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Law, Development, and the Possibility of a  
Resource-Rich Developmental State in Southern Africa

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## 1. Introduction

With the exception of a few states, resource wealth has not successfully contributed to socio-economic development in much of Sub-Saharan Africa.<sup>1</sup> Both the “resource curse” and weak governance have been given as reasons for the poor performance of several resource-rich African states. This paper will focus on one of the success stories – Botswana. Heralded for combatting the resource curse with its sound institutions and governance,<sup>2</sup> Botswana’s economic development has also been attributed to developmental policies that make it characteristic of the developmental state.<sup>3</sup>

Botswana’s effectiveness as a developmental state is due significantly to its abundant mineral wealth, which has provided the state with the revenue necessary to achieve its developmental objectives. Due to this direct correlation between Botswana’s mineral wealth and its developmental state capabilities, I will argue that Botswana is better characterized as a “resource-rich developmental state.”<sup>4</sup> However, to further discuss the possibility of a resource-rich developmental state in southern Africa, I will further consider how this iteration of the developmental state is compatible with democratic principles that are regarded as necessary for escaping the resource curse.

To examine this question, the paper is divided as follows. Section 2 will provide an overview of the developmental state paradigm, and the intersection between democracy and the developmental state, before concluding with an evaluation of democracy and the resource-rich developmental state. In section 3, I consider how Botswana fits into the democratic resource-rich developmental state framework explained in section 2 by outlining the

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<sup>1</sup> “Africa” and “Sub-Saharan Africa” will be used interchangeably in this paper to refer to countries south of the Sahara Desert.

<sup>2</sup> D. Acemoglu, S. Johnson, and J.A. Robinson, *An African Success Story: Botswana*, MIT Department of Economics Working Paper No. 01-37 (2001) at 1.

<sup>3</sup> See P. Mbabazi and I. Taylor, “Conclusion: Developmental States and Africa in the Twenty-First Century”, in P. Mbabazi and I. Taylor (eds.), *The Potentiality of ‘Developmental States’ in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005); D. Sebudubudu, “The Institutional Framework of the Developmental State in Botswana”, in P. Mbabazi and I. Taylor (eds.), *The Potentiality of ‘Developmental States’ in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005).

<sup>4</sup> My phrasing “resource-rich developmental state” stems from D. Joshi’s “resource developmental state” in *Varieties of Developmental States: Three Non-Western Pathways to the Millennium Development Goals*, 28 *Journal of Developing Societies*, no. 3 (2012), 355-378. By using “resource-rich” rather than “resource”, I intend to emphasize the developmental state’s reliance on mineral wealth, in accordance with the “resource-rich” definition created by the International Monetary Fund, in which at least 20 percent of a state’s percent of total revenue and 25 percent of total exports are attributable to its nonrenewable natural resource industry (*Sub-Saharan Africa – Sustaining Growth amid Global Uncertainty* (IMF. Washington D.C. 2012)).

arguments for Botswana as a developmental state, and using three institutional case studies – Okavango Diamond, Debswana, and economic diversification in the National Development Plan – to examine democracy in Botswana’s resource-rich developmental. To conduct this analysis, I rely extensively on the “thin versus thick” democracy framework developed by Mariana Mota Prado, Mario Schapiro, and Diogo R. Coutinho in “The Dilemmas of the Developmental State: Democracy and Economic Development in Brazil.”<sup>5</sup> Section 4 concludes the paper.

## 2. Democracy and the developmental state

The developmental state has received extensive coverage in Law and Development scholarship, and therefore only a brief summary is provided here.<sup>6</sup> Prior to its adoption as an analytical tool in Law and Development literature, the developmental state originated in political science and political economy studies as a means to explain the economic success of the East Asian Tigers, namely Japan, South Korea, Taiwan, and Singapore.<sup>7</sup> Coined by Chalmers Johnson in his 1982 study of Japan’s Ministry of International Trade and Industry (MITI)<sup>8</sup> to identify key components of the state that promoted economic development: a small, efficient bureaucracy; a political environment that allows the bureaucracy to operate independently and free of intrusive interests; state intervention in the economy; and pilot institutions, such as the MITI.<sup>9</sup>

Due to their incredible levels of economic growth and development in the post-war period,<sup>10</sup> the East Asian Tigers – notably Japan, South Korea, Taiwan, and Singapore – became synonymous with the “successful” developmental state, and offered insights into what

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<sup>5</sup> M.M. Prado, M. Schapiro, and D.R. Coutinho, *The Dilemmas of the Developmental State: Democracy and Economic Development in Brazil*, 9 *Law and Development Review*, no. 2 (2016), 369-410 at 381.

<sup>6</sup> See for example D.M. Trubek, “Developmental States and the Legal Order: Towards a New Political Economy of Development and Law”, Univ. of Wisconsin Legal Studies Research Paper No. 1075 (2008); D.M. Trubek, H. A. Garcia, D.R. Coutinho and A. Santos (eds.), *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge: Cambridge University Press, 2013).

<sup>7</sup> See for example J. Wong, *The Adaptive Developmental State in East Asia*, 4 *Journal of East Asian Studies*, (2004), 345-362.

<sup>8</sup> C. Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975* (Stanford: Stanford University Press, 1982).

<sup>9</sup> P. Mbabazi and I. Taylor, “Botswana and Uganda as Developmental States(?)”, in P. Mbabazi and I. Taylor, eds, *The Potentiality of ‘Developmental States’ in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005), p. 65.

<sup>10</sup> J. Wong, *The Adaptive Developmental State in East Asia*, 4 *Journal of East Asian Studies*, (2004), 345-362 at 349. At their peak, the East Asian Tigers as a region experienced economic growth rates of 10% per year, well ahead of developing countries in Latin America and Africa during the same time period.

this came to mean. In my paper, “Conceptualizing the Developmental State in Africa”,<sup>11</sup> I consolidated the features of the successful developmental state into four key areas: development-oriented political leadership; an autonomous and effective bureaucracy; performance-oriented governance; and production coordination and conflict-management.<sup>12</sup>

Prominent Law and Development scholars revisited the field’s characterization of the developmental state and attempted to re-evaluate the paradigm based on recent changes in Brazil. David Trubek, Alvaro Santos, Mario Schapiro, and Diogo R. Coutinho argue that the revised relationship between the public and private sectors in Brazil has created a new form of developmentalism that they termed the “new” developmental state.<sup>13</sup>

## 2.1 Is democracy compatible with the developmental state?

The question of whether democracy is compatible with development and the developmental state was previously examined by Prado, Schapiro, and Coutinho in their article on Brazil, and will not be discussed extensively in this section. Instead, I will summarize the main aspects of their analysis, along with others, and reaffirm the spectrum nature of the democratic developmental state, with “thick” features at one end, and “thin” at the other.

Questioning democracy’s compatibility with development helps identify reasons why states that were more authoritarian and achieved successful levels of economic development were able to do so. It also sheds light on why democratic principles may not be conducive to realizing development objectives. In “Democracy and Development: Is there Institutional Incompatibility?,”<sup>14</sup> Adrian Leftwich explains what is at the core of the conflict between democracy and development. His central tenet is that the “institutional characteristics and requirements for development and for democracy pull in opposite directions.”<sup>15</sup> To describe development institutions, Leftwich adopts Joseph Stiglitz’s approach that defines

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<sup>11</sup> S. Ghebremusse, *Conceptualizing the Developmental State in Resource-Rich Sub-Saharan Africa*, 8 *Law and Development Review*, no. 2 (2015), 467-502.

<sup>12</sup> *Ibid*, at 477-480.

<sup>13</sup> D.M. Trubek, D.R. Coutinho, and M.G. Schapiro, “Towards a new law and development: new state activism in Brazil and the challenge for legal institutions” University of Wisconsin Legal Studies Research Paper No. 1207 (2012); D.M. Trubek, *The Political Economy of the Rule of Law: The New Developmental State*, 1 *Hague Journal on the Rule of Law*, (2009), 28-32.

<sup>14</sup> A. Leftwich, *Democracy and Development: Is There Institutional Incompatibility?*, 12 *Democratization*, no. 5 (2005), 686-703.

<sup>15</sup> *Ibid*, at 689.

development as “transformation of society” that occurs across social, economic, political, and legal spheres.<sup>16</sup> Achieving this transformation consists of a process of change, which Leftwich contends consists of institutions required to facilitate and manage its success. For Leftwich, formal democratic institutions include: “(1) a competitive (and multiparty) political system; (2) universal adult suffrage for all citizens; (3) regularly contested, free and fair elections with secret ballots; and (4) effective public access by political parties to the electorate through the media and through generally open political campaigning.”<sup>17</sup> Leftwich further contends that these formal electoral institutions are supplemented by institutionalized civil rights, such as “freedom of expression, association and religion; the rule of law; individual rights and autonomy.”<sup>18</sup>

After describing the characteristics that define democratic and developmental institutions, Leftwich posits that

economic growth and development is a turbulent and transformative process, challenging (and often defeating) old interests and creating new ones. The institutional changes which it requires and generates, both in the economic and political spheres (especially where attempts are made to make growth into development) have commonly been radical and far-reaching, bringing with them cognate changes in social, cultural and ideological institutions (notably in the class structures and in the general trend to secularism). These changes, at their inception, have seldom been achieved ..., and have most commonly been associated with opposition, conflict and violence which may take religious, regional, ethnic or class-based forms.<sup>19</sup>

The development process, according to Leftwich, greatly contrasts the democratic one. Although both require “strong states” to ensure their effectiveness, Leftwich contends the effective democratic state contrasts from the state required for development because it

presupposes a particular kind of consensual competitive politics that generates and sustains the legitimacy of the state. It must allow and encourage the fullest possible range of interests and preferences...to jostle and argue for advantage, to strike deals, form coalitions and accept compromises, within the formal rules of the game and in relation to the state.

Similarly, Prado, Schapiro, and Coutinho argue that conflict between democracy and development lies in the incongruity between the processes necessary to achieve either regime.<sup>20</sup> Democratic processes, they contend, are slower due to the accountability

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<sup>16</sup> *Ibid*, at 692.

<sup>17</sup> *Ibid*, at 695.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid*, at 694.

<sup>20</sup> Prado, Schapiro, and Coutinho, *supra* note 5 at 372.

mechanisms such as checks and balances, electoral competition, and attending to competing interests. Developmental policies, on the other hand, are most effective when they can quickly adapt to changing circumstances, and are not hindered by competing or divergent interests.<sup>21</sup> Prado, Schapiro, and Coutinho further contend that the form of legitimacy sought in a democratic regime is fundamentally different from the developmental state, and may potentially conflict. Legitimacy in democratic regimes is procedural, and seeks to ensure fairness and equity in its processes. Alternatively, the developmental state’s legitimacy is acquired from the developmental objectives it achieves, whether they be economic (in the form of GDP growth), or social (such as increased access to education and health).<sup>22</sup>

To what extent a developmental state is democratic depends on what principles that state is held to. Here is where Prado, Schapiro, and Coutinho offer their “thick” versus “thin” definitions of democracy:

...a thin concept is one that equates democracy with competitive and fair elections. A thick definition would also include other features, such as individual freedoms, a system of checks and balances, protection of the rights of minorities, an independent judiciary, and rule of law (footnote for sources). As Manor points out, most definitions of democracy will go beyond the requirement of free and fair elections, encompassing also mechanisms of checks and balances (the executive branch is controlled by the legislature) and expectations of transparency and accountability (which takes place through the judiciary and other accountability institutions), as well as forms of social participation and control.<sup>23</sup>

In making his case for the democratic developmental state in Africa, Omano Edigheji argues strongly that democracy is crucial to the success of the developmental state. If a positive correlation truly existed between authoritarianism and development, Edigheji contends that African countries would not be as underdeveloped as they are.<sup>24</sup> Therefore, Edigheji insists that effective African democratic developmental states must embody citizen participation, and cannot simply be characterized by thin, electoral conceptions of democracy.

## 2.2 Democracy in the Resource-Rich Developmental State

Before considering the role of democratic institutions in the resource-rich developmental state, I offer an explanation of the institutions unique to this form of

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, at 381.

<sup>24</sup> O. Edigheji, *A Democratic Developmental State in Africa? A concept paper*, Centre for Policy Studies (2005), at 14.

developmental state. The primacy of natural resources and these institutions to the success of the resource-rich developmental state warrants acknowledging and distinguishing this variety from the generally accepted form.

Resource-rich developmental states directly intervene in their extractive sectors to accrue more revenue from the industry to support the state’s socio-economic objectives. Additionally, resource-rich developmental states are relying on relationships with the private sector to ensure greater benefits from resource extraction. This can take the form of public-private partnerships or joint ventures. Development policies specific to the resource-rich developmental state include<sup>25</sup>:

- (a) Enhancing local participation through local content requirements, which are measures that typically demand that “a certain percentage of intermediate goods used in the production processes...be sourced from domestic manufacturers.”<sup>26</sup>
- (b) Creating cross-sectoral linkages that will promote economic diversification, and produce spillovers into less robust industries, via upstream, downstream, or side-stream linkages. Upstream (or backward) linkages are the relationships between an industry and its suppliers. In the extractives sector, upstream linkages arise early in the production process “as deposits are identified, assayed and quantified; finance secured; legal and permitting issues addressed; plans for development and earthworks commissioned; and labour, raw materials equipment and utilities sourced.”<sup>27</sup> Alternatively, downstream linkages (also referred to as forward linkages) connect extracted resources to value-added production processes: smelting or refining, semi-fabrication, or final product manufacturing.<sup>28</sup> Sidestream linkages are created when the extractives industry helps build other industries, such as “financial services, power, logistics, communications, skills and technology development.”<sup>29</sup>

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<sup>25</sup> The list I provide here is not exhaustive; it includes the list of more institutions that I have identified in the course of my doctoral research thus far.

<sup>26</sup> S.M. Stephenson, ‘Addressing local content requirements: Current challenges and future opportunities’ (2013) 7:3 BIoRES, available at <<http://www.ictsd.org/bridges-news/biores/news/addressing-local-content-requirements-current-challenges-and-future>>, accessed 15 June 2017.

<sup>27</sup> Economic Commission for Africa and the African Union, *Minerals and Africa’s Development: The International Study Group Report on Africa’s Mineral Regimes* (Addis Ababa: United Nations Economic Commission for Africa, 2011), at 103.

<sup>28</sup> A. E. Bastida, *From extractive to transformative industries: paths for linkages and diversification for resource-driven development*, 27 *Mineral Economics*, no. 73 (2-3) (2014), at 74; UNECA/AU, *supra* note 27 at p. 104.

<sup>29</sup> Bastida, *supra* note 28, p. 74; UNECA/AU, *supra* note 27, p. 106.

- (c) Increasing state ownership and commercial interests in extractive projects by renegotiating contracts with extractive companies, particularly those that are foreign-owned, and reforming fiscal regimes to ensure a greater share of resource revenue.<sup>30</sup>

Examining the compatibility of the resource-rich developmental state and democracy is an interesting endeavour, and contributes to the literature on both the developmental state and natural resource governance. The relationship between the two has yet to be fully examined; instead, the importance of natural resource governance has been thoroughly explained in the literature as a means to combat the resource curse. The idea emerged in the 1990s that combating the resource curse required a political response, and more specifically, one that entailed the creation of sound institutions and policies.<sup>31</sup> The influence of Douglass North’s “new institutional economics” was vital to contending that “institutions matter for development.”<sup>32</sup> North’s economic theory argued that institutions created incentives for behaviour by enhancing the efficiency of economic transactions and improving the overall political and economic environment in which investment can occur.<sup>33</sup> This premise spurred the popular theoretical framework that it was not only that institutions mattered, but that the quality of these institutions was also important. From that, the notion of “good governance” emerged and has dominated economic evaluations of resource-rich developing countries since the 1990s.<sup>34</sup> The World Bank’s *A Strategy for African Mining* embodied some of this approach in the context of African natural resource governance. Not only did the report prioritize the private sector as the engine of mining development in Africa, its authors also emphasized the importance of governments having “sound institutional structures and capabilities”<sup>35</sup> to ensure the state received its share of resource rents.

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<sup>30</sup> S. Ghebremusse, *New Directions in African Developmentalism: The Emerging Developmental State in Resource-Rich Africa*, 7 *Journal of Sustainable Development Law and Policy*, no. 1 (2016) 1-24, at 20.

<sup>31</sup> D. Acemoglu, S. Johnson and J.A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 *American Economic Review*, no. 5 (2001), 1369– 1401; W. Easterly and Ross Levine, *Tropics, Germs, and Crops: How Endowments Influence Economic Development*, 50 *Journal of Monetary Economics*, no. 1 (2003), 3–39; H. Mehlum, K. Moene and R. Torvik, *Institutions and the Resource Curse*, 116 *The Economic Journal*, no. 508 (2006), 1–20.

<sup>32</sup> M.M. Prado and M. Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 *University of Toronto Law Journal* (2009), at 342.

<sup>33</sup> *Ibid.*

<sup>34</sup> Mehlum et al., *supra* note 31.

<sup>35</sup> World Bank, *Strategy for African Mining*, World Bank Technical Paper No 181, Africa Technical Development Series, Mining Unit, Industry and Energy Division (Washington, D.C.: The World Bank) at 10.

Natural resource governance – as a particular facet of “good governance” – remains important to the evaluation of African state involvement in the extractives sector, particularly as the sector experienced a retreat from neo-liberalism over the past fifteen years. Three key elements central to natural resource governance are transparency, accountability, and the rule of law, as the term attempts to capture the various strategies employed to promote all three in the management of natural resources.<sup>36</sup> The ideal form this should take has varied widely in the literature as well.

Transparency is a simple term that encompasses a broad range of activities. In its simplest form, transparency relates to the disclosure of information. How information is disclosed can vary, but the purpose is the same in every instance: to promote broad-based participation (usually by citizens), and facilitate accountability.<sup>37</sup> To be most effective, the disclosure of information should be relevant, timely, accessible, and accurate. Once effective disclosure occurs, accountability mechanisms can be implemented to hold actors responsible for their actions.<sup>38</sup> These mechanisms can include either formal, established institutionalized processes (including the judiciary), or may consist of informal sites of contestation such as public opinion.

Despite the creation of multiple transparency and accountability initiatives, including the Extractive Industries Transparency Initiative, the Kimberley Process Certification Scheme, and the Publish What You Pay Coalition, there is considerable debate about the impact and effectiveness of both domestic and international transparency and accountability mechanisms.<sup>39</sup> The most controversial aspects relate to the uncertain causal relationship between transparency, accountability, and development outcomes, the unlikelihood of current initiatives to achieve their desired outcomes due to their flawed designs, and the misalignment between adherence and their expected impact.<sup>40</sup>

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<sup>36</sup> A.M. Acosta, *The Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources*, 31 *Development Policy Review*, no. S89 (2013) at S89.

<sup>37</sup> S. Darby, *Natural Resource Governance: New Frontiers in Transparency and Accountability*, available at <[http://www.transparency-initiative.org/archive/wp-content/uploads/2011/05/natural\\_resources\\_final1.pdf](http://www.transparency-initiative.org/archive/wp-content/uploads/2011/05/natural_resources_final1.pdf)>, accessed 12 June 2017.

<sup>38</sup> *Ibid.*

<sup>39</sup> See for example Acosta, *supra* note 36; A. Gillies and A. Heuty, *Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries*, 6 *Yale Journal of International Affairs*, no. 25 (2011); and C. Nwapi, *Enhancing the Effectiveness of Transparency in Extractive Resource Governance: A Nigerian Case Study*, 7 *Law and Development Review*, no. 1 (2014), at 25.

<sup>40</sup> Gillies, *supra* note 39, p. 28.

Like transparency and accountability, the rule of law as a facet of natural resource governance can take many shapes and forms. More so than transparency and accountability, it is a concept that is almost universally accepted as being vital to promoting good governance and escaping. It is also less controversial than the corresponding debate of the rule of law in economic development.<sup>41</sup> The rule of law is understood to mean “a legal order consisting of predictable, enforceable and efficient rules”<sup>42</sup> that is applied to all persons, institutions, and government entities equally. Fundamentally, this is understood to mean an independent and credible judiciary. However, other means of upholding the rule of law in natural resource governance can vary across resource-rich states. Unlike transparency and accountability initiatives, transnational global governance regimes have not emerged around the rule of law; instead, individual state performance is regularly measured in such global indices as the Worldwide Governance Indicators produced by the World Bank.<sup>43</sup>

### 3. Botswana: a democratic resource-rich developmental state?

Botswana’s characterization as a developmental state is widely accepted in the literature. With the exception of Ellen Hillbom, who argues Botswana is a “development-oriented gate-keeping state”, academics across disciplines have made the case that Botswana is best understood as a developmental state.<sup>44</sup> Like the commonly accepted developmental states of East Asia, Botswana achieved significant economic growth since its independence from Great Britain in 1966 when it was one the world’s poorest countries with a per capita income of approximately US\$80.<sup>45</sup> In a previous paper, I discussed how four attributes of the developmental state contributed to Botswana’s socio-economic transformation: a

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<sup>41</sup> See for example Trubek, *supra* note 13; A. Santos, “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development”, in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal*, (New York: Cambridge University Press); A. di Giovanni, *Making the Link between Development’s Regulation through Law and Law’s Promotion through Development*, 8 Hague Journal on the Rule of Law, (2016), 101-133.

<sup>42</sup> Santos, *supra* note 41, p. 253.

<sup>43</sup> Worldwide Governance Indicators, available at <<http://info.worldbank.org/governance/wgi/#home>>, accessed 16 June 2017.

<sup>44</sup> Mbabazi and Taylor, *supra* note 9; T. Mkandawire, “Thinking about developmental states in Africa” (2001) 25 Cambridge Journal of Economics 289; P. Meyns and C. Musamba, *The Developmental State in Africa: Problems and Prospects*, INEF Report 101/2010, available at: <<https://inef.uni-due.de/cms/files/report101.pdf>>, accessed 14 May 2017; I. Taylor, *Botswana as a ‘Development Oriented GateKeeping State’: A Response*, 111 African Affairs, (2012), 466-476..

<sup>45</sup> Sebudubudu, *supra* note 3, p. 82.

development-oriented political leadership willing to intervene in the economy; an autonomous and effective bureaucracy; a production-oriented private sector, and performance-oriented governance.<sup>46</sup> This section will elaborate further on these factors, and will focus more closely on my contention that Botswana’s characterization as a developmental state due to the facilitative role its natural resources played warrants describing the country as a resource-rich developmental state.

### 3.1 Botswana: a *resource-rich* developmental state

Visionary leadership was decisive to setting Botswana on the developmental course. Soon after Botswana gained its independence, President Seretse Khama was intent on creating a strong central government that respected the influence of traditional rulers, but purposely made them less powerful.<sup>47</sup> Building a strong central government was a vision of President Khama and the Botswana Democratic Party (BDP) that resulted in the country’s constitution and legislature being designed with limited power over the executive.<sup>48</sup> Despite purposefully situating power in a tiny sector of the state, making it potentially vulnerable to elite capture, President Khama appeased elite interests by focusing early national development planning on the rural sector, the richest at the time.<sup>49</sup> Coincidentally, elites in government made use of the policy and legislative process to move the developmental project forward by providing public goods and investment in rural health, infrastructure, and education.<sup>50</sup>

To further centralize economic power in the state, President Khama proposed vesting mineral rights in the state rather than individual tribes a year before independence. He declared in the Bechuanaland Democratic Party’s (the precursor to the 1965 Election Manifesto that “[c]onsequently leaving mineral rights vested in tribal authorities and private companies must necessarily result in uneven growth of the country’s economy, as well as deprive the Central Government of an important source of revenue for developing the

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<sup>46</sup> Ghebremusse, *supra* note 11, p. 484.

<sup>47</sup> Acemoglu et al., *supra* note 2, p. 97.

<sup>48</sup> *Ibid.*, at 99.

<sup>49</sup> P. Martin, A Closer Look at Botswana’s Development: The Role of Institutions, 9 Paterson Review (2008), at 42.

<sup>50</sup> *Ibid.*

country.”<sup>51</sup> This policy proposal soon became entrenched in legislation following independence in the form of the 1967 *Mines and Minerals Act* (the “Act”).<sup>52</sup>

In addition to vesting mineral rights in the national government, President Khama’s government moved quickly to foster further benefits from potential mineral resources. The importance of visionary leadership was most crucial in the years immediately following independence because mineral deposits had not yet been discovered in the country. To encourage exploration, Botswana entered into a strategic partnership with De Beers, the world’s leading diamond mining corporation, to create Debswana. The 50-50 joint venture generated significant revenue for the central government, which was then directed towards infrastructure projects, and funding for health and education.<sup>53</sup>

President Khama’s early commitment to social and economic development continued through the government’s formalization of development planning through the National Development Plans (“NDPs”). Not only did the Plans contribute to creating and implementing a coherent developmental vision for the state, but the government procedure that was developed to produce the Plans entrenched a consensus-driven process that resist destructive neo-patrimonial and rent seeking behaviour.<sup>54</sup> Quett Masire’s leadership role in Seretse Khama’s government, and later as his successor, was key to establishing the NDPs development and implementation process.<sup>55</sup> Further reinforcing the government’s development planning efforts were the common interests of elites and senior government officials, which translated into directing collective efforts towards national development, rather than self-enrichment.<sup>56</sup> Leith contends that this was due to “mostly homogenous”<sup>57</sup> interests that “were based on cattle, thereby creating an overwhelming encompassing interest.”<sup>58</sup>

Autonomous bureaucratic institutions necessary to ensure the NDPs effectiveness were also introduced by the Botswana government.<sup>59</sup> Key to their success was the

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<sup>51</sup> J.C. Leith, *Why Botswana Prospered* (Montreal: McGill-Queen’s University Press, 2005), at 60.

<sup>52</sup> Acemoglu et al., *supra* note 2, p. 99.

<sup>53</sup> Martin, *supra* note 49, p. 43.

<sup>54</sup> *Ibid*, at 42.

<sup>55</sup> Leith, *supra* note 51, p. 121.

<sup>56</sup> Meyns and Musamba, *supra* note 44. p. 47.

<sup>57</sup> Leith, *supra* note 52, p. 121.

<sup>58</sup> *Ibid*, at 58.

<sup>59</sup> Sebudubudu, *supra* note 3, p. 81.

government’s recognition that political interference, indigenizing the civil service, and creating a non-meritorious bureaucracy would hinder its productiveness. The national government also established centralized ministries empowered to direct development planning, and minerals governance. The Ministry of Finance and Development Planning was mandated to carry out the government’s developmental planning, and became the centrepiece of the developmental state.<sup>60</sup> Similarly, the Department of Mines, the precursor to the current Ministry of Minerals, Energy, and Water Resources, was designated the designer of the country’s early mineral governance regime, which included developing the fiscal regime entailing the royalty rate, and equity sharing option.<sup>61</sup>

Promoting production-oriented private investment was another central element of Botswana’s developmental state. The diamond industry dominated Botswana’s policy in this area, with Debswana being an example of the government’s position. Along with Debswana, the Botswana government requires that corporations seeking mining licenses include a provision in their application that allows the state to purchase an equity stake in the venture.<sup>62</sup> In sectors slow to see foreign investment after independence, the Botswana government intervened and created development-oriented state-owned enterprises (“SOEs”) that delivered necessary services, such as electricity, telecommunications and water.<sup>63</sup>

In the years since Botswana’s first independent government laid the foundation for the developmental state, mineral extraction has been critical to ensuring its sustainability and promoting economic growth. Over the past two decades, Botswana’s resource-rich developmental state evolved to create more linkages between mining and other industries, while also attempting to generate additional benefits from mining through greater interventions in the mining sector. Due to these interventions, Botswana continued to avoid the resource curse. Mineral beneficiation is one method supported by the Botswana government to create more industrial linkages, and promote economic diversification. Expanding the country’s downstream mineral production was an important component of this

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<sup>60</sup> Meyns and Musamba, *supra* note 44, p. 47.

<sup>61</sup> *Ibid.*, at 48; K. Jefferis, *The role of TNCs in the Extractive Industry of Botswana*, 18 *Transnational Corporations*, no. 1 (2009), at 80.

<sup>62</sup> Jefferis, *supra* note 61, p. 80.

<sup>63</sup> Leith, *supra* note 51, p. 94.

policy identified in the 11th National Development Plan.<sup>64</sup> The Diamond Technology Park built in Gaborone was one investment aimed at promoting beneficiation. The Park incubates small-scale companies (and their spinoffs) that cut, polish, and sell diamonds under the banner of the government’s diamond sales corporation, Okavango Diamond Company.<sup>65</sup> Along with the Park, Botswana successfully negotiated the relocation of De Beers’ rough diamonds sales operations from London to Gaborone (Anglo American press release). Recent statistics indicate the efforts to encourage downstream mining are successful: more than 3,000 are employed in polishing operations (up from 500 in 2006), and polished diamond exports totaled \$800 million in 2013, compared to \$100 million in 2008.<sup>66</sup> Further pushing the need to diversify Botswana’s economy is the recent slowdown in the global price for rough and polished stones slowed in 2015 and 2016.<sup>67</sup> Lower global demand also led Debswana to cut its 2015 production target by 3 million carats to 20 million carats.<sup>68</sup> Exacerbating lower global diamond prices and demand is dwindling reserves. Recent modelling by Roman Grynberg estimated that the decline in Botswana’s diamond reserves could lower the country’s Gross Domestic Product per capita by 48% by 2027, when the effects will likely earliest be felt.<sup>69</sup>

### 3.2 Is Botswana a democratic resource-rich developmental state?

Several academics and activists contend that Botswana’s economic growth came at the expense of true democracy in the country. The arguments made describe Botswana as an authoritarian liberal state similar to some of the East Asian developmental states like Singapore and South Korea.<sup>70</sup> Critiques of Botswana’s developmental state include the

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<sup>64</sup> The Government of Botswana, National Development Plan 11 Volume 1, April 2017 - March 2023, available at <https://www.tralac.org/images/Resources/By%20country/Botswana/Botswana%2011th%20National%20Development%20Plan%202017-2023.pdf>, accessed 24 May 2017.

<sup>65</sup> R. Young, “Botswana: From sleepy backwater to global mining hub”, available at <http://www.bbc.co.uk/news/business-23771552>, accessed 9 April 2017; “Diamond Technology Park Botswana”, available at <http://www.saf dico.com/Diamond-Technology-Park>, accessed 9 April 2017.

<sup>66</sup> R. Weldon and R. Shor, *Botswana’s Scintillating Moment*, 50 *Gems & Gemology*, no. 2 (2014), available at <http://www.gia.edu/gems-gemology/summer-2014-weldon-botswana-scintillating-moment>, accessed 2 June 2017.

<sup>67</sup> J. Neicho, “Shine starts to fade on Botswana’s diamond dividend” (28 January 2016), available at <https://www.theguardian.com/global-development/2016/jan/28/botswana-diamond-mines-tourism-transport-agriculture-karowe>, accessed 2 June 2017.

<sup>68</sup> “Botswana’s Debswana cuts diamond production due to market downturn” (11 September 2015), available at <http://www.reuters.com/article/botswana-diamonds-idUSL5N11H16120150911>, accessed 2 June 2017.

<sup>69</sup> Neicho, *supra* note 67; R. Grynberg, “And we will live like Swazis” (17 November 2014), available at <http://www.sundaystandard.info/and-we-will-live-swazis>, accessed 2 June 2017.

<sup>70</sup> I. Taylor, *As Good as it Gets?: Botswana’s ‘Democratic Development’*, 21 *Journal of Contemporary African Studies*, no. 2 (2003), 215-231, at 216.

country’s unequal distribution of wealth, limited participatory democracy, and poor human rights record in relation to the San minority ethnic group.

Despite its steady economic growth, Botswana’s poverty and unemployment rates remain high.<sup>71</sup> Critics argue that elites benefitted disproportionately from the wealth generated from mineral extraction.<sup>72</sup> Although the revenues generated from the industry were consistently directed towards social and infrastructure development, critics contend that the diamond industry in particular has not done enough to support local communities and provide more employment opportunities.<sup>73</sup> Specific concerns were raised about Debswana (the joint venture between the Botswana government and De Beers) in a 2009 report by the Bench Marks Foundation.<sup>74</sup> The Report was critical of the environmental and community impact of Debswana’s operations, specifically criticizing the prominence of the relationship at the expense of the country’s “communities, human rights, the environment and sustainable local economic development.”<sup>75</sup> David van Wyk, the author, maintained that these concerns can only be addressed if the government took the necessary steps to “assert its own independence and responsibility not just to [De Beers], but to the people of Botswana as a whole.”<sup>76</sup>

The Botswana Democratic Party’s dominance of the country’s politics also leads some to argue that the country is not a democratic developmental state, but rather an authoritarian state that suppresses public criticism, and restricts participation of other political parties through covert mechanisms.<sup>77</sup>

### 3.3 An alternative

The democratic record of Botswana’s developmental state highlights the opposing sides of the democracy and development debate. Of critical importance to Botswana’s example is the centrality of democratic values to the good governance paradigm that offers solutions to the resource curse. If democratic values and good governance are vital to

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<sup>71</sup> A. Cook and J. Sarkin, *Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights versus Economic Development*, 19 *Transational Law & Contemporary Problems*, (2010), at 487.

<sup>72</sup> *Ibid*, at 464.

<sup>73</sup> *Ibid*, at 480.

<sup>74</sup> D. van Wyk, “Corporate Social Responsibility in the Diamond Mining Industry in Botswana” (2009) SADC Research Report Policy Gap 5, available at <[http://www.bench-marks.org.za/research/botswana\\_edit\\_fina\\_dvw.pdf](http://www.bench-marks.org.za/research/botswana_edit_fina_dvw.pdf)>, accessed at 15 April 2017.

<sup>75</sup> *Ibid* at 7.

<sup>76</sup> *Ibid* at 7.

<sup>77</sup> Cook and Sarkin, *supra* note 71, p. 475.

combatting the resource curse, how could Botswana, as a less than ideal democracy, have such great success? Various reasons were explored by academics, and have included Botswana’s traditional institutions; the consensus-seeking approach of the immediate post-independence governments; the broad political coalitions established after independence that placated the elite; and the development of institutional knowledge that contributed to political stability.<sup>78</sup> Given the disconnect between the good governance paradigm and the reasons for Botswana’s developmental state success, it is important to reframe how the Botswanan developmental state is evaluated.

Since at its core the developmental state is concerned with economic growth, it is necessary to create a different set of criteria that can be better suited to evaluate the potential success of a resource-rich developmental state like Botswana. The framework developed by Trubek, Coutinho, and Schapiro’s evaluation of the role of law in Brazil’s recent state activism is most helpful in this regard. The authors

reasoned that for new state activism to be successful and the new development policies to work it is essential to maintain flexibility, orchestrate the relations among public actors and between them and the private sector, create conditions that will maximize synergy between actors, and preserve legitimacy. These *functional* needs point to new roles for law: if we isolate the role law can play in these new functionalities, we can identify four roles the legal system could play: (i) safeguarding flexibility, (ii) stimulating orchestration, (iii) framing synergy, and (iv) ensuring legitimacy.<sup>79</sup>

Trubek et al. elaborate further and describe each criteria as follows:

*Safeguarding flexibility* means using legal norms to allow room for experimentation, promote innovation, and facilitate feedback from experiments to policy. [New state activism (“NSA”)] demands legal regimes that permit learning-by-doing and encourage path correction...NSA requires that some degree of flexibility and learning is ensured to implement initiatives that in most cases do not resemble preexisting recipes or strategies: that is one reason why NSA ultimately employs several “new governance” tools.”

*Stimulating orchestration* means using law to structure state activities for effective new style industrial and social policy. This means facilitating coordination and articulation within the state - both horizontally (i.e., between entities that belong to the same bureaucratic state level) and vertically (i.e. between entities that are subject to hierarchies or belong to different state levels). Practically, it can consist of norms and procedures that assign institutional tasks and foster cooperative (rather than competitive) governance regimes including rules that encourage government to work with the private sector. Also, it can mean supporting policy networks that share tasks and interact in a complementary way to implement policies: this can include defining policy “hubs”. Finally, it can mean using norms that harmonize new policies with pre-existing ones to ensure coherence. Norms and processes playing these roles are crucial in NSA since it fundamentally relies on actions that integrate different fields.

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<sup>78</sup> Acemoglu et al, *supra* note 2; Leith, *supra* note 51; and Martin, *supra* note 49.

<sup>79</sup> Trubek, Coutinho, and Schapiro, *supra* note 13, p. 24.

*Framing synergy* involves using the law to frame public-private partnerships and ensure they are more effective than purely public or private solutions. Framing modalities include collaborative governance regimes that create incentives for public-private cooperation (through incentive-alignment and/or the use of private contracts by public entities), risk sharing, and hybrid instances in which public and private players regularly meet to interact and exchange opinions and regulatory and contractual instruments that bring private expertise and public financial capacity together.

*Ensuring legitimacy* means keeping government transparent and ensuring adequate participation. NSA seems to require a regime in which it is easy for new ideas to percolate and be widely shared. This makes older authoritarian models obsolete and increases the importance of democracy. Legal regimes must ensure accountability, transparency and participation in development policies. That requires norms for disclosure, frameworks for participation, methods to hold policy makers accountable for results, and ways to avoid capture at the same time public-private dialogue is fostered.

Trubek et al.’s criteria is most helpful offers a framework that evaluates the function of the role of law and institutions in developmental states. The democracy-development debate operates as a way to evaluate whether democratic institutions are vital to the promotion of development. Trubek et al.’s framework offers an alternative method of evaluating the law-development nexus, which is central to the success of the developmental state.

In Botswana’s case, its resource-rich developmental state mostly adheres to Trubek et al.’s criteria for the role of law in the developmental state. The country’s early policy initiatives and willingness to work closely with the private sector created legal norms that safeguarded flexibility and did not entrench the government in an unfavourable legal environment. Additionally, the country’s early efforts to promote consensus-building and broad based institutional participation within government helped stimulate orchestration across departments. This allowed for better coordination in the planning of development objectives. Furthermore, Botswana’s legal framework that governed private-public mining partnerships framed synergies that created incentives for investment and enhanced public-private cooperation.

Despite its thin democratic institutions, the Botswana resource-rich developmental state ensured legitimacy through decades long public support of its initiatives and policies. The civil wars and political instability common to other parts of Africa never took place in Botswana. Its peace and minimal political dissent indicates the public supported and endorsed the government’s economic and development planning.<sup>80</sup>

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<sup>80</sup> Meyns and Musamba, *supra* note 44, p. 25.

#### 4. Conclusion

Throughout the developing world, there are examples of significant economic success despite thin democratic institutions (Brazil, Tigers, China). The authoritarian regimes and centralized power structures that are characteristic of these examples, it can be argued, have not necessarily had to manage the governance and economic developmental challenges resulting from the resource curse. Where centralization of power and one party dominant political systems have been faced with resource abundance, the results have been demonstrably poor (Nigeria, civil war Sierra Leone, Equatorial Guinea). However, the relative concentration of authority, restriction of democracy through a one party political system, the alignment of economic elites and public interests, and the resulting economic development in Botswana flies in the face of the typical resource-rich, governance poor African state.

Therefore, rather than tying development to democracy (as is done with international governance indicators), I have argued that the framework developed by Trubek et al. is better for evaluating the conditions for economic success, and as is the case in Botswana, perhaps democracy is less of a determining factor than centralized governance structures and alignment between public and private interests.