

**BUREAUCRACY, DISTRIBUTION AND
SOCIAL CHANGE. A CRITIQUE OF
COLOMBIAN STATELESSNESS***

**BUROCRACIA, DISTRIBUCIÓN Y
CAMBIO SOCIAL. UNA CRÍTICA A LA
FALTA DE ESTADO COLOMBIANO**

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ABSTRACT

This paper answers the question of how the state affects the power distribution among the citizens by bureaucratic interaction. The author argues that we have to analyze the interaction between citizens and street-level bureaucrats to understand the state's role on a daily basis. I illustrate my theoretical argument with an example of the bureaucratic behavior inside of a conditional cash transfer program in Colombia. The article concludes that the legal academia has to rediscover the street-level bureaucrat concept in order to recognize new stages of litigation beyond the judiciary branch.

Keywords author: Failed state, street-level bureaucracy, legal realism, executive branch.

RESUMEN

Este documento responde a la pregunta de cómo el Estado afecta a la distribución del poder entre los ciudadanos en la interacción burocrática. La autora sostiene que hay que analizar la interacción entre ciudadanos y funcionarios callejeros para entender el papel del Estado en la vida cotidiana. El argumento teórico se ilustra con un ejemplo de la conducta burocrática dentro de un programa de asistencia social con subsidios monetarios condicionados en Colombia. El artículo concluye que la academia jurídica debe re-descubrir el concepto de burócrata callejero con el fin de ampliar la estrategia de litigio para el cambio social.

Palabras clave autora: Estados fallidos, burocracias callejeras, realismo legal, Rama Ejecutiva.

SUMMARY

INTRODUCTION.- I. COLOMBIAN STATELESSNESS: THE DIAGNOSIS.- *A. The absence of the state.- 1. The independence process and construction of the national state.- 2. Failure of the monopoly on violence.- 3. The lack of state as an agency-physical presence.- 4. The lack of the state as a lack of rights.- B. Re-defining the state debate within the legal academy.-* II. AN ALTERNATIVE BUREAUCRATIC LEGALISM: THE BOTTOM-UP PERSPECTIVE.- *A. Re-thinking bureaucratic legalism.- 1. The practical effects of the statelessness discourse.- 2. Bureaucracy: orthodox and heterodox trends.- 3. Bureaucracy and the jurisprudence debates: legal indetermination.- B. Bottom-up and resistance dynamics: executive and social change.-* CONCLUSION.

INTRODUCTION

Growing up in Colombia, I perceived the state apparatus as a failed structure.¹ In a way, the failed state debate and the development theory that argues for the dependence of the third world on the structure have popularized this interpretation of the state and the notion of public collapse in the minds of third world citizens (Moncada 2007, Gutiérrez 2010). Thus, the state in Colombia is always weak, unsuccessful, and ultimately a failure. Ironically, the development discourse that works against Colombia has been internalized and unfortunately elements of the legal academy have reproduced this internalization of the foreign judgment.²

Moreover, most of the academic discourses about the Colombian state argue that is either a failed or an absent state. Therefore, it does not have any impact on the everyday life of Colombian citizens (Moncayo 2001). In this paper, I argue that the dialogue between practitioners and academics about the presence or absence of the state obstructs the ability to analyze and understand the ways in which the state —through its bureaucracies— creates material effects on citizen's lives. Specifically, I analyze this tension in the administrative law field showing that despite the argument about the absence of the state or failed state in academic discourses about the legal system, the state exists as a set of rules that administrative lawyers apply without realizing its distributive power. The implications of those discourses are problematic in at least in two respects: 1) they treat the state as a simple idea that obstructs the

1 State is a word that has different meanings in the Spanish and English contexts. In North American legal academia, the word “state” is often used to make reference to the 50 states as political entities that constitute the federal union. In Spanish, as same as in English, the word state is used to designate the official political power, which includes the three branches of the public structure designed by liberalism. However, usually in the Colombian context, administrative law uses the word state as a synonym of the executive branch. In this paper, I use the word state idea as described for the Spanish context, but nonetheless focus on the executive branch.

2 I use the expression “critical legal academy” to refer to the academic group that constructs this kind of interpretation. I use the adjective *critical* for several reasons. For one, in its very beginning, this diagnosis was produced in reaction to mainstream discourse that took the state's existence as a fact and hid the state construction process as a problem. Furthermore, this alternative explanation of a “fake state” often can be read as a move on the part of a leftist *intelligentsia*, which constantly seeks to augment the state's powers using the claim of statelessness. This relation involves the ambiguity of linking leftist ideas with the desire for a state, but is an interpretation about how the ideological debate was framed in Colombia as a reaction to the neoliberal script of “less-state” within the development debate.

possibility of analyzing the practices that have material effects on citizen's lives; 2) they underestimate the redistribute power of the administrative law.

This analysis shows that the action of the state may be very powerful in the daily life of citizens when we look carefully at the action of the street-level bureaucrats. Following Lipsky, the street-level bureaucrat is a public actor who performs his role far enough to the central authority to play a discretionary and non-controlling work that changes citizen life (Lipsky 2010). Furthermore, I argue the role of this bureaucrat is more powerful than the other actors within the state, imposing material and symbolic effects on the everyday life of citizens. For that reason, in order to understand how the state is able to change the distribution of power in the everyday life of people, the action of that type of bureaucrat is the most critical.³

In order to support my claim, I use the gap between the law and the reality inside one of the conditional cash transfers programs in Colombia. I use this example because it uses differential criteria (gender, socioeconomic status, forced displacement, etc) in order to protect the vulnerable population. The goal of these types of programs is to provide economic subsidies to vulnerable groups of the population in order to support poverty reduction. To that extent, these programs are supposed to modify the economic situation of those groups rather than to maintain it. The state action is supposed to be the way in which the daily life of those citizens is materially modified. However, such state-action is not defined by the program itself but by the action of the street-level bureaucrat.

Thus, by re-discovering street-level bureaucracy as a response to the state's absence, I challenge the overproduction of legal studies in the judiciary branch and propose an alternative application of legal theory arguments to executive bureaucratic actors. Executive

3 I argue that you can find three types of bureaucrats according to the level of interaction with the citizenship on a daily basis and the level of participation in the legal design of public policies: 1) The *Street – level bureaucrat*, who does not participate in the public policy design but has a high level of discretion and a direct contact with the citizen; 2) The *technocrat* who is controlled directly by the power elite, participates in the public policy design and implementation and has not interaction with the citizen; 3) The *power elite*, who is elected by democratic process (and heir close advisors), has the election of the goals in the public policy and has indirect contact with the citizen by accountability process.

power has been a lacuna in the sociology of law and also in the law and society fields. Thus, an exploration of the executive branch and administrative law can visualize new stages of litigation for social change.

Here, I develop in three main sections the transition from the failed state narrative to an account of street-level bureaucracy governmentality, as a response to the claim of state absence. In the first section, I briefly show how the critical legal academy produces the statelessness discourse in Colombia and the effects of this claim in legal debates. In addition, I propose alternative ways to redefine the state debate on the public scene. In the second section, I frame my argument in relation to the anthropology of the state discussion as a substitute way of explaining the state's reality. Furthermore, I introduce the category of "street-level bureaucrats," explaining their legal input in the public structure debate. This legal input highlights the state's existence as a rule that constitutes public reality by creating the identities and performances of bureaucrats and non-bureaucrats. These individuals bargain in the shadow of the legal rules to decide the allocation of official resources among different identities. Lastly, I restate my argument and offer some conclusions regarding how the question of the state's presence can be answered with an account of executive bureaucratic performance.

I. COLOMBIAN STATELESSNESS: THE DIAGNOSIS

In this section I develop two main ideas. First, I describe the different narratives by which the legal academy in Colombia constructs statelessness. Secondly, I emphasize the effects that these produce. I propose that one of the main effects of the hyper-visibility of the Colombian statelessness diagnosis is a denial of the state as a presence, and the consequent reification of the state as a non-material idea. This reification of the state idea has a direct impact on the legal academy: it shapes the taxonomy of legal debates, and breaks the connection between legal theory and administrative lawyering.⁴ The section ends by discussing why we have to re-think the link

4 I am going to use "administrative lawyering" to signify the practices of administrative lawyers who work with rules and regulations enacted by the executive (departments and agencies).

between these subjects as a method for rediscovering administrative law and executive power as a distributive tool.

A. The absence of the state

It is common to find an adjective before a reference to the Colombian state in critical legal academic contexts. Usually, we find Colombia characterized as a *weak* state, a *failed* state, a *fake* state, a *pseudo*-state, or a *stateless* society. The critical legal academy has constructed a hegemonic diagnosis of our public life. This diagnosis talks about an absence of the state in our territory. My goal here is to show how the diagnosis of statelessness in the Colombian context appears in different critical academic studies and the effects its repetitive use produces among legal scholars.⁵

The diagnosis of the state as “lacking” has at least four manifestations: (1) it refers to problems in the construction process of the nation state; (2) it discusses the failure of the monopoly on violence; (3) it complains about the absence of public agencies in the whole territory; and (4) it equates the absence of the state with a lack of rights or political protection. Each manifestation should be analyzed separately.

1. The independence process and construction of the national state

Criticisms of the construction of the nation state take two major forms, focusing on either: (1) the exclusionary character of nation-building that supports the official state, with criticism emphasizing the national element and the construction of a social community that shares a cultural representation and perceives its image as that of a social corpus (Anderson 1983); or (2) the construction of the state as an elite project (this criticism highlights the pursuit of a political apparatus by a local elite).

The first claim shows how a nation that supports the state is the outcome of a strong exclusionary process, and hides, as manifesta-

5 For an explanation of the different scripts that constitute the stateless diagnosis, I am going to use both academic pieces written inside the legal academy and those from outside the legal academy that law professors frequently use to support their arguments.

tions of national identity, the indigenous project and the African descendants project, which used to exist as an alternative versions of the *criollo* project (Castillo 2008; Ariza 2009).⁶ These projects are race-based discourses that emphasize the native roots of the nation rather than colonial experience. The second claim is related to the construction of the nation as a state project. This project is identified as a political problem because it does not follow the model of European states. Colombia only has an elite that shapes the state project into independence process, and uses the state and the legal apparatus as an instrument to maintain its material domination (Valencia 1987; García 1993; Moncayo 2004).

2. Failure of the monopoly on violence

The Colombian state is often regarded in academic legal discourse as a pseudo-state for its lack of a monopoly of violence within the national territory. Here, the absence or precariousness of the state is inferred from the problem of political violence in Colombia, and the effects this has on relations between the state and civil society (Pecault 1995). This line of criticism includes the approach that speaks of failure in terms of the presence of parallel organizations—army groups, including guerrillas and paramilitary forces—that challenge the state's domain in terms of sovereignty and territory (Garay 2002; Kalmanovitz 2005).

3. The lack of state as an agency-physical presence

The third claim speaks of state weaknesses in terms of its paucity of material representation within the territory's boundaries: a lack of physical presence of the state in terms of public schools, social welfare agencies, infrastructure, policy, and enforcement entities. This accusation indicates a break in the equation of state and territory and the discourse of the state as a geographical representation. It also signals, as a matter of a fact, the state is less than the territory in the Colombian experience (Serje 2005; García 2008).

6 The *criollo* nation project was the winner in the process of national building. *Criollo* is an identity that refers to the sons of the Spanish who were born in the American colonized lands.

4. The lack of the state as a lack of rights

The last approach that imputes a stateless condition in the Colombian context interprets the weakness of the law as a weakness of the state. Here I find the claims of academics and activists that highlight the failure of the state as a failure of the legal system, taking the form of a lack of rights enforcement. This discourse often suggests that Colombia does not have “good law,” or that is a failed state because it has “failed law”. In other words, Colombia is a society without rights. If the Colombian state does not guarantee the law’s enforcement, which is to say that Colombians live in an illegal culture, then Colombia has a “fake” state (Lemaitre 2007; García 2006).

As the reader can see, the common point throughout these scripts is the outcome: the statelessness diagnosis as a compressive description of the Colombian legal and political situation. The main effect of these four scripts is that the state is looked on as a non-material entity, as an idea. When citizens make a complaint in terms of the state as an absent, they begin to deny the state as a presence in their daily lives, therefore denying the state as a legal and social construction.

This phenomenon can be recognized because it affects the way people see and talk about their state: they start to deny its presence, identify the absence of its intervention, and claim its duties as an obsession. All of this happens despite the state’s appearance in many daily arenas (Abrams 1988). Citizens never recognize the state, even though they see it embodied in a bureaucrat walking down the street every day. They take advantage of it, use it to win, to cheat, and they give bureaucrats assistance or deal with its effects. Their relationship with the state is mediated by various habits of thought that consider the state as invisible. The pathology from which we all suffer is this collective blindness that makes us consider something non-existent that is perfectly present in our everyday lives. This approach to the state makes it invisible; it also normalizes and legitimizes the rules governing our relations with the state. As a result, instead of seeing its materiality, we experience our state contacts as abstract, immaterial, and invisible relations.

There is a specific version of this problem in legal academia: the people who talk about the state's failure and the attorneys and professors of administrative law who work with the state as a reality do not communicate with each other. There is no debate between them, no dialogue. The professor of legal theory never thinks about the administrative law professor's practices as involving the existence of the state, and professors of administrative law consider the perspective of the state as failed. There is no connection between these two areas despite the fact that they are concerned with the same object: the state.

This discrepancy is at the core of an artificial distinction between the state in theory and the state in action. While the critical legal academy is producing its statelessness discourse as the mainstream diagnosis, they are also creating an artificial boundary that separates it from the work of those who deal with the state from the point of view of the law (administrative lawyers). In other words, the critical legal academy avoids paying attention to everyday bureaucratic interactions, where some win and some lose in the distribution of public goods. I support this argument in the next section.

B. Re-defining the state debate within the legal academy

As I explained in the previous section, my hypothesis is that the diagnosis of the absence of the state produces blindness towards the state. We never see the state despite its frequent appearance in our daily lives. I can say that this is a pervasive discrepancy between the state in theory and the state in action. In my reading, this discrepancy happens because citizens look at the state as a non-material entity, as an idea. In this movement, we also obscure the state as it appears in legal practices, as it constructs public law and is constructed by administrative lawyers. This is relevant because when we deny the state as an everyday practice that affects our lives, we abandon the opportunity to understand the state as a legal artifact and as a redistribution opportunity. We lose the chance to understand the state as a decentralized set of power relationships, shaped by the law, in which someone wins and someone loses in terms of the distribution of public goods (Rittich 2001).

As I pointed out initially, the persistent references to statelessness have a perverse effect on intellectual debates in the academic domain regarding what we call the “state.” Those authors who deny the existence of the state create a false representation of the state as an idea, as a metaphysical entity (Abrams 1988). This move denies the existence of state in its mundane activities (Gupta 2006). Additionally, this framework of the state has particular implications for the legal community. Citizens constantly work with legal rules as a system that constitutes the state as a political construction. In addition, they accept the consensus of legal thought that talks about the equation between states and legal systems at a theoretical level (Kennedy 2003; López 2004). However, citizens cannot recognize the state in the law. Despite their acceptance of Kelsen and Duguit as their theoretical fathers, they fail to acknowledge the part of their argument that identifies the state as a legal instrument. Consequently, citizens cannot understand the state as an institutional arrangement or a set of rules that confers endowments, creates identities, and constitutes bargaining positions. Instead, citizens view the state as an “idea.”

This situation in legal academia has direct effects within the discipline. Denying the existence of the state in legal terms creates strange taxonomies in the law curriculum, and transforms the conversations between lawyers. For example, a public law professor does not read works from the critical legal academy that construct the statelessness diagnosis. At the same time, administrative law staff never views their discipline as a failed entity. There are two separate discourses. The first talks about the state on the jurisprudence level, in development discussions, legal theory, and the sociology of law. The second talks about the rules governing the state as it functions in constant interaction with citizens (administrative law). The two discourses are like cars on separate highways.

The anthropology of the state offers a framework for struggling with the life of the state as an idea. It shifts the theoretical work involving public issues to a physical, as opposed to a metaphysical, level. In these terms, the anthropology of the state suggests the existence of the state is a cultural artifact (Abrams 1987; Gupta 2006). By using the framework of the anthropology of the state to create a critical distance from the state as an isolated idea, I want to

embrace an understanding of the state as a legal rather than a cultural artifact. I want to push forward with the Kelsen and Duiguit suggestion that sees the state as a set of regal rules and recognize its life in a simple set of norms (Duguit 1918; Kelsen 1949).

Nevertheless, I do not use the law as an isolated entity separate from society (Gordon 1984). Instead, I use it in alignment with the sociological trend that understands the state as a constitutive element of the reality legal rules create in the social scripts that shape identities and social bargains (Berger 1966; Suchman 1997). According to this approach, law creates identities and distributes power among these identities through determinate arrangements of legal rules. As a result, law constitutes social reality and distributes power to various actors within the public game (Jaramillo 2007). The state is a site of possible social conflicts in the interactions between particular subjects who bargain for the distribution of certain public goods (Olson 1971). This involves a game played between bureaucrats and citizens. In this game, there are thousands of legal maneuvers executed at the same time. Individuals can be bureaucrats, women, employees, married couples, housewives, mothers, Christians, citizens, or migrant workers. The point here is that we have to understand how legal rules create this backstage of negotiation and use the different identities as bargaining positions (Rittich 2002).

With this idea, I want to support my alternative focus on the state's existence within the power interactions that marks bureaucrats engagement in their everyday rituals. Bureaucratic performance is evidence that can destabilize the absence of the state idea in the critical legal academy. My proposal here suggests that the state appears in the daily interactions between bureaucrats and non-bureaucrats, who shape their bargains through legal rules (Kennedy 1993, 103). Thus, the role of the bureaucrat is constituted through the legal system as well as the different scripts that non-bureaucrats use to interact with them. The relative bargaining power that bureaucrats and non-bureaucrats use when they confront one another from public and private positions is influenced by a myriad of "discrete legal rules" that constitute their identities as positioned

subjects (Kennedy 1993).⁷ As a result of the impact of these rules, we can say that the terms of this interaction and the shape of the alternative outcomes of the social bargain are *functions of the legal system* (Kennedy 1993, 104).

This approach also decentralizes the idea of political power by proposing it as a complex net that appears at some point in society, depending on particular bargains, and has unpredictable outcomes. The outcome in which we can find the materialization of the state is linked with the agency of the bureaucrat and the bargaining power of the parts, bureaucrat and non- bureaucrat, which is affected by the background rules that define the subject position in a social arena (Kennedy 1992). These two things have a lot to do with law because (a) the bureaucrat works with statutes (Weber 1963) but they are indeterminate (Holmes 1897); and (b) the identity of the persons—or the position that the subjects have in the society—are constituted by a set of norms and background rules that are given to us as natural and fair rules of law.⁸ As a result, we can analyze the state's presence by seeing the bureaucratic interaction outcomes and recognizing how the law has constituted them.

In order to support my argument, I want to bring to the foreground three old arguments of legal theory: (1) the idea that the state is only a set of legal rules (Kelsen 1949; Duguit 1918); (2) the idea that these legal rules are operated by bureaucrats (Weber 1963); and (3) the idea that, as social actors, bureaucrats bargain with citizens for distribution of public goods (Lipsky 2010). This bargaining happens in the context of the power relationship where some win and some lose⁹. This means that the redefinition of the state debate has to do with the legal bureaucratic script as a form of redistribution. We need to rediscover the power of the executive branch and administrative law in the direct and material distribution of public goods and social change.

7 The rules that indirectly affect these outcomes are called “background rules” in American legal realism. This theory maintains that foregrounding the background rules means exposing the legal disposition that indirectly constitutes each legal issue (Kennedy 1993).

8 As Rittich points out: “*It makes clear the connection between different configuration of rules and the allocation of resources and power among different groups. Thus, it allows an appreciation of the role of law in constituting social and economic relations, rather than merely “regulated” them*” (Rittich 2001, 15).

9 For example, bureaucrats win by maintaining the status quo and lose when giving out redistribution opportunities. *Supra*, 25.

Thus, it is possible that we need to take a break from analyzing the state in terms of what is absent or its weaknesses. We need to study the state as a set of legal rules, as a presence that works with the citizens, manages our rights and welfare benefits, and also creates opportunities for the material redistribution of power. We need to place the state discussion within the debate on the distribution of public goods. In this paper, I propose that these legal rules manage the form in which bureaucratic agents bargain for public resources with citizens in everyday contexts, with unpredictable results. However, while this happens, background legal rules determine the allocation of resources and power among different identities. Thus, affecting the material outcome as a public issue (Rittich 2002). The material distribution of public goods is something that the law shapes in many ways. This paper seeks to contribute to understanding how the law intervenes in this kind of operation.

II. AN ALTERNATIVE BUREAUCRATIC LEGALISM: THE BOTTOM-UP PERSPECTIVE

In this section I develop three main ideas. First, I describe how the bureaucratic discussion has developed in orthodox and heterodox approaches. By embracing a heterodox perspective, I suggest that there are connections between bureaucratic agencies and legal indeterminacy, recalling some of the statements of legal realists on Colombia. The link between these two elements, bureaucratic agencies and the legal indeterminacy of the statutes, supports an alternative perspective of the executive branch as a new field for social change. By transplanting the theoretical work of jurisprudence to the executive bureaucratic stage, I propose that the bureaucratic bargain allows important bottom-up changes to the distribution of public goods.

A. Re-thinking bureaucratic legalism

1. The practical effects of the statelessness discourse

I explain the practical effects of bureaucratic behavior with reference to the problem of gender inequality in Colombia. Globally,

women's rights have come into public awareness in recent years. In 1990, the Colombian government created the Presidential Council for Youth, Women, and Family (*Consejería Presidencial para la Juventud, la Mujer y la Familia*) with the goal of compliance with the CEDAW (The Convention on the Elimination of All Forms of Discrimination against Women) and other international agreements on gender discrimination. Following this, in 1995, the Congress created the National Agency for Women's Equality (*Dirección Nacional para la Equidad de las Mujeres*), which is now the Presidential Office for the Equality for Women (*Alta Consejería Presidencial para la Equidad de la Mujer*, ACPEM). In addition to this bureaucratic structure, a "gender perspective" has successfully permeated the narrative of public policies. Currently, at least 43% of legislation incorporates texts that mention some aspect of discrimination against women.¹⁰

Moreover, the beneficiaries of social policies concerning conditional cash transfers are concentrated among the female population. The concept of "social risk management" around which the model of social protection on a global scale has been articulated in the last twenty years, is also permeated with gender narratives. This develops the construction of family and women as definers of marginal conditions. Moreover, women are the social actors who have the most contact with bureaucrats. A preponderance of state involvement on the street-level is developed between bureaucrats and women, and this indicator is shown as evidence of women's empowerment by government agencies.¹¹

For example, at the beginning president Uribe's first term, the national plan adopted the vulnerability model as a tool of subsidy distribution. The vulnerability model is basically a matrix that levels the priority of the population that becomes a beneficiary of public help. In the first version of the model, the vulnerability approach has three categories of prioritization: 1) victims of terrorism and the internal armed groups, 2) displaced people, and 3) poor people (e.g., Sisben users, the subsidiary health system in Colombia, that maps the population by socio-economical criteria). All these categories have an internal organization that gives women the first place in public priority. In the "justification of policies" document

10 http://www.equidadmujer.gov.co/Publicaciones/oag_eEspecial.pdf

11 *Ibíd.*

in Colombia (that is called Conpes document) these relations are described as “transversal affirmative gender policies and actions”.

However, in the internal and external data, and also in the accountability process that happened at the end of the second term of president Uribe, the statistics show that women are only beneficiaries of the subsidies in 4.3% of the cases.¹² Despite the implementation of specific affirmative actions to strengthen the economic development of women, the actual distribution of income remains completely adverse. In fact, 65% of people below the poverty line are women despite the gender focus in public policies.¹³ What elements explain this gap? What is the reason for the paradox that the numbers suggest?

Some feminists argue that this gap is created by the legal background rules, which are regulations not explicit in the legal system and have to do with the dominant economic power allocated among different social groups (Kennedy 1993). For example, welfare policies hide the transactions between women and the state in terms of welfare services, such as those involving children, patient care, and housing. This gives women more parallel work to do but also makes their work engagement more risky (Shamir 2010). Likewise, social policies and institutions of social provision like citizenship entitlements, basic public services, social assistance and social insurance programs determine gender relations in a way in which women almost always “lose” in terms of resource distribution (Orloff 1993). This means that the social division of care work is unequal and affects the level of women’s labor engagement given men have less reproductive work to do than women. For this reason, their performance in the job market is much better.

Despite this, another factor affecting the status of women is bureaucratic operations. The street level bureaucrat has an unknowing power to determine the outcome of the interaction. Rather than the statute, the street-level bureaucrat is using his discretion to make distributive decisions. If the goal of the program is to provide economic subsidies to vulnerable groups, then the program is supposed to modify the situation of those groups rather than maintain

12 http://www.equidadmujer.gov.co/Publicaciones/oag_eEspecial.pdf

13 http://www.dane.gov.co/daneweb_V09/index.php?option=com_content&view=article&id=744

it. The street-level bureaucrat is an individual, with a particular agenda and ideology, who execute his decision far enough of the political authority to apply his subjectivity rather than the norm. Thus, the state-action is not defined by the program itself but by the action of the street-level bureaucrat. For example, I identified three scripts in a preliminary approach with public operators. According to these scripts, “giving money to women is losing money because . . .”: 1) women are bad administrators, 2) somebody else is going to seek this money (in a rent-seeking process), 3) women really don’t need the money. They have other mechanisms (more than men) to earn money.¹⁴

The above description has a lot to do with the problem of statelessness. When one develops the idea of the state as a failed entity, one obscures the form in which the state appears in people’s lives. For example, making transactions between women and bureaucrats in conditional cash transfer policies. When we understand that the state is a set of rules that constitutes social realities by creating bureaucratic performances involving bargaining with non-bureaucrats in relation to the destination of some public goods, we can propose incremental reforms to change the existing distribution of resources. In the next section I develop the theoretical argument to support this shift. This theoretical argument is linked with two categories: bureaucracies and the distributive power of the rules (legal realism).

2. Bureaucracy: orthodox and heterodox trends

I mentioned that my alternative definition of the state debate uses the category of bureaucracy. The theoretical consideration of the bureaucratic field has a long history. The work of Max Weber showed the importance of the bureaucratic apparatus as an organizational model of the modern form of domination (Weber 1963). Legal authority with a bureaucratic staff was used to explain how and why Western capitalist societies developed certain organizations in order to create legal and economic stability, which allowed social agents to foresee the outcomes of legal action. This was an important approach to understanding the ideal type according

14 Interview with a Program Evaluator.

to which the paperwork and organization of the modern form of power was performed.

In contrast, we now have contemporary perspectives on bureaucratic organization drawing on ethnographic mappings. Akhil Gupta and other authors who work on trends related to the anthropology of the state work with the category of bureaucracy as indicating a performance of statehood that helps to understand how power appears in our everyday lives as governmentality (Gupta 2006). I want to place my reflection within these theoretical boundaries. Thus, I understand power as a contingent and decentralized net, following Foucault, who held that “[i]nstead of assuming that states are the supreme ‘holders’ of the power and deploy that power exclusively to dominate and rule, governmentality offers a lens to understand how power is exercised in society through varied social relations, institutions, and ‘bodies’ that do not automatically fit under the rubric of ‘the state’” (Gupta 2006, 25). I want to propose that street-level bureaucracy is one of these manifestations of public power that is essentially decentralized, dispersed in social relations, and different from the state as a centralized and metaphysical idea (Lipsky 2010).

The street-level bureaucrat model breaks with the Weberian tradition of official power. This orthodox approach to public organization always emphasizes the importance of the statute in terms of behavioral prediction and control of uncertainty in the context of transactions in capitalism. The rational domination mode understands these effects in terms of the function of a power structure based on hierarchies, paperwork routinization, the dynamics of specialization, rituals of professionalization, the existence of procedural arrangements, the impersonality and permanency of the staff, and the imperium of the rule of law (Weber 1963). On the other hand, the heterodox approaches to bureaucratic behavior show the weakness of the Weberian model and destabilize the rational domination ideal type, understood as a legal authority with a bureaucratic staff.

Unlike the legal domination system, a heterodox approach shows the non-existence of collective action in the bureaucratic field. Within it, the public organization is seen as a structure where individual interest operates according to a rational choice model of decision-making, and where the public goal cannot be understood

independently of the selective and individual interests of those who execute public policies (Olson 1971). On the other hand, parallel heterodox trends expose the bureaucratic organization as a fake, professionalized system that is exploited by the power of elites with a hegemonic perspective to manage public issues under the appearance of collective and organizational operation (Mills 1993). A third strand of heterodox approaches, in contrast with the powerful elite perspective, reveal the discretionary power of bureaucratic staff by showing the existence of bureaucratic agents who execute their work far enough from the central authority to have a considerable level of agency in policy-making (Lipsky 2010). In this approach, the bureaucrat interprets the outcome of the official mandate in a particular way and makes their own concrete public policies. In this last trend, the bureaucrats can never determine their behavior and interaction outcomes according to statute influence.

In this sense, the heterodox arguments are fundamentally related with several major debates in legal theory associated with legal indeterminacy. Within the bureaucratic performance, the indeterminacy of the statutes will be combined with approaches towards the indeterminacy of law, and in particular with discussions of the indeterminacy of rules and legal facts largely developed by American Legal Realism, through authors such as Holmes, Llewellyn and Frank. I will explain this connection in the next section.

3. Bureaucracy and the Jurisprudence debates: legal indeterminacy

My argument is that the classical jurisprudence debates can help us understand bureaucratic behavior on some level, and that we can reveal this by exploring the links between legal theory and administrative law. In certain ways, I have said that we have to get back to old categories from the history of state debate and to remember how the state is a legal construction operated by bureaucratic agents. The law here is the script that shapes this operation, but not in the way that legal liberalism thought (Kennedy 1997). As I mentioned before, the law does not affect reality by providing a foreseeable outcome and objective materials that control decision-making by bureaucratic agents. Conversely, law intervenes in the

way that critical thought has imagined its complex intervention. First, bureaucrats cannot foresee the end of the public bargain because the statutes are indeterminable legal material (Holmes 1987). Second, the facts and situations that involve bureaucratic agents are also undetermined, and depend on extra-legal factors included in the decision field, including individual subjectivity (Frank 2009). Lastly, restrictions of bureaucratic actions—in terms of time and resources—are also shaped by law and operate in the shadow of the legal rules (Lipsky 2010).

I want to briefly explain these elements. Bureaucratic actors have restrictions in terms of time and resources for the execution of organizational goals. On one hand, they always bargain between the public script that teaches them that they are welfare actors. On the other hand, they are concerned with restricted material goods and the alleged impossibility of executing the redistributive role of the state (Lipsky 2010). Thus, the public script that the legal rules create for the bureaucrats—as those who work for the people at an official level by representing the general goals of the state—creates its own limitation. First, the text of the law is always ambiguous and does not produce foreseeable outcomes. Second, material restrictions are created by law packages that resolve economic issues, make budget decisions, create artificial market participation and produce the stakes of the participant in the bureaucratic interaction with the citizen at the micro-level (Kennedy 1993). As a result, bureaucratic behavior is shaped by the law but is not controlled by it. Bureaucratic interaction with citizens happens in the shadow of the law, but we must recognize that this very shadow is also an effect of the law (Bumiller 1986; Mnookin 1979).

Thus, debates about bureaucratic decision-making are related to the discussion of adjudication in legal theory. It is important to note the similarities between the judicial decision scenario in Duncan Kennedy's *A Critique of Adjudication* and *Freedom and Constraint in Adjudication: A Critical Phenomenology*, and the public action stage as described by authors such as Lipsky and Olson, which I used before to explain the heterodox trend in the bureaucratic field. As in the judicial stage, bureaucratic decision-making experiments with a set of ambivalent sensations that determines their interaction with non-bureaucrats:

- Bureaucrats construct their own image as philanthropists
- These narratives are supported by the public administration discourse that recognizes their role as “community helpers” or “community employees.”

But

- Bureaucrats are human, not machines, and manage public expectations with feelings of anxiety, frustration and fatigue.
- Bureaucrats are also trained in technical discourse (internal to the government) that teaches the following: they cannot do anything to “change” or substantially alter the existing reality. Technical discourse about the lack of agency in their actions is fully internalized within the consciousness and behavior of bureaucratic agents.
- On the part of the institutional organization, bureaucrats intentionally lack resources, which become fundamental in their excuse.

Hence, in addition to freedom and constraint, the performance of bureaucrats also alternates between philanthropy and feelings of alienation. They always feel the contradiction between their work as a tool designed to provide services from the people to the people (by invoking the model of human service), and their inability to effectively guarantee people’s expectations (derived from the material constraints). In that sense, bureaucrats help others, but only by manipulating their expectations (Olson 1971).

Using the Lipsky’s theory and the legal realism approach to the legal rules, I believe that we can re-define the state discussion as a debate over bureaucratic bargaining. By bureaucratic bargaining, I mean bureaucrat-client (citizen) contact as an interaction that is indeterminate and unpredictable, but also shaped by the law in a complex way and determined by the elements that are mentioned above. The understanding of the bureaucratic category is challenged by the Weberian approach in this argument. It emphasizes the agency and discretion of bureaucrats as individuals with different political agendas (Lipsky 1980), and the importance of the law in

shaping the reality where this bargaining occurs, rather than any predictive activity of the law as to effects (Rittich 2002). The first idea comes from the heterodox views of bureaucratic power, while the second perspective is derived from legal realism. Therefore, the important aspect of these bureaucratic agents is their relative autonomy from organizational authority, and the level of discretion and agency they possess in their everyday bargaining over public goods. My intent here is to show how the stakes of both bureaucrats and non-bureaucratic actors are given, shaped and affected by the law.

However, the form in which the law figures into this interaction is not the liberal understanding of legal rules intervention, and the outcome of a rule cannot be foreseen by the text (Kennedy 1997). The social outcomes of these complex interactions are not predetermined. We cannot know beforehand who will be the winners or losers of the bargaining process. In this realist view of the law, legal rules and regulations, rather than giving unique answers to legal disputes that bureaucrats need to resolve, delegate power to game actors and allocate resources to various parties within society. Thus, laws and regulation help determine the distribution of wealth and income, but cannot guarantee the outcome of a particular conflict (Rittich 2002, 16). The law appears in a role different from the traditional interpretation of how intervention works.

Here, I restate my argument. I propose the idea that redefines the stateless debate within the legal academy by returning to the bureaucratic apparatus. Rather than emphasize the statelessness of Colombian society, this alternative approach shows that the state is a legal ensemble that appears in everyday relationships between bureaucratic and non-bureaucratic agents. This relationship is a bargain that is also shaped by law in a complex way. While the law creates the identities that are involved in the bargain and gives them positions of power in terms of legal endowments and privileges that produce the stakes of the actors, we cannot foresee the outcome of this interaction. That means that the state, as a legally embedded artifact, is a contingent result.

B. Bottom-up and resistance dynamics: executive and social change

What I mean when I say that the law shapes relations is that all our scripts as social actors are produced on a certain level by applying legal categories. We have to understand the background of the rules to know how the interactions are constituted by legal endowments (Rittich 2002). For example, employed upper-class men are often better situated to take advantage of state programs than poor working-class women. We can discover how employment produces this better bargaining situation in terms of distribution position only when we map the discrete legal rules that shape each of the stakes in particular situations with determinate identities. That means that the law, rather than the absence of law, produces inequality. In fact, it is the law's enforcement that produces social differences rather than the inefficiencies of the law (Galanter 1974; Mnookin 1979; Jaramillo 2006).

However, the relationship between bureaucratic and non-bureaucratic actors allows both resistance and change in distributive results. In relation of power, the bargaining structure has a complex dynamic that makes the outcome of this interaction also contingent (Hegel 1977, Sommer 1999). The power relationship is always an unstable structure where the result of the transaction between discretionary bureaucrats and instrumental non-bureaucrats is unforeseeable, despite the fact that the law constitutes their bargaining positions. This double indetermination means that bureaucratic behavior includes two levels of contingency: one in the legal rules and another in the power relationship.

The relative autonomy of the law can perhaps explain the resistance dynamics that the worst positioned non-bureaucratic actors engage in through the instrumental use of the law scripts (Balbus 1977). In this approach, I assume that bureaucrats are involved in a stabilizing dynamic that limits social change. Some approaches to the bureaucratic field indicate that public staff is trained to preserve the status quo, or, the current material distribution of resources in society (Gupta 2006). Therefore, the "*very procedures of state institutions perpetuate, rather than reduce, those inequalities*" (Gupta

2006, 13). The bureaucrat “wins” when he achieves an outcome that preserves the status quo and limits social change.

But while the law and the state both produce inequality, they also distribute resistance scripts as part of their relative autonomy dynamic. The law furthermore enables people to devise strategies of change, accumulation and winning and deploys a redistribution opportunity. Here the state is a legal artifact, in which the law’s principal function is creating a reality where the public goods are assigned and redistribution opportunities occur (Rittich 2002). Thus, non-bureaucrat “wins” when he successfully applies the legal rules for managing his own identity, and obtains the advantages of state programs. He loses when bureaucratic management maintains the current material distribution. We cannot foresee the outcome of this bargaining inside the legal rules. Hence, the state is a set of legal rules that governs the way in which bureaucrats and non-bureaucrats bargain over the distribution of the public goods in an operation that is shaped by the law, but often has contingent outcomes.

Although the bottom-up dynamic and social change have been studied only in relation to the judiciary branch (McCann 1992), I showed a similar relationship between the judiciary and the executive process of decision-making. Even though the bureaucratic field and the judicial stage are different —as this article shows with the specificity of the bureaucratic space— administrative law and the executive branch remain unexplored in terms of litigation for social change, despite having a lot of potential for achieving distribution effects. This can illuminate what opportunities for distribution we have when faced with bureaucracies created by law, physically located, with political agendas and limited resources. Progress in explaining the power relationship between customer (citizen) and bureaucrat creates dynamics that highlight the instability and contingency of this relationship, which was one of the objectives of this work. It seems that perhaps we must re-discover the executive power in order to extend our perspective of working with the law.

CONCLUSION

The main goal of this paper was to offer an alternative argument through which to understand the state within legal academia in Colombia. Nowadays, mainstream state studies have separated theoretical work concerning the state as an idea from experiences that work with the state concept as a legal rule (administrative lawyers). While the first players insist in the statelessness of the Colombian context, the second players ignore the power of the rules as redistribution tools. The result of this situation is that we are experimenting with a state whose role is that of a metaphysical or legal experience perceived as being without impact on our daily lives or economic power. Concomitantly, we understand the re-distribution state's role as a magical performance executed by the market. Here, the market is also an artificial reality shaped by the law as a regulative alternative (Kennedy 1998). This paper is an attempt to restore the theoretical debate over the state as a serious discussion of the methodologies deployed in the distribution of public goods.

The law has a preeminent role in this new understanding. Legal rules constitute the bargaining field where bureaucratic and non-bureaucratic entities negotiate their opportunities to take advantage of the state's resources. Inevitably, an understanding of the law helps in discussing the impact of "background legal rules in the allocation of resources and power among different groups" (Rittich 2002). We need to understand how the state is shaped by legal rules in order to improve our grasp of the public issues and really measure the impact of how we can win or lose in terms of changing the current material distribution within society. In addition, we must rediscover the executive branch and administrative law as a field of litigation for social change.

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