# RIGHTS, DISTRIBUTION, AND ACCESS TO JUSTICE

By: Rolando TAMAYO[1]

## 1. *Preliminary*

This paper is concerned with political systems and democracy, in which democracy is understood as political freedom. It is a fragmentary analysis of the conditions that must be met for a political system to be considered democratic (*i.e.* one in which there is political freedom). When said conditions are met, certain rights (democratic ones) exist. Those rights are indispensable to enjoy "political freedom," which shall be understood as the entirety of rights that permit participation and tolerance. I will argue that a political system that does not fulfill these conditions is morally wrong for it does not comply with the (minimal) requirements of the rule of law.

For the following analysis a simple, almost intuitive notion of political system and political freedom is sufficient. By political system, I mean the body of rules and actions linked to the exercise of political power within a determined society. I am aware that said definition of political system is rudimentary; it requires further refinement. Nonetheless, I prefer to leave it the way Max Weber originally stated it.[2] I will now proceed to clarify the relationship that exists between a democratic political system and a person's rights (whether human rights, prerogatives, or liberties).

An important part of this argument is the role that courts play in the functioning of rights. However, this essay is not about courts; it is about the role played by the judiciary in the determination, existence and functioning of rights. Specifically, it is concerned with certain rights that constitute the nucleus of the "democratic game" for any political system.

Thus, in this essay, I am not concerned with judicial procedures, but with the access to them. This access, as I shall later demonstrate, constitutes a

---

[1] Senior Research Fellow and Tenured Professor. Law School, National University of Mexico.

[2] Weber, Max, *Politik als Beruf* en Winkelmann, Johanes (Ed), *Gesammelte politische Schriften*, Tubinga, 1971, p. 505.

necessary condition for any right to exist. All rights, if there are such, are necessarily "actionable"[3] (*sit venia verba*).

It is my belief that in every democratic system:

(1) People have rights;

(2) These rights are legally established (by a legal source); and

(3) The only condition that needs to be met in order to be granted these rights is merely to belong to the political community.[4]

Part of my argument is to defend the thesis that the availability of a jurisdictional process is a necessary condition for the existence of every right and therefore of the rights constituting the nucleus of the "democratic game".

In light of the preceding paragraph, we must find what *data* may be considered characteristics traits[5] of said rights, in order to be able to determine which rights make up the nucleus of the democratic mechanism (democratic rights, *tout court*) and lastly, describe the access to justice that meets the democratic metarequirement *par excelance* for any system to be democratic: equality.

## 2. *Law and Courts*

One of the main tenets of the thesis exposed herein, which however cannot be developed now, is that courts constitute *primary institutions* within the legal order.[6] The identifying criterion of a community's law is basically the result of

---

[3] Any genuine right presupposes the availability to legal action in order, as the case may be, judicially demand the satisfaction of its right.

[4] Undoubtedly, I am referring to fully capable adults. I shall not speak about children or the mentally challenged because it is not relevant to the context of this essay.

[5] See my article "The Functioning of Human Rights in the Legal System", in Arnau, J.A., Hilpinen, R. y Wroblewski, (Eds.). *Juristische Logik, Rationalität und Irrationalität im Recht*, en *Recthstheorie*, Berlín/Mainz, Verlag Duncker & Humbolt, 46. Band, Beih. 8, 1985, pgs. 375-386.

[6] Alan Watson believes that law's distinctive and sole characteristic is constituted by the availability of a judicial process which has the essential function of resolving effective or potential disputes (*Cf. The nature of Law*, Edinburgh, Edinburgh University Press, 1977).

the court's activity. The criterion provided by the legislator is only a *prima facie* proof.[7] Therefore, if the law's proof of identity is provided by the courts, then rights, as legal institutions, must pass the same identity test in order to be a part of that law.

This argument creates different interpretations regarding the relationship between rights and Courts. I will distinguish two: the first could be called the 'strong thesis'; it reads as follows: 'a right exists only when (having met other conditions) it is effectively recognized by the courts (*e.g*. by a judicial ruling). Thus, Aulus Agerius[8] has a right only when the court decides that he effectively does. The 'weak thesis' runs as follows: a right exists when (having met other requirements) there are courts that can make effective said right, if necessary. According to this version, undoubtedly, Aulus Agerius' right exists because there are courts, but acknowledges that rights might exist independently of whether or not there actually exists a judicial process. Therefore, Aulus Agerius has a right if and only if there are courts, but he may have a right even if he never files an action to defend it. In this essay I shall adopt a variant of the weak thesis, which I will not make explicit.

## 3. *Equality and Procedure*

In political utterances (as in the judicial discourse), the concept of democracy alludes to two different elements that, although they may be placed together, are independent.[9] The first is the principle of equality, according to which all

---

Joseph Raz states that the courts are the clearest example of primary judicial institutions (*Cf. The Authority of Law. Essays on Law and Morality*, Oxford, Clarendon Press, 1979, p. 110

7 Kelsen believes that a "provisional membership" is always necessary within a legal order. (*Cf.* "La garantie juridictionelle de la constitution. La justice constitucionnelle" en *Revue du Droit Public et de la Science Politique* , Vol.XXXV, 1928, pgs. 197-257, París; reprinted in *Annuaire de L'Institut International du Droit Public*, París, Presses Universitaires de France, 1929, pgs. 52-143. The German text of this essay: "Wesen und Entwicklung der Staatsgerichtsbarkeit", apareció en *Veröffentichungen der Vereinigung der deutschen Staatsrechtslehrer*, Heft, 5, Berlín/Leipzig, 1929, pgs. 31-88.

8 "*… Si Aulus Agerius (id est, si ipse actor)…*" (Gai, *Institutionum quattor commentari*, IV, 34.). The "claimant" in Gayo's *Institutiones* (*is qui agit, ergo, Agerius*) (*Cf.*: Berger, Adolf, *Encyclopedic Dictionary of Roman Law*, Transactions of the American Philosophical Society, Philadelphia, 1968, p. 370.

9 *Vid.*: Farrell, Martin. *La democracia liberal*, Buenos Aires, Abeledo-Perrot, 1988, pp. 13ff.

individuals, due to the sole fact of being members of the political community, qualify for being granted democratic rights (*e.g.* freedom of speech, freedom of association, right to vote, etc.).[10] The second aspect is the existence of a body of procedures by which individuals exercise and assure their rights (the rights to which they are entitled). Among these procedures, the jurisdictional process (where there is democracy) stands out.

## 4. *Democracy and Distribution*

> h) e)n dhmokrati/ni peri/n th=s para_ toi=j duna&sthisi kaleome&nhj eu/daimonih/j tosou=to&n e)sti ai9petwte/rh, o(ko&son e/leuqeri/h doulei/hj[11]
>
> DÊMOCRITUS of ABDÊRA

Democracy's most relevant economic aspect is not exactly well-being, but distribution (or even better: redistribution).[12] Distribution is not a neutral term. It alludes to the concept of distributive justice. When it is used, individuals assume the existence of a fair mechanism by which goods and honors are distributed. It is not difficult to consider that, among goods and honors, there is the conferment of democratic rights," which constitute the *modicum* of citizen's autonomy.

Pursuant to the distribution of rights, two questions arise: (1) how to make a fair distribution; and (2) how to rectify such distribution if it is morally wrong.

---

[10] This principle also states that everybody must have the rights granted on the other members of his class (*e.g.* worker, soldier, merchant, taxpayer) have.

[11] *Frg. 251* (*Cf.*: Dielz, Hermann. *Die Fragmente der Vorsokratiker*. *Griechisch und Deutsch*, Kranz, Walther (Ed.), Weidmann, 1972, t. II, p. 195: "Poverty under democracy is to be preferred to so-called prosperity under an autocracy; just as liberty is preferred to slavery." (As to English version I follow Kathleen Freeman's. (*Vid.*: *Ancilla to Pre-Socratic Philosophers*, Oxford, Basil Blackwell, 1962, p. 114).

[12] Regarding the aforementioned, see: Nozick, Robert, *Anarchy*, *State and Utopia*, New York, Basic Books, Inc. 1974 (there is a translation of mine: *Anarquía*, *Estado y utopía*, México, Fondo de Cultura Económica, 1988).

Distributive justice has to do with the portions to be distributed; rights included. But, although rights actually represent a practical advantage to someone or to a class; this is not the case for democratic rights, which ought to be distributed to every man in the community. The procedure for that purpose, whichever it may be, has to assure equal treatment and equal results. Democratic rights do not represent a practical advantage for anybody or for any class of individuals. All men receive the same portion. These rights never decrease and nobody increases his portion either. A distribution of rights is not morally wrong if an equivalent portion of rights is distributed to each member of the community.

## 5. *Rights and Jurisdiction*

A fair distribution of rights does not conclude with the distribution made by the legislator; the legislator's distribution is only a *prima facie* distribution. A fair distribution of rights requires a fair distribution of the conditions to exercise said rights. Access to justice requires equality.

Now, we must consider the rectification of an unfair (or damaged) distribution. Thus, the golden rule of rectification is the following: *spoliatus ante omnia restituendus*[13] (*i.e.* 'immediate restitution of the aggrieved parties' rights'). In this paper I will let aside the questions concerning the responsibility of those who commit injustices before those who worsen their situation because of the perpetration of said injustices.

The following formula I believe captures the general form for any statement of rights: '**x** has a right to **φ**' (or simply: '**x** R **φ**'), where '**x'** designates Aulus Agerius (because a right holder is, by definition, a potential plaintiff); 'R' names the right under consideration, and '**φ'** is a variable that covers any human conduct. In the legal discourse, the statement '**x** R **φ**' is generally understood as '**x** is legally permitted to **φ**'. The idea that the action covered by a right is permitted is immediately perceived when the statement is interchanged with phrases where the auxiliary 'may' occurs, for instance: 'Aulus Agerius may **φ**'. Furthermore, legal and jurisprudential usages of 'right' interpret the statement '*Per* **x, φ**': '**x** is permitted to **φ** or **x** is permitted to refrain from **φ**-ing (*i.e.* '*Per* **x, φ** ↓ *Per* **x**, ~**φ**).' This is a very important modal predicate that distinguishes the right from any other permission. Let us

13 *Cf.*: *C.* 9, 12, 7, 1.

call this permission which includes the possibility of refraining from acting 'complete permission' or 'liberty permission'. I cannot elaborate any further on this; however, I must point out that the right, as a complete permission, expresses the idea that **x** is "free" to **φ** (namely: to do or omit **φ**). This view is not only common but classic: "*libertas est… quod cuique facere libet*."[14]

Rights have to satisfy a criterion of existence. Rights (properly so called) have to be created by a legal source (a statute, a contract, a ruling). In ordinary discourse and particularly in the legal one 'a permission' means some act of granting permission and an individual is permitted to act only if he is granted permission to do so. Actually rights are conferred where the act is not yet permitted or to prevent its prohibition. The act of investing a right upon a man presupposes a permission (established by a legal source), without which the act is never legally permitted. A right is a complete permission (a "liberty") if, and only if he has a legal source. These traits distinguish a right from the so called "weak permission": an act which has never been (legally) permitted and has no legal constrains whatsoever.

It should be noted that the strength, weight and effects of rights depend on the fact that a right is a legal phenomenon, as consolidated by judicial practice since Roman times, and once granted presupposes the actual possibility that the right holder may go to courts to make effective his right. "*Ius* [right] *est esto*..." is the initial phrase (as a sentential operator) of a Roman ruling. And this is why "*Actio,*" −Celsus elegantly says− *"nihil aliud est quam ius quod sibi debeatur*, *iudicium persequendi.*"[15]Right is a right only where there is an actual *iudicium persequendi*.

Rights are not written words or solemn utterances; nor are they desires aspirations or whims. The notion of a right cannot be separated from the judicial conceptions that give it its legal meaning. A person has a right because having been conferred on him he disposes of the judiciary to make it effective. The two foregoing traits are necessary conditions to characterize something as a right. Undoubtedly, those that are on the periphery of a right do not interfere because *editiones actionibus*[16] (the threat of imposing a

---

14 *D.* I., 5, 4.

15 *D. 44*, *7*, *51*. Legal action is only the right to seek in trial what is owed to us.

16 *Cf.*: *D.* 2, 13, 1, PR. 1.

judicial action and an eventual condemnation) becomes a reason not to interfere.

Elsewhere[17] I explain that we must be very careful not to trivialize the concept of right. But, when any interest or desire, a political ideology, any more or less justified claim or simply a whim, are improperly called 'right' the expression is trivialized. Hence, it looses its importance and corresponding effect in legal discourse.

From the general form for any right (*i.e.* '**x** R **φ**') it follows not only that *Per* **x***,* **φ** ↓ *Per* **x**, ~**φ**, but also that $\mathbf{y}_\mathbf{i}$ **O ~ψ** (*i.e.* that any other, *i.e.* $\mathbf{y}_\mathbf{i}$) is obligated not to interfere (**~ψ**). From the existence (and actual operation) of the judicial apparatus is obtained this practical inference: "if you do not want to be condemned judicially, do not interfere with anybody's right."

Rights, therefore, are not mere demagogic statements, slogans or extravagant claims. The maxim *Ubi ius*, *ibi remedium* (wherever there is right, there is a judicial remedy) indicates that rights exist only in that manner.

## 6. *Right as legal Justification*

When an individual has a right he has a legal basis (justification) to do or refrain from doing an action, hence the maxim "*qui iure suo utitur*, *neminet laedit.*"[18] Furthermore, it is necessary to underscore that whoever has a right, he has as well, the right to carry out all the acts that the making effective his right requires. In that respect, whoever has a right to **φ**, has a right to carry out all of the necessary acts for **φ**; if **x** R **φ,** then **x** R **φ & φ* (**where '**φ***' indicates all of the accessory acts that are necessary to exercise **φ).** Hence, whoever has a legal basis for **φ** also has a legal basis for **φ***. Whoever makes the acts necessary for the use of their right does not exercise violence or harm to anyone. In this sense, Paul says: "*Non videtur vim facere, quod iure suo utitur et ordinaria actione experitur.*" If **x** has a servitude right-of-way (**φ**), across

---

[17] *Vid*. "The Functioning of Human Rights in the Legal System", *cit*., pp. 375-386.

[18] "Whoever exercises his right does not harm anyone." Regarding this *D. 50*, *17*, *151*, states"*Nemo damnum facit, nisi qui id fecit, quod facere ius not habet*" (Only the person without a right that acts causes harm).

the property of y, and if the private way by which **x** is permitted to pass, according with his right, is blocked, **x** may eliminate any obstacle in order to clear the way.

## 9. *Democracy and Rights*

Human rights are, as Carlos Nino stated,[19] an invention of mankind (a great invention); however, sadly many times the so called ‘human rights’ are a fairytale.

Irrespective of any other aspects that may be adequately covered by de word ‘democracy’, I am going to defend the thesis that democracy may be defined in terms of certain rights and liberties. [20] This theory is nothing more than a version of a widely accepted view of democracy that argues that certain rights follow from the meaning of democracy.[21] My thesis could be formulated as follows: Wherever democracy exists, there is a body of rights (properly so called). I will not mention natural or moral rights or any other supposed right based on non-legal considerations.[22]

It is not difficult to accept that some rights are directly associated with the meaning of ‘democracy’. Some rights are privileged because of this position. The paradigmatic example of a democratic right is freedom of speech.[23] If I accept democracy, I accept freedom of speech. Alongside this right there are

---

[19] *Vid.*: *Etica y derechos humanos. Un ensayo de fundamentación*, Barcelona, Editorial Ariel, 1989, p. 1.

[20] Although the expressions can be clearly distinguished, I am going to use ‘liberties’and ‘rights’ synonymously. For a classification of rights see: Hohfeld, Wesley Newcomb, *Fundamental Legal Conceptions. As Applied in judicial reasoning,* Westport, Conn., Greenwood Press Publishers, 1978 (reprinted in the edition of Yale University Press, 1919).

[21] *Vid*. for example: Ross, Alf. *Why democracy?*, Cambridge Mass. Harvard University Press, 1952. For a brief explanation of these defining theories of democracy, see Farrell, Martín D., *Democracia liberal*, *cit.*

[22] Nonetheless, I can certainly defend the hypothesis that at least some human rights are morally based.

[23] *Vid*. Farrell, Martín D., *Liberal Democracy*, *cit.* Regarding this, see: Schauer, Frederick, “Free Speech and the Argument from Democracy”, en *Nomos XXV*: *Liberal Democracy*, ed. by J. Roland Penock and John Chapman, New York, 1983.

other rights (liberties) that are considered "inherent" to democracy. Nonetheless, democracy (including freedom of speech and the other rights that identify it) presupposes equality as a necessary condition. How can there be public debate and deliberation if some are denied or limited in their speech? Likewise, how can there be any of the rights defining democracy if the guarantee that these rights are equally distributed and protected for all does not exist?

From the foregoing, it follows a principle that conditions the existence of democratic rights: equality (and its assurance).

## 10. *What obligations are derived from a democratic system?*

The first would be a first order obligation: $\mathbf{O} \sim\psi$ (the obligation to not interfere in the exercise of others' rights).

The second would be a second-order obligation: $\boldsymbol{O}\ \mathbf{o}_i$ (we ought to comply with all obligations that are established by means of a democratic mechanism in which '$\boldsymbol{O}$' is the second order operator for obligation, and '$\mathbf{o}_i$' covers any first order obligation.

## 11. *Person and Autonomy*

Democratic rights make up a sphere of citizen action: the citizen's autonomy. This autonomy reflects the fact of our separate existences. This idea, namely: that men are different with a different life to live, serves as foundation for a fair distribution. But a fair distribution assumes that no autonomous being may be excluded from the distribution of rights (or much less sacrificed), also serves as a basis for establishing restrictions. These restrictions express the inviolability of a person's autonomy. The inviolability of the citizen autonomy is manifested by the fact that depriving him of his rights is a morally wrong. Citizens (people having democratic rights) are persons granted liberty as per the aforementioned meaning, and, therefore, no group or government can interfere with this liberty without violating these rights.[24]

[24] Nozick, Robert, *Anarchy, State and Utopia, cit*., p. 48.

From the foregoing, it follows that individual autonomy is a fundamental conception of a doctrine of political liberty. Hence the traditional idea of political freedom, conceived only as a limitation of powers is not sufficient to characterize political liberty. Moral autonomy is understood not only through its correlative restrictions but also by the facilities conferred to people to make effective his rights. Therefore, liberty rejects all kind of coercion over people but requires the support of legal institution for make their rights effective. Without this an individual suffers a *capitis diminutio*, being deprived of his rights.[25]

## 12. *Protection and Administration of Justice*

> *Quam similia sunt latrociniis regna absque iustitia.*
> *Remota itaquie iustitia quid sunt regna nisi magna latrocinia?*
>
> AGUSTÍN DE HIPONA[26]

Always and everywhere it is very natural in the case of unrestrained passion for a man to get for himself a right which he has, or believes he has, if another withholds it. However, it has always been considered rational and morally correct to limit (if not completely impede) a man's self-defense.[27]

If self-defense, on principle, is legally proscribed, then it is a practical requirement to establish the means by which disputes may be resolved (and terminated). The answer to this problem was the introduction of an institution devoted to arbitrate disputes. The very same argument that disapproves of self-defense, justifies (if it works) the existence of the *arbitrator* (*i.e. iudex*).

---

25 Some of these ideas are set forth in my essay: "Libertad política y estabilidad. El caso del regimen presidencial", in *Revista Jurídica Jalisciense*, Instituto de Investigaciones Jurídicas, University of Guadalajara (Mex.), Año I, number 1, September-December, 1991. *cf.*: pgs. 254-255.

26 *De civitate Dei*, IV, iv. pr.

27 *Vid.*: Wenger, Leopold. *Institutes of the Roman Law of Civil Procedure*, trans. by Otis H. Fizk (English version of *Institutionen des römischen Zivilprocessrechts*), New York, Veritas Press. Inc., 1940. pp. 8-9.

There are two reasons, *inter alia*, that are relevant to prefer an arbitrator to self-defense: (1) because deliberation, regarding the justification of the claim, for all intents and purposes, is withdrawn from the parties and delivered to an office that acts *pro tribunali* (*i.e.* above the parties); and (2) because otherwise the weak could not prevail against the strong, even if his claim were a thousand times more justified than the powerful party's claim (which could be not justified at all). This entirely apart from the incompatibility of every private use of force with order in a community.[28]

If the State prohibits an individual from using self-defense the necessary correlate of this is the organization of a State protection of individuals' rights. The State must, to whomever feels injured in his rights, offer a means and indicates the ways as to how the assertion of a right can be impartially resolved and then as to how the right thus decided can be realized in case of need even against the other party's will. If at the moment self-defense is outlawed and an individual cannot have access to an arbitrator to ascertain his right and means to realize it (if needed), then this individual has been deprived of his right.

Access to justice constitutes a problem of distribution in a democratic state. To redistribute the benefits of the administration of justice is a democratic demand based on moral grounds (as stated in the first paragraph). If access to justice is not equally redistributed, then there is a moral error: people suffer a serious damage as a result of being precluded from equal treatment.

If democracy is basically a body of rights (conferred upon people), then there should be equal access to justice to realize these right. Access to justice, ~~its~~ if true, imposes often unsurpassable obstacles for many individuals. If this is so, then in a democratic State whose one of its desiderata is equality, the benefits obtained by those who do have access must be extended to those that do not, provided that these policies do not harm others. Now, I will use the strongest formulation possible of the thesis: one cannot obligate anybody to pay the cost of redistribution without his consent. Thus this extension is acceptable when it does not increase the cost or sacrifice of those who have access to justice. (Though I might conceive a more humanitarian argument, I prefer this strongest version in order to make my point more convincing).

---

28 *Vid.*: *ibidem*.

Let us imagine that two individuals in the State S are victims of the same wrongdoing. One of them, *opulentus*, is rich with available time and therefore one who has access to a judicial protection of his rights. Hence, he can pay and can devote part of his time to the claim. Thus, in the case his claim be justified, *opulentus* will see his rights restituted. Let us consider that the cost of the restitution of *opulentus* rights is 100. (Furthermore, let us ignore in this example the court costs, which, in any case, are constant). The other individual, *pauperrimus*, is poor and does not have available time and therefore cannot have access to the system of judicial protection of his rights because it is something he cannot afford. The judicial system of protection is "an expensive taste" that *pauperrimus* cannot pay. Therefore, notwithstanding that *pauperrimus* suffered the same wrongdoing as *opulentus* and that, if that were the case, his claim is equally justified, *pauperrimus*, besides being poor, has to bear not only the wrongdoing and be deprived of the rights that are restituted to others, but also the opprobrium and humiliation of being marginated from judicial protection.

It is not difficult to prove that the judicial decision *D*, which restituted to *opulentus* the use of his rights is, without a doubt, a legally correct decision and would be the expected judicial decision (pursuant the stare decesis doctrine) if *pauperrimus*, instead of being poor, had the means and could, thus, have access to the benefit of judicial protection. In this regard, it is important to note that *D* still costs 100 and the operation of the judicial system, as stated above, is constant (it costs the same even if *pauperrimus* were rich).

This poses a question about what is morally and politically relevant; if the cost of the judicial system is constant and does not cause harm to *opulentus* (nor to any other member of *E*), why not give *pauperrimus* (when he asks for it) the benefits of *S*? Is there in fact a moral argument or an unsurpassable judicial obstacle not to give *pauperrimus* the benefits of *D*? On what moral or legal grounds is this discrimination based?

In order to be granted the same, the only thing *pauperrimus* would have to prove is that he is in the same hypothesis as *opulentus*. Said procedure does not increase the cost of the procedure in which *D* is ruled. (However, you look at it, the cost of the judicial system is still the same).

The problem with redistribution is only part of the problem of participation (correct participation includes correct benefit redistribution) and, as such, becomes democracy's central problem.

If the problem above is correct, then, besides direct access to courts (*i.e. iudicium persequendi*), indirect (corrective) access should exist for judicial protection. Such would allow any *pauperrimus* that suffers the same wrongdoing as *opulentus* to be benefited with *D*.[29]

We must come up with means to satisfy the requirement of moral redistribution.

## 13. *Reverse Due Process*[30]

Discrimination brought about by inequality to access to justice not only accentuates or exacerbates inequality, but also introduces a stable and official mechanism (an invisible hand mechanism) by which a class of individuals (the poors) are stripped of their rights.

Let us consider the due process doctrine. For the legal profession and other social scientist, law is considered a set of solutions (established to solve a set of cases –disputes–). Legal procedures and their rulings are conceived to cancel disputes and convert those cases into *res iudicata*.

Let us assume that pauperrimus is the defendant and he is summoned to court. Note that the ruling that concludes the process; this ruling that declares *res iudicata*, despoils definitively pauperrimus of his rights because he cannot appear in court (much to his dismay). Suppose that the process is followed pursuant to laws passed previously to the fact and everything the court does is

---

[29] *Vid*. My essay: "Class Action. Una solución al problema del acceso a la justicia", en *Boletín Mexicano de Derecho Comparado*, México, UNAM, Instituto de Investigaciones Jurídicas, Año XX, Núm. 58, enero-abril, 1987, pp. 147-165, reimpreso en Academia Mexicana de Legislación y Jurisprudencia y Serrano Migallón, Fernando (Ed.), *Estudios Jurídicos en memoria de Alfonso Noriega Cantú*, México, Porrúa, 1991, pp. 461-476.

[30] For those who are not familiar with United States' Constitutional Law, this name may sound strange, but it alludes to indirect discrimination.

legally correct. Thus, process of law[31] is a beautiful example of how pernicious is the Law for the poors. Legal process became threefold harmful for those who do not have access to justice. Firstly, and because of the fact of not having access, said individuals loose all rights that they could not defend in court (for papuerrimus, rights were just fairytales). Now, his lost is official, solemnly pronounced. If pauperrimus ever was tall they had some sort of right, now he knows for a fact they do not. What a beautiful democracy! A due process decision confirms and certifies that those without access are left aside.

Such a situation is serious, but due process (and the lack of access) has an even more harmful effect. When paperrimus does not appear in court, the court takes for granted various sinister course of action. For example, "paperrimus is considered as confessed," "he is declared in contempt," "…is insubordinate" and, on top of it, he is sanctioned (a fine ensues) and so on.

Let us suppose that any wrongdoing is charged (a breach of a civil, commercial or labor contract),pauperrimus is tried and, as in the case of our example, he cannot appear in court. A ruling (duly decreed) condemns him. In this manner, by not having access to justice (because he is not able defend his rights) because he is poor, he must pay indemnities, damages and losses or he faces losing his job (all of which, in addition to the vexation and humiliation that stigmatize him, impoverish even more). How grave this is when the wrongdoing that is charged to pauperrimus is a crime. The result is frightful: humiliation, vexation, mockery and, lastly, imprisonment. This never happens to opulentus.

Suppose an irregular tax is decreed. The rich (*i.e.* businessmen, merchants and bankers) can file the appropriate remedies, pursue legal annulment or file judicial actions because their status so permits. The poor pays the tax because, if they do not, they will suffer a foreclosure on their property. Therefore, the poor not only pays what is not owed, but also is brutally deprived of what little he does have.

It is not my intention to write about thesis of judicial mercy. Democracy is not a mockery, either you have rights or you do not. We cannot distribute bonuses or coupons to individuals that are that way deprived of his rights. In this

---

[31] In 1868, this principle was established in the 14th Amendment to the United States Constitution. This formula because the model for other constitutions.

regard, my aim has been to underline that democracy demands equality and access to the same procedures.

Furthermore, it is not my intention to make the poor rich (I wish I could); I simply uphold the thesis that the poor must be given the benefits of judicial rulings without damaging others, although the said others may be very wealthy.