Development and “New Law”

John N. Hazard†

Reassessment of the work that has been done in the field of law and development is engaging an increasing number of comparatists as the decade of the seventies approaches its end. A noted American comparatist, John Merryman, has reviewed the entire field of American literature on law and development and has concluded that, with few exceptions, it spells failure.¹ In his view, the action-oriented American approach has been incompatible with the intellectual styles and legal cultures of most developing countries, because the principal legal tradition in these countries, like the civil law on which it is based, is more academic and more concerned with theory than the American approach. The American law and development movement has failed largely because of a lack of communication—the developing countries are not able to understand the “language” of the American approach. What is really needed, according to Merryman, is an approach that stresses “inquiry” in pursuit of a theory on which to base third world action; “action” on the part of American scholars is, and has been, premature.

For those determined African leaders who have “opted for socialism” and are bent on radical change, both politically and culturally,² the proper approach, however, is clearly action-oriented. They see law as an instrument to be used in effectuating policy. In contrast to Merryman’s position, one African has stated: “What we now know is that law is the creator of the future. What we can do is to foresee and construct, through the techniques of the law, the framework of the evolution of the African future.”³ Similarly, it has been argued that Africans sense no ideological obstacles to state intervention into the people’s welfare⁴ because nation-building is more than political activity;⁵ it is essentially culture-building. Traditional or

† Nash Professor Emeritus of Law, Columbia University.


⁵ Id. at 75.
colonial systems of law are to be restructured to provide social leadership in new directions. The customary law of the past and the imported law of the metropole to which colonials had been forced to adhere during their bondage are being discarded. Lawmakers of the future believe that their task is to provide vigorous socialist leadership, whether they create new law as legislators, administrators, or judges.

Max Rheinstein, in whose honor this festschrift appears, would have enjoyed participating in this discussion. Great comparatist that he was, he travelled to many African states, soon after they obtained independence, in order to learn what was happening to law as the colonial administrators were removed. It is now perhaps fitting to review what has been occurring in the legal systems of Africa, especially in those states where the leaders have chosen the socialist route to change.

Once it is acknowledged that these African statesmen see law as a tool to be used in development, the question becomes what law is required? An international congress of legal philosophers held in Australia in 1977 placed on its agenda the topic, “Do developing countries require a special system or type of law?” In other words, must law revision establish a special system, a “new” type of law that will be unlike anything known before socialist concepts became popular in the developing world?

Presumably those who formulate the question in this manner accept the position of those comparatists who have divided all legal systems on the basis of certain shared characteristics into different “families” of law, with each family differing in some critical way from the others. If these differences were not crucial, why would one ask whether a special system or type of law has been brought into being? Law would be “universal,” indistinguishable as to types, if systems of law were not classified as to “families.”

If the classifying comparatists are to be followed, however, what grid is to be used for purposes of comparison? How is novelty to be determined? Providing an answer to this question is difficult because the stimuli to adopting socialist patterns of thought have been varied. Thus, to aid in bringing order into this discussion, it may be helpful to analyze the question of “novelty” within three frameworks: (1) the Western, (2) the Marxist-Soviet, and (3) the African.

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6 World Congress on Philosophy of Law and Social Philosophy: Law and the Future of Society, Program, Topic F 4, Sydney-Canberra August 14-21, 1977. No publication of papers is planned. Only the Program has been published by the Congress sponsors.

7 Various motives for adoption of the socialist path are reviewed in H. DESFOSSES & J. LEVESQUE, SOCIALISM IN THE THIRD WORLD V-IX (1975).
I. WESTERN AND MARXIST-SOVIET SYSTEMS OF CLASSIFICATION

Apart from but related to the question whether the type of socialism developing in Africa can be called "novel," is the long-standing debate as to whether socialism is itself a distinct family of law. The debate has centered on whether Marxian socialists have developed a legal system so different that it must be placed in a new category of its own. The question, therefore, is whether "socialism," at least in its Marxist version, has created a new family of law that deserves to be distinguished from the other legal systems.

Perhaps the most widely used method of classification is that devised by René David. David popularized a system of classification based on two main criteria. He groups laws into "families" according to the sources of law that the particular legal system recognizes, and according to the philosophical, political, or economic principles on which the legal system is founded. Using these criteria, David originally identified three major legal families: the Romano-Germanic, the English common law, and the Socialist. However, there are those among the Western comparatists who deny that...

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* In the early editions of his work, David suggested that two legal systems belong to the same family when a jurist trained in one system can find his way in another, and when the systems embody similar philosophic, political, and economic principles and attempt to realize the same type of society. 1st ed. at 18; 2d ed. at 16; but see 5th ed. at 22-23. Using these criteria, David has consistently distinguished three Western legal families: the common law, the Romanist, and the socialist. 1st ed. at 18-23; 5th ed. at 23-29. Although both are code-based families, the socialist legal systems differ from the Romanist in their revolutionary character, their dynamic aims, the subordination of legal science to economics as a source of law, and, as a result of the nationalization of the means of production, the shrinking of the area of private law and the dominance of public law. 1st ed. at 22-23; 5th ed. at 27-28.

David's analysis of non-European legal systems has evolved over time. In his early editions, David questioned whether the Islamic and Hindu systems, which emphasized only the duties of the just man and not the rights of the individual, could be characterized as "law" in the Western sense. 1st ed. at 23-24; 2d ed. at 25-26. Later, however, he recognized that Islamic and Hindu law is a necessary pillar of society even though it is viewed more as a paradigm and an idealization of perfect law than as something to be applied to concrete problems. 5th ed. at 28-30. The Far Eastern legal family, however, differs greatly from Western law in that unlike Western, Indian, or Islamic law, law in the Far East is not a primary source of social order but a source of disorder: harmony, peace, conciliation are seen as more valuable than justice. 5th ed. at 30-31.

David's views on Africa have changed as radically as his understanding of Islamic and Hindu law. In the early editions, he stated that Africa lacked traditions strong enough to withstand the influence of Western legal systems. 1st ed. at 25-26; 2d ed. at 27-28. The different African legal systems, therefore, belong either to the Romanist or the common law family. By 1973, however, he had come to view Africa as more like the Far East than like Europe. He now believes that in Africa harmony and the cohesion of the community are more important than legal justice and individual rights. 5th ed. at 32.
socialism is novel or deserves to be classified as a separate system. These comparatists argue that Marxism did not effect any fundamental metamorphosis in the Romanist system on which the law of the Soviet Union is based. In their view the Marxian socialist system in the Soviet model is essentially Romanist, albeit with a veneer created by socialist imperatives, such as state ownership of the means of production. These critics argue that the Soviet system cannot be other than Romanist since it recognizes codes as the source of law, excludes judicial precedent as an auxiliary source, and structures its system exactly as Western Europeans structure theirs.

A similar debate over the novelty of socialist law began in the Soviet Union during the first decade after the revolution. Lenin had directed his new judges in the People's Courts to apply Tsarist substantive and procedural codes of law, but with restraint, influenced by their socialist consciousness. A year later, in November, 1918, the People's Court Act forbade any reference to the Tsarist codes. Since the government had not had an adequate amount of time to prepare more than isolated decrees to guide the courts, however, the Act instructed judges to continue to apply their socialist consciousness in the absence of a decree covering the matter brought before them. When calm was restored at the end of the civil war in 1921 and 1922, a more formal legal system was installed by the Communist Party, which took the form of codes of law. The codes were drafted by lawyers, based on models that were familiar to them from prerevolutionary experience or from their study in Central and Western Europe.

Codification on the basis of prerevolutionary and European texts stimulated debate among the Soviet legal philosophers of the 1920s as to whether the codes represented a new or an old type of law. A former judge, E.B. Pashukanis, emerged as a leader in the argument, taking the position that the forms of the new codes were bourgeois because of their origin, even though they were being used for a new purpose and had a new content. Pashukanis's political

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11 Decree on the courts of Nov. 24, 1917, § 5 [1917] I Sob. Uzak. RSFSR, No. 4, item 50.
12 People's Court Act of Nov. 30, 1918, § 22, [1918] I Sob. Uzak. RSFSR, No. 85, item 889.
13 For the steps taken to codify, see J. N. Hazard, Settling Disputes in Soviet Society: The Formative Years of Legal Institutions (1960), especially at 301-13, 342-435.
strength within the Communist Party was great, and his arguments were attractive to the men of his time. Consequently, his view prevailed until the end of the 1920s when Pashukanis took a step that he considered to be the logical consequence of his position. He began to prepare for the "withering away" of law, which was to occur, according to Marx and Engels, once socialism had been instituted. To implement this theory, Pashukanis drafted new codes representing a new flexible system resting upon two pillars: (1) the discretion of judges guided by general principles (as opposed to code provisions defining crimes and fixing the penalties therefor), and (2) an economic code to govern relationships between state enterprises as they absorbed private enterprise. The 1922 Civil Code was to wither away, eventually governing nothing.

Pashukanis was ousted in 1937, following what seems to have been a slowly emerging rejection of his theories prompted by Stalin's 1930 speech to the Communist Party, which called for stability and an end to any thought that the state and law would soon wither away by degrees. Pashukanis's disgrace was attributed to his failure to understand fundamental philosophical principles, namely that law could not have remained bourgeois as it became infused with socialist principles. The form necessarily changed as the content of the law changed. In short, Pashukanis's successors argued that a new type of law had been created, a law that was totally distinguishable from the Romanist code-based system from which it had evolved.

Since the late 1930s, the position has become firmly entrenched among Soviet legal philosophers that the Soviet legal system is new. This position is no longer limited to the Marxist-oriented world. It has been used in the apportionment of seats in those world bodies in which, by statute or custom, representation is based on adherence to one or another of the principal legal systems of the world. For example, the Soviet legal system is represented in the International Court of Justice, the United Nations' International Law Commis-

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15 Pashukanis supervised the drafting of a code to implement his thesis. His draft codes are available in Microfiche edition from Interdocumentation Company AG, Poststrasse 14, Zug, Switzerland, under the identifying numbers R-9804, 9805, 9806, 9807, 9808. They are analyzed and compared with contemporary Soviet codes by Hazard, The Abortive Codes of the Pashukanis School, 19 Law in Eastern Europe 145 (1975).


sion, and in non-governmental bodies such as the International Faculty for the Teaching of Comparative Law.

Eastern European legal philosophers follow the example of their Soviet colleagues in that they see their own laws as falling within the distinctive Marxian-socialist legal family, even though they note certain variations on the Soviet model. Because of the increasing variety of forms appearing in the codes of Eastern Europe, some legal philosophers have asked whether a limit on variation is to be imposed upon systems claiming to be Marxian-socialist. Professor Gyula Eörsi has written recently that such a limit exists; there are certain general socialist institutions that must be maintained if a given system is to be categorized as “socialist.”

Eörsi’s common core requires socialization of the means of production, a planned economy, and the socialist concept of rights (that is, rights are protected only insofar as their exercise conforms to the function for which the right is granted). He adds, moreover, that the codes of family and labor law must be separated from the traditional civil code, and that there must be a commonality of economic administrative forms for state enterprise, management, and accounting. Eörsi says nothing of political structures, omitting any reference to the necessity for a dominant or monopoly communist party, or for the assembly system of state organization typified by the “soviet.” Western classifiers have thought that these features were as important as the economic ones in distinguishing the Marxian-socialist family of law.

Eastern European legal philosopher-comparatists attack David’s system of classification as artificial because it overlooks the basic difference in legal systems—namely, the nature of the ruling class which it protects. Relying upon their Marxist training, these philosophers contend that the only persuasive basis for classification is the economic base on which the superstructure of the law rests. Thus, Academician Imre Szabó of Hungary argues that there are only two great families of law in the modern world—the socialist and the capitalist. For him, any distinction drawn between the Romanist and English common law systems based upon differences in attitudes toward source of law rests on no more than inconsequential detail. Professor A.A. Tille of the Soviet Union argues in a

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somewhat similar vein that no classification system is acceptable that does not conform to Marxist-Leninist thought. Although he is willing to recognize that there are differences between Romanist and common law structures, he allows distinction only between the fundamental types, "exploitative" and "socialist."\(^2\)

With the background of this brief description of the debate over whether the Marxian-socialist legal family is law of a new type, let us return to the law of developing countries: is it special, is it a new type of law? For the majority of Eastern European legal philosophers, the answer would seem to be "no." A system is not "new" unless it adheres to the models of Eastern Europe, at least to the extent required by Eorsi. This conclusion is based upon scrutiny of the literature appearing in increasing volume in the Marxian-socialist states, as authors try to determine whether what is happening in the developing countries meets with their approval.

In this Marxist-oriented literature, it is evident that the authors expect the developing countries to fail to achieve socialist goals unless these countries adhere to what the authors conceive to be the essential features of the Soviet model.\(^3\) According to these Eastern Europeans, this does not mean, however, that ages-old cultural patterns of life must be rejected. On the contrary, Lenin is quoted to indicate that variation to accommodate culture is to be expected; indeed it is necessary if political opposition to change is to be held within manageable bounds. Yet there is a limit to permissible variation, as evidenced by Eastern European denunciation of Léopold Sédar Senghor of Senegal and praise of Modibo Keita of Mali. Senghor was written out of the socialist camp well before he threw in his lot with the II [Second] International in 1976. Taking such reactions as indicative of deeply felt attitudes, it appears that Eastern Europeans believe that success in building socialism depends upon following their own models, and that, therefore, their new special type of law, adapted to African conditions, is required for developing countries if development is to succeed.

This conclusion is strengthened by a review of the discussion emerging in Soviet studies in international public law. The question posed is whether the municipal law of a developing country must be taken into consideration in determining the font to which Soviet diplomats will turn in selecting the institutions of international public law suited to relationships between the Soviet Union and any

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\(^2\) See A.A. Tille, Sotsialisticheskoe srovitel'noe pravovedenie 91 (1975).

given developing country. To understand the issue, the reader approaching the subject anew must bear in mind that Soviet foreign policy is bifurcated; it is based on "peaceful coexistence" when dealing with a capitalist country, and "fraternal"—based on "proletarian internationalism"—when dealing with a ruling Communist Party in a state where a Marxian-socialist structure prevails. The question posed within this framework is whether relations with an avowedly socialist state in the developing world should be fraternal or should be structured on the pattern of peaceful coexistence. Soviet scholars do not agree on the answer to this question. Some say that unless a state's leaders adhere sufficiently to the Soviet model to merit inclusion within the Marxian-socialist family, the relations can be only those of "peaceful coexistence." This must be so even when the statesmen of the developing country concerned declare that they have "opted for socialism," or the "non-capitalist path" and have demonstrated friendship. Other Soviet voices have argued for a more fraternal relationship when there are such expressions of intent. Under the latter approach, there would then be no current of ideological struggle in the relationship, as there must be by definition of the 1961 program of the Communist Party of the Soviet Union when relations of "peaceful coexistence" govern. Although the debate seems to have swung in favor of the group that relegates the developing world to the capitalist camp, in spite of options for socialism, the very existence of the debate suggests that, in formulating positions, Marxists will try to determine how closely the politics and law of a developing country conform to the model of which the Soviet Union is the prototype.

This is not the place to inquire into the classification of the political and legal structure of the People's Republic of China. All the world knows that leaders of the two giants said to be following a Marxian-socialist path challenge each other's right to determine what that path shall be. Each thinks the other has departed from the path to such an extent that it has become capitalist, or, at least, "opened the gates to capitalism." In consequence of this split, the leaders of each of the giants apply their own standards to evaluate what the developing states are doing, and each prescribes its own model. For purposes of this paper, it is probably enough to say that, while the conceptions of orthodoxy differ between the two giants, both would respond affirmatively if asked whether there is a need

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for a novel legal system in a developing country, although each would argue that only a system based on its particular model would be truly novel. Philosophers in each system seem to be calling for the introduction of a special type of law to further development, at least if there is to be any expectation that production will be maximized, society structured to eliminate the exploitation of man by man, and a basis for non-aggression established.

II. The African View

Having suggested that the Marxists would agree that the developing countries need a new system of law, but would require it to be based on their own model of socialism, let us turn to the Africans themselves to see how they would respond to the question posed in this paper. The system of classification favored by some Africans perceives the primary fonts of socialist ideas in Africa to be two: one may be called the font of "imported" ideas, the other the font of "indigenous" stimuli. Each has its own distinctive approach to the theory and practice of developmental socialism.

Take at the outset the "imported" ideas. What does this label mean to Africans? The response is universally "Marxism," as developed by Europeans to meet European conditions as they were perceived in the nineteenth century. In spite of this European origin, some Africans believe that Marxism has relevancy for Africa, not in the precise terms of the Communist Manifesto of 1848, but relevancy nonetheless.2

There are fundamentals of Marxism that hold a certain attraction for Africans, even now at the end of the twentieth century and on a continent quite unlike Europe. These are the Marxists' emphases upon maximizing production and eliminating "unearned income" so as to give labor its due. The attraction is enhanced by what is seen to be the success of the Soviet Union, the apostle of Marxism, in stimulating a startling rate of growth.26 For African leaders, and even for those Asians who profess Marxism to be an inspiration to policies of development, the Soviet Union has created a model in its sixty years of existence which can be used not for slavish copying, but for copying nevertheless.27 Its economic

2 "We do not claim to have invented socialism in the twentieth century but simply to have subjected it to the needs of our country." The words are those of one of Modibo Keita's ministers. Kouyate, La politique economique de l'Union Soudanaise R.D.A., in 2e Seminaire, supra note 2 at 51, 73.


27 "Our socialism will not be for us the manifestation of a tendency to copy servilely what others have done." Keita, Discours prononce à Bamako au meeting de masse à l'occasion du
structures are thought to be conducive to rapid economic growth, and its political structures are believed to be suitable to the creation of a political machine capable of maintaining its manipulators in power, even as those leaders force a sometimes reluctant citizenry to proceed along a path of severe sacrifice thought to lead to the glittering goal of abundance.

Turn now to the font of socialist ideas labelled "indigenous." Although leaders finding inspiration in this font profess the same goal of abundance, and understand the role of law to be that of a guide toward this goal of abundance, their model is different. The transformation of colonial structures is not to be achieved by copying the Soviet model in whole or in part but by reaffirming the traditional values of the African village.\(^2\) This means that the state, to meet the needs of development, is to be structured and administered on the model of the village. Politics must, therefore, foster a sense of community like that permeating the life of the extended family. There can be no narrow elite, as in the Soviet model, no leadership group set apart from the people at large. Instead there will be a figure comparable to the head of the family, and a group comparable to the village elders who meet with him—positions quite different from the leadership posts that characterized the Soviet Union during the Stalin years.

For African leaders building upon the indigenous model, the emphasis upon "novelty" springs not from the importation of attitudes and structures developed by Marxist-oriented leaders on other continents, but from the reaffirmation of tradition. The novel feature is the application of traditional forms on a level higher than that of the village. Community attitudes are transferred to the level of the state inherited from the metropole, a level which did not exist for the traditionalists before their tribal structures were altered. Thus, the change in scale creates the novelty, and this change of scale requires new forms as well as new content. Legislation to guide the activity of the entire people toward the goal of abundance is required, since the hoary custom of the village cannot be a guide at a level where it has never been known. This truism is accentuated

\(^2\) "'Ujamaa', then, or 'Familyhood', describes our socialism. It is opposed to capitalism, which seeks to build a happy society on the basis of the exploitation of man by man; and it is equally opposed to doctrinaire socialism which seeks to build its happy society on a philosophy of inevitable conflict between man and man. . . . Modern African socialism can draw from its traditional heritage the recognition of 'society' as an extension of the basic family unit." J.K. Nyerere, UJAMAA—THE BASIS OF AFRICAN SOCIALISM (1962), reprinted in UJAMAA—ESSAYS ON SOCIALISM, 1, 12 (1968).
by the fact that tribes and villages brought together in the new state have no common customary law. Only the deeply rooted communitarian attitude of the village is common to all.

An examination of the various systems which are currently being developed in Africa reveals certain elements that are common to all. Whether the leaders of these countries feel a need to characterize their particular system as "new" may not be totally dependent upon any unique feature of that system. Instead, those leaders who characterize their system as new or special may feel that such a characterization is necessary in order to mobilize the masses in support of the system.

Julius Nyerere of Tanzania is the leading example of an African leader who denies Marxist inspiration and has built a system based on an "indigenous" model of socialism. It is clear that Nyerere would agree that Africa needs a "new" law, although he could rely on no structure of thought such as that prevailing among Marxists. His argument would be based upon a recognition of the need for a community orientation surpassing anything known to societies structured along the lines of capitalist economies. He sees socialism as an "attitude of mind," and he has declared that adherence to a standard political pattern is not needed to ensure that the people care for each other's welfare. 29

Nyerere proposes to structure his developing society so that men may not use their wealth to dominate other men. He advocates the distribution of wealth along lines that are just, the abandonment of personal competition, and respect for the values of traditional African society. In his Arusha Declaration he calls for recognition that all people are workers, that there should be neither capitalism nor feudalism, and that there should not be classes of people, one working and one living off the workers. 30 Marxist-inspired socialists argue that state and cooperative ownership of the major means of production is required to put these principles into practice. Although Nyerere would agree, he takes an additional step. For him, socialism must be more than economic, it must be political.

In Nyerere's view, political socialism requires that the government be chosen and led by the workers and peasants as a mass. To achieve this non-elitist policy, Nyerere has organized a mass party, which calls upon workers and peasants to nominate whom they will for election. Then Nyerere's party, TANU, chooses two candidates in order to provide a contested election. Membership in TANU is
not limited to a carefully screened corps of activists, as in communist parties, but is open to all.

In an attempt to deal with the crushing poverty of many of his countrymen, Nyerere has urged a policy of self-reliance rather than reliance on an infusion of capital from the State Treasury. From this policy has sprung the noted UJAMAA village, much like the Soviet collective farm, but directed by TANU and not by a Ministry of Agriculture as in the Soviet Union. In implementing this program of self-help, the village leaders must emphasize that the program requires nothing more from the central government than the assignment of some specialists during the learning process. Moreover, they must recruit on a voluntary basis rather than with the use of compulsion. Reports from Tanzania suggest that the economy has suffered from several years of inadequate rainfall, as well as from strong opposition on the part of tribal groups in some regions to transfer to UJAMAA villages. Although these impediments seem to have stimulated Tanzanian local leaders to compel peasants to enter villages against their will—thus giving the Tanzanian model some of the characteristics of the Soviet—Nyerere remains determined to avoid what he sees as the excesses of Stalinism. He wants to create an African socialist model that is humanistic, communistic, village-like, and totally African. This will make it “new” and “special” in Nyerere’s view.

Not all African leaders, however, see their developmental systems as “special” or even “socialist.” Perhaps the least philosophical among the Francophone leaders is President Houphouet-Boigny of the Ivory Coast. He has shown himself to be concerned with structures that meet the needs of a developing country: a single political party to provide inspiration and leadership; a state-oriented investment policy to make capital available for development and to assure that its use accords with a plan designed to maximize the national product.\(^3\) In spite of these points of similarity with those of his avowedly socialist neighbors in Africa, the Ivorian system is not called “socialist.” On the contrary, the President has said that Ivorians live under “a liberal system, not a socialist one,” and refers to his approach as “state capitalism.”\(^2\) In spite of a doctrinal training similar to that of African Francophones who espouse socialism, he seems to require no inspirational slogans, no need to call his system “special.”

The Nigerians present even greater silence on “socialism.” The

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\(^3\) J. WORONOFF, WEST AFRICAN WAGER: HOUPHOUET VERSUS NKRUMAH (1972).
\(^2\) Id. at 205.
Military Council members make no reference to it, nor do they show interest in characterizing their system as "special." They have produced no ideologue like N’Krumah in Ghana who found his creed in "consciencism." They are proceeding simply to build an economy with a mixed system of capitalism and state-ownership, without support from an inspirational political party. In short, they fit their system to the needs of the times in a pragmatic fashion.

The contrast between the "special" and the "non-special" approach to structuring a developmental system has become evident in Mali during its nearly two decades of independence. When Modibo Keita was ousted by the military in late 1968, the new military leadership abandoned his socialist rhetoric and much of his political and economic structures. His one-party system was disbanded, his constitution was suspended, his National Assembly was dismissed, and his restrictions upon small scale merchandising and private production were erased from the statute books. His drive to stimulate the formation of producers’ cooperatives was also abandoned, although some successful cooperatives continued to function. Village governments returned to traditional ways and the civil service, under military direction, resumed responsibility for government of the country as a whole. Only the state enterprises Keita had created remained in state hands, and this was not for any doctrinal reason, but because the labor unions feared for their future if private entrepreneurs from abroad were to buy up the enterprises. Industrial capital and management were invited from abroad to build new industry. Not until 1974 was a new constitution promulgated, calling for the reestablishment of a unique political party and resumption of the National Assembly.

Reform moves slowly; indeed the new constitution is not scheduled to come into effect until 1980. Although the Military Committee for National Liberation continues to rule, Chief of State Moussa Traoré has declared that the way has been prepared for a new party, the Democratic Union of the Malian People. Its task is to mobilize and educate the people to compensate for the continuing lack of unity and national solidarity. Thus, the party seems not to be based wholly on the Soviet model, but it is to perform part of a

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25 A BEBLER, MILITARY RULE IN AFRICA: DAHOMEY, GHANA, SIERRA LEONE AND MALI 100-01 (1973).
communist party's function. Perhaps Traoré has had his eyes on his neighbor to the north, Algeria.

Algeria has also proceeded through a cycle, beginning with the socialist fervor of Ben Bella and proceeding to Boumedienne's more pragmatic system. Ben Bella copied Yugoslavia's self-management systems for both agriculture and industry when he nationalized former French possessions, but Boumedienne has retreated so far from this system that little is left of it. Although Ben Bella began with a National Assembly, Boumedienne disbanded it, and is only now resurrecting it to provide high level participation in government. He weakened the unique political party until some Algerians said it had, in effect, ceased to exist, although he is now reemphasizing its mobilizing function within the restored framework of parliamentary democracy. The rhetoric of socialism remains, but the model is not the Soviet one, nor has it ever been in spite of its étatism and strong centralized control. Private enterprise has continued to flourish in the service trades and in small productive units.

CONCLUSION

The variety of experiences discussed in this paper suggests that in structuring their legal systems, leaders of developing states take into account economic and political reality. Foremost among these realities is the need for capital. Therefore, leaders of developing countries locate potential sources of capital and determine how best to mobilize these sources. Some states have private entrepreneurs with capital and skills, such as the Tatas in India. In such places, laws can be drafted to permit the private enterprise system to flourish, notwithstanding certain restrictions to assure community advantage. But in countries where there are no skilled or rich private entrepreneurs the approach must be different. Algeria and Senegal have enacted investment codes to attract foreign skills and capital while retaining the planning function in the government's hands. The methods used to control foreign investment sometimes include requiring a state license for every endeavor, and appointing corporate officers chosen from the nationals of the developing country concerned.

Doctrinally-inclined leaders, such as Nyerere, have shown that they prefer state development of natural resources without the in-

tervention of private licensees. But this doctrinal position is also emulated by leaders who have no doctrinal foundation, as in Nigeria and the Ivory Coast. Thus, it is difficult to claim that the base for a special type of law for developing countries has necessarily been laid when national resources are state-owned and exploited. State ownership alone is not a key to classifying a system as “new” or “special.”

Beyond the ownership and operations level there is the matter of state economic planning. Without exception the leaders of developing states have sensed that national welfare can be furthered more rapidly if production is conducted in accordance with a state economic plan than if private enterprise is left to function on a laissez faire basis. The only choice on this level seems to be whether the plan shall be detailed (“directive”) or generalized (“indicative”), containing only priorities for investment.

Once a leadership has opted for a certain type of economic system, its second task is to choose political structures capable of directing and controlling the choices of the masses so that the economic plan, with its sacrifice of consumers’ desires, will not be resisted. Few leaders seem confident that the masses will make the proper choices without strong leadership, for they surmise that the masses will prefer a consumer-oriented path to a growth-oriented path.

Most leaders have chosen a one-party or a dominant party system for what it appears to offer as a means of retaining power in the face of opposition. Some of those who are close to an orthodox Marxist position can support their choice of political structure by referring to the Marxist position that political parties represent classes in the class struggle, and that where there is no struggle there need be no parties other than the one representing the workers and peasants. Most leaders, however, seem to choose the unique party for what it offers in maintaining power and because of its potential for mobilizing the masses through vigorously led campaigns. This seems to be the reason for unique parties in Tanzania and restructured Mali, as well as in Algeria since Boumedienne’s reform of political life.

Senghor in Senegal has provided the most unusual variation on this political structure. While requiring that his own party remain dominant, he has planned a political structure which places his party in the center with one party on each side of it. Thus, three parties offer a variety of positions to the voter, but the right and the left are kept in minority status. The minority parties seem to have the function of presenting limited alternatives so that the dominant party may gauge trends in public opinion. They also perform a
watch-dog function against corruption among local officials of the state and dominant party, which might otherwise go undiscovered.

This chronicle could be extended to explore other areas of social organization, such as the role of the trade union in the political process, or the system to be fostered in ownership and use of land, which is the primary resource of most developing countries. Space does not permit this expansion of coverage, nor is it necessary in order to respond to the question posed in the paper. The facts have been marshalled sufficiently, it is hoped, to sketch the outlines of what the leadership in developing countries believes necessary to development, both economically and politically. The way has been prepared for a conclusion to the question.

To the pragmatist the answer must be clear: certain measures have universally been found necessary in the developing states to mobilize the economy. There is evident variation, but the key points of the pattern stand out. There seems, however, to be no need on the part of some statesmen to characterize the result as "special"—at least the Nigerians and the Ivorians do not seem to express such a need.

To the doctrinaire leaders, however, characterization is necessary in the interest of national mobilization, if not also to satisfy a leader's personal desire to stand among his people and the world generally as an innovator, a philosopher, a guide along a path of universal significance. For such personalities, the nature of the legal structures devised to achieve developmental purposes has greater significance. Structures must inspire a respect from the people that could not be achieved unless the structures were characterized as "special," or "new." They must be related to the long tortuous progress of mankind through the ages toward the goal of abundance and the end of social strife.