the core values mentioned already define good governance obtainable in a democratic society with respect for the law.

Development has been viewed from different angles by writers on the subject; economic, social, political, educational, cultural, health, et al but in this discourse, development will be holistically considered. The development of a nation comprises the aggregate of all these areas with the end of advancement of all these sectors for the wellbeing of both the citizens within the nation and the nation as an entity.

Governance plays an important part in this foray either when approached from the angle of the organised private sector, the individual in his home or in his administrative capacity, international assistance and government departments and agencies. The private sector operates within a territory governed by an institution of governance, so also foreign companies. The target of international assistance is within a particular society with a functioning government and there would be no government department/agency without a government hence the indispensability of not just a government but a good one. The argument for a good government based on the core values of good governance is made on the strength of the fact that it is necessary for development to be positive and forward-driven, sustainable, inclusive of all stakeholders in the society with a feedback mechanism that is not only responsive but malleable to reforms and immune to redundancies.

A good government is that which uses political power and the instrument of the law^{vi} for the overall good of the society; the law being the thread that not only binds society and beats it into the rhythm of order, it is also the fulcrum on which other activities, government, private-sector driven and individual derive validity. Having knowledge of the import of the law and good governance, and why law is a leading tool in societal development, we can make a quick analysis of its role in solving the challenges arising from development.

The challenges for development

The challenges for development can be categorised into blocs of positive and negative; it can be advancement for good or vice depending on the strategy and system adopted and entrenched within a society. A holistic or piecemeal strategy, depending on the facts and circumstances of unique situations may produce the intended results of development but what strategy to be adopted is itself a background study to be carried out. Against the backlash of the Arab uprising, Saudi Arabia has introduced a couple of innovations in its political and socio-economic policies, granting voting rights to women, extending the right to drive to women and expanding economic incentives and opportunities to an ethnic class previously denied visibility. It can be argued that the best form of development strategy to be adopted by a country in order to prevent a public boomerang arising from frustration and the need for expression is piecemeal, otherwise the public can take charge of development by the holistic strategy. The Arab uprising remains a classic example.

A development system (to be) entrenched may also be political, economic and social; the political system may be democratic, autocratic, monarchical, religious or a mishmash depending on the leanings of the people and the peculiarities of each society. The political systems of America and Great Britain work well for each of them just as that of Iran is popularly approved by the people, arguably, with their different means of input and feedback protocols for assessment. The economic systems may be capitalism, socialism, communism, mixed economy or a combination of two or more ‘isms’ to suit the individual needs of a society. A ‘controlled’ capitalism works well for the Chinese society and is quite adapted to its development needs just as the capitalism in the West. The social systems may be hinged on class either entrenched by a tradition to be challenged, for example, India; or by operation of unleashing the potentials inherent in the individual entrepreneurial spirit in a capitalist society.

No argument is made for the ranking of the system into good, better or best but how these reflect on the challenges of societal development. A society of necessity has to develop, either positively or negatively; it lacks the benefit of a red-light intersection. Either there are policies to move the society forward or there are none with the unavoidable result of backward development as a result of society’s dynamism. Society, as a being evolves on its

own and the people in it innovate to either utilize the change for good or lean back to allow society run itself in a state of nature.

On the other hand, development policies may be made but with no or ineffective feedback mechanism; by feedback is meant accountability of public institutions and offices to the people directly or through their representatives. The Nigerian Police Act is a law enabling the Police Force carry out its constitutional responsibility of generally maintaining law and order. A feedback mechanism to ensure soundness in the system may include a section of the law criminalising certain actions of serving police officers and listing others for disciplinary measures as well as instituting by the same law an office to oversee proper operations of an agency by the law with constant innovative amends to avoid relapse and redundancy. However, everyday experience highlights official recklessness, highhandedness, arbitrary behaviour, flagrant corruption and disrespect for the rule of law all pointers to an ineffective feedback mechanism within the law. Same applies with the Nigerian Economic and Financial Crimes Commission Act.

Generally, the negative effects of no or an ineffective feedback mechanism will include the following: rent-seeking, witch-hunting and diabolical methods. Rent-seeking which is simply profit-making by both government officials and private individuals or concerns dealing with them in an underhand manner is better appreciated in a government regulated environment or sector, or in an environment influenced by official acts of public servants. A freighter in order to get his goods into the country without the hitch of trade restrictions such as tariffs and import quotas may have to pay 'incentives' to government officials at the border or the ports quite apart from import duties. Same thing goes for an oil-exploring company, an item or two short qualifying for a licence but in need of exploration licence in an oil-rich country would have its employees line the pockets of government officials to get a licence on time and at the 'right' price. A sound example may exist in the Oil Prospecting Licences (Conversion to Oil Mining Leases, Etc.) Regulation S. I. 5, 2004, gives the Minister the discretion to fix payment of a signature bonus on conversion. This regulation cultivates an environment where rent-seeking behaviour can thrive. These few examples are descriptive of rent-seeking in an environment regulated by government policies. Would rent-seeking disappear if government stops its intervention through policies? Paolo Mauro (F&D March, 1998) isn't quite sure and I agree that it not only may arise but would arise in the face of desperate criminal innovations

by both government officials and private business concerns alike to make the ‘best’ of a deregulated situation. Take the recent issue of subsidy removal in Nigeria. The need to curb the excesses of the oil cartel, channel oil-figures on subsidy to other developmental ends and release the sector to free market forces would be a step in the right direction but consider the flip side. Evidence shows a significantly reduced price of refined oil at select depots in the country as against an outrageous pump price justified on the grounds of transportation costs to other parts of the country. Certain issues arise. If a depot exists in Lagos for instance and the price of oil at the depot is (approx.) N40 but the price of oil at a fuel station in Maiduguri is N150 as a result of the cost of transportation from Lagos to Maiduguri incurred and transferred, would the cost of oil at a Lagos fuel station also be N150? The first issue reared is the ugly side of Associations and Unions that the deregulation of a public amenity like oil and its release to market forces would bring, the realisation of abnormal profits of marketers in Lagos against marginal profit-making in Maiduguri by marketers who, in an attempt to raise the stakes to that obtainable in Lagos might either implode the economy through inflation or stagnate the economy where people resort to other crude methods of carrying out economic activities in an environment devoid of alternative means of economic production other than by fuel. The point made here is that price regime, when left to market forces controlled by unions and Associations, tends to be unfairly universal, price variations marginal and cost prohibitive without the intervention of the government through policies and institutions devoid of subsidy. The argument for government intervention is not subsidy continuation nor an autocratic price peg on public utilities like petroleum in Nigeria such as would negate the advantages of a free market and its positive derivatives of competition, efficiencies in production and cost, availability, et al; but to ensure that the infrastructure including physical, legal, economic and social are available for all economic players to utilize so that the ends of development can be achieved.

Second, as Mauro (1998) rightly observed, since abnormal profits are available to those who extract oil, officials who allocate extraction rights are likely to be offered ‘rents’. If this persists, extractors, refiners and marketers would transfer the ‘rents’ to the consumers resulting in the ‘justified’ higher price regime for an otherwise inexpensive product. The fallout effects are staggering. One, double-digits inflation reduces the purchasing power of the average buyer who has to contend with transportation cost, commodities prices in the market, household bills like the school fees of his children et al with a minimum wage

mocked by economic realities. Two, economic activities are stifled and entrepreneurial spirits dampened from unavailability or insufficiency of capital, or where capital is to be obtained from banks, staggering interest rates will discourage an entrepreneurial initiative before it is taken. Third, social vices will be on the increase and this would destabilize social order as a result of a pronounced social inequality further made possible by ostracizing majority from social services enjoyed by a privileged few. To keep up with the 'joneses', the average man will resort to Hobbes' state of nature of the survival of the fittest.

Witch-hunting and the diabolical are more of a pair working in tandem, to the effect that positions are utilized to hamstring the other with unequal position of power in order for the latter to back down in deference to the agenda of the former else a rotten cupboard will be opened and law enforcement called in to take its course. The diabolical is utilized more and is better explained with how the Nigeria Police operate; they hide in a position where it is more likely for unwary persons to fall short of the law and then they pounce. A policeman stands at a one-way street with no sign to show motorists and waits for an unwary motorist to do a return lane on the street only for him to jump out of the shadows and impound the vehicle. The end is obviously not to enforce the law; it is to get something from him to release him from defaulting. The law is upheld but in an illegal and unjust way; society develops retrogressively while institutional officials profit from it.

How laws can be effectively used in governance to achieve development.

To start with, laws and policies of government are the fulcrum on which development rests. Government policies earmark a sector, make laws to regulate the sector and use a combination of laws and policies to guarantee the growth of society. Take the Nigerian oil-subsidy removal debacle. The removal of subsidy is government policy geared towards the development and transformation of the country by the agenda of the administration but how does this work without the law? By this is not meant the making of new laws but the full and transparent implementation of not just the laws but innovations in the legal instruments governing transactions in the sector. For instance, government issues licences to oil companies to explore and refine petroleum for local consumption and export but with the end game of liberalising for market forces to utilize. Subsidy is a major rent-seeking incentive for government officials, their cronies and cutthroat investors who would rather cut corners in the

name of importation to be entitled to government subsidy funds and create a cartel-enrichment the government wants to disband. What can laws and policies do?

First, laws can create clauses in the legal instruments circumscribing the issue of licences providing completion of refinery-building duration clauses, conditions entitling oil companies to government subsidies, conditions under which licences would be revoked, criminalisation of certain sharp practices in anticipation by oil companies, etc.

Second, oil subsidy removal in phases of the progress of oil exploration and refining infrastructure embarked upon by oil companies through the granting of government licences. This would involve inspections of oil infrastructure projects by the oil companies to determine revocation of licences or not, blacklisting on oil subsidy-collection qualification, the extent on subsidy removal for local production and consumption to be optimal, etc.

Third, a regulatory body to oversee government policies on daily production, ethical practices within the sector, labour relations for local workers vis-à-vis foreign oil companies operating within Nigeria and price regulation for the protection of local consumers among others. My concern for price regulation is two fold: oil as a public good with consequences for economic development should not be left completely to the private sector. One of the arguments for having a government is the regulation of society and services provided within the society such that although government is liberalising and isn't directly involved in the production process by leaving same to private hands, it should have a moderating influence through regulatory policies to ensure access for all. Second, although one of the strong reasons for business is profit-making, profit-making should not be at the expense of service provision. Service will not be provided if the price regime puts it out of the reach of the ordinary man who as a player in the economic process, would be ostracised by a profit-grabbing business enterprise more concerned with making abnormal profit than granting access to the product for economic development. A case in hand is the situation in Nigeria at the liberalisation of the telecommunication industry with initial prohibitive costs that put the service out of the reach of the ordinary economic player. Oil as a more important and volatile resource may not easily settle and stabilize as the telecommunication market if left entirely to market forces hence my disagreement with the term 'deregulation' where it means a lack of regulation for the oil sector. The term 'liberalization' appears practically better for policy-control of the

sector by the government. Secondly, the Nigerian Communications Commission as a regulatory body has been active in controlling the industry to prevent it imploding.

Four, Negrut V., et al identified participative democracy as one of the principles of democratic governance promoted in the Lisbon Treaty recognising the ‘importance of consultation and dialogue with association, civil society, workers and employers, churches and other non-confessional organisations’^{vii}. Although the Lisbon Treaty as an international legal instrument may not be universally applicable especially where nations are not signatories, it however lays a foundation for development in democratic nations.

Conclusion

What are the positive challenges for development? These would include stretching the elasticity of governance on intellectualism, inclusion of quality and proven technocrats, robust but not necessarily big government, taking on of the services of academics and technocrats as office employees for legislators, national and state, as think-tank operators on legal research, comparative policy reasoning and position taking on core development issues affecting society. Maybe this would at least justify the jumbo pay they are paid not on pay breakdown but in practice. Economists would agree that economic growth is a sine qua non for development but development remains a tall order, together with its derivatives, in the face of rhetoric, non-cohesiveness and non-coherence of the means, method and practice of how development can be achieved especially by those entrusted with the responsibility to do so. We can only hope that the quest for development would eventually lead us to practical answers.

ⁱ Wilkinson, R. (2002) Global governance: Preliminary Interrogation, in Global governance, Critical perspectives, R. Wilkinson & S. Hughes, Routledge, ISBN: 0-415-26838-9, London, UK, in Negrut, V.; Costache, M.P; Maftai, J.; Coman, V.L; matei, D. & Negrut, A. (2010). The Aspects of Good Governance in the Context of Globalisation, in Annals of DAAAM for 2010 & Proceedings of the 21st International DAAAM Symposium, Vol. 21, No. 1, ISSN 1726-9679, ISBN 978-3-901509-73-5, Ed. B. Katalinic, Published by DAAAM International, Vienna, Austria, EU, 2010, p. 1259.

ⁱⁱ Apahideanu, I. (2006) Globalization between concept and assigned reality, in Handbook of International Relations. A. Miroiu, & R. S. Ungureanu (p.309), Polirom. ISBN 973-46-0429-5, Bucharest in Negrut, V. et al, The Aspects of Good Governance in the Context of Globalization, *ibid.*, p.1260.

ⁱⁱⁱ Negrut, V., et al, The Aspects of Good Governance in the Context of Globalization, *ibid.*, p.1260.

^{iv} *Ibid.*

^v This is after a listing of what they consider as five principles that define good governance to include: openness, participation, accountability, efficiency and coherence. *Ibid.*, note 4.

^{vi} Jon Elster also closely relates a nation's constitution to its economic performance to the extent that it promotes stability, accountability and credibility, in Jon Elster, The Impact of Constitution on Economic Performance, Proceeding of the World Bank Annual Conference on Development Economics, The World Bank, 1994.

Edgardo Boeninger also hinges good governance on effective governance, which requires that the laws apply to all citizens. See Edgardo Boeninger, Governance and Development: Issue and Constraints, Joan M. Nelson, Comment on 'Governance and Development' by Boeninger. Both in Proceedings of the World Bank Annual Conference on Development Economics, 1991.

^{vii} Negrut, V., et al, The Aspects of Good Governance in the Context of Globalization, *ibid.*, p. 1260.