

# ENHANCING POOR PEOPLE'S CAPABILITIES THROUGH THE RULE OF LAW: CREATING AN ACCESS TO JUSTICE INDEX

## I. INTRODUCTION

At the beginning of the twenty-first century, it is estimated that nearly half of the world's six billion people live on less than \$2 per day,<sup>1</sup> while 1.1 billion people live on less than \$1 per day.<sup>2</sup> Globally, 30,000 children die every day, mostly from preventable causes.<sup>3</sup> The United Nations Development Programme (UNDP) reports, "Human poverty is pervasive, affecting a quarter of the people in the developing world."<sup>4</sup> In addition, serious inequalities exist between<sup>5</sup> and within nations.<sup>6</sup>

Following the September 11th terrorist attacks, some commentators argued that the effects of poverty could no longer be contained within the boundaries of poor nations.<sup>7</sup> The UNDP maintains:

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1. The World Bank Group, *PovertyNet: Overview: Understanding Poverty*, at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20153855~menuPK:435040~pagePK:148956~PIPK:216618~thesitePK:430367,00.html> (last visited Feb. 23, 2005).

2. *Id.*; cf. HENRI BARTOLI, RETHINKING DEVELOPMENT: PUTTING AN END TO POVERTY 4 (UNESCO 2000). Bartoli maintains that 1.5 billion people live on less than \$1 a day. *Id.*

3. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2000, at 73 (2000); see also The World Bank Group, *Millennium Development Goals: Reduce Child Mortality*, at [http://www.developmentgoals.org/Child\\_Mortality.htm](http://www.developmentgoals.org/Child_Mortality.htm) (last visited Feb. 23, 2005) [hereinafter *Millennium Development Goals: Reduce Child Mortality*]. In total, more than ten million children die every year in developing countries. *Id.* It is believed that providing better medical care and nutrition to children in developing countries could prevent most of these deaths. *Id.*

4. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 3, at 42. The United Nations Development Programme (UNDP) has published a "Human Development Report" every year since 1990. *Id.* at 147. The report is an independent publication commissioned by the UNDP. *Id.* at iv. The Report creates a "Human Development Index," which is a composite of three indicators: "longevity, as measured by life expectancy at birth; educational attainment . . . and standard of living, as measured by GDP per capita. . . ." *Id.* at 279. The indicators measure the average achievement in each category. *Id.* The "Human Poverty Index," on the other hand, measures deprivations in each category. *Id.* Based on each index, countries are classified into three categories: high, medium, and low human development. *Id.* at 145.

5. *Id.* at 157–268 (listing numerous indicators of human poverty and development). For example, in Canada the average person lives 79.1 years, 99% of the adult population is literate, and the Gross Domestic Product per capita is \$23,582. *Id.* at 157. Canada ranks the highest, overall, on the Human Development Index. *Id.* On the other hand, in Sierra Leone the average person lives only 37.9 years, 31% of the adult population is literate, and the Gross Domestic Product per capita is \$458. *Id.* at 160. Sierra Leone ranks the lowest, overall, on the Human Development Index. *Id.*

6. The UNDP suggests "National human development data, disaggregated by region, gender, ethnic group or rural and urban areas, reveal significant disparities within countries too." *Id.* at 152. For example, in South Africa in 1995, the unemployment rate for African males was seven times higher than that among white males. *Id.* at 153.

7. Editorial, *Poverty and Terror*, WASH. POST, Oct. 5, 2001, at A36. The editorial maintains

As the world becomes increasingly interdependent, both states—in their policies that affect other states—and other global actors have greater obligations to create a better enabling environment for the realization of economic and social rights. . . . Despite mutual self-interest as well as ethical obligations to design pro-poor global economic and social policies, little binds or encourages national governments, corporations, the media and other global actors to do so under current arrangements for global governance. Today's marginalization of poor countries from global trade and investment surely reflects the failure of global policies. . . .<sup>8</sup>

Therefore, from a self-interested point of view, countries that are concerned about stabilizing international relations must also take a strong interest in poverty alleviation efforts worldwide.<sup>9</sup>

Poverty alleviation is obviously an enormous task—a task that often has been left up to economists.<sup>10</sup> Hence, many of the earlier models of development focused solely on poverty reduction through economic growth.<sup>11</sup>

Recently, however, there has been a shift. Amartya Sen, winner of the 1998 Nobel Prize in Economics, argues that a wider set of indicators should be considered when evaluating poverty reduction efforts.<sup>12</sup> In his book *Development as Freedom*, Sen suggests that development policies

that “the attacks of Sept. 11 have served as a reminder of the danger posed to a rich superpower by large regions of the world mired in resentful poverty. The link between foreign aid and the national interest has seldom been clearer.” *Id.*

8. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 3, at 82. Furthermore, evidence suggests that the gap between the world's rich and poor continues to widen. “The combined wealth of the top 200 billionaires hit \$1,135 billion in 1999, up from \$1,042 billion in 1998. Compare that with the combined incomes of \$146 billion for the 582 million people in all the least developed countries.” *Id.*

9. For example, “[h]atred of America flourishes in rich countries as well as poor ones. But by and large, growing economies are less likely to be breeding grounds for anti-American extremism. And American power is less likely to be resented if it is seen to promote poverty-reduction and other humanitarian causes.” *Poverty and Terror*, *supra* note 7, at A36.

10. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1065. The authors suggest that “lawyers were latecomers to the development research game, responding more slowly than social scientists to the demand for theoretical insights into the processes of development.” *Id.*

11. *Id.* Trubek and Galanter also suggest that in the initial stages of development, policymakers were focused almost entirely on the economic aspects of development, and some were even considered hostile to noneconomic aspects. *Id.* at 1086.

12. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999) (advocating for a development model that enhances people's capabilities, rather than one that focuses solely on income enhancement) [hereinafter SEN, *DEVELOPMENT AS FREEDOM*].

should focus on enhancing poor people's "capabilities."<sup>13</sup> Sen's capabilities approach suggests that "[P]overty must be seen as the deprivation of basic capabilities rather than merely as lowness of incomes, which is the standard criterion of identification of poverty."<sup>14</sup> Unlike other development models that focus solely on economic growth, the capabilities approach, as operationalized by the Human Development Report, suggests a much broader, interdisciplinary approach to combating poverty.<sup>15</sup> Because of its interdisciplinary nature, this Note will argue that the capabilities approach provides a useful framework for considering the role of law in development.

Part II of this Note will begin by exploring some of the traditional non-legal and legal approaches to development.<sup>16</sup> Next, Sen's capabilities approach to development will be considered in-depth.<sup>17</sup> Part III will explore how the capabilities approach could be utilized as a framework when evaluating the effectiveness of legal reforms and the "Rule of Law" in developing countries.<sup>18</sup> Part IV will analyze the results of this inquiry and consider what steps should be taken next.<sup>19</sup> Part V concludes that Amartya Sen's capabilities approach provides the best framework for both measuring poverty and enhancing the well-being of the disenfranchised in developing countries.<sup>20</sup> In particular, this Note recommends that

13. *Id.* at 40 (stating that "instrumental freedoms directly enhance the capabilities of people, but they also supplement one another, and can furthermore reinforce one another. These interlinkages are particularly important to seize in considering development policies.").

14. *Id.* at 87; see also Amartya Sen & Martha Nussbaum, *Introduction*, in *THE QUALITY OF LIFE 1* (Amartya Sen & Martha Nussbaum eds., 1993). To illustrate the problem with simply using income indicators to measure quality of life, Sen and Nussbaum use an excerpt from Charles Dickens' *Hard Times*:

'And he said, Now, this schoolroom is a Nation. And in this nation, there are fifty millions of money. Isn't this a prosperous nation? Girl number twenty, isn't this a prosperous nation, and a'n't you in a thriving state?'

'What did you say?'

asked Louisa.  
'Miss Louisa, I said I didn't know. I thought I couldn't know whether it was a prosperous nation or not, and whether I was in a thriving state or not, unless I knew who had got the money, and whether any of it was mine. But that had nothing to do with it. It was not in the figures at all,' said Sissy, wiping her eyes.

'That was a great mistake of yours,' observed Louisa.

*Id.*

15. The Report suggests that a number of disciplines such as law, social work, medicine, education, political science, and economics all play vital roles in enhancing the capabilities of people. See generally UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 3.

16. See *infra* notes 32–77 and accompanying text.

17. See *infra* notes 78–112 and accompanying text.

18. See *infra* notes 113–29 and accompanying text.

19. See *infra* notes 130–34 and accompanying text.

20. See *infra* notes 135–36 and accompanying text.

organizations such as the UNDP adopt an “access to justice index” and include it as another measure of human development.

## II. HISTORY

### A. *Measuring and Defining Poverty*

Over half the population in developing countries live on less than \$2 a day.<sup>21</sup> In 1998, the Gross Domestic Product per capita in low human development countries<sup>22</sup> was only \$980.<sup>23</sup> However, low incomes are just part of the picture of deprivation. In Sub-Saharan Africa nearly 35% of the total population is undernourished,<sup>24</sup> and in South Asia nearly 50% of children under the age of five are malnourished.<sup>25</sup> In low-income countries, one child in every ten dies before the age of five,<sup>26</sup> and according to the UNDP, life expectancy in low human development countries is 50.9 years, nearly twenty-six years less than the average in high human development countries.<sup>27</sup>

Traditionally, poverty was measured in terms of the income or consumption of a household over a period of time, and then a minimal level was set to define the poverty line.<sup>28</sup> However, theorists have begun to conceive of poverty in much broader terms, as evidenced by the UNDP’s

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21. The World Bank Group, *Millennium Development Goals: Malnutrition and Hunger*, at <http://www.developmentgoals.org/Poverty.htm> (last modified Sept. 2003) [hereinafter *Millennium Development Goals: Malnutrition and Hunger*].

22. See *supra* note 4 for a discussion of how the UNDP calculates high, medium, and low development countries using various indicators.

23. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 3, at 181. On the other hand, the Gross Domestic Product per capita in high human development countries was \$21,770. *Id.* However, many argue that GDP is not a good indicator of poverty because it fails to accurately depict income variations within a country’s population. See *supra* note 14 and accompanying text.

24. *Millennium Development Goals: Malnutrition and Hunger*, *supra* note 21. The Bank defines undernourishment as “consuming too little food to maintain [a] normal level of activity.” *Id.*

25. *Id.*

26. *Millennium Development Goals: Reduce Child Mortality*, *supra* note 3. As a comparison, in high income countries, one child in 143 dies before the age of five. *Id.* In 2002, fifteen countries had child mortality rates higher than 200 deaths per 1,000. *Id.* “For approximately 70 percent of the deaths before age five, the cause is a disease or a combination of diseases and malnutrition that would be preventable in a high-income country: acute respiratory infections, diarrhea, measles, and malaria.” *Id.*

27. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 3, at 160. Literacy rates are also astoundingly low. *Id.* In low human development countries the literacy rate lingers around 48.8%, while in high human development countries it reaches nearly 99%. *Id.*

28. NEIL MCCULLOCH ET AL., UK DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, TRADE LIBERALIZATION AND POVERTY 37 (2001). The authors suggest that utilizing this traditional approach to measuring poverty means that “poverty is defined simply as a lack of income or consumption.” *Id.* For a general discussion of differing approaches to defining and measuring poverty, see *id.* at 38–55.

Human Development Report.<sup>29</sup> As the report points out, “[I]ncome is not the sum total of human lives, nor is its lack the sum total of human deprivations.”<sup>30</sup>

How one defines “poverty” will frame, in many ways, the policies and strategies that are recommended and utilized in attempting to alleviate it.<sup>31</sup> The next section will explore how approaches and conceptions of poverty have shaped the development debate over time.

## *B. Economics-Based Models of Development*

### *1. Traditional Approaches*

Contemporary development theory emerged around the middle of the twentieth century.<sup>32</sup> These development models conceived of poverty strictly in terms of income and therefore sought to employ strategies that

29. See generally UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 3, at 141. Some methods of defining poverty, known as “participatory approaches,” attempt to involve the poor in defining their own concept of poverty. See MCCULLOCH, *supra* note 28, at 45. For example, a study utilizing the participatory approach in Asia and Sub-Saharan Africa developed the following set of criteria for “ill-being”:

- disabled (for example, blind, crippled, mentally impaired, chronically sick);
- widowed;
- lacking land, livestock, farm equipment, grinding mill;
- cannot decently bury their dead;
- cannot send their children to school;
- having more mouths to feed and fewer hands to help;
- lacking able-bodied members who can fend for their families in the event of crisis;
- with bad housing;
- having vices (such as alcoholism);
- being ‘poor in people,’ lacking social supports;
- having to put children in employment;
- single parents;
- having to accept demeaning or low-status work;
- having food security for only a few months each year;
- being dependent on common property resources.

*Id.*

30. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 3, at 148.

31. Alicia Ely Yamin, *Reflections on Defining, Understanding, and Measuring Poverty in Terms of Violations of Economic Social Rights—Under International Law*, 4 GEO. J. ON FIGHTING POVERTY 273 (1997). For example, the author suggests that if poverty is framed as a personal deficiency, then policy responses will make distinctions based on the “deserving” poor. *Id.* at 274. Likewise, if poverty is seen as a resource issue, then policy options will focus on expanding economic productivity. *Id.*

32. DAVID STOESZ ET AL., INTERNATIONAL DEVELOPMENT 104 (1999). The authors suggest that modern development theory grew out of classical and neo-classical economics. *Id.*

would fuel economic growth,<sup>33</sup> even if that meant delaying democratic reforms.<sup>34</sup> Many development theorists even believed that authoritarian regimes were more efficient in creating policies that would spur economic growth.<sup>35</sup> These models of development viewed poverty as a “failure of productivity” and encouraged state policies that would convert the “unproductive poor into productive workers and wealth-creators.”<sup>36</sup> In addition, growth-based models promoted trade liberalization<sup>37</sup> and discouraged protectionism.<sup>38</sup>

These growth-based policies are often promoted by countries, such as the United States, which offer foreign aid assistance, or by international

33. *Id.* at 105. The classical model of development “emphasizes the efficient allocation of labor and resources, production of wealth, and growth of output to thereby generate self-sufficiency, increase commerce, and improve general welfare.” *Id.* The authors suggest that under the classical framework of development the goal is to “reduce or eliminate those factors that interfere with the market’s innate tendency to achieve dynamic equilibrium through efficient allocation and trade.” *Id.*; see ANNA K. DICKSON, *DEVELOPMENT AND INTERNATIONAL RELATIONS* 33 (1997) (discussing various development models). Dickson posits that development theories have paralleled the development of capitalist theories. *Id.*

34. Jennifer Windsor, *Democracy and Development: The Evolution of U.S. Foreign Assistance Policy*, 27 FLETCHER F. WORLD AFF. 141 (2003).

35. *Id.* Windsor suggests that many scholars believed that the “use of populist appeals and compromises could make [democratic regimes] less capable of developing coherent economic plans relative to insulated authoritarian regimes. Thus, the argument went, democratization should be delayed until certain development goals were achieved.” *Id.* at 141–42.

36. Yamin, *supra* note 31, at 277. Yamin cites a 1990 World Bank report, which describes its poverty alleviation strategy as containing two policies. *Id.* A primary policy focused on growth, and a secondary policy sought to “address the remaining poor.” *Id.* Yamin suggests that under this approach to poverty, “[t]ax, trade, exchange rate, monetary, and labor policies are all potential ways for the state to structure opportunities for increasing the work force, while at the same time wage ceilings are encouraged to control the costs of labor.” *Id.* at 278.

37. MCCULLOCH, *supra* note 28, at 3. “Trade liberalization” implies a set of national policies that favor free market domestic economies, while opening channels of trade with international markets. *Id.* “Protectionist” policies, on the other hand, favor protecting domestic markets by placing limitations on trade with international markets. *Id.* McCulloch posits that “trade liberalization is an ally in the fight against poverty: it tends to increase average incomes, providing more resources with which to tackle poverty; and while it will generally affect income distribution, it does not appear to do so in a systematically adverse way.” *Id.* at 3. However, others view trade liberalization and the institutions that advocate for such policies with more than a tinge of skepticism. See Paul Cammack, *Neoliberalism, the World Bank, and the New Politics of Development*, in *DEVELOPMENT THEORY AND PRACTICE: CRITICAL PERSPECTIVES* 157 (Uma Kothari & Martin Minogue eds., 2002). Cammack states that for the World Bank, “development is *capitalism*, pure and simple. Over little more than a decade the vocabulary of development has been hijacked to project capitalism as the answer to the human aspiration for a better life.” *Id.* at 178. He goes on to argue that the World Bank’s agenda is “simply a recipe for establishing capitalism on a global scale.” *Id.*

38. There is quite a contentious debate over the value of trade liberalization versus protectionist policies to the poor in developing countries. See, e.g., Paul Blustein, *Cause, Effect and the Wealth of Nations: David Dollar Says Globalization is Good for Poor Countries. Dani Rodrick Strongly Disagrees*, WASH. POST, Nov. 4, 2001, at H1. While certainly related to the topic of development, it is outside of the scope of this Note to address which global or even national economic policies best promote the interests of the poor.

financial institutions, such as the World Bank or the International Monetary Fund.<sup>39</sup> Frequently, developing states “agreed”<sup>40</sup> to adopt these “structural adjustment policies”<sup>41</sup> in exchange for loans.<sup>42</sup>

Traditionally, such policies focused on encouraging economic growth for the economy as a whole; it was thought that this would automatically lead to a reduction in poverty.<sup>43</sup> However, the goal of such policies was to reduce poverty, not necessarily to reduce income inequalities.<sup>44</sup>

## 2. *Current Economic Approaches*

In contrast, some contemporary development theorists have become more concerned about the connection between poverty and income inequalities.<sup>45</sup> In a recent literature review,<sup>46</sup> the World Bank explored

39. See Cammack, *supra* note 37, at 175; Yamin, *supra* note 31, at 277. Cammack states that it was the World Bank’s strategy from 1990 to 1997 to “promote procapitalist policies, extend them to every aspect of social and economic organization, and claim that they would reduce poverty to the benefit of all.” *Id.*

40. There has been significant debate over the past several years on the coercive nature of the structural adjustment policies. See BARTOLI, *supra* note 2, at 31–57. Bartoli maintains that developing countries “consider interventions in the form of mandatory advice to be an excessive intrusion in their strategies. . . .” *Id.* at 42. He queries, “Can one require developing countries to adopt austere recovery policies demanding political authoritarianism while at the same time demanding a contraction of the State and making the adoption of an imported and unstable model of democracy a criterion of judgment?” *Id.* Referring to an incident known as the “IMF suicides,” in which Thai workers were fired from their jobs and ended up killing their entire families before killing themselves, Bartoli warns, “The weakness of the State, deprived of certain instruments of intervention under the ‘conditions’ imposed on it and unable to solve social problems, makes emerging democracies difficult to govern, and even exposes them to the danger of *coups d’etat*. . . .” *Id.* at 44.

41. See *id.* at 39–45 (providing a general discussion of the history of structural adjustment policies). Bartoli explains that structural adjustment policies came about in the 1980s as international financial institutions sought ways to combat global economic, monetary, and financial instability. *Id.* at 39. Bartoli further explains that because governments in developing countries cannot secure loans by assets such as pledges or mortgages, the criterion for a loan becomes one of “conditionality.” *Id.* at 40. He suggests that this conditionality “takes the form of a right to scrutinize the conduct of the economy of the borrowing country; the greater the amount of funds requested, the closer the scrutiny . . . [and] conditions relating to the fundamental macroeconomic objectives which the State receiving the loan has to undertake. . . .” *Id.* at 41.

42. Yamin, *supra* note 31, at 278. Often, structural adjustment policies include structural economic reforms such as requiring the State to invest in infrastructure to enhance trade and the distribution of goods, abolishing price controls and privatizing public utilities and state-run industries. *Id.* Structural adjustment policies also usually require major cuts in social spending. *Id.*

43. MCCULLOCH, *supra* note 28, at 6.

44. *Id.*

45. See generally J. HUMBERTO LOPEZ, THE WORLD BANK, PRO-POOR GROWTH: A REVIEW OF WHAT WE KNOW (AND OF WHAT WE DON’T) (Draft, Sept. 11, 2004), at <http://www.worldbank.org/poverty/inequal/econ/growth.htm> (last visited Apr. 8, 2005) (reviewing the literature on the current debate surrounding the effect of income inequalities on economic growth).

46. *Id.*

both theoretical and empirical research regarding pro-poor policies.<sup>47</sup> The World Bank became interested in addressing wealth inequalities because some theorists believe that income disparities can negatively impact growth.<sup>48</sup> However, “the theoretical literature is divided between those who suggest that inequality is detrimental for growth, and those who predict that inequality is conducive to higher growth.”<sup>49</sup> Presently, the World Bank has adopted a definition of pro-poor growth policies that essentially ignores inequality concerns.<sup>50</sup>

Some argue that under this reasoning, income inequality-reduction models view “social services [as] human capital investments that help the poor to become productive workers. Thus, social spending is strictly utilitarian and the value of poor people extends to the amount of their productivity.”<sup>51</sup> This suggests that such models are ultimately concerned with preserving economic growth rather than enhancing the well-being of individuals. “Thus the health—and by extension the well-being—of poor people becomes a means toward economic development and poverty alleviation as opposed to a good in its own right.”<sup>52</sup> This leads some to

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47. The World Bank suggests the “[p]ro-poor growth is about changing the distribution of relative incomes through the growth process to favor the poor.” The World Bank Group, *Pro-Poor Growth & Inequality—Pro-Poor Growth*, at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPGI/0,,contentMDK:20292383~menuPK:524081~pagePK:148956~piPK:216618~theSitePK:342771,00.html> (last visited Apr. 8, 2005).

48. See Lopez, *supra* note 45, at 7–9.

49. *Id.* at 8.

50. See The World Bank Group, *Pro-Poor Growth & Inequality—Pro-Poor Growth*, at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPGI/0,,contentMDK:20292383~menuPK:524081~pagePK:148956~piPK:216618~theSitePK:342771,00.html> (last visited Apr. 8, 2005). The World Bank adopts an “absolute” definition of pro-poor, which holds that “the extent to which growth is pro-poor depends solely on the rate of change in poverty”—not necessarily on the level of inequality. *Id.*

51. Yamin, *supra* note 31, at 278. To support this assertion, Yamin quotes the World Bank’s 1993 World Development Report, which suggests that health should be measured in terms of functionality or productivity and contributes to economic growth in the following four ways: “it reduces production losses caused by worker illness; it permits the use of natural resources that had been totally or nearly inaccessible because of disease; it increases the enrollment of children in school . . . and it frees for alternative uses resources that would otherwise have been spent on treating illness.” *Id.* (quoting THE WORLD BANK, WORLD DEVELOPMENT REPORT: INVESTING IN HEALTH 17 (1993)).

52. Yamin, *supra* note 31, at 278. Yamin argues that state policies affecting reproductive health have often been molded to fit the current needs of the state, rather than the women the policies purported to serve. *Id.* at 279. For example, she discusses communist Romania in the 1970s, which was in dire need of an expanding labor force. *Id.* “Abortion and contraceptive methods, which previously had been freely available, suddenly were banned, and pregnant women were forced to undergo gynecologic examinations throughout their pregnancies at their workplaces to ensure that abortions were not attempted.” *Id.*

suggest that the state or the pre-existing elite are ultimately served by such policies, not the poor.<sup>53</sup>

### C. *The Role of Law in Development*

#### 1. *The Early Law and Development Movement*

The law and development movement began in earnest in the 1960s and grew largely out of foreign aid assistance activities undertaken by the United States government, international organizations, and private foundations.<sup>54</sup> The legal component of development lagged behind other areas, namely economics, in part because universities lacked the capacity or interest to conduct research on law in developing societies.<sup>55</sup> Legal development efforts initially were seen as a “rational and effective method to protect individual freedom, expand citizen participation in decisionmaking, enhance social equality, and increase the capacity of all citizens rationally to control events and shape social life.”<sup>56</sup> Law and development theorists believed that legal rules provided the means to social change and assumed that liberal legalism could easily be transplanted to developing countries.<sup>57</sup> Furthermore, theorists believed that liberal legalism would provide the necessary framework in which economic reforms would flourish.<sup>58</sup> Theorists such as F.A. Hayek

53. *See id.* at 280. Yamin suggests that “the people who are left behind by growth policies are merely casualties of demographic or situational circumstances; they are not acknowledged as unique human beings whose deprivations is imbued with normative significance.” *Id.*; *see also* Cammack, *supra* note 37, at 178. Cammack strongly argues that the World Bank’s policies are intended to promote the interests of the elite. He suggests, “The effect is to present a set of policies infused with the disciplines and class logic of capitalism as if they were of universal benefit.” *Id.*

54. Trubek & Galanter, *supra* note 10, at 1063. The law and development movement of the 1960s was short-lived; just a few years later, Trubek and Galanter declared “that intellectual and moral shifts have created a crisis for this small group of academics, a crisis which threatens the future of their efforts to create theories about and to institutionalize the study of law and development.” *Id.* They go on to explain, “This crisis has two dimensions. Many scholars in the area have encountered difficulties defining the nature of their work or explaining its social utility. At the same time, the scholars have been unable to agree on the common interests that might unite them. . . .” *Id.*

55. *Id.* at 1065–66.

56. *Id.* at 1063.

57. *Id.* at 1079. These underlying assumptions led early law and development proponents to “focus on reform of formal rules, to work with the established professions, to believe that changes in the education of the professional legal class would ultimately produce desired social change. . . .” *Id.* Trubek and Galanter maintain that these assumptions led them to believe that “any activity that was designed to change legal institutions of Third World countries to make them more like those of the United States would be an effective and morally worthy pursuit.” *Id.* at 1079–80.

58. *Id.* at 1073. In essence, law was seen as both shaping and enforcing norms that would enhance economic development. *See also* Peter Boettke & J. Robert Subrick, *Rule of Law, Development, and Human Capabilities*, 10 SUP. CT. ECON. REV. 109, 111 (2003). Boettke and Subrick

maintained that the rule of law “means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”<sup>59</sup>

Founders of the law and development movement of the 1960s declared it a failure soon after it was launched.<sup>60</sup> Trubek and Galanter criticized the approach as assuming too much about social and legal structures in developing countries, being “naïve and ethnocentric,” and taking for granted that Western legal ideals were good or even transferable.<sup>61</sup> In addition, similar to criticism launched against economics-based development models, Trubek and Galanter argued that the law might be used by elites to further their domination.<sup>62</sup> Furthermore, they questioned whether law and development initiatives were mere rhetoric, aimed ultimately at serving the interests of the United States<sup>63</sup> or Third World governments rather than the poor.<sup>64</sup> Instead of abandoning efforts entirely to incorporate legal reform into development initiatives, Trubek and

attempt to prove a strong correlation between the rule of law and economic development. *Id.*

59. Boettke & Subrick, *supra* note 58, at 112 (quoting F.A. HAYEK, *THE ROAD OF SERFDOM* 72, 72 (1960)). The authors suggest that the rule of law sets parameters within which the government and the public must exist. *Id.* They suggest that the predictability of such parameters encourages economic growth. *Id.*

60. *See supra* note 54.

61. Trubek & Galanter, *supra* note 10, at 1080. In fact, Trubek and Galanter argue that the same “legal reforms” could actually harm the disenfranchised and “hamper efforts to increase material well-being.” *Id.*; *see id.* at 1080–85 (providing an interesting discussion of how the “crisis” in the 1960s law and development movement came about).

62. *Id.* at 1083. Trubek and Galanter argue, “The wealthy and more conservative groups in the society frequently have better access to the legal system. The legalization of areas of social life and the increased formalization of the legal process may increase the costs of protest. . . .” *Id.* They further maintain that the law may actually be used to “justify and legitimate arbitrary actions by governments rather than to curb or ban such excesses.” *Id.* In addition, they suggest, “increased instrumental rationality in legal processes together with governmental regulation of economic life may contribute to the economic well being of only a small elite, leaving the mass no better, or even worse, off.” *Id.* at 1084.

63. *Id.* at 1092. Trubek and Galanter’s “crisis” occurred in the midst of the United States’ involvement in the Vietnam War. They claim that the conflict led to a “collapse of the liberal belief that United States foreign policy is really guided by its humanitarian rhetoric.” *Id.* In addition, they maintain, “If the real motives behind United States assistance are military security or preservation of economic interests, then government-supported legal-development assistance is at best a peripheral activity, and at worst part of a humanitarian make concealing American *real politik*.” *Id.*

64. *Id.* at 1093. Trubek and Galanter expressed their disappointment in learning that their assumption that “Third World governments were beneficent” did not always prove to be the case. *Id.* In fact, they found that although Third World countries claimed to be interested in democratic reforms, “Third World governments often in fact constitute or represent narrow and self-satisfied elites whose vital concern is to protect and augment their dominant positions.” *Id.* Trubek and Galanter also complained that the same was true of professionals within developing countries. *Id.*

Galanter advocated for a “roving suspicion” of development policies, which they hoped would reveal the underlying moral value of policies.<sup>65</sup>

## 2. *The Current Role of Law in Development*

Despite this apparent breakdown in the law and development movement, there was a renewed interest in the role of law in development in the early 1990s following the collapse of the former Soviet Union.<sup>66</sup> Consensus gathered around the idea that the “rule of law” is a fundamental building block to both democracy and economic development.<sup>67</sup> Underlying this consensus was an assertion that law is necessary to the development and efficient functioning of the market.<sup>68</sup> “Rule of law” initiatives became central to the democracy-building efforts in a number of newly emerging democracies.<sup>69</sup> As a report by the United States Agency for International Development (USAID) in 1991 noted, “Open political system[s] respect for basic human rights, and an appropriate and efficiently administered legal and regulatory system based on due process of law, encourage[s] peaceful resolution of social conflict, stimulate[s]

65. *Id.* at 1100.

66. Windsor, *supra* note 34, at 143. Following the collapse of the Berlin Wall, the U.S. Congress enacted the Support for Eastern European Democracy Act and the Freedom Support Act for Russia and the former Soviet republics. *Id.* Funds provided by these Acts were used to promote democracy and free markets. *Id.*

67. The United States Agency for International Development (USAID) adopted a Democracy Initiative in 1990 which stated that “there is growing evidence that open societies that value individual rights, respect the rule of law and have open and accountable governments provide better opportunities for sustained economic development than do closed societies that stifle individual initiatives.” *Id.* at 143 (quoting USAID, DEMOCRACY INITIATIVE 2 (1990)). Later papers from USAID further support the interplay between democracy initiatives and economic development in emerging democracies. *Id.*

68. Boettke & Subrick, *supra* note 58, at 111. The authors assert that “the rule of law provides us with the stability and predictability in economic affairs required for agents to engage in entrepreneurial action—both in terms of exploiting existing opportunities for profit through arbitrage and the discovery of new profit opportunities through innovation.” *Id.* They go on to explain, “Absent the security and predictability provided by the rule of law, economic actors will shorten their time horizon of investment and economic progress will be thwarted.” *Id.*; see also Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1149 (1997). The authors conducted a study comparing the legal rules and quality of enforcement in forty-nine countries. *Id.* at 1131. The authors concluded that “the legal environment—as described by both legal rules and their enforcement—matters for the size and extent of a country’s capital markets.” *Id.* at 1149. They explain that “a good legal environment protects the potential financiers against expropriation by entrepreneurs, it raises their willingness to surrender funds in exchange for securities, and hence expands the scope of capital markets.” *Id.*

69. See *supra* note 64; see also Molly Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 HARV. INT’L L.J. 387, 428 (2003) (“[t]ransparency and rule of law ensure that citizens’ participation will be backed up by real authority and that efforts to hold leaders accountable will be effective.”).

individual initiative . . . and thus support[s] economic and social development.”<sup>70</sup>

Throughout the 1990s and into the present, democracy building and “rule of law” initiatives have become critical determinants of development assistance from international financial institutions, such as the World Bank and the International Monetary Fund, as well as U.S. administrations.<sup>71</sup> However, the question remains as to how well these initiatives serve the interests of the poor.

### 3. *Critique of the Role of Law in Development*

Once again, critics have questioned whether the factors used to determine the effectiveness of the rule of law actually benefit the poor.<sup>72</sup> Furthermore, the UNDP posits that while “[d]emocracy is the only form of political regime compatible with respecting all five categories of rights . . . it is not enough to establish electoral democracy.”<sup>73</sup> The UNDP maintains that democracies are not homogeneous; successful development efforts depend on the type of democracy—not just rhetoric about the rule of law.<sup>74</sup> In some cases, democracies may actually harm human rights.<sup>75</sup> Therefore,

70. Windsor, *supra* note 34, at 144 (quoting USAID, DEMOCRACY INITIATIVE 5 (1990)).

71. *Id.* at 145. Another USAID report stated that “USAID will consider a government’s human rights performance, including its willingness to permit the emergence and functioning of democratic institutions and independent political groups.” *Id.* (quoting USAID, STRATEGIES FOR SUSTAINABLE DEVELOPMENT 17–18 (1995)).

72. *Id.* at 146. Windsor suggests that factors related to economic development rather than democracy were actually used when determining eligibility for one democracy-promoting initiative. *Id.*

73. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 3, at 56. The five categories of rights are economic, social, political, civil, and cultural. *Id.* The Human Development Report suggests that the type of democracy matters, for example, when it comes to protecting minority rights. *Id.*

74. *Id.* The Human Development Report cites the following four characteristics as essential to sustaining a democracy based on human rights:

- Holding free and fair elections contributes to fulfillment of the right to political participation.
- Allowing free and independent media contributes to fulfillment of the right to freedom of expression, thought and conscience.
- Separating powers among branches of government helps protect citizens from abuses of their civil and political rights.
- Encouraging an open civil society contributes to fulfillment of the right to peaceful assembly and association.

*Id.* at 57–59.

75. *Id.* at 59. For example, the Human Development Report suggests that in certain cases of extreme illiberal majoritarian democracy, minority groups (such as in Nigeria) have suffered a decline in their human rights. *Id.* at 56. The Human Development Report points to four challenges faced by countries transitioning to democracy: (1) the protection of minority rights; (2) a need to protect against the arbitrary use of power; (3) a need to promote the economic dimension of human rights; and (4) a

while many scholars agree that there is some correlation between the rule of law and development,<sup>76</sup> they still seem to be searching for some kind of normative standard to judge the effectiveness of rule of law initiatives.<sup>77</sup>

#### *D. Defining “Development as Freedom”: The Capabilities Approach*

Many theorists now contend “[d]evelopment is not merely growth.”<sup>78</sup> They suggest that a new paradigm is called for in thinking about development.<sup>79</sup> This new model, they suggest, must address the multiple dimensions of human poverty<sup>80</sup>—as opposed to the single economic dimension—and attempt to define poverty “in terms of a *poverty of social justice*.”<sup>81</sup> At the forefront of these thinkers is Nobel Prize winning economist Amartya Sen.<sup>82</sup> Sen’s groundbreaking work suggests:

Development can be seen . . . as a process of expanding the real freedoms that people enjoy. Focusing on human freedoms contrasts with narrower views of development, such as identifying development with the growth of gross national product, or with the rise in personal incomes, or with industrialization, or with technological advance, or with social modernization. . . . If freedom is what development advances, then there is a major argument for

requirement to deal with an authoritarian past. *Id.* at 59.

76. *See supra* notes 65–69 and accompanying text.

77. *See generally* David Kinley, *Human Rights, Globalization and the Rule of Law: Friends, Foes or Family?*, 7 UCLA J. INT’L L. & FOREIGN AFF. 239 (2002); Chantel Thomas, *Poverty Reduction, Trade, and Rights*, 18 AM. U. INT’L L. REV. 1399 (2003).

78. BARTOLI, *supra* note 2, at 9. Bartoli further asserts that development “assumes a human dimension when it encompasses the enhancement of material well-being in low-income countries, be it food, health, education or the duration and dignity of life.” *Id.*

79. *Id.* Bartoli suggests, “The ‘new paradigm’ pursued by international experts is not exclusive to the scientific community. It calls on all actors in economic, social, political and cultural life; it requires us to rise to the challenges of our times.” *Id.*

80. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 3, at 17. The report suggests, “[a]t all levels of development the three essential capabilities are for people to lead a long and healthy life, to be knowledgeable and to have access to the resources needed for a decent standard of living.” *Id.*; *see also supra* note 4.

81. Yamin, *supra* note 31, at 274. Yamin suggests that if poverty is viewed from a human rights perspective “the people who are poor are neither blamed for their condition nor viewed instrumentally.” *Id.* at 280.

82. Sen has developed his capabilities development model throughout a number of works. For more recent examples see generally Amartya Sen, *Capabilities and Well-Being*, in THE QUALITY OF LIFE, *supra* note 14, at 30–53 [hereinafter Sen, *Capabilities and Well-Being*]; AMARTYA SEN, COMMODITIES AND CAPABILITIES (1999) [hereinafter SEN, COMMODITIES AND CAPABILITIES]; SEN, DEVELOPMENT AS FREEDOM, *supra* note 12; Amartya Sen, *Fear of Freedom*, in WELFARE STATE AND DEMOCRACY IN CRISIS: REFORMING THE EUROPEAN MODEL 17–25 (Theodore Pelagidis et al. eds., 2001) [hereinafter Sen, *Fear of Freedom*]; AMARTYA SEN, RESOURCES, VALUES, AND DEVELOPMENT (1997) [hereinafter SEN, RESOURCES, VALUES, AND DEVELOPMENT].

concentrating on that overarching objective. . . . Viewing development in terms of expanding substantive freedoms directs attention to the ends that make development important, rather than merely to some of the means that . . . play a prominent part in the process.<sup>83</sup>

Sen posits that freedom should be both the objective of development initiatives and the principal means of development.<sup>84</sup> In other words, the ultimate goal of development is to enhance people's freedoms and their capabilities.<sup>85</sup> Therefore, Sen rejects the approach to development that "temporarily" puts enhancement of people's capabilities on the backburner while jumpstarting the economy.<sup>86</sup> Instead, Sen advocates a model of development that enhances freedoms as part of the process.<sup>87</sup> In his book, *Development as Freedom*, Sen discusses at length five such freedoms that he considers "instrumental"<sup>88</sup> to expanding people's individual capabilities, and therefore overall development: (1) political freedoms;<sup>89</sup> (2) economic facilities;<sup>90</sup> (3) social opportunities;<sup>91</sup> (4) transparency

83. SEN, DEVELOPMENT AS FREEDOM, *supra* note 12, at 1.

84. Sen, *Fear of Freedom*, *supra* note 82, at 19. Sen suggests that the means used in development cannot be divorced from the desired end. *Id.* In other words, "[d]evelopment can scarcely be seen merely in terms of enhancement of inanimate objects of use (and their instrumental role), such as a rise in personal incomes. . . . The value of these things depends ultimately on what they do to the lives and freedoms of the people involved." *Id.*

85. SEN, DEVELOPMENT AS FREEDOM, *supra* note 12, at 36. Sen draws a distinction between the "constitutive role" and the "instrumental role" of freedom in development. *Id.* He explains that if freedoms play a constitutive role, as he advocates they should, then they are absolutely central to a development scheme because they constitute development by enriching human life. *Id.* He suggests, "The substantive freedoms include elementary capabilities like being able to avoid such deprivations as starvation, undernourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech. . . ." *Id.* Alternatively, the instrumental vision argues that freedoms may be useful also in promoting economic development. *Id.* at 37. This vision focuses less on the intrinsic value of freedoms and more on the use of freedoms as tools to achieving other important ends. *Id.* Sen maintains that the value of "freedom as an instrument lies in the fact that different kinds of freedom interrelate with one another, and freedom of one type may greatly help in advancing freedom of other types. [They] are thus linked by empirical connections, relating freedom of one kind to freedom of other kinds." *Id.* Sen endorses both visions of freedom. *Id.*

86. *Id.* at 34.

87. *Id.* at 37. Sen argues, "The relevance of the deprivation of basic political freedoms or civil rights . . . does not have to be established through their indirect contribution to *other* features of development (such as the growth of GNP . . .). These freedoms are part and parcel of enriching the process of development." *Id.*

88. See *supra* note 85 for a discussion of "instrumental freedoms."

89. SEN, DEVELOPMENT AS FREEDOM, *supra* note 12, at 38. Sen defines political freedoms as the "opportunities that people have to determine who should govern and on what principles . . . to scrutinize and criticize authorities, to have freedom of political expression and an uncensored press, to enjoy the freedom to choose between different political parties. . . ." *Id.*

90. *Id.* at 38–39. Sen defines economic facilities as the "opportunities that individuals

guarantees;<sup>92</sup> and (5) protective security.<sup>93</sup> Not only is each freedom essential in its own right, but Sen argues that each promotes and reinforces the other rights.<sup>94</sup>

One essential difference between Sen and other development theorists is that he does not suggest that freedom should be measured in terms of “realized functionings.”<sup>95</sup> Instead, he prefers to focus on a person’s capabilities, or freedom of opportunity.<sup>96</sup> Therefore, poverty, Sen suggests, should be seen as a “deprivation of elementary capabilities.”<sup>97</sup> Hence, the measurement of such a deprivation cannot be garnered from one single factor, such as personal income,<sup>98</sup> which may or may not enhance one’s

respectively enjoy to utilize economic resources for the purpose of consumption, or production, or exchange.” *Id.*

91. *Id.* at 39. Sen defines social opportunities as “the arrangements that society makes for education, health care and so on, which influence the individual’s substantive freedom to live better.” *Id.*

92. *Id.* Sen defines transparency guarantees as “the need for openness that people can expect: the freedom to deal with one another under guarantees of disclosure and lucidity.” *Id.*

93. *Id.* at 40. Sen defines protective security as “a social safety net for preventing the affected population from being reduced to abject misery, and in some cases even starvation and death.” *Id.*

94. Sen asserts, “While development analysis must . . . be concerned with the objectives and aims that make these instrumental freedoms consequentially important, it must also take note of the empirical linkages that tie the distinct types of freedoms *together*, strengthening their joint importance.” *Id.* at 38. For example, Sen notes that no major famine has occurred in a country with a true democracy. Sen, *Fear of Freedom*, *supra* note 82, at 20. Therefore, he argues, political liberties support and enhance personal security. *Id.*

95. SEN, DEVELOPMENT AS FREEDOM, *supra* note 12, at 75. This would entail examining what a person “is actually able to do” rather than what the person has the capacity to do. *Id.* Sen prefers the latter approach because he believes that it is more freedom-enhancing, while at the same time less paternalistic. *Id.* It protects a person’s right to choose. *Id.* “Indeed, ‘choosing’ itself can be seen as a valuable functioning. . . . Fasting is not the same thing as being forced to starve. Having the option of eating makes fasting what it is, to wit, choosing not to eat when one could have eaten.” *Id.* at 76.

96. *Id.* Implicit in this statement is the appreciation of human diversity. *Id.* Sen understands that people will have different capabilities to utilize goods and resources. *Id.* Therefore, different levels of resources may be required to assist different people to achieve their basic functionings. Sen, *Capability and Well-Being*, *supra* note 82, at 40 n.30. Sen notes, “even for the elementary functioning of being well nourished, the relation between food intake and nutritional achievements varies greatly with metabolic rates, body size, gender, pregnancy, age, climatic conditions, epidemiological characteristics, and other factors.” *Id.*

97. SEN, DEVELOPMENT AS FREEDOM, *supra* note 12, at 20. Sen does not deny that lowness of income may be a strong indicator of poverty; however, he suggests that viewing poverty as a capability deprivation gives us a better understanding of the hurdles involved with overcoming poverty. *Id.* To reach this conclusion, Sen reasons, “Poverty can be sensibly identified in terms of capability deprivation; the approach concentrates on deprivations that are *intrinsically* important (unlike low income, which is only *instrumentally* significant).” *Id.* at 87. He continues, “There are influences on capability deprivation—and thus on real poverty—*other* than lowness of income (income is not the only instrument in generating capabilities).” *Id.* Finally, Sen asserts, “The instrumental relation between low income and low capability is *variable* between different communities and even between different families and different individuals (the impact of income on capabilities is contingent and conditional).” *Id.* at 88.

98. *Id.* at 14. On the issue of the value of income, in and of itself, Sen quotes Aristotle who said,

freedom.<sup>99</sup> Sen maintains that a capabilities view of development “provides a deeper basis of evaluation of development than can be obtained from concentrating on commodities and things rather than on the lives and liberties of people.”<sup>100</sup>

### *E. Practical Implications of the Capabilities Approach*

Sen’s capabilities approach gained significant practical ground when the UNDP adopted it in 1990.<sup>101</sup> The Human Development Index<sup>102</sup> was a large step forward in recognizing that multiple factors constitute human development.<sup>103</sup> By redefining poverty and monitoring non-economic factors, the UNDP essentially shifted the focus of development from economic growth to promoting capabilities and human rights.<sup>104</sup>

“wealth is evidently not the good we are seeking; for it is merely useful and for the sake of something else.” *Id.* (quoting THE NICOMACHEAN ETHICS 7 (translated by D. Ross, 1980)). Sen concurs and argues that wealth is useful only if it can help us increase our capabilities. *Id.*

99. Sen, *Fear of Freedom*, *supra* note 82, at 19. Sen uses the life expectancy of African-American males to illustrate this point. *Id.* Measured in terms of income, African-American males fare far better than most men in the developing world; however, in terms of life expectancy, “African American men fall far behind those in China, or Sri Lanka, or the state of Kerala in India. . . . The capability to live to mature ages is an important freedom and cannot be overlooked on the ground of the high incomes of the short-lived.” *Id.*

100. *Id.* at 24–25. Sen also suggests that the capabilities approach helps determine the role of the state in development. *Id.* at 25. He asserts that the state can enhance capabilities in various ways; “for example, in providing public education, health care, social safety nets, good macroeconomic policies and industrial competition, and necessary epidemiological and ecological protection.” *Id.* See *infra* Parts II.E, III for a discussion of the practical policy implications for government and non-governmental organizations when Sen’s framework is applied.

101. Yamin, *supra* note 31, at 290 (stating that “Sen’s writings have not languished in the Ivory Tower.”). While the Human Development Report does not always quote Sen, its language bears a clear resemblance to his work. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 3, at 74. For example, in discussing capabilities the 2000 Human Development Report states, “Human rights have intrinsic value as ends in themselves. They also have instrumental value. There are causal links between the realization of one right and that of another. . . .” *Id.* In fact, Sen was one of the consultants to the 2000 Human Development Report. *Id.* at iv.

102. See *supra* note 4 for a discussion of how the Human Development Index is calculated.

103. See *supra* note 4 and accompanying text. The 1990 Human Development Report noted, “Measurements of poverty would focus on the key variables of people’s deprivation. In the terminology of this Report, action-oriented poverty measures would focus on the access, or lack of access, that people have to various options for human development.” Yamin, *supra* note 31, at 290 (quoting 1990 Human Development Report). The report goes on to explain how this will translate into concrete policy objectives: “This would then allow saying *how* poor people are and *why* they are poor—and *where* corrective policy interventions should break the process of poverty.” *Id.*

104. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 3, at 1. The 2000 Human Development Report begins with a declaration of the importance of human rights:

Human rights and human development share a common vision and a common purpose—to secure the freedom, well-being and dignity of all people everywhere. To secure:

- Freedom from discrimination—by gender, race, ethnicity, national origin or religion.

Furthermore, other non-governmental organizations began to focus on non-economic criteria when evaluating countries.<sup>105</sup>

In addition, by insisting that economic resources alone do not guarantee rights, the UNDP holds accountable countries that previously may have claimed that a lack of resources prevented them from achieving better human development results.<sup>106</sup> The Human Development Report maintains, “Policies are needed to ensure that the pattern of growth benefits the poor and that the resources generated are invested in building

- Freedom from want—to enjoy a decent standard of living.
- Freedom to develop and realize one’s human potential.
- Freedom from fear—of threats to personal security, from torture, arbitrary arrest and other violent acts.
- Freedom from injustice and violations of the rule of law.
- Freedom of thought and speech and to participate in decision-making and form associations.
- Freedom for decent work—without exploitation.

*Id.* The report goes on to note that all but one of the six core covenants and conventions on civil, political, economic, social and cultural rights have been ratified by more than 140 countries. *Id.*

105. *See, e.g.,* Freedom House, *Civil Liberties Checklist*, at <http://www.freedomhouse.org/research/freeworld/2001/methodology3.htm> (last updated June 19, 2001). Freedom House’s Civil Liberties Checklist is broken down into four categories: (1) Freedom of Expression and Belief; (2) Association and Organizational Rights; (3) Rule of Law and Human Rights; and (4) Personal Autonomy and Economic Rights. *Id.* The Rule of Law and Human Rights category entails the following inquiry:

1. Is there an independent judiciary? 2. Does the rule of law prevail in civil and criminal matters? Is the population treated equally under the law? Are police under direct civilian control? 3. Is there protection from political terror, unjustified imprisonment, exile, or torture, whether by groups that support or oppose the system? Is there freedom from war and insurgencies? (Note: freedom from war and insurgencies enhances the liberties in a free society, but the absence of wars and insurgencies does not in and of itself make a not free society free.) 4. Is there freedom from extreme government indifference and corruption?

*Id.*

106. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 3, at 80. The Report insists that many policies may be adopted, cost-free to a state, that enhance and promote human rights. *Id.* “[C]ountries with similar incomes can have sharply different achievements in eliminating such basic deprivations as illiteracy and avoidable infant mortality.” *Id.* To illustrate this point, the Report contrasts South Africa and Vietnam. *Id.* at 80–81. They have per capita incomes of \$3,310 and \$350 respectively. *Id.* at 80. Yet the infant mortality rate is sixty per 1,000 live births in South Africa, compared to thirty-one per 1,000 live births in Vietnam. *Id.* Furthermore, South Africa lags behind Vietnam in adult literacy by nearly 10%. *Id.* at 81. Simply stated, a lack of resources is no longer a sufficient excuse. *Id.* The report adamantly maintains, “Poor countries face tight resource constraints, and they have to make tough choices to establish priorities. But that does not justify neglecting resource allocations to institutions for protecting human rights. . . . Human rights and the legal commitments associated with them should command the highest priority, whatever the resource constraints.” *Id.*

human capabilities. Growth alone is not enough. It can be *ruthless*, leaving losers to abject poverty.”<sup>107</sup>

State policies are critical to the degree of agency that individuals are able to exercise in enhancing their freedoms and capabilities.<sup>108</sup> Although freedom of choice is at the center of Sen’s model,<sup>109</sup> in no way does Sen suggest that it is up to individuals to create and enhance their own capabilities.<sup>110</sup> In fact, Sen considers public policy foundational to one’s ability to exercise agency.<sup>111</sup> Another theorist, Yamin, agrees with Sen’s assertion and adds, “The core of a rights-based analysis must be to recognize that the capability to be free from hunger, from preventable communicable diseases and from other poverty-related afflictions and deprivations is determined through governmental actions and policies.”<sup>112</sup>

### III. ANALYSIS

#### A. *Capabilities as a Framework for Legal Reform*

One of the main criticisms of Sen’s approach to development is that it is difficult to operationalize.<sup>113</sup> While Sen’s framework offers a number of valuable theoretical observations, policymakers and practitioners in the field may have difficulty knowing exactly how to implement such a model.<sup>114</sup> For example, how are capabilities to be measured?<sup>115</sup> This

107. *Id.*

108. *Id.*

109. *See supra* notes 95–96 and accompanying text.

110. *See Sen, Capabilities and Well-Being, supra* note 82, at 44. In fact, Sen suggests that “[a] person’s ability to achieve various valuable functioning may be greatly enhanced by public action and policy . . . [T]here is a very real sense in which the freedom to live the way one would like is enhanced by public policy that transforms epidemiological and social environments.” *Id.*

111. *Id.*

112. Yamin, *supra* note 31, at 286. From this point of view, Yamin suggests that policymakers should be concerned about poverty “precisely because it deprives people of the power to make choices and . . . to develop the capacity to make truly free choices about the courses of their lives.” *Id.* This suggests the critical role that policy plays in enhancing such choices. *Id.* For another perspective on the role of government in ensuring “rights” see generally Robin West, *Rights, Capabilities, and the Good Society*, 69 *FORDHAM L. REV.* 1901 (2001). West posits, “A right—whether to anti-subordination, to give care, to dignified labor, to a living wage, to welfare—must also be found in the language, logic or history of a state or a nation’s constitution.” *Id.* at 1929.

113. SABINA ALKIRE, *VALUING FREEDOMS: SEN’S CAPABILITY APPROACH AND POVERTY REDUCTION 3* (2002).

114. *Id.* Alkire notes that non-governmental organizations who wish to utilize Sen’s model might have difficulty knowing where to start and how to assess the value of their activities. *Id.* Alkire suggests a number of competing considerations that all entail value judgments; “such as how participatory an activity was, how much it had targeted the poor, empowered women, built capacity, strengthened institutions, improved the environment, catalyzed local government, mobilized communities to undertake collective action, deepened cultural life or generated sustainable social

section seeks to explore such questions, while also examining ways that the capabilities approach could be applied to evaluating the effectiveness of law and development initiatives.<sup>116</sup>

Responding to criticisms that the rule of law is either normatively empty<sup>117</sup> or serves the elite,<sup>118</sup> the capabilities approach could provide an effective framework for measuring the effectiveness of the rule of law. Rather than promoting rule of law initiatives that purport to serve common values,<sup>119</sup> but actually serve the elite, law and development scholars should advocate for policies that promote the capabilities of poor people. In addition, scholars should measure the effectiveness of legal reforms<sup>120</sup> in

services.” *Id.*

115. Alkire queries whether the capability approach offers “adequate direction regarding (i) how to identify *valuable* capabilities; (ii) how to make strategic economic decisions that weight and prioritize capabilities; (iii) what to do when value judgments conflict; and (iv) how capability sets may be measured, such that one can evaluate changes brought about by economic initiatives?” *Id.* at 11.

116. Surely if policymakers have learned anything from this inquiry, it is that no single criterion should be used to judge the effectiveness of development initiatives. See *supra* Part II.D for a discussion of why the use of a single criterion fails to adequately measure needs or outcomes. Hence, rather than using “democracy” as a proxy for success in implementing the “rule of law,” theorists and practitioners must look to other indicators. See *supra* notes 72–75 and accompanying text for a discussion of why the type of democracy matters.

117. See *supra* note 57 and accompanying text for a discussion of how early law and development scholars believed that “Western” legal ideals were universal and therefore easily transferable.

118. See *supra* note 62 and accompanying text for a discussion of why some perceive legal reform initiatives as serving the interests of the local, national, or international elite.

119. See Steven E. Hendrix, *USAID Promoting Democracy and the Rule of Law in Latin America and the Caribbean*, 9 SW. J.L. & TRADE AM. 277, 281 (2003). Hendrix suggests that “[t]he efforts to build trade capacity would fail but for the basic legal infrastructure to allow for the rule of law to prevail and discourage corruption.” *Id.* However, as Trubek and Galanter warned, rule of law initiatives that are primarily concerned with enhancing a country’s economic growth should be viewed with skepticism. See *supra* note 65 and accompanying text.

120. Hendrix suggests,

In terms of tangible achievements over the past ten to fifteen years, USAID, other donors and host governments in most countries have been able to:

- Increase salaries for judges, prosecutors, and public defenders;
- Improve the transparency of the judicial process;
- Reduce delay in judicial process and, in particular, procedural due process violations of human rights;
- Expand coverage of the courts, public prosecutors, and public defenders to broader sections of the population and geographic areas;
- Advance enhanced court administration and public management of justice sector employees in terms of productivity and quality;
- Increase availability of information to the public, both on individual cases where citizens have an interest and on the reform agenda in general;
- Establish new organizations such as public defenders, human rights ombudsmen, and Constitutional Courts;
- Create alternative legal services, such as mediation and arbitration, and small claims courts, all of which benefit the poor and entrepreneurs alike;

developing countries in terms of whether the reforms enhance poor people's capabilities.<sup>121</sup> To operationalize Sen's capabilities model in the legal context, scholars will want to ask: How effective is the law, both as a means and as an end, at building the capacity of the disenfranchised to access justice?<sup>122</sup>

Such an inquiry is likely to entail an examination of both procedural and substantive issues related to legal reform.<sup>123</sup> On the procedural end, factors such as the geographical accessibility of court systems; the resources for legal services; the cost of legal fees and availability of income waivers; and the waiting period between filing and adjudication should be measured.<sup>124</sup> Simply put, does the legal system, procedurally, unduly burden poor people?

In addition, it would be necessary to assess whether the legal system promotes substantive outcomes that enhance poor people's capabilities.<sup>125</sup> Does the law improve upon people's capabilities, by guaranteeing access to public goods such as education and health care, or does it diminish people's freedoms and functions?<sup>126</sup> For this assessment, both statutory and common law should be considered.

In recent years, a number of agencies, including the World Bank, have purportedly adopted a Sen-like approach to development.<sup>127</sup> However, some assert that although the "shift in the discourse at the Bank has been significant, there is a gap between the rhetoric and the implementation of

- Increase the media attention of the justice system to civil society;
- Involve courts in the enforcement of Constitutional Rights and promote judicial review of executive branch decrees and activities.

Hendrix, *supra* note 119, at 282–83. Certainly, on the surface, these are all respectable goals. However, the capabilities approach would attempt to add an additional layer to the inquiry by asking how the reforms enhance the capabilities of the poor. *See supra* Part II.D.

121. *See supra* Part II.D.

122. This is analogous to the distinction that Sen draws between the "constitutive role" and the "instrumental role" of freedom in development. *See supra* note 85. Similarly, it would be helpful to think of the rule of law as valuable in itself, as well as a critical tool in achieving other important development goals, such as poverty alleviation.

123. This mirrors the capabilities approach in its concern with both process and substantive outcomes. *See supra* Part II.D.

124. *See Partnerships Across Borders: A Global Forum on Access to Justice, What is Access to Justice? Identifying the Unmet Legal Needs of the Poor*, 24 *FORDHAM INT'L L.J.* S187 (2000). Participants in the forum discuss these and other factors that are critical to the poor being able to access justice. *Id.*

125. *See id.* at S198–205 for examples of the substantive impact the law can have on vulnerable populations, such as the indigenous population in Australia.

126. *See supra* notes 89–93 for a discussion of the freedoms Sen believes are "instrumental" to enhancing individuals' capabilities.

127. *See* Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 *HARV. HUM. RTS. J.* 205, 206 (2002).

the policy framework. The unfortunate reality is that these ‘safeguard’ policies are often violated, and people whose rights are harmed have only limited access to recourse and remedy.”<sup>128</sup> This suggests that the policies adopted by institutions such as the World Bank, as well as individual countries, must be closely monitored to ensure that there is more than rhetoric at play.<sup>129</sup> Otherwise, initiatives will fail to promote the capabilities of the poor.

#### IV. PROPOSAL

There is much to be learned from applying the capabilities approach to how we think about access to justice in developing countries.<sup>130</sup> Certainly, more research needs to be conducted in this field, particularly concerning the issue of what criteria would be most useful in assessing capacity-enhancing legal systems. Specifically, this Note makes two recommendations.

First, organizations like the UNDP should develop criteria, as it has with the Human Poverty Index, on how to measure the effectiveness of citizens’ access to justice. As discussed above, the criteria should examine whether the legal system, as an instrument, promotes poor people’s capacity to access justice, as well as whether the legal system produces substantive outcomes that enhance people’s capabilities.<sup>131</sup> Ultimately, all of these procedural and substantive factors should be combined to create an “Access to Justice Index” that would be monitored regularly by an independent agency, such as the UNDP. Like the Human Development and Human Poverty Indexes, the Access to Justice Index should measure both achievements as well as deprivations in each area. Empirical research should be conducted to fine-tune the Index and ensure that it measures criteria that truly impact vulnerable populations. In conducting this research, I would advocate a participatory approach that involves input

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128. *Id.* Clark also asserts, “There is growing recognition . . . that the Bank’s mandate of poverty alleviation is compromised when its lending activities undermine respect for human rights.” *Id.* She maintains, “As a result, the World Bank is increasingly challenged to consider the human rights implications of its lending decisions and to recognize that respect for human rights is essential to sustainable development and poverty alleviation.” *Id.*

129. Clark claims, “there are situations where persons who attempt to exercise rights recognized by World Bank policies—such as participatory and consultation rights or the right to file a complaint to an accountability mechanism . . .—suffer human rights violations for occupying the political space provided by World Bank policies.” *Id.* at 206–07.

130. It would be particularly useful to consider international human rights agreements when developing a framework to assess freedoms and capabilities. *See supra* note 104.

131. *See supra* Part III.

from local disenfranchised populations.<sup>132</sup> Researchers should also consider whether realistically, one instrument could be used when measuring countries with vastly different customs, histories, and cultures.

Second, results contained in the Access to Justice Index should be utilized by donor agencies and governments to determine foreign assistance. Rather than “structural adjustment policies” based solely on economic outcomes,<sup>133</sup> donors could encourage certain legal reforms when providing financial assistance. Of course, these legal reforms should be measured in terms of capability enhancement for the poor. As Trubek and Galanter suggest, such efforts should be carefully monitored to ensure that reforms serve the poor and not the elite.<sup>134</sup>

#### V. CONCLUSION

Of all the development models considered, Amartya Sen’s capabilities approach provides the best framework for both measuring poverty and enhancing the well-being of the disenfranchised in developing countries.<sup>135</sup> It also invites greater involvement in development issues for a variety of fields, including the law. This Note has laid out some suggestions on how the capabilities approach could inform the way scholars think about the effectiveness of legal systems at providing access to justice for the most vulnerable populations in the world.<sup>136</sup> Ultimately, non-governmental organizations such as the UNDP should adopt ways to measure “access to justice” and include this as another measure of human development. In addition, donor countries and international financial institutions should monitor such indices and encourage legal reforms that will enhance the capabilities of the poor.

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132. See *supra* note 29 for a discussion of the participatory approach.

133. See *supra* notes 39–42 and accompanying text for a discussion of structural adjustment policies focused on economic outcomes.

134. See *supra* notes 62–64 and accompanying text.

135. See *supra* Part II.D.

136. See *supra* Part III.

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