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Legal Reform, Social Policy, and Gendered Redistribution in Colombia: The Role of the Family

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LEGAL REFORM, SOCIAL POLICY, AND GENDERED REDISTRIBUTION IN COLOMBIA: THE ROLE OF THE FAMILY

HELENA ALVIAR GARCÍA *

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I. INTRODUCTION

My work's objective is to critically engage with the structure of redistributive legal transformations in Latin America, taking as its first example Colombia. I would like to understand why it is that, given a range of social¹ and gender neutral reforms since the early twentieth century, Colombia continues to be a country characterized by high levels of inequality in terms of resource distribution² and access to jobs³ across gender lines. As seen in the tables below, if we compare rates of informal labor, poverty, and extreme poverty, women are above men in all categories.⁴

Informal labor rate in Colombia⁵

	2006	2007	2008
Women	59.1%	58.8%	59.6%
Men	55.2%	55.2%	56.2%

1. Legal reforms that included social welfare were established in many countries of the region by the early 1930s. These transformations were basically related to workers' rights, social security, education, and the social function of property.

2. See COMISIÓN ECONÓMICA PARA AMÉRICA LATINA Y EL CARIBE, POBREZA, EXCLUSIÓN SOCIAL Y DESIGUALDAD DISTRIBUTIVA [POVERTY, SOCIAL EXCLUSION AND INEQUALITY IN INCOME DISTRIBUTION] (2005), *available at* http://www.eclac.cl/publicaciones/xml/2/34732/PSE2008_Cap1_Pobreza.pdf (citing recent statistics from the Comisión Económica para América Latina y el Caribe ("CEPAL") identifying Colombia as one of the nine most unequal countries in the world and second only to Brazil as the most unequal country in Latin America); *see also* ARMANDO MONTENEGRO & RAFAEL RIVAS, LAS PIEZAS DEL ROMPECABEZAS: DESIGUALDAD, POBREZA Y CRECIMIENTO [THE PIECES OF THE PUZZLE: INEQUALITY, POVERTY AND GROWTH] 37 (2005).

3. See El Departamento Administrativo Nacional de Estadística, Mercado Laboral [The National Administrative Department of Statistics, Labor Market], http://www.dane.gov.co/daneweb_V09/#twoj_fragment1-3 (last visited Feb. 10, 2011); *see also* Ferdinand Lepper, International Labour Organization [ILO], Comparable Annual Employment & Unemployment Estimates (2004), *available at* http://www.ilo.org/global/What_we_do/Statistics/lang=en/docName=WCMS_087893/index.htm (citing statistics from the ILO indicating that the rate of unemployment in Colombia has never been below 10% and showing Colombia to be characterized by very high rates of informal labor).

4. MARÍA M. CUÉLLAR, LIDERAZGO FEMININO EN LOS SECTORES PRODUCTIVO Y FINANCIERO [Female Leadership in the Production and Financial Sectors] (2009), *available at* www.asobancaria.com/upload/docs/docPub4787_2.ppt.

5. *Id.*

Poverty and Extreme Poverty in Colombia

Poverty⁶

	1999	2002	2005
Women	55.39%	51.95%	47.77%
Men	54.32%	50.56%	46.17%

Extreme poverty⁷

	1999	2002	2005
Women	27.09%	25.18%	20.96%
Men	26.40%	24.42%	19.58%

After engaging with different legal academic projects in the past years, I have come to the conclusion that the rigidities that characterize the distribution of resources in Colombia are determined by the instrumental use of law and rights, the corresponding relationship with development, and the gendered dimensions of redistributive policies.

Traditionally, in both Colombia and the surrounding region, there is enormous faith in the law's capacity to transform societies. In moments of social unrest the first impulse is to reform the existing constitution,⁸ and when confronted with problems of resource distribution or discrimination, legal reform is always part of the recipe. Much has been written arguing in favor of legal reform, and much less about the law's role in reproducing social injustice.

This is the first desire of my work: I want to show the limits and potential of what I will call the culture of legality. Specifically, I will demonstrate what has been lost by progressives when concentrating their energy on the transformation of the text of the law and underestimating the weight that diverse legal regimes carry. For example: an administrative regulation may be more powerful than a Constitutional Court ruling;⁹ a labor judge may be

6. Estadísticas de América Latina y El Caribe [Latin America and The Caribbean Statistics] <http://websie.eclac.cl/sisgen/ConsultaIntegrada.asp?idAplicacion=14&idioma> (last visited Feb. 10, 2011).

7. *Id.*

8. Scott Mainwaring, *The Surprising Resilience of Elected Governments*, 10 J. DEMOCRACY 101, 101-14 (1999), available at http://muse.jhu.edu/journals/journal_of_democracy/v010/10.3mainwaring.html (stating how, in the last two decades, Colombia, Bolivia, Ecuador, and Venezuela have transformed their constitutions to solve problems that range from political violence (Colombia), increases in the participation of indigenous groups (Bolivia and Ecuador), and the redistribution of resources among classes (Venezuela)).

9. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.), available at http://www.unifr.ch/ddp1/derechopenal/jurisprudencia/j_20080616_03.pdf (in Spanish) (holding that abortion was authorized in three cases: danger for the mother's life, extreme malformation of the fetus, and rape). The administrative regulation that was necessary in order to get access to obtain an abortion in these cases was established nine months after the ruling, making it effectively inapplicable during this period. Two

completely paralyzed by formalism, which will effectively make workers' rights inapplicable; and a politically powerful executive can provide more welfare benefits than benefits adjudicated through socio-economic rights.¹⁰

Recently, there has been an increase in the relevance of social and economic rights adjudication within legal discourse. This characteristic provides an additional layer to the interaction between different legal regimes. The use of rights for progressive purposes is not new in the region. Since the 1990s, the role of judges in the adjudication of constitutionally protected economic, social, and cultural rights has been described by many¹¹ as the most effective way for the state to channel social services toward hitherto excluded segments of society, including formal and informal workers, marginalized identity groups, and women.

In addition to the weight carried by the interaction between different legal regimes, I am interested in unveiling the role that ideas about economic development have had upon the distributional thrust of social policies. This interaction is relevant for the purposes of this paper because it is in this relationship that resources are distributed according to the identities created by development agendas. Specifically, I am thinking of two dichotomies: employed/unemployed and worker/care-provider.

Nevertheless, these dichotomies do not fully explain the persistence of resource inequality along gender lines, partly because since the mid-1990s the concentration of distributive policies along these identities has been blurred in two ways. The first is that the development agenda is geared less towards full employment and more towards creating the conditions for comparative advantage. The second is the refocusing of social policies towards the care-provider within the household. This refocusing has happened through a reliance on conditional cash transfers as the most effective way for the state to channel social services to those in the

years after the regulation was set in place, it was suspended by an Administrative Court order. To this date, it is almost impossible to get an abortion in the cases authorized by the Court.

10. See OVERSEAS DEVELOPMENT INSTITUTE, *FAMILIAS EN ACCIÓN*, Policy Brief 2 (2006), available at <http://www.odi.org.uk/resources/download/1068.pdf> (showing that the *Familias en Acción* government program seeks to mitigate the adverse effects of extreme poverty by supplementing the income of families with young children, increasing health care, and reducing the non-attendance and dropout rates in primary and high school students). For a more thorough description of this program, see *infra* III.2(b).

11. See generally *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (Varun Gauri & Daniel M. Brinks eds., 2008) (commenting on the traditional closing in on the unenforceable social rights that are part of the public law in many Hispano-American countries). See also VICTOR ABRAMOVICH & CHRISTIAN COURTIS, *LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES [Social Rights as Enforceable Rights]* (2004) (describing strategies to enforce social rights embodied in constitutions and human rights covenants by examining the practical experience of demanding those rights through the courts in various countries).

margins.¹²

This shift has consequences on the distribution of resources along gender lines, and this is the reason I also want to unpack the different forms that the gendered dimension of social policy has taken. In order to do this, I want to explore the role that background rules within the household have over the impact of social policies.

This paper is the first attempt to relate social policies and the legal regime of the household to explain the role of law in the distribution of resources. In order to demonstrate why this analysis sheds light on the law's inability to transform societies into more egalitarian ones, I will first describe the mainstream narrative of the evolution of social policies and what I left out of this account. I will then summarize the way in which feminists have responded to welfare state policies. Finally, I will propose an example of what the gendered distributional critique of new Colombian social policies would look like.

II. THE MISSING REDISTRIBUTIONAL ELEMENT IN COLOMBIAN SOCIAL POLICIES

A. Traditional Accounts of the Evolution of the Colombian Welfare State

Most legal accounts of the transformation of the welfare state in Colombia are included in texts which describe the evolution of labor code norms. There are progress narratives that include a foundational moment, a strengthening period, and, since the 1990s, a period of decadence.

All of these legal accounts have three basic characteristics. First, they center on the description of laws or administrative decrees produced through special powers invested on the executive, and no account discusses the role of judges or administrative regulatory agencies. Second, specialization and codification are seen as positive characteristics, but dispersion and fragmentation are considered detrimental to the evolution of the field. Finally, there are no references to the gendered dimensions of policies or to the feminist contribution to the debate.

12. See, e.g., ORAZIO ATTANASIO ET AL., INST. FOR FISCAL STUDIES, Briefing Note No. 54, HOW EFFECTIVE ARE CONDITIONAL CASH TRANSFERS? EVIDENCE FROM COLOMBIA (2005), available at <http://www.ifs.org.uk/bns/bn54.pdf>; see also <http://www.ifs.org.uk/publications/3214>; Jairo Nuñez y Laura Cuesta, *Evolución de Las Políticas Contra la Pobreza: de la Previsión Social a las Transferencias Condicionadas* [The Evolution of Policies Against Poverty: Social Welfare for Conditional Transfers], CEDE document 2006-31 (2006) (illustrating an intervention program that conditions monetary transfers on the household's participation in growth and development and school attendance for children between seven and seventeen).

1. Foundational Moment

According to most accounts,¹³ 1905-1946 welfare policies were dispersed among a range of laws which included: work related accidents,¹⁴ the process for strikes,¹⁵ pensions,¹⁶ collective bargaining, minimum characteristics of the labor contract, the creation of the Ministry for Labor, and the creation of the National Institute for Health and Social Insurance (*"Instituto Colombiano de Seguros Sociales,"* or "ICSS"). All of these were laws, the only exception being the 1936 Constitutional reform which established that work was a social responsibility with special protection from the state and it also established the right to strike except for public services.¹⁷

From 1946-1950, the norms regulating welfare issues shifted from Congress to the Executive Branch. In 1946, the minimum wage was established,¹⁸ even though it was ineffective until 1949 when the first administrative regulation established the amount, and in 1950 most laws were consolidated under a Labor Code designed through special powers invested in the President.

2. Golden Age

During the Golden Age, according to most liberal accounts, workers' rights were strengthened because they were systematized. A labor procedures code was passed first as an administrative decree (through special powers invested in the President), and later it was confirmed by Congress. Despite some liberal beliefs, the labor code was designed by the Executive branch with no participation from Congress.¹⁹

13. See, e.g., FRANCISCO RAFAEL OSTAU DE LAFONT, *EL DISCURSO PATERNALISTA EN LA FORMACIÓN DE LA NORMA LABORAL* [THE PATERNALISTIC DISCOURSE IN THE FORMATION OF THE LABOR STANDARD] (2006) (characterizing the development of Colombian labor legislation as primarily the product of state discourse, with the social struggles and socioeconomic conditions that traditionally drive European labor legislation playing a minor role).

14. See L. 57, noviembre 15, 1915, DIARIO OFICIAL [D.O.] (Colom.), available at <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=12998> (establishing the responsibility of the employer for work-related accidents).

15. See L. 21, octubre 4, 1920, DIARIO OFICIAL [D.O.] (Colom.) (establishing the necessary procedure for an authorized strike, and stating that a strike is illegal unless workers follow the process set forth in this law).

16. See L. 1, 1932, DIARIO OFICIAL [D.O.] (Colom.) (establishing the age of retirement and the pension amount).

17. This constitutional reform established that "work is a social obligation that will enjoy special protection by the State" in Article 17, and the right to strike in Article 18. CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1931 [C.P.] art. 17, 18.

18. See L. 6, febrero 19, 1945, DIARIO OFICIAL [D.O.] (Colom.), available at <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=1167> (allowing the government to establish a minimum wage through administrative decrees for specific periods according to differences in region, industry, and economic activity).

19. See generally BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR,

During the 1960s and 1970s additional social security policies were strengthened, such as the structuring of the pension system for sickness, work related accidents, and death; the establishment of regional offices both for the Ministry of Labor and the ICSS; the creation of a special social insurance system for peasants; unemployment benefits and the establishment of family subsidies and family health benefits.²⁰

3. *Decadence through Flexibilisation*

After the 1990s, there was a regional trend to make labor laws more flexible as part of the liberal reforms known as the “Washington Consensus.” These reforms were justified in terms of adjusting rigid labor laws seen as obstacles in job creation. Most of the reforms of this first period were geared towards giving flexible wages according to supply and demand of labor, different forms for the labor contract that included flexible hours, and the possibility to hire part time.

Table 1 Post 1990 Flexibilisation²¹

Before Law 50 of 1990	Flexible norms of Law 50 of 1990
The decree 2351 of 1965 established that the fixed term contract could not be for less than a year.	The law 50 of 1990 enables the employer to make fixed term contracts for less than a year. This reform affects the employment stability because a worker can be hired for less than a year.
Occasional benefits agreed to or not by the employer and the worker were part of the wage of the employee.	The article 15 of the 50 law establishes that those benefits are not part of the wage, if the employer and the worker agree that the benefit is not part of it.

During the year 2002, more norms were passed through Congress to make labor even more flexible: reducing firing costs, extending apprentice contracts (which exclude most workers benefits), and closing the gap between the day shift and the night shift.

COLOMBIA LABOR RIGHTS REPORT 4-8 (2008) (examining the legal framework for labor rights and the administration of labor law in Colombia).

20. L. 21, enero 22, 1982, DIARIO OFICIAL [D.O.] (Colom.), *available at* <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=4827> (defining the family subsidy as a social provision that can be paid in money and services to workers that have lower to middle incomes in proportion to the number of family dependants).

21. CÓDIGO SUSTANTIVO DEL TRABAJO [C.S.T.] art. 10 (Colom.), *available at* <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=33104>.

4. Redemption Through the Constitutional Court

The 1991 Constitution has an extensive bill of social and economic rights that have been used mainly by workers to ensure rights that were available to them since the early twentieth century, but were weakly adjudicated before 1991 because of difficulties in procedures and a backlog in the judicial labor system.

Statistics on the year 1999 illustrate how important social and economic rights have been to workers, as approximately 42% of rights adjudication cases brought to judges were related to health insurance (because it is connected to a fundamental right: the right to life) and the right to a pension (because it is related to the minimal conditions to survive, a bundle of rights that the Constitutional Court has made equivalent to a fundamental right).²²

B. An Alternative Account: Law, Development Redistribution

The traditional account of the evolution of the welfare state in Colombia demonstrates the linear narrative of progress that has characterized the liberal side of the academia and how deterministic and static the left side of the account has been.

I propose a different narrative of the evolution of the welfare state. This narrative includes, on the one hand, the impact that development policies had over the form and substance of the distributional impulse of the welfare state, as well as the corresponding legal regimes that were directly²³ and indirectly related to these economic development policies and that effectively determined their provision and adjudication. On the other hand, the structure of the family, which was the background for social policies, ended up determining the distribution of resources both among class and gender lines.

Relating economic development to social policies within a more complex idea of law provides an understanding of how law was instrumental in the distribution of resources along class and gender lines. A more complex understanding of law includes analyzing the different modes of legal

22. Mauricio García Villegas & Rodrigo Uprimny Yepes, *La reforma a la tutela: ¿ajuste o desmonte?* [Guardianship Reform: Adjust or Remove?], 15 REVISTA DE DERECHO PÚBLICO 245, 253 (2002).

23. The fact that in the Colombian legal system there are clearly defined areas of law creates many blind spots among academics and policy makers when understanding the complex interaction between different areas of law. Administrative law is described by many local authors as a field full of unique particularities that are a product of being a transplant from the French system. Nevertheless, these particularities are blurred when administrative law is analyzed more in terms of its relationship with economic development and less as part of a French tradition. See, e.g., Helena Alviar García, *Una Mirada Distinta a las Transformaciones del Derecho Administrativo* [A Distinct Look at the Transformations of Administrative Law], 19 REVISTA DE DERECHO PÚBLICO 1 (2007) (evaluating the evolution of Colombian administrative law).

reasoning considered, such as administrative regulatory policy or constitutional rights adjudication. It also includes understanding the effect on the distribution of resources that the mode of reasoning had in terms of claims. For example, how can a worker initiate a process to receive state benefits framed within administrative law regulations, and what is the difference when those benefits are structured as rights? Thirdly, it includes assessing the role of judges, the scope of judicial review, and the power of labor law judges to adjudicate labor law cases. Finally, a more complex understanding of law includes studying the interaction between private arrangements within the family and the welfare state in terms of the social provision of services structured around ideas about the role of women within the household. For example, women were not allowed to manage their own resources until 1976 and divorce was only authorized for Catholic marriages after 1991,²⁴ so the structure of the labor market was geared towards a male breadwinner. At the same time, not all legal regimes are the same, and constitutional reasoning varies among administrative law, criminal law, and private law. The appeals system also works in diverse ways, requires different tools, different expertise, and legal counsel, so the rates of success and failure vary.

Therefore, even though employment policies were generally phrased in gender neutral terms, the truth is that during Import Substitution Industrialization (ISI) the jobs were thought of in terms of the male working force, and women were considered care-providers. This had the effect of reducing women's participation in the market.²⁵ Additionally, due to important development policy of the 1970s and 1980s, the new jobs that were created centered on the construction industry, which excluded women. Meanwhile, family-style subsidies were understood to help "the workers'" family.²⁶

In addition, since the 1950s, law was understood to be instrumental to

24. See L. 1, enero 19, 1976, DIARIO OFICIAL [D.O.] (Colom.), available at http://www.cntv.org.co/cntv_bop/basedoc/ley/1976/ley_0001_1976.html (establishing judicial authority for divorce decrees in civil marriages and allowing women to receive and manage their own resources); L. 25, diciembre 17, 1992, DIARIO OFICIAL [D.O.] (Colom.), available at http://www.cntv.org.co/cntv_bop/basedoc/ley/1992/ley_0025_1992.html (extending the effects of civil divorce to religious marriages, requiring couples to enter into civil marriage after religious ceremonies to give marriages effect, and mandating judicial affirmation of annulments or marriage dissolutions by religious organizations to be given effect).

25. See Alejandro Charry L., *La Participación Laboral de las Mujeres No Jefes de Hogar en Colombia y el Efecto del Servicio Doméstico* [The Labor Force Participation of Women Not Heads of Household in Colombia and the Effect of Domesitc Service], available at <http://www.banrep.gov.co/docum/ftp/borra262.pdf> (last visited Jan. 10, 2011).

26. L. 21, enero 22, 1982, DIARIO OFICIAL [D.O.] (Colom.), available at <http://www.alcaldiabogota.gov.co/sisjur/normas/norma.jsp?i=4827> (defining family subsidies as social assistance paid out in money and services to lower and middle income workers, in proportion to the number of their dependants, which included their spouses).

economic development. The definition of development changed over time and, with it, the use of law. For example, from the 1960s through the 1980s, the definition of development was growth by import, substituting industrialization.²⁷ This growth would be accompanied by full employment, which facilitated the distribution of resources within society through salary, social security, and family subsidies; all of which were linked to formal employment. During this period, there was no policy geared towards people who were unable to find work for a diverse range of reasons. In this sense, the social purpose of growth by ISI and law was instrumental in reaching economic development.

In the 1960s through the end of the 1980s, Colombia experienced the strengthening of the administrative regulatory state with little judicial control since it was understood to serve the greater goal of development. This instrumental use of law translated into several characteristics that defined its transformative thrust. These characteristics included: power being centralized in the executive technocracy,²⁸ a formalist judiciary in adjudicating labor rights,²⁹ a lack of alternative means of claiming workers' guarantees which had been established by the law,³⁰ and a prevalent use of public law over private law. The last characteristic continues today because transforming the instructions provided through public law is still seen as the best way of solving social and economic problems.³¹

After 1991, the use of law was transformed because of a change in the definition of development (growth through integration in the global market on the basis of comparative advantage), the transformation of social services through privatization, an increased interest in poverty alleviation, the move from using macroeconomic formulas in developing social policy to employing microeconomic insights in designing a generous bill of social and economic rights, an increased attention on the rule of law, the conservatives' use of antiformalism when opposing judicial review of economic development policies,³² and the progressives' use of formalism

27. See generally HELENA ALVIAR, *DERECHO, DESARROLLO Y FEMINISMO EN AMERICA LATINA* [DEVELOPMENT AND FEMINISM IN LATIN AMERICA] (2008) [Hereinafter ALVIAR, *DERECHO, DESARROLLO*] (detailing the different ways in which development was defined within the Colombian context).

28. See Helena Alviar García, *Una Mirada Distinta a las Transformaciones del Derecho Administrativo* [A Distinct Look at the Transformations of Administrative Law], 19 REVISTA DE DERECHO PÚBLICO 1 (2007).

29. Even though labor law judges are historically described as the most progressive judges, in reality most of their rulings are characterized by a formalist style which excluded any interpretation that was not literally allowed by the law.

30. After 1991, social and economic rights created an alternative and more effective means of claiming worker's rights.

31. Examples include not only the constitutional transformations mentioned above, but also violence against women, land reform, equality between men and women, and anticorruption laws.

32. HELENA ALVIAR, *¿QUIÉN PAGA O DEBE PAGAR POR LOS COSTOS DEL ESTADO*

when including constitutional provisions guaranteeing social and economic rights.

The 1991 Constitution counteracted the Neoliberal impulse through the establishment of a social democratic state and through the addition of social ideas about solidarity and an extensive bill of social economic rights, international obligations became a part of the Colombian legal regime through the constitutional block. The constitutional block is the set of international treaties and human rights principles that, although not formally part of the Constitution, are integrated into interpretation principles. Conversely, the role of the Catholic Church and the conservative party in the design of family subsidies prevailed even after privatization and the reduction in the state's provision of services.

The role of judges increased significantly because constitutional law measured not only economic development policies, but also social services and daily life. For example, the Colombian Constitutional Court has made many rulings regulating social interaction, from forbidding forms of discrimination, allowing euthanasia and the personal use of marijuana, to extending economic benefits to same sex couples. In addition, both courts and private arbitrators became increasingly powerful given the relevance of enforcing contracts and property rights.

III. FEMINIST RESPONSES TO THE WELFARE STATE

The last Section presented the traditional account of the evolution of the welfare state, available in Colombian literature, as well as my critique of it, and my specific proposal which intends to provide a more detailed analysis of the dimensions of law in order to understand the complex legal framework and how the interaction between different uses of law and the role of judges has caused an unacceptable and unequal distribution of resources among social classes in Colombia.

Nevertheless, this analysis still lacks a major element: the effects of gender that any specific type of welfare state entails. This Section describes the feminist responses to the welfare state as well as the existing Colombian feminist account of social policies. This is mainly intended to expose, once again, how feminists also prescribe to a very linear, text centered understanding of law. This view has led their agenda to concentrate on transforming legal norms by reiterating the existing equality clause, and penalizing domestic violence and sexual abuse, amongst other

SOCIAL DE DERECHO? [WHO PAYS OR SHOULD PAY FOR THE COSTS OF THE WELFARE STATE?] 3-17 (2009) (explaining that, during the first ten years of the 1991 Constitution, there was a heated debate between economists and lawyers about Constitutional Court rulings that went against economic development policies). Economists accused lawyers and Constitutional Court Justices of being ignorant about economic matters, while defenders of the Court responded by saying that the Court was only following orders imposed by the social content of the Constitution. *Id.*

things.

A. Mainstream Feminist Responses

As has been the case in many feminist contributions,³³ the initial interpretation of the welfare state faced the fact that both its structure and academic interpretation were described in gender neutral terms. This proves to be one of the major difficulties, because the norms do not explicitly say that women should stay at home or be the main care-providers. In fact, laws have not excluded women from being wage earners, and equal pay for equal work has been the law in Colombia since 1950.³⁴ A closer look, and this has been a major feminist contribution, shows how men are the point of departure both in the law and the analysis of the law. For example, in a system based on the insurance of the employed, the type of jobs that were created through government plans and incentives had gendered dimensions. As a matter of fact, and as it was described in the last section, up to the 1990s macroeconomic policy concentrated on the creation of jobs in industries such as car manufacturing, steel production, coffee harvesting, and construction, so it is no surprise that women's participation in the labor market up to 1990 was below 40%.³⁵

If we take into account that the Colombian social policy's main thrust during the thirty years was distribution through full employment and that the welfare state was based on a social insurance model geared toward those employed, the gendered dimension of an apparently neutral set of norms becomes apparent. In addition, women's entitlement in the system came mainly through family subsidies that were derived from their husbands' worker rights.

Once the development paradigm shifted from ISI, redistribution through full employment and social policy was directed toward people who were formally employed in export-led-growth industries. Legal instruments such as poverty alleviation and employment flexible programs, targeting the

33. See, e.g., *GENDERING WELFARE STATES* (Diane Sainsbury ed., 1994) (examining the impact of gender on the welfare state).

34. See CÓDIGO SUSTANTIVO DEL TRABAJO [C.S.T.] art. 10 (Colom.), available at <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=33104> (establishing that all workers are equal under law with the same protection and guarantees and abolishing any distinction between employees based on the intellectual or material nature of the work or its form or payment, except as otherwise provided by the act).

35. See *Charry*, *supra* note 25.

Year	1950	1982	1985	1992	1996	2000	2005
Female participation in the labor market	19%	37%	39%	47%	49%	56%	56%

neediest, changed and the gendered dimension were transformed but somehow still maintained the same structural unequal distribution of resources and power. Women continued to be considered care-providers. This fact is illustrated by the functioning of the *Familias en Acción* program, which will be described in the last section.

In addition to the male/breadwinner and female/care-provider dynamic, feminists analyzing the welfare state have researched and established the inequalities between women and men as recipients of welfare state benefits.³⁶ By examining care and the concentration of women in the service sector, feminists have problematized the dichotomy of formal and informal employment otherwise referred to as paid and unpaid work.

Feminists in Colombia, who have been able to influence the social policy agenda, have concentrated on establishing equality in the norms through judicial review and the elimination of discriminatory norms.

The evolution of the feminist approach to the welfare state has gone through three, sometimes overlapping, stages: maternity protection, equality and the exclusion of discriminatory norms, and poverty alleviation. In all the different stages, there has been an instrumental use of the law; it has been through legal and constitutional reforms that these transformations have taken place.

1. Maternity Protection

From the 1930s through the early 1980s, most of the norms that protected women were related either directly to pregnancy and birth or indirectly to the protection of mothers within society. In 1931, Colombia ratified the convention which protected pregnant women before and after giving birth.³⁷ In 1938, a specific law protecting maternity was passed.³⁸ This law was integrated into the labor code of 1950.³⁹ The protections included in the code were: an eight week maternity leave, the prohibition against firing during pregnancy and for three months after giving birth, the right to two twenty minute breaks during the working day in order to breastfeed, and the prohibition against hiring pregnant women in dangerous or unhealthy conditions.⁴⁰

Maternity protection has continued to be a basic characteristic of the

36. See, e.g., GENDERING WELFARE STATES, *supra* note 30 (evaluating the differing effects of the policies of welfare states on women versus men).

37. In 1931, Law 29 ratified the ILO Convention, which prohibited women from working night shifts.

38. See L. 21, enero 22, 1982, DIARIO OFICIAL [D.O.] (Colom.), available at <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=4827> (giving cash payables to families in medium and lower income proportional to the number of dependents, to the financial burden on the family, the basic unit of society).

39. CÓDIGO SUSTANTIVO DEL TRABAJO [C.S.T.] art. 10 (Colom.), available at <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=33104>.

40. C.S.T. arts. 236-41 (Colom.).

welfare type norms. In 1990, when a few of the worker's rights were dismantled, maternity leave was extended to twelve weeks.⁴¹

The protection of mothers has also been a salient characteristic of the pension system. Since the 1950s, women have consistently reached retirement younger than men, in order to compensate them for their "double shift," that is, the sum of domestic work and paid labor.⁴² This has affected women because they end up with pensions that are lower than men.

Now, even though motherhood has been extensively protected in the law, cases are constantly brought by female workers who have been fired during and after pregnancy.⁴³ Neoclassical Colombian economists blame maternity leave for the fact that women earn less than men. This argument is surprising, given the fact that working women are insured through the health system (both employer and employee contribute to this insurance) and the insurance company reimburses this payment to the employer.

2. Equality and the Exclusion of Discriminatory Norms

As I stated above, since the creation of the labor code of 1950, non-discrimination was established as a principle. In the 1980s and 1990s, through the ratification of international conventions and as a product of the 1991 Constitution, the discussion surrounding equality and non-discrimination has been strengthened.

It is interesting to note that even though Colombia ratified the international convention, which banned all forms of discrimination against women in 1982,⁴⁴ it was only in 1990 that it implemented its principles, by restating them in an administrative decree and was effectively useless.⁴⁵ Equality reached constitutional right status in 1991. Article 13 states:

All individuals are born free and equal before the law and are entitled to

41. See L. 50, diciembre 28, 1990, art. 236, DIARIO OFICIAL [D.O.] (Colom.), available at www.cntv.org.co/cntv_bop/basedoc/ley/1990/ley_0050_1990.html.

42. Corte Constitucional [C.C.] [Constitutional Court], septiembre 15, 1994, Sentencia C-410/94, (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/1994/c-410-94.htm>.

43. Corte Constitucional [C.C.] [Constitutional Court], octubre 2, 2003, Sentencia T-885/03, (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2003/t-885-03.htm>; Corte Constitucional [C.C.] [Constitutional Court], julio 13, 2006, Sentencia T-546/06, (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2006/t-546-06.htm>; Corte Constitucional [C.C.] [Constitutional Court], diciembre 5, 2006, Sentencia T-1040/06, (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2006/t-1040-06.htm>.

44. See UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-8&chapter=4&lang=en (last visited Oct. 28, 2010).

45. Decree 1398, julio 3, 1990 (enumerating the provisions of the CEDAW, but not regulating how the CEDAW will be put into effect and what programs will be established).

equal protection and treatment by the authorities, and to enjoy the same rights, freedoms, and opportunities without discrimination on the basis of gender, race, national or family origin, language, religion, political opinion, or philosophy.⁴⁶

Notwithstanding its constitutional right status, establishing the objective of equality in legal norms has been an obsession since the end of the 1990s. For example, in 2000, the Colombian Congress passed a law which established that women should be represented in 30% of high ranking posts of government.⁴⁷ Additionally, in 2002,⁴⁸ equality was reiterated for peasant women, and, in 2003,⁴⁹ a law demanding equality in working opportunities passed. In addition, after 1991, and through the special procedure established by the Constitution to ensure the protection of fundamental rights, the role and importance of the judges increased. In 1997, for example, a law that prohibited women from working night shifts in industries was declared unconstitutional. The Constitutional Court's arguments were based on the fact that the law was paternalistic and discriminatory. The court held that the rule in question was paternalistic when it forbids women from working at night in industrial enterprises. The court said that this is blatant discrimination that must be abolished because, along with being fully capable of working in dignified and fair conditions, women are entitled to exercise the same rights and opportunities in equal conditions to men. There is no doubt that today, within the constitutional framework, both women and men must participate equally in the economic, labor, social, and political processes, in the different activities, and therefore we must eliminate all restrictions that tend to impair or nullify the recognition and exercise of women's rights.⁵⁰

46. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 13.

47. See L. 581, mayo 4, 2000, DIARIO OFICIAL [D.O.] (Colom.), *available at* http://www.cntv.org.co/cntv_bop/basedoc/ley/2000/ley_0581_2000.html (applying the requirement to positions that are (1) top-level decision making positions and (2) other levels of decisions making).

48. See L. 731, enero 14, 2002, DIARIO OFICIAL [D.O.] (Colom.), *available at* http://www.cntv.org.co/cntv_bop/basedoc/ley/2002/ley_0731_2002.html (establishing methods to improve the quality of life for rural women through funding in the rural sector, outreach and training, making credit available, and agricultural funding, among other programs).

49. See L. 823, julio 10, 2003, DIARIO OFICIAL [D.O.] (Colom.), art. 3, *available at* http://www.cntv.org.co/cntv_bop/basedoc/ley/2003/ley_0823_2003.html (reiterating the Colombian government's push for guaranteeing equality of opportunities for women in both the public and private sector by establishing institutional framework and "gender-guide" policies for government entities to use to implement concrete opportunity and real equality of rights among women and all people). Article 3(a) of this law provides that government activities should be directed to promote the exercise of women's political, civil, economic, social, and cultural rights, to the free development of their individuality, and should remove all obstacles that prevent women the exercise of their rights, both at the national and regional level. *Id.*

50. Corte Constitucional [C.C.] [Constitutional Court], noviembre 27, 1997, Sentencia C-622/97, (Colom.), *available at* http://www.cntv.org.co/cntv_bop

3. *Poverty Alleviation*

Female poverty alleviation has been an issue since feminists began noticing the fact that women were among the poorest of the poor populations. In Colombia, this poverty alleviation was represented in special programs for peasant women and mothers as heads of households,⁵¹ micro-lending, and, since 1995, conditional cash transfers.

B. An Alternative Feminist Account: Law, Development, and Redistribution

This type of progressive agenda marginalizes two aspects: the multiple ways in which legal instruments can be used to prevent a better distribution of resources and the range of different legal norms that influence the bargaining position of women within the household. This bargaining position ends up determining the gendered distribution of power and resources. In the following Section I will describe how this should be done. Finally, I will explain an initial set of background norms that determine the distributive power of social policies.

1. What is Distributional Analysis?

An important argument of this paper has been to understand why, despite progressive legal provisions, Colombia continues to be an extremely unequal society. First, I will critique the Marxist interpretation which establishes that the economic structure determines the legal one (because this interpretation underestimates the many laws, administrative regulations and rulings that mediate between the interests of industrialists and property owners, as in the case of many labor law provisions as well as agrarian reforms). Second, I will critique the liberal interpretation that the problem is lack of rule enforcement, gaps or ambiguities in the law which can be corrected through amendments in the legal text.

Therefore, my objective is to highlight the effects that economic development and different modes of legal reasoning have over the distribution of resources. This is what was explained in the second part of the paper. In this part, my goal is to explore how background rules have an effect over the bargaining between classes and gender, the role that state enforcement plays in this same negotiation, and the cultural norms that

/basedoc/cc_sc_nf/1997/c-622_1997.html.

51. See L. 82, noviembre 3, 1993, DIARIO OFICIAL [D.O.] (Colom.), available at http://www.cntv.org.co/cntv_bop/basedoc/ley/1993/ley_0082_1993.html (promoting strategies, through decrees, to support women who are heads of households by calling on special protections for them). These protections include (1) calling on schools to loan texts to students who belong to a single mother's household; (2) establishing that the State will create and offer free training programs and development plans for micro-industries where women heads of households can be employed; and (3) decreeing that the national government will also create incentives for the private sector so as to create, promote, and develop special programs in health, education, housing, social security, credit, and employment for women heads of households. *Id.*

affect bargaining positions as well as the chances of opting out of negotiations.

Background rules allow one to understand how the definition of property, the enforcement of labor contracts, the criminal code, and family law all determine the outcomes of social policy. These rules frame the outcome because they effectively determine the bargaining power both between social classes as well as among men and women. In this sense, I want to suggest the problem with understanding a very limited scope of the law: only labor rules affect labor (not taking into account that property law, tax law, and criminal law, just to mention a few); only family law affects family (not talking into account that marriage affects property and labor); and criminal law only affects criminals, etc. The problem is that one loses sight of the range of background rules that will affect the distribution of resources.

In addition to relating the apparently unrelated, this analysis tries to bring out how the enforcement of certain legal norms determines the power of the parties negotiating over resources. This is the case when enforcement indirectly creates incentives for women to stay home (in the 1960 through 1980s by establishing benefits for wives and mothers in family subsidies, making divorce almost impossible and abortion a crime, and not providing universal child care services until the 1990s through *Familias en Acción*). The lack of enforcement is also part of the picture—for example, when the state regulates in a way that makes the norms inapplicable (abortion,⁵² violence against women, and maternity leave⁵³).⁵⁴ Furthermore, the idea of bargaining shies away from both the left and right traditional interpretation of a single winner or loser, it brings in the idea of negotiation and in some cases coercion.

Another important step for distributional analysis is the set of rules that determine the alternatives to remaining in a bargaining situation. Examples

52. Isabel Cristina Jaramillo & Tatiana Alfonso, MUJERES, CORTES Y MEDIOS: LA REFORMA JUDICIAL DEL ABORTO [WOMEN, COURTS AND MEDIA: JUDICIAL REFORM OF ABORTION] 259-66 (2008).

53. Julieta Lemaitre, *Estudio de caso: Despido injusto de mujer embarazada*, in ESTUDIOS OCASIONALES CIJUS 133,138 (2002). The applicable law prohibited firing a woman during maternity leave, but only provided a remedy of compensation if such firing occurred. In 1997, the Constitutional Court decided to modify the applicable remedy, which would be an order to reinstate the fired woman into her previous job. However, the Colombian Supreme Court, the organ in charge of actually adjudicating these claims, decided not to apply this remedy using technical arguments on interpretation of the law and retroactivity of the law.

54. See Corte Constitucional [C.C.] [Constitutional Court], noviembre 27, 1997, Sentencia C-622/97, (Colom.), available at http://www.cntv.org.co/cntv_bop/basedoc/cc_sc_nf/1997/c-622_1997.html. In the case of land reform, the regulatory measures needed in order to establish the maximum amount of land that could be owned by a single individual was established ten years after the 1968 agrarian reform. In the case of the decriminalization of abortion in extreme cases, a Constitutional Court ruled that the 2006 regulation has created a situation in which getting access to abortion is practically impossible.

include how easy or difficult it is to get and maintain a job given gender and class differences, who is the main care-provider within a household, who has a higher level of education and who manages the household resources, and the legal determinants of formal and informal labor. Additional considerations are the restrictions (both legal and cultural) that women can get certain jobs, the possibilities to exit the marriage, and the regulation of sexual harassment or the weak enforcement of labor rights or meager access to justice. These all will definitely influence access to social policies. In other words, in a system that was based in full employment, but treated women as care takers, the question is how this is going to affect their possibilities of exiting a marriage and entering the workforce.

Finally, determining factors are the sets of ideas and cultural representations which characterize men and women as having different desires, behaviors, personalities and abilities. In this sense, it is important to include in the analysis what roles social norms and cultural perceptions play. In the Colombian case, just to provide one example of a cultural perception, the influence of the Catholic Church in portraying the ideal woman as the selfless mother inspired by the Virgin Mary⁵⁵ has also determined the division male/breadwinner, female/care-provider.

Distributional analysis opens up the discussion about how social policy is designed. In the case of cash transfer programs, policy makers in many countries traditionally (many times unaware of it) have directed resources and opportunities to male household heads, assuming that the benefits would be distributed equally. Since the mid-1990s, the policy has shifted, giving family subsidies to mothers, as is clearly stated in the *Familias en Acción* documents, but making it difficult for them to access formal full time jobs.

2. A Prelude to a Gendered Distributional Critique of Colombia's New Social Policies

The dismantling of subsidies and social assistance programs, which was characteristic of the 1990s, has faced important institutional restrictions and at the same time has strengthened the unequal bargaining power between men and women within the household.

In terms of the institutional restrictions, it is important to note that many of the social policies set forth in Colombia have been conservative corporate governance initiatives. These social assistance programs are conservative because of the values they promote: the definition of what is considered a family and the role of women within them.

As a matter of fact, corporate governance programs translated into social

55. For an account of the influence of the Virgin Mary, see ALVIAR, DERECHO, DESARROLLO, *supra* note 27.

initiatives have evolved from charity⁵⁶ to comprehensive social investment programs that have at times replaced or inspired state policies.⁵⁷ These contributions are seen through direct intervention and particular forms of public financing as well as through the activities of nonprofit organizations. Most of these initiatives reaffirm ideas about traditional families, good behavior, and the importance of mothers within the family. The emphasis on the traditional structure of the family and the identification of women with the family has been part of the conservative agenda since the end of the 19th century in Colombia.

The *Familias en Acción* program reinforces the gendered structure of social policies, as is demonstrated by the way it works. The objective of *Familias en Acción* is to “offer help in moments of crisis in the best way possible to the poorest households, either with food subsidies to children, measures to avoid school desertion, with teaching programs for the unemployed population to get into the labor market and job promotion and creation programs.”⁵⁸ Each month, it provides a specific amount of money to a family (U.S. \$100 for each child younger than seven years old, U.S. \$50 for each child between the second and fifth grade of school, and U.S. \$100 for each child in high school). This sum is supposed to be used to fulfill basic needs related with nutrition and permanency in the schooling system. According to the program’s description, “the subsidy is given to mothers, who tend to redistribute the resources in the consumption of food, education and health.”⁵⁹ To guarantee the use of the money accordingly, mothers have to complete forms in which they assure their duty to provide nutrition, health and education.

This policy was designed in 2000 and financed by World Bank and Inter-American Development Bank credit.⁶⁰ The loan’s objective was to promote three welfare programs intended to alleviate poverty and, consequently, foster development.⁶¹ The first of these: *Familias en Acción*,

56. See ROBERTO GUTIÉRREZ ET AL., APORTE Y DESAFIOS EN LA RESPONSABILIDAD SOCIAL DEL EMPRESARIADO PARA LA CONSTRUCCION DE LA SOCIEDAD COLOMBIANA [ACHIEVEMENTS AND CHALLENGES OF CORPORATE SOCIAL RESPONSIBILITY IN COLOMBIA] (2005) (discussing how, since the beginning of the century, Colombian companies in a Catholic environment were in charge of giving money to social activities of the Church).

57. See *id.* (finding that research in Brazil, Chile, Peru, Colombia, Ecuador, and Mexico revealed that companies and their respective leaders are the principal promoters of new social funds in the region, and stating that in 1997). For example, Maria Cristina Rojas identified ninety four social foundations in Colombia with assets that were close to the U.S. \$1,000,000, the amount that represented the percentage of the social cost of the State. *Id.*

58. DEPARTAMENT NACIONAL DE PLANEACION, HACIA UN ESTADO COMUNITARIO, PLAN NACIONAL DE DESARROLLO 2002 – 2006 [NATIONAL DEVELOPMENT PLAN 2002 – 2006] 214 (2002).

59. *Id.*

60. ATTANASIO ET AL., *supra* note 12.

61. *Id.*

was inspired by the Mexican program PROGRESA and centered on conditional cash subsidies for education and nutrition. Initially, the policy was designed according to geographical considerations due to the fact that poorest of the Colombian population live in rural areas.⁶² Accordingly, 70% of Colombian municipalities qualified for the program. In 2005, President Uribe pushed for total coverage including all cities⁶³ and most towns. To date, 1,093 of the 1,098 municipalities are covered by the program.⁶⁴

There is a process to access the subsidy. After the town or city has been included in the list of targeted municipalities, the office of the town mayor must publicly announce a date for families to register in the program. In order to register, you must be a mother, classified as SISBEN 1,⁶⁵ or be part of the displaced people's identification data base,⁶⁶ and have children younger than seventeen. This registration process is done once a year. The payment of subsidies is practiced bimonthly. In order to receive the subsidy, the mother must prove that both she and her family have complied with:

- A standard increase in weight and height for children younger than seven. This includes going to 100% of

62. *Id.*; see Catherine Rodriguez, *Pobreza Rural en Colombia* [*Rural Poverty in Colombia*], LA SILLA VACIA (Oct. 16, 2009), <http://www.lasillavacia.com/elblogueo/blogoeconomia/4832/pobreza-rural-en-colombia> (presenting data by the Food and Agriculture Organization of the U.N. and UNESCO that rural poverty in Colombia is "65.2%" of the rural population).

63. See CONSEJO NACIONAL DE POLÍTICA ECONÓMICA Y SOCIAL, DOCUMENTO CONEPES 3472: CONCEPTO FAVORABLE A LA NACION PARA CONTRATAR EMPRESTITOS EXTERNOS CON LA BANCA MULTILATERAL HASTA POR U.S. \$1,500 MILLONES, O SU EQUIVALENTE EN OTRAS MONEDAS, CON EL FIN DE FINANCIAR LA PUESTA EN MARCHA DE LA EXPANSION DEL PROGRAMA FAMILIAS EN ACCIÓN 2007-2010 [FAVORABLE NATIONAL CONCEPT TO CONTRACT WITH FOREIGN BANK LOANS FOR MULTILATERAL U.S. \$1,500 MILLION OR EQUIVALENT IN OTHER CURRENCIES, FOR THE PURPOSE OF FINANCING THE IMPLEMENTATION OF THE EXPANSION OF FAMILIES IN ACTION PROGRAM 2007-2010] (2007).

64. See Acción Social, Familias en Acción, Objetivo [Families in Action, Objectives], available at <http://www.accionsocial.gov.co/contenido/contenido.aspx?catID=204&conID=157&pagID=275> (last visited Jan. 30, 2011) (showing that 99.54% of the geographical area is covered by the thirty two departments).

65. SISBEN is a poverty classification database that is created through a survey performed in the entire territory. The survey asks questions intended to measure levels of wellbeing and needs in terms of health, nutrition, education, construction of the family house, type of employment, safety, and social interaction. CONSEJO NACIONAL DE POLÍTICA ECONÓMICA Y SOCIAL, DOCUMENTO 117, ACTUALIZACION DE LOS CRITERIOS PARA LA DETERMINACION, IDENTIFICACION Y SELECCION DE BENEFICIARIOS DE PROGRAMAS SOCIALES [UPDATE OF THE CRITERIA FOR THE DETERMINATION, IDENTIFICATION, AND SELECTION OF SOCIAL PROGRAM BENEFICIARIES] (Aug. 25, 2008) [hereinafter ACTUALIZACION DE LOS CRITERIOS], available at <http://www.dnp.gov.co/PortalWeb/tabid/55/Default.aspx>.

66. Registro Único de Población Desplazada [Registry of Displaced Persons], available at http://www.gobiernoenlinea.gov.co/contenido_ciudadanos.aspx?temID=119&tralID=4752 (last visited Jan. 30, 2011).

- follow up appointments.
- No more than eight unexcused absence from elementary school for school aged children
- Full attendance to courses on nutrition and early education.

The office of the town mayor is responsible for sending the necessary reports and information about the adequate fulfillment of conditions to the central government.

In terms of its legal structure, the program is designed by the National Planning Department and a public institution created by President Uribe in order to channel both national and international resources for presidential social policy initiatives: *Acción Social*. The existing regulatory framework can only be traced in planning department papers from Consejo Nacional de Política Económica y Social (“CONPES”). CONPES texts are defined as policy discussions whose objective is to serve as government consulting documents for economic and social development.⁶⁷ Nevertheless, it adjudicates enormous amounts of resources (such as in the case of *Familias en Acción*), but most of the CONPES documents deal with issues that have to do with state expenditures such as social security, displaced population, agrarian subsidies, urban zoning projects, aid for minorities, road building, and education. The policies CONPES designs have not been challenged in court up to this date. As a consequence, *Familias en Acción* subsidies provide no citizen entitlement and up to this date have not been contested in administrative courts.

Recently, the program has been greatly criticized by both the right and the left. The critics on the right state that it creates incentives for people not to enter the labor force, it weakens individual resilience, and it fosters a paternalistic view of the state. On the left, the critics say that the amount of the subsidy is too small, that it will never make any difference in poor people’s lives, and that it has been used in order to increase the popular support for President Uribe.⁶⁸ As a matter of fact, President Uribe has

67. See ACTUALIZACION DE LOS CRITERIOS, *supra* note 65 (stating that CONPES is the highest national planning advisory board that serves the government on all aspects of economic and social development within the country).

68. See Cecilia Lopez Montano, Editorial, *Hacia una Nueva Política Social [Towards a New Social Policy]*, ELTIEMPO.COM (Nov. 26, 2007), available at <http://www.eltiempo.com/archivo/documento/MAM-2742953>. Montano quotes presidential candidate Cecilia López as saying:

La política social colombiana no puede seguir basándose en limosnas para los pobres, malos servicios para los pocos trabajadores formales y mercados de seguros en salud, educación y pensiones para los pudientes. Tampoco se justifica que los programas asistenciales del Gobierno acaparen cada vez más recursos públicos y se conviertan en la prioridad mientras que, para la mayoría, la salud está en crisis, la educación es de mala calidad, la seguridad social es privilegio de pocos y el mercado laboral es generador de pobreza. Se agrega la crítica situación social de las costas del país, que se comportan como si fueran

forced an increase in the number of families benefitted, which has meant that *Acción Social* (the agency in charge of delivering the subsidy) in October of 2009 had not reached the presidential goals.⁶⁹ Beneficiaries have also complained about long lines in order to register and the slow delivery of the subsidy.

Familias en Acción, confirms that social assistance in Colombia is related to a very traditional idea of what is family and which is the role of women inside of the family. It would seem as if women were not identified with individuals but as extensions of their maternal work. Second, assistance for women based on need actually increases women's "reproductive work."⁷⁰ This occurs because in order for the woman to receive the subsidy, she must go through a long procedure that includes completing paper work and visits. This administrative procedure is done by women not only because they are the ones in charge of redistributing the resources, but because the program only distributes.

IV. CONCLUSIONS

This Paper engaged three distinct, but deeply interrelated, arguments. The first one, is an attempt to critically engage with the reformist culture of legality in Latin America, taking Colombia as the first example. The basic characteristics of this culture of legality are an extreme faith in the capacity that laws and, more recently, constitutional rights, have in transforming society. I demonstrated how progressives in the region have overestimated the power of a legal text (constitutional or statutory) and of the

parte de las zonas más pobres del África, donde los niños mueren de desnutrición y los servicios de salud y de educación son vergonzosos o inexistentes. Voces autorizadas, nacionales e internacionales, han prendido las luces rojas, pero el Gobierno hace 'mutis por el foro.' La política social sigue siendo la cenicienta de este y un instrumento para obtener votos o pagar favores políticos, cuando no la fuente de financiación de las mafias." Translated as, "Colombian social policy cannot continue to rely on handouts to the poor, poor services for the few formal workers and insurance markets in health, education, and pensions for the wealthy. There is no justification for government assistance programs nor justification for an increase in public resources. Especially when, for most, health is in a state of crisis, education is lacking, social security and privileges for the few labor markets is generating poverty. Additionally, the social plight of the country's coasts, which behave as if they were part of the poorest parts of Africa, where children die of malnutrition and health services and education are outrageous or lacking. Authoritative voices, national and international red lights are on, but the government does 'mutis por el foro.' Social policy remains the fairytale of this and a tool to get votes or pay for political favors, if not the source of funding for the gangs.

69. See *Acción Social*, *supra* note 64 (stating that the number of families that benefitted from the program, including the displaced population, was half a million below the goal announced by President Uribe).

70. I define "reproductive work" as the set of functions that women do inside their houses: cooking, washing, taking care of the children.

constitutional judge. I demonstrated how progressives have underestimated the relevance of a powerful executive in the distribution of welfare benefits, the role that administrative agencies effectively have when defining rights, and the effect that labor, criminal and family judges have. This explains why redistributive social policies and gender equality norms are reiterated in the texts, but because their regulation comes late, it is insufficient or effectively blocks any weak re-distributional impulse the legal or constitutional text might have. In addition, many legislators have lost sight of the fact that norms are interrelated: labor law is related to property and criminal law; social policies are related to divorce laws, access to abortion, and the gendered labor market.

The second objective of this paper was to lay out how the development agenda, once compared with the social policy narrative, determines the distribution of resources along identities: formal/informal worker and care-provider/breadwinner. Along the same lines, when analyzing the succession of economic development models, it becomes very clear that redistribution hasn't been a national objective, a fact that continues to surprise me given the disturbing levels of inequality that characterize Colombia. After the 1990s, when targeted poverty alleviation became an economic concern, the gendered, meager and marginal way in which it is designed, proves that redistribution continues absent from the political discussion.

Finally, what distributional analysis demonstrates is that the transformative impact will vary if you relate different legal regimes or take into account the variations in their weight and argumentation style. It allows us to analyze what are the differences between designing social policies through laws, administrative regulations or constitutional rights. Sometimes laws are left unregulated, rights have only an individual effect, and regulations can be arbitrarily used to adjudicate resources.