



OLIVIER DE SCHUTTER

United Nations Special Rapporteur
on the right to food

Closing Speech: The contribution of access to justice to the post-2015 agenda

(Additional summary for the PowerPoint presentation)

The ASF conference is essential because it forces us to reflect on the strategies and tools we should explore to “shed light” on access to justice and to find therein an effective tool for poverty reduction.

The reality of poverty:

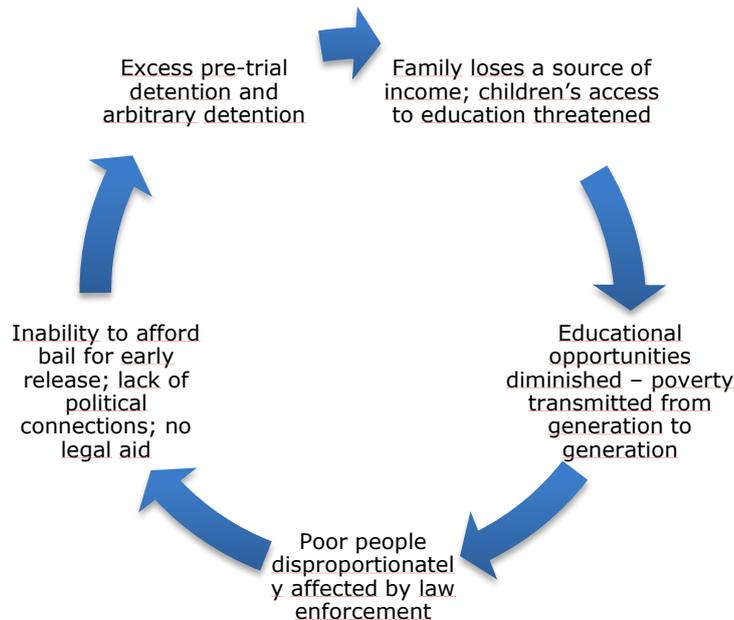
Description of a cycle illustrating the idea that poverty is both a cause and a consequence of poverty:

- The consequences of limited access to justice (“poor access to justice”):
 - No protection from discrimination and exclusion from social services
 - The ultra-poor cannot be reached or given the support they need to escape poverty
- The causes of this limited access to justice:
 - Lack of expression, education, access to decision making
 - Political disempowerment as a result of a lack of accountability



The issue of the criminalization of the most vulnerable members of society, particularly abusive use of detention, illustrates another cycle by showing that the people concerned and the victims of these abuses:

- belong to the poorest groups;
- are subjected disproportionately to harsh enforcement of criminal law (no recourse to bail; lack of legal aid);
- see their level of poverty increase by their time in detention;
- reducing the chances that their children will have access to education;
- and therefore increasing the risks that this poverty will be transmitted to future generations.



The contribution of access to justice to the Millennium Development Goals

Although it is striking to note that none of the great authors writing about development (Jeffrey Sachs, Paul Collier, Abihijit Banerjee, Esther Dufflo, etc.) so much as mention access to justice in their analyses on the causes of and solutions for poverty, it is essential to raise the issue of access to justice as a factor of poverty reduction in the context of the debate about the post-2015 Millennium Development Goals.

We should examine the importance of access to justice in the framework of development and the fight against poverty while taking into account the following:

- The rule of law (of which access to justice is a component) attracts private investors who do not wish to be “trapped” interfering in countries that violate human rights, thus tarnishing their public (corporate) reputation. Governments therefore have a high interest in supporting rule of law and respect for human rights;
- Furthermore, economic growth should not be seen as an end in itself, but a means towards poverty reduction. The benefits of economic growth should therefore “percolate” down to the poorest. This would reduce inequality and require accountability systems;
- The poorest should benefit from development aid; economic and social rights should be justiciable.

For these three reasons, access to justice, rule of law and legal empowerment are the key ingredients in poverty reduction. Policy-makers and practitioners in the area of development would be wrong to neglect human rights, because of the important contribution they can make : *participation* improves the information on the basis of which policies are designed and implemented, and it ensures adequate feedback and therefore accelerates learning ; *accountability* provides access to claims mechanisms for those that are unjustifiably excluded from certain programs, thus reducing the potential leakage of funds or mistargeting ; *empowerment*, putting people in the driver's seat, ensures that the solutions that are designed will respond to the real problems that the poor face, and will be based on the local knowledge that they can mobilize about how to address such problems.

Many of these advantages of a rights-based approach to development have been described as follows by Arjun Sengupta, when he was the Independent Expert on the right to development: "The human rights approach helps to establish accountability, and where possible culpability for the failures or mistakes in implementing the policies by establishing the duties and obligations of the different parties, especially of the state and of the international community. Even if they are 'imperfect obligations' the rights-duty correspondence for each of the rights has to be established. The remedial or corrective actions have to be enforceable, some of them through legislation, where possible, others through appropriate monitoring mechanisms. The search for accountability leading up to culpability is a genuine value addition of the human rights approach to the fulfillment of human development".

It should nevertheless not come as a surprise that, despite these advantages of a human rights-based approach to development, the dialogue has been difficult between the human rights and development communities -- the former predominantly populated by lawyers and community activists, the latter by development economists and practitioners within aid agencies --. As Alston has written, the human rights and the development agendas have been like "ships passing through the night": both moving according to their own itinerary and at their own speed, without a real attempt to coordinate with one another, and at a permanent risk of colliding.

Yet, what we now need is more accountability -- so that the poor are not left out from development policies, and so that the commitments made by the international community do not remain dead letter. Mac Darrow, who follows these issues from the Office of the High Commissioner for Human Rights, writes: "The main barriers to realising the MDGs are deficits in political will, rather than resources. The human rights framework can help to close the accountability gap and strengthen incentives for action, mobilising individuals and communities to demand the MDGs as a matter of right, rather than charitable dispensation".

In the next few months, governments will be entering into discussions on a new set of goals to succeed the eight Millennium Development Goals, that were developed by the United Nations Secretariat following the Millennium Declaration adopted by the Heads of State and Governments in September 2000. It is to be hoped that, in defining this new set of commitments, greater attention will be paid to the issue of accountability, understood both at improved participation and access to justice at domestic level and as improved follow-up on pledges at international level, and to the questions of inequality and the situation of the poorest, based on the realization that economic growth combined with growing inequalities within countries has limited poverty-reducing impacts. In this interdependent world more than in any other time in past history, the full realization of economic and social rights is a shared responsibility.

Which elements matter in access to justice?

1. Access to justice – the “4 As” (availability, accessibility, adequacy, adaptability). Note: As mentioned during the conference, access to information rights is crucial;
2. Due process – independence and impartiality;
3. Remedies.

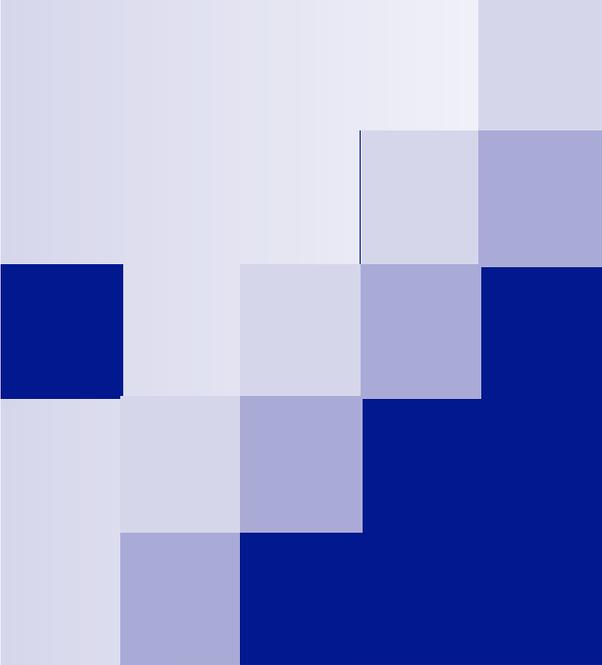
Why and how should we strengthen the link between the Millennium Development Goals and access to justice?

The MDGS are not a perfect instrument but they have the merit of highlighting the priorities to be held. In this perspective, pleading for the inclusion of access to justice in the new post-2015 objectives is of utmost urgency.

The following avenues should be explored:

- Access to justice should systematically be included in the Poverty Reduction Strategy Papers (PRSP) and their actual implementation, which is not yet the case;
- Class actions mechanisms or other collective redress mechanisms should be multiplied; the development, otherwise relevant, of alternative mechanisms of conflict resolution (Alternative Dispute Resolution) should not generate a two-tier justice: one for the poor and the other for the rich.

O. De Schutter - Access to Justice as a tool against poverty

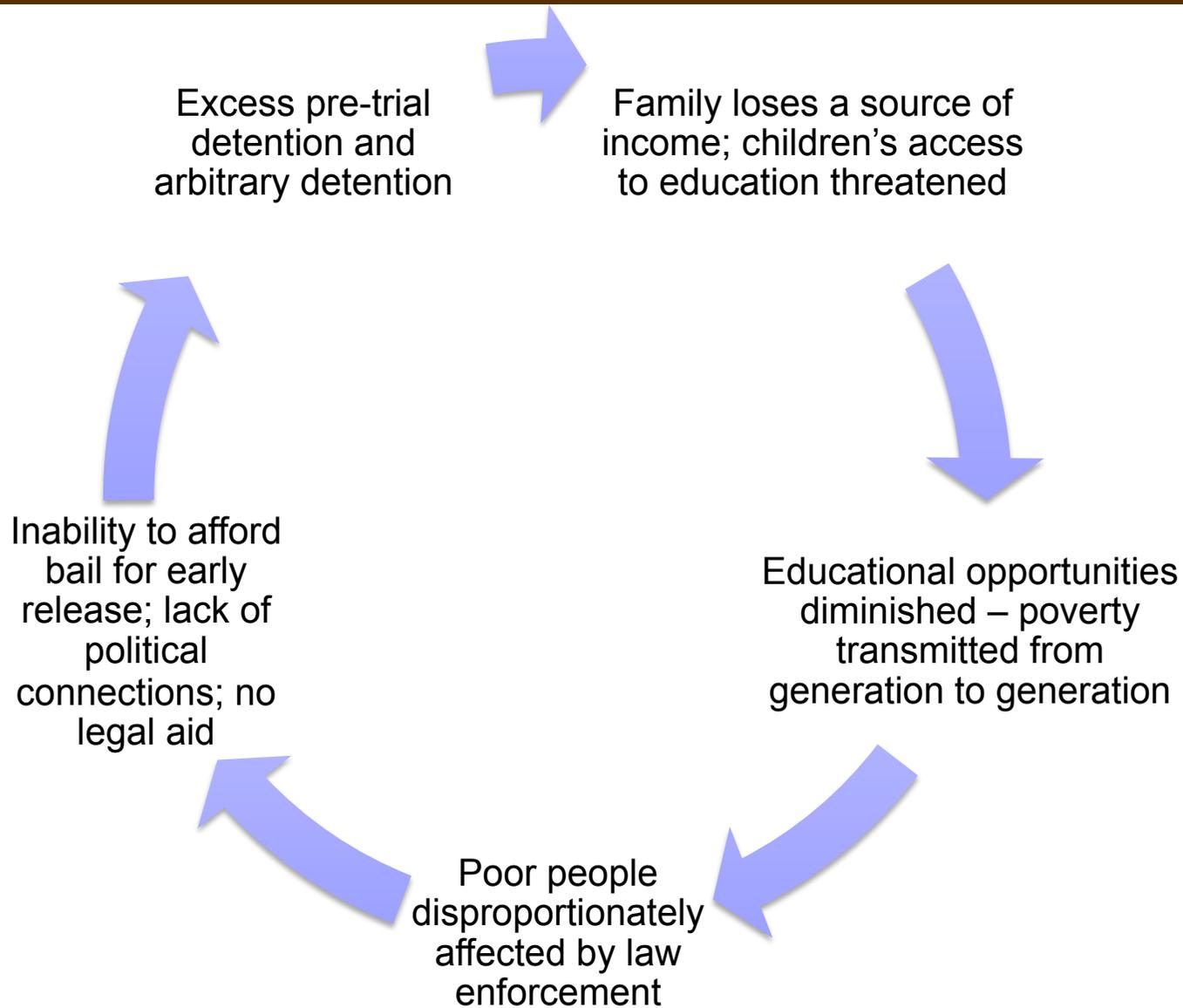


Access to Justice as a Tool against Poverty and Inequality

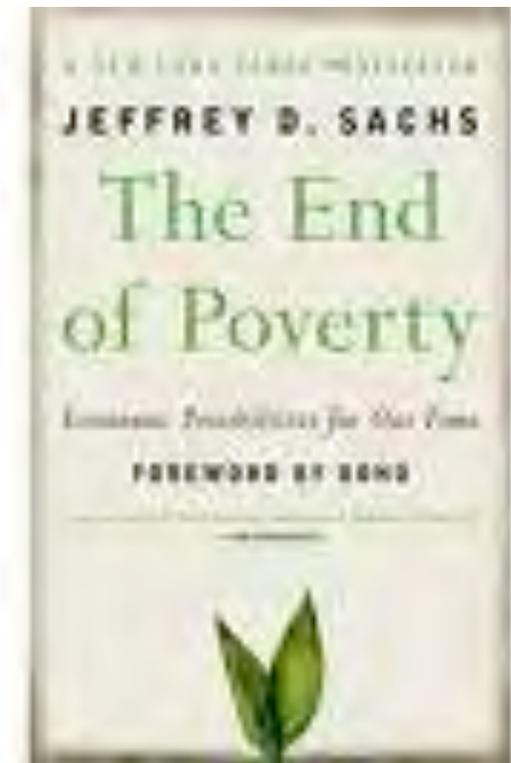
Olivier De Schutter

Avocats Sans Frontières, 22 May 2013





THE CONTRIBUTION OF ACCESS TO JUSTICE TO DEVELOPMENT GOALS



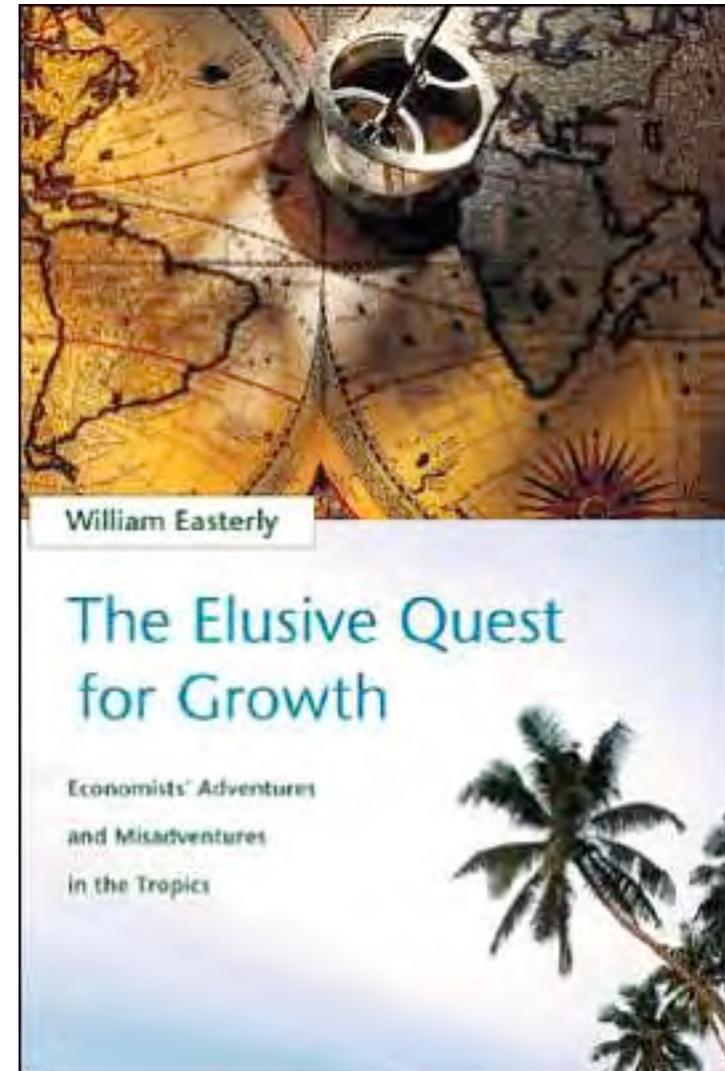
Jeffrey Sachs, The End of Poverty (2005) – on the establishment of a diagnosis in clinical economics :

“...democracy is not a prerequisite for economic development. On the other hand, a regime that is despotic, arbitrary, and lawless will easily destroy an economy. Is there a rule of law, or only the arbitrary command of a dictator? Do the systems of public management – for registering businesses, trading property, defending contracts, bidding for government tenders – work effectively? Are public services ... efficiently provided, or are they subject to massive waste and fraud?”

Good governance and business-friendly environment as a substitute for human rights and accountability



William Easterly, *The Elusive Quest for Growth* (2001)



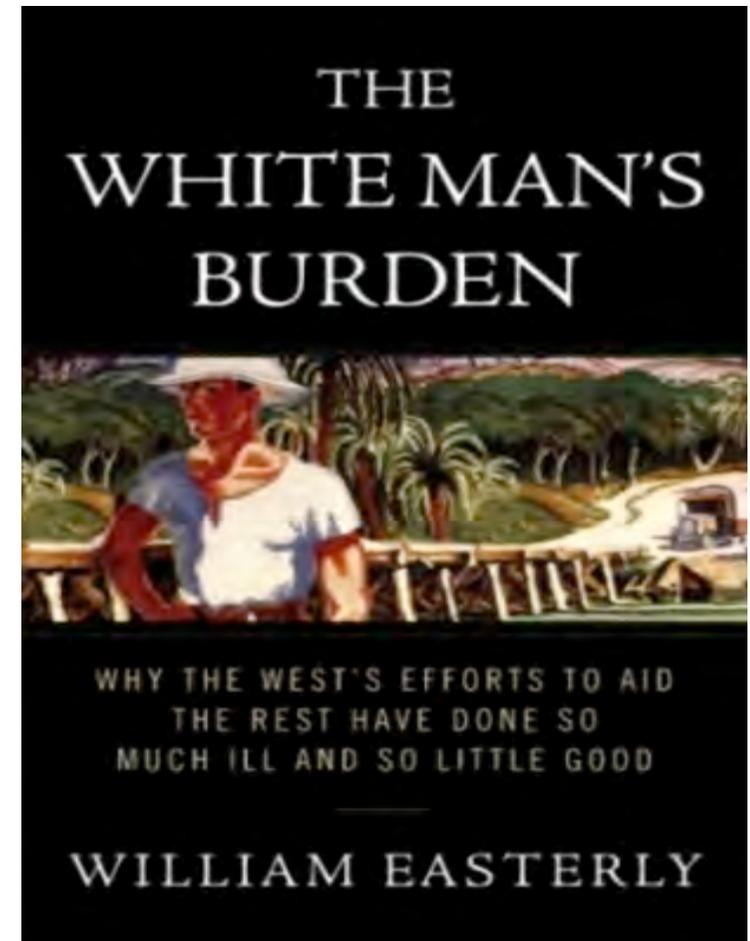
William Easterly, *The White Man's Burden* (2006)

Planners v. Searchers

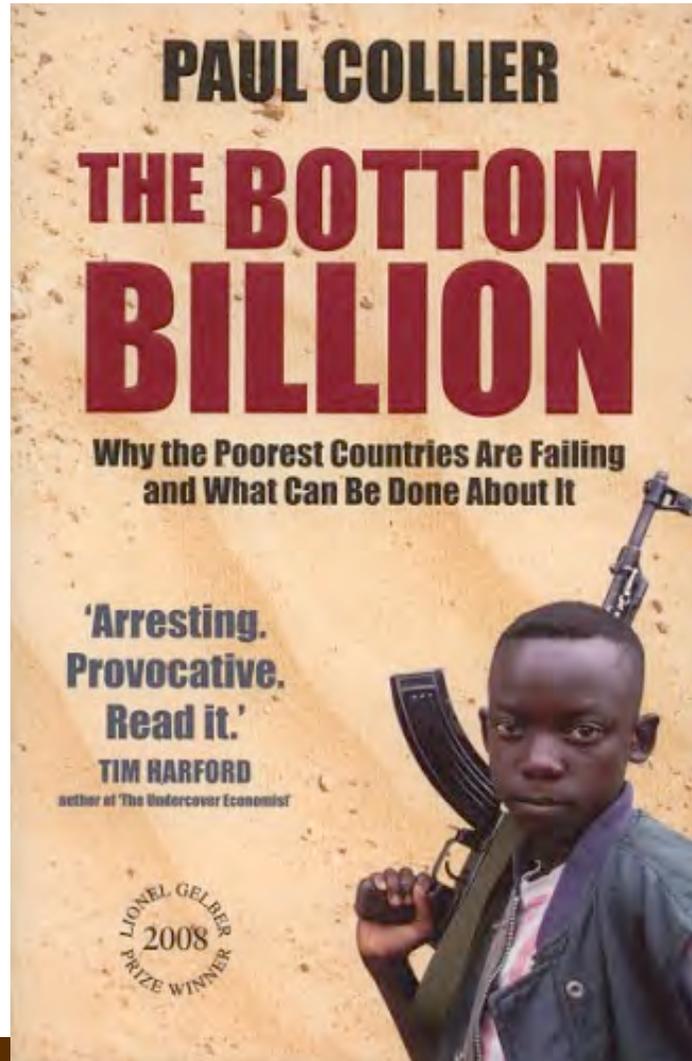
The Legend of the Big Push

You Can't Plan a Market

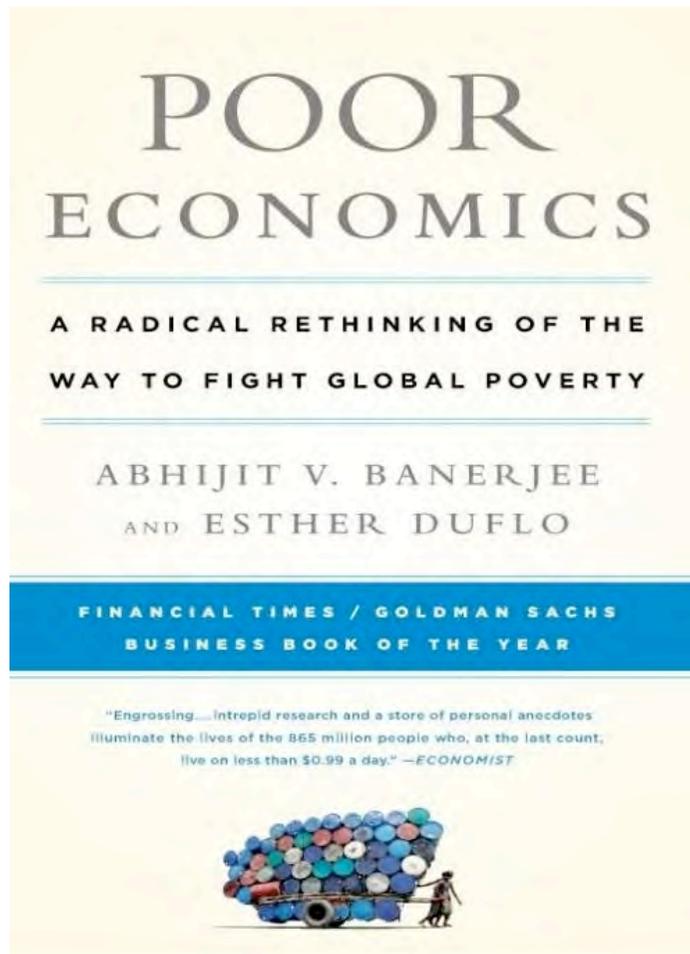
The Rich Have Markets, the Poor Have Bureaucrats



The special case of Paul Collier: the key issue of improved governance



The soft paternalism of Abhijit Banerjee and Esther Duflo: “randomized trials” and nudging the “right” choices



WHICH ELEMENTS MATTER?

- 1. Access to justice – the « 4 As » (availability, accessibility, adequacy, adaptability)**
- 2. Due process – independence and impartiality**
- 3. Remedies**

How to mediate the tension between enforcement of social rights and separation of powers / democratic self-determination ?

'Weak form review'	Engagement model	Monitoring adequate implementation of public programmes	'Negative review': sanctioning retrogressive steps	Individual protection of entitlements
South African Constitutional Court Grootboom	South African Constitutional Court Residents of Johannesburg Kenneth George Case	Indian Supreme Court right to food case	Colombian Constitutional Court public pensions or salaries in the public sector decisions	Brazilian Supreme Federal Tribunal case of Sepulveda Pertence (health care)

<i>Approach</i>	<i>Legitimacy/ Capacity Costs on Court</i>	<i>Effectiveness at Changing Practice</i>	<i>Likely Beneficiaries</i>
Individualized enforcement	Low	Will not alter bureaucratic behavior	Middle & upper-class groups
Negative injunctions	Moderate, although may be high if have huge macroeconomic effect	Will strike down laws and maintain status quo	Middle & upper-class groups
Weak-form enforcement	Low to moderate	Will not cause any change	Nobody, although may aim at poor
Structural enforcement	High	May alter bureaucratic practice	May target lower income groups