REVISTA JURÍDICA Mario Alario D'Filippo

ARTÍCULO DE INVESTIGACIÓN

The Civil Code of Andrés Bello and the exegetical movement in Colombia[1]

El código civil de Andrés Bello y el movimiento exegético en Colombia

Andrés Botero Bernal[2]
Universidad Industrial de Santander - Colombia

ABSTRACT

This paper is interested in the reception of the civil code of Andrés Bello in Colombia during the second half of the 19th century and the first decades of the 20th century. Likewise, it relates the above to the emergence of the Colombian exegetical movement, close to –as well as different– from the movement of French commentators on the Civil Code of 1804, a movement that will be called, pejoratively in the 20th century, as "exegesis". Now, this work is justified by the importance of articulating, due to the potentialities that this allows, the legal history with the comparative law, remembering that both disciplines had common origins. This is so, to understand law historically, it is necessary to understand it as a product of cultures in constant communication, in such a way that comparative analysis, in our view, appears as necessary for history, and vice versa. We hope then that the reader can observe that exegesis, if we may use this word, was not homogeneous throughout the Western Hemisphere, but there are still points in common regarding some of its most important postulates. Understanding this movement happens, we believe, by recognizing the similarities and differences with other previous, concomitant, and subsequent movements.

Keywords: The Civil Code; the exegetical movement; exegesis; Andrés Bello; Colombia.

RESUMEN

El presente escrito se interesa por la recepción del código civil de Andrés Bello en Colombia, durante la segunda mitad del siglo XIX y las primeras décadas del siglo XX. Igualmente, relaciona lo anterior con el surgimiento del movimiento exegético colombiano, cercano - además de diferente – al movimiento de los comentadores franceses del Código Civil de 1804, movimiento que será denominado, peyorativamente en pleno siglo XX, como "exégesis". Ahora bien, este trabajo se justifica por la importancia de articular, dadas las

Para citaciones: Botero Bernal, A. (2022). The Civil Code of Andrés Bello and the exegetical movement in Colombia. Revista Jurídica Mario Alario D'Filippo, 14(27), 47-65. https://doi.org/10.32997/2256-2796-vol.14-num.27-2022-3806

Recibido: 02 de noviembre de 2021

Aprobado: 20 de diciembre de 2021

Editor: Fernando Luna Salas. Universidad de Cartagena-Colombia.

Universidad Editorial Universitaria de Cartagena

[1] Translated by Giuseppe Arias gmateo.arias@gmail.com and revisited by Juan Almeyda juanalmeyda96@gmail.com
This paper was translated from: (Botero, 2018, pp. 155-173). We thank this journal for its authorization to publish this translation.
Result of the institutional research project 2808, financed by the Universidad Industrial de Santander (Colombia).

[2] Professor at Universidad Industrial de Santander (Colombia). Scopus author ID: 55604950500. aboterob@uis.edu.co

potencialidades que ello permite, la iushistoria con la iuscomparatística, recordando que ambas disciplinas tuvieron orígenes comunes. Es así que, para poder comprender históricamente el Derecho, es necesario entenderlo como un producto de culturas en constante comunicación, de manera tal que la comparatística, a nuestro modo de ver, aparece como necesaria para la historia, y viceversa. Esperamos entonces que el lector pueda observar que la exégesis, si se nos permite usar esta palabra, no fue homogénea en todo el hemisferio occidental, pero aún existen puntos en común en lo que atañe a algunos de sus postulados más importantes. Comprender este movimiento pasa, creemos, por reconocer las similitudes y las diferencias con otros movimientos previos, concomitantes y posteriores.

Palabras clave: Código Civil; movimiento exegético; exégesis; Andrés Bello; Colombia.

I. INTRODUCTION

This paper provides a general overview, for historical-comparative purposes, of the reception of Andrés Bello's civil code in Colombia during the second half of the 19th century and the first decades of the 20th century. Likewise, it relates the foregoing to the emergence of the Colombian exegetical movement, both close to and different from the movement of the French commentators of the Civil Code of 1804, a movement that will be known pejoratively at the beginning of the 20th century as "Exegesis"[3].

Now, this work is justified by the importance of articulating, due to the potentialities that it allows, legal history with comparative law, remembering that both disciplines had common origins (Tate et al., 2019, pp. 1-17). To be able to understand law historically it is essential to recognize it as a product of cultures in constant communication, in such a way that comparative law, in our view, appears as necessary for legal history, and vice versa.

Finally, it is important to note that this article is the result of a research about the history of legal positivism financed by the Universidad Industrial de Santander (UIS, Colombia)[4]. In this paper, we intend to locate the positivist schools of the philosophy of law in the cultures from which they emerged (to make clear that theory of law is not an autonomous product of its context.) Moreover, it seeks to highlight the links that these schools

[3] About the history of the pejorative assignment of the term "Exegesis" to the movement of commentators of the French Civil Code, see (Halpérin, 2003, pp. 681-685). Although the term "Exegesis" is anachronistic (it was not characteristic of the commentators of the 19th century), we will be still using it since it has already made a career in the History of Philosophy of Law.
[4] That has resulted, so far, of a general book about the different positivism schools: (Botero, 2020).

maintained with other academic movements in different latitudes, to make it clear that the national law cannot continue being the unit of analysis, but rather the continuous connections that, in a sense, allow to speak of global legal theories (Botero, 2019, pp. 93-103).

Then, we hope that the reader can see that Exegesis, if we are allowed to use this word (see footnote 1), was not homogeneous throughout the Western Hemisphere, but even so, there are common points in regard with some of its most important postulates. The understanding of this movement happens, we believe, begins with the recognition of similarities and differences with other previous, concomitant, and subsequent movements.

Finally, an additional clarification is necessary. We have translated the texts in Spanish into English for a better understanding of the non-Spanish-speaking reader.

II. The Code of Andrés Bello and his Reception in Colombia

Exegesis was not an exclusively French movement, but its reception in other national contexts implied a strong transformation of the model. Usually, countries that had just released large legal texts, such as the Civil Code, saw movements flourish that were sometimes called Exegesis. This was the case in Latin America, in where Exegesis, which appears just at the time of codification (Bello [1781-1865] in Chile, Freitas [1816-1883] in Brazil and Vélez Sársfield [1800-1875] in Argentina, as the most important), had to make concessions (without judging here whether they were justified or not) with the legal traditions prior to the independence of the Spanish crown. These concessions were both normative (such as the Laws of the Indies –*Derecho indiano*– and the Castilian rules of the Old Regime[5]) and theoretical (for example the Second Scholastic). Also, foreign traditions of the nineteenth and twentieth centuries (e.g., the Bentham's theories and German anti-exegetical schools, specially Savigny [1779-1861] and Puchta [1798-1846], among others), gave rise to an amalgam or juridical miscegenation that has recently been called Latin American Legal Formalism[6]. In this way, Exegesis circulated worldwide, although always with acknowledgeable nuances.

[5] By *Law of the Indies*, we understand the regulations issued in the Peninsula to govern in the Spanish America, as well as the regulations and customs adopted in Spanish America itself by the viceregal and colonial authorities. There is also part of the Law of the Indies, by its explicit delegation, the indigenous norms and customs applied in their own conflicts, as long as those provided rules were not against natural law, the doctrine of the Church and the power of the King. In addition, the Castilian Law was a supplementary legal system in the Spanish America in those cases in which there was no response by Law of the Indies, so they were able to apply it by the fact of which the Spanish America was Castilian territory from the first moment. Within Castilian Law, we find the famous legal text *Las Partidas* of King Alfonso X, a work that was very important –and much cited by the judges– in Spanish America until the end of the Liberal Century (the19th).

[6] Subject that analyzes Diego López (2004, pp. 129-233; 2008, pp. 1-42). The eclecticism of legal formalism (Scholasticism plus Exegesis) was also lived in the legal education provided (Goyes, 2010, pp. 255-259). In addition, it is important to understand how Latin American legal formalism was the way in which was experienced political and economic liberalism in the legal field. This is thanks, among other things, to the fact that the Second Scholastic

However, let us explain something more about the case of the reception of Exegesis in Colombia, which could serve as a framework for better understanding of this movement across the Atlantic. In Colombia, from the first constitutions, it was demanded the creation of a legislated legal system that revolved around the Civil and Criminal codes. Nonetheless, the possibilities for the creation of a Civil Code of its own (despite the attempts made) and the creation of the State in the strict sense were very low, due to the demands of the War of Independence against Spain, initially, and then the internal disputes between the political groups that tried (several times) to solve in the battlefields. Even so, we can clearly see in Colombia statist-legicentrist discourses, with certain differentiating shades, of course, of the French model [for example, in what concern to the great legal value of the constitution in Spanish America, that was different from the merely political value of the constitution in the French model (Botero, 2012, pp. 319-341)], but with a very limited effectiveness, among other things due to the survival of the Law of the Indies and Castilian laws strongly felt during the first half of the 19th century. It was in this frame of wide desires and narrow realities that the Chilean Code of Andrés Bello arrived in Colombia.

In 1852, Bello communicated to the Chilean government the completion of the Civil Code in which he had been working, alone, since 1845. Between 1853 and 1855, they submitted the Code to various examining committees before its approval, with adjustments, in 1855. The Chilean government set the date to enter into force in the Chilean territory on January 1, 1857. In 1856, the Chilean government sent a copy of the Code to the different Spanish-American countries, including Colombia. As well as by private correspondence with the Colombian Manuel Ancízar [1812-1882], other codes were referred[7].

This Chilean Code of Bello is a monument not only to the law but also of the Spanish letters, result of the author's domain of this language: Bello even wrote several of its articles rhythmically, probably to facilitate their memorization, which, in turn, embellished the Code. Let us add that, in many opportunities, the Code drew examples to teach matters of the language and was useful material for dictation to schoolchildren, among other things. Remember, also, that Bello was a classic example of the intellectual biotype of the time: the grammarian. This last means that he believed that from knowing how to speak and write derived the knowledge to govern and the knowledge to legislate (Deas, 2006) (Botero, 2011, pp. 161-216).

(one of the sources of the aforementioned formalism) served as the basis for the liberal state to enter Latin America. Cfr (Carpintero, 2003, pp. 341-373).

[7] On the history of the code of Bello, consult: Alejandro Guzmán (1982; 2009, pp. 93-102) and Iván Jaksic (2001, pp. 189-215). On the history of the Code of Bello in Colombia, see: (Mayorga, 1991, pp. 291-313; 2006, pp. 103-160) (Hinestroza, 2005, pp. 5-27).

> His work in grammar reinforced his interest in law, not only in the sense that both are related to language, but also in that both are mechanisms of order. And order was just not a personal search, but perhaps the most important and urgent objective in post-colonial Spanish America (Jaksic, 2001, p. 215).

Now, returning to Bello's Code, it was accepted between Colombian liberals and conservatives, something that helped its extension in this country.

> Bello's solution, of a balance between the historical legal tradition and the codifying change, combined with a strong rootedness in Roman law, immediately attracted the attention of jurists and politicians from other countries. From Colombia, [the liberal] Manuel Ancízar wrote to Bello on July 10, 1856, when he had just finished his final revisions to the Code: "From several parts (of Colombia) have expressed to me the desire to possess the Civil Code that you elaborated for Chile, and I have been asked to request it. It is certain that you, with your great kindness, will lend yourself satisfy that recommendable desire, because it is about us taking advantage of the knowledge of other countries, and preferring, before any other, the legal doctrines professed in our South America, which can be a first step taken towards the desiderated social unit of our continent (XXVI, 334)".
> Indeed, Bello replied on October 11, 1856, that he had already sent four (4) copies of the code. Ancízar acknowledged receipt on March 13 of 1857 and stated that he had managed to get the Colombian Congress to print copies for distribution in the different [Colombian] states (Jaksic, 2001, p. 208).

Liberals ended up accepting it, mostly, because doing it was an integral part of their discourse of *progress* and *civilization*[8]. The Conservatives, on the other hand, did not have greater objection because it was a Code with clear catholic content. For instance, this Code does not interfere, broadly, with the doctrine of catholic marriage (the Chilean Civil Code regulated marriage but made it clear that civil marriage would be for non-Catholics, article 118 of the Code)[9], the validity of Canon Law and the specificity of ecclesiastical property, and some institutions of the Code were product of the legal tradition (Romanist, Scholastic, Castilian, and Indigenous logic)[10].

[8] About the consideration of the code like progress and civilization in the XIX Century, see (Petit, 2011, pp. 1-36). These concepts (*progress* and *civilization*) we found everywhere in the 19th century, as they were the legitimizers of many of the transformations that positivism (philosophical, scientific, and legal) caused at the time. Cfr. (Bock, 1988, pp. 59-104).

[9] Let us see what Bello himself said in the explanatory statement of his Code: "The ecclesiastical authority retains the right of decision on the validity of marriage; and those recognized as such by the Catholic Church are recognized as impediments to contracting it. Marriage that is valid in the eyes of the church is also valid under civil law".

[10] There is a debate about whether the conservatism of the Chilean Civil Code, as far as Canon Law is concerned, was something desired by Bello. We will not take sides in this debate, but in the bibliography reviewed so far, the lector can realize this issue. For instance, Iván Jaksic, (2001, p. 202), suggests that it was more for reasons of political caution than Bello's personal desires.

In addition, almost instantaneously, it appeared in the culture, but not in the minds of the protagonists of this reception process, the *myth of translation,* i.e., to believe that Bello's Code was merely a *translation* (the most radical ones would say,) or an *adaptation* (the most moderate) of the French Code of 1804. This was far from reality, since although the Code of Bello did appeal on several occasions to the Napoleonic Code and to the French literature that surrounded it (especially, Pothier [1699-1772] and Delvincourt [1762-1831] [Guzmán, 1982, pp. 423-425; 2004, pp. 31-32]), which was something normal at the time[11], even so the distances between these two codes are palpable.

> This Code (of 1804) influenced the Codes of Bello and Vélez in many ways. The French Civil Code was a model of the coding method, which they were able to accept, reject, or modify. It also provided articles that the coders directly used. In addition to this direct influence, the French Civil Code influenced the works of Bello and especially of Vélez in another way. There was incorporated its approach, language, and mentality into other codes, e.g., the Freitas code, which was then used as a source for other codes. The French Civil Code was also the subject of many comments, usually in French. Bello and Vélez also used these works in their codes (Mirow, 2004, pp. 1-21)[12].

Even, what Bello took from France was improved, generalizing, not only in its writing but also in its scope.

> Bello took advantage of the French Code as a source of inspiration for topics, legislative ideas, which he wrote with his incomparable pen, as we all know. And even when he copied, although he never totally copied, he always added something to it, so he perfected it; but when it came closest to the model, it was not the model of the French Code, but the commentators of the French Code" (Guzmán, 2004, p. 31)[13].

Nevertheless, the interesting thing is that this myth, the one about the translation, ended up helping in the acceptance of the Chilean Code, so it is reasonable to think that the Colombian protagonists of the reception process sponsored this belief even though they knew it was not true. It is that the myth of the translation, added to Bello's religious conservatism (which was reflected in his Code), eased its general acceptance. If someone dared to criticize it, it would mean that the French Code, which was also a myth back then, would be the wrong as much as supposedly was the "translated" one, and few would dare to say such a thing at that time.

[11] "History of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law" (Pound, 1938, p. 94).
[12]The text in parentheses is added to us. Other information in this regard, in: (Guzmán, 2004, pp. 13-35) (Ramos, 1997).
[13] Likewise, (Elizalde, 1871).

Furthermore, if the Bello Code was a "translation" or "adaptation" (to respect the dominant religiosity in Colombia) of European private law (common practice at the time[14]), then it was demonstrated, via the aforementioned myth, the superiority of Bello's Code. First, because a "successful" model (the French) served as its basis and, in this way, that would annul the anxiety generated, on the one hand, by any new norm and, on the other, any copy if not well adapted.

> The originality of Bello's Code is equally based on a second type of argument that is very different from the idea of the *collage* of sources. In this new strategy of foundation, the claim to originality sits on the statement that Bello's work consisted, fundamentally, of the effort to tune the classic corpus of European private law to the particular requirements and characteristics of Spanish American society. This argument is a response constantly presented in the regional legal literature as a defense against the anxiety produced by the legal transplant in which is not examined the need for "acclimatization" and adaptation to the needs generated by the material reality of the target-country by opposition to those existing in the source-country (López, 2004, p. 140)[15].

Secondly, because many believed –and continue to believe– that something worthwhile could not emerge from Latin America, so a text from these lands would be appreciated and accepted only if it responded to the dominant European or American ideas.

Moreover, let us not lose sight of the fact that Bello's Code, although participated in the codifying ideology of French formalism, had in its essence elements so *sui generis* that they never cease to surprise. One of them was the wide variety of sources used by Bello, among them the Code of 1804 and the French exegetical literature. There were also, the *Scholastic* (fundamentally the *Second Scholastic or Salamanca School*), the Christianized Roman law in the Middle Ages (which Bello admired so much), Castilian law (especially *Las Partidas*), *Derecho indiano*, other civil codes of the time (such as that of Louisiana of 1825 [Parise, 2013][16]), some Bentham's theories[17] and German scientific doctrines, especially Savigny (whom Bello knew from French translations) (Jaksic, 2001, pp. 205-207), known to Bello when he lived in Europe.

[14] Martinez said in 1895: "Among us laziness and routine have prevailed; the habit of copying legislation, already old ones or foreign, has separated us from observation, a true method that must be followed, which has prevented us from having our own, which responds to the current state." (Martínez, 1895, p. 65). Note how this text appeal for a scientific observation of reality to be able to propose pertinent norms, something that reminds us, largely, the Savignian model.
[15] Also: (Jaksic, 2001, pp. 199-201).
[16] Also: (Parise, 2009, pp. 33-97).
[17] About the influence (partial and limited) of Bentham on Bello, see (Vergara, 2020, pp. 1-14).

For example, Bello said in his five-year report to the University of Chile in 1848, referring to the importance of Roman law: "I will cite, with Savigny, the example of French jurisconsults, who use Roman Law with much ability to illustrate and complete its Civil Code, thus acting according to the true spirit of that same Code (XXI, 68)" (Jaksic, 2001, p. 205)[18].

> This leads us to consider the originality of Bello's thought that, taking his foot from the work of Savigny and some ideas extracted from Pothier, was able to organize a realistic and efficient legal system... Bello's ability was to transform doctrinal elements into a complete and operating legislative system (Hanish, 1980, p. 198)[19].

Therefore, the structure of the Colombian Exegesis, if we can call it that way, was not the French purity, but a mixture, as interesting as bold, of positions that in the Old World were opposed to each other.

Now, the Bello's Code entered Colombia just as it began its federalization. Thus, each State, between 1858 and 1886, starting with the States of Santander and Cundinamarca, promulgated the Bello's Code with various modifications according to the political ideology of the day.

> It is thus clear how and when the Chilean Civil Code or Bello's Code arrived in our country. The States of the Granada Confederation, after the United States of Colombia, were successively adopting it, all of them, and finally the Union, with some modifications that will be highlighted later, starting from the State of Santander, which enacted the law on October 18, 1858, followed by the State of Cundinamarca, which did the same on January 8, 1859. Only this began to take effect on January 1 of 1860, and that on the following July 1. And when the unitary Republic was established, the Civil Code of the Union of 1873, a version quite close to the original of Mr. Bello, was adopted for the entire Nation (Hinestroza, 2005, p. 9)[20]

For example, in liberal State governments, they reduced the concessions that the aforementioned Code had in relation to Canon Law, as would be, for giving three cases: (i) eliminating the dual system of marriage that established the Bello's Code (a civil, regulated by the Code, and another canonical, from the Church), to indicate that only marriages before the State would be valid; (ii) allowing divorce especially based on the will of the spouses; and, (iii) removing the protection of ecclesiastical assets[21].

[18] In addition, see: (Hanish, 1980, pp. 167-198).
[19] Likewise: (Guzmán, 2004, p. 32) (Barría, 2011, pp. 257-282) (this paper indicates that, regarding the method of grammatical interpretation, Bello supported more in other sources, such as the Louisiana Civil Code, than in Savigny, despite the importance of the latter in this topic). (Schipani, 1987, pp. 205-258).
[20] Also: (Mayorga, 2006, pp. 138-145).
[21] A description of the changes made by the different Colombian States to the civil code, in: (Hinestroza, 2005, pp. 9-13) (Mayorga, 2006, pp. 138-145). Another example of such changes, but already from a more conservative government, were laws 281 and 298 of the State of Antioquia, both of September 1875. The latter faced previous

When the federal period ended, follow by a strong centralism, the Constitution of 1886, in its transitory article H, ordered to Congress "to issue a law on the adoption of Codes and the unification of national legislation". The Civil Code (for the non-federated territories in charge) of the Union of 1873, which was a version of Agustín Nuñez based on the Civil Code of the Sovereign State of Santander in 1860[22], was adopted for the entire nation through article 1st of Law 57 of April 15 of 1887:

> The following Codes shall govern the Republic, ninety days after the publication of this law, with the additions and reforms that it deals with: The Civil of the Nation, sanctioned on May 26, 1873; The one of Commerce of the extinct State of Panama, sanctioned on October 12, 1869; and the National on the same matter, edition of 1884, which deals only with maritime trade; The Criminal of the extinct State of Cundinamarca sanctioned on October 16, 1858; The Judicial of the Nation, sanctioned in 1872, edition of 1874; The National Treasury, and the laws and decrees with force of law related to the organization and administration of national income; and The National Military and the laws that add and reform it.

A few things stand out from the events of 1886-1887, namely:

1) That an Ordinary Law (Law 57), and not the Constitution, determined what the base codes of the new national State would be. This matter also refers us to the last article of the Civil Code in its version of 1873 (Article 2684) that established how the provisions of national codes should be cited, an aspect that does not seem to be the eminent object of a Civil Code. "C.C. (Civil Code); C.Co. (Commercial Code); C.P. (Criminal Code); C.A. (Administrative Code); C.F. (Tax and Treasury Code); C.M. (Military Code); C.J. (Judicial Code); C. Fo. (Economic Development Code)".
2) That these codes adopted in 1887 were different from the French *cinq codes* (the Civil one of 1804, the one of Commerce of 1806, the one of Civil Procedures of 1807, the one of Criminal Instruction of 1808 and the Criminal one of 1810).
3) That the Codes in general, nor the Civil one in particular, were not formally recognized a special hierarchical rank compared to Ordinary Law, in such a way that the latter could modify them, although in forensic practice they were not considered as rules of the same level of applicability and sustainability.

anticlerical norms and pointed out the validity of religious marriages. Then, during an opposite government, Law 43 of December 5 of 1877 appeared in Antioquia, establishing the only valid marriage, the civil one. In 1885 religious marriage was restored, by decree 315 of September 24, sanctioned by the Civil and Military Chief of the State of Antioquia. See, (Vélez, 1891, pp. 266-267).

[22] On the evolution of the 1873 Code, until it became the 1887 Code, see: (Mayorga, 2006, pp. 48-151). (Mayorga, 2002).

And 4) that the Constitution of 1886, in its article 52, commanded to insert its bill of rights (title III of the Constitution) in the text of the Civil Code, but made clear the reform procedure: "Article 52. The provisions of this Title will be incorporated in the Civil Code preliminary title and may not be altered except by a reform act of the Constitution." The latter reveals the importance of the Civil Code in the collective representation of the moment. In other words, the judicial effectiveness of the –already very limited– bill of rights depended largely on its transcription within the Civil Code, in such a way that it was not enough for it to be in the Constitution. At the same time, it proposed an intermediate path between a powerful judge who could go directly to the Constitution to contradict the law and the Code, and a judge who only followed the law, and not the Constitution[23]. An illustrious protagonist of the 1886 constituent clarifies the foregoing:

> Strong reasons were alleged in favor, by some Delegates, and against by Delegates and ministers; but the favorable opinion of the principle of successive preeminence of the Constitution and the Law prevailed. Still, in the end, there was adopted a compromise or conciliation mode of the opposite views, consisting of replacing the approved article with which we commented here, since it was argued that it was dangerous to leave all the judges the power of interpretation against the law, in gift of the constitutional precept. Many believed (greatly influenced in certain *fiscal* (public treasury) interests enforced by the Ministry) that to avoid conflicts between the Constitution and civil laws, it would suffice to always have this title III in view of the judges as the obligatory heading of the Civil Code; this along with the circumstance that this title is not alterable, but by a reform act of the Constitution.
>
> It is clear that, if this article 52 means something positive and it is not a fiction, it is equivalent to the primitive power of interpretation, granted to all judges, except the guarantee previously sought in the decisions of the Supreme Court. If title III of the Constitution is incorporated into the Civil Code, as a preliminary title, and other provisions of the same Code, or of the laws that reform or add it, may disagree with it (the title III), it is evident that every judge, when applying these provisions, must conform to the rules of hermeneutics that are imposed over him. And as one of these rules mandates that the meaning of some articles to be understood and fixed by of the others (when there is disagreement), so that all agree, it is obvious that, between opposing or discordant provisions of the same Code, the judge must prefer or put superior ones before the inferior ones; the substantive or primordial above the executive or secondary, and to those that can be reformed by means of simple laws, (the judge must prefer) under those that, because they are constitutive, are not

[23] These four particularities demonstrate, once again, the creative adaptation of the European codified law model. See, (Petit, 2014, pp. 18-19) (Mayorga, 2006, pp. 154-155).

> alterable except by virtue of the reform of the Constitution, and therefore have character of fundamental permanence [(Samper, 1951, 109-110), the text in parentheses is ours].

Although, to tell the truth, and after verifying how we have done it in the judicial processes of the provinces of Antioquia and Santander in the second half of the 19th century, the effectiveness of Bello's Civil Code was very limited. In general, civil justice, which had not yet achieved its professionalization and complete statehood, when could have functioned with certain regularity within both political and military chaos, preferred the regulations of the Indies (Laws of the Indies or *Derecho indiano*) and the Castilian over the Republican regulations, despite the continuous State laws that were issued to restrict and even repeal (in 1887) Spanish law[24]. In this way, given the weakness of the statist-legicentrist-codified model, it is not surprising that the little legal literature of the time does not fit into the proper format of the French Exegesis[25].

III. Colombian Exegetic Movement

We can already appreciate, very late in the 19th century and beginning of the 20th, a certain movement, somewhat exegetical, when Bello's Civil Code, little by little, was consolidating in forensic practice and in the training of new Colombian lawyers. Thus, gradually emerged very experienced commentators of the Civil Code, among which are: Fernando Vélez [1847-1935], Antonio Uribe [1869-1942] and Eduardo Rodríguez Piñeres [1869-1958] (Botero, 2011, pp. 161-216), as Catholic as legalistic[26] and, above all, great scholars on the institutions of Civil Law.

They began to see the legal beyond the paradigm of the grammarian-politician-jurist that prevailed in the second half of the 19th century; i.e., they assumed a more professionalizing than literary or grammatical form,

[24] About the continuity of *Law of the Indies* and Castilian law in Colombia: (Mayorga, 1991, pp. 291-296). For the Latin American case: (Capdequí, 1974, pp. 173-182).

[25] There are many factors to consider understanding the state of Colombian justice in the second half of the 19th century. However, due to space, and given that it is a matter of registering generalities, we cannot state these factors, as would be the case, in just one case, the status of the profession of a lawyer (which during the federal period was of free practice, i.e., without the need for a university degree). Making appropriate diagnoses of how a legal movement was woven or unraveled from the judicial cultures, in this case the EXEGESIS in front the regulations, legal knowledge and profession, is an urgent task in the history of legal philosophy.

[26] All of them "cultural amphibians" because they knew how to move, with great efficiency, in different worlds in parallel, serving as a bridge between them. We therefore refer to the metaphor developed by Mockus, (1994, pp. 37-48); although with a correction of meaning, since for Mockus *cultural amphibians* are those that can function in different media without losing their "intellectual and moral integrity" (p. 38). Some academic feel this last aspect like problematic when studying specific biographies (a critique of the concept of Mockus, just for this moral determinism, in (Ramírez, 1999, pp. 63-65). The concept of *cultural amphibian*, applied to those who "assimilate various and different cultures and identities that exceed, due to the divergence of their interests, the possibility of a comprehensive solution" (Ramírez, 1999, p. 65), not only allows us to identify the task of Latin American exegetes, but also makes clear the heterogeneity and tensions in the circulation of Atlantic legal institutions, because at each reception, it was necessary to reconcile the "foreign" with "local" cultural and regulatory systems.

more legal than political, more interpretive-specialized than erudite, when approaching Bello's Civil Code.

Then, at the beginning of the 20th century, while in the United States were shifting from Conservative-Formalist Legal thought to one closer to the empirical sciences (that is, American Realism and Sociological Jurisprudence), while in Germany a more social model was growing (Botero, 2020, pp. 113-149), abandoning the formalist molds of the first scientific schools, while in France discarded the formalism of the Exegesis to give rise to freer and socialist positions in the interpretation of the law (passing from the Liberal State to a more Social one), in Colombia, instead, we see how it went from a traditional law to another formalist but more legal. The first one (with a strong presence of the Law of the Indies and Castilian law), was formalist and anchored in the humanities and grammar (the good jurist was distinguished by his mastery of letters and Greco-Latin history, among another knowledge). The latter was ready to consolidate the modernizing impulse of a liberal State around a Civil Code, impulse that, of course, did not reach the entire national territory, but it lived, at least, in the big cities.
Now, if we can be generalist, the interesting thing about the process is that when this Colombian formalist movement was consolidating, thanks to the force that the imported and adapted Chilean Code took in the legal forum, the Civil Code was already obsolete to meet reality of Colombia (we are already in the 20th century.) In other words, the Bello's Civil Code, which was thought to implement a Liberal State, under Catholic-Conservative ideology, in the social context of the mid-19th century, could only be consolidated in Colombia at the beginning of the 20th century, just when that nineteenth-century model was beginning to be questioned. That is why the political and constitutional changes of the first half of the 20th century, especially the social reforms that occurred during the period of the Liberal Republic [1930-1946], left the Civil Code in such a bad situation. Many jurists and politicians claimed for a new Code or, at least, a structural reform, something that did not happen (Mayorga, 2006, pp. 155-160); therefore, it was necessary to implement reforms in specific sections, most of them not express or implicit.

One of the ways of implicit modification was by means of reforms derived from a change in the judicial interpretative lens that ended up modifying the sense, although not the letter, of sections of the Civil Code. For instance, eluding express mandates from the text by alluding to *General Principles of Law* (something typical of *Free Scientific Investigation* of Gény [1861–1959][27]) which were, supposedly, deductible from the Code (like what happened in France).

[27] About the Gény's fight against EXEGESIS in France, see (Bernuz, 2006).

However, despite the implicit reforms made to the Code, this could not get rid of its original form, which clashed with the new times. In this context, the galloping legicentrism, with a Code on the way to strong obsolescence, was assumed as a source of formalism and formulism that violated social justice itself, which explains the rejection of the legal socialists to the Bello's Code during the first decades of the 20th century. "By virtue of them (laws, especially procedural ones) are abused of the good faith of many of the parties, the law is, as it is said, sacrificed by the formulas, and the Judge has to sentence against his conscience and in favor of injustice and fraud." (Martinez, 1895, p. 61. The text in parentheses is ours). This explains the association that this *Latin American Formalism* has had with Formulism and Formatism, which will lead to its current bad image.

How interesting to see that both movements, French Exegesis and *Latin American Formalism*, despite their distances shared the same crisis: the obsolescence of the law in relation to realities that demanded, at that time, responses more socials. Anyway, it was in this environment of the appearance of an Exegesis in Colombia, with different molds than the merely French, where many voices appeared asking for a new Civil Code or, at least, a strong reform to fine-tune it with the country's realities:

> If our Civil Code is analyzed in the light of this point of view, it is clear that a legislative work issued to meet the social needs of the mid-nineteenth century, does not respond to the conditions of economic, industrial and commercial life of the moment present. The era of electricity, airplanes and radio, of unions and of trusts, demands a regime of law different from the one applied in the era of the bridleways, domestic industry, rudimentary trade and the passivity of the masses. No wonder it has been said that there is nothing more serious, both from the political and social criteria, than a backwardness of the legal rules, with respect to the material, spiritual and moral reality (Mayorga, 1991, p. 311)[28]

But as already stated, given that a new Code was not issued nor was the existing one structurally reformed, Colombians jurists were forced to initially consult the "Spirit or Will of the *Legislator*" to respond to new social demands, thus like voids and antinomies. However, since this "will" was initially identified with Bello, the encoder, it was necessary, now at the beginning of the 20th century, to change the meaning of the expression to consider the *legislator* as an abstract and ahistorical entity. Whenever someone goes to the "Will of the legislator" could found different answers more in line with the new times, as happened in France in the last decades of the nineteenth century. Something similar happened in other countries:

[28] Words by Carlos Lozano y Lozano, 1938, transcribed by Mayorga.

> Among us –the Argentines– the theoretical predominance of exegetical tendencies is really curious, since instead of invoking a consistent first legislator, we resort to another figure also mythologized: the encoder. To say that we do exegesis, among our civilians, does not consist in trying to reconstruct the will of the legislator, who was especially laconic when promulgating the Civil Code, but rather in trying to find out what Vélez Sarsfield meant and what he intended when he wrote the text of the Civil Code (Vernengo, 1977, p. 77).

Likewise, the legislator started to issue special laws that gradually replaced the Code's standards (known as *decoding* through special regulations[29].) Judges and jurists began to search –as in some kind of market of legal ideas– for theories that allow an interpretative amplitude of the Civil Code to be able to apply it to different realities from those initially thought by Bello. Nevertheless, due to that same amplitude, the responses obtained by the judges and jurists used to be opposed to each other. We can find a good example interpretative breadth in the indigenous leader Quintín Lame [1880-1967], who realized of the need to legalize his speech to protect the lands of indigenous peoples. He based for it in Bello's own Civil Code, especially in the rules of possession and prescription, which in turn was the legal tool used by his adversaries, the white settlers, to get hold of those same lands (Lame, 1973, pp. 59-69) (Espinosa, 2006, p. 17) (Bonilla, 2014, p. 40).

It was here (in search of theories that would allow an interpretative breadth) that French antiformalist positions (such as those of Gény or Bonnecase [1978-1950], to give two examples) forcefully entered in Colombia. Moreover, the entry of antiformalist theories was possible, among other things, thanks to the abstract conception that prevailed among the interpreters that being a defender of the Code meant following the "will of the legislator". Still, they already understood that 'Will' as an abstract-ahistorical entity so it made it easier to suppose that the Legislator's Will was in accordance with the *General Principles of Law* that should rectify the literal interpretation of the norms of an increasingly obsolete Code. In other words, the progressive obsolescence of the Civil Code made urgent an increasingly complex task for the interpreter in its reading, to make it compatible with a reality that was less and less adaptable to original Code's

[29] About the fragmentation of the code or decoding –that is, the loss of the centralizing unit of the code from a plurality of special laws, so that the Civil Code gradually remains only as a residual rule of general principles, see (Irti, 1992, pp. 17-41). The decoding of the Colombian Civil Code adopted in 1887 began almost immediately. For example, with regard to (the government and) the lands of indigenous communities: for the "civilized" natives, the Civil Code would govern, for the "semi-civilized" the law 89 of 1890 (articles 2 to 42) and for the "Savages" the norms that the Government defines in common agreement with the ecclesiastical missionaries (article 1 of law 89 of 1890). For the curious, a kind look at this law can be seen in: (Mayorga, 2013, pp. 159-182). A critical look at this law, in: (Clavero, 2011, pp. 107, and pp. 115-117).

responses. It was in this environment, into the 20th century, where some exegetes in a broad sense, by means of the supposed and mythical search for the "will of the legislator" tried to give coherence to the Code, approaching German and French scientific and anti-formalistic doctrines, to reinterpret the Code considering extra-systematic norms, such as the *General Principles of Law*.

Therefore, unlike what happened in France, the strong entry of anti-formalism did not sweep away the legicentrist legal *formalism*, but rather gave it a break, since being literalists with a Code in the process of obsolescence was no longer an option. Consequently, unlike Europe, in Colombia a person could be a formalist during the first decades of the 20th century speaking of *General Principles of Law*, understood as the will of the abstract legislator, who should rule the interpretation of the Civil Code.

Even in civil works and civil law classes in the first decades of the Colombian twentieth century, anyone could be a formalist and legicentrist while criticized, in words, the Exegesis, already cursed in France at the time. After that, this same person could then apply an exegetical method, giving some place to *General Principles* and *Natural Law*, quoting on the same page one to another French and German jurist, all at the time of interpreting and teaching this or that article of the Bello's Civil Code. Something relatively common among civil dogmatists:

> The French exegetical tradition is repudiated, in prologues and general parts, to rigorously abide by it as soon as dogmatic work begins. The rejection of exegesis, therefore, is more verbal than real, and the importance that is usually given to some antagonists of exegesis –as was Gény at the time– thus acquires a much greater relevance than the theoretical merits of these authors (such as Gény himself) would allow it to be attributed… That criticism is no more than verbal, is verified by the indicated circumstance that these authors, so severe in general with exegesis, tend to become fervent practitioners of it, as soon as they pass from the initial generalities, and are confronted with the encoded legal text (Vernengo, 1977, p. 67).

Then, one could be a legicentrist (exegete of work) criticizing the French exegesis already sent to collect in European academic circles.

It was thanks to this ambivalent environment, of loans and arrangements between iusnaturalism and iuspositivism, among formalism and anti-formalism, that the philosophy of the German Karl Christian Friedrich Krause [1781-1832] entered strongly into many Hispanic Americans jurists of the time. Since this author allowed a reading that sought, in any way, a

reconciliation between modernity (such as the liberal tradition and scientific positivism) with tradition (natural law, the Catholic religion, etc.).

IV. Conclusions

Being synthetic, Latin American Legal Formalism, which was the conservative legal framework with which lived the political and economic liberalism in this part of the Continent, began its journey with the creative reception of the French Exegesis (under a Romanist-Scholastic-Castilian-Indies background.) It was adapted to German schools, moderated from anti-formal doctrines, and consolidated, later, by his particular interpretation of Kelsen's positivism, just when he became the regional hegemonic author in the middle of the 20th century (López, 2004, pp. 116-135). This shows the great syncretic capacity of Colombian legal theory, in particular, and Latin American theory, in general.

In addition, the culture of the Code in Latin America began from the hand of important codifying jurists, who later will be ending up identified as, the legislators themselves. These coders did not exclusively use the French Code, as many have believed, but, displaying the Latin American art of miscegenation, they adopted legal institutions from different origins (including authors and schools contrary to each other in Europe), added to institutions rooted in Latin American legal culture, such as Castilian and The Law of the Indies. The result was a series of Civil Codes, goods for the moment of their creation, that demanded their own Exegesis, which was not –nor could it be– a copy of the French one, one that managed to gain importance at the beginning of the 20th century, just when the French Exegesis in sharp decline. In this sense, Latin American Exegesis, the basis of Latin American Legal Formalism, is not identifiable with the French Exegesis, but their history cannot construct separately from each other either.

Finally, we make it clear that this widespread belief of the French paternity of Andrés Bello's Code, on the one hand, and of the Exegesis that said code encouraged, is not so true if you look closely at everything. However, that belief, which we have called myth, achieved widespread acceptance of the Civil Code in these lands.

Referencies

Barría, M. (2011). El elemento de interpretación gramatical. Su origen en Savigny, algunos autores modernos y la doctrina nacional. *Ars Boni et Aequi*, *7* (2), pp. 257-282.

Bartolomé, C. (2011). Nación y naciones en Colombia: entre constitución, concordato y un convenio (1810-2010). *Revista de Historia del Derecho*, (41), pp. 79-137.

Bernuz, M. (2006). *François Gény y el derecho: la lucha contra el método exegético*, Bogotá: Universidad Externado de Colombia, 2006.

Bonilla, V. (2014). *Historia política del Pueblo Nasa,* Popayán: ACIN.

Botero, A. (2011). Saberes y poderes: los grupos intelectuales en Colombia. *Revista Pensamiento Jurídico*, (30), pp. 161-216.

Botero, A. (2012). La interpretación constitucional en América Latina: una denuncia del colonialismo cultural en la dogmática constitucional contemporánea. In F. Barbosa, *Historia del derecho público en Colombia. Tomo I* (pp. 319-341). Bogotá: Universidad Externado de Colombia.

Botero, A. (2018). El código civil de Andrés Bello y el movimiento exegético en Colombia. *Comparative Law Review*, *9*(1), pp. 155-173.

Botero, A. (2019). A Short History of the Idea of National Law: The Exception Becomes the Rule. In J. Kassner and S. Colin, *The Value and Purpose of Law* (pp. 93-103). Stuttgart: Franz Steiner Verlag.

Botero, A. (2020). El derecho social y la comunicación de ideas jurídicas en el Atlántico a fines del siglo XIX y principios del siglo XX. *Revista de Derecho: Universidad del Norte*, (54), pp. 113-149.

Botero, A. (2020). *Positivismos jurídicos (1800-1950). Estudio general de las escuelas y los movimientos iuspositivistas de la época*. Bucaramanga: Universidad Industrial de Santander.

Carpintero, F. (2003). Los escolásticos españoles en los inicios del liberalismo político y jurídico. *Revista de Estudios Histórico-Jurídicos*, *25*, pp. 341-373.

Deas, M. (2006). *Del poder y la gramática y otros ensayos sobre historia, política y literatura colombianas*. Bogotá: Taurus.

Espinosa, M. (2006). Sobre memorias, paternidades y violencias: Lame y los indígenas. *Aquelarre: Revista del centro cultural universitario*, (9), pp. 7-37.

Goyes, I. (2010). *La enseñanza del derecho en Colombia 1886-1930*. Pasto: Universidad de Nariño.

Gúzman, A. (1982). *Andrés Bello codificador: Historia de la fijación y codificación del derecho civil en Chile*. Santiago de Chile: Universidad de Chile.

Guzmán, A. (2004). "La influencia del código civil francés en el derecho civil latinoamericano", *Temas de Derecho*, *XIX* (1 y 2), pp. 27-60.

Gúzman, A. (2009). *Vida y obra de Andrés Bello*. Santiago: Globo editores.

Halpérin, J. (2003). Exégèse (école). In D. Alland and S. Rials, *Dictionnaire de la culture juridique* (pp. 6181-185). París: PUF.

Hanish, H. (1980). La influencia de Savigny en Bello en materia de personas jurídicas. *Revista de Estudios Historico-Juridicos,* (5), pp. 167-198.

Hinestroza, F. (2005). El código civil de Bello en Colombia. *Revista de Derecho Privado*, (10), pp. 5-27.

Irti, N. (1992). *La edad de la descodificación*. Luis Rojo, Transl. Barcelona: Bosch.

Jaksic, I. (2001). *Andrés Bello: La pasión por el orden*. Santiago de Chile: Universidad de Chile.

Lame, M. (1973). *Las luchas del indio que bajó de la montaña al valle de la 'civilización'*. Bogotá: Comité de Defensa del Indio.

Likewise, E. (1871). *Concordancias de los artículos del código civil chileno entre sí y con los artículos del código francés.* Santiago de Chile: Imprenta de la Libertad.

López, D. (2004). *Teoría impura del derecho: La transformación de la cultura jurídica latinoamericana*. Bogotá: Universidad de los Andes, Legis and Universidad Nacional de Colombia.

López, D. (2008). *La letra y el espíritu de la ley*. Bogotá: Universidad de los Andes y Temis.

Martínez, M. (1895). *Criminalidad en Antioquia*, Thesis for a doctorate in Law. Medellín: Universidad de Antioquia.

Mayorga, F. (1991). Pervivencia del derecho español durante el siglo XIX y proceso de codificación civil en Colombia. *Revista Chilena de Historia del Derecho,* (14), pp. 291-313.

Mayorga, F. (2002). Codificación de la legislación en Colombia: Procesos de unificación del sistema jurídico. *Revista Credencial Historia*, (148).

Mayorga, F. (2006). El proceso de codificación civil en Colombia. O. Cruz in *La codificación* (pp. 103-160). México: Porrúa and Universidad Iberoamericana.

Mayorga, F. (2013). Norma general, norma especial: el Código Civil de 1887 y la Ley 89 de 1890, un caso de regulación protectora de las minorías durante la Regeneración. *Revista Mexicana de Historia del Derecho,* (XXVII), pp. 159-182.

Mirow, M. (2004). El Código de Napoleón y los Códigos de Bello y Vélez Sársfield. *Revista Derecho Privado*, (33), pp. 1-21.

Mockus, A. (1994). Anfibios culturales y divorcio entre ley, moral y cultura. *Análisis Político*, (21), 1994, pp. 37-48.

Ots J. (1974). Sobre la vigencia efectiva de las partidas en América. in *Estudios jurídicos en homenaje al profesor Santa Cruz Teijeiro. Tomo II* (pp. 173-182). Valencia: Universidad de Valencia.

Parise, A. (2009). El código civil de la Luisiana y la codificación civil hispánica: diseminación del texto americano mediante la inclusión en el proyecto de García Goyena. *Iushistoria,* (6), pp. 33-97.

Parise, A. (2013). *Historia de la Codificación Civil del Estado de Luisiana y su influencia en el Código Civil Argentino*. Buenos Aires: Facultad de Derecho de la Universidad de Buenos Aires – Eudeba.

Petit, C. (2014). El Código de tránsito no es un código: A propósito de la sentencia C-362/1996, 3 de septiembre, de la Corte Constitucional de Colombia. *InDret: Revista para el análisis del Derecho* [on-line], (2), pp. 18-19.

Pound, R. (1938). *The Formative Era of American Law*. Boston: Little, Brown and Company.

Ramírez, W. (1999). Nómadas y anfibios: dos metáforas de insurgencia cultural. *Análisis Político*, (36), pp. 63-65.

Ramos, C. (1997). *El código napoleónico y su recepción en América* Latina. Lima: Pontificia Universidad Católica del Perú.

Samper, J. (1951). *Derecho público interno de Colombia. Tomo II*. Bogotá: Biblioteca Popular de Cultura Colombiana.

Schipani, S. (1987). Andrés Bello romanista-institucionalista. in *Andrés Bello y el Derecho Latinoamericano* (pp. 205-258). Caracas: La Casa de Bello.

Tate, J., Lopes, J. and Botero, A. (2019). "Global comparative legal history. An introduction", in J. Tate *Global Legal History. A Comparative Law Perspective* (pp. 1-17), edited by Joshua Tate, José Lopes, J. Lopez and A. Botero. New York: Routledge.

Vélez, F. (1891). *Datos para la Historia del Derecho Nacional*. Medellín: Departamento de Antioquia.

Vergara, A. (2020). La circulation des idées de Jeremy Bentham au Chili pendant la première moitié du XIXème siècle et Andrés Bello, leur divulgateur. *Revue d'études benthamiennes* [online], *17*, pp. 1-14.

Vernengo, R. (1977). *La interpretación jurídica*. México: UNAM.