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## LAW AND ABSOLUTE POVERTY

JULIO MENEZES\*†

### INTRODUCTION

My principal objective in this article is to tentatively re-examine the perspectives from which one studies, improves or supports legal institutions in a materially impoverished society. This objective, by necessary implication, involves the assertion that existing approaches are inadequate. Making a credible case against widely held schools of thought in a single article, however, is difficult, if not genuinely foolhardy. The problem is compounded by my preference for assuming that the reader knows very little about non-industrialized societies. Thus, in seeking to attain my objective, necessity has led to invention. Two specific factual situations are sketched in order to illustrate the operation of law in a non-industrialized society. Simultaneously, they are taken to reflect an intellectual approach. The validity of the rest of the article is, therefore, dependent on whether in this particular context events may be understood as representing jurisprudential positions.

The year 1980 marks another low point in global starvation and the mass media have given the matter considerable attention. Statistics, therefore, become redundant. Third World statistics are generally unreliable, especially in regard to food supply. In addition to the logistical problems of compiling data about subsistence, political considerations tend to interfere with the process. At times governments attempt to suppress information, and at other times they exaggerate their problems.<sup>1</sup> While wars and natural disasters only make the crisis more acute, poverty and starvation are endemic in the Third World<sup>2</sup> and take their toll during the interludes of peace and normal harvests. The scale of the problem is large enough to warrant and attract academic attention.

In 1975, the Dag Hammarskjold Foundation issued a special report entitled *What Now? Another Development*.<sup>3</sup> In its own

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†I am indebted to Professor Jack Hiller and Professor Paul Brietzke for their comments on a previous draft of this article.

1. J. SHEPHERD, *THE POLITICS OF STARVATION* (1975).

2. *World Food Supply*, 2 *THIRD WORLD Q.* No. 3, p. 551 (1980).

3. *DEVELOPMENT DIALOGUES* (1975) [hereinafter referred to as *Another Development*]. The report did not claim to be original and makes substantial

words, *Another Development* was "neither a manifesto nor an academic exercise." It had elements of both. The report was, as the title suggests, prompted by the pervasive frustration over the perceivable worsening problems of the Third World after decades of debate and concern. It crystalized an academic concern over the adequacy of the intellectual theory applied in tackling those problems. The essential conceptual framework is set out in *Another Development* as follows:

Development is a whole. Its ecological, cultural, social, economic, institutional and political dimensions can only be understood in their systematic interrelationships, and action in its service must be integrated. Similarly, needs cannot be dissociated from each other: the satisfaction of each need is at one and the same time the condition and the result of satisfaction of all others. Analysis may require that the parts of the whole be examined one by one, but this should not obscure their essential unity or the many inextricable bonds which bind them. Thus, the elements of the following discussion make sense only through and in their complementarity.

The discussion is structured first around three central elements, the three pillars, so to speak, of another development, which would be:

1. Geared to the satisfaction of needs, beginning with the eradication of poverty.
2. Endogenous and self-reliant, that is, relying on the strength of the societies which undertake it.
3. In harmony with the environment.<sup>4</sup>

The brevity of the statement and the diffuse audience to which it is addressed, give it the semblance of a manifesto. The academic challenge it sets out is, however, very considerable. Part of that challenge falls upon lawyers.

Some legal academics and policymakers are still accused of seeing themselves as mere scribes who perform no policy-shaping role.<sup>5</sup> Such individuals may exist, but I am unaware of them, so I shall not dwell on this. Likewise, the necessity for a multi-disciplinary ap-

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acknowledgement to others. The approach has, however, become known as "Another Development" or "Basic Needs Approach."

4. *Id.* at 28.

5. R. SEIDMAN, *THE STATE, LAW AND DEVELOPMENT* 18 (1978).

proach to development and the need to recognize the inter-relationship of elements of the social system appear to meet no seriously articulated challenge. The focus on "law," then, is merely for the purpose of examining the implications of *Another Development* for institutions and programs that are readily understood to be legal.<sup>6</sup> It is not an analysis of positive law since I am concerned more with the rationale, than with the rules.

Legal academics, very properly, when launching into discussion of the theoretical underpinnings of a field, make explicit that they do not purport to do so as philosophers. That caveat is particularly appropriate in this instance for two reasons. Given my talents, an attempt to "do philosophy" would be presumptuous. In addition, there is the special focus of this article. The very expression "Third World,"<sup>7</sup> which suggests that geographically and ethnically diverse nations fall into a single category, stems from the belief that they share certain essential characteristics. Starvation, poverty, and a variety of other social indicators are the principal, common features. Another feature is history. The acephelous tribal societies that inspired social theorists may survive in parts of the Third World. However, a colonial history is so dominant a feature of these nations that they bear no greater resemblance to the ideal "state of nature" than Rousseau's France. As independent nations, sovereign in a formal legal sense, their legal systems and political economies bear the mark of their intermediate colonial past, more profoundly than that of pre-existing cultures. As academics we must take the problem as we find it.

I intend for reasons of economy and personal preference to simplify the problem by not taking into account the potential of foreign aid or the so-called new international economic order. The issues raised by an absence of political will—the refusal of key political players to implement beneficial policies for reasons of personal greed, megalomania or temerity—are also not addressed. Both international assistance and domestic leadership are very substantial concerns, and feature very prominently in *Another Development*. Setting aside the promise of foreign aid will be more readily overlooked because a substantial body of literature exists question-

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6. That is, formal law.

7. There are situations for which a more narrowly constructed category is necessary. However if nothing else, the Third World or Group of 77 is an ideological group, and the blanket denial that those nations lack anything in common is essentially an opposing ideological position. My special focus on East Africa is simply an outgrowth of greater familiarity with that region.

ing the reality of that promise.<sup>8</sup> As a relevant example, one could look to the Food for Peace Program of the United States. George McGovern, as Chairman of the United States Senate Select Committee on Nutrition and Human Needs, said:

We dispense the surplus foods not on the basis of where they are most needed, but on the basis of power, political considerations of foreign affairs. In other words, we use the food as ammunition. There's been a continuous struggle between the Department of State, which favors giving food to our military allies, and the Department of Agriculture, which prefers to use the food to market future commercial markets for American business. Very little of our Food for Peace has gone to Africa where tens of thousands have perished from famine. But during the last year nearly half of it went to Cambodia and South Vietnam.<sup>9</sup>

There are many who take a more sanguine view than I do of the imminence of a new international economic order, and who are working very diligently to give it shape and substance.<sup>10</sup> It is still acceptable not to share in that optimism since it presents, most acutely, the problems of legal responses to the elimination of starvation.

The opposite is true of the assumption made here that the requisite political will exists domestically. In making this assumption, I do not intend to deny the existence of moral flaws among Third World leaders or the enormous social consequences that result from those flaws. Lack of political will is a very serious problem and deserves serious attention. It does not follow, however, that by ignoring a very serious facet of the problem, analysis of other issues can be dismissed as bearing no relation to reality. There is still room for "ideal" reasoning even in the least ideal of conditions. I attempt to reinforce that point by selecting examples of policies that were advocated without any personal malevolence or opportunism on the part of those suggesting them. I, of course, concede that by simplifying the problem in this manner, one must forego any expectation of providing a directly viable blueprint for the future.

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8. Even those who see it as being generally beneficial conclude that it increases inequality. See G. HOLTHAM AND A. HAZELWOOD, AID AND INEQUALITY IN KENYA (1976).

9. Quoted in *Another Development*, *supra* note 3, at 30.

10. Declaration on the Establishment of New Economic Order, G.A. Res. 3201, 5-VI U.N. GAOR Doc. A19556 (1974); BRANDT, NORTH-SOUTH DIALOGUE, (1980).

Apart from the significant distortion resulting from the assumption of political will and the exclusion of external considerations, the discussion is grounded in the current conditions of the Third World, particularly those of Kenya and Tanzania.

### *The Political Backdrop*

Kenya and Tanzania are recognized as excellent societies for comparative study because of their rough similarities in geography and in their shared colonial history. Much of the research and writing about these two countries is focused on the impact of markedly divergent economic and foreign policy postures on post-colonial development. I believe that the investigation of these societies tends to indicate a remarkable similarity in that development.<sup>11</sup> Consequently, the insights to be gained from examining the official statements of national goals and values are not very valuable. The official ideologies seem to be studied and talked about mainly because they exist.

The Kenyan contribution to development studies was labeled "African Socialism."<sup>12</sup> It made "mutual social responsibility" the cornerstone of social policy. The statement of national ideals emerged in time to meet the challenge posed by a new political party—the Kenya Peoples' Union (K.P.U.) formed by a radical splinter of the ruling Kenya African National Union (K.A.N.U.). Since that opposition force has been removed<sup>13</sup> the manifesto is now reserved for purely ceremonial purposes.<sup>14</sup> That particularly cynical use of ideology makes it relatively easy to resist the temptation to unravel the tract for jurisprudential insights.

The inspiring sincerity of Tanzania's President Julius Nyerere has attracted attention to the philosophy he espouses, namely, *Ujamaa*.<sup>15</sup> The two key features of *Ujamaa*—that it is socialist and African—were also stressed in the Kenyan platform. Both have an obvious appeal to a population that has just rid itself of British colonialism. The combination allows for a broad range of goals and methods, some of which will be justified by nationalistic, traditional sentiments, and others, because they are egalitarian. Where neither

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11. Cf. I. SHIVJI, *THE SILENT CLASS STRUGGLE* (1976); C. LEYS, *UNDERDEVELOPMENT IN KENYA* (1974).

12. Sessional Paper No. 10 of 1965 (Government Printer, Nairobi).

13. C. GERTZEL, *THE POLITICS OF INDEPENDENT KENYA* (1969).

14. For the introductions to quinquennial development plans, see *Development Plan 1974-1978* (Government Printer, Nairobi, 1974).

15. Swahili for "family-hood." J. NYERERE, *FREEDOM AND SOCIALISM* (1962).

value is served, every office holder has an additional justification—pragmatism. To quote President Nyerere, mildly out of context, "I am pragmatic because I lead a government. You cannot lead a government as a bishop or a professor. When you lead a government you have to achieve results, you have to do things."<sup>16</sup> Without questioning President Nyerere's personal idealism, the degree to which values can be elicited from the writings of practicing politicians is extremely limited.

The urban centers of Kenya and Tanzania show definite and perceptible differences. The accepted level of opulence amid poverty is much higher in Kenya. This difference can be attributed largely to the difference between the ideology of the dominant personalities, particularly the late Jomo Kenyatta and Julius Nyerere. The foreign policy of the two countries is also discernibly different. While Kenya has become very closely allied with the West, Tanzania steadfastly strives to remain nonaligned. The similarities are at least as significant. Both have "dual" economies—a traditional sector of subsistence producers with a very limited connection to the monetary economy and a modern sector dominated by the production of cash crops for export. The modern sector of the economy in both countries has a mix of state and private enterprises.<sup>17</sup> Private investment is both foreign and domestic.

One area in which their policies converge, to which I will return later in this article, deals with civil liberties. Kenya had a constitutionally entrenched charter of rights at the time of its independence.<sup>18</sup> A year later the entrenchment was gone,<sup>19</sup> and by 1969, the ambit of rights was much more narrowly defined and the permissible grounds for derogation expanded.<sup>20</sup> The "fundamental" rights were made subject to the operation of the Preservation of Public Security Act,<sup>21</sup> which allows *inter alia* detention without trial, censorship and forced labor. Tanzania examined the question of entrenching civil rights and decided against it.<sup>22</sup> In 1962, a year after

16. *Third World Negotiating Strategy*, 1 THIRD WORLD Q. No. 2, p. 21 (1979).

17. See note 11 *supra*.

18. [U.K.] Kenya Independence Act 1963, s.I (I),(3) (Order-in-Council). For a detailed exposition of Civil Liberties in Kenya, see GHAI & MCAUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA, Ch. IX.

19. Constitution of Kenya Amendment Act 1964, No. 38 of 1964.

20. Constitution of Kenya Act 1969, No. 5 of 1969.

21. *Id.* at § 83.

22. *Report of the Presidential Commission on the Establishment of a Democratic One Party State* (Government Printer, Dar-es-Salaam, 1965) [hereinafter cited as *Report of Presidential Commission*].

independence, it passed the Preventive Detention Act,<sup>23</sup> which authorized arrest and detention without trial. On the positive side, Tanzania established the office of a Permanent Commission of Enquiry<sup>24</sup> and made considerable efforts to give it status. In Kenya, the convention of the ministerial duty to respond to questions in the National Assembly has continued, at least for individual complaint, if not for the purpose of subjecting cabinet policy to criticism.

Even this brief listing of similarities and differences suggests that it would be fruitful to sidestep official ideology and examine particular legal institutions in the light of the specific justifications given for their creation. An institution shaped by "experts" will reflect their personal perspectives and adopt, in varying degrees, the position of some theoretical movement. Subsequent implementation may distort the institution, but its design must incorporate a vision of the problem and of preferred solutions. That vision is suspect if it reaches a point where it can only operate by accepting solutions that deny the values that operated in the initial identification and characterization of the problem.

#### WHY ANOTHER DEVELOPMENT?

International scholars concerned with law in Third World societies have chosen to be identified by their perception not of the problems but of the cures. The field has come to be known as "Law and Development."<sup>25</sup> The past decade has produced evidence of an acute personal disappointment with the fruits of such scholarship, particularly among academics from the United States.<sup>26</sup> Some of the frustration appears to flow from that title. It apparently suggests to some academics the possibility of providing unique insights into legal historiography. Failing to reach a consensus on what constitutes "development," the participants or their critics are dissatisfied. Criticisms of that nature are valid when leveled against academics who view the developing nations as an exotic laboratory for the "scientific" study of law. Academics concerned primarily

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23. The Preventive Detention Act, 1962, ch. 490.

24. Interim Constitution of Tanzania, Act. No. 43 of 1965, § 67. See J. McAuslan and Y. Ghai, *Constitutional Innovation and Political Stability in Tanzania*, 4 J. of MOD. AFR. STUD., No. 4, 491 (1966).

25. Merryman, *Comparative Law and Social Change*, 25 AM. J. COMP. L. 457 (1977).

26. Trubek and Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.



with contributing, as best they can, to the material advance of the poor are less affected by such criticisms.

*Another Development* is the product of a much more global frustration. Decades of research, foreign aid, development programs, political meetings at national, international, and other levels had left the Third World in a condition possibly worse than it was at the time of the declaration of the first "Development Decade" fifteen years before the Seventh Special Session of the United Nations. Cherished dreams and the promise of decolonization had not materialized. Crudely generalized, visions of the future fell somewhere along the continuum of views bounded by ultra capitalists at one extreme and radical Marxists at the other.

The particular labels for the application of northern ideologies to development studies are "modernization" and "underdevelopment."<sup>27</sup> To maintain the link with legal schools of thought, I shall use the familiar labels of liberal and socialist.<sup>28</sup> The ultra Western position (more a useful caricature for academic abuse than identifiable individuals) allegedly sees colonialism as an altruistic and paternal development of the colonized societies to the point where they become self-governing. Liberals do not necessarily share that view but firmly believe that post-colonial development requires the ongoing sophistication of technology, laws, and legal institutions in order to maximize efficiency and productivity. A corollary that requires the special attention of lawyers is to insure that the powers of the state are not abused as against the individual. The models for this form of development are Western.

Legal development in the liberal democratic tradition obviously takes its lead from economics. The need to alter Western economic ideology to take into account the problems of the Third World are immediately apparent. Third World countries cannot replicate the economic development of Western societies because conditions are markedly different. Moreover, certain correlations that might exist in industrial economics are often meaningless in a nonindustrialized setting. In particular, there is little reason to assume that benefits of aid or investment "trickle down." A close look at the effects of

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27. Compare C. KINDLEBERGER & B. HERRICK, ECONOMIC DEVELOPMENT (1977) with FRANK, CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA (1967) and W. RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA (1972).

28. The generalized categories blur perceptible distinctions of subgroups within each camp. Apart from the difficulty of fully acknowledging the various factions and schisms within a brief article there is little need for it in order to demonstrate the potential benefit of *Another Development*.

economic growth indicates that it does not necessarily result in benefits to the poor and, in fact, may result in a worsening of their position. With a great and growing inequality of wealth and income, growth in per capita gross national product does not represent meaningful progress. Tables from an economic report on Kenya help illustrate these concerns.<sup>29</sup> Though there is no unanimity among liberal economists that the "trickle down" theory of development is

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*Trends in Income Distribution, 1963-74*

(a) *The Distribution of Smallholders Income in Central Province 1963 and 1974.*

	Population (By Income)	% Income		% Change in Share	Change in per Capita Real In- come %
		1963	1974		
POOREST	40	24.38	18.23	- 25.22	+ 4.3
MIDDLE	30	25.27	27.66	+ 9.46	+ 52.7
RICHEST	30	50.35	54.11	+ 7.47	+ 49.9
	All	100	100	0	+ 39.5

(b) *The Distribution of Smallholders Income in Nyanza, 1970 and 1974*

	Population (by Income)	% Income		% Change in share	Change in per Capita Real In- come %
		1970 1/	1974 2/		
POOREST	40	28.85	18.44	- 36.09	- 19.1
MIDDLE	30	25.61	25.47	- 0.55	+ 27.4
RICHEST	30	46.54	56.09	+ 20.52	+ 54.4
	All	100	100	0	+ 28.1

(c) *The Distribution of Income in Nairobi, 1969 and 1974*

	Population (By Income)	% Income		% Change in Share	Change in per Capita Real In- come %
		1969	1974		
POOREST	40	17.2	15.1	- 12.2	+ 7.0
MIDDLE	30	28.8	21.8	- 24.3	- 7.7
RICHEST	30	54.0	63.1	+ 16.9	+ 42.5
	All	100	100	0	+ 21.9

P. COLLIER AND D. LAL, *POVERTY AND GROWTH IN KENYA 7* (1980). The authors caution that the statistics represent "snapshots" more than clear trends. Central and Hyanza Provinces are both better than average agricultural lands but are very densely populated.

invalid,<sup>30</sup> for many economists the case against the theory is persuasive enough to have led them to search for alternatives, such as *Another Development*.

Socialists integrate political and economic theory much more fully than liberals do. A conscious concern with the power relationships inherent in economic activity make the possibility of a negative distributive impact entirely predictable. Those results are causally connected to the mode of investment. The central challenge of socialist development is to shape the economy so as to promote the ideal of eliminating class stratification. For socialists, the search for novel approaches has been prompted by the pattern that has emerged in the drive towards the creation of nonexploitative economic institutions.

Independence has been achieved by revolutionary struggle. Those forces winning the battles could have continued the transformation of society into a just socialist system. Unfortunately, the politicians and bureaucrats who were expected to be in the vanguard of such an ongoing struggle, appear to have coalesced into an interest group that is in opposition to the workers and peasants.<sup>31</sup>

Trends in the Distribution of  
Smallholder Consumption, 1963-1974

	% Population (by household Income)	Central Province		Nyanza	
		1963 1/	1974 2/	1970 3/	1974 4/
POOREST	40	32.2	25.8	32.2	26.2
MIDDLE	30	24.7	28.4	30.7	29.7
RICHEST	30	43.1	45.8	37.1	44.1

*Id.* at 9.

Table 7: Landholding of Those Cultivating Land  
on Smallholdings (% Land Owned)

	% Popu- lation (by Land Size)	Central Province			Nyanza	
		1961	1963	1974	1961	1974
POOREST	40	23.9	26.3	18.3	15.6	12.9
MIDDLE	30	30.9	29.7	27.9	29.5	28.0
RICHEST	30	45.2	44.0	53.8	54.9	59.1
All		100.0	100.0	100.0	100.0	100.0

*Id.* at 10.

30. Albert Fislow, 1978 PROC. AM. SOC'Y INT'L L. 231, 252.

31. See SHIVJI, *supra* note 11. P. CHALIAND, REVOLUTION IN THE THIRD WORLD (1973).

## LAW AND ABSOLUTE POVERTY

The preceding brief sketch of trends in the developing nations seems to suggest that greater attention be focused on the rich and the powerful. *Another Development* stresses what is viewed as contradictions on the one hand, between the industrialized nations and the Third World, and on the other hand, between the privileged within the Third World and the poorest segments of those societies.<sup>32</sup> Nevertheless, without any embarrassment, the report leaves it to the oppressed to discover their way out. There are two explanations for the adoption of this posture in *Another Development*. First, the commitment to "self-reliance" requires that it be so.<sup>33</sup> Second, there is the belief—articulated in a later contribution to the literature on *Another Development* entitled *Reshaping the International Order*<sup>34</sup>—which may be stated as follows:

In the final analysis, our world is ruled by ideas—rational and ethical—and not by vested interests. The "power of the idea," the particular weapon of scientists, moralists and concerned citizens, must prove of decisive importance in constructing a fairer and more peaceful world and the search for relevant new ideas must be intensified so as to support it.<sup>35</sup>

This article is based, of course, on the belief that rational and ethical ideas are important, notwithstanding that the claim that they rule the world is merely a colorful flourish. Bureaucracies require, in Weber's terms, legitimating rationalizations. Stripped of their protective myths, they are made vulnerable. Unfortunately, this is less true of the ruling elites in the Third World than it is of multinational bodies whose proclaimed *raison d'être* is the alleviation of global poverty. Governments can continue to operate through other forms of power besides authority. There is vast room for manipulation and, should all else fail, for naked coercion.

The appeal of *Another Development* is twofold. It sets more specific targets than does a general commitment to development. *Another Development* also seeks to protect against certain ethical blind spots revealed by the academic responses to the problems of development. Notwithstanding the subjectivity of values, academics have and use values for ideological purposes to the same extent that

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32. *Another Development*, *supra* note 3, at 38.

33. *Id.* at 36.

34. *RESHAPING THE INTERNATIONAL ORDER* (Tinbergen ed. 1976).

35. *Id.* at 107.

bureaucrats do.<sup>36</sup> Under such circumstances, the ideals may not be considered either cynical or self-serving, and those of both the bureaucrats and the academics are at least worthy of attention.

The reason the debate concerning goals and values need not regress to assertion and counter-assertion is that lawyers concerned with development share considerable common ground. There is the common commitment to the elimination of poverty in the Third World. There is also an understanding that the ideology of any particular academic discipline does not adequately cover the entire field. Finally, but more tenuously, there is the assumption that policies are more efficiently and effectively co-ordinated, defined, and operationalized through legal formulation.<sup>37</sup> This last proposition is tentative not because the myth of the lawyer as mere scribe has any great academic support, but because a serious case can, of course, be made for extra-legal development.<sup>38</sup>

Even addressing an audience homogenized by the assumptions listed above, the underpinnings of the method that uses particular events to exemplify both the need for a new perspective and the benefits of the perspective offered by *Another Development*, will be controversial at best. The focus on civil liberties and land reform is eminently defensible as they are central to the field of legal development. The pragmatic response of two developing nations to questions of civil liberty or property may be similar despite widely divergent official ideologies. The same is not true of the academic input that goes into the shaping and analysis of policies. The distortion of programs by corrupt, fraudulent or inept implementation is not to be laid at the feet of the expert whose altruism and integrity I assume to be at least as high as my own. It is also important to stress that the argument being made is that both socialist and liberal perspectives that do not incorporate the essential features of *Another Development* are deficient by the very criteria of socialism and liberalism respectively.

A socialist example may be taken from Robert Martin's book *Personal Freedom and the Law in Tanzania*.<sup>39</sup> It is obvious from the very inclusion of the following episode in the book and from the author's introductory sentence that it typifies an issue of significant concern to socialist scholars.

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36. C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* (1959).

37. P. BRIETZKE, *LAW, DEVELOPMENT AND THE ETHIOPIAN REVOLUTION* (forthcoming).

38. Abel, *Law Books and Books About Law*, 26 *STANFORD L. REV.* 175 (1973).

39. R. MARTIN, *PERSONAL FREEDOM AND THE LAW IN TANZANIA* (1974).

Consider the following example of the difficulties involved in appreciating the true nature of a particular contradiction: on 16th June, 1969, approximately 150 workers at a shirt factory in Dar-es-Salaam walked out of work and staged a demonstration to protest against the methods being used by the production manager at the factory. The police field-force unit was called to the scene and arrived at the factory wearing steel helmets and armed with semi-automatic rifles with bayonets fixed. They immediately arrested the workers and herded them into trucks. The workers were then carried to the Central Police Station in Dar-es-Salaam . . . where they were marched with hands over head into custody. The arrests were made on the grounds that workers had engaged in conduct which, under Tanzania's Labour Laws, amounted to an illegal strike. The Second Vice-President, Mr. Kawawa, then intervened. He ordered the release of the arrested "strikers" and called a meeting to be held the next day at the shirt factory. At this meeting he ordered the dismissal of the production manager and warned the firm not to mistreat the workers. He also warned the firm not to take advantage of laws designed to inhibit strikes and seemed to disavow the action of the police. The Nationalist, the official organ of Tanu, carried an editorial on 18th June which was severely critical of the police action and pointed out that in this case the enemies of the people were not the "striking workers," as the actions of the police seemed to indicate but the capitalist owners of the factory.<sup>40</sup>

The labor laws under which the arrests were made clearly deal with the relationship between individuals and the modes of production. For our purposes the harangues of Mr. Kawawa<sup>41</sup> and the editor and the ad-hoc solution to the problem are of no great moment. The imputation of fault to the police and not to the policy-makers of the laws is important. At the time, most employers were Asian immigrants and most workers were indigenous Africans. The sure-fire methods of deciding who the "good guys" are by race or national origin are precluded by socialist theory, which explains racial tension in Tanzania, and elsewhere, as a product of the economic struc-

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40. *Id.* at 32.

41. Subsequently found to be an "enemy of the people."

ture. The event is also notable precisely because straight-forward class analysis does not help resolve the question of when the law should be enforced. Individuals are governed by the labor laws according to their class, i.e., as workers or employers. The solution socialists must resort to is found in the metaphysical maze of "true" and "false" consciousness.

For a liberal example consider the following from *Reshaping the International Order*. "[L]and taxes, where land is privately owned, can be administered without excessive difficulty. They carry the additional advantage that they can be used as a powerful incentive to make the best use of the land available."<sup>42</sup> It should be borne in mind that *Reshaping the International Order* was responding to the problem of the material conditions in the Third World. The connection between the recommendation quoted above and events in the Third World will be elaborated below. For the moment, follow the policy through this hypothetical scenerio. To implement the policy, a government implements a program of registering title. For reasons of benevolence it restricts the level of the land taxes to an amount that merely covers the cost of initial registration. A drought occurs, farmer A is unable to pay the tax or to pay for food. He sells his land to the adjacent farmer B, who is engaged in producing a non-comestible crop such as coffee or bananas for export. Eventually unable to survive through crime or charity, farmer A dies. Productivity has increased but food production has not. However, the supply/demand situation has changed. There is at least one less mouth to feed.<sup>43</sup>

The ethical problems that arise from either of the legal policies set out above emerge from the level of deprivation prevailing in the Third World. In 1973, speaking to the Governors of the World Bank in Nairobi, Robert McNamara described a condition of absolute poverty as:

a condition of life so limited as to prevent the realization of the potential of the genes with which one is born; a condition of life so degrading as to insult human dignity—yet a condition of life so common as to be the lot of some 40%—800,000,000 individuals—of the people of the developing countries.<sup>44</sup>

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42. *RESHAPING THE INTERNATIONAL ORDER*, *supra* note 34, at 85.

43. For convenience, constant reference to dependents is avoided but their rights are equally a matter of concern.

44. 1973 Annual Meeting of the Board of Governors 16, I.B.R.D. (World Bank).

The concept of absolute poverty, which is not relative to average incomes or other variable standards, is a valuable tool in researching the Third World. The absolute poverty line determined by minimum daily nutritional needs permits economists to make comparable observations between subsistence farmers and the urban unemployed<sup>45</sup> a more meaningful figure than a comparison of earnings. In law, the notion of absolute poverty has a somewhat different potential use. The institution that creates and protects relationships to resources must contend with the morality of the rights created within the social context in which the institution operates. While medicine and nutrition have ideological components and margins of uncertainty, health experts would agree that a stage is reached at which starvation is the cause of death. In pursuit of grand dreams of "human dignity," "equality," and "self-sustaining growth," the point may have been lost that starvation is the equivalent of capital punishment. The analogy obviously is laden with emotional connotation. It is therefore suspect. But kwashiorkor, pellegra, and anorexia are less emotionally laden than "class," "efficiency," or for that matter "development." In many jurisdictions it is a criminal offense to deprive individuals, in certain relationships to the accused, of the necessities of life, if that deprivation results in the loss of life or impairment of health.<sup>46</sup> Difficult as it may be to obtain convictions for such crimes, an equivalence between deprivation, on the one hand, and direct violence, on the other, is, nevertheless, accepted. In the case of legal intervention in the lives of the absolute poor, it must follow that the morality of causing further deprivation is as relevant as any necessary justification for the use of force. Accelerating death may be as culpable as causing it.

The concept of absolute poverty makes the benefit of *Another Development* obvious in that it focuses on the primary basis for action. Liberals and Socialists are distinguished from each other by their explanations as to the causes of poverty. They are united by their approach that suggests that one can eliminate the cause and that a cure has been found. *Another Development* demands that consideration be given to the impact of the remedies on the poor.<sup>47</sup> At the very minimum there must be two stages of analysis. The first is a subsistence analysis that contends with a moral right to survival. Only when the law protects that basic minimum right can one proceed to pursue the grander goals that dominate ethical debates in

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45. See P. COLLIER AND D. LAL, note 29 *supra*.

46. See, e.g., CAN. REV. STAT., ch. 34, § 197 (1970) (Canadian Criminal Code).

47. See *Another Development*, note 3 *supra*.



the affluent world. A brief return to the earlier illustrations on civil liberties and land reform will demonstrate the benefit of keeping absolute poverty in mind.

#### SUBSISTENCE ANALYSIS AND CIVIL LIBERTIES

The essence of the arguments against legal protection of civil rights in the Third World is, strangely enough, poverty and development. The following are a representative selection. A fairly brief strike (assumed to be an incident of the right of association) of railway employees in India could lead to the death of millions.<sup>48</sup> Clashes between the judiciary and the executive "is a luxury" in a newly emergent nation.<sup>49</sup> Effective (as opposed to symbolic) protection of civil liberties is primarily dependent on a political and cultural base that requires a sophisticated citizenry.<sup>50</sup> In any event, the poor cannot afford the court system and would therefore obtain no protection.<sup>51</sup> Even where statements are addressed to domestic policy-making bodies, they appear to be primarily directed at actual or perceived criticism from the Western world. In addition to the arguments against protections similar to those recognized by industrialized liberal democracies, an even more fervent debate about civil rights has been fed by the entry of the Third World nations into international organizations. As temporary allies of the Warsaw bloc they have demanded the recognition of new rights. Consequently, a whole new industry of labeling and name-calling has been born.<sup>52</sup> One can now stand behind rights that are positive versus negative; economic, social and cultural versus civil and political; communal or socialist versus individualistic and bourgeois. All of this may mean a great deal in the world of international law, but from the perspective of domestic subsistence rights, the new vocabulary is utterly sterile. Where the government cannot afford to institute a welfare system the positive "rights" to food and other necessities are meaningless. The best that one can hope for is that the right will operate negatively (as in the United States Bill of Rights) to preclude the government from implementing policies that would deprive the individual of the means of subsistence.<sup>53</sup> The right to

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48. Nehru, *Western Democracy and The Third World*, 2 THIRD WORLD Q. 53 (1979).

49. *Report of the Presidential Commission*, note 22 *supra*.

50. *Id.* at 203.

51. *Id.* at 86.

52. See Preambles to International Covenant on Civil and Political Rights, 21 U.N. GAOR, Supp. 16, U.N. Doc. A6316 (1967).

53. Oscar Schachter, 1978 PROC. OF THE AM. SOC'Y OF INT'L L. 231.

form a trade union or co-operative may be primarily economic but it is also political; conversely, the political choice between Tweedledum and Tweedledee exercised by voters in liberal nations is as much an act of economic yearning as it is an unpopularity contest. I need hardly add that I am incapable of taking seriously the potential of a state to feed, employ or educate *the nation* without feeding, employing or educating *individuals*!

Returning to the problem of the strike at the shirt factory, it appears to be a matter of not ascribing blame where it is properly due. Third World economies are essentially dualistic with a modern monetary sector, which is largely urban, and a traditional nonmonetary sector, which is largely rural. A member of a trade union, however rigorously controlled an association it is, is substantially better off than the peasantry, let alone the unemployed landless. Any major investment, even if it is totally privately owned, involves public capital investment in the economic infrastructure and, more likely than not, a protected market, investment incentives and obligations to the international monetary system. Under these circumstances, the argument for individual autonomy of workers is hard to make, even where the product is not an absolute essential. Where the product or service is an essential, curbing the right to collective work stoppage is much easier to make. It is nevertheless poor legislation that makes any form of strike illegal and then presumes to lay the blame on the enforcers. The question of whether workers should be permitted to strike in a society where a segment of the society starves to death, leads to better answers. Subsistence analysis would not necessarily give the workers the right to strike for pay (assuming wages are above the subsistence level). It would, however, provide the very basis for the right to strike against hazardous conditions, physical abuse, or the obligation to recoup a proper share of any surplus for the public as against rapacious or dishonest management.

The same can be said for almost the entire range of civil or economic rights, including the most controversial of all rights—the right to land. Northern ideologies give no easily discernible answers to what the nature of this right should be in the Third World. Marx would not provide the rationale for abolishing individual rights of the peasant farmer and the United States Bill of Rights would not require the right to property override the government power to take from the haves to give to the have nots.<sup>54</sup> What *Another*

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54. *Puerto Rico v. Eastern Sugar Assoc.*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946).

*Development* seems to me to suggest is that one does not examine questions of civil liberties from the standpoint of what it means or how it is achieved in the industrialized world. Ignoring the industrial world and concentrating on acute poverty, the arguments against civil liberties mentioned earlier become virtually irrelevant. Judicial safeguards are not a luxury when the stake is the individual's best and only chance at survival. A supportive culture that recognizes limits to the power of government is not going to emerge any faster within a particular society, if no mechanism is provided for challenge. Rights do not have to be protected as absolutes that do not allow for distinctions to be made between very rich and very poor.

#### LAND REFORM

There is an element of unfairness in my selecting from *Reshaping the International Order* the proposal for land taxes. It is an incidental paragraph in a report that attempts to deal with almost everything from the ocean floor to outer space. The source of the proposal was important in that it would take an extraordinary conspiracy theory to link the recommendation with the self-interest of the authors. The real source of inspiration for the selection of a policy aimed at promoting land transfer as a means towards development was land reform in Kenya. I think the policy implemented in Kenya is a perfect example of the liberal modernization perspective. It was originated by colonial experts and may, therefore, be suspect, but it provides an excellent illustration of the need for *Another Development*.

In brief,<sup>55</sup> the British, after some initial hesitation, assumed both sovereignty over Kenya and ownership of land.<sup>56</sup> Pre-colonial rights were relegated to "tenancies at will."<sup>57</sup> Within defined tribal reserves, customary entitlement to property and succession was maintained.<sup>58</sup> In the early 1950s, a dramatic change in policy, coincidental with the Mau Mau uprising, was formulated. That colonial policy has been adopted and accelerated since independence.<sup>59</sup> The

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55. For a fuller account of the Kenyan reforms, see M. SORRENSEN, *LAND REFORM IN THE KIKUYU COUNTRY* (1967).

56. GHAI AND MCAUSLAN, *supra* note 18, at 25-30.

57. *Gathomo v. Murito*, 9 E. Afr. L. Rep. 102.

58. The territorial limits of African versus European lands was kept flexible for the benefit of the latter until the late 1930's. Crown Lands (Amendment) Ordinance No. 27 of 1938; Native Lands Trust Ordinance, No. 28 of 1938.

59. *Report of the Mission on Land Consolidation and Registration in Kenya 1965-1966* (Government Printer, Nairobi, 1966) [hereinafter referred to as the

basis of the policy was the Swynnerton Plan.<sup>60</sup> There are three elements to the plan that have to be distinguished because one—land consolidation—has been sparingly applied since independence.<sup>61</sup> The principal element is the registration of individual title under the Registered Land Act.<sup>62</sup> An essential prerequisite is adjudication of rights existing at the time of initial registration. Land consolidation was initially combined with the process of adjudication in order to create efficiencies by giving the registrant one parcel of land approximately equal to several widely dispersed units. This aspect of the program was found to be an unnecessary and politically antagonizing adjunct of registration and has been downgraded. The third element was to extend credit and advice on terracing and other better farming practices to increase productivity.

As Swynnerton saw it, through the individualization of land holding and free alienability, "the able, energetic or rich Africans [would] be able to acquire more land and bad or poor farmers less, creating a landed and landless class. This is a normal step in the evolution of a country."<sup>63</sup> The desired result would emerge faster and more directly from the Swynnerton Plan than in the hypothetical situation described earlier, and the costs of the policy were understood and spelled out more explicitly than they were in the recommendation on land taxes in *Reshaping the International Order*. Apart from fraud and other malfunctions in the process, the emergence of a landless class was inherent to the program for reform for two reasons. First, there was no complete correlation between the property rights recognized under the statutory scheme and rights under customary law. The traditional rights ceased to apply after registration. The individual with the most substantial claim under customary law became the "absolute owner."<sup>64</sup> Customary rights not recognized by the statutory regime were extinguished with no compensation. Second, all the proponents of freely alienable title were well aware of the adage "[t]he quickest way to deprive a peasant of his land is to give him title to it." This had, after all, been the basis of colonial paternalism.<sup>65</sup>

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Lawrence Report]; Development Plan 1974-1978, 216-20. (Government Printer, Nairobi, 1974).

60. Swynnerton, A Plan to Intensify the Development of African Agriculture in Kenya (Government Printer, Nairobi, 1955).

61. Lawrence Report, *supra* note 59, at ch. X.

62. Laws of Kenya, Registered Land Act, ch. 300, § 3 (No. 25 of 1963).

63. Swynnerton, *supra* note 60, at 60.

64. Note 62 *supra*.

65. Lawrence Report, *supra* note 59, at ch. XVI. Simpson, *Land Problems in Papua New Guinea*, 40 NEW GUINEA RESEARCH BULL. 1 (1971).

In 1965 a joint British-Kenyan Mission was appointed to evaluate land consolidation and registration.<sup>66</sup> Their report confirmed that the anticipated loss of access to land had occurred both as a result of the process of registration<sup>67</sup> and through alienation by the registrants.<sup>68</sup> The Commissioners were critical of aspects of the program, such as the political hype promoting registration.<sup>69</sup> They refused to see all gains in productivity as resulting from tenure reform. They nevertheless came out strongly in favor of the continued march toward freely alienable individual title. The program of land registration has been continued and accelerated.

It is difficult to identify in all of this policy-making those concerns that are "legal," because the design of legal institutions is a major feature of that which is "economic" or "agricultural." But at one point in the formulation of land tenure policy, subsistence analysis slipped in and triumphed! Clearly, if one had the power to increase productivity by wiping out subordinate vested interests at the stroke of a pen, why not go a step further and eliminate proprietary interests where the size of the parcel of land or the skills of the farmer made the interest economically insignificant? This was advocated and explicitly rejected in Kenya.

The essence of the system which we propose is that ownership is established by proving long occupation to the satisfaction of the traditional land authorities; size of holdings and standards of farming are irrelevant factors which in no way affect the right to be entered in the Record of Existing Rights. Neglected fragments are recorded equally with well-planned farms. The process of adjudication must be applied equally to all and it would be *unjust* to allow recognition of one owner, a good farmer, and refuse another because, for instance, his holding is too small. *It might well be the only land he owned.*<sup>70</sup>

What happens to the people displaced by tenure reform? In some instances the formal program may not change anything, and the actual working of the land continues as it did before registration.<sup>71</sup> Some landless are re-settled on land purchased from colonial

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66. Lawrence Report, note 59 *supra*.

67. *Id.* at 19.

68. *Id.* at 24, para. 87.

69. *Id.* at ch. VII.

70. *Report of the Working Party on African Land Tenure 1957-1958*, 19 (Government Printer, Nairobi, 1958) (emphasis added).

71. The reforms did not originally extend to changing the applicable

settlers or on previously uncultivated government land.<sup>72</sup> Others migrate in search of a livelihood. They must either move to the urban centers in search of work or find unoccupied land to cultivate, possibly marginal agricultural land previously occupied by and exclusively reserved for nomadic pastoralists. This in turn changes the focus of attention from land reform to freedom of movement. Both the legal powers and police actions aimed against urban slum dwellers, mainly rural immigrants, have been expanded since independence.<sup>73</sup> Conversely, the freedom of movement to the drier range lands has been increased.<sup>74</sup> This is in dramatic contrast to the general trend on entrenched rights.<sup>75</sup>

The legal balance sheet of the Kenyan reform shows some individuals have had their property rights enhanced through legislation or grants of public land. The public at large has paid for some of the costs through paying for adjudication and registration and for a substantial portion of the costs of the settlement schemes. The other contributors are those whose proprietary interests under customary law were extinguished without compensation, and the pastoralists who have had the territory over which they moved (and grazed) diminished by the increased freedom of movement given to outsiders.<sup>76</sup> The victims of the policy will also eventually rank among the victims of malnutrition.

#### BASIC HUMAN NEEDS AND SELF-RELIANCE

Subsistence analysis is obviously relevant to a workers' strike or land tenure reform. It is also relevant to other Third World legal issues in which the connection between the particular legal institution and the means of subsistence is less direct. However, in order to proceed with the application of *Another Development* to law in the Third World, one must first focus on the report itself. *Another Development* merely provides a framework to which the substance of each individual's role in development must be added. It leaves

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customary law of succession. As a result, and also due to sheer necessity, informal subdivision of land occurs.

72. Development Plan 1974-1978, *supra* note 14, at 225-30.

73. Freedom of movement of Africans was very severely restricted during the colonial days. The right to freedom of movement was established by the Independence Constitution. A new Vagrancy Act (Laws of Kenya, No. 61 of 1969) was enacted after independence. It is the center piece of psychological and physical campaigns against the urban poor.

74. Without Constitutional amendment.

75. Note 18 *supra*.

76. COLLIER AND LAL, *supra* note 29, at 58.

hard questions and internal conflicts for each academic discipline. For those who seek to operate solely through domestic legal policy, resolution of questions and conflicts must be arrived at without recourse to the probability of greatly increased international assistance.

Of the "three pillars" of *Another Development*—satisfaction of basic needs, through endogenous and self-reliant methods, that are in harmony with the environment—the last is not especially difficult. The environmental constraint has been defined so very narrowly as to be virtually eliminated. The less extreme consequences of human impact on nature, such as a potable water supply, are treated as basic necessities for a safe "habitat." The call for endogenous structures is initially ignored for reasons stated later. For the moment, consider the goals of satisfying basic needs through self-reliance.

Certain normative duties have been suggested to correlate to subsistence rights. They are the duties "not to eliminate a person's only available means of subsistence, that is, a duty to forebear from depriving; to protect people from deprivation by others of their only means of subsistence; and to provide subsistence for those unable to provide for their own."<sup>77</sup> The suggestion was made in an international context. Since the obligations would apply at all levels, i.e., to individuals, multinationals, and domestic and foreign governments, their fulfillment through global resources is theoretically possible in the near future. Tragically, without external aid the fulfillment of these obligations through internal redistribution is not even theoretically possible for about sixty of the Third World countries.

All resources are extremely scarce. So even if there were no clash between different needs, such as the growing and providing of food, on the one hand, and an unpolluted water supply, on the other, vital policy choices have to be made. As a consequence, a basic human—needs approach to development presents enormous challenges to economists. It not only calls into question the efficiency of market allocation but thrusts at the foundations of certain disciplines, especially the dependence on exchange value. I am struck by the extreme diffidence with which researchers add to the productivity figures of a farm a figure representing the farm produce consumed by the owner.<sup>78</sup> It is as if they fear an audit for fraudulent accounting where the monetary estimate has not had the

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77. Cheryl Cristensen, 1978 PROC. AM. SOC'Y OF INT'L L. 235.

78. Economic Survey No. 27 (Government Printer, Nairobi).

benediction of an arms-length transaction. Possibly because of the very severity of the limitations of the discipline, some economists, when transposing it to a Third World context, have sought to broaden its capabilities.<sup>79</sup> For most lawyers, by contrast, the idea that non-market allocations may be necessary and desirable is not particularly radical, and consequently, not as thought provoking.

"Lawyers concerned with economics"<sup>80</sup> may be in a better position to do more than make *ad hoc* comments about reform. A particularly useful exposition is found in the book *Tragic Choices*.<sup>81</sup> Its central focus on the allocation of very vital and very scarce resources, particularly as they relate to situations that bring the value of the prolongation of life into conflict with some other value, make the work extremely relevant to *Another Development*. It is, however, only tangentially so, because it is not just concerned with scarcity *per se* but also with a particularly defined notion of "tragic choice" that relates, for instance, to the mode of selection of land ownership where starvation is rampant.<sup>82</sup>

An engineer might conceptualize basic needs and self-reliance as being complimentary. The machine must serve the basic needs of the owner who ought to be able to afford and operate it—the foundations of "appropriate technology." However, in designing the social system, this conceptualization is inadequate. There is a conflict present here that is commonplace to law. At the one extreme, there are humane prisons where material needs are provided, but personal autonomy is curbed and manipulated so as to be virtually extinguished. At the other extreme, there is a totally *laissez faire* system where individual autonomy is uninhibited except to prevent physical injury to others, and only the strongest and fittest survive. Very simply, if providing basic human needs is the only value, all intervention (perhaps excepting execution) would be permissible. Self-reliance as a primary and exclusive goal, however, would justify virtually no intervention. Through such a conflict as this, absolute poverty highlights the point of convergence and of departure between Third World problems and the main concerns of Northern jurisprudence.

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79. Ahluwalia, Carter, and Chenery, *Growth and Poverty in Developing Nations*, 6 J. OF DEV. ECON. 299 (1979).

80. Calabresi and Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). The framework outlined in the article links various private law perspectives but also law and allocations by market or non-market institutions.

81. G. CALABRESI & P. BOBBIT, *TRAGIC CHOICES* (1978).

82. *Id.* at 127.



Without the capacity to realistically legislate freedom from want, one is reduced to subsistence analysis. Under such an analysis, the rights become negative and minimal. The moral basis for the rights is the right not to be marginalized, directly or overtly, by the erection of legal institutions other than those which guarantee to all a borderline existence. In conditions of want, further marginalization entails accelerated death. To legitimate an order that does not guarantee the minimal right against marginalization is to argue that potential victims acquiesce in their own death<sup>83</sup>—an argument that cannot be made without resort to metaphysical eschatology.

Subsistence analysis would not preclude an economic transformation whose purpose is to increase productivity and whose aim is much higher than meager existence. However, the onus is on the reformers to achieve their objectives without sacrificing the lives of others. Since the right against marginalization is self-supporting and not founded on an assertion of any universal value, such as freedom or equality, it would, unfortunately, be compatible with a system that is neither democratic nor egalitarian. A Scandinavian foundation, such as the Dag Hammarskjöld Foundation, and most academics would find that conclusion distasteful. Moreover, there are real dangers connected with issuing an altruistic manifesto in favor of material values without asserting a strong commitment to the abstract values clustered around "self-reliance"—freedom, human dignity, and pluralism to name a few. Third World nations present an ironical dual attitude towards the direct use of force and manipulative violence. On the one hand, there is considerable zeal by government officials for the protection of their status—often through crude and brutal forms of coercion. On the other hand, most of the nations are "soft-states," deficient in legislation, with lax enforcement of laws that do exist and with low levels of obedience to those laws.<sup>84</sup> However, a discussion of the role of coercion must, at the very least, be tolerated within the secluded confines of an academic journal.

The assertion of a right to subsist provides a moral argument against coercion for certain purposes, but not against use of force *per se*. The use of laws, backed by effective capacity for enforcement, to increase production, with the resulting products then being

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83. There is the potential for a counter-argument based on the justification used in supporting the drafting of soldiers in a moral war. The analogy is profitable but would be imperfect.

84. GUNNAR MYRDAL, *ASIAN DRAMA: A STUDY OF POVERTY AMONG NATIONS* 66 (1968).

distributed widely enough to ensure that every one has more, does not violate a right to survival. Conversely, in order to safeguard that minimal right, the use of force may be necessary and is morally justifiable. Circumstances may require coercion of the poor as well as the rich, in situations such as the encroachment by agriculturalists on pastoral nomads.

The foundations of liberal arguments in favor of self-reliance, entirely independent of the right to survival, tend to collapse on themselves under conditions where absolute poverty is coupled with enormous inequality of wealth, income and power. It is only the lack of empirical research and writing in conjunction with whatever abstract theoretical speculation is already at hand, that has led legal academics who would not seriously argue in favor of *laissez faire* to posit voluntariness and self-reliance as high level ideals.

Self-reliance, in a Third World context, becomes a secondary value. Satisfaction of basic human needs is the primary goal. In the course of making specific policy decisions promoting and safeguarding subsistence rights, choices between voluntariness and coercion, incentives and compulsion may be available.<sup>85</sup> Favoring self-reliant methods at that level of decision-making is compatible with subsistence analysis. Asserting a goal of self-reliance to veto programs aimed at the goal of satisfaction of basic human needs, is not.

Even as a secondary value, however, the anti-coercive goal has moral implications. The theoretical justification for the use of force is confined to the limits dictated by subsistence rights. It follows that anyone asserting technical expertise in designing or advocating appropriate institutions must exercise prudence commensurate with their claimed expertise. Obviously, it is morally culpable, on the one hand, to exercise professional power, and on the other, when faced with the abuse of the system, to plead the ingeniousness of the abusers. The context may justify and even compel taking calculated risks, but nothing can justify advocating monopolized coercion with a naive disregard for realistically foreseeable distortion and exploitation of the system by those who are expected to make it work. Building in effective safeguards into legal institutions is an integral part of the task of design and advocacy.

#### ENDOGENOUS DEVELOPMENT

Self-reliance aside, the second pillar of *Another Development* calls for "[e]ndogenous [development], that is, relying on the

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85. SEIDMAN, *supra* note 5, at 52.

strength of societies undertaking it." The statement appears so trite that perhaps one ought to demonstrate that it is worthy of attention before subjecting it to criticism. If one focuses primarily on economic programs (possibly the pre-eminent discipline among the authors of the report), it is fairly easy to demonstrate that development patterns and institutions in the Third World cannot be modeled on the industrialized world. Lawyers, with their broad range of concerns, from constitutional structures to domestic relations, would be able to provide a list even longer than that which economists could provide of illustrations of ill-fated and pernicious legal transplants. Some instances of ill-considered legal importation are innocuous but amusing, such as Professor Seidman's example of the prohibition against being about after dark with a "black face"—legislation introduced to colonial Africa from and by Britain.<sup>86</sup> A less entertaining and current illustration is taken from Kenyan legislation. It helps incidentally to emphasize that well-meaning experts can have a negative impact on development without any assistance from malevolent politicians.

In 1969 (the sixth year of independence), Kenya passed a set of regulations governing building standards.<sup>87</sup> The Building Code defined a dwelling "as a part of a building lawfully used or constructed, adapted or designed to be used as a residence for one family."<sup>88</sup> The code is a highly technical document, and it is therefore improbable that any high level political figure ever read it. The best explanation of the definition and the other bylaws aimed at restricting occupancy to a nuclear family is that it was a copy of English legislation. Western building technology carried with it its own baggage. In every country in the Third World, conditions of habitation for the vast majority of the population fall far below the limits permissible under building codes.<sup>89</sup> However, if compliance with the standards were strictly enforced, health and comfort would be considerably lessened for those unable to pay the higher prices required for maintaining the unrealistic standards. The legislation was certainly not a deliberate attempt to transform the traditional family, which is extended and polygamous, into the comparatively aberrational, nuclear family. The bylaw as it stands, and as occasionally

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86. *Id.* at 34.

87. The Local Government (Adoptive By-Laws) Building Order 1968. Legal Notice 15 of 1968.

88. By-Law 1.

89. C. ROSSER, URBANIZATION IN TROPICAL AFRICA (1972); D. DWYER, PEOPLE AND HOUSING IN THE THIRD WORLD (1975).

enforced,<sup>90</sup> provides little health or safety advantages to the poor, while increasing the numbers of those unable to afford adequate housing.

While examples of counter-productive or ineffective legal intrusion are plentiful, the second pillar of *Another Development* has much too obvious an inspirational source. Bad colonialism versus virtuous tradition was the first target of law and development. The early writing on law and development is replete with situations where social institutions, some of them pernicious, are defended on the grounds that they are indigenous. It hardly matters. Victims of profound racism can hardly be expected not to react to it. The return to the past is one such response. "The past having become a constellation of values, becomes identified with the Truth. The sense of past is rediscovered. The worship of ancestors resumes."<sup>91</sup>

A shift in focus from decolonization to current and future problems is an all too obvious necessity. With that perspective endogenous institutions may be good or bad in subsistence terms. Starvation does not hit all within the society equally. The main victims are not merely a matter of natural selection. Social structures have considerable impact on who pays the price. Some of those structures are indigenous.<sup>92</sup> To say that one should preserve what is good in a society and add to it what is good in other societies is not saying very much at all. As an argument for non-intervention or, worse yet, for fossilizing traditional hierarchies of communal and domestic exploitation, it conflicts with the satisfaction of basic human needs.

### CONCLUSION

The distance between the industrial and non-industrial worlds is very great. The gap between the victims of starvation and poverty and academics may be just as wide. If that gap were merely a matter of the failure of the absolute poor to fully appreciate liberty or to recognize the conspiracies of imperialists, academic research and writing aimed at developing that consciousness might well be a meaningful response. It is hard to develop any intellectual certainty

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90. Enforcement is harshest and consistent against squatters who have as a result invented portable homes of bamboo and plastic sheeting. The homes are dismantled before police raids and set up again after they depart. The press labeled these structures "igloos." *East African Standard*, 29 April 1974, at 5.

91. FRANZ FANNON, *TOWARD THE AFRICAN REVOLUTION* 43 (1967).

92. *LAW AND THE STATUS OF WOMEN* (U.N. Centre for Social Development and Humanitarian Affairs 1977).

that such a response is anything but absurd. With starving individuals in mind, it appears to make much more sense to alter the perspective of those looking on.

In dealing with issues of law under conditions of absolute poverty, it may well be that foreign aid donors and domestic politicians have the most to do. Yet, even with goodwill from those groups, they alone are not sufficient to solve the problems represented by millions of impoverished people. An entire social system cannot be the gift of benevolent donors or perspicacious politicians. In some measure policy scientists and lawyers must participate.

The lowering of one's horizons from all of the noblest goals of humanity to mere subsistence is hard to accept. One can be reconciled to such acceptance by the absence of viable alternatives. I must admit to much greater reluctance in arguing for greater intervention in people's lives and for the use of force. A much closer look is required at circumstances which call for coercive measure and how its exercise has to be controlled. Subsistence analysis must at the same time be rigorously applied in all areas of substantive and procedural law. After making such application, we would know better whether or not the disquieting aspects of pursuing the goal of satisfaction of basic human needs are really fears about the abuse of the legal system. The fears may camouflage an unrealistic optimism and a refusal to accept that something as negative and uninspiring as survival should be a guiding value in shaping a legal system.