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A global zero tolerance? Colombian prisons from a world historical perspective**

RESUMEN

En este artículo quiero mostrar la historia discursiva de la reforma del sistema de justicia criminal y cómo la reforma colombiana está atada a una tendencia global que está tratando de usar la prisión no como un lugar de rehabilitación, sino como un lugar para el control del exceso. En Europa y en los Estados Unidos este exceso es ejemplificado con los inmigrantes ilegales y las leyes que se usan para tratarlos, mientras que en Colombia la ley criminal se usa contra los desempleados y los pobres.

Palabras clave: economía, ley criminal, sistema de justicia criminal, prisiones, ley y desarrollo, historia legal colombiana, tolerancia cero.

ABSTRACT

In this paper I show the discursive history of reforms to the Criminal Justice System and how Colombian reform is tied to a global trend that attempts to use prison facilities not as places of rehabilitation, but as places for the control of excess. In Europe and the United States this excess is exemplified with illegal immigrants and the laws that are used to deal with them; whereas in Colombia, criminal law is used against the unemployed and the poor.

Keywords: economics, criminal law, criminal justice system, prisons, law and development, Colombian legal history, Zero tolerance.

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INTRODUCTION

In July 1991 Colombia's Constituent Assembly passed a new constitution that transformed the structure of the political and legal systems. Several new measures were included to protect the fundamental rights of the people and a more open political organization was established. One of the most relevant reforms was the transformation of the criminal justice system, which included a reform to the judiciary, creating for the first time the Attorney General's Office (Fiscalía). The new attorneys were given higher level salaries to avoid corruption, and a separate administrative entity for the judiciary was created in order to guarantee its independence. This reform didn't make any reference to the Prison System, other than the defendants' right to a due process under the law and the inclusion of the relevant United Nations' rules in Colombian legislation¹.

The 1991 constitutional reform forced a structural transformation of the Criminal Justice System, which was understood as a reform to the legal instruments regulating its sphere of action. The Penal Code, the Procedural Code, and the Prison Code were reformed. The Penal Code made a structural adjustment of the penalties and twitched criminal law to make it constitutionally sound; the Procedural Code gave criminal procedure more elements of the adversarial system; finally, the Prison Code carried a superficial reform that didn't alter the ideology of rehabilitation that was in force in the law since the 1960s².

However, in 1995, as a result of a wave of robberies on the streets of Bogotá, Nestor Humberto Martínez, then Minister of Justice, proposed a reform to the code that made prison mandatory for minor crimes (Law 228 of 1995). Among the measures in the reform, a mandatory minimum prison term was established for some crimes and prison was recommended as a preventive measure in other cases. Prison and preventive detention became the central elements in the penal public policy of the Colombian government under the administration of Ernesto Samper.

The rationale for the reform, according to Nestor Humberto Martínez, was the need to adopt a "zero tolerance" policy against crime. For the first time in Colombian

¹ See Standard Minimum Rules for the Treatment of Prisoners. Adopted on May 13th 1977.

² In 2001 there was a reform to the system that involved a substantial update of criminal law. According to the lawyers leading the reform, Colombian criminal law needed to adapt to the new doctrines existing in Germany. In 2005 the Criminal Process –the procedural code– was reformed in order to incorporate an American model of criminal law. However in neither reform the prison system has been transformed, and the law still has a correctional ideology, despite the fact that the reality of prisons goes more along the lines of a waste management model. See Malcolm Feeley & Jonathan Simon. "Actuarial Justice: the Emerging New Criminal Law". In David Nelken. *The Futures of Criminology*. (London/Thousand Oaks/ New Delhi: Sage, 1994).

criminal discourse, the idea of showing zero tolerance against crime and the need to deal with minor crimes for reasons other than the mere enforcement of the law were used as justification for new rules. The introduction of this regulation is part of the construction of a building for law and order where lawyers have lost their ability to make relevant statements about crime and criminal law, and the role to do so was passed onto economists and managers trained in other fields. Statements about judicial expediency and impunity were made from a perspective that rarely invoked justice, but mostly corruption, efficiency and the attractiveness of Colombian markets to foreign investment.

Colombian prisons are in crisis. The discourse of rehabilitation is increasingly losing its value; the number of inmates has increased in the last fifteen years; the discourse about prisons gravitates around discussions of inefficiency in the Criminal Justice System and the need for a more effective use of incarceration time. The lack of resources has led to an overload of the system, which has gained more adherents to the “more prisons are needed” claim, without addressing the issues and policies that led to overpopulation in the first place.

Penal policies in Colombia are not created in a void. They stem from policies designed and applied in other places. In this paper I want to show the transformation in criminal policies in the United States in the 1970s, and how in this country, as well as in Europe, the Criminal Justice System has moved from being of a correctionalist type to being more focused on the control of populations, a sort of restraint over a dangerous class. The emergence of an actuarial system of justice led to policies like zero tolerance in New York, incapacitation theory in the prison system, and an unprecedented increase in the prison population, which has sometimes made the Criminal Justice System to be called the largest city in the United States after New York City. I shall argue that there is a global trend that renounces to the discourse and practices of rehabilitation and instead opts for a management/control approach of populations that are a risk –not at risk– for society. Following Alessandro De Giorgi’s analysis, I have labeled this trend a global zero tolerance, to express the view of the people involved and at the same time to emphasize the centrality of the American experience in this trend. Its effects in the reduction of crime are debatable, but this attitude has led to an increase in prison population and to acts of police brutality³. However, from a world historical perspective, I aim to show the paths that brought these ideas and policies to Colombia and the reasons why the American model of crime control was adopted in Colombia during the 1990s, as part of the transformations in the model of development carried out under the administration of César Gaviria and further enacted in the 1991 Constitution. The particularities of the Colombian case will show that the groups under control respond to different configurations than the ones adopted in Europe and the United States.

³ It is important to keep in mind that the reduction in crime is subject to debate. Some authors like Harcourt and Bowling show that the reduction in crime is the result of a different trend and it is not related to policies like broken windows in New York City. See Benjamin Bowling: 1999 and Bernard Harcourt: 2002; and Alessandro De Giorgi: 2000.

1. THE END OF CORRECTIONALISM: TOWARDS A CONTROL OF RISKY POPULATIONS

In 1973 Jock Young, Ian Taylor, and Roger Walton published a book entitled *The New Criminology* (Jock Young, Ian Taylor, Roger Walton: 1973). This book was essentially an attack on traditional positivist and correctionalist criminology; arguing that these traditions acted as an academic justification for discriminatory practices in the prison and criminal justice systems, these authors proposed a radical approach to criminology and criminal systems that took into account the interests of the working class (John Muncie: 1998). As a result of the book, but also of transformations in sociological theory during the 1960s, deviance and crime were not seen as individual pathological acts, but rather as the result of definitions that came from sites of power and in relationship to structural transformations in the national and world economy. The book was a critique of how society works and how social order is maintained and subjected to political change⁴.

After analyzing different theories about crime, Young et al. show that crime is an ideological category generated by state agents and intellectuals. Given this diagnosis of crime, it was not a surprise that criminologists were concerned about the fate of the criminal justice system and the way to deal with this problematic situation (Alessandro Baratta: 1986). In Marxist thought there was a dispute about the discipline itself. Some criminologists, writing in a collection entitled *Critical Criminology* (Jock Young, Roger Walton, Ian Taylor: 1975.), put into question the very idea of a Marxist criminology⁵. From this point of view, the criminal justice system was seen as oppressive and intrusive. The correctionalist ideology was criticized as a disciplinary intervention in the souls of prisoners, and therefore as part of the crisis of modernity (Michel Foucault: 1977). The leftist critique left penal and prison interventions without legitimacy. According to David Garland, during the 1960s the left criticized the Criminal Justice System (CJS) and found that it was too intrusive in people's lives and that it could lead to a disciplinary society (David Garland: 2001). To critical accounts of the role of the CJS, the idea of rehabilitation was too totalizing and it could not be accepted in a democratic society. During these times critiques like the one made by Nils Christie about the pain delivery nature of the CJS, as well as other accounts showing the need to eliminate the prison, the CJS, or capitalist society in general were the common currency of the day. The alternatives were restorative justice, community justice, and a dialogue between the victim and her victimizer⁶. Given the failure of the alternatives and the problems that it caused in the intervention from the CJS, at the end, a discourse of "nothing works" left the CJS and its alternatives without legitimacy. However, at the same time, another discourse was developing. Faced with the inefficiency of the system, some authors like James Q. Wilson and Gary Becker proposed not the elimination of the Criminal Justice System, but instead a transformation of the CJS and an improvement of its performance in terms of

⁴ Ibid. P. 221.

⁵ Along these lines see also Roberto Bergalli et al: 1982.

⁶ Nils Christie: 1981; Thomas Mathiesen: 1974; Louk Hulsman: 1984.

efficiency. Becker analyzes the “supply” of offenses and how they are dealt with by the CJS. After analyzing the CJS in terms of costs and benefits, and in terms of the costs that crime carries for the taxpayers, Becker points out the need to analyze the optimal conditions in which crime can be controlled via a rational decision, where the agent has to weigh the benefits of the crime against the cost of the punishment. Becker writes:

The main contribution of this essay, as I see it, is to demonstrate that optimal policies to combat illegal behaviors are part of an optimal allocation of resources. Since economics has been developed to handle resource allocation, an “economic” framework becomes applicable to, and helps enrich, the analysis of illegal behavior. At the same time, certain unique aspects of the latter enrich economic analysis: some punishments such as imprisonment are necessarily non-monetary and are a cost to society as well as to offenders; the degree of uncertainty is a decision variable that enters both the revenue and costs functions (Gary Becker:1968, 169-217).

By applying an economic framework, Becker is not only introducing the idea of efficiency within the system, but something more important: agents in the CJS are rational and take rational choices; therefore, social conditions and historical reasons are not explanations to the crime problem. Along similar lines, James Q. Wilson, explained the crime problem as a question of city disorganization and as a sort of environmental problem (James Q. Wilson: 1975). In 1982, in an issue of *The Atlantic Monthly*, Wilson wrote his article on *Broken Windows* that led to a series of policies, promoted from the conservative think tank *Manhattan Institute*, which later on would be known as Zero Tolerance policies (James Q. Wilson and George L. Kelling: 1982). In this article Wilson analyzes some literature on crime control and shows that individuals in certain areas of the city are not afraid of crime but rather of disorderly behavior. Wilson considers that disorderly behavior affects people’s lives and it can lead to an increase in crime. He analyzes some research where the effects of broken windows were studied. To Wilson, these studies show that disorderly behavior suggests that in the area law is weakly enforced and thereby anything goes. If disorderly behavior is controlled, people are inclined to think that the law is enforced and therefore more serious crimes will not occur. This means a more active role for the police and more involvement from the community. Analyzing the case of New York, where Zero Tolerance policies were implemented, Bowling shows the limitations of this policy and the lack of support from social sciences⁷. Wilson writes at the end of his article on *Broken Windows*:

But the most important requirement is to think that to maintain order in precarious situations is a vital job. The police know this is one of their functions, and they also believe, correctly, that it cannot be done to the exclusion of criminal investigation and responding to calls. We may have

⁷ Bowling:1999 and Harcourt: 2002. Supra n. 3 and Bernard Harcourt: 2001.

encouraged them to suppose, however, on the basis of our oft-repeated concerns about serious, violent crime, that they will be judged exclusively on their capacity as crime-fighters. To the extent that this is the case, police administrators will continue to concentrate police personnel in the highest-crime areas (though not necessarily in the areas most vulnerable to criminal invasion), emphasize their training in the law and criminal apprehension (and not their training in managing street life), and join too quickly in campaigns to decriminalize “harmless” behavior (though public drunkenness, street prostitution, and pornographic displays can destroy a community more quickly than any team of professional burglars).

Above all, we must return to our long-abandoned view that the police ought to protect communities as well as individuals. Our crime statistics and victimization surveys measure individual losses, but they do not measure communal losses. Just as physicians now recognize the importance of fostering health rather than simply treating illness, so the police –and the rest of us– ought to recognize the importance of maintaining, intact, communities without broken windows (James Q. Wilson: 1983).

The idea of management thus enters the field of criminal law and crime control. These two ideas of a more efficient criminal justice system –management of resources and the need to control not individuals but populations, –the biopolitical management of populations–, were central elements in the paradigm of society that was being developed in the 1970s and that Foucault labeled as ‘governmentality’ and that Deleuze called societies of control⁸. In Foucault we find the transition from a disciplinary society to a society where transformation of the soul is not as important as control through freedom. Foucault shows a subtle movement from discipline, where souls are the object of disciplinary practices, to regulation, where under the idea of freedom, subjects are left without state intervention and therefore they have to control themselves⁹. Neoliberal governmentality complements the law with regulatory practices that are being exercised outside the state. In neoliberalism, subjects are not disciplined within the state, but they are left to their own freedom and private institutions are in charge of normalizing practices. According to Hudson, neoliberal governmentality establishes a government from a distance. State institutions do not intervene in people’s lives, at least not directly. Law becomes what Deleuze and Guattari call an ensemble of capture, that is, the law and the legal system become places where different sites and ways of power meet and constitute agents and fields. In this manner, the law ceases to be used as an instrument of discipline or of direct power, and becomes a tool to control populations that can constitute a risk for the management of society¹⁰. According

⁸ Michel Foucault: 1990; Michel Foucault: 1992; Michel Foucault: 1998; Michel Foucault: 1993; Giles Deleuze. Societies of Control. *L'autre journal*, Nr. 1, Mai 1990.

⁹ Francois Ewald. “Norms, Discipline, and the law”. En Representations No. 30. P. 138; Nicholas Rose & Mariana Valverde. Governed by Law. Social and Legal Studies No. 7 Vol. 4. 541-551.

¹⁰ Barbara Hudson. “Punishment and Governance” Social and Legal Studies No. 7 Vol. 4, pp. 554-559.

to Victor Tadross, neoliberal governmentality focuses not on the acts of individual but on their lives, the law becomes part of a biopower (Victor Tadross: 1998).

The prison crisis is related to the emergence of a new paradigm of control, one that is more concerned about controlling populations than about controlling crime or particular behaviors. The new criminal policies are focused on controlling the criminal or dangerous class, and the whole structure of the criminal justice system is dedicated to this goal; it is the efficient risk management of the criminal class. Crime control is de-individualized, agents are not particular targets of disciplining practices, but rather their class as a whole is object of control. As Mona Lynch has put it:

Feeley and Simon suggest that the new penal machinery may be heading towards a kind of waste management model in practice. Specifically, they argue that contemporary corrections may be pushing toward a self understanding that views its primary role as herding a specific population that cannot be disaggregated and transformed but only maintained—a kind of waste management function. The waste management model emphasizes securing and neutralizing the threat posed by the criminal class at the lowest possible cost, while striving to downplay and deny the emotional, irrational, and psychological elements of punishment¹¹.

As a result of the model, increasing numbers of people have been sent to prison. The prison became a place of confinement and management and not a place for rehabilitation. This is what has been labeled as a *crowding crisis*, a crisis that is not the particular experience of industrial nations, but also part of the experiences of other countries like Colombia, where the need for more imprisonment has been imported. In the sections to come I'll show how this discursive field has been constructed, making relevant the statements of economists in the field of criminal law and crime control¹². The next section is devoted to explain how economists entered the field of criminal law and how they refashioned it to introduce ideas of efficiency and crime control crafted for a neoliberal form of development.

1.1. Criminal Law and the Civilizing Process

Yves Dezalay and Bryant G. Garth have analyzed the constitution of a field of power in the law in Latin America. In their book they study the role lawyers and economists played in the transformations that took effect from the 1960s to the 1990s in the region. In their analysis they use the concept of *palace wars*, a concept taken from Bourdieu, in order to show the internal disputes between lawyers and economists for power and how these disputes led to transformations in the state. According to Dezalay and Garth, lawyers, or what they call *gentlemen*

¹¹ Mona Lynch. "The disposal of inmate #85271. Notes on a routine execution". Austin Sarat and Patricia Ewick: 2000, 6.

¹² On this topic see: Roger Mathews and Peter Francis:2000; David Nelken: 1994; David Garland: 2001.

politicians of the law, represented a kind of aristocratic ideal of government (Yves Dezalay & Bryant G. Garth: 2002). Despite the differences in the historical trajectories in each of the countries they analyzed, what is common in all of them is the role lawyers played in the 19th century. Garth and Dezalay show that the legitimacy of the law was produced through internationally scholarly capital that was acquired traditionally in Europe. They add that “the classical pattern did not require all politicians to be law graduates, but the law provided the key network of relationships and legitimizing language” (Dezalay and Garth, 2002, Pp. 22). On the other hand, using Jorge I. Domínguez’ description of modern rulers (Jorge I. Domínguez: 1997), Dezalay and Garth show that in the 1970s there was a transformation in the elites controlling the countries they analyzed. They show how economists, educated initially at the University of Chicago, used their connections to the United States to access the state and to finally replace lawyers in the government. Having access to the US would give them access to prestige and to international contacts that would make their cultural capital more attractive than the one held by lawyers. While lawyers’ field of expertise was law, theirs was economics.

This analysis is important because it shows the agents that introduced ideas that later would transform the structure of the state. However, in their analysis, Dezalay and Garth just pay attention to the prestige that Europe had in the 19th and 20th century in Latin America, but they do not take into account the reasons why European legal knowledge was so valued in the region and how it was perceived by the elites. At the same time, they do not take into account that the transformations in the model of development and in the hegemony of the world system reshaped the sphere of power as an economic sphere, and how this transformation was instrumental in the perception of the law as an instrument and not as constitutive or political. As Teivanen has shown, in the 1990s the neoliberal model led to the depoliticization of politics, and in this case of the law (Teivo Teivanen: 2002). In Garth and Dezalay’s analysis, the construction of a discursive sphere is left aside and the result is put as one of rational choice, where agents look for the most prestigious and expedite way to access power.

In this section we want to show the geography of legal knowledge and show how law –and criminal law in particular– was an instrument in the civilizing mission of the 19th century in Colombia. Colombian elites tried to apply a policy of whitening the Colombian population, along the lines of the Sarmiento model, and to do so they used criminal law. It is this role in the civilizing mission of Colombia that gave European law the prestige it had among Colombian lawyers and it is from this point that we can build our analysis following Dezalay’s and Garth’s explanations.

2. LAW AND THE CIVILIZING MISSION

19th Century Colombia is characterized by its many wars and power struggles. A traditional interpretation would show this period as a struggle for economic power between urban rulers and rich landowners, and as a struggle that led to

the centralization of the state. This approach would show these fights as combats between elites, leaving aside the role that other sectors of society played in the creation of the Colombian nation and state. At the same time, such an approach would not take into account the special relations that existed between the elites and the gross of the population. These relations were of domination and control, but this is not enough to explain the special configuration of the state and the role played by the law in this process. As Salvatore and Aguirre have shown, a purely Foucauldian or Marxist approach does not take into account the fact that the working class and the lower classes were in a process of consolidation and that the European experience cannot explain the particular history of Latin America¹³. In this section I want to attempt a different approach, one which takes into account the process of constitution of identities in Colombia and also connects criminal law with the civilizing process that took place in Colombia during the 19th century.

The wars of the 19th century can be best understood as wars for civilization. After the Wars of Independence, Colombian elites faced the construction of a new nation. They were not part of the Spanish Empire anymore and they were claiming a new identity, that of Americans¹⁴. But to be American could mean many things. In the discourse of politicians like Domingo Faustino Sarmiento, the American nation had to be white and more along the lines of the United States. Sarmiento is important because his ideas about whitening the nation were followed in Colombia by one of his disciples: Florentino Gonzalez, who translated them into constitutional law (Jaime Duarte French: 1971). In the law, this idea was translated into a fear of the people –the popular sector– and a need to constitute their identities in a way that was functional to capitalism and civilization (Rojas: 2002, xxvii).

In the process of civilizing the nation and modeling it as white and of European descent, stories of travel were central for Colombian elites (Quijano, Anibal: 2000). Some members of the elites traveled to Europe and learned how to be cosmopolitan and white. They wrote their impressions in books that circulated widely amongst the regional elites and became models of behavior for them. These books presented the civilizing process in two ways: on the one hand, the elites considered themselves to be different from the lower classes, because they had different physical features and light skin. But at the same time, they realized that they were not Europeans, and therefore that they were uncivilized. This double negation characterized most travel accounts. Elites traveled physically or symbolically to Europe and learned the double negation and how to operate within it¹⁵. Simon Bolivar expressed this double negation in the following way:

¹³ Ricardo D. Salvatore and Carlos Aguirre: 1996; Dario Melossi & Massimo Pavarini: 1981; Carlos Franco: 1981; Anibal Quijano: 1981.

¹⁴ About the dilemmas of law see, Jorge Esquirol: 1997.

¹⁵ This double negation is very similar to the experience of the subaltern explained by Dubois and his concept of double consciousness. However, elites had the opportunity to shape their image. They act as subalterns/oppressors at the same time. Cfr. W.E.B. Dubois: 1939).

Neither Indians nor Europeans, but a race between the original natives and the Spanish usurpers; in short, being by birth Americans, and our rights those of Europe, we are obliged to dispute and combat for these rights against the original natives, and to persevere and maintain ourselves there in opposition to our invaders, so we find ourselves placed in a most extraordinary embarrassing dilemma¹⁶.

Lawyers, as members of the elite, became central agents in the process of civilization. Given their fundamental relation to the written word, they became important elements in the exercise of power. The wordy character of lawyers, in a lettered city, explains why lawyers became politicians and also the close connection between lawyers and the state. Florentino Gonzalez, a lawyer himself, epitomizes this idea of the law as part of the civilizing project. Gonzalez, a Creole, is one of the educated few who are working to attain the level of progress perceived in Europe; they are the only ones with the power to civilize the country (Florentino Gonzalez: 1981; Angel Rama: 1984). Following Bentham, his proposal was based on the rationality of the individual against the solidarity of the traditional indigenous peoples. Independence is not based on a vengeful morality, but on an ethics of progress. In a letter to Jose Maria Torres Caicedo, Florentino Gonzalez expresses candidly the racist character of the Colombian nation he and the elites were trying to build:

Barbarians do not aspire to be equals to the civilized men, putting themselves at their level with science and property given to them by work and study... We have nothing in common with the Indians or the Africans, who have barbarian tendencies and instincts that are against civilization. Civilization has nothing to expect from them; on the contrary, they have to fear everything from civilization¹⁷.

Law books became part of those travel stories we mentioned earlier. Lawyers traveled to Europe to study law, to witness the workings of a state, and to understand how political power worked in a civilized country. Given the colonial history, it is not surprising that they chose Spain as the place where they wanted to develop their studies. In Spanish universities, but also in Italian and German due to the cultural dependency of Spain, these lawyers studied law. The kind of travel book they wrote is not like the ones written by the literati but in general they shared the same features: they talked about splendid venues, they celebrated the European culture, and finally they referred to the outdated state of our laws. By treating law books as travel stories, they did not talk about the real world of crime and criminal law, but were speaking to the civilized to teach them how to deal with those barbarians still existing in the nation, in sum, to teach them how to whiten the Colombian nation.

¹⁶ Simon Bolivar as in Rojas (2002): 1.

¹⁷ Gonzalez, 1863 as in Nestor Diaz Videla: 1994.

The first treaty of criminal law written in Colombia was by Jose Vicente Concha, a conservative lawyer who traveled to Spain and who published his book for consumption in Latin America by the end of the 19th century. It is important to note that Concha wrote his book in Spanish and had it published in France, not only due to the lack of publishing houses in Colombia, but also on account of his desire of reaching all Latin America¹⁸. The treaty is based on the most advanced theories of law developed in Europe, which appeared to Concha to be close to perfection. He based his work on the studies of Francesco Carrara and Pellegrino Rossi, two Italian lawyers who developed a theory of law based on the rationality of the individual and on an economic theory of law. To these authors, crime was just a violation of the law and punishment was a deterrent against crime. That is, their theory of criminal was based on an analysis of costs and benefits. What is important about these theories is how they assumed that criminals were equal to the majority of society. They did not constitute a different class or race; they were rational individuals breaking the social contract (Francesco Carrara: 1984 and Alessandro Baratta: 1986).

One of the questions that comes up is why the elite decided to apply theories that assumed equal treatment for everyone. However, this adoption does not seem so strange if we analyze the process of state building having place in 19th century Colombia. As we mentioned earlier, after Independence in 1819, elites began fighting for power. These fights took place in different provinces like Cauca, Cundinamarca and Antioquia. Local elites fought for local power. Since central power was not at stake, and the fight was between equals, constitutions assumed that rebels were not criminals but combatants¹⁹. That is, criminal law was not supposed to be an instrument to control indigenous peoples or afro-descendants, because they didn't even exist before the law. Indigenous peoples were controlled and constituted as peasants with other instruments that did not involve the criminalization of their identities. It was the role of the Church to take care of indigenous peoples and to make sure of their occidentalization. With the introduction of liberalism in the mid 1800s, indigenous peoples were constituted as individuals and therefore as equals before the law. This time the kind of control was not criminal law, but the informal structure of the hacienda (Lorenzo Muelas Hurtado:2005).

By the end of 19th century, criminal law is part of the civilizing mission but it is not in charge of civilizing the barbarians. Indigenous peoples are not mentioned because their status was regulated by Law 89 of 1890, a law that divided indigenous persons between civilized, semi-civilized and savages²⁰. For the civilized and

¹⁸ José Vicente Concha. *Tratado de Derecho Penal*.

¹⁹ The Thousand Days War, for instance, had the character of a sort of international war between equals. White combatants were treated as equals, indigenous peoples in Cauca were treated as guerrilleros and therefore as outside the field of the law. See Ary Campos Chicangana. Montoneras: 2003.

²⁰ The importance of wars in the defense of rights of indigenous peoples is explained by Ary R. Campo Chicangana. Op. cit.

semi-civilized the law had a regime of control based on their confinement in the areas assigned to them by the Government, also known as *Resguardos*, but where their autonomy was essentially limited. For the latter, the law had the Christian mission, where indigenous peoples were subject to the absolute power of the Catholic Church. Victor Bonilla, analyzing the missions in the Amazon, showed how these Catholic missions considered themselves servants of God, masters of men (Victor D. Bonilla: 1972).

Travel stories were important in the process of civilization of the Colombian nation. They were used to show the goal Colombian elites needed to achieve. Lawyers, as literati, became central agents in this process, because they had literacy and the tools used in Europe to civilize the country from the state. Up to that point Concha's book was used as a travel story used by lawyers and judges in their understanding of criminal law. In the 1920s, Indigenous peoples and peasants became visible due to their struggles for rights and land. The Socialist party was created and Manuel Quintín Lame was fighting for the indigenous peoples of Cauca and Tolima²¹. In 1925 the elites tried to pass a reform to the CJS to adapt it to the transformations in the culture and doctrine of law prevalent in Europe. Carrara's and Ferri's conception of law was outdated and this is one reason why the reform drafted by Concha did not come into force, despite the approval of Congress. But another reason that is important to consider is the utility, or lack of it, of Concha's doctrine for the civilizing mission and the process of constitution of agents as workers and lower class. The role of law 1890 had proven to be weak, indigenous and peasants were revolting against the system, workers were organizing and protesting against the state of affairs, in sum, the civilizing mission had backfired because it had given tools to workers, peasants, and indigenous peoples to make claims against the state. Quintín Lame, for instance, used the law as an instrument in his struggles, or as one of the leaders of the Colombian indigenous movement has put it: they used the law to control us; we used it to liberate ourselves²².

Up to this point lawyers were the ones in charge of promoting the reform and giving scientific advice to politicians in topics related to criminal law and judicial reform. National University of Colombia and Externado University, two institutions that at the time could be considered liberal, were promoting a transformation of the criminal justice system. Some of the professors of these two institutions traveled to Europe and brought with them new theories that were to be used in the reform of the CJS in 1936. Jorge Eliécer Gaitán, Carlos Lozano y Lozano, and Jorge Gutiérrez Anzola were lawyers connected to both the government and these Universities that brought travel stories in the form of a criminal law book. In these stories, they showed the advances of criminal law in Italy and how law was useful to control the dangerous classes.

²¹ Gonzalo Sánchez: 1976; Mónica Espinosa Arango: 2004; Medófilo Medina: 1989.

²² Monica Espinosa. *Of visions and sorrows: Manuel Quintín Lame's Indian thought and the violences of Colombia*. Supra n. 27 and Interview with Jose Vicente Garcia. Director of the Indigenous Regional Organization of Valle del Cauca, ORIVAC. Cali, July 7th 2005.

In 1936 a reform to the system was approved and a conception of the criminal man as biologically different and in need of treatment was introduced²³. National University of Colombia created the Institute of Criminology, appointed to study the causes of crime and different aspects of the criminal man from a positivist point of view. Gaitán, recognized by Enrico Ferri, the Italian founder of the Criminological Positivism School, as one of his most brilliant students²⁴, did not write any book on criminal law but he used the theories in his practice as a lawyer (Jorge Eliécer Gaitán: 1983). His closing arguments were published and widely read amongst the population of young law students. Carlos Lozano y Lozano would publish his own book in 1950, some time before his death (Carlos Lozano y Lozano: 1950). With the deaths of Gaitán and Lozano y Lozano, the torch in criminal law studies was passed onto the Externado of Colombia University, due to the fact that lawyers educated in this institution had access to the necessary resources and networks to travel to European universities.

Colombian professors of law were not full time professors, but mostly practitioners that used the teaching of law as part of their symbolic capital, or judges who were connected to the University as part of those same networks to advance their careers (Bernardo Gaitán Mahecha: 1961). Alfonso Reyes Echandía was a mixture of both. He was once a practitioner and the Chair of the Criminal Law Department in the Externado University. After having been to Italy and Germany, he came back to Colombia to teach and practice law. He brought his own travel book and introduced German law and doctrine in Colombia. His book *Derecho Penal*, published in the early 1960s, introduced theories that understood the crime problem as a technical one, one in which criminals were sanctioned following certain procedures (Alfonso Reyes Echandía: 1964). He also wrote Criminology books that were used by the Police and by members of other law enforcement agencies. His books and the University positioned themselves as the epitome of criminal law in Colombia for about 40 years, and the figure of Reyes Echandía was central in that positioning, until his death in the massacre of the Palace of Justice in 1985. However, he left the door open for German law in Colombia²⁵. Colombian lawyers have traveled since then to Germany, Italy, and Spain, to learn German law and doctrine and to translate the works of German authors in order to keep up with the doctrine in this country. In the 1970s, for instance, Colombian lawyers got involved in the discussion about two theories of criminal

²³ Lombroso analyzed first the criminal man and later the criminal woman. In any case, the functions of the CJS were different depending on the gender of the violator of the law. Cfr. Cesare Lombroso:1971.

²⁴ Given the lack of prestige in other regions, it is safe to say that he was brilliant because he followed his doctrines.

²⁵ The 2001 reform was promoted by Attorney General Alfonso Gómez, who studied in Germany, and his advisors were educated directly or indirectly in German Criminal law. It is interesting to note that the disputes were about which German school of law incorporate in Criminal Law: Gunther Jakobs' doctrine promoted by lawyers like Eduardo Montealegre and his team of advisers in the Procuraduría (sort of Ombudsman office) or Claus Roxin's theory, promoted by lawyers like Fernando Velasquez, Carlos Arturo Gómez and the team of adviser in the Attorney General's office.

law, a technical discussion that emerged in the 1950s to cover the participation of those lawyers involved in the Nazi regime²⁶. The reform passed in 2001 was the result of the influence of lawyers from this University, and it was based on the need to update Colombian laws and doctrines, in order to remain full participants of the community of civilized countries. This approach to criminal law came under attack in the early 1990s, but this time the attack didn't come from other lawyers, but from the economists educated in the United States. This attack could only be possible within a framework of development policies, where law made sense as an instrument to promote them. In the next section we will see how the movement for law and development set the bases that allowed economists to make meaningful statements in the sphere of law.

3. THE PROJECT OF DEVELOPMENT AND THE ROLE OF THE LAW

The first wave of Law and Development was associated to the idea of national development and it was connected to institutions like USAID and the Ford Foundation. In the discussions about development in Latin America in the 1960s there are few references to the role of the state and none to the role of criminal law in the project of development (Cesar Rodriguez: 2001). Despite the fact that Prebisch's ideas about development involve an important role for the state, criminal law was not considered as part of this process. For Prebisch, the state protects private initiative and the development of the forces of the market. According to him, the role of the state is to channel social resources to the private sector, correct the forces of the market, develop infrastructure for further growth, and mediate between domestic entrepreneurs and international aid²⁷. As we see, in Cepal's and Prebisch's thought, the role of the state is just one of helping a national economy and the market to develop. Criminal law is not mentioned because it has no role in development, except the expected one of stabilizing the state and bringing about order in society. At the same time, criminal law was seen as part of the securing of universal values, and to state that it could be used as a tool for economic development would lead to the idea that criminal law does not protect universal values, but particular interests.

Sponsored by USAID and the Ford Foundation, there was an attempt in the United States to involve the law in the process of development. However, as in Latin American thought, the law came too late for the project of development. Law

²⁶ Edmund Mezger and Hans Welzel had participated in the Nazi regime, especially Mezger who drafted some of Hitler's laws. After the end of the war, and as a way to divert attention from his Nazi part, both authors were involved in a polemic about the nature of human action. A polemic that lasted until the 1970s when German Congress passed the new German Criminal Code with a structure of criminal law that was more along the lines of Welzel's theory. In the 1970s the polemic was imported to Argentina, where lawyers got involved in it as a way to avoid discussing the political situation of the country and the fact of the dictatorship. Roberto Bergalli has shown that in Argentina the more critical the situation, the more abstract the discussions in criminal law. See Francisco Muñoz Conde: 2003; Emilio García Méndez: 1985; Roberto Bergalli: 1984).

²⁷ Raul Prebisch: 1982 and Victor Bernal et al: 1980. See also Amy L. Chua: 1998.

Professors from the Universities of Harvard, Yale, Stanford, and Wisconsin, were involved in a project that studied the Latin American legal system and concluded it was underdeveloped and for that reason seems in need of furtherance. Law was seen at the time as an instrument of social change, but most specifically as an instrument of social engineering. The aim of judicial and legal reforms, according to the scholars involved in this movement, was to adjust the legal system to the social and economic changes that had already taken place. It is important to notice that lawyers came late to the reform and they were seen as secondary agents in the process of reform. Traditional lawyers have thought otherwise: in the reforms to the CJS they avoided using social science, even though they sometimes based their reforms on their understanding of social science. For instance, the reform of 1966 was the result of how Colombian Lawyers understood Durkheim's theory of solidarity.

To David Trubek, one of the leading scholars of the movement, law and development sees modern law as essential to the creation and maintenance of markets, and the emphasis is on predictability as a set of universal rules uniformly applied (David Trubek: 1972). Given that underdeveloped countries lacked a modern legal system, they had to adopt modern rules that led to freedom and development, and they had to do so by importing foreign –meaning American– codes. Domestic legal practices came to be seen as traditional or customary, and for that reason as non-rational and non progressive. Given that most of the work in the transformation of the state was done by economists, lawyers were left with just the transformation of legal education, because underdeveloped countries had a formalistic and traditional way of teaching law. However, Trubek, using Max Weber's conception of law, writes that modern law does not produce economic development or political development; it just helps to free the structure of the market and support a centralized bureaucratic state²⁸.

Local histories were presented as inferior and in need of adopting a superior model. To Robert Seidman, third world countries are based on a tradition of dual law. According to him, the fact that there is a plural society and parallel legal systems shows the colonial legacy of these countries and the need to transform them. To him, “by definition customary law cannot lead to development”, therefore we need to eliminate parallel systems of law and unify the economy and the legal system²⁹. As a result of this wave of law and development, the Ford Foundation supported transformations of the legal system in three countries: Brazil, Chile, and Colombia. In Brazil the transformation was instrumental in helping discredit the formal legal system and the protections of formal law, yielding to forms of authoritarianism that interpreted law as a neutral instrument of politics. In Chile

²⁸ Trubek. *Supra* n. 38 at 15.

²⁹ Robert B. Seidman: 1972, At 315. See also Kenneth L. Karst and Keith S. Rosen: 1975. This analysis reminds us of the discussion about feudalism and capitalism in Latin America, and the idea that the dual economy of these nations was the cause of underdevelopment. Cfr. Rodolfo Stavenhagen et al: 1980.

it led to superficial transformations and in Colombia the project was a total failure (James Gardner: 1980).

However, the project of Law and Development left an important legacy that was going to become important in the 1990s. As I mentioned earlier, in the 1960s the model of CEPAL turned to economists for the transformation of the state. Criminal law had not role, but legal education was vital. The Ford Foundation supported reforms in legal education in National and Los Andes Universities. Despite the failure of the program, students in Los Andes University were educated under the model of American universities. Colombian law schools taught American law and the way of teaching law in the United States became the way of teaching law in this University. Law students went later to Harvard, Wisconsin, Yale, and other American universities to be trained in the model of American law. They got their JDs in the United States and returned to Colombia to become professors and to do scholarly work following the American model.

These lawyers were trained in the use of law as an instrument of social change. They learned the importance of social and legal engineering in the process of development. This knowledge, tied with the neo institutionalism model developed by the World Bank, became important for the reforms that are being applied today. These lawyers came to Colombia with a travel book: the American law book. In the 1980s and 1990s, lawyers in Colombia began to publish the works of professors of Constitutional law like Ronald Dworkin, Bruce Ackerman, Duncan Kennedy, and others, and began to import the American discussions about constitutional law, despite of the many differences between the Colombian and American legal systems. But economist got involved in the study of the law too. Following the analyses of Gary Becker, economists like Mauricio Rubio and Sergio Clavijo began to analyze the relationship between law and economics and began to introduce a model of efficiency to understand the role of law. Like the gap studies of the 1960s in the field of law and society, these economists analyzed the best way to implement the law and the best way to have an efficient legal system.

On the side of criminal law, lawyers kept their power and were leading the transformations of the CJS using legal doctrines produced in Europe, especially Spain, Italy, and Germany. With the 1991 Constitution, their role became less relevant because they were unable to speak in a non normative language. The time for economists was coming. In the following sections we will see how development was transformed and how law, development, and criminal law became partners in the reform of the CJS.

4. FROM NATIONAL DEVELOPMENT TO NEOLIBERAL DEVELOPMENT

The ideas of CEPAL and the idea of development were under strong attack in the 1970s. From the side of dependency theory it was shown that the idea of development involved several contradictions. Fernando Cardoso showed that it was possible to achieve development in conditions of political dependency, that

is, he separated political dependency and economic underdevelopment³⁰. Ruy Mauro Marini and Gunder Frank focused on the idea that underdevelopment and development were two sides of the same coin, and rejected the idea that Latin America was feudal and that this feudalism was an obstacle to development³¹. Furthermore, they showed that underdevelopment was the result of development. Prebisch himself wrote in 1982 a critique to the model of CEPAL and showed the need to create a new model able to achieve the much desired development of the Latin American countries (Raul Prebisch: 1950 and Raul Prebisch:1982).

By the end of the 1980s and the earlier 1990s the idea of development as such was criticized: scholars like Arturo Escobar, Philip McMichael and others showed how development was a project or a discursive construct (Arturo Escobar: 1995; Philip McMichael: 2000).

However, with the Washington Consensus and the writings of Francis Fukuyama, the idea was that the state was an obstacle to development and that it needed to be transformed. That is, democracy needed not only liberalization of politics but also the liberalization of markets. After a long process of *mea culpa*, scholars in the field of law and development gathered around the idea of a right to development (Hans Otto Sano: 2000). This didn't lead to a new international order, but it brought about a new push to the law and development movement. Now stable environments for foreign investment with efficient protection of property rights and the protection of the global rule of law to facilitate international transactions became the central elements advocated by scholars in the field of law and development³². This new conception of law and development led to an optimistic view of human rights and economic growth, which was tied to the wave of democratization that swept across Latin America in the 1980s. According to supporters of this trend, some of the obstacles for development were the lack of access to justice; corruption; the instability of property rights; and the inefficiency of the legal system to protect the rights of the people. In this second wave, the focus is not the transformation of legal education but the idea that the state matters and therefore that the reform needs to cover more than the role of lawyers as social engineers.

In 1995, scholars discussed the role of the law in the process of development. The goal was to embark on programs of legal technical assistance and so there rose the need for technicians who were able to use the law in the best way in order to promote development, now understood as facilitating market transactions by defining property rights, guaranteeing the enforcement of contracts and maintaining law and order (Julio Faundez: 1997). To do so, the model goes back to the state, but this time to ensure that there is an institutional design that guarantees the non intervention of the state in economic matters.

³⁰ Fernando Cardoso y Enzo Faletto: 1969.

³¹ Ruy Mauro Marini. "Dialéctica de la Dependencia". En Rodolfo Stavenhagen. *Supra* n. 41. and Andre Gunder Frank. *Capitalism and Underdevelopment in Latin America* (New York: Monthly Review Studies, 1969).

³² Rodrigez. *Supra* n. 53 at 14.

In the new wave of law and development it appears as if the main role of the reform was just the rule of law. In the new model, reformers claim to redesign the state in order to push for a reform of the state that protects democracy and the rule of law (Deborah J. Yashar: 1999). After the Summit of the World Bank, the criminal justice system began to be seen as part of the process of development and neo institutionalism became the way to understand theoretically the reforms. Joseph Thome, commenting on the second wave of law and development, asserted that law reform was based on three premises: development requires a legal framework resembling that of the United States; this model establishes clear and predictable rules; and this model can be easily transferred. However Thome adds that these three premises have been proven false. In spite of that, these are the premises that were at the base of the 2005 reform to the CJS in Colombia.

The World Bank began to be concerned with judicial reform and the role of law in development. Now the reform was not only pushed from USAID and the Ford Foundation, but from the Interamerican Development Bank, the World Bank, and a series of multinational companies in charge of giving technical support in the development process and legal reform. The judicial system was important to achieve the goals of neoliberal reform. In the proceedings of the 1995 Conference on Judicial Reform, the World Bank states:

*The World Bank's interests in judicial reform stems from its concern about the sustainability of the development efforts it supports in borrowing countries. Many of the programs of the Bank and other development institutions and governments finance are at risk because of the lack of enforcement of the rule of law, a basic principle for sustainable social and economic development*³³.

Institutions needed to be redesigned and the state needed to get involved to ensure rights and stability. The World Bank promoted a transformation of Latin American judicial systems and a new design of their institution. The model of the new institutionalism was central in this process³⁴.

March's and Olson's seminal article coined the term "new institutionalism" for the studies that were being made by scholars concerned with the importance of institutions. After criticizing old studies for their analysis of institutions under the labels of contextuuals, reductionists, utilitarians, functionalists, and instrumentalists, March and Olson write that the new institutionalists understand institutions in a more autonomous way. One central element in their analysis is what they call

³³ Malcolm Rowat, Waleed H. Malik, and Maria Dakolias, 1995, At vii.

³⁴ Luis Salas. "From Law and Development to Rule of Law. New and Old Issues in Justice Reform in Latin America". In Pilar Domingo and Rachel Scieder: 2003; Linn Hamnergren: 2002; Lawyers Committee for Human Rights. *Building on Quicksand. The Collapse of World Bank's Reform in Peru*. (New York: Lawyers Committee for Human Rights, 2000); Miguel Schor. The rule of Law and democratic consolidation in Latin America. Paper Presented at the 2003 meeting of the Law and Society Association (in file with authors).

the logic of appropriateness. Against the rational choice theorists, they hold that choices are not made in a void, and against structural functionalists they hold that behavior is not just the result of roles. Institutions shape individual behavior, they limit it, orient it, but never completely determine it. At the same time they emphasize the importance of history in the analysis of institutions, because past decisions will determine present ones. With regard to the concept of institutions, they include not only formal ones, but also rules, rituals, informal norms, etc.³⁵. In 1985, Evans Skocpol and Reuschmeyer edited a book in which they showed how the state had returned to be the main object of analysis. As a result of this book, there was a wave of analysis in which the state was studied both as an independent variable and as affecting society, for instance, for the construction of a durable democracy³⁶.

The re-emergence of the state and what Olsen and March coined as “new institutionalism” was not a unified and homogenous academic endeavor. As Hall and Taylor, Peters, Koelbe, Campbell, and Kato have shown, new institutionalism developed in different kinds of not necessarily connected scholarship, with different approaches to the role of institutions³⁷. This was called the first wave of new institutionalism, the one in which the different approaches developed their own paradigms in a separate way. According to these scholars, we are witnessing now the second wave of new institutionalism, in which the different paradigms are put together to constitute a unified theory.

Lawyers were not trained in the nuances of this new institutionalism. It was now the job of the economists to reform the institutions but to do so they had to legitimize themselves in the field of criminal law³⁸. Traditional lawyers focused on the state as a formal institution and saw the law just as an instrument to regulate people’s behavior; for that reason, their role in the reform of the system was increasingly losing its importance. But at the same time, the World Bank became involved in the reforms of institutions, because it began to connect development and the reform to the criminal justice system.

As a result of the 1995 Summit of the World Bank, the legal system was included in the social agenda of donor institutions. According to the World Bank, third world countries are in need of transforming their legal systems in order to promote economic development. However, this time the legal system is not used as in Prebisch or as in the first wave of law and development, but as an instrument to guarantee market transactions and to protect property rights. Behind this is the

³⁵ James March and Johan P. Olsen: 1984, 734-749.

³⁶ Peter Evans, Theda Skocpol, Dieter Rueschmeyer : 1985.

³⁷ Peter Hall and Rosemary Taylor: 1996, 936-957; B. Guy Peters. “Political Institutions. Old and New.” In Robert Goodlin and Hans Dieter Klingemann: 1998 ; Thomas A. Koelbe: 1995, 231-243; John L. Campbell. “Introduction”. In John Campbell and Ove K. Pedersen: 2001; Junko Kato:1996, 553-582.

³⁸ Linn Hammergren. *The Judicial Career in Latin America. An overview of Theory and Experience*. World Bank.

idea of the best practice, that is, the World Bank looks for the best practice in the matter of the CJS and it imposes this transformation on the recipient countries.

Neoliberal reform is now connecting the criminal justice system to the idea of development in order to prevent and attack corruption and in that way help the recipient countries develop their economies, that is, open their markets to facilitate foreign investment. In Colombia, the transformation had been done originally through the AID and its fight against the drug trade. In fact, after the reform effected in 1991, where the old Colombian constitution was changed by a new one, new elements were established in the Colombian legal system. The 1991 Constitution established new social rights, a remedy for human rights violations based on the Mexican *amparo*, a Constitutional Court, among others. At the same time, the Constitution established a new office in charge of the investigation of crimes. The Attorney General's office is part of the judicial branch and it is in charge of investigating and indicting those who are responsible for crimes. The institution goes more along the lines of the Spanish model, showing the influence of the Spanish design in the CJS.

However, with the mounting importance of institutions in the World Bank, the stress has been put not just in the law but now more importantly in the role of institutions to shape the decisions of agents in the system. Given this analysis, the World Bank has become an important institution in the transformation of the judicial system in Latin America. But this is a design that involves not only the participation of national institutions, like USAID, but more institutions of global governance, like the World Bank, the IMF, and the UNPD³⁹.

To the 2005 reformers, law was an important element for development, because it can guarantee property rights and a competitive environment for foreign investors. According to the 2005 reformers, the idea is to make the country as competitive as possible, and this means the liberalization of the economy, the reduction of the regulatory power of the state, and the elimination of labor rights⁴⁰. But one of the main problems these reformers see in the economy is the existence of transaction costs that make the system less competitive, and one of them is corruption⁴¹. This conception is seen in the idea of transparency and how the state is minimized in order to prevent its intervention in the market, unless it is to help it (Edgar Reveiz: 1997).

5. ECONOMISTS ENTER THE FIELD OF CRIMINAL LAW

In June 1991 Colombia passed a new Constitution, which was going to completely reshape the structure of the state. The reform was the result of the policies brought by Colombian president César Gaviria, an economist from Los Andes University,

³⁹ Malcom Rowat et al:1995 and Peter Murrell: 2001.

⁴⁰ Yves Dezalay and Brian Garth: 2002 and Yves Dezalay and Brian Garth: 2002.

⁴¹ Edgardo Buscaglia et al: 1997 and Pilar Domingo et al: 2001.

educated in the United States and who brought to the government lawyers and economists who were willing to redesign the institutions of the Colombian state and to implement a model of development that opened Colombian markets to the world and made the country more attractive for foreign investors. One of the transformations in the Constitution was the creation of the Attorney General's office and the Council of the Judiciary. Although these measures can be seen as democratic, they were also part of the process of redesigning the state for the implementation of neoliberal policies in Colombia, a project that Gaviria proudly labeled as *apertura* (opening).

As a result of these policies, business people, politicians, and the owners of the most important Colombian newspaper created the Corporación Excelencia en la Justicia (Excelence in Justice Corporation), a think tank dedicated to analyze the legal system and design policies for the government to improve the efficiency of the system. This think tank has been publishing a journal dedicated to study the relationship between law and development. In this journal, *Justicia y Desarrollo*, lawyers and economist have published their articles on the efficiency of the system of justice and on how to improve it, and to do so they have been using a perspective based on law and economics.

Among the economists who have been publishing in several journals about this topic are Armando Montenegro and Mauricio Rubio, professors of economics at Los Andes University and educated in the United States. In the pages of *Justicia y Sociedad* and *Coyuntura Económica*, economists elaborated a discourse in which the criminal justice system began to be seen not as an instrument to solve conflicts between the parties, but as an instrument to control criminality, corruption, and to eliminate the cost of transactions for foreign companies.

This journal has published several studies relating the economy to the CJS. In these studies the need to have a reliable justice system in order to allow the system to function properly is stressed. To do so, it is proposed that the rights to property be granted and protected efficiently by the CJS. Given that crime and corruption create transaction costs for the investors, the authors of the articles published in these journals advocate for a more efficient CJS. In a poll done in 2000, entrepreneurs answered that the inefficiency of the judicial system and the instability of the rights to property were the main causes for transaction costs and the main difference between a region and another in terms of being attractive to investment and industrial development⁴². In the same issue of *Justicia y Desarrollo*, an analysis of the obstacles for foreign investment is presented, where it is claimed that foreign companies prefer to have their business in places where physical and rights safety are guaranteed. One of the obstacles to foreign investment, according to the study, is the inefficiency of the judicial system⁴³.

⁴² Fundación de Investigaciones Económicas Latinoamericanas. "La seguridad jurídica y su impacto sobre las inversiones". *Justicia y Desarrollo* Vol. 3 No. 13 (September, 2000).

⁴³ Programa Convertir-DNP. "Obstáculos y oportunidades para la Inversión Extranjera en Colombia". *Justicia y Desarrollo* Vol. 3 No. 13 (September, 2000).

Armando Montenegro and Carlos Posada analyzed the crime rate in Colombia in the year 1995. In their article, Posada and Montenegro take Becker's rational choice theory as their theory to explain crime. This neoclassical approach will show that crime is the result of a rational choice taken by the person who decides to break the law. Although this approach has been criticized because it does not take into account the structure of society and assumes that individuals break the law just because they want to, the authors do not make an attempt to evaluate any critical approach to crime. In their article they show that the model of development is unrelated to the idea of crime and therefore that it is not the process of industrialization or the process of opening of the markets that are responsible for the increase in the crime rate. Since their approach is based on the relationship between costs and benefits, they conclude by saying that it is not the lack of social services but the absence of costs to committing a crime the main reasons why the crime rate has increased in Colombia in the 1990s⁴⁴.

Mauricio Rubio, another economist educated at Los Andes University and Harvard, analyzes the costs that crime causes to the state. In his analysis, Rubio emphasizes the importance of an institutional redesign and how it is the lacking structure of the state the main reason why crime has gone up and people solve their conflicts privately (Mauricio Rubio: 1999). In his book he shows how crime affects the efficiency of the economy and how crime can become an obstacle to economic development, that is to say, open markets.

One result of these economic analyses of criminal law is the emphasis placed on efficiency. However, economists have defined efficiency in terms that they can measure with econometric analysis. Given that the efficiency and efficacy of the system cannot be defined without taking into account the role of the state and the law as an instrument of control and creation of identities, Colombian economists have had a hard time defining this term. Rubio and others came up with the idea that efficiency means time in prison; therefore, if a person investigated for a crime is not sentenced to prison time, they would consider that there is impunity in the system. Following this model, Mauricio Cardenas, stated in an article written in 1996 that crime rate has increased and overwhelmed the ability of the system to deal with it. He adds that the inefficiency of the system amounts to 98% of impunity, because only 5% of the cases are dealt with by the CJS and among those only 2% end in prison time. The system is as inefficient, according to Cardenas, as it used to be in the 1980s, but the budget has doubled since the 1991 Constitution (Mauricio Cárdenas: 1996).

The CJS is presented in these studies as an inefficient instrument and consequently as an obstacle to the development of the country. At the same time, the political implications of crime and justice, studied and analyzed in European criminological

⁴⁴ Armando Montenegro and Carlos Esteban Posada. "Criminalidad en Colombia". *Coyuntura Económica* Vol. 25 No. 1 (1995). See also AAVV: 1995 and Jaime Granados Pena. "Se necesita una reforma a la Fiscalía General de la Nación?" *Justicia y Desarrollo Año IV Vol 16*. (June, 2001).

discourse, and the normative questions that were asked by lawyers in the European criminal law design, are left aside by economists, and instead questions about efficiency begin to be asked. In this way, the CJS is being constructed discursively as a technical instrument that can be analyzed only by technocrats and therefore a space where traditional lawyers have no place.

Economists have been writing about the need to treat the economy and the model of development as a technical matter and not as one that involves any kind of political discussion. Salomon Kalmanovitz, professor at the Economics Department at both National and Los Andes University, and member of the Board of Directors of the Central Bank in Colombia—a sort of Colombian Allan Greenspan—has written that the Constitutional Court when deciding about economic issues should have the advise of technocrats—economists with PhD—who can analyze these issues guaranteeing their political neutrality⁴⁵.

CONCLUSION: ENTER ECONOMIC EXIT POLITICS

Teivo Teivanen in his book on neoliberal reform in Peru shows the process by which economics became the language of state reform, so that any reform became a-political and therefore inevitable. In the Colombian reform to the state, the discourse about redesign of institutions has become one about globalization and the need to adapt the system to the requirements of globalization, open markets and a global economy. If the country wants to succeed, it will have to adapt to these transformations in both the economic and the law.

The language of economics did not emerge suddenly in Colombia. Since the first wave of law and development, in which lawyers were nothing more than technicians trying to determine the best way to educate lawyers for social change, economists have dominated the field of development. However, the 1950s and 1960s model of development did not pay much attention to the state and institutions. It is with the revival of the state in the 1980s that the idea that institutions matter took again the lead in the discourses about development and it permeated the language of lawyers and social scientists.

The second wave of law and development was linked to the transition to democracy in Latin America and the revival of institutional analysis in the social sciences. At the same time, it was connected with the lost of European cultural hegemony in criminal law and the transition to a model based on the American system of justice. In Gaviria's administration economists were focused on a redesign of the state, trying to adapt the state to a neoliberal model of development, one in which the state has to reduce its size and increase its attractiveness for foreign investment. Since 1991 economists and lawyers educated in the model of law and development began to develop a discourse in which the idea of efficiency became central and

⁴⁵ Salomon Kalmanovitz: 1999 and Salomon Kalmanovitz. "Los fallos del Juez Constitucional: el caso de la Capitalización de Intereses". *Justicia y Desarrollo* vol. 3 No. 2.

one in which normative statements about the CJS were losing their credentials. In different articles written by economists from Los Andes University, the CJS was included in a neoliberal model of development, highlighting its importance for foreign investment in the country. As a result, the discourse about criminal law became one about efficiency, transparency, corruption and development.

Once this discourse was elaborated, lawyers –particularly those from Externado University– lost their ability to utter meaningful statements about the CJS and therefore to be relevant as policy makers in the reform to the CJS. In the reform to the criminal justice system in Colombia, we witnessed a process whereby lawyers either had to get involved in discussions about efficiency and impunity, lacking the elements to say interesting things, or had to lose their role as policy makers and crucial agents in the system. This is not to say that lawyers disappeared from the CJS, they still exist as workers of the system, but they work in a system where their ability to contribute to it is decreasing rapidly. The reform to the CJS is the result of this battle for cultural hegemony, and at the end economists and business lawyers are the ones taking the fruits of victory.

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