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THE FATAL RACE:
LAW-MAKING AND THE IMPLEMENTATION OF
DEVELOPMENT GOALS*

Robert B. Seidman**

No Third World political leadership will attempt radical institutional change to implement development goals — that is, to alleviate poverty and powerlessness of the masses — unless their leadership interests and ideologies conflict with those of the economic ruling class. For purposes of this paper, I assume that in many countries, the day after gaining Independence, that precise contradiction existed.¹ In these nations, a political leadership, which had acquired power with a populist, frequently socialist rhetoric, controlled a country whose laws and economic institutions had emerged out of colonial capitalism, which had caused mass poverty and powerlessness. A fatal race ensued: Would the leaders transform the institutions to favor the poor and dispossessed? or would the institutions transform the leadership? Why, so often, did the institutions win? How can a willing leadership employ newly-won state power to make it more likely that the poor will not so frequently lose out in this fatal race?

Those questions have no general answers, applicable to every time and place.² Experience elsewhere, however, becomes useful as the basis for theory. A proposed legal solution for a specific developmental problem in a particular time and place, requires

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¹ I am indebted to Ann Seidman for useful critique.
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1. I assume that most of the first generation of leaders of the newly independent former colonies, men and women who had fought through the independence struggles, sometimes for many years in conditions of penury and hardship, not to say genuine physical danger, did not do so merely to enrich themselves; if they did, they did not act as rational maximizing economic people, for there are easier ways to make a living than fighting as a guerilla or living as a refugee leader of a poor freedom movement. But see F. Fanon, WRETCHED OF THE EARTH (1965).

2. See R.B. Seidman, STATE, LAW AND DEVELOPMENT (1978), Chapt. II. (Except serendipitously, law copied from one country or time will not induce the same behavior in its new home that it did in the old — the "Law of Non-Transferability of Law.")
time-and-place specific analysis and empirical research. Research, however, requires bounds on enquiry — that is, general propositions to tell the researcher where she might find useful information (heuristics, or theory). Based mainly on the Anglophonic African experience this paper undertakes to develop such a theory.

It addresses only the contribution of the law-making system to implementing development goals. Section I describes the way that the legal order became part of the problem of underdevelopment, rather than part of its solution. Section II explains generally how deficiencies in the law-making system defeated effective implementation of developmental goals. Section III explains why individual lawmakers did so little to advance development, and Section IV, how the law-making system as a system contributed to that failure. Section V asks why the lawmakers did not change the system itself, and for an explanation, looks to the development of a bureaucratic bourgeoisie. Finally, drawing on this analysis, Section VI suggests a general strategy that might win the race for the poor.

I. The Difficulty: The Legal Order as the Cause of Third World Poverty and Powerlessness

Despite earlier rhetoric advocating the use of state power to alleviate mass poverty and powerlessness, the 1990s found most Third World peoples poorer and more vulnerable than at Independence, their economies in tatters, their political structures

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3. Thus, by theory I do not mean either a set of general propositions relating variables, good in every time and place, nor a set of prescriptions also purporting to hold for every time and place (e.g., neo-classical economics as practiced by some economists).

4. President Nkrumah summed up that rhetoric in the slogan for his Convention People's Party: "Seek ye first the political kingdom."
fragile and non-democratic. That counts as a failure of the legal order.

Like all social problems, poverty and powerlessness result from patterns of behavior, that is, institutions. Everywhere, the legal order bears a systematic relationship to the institutions that create and maintain patterns of behavior, and which in turn determine productivity and who has wealth and power. Of all the manifold causes of Third World poverty and powerlessness, the organized polity can most readily manipulate the law. Third World governments, however, did not do so in ways that reduced poverty and powerlessness, but rather in ways that maintained and increased poverty and powerlessness. Law became not part of the solution, but part of the problem.

II. Law-Making and Implementing Developmental Goals

Laws have failed to achieve developmental goals for any of three reasons: because they continue in force the received law; are new laws prescribing inappropriate behaviors; or are new laws prescribing appropriate behaviors but which fail to induce those behaviors.

5. What few successes existed turned out to rest as much on accidents of time and place as on wise management. For example, the discovery of oil reserves, massive United States military expenditures in the wake of the Korean and Vietnam Wars (Hong Kong and South Korea), combined with the lucky timing of an export drive coupled with the rapid expansion of world trade that bloomed in the 1960s and 1970s, and faded in the 1980s (Southeast Asia's four “little dragons” — South Korea, Hong Kong, Singapore and Taiwan).


7. Its actual influence on behavior depends upon the circumstances. For example, about 20% of automobile drivers use their seat belts, even though the law requires it; where the law require motorcyclists to wear helmets, almost all of them do so. But see J. Griffiths, “Is the Law Important?,” 59 N.Y.U.L. Rev. 339 (1979); R.L KIDDER, CONNECTING LAW AND SOCIETY: AN INTRODUCTION TO RESEARCH AND THEORY (1983) Ch. 6 passim.
A. The Colonial Legacy

In terms of resource allocation, the colonial economic system pumped surpluses earned from Third World natural resources and very low-paid labour into metropolitan-based corporations.\(^8\)

In the metropolitan countries, the banking system served to channel most surpluses into productive investment within the country. The Third World's surpluses, however, ended up not in the colony, but in the metropole. These patterns of resource allocation resulted from institutions, underpinned by the colonial legal order.\(^9\) Unless the law changes, however, institutions tend to change, but usually slowly, and without conscious planning.\(^10\)

Unless the independent governments changed the received legal order, the inherited economic institutions reproduced themselves, and therefore also the impoverishment and vulnerability of the masses and the wealth and privilege of their masters.

At Independence, every Third World country initially continued in force the colonial legal order. To implement its developmental goals, except for improving social welfare programs

\(^8\) See, e.g., F.H. CARDozo, DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA (1979); A. GUNDER FRANK, DEPENDENT ACCUMULATION AND UNDERDEVELOPMENT (1979); R. PALMER AND N. PARSONS (eds.), The Roots of Rural Poverty in Central and South Africa (1971); A. Seidman and N.S. Makgetla, Outposts of Monopoly Capitalism: Southern Africa in the Changing Global Economy (1980); I. WALLERSTEIN, THE MODERN WORLD SYSTEM (1974). The transnational corporations earned those enormous surpluses in part because the colonial governments maintained legal orders that drove indigenous male workers out of their villages into European employment at wages far lower than those they had to pay in the metropole. Employers as a class must pay enough so that the working class can reproduce itself. In the metropolitan countries, the male worker typically supported himself, a wife, a couple of children, perhaps one or two old folk. In the colonies, because wives could support children and old folk by subsistence farming, employers had to pay only enough to support the male worker.

\(^9\) For example, the laws of every Anglophonic African colonial state prescribed customary law for Africans, and English law for non-Africans. In effect, it prescribed customary law for the hinterland (where most Africans lived and worked), and a form of law conducive to capitalist exploitation for the export enclave. See, e.g. Ghana: The Supreme Court Ordinance, 1874 (the prototype for the African reception statutes); Seidman, supra n. 3, at 29 ff.

\(^10\) I have elsewhere called this the Law of Reproduction of Institutions. Seidman, supra note 2.
in various ways, almost no Third World country made a determined and vigorous assault on colonial law.

B. Enacting Inappropriate Laws

Almost invariably, the early Third World political rhetoric called for radical change, usually using a socialist vocabulary. The laws enacted, mainly facilitated not the transition to socialism, but the continuation and growth of state capitalism.2

C. Development-Oriented Laws That Did Not Work

Some countries did enact genuinely development-oriented laws. Too many did not induce the prescribed behavior. They did not either because they did not take into account accurately the milieu within which the actors chose to obey or disobey the new law, or because the laws assumed that the implementing agencies specified in the law would behave in ways they did not.3 A lawmaker's task consists in enacting not merely laws with high-flown objectives, but laws that work — that is, laws that in practice induce behaviors that tend to solve the social problems that excited the laws. That so many Third World laws never induced the

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11. To meet their constituencies' expectations, most Third World countries initially enacted laws that instituted various sorts of social welfare programs. To pay off the loans incurred to finance these, they increased exports without structural changes. When the world market for their exports slumped, they could not pay back the loans. Forced by IMF Structural Adjustment Programmes, in the 1980s they enacted new laws that cut back many of the new social services.


behaviors prescribed, or induced inappropriate behaviors, exhibited a failure of lawmaking.

III. Why Did the Law-Making System Fail to Implement Development Goals? The Lawmakers

This section first identifies the key actors in the law-making system upon whose behaviors analysis must focus, and, second, attempts to explain their behaviors.

A. The Key Actors in the Law-Making System

Laws emerge at the end of a long process, with many participants, in which the legislative vote frequently does no more than stamp a symbolic approval on decisions made much earlier. In the former British colonies, for example, to create a specific statute, significant actors included:

- the civil servants who usually first suggested the need for the legislation;
- the Permanent Secretary and Minister who decided to study the identified difficulty;
- the civil servants who studied the problem, generated a legislative program, contacted “interested parties” for comments, and produced a memorandum (sometimes called a “layman’s draft”);
- the Cabinet Committee on Legislation that approved the proposal and instructed Parliamentary Counsel to draft the bill, and later would approve its final draft for Cabinet vote;
- the lawyers in the Office of Parliamentary Counsel;

14. Our myths tell us that courts implement the law, but clearly appellate courts make law, at least in the interstices. Bureaucrats, too, supposedly implement law, but they also constitute the most fecund source of ideas about what the law should be. The “law-making” system includes all institutions that in fact make law. Which institutions make law constitutes an empirical question. On the use of law to induce appropriate action by the law-implementing system, see Seidman, “Drafting for the Rule of Law: The Problem of legality in the Third World,” 12 YALE J. INT’L L. 84 (1987).
• those whom they consulted — civil servants, mainly in the Ministry concerned, but frequently in related Ministries, and sometimes "interested parties" in civil society;
• the Cabinet that approved the bill for introduction into Parliament, and;
• at the end of that long passage, the legislators who formally enacted the bill into law.\(^5\) All these functionaries acted in the face of formal and informal rules purporting to prescribe their behavior. In the face of those rules, what explains their failures to introduce developmentally-oriented legislation?

**B. The Law-Makers’ Behavior**

Generally to explain behavior in the face of law, important categories for examination include: the applicable law, the role occupant’s opportunity and capacity to obey, whether she knows the rules, her interest in obeying (or disobeying), the process by which she comes to decide whether or not to obey, and her stated or unstated ideology.\(^6\) This subsection attempts generally to explain the behavior of law-makers in terms of these categories.

**1) The Rules**

No formal rules required law-makers to do anything about poverty and powerlessness. Most Third World constitutions merely lodged the legislative power with the legislature (and sometimes the

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15. Perhaps one ought also to include the civil servants, lawyers and others who drafted and enacted subordinate legislation, and the bureaucrats and judges who put a gloss on the enacted legislation by their interpretations of it.

16. See Seidman, *supra* note 3, at Chapter 6. ROCCIPI forms a convenient mnemonic for this list. Since no formal rules directed lawmakers to pay attention to development, the questions of communication of the rule and the process by which the lawmakers decided to obey become irrelevant here, and do not warrant discussion. For an example of its use to analyze legislation, see G.J.Lyons, “Taking Money-Launderers to the Cleaners: A Problem Solving Analysis of Current Legislation,” *ANNUAL REVIEW OF BANKING LAW/1990* 635.
executive). Many did not even contain aspirational clauses giving a “right” to a job, education or health care.

(2) Opportunity and Capacity

Opportunity to contribute to law-making fell differentially among the various actors, but all had some chance to do so. In doing so, and in the sorts of laws they addressed, all of them had great discretion to further development or not. For example, our common myths tell us that drafters merely write into legalese policies laid down by their political masters. worked out in detail by senior civil servants. At least in most of Anglophonic Africa, in practice, as often as not those superiors merely passed the problem to the drafters, and asked them to come up with a legislative solution. How to analyze the difficulty, where to get ideas for a solution, how to weigh competing values — all these lay in the drafter’s discretion.

In most of the Third World, however, law-making lay in amateur hands. Only a rare participant had much capacity to produce development-relevant laws. Very few Third World lawmakers had relevant economic training. Most political leaders had none at all — and Professor Galbraith has warned us that those who do not study economics fall sway to the dogmas of long-dead economists. Because of their long experience, their supposed technical expertise, and their daily experience with the deficiencies in existing laws, not politicians but civil servants supply most ideas for new laws. For the first few years after Independence, most senior civil servants remained colonial relics. The new ones had typically done their graduate work at Western universities, where they had studied those long-dead economists. Those economists did not address the problems of transforming the institutions of developing countries. The legislative drafters made up a particular category of scholars. They usually had no social science or economics training. They repeatedly drafted statutes that solved
problems in terms agreeable to those same long-dead economic theorists, doing little to help development.17

Like all bureaucracies, the structure of the civil service in part defines the policy outcomes it produces.18 The structure of the civil service did not advance development. Largely unchanged since colonial times, Ministerial portfolios addressed the sorts of problems the colonialists had identified — too frequently only law-and-order and tax collection.19

Interest. In most countries, whatever contradictions existed at Independence between political leadership and the economic ruling class rapidly disappeared. In country after country, not so long after Independence the leadership seemed sunk in self-aggrandizement. Rapidly, they joined the ranks of the exploiting classes. They considered the claims and demands of the poor at best when discontent threatened the stability of their regimes.

The same progression affected many civil servants. Returning home bright-eyed with idealism after Independence, a few years later many seemed to spend most of their office time conducting not public but private business.

Ideology. As well as their interest, their ideologies tended to influence officials to exercise their discretion in favor of those with power and privilege. Their Western university training taught most senior civil servants that the lack of capital caused Third World poverty, and that only foreign private investment could cure it.20 That explanation and solution discouraged legislation which would radically change the received institutional structures.

Even the politicians who had fought for freedom in time frequently changed their ideologies to ones that denied the need

18. Seidman, supra note 3, at Ch. 11; see also ALLISON, ESSENCE OF DECISION (1971).
19. See, e.g., A.L. ADU, THE CIVIL SERVICE IN NEW AFRICAN STATES 14-15 (1965); L. LaPolombara, Alternative Strategies for Developing Administrative Capabilities in Emerging Nations, in F. RIGGS (ED.), FRONTIERS OF DEVELOPMENT ADMINISTRATION (1971) 187; Ilichman and Bhargava, Balanced Thought and Economic Growth, in id. at 264; Diamant, Bureaucracy in Developmental Movement Regimes, in id. at 508, 525, 535; Burke and French, Bureaucracy and Africanization, in id. at 545-56, 553-54.
for institutional transformation. By 1990, for most of the Zimbabwean political leadership (who at Independence were leaders of a self-proclaimed Marxist movement), socialism had become a dirty word — and not because it had been tried and failed. Government had never come close to instituting a transition towards socialism.  

No rules demanded that lawmakers attend to development. Most lacked the capacity to do so, and their interests and ideologies quickly came to conform to those of the status quo. The law-making system supported that outcome.

**IV. The Law-Making System**

As we have seen, laws emerge not from a single individual or organization, but from a system with many players. The simplest model of such a system consists of an input-output process model.  

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21. For example, the Independence ar had as a root cause the issue of land. At Independence, some 6000 white farmers owned about half Zimbabwe's land — much the most arable half. 600,000 black peasant families barely survived on the other half. “Notwithstanding its earlier rhetoric, in the first decade of independence,” the government managed to resettle about 40,000 families. Emphasis on agricultural reform shifted back to the policies of the colonial regime, that is, to help peasants improve production without changing their land or land tenures.

22. Graham Allison denotes the simplistic view of government decision-making the Rational Actor model. He proposes two others: the Bureaucratic Politics and Organizational Process models. Of the three, the Rational Actor model seems mythical; the other two begin to model the real world. Allison, supra note 19, at 4-6, 10.

23. This model comes close the Allison's Organizational Process model. Id., 67 et seq. His Bureaucratic Politics model, id. at 144 et seq. in which outcomes result from bureaucratic bargaining and infighting, really counts only as a subset of organizational process. The relative strength of bureaucracies in the bargaining process lies embedded in the interstices of the institutions and processes of the decision-making system. Both models seem deficient in that they make little effort to explain the relationships between the decision-making structure and its social context.
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Input processes conversion processes outputs (decisions)
Feedback processes

Fig. 1.

The system's rules and processes determine: what and whose issues the system will consider, what and whose inputs and feedbacks to consider, whom the system will recruit for decision-making posts, and with what socialization, and what sorts of conversion processes, the package will be tied up and a decision made. The range of system outputs — the decisions — results from these inputs and conversion processes. The input, feedback and conversion processes therefore determine in general to whose interests and ideologies the laws will respond.

The failure of Third World law-making systems to respond to the claims and demands of the poor and powerless, therefore, reflected the way that the system filtered out their claims and demands. The question becomes transformed from one asking why the legal system produced (or failed to produce) laws with a particular subject-matter, to why it produced laws that advanced the interests not of the poor, but of the rich.

That reason lies in the system's overall structure. Most bills originated in the Civil Service, with the limitations we have noted. Formally or informally, the powerful and privileged had easy access to input and feedback channels, and sometimes even into the heart of the conversion process, the Cabinet; the poor did not. The elite met in country club bars and at each other's homes, to discuss matters of mutual interest; the poor never entered those doors. When a civil servant consulted "interested parties" with respect to a proposed bill, he always consulted organizations of employers, but frequently omitted organizations of the poor even

25. For example, in considering increases in controlled prices, the relevant Minister in Zimbabwe carried into Cabinet memoranda from the firms affected concerning their costs. No other data appeared before Cabinet, nor did Cabinet frequently even consider the impact of the increased prices on the poor or the economy generally.
when they existed — usually they did not exist. Formal input channels for the public at large hardly existed. The mass had almost no way as of right to influence decision-makers. Basic human rights such as freedom of expression, freedom to petition legislators, and freedom to demonstrate rarely existed in practice. Government secrecy prevented the mass even from knowing what issues fell for consideration in governmental circles.

Even where elections existed, aside from limited capacity to form viable parties representing the poor, for two principal reasons elections did not provide democratic accountability. First, only a very few governmental law-making decisions came under the Party manifestoes, and in any event mainly took place behind closed Ministerial doors. At any rate, elections supposedly effectuate popular will mainly through the legislature. In the Third World, all bills came to parliament with Cabinet’s imprimatur. Once introduced, the backbenchers had a choice: To vote for the Bill and hope for political advancement, or to vote against it, and cut their own political throats. They rarely revolted. As an input and feedback channel for the mass Parliament failed its function.

The law-making system, therefore, maximized inputs from those on top of the heap, not the poor and powerless whom development aims to help. Outputs responded to those influences. These patterns of behaviors by law-makers and law-making systems all bore a systematic relationship to the legal order. In principle, by changing the law the political leadership could have changed those institutions. They did not because they too quickly became a bureaucratic bourgeoisie.

27. So far as I know, only once in all Africa’s independent history: In Tanzania in the 1970s, when the Government wanted to increase ministerial salaries at a time of great austerity in government generally.
V. The Development of the Bureaucratic Bourgeoisie

In the Third World, the political elite demonstrated a marked capacity to enter office as poor populists who quickly become rich elitists — the bureaucratic bourgeoisie. In no place do rich elitists have much will to solve mass poverty and powerlessness. The critical issue became the growth of the bureaucratic bourgeoisie. Why did it develop so rapidly and so pervasively? The broadest answer lay in the leaders' new positions after Independence. From poor leaders of freedom movements, they suddenly became Ministers, living in grand houses, with bodyguards and servants, being driven in Mercedes Benz automobiles. They quickly acquired all the characteristics of a ruling class.

Why did this new class arise? It found its source in the legal order itself. No rule ordinarily forbade officials from acquiring wealth. They had ample opportunity to acquire wealth. The rules of a market economy hold out lures for everyone advantageously placed to take advantage of them. Officials, to a degree exceeding those of most others, had that advantageous position. They had the capacity to get rich. In most countries, immediately after Independence the people with the most formal education went into government. They used their discretion in large part (sometimes exclusively) to maximize rewards and lessen strains for themselves and their organizations. By and large, in most Third World countries the strata best positioned to increase the rewards

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28. In Tanzania, the Swahili name for the political elite became the WaBenzi — the people of the Benz.

29. I denote them as a ruling class because of these characteristics: (1) They held positions of power both in the political and the economic realms; (2) they could and did use that power to enrich themselves; (3) they had close personal relationships with each other and with the members of the economic ruling class; (4) they could and did pass on their wealth intergenerationally.

30. The General orders of the Civil Service, inherited from the Colonial regime, usually contained provisions that made it difficult for officials to enter trade or business. After Independence, in some countries the civil servants managed to get these removed, see, e.g. Republic of Kenya, Report of the Commission of Enquiry — Public Service Structure and Remuneration Commission (Ngwadega Commission Report) (1971); in others, they fell into desuetude.
and lessen the strains upon officials — that is, to appeal to their interests — consist of those with power and influence, both in the political and the civil society. They had many goodies to dangle before official eyes. Most of these enticements are legal — from politicians, bigger budgets and career advancement; from businessmen, a seat on a Board of Directors, a post for one’s wife, a bank loan at advantageous rates — some are illegal (bribery).

Some posts carried with them enormous economic power, especially those in government corporations. There, the managers and directors had all the de facto power that usually attaches to similar posts in private corporations. Just as the management of private-sector corporations constitutes an important element of the economic ruling class in capitalist societies, so in the Third World did the management of public corporations.

Only their ideologies might have broken the headlong rush into a new ruling class. Ideas flow from behavior as much as the contrary. In time, not populism but the class interests of the bureaucratic bourgeoisie became the engine that drove ideology. The usual explanation holds that the ruling class first existed, and then used law and state power to consolidate its power. In the Third World, the political elite used the law to become a ruling class. In a sense, law created the ruling class.

How did that happen? Class power rests on economic and political institutions — property, corporations, banks, land tenures, elections, and law-making and law-implementing institutions generally. A systematic relationship exists between institutions and the law. Class power, institutions and the legal order: These constitute a trinity, so that changing any of them changes the others. Not only can we explain the existence of law by class power, but also vice versa.

The systematic behavior of law-makers and law-making systems explains why the legal orders of the Third World so badly attended to the issues of development. The growth of the

bureaucratic bourgeoisie explains why the leadership did not change the institutions which produced that result.

VI. The Institutions of Participation

All these explanations for the behavior of individual lawmakers, for the behavior of the law-making system, and for the growth of a bureaucratic bourgeoisie suggest legislative solutions, on levels from the mundane to the sublime: For poorly trained drafters, further education in the behavioral consequences of law and political economy; for too much secrecy, laws requiring openness;\(^{32}\) for the mistakes about the addressee's milieu, that so frequently leads to incompetently-drawn legislative programs, more inputs from the addressees; for the failure of free expression, more human rights; for corruption, police units aimed at corruption\(^ {33}\) and better accounting systems;\(^ {34}\) for better control over misuse of discretion, the narrowest grants of discretion the nature of the case will admit, an Ombudsman, and easy access to courts and legal aid.\(^ {35}\)

All these — as indeed does Development itself — presupposes a government that has a will towards development. Once the bureaucratic bourgeoisie has established itself, that will cannot exist. Only for a brief period after Independence, at the start of the fatal race, does a window of opportunity exist to change the institutions that permit the development of a bureaucratic bourgeoisie and exclude mass participation. A truly revolutionary leadership must act decisively after taking office, or the existing institutions will likely win the fatal race.

33. Hong Kong has a famous example that Zambia among others has copied.
34. R.B. Seidman, "Why do People Obey the Law? The Case of Corruption in Developing Countries," 5 BRIT J.L. SOC. 45 (1978).
Some laws to make less likely the development of a bureaucratic bourgeoisie suggest themselves, most importantly, care in drafting the laws on which class power rests (e.g., banking law, public and private corporation law, property law, election law) as well as direct prohibitions (a Leadership Code, prohibitions on bank financing of leadership acquisitions of productive property). More important, however, are devices to ensure accountability to the mass, and to ensure actual mass participation in the law-making processes.

Accountability for political behavior begins but does not end with competitive elections for office — even in One-Party states. Other devices deserve exploration, for example, recall elections, institutions permitting constituencies to bind their representatives with respect to particular issues, and requirements that electoral representatives maintain offices in their constituencies, that representatives report back to their constituencies regularly at open, public meetings, and that bureaucrats and officials make their decisions in public and state in writing the reasons for at least their most important decisions, constitutional protection of the right of complaint and written response.

Finding devices to permit the mass to participate directly in the processes of governance raises much more difficult issues. They can best participate in small, face-to-face groups. That implies that as much of government as possible ought to devolve upon local government and workplace institutions. How to structure small organizations to ensure that their members in fact

36. Cf. Tanzania’s example of competitive one-party elections. L. CLIFFE (ED.), ONE PARTY DEMOCRACY (1967).
37. A draft constitution originally proposed by SWAPO for Namibia contained a number of these (only some survived into the final draft). See R.B. Seidman, “A Commentary on the Proposed Draft Constitution of the Republic of Namibia,” 1988 THIRD WORLD LEGAL STUDIES 35.
38. See Zambia’s proposals for One Party Democracy.
make decisions as a central device for directly empowering the powerless has received extensive study. 40

On the national level, referenda on particular issues may prove useful, although some debate that. 41 It would seem, however, that access to input and feedback systems constitutes the principal feasible device for mass participation. Obviously, that requires openness in government, and structured points of access by the mass: public hearings before Ministers to decide on subordinate legislation, held at places at which poor people can attend; changing the system of law-making so that bills will receive wide public circulation and perhaps even Parliamentary discussion before cast in concrete by Cabinet approval; canvassing of organizations of the masses as "interested parties" with respect to all proposed legislation and subordinate legislation; development of participatory systems of economic planning; 42 systematically sending national leaders into the countryside to hear local complaints — and ensuring that when they go, they listen to more than the local elite; 43 and, again, systematic respect for human rights, so that people can petition for redress, express new points of view, voice complaints, and even take to the streets as a way of bringing home to decision-makers the point of view not of the classes but the masses.

In the end, successful participation depends upon the education and the organization of the masses. So long as participation means only the mobilization of bias, an impossible contradiction quickly emerges between the parochial biases and


41. Switzerland, with a highly educated and literate population, has found that referenda have served a useful purpose. For a discussion of the debate and a strong argument in favor of referenda, see C. Gillette, "Plebiscites, Participation and Collective Government in Local Government Law," 86 Mich. L.R. 930 (1989).

42. See S.C. Patnaik, Economics of Regional Development and Planning in Third World Countries 163-71 (1982).

43. So did Zimbabwe's government in the very early months after Independence. See Seidman, supra note 25.
national needs. The solution lies in understanding normative choices in development as something more than the choice of "values," like choosing chocolate or vanilla ice cream. That calls for a high degree of understanding of the appropriate uses of scientific modes of thought in policy analysis and development. Given that mode of thought, ensuring that the clients of projects themselves evaluate them constitutes the critical step in empowerment.

That scientific mode of thought does not arise, like Athena from the brain of Zeus, fully mature and armed for battle, all at once. It emerges only after long experience with the help of facilitators who themselves understand the appropriate methodologies. People learn by doing. Paradoxically, the necessary education cannot begin until ordinary people systematically assess how things are going and why — that is, until they have the power to evaluate and control their own social lives. Given that control, at the present low level of social scientific education, of course the outcomes will be messy and frequently seem counterproductive.

Messiness seems a small price to pay for beginning the road to conquering poverty and powerlessness.

Second, participation on many levels seems impossible for unorganized people. Street demonstrations do not happen without

44. In Yugoslavia, a great deal of local autonomy and democratic participation led to a denigration of national interests in favor of local ones — a sort of pervasive game of Prisoner's Dilemma or the Tragedy of the Commons. The Prisoner's Dilemma is this: In a prison uprising that will surely go forward without any particular prisoner's commitment, it is in each individual prisoner's interest to play both sides: To seem to go along with the rebels, but secretly to inform the wardens, thus protecting one's personal interest in the event of either becoming the victor, without significantly weakening the rebellion. Given that potential, how can any rebellion succeed? The Tragedy of the Commons is this: If everyone may graze as many cattle on the Commons as he or she wishes, each will try to increase his or her herd to seize for their owner the maximum possible amount of the commonly-held property. That quickly leads to the degradation of the biomass and erosion — which lies in nobody's interest. In both cases, the vigorous pursuit of every actor's individual interest does not lead the beneficent Invisible Hand, but disaster.


46. Kaylala et al., supra note 41.
organization. Newspapers putting forth the position of the masses do not just suddenly appear; they require organization and capital. At public hearings, without experts representing mass interests, the articulation of the position of the poor likely will prove ineffective. If a Minister wants to consult peasants about a proposal, he has difficulty in doing so unless some peasant’s organization exists.

How can the law foster the growth of organizations whose main function will become (in effect) to harass government itself? That does not pose an insolvable contradiction, although it will remain a constant struggle. Without the systematic development of non-governmental organization representing people, however, people power — the only appropriate power for a theory of development that perceives people-empowerment as its main object — can hardly succeed.

VII. Conclusion

The fatal race that began at Independence depended for its outcome on the leadership’s ability quickly to create law that would transform the law-making process itself, and make less likely the development of a bureaucratic bourgeoisie. Law imbricates development because poverty and powerlessness constitute social problems, and therefore issues of social behavior. Law constitutes government’s principal device to affect behavior and therefore institutions. To explain the failure of most legal orders to implement development goals, we must examine lawmakers and law-making systems. There, the central difficulty lies in the simultaneous transformation of the political elite into a bureaucratic bourgeoisie, and the systematic exclusion of the masses from decision-making. The solution lies, therefore, in impeding the development of the bureaucratic bourgeoisie, and stimulating the development of institutions of mass participation.

47. Cf. the development of poverty law in US, where US has funded lawsuits against government itself — but not without real opposition. Also see Handler, supra note 38, at 6-15.
When and how can this be done? The analysis advanced here suggests that at least in the first few moments after a successful populist revolution, the political elite have not yet become a bureaucratic bourgeoisie; their ideologies remain for the moment allied with the poor and disinherited. If they have studied the history of the failure of Third World governments to induce development, at that moment perhaps they have the will and could have the knowledge to avoid repeating it. They have to transform the received state into one conducive to development.

This analysis, of course, provides no answers to any specific country's particular problems. It may at best provide the start of a research agenda to explain the failure of most countries to implement development goals, and thus to begin the task of looking for solutions. No inevitability dictates that the powerful and the privileged need win the fatal race.