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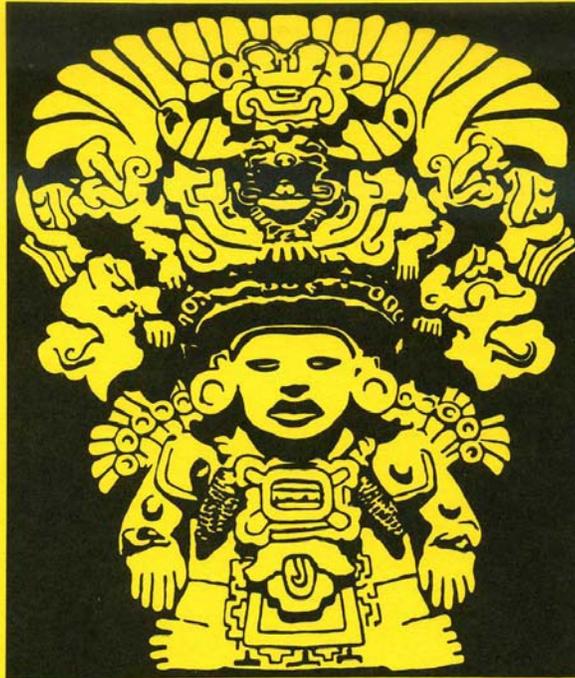
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*CRIMINAL LAW AS A CONSTITUTIVE STRATEGY:
THE COLOMBIAN CASE*

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Abstract

In this text I analyze the role criminal law has played in the production of subaltern subjectivities in Colombia. Criminal law and criminological discourse have been important to control subaltern groups and to constitute their identities. Colombian elites have appealed to criminal law to solve their social problems, in a strategy that has been labeled as law's symbolic efficiency or as "penal efficientism".

Criminal Law as a Constitutive Strategy: The Colombian Case¹

Introduction

Teivo Teivanen in his book on neoliberal reform in Peru shows the process by which economics became the language of state reform. In this country legal and economic reform became a-political and therefore inevitable (Teivanen, 2002). Likewise, in the Colombian institutional reform, the discourse about redesign of institutions has stressed the need to adapt the economic and political systems to the requirements of globalization and open markets. The argument goes this way: if Colombia wants to succeed in the world market, it would need to adapt to these transformations occurring in the economy and in the law.

The language of economics did not emerge suddenly in Colombia. Since the first wave of law and development, in which lawyers were technicians trying to determine the best way to educate law students as social engineers, economists have dominated the field of development. However, the 1950s and 1960s model of development did not pay much attention to 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 (Chua, 1998).

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 (Rodríguez,

¹ I thank the editors of the Latin American and Iberian Institute's Research Paper Series and the two anonymous reviewers for their comments. I benefited from those critiques to make this a better paper. The final result is my sole responsibility.

2001). At the same time, it was connected to the loss of European cultural hegemony in criminal law and the transition to a model based on the American system of justice. During President Cesar Gaviria's administration (1990-1994), economists focused on a redesign of the state, trying to adapt it to a neoliberal model of development, one in which the state had to reduce its size and increase its attractiveness to 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 one in which normative statements about the Criminal Justice System CJS were losing their credentials. In different articles, written by economists from the *Universidad de los Andes*, 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 constructed, lawyers—particularly those from the *Universidad Externado de Colombia*—lost their ability to utter meaningful statements about the CJS and therefore to be relevant as policy makers in its reform. In recent reforms lawyers had to get involved in discussions about efficiency and impunity. They had to pay the price of participating in the discussion without the necessary instruments to say something relevant or of avoiding participation and lose their role as policy makers and as central actors in the system.

This is not to say that lawyers disappeared in the CJS. They still exist as workers of the system, but they work in a system where their ability to design it is losing importance. From being a discourse to civilize populations, or to make them invisible if they were not

considered civilized, criminal law, as part of the legal coloniality of power, adopted the current language of globalization, that of economics and neoliberal governmentality.

In this text I analyze the role criminal law has played in the production of subaltern subjectivities and on the ideas held by Colombian legal elites. Criminal law and criminological discourse have been important to control subaltern groups and to constitute their identities. Colombian elites have appealed to criminal law to solve their social problems, in a strategy that has been labeled as law's symbolic efficiency (García, 2001; García, 2002) or as "penal efficientism" (Aponte, 2006)².

I analyze current criminological discourse in order to show that neoliberal governmentality deals with the idea of constituting identities in order to control subjects through the use of their freedom. I show that this kind of discourse is part of a long strategy of control where criminal law has been central to constitute spaces and to control subjects. I show that there is an implicit discourse under this classification of subjects, that of the civilizing mission, according to which criminal law was reserved for the civilized man, whereas religious missions and other forms of control were used for the "savages" and the "semi-savages" (Sanchez, 2004; Scarzanella, 2003). I will show the influence of global designs in local politics, and how the global is connected to the legal production of subjectivities and the legal coloniality of power within the confines of the nation-state.

² When criminal law is focused on protecting rights and on due process of law is known as "garantismo penal", that is, law is seen as based on the protection of the defendant's rights or his legal guarantees. In lack of a better word I have used, in a literal translation, the idea of "eficientismo penal" to mean the use of criminal law to obtain certain political or practical results even by harming people's constitutional and legal rights. The logic behind this idea is the perception that it is better to break some glasses in order to save the whole set. From this logic, rights are seen as obstacles in the path to obtain a decision that imposes prison time to the defendant.

In this paper I argue that penal policies in Colombia are not created in a void. They are part of policies designed and applied in other places. I will show the history of the civilizing discourse in criminal law and how it has persisted in current policies in Colombia. The emergence of an actuarial system of justice led to policies like zero tolerance, incapacitation theory in the prison system, and to an unprecedented increase in the prison population. I argue that there is a global trend that renounces the discourse and practices of re-socialization and instead opts for a management/control of populations that are a risk for society.³ Following Alessandro De Giorgi's analysis, I call the attention to the centrality of the U.S. experience in this trend (De Giorgi, 2000; De Giorgi, 2002; Wacquant, 2009).

However, from a world historical perspective, I aim to show the ways ideas and policies traveled to Colombia and the reasons why the American model of crime control was adopted in Colombia in the 1990s, as part of the transformations in the model of development established under Cesar Gaviria's administration (1990 – 1994) and after the 1991 Constitution. This paper is about ideas, even though I mention some of the reforms taking place in Colombia. My main interest is to show how lawyers as *literati* imported ideas and how law constituted identities. I focus on lawyers' textbooks because they are central in lawyers' education. Unlike American legal education, in Colombia court cases were not usually analyzed in criminal law courses, because they were more concerned with

³ Traditionally criminal law was considered to protect people's rights, that is to say, to protect people who were at risk of suffering a violation of their rights. Actuarial justice uses the CJS to protect some people from populations that are considered to be a risk to society. See Foucault, 1980; Ferrajoli, 1997, Feeley, 1994.

the study of modern doctrines, that is to say, European legal doctrines.⁴ In the following section I will show the emergence of a global design, that of actuarial criminology also known as zero tolerance. After showing this design I will show how it is imported and adapted by Colombian legal elites.

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* (Young, 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 penal and criminal justice systems, these authors proposed a radical criminology and a criminal system that took into account the interests of the working class (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 from sites of power and in relationship to structural transformations in the national economy and in the world economy (Muncie, 1998: 221).

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

⁴ I analyze the role the Constitutional Court has played in constituting a global liberal identity in Farid Samir Benavides Vanegas. *A Tutelazo Limpio: A story of the struggle for identity and rights in Colombia and the Demobilizing Effect of the Law*. Saarbrücken: VDM Verlag, 2009. However the analysis of the Supreme Court cases would show us how legal ideas are brought down to earth and how they are adapted for particular cases. I analyze in more detail the role of the Supreme Court in a project with the Law School of the Universidad Nacional de Colombia entitled *Modelo de Desarrollo Económico, Nuevas Estrategias de Control y Delito Político*.

crime, it was not a surprise that criminologists were concerned about the fate of the criminal justice system and the way to deal with these problematic situations (Baratta, 1986). In Marxist thought there was a dispute about the discipline itself. Some criminologists, writing in a collection entitled *Critical Criminology*, put into question the very idea of a Marxist criminology (Young, 1975). From this point of view, the criminal justice system was considered 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 (Foucault, 1977). The leftist critique left penal and prison interventions without legitimacy. According to David Garland, during the 1960s the left criticized the CJS and found that it was too intrusive in people's lives and that it could lead towards a disciplinary society (Garland, 2001). To critical accounts of the role of the CJS, the idea of re-socialization 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 victimizer (Christie, 1971; Mathiesen, 1974; Hulsman, 1984).

Given the failure of the alternatives and the problems that it caused in the intervention from the CJS, the 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 a transformation of the CJS and an improvement of its performance in terms of

efficiency. Becker analyzed 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 implies for states, Becker concluded pointing out the need for analyzing the optimal conditions in which crime would be controlled via a rational decision where the subject balances the benefits of crime with the costs of 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 (Becker, 1968).

By applying an economic framework, Becker not only was introducing an idea of efficiency within the system, but something more important: the idea that subjects in the CJS are rational subjects who make rational choices and therefore social conditions and historical reasons are not explanations for the crime problem.⁵

Along similar lines, James Q. Wilson, explained the crime problem as a question of urban disorganization and as a sort of environmental problem (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* (Wilson, 1982). In this article Wilson analyzed some of the literature on crime control and showed that individuals in certain areas of the city are not afraid of crime but rather of disorderly behavior. Wilson considered that

⁵ Mauricio Rubio reaches the same conclusion in his analysis of the crime problem in Colombia and Central America. See Rubio, 1999; Rubio, 2007.

disorderly behavior affects people's lives and that it could lead to an increase in crime. He analyzed research where the effects of broken windows were studied. To Wilson, these studies show that in areas where law is weakly enforced it is more likely to have problems with crime. When disorderly behavior is under control, people would not think that law is not being enforced and therefore that perception would stop criminals from committing more serious crimes. This means that the police should have a more active role and more involvement with the community.⁶ 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 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 (Wilson, 1983).

⁶ Analyzing the case of New York, where Zero Tolerance policies were implemented, Bowling and Harcourt show the limitations of this policy and the lack of bases on social science (Bowling, 1999; Harcourt, 2001; Harcourt, 2002).

The idea of management is incorporated in that way in the fields 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, which Foucault labeled as governmentality and Deleuze as societies of control (Foucault, 1990; Foucault, 1992; Foucault, 1998; Foucault, 1993; Deleuze, 1990).

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 themselves (Ewald, 1990; Rose & Valverde, 1998).

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 now they are left to their own freedom and private institutions have to develop their own normalizing practices. According to Hudson, neoliberal governmentality establishes a government from the 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, law and the legal system become places where different sites and ways of power meet and constitute subjects and fields. In that way, law ceases to be used as an instrument of discipline or of direct power, but rather as a way to control populations that can constitute a risk for the management of society (Hudson, 1998).

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

Feeley and Simon suggest that the new penal machinery may be heading toward 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 punishment (Lynch, 2000).

As a result of this model, increasing numbers of people have been sent to prison. Prison became a place of confinement and management and not a place for re-socialization. This *crowding crisis* 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 exported. In the following sections I shall explain how this discursive field has been constructed, making relevant the statements of economists in the field of criminal law and crime control (Mathews and Francis, 2000; Nelken, 1994; Garland, 2001). I will explain how economists entered the field of criminal law and how they re-constituted it to introduce ideas of efficiency and crime control for neoliberal forms of governmentality.

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 place from the 1960s to the 1990s in the region. In their analysis they use Bourdieu's concept of *palace wars* to show the internal disputes between lawyers and economists for power, stressing the way these disputes led to transformations in the state. According to Dezalay and Garth, lawyers, or what they call *gentlemen politicians of the law*, represented a kind of aristocratic ideal of government (Dezalay, 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, 2002: 22). On the other hand, using Jorge I. Dominguez' description of modern rulers (Dominguez, 1997), Dezalay and Garth show that in the 1970s there was a transformation in the elites controlling the countries they analyze. 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 positions of power within the government. Having access to the U.S. gave these *Technopols* access to prestige and to international contacts that made 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 those actors that introduce ideas that later on 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 constructed the field of power as an economic field. Neither do they take into account how this transformation was central in the perception of the law as an instrument. The idea of the law as constitutive or as a political and contested space is simply missed. In the 1990s the neoliberal model led to the de-politicization of politics, and in our case of the law (Teivanen, 2002). In Garth and Dezalay's analysis, the construction of a discursive field is left aside and the result is put as one of rational choice, where actors look for the most prestigious and expedite way to access to power.

In this section I 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 19th century 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 that gave the prestige European law had amongst Colombian lawyers and it is from this part that I want to build my analysis following Dezalay's and Garth's explanations.

Law and the Civilizing Mission

19th Century Colombia was characterized by its many wars and power struggles. A traditional interpretation would show this period as one of struggles for economic power; fights between urban rulers and rich landowners; and conflicts for centralization of the state. This approach would show these fights as combats between elites, leaving aside the role the popular sector played in the constitution of the nation and the state in Colombia. At the same time, such an approach would not take into account the special relations existing between the elites and the popular sector. 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 it, 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 constitution and that European history could not explain the particular history of Latin America (Salvatore and Aguirre, 1996; Melossi & Pavarini, 1981; Franco, 1981; Quijano, 1981).

The wars of the 19th century can be best understood as wars for civilization. After the wars of independence, Colombian elites faced the constitution of a new nation. They were not part of the Spanish Empire anymore and they were claiming a new identity, that of Americans (Esquirol, 1997). 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 (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).

Travel stories were central for Colombian elites in the process of civilizing the nation and constituting it as white and of European descent (Quijano, 2000). Some members of the elites traveled to Europe in order to learn how to be cosmopolitans and white. They wrote their impressions in books that circulated widely amongst the elites and that served as models for them. These books presented the civilizing process in two ways: on the one hand, the elites considered themselves to be different from the popular sector, 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 those travel stories. Elites traveled physically or symbolically to Europe and learned the double negation and how to operate within it.⁷

Simon Bolivar expressed this double negation in the following way:

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 dilemma (Simon Bolivar as in Rojas, 2002: 1).

Angel Rama analyzes the role of literature and *literati* in the configuration of Latin American nations (Rama, 2009). He has stressed the central importance of the written

⁷ 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. Dubois, 1939.

word and literatures in the nationalist project. According to Rama, literature worked as an instrument to legitimize social projects and to formalize national bourgeoisies, but also to constitute contracultural and counterhegemonic projects (Moraña, 1994; Acree, 2009).

Rama has identified two classes of *literati*: those associated to cultural production and to the project of construction of a public, that we can call *litteratos*; and those associated to institutions and who were able to constitute spaces by using the courts, the laws, and the legal profession, also known as *letrados* or as bureaucrat-*literati* (Rodríguez, 2007).

Writers like Andres Bello and Miguel Antonio Caro were *literati* in the two senses:

litteratos and *letrados*.

Lawyers, as part of the elites, became central actors in the process of civilization. Given their central relation to the written word, they became important in the exercise of power. The *literati* character of lawyers, in a lettered city, explains why lawyers became politicians and the close connection between lawyers and the state. Florentino Gonzalez, a lawyer himself, epitomizes this idea of law as part of the civilizing project. To Gonzalez, creoles, and by that he meant the educated ones, were the ones working for progress coming from the European race, they were the only ones with the power to civilize the country (González, 1981; Rama 2004). Following Bentham, his proposal was based on the rationality of the individual against the solidarity of traditional indigenous peoples.

According to Gonzalez, Colombia independence was not based on a vengeful morality, but on an ethics of progress. In a letter to Jose María Torres Caicedo, Florentino Gonzalez expresses candidly the racist character of the Colombian nation he and the elites were trying to constitute:

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 everything to fear from civilization (Gonzalez, 1863 as in Diaz Videla, 1994: 108).

Law books became part of those travel stories. Lawyers traveled to Europe to learn law, to learn the organization of the state, and, in general to understand how power worked in a civilized country. Given the colonial history of Colombia, it is not surprising that they chose Spain as the place where they wanted to develop their studies. The kind of travel book they wrote is not like the ones written by the *litteratos* but in general they shared the same features: they talked about other places, they celebrated European culture, and finally they referred to the backward situation 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 civilized men 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.

The first treatise of criminal law written in Colombia was one written by José Vicente Concha, a conservative lawyer –president of Colombia from 1914 to 1918- who traveled to Spain and who published his book for consumption in Latin America at the end of the 19th century. It is important to note that Concha wrote his book in Spanish, but it was published in France, not only because of the lack of publishing houses in Colombia, but also because of his desire of reaching the whole Latin American continent (Concha, 1886). The treaty is based on the most advanced theories of law developed in Europe, which to Concha were almost perfect. Concha based his analysis mainly 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 just a counter stimulus against crime. That is, their theory of the criminal was based on an analysis of costs and benefits. What is important about these theories is how they assumed that criminals were like any other member of society. They did not constitute a different class or a different race; they were rational individuals breaking the social contract (Carrara, 1984; Baratta, 1983).

One of the questions that arises is why elites decided to apply theories that assumed equal treatment for everyone. However this adoption does not appear to be as strange if we analyze the process of state and nation building that took place in 19th century Colombia. As I mentioned before, after Independence in 1819 elites were fighting for power. These fights took place in different regions 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 combatants.⁸ That is, criminal law was not supposed to be an instrument to control indigenous peoples or Afrodescendants. They just did not exist for criminal 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

⁸ The war known as the *One 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 Campos, 2003.

before the law. At this time the kind of control was not criminal law, but the informal structure of the hacienda (Muelas, 2005).

By the end of 19th century, criminal law was part of the civilizing mission but not in charge of civilizing the barbarians. Indigenous peoples were not mentioned because their status was regulated by Law 89 of 1890, a law that divided indigenous persons between civilized, semi-civilized and savages (Campo, 2003). For the civilized and 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 (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 actors 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. His book was the only textbook used by law students and by judges; therefore it was the main source of authority in judges' decisions (Gómez, 2006). Other authors like Arcesio Aragón and Samuel Barrientos Restrepo did not have the same influence.

In the 1920s, indigenous peoples and peasants became visible due to their struggles for rights and land. The Socialist party was created and Manuel Quintin Lame was fighting for the indigenous peoples of Cauca and Tolima (Sanchez, 1976; Espinosa, 2004; Medina, 1989). 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 were outdated and that is one of the reasons why the reform drafted by Concha did not come into force, in spite of Congress' approval. But another reason that is important to consider is the utility, or lack thereof, of Concha's doctrine for the civilizing mission and the process of constitution of subjects as workers and as lower classes. Law 89/1890 had proven to be weak in controlling indigenous peoples. The latter and peasants were revolting against the system, while workers were organizing and protesting against this 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. Quintin 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 ourselves (Espinosa, 2004 and Interview with Don Jose Vicente Garcia. Director of the Indigenous Regional Organization of Valle del Cauca, ORIVAC. Cali, July 7th 2005).

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. The *Universidad Nacional de Colombia* and the *Universidad Externado de Colombia*, two institutions that at the time were promoting liberal political ideas, were part of the promotion of 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 Eliecer Gaitàn, Carlos Lozano y Lozano, and Jorge Gutierrez Anzola were lawyers connected to both the government and these

Universities that brought new criminological theories and new textbooks for law students and legal practitioners. In these textbooks, they showed the advances of criminal law in Italy and how law was useful to control the dangerous classes.⁹

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 introduced.¹⁰ The *Universidad Nacional de Colombia* created the Institute of Criminology in charge of studying the causes of crime and of studying different aspects of the criminal man from a positivist point of view. Gaitán, who Enrico Ferri deemed one of his most brilliant students,¹¹ used positivist ideas in his arguments before the courts (Gaitán, 1983). His closing arguments were published and widely read amongst the population of young law students. Carlos Lozano y Lozano, another scholar also teaching at the *Universidad Nacional de Colombia*, would publish his book in 1950, some time before his death (Lozano, 1950). With the deaths of Gaitán and Lozano y Lozano, the University's role in criminal law was passed to the *Universidad Externado de Colombia*, due to the fact that lawyers educated at this institution had access to the necessary resources and networks with European universities.

⁹ Herbert Braun analyzes the role lawyers and politicians played in the first part of the 20th century. Braun shows that politicians played a role of teachers of the masses. Private life did not exist, because the public was the field of the education of the "populacho". Politicians like Laureano Gomez, president of Colombia from 1950-1953, considered that racial mixture of savages Indians and primitive blacks with Spaniards in addition to Colombian geography made almost impossible to get progress and to become finally moderns. Politicians saw that their role was to civilize Colombian with the use of the law, and to obtain that goal it was necessary to have a closed democracy where only the civilized could take part in the political system (Braun, 2008: 34).

¹⁰ 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. Lombroso, 1971.

¹¹ Given the lack of prestige of Ferri's doctrine in other regions, it is safe to say that he was brilliant because he followed his doctrines.

Colombian law professors 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 networks to advance their careers. Alfonso Reyes Echandía was one mixture of both. He was once a practitioner and the Chair of the Criminal Law Department at the *Universidad Externado*. After having been to Italy and Germany, he went back to Colombia to teach and practice law. He brought his own textbook 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 technical guidelines (Reyes, 1964). He also wrote books on criminology that the police and people in the law enforcement agencies used. The University reached a position as the epitome of criminal law in Colombia, thanks to Reyes Echandía's import of German legal doctrines.¹² Colombian lawyers have traveled since then to Germany, Italy, and Spain, to learn German law and German 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 law, a technical discussion that emerged in the 1950s to cover the participation of those lawyers in the Nazi regime.¹³ A

¹² The 2001 reform was promoted by Attorney General Alfonso Gomez, 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 we could 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 Gomez and the team of advisers in the Attorney General's office.

¹³ 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 past, both authors were involved in a polemic about the nature of human action. A polemic that lasted until the 1970s

reform to the Criminal Justice System 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 part of the civilized countries of the world. This approach to criminal law was under attack in the early 1990s, but now the attack did not come from other lawyers but from economists educated in the United States. But that attack was possible only within a framework of development, where law made sense as an instrument to promote it. In the next section I will show how the movement for law and development set the bases where economists could make meaningful statements in the field of law.

The Project of Development and the Role of Law

The first wave of Law and Development was associated to the idea of national development and it was connected to institutions like the 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 (Rodríguez, 2001). Despite the fact that Prebisch's and Cepal's ideas about development preserved an important role for the state, criminal law was not considered as part of this process. To Prebisch, the state protects private initiative and the role of the state is to channel social resources to the private sector, correct the forces of market, develop infrastructure for development, and mediate between domestic entrepreneurs and

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 Muñoz, 2003; Garcia Mendez, 1985; Bergalli, 1984.

international aid (Prebisch, 1982; Bernal, 1980; Chua, 1998). 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 for them criminal law had no role in development, except the normal one of stabilizing the state and bringing about order in society. At the same time, criminal law was seen as part of the protection of universal values. To say that the law could be a tool for development would mean that criminal law does not protect universal values but particular interests.

In the United States, sponsored by the USAID and the Ford Foundation, there was an attempt to involve law in the process of development. However, as in the Latin American thought, law came too late to the project of development. Law Professors from the universities of Harvard, Yale, Stanford, and Wisconsin, were involved in a project whereby the legal system of Latin America was considered traditional and in need to develop. 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 scholars involved in this movement, was to adjust the legal system to social and economic changes that had already taken place (Trubek, 1972). It is important to notice that lawyers came late to the reform and that they were seen as secondary actors in that process. Traditional lawyers had thought otherwise: in the reforms to the CJS they avoided using social scientists' advice, 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 and the inefficiency of the

system was not seen in terms of costs and balances, but in terms of how to recover solidarity and how to rebuild the social fabric.

To David Trubek, one of the leading scholars of the movement, law and development sees modern law as essential for the creation and maintenance of markets, and the emphasis is on predictability as a set of universal rules uniformly applied (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 economists did most of the work in the transformation of the state, lawyers were left with just the transformation of legal education, because underdeveloped countries had a formalistic and traditional way of teaching law. To Trubek, based on a Weberian conception of law, modern law does not bring about economic or political development; it just helps to liberalize the structure of the market and to support a centralized bureaucratic state (Trubek, 1972: 15).

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 plural 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 dual systems of law and

unify the economy and the legal system.¹⁴ 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 to discredit the formal legal system and the protections of formal law, yielding to forms of authoritarianism that saw law as a neutral instrument of politics; in Chile it led to superficial transformations; and in Colombia the project was a total failure (Gardner, 1980).

However, the project of Law and Development left an important legacy that was going to become important in the 1990s. During the 1960s, the model of CEPAL left everything for economists in the transformation of the state. Criminal law had no role, but legal education was central. The Ford Foundation supported reforms in legal education but only the *Universidad de los Andes* was willing to have an American system of legal education. Law students came 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 went back 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-institutionalist model developed by the World Bank, became important for the reforms that are being applied currently. These lawyers came to Colombia with “new” ideas: the American law book and the idea of strategic litigation. In

¹⁴ See Seidman, 1972: 315; Karst, 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. Stavenhagen, 1980.

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 American discussions about constitutional law, despite the fact of the many differences between the Colombian legal system and the American one. But economists got involved in the study of 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 introduced 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 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.

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 underdevelopment (Cardoso, 1969). Ruy Mauro Marini and Andre 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 its feudalism was an obstacle to development (Marini, 1980; Frank, 1969). On the contrary, 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 desired development of Latin American countries (Prebisch, 1950; Prebisch, 1982). By the end of the 1980s and the earlier 1990s the idea of development as such was criticized, scholars like Arturo Escobar and Philip McMichael showed how development was a project or a discursive construct, but in any case that it was not related to some natural destiny of the Third World (Escobar, 1995; 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 (Otto, 2000). This new understanding of development did not lead to a new international order, but it brought about a new push to the movement of law and development. 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 development (Rodríguez, 2001: 14). This new conception of law and development led to an optimistic view of human rights and development, which was tied to the wave of democratization that was going on in Latin America in the 1980s. According to supporters of this new wave of law and development,

lack of access to justice, corruption, instability of property rights, and inefficiency of the legal system to protect people's rights were obstacles for development. In this second wave, the focus was 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 law in the process of development. The goal was now to embark on legal technical assistance programs. Development was now understood as facilitating market transactions by defining property rights, guaranteeing the enforcement of contracts and maintaining law and order (Faundez, 1997). The model brought the state back in and focused on institutional designs that guaranteed the non-intervention of the state in economic matters.

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 that protects democracy and the rule of law (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 theoretically understand 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 the AID 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 for the development process and for 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 (Rowat, 1995: VII).

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 institutions. The model of new institutionalism was central in this process (Salas, 2003; Hammergren, 2002; Lawyers Committee for Human Rights, 2000; Schor, 2003).

Lawyers were not trained in the nuances of 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 law (Hammergren, 1999; Hammergren, 2002). Traditional lawyers focused on the state as a formal institution and saw law just as the 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 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. The World Bank has become an important institution in the transformation of the justice system in Latin America (Rowat, 1995; Murrell, 2001).

Economists Enter the Field of Criminal Law

The 1991 Constitution transformed completely the structure of the state. The reform was the result of the policies brought by Colombian president Cesar Gaviria, an economist from *Universidad de los Andes*, 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 to foreign investment. 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* (openness).

As a result of these policies, business people, politicians, and the owners of the most important Colombian newspaper created the *Corporacion Excelencia en la Justicia*, a think tank dedicated to analyze the Justice System and to 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 CJS and on how to improve it, and to do so they have been using a perspective of law and economics.

Amongst the economists who have been publishing in several journals about this topic are Armando Montenegro and Mauricio Rubio, who are professors of economics at the *Universidad de los Andes* and educated in the United States. In the pages of *Justicia y Sociedad* and *Coyuntura Económica*, economists were constructing 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 transaction costs for foreign companies.

These journals have 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 state and the economy to function properly is stressed. To do so, it is proposed that property rights 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 opined that the inefficiency of the judicial system and the instability of property rights were the main causes for transaction costs and the main difference between one region and another in terms of being attractive to investment and industrial development (Fundaciòn de Investigaciones Economicas Latinoamericanas, 2000). In the same issue of *Justicia y Desarrollo*, an analysis of the obstacles to foreign investment is presented, claiming that foreign companies prefer to have their business in places where physical and safety rights are guaranteed. One of the obstacles to foreign investment, according to the study, is the inefficiency of the judicial system (Programa Convertir-DNP, 2000).

Armando Montenegro and Carlos Posada analyze the crime rate in Colombia in the year 1995. Posada and Montenegro take Becker's rational choice theory as their theory to explain crime. This neoclassic approach holds that crime is the result of the person's rational choice. Although this approach has been criticized because it does not take into account the structure of society and it assumes that individuals break the law just because they want to, these authors do not make an attempt to take into account any critical approach to crime. The model of development is considered unrelated to the idea of crime; therefore the processes of industrialization or of opening of the markets are not the causes of a higher crime rate. According to them, the absence of costs to crimes is the main reason for the changes in Colombian crime rates in the 1990s (Montenegro, 1995; AAVV, 1995; Granados Pena, 2001).

Mauricio Rubio analyzes the costs that crime causes to the state. Rubio stresses the importance of an institutional redesign. The state's absence explains crime rates and

private justice (Rubio, 1999). In his book he shows how crime affects the efficiency of the economy and how it can become an obstacle to economic development, that is to say, to open markets.

Economic analyses of criminal law emphasize the efficiency of the criminal justice system. Economists have defined efficiency in terms they can measure with their econometric analysis. But given that it cannot be defined without taking into account the role of the state and the law, Colombian economists have had a hard time to define it. 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 in Colombia has increased and that it overwhelmed the ability of the system to deal with it. He added that the inefficiency of the system amounts to a 98% of impunity, because only 5% of the cases are dealt with by the CJS and only 2% of the CJS clientele was sentenced to prison time. The system is as inefficient, according to Cardenas, as it used to be in the 1980s, in spite of the fact that the budget has doubled since the 1991 Constitution (Cardenas, 1996).

The CJS is presented in these studies as an inefficient instrument and consequently as an obstacle to the development of the country. Political implications of crime and justice, studied and analyzed in European criminological discourse, and the normative questions asked by lawyers in the European criminal law design, are just left aside by economists and instead questions about efficiency began to be asked. In this way, the CJS

is discursively constructed as a technical instrument, analyzed only by technocrats, and as a space where traditional lawyers have no place.¹⁵

Conclusion

In the past two decades we have witnessed many important reforms in Colombia. Institutional and legal reforms have been used to face the challenge that violence continues to pose to the Colombian state. Based on a neo-institutionalist approach, Colombia passed the 1991 Constitution and created a cluster of new institutions that were supposed to reduce both political and common violence in the country. Sometimes, as Claudia López shows, these reforms backfired and created an institutional environment that allowed more violence and a deeper deterioration of the Colombian political system. López shows how the 1991 Constitutional reform intended to give local communities more participation in the national government by creating a national jurisdiction to be elected to the Senate. This reform meant that candidates were elected for all the people in the country and that candidates would win their seat in Senate as long as they obtained the necessary number of ballots on a national level. However, the reform opened a window of opportunity to paramilitaries, because they used violence in some selected regions in order to force citizens to vote for the candidate of paramilitary's choice. Some towns showed massive and unusual participation that led to the election of people linked to these criminal

¹⁵ Economists have been writing on the need to see the economy and the model of development as a technical and not as a political matter. Salomon Kalmanovitz, professor of the Economics Department at the *Universidad Nacional de Colombia* and the *Universidad de Los Andes* and former member of the Board of Directors of the Central Bank in Colombia –a sort of Colombian Allan Greenspan- has written that the Constitutional Court should have the advise of technocrats –economists with PhD- in cases involving economic issues in order to guarantee the Court's political neutrality (Kalmanovitz, 1999).

organizations. More than 30% of members of both Chambers are investigated for links with these groups, in what is now known as the “parapolítica” (López, 2007).

In the process of state reform there has been an intellectual struggle between two fields of knowledge: economy and law. Traditionally lawyers were the central actors of the political system, they were both *litteratos* and *letrados* which gave them a central role in the process of nation building in Colombia. European ideas traveled to Colombia in the form of textbooks that replicated the travel books that were written by the *litteratos*. As *litterati*, lawyers brought stories and ideas that allowed them to get social and cultural capital to rule the country. Judicial reforms were usually the result of this import of ideas. Discussions in the field of law and the political system were marked by the agenda set up by lawyers. The literature on reforms to the criminal justice system has usually focused on the history of the reform or on the content of it. My contribution to this discussion helps to put legal transformation in a broader framework, that of the capitalist modern world system. In this paper I have shown how global designs have traveled to Colombia and presented some of the agents of this sort of legal globalization that I have labeled as the legal coloniality of power.

Since the 1990s, in a process that began about twenty years before, economists acquired enough social capital to replace lawyers as the central actors in the system. In a silent work, economists were constructing the field and once they had done it, lawyers were put at the crossroads of having to decide whether to take part in the discussions of legal reforms, and be part of a field shaped by and for economists; or decide no to take part in these discussions and becoming irrelevant in the field of legal reforms.

So far the struggle has not been decided. In 2004 Congress passed a new Penal Procedure Code. The intellectual and institutional support for this new reform to the legal process came from the USAID and the *Universidad de los Andes*. The reform imported the American accusatorial system because, the reformers held, it was more efficient and protected human rights in a way that other kinds of procedure do not. As usual in Colombia, the reform has been a complete failure. The system is as inefficient and unjust as before. The perception of impunity has not changed (Revista Semana, August 2 2009).

The *Universidad Externado de Colombia* remains one of the leading schools in criminal law. But its links to German and Spanish law are unchanged. The dependency on professors and ideas is even more staggering. Lawyers educated at this university continue the cycle started by Reyes Echandía more than 40 years ago. They learn European ideas, they travel to Europe to learn more German criminal law, and finally they return to Colombia to teach these ideas and with textbooks that will give the necessary social capital to be in positions of power.

Based on the history of Colombian legal reforms we can say that it would be naïve to expect a change in this situation. There is not research being done on this particular topic and no apparent intention to change this state of affairs. Moreover, new reforms are being done under the same model: the import of foreign ideas that are considered valid just because they are foreign. International agencies of cooperation are now central actors, because under the label of best practices they import with their money their own legal practices, which they consider to be the best.

The fact that Colombia lives in the middle of an armed conflict makes scholars forget or ignore these *palace wars*. More research needs to be done on the constitutive character of criminal law, because it will help us understand the politics behind many of the reforms not only in Colombia but also in the Third World.¹⁶

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¹⁶ The fields of state building and peace building are target of similar critiques. See: Englebert and Tull, 2008.

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