

Yale Law School
Yale Law School Legal Scholarship Repository

SELA (Seminario en Latinoamérica de Teoría
Constitucional y Política) Papers

Yale Law School SELA (Seminario en
Latinoamérica de Teoría Constitucional y Política)
Papers

1-1-2005

Someone Writes to the Colonel: Judicial Protection of the Right to Survival in Colombia and the State's Duty to Rescue

Julieta Lemaitre

Follow this and additional works at: http://digitalcommons.law.yale.edu/yls_sela

Recommended Citation

Lemaitre, Julieta, "Someone Writes to the Colonel: Judicial Protection of the Right to Survival in Colombia and the State's Duty to Rescue" (2005). *SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers*. Paper 42.
http://digitalcommons.law.yale.edu/yls_sela/42

This Article is brought to you for free and open access by the Yale Law School SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

By Julieta Lemaitre Ripoll
SELA 2005 Law and Poverty
Panel 2: The Institutional Strategies to Eradicate Poverty

Someone Writes to the Colonel:
Judicial Protection of the Right to Survival in Colombia and the State's Duty to Rescue

Every Friday for twenty-seven years the protagonist of *No One Writes to the Colonel* goes to the Post Office in the hope that his pension check might have finally arrived – to no avail. With this never ending wait come daily degradation, hunger and despair, until the end of the story where the remote possibility that his dead son's game-cock will win next Sunday's fight is his only chance of survival. In the last scene, the Colonel's ailing wife, who has resigned herself to wait until that day, asks him, "In the meantime, what will we eat?" And the Colonel answers: "Shit."¹

In 1992 Colombia's new Constitutional Court decided a similar case. The plaintiff was a 69 year old man who after a year had not received response to his pension request from Cajanal, the National Pension Fund. He had lost his house, unable to pay rent, and was at the time living with a son who hardly had the means to support him. He had no resources, and required an urgent medical intervention to save his eyesight, but could not access medical benefits without the recognition of his status as a pensioner.² His chances of winning against Cajanal before the Constitutional Court were as slim as the Colonel's cock of winning the fight, since he was asking for a writ of protection for a fundamental right that did not exist in the Constitution: the right to survive. Against all odds, he won the case. The Court accepted his claim, and decided there was in the Constitution an implicit right to survival that derived from Constitutional doctrine on human dignity: the right to *mínimo vital*, an existential minimum (henceforth: right to survival).³

In the years following this decision, the Court has decided favorably hundreds of similar cases, developing a solid doctrine about the justiciability of social and economic rights when there is a threat to the plaintiff's right to survival. While the Court has also decided other social and economic rights cases, the vast majority of cases are over this "right to survival," and in these series of cases the Court has developed its doctrine on the State's duty to rescue, which is the central concern of this article. The rule, as developed by the Court, is that social and economic rights are justiciable when there is a threat to the right to survival and the State has the capacity to prevent serious harm: if both elements are present then the state has a duty to rescue, and judicial protection is in order. The Court has used this rule to protect the plaintiff in cases where there is a significant delay in the payment of, or in the recognition of entitlement to social security;⁴ delay in the payment of salaries;⁵ discriminatory dismissal of a pregnant woman;⁶ the

¹ Gabriel García Márquez, *El Coronel no tiene quien le escriba*, Editorial Norma, Bogotá, 1991.

² Colombia, Constitutional Court T-426 de 1992.

³ The Court has adopted the doctrine whereby the list of fundamental constitutional rights is not exhausted in the bill of rights, and that the Court can deduce implicit rights from the bill of rights (*derechos innominados*).

⁴ Colombia, Corte Constitucional, Sentencias de mora en el pago de pensiones T-426 de 1992; T-005 de 1995; T-144 de 1995; T-147 de 1995; T-198 de 1995, T-202 de 1995, T-287 de 1995, T-076-96, T-323-96, T-160 de 1997, T-278 de 1997, T-458 de 1997, T-611 de 1997; SU-022 de 1998; SU-430 de 1998; T-07 de 1998, T-120^a de 1998, T-143 de 1998, T-297 de 1998, T-330 de 1998, T-553 de 1998, T-559 de 1998, T-259 de 1999, T-1103 de 2000, T-1205 de 2000, SU-090 de 2000, SU-1354 de 2000, SU-062 de 1999, T-001 de 2001, T-019 de 2001, T-124 de 2001,

lack of provision of health care services,⁷ and the exclusion of vital medicines and treatments from the Mandatory Health Plan.⁸ The Court's innovation in these cases is not merely substantial, it is, more importantly I argue, procedural: the Court gives the poor the right to a special Constitutional procedure instead of the regular, and for the most part inaccessible, ordinary procedure. In all of these cases, the Court has established that, thus when there is a threat to the right to survival, the plaintiff is allowed to ask for a writ of protection of fundamental rights (*accion de tutela, henceforth: tutela*) which is fast and free of costs, that forces any judge to drop other business to decide the *tutela* cases put before him as an urgent matter.

This procedural innovation is critically important for an effective enjoyment of legal rights. Technically, many of the right to survival cases might be decided favorably through other procedures different from that of Constitutional Law, such as labor or civil procedures, but these are notoriously long and expensive. By allowing the use of *tutela*, the Court effectively created an extraordinary judicial mechanism, one that takes seriously poor people's vulnerability before power. In a context of chronic lack of application of the law and prohibitive costs of the judicial system, the protection of the right to survival through the *tutela* gives the poor a real chance to use the justice system against the abuses of the powerful.⁹ This mechanism, I will argue, goes beyond previous failed attempts to give the poor access to justice.

A procedural innovation might seem like a minor development in current debates about the state's obligation to eradicate poverty, especially in light of the grand philosophical and political questions about the nature of the state and of human dignity. However these grand debates often ignore the central characteristic of law in poor countries like Colombia, which is the chronic and sometimes total lack of enforcement of law, especially of laws that benefit the poor.¹⁰ This is not a gap between the law in the books and the law in action, but rather the purely

T-398 de 2001, T-400 de 2001, T-405 de 2001, T-433 de 2001, T-444 de 2001, T-203 de 2002, T-1121 de 2002, T-1097 de 2002, T-099 de 2002, T-910 de 2003, T-905 de 2003, T-454 de 2003, T-435 de 2003, T-390 de 2003, T-547 de 2004, T-524 de 2004, T-267 de 2004. Sentencias de no pago de la licencia de maternidad: T-270 de 1997, T-576 de 1997, T-662 de 1997, T-139 de 1999, T-210 de 1999, T-558 de 1999, T-365 de 1999, T-1620 de 2000, T-205 de 1999 T-473 de 2001, T-483 de 2001, T-572 de 2001, T-736 de 2001, T-707 de 2002, T-999 de 2003, y T-390 de 2004.

⁵ Colombia, Corte Constitucional, Sentencias de mora en el pago de de salarios: T-146 de 1996, T-166 de 1997, T-174 de 1997, T-529 de 1997, T-144 de 1999, T-502 de 1999, T-679 de 1999, SU-995 de 1999, T-121 de 2001, T-132 de 2001, T-399 de 2001, T-418 de 2001, T-435 de 2001, T-436 de 2001, T-438 de 2001, T-458 de 2001, T-481 de 2001, T-481 de 2001, T-541 de 2001, T-614 de 2001, T-626 de 2001, T-630 de 2001, T-698 de 2001, T-700 de 2001 T-725 de 2001, T-734 de 2001, T-1156 de 2001, T-148 de 2002, T-115 de 2002, T-594 de 2002, T-162 de 2002, T-1023 de 2003, T-1049 de 2003, T-192 de 2003, T-222 de 2003, T-552 de 2004, T-541 de 2004, T-505 de 2004.

⁶ Colombia, Corte Constitucional, Sentencias T-238 de 1998, T-283 de 1998, T-286 de 1998.

⁷ Colombia, Corte Constitucional, Sentencias SU 562 de 1999, T-497 de 1997.

⁸ Algunos casos son: el tratamiento del SIDA Colombia, Corte Constitucional, Sentencia T-328 de 1998, del cáncer T-283 de 1998, con parálisis cerebral T-286 de 1998 que necesitan equipos ortopédicos T-597 de 1993, o intervenciones quirúrgicas T-571 de 1998.

⁹ The State and, in certain cases, of private entities and individuals.

¹⁰ With this proposal I hope to develop an idea initially presented by Rodolfo Arango: the *right to survival* is Colombian constitutionalist's contribution to the development of human rights in societies "not well ordered"; that is to say, in "societies characterized by structural situations of inequality and the dysfunctionality of democratic mechanisms." However, in contrast to Arango, and more generally in contrast to those who defend the *tutela* of

symbolic existence of large segments of progressive legislation and judicial decisions. Lack of enforcement is not a temporary problem that will work itself out, but rather, it is at the core of institutional design and legal culture, firmly grounded on the assumption the consequences of the law, including its lack of enforcement, is not the concern of lawyers or lawmakers. This allows the legal system to continue to reproduce the status quo while at the same its elites adopt and adapt fashionable trends in transnational theory on State obligations. The lack of enforcement of the law, disguised as a minor problem, reproduces in the XXI century the colonial dictum of “*la ley se acata pero no se cumple*,” (the law is respected but not enforced) which then as now served the purpose of allowing elites to ignore inconvenient orders from the Crown, such as that of moderating the brutal exploitation of indigenous peoples. Consistently, poor people’s impotence before the powerful¹¹ is hidden under the mantle of progressive legislation that enshrines democracy and the rule of law; it is one of the defining experiences of poverty, and justifies poor people’s lack of confidence in the law, and their concomitant authoritarian aspirations.

I. Basic injustice of the legal system

The injustice of a pension endlessly delayed and, above all, the powerlessness of the pensioner, is an example of what I call the basic injustice of the system of justice. The basic injustice is that, in principle, the poor cannot even demand their recognized legal rights because, first, the proceedings of the ordinary judicial system are too costly and, second, because in conflicts between the poor and the powerful,¹² the design of the judicial system, in principle, favors the powerful.¹³

social rights, I do not think the contribution of Colombian constitutionalism is to be found in the justiciability of those rights, but rather in the effective democratization of the access to justice. Rodolfo Arango, “Introducción” en Rodolfo Arango y Julieta Lemaitre “Jurisprudencia Constitucional sobre el derecho al mínimo vital” Estudios Ocasionales CIJUS Universidad de los Andes, Bogotá 2002. p7. Para un desarrollo de la posición de Arango, ver Arango, Op. Cit.

¹¹ En este artículo utilizaré las dos categorías “pobres” y “poderosos” sin adentrarme demasiado en definiciones; en cambio espero que a través de los ejemplos pueda comunicar el contenido de estas dos categorías para efectos del argumento que aquí se presenta.

¹² A diferencia de lo que sucede en la tradición constitucional inspirada en los Estados Unidos, donde los derechos están fincados en identidades irrenunciables (negro, mujer, homosexual) en la discusión sobre los derechos sociales los derechos están fincados no en una identidad sino en una situación coyuntural. Ello dificulta pensar los derechos sociales desde la tradición constitucional estadounidense donde la identidad y la no discriminación son pilares de la concepción de los derechos, ya que la teoría está dominada por una larga tradición de conceptualización de indicadores de justicia basados en la identidad, pero no en situaciones contingentes como la pobreza. Además, claro, influye la ideología individualista y de “responsabilidad individual” del neoconservadurismo dominante. Como contraste interesante está la diferencia de principios en la responsabilidad extra-contractual: mientras que en Colombia el caso de “un niño que se ahoga” y quien sabiendo nadar no lo salva conlleva responsabilidad, en los Estados Unidos no hay deber de rescatar, ni siquiera por parte del Estado, ver *De Shaney v. Winnebago County Dep.. of Social Services* 489 US189, 109 S.Ct.998 (1989).

¹³ Esto no sucede sólo en los países pobres. El artículo clásico de Marc Galanter “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” 9 *Law & Society Review* 95 (1974) describió como esta situación ocurre también en los Estados Unidos, y ha motivado muchos esfuerzos de investigación sociolegal y de activismo reformista. Ver por ejemplo la edición de 1999 del *Law and Society Review* donde se recogen una serie de artículos presentados en el simposio de la Universidad de Winsconsin del mismo año llamado: Do the haves still come out ahead y dedicado a este influyente artículo.

This injustice is simply another fact of poverty, which is more than a lack of resources; it is also the experience of extreme vulnerability in the face of power (be it state or private power) that forces the poor to accept that it is not possible to demand and obtain even that to which one has a right. The daily solution of the poor person, besides resignation, is to turn to networks of patronage, nepotism and clientelism, so that in exchange for loyalty, a vote, or a commission it will be his *patrón* or *caudillo* who intercedes in his favor. To turn to the authorities in search of justice remains a privilege of class, since it requires time and resources, and the poor have neither. Therefore, popular culture expresses the profound conviction that the justice system does not serve the poor, independently of their legal rights. Mistrust and fear of the police and judges runs deep -this is true not only of the criminal system, but of civil and labor justice as well, due to long delays, high costs, and corruption.

In this context, what is the major challenge for institutional strategies that seek, in the name of justice, to eradicate poverty? Clearly it is not the judicial system's responsibility to lead the fight against poverty, since judges have very little capacity to order structural change, no capacity to enforce it, and very little capacity to follow up on the actual implementation of law and policies. However, there are some strategies the justice system can adopt in order to be more responsive to poor people's everyday vulnerability before the powerful. One of these strategies is to reform the system to provide a better service to the poor, going beyond equal access in order to actually privilege poor people's needs.

One possible strategy to make the needs of the poor a priority is to have a procedural mechanism that allows judges to compensate the poor for their vulnerability in their conflicts with the powerful. This mechanism would be similar to affirmative action in so far as it takes into account the plaintiff's condition without any pretension of neutrality before factual unbalances in power and resources, in order to achieve a more level playing field. This proposal might seem completely unrealistic, but it is not a fantasy: it actually exists in Colombia in the *tutela* for the protection of the right to survival.

1. Strategies to For a More Just Justice System

Poor people's lack of access to justice is a problem in rich countries as in poor, but the institutional capacities to change this situation differ, depending on factors such as state structure, legal culture and available resources. This context must shape any consideration of judicial strategies to eradicate poverty in societies where the state is weak, the judicial branch is even weaker, social inequality is abhorrent, and the poor comprise the majority of the population. This is to say, it is not the same to ponder the institutional strategies to eradicate poverty in Germany as it is in Colombia, or in the United States as in Ecuador; legal scholarship about the state obligation to eradicate poverty, the role of the judiciary, social rights, judicial power, etc., should not be conducted as if it were possible to discuss these issues in a "transnational" manner without taking location into account.¹⁴

¹⁴ Si bien es cierto que es común reconocer la especificidad del contexto, es raro, y por lo general difícil, desarrollar las implicaciones de esta situación para la teoría constitucional. En Colombia, por ejemplo, la discusión académica sobre la responsabilidad de la justicia frente a los pobres ha girado en gran parte en torno al concepto del Estado Social de Derecho consagrado en la Constitución de 1991 y a la justiciabilidad de los derechos económicos y sociales en sintonía con la teoría constitucional transnacional. Las consideraciones sobre las diferencias de contexto

In this article I am specifically concerned with the unfairness of the justice system in Colombia, assuming that these considerations might be applicable to other societies with similar problems. In Colombia, strategies to change this situation are not new. Nevertheless, these strategies have not taken seriously poor people's needs in the conflicts with the powerful. These strategies have been mainly three: judicial reform, including alternatives methods for dispute resolution; free legal services for the poor, and the last is a new constitutionalism, the origin of the *tutela*.¹⁵

1.1 Judicial Reform and the Poor

The last decade or so of judicial reforms are often justified by ordinary people's lack of access to justice; nevertheless, the principal objective is not to help the poor, and the reforms attempt to do so only indirectly.¹⁶ According to the logic of reform, although lack of access is important, it is not its main concern; instead, judicial reform is a tool for development, with the poor as eventual beneficiaries. For the reformers, the ineffectiveness of the system is not only the result but also the cause of under-development, not because the poor suffer, but rather because it hinders investment and free markets. Therefore, the principal justification of judicial reform is that economic development needs the security of contractual performance, maintenance of property rights, and control of corruption, in order to benefit private investment and better functioning of a market economy, and the poor only indirectly.¹⁷

The transplant of U.S. alternative dispute resolution mechanisms, ADR, is an example of the way judicial reform has been carried out. The introduction of ADR was intended to alleviate docket congestion, not to benefit the poor: its main intention is to free judges to handle more important affairs than poor people's minor concerns. Furthermore, by not recognizing power differentials between parties in a conflict, the law actually ends up leaving the poor in a more vulnerable position than they were before. What is most revealing of the spirit of the ADR law is that the great beneficiaries have been Chambers of Commerce who implemented successful negotiation and mediation programs for a fee, geared at small and medium businesses. Poor people in search of justice are faced with a free and mandatory judicial mediation hearing in many of their concerns, where they must negotiate without legal guidance or representation, and any agreement they reach is legally enforceable.

1.2 The Poor as Beneficiaries of Legal Aid Schemes

y su impacto teórico son mínimas. Por dar dos ejemplos accesibles a través de las en bases de datos electrónicas, ver, por ejemplo: Manuel José Cepeda, "Judicial Activism in a Violent Context: the Origin, Role and and Impact of the Colombian Constitutional Court" 3 *Wash. U. Global Stud. L. Rev.* 529 y Rodolfo Arango "Basic Social Rights, Constitutional Justice and Democracy" 16 *Ratio Juris* 141 (Junio 2003).

¹⁵ Public interest litigation is practically non existent except for some environmental protection suits, but whatever little there is happens within the frame of new constitutionalism.

¹⁶ Ver Thomas Carothers "The Many Agendas of Law Reform in Latin America" en *The Rule of Law in Latin America: The International Promotion of Judicial Reform*, editado por Pilar Domingo y Rachel Sieder, Institute of Latin American Studies, London, 2001. Joseph Thome "Heading South but Looking North: Globalization and law Reform in Latin America" 3 *Wisconsin Law Review* p.691 (2000); Linn Hammergren Fifteen Years of Judicial Reform in Latin America: Where We are And Why We Haven't Made More Progress at <http://www.undp-pogar.org/publications/judiciary/linn2/sources.html>.

¹⁷ According to this logic, the poor will benefit in two ways: reform will benefit them because there is more employment and better services, and they will benefit from a judicial system that works better overall.

Debates about access to justice usually involve legal aid as the main strategy to benefit the poor.¹⁸ Unlike judicial reform, legal aid benefits the poor directly. The premise is that the poor need lawyers to vindicate their rights. The project is then to offer them access to free legal services, often through university legal clinics, but also through other forms of free legal services offered by state agencies. In Colombia, for example, law students are required to render free legal services for a year through University Legal Centers in order to graduate. There are also specialized entities like the Ombudsman or Labor Inspectors that offer individual legal orientation and sometimes representation for the poor. Nevertheless, these legal services are perennially overburdened and understaffed, and their quality, at least in the case of law students, is questionable.

Even though the legal services strategy seeks to directly benefit the poor, its proponents, like the proponents of the judicial reform strategy, do not take basic injustice seriously, since they do not suggest transformation of the system, but rather offer resources (lawyers) to the poor in order to humanize the situation without altering its structure: the justice system remains the same. Even proposals that consider institutional reform as part of access to justice programs argue for improvement to the present syst, such as more efficient judges or more expedient procedures, but do not consider substantially transforming ht system to explicitly benefit the poor.

1.3 The Poor in the New Constitutionalism

The new constitutionalism that has emerged in Colombia since 1991 includes, as an important aspect of its anti-formalism,¹⁹ a commitment to the protection of human rights. Direct application of the rights enshrined in the new document revolves around the concept of the Social Rule of Law, according to which social and civil rights are and should be integrated. Even so, in the new constitutionalism, social and economic tights, even if justiciable in some cases, remain essentially “programmatic.”

In principel the Constitutional Court follows international law doctrine in the sense that economic and social rights are programmatic except for a very basic minimum core of rights. The content however of this core in Colombia generally has depended on the state’s capacity to afford the duty in question. For the Constitutional Court, especially from 1997 on, with decision SU-111²⁰, the central problem of the justiciability of social rights is state capacity, assuming always that state resources are scarce. Already in its first right to survival decision, the Court insisted that justiciability of social rights is limited by scarcity of resources, and that it was not

¹⁸ See for example Alejandro Garró “Access to Justice for the Poor in Latin America” in Juan E. Méndez, Guillermo O’Donnell and Paulo Sergio Pinheiro The (Un)Rule of Law and the Underprivileged in Latin America University of Notre Dame Press, Notre Dame, 1999.

¹⁹Diego López, Teoría impura del derecho: la transformación de la cultura jurídica latinoamericana. Editorial Legis, Bogotá, 2004.

²⁰ Esta sentencia resuelve el no pago de pensiones por parte de una entidad departamental, donde el no pago tiene una relación directa con la corrupción de los gobiernos departamentales anteriores que habían dejado al departamento sin dinero para pagar. La Corte insta al ejecutivo a resolver el problema estructural, e insiste en la importancia de la prudencia judicial frente a la incapacidad de la entidad estatal de pagar las deudas.

the judge's task to establish priorities in the distribution of scarce resources, but that of the other branches of power.²¹

With this line of argument the Court, in spite of opening an interesting path for social rights is still limited in its definition of social rights, a limitation that is typical of new constitutionalism. The Court, even though it speaks of a core of social rights that are enforceable, still defines both this core and in general social rights in terms of scarcity, as it is in international human rights law. Therefore, unlike civil and political rights, social rights are by definition justiciable only if the state has the capacity (resources) to guarantee the right.

In other words, social rights exist if the state has the resources, while civil rights exist even if the state does not have the resources. Limitations in the implementation of civil and political rights are not conceived as a matter that affects the definition of the obligation, but as a matter of budgeting. For example, the incapacity of the Colombian state to protect its citizens from irregular armies is not a matter of scarce resources that change the state's obligation, but rather a problem of the implementation of a basic state obligation. Another example is prolonged detention without trial when there are no resources to assign judges to decide criminal cases. This is an established right, as are free elections no matter the cost to the state, or the protection of private property through the police and the criminal system, both extremely expensive for a poor country. But when scarcity is an obstacle for state provision of the right to education and the right to health, it stops being a problem of lacking the resources to uphold an obligation, and turns into a problem of lacking an obligation because the state has no resources.

This frame for understanding state's obligation to eradicate poverty reflects the links between new constitutionalism and cold war liberalism, which seriously limits its commitment to the poor. New constitutionalism, in spite of its commitment to a social rule of law (*Estado Social de Derecho*) generally adopts the institutions of a liberal state as the natural and necessary form of democracy, and as the best system to materialize aspirations to justice.²² Commitments to the "social" aspect take second place before the idea of a State whose main purpose is to guarantee civil and political liberties. In spite of this tendency from within the heart of new constitutionalism appears, as an experiment with the institutional possibilities of democracy, the *tutela* for the right to survival, an institution that allows for the imagination of a different type of state, one committed to eradicating poverty within a human rights frame.

2.1 Tutela as a democratic experiment

Roberto Unger's democratic experimentalism is a remedy for this apparent necessity of institutions that constraints any opposition. Through democratic experimentalism societies can

²¹ Colombia, Corte Constitucional, Sentencia T- 426 de 1992.

²² Hay dos desarrollos conceptuales de la Corte que van en sentido opuesto: el primero, es la afirmación de la Corte que los derechos sociales tienen un núcleo básico y un área de desarrollo progresivo, y que el núcleo básico es justiciable (concepto de "erradicación de las injusticias presentes"). Esta doctrina se crea a partir de un caso donde la Corte ordena al Estado brindar las vacunas básicas a niños de escasos recursos en Bogotá. Ver Corte Constitucional Sentencia SU -225 de 1998, reiterada en T-177 de 1999, T-772 de 2003 y C-671 de 2002. El segundo es el concepto del "estado inconstitucional de cosas" que permite ala Corte dar órdenes estructurales por ejemplo para ordenar condiciones dignas para todos los presos de una cárcel. Sentencia T-714 de 1996, T'025 de 1994, Sin embargo, esta no es la tendencia del grueso de la jurisprudencia, donde la capacidad del estado es el tema central.

expand democracy's institutional repertoire beyond the narrow limits of liberalism in the aftermath of the Cold War.²³ Democratic experimentalism is premised on the absence of one necessary institutional form for democratic ideals, proposing instead a wealth of possibilities. The goal is to experiment, evaluate and learn from different institutional practices to constantly breach the gap between ideals and practice without having to reach a point of crisis for transformation. In the concrete problem of law and poverty, the ideological triumph of the United State's development model has led to a liberal hegemony that constraints the possibility of imagining states that make the needs of the poor a priority without invoking the specters of the cold war. Institutional experimentation then offers a measure of freedom to rethink the possible shapes of democracy and the market in poor countries.

Therefore, I suggest the Colombian experiment with *tutela* for the right to survival be examined as an institutional experiment that comes from new constitutionalism, but at the same time pushes its ideological boundaries. This experience, which has to a certain degree been contingent and erratic, can even so be the basis for thinking of ways the legal system can take seriously the vulnerability of the poor before the powerful.

Tutela for the right to survival, is an interesting institutional experiment, because it transforms the systems institutional practice by giving the poor a privileged access to justice, and forcing the judge to leave behind the pretension of neutrality and instead assume an active role in favor of the poor. This is achieved through four ways of democratization. The first, common to all *tutelas*, is to make justice more accessible for the poor by eliminating procedural barriers. The second is to empower the judge to decide according to equity and not to formal equality. The third is to acknowledge poverty as a situation that gives the right to ask for a writ of protection. The fourth, a result of the previous three, is that it distributes a scarce good: access to justice.

III. Access to justice through procedural reform

The procedure for *tutela* brings the administration of justice closer to the poor through its accessibility, speed, and efficacy. It is very accessible for the poor because any ordinary judge is allowed to hear *tutelas*; any day or hour is possible; and the procedure is free, fast, and does not require an attorney.²⁴ Furthermore it gives the judge flexibility in the evaluation of evidence and even the possibility of inverting the burden of proof, alleviating the costs for the plaintiff.²⁵ It is quick because it is conducted with the criterion of urgency; the judge has ten days to give the ruling and the action receives expedited treatment.²⁶ It is effective because it provides the judge latitude to craft remedial orders broader than those than the plaintiff requests, and because includes the possibility of arrest for contempt of a judicial order.²⁷ These characteristics have

²³ Roberto Unger, *Democracy Realized The Progressive Alternative*. Verso, London and New York 1998.

²⁴ Colombia, Constitución Nacional Art. 246 y Decreto 2591 de 1991 Art.1 y 14.

²⁵ Se puede tutelar el derecho "prescindiendo de cualquier consideración formal y sin ninguna averiguación previa si algún medio de prueba del que se pueda deducir grave o inminente violación o amenaza del derecho." El juez "puede fundar su decisión en cualquier medio probatorio" y "puede proferir el fallo tan pronto llegue al convencimiento" sin necesidad de practicar las pruebas solicitadas. Colombia, Decreto 2591 de 1991 Art.18.

²⁶ Colombia, Decreto 2591 de 1991 Art. 15 y Art.29.

²⁷ Colombia, Decreto 2591 de 1991 Art.52.

resulted in the high acceptance of *tutela*, and thus in the high number of *tutelas*: 133, 273 in the year 2002, for a country of 40 million people (the Court revised 1,123 of these).²⁸

Other similar procedures for the direct application of constitutional rights, such as the Mexican *amparo* or the Chilean *orden de proteccion*, share some of the characteristics that make the *tutela* such an attractive institution. However, they are almost all limited in the causes that allow plaintiffs to ask for a writ of protection of a constitutional right: perhaps the most striking characteristic of the Colombian *tutela* is judicial discretion to decide whether or not a constitutional right is being threatened, and decide which rights can be protected through *tutela*.²⁹ This discretion exists even when there are other legal procedures that the plaintiff could follow, if the other procedures do not fully protect the threatened right.³⁰

III.2. The Introduction of Equity to a Civil Law System

But perhaps the most transformative advantage of *tutela*, which gives significance to its accessibility, quickness, and efficacy, is that it empowers the judge to impose a criterion of equity.³¹ In a context where formal justice has traditionally prevailed over substantive justice, and judges were supposed to apply the law mechanically, the regulation of the action is thus an important transformation of the conception of the judge's role; for the first time, it awards her a social role, responsible for the equitable consequences of her rulings.

This transformation of the judge's role has various aspects. First, *tutela* forces the judge to recognize the disequilibrium of power between the parties as the central fact of injustice, and assigns her the responsibility of balancing the situation, especially when the government is the defendant,³² but also when powerful private individuals are accepted as defendants.³³ Second,

²⁸ Manuel José Cepeda, Op. Cit. p. 599.

²⁹ Colombia, Constitución Nacional Art. 86. No se requiere que el derecho tenga un desarrollo legal para protegerlo pues la Constitución es directamente aplicable. Colombia, Corte Constitucional, Sentencia T-002 de 92, y T-406 de 92). La tutela procede en razón de la naturaleza del derecho y no por que esté en la lista de la Constitución (T-418 de 1992). Incluso se acepta que hay derechos fundamentales que no están positivizados (Constitución Nacional, Art.94) y cuyo reconocimiento procede en la realidad de cada caso cuando se afecta la dignidad humana y la persona se encuentra en situación de indefensión (T-801 de 1998, T-881 de 2002).

³⁰ Colombia, Constitución Nacional, Art. 86: "Toda persona tendrá acción de tutela para reclamar ante los jueces, en todo momento y lugar, mediante un procedimiento preferente y sumario, por sí misma o por quien actúe a su nombre, la protección inmediata de sus derechos constitucionales fundamentales, cuando quiera que éstos resulten vulnerados o amenazados por la acción o la omisión de cualquier autoridad pública. La protección consistirá en una orden para que aquel respecto de quien se solicita la tutela, actúe o se abstenga de hacerlo. El fallo, que será de inmediato cumplimiento, podrá impugnarse ante el juez competente y, en todo caso, éste lo remitirá a la Corte Constitucional para su eventual revisión. Esta acción solo procederá cuando el afectado no disponga de otro medio de defensa judicial, salvo que aquella se utilice como mecanismo transitorio para evitar un perjuicio irremediable. En ningún caso podrán transcurrir más de diez días entre la solicitud de tutela y su resolución. La ley establecerá los casos en los que la acción de tutela procede contra particulares encargados de la prestación de un servicio público o cuya conducta afecte grave y directamente el interés colectivo, o respecto de quienes el solicitante se halle en estado de subordinación o indefensión."

³¹ Colombia, Corte Constitucional, T-002 de 1992.

³² Private parties can be defendants when they provide a public service or when there is a gross unbalance of power that amounts to powerlessness (indefensión) of the plaintiff. Constitución Nacional Art. 246

³³ Colombia, Decreto 2591 de 1991 Art.5 y Art.42. Ver además Colombia, Corte Constitucional, Sentencia C-134 de 1994

aside from recognizing inequality, the action provides the judge with broad capabilities to correct it. For example, it offers her great flexibility in the assessment of evidence, including the possibility to reverse the burden of proof case-by-case.³⁴ Additionally, there is no strict limit to the rights or situations through which one can proceed, and the judge has the authority to examine case-by-case if there is a violation of rights; in this way, the ample catalogue of rights protected by *tutela* can always be amplified by the courts.³⁵

The Constitutional Court has further empowered judges in various decisions. The Court itself has significant power; it has discretion as to which *tutela* it hears on revision, and its revision has legal power similar to that of precedent in the common law system.³⁶ Constitutional Court judges have more independence since, unlike other magistrates, they are elected by Congress instead of by judicial career. Plus, for purely contingent reasons there has been a significant presence of progressive judges who have used their control of the *tutela* docket to create a constitutional jurisdiction mindful of material justice.³⁷ The result has been a relative transformation of the legal culture.³⁸

2.2 Procedural rights for the poor

Besides the advantages of *tutela* in general, the *tutela* of the right to survival is of particular interest to the poor since it gives constitutional status to threats to their subsistence: the poor have a constitutional privilege of asking for a writ of protection when the breach of a powerful entity or individual's obligation toward them threatens their survival. This is procedural right to enforce the law through a *tutela* is granted only to the poor, and effectively gives them access to a fast, accessible, efficient special procedure where the judge must decide according to equity and not to formal equality.

³⁴ Se puede tutelar el derecho “prescindiendo de cualquier consideración formal y sin ninguna averiguación previa si algún medio de prueba del que se pueda deducir grave o inminente violación o amenaza del derecho.” El juez “puede fundar su decisión en cualquier medio probatorio” y “puede proferir el fallo tan pronto llegue al convencimiento” sin necesidad de practicar las pruebas solicitadas. Colombia, Decreto 2591 de 1991 Art.18.

³⁵ Colombia, Constitución Nacional Art. 86 No se requiere que el derecho tenga un desarrollo legal para protegerlo pues la Constitución es directamente aplicable. Colombia, Corte Constitucional, Sentencia T-002 de 92, y T-406 de 92). La tutela procede en razón de la naturaleza del derecho y no por que esté en la lista de la Constitución (T-418 de 1992). Incluso se acepta que hay derechos fundamentales que no están positivizados (Constitución Nacional, Art.94) y cuyo reconocimiento procede en la realidad de cada caso cuando se afecta la dignidad humana y la persona se encuentra en situación de indefensión (T-801 de 1998, T-881 de 2002).

³⁶ Ver pie de página 34.

³⁷ La jurisprudencia de la Corte Constitucional estable un precedente obligatorio para los fallos de tutela de todos los jueces del país. Este poder, en contra del principio general de que el juez se guía por la ley y no por la jurisprudencia se basa en las siguientes fuentes: primero, la Constitución Nacional establece en su artículo 243 que “Los fallos que dicte la Corte en ejercicio del control jurisdiccional harán tránsito a cosa juzgada constitucional.” Segundo, el Decreto 2591 de 1991 en su artículo 33 reglamenta la revisión de los fallos de tutela. Tercero, en sentencia C-018 de 1993, la Corte Constitucional, declarando la constitucionalidad del artículo 33 del Decreto 2591 de 1991, estableció que la jurisprudencia de la Corte en materia de tutela establece la “cosa juzgada constitucional,” lo cual quiere decir que tiene efecto *erga omnes* y no solo *inter partes*, en virtud del principio de igualdad y del artículo 243 de la CN. Por lo tanto las revisiones de tutela obligan para los casos futuros y no sólo para el caso concreto.

³⁸ Sobre esta transformación, ver: Diego López, op. Cit. Sobre su impacto para los movimientos sociales, ver Mauricio García y Rodrigo Uprimny en Boaventura de Sousa Santos y Mauricio García Villegas, eds. Emancipación Social y Violencia en Colombia, Editorial Norma, 2004. Sobre su impacto para la vida cotidiana, ver Esteban Restrepo “Reforma Constitucional y Progreso Social: La ‘Constitucionalización de la Vida Cotidiana’ en Colombia” en Roberto Saba (ed.), El Derecho Como Objeto e Instrumento de Transformación, Buenos Aires: Editores del Puerto, 2003, pp. 73-88. Ponencia del SELA 2002. islandia.law.yale.edu/sela/restrepos.pdf

In order for any type of *tutela* to proceed the consequences of the action or inaction of the defendant must be grave for the plaintiff (the situation must be urgent) and the plaintiff must be helpless before the defendant.³⁹ In *tutela* to protect the right to survival urgency and helplessness are a consequence of the lack of resources to survive, that is of poverty. Therefore, the Court turns down those cases where the plaintiff isn't poor, considering there is no urgency, because the consequences are not serious, or because the plaintiff has not claimed or given any evidence to support the claim that his or her survival is threatened.⁴⁰ These two criteria, helplessness and urgency of the situation, are of central importance to appreciate the contribution of *tutela* of the right to survival for the poor.

The *tutela* of the right to survival carries the recognition of inequality to the economic sphere. Unlike the ordinary judge who is limited by the official "blindness" of justice, the judge hearing the claim is allowed to see that, if not for his rapid intervention, the poor person is in reality defenseless against the powerful. She is also able to determine that this radical helplessness is rooted precisely in the lack of available resources necessary for survival when the government or a particular entity, having the capacity and the obligation to act, does nothing. For example, the judge may recognize the inequality between the senior citizen that lives off of his pension and the public entity that does not pay him; between the worker and the company that is late in paying salaries; between the person without the resources to pay for cancer treatment and the insurance agency that denies him coverage.

Besides being able to appreciate defenselessness, the judge responds to the urgency of the situation by extending the criteria of urgency of *tutela* to contemplate poverty: for the Court there is urgency when the plaintiff has no other means of subsistence different from disputed. Thus poverty transforms the lack of enforcement of the States duty (or of a private party in certain cases) in a matter of urgency where the judge must decide the cases in equity.⁴¹

2.3 Redistribution of justice instead of access to justice

It is a well-known fact that in a weak and poor state, access to justice is a privilege. The investment in justice requires important resources, and the demand exceeds its capacity to respond. In order to prioritize the poor when the situation threatens their subsistence, the *tutela* of the right to survival offers a form of distributing this scarce resource (the service of justice) in a realistic and just manner. Realistic because it must take into account the real scarcity of the service of justice, which in theory is for all, and just because it prioritizes the urgency and helplessness of the poor.

³⁹ Ver, sobre criterios de indefensión y subordinación en la tutela contra particulares: Sentencias T-333 de 1995, T-190 de 1994, T-498 de 1994.

⁴⁰ Por ejemplo ver las sentencias T-001 de 1997, T-123 de 1997, T-126 de 1997.

⁴¹ El criterio de urgencia es explorado y justificado por Rodolfo Arango como el elemento central de la justiciabilidad de los derechos sociales. Ver Arango Op.Cit. y Rodolfo Arango. "Los derechos sociales fundamentales como derechos subjetivos" Pensamiento Jurídico N. 8 Facultad de Derecho y Ciencias Políticas, Universidad nacional Bogotá 1997. "El Mínimo Vital como índice de justicia entre particulares" en Antonio Barreto editor, *Derecho Constitucional Perspectivas Críticas* Universidad de los Andes y Editorial Legis Bogotá 2001. Protección Nacional e internacional de los derechos humanos sociales en Ciudadanía y derechos humanos sociales, Alonso MA y Giraldo J eds. Escuela Nacional Sindical, Medellín, 2002.

It often seems that distributional analysis ignore judicial services as a state provided service, one that competes for budgetary allocations of scarce resources just as health care, national security or education do.⁴² Nevertheless, justice is a public service, and access to justice an issue of the distribution of scarce resources, like any other action that results in a state expenditure in a poor country.

When faced with a scarce resource, the government faces the problem of providing the service in accordance with a criterion of distributive justice. In Colombia, for example, the public schools only educate those children from the poorest groups in the population, and they demand proof of poverty⁴³ before awarding spots in the school (which are very scarce). The middle and upper class then must resort to private education. Similarly, only the poorest people have access to subsidized health insurance, while the rest must pay for insurance. With a criterion of distributive justice, the government's principal obligation is to provide services to those who cannot fend for themselves, and to hope for the autonomy of those that have resources to subsist.

Nevertheless, in the case of judicial services something very different happens. As in education and health, the rendition of the service depends on the available resources, but there is not, as in the other areas, consciousness of scarcity. To the contrary, there is a denial of the scarcity, with the idea that justice is a service that should be rendered to all. To make matters worse, one of the consequences of the system's design is that the poorest people not only fail to receive preferential treatment, but are also in practice excluded from the service. It excludes them first since they do not have the means to pay attorneys or to sustain a legal action, and it also excludes them because their claims are "minor claims" that generally do not have priority, and are diverted to mandatory mediation hearings.

The *tutela* of the right to survival instead allows for a prioritization of judicial services that follows the logic of distributive justice.⁴⁴ Under *tutela* the legal process that guarantees a poor person's legal right receives preferential treatment and must be decided quickly, and according to equity. The judge is empowered to avoid procedural requirements, including rules about the burden of proof, in order to protect substantive justice. This is one advantage for the poor, but also for the state that must prioritize its scarce resources to offer judicial services.⁴⁵

⁴² Como sucede con los otros servicios, los ricos pueden privatizar su acceso al servicio, y de hecho lo hacen en su conflictos entre ricos, por ejemplo con la firma de acuerdos de acudir a tribunales de arbitramento, o a través de los servicios de negociación de las Cámaras de Comercio, o de las negociaciones y arreglos entre abogados, donde el uso de los tribunales se evita o se usa tan solo instrumentalmente. Los pobres, como sucede con los otros servicios, no tienen muchas alternativas viables fuera del servicio del estado, y sobretodo no tienen alternativas legales. (Por ejemplo, acudir a un tribunal de arbitramento es una alternativa legal pero acudir a un padrino poderoso no lo es.)

⁴³ Por ejemplo el recibo de pago de de los servicios públicos, que están subsidiados para en los barrios más pobres, indicando el "estrato" de la vivienda. La Corte declaró que este arreglo en la sentencia C-566 de 1995.

⁴⁴ Mientras que la justicia compensatoria busca regresar al estado de cosas anterior al conflicto, la justicia distributiva busca cambiar el estado de las cosas para que sea más equitativo.

⁴⁵ N.B. en esta sección me refiero a los recursos del estado en el servicio de justicia, no a los recursos del estado en general, o en otros aspectos como salud o educación. A ello me referiré más adelante en el artículo, al examinar el problema de los recursos del estado como demandado en la tutela por mínimo vital, que es diferente a los recursos del estado como proveedor del servicio de justicia.

3. Limits and Problems of the *Tutela* of the Right to survival as an Institutional Strategy Against Poverty

In spite of these advantages, the *tutela* of the right to survival also presents a series of limitations that should be taken into account when evaluating its contribution as an institutional strategy. These limitations can be divided into three groups of problems: the problems of state capacity to assist the poor; the problems of the abuse of the *tutela*; and the problems of judicial powerlessness in the face of structural injustices. Each of these problems has aspects that have been considered in debates about the justiciability of social rights as aspects that arise from the specific practice of the *tutela* for the right to survival. I will try to limit myself to these latter problems while recognizing that, in a way, these are problems that have also been debated in broader contexts.

3.1 The (In)ability of the State to Rescue the Poor

The first problem with the *tutela* of the right to survival is the judge's difficulty in establishing whether the state is able or not to provide assistance, and therefore, whether or not the state has the duty to rescue. The Constitutional Court confronts this difficulty on a case-by-case basis instead of providing a general rule. In most cases the Court has sought the certainty that a budgetary allocation existed or should exist to cover the expenditure. While there are exceptions, in the majority of *tutelas* for the right to survival the judge orders the payment of state debts. Obviously in cases involving social security or salaries, the budgetary allocation should exist, since they are debts that the government has acquired—subjective, concrete obligations and not general programmatic obligations.⁴⁶ Even the amplification of the list of medicines and services is backed by a budgetary allocation that covers unforeseen expenditures of the health system.⁴⁷ This tendency might respond either to the Court's inability to determine otherwise whether or not the state has enough resources, or to a lack of political commitment to the poor; its critics have advanced both explanations, and both are entirely plausible.

⁴⁶ Antonio Barreto argues that judicial power in the *tutela* does not match judges' limited capacity to understand the financial aspects of public entities. Barreto's criticism is concentrated on the probative criterion that the Court uses to determine if the government does or does not have the resources to assist the plaintiff. In general, he says, what happens is that, by failing to follow economic and financial reasoning that would allow it to determine if an entity has the resources to guarantee social rights, the Court simply stops accepting the lack-of-resources defense rather than examining and questioning it. Mauricio García, for his part, considers that this judicial reasonableness makes the Court less progressive than it is otherwise thought, since the majority of the cases do not create a right but rather order a payment based on a right already recognized. Antonio Barreto. "Amparo Constitucional de los Derechos Sociales- A propósito del carácter social de la acción de tutela." En Derecho Constitucional Perspectivas Críticas. Uniandes y Tercer Mundo Editores Bogota 2001. Mauricio Garcia, Op. Cit. En consecuencia la Corte no es realmente activista, ya que actúa dentro de los parámetros de la justicia compensatoria, en lugar de ejercer una justicia verdaderamente distributiva. Y por lo tanto no tienen un efecto social importante En un artículo anterior expuse mi diferencia con esta apreciación de García, argumentando que esta acción de cumplimiento sui generis sí es socialmente significativa, y sí refleja un criterio de justicia distributiva. Si bien estoy de acuerdo en principio con la aspiración de un mayor activismo creo que García no tiene en cuenta el efecto distributivo de la democratización del acceso a la justicia señalado arriba, y desarrollado en: Julieta Lemaitre "La redistribución del acceso a la justicia: análisis de las sentencias del mínimo vital" en Rodolfo Arango y Julieta Lemaitre "Jurisprudencia Constitucional sobre el derecho al mínimo vital" Estudios Ocasionales CIJUS Universidad de los Andes, Bogotá 2002.

⁴⁷ Esta es función la asume el Fondo de Solidaridad y Garantías a través de la subcuenta de compensación al régimen contributivo. Ver artículo 218 de la ley 100 de 1993 art. 218 y Decreto 1283 del 23 de julio de 1996 Art. 1.

3.2 Abuse of Tutela

The abuse of *tutela* action occurs when it ceases to be a mechanism for safeguarding rights and becomes an instrument of other interests. Perhaps the worst situation in this sense is the appearance of a bureaucratic *tutela*, when public officials as for it as an extra-official requirement for state action. Thus it becomes in some sectors one more bureaucratic requirement in the process of compelling state action. For example, in some groups, like pensioners from certain entities, it is clear that whoever does not have “his *tutela*” does not receive his pension. Likewise, some health care providers are reluctant to provide a costly service, and prefers to provide one that is less costly but also less effective or more invasive (for example it provides surgery rather than radiation therapy for certain types of prostate cancer), unless the patient has “her *tutela*.” Thus, it goes from being an exceptional mechanism to being an everyday, bureaucratic mechanism. This is evident not only from the anecdotal data collected from various forums but also from the very high number of claims, which leads one to think that the defendant entities have not changed their behavior.

3.3 The Powerlessness of the Justice System Against Structural Injustices

The repetition of the same type of claims and in many cases against the same entities brings us to the second problem of the *tutela*, which is that the judge’s power is limited by structural injustices, by which I mean injustices that are neither exceptional nor occasional but rather those that correspond to institutional dynamics deeply rooted in society. This judicial limitation has at least two causes. The first cause, and perhaps the most obvious, is that decisions are made case-by-case and so the judiciary is not designed to affect generalized situations. What happens then is that the judiciary is inundated with repeated claims against the same type of institution or even against the same institution. Even at the Constitutional Court, which controls its own *tutela* docket, there is a constant increase in the number of decisions that are revised to “reiterate a line of jurisprudence.”

The Constitutional Court’s efforts to confront this limitation represent significant innovations in the use of judicial power in our legal tradition. For example the Court has gone beyond the inter-partes effects of judicial decisions to create broader orders that do not apply just to the parties before it but also to those similarly situated.⁴⁸ Additionally, it has tried dispatching orders directed toward the entities responsible for general situations, giving them time frames and specific measures to follow. In spite of these innovations, it is evident that problems persist and that new institutional innovations are needed, especially to address the Courts incapacity to follow up on its own structural orders.

The second cause of the *tutela* action’s powerlessness before structural injustice is that there are large groups of the population who have very little access to the system. Against the structural injustice of the de facto exclusion of these groups, it is also ineffective. It is true that it has democratized the access to justice, but in any event its use requires a minimum of material and cultural resources. For example, even though *tutela* is free and does not require an attorney,

⁴⁸ Para una explicación de los tipos de efectos de las sentencias, ver: SU 1023 de 2001 y T-203 de 2002.

it still has costs related to transportation and lost work days.⁴⁹ Additionally, the person must have minimum cultural resources to interact with the professional judicial environment, and a minimum consciousness of and confidence in the legal process. This is perhaps why *tutela* is not used, or is used very little, by the most vulnerable groups of the population, like for example the indigent, boys and girls, rural peasants, or the internally displaced population.⁵⁰ Paradoxically, these are the people whose situation is the most urgent and who are the most defenseless.

4. Conclusion: Colombia as an Institutional Laboratory?

It may seem strange that a Colombian institution provides a positive example, especially of the legal system. After all, *tutela* originates in a society in crisis where vast social inequalities, appalling rates of daily violence, a limited democracy, persisting armed conflict, the corrupting effect of the drug and arms trade, and the deterioration of social indicators apparently condemn its institutions to failure. Nevertheless, this situation of permanent crisis also has a positive aspect, and it is that it sets up an incentive for institutional experimentation. The constant denunciation of institutional failure is a challenge to the complacency of the elites, and leads to the legitimacy of a permanent search for alternative solutions. In this sense Colombia could be a regional laboratory where not all that is produced is inevitably doomed to failure, but rather to the contrary, where institutional products could be new and useful solutions for common problems.

The point however is not to reproduce elsewhere *tutela* for the right to survival in the same form as it exists in Colombia. As we have seen, this institution also has serious problems, and further evaluation of its impact is still lacking. In spite of these problems, its advantages have made it an interesting experiment in the search of institutional solutions to eradicate poverty. Its limitations and problems can be resolved in part through institutional design, for example, by making repeated claims more costly for defendants. Perhaps during the next few years of institutional experimentation in Colombia some of these alternatives will come to light.

To conclude, I want to insist on the importance of regarding access to justice as access to a scarce resource and, consequently, recognizing the distributive impact of the *tutela* of the right to survival. This democratization of the access to constitutional justice permits us to correct, at least in part, the basic injustice the poor face in their conflicts with the powerful. This results in a change of priorities in which the predicament of the poor—their helplessness and the urgency of their situation—and the injustice of the government that can intervene but does not—become the most important business of the day for the judge. In Colombia, as in most of the region, development, which is supposed to solve the problems of poverty, is much like the Colonel's

⁴⁹ El gasto de transporte sobretodo es una preocupación importante para las personas pobres: el costo de los dos buses (o más) que hace falta tomar para llegar al juzgado supera el costo del almuerzo del día. Como estudiante de derecho una de las situaciones que más me dejo en claro lo excluyente del servicio de justicia es el de un caso que conocí donde la madre no llevó a la hija violada a la práctica forense sino tres días después de ocurrido el hecho pues no tenía dinero para el transporte público (dos buses de ida y dos de regreso para cada una). Varios funcionarios de Medicina Legal confirmaron que era frecuente el caso de las personas que a la salida del examen forense piden limosna para poder tomar el bus de regreso a su casa.

⁵⁰ Es cierto que hay sentencias de la Corte Constitucional que favorecen a estos grupos poblacionales. No me refiero sin embargo a los grupos como tema, sino al uso de la tutela por los miembros de estos grupos.

pension: we keep waiting for it, to no avail. But if development does not arrive, in the meantime at least in Colombia many Colonels receive their pensions thanks to the *tutela*.