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The school of exegesis and free scientific inquiry: Legal Hermeneutics Reflexes in Brazil (1873 to 1887)

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ABSTRACT
The objective of this article, through a literature review, is to present an overview of the School of Exegesis, the Scientific School and the Free Law Movement. Through the study of classical authors who wrote on the themes, it seeks to relate the main characteristics of the School of Exegesis, of Free Scientific Inquiry, and to show the development of the Free Law Movement in Germany. From this study it is intended to discuss how the debate about legal hermeneutics in Brazil in the nineteenth century took place, analyzing the influences suffered in the heyday of the School of Exe-gesis (1830-1880). The research methodology was bibliographic research and analy-sis of documentary sources. For the analysis of legal hermeneutics in Brazil, the Legal Journals of circulation of the time were used as a source.

Keywords: School of Exegesis, Free Scientific Inquiry, Free Right Movement, Legal Hepeutics, Brazil.

1 INTRODUCTION

This article presents a literature review on the School of Exegesis, the Scientific School, the Free Law Movement and its developments in Brazil, based on readings of foreign and national classical texts. Considering the national codifications of the nineteenth century as a landmark, it was chosen, for didactic purposes, to work initially on the School of Exegesis, with an incursion into the Scientific

School and the Free Law Movement and later an analysis of the hermeneutic influences in Brazil in the heyday of the exegetical method (1830-1880). We will try to identify such methods in the publications of some Brazilian legal periodicals of monthly circulation, where we have as an excerpt editions and sparse cases extracted from the reading of magazines published in the years 1873 to 1887.

First, a contextualization of the political and social influences of the French Revolution and the consequences for the formation of the School of Exegesis is presented, then an exposition of the main characteristics and methods used by the School, and finally, an analysis of theoretical criticisms of the exegetical method at the time, outlining, consequently, the theoretical guidelines of the decline of the School.

Regarding the period of decline of the School of Exegesis, the ascendant ideas developed by François Gény, who sought the Free Investigation of Law (Scientific School), and his influence on the Free Law Movement in Germany, stand out.

At the end, a reflection on the hermeneutical influences in Brazil is carried out, considering as a starting point the apogee period (1830-1880) of the School of Exegesis. The Legal Journals, legal vehicles widely used at the time, will undoubtedly allow us to carry out a more consistent interpretation of these influences in Brazil. The analysis focuses on the main hermeneutical discussions in Brazil during the nineteenth century that are related to the exegetical method and free scientific investigation.

In addition to the bibliographic research, the methodology adopted for the analysis of hermeneutic influences is the analysis *of legal journalism*, privileging the rereading of publications made in the following magazines: Gazeta Jurídica, a monthly magazine, where we have as an excerpt editions of scattered cases extracted from the reading of magazines published in the years 1873 to 1887, seeking to identify such methods in these publications; Also the analysis in the *Compendium of Legal Hermeneutics*[1], published in Recife, in 1872, considering that it brings the rules of interpretation to be used as "guides" by the Faculties of Law of the Empire.

2 INITIAL COSIDES

Law is the preponderant social will, and as such has always reflected the society that shaped it. However, legal practitioners, at different times, have learned, interpreted and applied the legal norm under different paradigms based on the different Legal Schools.

Western Europe had a great development of law in the Roman civilization during Classical Antiquity. The Doctrine of Law (known at the time as Jurisprudence) made remarkable progress. In this period, Classical Jusnaturalism, a school of interpretation of Law, arose from the ideas of the

[1] By the Author: Francisco de Paula Baptista. Other important jurists also published on hermeneutics at that time, in 1838, Correia Teles, with the *Theory of Interpretation of Laws; and, in* 1861, Bernardino Carneiro, with *First Lines of Legal and Diplomatic Hermeneutics.*

Greek philosophers (Plato and Aristotle) and sought a universal justice based on natural reason. This thinking had a long and lasting influence on Western Europe.

Medieval law was marked by legal pluralism, that is, by the co-existence of several distinct legal systems: Customary Rights of Barbarian Peoples, Canon Law, and Feudal Law. From the eleventh century onwards, with the birth of the Universities, the School of the Glossators and later the School of the Commentators resurrected and disseminated Justineanean Roman Law in Europe. At the same time, they built the *Ius commune* (Common Law) on the basis of the Corpus Iuris Civillis, which had the force of a sacred text. Responding to this new reality, Jusnaturalism acquired a new guise and presented a theological content, since the law was a Jus *Sacrum*, since Law and Society were based on the divine will and the religious creed.

In the Modern Age, with the birth of the Absolute National States, a National Law was also born with the King's Ordinances. In addition to Roman Law, Ordinations also came to be taught at the university. Still in the Modern Age, the Schools of the Glossers and the Commentators were criticized by the Jusrationalist School. In this moment of so many transformations, Jusnaturalism acquired a new garb. It has become more rational (just reason). He sought justice respecting the rational nature of man and the main source of Law is human nature and has a rationalist method. This school flourished in the sixteenth and eighteenth centuries, and had as protagonists Hugo Grotius, Hobbes, Spinoza, Puffendorf, Wolf, Rousseau and Kant.

The French Revolution brought great changes in the Western world and of course also in the Direito.Com the rise of the bourgeoisie, a State Law was born in Europe, codified and unique to be applied within a State. The Code of Napoleon was the emblematic example of all this transformation.

In the midst of all the changes and this new economic, political and social order, at the end of the eighteenth century, and in the nineteenth and twentieth centuries, several Schools of Interpretation of Law emerged in Europe, among them the School of Exegesis, the Historical School, the Teleological School, the School of Free Inquiry and the School of Free Law.

Juspositivism was a direct and immediate product of the French Revolution and one of the first currents of this thought in France was the School of Exegesis, also known as the Philological School.

3 SCHOOL OF EXEGESIS AND ITS CHARACTERISTICS

The Loyalist movement gained momentum in the late eighteenth century, and with the end of the French Revolution, France yearned for a national right. According to Antônio Manuel Hespanha (2012:401), state laws have tended to monopolize the attention of jurists since the mid-eighteenth century, and this monopoly was influenced by the ideas of law[2].

[2] In the words of Manuel Hespanha (2012), the monopoly was tempered "by the belief in the existence of a suprapositive right based on reason, that the positive right would constitute a specification and a guarantee".

As a result, there was a "rupture" in the conception of law and legal thought of the ancien régime, in which Castanheira Neves (1995:181) lists three main assumptions present in the "French cultural and political legal context immediately preceding and immediately consequent to the Revolution of 1789", namely: 1) the philosophical-legal (in modern-Enlightenment *jusnaturalism*); 2) political-legal (in demo-liberal *legalism)* and 3) cultural (legal phenomenon of post-revolutionary *codification*).

The political and social implications of the time ended up stimulating the "legalism of post-revolutionary codification", which drove and nourished the codification movement, as they sought through it, "to respond to the yearnings for a stable, predictable and, therefore, secure legal order". (NEVES, 1995:181; HESPANHA, 2012:401)

> Post-revolutionary legalism saw law only in politically legitimized laws in a state of representative assembly and structured according to a rigid separation of powers, and naturalism said they were based on natural-rational law deduced from socially anthropological axioms, but that legalism, which had an immediate ideological origin in Enlightenment contractualism, did not fail to receive from jusrationalism not only a lot of normative content prescribed by its laws, but also a great deal of normative content prescribed by its laws. as well as the idea that legal normativity corresponded essentially to the *modus* of a systematic rationality and even of an axiomatically systematic rationality. This was the *cultural form* of a time of "reason" that was consubstantial with naturalism in general, both modern and Enlightenment, and that the legalism of the nineteenth century dogmatically enshrined. Hence the fundamental requirement of the prescription of the laws *sub specie códicis*, as precisely the juridical-positive form of this essential rationality (NEVES, 1995:182).

Thus, this legal culture of rationality through the prescription of laws in codes "implied that a code was not a mere collection of laws, but a *legislative corpus* that proposed itself, in a rational, systematic and unitary way", as an "embodiment of the ideal of a certain legal domain". (NEVES, 1995:182)

The codifying phenomenon can be translated at that time as a juridical culture that arose in opposition to the previous juridical culture, the *ius commune*. While the *ius commune* was based on canonized juridical texts and on a method of normative production that compiled various particular rights, the codification proposal was molded to the rationally unified discourse, where the source is no longer customs or local history, but the sovereign state that represented the will of a people (MARQUES, 2003:10-15).

The whole context of this rational codifying legal culture in France contributed to the School of Exegesis, as an example, the laws in 1790 that value the legal sentiments of the common people, instituting the illiterate justices of the peace and ending appeals to the higher courts; the feeling of will of the revolutionary legislator extremely valued, which imprints, the provision of the codes in the preamble of the Constitution of 1791[3]; and, the closure of the law faculties by Convention in 1793.

[3] The Constitution of 1791 provides in the preamble that "a code shall be drawn up of the civil laws common to the whole kingdom." "Shortly thereafter, the Convention promulgated a *Code of Crimes and Penalties* (3rd Brumaire of Year IV

And it is in this scenario that Napoleonic discourse proposed arras to post-revolutionary contractualist rationalism. A single right for a fragmented nation, but legitimized by the representativeness of the people, by the balance caused by the separation of powers. At that time, with the approval of the Napoleonic Code, the codifying phenomenon was spreading as a benefit to the many territories occupied by Napoleon. (ARNAUD, 1995:136; FORMIGA, 2012:13)

It is possible to perceive that the *Civil Code* was extremely radical, considering that it is the result of a Revolution that, intent on breaking with the past, started from the idea that the refusal of history would be enough to establish a new political/legal/social order.

According to John Gilissen (1995:516) the Code of Napoleon exerted a widespread influence on the codification that took place in the nineteenth century. The preceding codes did not have the degree of synthesis that the Code of Napoleon had, and such influence only declined at the end of the twentieth century, with the entry into force of the Civil Codes of Germany (1900) and Switzerland (1907) which superimposed the French model of codification. becoming a new paradigm for coding in other countries; and, according to Formiga (2012:13):

> [...] The Civil Code (1804) achieved success and won the sympathy of many within and beyond the French borders. The new catechism – sown "in the gullies opened by the soldier of freedom" – was "dragged by the footsteps of the imperial cavalry". Napoleon offered the occupied territories his code as a boon, while he personally introduced his brothers (turned kings). Generals and ambassadors to have it adopted by the countries they were in charge of. (FORMIGA, 2012:13)

The School of Exegesis is linked to the legal and political environment that probed France in the post-revolution, ensuring the idea of the rule of law, since the context of distrust in relation to the magistrates and jurists of the time was conflictive, thus, the legal culture of the rule of law and the prohibition of interpretation was instituted, and the Courts should resort to the legislature whenever there was a need to interpret a law[4].

In codified law, the [5] law was considered as the main instrument of legal production, in a scenario where "the legal will cannot be contaminated by subjective opinions" (MARQUES, 2003:12).

[25/10/1795]). But it was only in 1804, during the Consulate and under the influence of Napoleon I, that the *Civil Code* met its definitive version and was promulgated (1804). This was followed by *the Codes of Civil Procedure* (1806), the Commercial *Code (1807), the Penal Code (1809), and the Code of Criminal Procedure (1810*). (HESPANHA, 2012:401) For a more in-depth study of the codifications in France, see GILISSEN, John. Historical Introduction to Law. 2. ed. Lisbon: Calouste Gulbenkian Foundation, 1995. Translated by: A. Manuel Hespanha. p. 451 - 461.

[4] For a better understanding of the French model in the constitutionalization movement, see: TRECK, Lenio Luiz. Constitutional Jurisdiction. 6. ed. Rio de Janeiro: Forense, 2019, p. 49-59. According to Lenio Luiz Streck (2019, p. 53-54): "The lack of faith in the judges is based on the work they had done in favor of the absolute monarch, a work characterized by conformism and docility, an issue that was well captured by Tremps, from Alexis de Tocqueville: "It can never be forgotten that if, on the one hand, the Judiciary in the Ancien Régime extended incessantly beyond the natural sphere of its authority, on the other hand, it never fully completed it." Since then, a tradition has been fostered in France that has continued to this day. The distrust of judges was reflected in the exclusion of the courts from the task of guaranteeing the Constitution, an exclusion that marked the French system and that influenced European thinking on this matter."

[5] According to Mário Reis Marques, the "word code". (MARQUES, 2003:1-2)

Conceptualizing the School of Exegesis, Castanheira Neves (1995:181) states that it was a kind of primeval positivism, being

> "a current of French legal thought born at the beginning of the twentieth century, which subsisted, with greater or lesser fidelity to its original meaning, throughout that century and in which it found doctrinal and methodological expression in the legalism of the post-revolutionary codification".

According to John Gilissen (1995:516), the theories arising from the School of Exegesis were called *legal positivism* (*Gesetzpositivisms*), "under the influence of the philosophical ideas of Kant in Germany, Saint-Simon and, above all, Auguste Comte in France".

According to Lenio Luiz Streck (2010:160),

> [The] exegetical positivism (which was the form of primitive positivism) separated law and morals, in addition to confusing text and norm, law and law, that is, it was an old belief – still very present in the imagination of jurists – around the prohibition of interpretation, a corollary of the age-old separation between fact and law, something that takes us back to the post-French Revolution period and all the political consequences that followed from it. (Streck, 2010:160)

Regarding the protagonists of the School of Exegesis, Julien Bonnecase (1944) indicates three main "founders": C. Étienne Delvincourt[6]; Jean Proudhon[7] and C.B. Marie Toullier.[8] Other thinkers are important in the formative phase of the reign of the School of Exegesis, such as: A. Merlin of Thionville; Jacuqes of Maleville[9]; Chabot de L'Allier and Alexandre Duranton, and it was A. Duranton who would develop the principles given by the founders and establish, in fact, the period of reign (apogee) of the School of Exegesis.

Analyzing the School of Exegesis, Julien Bonnecase (1944:36-66) made a periodization with three phases: formation (1804-1830), apogee (1830-1880) and decline (1880-1900).

3.1 FIRST PHASE

In the formative period (1804-1830) the exegetical current was strengthened by the spirit and procedures of the Imperial Government that did not please the tendencies that had manifested themselves in the teaching of Law in the central schools. This is due to the characteristics noted, such as the "reduction of the right to the product of wills (conventions, laws), in line with Rousseau's political philosophy"; the "identification of the law with the law, as the will of the legislator"; the "disregard of legal doctrine, with the closure of law schools"; and the "conversion of jurists to mere explainers of the law", since they limited themselves to expounding and interpreting the new codes. (HESPANHA, 2012:403-404).

[6] Com sua obra *Institutes de droit civil français* - 1808 [*Cours de Code Civil* - 1812].
[7] With his work *Cours de droit Français* - 1809.
[8] Com sua obra *Droit Civil Français Suivant l'ordre du Code* - 1811.
[9] Analyse *Raisonnée de la Discussion di Code Civil Au Conseil d'Etat* (1804-1305).

3.2 SECOND PHASE

The heyday (1830-1880) was marked by the great spread of the ideas developed by the School, and its great popularity (including international). The methods of the School in this phase were marked by four groups of authors[10]: in the first group are the commentators, most of whom are professors; in the second are those who made second-rate commentaries, composed of professors, magistrates and lawyers; in the third group the jurists who did not produce written works, but by influence represented the spirit of the School of Exegesis; and, in the fourth group, those who popularized the principles of the School through the manuals[11]. (BONNECASE, 1944).

In 1841, the jurist Hyacinthe Blondeau [12]systematized the doctrinal bases of the School and explained precisely the formula regarding the role of the interpreter of codified law. For him, the interpretation of the legal norm was carried out through the exegesis of the texts of law, going so far as to maintain that the judge should abstain from judging in the hypotheses of lacuna. This understanding is also supported by other authors, such as the Dean Professor of the Faculty of Caen, Charles Demolombe[13]. Criticizing this understanding, Julien Bonnecase (1944) points out that such an understanding violated article 4 of the *Civil Code,* in which he said that it was forbidden for the judge to fail to judge by alleging silence, obscurity or insufficiency of the law.

At the time of his heyday, he perceives the influence of the School of Exegesis in Belgium, through the propagation of the works of François Laurent, in the period from 1869 to 1879, the author prefaces the work explaining that for him "law is a rational science; the judge cannot disobey the letter of the law under the pretext of penetrating its mind; the codes leave nothing to the discretion of the interpreter; It no longer has the mission of doing law, because the law is done." (GILISSEN, 1995:517).

Very emblematic at the time, the statement of Professor Jean-Joseph Bugnet that became known as a fundamental characteristic of the methods of the School of Exegesis*: "Je ne connais pas le droit civil: je n'enseigne que le Code Napoléon*". [14]

[10] Jullien Bonnecase (1994) explains in his work *La Escuela de la Exégesis en Derecho Civil* in more detail the works of each author of the School of Exegesis. In order to provide a better overview for the reader, I explain here the names of the authors located in each group: 1) The Great Commentators: A. Duraton, Ch. Aubry, Ch. Rau, Demolombe, Taulier, Demande, Colmet de Santerre, Tropolong, Marcadé, Laurent (his 33-volume work *Principes de Droit Civil* - 1869 to 1879); 2) The Commentators of the Second Order: Larombière, Pont, Rodière, Massé, Vergé, Duverdier, Du Caurooy, Coin- Delisle, Blondeau (with his work *L'autorité de la loi: de quelle source doivent décoller aujord'hui toutes les décisions juridiques* - 1841); 3) The Jurists: Bugner and Vallete; and, 4) The Manuals: Morlon (with his work *Répétitions écrites sur les trois examens du Code Civil - 1846*) and Baundry-Lacantinerie (with his work *Précis de droit Civil* - 1880).

[11] The author Julien Bonnecase (1994) describes in great detail the characteristics present in the writings of each group. One of the main and most striking characteristics present in the work of authors of this period was introduction with the repetition of the works of their predecessors, always showing a sign of respect and admiration (even if they did not agree with the full content of the work), this process of "introduction of the predecessor" is almost an obligatory ritual of exegetical authors.

[12] The *authority of the law: from what source all legal decisions should be taken today.*

[13] In his work *Cours de Code Civil* - 1845.

[14] I don't know Civil Law, I teach Napoleon's Code.

3.3 THIRD PHASE

The last period of the School of Exegesis has as its main driving force the work of François Gény called *Méthode d'interprétation et sources en droit privé positif* (1899), "which criticizes the legal fetishism of the School, with the argument that the diversity of human relations and their inherent complexity are always beyond the creative capacity of the authors of legislated law". (LIMA, 2008:107).

The School of Exegesis was intimately linked to the political, social and legal influences after the French Revolution, where it was reinforced by the feeling of distrust in the judge, still following the molds of the codification movement that was already apparent. However, an exaggerated cult of codified norms and the will of the legislator was preached, which was sustained until 1900, the main reason for its decline being the works developed by François Gény for the free scientific investigation of law.

3.4 METHODS OF THE SCHOOL OF EXEGESIS

Regarding the methods used by the School of Exegesis, Julien Bonnecase (1994) explained five main formulas visible in exegetical teachings: 1) the cult of the text of the law; 2) the predominance of the legislator's intention in interpreting the law; 3) the statist character of exegetical doctrine; 4) the (il)logical and paradoxical character of the doctrine of exegesis as the existence and notion of Law; and, 5) the argument from the authority of the legislature. For Julien Bonnecase (1994:144):

> The exegetical method is essentially reduced, like all methods, to the exposition and execution, according to a preconceived plan, of the doctrine of the School, and this doctrine consists, as we have said briefly, in the conception that the School itself has of the constituent elements of Law, that is, of its object, sources, principles and guidelines emanating from those sources. Now, the School regards the intention of the legislator as the supreme source of positive law[15]; it is true that the means employed to discover this intention belong to the method; but the intention considered in itself is essentially an integral part of the doctrine because the role which it is made to play ends up identifying, to a large extent, the substance of positive law with the manifestations of the will of the legislator (BONNECASE, 1994: 144).

In this sense, the author A. Castanheira Neves (1995:183-186) summarizes the methods in three main postulates, namely: 1) the identification of law as law, since he understood that the solution to

[15] With the intention of providing a better context for the reader, it is important to justify what the author Julien Bonnecase (1994:160) in the text about the understanding of Positive Law when he mentions it for that period, thus understood: "el Derecho positivo ... It is defined as the set of laws that the legislator has promulgated to regulate the relations of men among themselves... In shaving, natural or moral laws are only obrigatory insofar as they have been sanctioned by written law. The others are not matters of law, and the judge who relied on them to justify his decisions, would exceed the limits of his powers. Only to the legislator belongs the right to determine, among the numerous and sometimes so controversial rules of natural law, those that are equally obligatory... Dura lex, sed lex. [...] Nothing is above the law, and it is prevarication to circumvent its provisions on the pretext that they are not in accordance with natural equity. In jurisprudence there can be no greater reason or better equity, than reason or equity gives law." Furthermore, in the course of Bonnecase (1994:161) it is possible to see various conceptualizations of what was meant by positive law by exegetes.

the sources of law had already been found by the School of Exegesis. During the period in which this School was in force, the cult of the text of the law imprinted the statist character, focusing power in the hands of the legislator; 2) exclusivity of the law as a legal criterion, which refused to appeal to the other criteria of interpretation that existed at the time, the law, in addition to being the only source of law, was also the "exclusive normative-legal" criterion; and, 3) the sufficiency of the *Civil Code* Law to resolve all legal cases.

Regarding the categorization of the methodology of *exegetical positivism*, A. Castanheira Neves (1995:186-190) reduces it in four terms: 1) supremacy of the law; 2) the interpretation made on the basis of logic (interpretation is forbidden and, when it was done, it should be restricted to the will of the legislator), "the hermeneutical method was capable of providing legal certainty, but it was indifferent as to normative justice and material adequacy to the concrete merit of the cases"; 3) the solution of gaps made through the refusal to judge, since "the law was the law, and a case that was not directly or indirectly regulated in it would be a case that lacked legal protection - it would fall outside the law, because it [was] not covered by the legal system"; and, 4th) the mediation of the logical operation that was carried out ends up being reduced to a scheme of "syllogism of the judiciary - the jurist was a geomatra (LIARD) and the judge was a passive instrument of the legislative will (GAUDEMET, 4)". (NEVES, 1995:189).

For the School of Exegesis, jurisprudence was not considered as the proper source of Positive Law, for the simple fact that "sus decisiones no pueden ya valer más que por los motivos que la justifican", and thus, when there is doubt about the intention of the legislator "one should presume that he wanted to be faithful to the previous law", because, the exegetes understood that "the most safe procedure is to interpret the Civil Code for the sake of the Mismo Code". (BONNECASE, 1994:153-158).

Furthermore, Julien Bonnecase (1994) lists three main methods used by the School: 1st) The analytical or exegetical method, which is subdivided into pure exegetical method, synthetic method, and mixed method. The pure has the characteristic of reducing the exposition and elaboration of the science of civil law *in the Civil Code* and in the order in which the laws were organized in the code (book, title, chapter), starting from this order an analysis of the content of the various articles is obtained. From this method we had the commentaries of the *Civil Code.* 2) The synthetic method is the opposite of the exegetical method, it was also called for a long time the dogmatic method, it was the one taught by the jurists Charles Aubry and Charles Rau, [16][17]who preached the idea that the

[16] In the work *Cours de droit civil français: d'après la méthode de Zachariae* (1897).

[17] "Judge by the following statement by Aubry and Rau: "The principal means of logical interpretation are as follows: (1) comparison of the text to be interpreted, with other legal provisions relating to the same subject-matter, or to similar matters; 2), the investigation of the motives, or the object of the law, in the preparatory work for its drafting, or in the previous law; and (3), an assessment of the consequences of an extensive or restrictive application of the scope of the law ...""" (BONNECASE, 1994:157).

jurisconsults did not concern themselves with the divisions used by the drafters of the Code when building the work. Rather, they followed a rational plan that made it possible to present the original form of the aspect of social life, which was the object of the Code's regulation. Works derived from this method were qualified as treatises in opposition to commentaries. 3) Mixed or Intermediate, it is almost considered, by Julien Bonnecase (1994), a variant, because it respects the order followed in the pure method, but comments on articles without following the sequential logic of the Code. Still, according to the author, the only distinction between the latter and the pure method is that in the latter there were two drawbacks: a) the meanings of the articles were often misunderstood and b) in the end the author could not acquire knowledge of the articles of the Code.

It is evident that after almost a century of using the exegetical method, some authors demanded some renewal, a fact that did not succeed in a way that would sustain the teachings of the School of Exegesis as in the heyday, which caused the phase of decline (1880-1900). According to Julien Bonnecase (1994:59), the unsuccessful attempt to renew the methods of the School is the reason why several[18] authors confuse the renovators of the School of Exegesis with the authors belonging to the Scientific School, because the past teachings were no longer so faithful to some variants of the School of Exegesis.

The decline phase has as its neuralgic point the discussion about the gaps in the law and how the judge should act in such cases, thus arising the use of analogy in the hypotheses of a gap in the law.

The judge, Joseph-Emille Labbé, expanded the formulas of the legal norms that were conceived in a restrictive way, by extending the creations of the legislator. Comparing the methodological procedures of the School of Exegesis, these authors are the least traditionalist because they sought a renewal through extension by analogy, creating a new rule based on similar situations and on the identity of legal reason. So, in the decline phase, reasoning by analogy is the extreme point of the traditional method.

As Lenio Luiz Streck (2011:27) points out, "concepts such as analogy and general principles of law should also be seen from this perspective of constructing a rigorous conceptual framework, which would represent the – extremely exceptional – hypotheses of inadequacy of cases to legislative hypotheses".

Some commentators based the analogy on the fictitious intention of the legislator, as if the solution were presumed in the hypothesis in which the legislator faced the concrete case. Other authors substantiated the argument that the norms applicable to the concrete case would be latent in the "background" of the legislation, and the analogy makes explicit, captures and puts these norms in evidence, these convictions have as their substrate the theory of the logical plenitude of the law, in a

[18] Como J. E. Labbé, C. Bufnoir, Raymond Saleilles e Ch. Beudant.

restrictive and extremely legalistic sense, since they understood that the legislative system was a closed set that suffices being alien to any element foreign to the legislated law.

> By making use of the logical method, the adherents of the School of Exegesis defended the thesis that the law is an expression of the will of the legislator, and that a *stricto sensu interpretation* of legal texts would be sufficient to provide the necessary elements to understand its meaning and scope. The interpreter's function was therefore limited to discovering in the rigid text of the law the *voluntas legislatoris*. To interpret the law was only to reconstitute and reveal, with fidelity, this will. (LIMA, 2008:113-114).

According to Julien Bonnecase (1994), in 1812, the professor and commentator on Napoleon's Code, F. von Lassaulx, was the first representative of the School of Exegesis who dared to criticize and prepare the way for the technical conception that would prevail in the German Civil Code (1900) and the Swiss Civil Code (1907).

4 THE SCIENTIFIC RESEARCH OF FRANÇOIS GÉNY AND THE SCHOOL OF EXEGESIS

The School of Exegesis dominated French legal culture for almost a century, and in 1899, with the work of Gény, there was, in fact, the fall of the exegetical method. Taking a panoramic view of the emergence of the Scientific School, it can be seen that its beginning took place with A. Jourdan and *El programa de La Thémis* (1819/1831).

In 1819, A. Jourdan established the fundamental distinction between real and formal sources in the rules of law and with the scope of laws, even if they were codified. He said that to limit the judge to being a mere interpreter of the legislator's thought, without denouncing the defects of the law, would be to condemn science to sterility. In the words of J. Bonnecase (1994:211) "the distinction between the real and the formalities of the rules of law was revealed from the beginning, by the representatives of the Scientific School".

The perception begins that the council of the Imperial State was not a sanctuary with reason dictated, as if it were an oracle (characteristic of the exegetical method). In the words of A. Jourdan:

> With the priests of the temple of Thémis [...] It is necessary to combat this perpetual tendency of jurisprudência to resolve itself in individual interests; It is necessary that the jurisconsults do not degenerate into casuists, and that, placed, so to speak, at the top, they discover and grasp at the same time, the whole and details of the science, it is necessary, in short, eu reason dominates all, presides over all, reigns as sovereign in all parts; She must never obey as a slave, chained by form or subjugated by the authorities." (JOURDAN apud BONNECASE 1994:210-211).

However, it was only in 1900 that the establishment of the reign of the Scientific School and the closure of the School of Exegesis were considered, with the program of Renewal of Methods of Interpretation proposed by F. Gény.

It is possible to see that the impacts of F. Gèny's teachings triggered a real revolution in the field of Civil Law[19], according to J. Bonnecase (1994:249):

> This teaching, which at first glance may seem strange, is the power of the *Manifesto* in all domains of social activity, even in that which many intellectuals consider sheltered from such influences: the scientific domain. Two famous manifestos gave body, at the beginning of the nineteenth century, to two great Schools that, in their first half, divided the German legal world: *The Philosophical School and the Historical School*; the first owes birth to the writing of Thibaut: *Sur la necesité d'un Code civil pour L'Allemagne*, published in 1814; the second, to Savigny's reply: *De la vocation de Notre apoque pour la législation et la jurisprudence*, published the same year. The concepts which these Schools defend and symbolize already existed in Germany, before the two manifestos had been published, and yet they would probably never have engendered the movements which they gave rise to, if in two well-defined programmes their adherents had not pointed out the opposing scientific guidelines, which such concepts represented. [...] The correct understanding of this situation, regardless of the underlying issue, decided the triumph of the doctrine of Gény over that of Saleilles. In truth, the aforementioned work of Gény: *Method of Interpretation and Sources in Positive Private Law*, was more than a manifesto, but also a giant Manifesto! (BONNECASE, 1994:247-249).

The first part of the work *Méthode d'interprétation et sources en droit privé positif*, by the author F. Gény (1902), aims to point out the failures of the School of Exegesis. He proved a disorder in the normal development of the program of the Scientific School thanks to the role attributed by him to legal technique, and he makes three critiques about the legal fetishism of the School of Exegesis, carried out in three distinct fields (practical, scientific and philosophical).

In the practical field, the criticism is made about the use of logic to interpret the will of the legislator, because this attitude plastered the law and it was impossible to govern the social world indefinitely with institutions closed to the past. So, the text and the corporate purpose were factors that had to be considered when interpreting the laws. (GENY, 1902).

In the scientific field, the criticism turned to the effect that the School of Exegesis deprived positive law of the scientific element, reducing it to a purely empirical art. F. Gény (1902) mentions the scientific spirit, in the principles of science, as something that is not given and done alone. They form as they create themselves. The author's attention was focused on the social reality, for F. Gény (1902), the jurist could not ignore the compounds of the legal world that were before him, the jurist having two moments in his work: the given and the constructed. He sought to overcome two extremes, the naturalism that accentuates the ideal, and the positivism that accentuates the real.

The Concept inaugurated by F. Gény (1902) introduced the construction of awareness and creative activity as tasks of the jurist. For him, The *Given* and *The Constructed* were two fundamental elements of Law, *the given* being that which had not yet been created by the legislator. Science as knowledge of the *given (*social reality and positive law) and technique came as the production of what

[19] "In the other branches of law, renewal is at the same time; in public law, with the works of Duguit and Hauriou; in criminal law with those of Garraud, Garçon and Roux; in commercial law with those of Thaller and Lyon-Caen. The reign of 'His Majesty the *Civil Code'* ended around 1880-1900, with the other branches of law acquiring a certain autonomy" (GILISSEN, 1995:519).

is constructed, the great contribution of the work of F. Gény (1902) in the theory of interpretation was to situate the interpretative work within the role of the jurist, placed between realities and needs.

Already in the philosophical field, F. Gény (1902) understood that it was clear that the School of Exegesis was not concerned with philosophy, science being the necessary basis of philosophy and its starting point. And a science that is merely narrative is not really a science at all. Therefore, Law should go beyond a normative science, contesting what the School of Exegesis preached.

4.1 LEGAL METHODOLOGY OF THE SCIENTIFIC SCHOOL

In this sense, the Scientific School had a translegal understanding of Law in its foundations, constitution and investigation, based on an unequivocal recognition of the limits and normative-legal sufficiency of the law. For F. Gény (1902), the fetishism for the legal text ceased with the recognition of the distinction between law and law. In the Scientific School, the legal methodology ceased to be exhausted in interpretation and became fundamentally problematic-normative and teleological-material, the law began to be understood as something beyond the dogmatic-formal status of an axiomatic rationality, being a practical intention of a rationality in which axiological, political, sociological coordinates concurred, becoming this the right that the Law Schools began to assume, calling for the investigation and teaching of law.

With the studies developed by the Scientific School, the clear distinction between science, technique and method that was the abstract basis of F. Gény's program (1902) was perceived. Thus the opposition between the two schools in France became evident.

The tripod (science, technique and method) of the Scientific School was the clear difference of the exegetical models. For F. Gény (1902), science was understood as the study of real sources, which are the guidelines and generating elements of the rules of law. There are two elements of these elements: experimental and rational. The experimental is the *given fact*, the rational is the mission of filtering the data from the experimental. The rational element translates into the notion of right. Legal technique consists of formal sources, which serves to designate the set of means of any nature, it is the language of law, formal characteristics of law and customs, judicial decisions and methods of exposition of doctrine, so it is the whole manifestation of a rule of law. The method, on the other hand, is the program of the Scientific School, consisting of guidelines that follow the spirit to perceive and know any object of human knowledge and to come to possess them. The method performs its function in the technical and scientific aspects of civil law.

> It is by means of free scientific research (German*: Freie Rechtsfindung)* that the jurist must strive to reveal the law of his time: he must take into account all the constituent elements of the present state of law; his research must be guided in particular by the history of the institutions. The advances made by the sociology of law and the philosophy of law should be used for a better knowledge and understanding of the legal norms of today's life. The jurist must consider the experiences made, the successes or failures that result from the constant

> movements of the law. It must seek the expression of what is just and not exclusively the will of the legislator. Right is in itself something different from law; While the latter remains the principal element for the knowledge of the law, it does not exclude the other elements: above all, custom, general principles and case-law. [...] In reality, there is no such thing as "one" scientific school; There are several, each of them emphasizing one or another aspect of the sources of law: historical, sociological, economic, etc. For this reason, it is also given different names: realist school of interpretation, sociological school, etc. In Germany, the same tendencies are found under other names: *Naturalismus*, *Freirechtsbewegung*, *Interessenjurisprudenz*, *Wertungsjurisprudenz*, etc. (GILISSEN, 1995:518-519).

Thus, the program of free scientific investigation defended by F. Gény (1902) ended up surpassing the exegetical methods used in France, the two works developed by him signified and marked the processes of creation and expansion of Law, contributing to the theory of interpretation. (BARRETTO, 2009:379). His works influenced German theories regarding the importance of the role of the jurist in law and, in turn, influenced the unleashing of the Free Law Movement in Germany between the period of 1900 and 1930.

5 SCIENTIFIC RESEARCH AND THE FREE LAW MOVEMENT

In the School of Free Law[20], law is not legal, it is free, it means every right beyond the law, "free from the law". In other words, the Free Law movement is designated only in the metalegal formation of law (CASTANHEIRA NEVES 1995:193).

This movement has German origins, was established between 1900 and 1930 and is linked to the authors who founded it[21] or who proclaimed themselves as militants[22]. Among its precursors were Stammler, for the search for just law, and F. Gény, for justifying the free scientific research of law. The name livre direito itself was inspired by F. Gény. (CASTANHEIRA NEVES 1995:194),

However, it was only in 1903 that it emerged as an autonomous movement with Ehrlich and Kantorowicz, who used a pseudonym of *Gnaeus Flavius*, also linking to the movement some authors who had a wide and intense militancy. A. Castanheira Neves (1995:194) points out "that it is a current of legal thought that emerged within legal thought itself".

> The School of Free Law is a movement of more radical contestation of formalism, in the name of attributing to the judge a greater capacity to shape the law, based on his reading of the concrete justice of the case. Its origin lies in the observation made by a practical jurist – Ernst Fuchs, 1859-1929, *Die gemeinschädlichkeit der konstruktiven Jurisprudenz* (The socially harmful character of constructive jurisprudence), 1907 – that the judge, in the process of finding the legal solution, always started from his sense of justice (Rechtsgefühl) and not from the data of the law and considerations of formal logic. The contribution of a historian –

[20] According to Castanheira Neves (1995:193): "It is a movement (<*movement*> in the proper sense of the term, and not <school>, considering that its nature is mainly polemical and militant and not systematically organized - cfr.. LOMBARDI, 221, ff)".

[21] Mais especificamente: E. Ehrlich (com sua obra: Free Jurisprudence and Free Jurisprudence, *1903) e H. Kantorowicz "Gnaeus Flavius" (com sua obra:* The Struggle for Jurisprudence, 1906).

[22] The following are considered precursors of the authors: Bulow (1885); G. Rumelin (1891); E. Danz (1891, 1912); Stammler (1992, 1926); *and* Gény (1899, 1919). The following are considered to be the adjuncts of the Movement: M. Rumpf (1906); Stampe (1911); E. Fuchs (1909); C. Schmitt (1912); H. Reichel (1915); *and* H. Isay (1929). (NEVES, 1995:194).

> Hermann Kantorowicz (1877-1940, *Rechtswissenschaft und* Soziologie, 1910) – and a sociologist of law – Eugen Ehrlich (1862-1922, *Grundlegung der Soziologie des Rechtes*, 1912) – contributed to giving greater theoretical consistency to the proposals to problematize or abandon the formalistic legalist and conceptualist model of law, on the way to a "free" foundation, based on the Community's legal sensibility. heard on a case-by-case basis by the judge. (HESPANHA, 2012:457-458).

Ehrlich's thought was based on a sociological understanding of law, and his thesis that it is possible for the judge to freely establish his own solution has a profound repercussion.

And Rudolf Stammler's philosophy of law paved the way for the creative activity of the judge, so much so that it yielded article 1 of the Swiss Civil Code (which ended up influencing article 114 of the Code of Civil Procedure of 1939), which established that: "*When authorized to decide in equity, the judge shall apply the rule that he would establish if* he were a legislator").[23]

For Kantorowicz in the legal interpretation: a) The text of the law should be applied only if it does not hurt the feelings of the people; b) When the legal text leads to an unjust decision, the judge must ignore it and sentence according to his conviction; c) If the Judge is not convinced about how the legislator would resolve the case, he must apply the free law according to the feeling of the collectivity; d) If you can't find this feeling, you should decide at your own discretion.

The Movement specifically combated three fundamental postulates of positivism: 1) *The postulate of statist legalism*, which understood the law as the exclusive source of law, sustaining the existence of extra-legal sources, competed with legal law with free law and, here, law and law were distinct understandings. 2) The *postulate of the logical plenitude of the legal system*, which is the idea of logical-normative self-sufficiency, 3) *Law as a rational entity subsisting in itself or as a logically-rationally determinable and logically-deductively applicable system*, which is law as logic, detached from social reality.

Contrary to these postulates, the movement affirmed that legal thought should belong to the axiological-normative and practical-emotional sphere, it had to do directly with life and the demands of social reality, since it was there that legal problems would arise, then, under these "social requirements, these problems should be solved". (NEVES, 1995:196-197).

These postulates were not exclusive to the Free Law Movement, some points shared with other currents of legal thought, so the difference between F. Gény's idea and the Free Law Movement was that F. Gény understood that even free, research should still be scientific, it did not have an emotional-subjective or intuitive nature.

In the Free Law Movement, the creative foundation of the law was the will, it was driven by the concrete intuition of the just, the juridical conscience or by the feeling of the right, he recognized

[23] An interesting criticism of this article is made by Pontes de Miranda (1998:376-380), the author, understands that the conditioning of the judge's decision for equity to the legal authorization is a convenient limitation, because equity has an indeterminate concept, nowadays the gnt has article 140 of the Code of Civil Procedure which says that the judge can only act with equity in the cases provided for by law.

the legitimacy of *contra legem decisions*, invoking the principle of jurisdiction, but in only two cases: 1) if the law "did not offer an indubitable solution" and 2) "if it concluded, freely and conscientiously" that the legislator would not have at the "time of the decision prescribed the solution set out in the law". In such cases, the judge should decide in the sense that he presumed to be the direction he would take if he were the legislator. And if he could not determine the meaning, he would have to decide according to free law, he could also decide freely in very complex cases and in quantitative cases. (NEVES, 1995:199-200)

Thus, there were several factors that cooperated for this Movement:

> On the legal level, in line with the change in the social sphere, (legal) certainty, which postulated a stable right of predictable certainty and formal equality, is now confronted with the intention of justice and its demand for a materially founded right and of concretely adequate realization". (NEVES, 1995:195)

In essence, this movement affirmed "the necessary freedom of the jurist in the search for law", denying the purely logical operations that the classical methodology preached. For A. Castanheira Neves (1995:195), the classical methodology that the Movement opposed referred to "legalistic positivism in the pandemic version, the systematic and logicist positivism that was the result of the evolution of the historical school in Germany".

> Each of the three modalities of nineteenth-century positivism had its antithesis: Free Scientific Research in France, the doctrine of the second Ihering, the School of Free Law and the Jurisprudence of Interests in Germany, and legal realism in England and the United States. [...] From legal positivism, there was a migration to axiological-evaluative and/or factual positivism, in the case of realist/empiricist positions. What at first appeared to be the solution to a problem turned out to be, over time, the problem resulting from the solution (STRECK, 2017:171-172).

However, it can be seen that the Free Law Movement was a reaction to orthodox legal positivism, being a great influence on the ideas of free scientific research developed by F. Gény. A. Castanheira Neves (1995:200) believes that it is necessary to consider that "free law in the terms indicated" by the Movement is unacceptable, but he had "the great merit of having highlighted the problem of gaps, of drawing attention to the decisive moment of the concrete legal decision, of accentuating the participation of non-logical-formal factors" in the legal judgment, Thus, he clarified "the impossibility of confusing the law with the law".

6 HERMENEUTICS IN BRAZIL IN THE NINETEENTH CENTURY

After all, what are the reflections of the modern-exegetical codification phenomenon in the construction of the hermeneutical methods adopted in Brazil?

First of all, it is necessary to highlight the limits of liberal ideas, of the Enlightenment and of Juspositivism itself in Brazil, a country that lived under a monarchy and a Constitution with moderating power until the end of the nineteenth century.

In the nineteenth century, the idea of nation, the late higher education, including legal education and the formation of an intelligentsia began in Brazil. The first two higher education law courses in Brazil were in São Paulo and Recife.

The main legal issues discussed in Brazil in the nineteenth and early twentieth centuries (legislation, doctrine, jurisprudence and consequently the methods of interpretation) were always the subject of publication in the emerging legal journals of the time.

In Brazil, the influences of the codifying discourse are already visible with the law of October 20, 1823, [24]even before the first constitution, where Dom Pedro II establishes that the Ordinances of the Kingdom of Portugal would be in force on Brazilian soil until codes were elaborated and approved that would replace the law compiled in the ordinances.

When the Philippine Ordinances came into force in Brazil, they were already considered obsolete[25] by many jurists because "they sustain the legal tradition of the compilers" (STAUT JÚNIOR, 2009:113).

> With the arrival of new, more "modern" times, the Philippine Ordinances, as in the historical course of the *ius commune*, began to be increasingly accused of being obsolete, defective and incomplete. However, from the second half of the eighteenth century onwards, in Portugal, the Ordinances underwent important modifications. There is a kind of "updating" of the old Portuguese legislation in an environment of centralization of political power, of an attempt to value the legislative sources (primacy of the law) and of reducing uncertainties in the legal field. The Pombaline policy for law, in the broader set of changes driven by the enlightened despotism of the Marquis of Pombal, sought to subject the production of law and the activity of jurists to a stricter control of the crown. Legislative reform is the first fruit of this project. What can be observed is a significant increase in the production of new laws drafted by the Portuguese Empire with the clear intention of reducing the relevance of other normative sources, other than the actual legislation, such as customs and doctrine. (STAUT JÚNIOR, 2009:114).

It should be noted that the first elaboration codified in Brazil was the Criminal Code of 1830, followed by the Criminal Procedure Code of 1832, contrary to the influx of rationalization of civil rights preached in the genesis of the first codes. Only in 1916, effective in 1917, will we have a text of codified civil laws in Brazilian law.

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[24] Access: <https://www2.camara.leg.br/legin/fed/lei_sn/anterioresa1824/lei-40951-20-outubro-1823-574564-publicacaooriginal-97677-pe.html>.

[25] "The Philippine Ordinances, in Book III, Title LXIV, delimited the relations between the common law and the law of the realm, establishing the "prevalence of the law of the country (Ordinances and extravagant legislation) over the common law (Gloss of Acursius, Commentaries of Bartolo, opinio communis doctorum)." But, despite the institution of a kind of "normative hierarchy", what can be observed is that the very practical activity of Portuguese literate jurists ended up contradicting or disrespecting the established order. Whether due to the fact that many matters did not find a regulation in the law of the kingdom, or due to the very training of the jurists of the time (in schools of Roman and canon law), the decisions and solutions to legal problems were often based on the doctrinal weight of common law. (STAUT JÚNIOR, 2009:112).

The Brazilian legal culture, still in formation in Imperial Brazil, began to consolidate itself with the training of the first Brazilian jurists.

> From a cultural point of view, from the second half of the nineteenth century onwards, some events can be observed that indicate a different moment in Brazilian law and legal culture, despite many permanences. There is a new generation of national jurists and professors trained not in Coimbra but in Brazilian legal academies. It is already possible to observe in this period of the Empire a certain legislative framework (such as, for example, the Imperial Constitution of 1824, the Criminal Code of 1830, the Commercial Code of 1850 and the Land Law of 1850) and the emergence of comments on this body of laws. In this same perspective, there is the emergence of a greater doctrinal production (books and manuals) written by Brazilian jurists. (STAUT JUNIOR, 2009:107)

In this same context, the legal culture that was being formed was predominantly elitist, "the Brazilian legal culture in the first half of the nineteenth century was composed of a handful of children of the elites educated at the University of Coimbra", in addition, by "students trained from the 1930s onwards in the young and pragmatic law courses of Recife and São Paulo". Thus, "one could not expect a strong scientific awareness of the cultural reception of the tradition of the French civil code, as well as of the discussion of French jurists, in a context like this". (FONSECA, 2005:97-116)

Having as a primary reflection the teachings of the Portuguese legal schools, the Brazilian jurists have in front of them the role of consolidating the codified Brazilian law under the legal influence of what was put in the Universities of the time and the scenario of validity of a compiled law, where the customary value is rooted in its essence but prohibited by the Law of Good Reason[26]. in a clear miscegenation of sources of law.

> In addition to the significant growth of Portuguese legislation and the relevant changes in the framework of the sources of law, the Pombaline reform also affected legal education. The university legal statutes were modified in 1772 in order to privilege national law to the detriment of the doctrinal opinions enshrined in the old statutes. Legal education in Portugal is substantially changed in both the Faculty of Laws and the Faculty of Canons. The professors are all replaced, new chairs are created that sought to establish a more modern teaching of law, strict controls of the attendance and evaluation of students are established, a strong control is exercised over the content of the classes, the teaching methods are modified, the practical training of the bachelor of law is also concerned, foreign manuals and compendiums are adopted with (naturalist) guidelines more appropriate to the time, Roman law was required to be the *usus modernus pandectarum*, among other measures that sought to link legal education to the new Pombaline policy for law. (STAUT JÚNIOR, 2009:116).

On the influences of the Pombaline reform on Portuguese law, António M. Hespanha explains that:

> [...] It is not yet now that the primacy of national law is guaranteed. By insisting on linking the politics of law to the 'modern use of Roman law' and to the solutions enshrined in the legal orders of the 'polite and civilized nations', the Pombaline legislator opened the door to the influence of the new Enlightenment (and later liberal) law of the German and Italian states and, later, of France, whose codes had a direct application in many areas until the entry into

[26] That it devalued "customs, jurisprudence and doctrine to the detriment of the laws of the kingdom". (STAUT JÚNIOR, 2009:114)

> force of the Civil Code of the Viscount of Seabra (1867). In other words, although the Pombaline period represents a time when law was linked to monarchical politics, it did not yet realize that image of Épinal, to which the more traditional historiography referred, of a law and a body of jurists functionalized to a centralizing political project. (HESPANHA, 2006)

In *the Compendium of Legal Hermeneutics*[27] (Recife, 1872), jurists already criticized the limited role of the judge in French law, and brought rules that should be complied with in cases that were subject to interpretation. They understood that interpretation was appropriate whenever there was some obscurity in the law to be revealed, or some incoherence and contradiction to be avoided (or some gap to be filled). Thus, in 1872 it was already possible to see that jurists understood that the wording could have defects. (BAPTISTA, 1872).

According to Francisco de Paula Baptista (1872), the means of interpretation should follow some rules: (1) the analysis of the construction of the text should be based on the rules of orthography, syntax and language; (2) the various meanings of the words, be they grammatical, juridical, usual, absolute or relative, exemplifying or exhaustive or enunciative or dispositive, should be considered, so care should be taken with the meaning of the words at the time when the law was made; (3) the comparison within the law with other provisions should be made, since the jurists understood that the same spirit should have presided over the entire drafting of the law; (4) the jurists used the comparison with other previous and analogous laws, because this was the idea of the legislator, which he took into account when making the law, precisely to avoid inconsistencies and contradictions between analogous laws; and, (5th) regarding the motives of the law, which demonstrates the thought of the legislator, Francisco Baptista (1872) understands that they could be remote and subjective (given at the time of the law) and close and objective (which were the foundations). These factors, considered close and objective, were of an intrinsic nature, according to Savigny (apud BAPTISTA, 1872), that "these motives are in the same logical relation to the law as principles are with their natural consequences". As an example of the motives of the law, Francisco Baptista (1872) uses the law of the time that postulated the prohibition of women from seeking other people's business: "the origin, or the remote motive of this law was the animosity of a certain woman, who indulged in forensic business, while the proximate and general motive was deduced from good customs and public decency".

Another rule still to be observed (6th) was regarding the preparatory work of the law, that the whole set should be considered in the interpretation, as this was the most probable intention of the wording. In this specific rule, Francisco Baptista (1872) cites the preparatory works of the *Civil Code* in France. For the author, the auxiliary rules were based on an interpretation in accordance with the letter of the law, so that it considers the nature and importance of the business treated, this interpretation

[27] By the Author: Francisco de Paula Baptista. Other important jurists also published on hermeneutics at that time, in 1838, Correia Teles, with the *Theory of Interpretation of Laws; and, in* 1861, Bernardino Carneiro, with *First Lines of Legal and Diplomatic Hermeneutics.*

should in common law be in conformity with equity and, in criminal laws, it should be in the most humane way, that is, that which brings the least evil. (BAPTISTA, 1872).

According to Warat (apud STRECK, 2014:160), among the twelve main formulas of signification by different hermeneutic methods and techniques, there is the "appeal to the spirit of the legislator" (coming from the exegetical method); the "systemic idealization of the real in search of social adaptability" (derived from the method of the French Scientific School); and, the "interpretation based on the search for decision-making certainty" (a method derived from the School of Free Law).

> These methods or theories, Brum explains, "can be seen as *rhetorical instances* that have the function of channeling, in an apparently neutral and scientific way, certain values that one wants to preserve. Depending on the method or set of methods used, the line of decision can be changed, drawing different legal consequences from the same legal norm. Thus, *the fungibility of methods turns legal interpretation into a game of marked cards."* Also important is Eros Grau's criticism of the methods of interpretation: the existence of several canons of interpretation - which is aggravated by the lack of rules that hierarchically order their use (Alexy), makes *this use arbitrary.* These methods, says Grau, function as justifications to legitimize the results that the interpreter proposes to achieve. Methods thus function as a reserve of argumentation resources, depending, moreover, also on interpretation (Zagrebelsky). And, he adds, since the only thing they do is to prescribe a certain procedure of interpretation, they do not bind the interpreter (Hassemer). In other words, the *fragility of the methods of interpretation derives from the lack of a meta-rule ordering their application, in each case, of each one of them,* he concludes. It is insignificant to say that all this discussion is rooted in the various philosophical conceptions about the conditions of possibilities that man has to apprehend things, how to master them, how to know them [...]. (STRECK, 2014:162).

In Brazil, in the matter of comparative law, for example, in 1874, in a discussion about the possibility of French Courts being able to review the judgments of Foreign Courts, it is noted that the conclusion in the judgment was negative. They understood that the French courts could not review these judgments. The comments of Brazilian jurists on the case are interesting because they understand that, in Brazil, this matter was not the subject of discussion and, therefore, there was no provision in positive legislation on this subject, much less practical cases. (LEGAL GAZETTE, 1874:39).

Another example present in the Revista Gazeta Jurídica (1874:3-9) is the case of the sale of the Ourucú, which raises a discussion[28] as to whether it was possible, if there was already a sentence

[28] Here the story will be explained for a better contextualization of reasoning for the reader: a friend of a lawyer Portuguese makes comments in which he says that a friend of his entrusted a third party with the sale of Ourucú. And this third party, based on a calculation, obtained a conviction in a sentence that ordered this friend of his (who was the defendant) to pay the third the amount of 7,759 francs. This sentence was handed down by the Court of Marseille, and it also authorized the sale of the ourucú. Subsequently, a lawsuit with the same request was filed in a separate court (in Portugal). Then, the discussion began: if there was already a sentence handed down by the foreign court, would this new claim be prejudiced? The reasoning developed: The lawyer brings the sentence of the second case, in which the judge develops the reasoning based on the understanding that the law/law did not allow the conviction in the same request, in which there was already a sentence that was not annulled, based on the *non bis in idem*. The claim and the cause of action were the same as those contained in the action already decided, which dealt with the scope of the result of the sales of Ourucú negotiations and the claim arising from what was judged in the Court of Marseille, also because it asked for the deduction of the amount produced by the judicial sale that had been authorized. Based on this, if the judge convicted the defendant, *he understood that he would fall into the bis in idem*, and if he did not convict, it would produce the effect that made it possible to annul the sentence handed down by the Court of Marseille. Then, the judge in the case concluded that the only right the plaintiff had was to review and confirm the sentence handed down by the Court of Marseille, so his alternative was to acquit the defendant of the case. (LEGAL GAZETTE, 1874:3-9).

handed down by a foreign court, there could be a new claim, or would it be considered prejudiced? Then, the judge in the case understood that the second claim would be prejudiced based on the principle of *non bis in idem*, therefore, his alternative was to acquit the defendant from the instance.

In this sense, it is possible to perceive that a decision handed down in a Conference in France influenced cases that were judged in Portugal and were brought in periodicals of the time to serve as a source of research in case something on the matter was judged in Brazil.

Another case that is brought here as an example to ascertain how the theoretical-legal reflexes dealt with influenced Brazil in matters of interpretation of the rule, is a case that could fit today into credit law. This case[29] is about credit privileges in the mortgage regime. Then, based on the spirit of the law, the jurists understood that it had established different classes of privileges, as in the case of the Code of France, Italy and Portugal, in the case of limitation of preference to certain objects in certain orders of goods. Thus, the Brazilian law created its own system of preference, being a reflection of the Napoleon's Code the provisions of the legal mortgages of the interdict, of the minor, of the married woman and in the guarantees for lack of registration. But, as for privileges, Brazilian law was similar to the laws of Italy and Portugal with regard to exemption from registration or registration. (LEGAL GAZETTE, 1874:9).

In 1906, the jurist Clóvis Beviláqua (1906:15), published a text explaining *the function of the interpreter* (in Brazilian law), pointed out the events with the Schools of Exegesis and Scientific, in France, and with the Historical School, in Germany. He also observed that the interpretation of the law must be confined, first of all, to what is meant by reasonable, and then, to the systematic consequences, finally, the interpretation will turn to the historical development of civilization, and, for this purpose, "the preparatory work and the paramentary discussion are devoid of value", he concluded his thought by informing that "on this point many masters of today's hermeneutics are in agreement. Not that they

[29]The history and its reasoning: The first comments in the Revista Gazeta Jurídica (1874:6-9) are to the effect that there were divergences in the laws of other countries. That in France, the legislator would be more concerned with the relations of interest of the family, than with the preference of credit in particular and of the mortgage loan. In France, there was a rule that privileges would only take effect against third parties from the date of publication of the entry. In France, the reservation I had was about the principle of publicity as a restriction in the case of a legal minor, there is an interdict and there is a married woman, in these cases. In the Piedmont Code, there was a three-month rule to register the privileges of credits, and after registration the effects would be retroactive to the date of constitution of the credit. In Portugal and Italy, on the other hand, the legislation enshrined the privilege without the need for registration, so they would be reduced to personal rights, they did not give the right of sequelae in the case. In 1864, mortgage law no. 1237 appeared, and as for privileges, the question arises about the doubts in the legislation as to which credits would no longer be contemplated in those who enjoyed a legal mortgage. In the Revista Gazeta Jurídica (1874:9) it is mentioned a judgment of the Supreme Court of Justice that denied an appeal and ended up indirectly maintaining the understanding that the credit of a contractor for the construction of houses would be unsecured credits and that they had no preference over mortgage creditors, being creditors in general in the case of bankruptcy. In the Revista Gazeta Jurídica (1874:9) it is possible to perceive the criticism of jurists to this decision of the STJ, because, in their view, this understanding contradicted the principles of justice, equity and the law as it should in fact be understood. Also, that the foreign law would influence in some points the Brazilian law on mortgages, and, by analyzing such influences, it would be known how the law should in fact be understood. This is because, according to our mortgage system, although privileges are not rights in rem, they do not confer the right of sequela, and therefore they cannot in any case prefer mortgages on the property encumbered by them. Jurists take the view that this interpretation is broadened *by the stricti juris privileges* and that they can only include the goods which were subject to them by the previous legislation. (LEGAL GAZETTE, 1874:9).

go so far as to opine with the illustrious *Kohler*[30] that it would be prudent not to publish these preparatory works, such as, for example, the *Reasons of the* German Civil Code", but the hermeneutics recognized that "the criticism of the noted jurist strikes the mark well on many points on which it is exercised". (BEVILÁQUA, 1906:15). For the jurist:

> This new aspect of the doctrine in France and the growing audacity in the jurisprudence show, on the one hand, that the ideas on interpretation no longer satisfy the demands of the moment today; whereas the law is not the sole source of law; and that social life reacts incessantly on the law. [...] Among the many other examples that national law offers us in this regard, we can recall that of life insurance, which, expressly condemned by the Code, has made its way into the legal conscience and has been definitively recognized by doctrine and jurisprudence. (BEVILÁQUA, 1906:13-18).

However, after reflecting on these examples of interpretative analysis related to the years following 1800, it is possible to perceive the *mixture of* codifying traditions in our civil laws[31], such as the mortgage law, which was influenced by three different codes. (LEGAL GAZETTE, 1874:9). Thus, a mixed hermeneutic legal model is generated that is solidified in the false idea of "better" and "more evolved" and that generates consequences for Brazilian law.

For example, when the Civil Code of 1916 was published, it had main influences from the French Civil Code (1804), the Portuguese Civil Code (1867) and the German Civil Code (1900), it also covered subsidiary reflections of the Civil Codes: Prussian (1794); of Bavaria (1756); Sardinia; of Two-Sicilies; of Lusiana; of the Duchy of Baden; the Cantons of Vaud; of Fribourg; the Austrian (1811), the Canton of Berne (1831); Holland (1838); of Chile (1856). (STAUT JÚNIOR, 2009)

On the subject, Lenio Luiz Streck (2011:29):

> So we have always been grappling with this complicated kind of syncretism. This is a problem because it ends up generating the – false – idea that, as we seek to combine all the traditions that make up Western law, we have here a "better" or "more advanced" law. Surely this is a big mistake. Let's take a look at what we have in terms of constitutional review: our model is a mixture of the diffuse North American system with the concentrated system from continental Europe; we mix a model in which the system is closed by a Constitutional Court, with another that has a Constitutional Court at the apex. It is worth asking: does this have any consequences? Does the fact that we have this mix of traditions in *terrae brasilis* make our model of constitutional review something "better" or "more effective" than those experienced elsewhere, more "pure" from a systematic point of view and focused on a specific model of constitutional jurisdiction? Regardless of the answers that may be offered to these questions, it seems clear that this "juridical ecumenism" has serious consequences at the level of operationality. (STRECK, 2011:29)

However, regarding the hermeneutic techniques used in Brazil in the heyday of the School of Exegesis, it is possible to perceive that exegetical methods significantly influenced the way of deciding

[30] As Clovis Beviláqua points out, "Kohler understands that the preparatory work and the parliamentary discussion do not have the importance that has been given to them, they only serve to indicate the historical conditions of the people and the impulses that determined the creation of the law as a remedy to meet the needs of the moment". (BEVILAQUA, 1906:16).
[31] Several other examples could be cited, such as article 4 of the Law of Introduction to the Rules of Brazilian Law, articles 126, 127 and 128 of the Code of Civil Procedure/73 (articles 140, 141 and 142 of the CPC/15).

in Brazil, however, in addition to it, it was possible to see great references to German authors, as well as techniques such as the "appeal to the spirit of the legislator"; the "systemic idealization of the real in search of social adaptability"; and, the "interpretation based on the search for decision-making certainty", characteristics, respectively, of the School of Exegesis, the Scientific School and the Free Law Movement, are still present in Brazilian legal hermeneutics. (STRECK, 2014:160). Another factor that deserves to be highlighted *is the mixture of traditions* in the codification movement in Brazil, it is possible to perceive a mixture of several foreign laws to form a specific law of the matter in Brazil, understanding the idea of taking advantage of the best factor of each model so that it is possible to assemble an ideal and more complete law. (STRECK, 2011:29).

7 FINAL CONSIDERATIONS

The theories developed by several legal schools, despite advances and setbacks, are important studies for the analysis of the theory of law and contemporary legal hermeneutics, thus, disregarding the history of the construction of doctrine, law and jurisprudence constitutes a huge deficiency for the scientific study of Law.

Despite being considered a kind of primitive legal positivism, the studies of the School of Exegesis praised the performance of the legislator, which ended up turning attention to the limitation of the jurist's performance, and the need for a free scientific investigation of law preached by the Scientific School, studies that served as a paradigm for research in Law.

The program of the Scientific School also influenced movements that sought to criticize the orthodox positivist method, as in the case of Germany, with the Free Law Movement, which despite its liberating and subversive spirit was of great importance in raising questions at the time about the gap in law and the importance of not confusing law and law.

It can be seen that the influences of French and German Law in Brazil in the years following 1800 were significant, some still present in the legislation in force, and the important notes of the Brazilian jurist Clóvis Beviláqua, in 1904, about the need to go beyond exegetical "interpretation", uniting positive and scientific law, law and jurisprudence. so that the rules of law can be systematically organized. Another characteristic that deserves attention is the *mixing of traditions* and the consequences that this tradition brings to Brazilian legal hermeneutics.

REFERENCES

ARNAUD, André-Jean. O Pensamento Jurídico Europeu. Lisboa, Editora Internacional, 1995.

BAPTISTA, Francisco de Paula. Compendio de Hermenêutica Jurídica: para uso das Faculdade de Direito do Império. 3. ed. Recife: Editora Não Identificada, 1872.

BARRETTO, Vicente de Paulo. Dicionário de Filosofia do Direito. Unisinos: São Leopoldo. 2009.

BEVILÁQUA, Clóvis. A funcção do Interprete. Revista Acadêmica da Faculdade de Direito do Recife - vol. 14, n.1, 1906

BONNECASE, J. Escuela de la exegesis en derecho civil. Puebla: Cajica, 1944.

CAENEGEM, R. C. van. Juízes, legisladores e professores. Rio de Janeiro: Elsevier, 2010.

CASTANHEIRA NEVES, Antonio. Digesta: escritos acerca do Direito, do pensamento jurídico, da sua metodologia e outros. Coimbra: Coimbra Editora, 1995. v. 2.

FONSECA, Ricardo Marcelo. A formação da cultura jurídica nacional e os cursos jurídicos no Brasil: uma análise preliminar (1854 - 1879). Cuadernos del Instituto Antonio de Nebrija. Universidade Carlos III de Madrid: Editorial Dykinson, p. 97-116, 2005.

FORMIGA, Armando Soares de Castro. Aspectos da codificação civil no século XIX. História do direito e pensamento jurídico. Curitiba: Juruá, 2012.

FORMIGA, Armando Soares de Castro. Periodismo Jurídico no Brasil do Século XIX: História do Direito em Jornais e Revistas. São Paulo: Juruá, 2010.

GAZETA JURÍDICA. REVISTA SEMANAL DE JURISPRUDENCIA, DOUTRINA E LEGISLAÇÃO. PROPRIETARIOS E REDACTORES: CARLOS FREDERICO MARQUES PERDIGÃO E ALVARO CAMINHA TAVARES DA SILVA (MENBROS EFFECTIVOS DO INSTITUTO DA ORDEM DOS ADVOGADOS BRASILEIROS). ANNO II, VOL. IV, N. 79. DOMINGO, 5 DE JULHO DE 1874. RIO DE JANEIRO. Harvard Law School. Link: https://ia800201.us.archive.org/2/items/gazetajuridicar00porigoog/gazetajuridicar00porigoog.pdf.

GENY, François. Método de interpretación y fuentes en derecho privado positivo. 2. ed. Madrid: Reus, 1902.

GILISSEN, John. Introdução histórica ao Direito. Fundação Calouste Gulbenkian: Lisboa. 1995.

GROSSI, Paolo. Mitología jurídica de la modernidad. Madri: Trotta, 2003.

HESPANHA, Antonio Manuel. A Cultura Jurídica Européia. Almedina: Coimbra. p. 400-458. 2012.

HESPANHA, António Manuel. O direito dos letrados no império português. Florianópolis: Fundação Boiteux, 2006.

LIMA, Iara Menezes. Escola da Exegese. Revista Brasileira de Estudos PolÍticos, Online, p.105-122. 2008.

MARQUES, Mário Alberto Pedrosa dos Reis. Codificação e paradigmas da modernidade. Coimbra. Editora Coimbra, 2003.

MAXIMILIANO, Carlos. Hermenêutica e Aplicação do Direito. 20 ed. Gen: Rio de Janeiro. 2011.

MIRANDA, Pontes de. Comentários ao Código de Processo Civil. Rio de Janeiro: Forense, 1998, p. 376-380.

PERELMAN, Chaim. Lógica Jurídica. Martins Fontes: São Paulo. p. 31-68. 2000.

REALE, Miguel. Lições Preliminares de Direito. 13 ed. Saraiva: São Paulo. 1986.

STAUT JÚNIOR, Sérgio Said. A POSSE NO DIREITO BRASILEIRO DA SEGUNDA METADE DO SÉCULO XIX AO CÓDIGO CIVIL DE 1916. Tese (Doutorado) - Curso de Direito, Universidade Federal do Paraná, Curitiba, 2009.

STEIN, Ernildo. Aproximações sobre Hermenêutica. Porto Alegre: EDIPUCRS. 1996.

STRECK, Lenio. Hermenêutica jurídica e(m) crise. 11 ed. Porto Alegre: Livraria do Advogado, 2014.
STRECK, Lenio. Jurisdição Constitucional. 6 ed. Rio de Janeiro: Forense, 2019.

STRECK, Lenio. Aplicar a letra da lei é uma atitude positivista?. Revista NEJ: eletrônica. Vol. 15. n.1. p. 158-173. 2010.

STRECK, Lenio. Verdade e Consenso. Saraiva: São Paulo. 2011.

STRECK, Lenio. Dicionário de Hermenêutica Jurídica. Coleção Dicionários Jurídicos: Belo Horizonte. 2017.