



**LAWYERS' ROLE ADDRESSING POVERTY ISSUES:
A PUERTO RICAN EXPERIENCE**

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EXECUTIVE SUMMARY

This thesis is aimed to determine lawyers' role to effectively address poverty issues. A capability approach to poverty indicates lawyers to pay attention to obstacles to the inability of the people to achieve freely their conception of well being. A deeper understanding of the reality of the poor reveals that various factors such as personal characteristics, particular circumstances, and social structures affect the full enjoyment of their human rights and hence resulting in the failure of their "human capabilities" to escape poverty. Even though poverty is an individual experience, it is a social problem that requires collective action to change the structures that maintain the people living in poverty. Therefore, lawyers' role shall be aimed to empower the poor in an ongoing process in which they become the principal character in the transformation of their reality.

To join the fight against poverty, lawyers have to deviate from their traditional professional role. Under the dominant law practice, lawyers' tools to address poverty are narrow. Furthermore, they usually play the central role in the solution of problems. Nevertheless, the tools given by the established structures might provide ineffective remedies, and the poor must lead the transformation of their reality.

Lawyers instead must employ the advocacy model developed by new theories of law practice. Accordingly, lawyers work *with* their clients within a relationship based on solidarity and dignity to further a mutual learning process for an effective collaboration to advance collective action toward social change. In conjunction with its clients, lawyers engage in strategic work that includes, for instance, legal and non-legal tools and professionals from other

areas, and other social actors; thus they become just a part of a broad collaborative network to effectively address poverty issues.

The experience of a Puerto Rican legal aid clinic shows the effectiveness of the lawyer's role based in new theories of law practice in the struggle against poverty. The legal clinic's work with various low income communities with similar problems but with different contexts was divided in three case studies, and evaluated in the light of its potential to promote its clients' "human capabilities" to freely achieve their notion of well being. In the three case studies, the communities were in danger of displacement and claimed their exclusion in the decision making processes on matters that affect their community development. The legal clinic helped the communities to translate their grievances in legal claims, and to incorporate law in their struggle in a strategic way according to their needs and interests.

In the first case study, the students and professor helped the community leaders to lead a lobbying process that culminated in a law that gives them the power to prevent their displacement. In the other two case studies, the claims of the communities are pending in the court. Nevertheless, the communities were actively involved in the management of the cases in court proceedings. In the meantime, the professors and students worked with the community leaders in the creation and implementation of strategies such as press conference and public forums in which the communities played the leading role to denounce their situation. By these means, the clients of the legal clinic were empowered to transform their reality.

INTRODUCTION

“It is cruel to decide for a person,” said a woman in a forum about the situation of her community which is in danger of displacement.¹ She is one of the persons that rescued an abandoned land because of the lack of accessible housing, and created the community *Villas del Sol* (Villages of the Sun). After more than a decade, the municipality acquired interests in the land where *Villas del Sol* is located and began a campaign for the eviction of its residents. From that moment, the people of *Villas del Sol* became objects of constant threats and abuses from the police, and continuous attempts of forced evictions through unfair trial proceedings and the cutting of light and water.²

The residents of *Villas del Sol* acknowledge their illegal status over the land and that they cannot claim housing in courts. However, the community leader claim that they are human beings that want to be active participant in their development. An individual in the public seems not to understand the main claim of *Villas del Sol*. He said, “They are not poor, they have car, clothes. They only need housing.”

The situation of *Villas del Sol* and the expressions of one of its community leaders indicates that poverty is more than living under severe economic deprivation. It is a state in which the people human rights are vulnerable as a result of an unjust social order that prevent them to freely achieve a satisfying standard of living. This means that, the social nature of poverty requires more than actions to guarantee the enjoyment of human rights. It requires from

¹ Forum “*Un llamado al análisis y a la solidaridad*” [A call to analysis and solidarity] August 14, 2009.

² Dennis Jones, *Policía Agrede a Comunidad Villas del Sol*, PERIÓDICO EL VOCERO, Fotogalería. 3 de agosto de 2009, available at <http://www.vocero.com/noticia.php?id=28288>. Associated Press, *Cortan Agua y Luz a Comunidad Villas del Sol*, 8 de agosto de 2009, available at <http://www.noticiasonline.com/Det.asp?id=25573>.

the disadvantaged collectives to get organize and change the structures of oppression. Therefore, the role of the professional working with people living in poverty shall be aimed to empower the poor in an ongoing process in which they become the principal character in the transformation of their reality.

According to Amartya Sen, poverty is the failure of “basic capabilities to reach an adequate standard of living within the particular social context.”³ Not only economic deprivation, but also personal “characteristics and circumstances” and social structures affects abilities of persons to carry out “functions” considered by them necessary in order to achieve freely their conception of well being.⁴ A deeper understanding of poverty from a “capability approach” shows the vulnerability of the people human rights, and hence identify the roots of the obstacles for the full enjoyment of human rights, and permits to speak in terms of duties.

Martha C. Nussbaum says that most of the capabilities are strongly linked with the entitlements guaranteed by human rights.⁵ These rights, says Nussbaum, are secure if the citizen is placed in a position of “capability to function” in the respective area.⁶ Moreover, thinking in terms of capability focuses the attention from the start on what limitations exist beyond State interference to effectual empowerment of all citizens. This implies that positive duties are required to secure fundamental rights.⁷

Human rights also value individuals’ relationships based on dignity and solidarity. According to Sandra Fredman, this means that there is a duty to ensure “dignity and respect, and

³ Amartya Sen, *Conceptualizing and Measuring Poverty*, in *POVERTY AND INEQUALITY* 30-46 (David B. Grusky & Ravy Kanbur eds., 2006) [hereinafter *Measuring Poverty*].

⁴ *Id.*

⁵ Martha C. Nussbaum, *Poverty and Human Functioning: Capabilities as Fundamental Entitlements*, in *POVERTY AND INEQUALITY* 47. *See supra* note 3. [hereinafter *Fundamental Entitlements*].

⁶ *Id.* at 53.

⁷ *Id.* at 54-55; Nussbaum gives as example an amendment in the Indian Constitution which guarantees women one-third representation in the local councils, which was strongly influenced by a capability approach. *See id.* at 55.

to promote and facilitate responsibility and caring.”⁸ In these terms, the notion of solidarity is rich, since it leaves space for diversity in values’ conceptions and personal autonomy but allows the imposition of duties to citizens.⁹ For Paulo Freire, solidarity requires the recognition of individuals living in poverty as persons unjustly treated. This means that true solidarity implies perceiving individuals as “subjects” and as such “should be free,” and do something about it.¹⁰

The social nature of poverty requires from all professionals that want to address poverty issues to know how to look and go beyond of what is given to work towards a definite solution, says Freire.¹¹ As Sen and Nussbaum, Freire perceived poverty as a state of un-freedom. It is a state of oppression that negates what every individual value most, his and her humanity.¹² Therefore, he concludes that the oppressed must organize and transform their reality to regain their humanity. Nevertheless, Freire identifies structural patterns and behaviors that resemble the practices of oppressors and thus prevent the disadvantaged to change their situation. Consequently, he develops a methodology to address poverty issues which is consistent with the collective action require to secure human rights and hence the enjoyment of “human capabilities” to freely achieve an adequate standard of living.

Law professionals are necessary for the definite solution against poverty Freire calls for. Law is perceived as a collection of specialized knowledge and a tool for effective participation and influence in society.¹³ Lawyers participate in various contexts that give them the opportunity

⁸ SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED, POSITIVE RIGHTS AND POSITIVE DUTIES* 16-17 (Oxford University Press 2008).

⁹ *Id.* at 27-29.

¹⁰ PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 50 (Myra Bergman Ramos trans., Continuum 30th Anniversary ed. 2008) (1970).

¹¹ *Id.* at 158-159.

¹² *Id.* at 43.

¹³ Martha Nussbaum, *Cultivating Humanity in Legal Education* 70 U. CHI. L. REV. 265, 271 (2003) [hereinafter *Legal Education*].

to arrange conventions and regulations for social life.¹⁴ The law professionals have the obligation to assist the needy, because the legal profession is considered as a “public utility” since the right to practice law is given only to its members.¹⁵ On the other hand, lawyers are not excuse from “the primordial moral agency that all individuals share simply by virtue of being human,” says David Luban.¹⁶ Luban states that a lawyer honors the human dignity¹⁷ of the individual who seeks his help by working hand on hand with the latter with the aim of reducing their dependency.¹⁸

Nevertheless, in what Gerald Lopez calls, the “regnant idea of law practice,” the lawyer play the central role and is the “master of knowledge.” This prevents the empowerment of his and her clients notwithstanding they have to be the principal character in the transformation of their reality. New theories of law practices developed by Lucie White and Gerald Lopez present a lawyer that goes beyond the definitions and tools given by the existing social order and that is consistent with the end to empower the disadvantaged to play the central role in the transformation of their reality as the case studies demonstrate.¹⁹

Chapter 1 of this thesis discusses different conceptions of poverty and analyzes it from a sociological perspective. Based in the “capability approach” to poverty, Chapter 2 analyzes it from a human rights perspective in order to provide a framework to effectively address poverty issues. Accordingly, Chapter 3 identifies a methodology to be employed by lawyers that work

¹⁴ Nussbaum, *Legal Education*, *supra* note 13, at 271.

¹⁵ *Id.* at 247.

¹⁶ David Luban, *The Inevitability of Conscience: A Response to my Critics*, 93 CORNELL L. REV. 1437, 1438 (2008) [hereinafter *A Response to my Critics*].

¹⁷ DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 76 (Cambridge University Press 2007) [hereinafter *LEGAL ETHICS*].

¹⁸ LUBAN, *LEGAL ETHICS*, *id.* at 92-93.

¹⁹ GERALD LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (Westview Press 1992); Lucie White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988).

with people living in poverty. The inclusion of this methodology in law practice as applied by a legal aid clinic in Puerto Rico will be evaluated in the light of its potential to further collective action to a lasting change that secure its clients' human rights and thus their "human capabilities" to freely reach their well being.

CHAPTER 1 - POVERTY

Poverty is one of the most stigmatized statuses in developed countries.¹ The confidence that everyone enjoy the same opportunities produces the belief that poverty is proof of wrong individual behavior and choices.² The following discussion challenges this premise with a deeper analysis of poverty, its causes, and consequences. This chapter indicates the vulnerability of the poor's human rights as the result of an unjust social order, and hence provides the starting point to develop a framework to address poverty issues.

1.1 Defining Poverty

People living in poverty are in a vulnerable position and in a situation of deprivation that affects their ability to reach their ideal of well being. The lack of money could prevent a young girl to pursue the career she wishes, and a serious illness suffered by a young boy from a rich family. Therefore, poverty, as some scholars say, not only is relative deprivation of resources and income.³

According to Amartya Sen, poverty is the failure of “basic capabilities” to reach an adequate standard of living.⁴ This idea of poverty recognizes that, not only economic deprivation but personal “characteristics and circumstances” affects abilities of persons to carry out “functions” considered by them necessary to achieve freely their conception of well being.⁵ Even though an individual initially does not have income problems, biological and social factors can

¹ MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY; DISGUST, SHAME, AND THE LAW* 282 (Princeton University Press 2004) [hereinafter NUSSBAUM, *HIDING FROM HUMANITY*].

² *Id.*

³ Amartya Sen, *Conceptualizing and Measuring Poverty*, in *POVERTY AND INEQUALITY* (David B. Grusky & Paula England eds., 2006) [hereinafter Sen, *Measuring Poverty*]; see also BILL JORDAN, *A THEORY OF POVERTY & SOCIAL EXCLUSION* (Polity Press 1996); see also Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273 (1997) [hereinafter Nussbaum, *Human Rights*].

⁴ See Sen, *Measuring Poverty*, *supra* note 3, at 33-34.

⁵ AMARTYA SEN, *INEQUALITY REEXAMINED* 109-112 (Harvard University Press 1992) [hereinafter *INEQUALITY REEXAMINED*].

adversely affect the capability to convert income into a function.⁶ For example, a woman will not have the capacity in having a satisfying job, “because of stereotyping of ‘woman’s jobs.’”⁷ Therefore, income is only one ‘space’ on which poverty must be measured.⁸

Equity and justice concerns are the parameters on which poverty has to be measured.⁹ This corresponds to Sen’s idea of development in terms of a satisfying human living freely reached by the means valued by the individuals.¹⁰ Therefore, the distinction between incomes and the “well-being and freedom of persons” becomes the appropriate “informational basis to assess equity and justice in general” by putting the capabilities to function at the center.¹¹

The measure of poverty has to be made in the light of the space of capabilities and incomes inequality.¹² Poverty and inequality¹³ are different concepts but at the same time are related and interdependent.¹⁴ The relative lack of income produces “absolute deprivation in terms of capabilities.”¹⁵ ‘Basic capabilities’ differ in different societies in terms of ‘commodities demands’ and the minimum income required which involves the connection with the incomes of other community members.¹⁶ Another factor to take in consideration is “peer pressure” towards “social capabilities.”¹⁷

⁶ *Id.* at 113.

⁷ *Id.*

⁸ Sen defines ‘spaces’ as “the variables in terms of which inequality and poverty are to be assessed.” Although income is not the only factor to be taken into account, according to Sen, is of great relevance, because is a “general-purpose means” which scarcity can bring an individual to severe deprivation. *See Sen, Measuring Poverty, supra* note 3, at 30, 33.

⁹ *Id.*

¹⁰ *Id.* at 34.

¹¹ *Id.*

¹² *Id.* at 36.

¹³ Poverty generally refers to “the definition and measurement of the numbers and extent of the poor in society.” Inequality, in contrast, concerns “with differences between individuals in income and access to resources.” *See JULIAN LE GRAMD, ET AL., THE ECONOMICS OF SOCIAL PROBLEMS 184 (Macmillan Press 1992) (1976).*

¹⁴ *Id.*

¹⁵ *See Sen, Measuring Poverty, supra* note 3, at 30, 36; *see also SEN, INEQUALITY REEXAMINED, supra* note 5, at 115.

¹⁶ *See Sen, Measuring Poverty, supra* note 3, at 37.

¹⁷ *Id.*

The assessment of poverty must be made also in terms of the interaction of individuals within the community or groups in which they interact. In other words, “economic data cannot be interpreted without the necessary sociological understanding.”¹⁸ For some scholars, the individual’s ability to participate in society as an indicator is an “appropriate objective for a relative poverty measure.”¹⁹ The problem is the difficulty to establish the abilities on which involvement should be assessed; whether the grounds for poverty measure, value judgments are involved.²⁰ Nevertheless, Martha C. Nussbaum dares to suggest a list of “central human capabilities.”²¹

Through its “capability approach,” Sen’s gives a human dimension to the analysis of poverty. He perceives it in terms of “the quality of life that people are able to lead, and the freedom they enjoy to live the way they would like.”²² However, poverty is not seen as a “phenomenon with universal application.”²³

The notion of poverty has been given different meanings according to the social, economic and political context from where those conceptions came.²⁴ On the other hand, theories of poverty differ in its base. For some scholars, poverty has to do with economic deprivation, whilst for others it is more than lack of resources and income, as previously discussed.

In the continental tradition, poverty is perceived in the light of the relationships of individuals with the social and political institutions. A poor person is the one that given her

¹⁸ *Id.* at 45.

¹⁹ LE GRAND, *supra* note 13, at 186.

²⁰ *Id.*

²¹ Nussbaum, *Human Rights*, *supra* note 3, at 285-288; *see also* Martha C. Nussbaum, *Poverty and Human Functioning: Capabilities as Fundamental Entitlements*, in *POVERTY AND INEQUALITY*, *see supra* note 3, at 47, 57-59 [hereinafter Nussbaum, *Fundamental Entitlements*].

²² Sen, *Measuring Poverty*, *supra* note 3, at 30, 34.

²³ Peter Townsend, *Conceptualizing Poverty*, in *DYNAMICS OF DEPRIVATION, STUDIES IN SOCIAL POLICY AND WELFARE* 31, 31 (Zsuzsa Fierge et al. eds., 1987).

²⁴ *Id.* at 31.

economic circumstances cannot participate in the “corporate life of the community,” thus loses her membership, representation and integration in State’s and social structures.²⁵ For this reason, poverty policies are aimed at reintegrating the poor, and membership predominates over individual rights.²⁶

In contrast, the poverty debate in Anglo-Saxon countries concentrates on the individuals and household characteristics, and how they influence the participation in the market economy. The political institutions perceived the person in the light of how her individual and household characteristics limit her access to necessary material resources to participate in society.²⁷ Therefore, the main concern of the government is the distribution of resources under a liberal tradition whose major concern is to allow freedom of choice by not interfering with the protected area of individual rights.²⁸

According to Peter Townsend, a “‘social’ and, therefore ‘relative’”²⁹ conception makes possible an exact formulation of poverty.³⁰ For him, the people are in poverty when they “cannot obtain, at all or sufficiently, the conditions of life, that is, the diets, amenities, standards and services, which allow them to play the roles, participate in the relationships and follow the customs which are expected of them by virtue of their membership of society.”³¹ This definition of poverty, based on relative deprivation, rests on social standards of what constitutes the basic resources and needs, which for Townsend have “some core objectivity,” that can be measured by social scientists.³² Nevertheless, this conception of poverty received many critiques.

²⁵ JORDAN, *supra* note 3, at 93.

²⁶ *Id.*

²⁷ JORDAN, *supra* note 3, at 93.

²⁸ *Id.* at 88-92; *see also* Townsend, *supra* note 13, at 31.

²⁹ Relative definitions of poverty analyze the living standards of the poor according to the prevailing ones elsewhere in the society in which. *See* LE GRAND, *supra* note 13, at 185.

³⁰ Townsend, *supra* note 23, at 37.

³¹ *Id.*

³² JORDAN, *supra* note 3, at 94.

Townsend's notion of poverty does not address the diversity in cultures and preferences.³³ Neither, say some scholars, the reality of "poverty threshold" is demonstrated.³⁴ There is no foundation for the selection of resources and needs Townsend calls for to measure poverty, neither for their connection with poverty.³⁵ Amartya Sen says that Townsend had confused the need of basic resources with the "capabilities to meet social conventions, participate in social activities, and retain self-respect."³⁶

Notwithstanding the differences among the various notions of poverty, all points to a disadvantaged collective. There is a consensus that the people living in poverty are not in a satisfying state of living. On the other hand, the meaning of an adequate standard of living and what is necessary to reach it can be diverse as the world itself. Nevertheless, Sen's conception of poverty responds to the diversity and complexity of human life by speaking in terms of "human capabilities" and freedom to achieve the person's idea of an adequate standard of living.³⁷ Sen's definition of poverty unveils other angles from which poverty issues and its causes can be identified beyond lack of income.

1.2 The Causes of Poverty

The causes of poverty have to be analyzed from a multidimensional perspective. Many factors operate within a social order that affects the individuals' capabilities to pursue their wellbeing. The following discussion explains that poverty is a product of a social construction and that the people personal characteristics and circumstances are some factors that shape the path of life.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*; see also ROBERT CHAMBERS, WHOSE REALITY COUNTS, PUTTING THE FIRST LAST 45-46 (ITDG Publishing 2000) (1997) (criticizing how poverty measures simplify poverty by only taking in account on view of deprivation, and definitions are based on the "static and standardized wants and needs of professionals and academics").

³⁶ JORDAN, *supra* note 3, at 94.

³⁷ See *supra* note 5.

Michael B. Katz seems to agree with Townsend who says that poverty is the product of “political economy.”³⁸ Accordingly, it is a consequence of social inequality and the product of actions by the rich to preserve and increase their capital with the exclusions of others in order to maintain the *status quo* through the “manipulation of wealth and power.”³⁹ Nevertheless, Katz insists that the emphasis in poverty studies on identifying the poor supports the “categorization and stereotypes.”⁴⁰ Consequently, the debates concentrate in terms of family, race, culture “rather than inequality, power and exploitation.”⁴¹ By categorization, the standpoint of the “powerless” is overlooked, and the economic and social *status quo* is accepted as normal.⁴²

The complex relations of structural, community, and individual aspects influence the path of people’s lives.⁴³ This is one of the results of the ethnographic studies on poverty done by Jay MacLeod. These studies are aimed to identify the causes of poverty through the subjects’ own experiences.⁴⁴ MacLeod concentrates his studies on a group of male residents of two public housing projects in the United States; one of them consisting mostly of whites and the other of blacks. Both projects were equally affected by social problems, and the studied subjects have been trapped in the “low-wage labor market.”⁴⁵

Similar to Townsend’s argument, MacLeod concludes that poverty is caused by intentional structural inequality.⁴⁶ “Our society is structured to create poverty and extreme

³⁸ MICHAEL B. KATZ, *THE UNDESERVING POOR, FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 7 & 169 (Pantheon Books 1989).

³⁹ *Id.* at 169.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 8.

⁴² *Id.* at 6.

⁴³ *Id.* at 170.

⁴⁴ *Id.* at 170-171.

⁴⁵ JAY MACLEOD, *AIN’T NO MAKIN’ IT, ASPIRATIONS & ATTAINMENT IN A LOW-INCOME NEIGHBORHOOD* 265 (Westview Press 1995) (1987). The first 8 chapter of this book are based in previous ethnographies studies in the public housing projects. The chapters 9 to 11 were included 8 years later as an update of the communities and lives of the both groups of men studied.

⁴⁶ *Id.* at 239.

economic inequality,” he says.⁴⁷ For MacLeod, poverty is predominantly a class issue. Economic transformations resulting in the expansion of ‘low-wage labor market’ and insecurity affects all poor.⁴⁸ Nevertheless, “race⁴⁹ and gender” play important roles in shaping “life chances” as well.⁵⁰ That is, poverty has to be analyzed from a multidimensional perspective.

“Racism, sexism, and economic domination” are interconnected in ways that reinforce each other.⁵¹ This “symbiotic nature” of different “systems of subordination” is at the center of new theories that tried to elaborate a doctrine of intersectionality, namely “new complexity theories,” that includes the experiences of privilege and subordination of the disadvantaged. In this perspective, a person is located at an intersection from one or more “subordinate status” and one or more “dominant status.”⁵² For example, a black women living in poverty is going to be in a subordinate position before a white women and a ‘nonpoor’ black woman. A multidimensional approach helps in the task to separate the complex systems of oppressions behind social practices in order to weaken all of them.⁵³ Otherwise, the poor black women intended to be protected will be subject to other system of subordination.⁵⁴

Regardless their races, the people living in poverty are confined by their inferior place in the class structure.⁵⁵ MacLeod’s studies illustrate how hard it is to slip through the rigid frames

⁴⁷ *Id.*

⁴⁸ *Id.* at 241-242.

⁴⁹ Race is considered as inherited and specific “physical characteristics such as skin color” in a person. See LYNN WEBER, UNDERSTANDING RACE, CLASS, GENDER, AND SEXUALITY, A CONCEPTUAL FRAMEWORK 19 (McGraw Hill 2001); But race is a notion of great uncertainty, and problematic, since was used mainly for racist motives. See Bradley R. SCHILLER, *The Economics of Poverty & Discrimination* 116 (Prentice Hall 5th ed., 1989) (1973); see also Susanne Baer, “*The End of Private Autonomy*” or *Rights-Based Legislation? The Antidiscrimination Law Debate in Germany*, in 1 ANNUAL OF GERMAN & EUROPEAN LAW 323, 329 n.27 (Russell A. Miller et al. eds., 2003).

⁵⁰ MACLEOD, *supra* note 45, at 247-250.

⁵¹ Darren Lenard Hutchinson, *New Complexity Theories: From Theoretical Innovation to Doctrinal Reform*, 71 UMKC L. REV. 431, 443 (2002).

⁵² *Id.* at 436.

⁵³ *Id.* at 443.

⁵⁴ *Id.*

⁵⁵ MACLEOD, *supra* note 45, at 243.

of structural inequality which is supported by the constant attempt to individualize poverty.⁵⁶ A dynamic perspective of poverty, the relationship of people with components of the social structure, such as the labor market, confirms this; usually, relationships of individuals with the job markets establish their economic and social status.⁵⁷

The “labor market forces” play a part in poverty’s increment, since it is not oblivious of prejudices against the poor based on “flawed character view.”⁵⁸ Under this view there is a certain belief that poverty is the result of the person fault. Therefore, employers are likely to have low valuation of the abilities of poorly dressed applicants or if they come from “bad neighborhoods.”⁵⁹ In order to get a good job, the poor have to demonstrate extraordinary qualifications. Furthermore, the poor have few friends employed in high profile jobs, thus they have little knowledge about openings of good jobs. The jobs they know are the “dirty, low-paid, and menial.” By these means, the disadvantaged is likely to be denying equal access to superior jobs and salaries, even though have the equal qualifications of a “nonpoor.”⁶⁰

Personal differences can result as a barrier to “functioning possibilities” in various situations. For instance, the reception of health services, the treatment by the police or by the job market can be affected.⁶¹ The conduct, speech and dress, and backgrounds of poor and minorities are unusual to “middle-class employers, employment agencies and even unions.”⁶² These are factors that create “communication barriers,” since they are perceived as a barometer of capacity

⁵⁶ *Id.* at 241.

⁵⁷ SCHILLER, *supra* note 49, at 233.

⁵⁸ *Id.* Schiller defines “flawed character view” as the perception that “poverty is regarded as the natural result of individual defects in aspirations or ability.” Accordingly, individuals are seen as “in full control of their socioeconomic status.” *See id.* at 2-3.

⁵⁹ *Id.* at 165.

⁶⁰ *Id.*

⁶¹ SEN, *INEQUALITY REEXAMINED*, *supra* note 5, at 121-122.

⁶² SCHILLER, *supra* note 49, at 166; *see also* NUSSBAUM, *HIDING FROM HUMANITY*, *supra* note 1, at 282 (explaining that poverty is noticeable by various ways such as the physical appearance and personal circumstances).

rather than the effect of socioeconomic situation.⁶³ As a consequence, minorities, women and the poor, usually enter the labor market with disadvantage.⁶⁴ Then, it is not a surprise that the poor end up in part-time jobs that are less attractive and with less income.⁶⁵ But the disadvantage is also a result of the educational structure.⁶⁶

School segregation results from neighborhoods isolated by race and class⁶⁷.⁶⁸ Schools in poor neighborhoods are well known for their lack of resources and low education quality.⁶⁹ Therefore, members of poor communities are prevented from equal opportunity to acquire the necessary skills and use them in the job market.⁷⁰ Those who lack skills and resources needed or are not given the chance in the “opportunity system” are kept out of the mainstream of a society.⁷¹

Likewise, the poor are excluded from the decision-making process. Because of the lack of skills, the poor are less likely to reach a high degree of organization to advance their interests, says Frances Fox.⁷² “Low-income people” do not have necessary means such as “money, organization skills, and professional expertise, and personal relations with officials.”⁷³

⁶³ SHILLER, *supra* note 49, at 166..

⁶⁴ *Id.* at 168; *see also* Jennifer L. Hochschild, *Equal opportunity and the Estranged Poor*, in *THE GUETTO UNDERCLASS, SOCIAL SCIENCE PERSPECTIVES* 160, 166-167 (William Julius Wilson ed., 1993) (1989) (discussing how white employers invented new ways of discrimination by denying jobs that require certain responsibility on the belief that members of some groups are more problematic than others. By this means, racial and gender prejudice are cover and job seekers found another barrier to prove they are the exceptions).

⁶⁵ SCHILLER, *supra* note 49, at 169.

⁶⁶ *Id.* at 168.

⁶⁷ For the purposes of this paper, class will be defined as, “position in the economy-in the distribution of wealth, income, and poverty.” *See* WEBER, *supra* note 49, at 19.

⁶⁸ SCHILLER, *supra* note 49, at 220.

⁶⁹ *Id.* at 108.

⁷⁰ *Id.* at 235.

⁷¹ Hochschild, *supra* note 80, at 161.

⁷² Frances Fox, et al., *‘Low-Income People and the Political Process,’* in *LAW AND POVERTY* 499, 506 (Frank Munger, ed., 2006). Sen says that public participation is an inherent part of a “basic capability” that at the same time strongly influence on other capabilities related to “education and health.” *See* Sen, *Measuring Poverty*, *supra* note 3, at 44. Likewise, Nussbaum says that public participation is part of the “central human capabilities” which enable control over decisions by whose lives will be affected. *See* Nussbaum, *Fundamental Entitlements*, *supra* note 21, at 59.

⁷³ Fox, *Id.*

Furthermore, the poor are relatively dispersed, preventing by this way regular interactions which would facilitate a sense of common group problems and interests that is more difficult among a “mobile and culturally heterogeneous poor.”⁷⁴ Instead, the energies are debilitated by constant struggles under “oppressive circumstances.”⁷⁵

On the other hand, to conclude that the lack of skills and resources is the reason for not reaching a high degree of organization is arguable. Other factors such as the legal structure and generalized social practices could prevent (not to make it impossible) a group to involve actively in the formal decision making process on matters that affect them.⁷⁶ Even so, some argue that the precarious situation of the people living in poverty is solely their responsibility.

The poor are poor, because of their fault. This is the central idea of the “cultural theory of poverty.” Based on behavioral studies, this theory says, the poor don’t care about their situation. That they lack “aspirations, values, and motivation” to improve their economic status, and this behavior is transmitted through generations.⁷⁷ The weak point of this theory is the assumption that the disparity in conducts between the poor and “nonpoor” reflects the divergence in purposes and objectives.⁷⁸

The difference of behavior can be explained by circumstantial and situational reasons.⁷⁹ For instance, the rates of school dropout are higher in poor communities; these results can be explained by the well known lack of resources and low quality in education of schools located in poor communities, in contrast with schools of “nonpoor” neighborhoods.⁸⁰ This is only one example that demonstrates the poor do not have the same opportunity to accomplish or even to

⁷⁴ *Id.* at 507.

⁷⁵ MACLEOD, *supra* note 45, at 241.

⁷⁶ The Chapter 3 will analyze in more detail this point.

⁷⁷ One of the precursor of the “cultural theory of poverty,” Oscar Lewis, based his conclusions in an empirical study held largely in Mexico and Puerto Rico. *See* SCHILLER, *supra* note 49, at 107.

⁷⁸ *Id.* at 108.

⁷⁹ *Id.*

⁸⁰ *Id.*

pursue their aspirations.⁸¹ The behaviors of the poor do not automatically entail cultural differences; it can be a “rational response” based on previous experiences marked by repetitive failures and disillusionments.⁸² Even the advocates of the cultural theory of poverty recognize that the cultural behavior originates from prolonged social immobility and unemployment.⁸³

The “behavioral and cultural deficiencies” are the consequences of poverty not the cause.⁸⁴ The confidence in the perception by “nonpoor” that economic opportunities are available to everyone, and prejudice against the poor contributes to “misconceptions.”⁸⁵ Inevitably, peoples’ lives are influenced by conceptions and behaviors that use absurd distinctions to sort preferential treatment and aversions, and to allocate resources.⁸⁶ The consequences are human beings without the necessary capabilities to live their desired standard of living and struggling for subsistence in a complex and difficult context.

1.3 Manage to Live from the “Barrio”⁸⁷

The context of the people living in poverty is “diverse and complex.”⁸⁸ The living is sustained by a broad array of sources obtained from many different activities carried out by various members of the family.⁸⁹ The improvisation in the run for subsistence is common. It depends on the “livelihoods capabilities, through tangible assets in the form of stores and resources, and through intangible assets in the form of claims and access.” Many means are

⁸¹ *Id.*

⁸² *Id.* at 110

⁸³ MACLEOD, *supra* note 45, at 265.

⁸⁴ *Id.*

⁸⁵ SCHILLER, *supra* note 49, at 110.

⁸⁶ Baer, *supra* note 49, at 331.

⁸⁷ Name given in Puerto Rico to low income communities.

⁸⁸ CHAMBERS, *supra* note 35, at 163.

⁸⁹ *Id.*

necessary to feed the family, diminish vulnerability, and to make the world a better place to live.⁹⁰

Different collectives within a community may have diverse strategies for surviving.⁹¹ The variety of income sources is of great relevance for the urban poor, for their limited access to natural resources, as the diversity in agricultural uses is for the rural poor.⁹² When structural limitations are so rooted in the education system and labor market, the choices are narrow.⁹³ Drug business may be a condemned behavior, but “social rationality” is behind it.⁹⁴ The resident of the “barrio” still needs to produce income and create relationships under difficult circumstances.

The local context of communities is “complex, diverse, dynamic, and unpredictable.”⁹⁵ Social changes are fast and provoke shifts in roles and responsibilities among the different components of the community. The residents of the community are continually perceiving and experiencing, and hence learning and unlearning during the harsh way for living.⁹⁶ It is difficult to expect long term view from an indigent that is constantly struggling for the meal of tomorrow; though this does not mean that the poor lack of long-term strategies.⁹⁷

The idea of well-being differs in meanings, places and times.⁹⁸ Income may be only one concern among others, such as “sickness, dependency, disability, being unable to fulfill social

⁹⁰ Chambers defines the way of poor’s subsistence as “fox like strategy.” That is, “to do many things: to sniff around and look for opportunities, to diversify by adding enterprises and to multiply activities and relationships.” *Id.* at 165.

⁹¹ *Id.* at 164. Just to give an example of how diverse are the strategies carried out for subsistence, Chambers list some of them recognizing that the list is incapable to encompass the whole reality. For example, he mentions, “theft, begging, remittances (from relatives or State), specialized occupation, domestic services, home gardening for self maintenance or for sale, migration, family splitting,” etc.. *See id.*, at 164-165.

⁹² *Id.* at 166.

⁹³ *Id.* at 240.

⁹⁴ *Id.*

⁹⁵ CHAMBERS, *supra* note 35, at 187.

⁹⁶ *Id.* at 173.

⁹⁷ *Id.* at 173-175.

⁹⁸ *Id.* at 178.

obligations, being poor in people, being miserable sort,” etc..⁹⁹ The aspirations and values of the people are heterogeneous and dynamic as well, and only known by the individual’s own perceptions shared without constraints.¹⁰⁰ Therefore, it is a mistake to treat a community as a homogeneous component. A poor community is not oblivious of stratification by gender, ethnic or social groups, age, wealth, living strategy, education, etc.. Nevertheless, common interests are shared by the whole community including the weak members.¹⁰¹

1.4 Conclusion

Poverty is much more than income deprivation. It is a negation of the full development of the human being; a state of powerlessness that attack the “fundamental human dignity.”¹⁰² As Sen states, the people living in poverty are incapable to have a satisfying human living freely achieved by the means valued by the individuals.¹⁰³ Factors such as personal characteristics, surrounding circumstances, and social structures of domination influence the capabilities of a person to attain a good standard of living, and hence provoking her to live in poverty.

This analysis of poverty indicates the vulnerability of the people human rights as the result of an unjust social order. Discrimination, lack of political participation, employment, and education of good quality are some aspects that people living in poverty have in common. This means that a deeper understanding of poverty from a human rights perspective provides a lawyer the framework, as the following chapter will explain, to join the fight against poverty.

⁹⁹ *Id.* at 178-179.

¹⁰⁰ *Id.* at 179.

¹⁰¹ *Id.* at 183-186.

¹⁰² KATZ, *supra* note 38, at 181 (citing the Catholic Bishop pastoral letter, Economic Justice for All, on the U.S. economy).

¹⁰³ *See supra* note 5.

CHAPTER 2 - POVERTY FROM A HUMAN RIGHTS PERSPECTIVE

Human rights of people living in poverty are vulnerable. Indeed, the United Nations recognizes that human rights violations are a “cause and consequence of poverty.” Moreover, it calls for an analysis of poverty from a human rights perspective for the efforts of its eradication.¹ The dominant human rights discourses are challenged, and new approaches to poverty from a human rights perspective are analyzed. Consequently, this chapter indicates that the social nature of poverty requires more than actions that guarantee the enjoyment of human rights to promote “human capabilities” to freely achieve a satisfying standard of living.

2.1 The Dominant Rights’ Discourse

Human right is not a clear-cut concept. Behind the “illusory agreement” on human rights, lies a great debate in what they imply, their sources, the causes for their violations, and its solutions.² The sources of human rights, if they are universal or relative, whether they pertain to individuals or collectives, if they imply positive or negative duties, and the relationship between rights and duty bearers are only some of the questions in human rights debates.³ What seems to be agreed on is that poverty is a human rights violation, but which human rights, is still uncertain.

According to the United Nations, human rights are universal legal guarantees that protect against interference with “fundamental freedoms, entitlements and human dignity.”⁴ For instance, under this conception of human rights, poverty is not perceived as lack of freedom

¹ Report of the Secretary General on the Observance of the International Day for the Eradication of Poverty, U.N. General Assembly, 66th Sess., Agenda Item 56, at ¶ 6, U.N. Doc. A/61/308 (2006) (English Version).

² MICHAEL FREEMAN, HUMAN RIGHTS 55-53 (Polity Press 2003) (2002).

³ *Id.* at 53.

⁴ U.N. Report, *supra* note 1, at ¶ 5.

unless it is caused purposely by others.⁵ On the other hand, poverty can be construed as a deliberate act by the State;⁶ lack of housing is due to the enforcement of the normative regarding property.⁷ However, a human rights approach to poverty makes it possible to talk about obligations rather than charity.⁸

It is said that economic and social rights are at the center of poverty.⁹ Unemployment, lack of adequate health services, education, housing and food are features of poverty. Nevertheless, a starved or ill person is at a disadvantage in political participation.¹⁰ In other words, poverty is a state in which the social and economic rights are infringed, and hence the civil and political rights as well. Even the United Nations recognized the interdependence of these rights.¹¹ Nevertheless, human rights are divided according to the interests protected, their historical and legal characteristics.¹²

The civil and political rights are those intended to protect an individual's autonomy and political participation. The so-called 'first generation rights,' impose negatives duties in virtue of which the State is to refrain from interference with human rights. Examples of these rights are the right to life, right to freedom of religion, and right to freedom of speech. These rights are associated with Western democracies, and are provided with mechanisms for their promotion and protection.¹³

⁵ SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED, POSITIVE RIGHTS AND POSITIVE DUTIES* 10 (Oxford University Press 2008).

⁶ *Id.*

⁷ *Id.* at 12 (citing Sunstein).

⁸ U.N. Report, *supra* note 1, at ¶ 4.

⁹ Regina Kreide, *Neglected Injustice: Poverty as a Violation of Social Autonomy*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT, WHO OWES THAT TO THE VERY POOR?* 155, 156 (Thomas Pogge ed., Oxford University Press 2007).

¹⁰ MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY, DISGUST, SHAME, AND THE LAW* 284 (Princeton University Press 2004) [hereinafter *NUSSBAUM, HUMANITY*].

¹¹ U.N. Report, *supra* note 1, at ¶ 4-7.

¹² Luis María Díez-Picazo and Marie-Claire Ponthoreau, *The Constitutional Protection of Social Rights: Some Comparative Remarks* 5-6, European University Institute Working Papers (1991).

¹³ FREDMAN, *supra* note 5, at 1.

In contrast, social and economic rights are pre-conditions for living. Also called, ‘second generation rights,’ they result in positive duties which require State action according to its resources for their fulfillment. These rights are rather aspirational, and are not judiciable enforced. The right to health, education, and work are part of this group of rights. The economic and social rights are related with communist and socialist regimes which promote equality in exchange to individual freedoms.¹⁴ The product of these dichotomies was the separation of these rights in different international instruments.¹⁵

Economic and social rights have been in a subordinated position.¹⁶ The vagueness of its normative and the lack of effective domestic mechanisms for their enforcement and promotion diminish effectiveness.¹⁷ The “progressive realization standard” established by the International Covenant of Economic, Social and Cultural Rights depends on the State’s available resources.¹⁸ As a consequence, the conceptualization and monitoring of social and economic rights is not an easy task.¹⁹ The result, the violation of social and economic rights has been tolerated.²⁰ Nevertheless, both groups of rights share characteristics that make the distinction superficial.

The distinction between the civil and political rights and social and economic rights is unfounded. According to Michael Freeman, a view to a more complex history of the origins of modern rights theories demonstrates that the generational division of human rights is not sustained. The rights of subsistence and property were of primary concerns in history, and the

¹⁴ *Id.*; see also Díez-Picazo and Ponthoreau, *supra* note 12, at 4.

¹⁵ E.g., International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 U.N.T.S. 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1976, entered into force 3 January 1976) 993 U.N.T.S. 3 (ICESCR).

¹⁶ FREDMAN, *supra* note 5, at 2.

¹⁷ CORE OBLIGATIONS BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INTRODUCTION 3 (Audrey Chapman and Sage Rusell eds., Intersentia 2002).

¹⁸ *Id.* at 4-5.

¹⁹ *Id.*

²⁰ FREDMAN, *supra* note 5, at 2.

civil and political rights were generated in order to secure the “basic rights to survival and property.”²¹ On the other hand, both sets of rights are interdependent.

The social and economic rights are preconditions for the exercise of civil and political rights.²² Indeed, the UN says that civil, political, economic and social rights are mutually supported and thus must be addressed at the same time to empower the individuals to fight against poverty.²³ For instance, it is less probable that an uneducated individual can go to the courts to enforce his civil and political rights.²⁴ Moreover, some social and economic rights share characteristics of civil and political rights that require negative duties.²⁵ The right to housing includes the obligation to refrain from state interference in home and family life.²⁶

Some argue the distinction is not an accident. David Kennedy suggests that the prevalence of civil and political rights insulates the economy by providing effective remedies only for State actions.²⁷ In other words, it is possible to claim rights against the State but not to extort rights from the economy unless the person is a property holder; thus it is less likely to challenge the economic arrangements.²⁸ Since the traditional concept of human rights concentrates on what the State shall not do, is left unattended if the infringements on citizens’ rights produced by the “economy market or private actors” are human rights violations.²⁹ However, the interdependence of both groups of rights is widely recognized. Nonetheless, the rights language still supposes certain limitations.

²¹ FREEMAN, *supra* note 2, at 168.

²² *Id.* at 71; *see also* NUSSBAUM, *supra* note 10, at 285; *see also* Tom Campbell, *Poverty as a Violation of Human Rights: Inhumanity or Injustice?* in FREEDOM FROM POVERTY, *supra* note 9, at 55, 58; *see also* FREDMAN, *supra* note 5, at 2.

²³ U.N. Report, *supra* note 1, at ¶ 7.

²⁴ NUSSBAUM, *in* HUMANITY, *supra* note 10, at 285.

²⁵ CORE OBLIGATIONS, *supra* note 17, at 17.

²⁶ FREDMAN, *supra* note 5, at 2.

²⁷ DAVID KENNEDY, *THE DARK SIDES OF VIRTUE* 11 (Princeton University Press 2004).

²⁸ *Id.*

²⁹ Martha C. Nussbaum, *Poverty and Human Functioning: Capabilities as Fundamental Entitlements*, in POVERTY AND INEQUALITY 47, 54 (David B. Grusky & Paula England eds., 2006) [hereinafter Nussbaum, *Fundamental Entitlements*].

The “traditional rights talk” not only left the private sphere untouchable,³⁰ but also may put constraints on claims against the State. For instance, the UN’s definition of human rights as legal entitlements imposed the obligations on States, in which lie many of the sources of human rights problems or lack of will and/or power to solve them.³¹ Legal rights are said to be only those the law considers as such, and are “legally enforceable.” But human rights claims originate precisely before the lack of their recognition and enforcement, and suppose the central foundation for claims against unjust legal regimes.³²

However, the discussion on poverty must concentrate on to “what means to be human... and how humans might relate to one another.” This is the claim of Kennedy, who criticizes the insistence on analyzing human rights in terms of “moral condemnation, legal adjudication, textual certainty and political power.”³³ Even though many of the new theories about poverty still speak in terms of rights and “moral condemnation”, some of them began to talk about how living in poverty conditions is against the human condition. Moreover, some new voices call for a transformation of the human rights discourse in order to include new actors and approaches in the fight against poverty.

2.2 New Approaches to Poverty in the Light of Human Rights

The basis of new analysis of poverty from a human rights perspective differs. The main difference in current debates is what factor makes poverty a human rights violation, and hence the correlative duties generated. Even so, a common characteristic is the perception of the human being in the society. In other words, some of the new debates try to introduce the social

³⁰ *Id.* at 55.

³¹ FREEMAN, *supra* note 2, at 85; *see also* KENNEDY, *supra* note 27, at 16.

³² FREEMAN, *supra* note 2, at 10.

³³ KENNEDY, *supra* note 27, at 14.

responsibility in the causes of poverty and efforts of its eradication by making the right of freedom from poverty a moral claim.³⁴

The recognition of individuals as human beings with a past and with the capacity to build their own history gives rise to strong moral demands. Under this premise, Thomas Pogge conceives human rights as moral rights.³⁵ The recognition that an individual within a society has basic needs which “give rise to weighty moral demands” entails the commitment to human rights to which those basic needs is object.³⁶ Thus, human rights are “moral claims” in the organization of society that is responsible to assure the access to the objects of human rights.³⁷

There is a human right to basic necessities, says Pogge. Therefore, a correlative moral duty is generated and imposes the obligation to not “foreseeably and avoidably” deprive individuals of basic means of living.³⁸ He says that the design of the “global institutional order” responds to the interest of rich countries and the elites of the undeveloped countries leaving the poor outside the global economic growth.³⁹ The “global institutional order” can avoid or moderate the impact of the globalized economy by viable alternatives.⁴⁰ Likewise, Marc Fleurbaey argues that the existence of poverty responds to the interests of the rich.

The oppressive nature of poverty is connected to “basic human rights.”⁴¹ A person living in poverty is subjected to oppression which attacks their personal integrity, since they are forced to accept transactions that otherwise will not accept. That is the case of an individual who has as his only option to accept a job with awful working conditions and low wages if he does not want

³⁴ Morals have been defined as claims that are believed “ought to be recognized universally in morality or law.” See Campbell, *supra* note 9, at 55, 61.

³⁵ THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 58 (Polity Press 2002).

³⁶ *Id.*

³⁷ *Id.* at 64-65.

³⁸ THOMAS POGGE, *Severe Poverty as a Human Rights Violation*, in *FREEDOM FROM POVERTY* 11, *supra* note 9, at 11, 14-15.

³⁹ *Id.* at 30-38.

⁴⁰ *Id.* at 38-51.

⁴¹ Marc Fleurbaey, *Poverty as a Form of Oppression*, in *FREEDOM FROM POVERTY*, *supra* note 9, at 133, 145.

to die of starving.⁴² The liable person in “cases of theft, displacement of population, and manipulation of prices” can be identified, but rarely outside these situations. The different social actors that offer bad work conditions or low quality consumer products are only part of the “chain” that, Fleurbaey points out, maintains the people living in the adversities of poverty. In this sense, the economic and social rights have been violated; but their infringements are commonly “impersonal, anonymous, and structural.”⁴³

All the community is guilty of “oppression by poverty.” For this reason, comments Fleurbaey, this kind of oppression is easily behind a veil.⁴⁴ The people living in deprivation are coerced to choose between “humiliation and misery,” and hence their freedom and integrity is undermined. In these terms is that this situation is oppressive compared to the “moral standard of a just society” in which all human beings have the opportunity to attain what is necessary to lead a good quality of life.⁴⁵ Therefore, the persons have the duty to not limit the choices of the disadvantaged.⁴⁶ The problem with Pogge’s and Fleurbaey’s perspectives is that they speak in terms of negative obligations, and do not necessarily respond to the complexities and realities of the poor in the local context.

In contrast, Regina Kreide defends the appropriate assistance to the “poor” for the development of the basic needs responding to their particular circumstances and context.⁴⁷ The economic and social rights are at the center of the issue of poverty, says Kreide. She argues for a ‘social autonomy justification’ for these rights, which is based on the idea of “promoting self-

⁴² *Id.* at 144-145.

⁴³ *Id.* at 146-147.

⁴⁴ *Id.* at 150.

⁴⁵ *Id.*

⁴⁶ *Id.* at 154.

⁴⁷ Kreide, *supra* note 9, at 155.

development.”⁴⁸ Therefore, since the human being has the fundamental interest to develop “basic capacities” in order to achieve an adequate standard of living, poverty indicates the denial of social and economic rights.⁴⁹

Kreide understands that the human right issue of poverty demands positive obligations.⁵⁰ The “duty-bearers” of these obligations are individuals and institutions which have the necessary knowledge and resources for the realization of social and economic rights.⁵¹ This “expediency approach” is integrated with the “cause approach”; the latter means that the person who causes poverty by neglecting social and economic rights is a “duty-bearer” as well.⁵² This statement is based on the idea that the social structures play an important role in causing and sustaining poverty.⁵³ Those who do not cause poverty have the “substitutional duty” to ensure economic and social rights if they are able to do so. This is a duty, argues Kreide, which is owed to the distressed population, since the ability to reach a good quality of life is a universal claim.⁵⁴

The above discussions still reflect divisions in the debate about poverty from a human rights perspective. However, they assist positively in the discussion. All have in common a conception of poverty as a condition that deprives people of what is needed to live a human life; either the lack of basic needs, personal integrity or social autonomy prevent the individual to reach a decent life. Moreover, they reinforce the idea that social structures are an important element in the causes of poverty. Still a link between the search for a human life and the

⁴⁸ Regina Kreide explain that ‘social autonomy’ refers to “pursuing one’s life and developing one’s capacities even under conditions of constraint (e.g., illness, disability, unemployment), with the support of others.” *Id.* at 163. *See also id.* at 159-162 (a discussion of the ‘functionalist justification’ of social and economic rights developed by John Rawls which he identified as means to the exercise of civil and political rights, and what she call ‘extended freedom justification,’ which emphasize the interdependence of the political and civil and economic and social rights, and their flaws as well).

⁴⁹ *Id.* at 179-180.

⁵⁰ *Id.* at 170-175.

⁵¹ *Id.* at 171.

⁵² *Id.* at 175-179.

⁵³ *Id.* at 172-173.

⁵⁴ *Id.* at 176.

necessity for a structural change is left unanswered. Some suggest the discussion shall start from the assumption that the people living in poverty want to live with dignity.⁵⁵

2.3 The “Ability to do and to be” as a Starting Point to Discuss Poverty

A situation of deprivation limits the capability of individuals to exercise their human rights to which all are equally entitled.⁵⁶ The language of “capabilities” has been used recently to discuss poverty from a human rights perspective. Under this approach, the focus is turned on to “what people are actually able to do and to be.”⁵⁷ The “capability approach” to poverty was discussed in the previous chapter. It was developed by Amartya Sen and Martha C. Nussbaum, but it is Nussbaum who links the discussion with human rights, and developed the idea of “central human capabilities” based on a conception of a life with dignity.⁵⁸

Poverty can be conceived as a state of “un-freedom.” Capabilities in the analysis of poverty have been defined as the “abilities to do and to be certain things deemed valuable.”⁵⁹ The “ability to do and to be” is affected by “economic opportunities, political liberties, social powers and the enabling conditions of good health and basic education.”⁶⁰ Therefore, poverty restricts the enjoyment of human rights, since it is a constraint of the exercise of the positive notion of freedom developed under the “capability theory.”⁶¹ The capabilities approach to poverty permits to see human rights constraints beyond intentional State obstruction.⁶²

⁵⁵ Roberto Gargarella, *Right of Resistance in Situations of Severe Deprivation*, in FREEDOM FROM POVERTY, *supra* note 9, at 359, 373.

⁵⁶ FREDMAN, *supra* note 5, at 11.

⁵⁷ Nussbaum, in *Fundamental Entitlements*, *supra* note 29, at 47, 55.

⁵⁸ *Id.* at 57

⁵⁹ Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 275 (1997) [hereinafter *Human Rights*].

⁶⁰ FREDMAN, *supra* note 6, at 5 (citing Amartya Sen in *Development as Freedom* (Oxford University Press 1995)).

⁶¹ *Id.*

⁶² *Id.*

Most of the capabilities are strongly linked with the entitlements guaranteed by human rights. They include both civil and political and economic and social rights.⁶³ These rights, says Nussbaum, are secure if the citizen is placed in a position of “capability to function” in the respective area.⁶⁴ Moreover, thinking in terms of capability focuses the attention from the start on what limitations exist to effectual empowerment of all citizens. Therefore, this implies that positive duties are required to secure fundamental rights.⁶⁵

The capability approach is consistent with the equality and dignity human rights acknowledged. The complex diversity of characteristics and circumstances of human beings results in inequalities on their capabilities that make them unable to pursue their well-being; but equality of capability is “not necessarily the appropriate goal” given the complex diversity of individuals who may have different values of different capabilities and functions.⁶⁶ Furthermore, this approach is consistent with a concept of dignity that sees “a citizen as a free and dignified human being.”⁶⁷ For instance, policies aimed to address poverty shall provide citizens with the necessary tools to choose in order to have a realistic option of exercising the functions they value.⁶⁸ The people living in poverty are not seen as “passive recipient of social pattering, but as dignified free beings who shape their own lives.”⁶⁹

Certain capabilities are essential to every individual. Nussbaum endorses a list of “central human capabilities” as essential for a life with dignity that has in it a “truly human

⁶³ Nussbaum, in *Fundamental Entitlements*, *supra* note 29, at 47, 52.

⁶⁴ *Id.* at 53.

⁶⁵ *Id.* at 54-55; Nussbaum gives as example an amendment in the Indian Constitution which guarantees women one-third representation in the local councils, which was strongly influenced by a capability approach. *See id.* at 55.

⁶⁶ Nussbaum, in *Human Rights*, *supra* note 58, at 280.

⁶⁷ *Id.* at 292.

⁶⁸ *Id.* On the other hand, Nussbaum call the attention to the problem of “adaptive preference.” *See id.* This means, as Fredman outlines, that “individuals cannot exercise effective choice when social, political, or economic conditions limit their horizons of possibility to such an extent that they are unable to even identify the potential choices.” *See FREDMAN*, *supra* note 6, at 15.

⁶⁹ *Id.*

functioning,” and hence treats individuals as an end to themselves.⁷⁰ The idea of dignity in which she conceives her recent list of “central human capabilities” is one that recognized different stages and states of dependency in human beings as a “fact about human life.”⁷¹ This means that illness or an accident can affect the moral and rational function, but this does not mean that the human being has no dignity. Nussbaum says that, morality and rationality are of “material and animal nature” and not separate from the natural world as Kant suggests.⁷² The individual has a claim to having “support in the dignity” of his “human need itself.”⁷³

According to Nussbaum, a society is unjust if it fails to maintain the “central human capabilities” above a certain threshold.⁷⁴ The society must ensure that the people are actually able to achieve their conception of values. The list of capabilities includes essential freedoms and needs such as “life, emotions, practical reason, affiliation, control over one’s environment, having the social bases of self-respect and non-humiliation,” etc..⁷⁵ For instance, the people have the right of political participation but may not have effective control over their own environment. A group of residents may not have the means or knowledge to participate in the formal decision making process in matters that affect them. In this sense, these persons may have the right but not the necessary capability to exercise it.

On the other hand, human rights valued individuals’ relationships based on dignity and solidarity as well. According to Sandra Fredman, this means that there is a duty to ensure “dignity and respect, and to promote and facilitate responsibility and caring.” The social nature

⁷⁰ Nussbaum, *in Fundamental Entitlements*, *supra* note 29, at 47, 57-58.

⁷¹ *Id.* 70-71

⁷² *Id.* at 70.

⁷³ *Id.* at 74. *See also*, DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 76 (Cambridge University Press 2007) (discussing a richer notion of human dignity which includes not only the will, but also the way individuals “experience the world- their perceptions, their passions and sufferings, their reflections, their relationships and commitments, what they care about.”).

⁷⁴ Nussbaum, *in Fundamental Entitlements*, *supra* note 29, at 47, 57.

⁷⁵ *Id.* 58-59.

of individuals makes the responsibility and caring an indispensable social activity.⁷⁶ In addition, society is essential for human flourishing. In these terms, the notion of solidarity is rich, since it leaves space for diversity in values' conceptions and personal autonomy but allows the imposition of duties to citizens.⁷⁷

For Paulo Freire, solidarity requires the recognition of individuals living in poverty as persons unjustly treated. This means that true solidarity implies perceiving individuals as "subjects" and as such "should be free," and do something about it.⁷⁸ For Freire, freedom is an essential precondition for "human completion." In other words, poverty is a form of oppression produced by an "unjust social order;" by this way the humanization of the person living in poverty is denied.⁷⁹

Poverty requires more than actions that guarantee the enjoyment of human rights to promote "human capabilities" to freely achieve a good quality of life. Its social nature requires collective action by the people living in poverty in order to transform the existing social order that maintain them oppressed. People living in poverty are in a state of "un-freedom", a state of oppression that negates what every individual value most, his and her humanity, says Freire. The right to be human is achieved by recognizing the causes of the state of "unfreedom" and the necessity to struggle for "freedom to create and to construct, to wonder and to venture" and not only for "freedom from hunger."⁸⁰ This demands true solidarity that is to perceive human fellows as subjects and as such should be free and work *with* them to reach that goal.⁸¹

⁷⁶ FREDMAN, *supra* note 5, at 16-17.

⁷⁷ *Id.* at 27-29.

⁷⁸ PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 50 (Myra Bergman Ramos trans., Continuum 30th Anniversary ed. 2008) (1970).

⁷⁹ *Id.* at 44-50.

⁸⁰ *Id.* at 44-50.

⁸¹ *See supra* note 78.

2.4 Conclusion

The effective exercise of human rights promotes “human capabilities” to freely achieve a good quality of life.⁸² Not only the civil and political rights but also the economic and social rights must be addressed at the same time since they are mutually supported.⁸³ The efforts to eradicate poverty require positive and negative obligations not only from the state but also from all individuals from whom human rights demands to base their relationships in “dignity and solidarity.”⁸⁴

Poverty is an individual experience but it is a collective problem. It is a social problem and thus requires collective action by the people living in poverty in order to transform the existing social order that maintain them oppressed. This demand from those whom want to address poverty issues true solidarity that is to perceive human fellows as subjects with the capacity to construct their story and that should be free, and work *with* them to secure their human rights, and hence promote their “human capabilities.”⁸⁵ This serve as a framework for lawyers to identify an effective law practice to address poverty issues as the following chapter will explain.

⁸² See *supra* note 63.

⁸³ See *supra* note 23.

⁸⁴ See *supra* note 75.

⁸⁵ See *supra* note 77.

CHAPTER 3 - THE LAWYER'S ROLE IN THE STRUGGLE AGAINST POVERTY

As previously discussed, poverty is a social problem and thus requires from the people living in poverty to transform the existing social order that maintain them oppressed. Accordingly, the theory of popular education by Paulo Freire, gives a methodology to work with disadvantaged collectives which is consistent with the goal to promote opportunities and capabilities of the people and to further collective action. As this chapter indicates, the “special legal knowledge” with which the lawyers are endowed,¹ gives them relevant means to address poverty issues. Nevertheless, the lawyer’s role under the dominant view of law practice is incompatible with a lawyer-client relationship based in solidarity and dignity and hence presents an obstacle in the struggle for a social change. Therefore, a radical deviation of the traditional lawyer’s role is necessary to address poverty issues effectively as new theories of law practice based in Freire illustrate.

3.1 Base model to address poverty issues

Paulo Freire’s theory of popular education starts with a capability approach to poverty. Even before the appearance of the capability approach developed by Amartya Sen and Martha C. Nussbaum, Freire perceived poverty as a state of un-freedom. For Freire, it is a state of oppression that negates what every individual value most, his and her humanity.² Freire identifies, beyond deliberate state interference, the patterns and everyday practices that poses

¹ GEOFFREY C. HAZARD JR. & ANGELO DONDI, *LEGAL ETHICS, A COMPARATIVE STUDY* 23 (Stanford University Press 2004).

² PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 43 (Myra Bergman Ramos trans., Continuum 30th Anniversary ed. 2008) (1970) [hereinafter, *PEDAGOGY OF THE OPPRESSED*].

obstacles to “human capabilities.” Consequently, he develops a methodology to address poverty issues which is consistent with the goal of promoting the capability to be human.

Only by conviction can individuals act together to transform a situation, says Freire. The ability to be human is achieved through self liberation by recognizing the causes of the state of “unfreedom” and the necessity to struggle for “freedom to create and to construct, to wonder and to venture” and not only for “freedom from hunger.”³ Therefore, a first task is to encourage a conversion in the people’s consciousness.⁴ This requires the perception of the individuals as subjects in a world “*with which* and *in which*” they are living.⁵ That is, since the learning process demands that all the parties reflect and act together in unveiling the reality related to them as subjects and to objectify it as a challenge they are obliged to undertake and to act for its transformation.⁶ Nevertheless, in the dominant education practice, the individuals are treated as mere objects to work for.

Paulo Freire calls “humanitarian generosity” when a person that help others perceives herself as the master of “revolutionary wisdom.”⁷ These “attitudes and practices mirror oppressive society as a whole,” says Freire.⁸ He explains this in the context of teacher-student relationship in which the former is the subject of the “learning process” and is the one that set the agenda to which the students as mere objects adjust.⁹

Under what Freire calls the “banking concept of education,” the individual’s role is limited to “receiving, filing, and storing the deposits.”¹⁰ The result is the formation of passive recipients ready to adapt the world as it is learned from the teacher. Consequently, the

³ *Id.* at 44-50.

⁴ *Id.* at 80, 92.

⁵ *Id.* at 83.

⁶ *Id.* at 79-89.

⁷ *Id.* at 54, 60-61.

⁸ *Id.* at 73.

⁹ *Id.*

¹⁰ *Id.* at 72.

development of individuals' "critical consciousness and creative power" which would result from their active participation in the transformation of the world is controlled to the extent that does not suppose a threat to the situation that maintains the advantage of the oppressor at the expense of the oppressed.¹¹

Freire goes further and says that, the "banking concept of education" serves the interests of the oppressor. The oppressor combines it with a "paternalistic" social welfare system in which the oppressed people are treated as "marginal persons who deviate from the general configuration of a 'good, organized, and just' society."¹² This means that the "conscious" of the oppressed has to change, not the situation. Nevertheless, the key is to change the situation that maintain "oppression by poverty", and for this, the persons wanting to help disadvantaged collectives must get rid off of the "teacher-student contradiction"¹³ and trust their fellows and "their creative power" and work together as partners.¹⁴

The reflection and action is possible in a "horizontal dialogical relationship" that only the "problem-posing education" can provide.¹⁵ In contrast with the "banking concept of education," the "problem-posing education" rejects the student-teacher opposition.¹⁶ However, Freire recognizes that education is a directive practice. The challenge is not to turn it into "manipulation and authoritarianism" that would result in the inhibition of the people power to create and act.¹⁷ This can be avoided, says Freire, by the practice of "humility, tolerance and consistency" of what is said and done.¹⁸

¹¹ *Id.* at 73.

¹² *Id.* at 74.

¹³ *Id.*

¹⁴ *Id.* at 75.

¹⁵ *Id.* at 79-80.

¹⁶ *Id.* at 79.

¹⁷ PAULO FREIRE, PEDAGOGY OF HOPE 66 (Robert R. Barr trans., Continuum 2004) (1992) [hereinafter PEDAGOGY OF HOPE].

¹⁸ *Id.* at 66-67.

A true dialogue requires humility to work with the people in partnership.¹⁹ It is a process in which nobody has the privilege of the word. The “right to word” is vested in everybody and must be used with the “common task of learning and acting” based on an environment of “critical thinking.”²⁰ Nevertheless, this environment is possible if trust exists between the participants. But trust, says Freire, is not an essential pre-condition; it will come from dialogue between subjects.²¹ At the same time, the person must be critical and hence able to recognize when the people’s “power to create and transform” is undermined by the concrete circumstances of estrangement that they are facing. This only represents one of the challenges to overcome by all the participants.²²

Respect for the others’ suggestions and perceptions is also necessary to forbid a pedagogical practice of manipulation, and to pursue a real transformation. Tolerance of diversities is necessary for a peaceful coexistence and hence for the unity for an effective collective action.²³ On the other hand, the imposition of views comes from the rejection of other views; thus, to repudiate the others’ knowledge undermines the objectives of the libertarian education.²⁴ It is inconsistent with a “problem-posing education” which involves critical thinking which is nurtured with curiosity and the constant challenge of opposing views.²⁵

On “consistency,” Freire means to educate in accordance with the individual’s “democratic dream.”²⁶ A true dialogue responds to the interests of the people and not to the teacher’s view of the reality. The agenda of any education or political action must be “the

¹⁹ FREIRE, PEDAGOGY OF THE OPPRESSED, *supra* note 2, at 90.

²⁰ *Id.* at 90-92.

²¹ *Id.* at 160.

²² *Id.* at 91.

²³ FREIRE, PEDAGOGY OF HOPE, *supra* note 17, at 29.

²⁴ *Id.* at 70-71.

²⁵ *Id.* at 67.

²⁶ *Id.* at 67.

present, existential, concrete situation, reflecting the aspirations of the people,” says Freire.²⁷ The search of the “content of the program” marks the beginning of the dialogue that provides to all the participants occasions to ascertain “generative themes” that will be “decoded” by a multidisciplinary work to inspire a richer understanding.²⁸

The making of the agenda with the active participation of the “oppressed” in a dialogical process in which suggestions that reflect the views that all the participants have of the world are posed as problems to debate on, make them the “masters of their thinking.”²⁹ By this way, the “pedagogy of the oppressed” is introduced;³⁰ the individuals will be able to take conscience of their need and hence the conviction of the obligation to change it.³¹

A continuing dialogue is essential so the subordinated take part in the process of social change with a progressively “critical awareness” of their capacity as “Subjects” in that process.³² They must play a central role in the transformation of the reality that maintains them in a status of subordination. Therefore, the persons engaged in the struggles against oppression cannot employ methods inconsistent with the objectives.³³ This means that, when the individual carry out the task to organize, and in some instances to direct, it has to be in conjunction with the action and reflection of the people whom he and she is working with.³⁴

Freire stresses that persons must pay attention not to resemble in their work the “prescriptive methods of the dominant elites.”³⁵ He says that true organizing actively involves

²⁷ FREIRE, PEDAGOGY OF THE OPPRESSED, *supra* note 2, at 95.

²⁸ *Id.* at 96-97, 117-119 and 121.

²⁹ *Id.* at 124.

³⁰ *Id.*

³¹ *Id.* at 94 n.10 (citing Mo-Tse –Tung, *The United Front in Cultural Work in SELECTED WORKS OF MO-TSE-TUNG*, Vol. III 189-187 (Peking, 1967))

³² *Id.* at 127.

³³ *Id.* at 126.

³⁴ *Id.*

³⁵ *Id.* at 126.

people in the process and not the imposition of objectives.³⁶ The imposition of an individual's view of the world, what he calls "cultural invasion," serves interests of the oppressor. These practices hamper the imagination by restricting people's expression and hence it is a form of domination that maintains the dichotomy of the oppressed and oppressor.³⁷

It does not mean that a person must adapt to the people's views; instead, the parties have to enter in a dialogical process in which they identify the need and put it as a problem, "as a real, concrete, historical³⁸ situation" of which the need is only one angle.³⁹ The task will be to know how to look and go beyond of what is given to work towards a definite solution. A solution to which all professionals are necessary, says Freire.⁴⁰

3.2 The Legal Profession

Law has been considered one of the "original" occupations.⁴¹ It is not only perceived as a collection of specialized knowledge but also a tool for effective participation and influence in society.⁴² This is of special application in common law countries where the lawyers are important "in terms of lawmaking," in contrast with places with a civil law legal system.⁴³ The lawyer participates in various contexts that gave him the opportunity to arrange conventions and

³⁶ *Id.* at n.148.

³⁷ *Id.* at 152-153.

³⁸ Freire rejects the idea of history as "determinism" and explains his conception of history and, as applied in his works, as "opportunity." For him history is in constant movement, and education, not "training," is important for the subjects' role in making history. *See*, FREIRE *in*, PEDAGOGY OF HOPE, *supra* note 82, at 77-78.

³⁹ FREIRE, PEDAGOGY OF THE OPPRESSED, *supra* note 2, at 182.

⁴⁰ *Id.* at 158-159.

⁴¹ SHARYN L. ROACH, LAW AND SOCIAL CHANGE 77 (Sage Publications 2000).

⁴² Martha Nussbaum, *Cultivating Humanity in Legal Education* 70 U. CHI. L. REV. 265, 271 (2003) [hereinafter *Legal Education*].

⁴³ ROACH, *supra* note 41, at 77. Lawyers in civil law countries work only to apply the law. They are not perceived as law makers since the legislation enacted by the parliament is supreme and court's decisions are not precedents. *See* James E. Moliterno, *The Lawyer as Catalyst of Social Change* 77 FORDHAM L. REV. 1559, 1559 (2009). The creation of the European Court of Human Rights provided the lawyers from civil law countries the opportunity to participate as law makers in human rights matters through litigation since the European Court's decisions are precedents applicable to many European countries.

regulations for social life.⁴⁴ That is the case when, for instance, he or she works as “a law clerk for judges, an attorney for a global law firm that represents multinational corporations, and as a government representative.”⁴⁵ The special features of the legal profession might explain the lawyer’s potential to effect impact in public life.

A sociological perspective of the legal profession puts emphasis in standards of knowledge and professional conduct towards the client.⁴⁶ The legal profession has been considered as a “public utility” since the right to practice law is given only to its members.⁴⁷ The lawyer has the legal understanding, what Geoffrey C. Hazard and Angelo Dondi call “technique,” and access to courts.⁴⁸ Therefore, the “professional authority” vested in the lawyer has a distinctive “sociological structure” which has as its foundation and restraint in a “superior technical competence.”⁴⁹ This also means that the client is not necessarily in a position to assess the legal services provided and thus, usually has the expectation that the lawyer will do a good job.⁵⁰ On the other hand, the legal work includes a variety of tasks.

Legal practice does not consist of a single task, and will depend in the kind of client, work context, and area of Law.⁵¹ Litigation is not the only task carried out by the lawyer. Indeed, most of the lawyer’s work is done outside the courtroom. Negotiations, legal counseling, legal drafting in form of contract or legislation are part of the “mix” of legal tasks.⁵² However, legal practice usually involves the “translation” of the client’s claims into legal demands and

⁴⁴ Nussbaum, *Legal Education*, *supra* note 42, at 271.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ HAZARD JR. & DONDI, *supra* note 1, at 247.

⁴⁸ *Id.* at 23.

⁴⁹ ROACH, *supra* note 41, at 78.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 84.

remedies,⁵³ coping with ambiguity, negotiating, and looking for agreements with the legal representatives of the other party.⁵⁴ Lawyers should strive to ensure that legal discourse creates beneficial outcomes that fit with his or her clients' objectives as expressed by them in daily "non-legal language."⁵⁵

When the lawyer's client have the means to afford the high costs of legal services, a lawyer efforts are aimed to establish a long lasting relationship as a stable source for potential work.⁵⁶ When working with low-income clients, the lawyer tends to adjust the issues according to the previous cases the lawyer already worked with as a way to deal effectively with the great amount of caseload.⁵⁷ As a consequence, it is less likely that the client will demand from the lawyer a more personalized involvement with the case. If the lawyer and client disagree about desired objectives, it is more likely that the former will avoid empowering the latter and will break the relationship.⁵⁸ Some will conclude that, in the last situation the lawyer had no choice, and that at least, he was fulfilling the obligation to assist the needy.

The monopoly of legal knowledge vested in lawyers gives rise to the obligation to help the disadvantaged. The basis of lawyers' obligation to assist the needy is, as stated before, the character of the legal profession as a "public utility" since the right to practice law is given only to its members.⁵⁹ Furthermore, legal assistance is a necessary means for access to justice to

⁵³ ROACH, *supra* note 41, at 85; Lucie White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 755 (1988) [hereinafter, *To Learn and Teach*].

⁵⁴ ROACH, *supra* note 41, at 85.

⁵⁵ *Id.*

⁵⁶ *Id.* at 85-86.

⁵⁷ *Id.* at 86.

⁵⁸ *Id.*

⁵⁹ HAZARD & DONDI, *supra* note 1, at 247. In jurisdictions such as United States and Puerto Rico, lawyers' obligation to assist the needy is prescribed in their legal ethics code. See R.6.1 of the American Bar Association Model Rules of Professional Conduct R.6.1 adopted by the majority of the states. Available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html. See also Canon 1 of the Code of Professional Ethics, T. 4AD Appendix IX (1970). Available at <http://www.lexjuris.com/abogado/lexcodigoetica.htm>.

which all individuals are entitled under the notion of “equal justice for all.”⁶⁰ Hence, they have to provide legal services to those who need them.⁶¹ Nevertheless, as the next section indicates, lawyers have developed a role under a dominant view of law practice which put in doubt its effectiveness to address poverty issues.

3.3 The Suitability of the Traditional Lawyer’s Role to Address Poverty Issues

The dominant view of the lawyer’s role has been defined and sustained by the legal education and practice. Lawyers go through a formal technical and instrumental formation and practical training in which the prevailing perception of lawyers is viewed as more or less “natural.”⁶² Students learn the evolution in the court’s treatment of a certain matter. By this means, especially in common law countries, social change is learnt as being achieved mainly by judicial authority in a systematic and incremental fashion.⁶³ The changes are not seen as the result of human aspiration and strategic work; instead, they are “impersonal and disembodied.”⁶⁴

Legal education rarely includes teaching about the consequences and arrangements of the law, in a broader sense and from the perspectives of a particular disadvantaged group, says Feldman.⁶⁵ It becomes a wasted opportunity, he says, to defy “erroneous but prevailing cultural assumptions.”⁶⁶ The lawyer’s role is essentially “to technique” in the sense that it is limited to secure the means for the client involvement as provided by the existing legal framework.⁶⁷

⁶⁰ HAZARD & DONDI, *supra* note 1, at 248.

⁶¹ *Id.*

⁶² *Id.* at 25; Nussbaum, *Humanity in Legal Education*, *supra* note 42, at 271 and 277.

⁶³ Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L. J. 1529, 1587 (1995). In this article, Feldman discuss the lawyer’s role in the context of legal services for people living in poverty in the United States of America which are mainly provided by legal assistance organizations partly financed by the government. He concentrates in the limitations imposed by the applicable normative, political pressure, prevailing legal practice and legal education on the work of “poverty lawyers.”

⁶⁴ *Id.*

⁶⁵ *Id.* at 1587-1588.

⁶⁶ Feldman gives as example the assumption that everybody has the same opportunities. *Id.* at 1587-88.

⁶⁷ *Id.* at 1598-1599.

A lawyer addressing poverty issues usually engages in innovative “public interest litigation.” Even so, he practices “an essentially traditional professional role,” says Lucie White.⁶⁸ His task is to come up and succeed in cases that will advance the substantive concerns of certain groups, and not necessarily assess and challenge the social and legal structures that maintain the *status quo*.⁶⁹ Courts becomes the primary means for redressing the suffering of the subordinated people and for reallocating power; either by seeking effective judicial remedies or using “courts as forums of protest” with the aim to engage the public opinion for political action.⁷⁰ Within this role, the client is in a marginal position and just has to be a good witness.⁷¹

The lawyer is the “expert decision maker”⁷² who plays the central role in judicial proceedings.⁷³ In this setting the client rarely has an active participation; the clients are sometimes involved in advocacy campaigns at the margin of the cases, though.⁷⁴ If litigation is successful, the clients are left “mystified” regarding the particularities of the process and the lawyer’s role in it.⁷⁵ However, this is the role expected by the people in, what Gerald Lopez calls, the “regnant idea of law practice.”

Many persons barely know about the law profession and thus they can not clearly anticipate the lawyer’s role and the relationship with him. Whilst the lawyers get into the dominant view through their legal education and job, the individuals come to it by means of “popular culture” and in the streets. On the other hand, professionals in other areas and lay people (activists, volunteers, etc.) that work *for* subordinated people adopt the “regnant idea”

⁶⁸ White, *To Learn and Teach*, *supra* note 53, at 756.

⁶⁹ *Id.* at 755; *see also* GERALD LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 24 (Westview Press 1992).

⁷⁰ White, *To Learn and Teach*, *id.* at 755, 758-60.

⁷¹ *Id.* at 756.

⁷² Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 *CLINICAL L. REV.* 427, 437 (2000).

⁷³ LÓPEZ, *supra* note 69, at 24.

⁷⁴ *Id.*

⁷⁵ *Id.* at 16.

during their previous work experiences and hence act accordingly.⁷⁶ Therefore, the “regnant idea” forms a regular practice that defines the potential social interactions and strategies. In this way all the persons participate in the “re-creation” of the dominant view of the lawyer’s role.⁷⁷ However, it is a matter of debate if the “regnant idea” helps furthering real social change.

The causes and effects of poverty require alternative approaches and other actors to address them effectively. The high costs of legal representation and judicial proceedings, and the available judicial remedies might not be adequate to deal efficiently with the social nature of poverty.⁷⁸ Indeed, these structural problems have been taken into account in the development of other forums such as “Alternative Dispute Resolution” with less intervention of a lawyer.⁷⁹ On the other hand, Lucie White recognizes that public interest litigation has had impact, but points out that litigation is limited as a “device for shifting social power.”⁸⁰

The court is limited in the effectiveness of the remedies that can provide. For instance, judicial power cannot address certain issues as the inadequate use of public funds. The reliance on litigation as the main strategic tool may compel the vulnerable group to plead “permission to conform the status quo.” This is the result of the assumption that the existing forums for political opposition fit the interest of all groups.⁸¹ Disadvantaged groups become legally alienated by an unreachable system that is hostile and at the same time oblivious to their interests. Then, not surprisingly, distrust of legal culture develops and the lawyer is less likely to be perceived as possible partners in the fight against subordination.⁸² To prevent these undesired outcomes and

⁷⁶ *Id.* at 25-26.

⁷⁷ *Id.* at 25.

⁷⁸ ROACH, *supra* note 41, at 107.

⁷⁹ *Id.*

⁸⁰ White, *To Learn and Teach*, *supra* note 53, at 765.

⁸¹ *Id.* at 765.

⁸² LÓPEZ, *supra* note 69, at 47.

to create effective responses for the clients' interests, the lawyer is required to analyze beyond a "rigid institutional context."⁸³

Feldman points out how lawyers "accept adversary and bureaucratic definitions and conceptions of problems."⁸⁴ The rooted self-perception of the lawyer as the "expert decision-maker" and the "regnant idea of law practice" is the origin of the absence of different actors from other professions which can provide other relevant perspectives and information necessary to effectively define the problems and its possible solutions. Other result is that it is less likely to recognize other ways of "practical know-how."⁸⁵

The "regnant idea" does not permit the opening of other possible social arrangements with great potential to effect change.⁸⁶ The strict legalization of problems makes the client believe in its inability to be part of the solution.⁸⁷ Moreover, the lawyers' belief that the individuals are adapted to their reality and are unable to change it by themselves undermines their work; the lawyers fail to change fundamental arrangements.⁸⁸

Under the "traditional lawyer's role" he and she acts as the "main problem solver" of poverty issues, as the knowledgeable over objects that not have any knowledge.⁸⁹ By this way, the lawyer demonstrates his or her lack of trust in the capacities of the persons he is determined to help notwithstanding trust is crucial to effect change.⁹⁰ Furthermore, the belief that the individuals are adapted to their reality and thus unable to employ strategies on their behalf undermines the lawyer's work. The strict legalization of problems makes the client believes in

⁸³ Nussbaum, *Humanity in Legal Education*, *supra* note 42, at 272, 276-279.

⁸⁴ Feldman, *supra* note 63, at 1547.

⁸⁵ Feldman, *supra* note 63, at 1547; LÓPEZ, *supra* note 69, at 29.

⁸⁶ LÓPEZ, *id.*

⁸⁷ *Id.* at 48.

⁸⁸ *Id.* at 48-49.

⁸⁹ *Id.* at 72.

⁹⁰ *Id.* at 60.

her inability to be part of the solution.⁹¹ On the other hand, the everyday practices of the lawyer in her relationship with clients could reinforce their powerless status.

Lucie White points out the risk of the law practice to reinforce the subordinated status of the client. Based on the idea that social interactions involve “enactments of power” in a fluid way, White calls for the necessity to pay attention to the “enactments of power” in the everyday lawyer-client relationship in terms of how his or her practices may prevent the client’s empowerment.⁹² Further, she states that, a lawyer cannot objectify the client and put his subjectivity in classifications formulated by the lawyer. A person will be recognized as a “unique human being” when the lawyer seeks to “listen” and “be moved” without falling in the risk to cause “interpersonal domination.”⁹³

The traditional lawyer’s role may produce positive changes but it also entails practices that become an obstacle for the individuals’ endeavour to empowerment for the transformation of their reality.⁹⁴ Freire’s concept of banking education discussed previously unveils that the traditional lawyer’s role might not be compatible with the humanist approach and true solidarity required to work *with* the subordinated people.⁹⁵ For instance, the lawyer is the “expert decision-maker” and assumes the central role during the processes. From a capability approach, the traditional lawyer’s role entails practices that become an obstacle for the individuals’ capability

⁹¹ LÓPEZ, *supra* note 69, at 48-49.

⁹² See Lucie White, *Seeking “...The Faces of Otherness...”: A response to Professor Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499, 1501-03 (1992) [hereinafter, *The Faces of Otherness*].

⁹³ *Id.* at 1508.

⁹⁴ *Id.* at 1501-1503; see also LÓPEZ, *supra* note 69, at 41-43 (discussing that lawyers must be aware of the role of power in everyday struggles in shaping and responding the interpersonal relationships of the people. Not only this unveils the fallacy of the enshrined idea of fair transactions between free men and hence the potential for political resistance, as White says, but also the base to work on to take advantage of the “practical knowledge” developed by the people in their everyday lives to convert them as power strategies for the struggles against subordination.)

⁹⁵ See FREIRE, *PEDAGOGY OF THE OPPRESSED*, *supra* note 2, at 60 (saying that, “A real humanist can be identified more by his trust in the people, which engages him in their struggle, than by a thousand of actions in their favor without that trust”).

to gain control of their lives. The lawyer who wants to join the fight against poverty must be aware that the “means and ends are consistent.”⁹⁶

3.4 Lawyers’ Role to Address Effectively Poverty Issues

A new law practice to face the challenges poverty presents is crucial. As above explained, the dominant view of law practice has risks and limitations to effectively address poverty issues. For this reason, some scholars such as Gerald López and Lucie White introduce theories of lawyering influenced by Paulo Freire that look beyond the traditional lawyer’s role. In their new notion of law practice, lawyers no longer work *for* the people but *with* the people. The given structures and ways to solve problems are now just part of a broad array of alternatives to effect social change.

The lawyer who works with disadvantaged groups convenes to “help them to help themselves.”⁹⁷ The law professional have to understand that he is just a part of broader set of “problem-solving” experiences with many actors and within the clients’ social context.⁹⁸ The clients already come to the lawyer with skills to solve their everyday problems from which the lawyer have to learn in order to teach the clients the use of these skills to understand their situation and necessity to act upon it with their known practices, says López.⁹⁹

The task to stimulate reflection at the “level of consciousness” involves didactic work.¹⁰⁰ Both, client and lawyers undertake the challenge to understand and agree to assume the responsibility that the active role of the client in the solution of his problem entails.¹⁰¹ Regarding the lawyer’s role in the dialogical process, White says, “she tries to speak honestly, as a person

⁹⁶ Piomelli, *supra* note 72, at 486.

⁹⁷ LÓPEZ, *supra* note 69, at 38.

⁹⁸ *Id.* at 40.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 52; White, *To Learn and Teach*, *supra* note 53, at 763.

¹⁰¹ LÓPEZ, *supra* note 69, at 52.

with a different experience and to demand that her views be taken seriously in the group's practice of understanding."¹⁰² Additionally, says Lopez, the lawyer must be receptive to be educated in relation to "the traditions and experiences of life on the bottom and at the margins."¹⁰³

The client-lawyer relationship evolves within a process in which the parties teach and learn. The lawyer teaches when she articulates what she needs to know and carefully question the orthodox ways of "thinking and acting."¹⁰⁴ Furthermore, she educates with reference to the "legal culture," about its means of defining and dealing with situations. At the same time, she learns from the client on the law's limitations in not responding to the people's realities and from the clients' relationships and practices.¹⁰⁵ However, White and Lopez point out that, the lawyer play a distinct role in this "mutual learning process."¹⁰⁶

The lawyer might undertake a directive and coordinating role. She works in creating the forum for group pedagogy and leading the parties through its initial encounters and helping in the coordination for the first actions.¹⁰⁷ On the other hand, White and Lopez draw attention to prevent practices that embed the powerlessness of the clients by effecting "interpersonal domination."¹⁰⁸ The professional does not have the mastery of knowledge. Instead, humility and trust on the others' ability to reflect and act is necessary to engage in a "mutual appreciation and critique" to create the environment of reciprocal trust that an effective collaboration demands.¹⁰⁹

¹⁰² White, *To Learn and Teach*, *supra* note 53, at 752.

¹⁰³ LÓPEZ, *supra* note 69, at 37.

¹⁰⁴ *Id.* at 53.

¹⁰⁵ *Id.*

¹⁰⁶ White, *To Learn and Teach*, *supra* note 53, at 762.

¹⁰⁷ *Id.*

¹⁰⁸ LÓPEZ, *supra* note 69, at 51-52; White, *The Faces of Otherness*, *supra* note 92, at 1508.

¹⁰⁹ LÓPEZ, *id.* at 53; see also, White, *To Learn and Teach*, *supra* note 53, at 762-763.

Trust in others' ability is important although not crucial. As Freire, López and White recognize that this trust cannot be naïve.¹¹⁰ The lawyer has to understand that a problem is not entirely isolated from the social context that it is generated; thus “confusion and ambivalence” are still present and hence the ability for self-transformation and action is undermined. The challenge for the lawyer will be to prevent the use of practices of domination whilst challenging the clients by “exposing the ways that subordination distorts the human capacities of all the participants and the ways the oppressor’s perspective continues to reemerge in their midst,” says White.¹¹¹ The lawyer must treat the clients as human fellows with the potential for transformation without falling in the risk of undermining their capacity.¹¹²

Lawyering with people living in poverty entails strategic work within which the dialogical process’ still goes on. Poverty is of social nature, thus “in order to effect lasting change, the poor must organize and act for themselves.”¹¹³ This process necessitates the continuation of the dialogue process in which the lawyer act like a teacher taking advantage of, what López calls, “practical moments in ordinary workdays,” to empower the client.¹¹⁴ Within this process, all the participants reflect on their experiences and knowledge and delineate strategies.¹¹⁵ The lawyer’s role is to nurture “sensibilities and skills compatible with a collective fight for social change,” says Lopez.¹¹⁶ This is crucial since the definitions and solutions given

¹¹⁰ LÓPEZ, *id.* at 50; White, *To Learn and Teach*, *id.* at 762.

¹¹¹ LÓPEZ, *id.* at 53; White, *To Learn and Teach*, *id.* at 762.

¹¹² LÓPEZ, *id.* at 50, 53.

¹¹³ White, *To Learn and Teach*, *supra* note 53, at 765 (citing Steven Wexler in *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970)).

¹¹⁴ For instance, the client can carry out investigations, be the leader in a reunion before agencies, etc.. See LOPEZ *supra* note 69, at 62-64; see also White, *To Learn and Teach*, *supra* note 53, at 765.

¹¹⁵ Lopez, *id.* at 37.

¹¹⁶ *Id.* at 38.

by the established structures might not be effective tools to challenge the existing social order of domination.¹¹⁷

The lawyer helps the clients to translate moments of subordination by identifying them as occasions for defiance. The task of the lawyer is to empower the client to speak for themselves as “critics and strategists” with the objective of fostering pragmatism and creativity for the craft of “context specific acts of public resistance.”¹¹⁸ By these means, the clients perceive their situation of subordination not as impossible to transform but as a reality in a changing world where they can work to shift the relationships of power.¹¹⁹ They become active players in the transformation of their reality within a “larger network of cooperating problem-solvers.”¹²⁰

An effective collaboration is carrying on from a multidisciplinary and multisectorial work. The technical education in law schools narrows the possibilities of law practice.¹²¹ Therefore, people from other disciplines are necessary. Not only is a multidisciplinary and multisectorial work desirable to help in the creation and implementation of strategies but also to deal more effectively with the array of problems inherent in the complex realities of an entire community.¹²² The point is to learn to work as a team with the client and actors from various fields and sectors by taking the best of the others’ knowledge.¹²³

The lawyer’s role discussed by Lopez and White is not free from challenges to overcome. As already mentioned, the clients might be in a situation that undermine their potential to engage actively in the learning process towards the transformation of their reality. To break with the

¹¹⁷ *Id.* at 60.

¹¹⁸ White, *To Learn and Teach*, *supra* note 53, at 764.

¹¹⁹ *Id.* at 763.

¹²⁰ LÓPEZ, *supra* note 69, at 55.

¹²¹ White, *To Learn and Teach*, *supra* note 53, at 763.

¹²² LÓPEZ, *supra* note 69, at 55.

¹²³ *Id.*

expectations and entrenched practices of the traditional lawyer's role is another challenge that can be more demanding to overcome, for instance by women lawyers.¹²⁴

Lawyers who work with people living in poverty usually operate with time and resources limitations. However, these limitations and the lawyers' capacity to overcome them with creativity "define their potential for change," says Lopez.¹²⁵ Is by "trial and error" that the parties define the strategies, roles and networks that will be feasible for a collective action towards a transformation.¹²⁶ Meanwhile, the lawyer works to the incremental achievement of "less obviously radical tasks."¹²⁷

The lawyer's role as perceived by Lopez and White promote a lawyer-client relationship based in human rights. Human dignity is "fundamentally relational" and hence informs the practice of lawyers,¹²⁸ especially when working with disadvantaged groups. Therefore, the lawyer honors the human dignity¹²⁹ of the individual who seek his help by working in partnership with the aim of reducing his dependency by "removing a stumbling-block," says David Luban.¹³⁰ Accordingly, the lawyer's role under the advocacy model proposed by Lopez

¹²⁴ Myrta Morales Cruz brought this point from her work experience with communities.

¹²⁵ LÓPEZ, *supra* note 69, at 80; *see also* Lucie E. White, *African Lawyers Harness Human Rights to Face Down Global Poverty*, 60 ME. L. REV. 165 (2008) (discussing the necessity of innovative approaches to address poverty issues. She examined the work of a "new generation of African lawyers" who were successful in their economic and social rights advocacy. These lawyers, according to White, have in common that they are practical and realistic about the tools available and in what they can accomplish. They refuse to accept the limits that human rights traditional jurisprudence imposes, and look for all possible accountable actors by using "human rights values" to create positive obligations in domestic and international societies.).

¹²⁶ LÓPEZ, *supra* note 69, at 66.

¹²⁷ *Id.* at 65.

¹²⁸ David Luban, *The Inevitability of Conscience: A Response To My Critics*, 93 CORNELL L. REV. 1437, 1454 (2008) [hereinafter, *To My Critics*].

¹²⁹ Luban explains that his conception of human dignity includes will and experiences, and that it is essentially "relational." Therefore, the lawyer honors individuals' human dignity by honoring their "being" which comprises, not only the will, but also the way they "experience the world- their perceptions, their passions and sufferings, their reflections, their relationships and commitments, what they care about." *See* DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 76 (Cambridge University Press 2007) [hereinafter *LEGAL ETHICS AND HUMAN DIGNITY*].

¹³⁰ *See* LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *id.* at 92-94. According to Luban, "Concerns in human dignity and human rights motivate the pursuit of justice." For this reason he inserts human dignity in the discussion of legal ethics for its relation with human rights. *See* Luban, *A Response to My Critics*, *supra* note 128, at 1453.

and White makes the law professional suitable to work with disadvantaged collectives in the struggle against poverty in accordance with Freire's methodology.

Lopez and White have developed theories of law practice compatible with a collective action to effect social change. Under their advocacy model, the lawyer perceive their human fellows as subjects with the capacity to craft their story. Consequently, the new lawyer's role entails practices that promote the capabilities of the people "to do and to be," because it pay attention from the start on what limitations exist to the full exercise of its clients' human rights and their effectual empowerment. Furthermore, it goes beyond the definitions and tools given by the existing social order to better address poverty issues.

3.5 Conclusion

The law profession has attributes to contribute in the fight against poverty. Nevertheless, a dominant view of law practice had shaped the lawyer's role which prevents the clients' empowerment notwithstanding they have to play a central role in the transformation of their reality. Based on Freire's theory of popular education, Lopez and White developed "theories of lawyering" consistent with a collective action toward social change. Under their advocacy model, lawyers work *with* their clients within a relationship based on solidarity and dignity that furthers a mutual learning process for an effective collaboration to address poverty issues. Lawyers deviate from their traditional role to engage in strategic work and be part of a broad collaborative network to promote "human capabilities to do and to be." The case studies in the next chapter illustrates how the lawyer's role in the new theories of law practice looks like.

CHAPTER 4 – A LEGAL AID CLINIC EXPERIENCE WITH PUERTO RICAN COMMUNITIES

This chapter will examine the experience of a legal aid clinic in Puerto Rico that worked directly with communities living in poverty. The community development section of the legal aid clinic of the University of Puerto Rico-School of Law was chosen because its advocacy model and methodology is based on the theories of law practice developed by Gerald López and Lucie White, discussed in the previous chapter. The effectiveness of this alternative lawyer's role to deal with poverty issues and to advance human rights and hence promote the capabilities of disadvantaged collectives will be analyzed in the light of its application by the legal clinic in their work with three Puerto Rican communities with similar problems but with different contexts. Poverty in the political, social, and economic background of Puerto Rico, and the rights discourse and the lawyer's role within this picture will be first discussed to give an idea of the context the legal clinic worked with the communities.

4.1 Poverty in Puerto Rico

Puerto Rico is the smallest island of the Greater Antilles of the Caribbean. From being a Spanish colony, Puerto Rico became in 1898 a possession of the United States (hereinafter US).¹ Presently the island is a Commonwealth with its own constitution and government under the plenary power of the US.² That means that the US Constitution, the federal laws, and the

¹ After the defeat in the Hispanic-American War of 1898, Spain ceded Puerto Rico by signing the Treaty of Paris which established that the "civil rights and political conditions of the natural inhabitants of the territories ceded to the United States will be determined by Congress." See PEDRO A. CABÁN, *CONSTRUCTING A COLONIAL PEOPLE, PUERTO RICO AND THE UNITED STATES, 1898-1932*, 1 (Westview Press 1999).

² By this way US managed to take Puerto Rico out of the United Nations list of cases; in conjunction with this political strategy, a wave of repression was employed against the independence and labor movements. *Id.*

international treaties subscribed by US apply to Puerto Rico.³ Through its history, poverty and social inequality have been an issue.

Puerto Rican society began its great transformation during the Spanish regime. Race and skin color were determinant in the society and economy of Puerto Rico, notwithstanding the reality of racial mixture that resulted by the importation of slaves and immigration of Europeans and inhabitants from neighboring countries. Class and gender as well, served as the basis for distribution of power and opportunity.⁴ The vast majority of the Puerto Rican population lived under poverty, malnutrition and sickness, a situation that continued under the new colonial regime.⁵

The change of the Spanish colonial regime for the American at the end of 19th century brought modernity, although poverty remained. The former institutions and legal systems were immediately dismantled and replaced by US institutions.⁶ At this time, around 80% of the population lived in poverty, and unemployment, housing, education, malnutrition and sickness were the main social problems.⁷

The island passed through various reforms in its development and social policy.⁸ The economy based mainly in agriculture was converted into an industrialized economy that concentrated in the urban areas. This brought a massive migration of Puerto Ricans from rural areas looking for employment in the new industries mainly of manufacture. The new social and

³ Efrén Rivera Ramos, *History of the Political Autonomy of Puerto Rico as a Commonwealth: Defining Elements of the Puerto Rican Autonomy and its Sources of Law*, 74 REV. JUR. U.P.R. 24, 258 (2005) (in Spanish).

⁴ At the end of 19th century, the population not even reach 1 million from which 80% were illiterate. There were no universities and those wanting to receive higher education had to go to another country. See EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY, THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* 46-47 and 160 (American Psychological Association 1st ed. 2001).

⁵ LINDA COLÓN REYES, *POBREZA EN PUERTO RICO, RADIOGRAFÍA DEL PROYECTO AMERICANO* 159 [Poverty in Puerto Rico, Radiography of the American Project] (Luna Nueva 5th ed. 2006) (2005).

⁶ CABAN, *supra* note 1.

⁷ COLÓN, *supra* note 5, at 207.

⁸ *Id.*

economic reforms controlled some conditions of extreme poverty.⁹ Nevertheless, the modernity and income generated concentrated on a small percentage of the society.¹⁰

Poverty is one of the greatest issues in Puerto Rico, but one of the least discussed, says Colón.¹¹ According to the last census of the Puerto Rican population in 2000, around its 50% lived under poverty.¹² There is a 25% of that percentage that lives under extreme poverty. This means that a fourth of the inhabitants are living without any income, lacks of basic education, are homeless or live in precarious housing in dangerous areas, and under unstable physical and emotional health conditions.¹³ On the other hand, live without income in a capitalist society as Puerto Rico, where consumption is given great relevance, is difficult, says the Puerto Rican sociologist, Linda Colón Reyes.¹⁴ Therefore, the people have developed means for subsistence outside the formal economic structures.¹⁵

Housing, unemployment, health, education and violence are some of the social problems that actually affect the Puerto Rican society. The lack of housing makes people take abandoned private and public lands to construct their houses, and public housing projects have been created by the government, as well. However, presently there is a crisis on housing availability¹⁶ and

⁹ For instance, the mortality rates due to epidemic diseases decreased as well the illiteracy rates. The standard of living for many Puerto Ricans improved and is higher than most of the Latin American and Caribbean countries, although it is significantly lower than in the US. *See*, RIVERA, *supra* note 2, at 62; *see also* COLÓN, *supra* note 5, at 219.

¹⁰ COLÓN, *supra* note 5, at 219.

¹¹ *Id.* at 302.

¹² *Id.* at 340

¹³ *Id.* at 339.

¹⁴ *Id.* at 259.

¹⁵ According to Colón, networks for mutual assistance between families and friends, cheap work, and informal credit are some means for survival are some means of substance created by the Puerto Ricans. *See id.* On the other hand, various social assistance programs are available. Nevertheless, says Colón, these programs are selective, the amount provided does not correspond to the cost of living, and since the money come from the federal government their intromission in the decision making for the implementation prevents the creation of alternative social policies suitable for the Puerto Rican needs. *See id.* at 235.

¹⁶ The waiting list for public housing reach 7,000 petitioners and for subsidized housing 14,000. Francisco Vargas, *Un Inmenso Reto la Vivienda Social [A Great Challenge Social Interest Housing]*, EDITORIAL DE EL NUEVO DÍA, September 29,2009, at 52.

forced evictions, a situation from which many social movements and community struggles have emerged and to which the government responded with repression.¹⁷

In a country with a population of 3.8 million, 1,325,000 are active in the labor market; according to the official statistics, only 16.5% of the Puerto Ricans are unemployed.¹⁸ Access to adequate public education system and health services is a problem in Puerto Rico where almost 50% of the students do not complete secondary school,¹⁹ and the health system is constantly under criticism for its poor quality and lack of resources.²⁰ To all these problems is added the high rate of criminality that concentrates in low income areas.²¹

The system of rights in Puerto Rico failed to deal with the social problems that affect a considerable percentage of its population.²² Police profiling, brutality against minorities and poor communities are the main human rights problems in Puerto Rico, according to Amnesty International 2009 Annual Report.²³ This exacerbates the violence and criminality from whose main victims are the residents of low-income areas.²⁴ On the other hand, despite the existence of legal aid programs, there is a serious problem of access to justice.²⁵ These situations reveal that the formal declaration of rights does not mean their enjoyment in reality.

However, rights' discourse had played a central role in the Puerto Rican society. Rights claims can be made against the federal government under the US constitution, and against the

¹⁷ COLÓN, *supra* note 5, at 324-325. For a comprehensive historical account of social movement and community struggles for housing and the role of the government, see LILIANA COTTO MORALES, *DESALAMBRAR [Cut the Wire]* (Editorial Tal Cual 2006).

¹⁸ The numbers provided came from the July 2009 official statistics from the Department of Labor and Human Resources of Puerto Rico, available at <http://net-emploe.org/alms23/index.jsp>.

¹⁹ COLÓN, *supra* note 5, at 293-294.

²⁰ *Id.* at 318-320.

²¹ *Id.* at 296-299.

²² RIVERA, *supra* note 3, at 215.

²³ 2009 Annual Report, Amnesty International, available at <http://thereport.amnesty.org/es/download>.

²⁴ COLÓN, *supra* note 5, at 296.

²⁵ RIVERA, *supra* note 4, at 214.

local government in virtue of the “internal regime of rights.” These parallel systems for legal claims are well structured and maintained by a network of institutions that include judicial system, an “organized legal profession,” and legal services.²⁶ Further, the “language of rights” has been essential in the “political discourse” to which the lawyer has contributed in a great extent for “its visibility and great weigh in public life.”²⁷

On the other hand, the US liberal notions of rights have influenced rights’ discourse in Puerto Rico. The demands have been shaped under the form of individual rights, as defined by the US Supreme Court, over collective claims.²⁸ A process reinforced when the section of the Puerto Rican constitution that guaranteed social and economic rights was eliminated by the US Congress after being ratified by the islanders.²⁹ However, the existence of a regime of rights and a long tradition of a rights discourse failed to deal with the social inequalities that prevent the persons to fully exercise their rights.³⁰ Even though the internal democratic government is characterized by high levels of electorate participation, it is not translated “into effective power to influence fundamental decisions” especially to the disadvantaged collectives.³¹

Poverty in Puerto Rico is manifested in a context of “dependent capitalism” as developed through its history. It is represented in the inability to enjoy the goods, services and political power that the island’s level of development can produce and a great part of the society don’t have access, says Colón.³² On the other hand, rights discourse as developed in Puerto Rico failed to discuss poverty in the light of economic arrangements and its structural roots.

²⁶ *Id.* at 217.

²⁷ *Id.* at 218.

²⁸ According to Rivera, this distinction would allow the extension of rights defined as “fundamental” while “preserving the basic subordination inherent in a colonial system.” *See id.* at 212.

²⁹ This is the section 20 which guaranteed the right to housing, work, social security, etc.. *Id.* at 214.

³⁰ *Id.* at 215.

³¹ *Id.* at 229.

³² COLÓN, *supra* note 5, at 249.

The problem of poverty in the island as well has to do with the lack of political participation and the self perception of the individuals. According to a study made by Colón, the people living in poverty doubt their capacity to transform their reality.³³ The psychological dependence on the state and political parties is translated into inaction, says Colón. Only scarce groups are conscious of their capacity to engage in collective action to change their situation.³⁴ The following case studies are about these groups and the lawyer's role in their struggles.

4.2 The Legal Aid Clinic and Its Work with Low Income Communities

As part of its curriculum, the University of Puerto Rico-School of Law has “clinical legal education” through “in-house live-client clinics.” Its purpose is to provide the students with practical experience to develop the skills and values of the legal profession whilst providing legal assistance to disadvantaged collectives under faculty supervision.³⁵ The students are responsible to handle legal claims of real clients since they are allowed to practice law in virtue of the “student practice rule.”³⁶ The legal aid clinic is divided in sections that focus in areas, and the advocacy model employed by each section may differ.

The community development section of the legal aid clinic is aimed to provide legal advice for disadvantaged communities in order to promote their self-management. The professor of this section, Myrta Morales Cruz, states in her syllabus that the students will develop the necessary skills to carry out initiatives for the benefit of the community based on the advocacy model developed by Gerald López and Lucie White, discussed in the previous chapter.

³³ *Id.* at 262.

³⁴ *Id.*

³⁵ Information about the legal aid clinic in the University of Puerto Rico-School of Law is available in Spanish at http://lspo.law.upr.edu/portal/page?_pageid=33,150922&_dad=portal&_schema=PORTAL. See also Elliott S. Milsten, *Clinical Legal Education in the United States: In-House Clinics, Externships and Simulations* 51 J. LEGAL EDUC. 375 (2001) (explaining the characteristics and different methodologies in clinical legal education).

³⁶ See Milsten, *supra* note 35, at 376. In Puerto Rico, the Supreme Court permits students to practice law under certain conditions. See R. 12 of the Rules of the Supreme Court of Puerto Rico available in Spanish at, <http://www.ramajudicial.pr/leyes/supremo/index.htm>.

Accordingly, the students have to identify with the community the problems and its possible solutions. One of the central objectives of Morales is to expose the students to the theory of popular education as developed by Paulo Freire; thus they use its methodology when working with the community.

The legal aid clinic demands from the student practitioner a non-traditional lawyer's role. According to its syllabus, the tasks might include community organizing, working with professionals of other disciplines,³⁷ reunions with different sectors including the community and government agencies, research and drafting of legal documents, preparation of legal workshops for the communities, lobbying, and litigation. Further, the professor requires from the students a real commitment to engage in the fight against poverty, availability, and sensibility to work hand on hand with residents of low income communities, and to be creative with the use of Law. The professor and her students have had the opportunity to apply the alternative advocacy model in their work with various communities.

4.2.1 *Special Communities*³⁸

The leaders of some communities in danger of being displaced approached the legal clinic.³⁹ These communities were protected by a special law that provides for initiatives to

³⁷ The clinic had worked with practitioner students of Architecture, Social Work, and Social Community Psychology.

³⁸ The communities of this first case study are identified as *special communities* because they meet several factors enumerated by a law which provides for these communities the necessary conditions and resources for their community development. See Ley para el Desarrollo Integral de las Comunidades Especiales de Puerto Rico, *Law for the Development of Special Communities in Puerto Rico*, Law 1 of March 1st, 2001. art. 2. [hereinafter *Law of the Special Communities*] (as amended by the Law 232 of August 27, 2004) (P.R.). To be protected by this Law, the communities have to meet several factors, such as: "socioeconomic rates, deficient infrastructure, problematic environmental conditions, individual and collective housing conditions, the existence of high percentage of illiteracy, and of persons under poverty level, high rate of unemployment, single headed families, and deficiencies in the provision of basic services." See *id.* at art. 8.

³⁹ See Myrta Morales Cruz, "No me des el pescado, enséñame a pescar" "Do not hand me fish, teach me how to fish," *Community Lawyering in Puerto Rico: Promoting Empowerment and Self-help*, INT'L J. CLINICAL LEGAL EDUC. 83 (Dec. 2007) (narrating the transformative process of change-oriented lawyering model employed in the process conducted primarily by the community leaders to amend the Law for the Development of Special

promote their empowerment and self management.⁴⁰ The communities endorsed the public policy of the law given the success in its implementation resulting in the well being of its residents. Nevertheless, the municipal authority wanted to take their lands for the development of social interest housing projects.⁴¹ The problem was that the communities in question did not have access to the municipality's plans and when they finally got some information, they noticed that many of them were excluded from the new plans.⁴² Further, they understood that this situation would result in the breakdown of their communities and frustrate their development.⁴³

The communities wanted to remove obstacles to their development. They wanted to know if the special law provided any protection against the arbitrary use of the eminent domain process which they perceived was only applied to low income communities. Thus, they also sought the possibility to claim in the courts the discriminatory use of the eminent domain power. According to the students' legal research, the law did not provide a mechanism of protection against the use of the eminent domain power and the possibilities to stop it in the courts were minimal under the applicable normative.⁴⁴ The community recognized the benefits the law provided for their empowerment and wanted to make it stronger.

The legal clinic suggested the possible alternatives available and all concluded that lobbying for an amendment to the law was the proper one. They agreed to introduce as an extra requirement in the eminent domain procedures a joint resolution by the members of the Puerto

Communities that ends in the inclusion of a powerful mechanism of participation in the decision making process in cases of expropriation.).

⁴⁰ *Law of the Special Communities*, *supra* note 38.

⁴¹ The Constitution of Puerto Rico permits the taking property for 'public use' after the payment of just compensation and in accordance with the law. *See* Art. II Sec. 9 of the Constitution of the Commonwealth of Puerto Rico (1952).

⁴² According to the community many of its residents do not meet some of the requirements for eligibility such as the old people, non-US citizens, and people with an income less than a certain level in order to be part of the new housing complex. *See*, Morales, *supra* note 39, at 85.

⁴³ *Id.* at 86.

⁴⁴ *Id.* at 85.

Rican legislative body. The students prepared a draft for the proposed amendment and in conjunction with the communities engaged in a lobbying process which culminated in the amendment of the Law that included a powerful mechanism of public participation.⁴⁵ The current normative was amended by the Law 232 and now 75% of the residents of the targeted community has to vote in favor of the commencement of the eminent domain procedures.⁴⁶ This was the result of a process in which not the lawyer but the communities played the leading role.

Instead, the student practitioners carried out a broad array of tasks in partnership with the communities. The students made legal research and the drafting of the proposed amendment. They help in the preparation of the community leaders for the public hearings and lobbying process. Further, the students collaborated in various activities carried out by the communities to promote the proposed amendment including press conferences, public appearance in various means of media, and protest demonstrations.⁴⁷

During the process, many alliances were formed with other communities and with members of all the political parties.⁴⁸ On the other hand, the legal clinic linked one of the communities with the “Community Design Workshop of the University of Puerto Rico’s School of Architecture.” This partnership resulted in the design of a development project in accordance with the interests and needs of the community.⁴⁹

The work of the legal clinic involved “pedagogy based on dialogue and strategic work to promote client empowerment,” says Morales.⁵⁰ She explains that it was a “mutual learning process” in which they learnt from the communities about their daily reality, politics, etc.; the

⁴⁵ *Id.* at 87.

⁴⁶ *Law 232 of August 27, 2004, sec. 2 (P.R.).*

⁴⁷ Morales, *supra* note 39, at 88.

⁴⁸ *Id.* at 87-89.

⁴⁹ *Id.* at 88.

⁵⁰ *Id.* at 92.

community leaders, on the other hand, increased their knowledge of law and the legislative process was “demystified for them.”⁵¹ This learning process included strategic work which was defined by the legal clinic in conjunction with the community leaders. By letting the clients play the leading role in the activities, public hearings and lobbying process, the legal clinic promoted their empowerment. The leaders “gained power as they speak and argue about their situation, about the law, about how the law should be... Their voice is independent from our voice as lawyers,” says Morales.⁵²

The pedagogical and collaborative process was not oblivious of challenges to overcome. Initially, the community leaders wanted to bring their claims to the court notwithstanding the legal clinic explained how difficult it would be in the light of the applicable normative. The proposal to include a referendum to approve the eminent domain process, as well, was subjected to huge debates among the members of the communities and the legal clinic. Some feared that the proposal would make the approval of the amendment more difficult. Finally, they decided just to mention it as a proposal of the communities “as a way of making the bill even more democratic.”⁵³

The proposal was well received by members of the legislative body. Then it was not a surprise the strong oppositions demonstrated by important political institutions such as the Federation of Mayors who disapproved of the idea to consult their residents.⁵⁴ Another challenge was to define the client when working with issues that affect various collectives. In this case, the legal clinic worked with committees chosen democratically by the communities.⁵⁵

⁵¹ *Id.*

⁵² *Id.* at 93.

⁵³ *Id.* at 88.

⁵⁴ *Id.*

⁵⁵ *Id.* at 92 n.50.

The struggle did not end with the approval of the proposed amendment, it still goes on. The municipalities know that the communities protected by the Law 232 have a powerful mechanism against eminent domain processes. This is perceived by some mayors as a great obstacle for the city's development. Indeed, with the change of government two bills for the partial or complete derogation of the law were proposed.⁵⁶ Further, a municipality filed an expropriation procedure against some members of the protected communities without consulting them. The legal clinic judicially challenged in the light of the amended law the commenced eminent domain processes which were dismissed by the courts.⁵⁷ However the strongest counter force against these threats was found in the communities.

The communities created acts of resistance before threats against *their law*. They participated actively in public hearings, made protest marches, and engage in lobbying. Additionally, various community leaders formed the "Puerto Rico Alliance of Community Leaders." They organize other special communities through all the island and present the Law 232 as an example of what can be done if all work together.⁵⁸ All these initiatives have been taken by themselves with minimum intervention from a lawyer.

The lawyer's role in the case of the Law 232 was not traditional. The professor and students of the legal aid clinic worked hand on hand with the community leaders in a process in which the leading role was played by the communities. This partnership resulted in the inclusion of a powerful mechanism of community participation and in the empowerment of citizens now able to resist moments of domination. After the successful outcome of this case, various

⁵⁶ *Id.* at 89.

⁵⁷ *Id.*

⁵⁸ *Id.*

communities in danger of displacement contacted the legal aid clinic seeking advice. Such was the case of the community of Mainé, which is to be discussed next.

4.2.2 Community of Mainé⁵⁹

Mainé is a low income community located in a very valuable land near downtown of the municipality with the highest income per capita of Puerto Rico. Its mayor had initiated an eminent procedure against them. In contrast with the communities of the previous case study, they were not protected by the Law 232, thus the mayor was not obliged to consult them in order to start the procedures for the expropriation of their land. Many residents left the community gradually after receiving compensation by far lower than the real value of their land.

After being denied legal services from various lawyers, the remaining residents approached the legal clinic for help. The lawyers that rejected their case argued that nothing can be done against the eminent domain power of the State and the only available remedy is to fight the just compensation. However, the community knew something was wrong. According to the information they got, the mayor's plans was to construct a housing complex for middle income families as part of a big plan to stimulate the economy of the urban area.

The “warriors,” as the remaining residents call themselves, wanted to stay in their land and houses by them acquired with a lot of effort. They developed strong ties between them and their land which for some was a source of food. Furthermore, being displaced to give housing to wealthier people was not a ‘public use’ that will justify an expropriation as required by the applicable normative. They wanted to know what they can do to stay and be part of the social and economic development of the city.

⁵⁹ The account of the case studies in subchapters 4.2.2 and 4.2.3 are based in the personal experience of the author of this paper work.

The legal clinic consulted with the community various alternatives. After an extensive research, the professors and students found that given the nature of the planned housing project, the municipality required the approval of the Agency of Planning⁶⁰ in order to start the expropriation. The importance of the administrative procedure was that it provided a space for the participation to the people who will be affected by the proposed development projects. The legal clinic and the community agreed that the residents will investigate in the agency the compliance by the government with this procedure and demand active participation. Additionally, they decided to challenge in the courts the eminent domain procedures arguing that the displacement of a poor community to bring wealthier persons was not a ‘public use’ according to the interpretative jurisprudence regarding eminent domain procedures.

During the development of the formal proceedings, the legal clinic and the community engaged in strategic work. With the help of the legal clinic, the residents of Mainé learnt to use the media to expose their story to the public. The discriminatory use of the eminent domain process against the poor communities and the unfair treatment received by the court and government agencies were exposed by them through the media. The legal clinic connected them with other community organizations with similar problems to share experiences and for support.

The community leaders became more active in public activities regarding issues on poverty and housing. For instance, they went with the professors and students of the legal clinic to the Social Forum of Puerto Rico 2006 where the residents actively participated and responded to questions of the public about their situation. The leaders as well joined press conferences in support of other community struggles. Furthermore, the community made the arrangements to be

⁶⁰ According to an Executive Order, the municipalities require the approval of the Agency of Planning, which is aimed to safeguard a space for public participation, the proper planning, and watch the use of public funds, previous the presentation of a petition of expropriation. Orden Ejecutiva Núm. 4 de 20 de enero de 2004.

named as a Special Community in order to get the protection that the Law 232 gives against expropriation.⁶¹ They even communicated with the Puerto Rico's governor, and proposed in conjunction with the "Community Design Workshop of the University of Puerto Rico's School of Architecture" a development project to the municipality to demonstrate that it was not necessary to displaced them in order to promote the social and economic development of the city. However, the efforts were unsuccessful.

On the other hand, the administrative proceedings were paralyzed since the municipality insisted that they do not have to get approval from any agency. In addition, the court's proceedings were not conducted fairly. The judges limited the discovery of evidence notwithstanding the constant claims made by the legal clinic regarding the resistance of the municipality to provide information about the proposed project. Also, one of the judges not even permitted the legal clinic to present the arguments of the community. Finally, the court declared, without evidence, the legitimacy of the 'public use' argued by the municipality and ordered the continuation of the eminent domain procedures. The legal clinic and the community decided to appeal the decision to a higher court.⁶²

Even though the proceedings were suspended by the presentation of the appeal, the municipality was keen to kick out the remaining residents from their lands. They requested from the primary court an order of eviction which was granted. The court gave the residents of Mainé 5 days to leave their houses. At the request of the legal clinic the higher court ordered the

⁶¹ *See supra* note 46.

⁶² In Puerto Rico, the final decisions of the primary courts can be revised by the Court of Appeals. Once the recourse is presented, the Court of Appeals does not have the discretion to reject the appeal, and the proceedings in the lower courts are automatically suspended unless the case is included in the enumerated exceptions. The case of the community of Mainé was not among the exceptions enumerated by the relevant normative. *See* Regla 53.9 de Procedimiento Civil, 32 L.P.R.A. Ap. III; Regla 18 del Reglamento del Tribunal de Apelaciones de 20 de julio de 2004, 4 L.P.R.A., Ap. XXII-B.

Municipality to stop the eviction process.⁶³ After this situation, the community made a press conference and denounced the illegal action of the primary court and municipality. From that moment, the community were not subjected anymore to threats of evictions, notwithstanding the possibility to be evicted remained.

Finally, after more than a year, the Appellate Court decided on the cases. The legality of the public use declared by the primary court was overruled. The appellate judges stated that it was not correct to decide on ‘public use’ without a proper discovery of evidence, and that the municipality is not exempted of the requirement to get the approval from the relevant agency to start eminent domain procedures to carry out development projects. In a press conference called by the community of Mainé, one of its leaders said, “We are going to be very aware of the municipality, agencies, and courts to make our rights be respected.”⁶⁴ Presently, the case is pending in the Supreme Court of Puerto Rico since the municipality appellate the decision.

Given the context of this case, the legal clinic relied too much on litigation to address the problems of the community. Nevertheless, the professor and students do not maintain at the margin of the judicial process their clients. Indeed, the residents of Mainé had an active role in the decision making process of the case after the lawyers explained them the incidences of the procedures. The lawyers also work *with* the community leaders in the creation and implementation of strategies to promote their cause.

The “warriors” of Mainé learnt not to solely rely on the possible outcome of the judicial case. By assuming a leading role in the implementation of strategic work and their active participation in the decision making process of the case in courts, the community of Mainé

⁶³ Marian Cobián, *Detienen Órdenes de Desalojo (Orders of Eviction Blocked)*, PERIÓDICO PRIMERA HORA, Abril 3, 2007.

⁶⁴ Mara D. Resto Vélez, *Prevalece Reclamo de Comunidad [Community’s Claim Prevails]*, PERIÓDICO EL VOCERO, July 22, 2008.

became empowered. Notwithstanding the constant failures, they maintained resistance before the unfair treatment received by the different government institutions. They know their rights and demanded the government publicly to be respected. Furthermore, from being spectators they became part of a coalition of Puerto Rican communities to fight against the displacement of poor communities. One of the active participants of this coalition is Gladiolas Vive Inc. (*Gladiolas Lives, Inc.*) created by the residents of the community to be presented in the next case study.

4.2.3 *Las Gladiolas Public Housing Project*

Located in the sector called the *Milla de Oro* (Mille of Gold), also named the Bank Zone, the community Las Gladiolas was and still face more than a threat of displacement. Las Gladiolas is a public housing project created in the 70s and in the year 2000 its demolition was announced as part of a public policy aimed to eliminate “severely distressed” public housing.⁶⁵ One year later, the children’s library was eliminated to establish a government office to commence the relocation process of residents notwithstanding the application for demolition was not even submitted to the corresponding agency.⁶⁶

Some residents approached the legal clinic with various concerns. They narrated that from the moment the demolition was announced, the private company contracted with public funding for the management of the building ceased to provide services for the reparation and maintenance of the buildings causing dangerous and unsanitary conditions and difficulties for the daily life of the residents especially for the elderly and sick. Furthermore, they were receiving

⁶⁵ Information about the federal program Hope VI available at, <http://www.hud.gov/offices/pih/programs/ph/hope6/about/index.cfm>.

⁶⁶ This public housing project is administered by Puerto Rican authorities with United States funding, thus federal normative apply in this matter. In order to grant funding for the demolition, it first has to be authorized by the Housing and Urban Department after they acknowledge the compliance with the applicable normative and procedures by the local authorities.

constant visits and notifications announcing the imminent demolition of the buildings and calling for immediate evacuation of their apartments in order to be eligible for housing assistance.

Notwithstanding the hardships suffered by the remaining residents, they wanted to stay in Las Gladiolas. They wanted to denounce the government's indiscriminate actions that resulted in the deterioration of some of the buildings and in the inhuman conditions of living they were facing. Las Gladiolas was their community and they wanted to be part of the decision making process regarding matters that affect them and to be in charge of their development.

The legal clinic and the community leaders began to investigate the legality of the commenced proceedings. According to the applicable normative,⁶⁷ in order to be granted authorization for demolition, the local government have to demonstrate that a renovation of the buildings is not cost-effective, and that a deliberative process was carried out with the active participation of the residents. Meanwhile, the residents tried unsuccessfully to obtain information in the government agencies regarding the alleged application submitted by the local government. It was not until 4 years after the formal request presented by the clinic that the court finally ordered the government to release the information.

With the help of the legal clinic, the community filed a formal complaint in the relevant agency denouncing the noncompliance by the local government with the legal requirements to obtain the authorization and funding for demolition. The federal agency did not acknowledge the residents' claims and authorized the demolition without confirming the veracity of the application's content. Then, the legal clinic and the community agreed to file a suit against the local and federal government for, among other things, the illegality of the authorization granted

⁶⁷ See *supra* note 65.

for the demolition of Las Gladiolas.⁶⁸ The allegations were dismissed by the Federal Court District of Puerto Rico, and the case is now pending in the US Court of Appeals.⁶⁹

In the meantime, the community with the help of the legal clinic engaged in strategic work to promote their cause. The legal clinic connected them with other community organizations and entities from which they received support. For instance, the “Community Design Workshop of the University of Puerto Rico’s School of Architecture” prepared a report of the estimated cost to renovate the buildings of the housing project to be used by the community to refute the argument that a renovation was not cost-effective. The community leaders became very active in the media and public forum to denounce their situation and prepared by themselves protest marches. But very few residents were involved in the struggle.

The residents gradually left the community and from more than six hundred families less than one hundred remained. The community leaders discussed with the professor and students the reasons for the lack of residents’ involvement and the possible strategies to gain more support. The legal clinic suggested the incorporation of the community organization, and Gladiolas Vive, Inc. [Gladiolas Lives, Inc.] was created. This brought to the community the possibility to engage in formal transactions to acquire funding for their cause. Also, the name of the corporation became a popular phrase among its residents, especially the young that began to yell as one of their leaders, “Gladiolas Viiiiiveeee!” as a demonstration of resistance. However, the organization of the community was still a challenge.

⁶⁸ The residents of Las Gladiolas claimed, among other things, violations of civil rights the illegality of the permission given by the federal government to local authorities to implode the housing project, because the lack of compliance with the legal requirement of community consultation as set forth in United States Housing Act of 1937, 42 U.S.C. § 1437p.

⁶⁹ The case number in the United States Court for the District of Puerto Rico was Civil No. 06-1578 (CCC). The case is now pending in the US Court of Appeals for the First Circuit. Case No. 09-1200 and No. 09-1362.

The coercive measures used by the government to evacuate the housing units undermined the will of the residents to join the community struggle. The cause was the increasing insecurity in the living conditions and the constant harassment from the Relocation Office that often used the police to deliver the communications. Then, the community leaders in conjunction with the students of the legal clinic and the social workers of the community organized an activity. A public hearing was held by the Commission of Constitutional and Human Rights of the Bar Association of Puerto Rico followed by activities for the children and music.

After the activity, more residents became involved in the community struggle. All the residents had the opportunity to hear the testimony of their neighbors and members of the commission by loudspeakers. They were informed that they have the right to not be coerced to leave, that the actions carried out by the government were illegal and have been challenged in court, and that they can not be forced to leave until the authorization for demolition is declared legal. However, the government continued with its intimidating actions⁷⁰ and more residents left the community.

The few families remained in Las Gladiolas are determined to stay until the last consequences. The community keeps struggling in a very difficult context in which they take advantage of occasions to promote their cause.⁷¹ Meanwhile, not only the legal clinic helped in the creation and implementation of strategic work but also dealt with individual legal issues of

⁷⁰ For instance, in a community assembly the police appeared with long weapons. Video available at <http://www.youtube.com/watch?v=hsLfQuCWdxo>.

⁷¹ In hearings held as part of a mission from the United Nations Reporteur on racism and new forms of intolerance, one of the community leaders of Las Gladiolas testified. See Manuel Ernesto Rivera, *Urgente atender el problema de racismo en Puerto Rico* [Racism in Puerto Rico requires urgent attention] PERIÓDICO EL NUEVO DÍA, June 4, 2008. Recently the community denounced the last attempts of the Relocation Office to evict them. See Juan A. Colón, *Las Gladiolas denuncian intentos de desalojo* [Gladiolas denounce attempts of eviction] PERIÓDICO EL VOCERO, August 1, 2009. Available in Spanish at <http://www.vocero.com/noticia-28152-las-gladiolas-denuncian-intentos-de-desalojo.html>.

some residents. For instance, the professor of the legal clinic prevented in the courts the eviction of one of the community leaders.

The role of the legal aid clinic in this case deviated from the traditional advocacy model. The professors and students relied not only in litigation to address the injustices faced by the community. Organizing, networking, multidisciplinary work, and creativity were components in the legal clinic's work.

The parties of this case engaged in a learning process that produced positive results. The professor and students of the legal clinic learnt from the clients their daily struggles and “problem-solving” methods; the residents of Las Gladiolas learnt from the legal clinic about the law and its procedures. The legal knowledge and the active participation of the community in the activities and proceedings empowered them to be proactive in transforming their reality. Their public claims against insecure physical conditions of the buildings had resulted in the quick response of the management that fixed temporarily some areas, for instance. The struggle continues, though.

4.3 Analysis of the Legal Aid Clinic's Role

Lack of income was not the main concern of the communities in the three case studies. The professor and students of the legal aid clinic worked with low-income communities that approached them seeking advice to prevent their displacement as planned by the government, and to claim participation in their development. They did not have the capability to live freely and be in charge of their development to which their community and their people were essential according to their conception of wellbeing.

The vulnerability of the legal clinic clients' human rights undermined their capabilities to live according to their ideal of well being. In the three case studies, the communities do not have access to public information and decision making processes on matters that affect them directly. In the case of Las Gladiolas, for instance, the constant cut off of basic services such as water, and the lack of maintenance in the public housing project created unsanitary and dangerous conditions of living. The communities knew that these situations prevent them to live a human life with dignity.

The communities sought legal advice because they felt their rights were violated. The community leaders of the three case studies claimed the illegality of their exclusion in the social and economic development of the country because of their social status. Also, they denounced their inability to participate in the decision making process on matters that affect them notwithstanding the system provides for democratic participation. The communities, said Morales, "had an optimistic perception of the law." They perceived "their situation was unjust and thus illegal," she said.⁷² This can explain why the case studies not provide details of a process in which the legal aid clinic would help the communities to acknowledge their reality as a state of oppression. The communities were conscious of their subordinate status and the need to change it; hence they approached the legal aid clinic for help.

The communities expected from the legal aid clinic the "regnant idea of law practice." In the first case study, the communities thought that the only available remedy to prevent their displacement was to claim in the courts the discriminatory use of the government eminent domain power against low income communities. The community of Mainé approached the legal aid clinic looking for legal representation in the court proceedings already commenced as part of

⁷² Personal interview with Myrta Morales Cruz, professor of the community development section of the legal aid clinic, University of Puerto Rico-School of Law, (Oct. 1, 2009).

the eminent domain procedures against them. Likewise, Las Gladiolas requested legal aid when the reallocation process already begun and asked for judicial remedies to stop it.

Initially, the communities showed some resistance and/or surprise with the advocacy model the legal clinic presented. Some leaders seek second opinions with other lawyers, male lawyers noted Morales, about the possibilities of their claims in the courts. Furthermore, in occasions some leaders questioned the non-legal strategies suggested by the professor and students, said Morales. For her, it was a great challenge to make the communities understand that the remedies for their problems were not necessarily in the courts but in their political organization.⁷³

The legal aid clinic wanted the communities to get organize and transform their reality and effect real change. The legal clinic explained to its clients that the applicable normative and available remedies might not solve their problems. If they wanted to reach their well being through the means they value, the communities have to transform the structures that prevent their effective participation in the decisions that affect their development. The clients then needed to be empowered. Therefore, the legal clinic should have the capacity to identify with its clients alternatives to address their problems, and serve as an enabling factor to promote their empowerment.

Lack of effective participation in matters that affect the community development of its clients was the main claim. Accordingly, the legal clinic and the communities of each case study chose to claim their space of public participation through different means. In the first case study, the communities and the legal clinic chose lobbying as a tool to include in a law aimed to their development, a requirement to the municipality that consist in the previous approval for the

⁷³ See *supra* note 72.

commencement of the eminent procedures by the affected community. In the other two cases, the communities and legal clinic claimed in the respective administrative forums and the courts the spaces the law provides for their participation in procedures that were affecting their community development.

The path taken by each case study responded to the particular circumstances of the communities notwithstanding their problems were similar. According to Morales, the communities that were less organized and passed through evictions processes ended up in court proceedings. The communities of the first case study approached the legal clinic before the start of any formal proceedings to evict them and were very organized, said Morales.⁷⁴ In contrast, the community of Mainé requested help from the legal aid clinic when the formal procedures for their expropriation already commenced against their properties and only around 10 families remained. Las Gladiolas sought legal advice when more than half of its residents were reallocated since the decision to demolish the public housing complex was already taken by the government.

A direct correlation of the organizational level of the communities with the alternatives chosen to address their problems can be debatable. Many other factors could influence the strategies and outcomes of the case studies. For instance, unlike Mainé and Las Gladiolas, the clinic's clients of the first case study represented almost 700 communities covered by a special normative to which they introduced the amendment.⁷⁵ The status as tenants of the government, the aggressive campaign of reallocation, the constant harassment of the police, and the hazardous living conditions of Las Gladiolas could undermine the potential of many of its residents to give

⁷⁴ See *supra* note 72.

⁷⁵ See *supra* note 38. According to a socio-economic profile prepared by the Office for the Socio-economic Funding and Self-management of Puerto Rico, 686 communities have been declared special communities in 2003. Available in Spanish at <http://www.ilaedes.org/documentos/unesco/Anejo%207%20PerfildePuertoRico.pdf>.

the fight for their community. The availability of alternatives and strategies used will depend of the particular circumstances of each case.

The legal clinic used traditional legal means in a non-traditional way. Instead of taking the lead during the lobbying process, the professor and students worked with the communities promoting their active participation during the process in the first case study. The legal clinic taught the leaders about the legislative proceedings and helped them to prepare for the public hearings and lobbying process, and helped in the creation of strategies to further their cause. In contrast, the legal clinic and the communities of Las Gladiolas and Mainé relied mainly in court's proceedings but the clients were not left at the margin.

The communities of the second and third case study were involved actively in the court's proceedings. Furthermore, the professor and students worked with the community in the creation of strategies. For instance, its residents were always consulted by the legal clinic about the legal strategies, make investigations for the case, and promoted administrative proceedings. By these means, the legal clinic helped in the empowerment of the communities.

The work of the legal clinic not only concentrated in legal tasks. The professor and students also work *with* community leaders in the creation and implementation of strategies for their organization and initiatives in which the leaders had a leading role in promoting their cause. For instance, the communities held press conferences and participated in public forums. In these activities, the community leaders were the principal actors and had their own voice and control of their struggles.

The legal clinic also worked with professionals from other fields and other social actors to deal more effectively with the problems of the community. The hearing with the Bar Association of Puerto Rico in the community of Las Gladiolas is an example which resulted in

an increment of participation of its residents in the collective action. The advocacy model as employed by the legal aid clinic in the three case studies discussed does not fall within the traditional lawyer's role. Indeed it was based in the new theories of law practice developed by López and White, discussed in the previous chapter.

In the three case studies the legal clinic treated its clients as subjects with the capacity to craft their story. The legal clinic helped the communities to translate their grievances in legal claims and to incorporate law in their struggle in a strategic way according to their needs and interests. Instead of imposing objectives and strategies, the professor and students worked hand on hand *with* its clients *in* their communities. They developed a relationship based in trust and respect that made possible to break with the “regnant idea of law practice” and hence facilitated collective action in which the communities played the leading role in the attempts to be free and transform their reality.

4.4 Conclusion

The legal clinic advocacy model reflects a lawyer-client relationship based in dignity and solidarity, an effective law practice to promote human rights, and with a great potential to effect social change. The clients of the legal clinic were perceived as subjects with the capacity to transform their reality. They got empowered to play the leading role in the attempts to be free and change the structures to secure the enjoyment of their human rights and hence have the “human capabilities” to achieve the conception of life they value. For instance, in the first case study, the legal clinic helped in the empowerment of the communities to exercise their right of political participation. The communities changed the law to include a mechanism that secure the effective exercise of the right of political participation by giving them the power to stop attempts for their displacement which would affect their community development.

On the other hand, cannot be conclude that the use of an advocacy model based on López and White theories of law practice will result in a change of a social order that maintain the people in a status of subordination. In the first case study, the communities changed a law and secure a mechanism to prevent their displacement whilst the issues of the communities of the second and third case studies are still pending in the court. As argued before, many factors can affect the development of a struggle and its possible outcome. However, the residents of these communities learnt not to rely in courts proceedings and became active in their struggle to prevent their eviction by other means. Still to be seen are the outcome of these cases.

CONCLUSION

Human rights and the capability approach to poverty provide lawyers a framework to determine a role compatible with a humanist practice, and that shall be aimed to secure its clients' human rights and thus their "human capabilities" to freely reach their well being. Nevertheless, to be endowed with "human capabilities" need more than the full enjoyment of human rights. The social nature of poverty requires the people to organize to transform the structures of oppression and resist moments of domination to effect lasting change. Therefore, the lawyer's role working with people living in poverty shall be aimed to empower the poor in an ongoing process in which they become the principal character in the transformation of their reality.

To effectively address poverty issues, not only the promotion of "human capabilities" shall be the goal but also the empowerment of the people. After the communities of the first case study achieved a transformation in the legislation to prevent the displacement of their community, there were various attempts to derogate the law. Nevertheless, the communities aggressively defended the law. If the communities were not empowered to defend their law, their community development would be frustrated.

The advocacy model as employed by the legal clinic based in the theories of law practice developed by Gerald López and Lucie White not necessarily will result in social change. Only the first case study was successful within an specific social and political context. The communities of the first case study changed the law and secure a mechanism to prevent their displacement whilst the issues of the communities of the second and third case studies are still pending in court. As the case studies show, many factors can affect the development of a struggle and its possible outcome. Nevertheless, the case studies provide other conclusions.

The use of traditional legal means is compatible with the end to empower the clients. In the last two case studies, legal aid clinic do not maintain at the margin of the judicial process its clients. The clients learnt from the legal clinic about the law and legal proceedings, and were actively involved in the deliberative process of the case and in its management. Furthermore, the communities were encouraged to play the leading role in advocacy activities to promote their cause. The legal knowledge and the active participation of the communities in the activities and proceedings empowered them to be proactive in the transformation their reality.

Litigation is perceived as the main tool to address grievances in Puerto Rico, notwithstanding its lack of reliability. Initially, the communities of the three case studies believed litigation was the only tool to resolve their problems. Nevertheless, the communities of the last two case studies learnt from their own experience not to rely on court's proceedings. The legal clinic had to use litigation as the last resources to help these communities given their circumstances, and as the outcomes of the case studies shows, it was not successful.

Lawyers' role in addressing poverty issues is not limited to legal matters. As the case studies indicate, the legal clinic worked with its clients to promote their cause and for their organization. They worked together in the creation and implementation of strategies such as press conference, march protests, public hearings, etc. in which the communities played the central role. By these means, the legal clinic treated their clients as subjects that craft their story, and also helped to further collective action.

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