

Stones of Hope

*How African Activists Reclaim Human Rights
to Challenge Global Poverty*

Edited by Lucie E. White and Jeremy Perelman

*With a Foreword by
Jeffrey D. Sachs and Lisa E. Sachs*

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Commentary on Anti-eviction and Development in the Global South

Duncan Kennedy

Land occupied by low-income people in the cities of the global South is sometimes potentially valuable for strong economic actors, who could make large profits if they could demolish the existing housing and appropriate the land for another use, typically middle- or upper-income housing, commercial development, or expansion of industrial or port facilities. Since this is not an intuitively obvious fact, it seems worthwhile to dwell for a moment on the reasons for it.⁴⁵

Residential segregation by income class is characteristic of much, although not all, urban housing all over the world, so the relevant units for understanding land values are usually neighborhoods.⁴⁶ A city that decades or just years ago was relatively small and compact likely had some low-income neighborhoods in close proximity to middle-income and/or upper-income neighborhoods, to the original commercial center, and to whatever industrial sites existed. Low-income neighborhoods were often located on terrain that was undesirable because it was swampy or hilly, or close to polluting uses, or subject to flooding, and therefore

more expensive to develop for middle- or upper-income uses than other land, often nearby. In port cities, low-income neighborhoods were often close to the water, not far from port facilities.

Because cities in the global South have been growing rapidly for decades, land use patterns often look very different today than they did at earlier points in the city's development. Land that was once obviously undesirable because of peripheral location or topography may become eminently developable once it has been surrounded by higher-value commercial, residential, or industrial uses.⁴⁷ A second important aspect of the situation is that a poor neighborhood in a once undesirable but now desirable location, even with woefully inadequate infrastructure, is likely to be attractive to low-income in-migrants looking for cheap housing close to jobs and to informal commercial opportunities in the developing center. (A third factor is that sometimes poor neighborhoods turn out to be located on top of mineral or other extractable resources.⁴⁸)

One way to look at this kind of situation is in terms of occupancy rights: will the poor residents be evicted from their poor housing and unserviced neighborhoods or not? But it may be useful to ask a related yet distinct question: who will appropriate the potential surplus, or economic rent, that derives from the current locational desirability of the land in the poor neighborhood?

Again, the potential surplus derives from the difference between what the land would be worth redeveloped and what it is worth in its current slum use. (It should be kept in mind that the current slum value has typically been enhanced by the willingness of poor in-migrants to pay for a central location.) If the poor residents are evicted without compensation by the developer (public or private) and, for example, the developer can sell high-end residential housing there for a price that is double (because of location) what it costs to construct the housing, then the developer makes a one hundred percent profit on his investment.

If the developer has to pay compensation based on the value of the land in its old use, then he will make less profit, and those to whom the compensation is paid get a share. If the developer has to compensate on the basis of the value of the land in its new use, then he will make a profit only on the difference between his cost of construction and the value added to the land by that construction (in other words, only a "normal" entrepreneurial profit).

Who among the occupants of the neighborhood get a share of the surplus depends only partly on the formal legal compensation regime, which could favor, for example, original chiefly titleholders, holders of informal title able to extract payment from the chiefs or the developer, or both. But tenants without

legal entitlements, if they are politically organized and able to resist physically so as to make it sensible for the developer to pay them off, may also end up with a share, in the form of relocation allowances.

At the same time, government officials with power to condemn the land, or with control over police or army units that will do the evicting (whether legally or illegally), are in a position to demand a share of the surplus in the form of bribes. A government oriented to development might exact a large part of the surplus from the developer as a tax, and then allocate it to projects that would benefit some and injure others in the population at large. In other words, the distribution of the surplus is only influenced, not determined, by whatever legal regime of formal property rights combined with "takings" law is nominally in force.

Although it is common for economists to see the surplus as a return to landownership, in fact all that is required in order to obtain a share is the *practical power to prevent* the new use of the land. An anti-eviction movement that can organize a community to prevent demolition of a slum neighborhood to make way for high-end residential or commercial development may therefore be in a position to bargain over the surplus as well as occupancy.

To take a simple example, if the movement could negotiate the reallocation of half the land to the new high-value use, it might be able to extract from the developer a share of the surplus that would amply compensate or rehouse the displaced residents while funding significant improvement of conditions in the remaining low-income area.

Of course, the minute a popular movement moves from the straightforward rhetoric of anti-eviction, and contemplates bargaining with the developing forces, a host of complex choices and accompanying problems come to the fore. In the Ijora-Badia case, Felix Morka tells us very little about how the movement conceptualized its demands beyond the demand not to be displaced. SERAC clearly had in the background the idea that the state and federal governments should invest in infrastructure to improve the neighborhoods, and that there should be "social housing."

The approach I describe below might be helpful in connecting the concrete accomplishments of anti-eviction campaigns worldwide (combining community mobilization and international human rights advocacy) with a set of forward-looking proposals about housing and infrastructure. My assumption is that the anti-eviction campaign has been successful enough in blocking displacement so that the private developers, governments, and international institutions involved have decided to negotiate, directly or indirectly.

I emphasize that the ideas that follow are tentative and impressionistic, suggestions for future discussion and nothing more. As well as assuming that the development forces will make concessions, I am going to assume that the community has a representative, along the lines of SERAC and the other organizations described in chapters of this book, that has real autonomy from the developer's side, some claim to popular legitimacy, and significant "capacity" in the sense of legal and technical resources. Legitimacy means that the organization can negotiate stable agreements among the different segments of the community regarding the costs and benefits of bargaining with the development force. Where this is not the case, none of these ideas have much relevance.

One question that could be asked of Morka's account is how SERAC established itself as a legitimate representative of the community. In our discussions of his account, Morka elaborated as follows:

Regarding the question of how to bring people out of a mode of alienation, distance, to become political agents, to take action to alter their circumstances even if those are created by forces beyond their understanding, and engage with the political process [. . .], we saw human rights as a powerful empowerment tool and as a framework for action. At every stage, the process of decision making about tactics and strategies was collective and very inclusive. [. . .] But at the essential core of why the Badia people ended up rising up together in a sustainable way to ask for change and win success [. . .] is a clear consciousness, progressively building, that you can't be pushed around by the state or even by the World Bank—you just can't be pushed around—you can't take us out of here, because this is our land. Whether or not I have a formal title, I live here; I know that my father and his father lived here. So I'm not going anywhere. And for those who had already been resettled in Badia, the idea was that since you have already moved us here, we're not going anywhere further—what would be the justice of that? Notions of how community residents were treated unfairly became part of the common consciousness, and allowed [them] to start breaching the various divides among the community—ethnic, religious, and socioeconomic.

What I find missing here, and in many similar descriptions, is a concrete description of "the ethnic, religious, and socioeconomic" "divides," and of legitimate and nonlegitimate authority in the community. *Someone* at SERAC must have figured out what the "divides" were, and what moves and gestures would conceivably persuade people to do something together.

Felix highlights the crucial role of human rights as an “empowerment tool and framework for action.” But human rights do not define themselves and do not empower of their own accord. Someone has to decide which rights to focus on, what they mean as applied, and how to deal with conflicts and ambiguities of rights within particular contexts.

Whoever makes those decisions surely acts on the basis of complex, explicit or implicit, understandings of local divisions and of preexisting structures of hierarchy, prestige, and domination. Rights rhetoric, moreover, empowers specific actors (lawyers? the more schooled members of the community?) at the expense of others. The universalism of rights rhetoric—its undifferentiated character—may be key to understanding its effectiveness in the face of social divisions, but it has also been in a sense an obstacle to the analysis of the concrete processes by which it operates.

Because I have been associated with the “critique of rights,”⁴⁹ I’d like to emphasize that I am not critical of the use of rights rhetoric in contexts like these. I think it is the general structure of *world discursive power* that makes human rights discourse a potentially important mobilizing tool.⁵⁰ I don’t think it is the validity or intrinsic truth of the discourse that makes it valuable, and for myself, given a choice, I would prefer the rhetoric of socialism (without claiming that it is any more internally coherent). Nonetheless, as time passes, different discursive modes gain and lose hegemonic power. And it would be wrong to say that because one prefers, for instance, socialism as a slogan, one should not use human rights opportunistically. Precisely because it is internally flexible and ambiguous, human rights discourse can serve as the vehicle for projects that might be better described as socialist.

That said, the choice of rights discourse for pursuit of a left project does lead to some quite specific rhetorical dilemmas, as will become apparent as we move from its role as “empowerment” to its role as a “framework for action.”

It is basic that the community is bargaining: giving up territory for development in exchange for money and nonmonetary benefits. Many intricate alternative bargaining strategies are likely, ranging, just for example, from selling off a significant border strip adjacent to the higher-value land, to promoting “in-fill” style development designed to spread effects across the whole area without full displacement from any discrete area. Leaving bargaining strategies aside, not because it is not important but because it seems hard to generalize, I will focus on the form of the surplus payment.

At one extreme, the “pure individual property rights” solution would be

to have the developer compensate according to the existing takings law of the jurisdiction, presumably paying formal titleholders according to a lost market value formula. A less legalistic but still "rightsy" solution would require the developer to make lump sum compensation to everyone who has suffered a loss through development, whether or not the loss would be cognizable under takings law. A further step along the spectrum would be to measure the compensation not by loss to residents but as a share of the benefits of development, that is, of the surplus. Why settle for mere compensation of losses when the community's organized resistance has put it in the position of a stakeholder? Then it will be necessary to decide how to parcel out the surplus, beyond the compensation of downside losses.

While these solutions are intuitively obvious possibilities, others are regularly proposed in analogous situations. These are more or less "collective" solutions, because they use the money (beyond what is allocated to directly compensating losses) to create a "social housing sector." First, they involve setting up a new institutional actor with strong powers: a community land trust, a community development corporation,⁵¹ a housing authority, or an empowered local government.⁵²

Second, these solutions distribute the surplus extracted from the development forces to residents in the form of "limited equity" residential tenure, with restrictions on alienability (the right to transfer ownership) that empower the collective to benefit from increases in housing values while maintaining the affordability of the community as a whole. Social housing means housing that gives residents something less than fee simple (absolute formal title), but something more than the status of mere tenant that they would have under a private landlord or a conventional public housing authority.⁵³

Here is where the ambiguity of rights discourse comes in. Suppose that we understand social and economic rights to include property rights, and then conceptualize property rights, as does neoliberal development theory, in terms of secure formal tenure for an individual absolute owner. In this case, rights rhetoric seems to push against bargaining toward what I have called collective solutions. It seems to favor a demand that the state recognize community residents as formal titleholders and then compensate them for lost market value when they give up land for development.⁵⁴

In this perspective it is interesting to note that the Nigerian Land Use Act of 1978 decrees that "all land comprised in the territory of each state shall be held in trust and administered for the use and common benefit of all Nigerians

in accordance with the provisions of this Act." The act empowers the state and federal governments to regulate and manage land, by "granting statutory and customary rights of occupancy," and also, more radically, requires government approval for all transfers of rights. From Morka's description it is easy to see how one might mount a neoliberal argument that the act denies the right of property and is a major obstacle to development.

Against this way of looking at it,⁵⁵ I would prefer to see the Land Use Act as a mechanism for setting up institutions that recognize that property is "just a bundle of rights," a collection of diverse entitlements and exposures that can be adjusted to whatever the goals of the community might be. This is the dominant Western legal theoretical view sometimes summarized as "the disintegration of property."⁵⁶ In addition, it would seem plausible that in constructing these bundles, those who bargain on behalf of the community should take into account how African property arrangements have traditionally recognized "nonabsolute" solutions, such as according household members wide rights to veto transfers by the head of the household that disadvantage them, and giving local chiefs an important role, sometimes analogized to trusteeship, in land allocation.⁵⁷

The strategy of creating a powerful community institution (development corporation, land trust) administering a social housing sector based on limited equity and some restrictions on alienability looks, in this perspective, like a quite conventional way to design property as an institution in the service of community ends. In short, a rhetoric of property rights as social, and not only as economic, rights is available to support more collective or socialist projects for administering whatever surplus the community can extract from the development forces.⁵⁸ The Nigerian Land Use Act could be conceived as an aid rather than an obstacle to this kind of strategy, supposing that the community could draw the various governments into the bargaining, and then bind them to whatever reconfiguration of rights emerges.

Now suppose that through some combination of popular mobilization, international human rights advocacy, and savvy negotiation the community has secured access to part of the revenues generated by this specific development. And assume, for the future, that the new organization has used the surplus to build a social housing sector based on limited equity and restraints on alienation. Finally, assume, perhaps most heroically, that the organization, deploying its equity in the social housing, its control of access through restraints on alienation, and whatever regulatory powers it can leverage from the government,

maneuvers skillfully to access whatever flow of rents becomes available because of the increased desirability of the location, for both high-value and low-income uses. The question remains how the entity should deploy the funds, beyond the initial creation of social housing.⁵⁹

Here the spectrum of possibilities includes, at one end, monitoring the new housing to ensure good living conditions and avoid either gentrification or a downward spiral, and expanding the social sector when possible. In the middle, the organization could undertake, as a joint venture or by itself, the kind of infrastructure improvement (water, sanitation, roads, and so on) that central governments have grievously neglected.

At the extreme, the community could conceive itself as a "mini-developmental-state-within-the-state," looking for ways to insert itself into global or local value chains.⁶⁰ Here I am influenced by Alice Amsden's description of the way in which a government with some financial leverage can influence economic activity by offering various kinds of subsidies combined with enforceable conditionalities (training, local content, and the like).⁶¹

As an example (and no more than that!), rather than simply contracting for infrastructure on the basis of cost and value, the organization could treat the building of latrines as a development project in its own right, requiring the use of local labor and materials along with training and technology transfer to a "local champion," which would receive a subsidy conditioned on its ability to do infrastructure work outside the neighborhood. According to Saskia Sassen, global city development creates new needs for unskilled or semi-skilled labor and small-scale entrepreneurship.⁶² Perhaps the organization could exploit the cost advantage provided by central location and social housing to train and then provide labor and enterprise to meet these needs.

Of course, there are many objections to any such scheme, some of which are highly persuasive. Indeed, there are even objections to the first step of trying to formally empower a local community to control its housing patterns. That the approach is usually utopian, however, doesn't mean that it is always utopian; where it could work, it seems to me, there is a lot to gain from experiment, given the alternatives.

To conclude this comment, I will respond, tentatively, to one very plausible objection: to the extent a community succeeded in using extracted surpluses to improve local housing, it would attract in-migrants who would dissipate the gains through overcrowding and social dislocation. The only reasonable response seems to be to erect a barrier to in-migration, thereby risking turning

the experiment into yet another means to exacerbate the social and economic inequalities that groups like SERAC set out to remedy in the first place.⁶³

To put it bluntly, I am in favor of the community adopting policies that will seriously limit, without eliminating, the in-migration of groups whose numbers and poverty would threaten the whole enterprise. The means to this kind of limited exclusion is the vigorous enforcement of zoning, housing codes, and occupancy limits, in other words the means that local elites all over the global South already use to retain the elite character of their neighborhoods.⁶⁴ These policies have a violent aspect, since their enforcement against squatters inevitably requires the plausible threat of police force.

The boundary involved need not be impermeable. If the strategy works, community development will generate jobs and also construction of new housing deliberately allocated to low-income in-migrants, perhaps targeted to potential small entrepreneurs subsidized by surplus extraction and supported by the relatively high value of low-income housing near the center. A slow-moving upward spiral, without gentrification or displacement of existing residents, should generate opportunities for in-migrants without the danger of a downward spiral that would be posed by uncontrolled open access to the area.

But more generally I would respond to this argument by refusing, at least provisionally, to adopt the perspective of the whole. Radical poverty is a world problem, and even more striking, it is a world *system* problem, meaning that it is generated through the interrelation of the parts of the transnational, global economic system, by relations between as well as within nations.⁶⁵ The only way to respond to the problem from the point of view of the whole is through institutional reform at both the national and the transnational levels, as for example through international labor standards.

I don't think, however, that we should just accept either the view that nothing can be done short of national or transnational institutional reform, or the view that the only kinds of programs that are morally acceptable are those without barriers that exclude outsiders. Under those constraints, my sense is that there is very, very little that the slum dwellers of the global South could do to improve their situation.

Fluidity between the subnational, national, and international orders is a deep problem with regard to all development strategies. What I am proposing is to structure access to an asset that derives from popular resistance to eviction in a way that gives nonabsolute residential rights in social housing, but also the potential of strong executive direction, to a local definition of "the

community." For example, Badia would make the decision to sell a strip at the border between itself and a richer neighborhood, and use the money for some combination of social housing and latrines for the neighborhood, designing the whole as a development strategy as well as a housing strategy.

Regulating the community so that the wealth that has been created won't be dissipated seems to me acceptable, even if not desirable in the abstract. The ultimate objective is to build virtuous circles that expand the local pie in dynamic and elastic ways. Refusing to defend the accomplishments of creative reform through some kind of formal or symbolic boundary is likely to lead to the opposite—a downward spiral. I do not believe you can have any form of development if you start out with the premise that nothing can be done unless it is universally accessible.

45. This section of the chapter was written by Duncan Kennedy, who offers the following: My thanks to Lama Abu-Odeh, Alice Amsden, Willie Forbath, Jerry Frug, Jeremy Perelman, Kerry Rittich, and Lucie White for helpful comments. Errors are mine alone. I found Felix Morka's chapter valuable and very interesting. I want in this comment to suggest, in a tentative and, I am afraid, quite schematic way, a direction for the design of anti-eviction campaigns. I need to say at the outset that I am not an expert (for a discussion of social justice lawyering and power in South Africa, see Lucie White, "To Learn and Teach: Lessons from Driefontein on Lawyering and Power," *Wisconsin Law Review* [1988]: 699). These are the remarks of a sympathetic bystander who has done some work on low-income housing policy in the U.S. context (see Duncan Kennedy, "Legal Economics of U.S. Low Income Housing Markets in Light of 'Informality' Analysis," *Journal of Law in Society* 4 [2002]: 71, and "The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society," *Howard Law Journal* 46 [2002]: 1).

46. The discussion of neighborhood change that follows is derived from the housing economics literature. The pieces that have influenced me the most are Matthew Edel, "Filtering in a Private Housing Market," in *Readings in Urban Economics*, ed. Matthew Edel and Jerome Rothenberg (New York: MacMillan, 1972); Charles L. Leven, James T. Little, Hugh O. Nourse, and Robert Read, "Neighborhood Change," in *Neighborhood Change: Lessons in the Dynamics of Urban Decay*, ed. Charles Leven et al. (New York: Praeger, 1976); Rolf Goetze, *Understanding Neighborhood Change* (Cambridge, MA: Ballinger, 1979); and Peter Marcuse, "Gentrification and Abandonment," *Journal of Urban and Contemporary Law* 28 (1985): 195, and "Neutralizing Homelessness," *Socialist Review* 18 (1988): 1.

47. See Edesio Fernandes and Ann Varley, eds., *Illegal Cities: Law and Urban Change in Developing Countries* (New York: Zed Press, 1998). See also Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (New York: Cambridge University Press, 2003).

48. See Raymond Atuguba and Mwambi Mwasaru, "I Refuse to Let Go of the Land: Malindi Citizens, Salt Farmers, and the Land Question in Kenya" (presentation at Stones of Hope workshops; manuscript on file with the editors of this volume).

49. See Duncan Kennedy, "The Critique of Rights in Critical Legal Studies," in *Left Legalism/Left Critique*, ed. Wendy Brown and Janet Halley (Durham: Duke University Press, 2002).

50. Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850–2000," in *The New Law and Economic Development: A Critical Appraisal*, ed. David Trubek and Alvaro Santos (New York: Cambridge University Press, 2006).

51. See William Simon, *The Community Economic Development Movement: Law, Business and the New Social Policy* (Durham: Duke University Press, 2002); David Barron, "The Community Economic Development Movement's Double Standard," *Stanford Law Review* 56 (2003): 701.

52. See generally Gerald Frug, "The City as a Legal Concept," *Harvard Law Review* 93 (1980): 1057; Gerald Frug and David Barron, "International Local Government Law," *The Urban Lawyer* 38 (2006): 1; Gerald Frug and David Barron, *City Bound: How States Stifle Urban Innovation* (Ithaca: Cornell University Press, 2008), 144–64.

53. Kennedy, "The Limited Equity Coop," supra n. 45; Duncan Kennedy and Leopold Specht, "Limited Equity Housing Cooperatives as a Mode of Privatization," in *A Fourth Way? Privatization, Property, and the Emergence of New Market Economies*, ed. Gregory Alexander and Grazyna Skapska (New York: Routledge, 1994); Duncan Kennedy, "Neither the Market nor the State: Housing Privatization Issues," in id.

54. See Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000). For a critical perspective on de Soto's approach, see Chapter 3 in this volume. See also Kerry Rittich, "The Properties of Gender Equality," in *Human Rights and Development: Toward Mutual Reinforcement*, ed. Philip Alston and Mary Robinson (New York: Oxford University Press, 2005).

55. For the critique of neoliberal property rights development strategy, see Joel Ngugi, "The World Bank and the Ideology of Reform in International Development Discourse," *Cardozo Journal of International and Comparative Law* 14 (2006): 313; *Indonesian Journal of International Law* 3 (2006): 316; Joel Ngugi, "Policing Neo-liberal Reforms: The Rule of Law as a Constraining and Enabling Discourse," *University of Pennsylvania Journal of International and Economic Law* 26 (2006): 513; Joel Ngugi, "Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration," *Michigan Journal of International Law* 25 (2004): 467.

56. See Thomas Grey, "The Disintegration of Property," in *Liberty, Property and the Law*, ed. Richard Epstein (New York: Gardland, 2000), and Charles Donahue, "The Future of Property Predicted from Its Past" (id.); Duncan Kennedy and Frank Michelman, "Are Property and Contract Efficient?" *Hofstra Law Review* 8 (1980): 711.

57. Celestine Nyamu-Musembi, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" *Harvard International Law Journal* 41 (2000): 381; Sylvia Kang'ara, "Rethinking Property: Language, Meaning and Institutions," *Hague Yearbook of International Law* 13 (2000): 35–42. See generally David Kennedy, "The 'Rule of Law,' Development Choices and Political Common Sense," Trubek and Santos, supra n. 50.

58. See generally Alexander and Skapska, supra n. 53.

59. See generally David Kennedy, "Laws and Developments," in *Law and Development: Facing Complexity in the 21st Century*, ed. John Hatchard and Amanda Perry-Kasaris (Portland, OR: Cavendish, 2003).

60. See Michael Porter, "What Is Strategy?" *Harvard Business Review*, November–December (1996): 61–78; Raphael Kaplinsky, *Globalization, Poverty and Inequality: Between a Rock and a Hard Place* (Malden: Polity, 2005).

61. See Alice Amsden, *Escape from Empire: The Developing World's Journey Through Heaven and Hell* (Cambridge, MA: MIT Press, 2007); Alice Amsden and Wan Wen Chu, *Beyond Late Development: Taiwan's Upgrading Policies* (Cambridge, MA: MIT Press, 2003); Alice Amsden, *The Rise of "The Rest": Challenges to the West from Late-Industrializing Economies* (New York: Oxford University Press, 2001).

62. See Saskia Sassen, *The Global City: New York, London, Tokyo*, 2nd ed. (Princeton: Princeton University Press, 2001).

63. See generally Kennedy, "Legal Economics of U.S. Low Income Housing Markets in Light of 'Informality,'" *supra* n. 45. For discussion of a similar argument in the U.S. context, see Duncan Kennedy, "The Effect of the Warranty of Habitability on Low Income Housing: 'Milking' and Class Violence," *Florida State Law Review* 15 (1987): 485, 517–18.

64. See Edesio Fernandes and Raquel Rolnik, "Law and Urban Change in Brazil," in Fernandes and Varley, *supra* n. 47.

65. Thomas Shannon, *An Introduction to the World System Perspective*, 2nd ed. (Boulder: Westview, 1996).