The Assault on Classical Legal Thought in Colombia (1886-1920)

Jorge Gonzalez-Jacome, Pontificia Universidad Javeriana

Available at: https://works.bepress.com/jorge_gonzalez_jacome/14/
Abstract

The topic of this paper is the tensions among classical legal thought (CLT) and other modes of legal thought in Colombia between 1886 and 1920. My main claim is that, during this period, CLT was attacked by a version of traditionalism and by a social-based legal thought. The former was evident in the constitutional discussions around the 1886 Colombian Constitution, while the latter became apparent in the interpretation of the Civil Code in areas such as property, contracts and torts. My goal is to tell a story that gives a sense of the fall of CLT as a process crossed with tensions and not merely as an abrupt replacement of one consciousness with another. Therefore, I show not only the attacks but also the responses of CLT to the threats posed by traditionalism and social-based legal thought.

This work is divided into four main parts. Part I explains the issues at stake in CLT. It gives a broad idea about the claims of this mode of thought in Colombian legal history. Part II presents the conflict between traditionalism and CLT in constitutional law. The discussions led by the main figures of traditionalism and CLT in Colombia show how both modes of legal thought shared an authoritarian project that was expressed through different arguments. Part III introduces the tension between CLT and social-based legal thought. To make evident this conflict I divide this part into three sections dealing with property, contracts and torts. In Part IV I offer some conclusions.

* This work, written under the supervision of Duncan Kennedy, was submitted as a partial fulfillment to obtain the LLM degree at Harvard Law School on May 1, 2009. Please do not cite without author’s permission.
Introduction

This paper is an historical reconstruction of the attacks suffered by Classical Legal Thought\(^1\) in Colombia between 1886 and 1920. CLT was a mode of legal thought predominant worldwide between 1850 and 1900.\(^2\) By a mode of legal thought –or legal consciousness– I refer to a “shared premises about the salient aspects of the legal order […] concerning the historical background of the legal process, the institutions involved in it, and the nature of the intellectual constructs which lawyers, judges and commentators manipulate as they attempt to convince their audiences.”\(^3\) CLT articulated its explanation of law and legal institutions as expression of the will of the individuals and the State –that is, the will theory. My claim is that CLT was attacked in Colombia by two different modes of legal thought: traditionalism and a social-based mode of legal thought.

The traditionalist attack, influenced by the Catholic Church, was strongly felt in constitutional doctrine especially in the explanations of political power and theories about rights and liberties. Traditionalism emphasized the moralizing role of law and rejected the conception that legal institutions were established to ensure the will of legal participants. The social mode of legal thought appeared in areas such as property, contracts and torts, fields regulated in the Civil Code. It also rejected the will theory on the grounds that law was a means to an end. It was different from traditionalism because it did not focused on the moralizing power of law but in the way legal institutions could overcome the growing conflict between capital and labor due to industrialization. In this paper I show how traditionalism and social-based legal thought

---

\(^1\) Hereinafter CLT.
\(^2\) Duncan Kennedy, Three Globalization of Law and Legal Thought in THE NEW LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL 19 (David Trubek & Alvaro Santos eds. 2006).
\(^3\) Duncan Kennedy, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 11 (1975).
challenged CLT in different areas of law, and the ways in which CLT reacted to these attacks through conceptualizations of law and legal institutions in its own terms.

My work builds on the developments of Duncan Kennedy in *Three Globalizations of Law and Legal Thought* and Diego Lopez’s *Teoria Impura del Derecho*. From the first one I borrow the idea that legal thought globalized around the world between 1850 and 2000 making it possible to identify at least three different legal consciousnesses. According to Kennedy, CLT and social-based legal thought globalized, respectively, from 1850 to 1900 and from 1900 to 1968. He argues that even though there is a globalization of modes of legal thought around the world, this does not mean every legal order developed the same solutions for legal problems. What globalized was a mode of thinking, type of arguments, conceptions about law and legal institutions. In the framework of these general legal tools, local legal elites creatively built a wide array of possibilities to deal with their problems. Building from the structural distinction between *langue* and *parole*, Kennedy argues that what globalized was the former, whereas local legal elites created different kinds of *paroles* spoken in the terms of the *langue*. In this sense, this paper is a history of a *parole*: the Colombian. I distance myself from Kennedy’s approach to the extent he pays little attention to a traditionalist mode of legal thought. I argue that traditionalism also contributed in the attack against CLT. My paper offers a different narrative strategy to the extent that I show the tensions and discussions between traditionalism and CLT on one hand, and CLT and social based legal thought on the other. Thus, I tell the story of Colombian legal thought between 1886 and 1920 as a period of ongoing tensions where CLT tried to resist some of the attacks posed by the other two modes of legal thought.

---

4 Kennedy supra note 2.
5 DIEGO LOPEZ, TEORIA IMPURA DEL DERECHO (2004).
I also build from Diego Lopez’s periodization of Colombian legal thought. He shows how a classical understanding of law was attacked in the first years of the twentieth century and was replaced by a social-based legal thought. In this sense, I choose the period of analysis bearing in mind his findings about Colombian legal thought. I believe my work pushes forward his findings by linking his explanations of treatise writers’ “misreadings” of foreign doctrine with the case-law of the time. I also think my approach is somewhat different from his to the extent that I pay less attention to the structure of legal reasoning and to the dichotomy formalism/antiformalism; instead, this paper focuses more on the legal elites’ views of the role of law and legal institutions in society. With this move my goal is to make more evident the politics of the legal field and reject readings of Colombian legal history as a conflict between formalism and antiformalism.

The sources I use are mainly the Colombian Constitutional Law and Private Law treatises, and Supreme Court opinions written between 1887 and 1920. In the case of Constitutional Law textbooks the only one published during this period of time was written by Jose Maria Samper. This treatise was influential for Colombian legal elites who copied the structure of Samper’s text in their twentieth century constitutional textbooks. A 1982 reprinting of his book eloquently speaks for the penetration of his thought in the Colombian twentieth century jurists. The other constitutional thinker of this period I will take into account is Catholic-

---

7 See Lopez, supra note 5.
9 Jose Maria Samper, Derecho Publico Interno Tomo I (1887) [heraafter Samper I] & Derecho Publico Interno Tomo II (1887) [hereafter Samper II].
10 Samper presented in the first volumen of his treatise a history of Colombian Constitutions. The second part was a commentary of each article of the Constitution. This structure was followed, among others, by: Francisco de Paula Pérez, Derecho Constitucional Colombiano (1942); Alvaro Copete Lizarralde, Lecciones de Derecho Constitucional Colombiano (1951); Javier Henao Hidrón, Panorama del Derecho Constitucional Colombiano (1980).
Conservative Miguel Antonio Caro. Even though he did not publish a constitutional law textbook, his thought was influential for conservative lawyers and his work was published in diverse books by the *Instituto Caro y Cuervo* along the twentieth century. In my narrative, Caro is the representative of “traditionalism”, while I portray Samper as an authoritarian classical legal thinker.

Regarding private law, I focus in three of the private law treatises written during this period by Antonio Jose Uribe and Edmond Champeau\textsuperscript{11}, Fernando Velez\textsuperscript{12} and Eduardo Rodriguez Piñeres.\textsuperscript{13} Uribe and Champeau, on one hand, and Velez, on the other, published their work in the turn of the twentieth century while Rodriguez did so 1919. Velez started the publication of his seven-volume treatise in 1898 and finished in 1911. Uribe only published the first volume of his work about generalities of the Civil Code and family law. Gutierrez text expressed some of the criticisms CLT had suffered during this period of time and shows how there was a discussion in Colombian private law between a classical conception about law and legal institutions and more social orientation While Velez and Uribe can be regarded, in general lines, as classical legal thinkers, Rodriguez-Piñeres represented a new line of thought associated with a social-based mode of legal thought.

This work is divided into four main parts. Part I presents the issues that were at stake in CLT in Colombia. It gives a broad idea about the claims of this mode of thought in Colombian legal history. This is a difficult task due to the few law texts published in Colombia before the 1890s. In addition to this, the absence of an archive of legal opinions prior to the 1886 makes it

\textsuperscript{11} Edmond Champeau & Antonio Jose Uribe, Tratado de Derecho Civil Colombiano. Volumen I (1898).
\textsuperscript{12} Fernando Velez, Estudio sobre el Derecho Civil Colombiano. Tomo I (1898)
\textsuperscript{13} Eduardo Rodriguez Pineres, Curso Elemental de Derecho Civil Colombiano (1919).
complicated to have a picture of the predominant mode of legal thought before this period. However, I build this picture with the help of the most important constitutional law textbook published by a Colombian scholar in Argentina, and the views of political and economic historians. Part II presents the conflict between traditionalism and CLT in constitutional law. The debate was influenced by the enactment of the 1886 Constitution and the discussions led by Caro and Samper around this issue. This part is divided into two sections: the first deals with the arguments about the origins of political power and the second explains the discussion around right and civil liberties. Part III introduces the tension between CLT and social-based legal thought based on the private law treatise literature and opinions of the Supreme Court. To make evident this conflict I divide this part in three sections: property, contracts and torts. In Part IV I offer some conclusions.

I. The Issues at Stake in CLT

Classical Legal Thought was a mode of legal consciousness dominant in the West between 1850 and 1900. Its basic premises were articulated around the idea of the will theory which asserted that law was established to advance the will of the participants of the legal realm. The State and the individuals were the legal actors whose will was advanced by legal institutions. Within their sphere, individuals and states held absolute powers finding a limit to the exercise of their will in the spheres of other legal actors. Under CLT, property and sovereignty were the key notions that explained the absolute powers that individuals and states had within their

---


sphere. Individuals against individuals, states against states, diverse branches of power inside a
State, and individuals against the State, were the possible conflicts that could arise under this
scheme. The first kind of conflicts among individuals was the province of private law, which was
understood as the law of obligations and property on one hand, and family and successions on
the other.\textsuperscript{16} Public International Law resolved the potential conflicts between states, while
Constitutional Law was in charge of defining the spheres of the individual vis-à-vis. the State,
the powers of the different branches of government and even the conflicts between the states and
the Federal State in other cases.\textsuperscript{17}

In Colombia, the times of CLT correspond with the years where the project of the Liberal
Party was dominant in the political arena. After the 1850s this party argued for a federal
organization of the country, sought the separation between Church and State and fought to
establish economic and political liberalism –individual rights, free commerce, and little
intervention of the State in private matters.\textsuperscript{18} In general terms, they thought that Colombia had to
get rid of the Hispanic heritage, which was the main cause for the poor economic performance of
the country in the first half of the nineteenth century. Jose Maria Samper, one of the main liberal
thinkers of the second half of the nineteenth century, accused Spain of establishing a “fiscal
inquisition” in colonial times through the State monopoly of some products. He saw that this
intervention of the State in free commerce was a cause of the diminished role Spain played in
world politics and economics in the second half of the nineteenth century. Thus, Samper –along
with other liberals– wanted to follow what they envisioned as England’s successful path of

\textsuperscript{16} \textsc{Friedrich Karl von Savigny}, \textit{System of the Modern Roman Law} (William Holloway trans. 1979).
\textsuperscript{17} See generally: \textsc{Albert Venn Dicey}, \textit{Introduction to the Study of the Law of the Constitution} (8\textsuperscript{th}
ed. 1915)
\textsuperscript{18} \textsc{Helen Delpar}, \textit{Red Against Blues: The Liberal Party in Colombian Politics 1863-1899} (1981).
economic and political organization.\textsuperscript{19} Between 1850 and 1880, the Liberal Party saw society as nothing more than the sum of individuals and thus rejected any argument sacrificing rights and liberties in the name of a superior or metaphysical idea of collectivity.\textsuperscript{20} The only limit for the will of the individuals was the realization of a reduced will of the State or the will of the individuals.

This mode of thought was evident in \textit{Lecciones de Derecho Constitucional}, textbook written by Florentino Gonzalez\textsuperscript{21} who was not only one of the most important leaders of the Liberal Party but also a relevant figure in the economic and constitutional reform that Colombia underwent after the 1850s. His book was published in Argentina and was used when he taught this subject in Buenos Aires during the 1870s.\textsuperscript{22} His explanations about the role of government and individuals in the construction of a political community showed that he saw law as the realization of the wills of individuals and the State, making it the role of constitutional law to give some balance to the spheres of these legal participants:

\begin{quote}
The purpose of government is to drive society towards the highest conception of good for each of its members; and since this good cannot result but from the enjoyment of each individual of some liberties and rights inherent to mankind due to its nature of a rational and free being […] such rights should be one of the most essential limits of the power delegated to government. It should be declared, then, that the power delegated cannot be
\end{quote}

\begin{flushright}
\textsuperscript{19} \textsc{See Jose Maria Samper, Ensayo sobre las Revoluciones y la Condicion Politica de las Republicas Colombianas (Hispano-Americanas) (1861). [Available at: http://www.lablaa.org/blaavirtual/historia/revpol/indice.htm#indice]}
\textsuperscript{20} \textsc{Jaime Jaramillo Uribe, El Pensamiento Colombiano en el Siglo XIX (1961).}
\textsuperscript{21} \textsc{Florentino Gonzalez, Lecciones de Derecho Constitucional (2 ed. 1871).}
\textsuperscript{22} Gonzalez also taught before in Colombia. However his work as a constitutional thinker was received apparently better in Argentina where a federalist regime was established. In Colombia, the federalist regime started its downfall in the final years of the 1870s; Gonzalez’s influence in Colombian legal elites suffered the same fate. Nevertheless it is important to notice that he was one of the principal reformers of the Liberal Party and a defender of the Federal and Liberal Constitutions enacted in Colombia during the 1850s and 1860s.
\end{flushright}
extended to take away or to regulate those rights and liberties of individuals. Thus, the [extension] of the delegation of power shall be understood to [include] just what it is necessary to regulate the use of such attributions that must be exercised according to a uniform and common pattern for all members of the political community, for the purpose that they do not hinder the action of government but cooperate to make it efficient and beneficial.\textsuperscript{23}

This quote captures the mode of thinking of constitutional lawyers in the times of CLT’s predominance. Gonzalez saw that individuals and the State –or government in his terms– were the legal participants that had a sphere of action. The difference among classical legal thinkers that accepted this scheme was how small/big the sphere of action could be for individuals and how small/big for the government or State. Gonzalez thought, in general terms, that individuals should benefit from a wide sphere of action while government could only exercise its will in a very limited one, only having the powers necessary to guarantee the well-being of each individual. Thus, he thought some rights and liberties were absolute and could not be regulated by the State, while others could be limited by the government according to the special needs of the social order.\textsuperscript{24} It is important to notice that CLT did not imply that individuals had to be protected in all the cases when their sphere of action clashed with the State. As Gonzalez shows, it was a political choice to decide whether to give a broad or a reduced sphere of action to the State vis-à-vis individuals. This mode of legal thought merely acknowledged that legal participants had independent spheres of action inside which they had absolute powers. Even though Gonzalez was an individualist classical legal thinker, there was also an authoritarian type

\textsuperscript{23} See: F. GONZALEZ supra note 21, at 15-6.
\textsuperscript{24} Id. at 20-1.
of CLT where the sphere of action of the State could reduce aggressively the individuals’ powers.\textsuperscript{25}

This mode of thought in Colombian legal arena was predominant during the rule of liberal ideology that started in the 1850s. The Liberal Party controlled the government for almost thirty years –until the 1880s. Under its rule, legal and political elites implemented the reforms that they saw essential for the integration of Colombia with the global markets of the second half of the nineteenth century. The reforms were characterized by the strict –and sometimes violent– separation between the State and Church, and the abolishment of most of the taxes collected by the Central government, leaving a high degree of financial autonomy in the states that formed the federal country (called the United States of Colombia since 1863).\textsuperscript{26} The Liberal Party embraced a project of secularism and integration to a global market, and thus interpreted that a Central government united with the Church, such as the one that ruled Colombia in colonial times, explained Spain’s disadvantage against England. If Colombia continued with these institutional and theoretical commitments, liberals thought, there was a risk of following the same fate of Spain.\textsuperscript{27}

The challenge to liberal predominance in the political arena coincided with the moment in which the attacks against CLT gained momentum. This occurred in the 1870s when a faction of the liberal party saw that the conflicts between labor and capital, due to an incipient process of industrialization,\textsuperscript{28} demanded a decisive intervention of the government in favor of the poor.\textsuperscript{29}

\begin{flushleft}
\textsuperscript{25} Kennedy, supra note 2 at 26.
\textsuperscript{26} Alvaro Tirado Mejia, El Estado y la Política en el Siglo XIX in NUEVA HISTORIA DE COLOMBIA. ERA REPUBLICANA 155, 163-70 (Jaime Jaramillo ed., 1989).
\textsuperscript{27} See: F. GONZALEZ, supra note 21 and SAMPER, supra note 19.
\textsuperscript{28} Bernardo Tovar Zambrano, La Economia Colombiana 1886-1922” in NUEVA HISTORIA DE COLOMBIA. ECONOMIA, CAFÉ E INDUSTRIA 9, 16 (Alvaro Tirado ed. 1989.)
\end{flushleft}
Moderate sectors of the Liberal and Conservative party –out of power since the mid 1850s– saw these claims for intervention as a road to Socialism and thus rejected them. Even though these sectors shared a concern towards the new rising conflicts, they did not support a socialist intervention to solve the problems. The alternative of these conservative elites was embodied in Rafael Nuñez, President of Colombia between 1884 and 1890, who led the process towards the reorganization of the country in a Republican Unitarian regime. The liberal-federal regime was the main target of the 1880s reformers who saw in the Constitution of 1863 the main source of the disorder of the Nation. After winning a Civil War declared by those against the centralizing reforms carried on by moderate liberals and conservatives since the beginning of the 1880s, Nuñez declared that the 1863 Constitution was dead and buried:

The Nation has barely saved itself, due to its good sense and thanks to the Divine Providence, of the armed anarchy that […] hindered the enactment of really free institutions. The government has directed with thoughtful firmness the defense of a society threatened with imminent disaster […] The great sacrifices for the victory of the national arms will not be vain [and the] economic dynamics [has to] stop the ravages of the public misery that, after some years of social insecurity, starts to reach alarming proportions.  

This portion of Nuñez’s address can be divided in two parts. In the first lines he expresses the source of disorder that led Colombia to a chaotic existence, which was basically the liberal-federal regime. The invocation of the Divine Providence, as one of the reasons for the salvation

---

29 Manuel Murillo Toro was the main representative of this faction that can be called progressive. Some of his proposals as president and minister were seen as very close to socialism causing the concern of the more traditionalist or conservative factions of the liberal party. See DELPAR, supra note 18 at 60-81.

30 Rafael Nuñez, El Presidente de la República a los Colombianos in MIGUEL ANTONIO CARO. ESTUDIOS CONSTITUCIONALES Y JURIDICOS 490, 491 (Carlos Valderrama Andrade ed. 1986.)
of the country, announced the recast of the role of Catholicism and the Church in Colombian legal thought. Also, he portrayed “anarchy” as the principal evil against which a reaction was desperately needed. Nuñez said this reaction had to come from the government, the ultimate guardian and savior of society. Considering that classical legal thinkers such as Gonzalez had stated that the role of the government had to be reduced to its minimal expression, this statement by the President of Colombia anticipated the discussions that were going to take place among constitutional thinkers in the years to come about the justification for the expanded power of government.

The second part of the above lines had a different tone where Nuñez did not focus exclusively in the structure of the constitutional order. Instead he turned to some “economic” and “social” matters that expressed the elite’s concerns during the second half of the nineteenth century. In the last years of the 1870s, a decrease in exports caused a deficit in the balance of payments and a difficult situation for Colombian economy. Also, during the 1880s, the conflicts between landlords and peasants, on one hand, and among artisans and the aristocracy, on the other, were evident in different parts of the country. Under the mechanisms of the 1863 Constitution, the central government did not have the political, legal and economic resources to confront the conflicts that altered the Colombian landscape. Therefore, Nuñez saw that new measures were necessary in order to overcome the conflictive social and economic situation.

31 MIGUEL SAMPER, LA MISERIA EN BOGOTÁ (1867). This is one of the first efforts by a Colombian political thinker analyzing the problems of poverty in Bogota after fifty years of Republican history.
32 Tovar-Zambrano, supra note 28 at 25.
33 See: ELSY MARULANDA, COLONIZACION Y CONFLICTO: LAS LECCIONES DEL SUMAPAZ (1991). She gives an account of this kind of conflicts within the realm of owners of land estates, in one hand, and settlers and squatters on the other.
After 1886, Nuñez led the country towards a process of economic growth centered on the idea of government intervention in the market, establishing national taxes and a national bank controlled by the executive branch. A new Constitution, enacted in 1886, was the main legal/political framework for the changes he envisioned Colombia needed to overcome anarchy, misery and social insecurity. Bearing in mind the new organization of the country as a central Unitarian State, the government adopted unified Codes for all the Colombian territory and established the cassation procedure in the Supreme Court for the purpose of controlling the application of national laws in local courts. With the establishment of a national bank, the government centralized the emission of paper money based on the distrust in individual initiative in monetary matters. The Constitution also established it was necessary to renew the bonds between the Colombian State and the Holy See, and thus provided for religious education and freedom of cults as long as they were not against Christian morals. As a result of these provisions of the Colombian Constitution, Colombia and the Holy See sealed this alliance with the signature of the Concordat; the Church, who saw her privileges cut back since the 1863 Constitution, was again close to the Colombian ruling elites.

These changes affected and were affected by the attacks against CLT. Nuñez’s concerns about anarchy, misery and social insecurity were interpreted in different ways by the jurists that explained different areas of law. In the constitutional realm, for example, the debate was focused on why was it legitimate for the State to have broad powers vis-à-vis the individuals. Meanwhile

---

34 Id. at 28-9. In macroeconomic terms, he was concerned about fiscal and monetary policies.
36 Tovar-Zambrano, supra note 28 at 29.
37 See SAMPER I, supra note 8..
38 This alliance was common throughout the world. As long as the parties rejected Socialism and the liberal revolution the Church was willing to back them up. See: ERIC HOBSBAWM, THE AGE OF EMPIRE 1875-1914 90-1 (1987).
in property, contracts and torts the questions were about the new economic dynamics and the possibility to avoid conflict. Jurists answered these questions in different ways between 1887 and 1920. Some of them thought that these changes had to be justified with a new conception about law and legal institutions, while others thought it was possible to deal with the transformations after reshaping the categories inside CLT. The attacks against CLT came from two strands: traditionalism and social-based legal consciousness. The first trend was explicit in the constitutional discussions of 1886, while the second one was advocated in the realm of private law –property, contracts and tort. Between 1887 and 1920 constitutional textbooks, case law and private law treatises showed the reaction against CLT posed by traditionalism and social-based legal thought, and also the ways in which classical legal thinkers tried to neutralize these attacks.

One of the first problems that jurists dealt with was the scope of action that individuals had under CLT. After Nuñez’s derogation of the 1863 and the tone of his address of 1885 cited above, the problem was how jurists were going to recast the role of individual viz. a viz. the State in the context of a constitutional reform that sought to impose order in an up/down fashion –from the government to individuals. Constitutional thinkers agreed that individual rights had to be limited but they did not agree why these limits should be imposed. A traditionalist strand appeared in the realm of constitutional thought giving answer to this question. In the next section, I turn my attention to this first answer and the ways in which CLT replied to this challenge.

II. Traditionalism attacking CLT: The Constitutional Arena
Miguel Antonio Caro and Jose Maria Samper were the two most influential constitutional thinkers of the period. They represented the traditionalist attack and the CLT answer to the challenges posed by the 1886 constitutional reform. Caro was a conservative that led ferocious attacks against the liberal regimes during the 1860s and 1870s. In his 1869 essay *Estudio sobre el Utilitarismo*\(^{39}\) he criticized Liberalism and Utilitarianism arguing that these doctrines left Catholic morality out of the picture. He censured the liberal doctrines that saw in the achievement of individual freedom the main purpose of legal and political institutions, and argued instead that freedom was only a means to achieve higher moral ends.\(^{40}\) Morality was given by Catholicism and since the latter was rejected by Liberalism and Utilitarianism, he thought these theories denied the highest source necessary for public morality: God.\(^{41}\) His main sources against Liberalism were De Maistre\(^{42}\), Donoso Cortes\(^{43}\) and Jaime Balmes\(^{44}\), writers who represented different strands of European –concretely French and Spanish– traditionalism that depicted Liberalism as a corrupting force for society. Traditionalists thought that the secular morality brought by liberal revolutions, which abolished the *ancient regime* hierarchies, had disordered society in such a way that anarchism and socialism became a permanent threat. De Maistre argued for the restoration of hereditary monarchy as a means to preserve the old order;\(^{45}\) Donoso favored a divinely-inspired dictatorship to avoid revolutionary threats to the established


\(^{40}\) Id. at 146.

\(^{41}\) Id. at 153.


\(^{44}\) See generally: *JAIME BALMES, EL PROTESTANTISMO COMPARADO CON EL CATOLICISMO EN SUS RELACIONES CON LA CIVILIZACION EUROPEA* (1849).

\(^{45}\) See: *DE MAISTRE* supra note 42.
order. Balmes stressed that liberal revolutions were influenced by a Protestant spirit of chaos and anarchy and called Catholics to stick to the principle of authority. These traditionalist authors, who shared the Catholic reaction against Liberalism and Socialism, were an important influence for Caro’s constitutional work. When the liberal-federal regime was overthrown, Caro was appointed as a delegate for the state of Panama in the constitutional convention and had the opportunity to enact his criticisms of Liberalism in the constitutional text of 1886. His traditionalist standpoint was the main source of attack against CLT in constitutional law during this period.

Jose Maria Samper, on the other hand, was part of the liberal elite that had vigorously supported the federal regime since the 1850s but lost his faith in it during the first years of the 1880s. Consequently, he ended up being a moderate Liberal Party member who allied with Conservatives in the enactment of the new constitution as a delegate of the state of Bolivar. Even though he saw that the liberal-federal regime was not suited for the Colombian people, Samper did not give up part of his liberal standpoint and became a defender of CLT responding to the attacks of Miguel Antonio Caro. Even though he lost most of the debates in the constitutional convention, the publication of his constitutional law textbook Derecho Publico Interno influenced legal elites from its initial publication up until its last edition in the 1980s.

---

46 See: DONOSO CORTES supra note 43.
47 See: BALTHES supra note 44 at 5.
50 JOSE MARIA SAMPER, HISTORIA DE UN ALMA. MEMORIAS INTIMAS Y DE HISTORIA CONTEMPORÁNEA (1881).
51 SAMPER I supra note 9 at 350.
52 Id.
53 The treatise was reprinted without any modification up to 1982, nine years before the enactment of the Colombian actual Constitution. His influence is evident in the opinions of the Supreme Court be between 1887 and 1920 where he was cited especially after 1910 when judicial review was established in the Colombian Constitution.
In this section I analyze the Colombian discussion between traditionalism and CLT in two areas of constitutional thought: the origins of political power and the theories about rights and liberties. Caro and Samper are the most important sources to understand this debate.

A. The Origins of Political Power

In the reaction against the federal and anarchized past regime, one of the first moves of the new regime was the signature of a Concordat with the Holy See in December 1887. This was clearly a reaction against the liberal past in which decisions regarding the separation of Church and State, establishment of a secular public education, and expropriations of estate from the Church had dominated the panorama. This new agreement gave civil effects to Catholic marriages, developing a strong bond between family and canonic law, and since it prohibited any teaching considered contrary to the Catholic faith, it also conferred control over education to the Catholic Church. The reformers saw that a good relationship with the Church was a guarantee to overcome the sad episodes of violence and civil wars that were so common during the federal regime.

The tight bond the Colombian government built with the Holy See was important not only in matters regarding family law, as the text of the Concordat expressly recognized, but it was also relevant to the extent that it reflected an ideological trend of legal elites about the origins of political power. This was clearly articulated in the Preamble of the Constitution when it established that the charter was enacted in “the name of God, supreme source of all authority.”

Colombian legal elites, in charge of drafting the Constitution, adopted the same tone of Catholic reaction against Liberalism and Socialism during the Papal rule of Leo XIII. Constitutional reformers included not only the State and the individuals as the participants of the legal realm, but also God as an entity above State, society or individuals – as a superior ordering principle from which power emanated.

Considering the renewed alliance between the government and the Holy See, it is not surprising that the proclamation of God as the supreme source of authority followed the doctrines that Leo XIII established in his 1881 reactionary encyclical – against Liberalism and Socialism – called *Diuturnum.* Concerned about disobedience to civil authorities, Leo XIII argued that liberal theories of popular sovereignty wrongly built societies based on the sovereign will of individuals. In contrast, he thought that only a Catholic theory of political power recognizing God as the source of authority was a reliable way for accomplishing obedience and order, something lost since the liberals had seized political and ideological power in the West. Leo even mocked the theories based on contractualism and said that they were motivated by human “arrogance” and “contumacy”, features that Catholics should maintain away from:

Indeed, very many men of more recent times, walking in the footsteps of those who in a former age assumed to themselves the name of philosophers, say that all power comes from the people; so that those who exercise it in the State do so not as their own, but as delegated to them by the people, and that, by this rule, it can be revoked by the will of the

---

56 HOBBSBAM, supra note 38, at 90.
57 POPE LEO XIII, ENCYClical DIUTURNUM (1881).
58 Id. at section 1.
59 Id. at section 3.
very people by whom it was delegated. But from these, Catholics dissent, who affirm that the right to rule is from God, as from a natural and necessary principle.60

This passage condensed the main criticism of the Catholic Church against the liberal theory of political power. If the latter comes and goes merely by the will of individuals, there is nothing that can assure obedience to civil authorities: people that once agreed to establish a particular authority could concur afterwards to depose it if they did not like its methods. Therefore, the Pope saw this principle of popular sovereignty as an unstable foundation for the establishment of civil authorities. In order to ensure obedience, civil authorities should hold a power that came from a source above individual free will, not emanating from it. Accordingly, Leo stated that God gave a special kind of people the ability to rule others61 envisioning that this was a step forward in the path towards a stable and timeless civil authority. The base of the latter’s power was not simply a voluntary act from individuals but a morally higher divine will that had to be obeyed in order to avoid falling in sin.62 Only this way of founding political power guaranteed obedience of individuals and any theory denying this superior source of authority was condemned to fail; thus, it was impossible to talk about political power without the recognition of God’s ultimate authority.63 The lack of this natural and necessary recognition, according to the Catholic Church, made the world reach “the limit of horrors [such as] communism, socialism [and] nihilism, hideous deformities of civil society of men and almost its ruin.”64

The 1886 Colombian Constitution echoed the Pope’s reaction against Liberalism when it established that it was not the people who had the supreme power in the political community but

60 Id. at section 5 (emphasis added).
61 Id. at section 13.
62 Id. at section 14.
63 Id. at section 23.
64 Id. at section 23.
God—the “supreme source of all authority.” Constitutional thinkers argued that it was necessary to react against an anarchic past that had disorganized the political community and thus both Caro and Samper felt that proclaiming God as the supreme source of authority was an essential starting point for the foundation of the new order. However, the reasons for the importance of such proclamation were different among these two constitutional thinkers. Acting as a spokesman for the government, Caro led most of the discussions in the Constitutional Convention that drafted the 1886 text and established the purposes of this body in the following terms:

> Our duty, in synthesis, is to maintain ourselves faithful to the spirit of the social transformation, [that is, the] difficult and glorious step of going from anarchy to legality. [...] It is the solemn condemnation that we are going to make, with voice and hearts, against revolutionary life, against any principle that generates disorder. There has not been a Nation so systematically anarchized as Colombia under the [past regime]. That [regime] denied supreme divine authority [and] because of this civil strife, a social situation more deplorable than tyranny, [was caused] [...] in which the signs of legitimacy are blurred, and respect for authority is lost. [...] In our civil wars no one knows where is the revolution and where is authority [...] and confusing the just with the unjust, chaos has taken over.  

In his search for the foundation of a new regime, Caro evoked the fear of an “anarchical past” that was consistently despised by Colombian legal elites throughout the twentieth century.

65 GONZALO ESPAÑA (COMP.), RAFAEL NUÑEZ: ESCRITOS POLÍTICOS 55 (1986).
Here, as in the Pope’s encyclical, Caro stated that the denial of a divine authority was one of the causes of the chaotic situation in Colombia; the rejection of liberal principles and the recognition of divine authority as a source of power could provide criteria to decide what was right and wrong, just or unjust, or—in his own words—where was revolution and where was authority. Therefore, Caro saw a moral problem in the absence of the recognition of God as source of all authority. The liberal regime, which based the civil order in popular will, was extremely dangerous because it was not able to establish higher moral criteria to guide society towards the righteous path. The recognition of God as the supreme source of authority intended to amend this moral void left by the constitutional thinkers of the second half of the nineteenth century.

Caro’s vision of authority as a moralizing power was present in his thought years before the constitutional discussions of 1885-6. Since 1869 he argued that countries—such as France—which went through liberal revolutions throwing away the true source of morality, were not able to establish a peaceful and ordered society. Since the main purpose of law was the realization of a divine design and not simply the fulfillment of the will of the State or the individuals, Caro saw that a constitutional order that rejected Catholic principles was destined to become anarchized. In a debate in Congress in 1888 regarding a decree that established limits upon free press, he sustained this view of law and legal institutions as moralizing tools. Civil authority was a necessary reflection of God’s mandates, and although authority could be evil in some way, this evil was necessary to order a disrupted society. In his own words, “God permits evil up to certain limits: but precisely, for this limit not to be trespassed and for evil not to take over, He has

---

68 See: GONZALEZ-JACOME, supra note 35.
69 Miguel Antonio Caro, Deberes de la Prensa Libre in OBRAS TOMO I 412, 419 (1962).
70 The project prohibited and criminalized the press considered subversive, i.e. articles against the social order and ultimately Christian morals. See Decree 151 of 1888.
instituted authority, delegating upon it the power to prevent and punish evil. And if this authority can be abused, its abuses, [...] are less than [those of] anarchy.”71 Thus, the command for authority was providentially required and the meaning of recognizing God as the supreme source of authority led Caro to argue that civil authority was designed in order to fulfill His commands; civil institutions, he continued, were necessary to “prevent and punish evil [since] God [stated that there] cannot be a society without authority.”72 The point for Caro was that not any authority could organize the anarchized political community; only an authority governing under the divine design of Catholicism was able to moralize society bringing back the order lost after the liberal reforms of the mid-nineteenth century in Colombia. Caro envisioned the 1886 constitutional transformation as an opportunity to recover the path lost in the 1850s and his reform project evoked the 1843 Constitution,73 which was enacted before the radical reforms had “corrupted” the Colombian people.

In a close resemblance to the Diuturnum encyclical of Pope Leo XIII, Caro’s desire of “social conservation”74 was away from CLT, which saw law as a realization of the will of individuals and the State. Besides reducing the sphere of the individuals’ will, Caro’s explanation of the origins of political power understood that this was necessary not because the State was wiser. Caro was a reactionary that wanted to go back to the times before the liberal revolutions altered the order of society. Catholic morality was essential for the achievement of this ordering purpose. Therefore the State was not realizing its will but implementing the design

71 Caro, supra note 61 at 164-165.
72 Id. at 165.
74 Id. at 157-159.
of the Divine Providence; law and legal institutions were established as a means to protect this order dictated by God.\textsuperscript{75}

Caro’s explanation of God as the supreme source of political power was different from Samper’s. Even though the latter shared the perception that it was necessary to start the Constitution recognizing God’s authority, he did not have the profound moral concerns Caro expressed in his writings. Samper agreed that Colombia had been walking through the path of anarchy since the enactment of the 1863 Constitution –which he supported during the 1860s and 70s– and hence the political project that brought Nuñez to power was a required step to overcome such situation.\textsuperscript{76} Samper criticized the 1863 Federal Constitution because it gave too much power to individuals and to the states that formed the United States of Colombia, leaving the central government without appropriate means to control insurrections and public order.\textsuperscript{77} He thought that broad individual liberties were impossible to practice in Colombia because of the nature of the people inhabiting the territory. Constitutions with an emphasis in individual rights and liberties suited perfectly societies such as the French, the British or the German; but the same could not be said from Colombian people that needed special institutions that respected their local conditions:

It is not new a thought that should lead us to meditate profoundly: Spanish America, mostly, has not completed the second evolution that she must follow in History; she has not abandoned the Middle Ages. She has barely completed the first evolution in the territories that are object of civil dominion: she has moved out from barbarianism. But between barbarianism and the high levels of civilization of France, England and Germany

\textsuperscript{75} JARAMILLO-URIBE, supra note 20 at 319.
\textsuperscript{76} See SAMPER I supra note 9 at VIII.
\textsuperscript{77} Id. at 4-5.
there is a mid-road that cannot be *jumped*, but patiently *transited*. Between the old realm of the savage violence and the present of democracy there is a vast path that must be walked and this task can take centuries.  

Therefore, legal institutions should be a reflection of particular features of Colombia and not simply high ideas that, even though Samper thought were close to perfection, could not be practiced fully in the country. Popular sovereignty, Republicanism and democracy were impossible for Samper because Colombians inherited a Spanish institution called the *encomienda* that hindered the move from a quasi-feudal society to a liberal one. The *encomienda* was a grant the Spanish Crown gave to the *conquistadores* of the New World to use natives for labor; the natives would work in the land of the *conquistador* and the latter will allow the former to live in his property although charging them with some “taxes.” At the same time, the *encomendero* evangelized the natives and a relationship based on loyalty was established. Even though this was an institution from colonial times, Samper saw this political organization was still dominant in Colombia under the name of *gamonalismo* where big landowners of the countryside conserved the same hierarchical organization as the one predominant in the *encomienda* system. He was concerned that this quasi-feudal institution was incompatible with the free democratic institutions necessary to overcome the “Colombian Middle Ages.” Therefore, Samper argued that

being the republican regime the most complicated and difficult one, and the wisest and most perfect, we are incapable –due to our general ignorance encouraged by our poverty [and] lack of unity– to practice the republican government *with all its consequences*; thus

---

78 Id. at 351.
79 Id. at 350.
80 Id. at 352.
we are forced to moderate it, leaving to the authority and the enlightened and strong sector of society most of what, under better social conditions, could be left to liberty and individual initiative [and] to the great mass of the People themselves.\textsuperscript{81}

Considering Samper’s standpoint, he supported an authoritarian turn taken in the 1886 Constitution giving more authority to the State, but his acquiesce with this decision did not have the moral strand contained in Caro’s thought. For Samper, legal institutions should reflect the spirit of the population and, accordingly, constitutional drafters should strike a balance between liberty and order to establish the correct equilibrium for a particular society.\textsuperscript{82} After carrying on a “scientific” study revealing the true characteristics of the Colombian society in his first volume of \textit{Derecho Publico Interno}, he thought the balance should go in favor of order, and therefore the will of the State should be expanded to reduce the individuals’. This method of analysis explained why his acknowledgment of God as the supreme source of all authority did not carry the moral and universalistic justifications that Caro or Leo XIII deployed. Samper thought that when the Constitution recognized God as the supreme source of authority was simply recognizing a two-leveled truth: i) that the Colombian population was overwhelmingly Catholic\textsuperscript{83} and ii) that if the Constitution pretended to be the highest source for power in Colombia it had to acknowledge that it was not above the creator of all things.\textsuperscript{84} This “creator” could have many different names and the fact that it was labeled as “God” under the 1886

\textsuperscript{81} Id. at 355-6 (emphasis added).
\textsuperscript{82} Id. at 1-7.
\textsuperscript{83} Id. at 357.
\textsuperscript{84} Id. at 4.
Colombian Constitution was coherent with the dominant Catholicism of the country; but this was not an obstacle for other cultures to call this creating principle with a different name.

Accordingly, Samper thought that the Constitution was simply recognizing a “philosophical doctrine or a scientific truth [...] a regulating force, an invisible source of every visible action” present in every human action and could not be rejected in a political order. This regulating force represented by God –or the principle of Creation– submitted humans to eternal laws that imposed them not only rights, but also duties. Nonetheless, Samper was less willing to derive prescriptive consequences from this clause. He tried to explain it in descriptive terms and thus understood that the constitutional convention had simply acknowledged the fact that the Creator was above humans. Unlike Caro, he stopped in this recognition and did not explain the constitutional edifice as an expression of a Divine Design.

This discussion shows that Samper was a classical legal thinker although he agreed in some of the provisions that traditionalists like Caro supported in 1886. Samper thought that legal institutions were a reflection of the peoples, and also understood law as a tension between liberty –the will of individuals– and order –the will of the State. In contrast Caro, the traditionalist, believed that the recognition of God was a moralizing principle that could save the corrupted Colombian society from the excessive individualism carried on by liberal reforms. Both of them supported an authoritarian turn but for different reasons: Samper, because the State needed more authority to lead the nation away from feudal institutions that still remained in the

---

85 Id. at 4-5.
86 Id. at 4.
87 Id.
88 Id. at 5.
provinces, whereas Caro did so because a constitutional regime led by a Catholic State was the main moral criteria that could educate and moralize corrupted individuals and bring back the old order.

The fact that Caro wanted the return of the old order and Samper envisioned the improvement of conditions where a radical liberalism could be possible led them to a significant debate around enfranchisement. As argued above, Samper thought that most of the Colombian population was under the influence of gamonaless or big landlords that controlled the voting of ignorant peasants altering the outcomes of political processes. Therefore, he saw that voting was not a right but a public function which “shall be given to whom some motive is offered to assume that will exercise it with dignity, independence and accuracy.” This led Samper to restrict elections of President and Senators to individuals who could read and write and have some economic autonomy (owned property and had an occupation) in order to avoid the influence of the gamonaless:

If workers and peasants that just earn to live humbly could elect governors and the public officials for the entire Nation, why not give the possibility of voting to women and minors and to the homeless? All this is absurd [...] because suffrage is not an individual right [...] and thus there is no need to create representation to govern the State. [...] Suffrage is, then, a collective and public function, established and exercised in benefit of the State—not a right.

Samper thought that proclaiming universal suffrage was a “democratic comedy” where many believed that the People were sovereign but in fact they were manipulated by caciques—or

---

90 SAMPER II, supra note 9 at 74.
91 Id. at 22-3.
92 Id. at 385.
local political bosses—of “the worst kind.” Samper was trying to protect the State vis-à-vis some undesirable individuals and making order prevail over rights; thus, voting should be directed to protect the will of the State and not simply to reflect an expression of individuals’ wills. Although Caro agreed it was important that voters knew what they were doing when electing public officials, limiting this function to those who could read and write or have financial autonomy was not the solution to the problem because it would transform the State into an economic institution instead of a moralizing one. Considering that Caro was not enthusiastic with the liberal project, he did not see anything wrong with universal suffrage because the landlords that Samper despised were seen by Caro as individuals cooperating in the education and moralization of corrupted sectors of society—just as in the old order. Reading and writing, thus, was not a guarantee for the appointment of better voters because in a “well ordered republic [good customs] are not propagated by reading but by oral tradition and good advises.” Thus, the landlord could educate the peasant with good Catholic morals and he (always a he) would be able to take a good decision.

The debates between Caro’s traditionalism and Samper’s commitment to an authoritarian version of CLT in constitutional law appeared more evidently in their conceptions about rights. I turn my attention to these discussions in the following subsection.

**B. The Limits for Rights and Liberties**

---

93 Id. at 357.
94 Miguel Antonio Caro, Sufragio in MIGUEL ANTONIO CARO. ESTUDIOS CONSTITUCIONALES Y JURIDICOS PRIMERA SERIE 165, 171 (Carlos Valderrama Andrade ed. 1986).
95 Id. at 172.
The 1886 Constitution established a special chapter about rights and liberties under the label of “civil rights and social guarantees”, which included provisions regarding general liberties –as freedom of expression, cult, conscience–, freedom of association, rights to privacy and property.⁹⁶ About the nature of rights, Caro saw they were not a means for individual self-realization but especially a way of guaranteeing the social order. Considering that Caro was concerned about the education of individuals through Catholic morality, one of his most recurrent topics was freedom of press. His thoughts around this issue, which were also influenced by the encyclical Libertas or “about human liberty”⁹⁷ enacted by Leo XIII in 1888, showed Caro’s insistence on the character of law as a moralizing instrument for a corrupt society. One of the first publications of Caro about the issue was his 1869 Deberes de la Prensa Libre.⁹⁸ In this text Caro argued that the most important mission of the press was to educate the people; therefore there should be some limitations upon the freedom of press in order to fulfill the educational role it had. He thought it was necessary to establish some degree of censorship very similar to the ones established in the times of the Inquisition:

In the midst of the almost unlimited liberty of thought and word authorized today in the most educated countries, there is a felt need of a high judicial power in intellectual matters similar to what was the Inquisition […]. That is why in the centers of civilization some mode of such attribution has begun. In religious matters, the Holy See exercises this power publishing the Index, where there can be found the most notable publications that, according to Catholic ideas, can pervert intelligence and corrupt the heart.⁹⁹

⁹⁶ See: articles 19-53 of the 1886 Constitution.
⁹⁸ See: Caro supra note 63.
⁹⁹ Id. at 415-6.
In 1869 Caro saw that a responsible press was important to keep away from the people those undesirable and corrupted ideas against religious morality.\textsuperscript{100} Along the years he maintained this commitment and in the 1880s he saw that a more vehement restriction to the press was necessary due to the lack of self-restraint of different writers. In the 1886 Constitution Caro supported the enactment of the infamous article “K” which established that “while no statute regarding printing is enacted, the government is allowed to prevent and punish the abuses of the press.”\textsuperscript{101} In the years to follow, the government enacted a decree that severely restricted this freedom. In 1888 Caro took the decree to Congress and pushed for its adoption as the general statute about freedom of press. The proposal authorized the government, through its police power, to suspend any publication considered subversive; it defined subversive as any publication that could “hurt or alarm society.”\textsuperscript{102} The discussion that took place in Congress about this governmental initiative had a theological tone and both defender and attacker of the proposal argued whether the legislation was coherent with Catholic morals. In the midst of this debate, Caro’s commitment to law as a moralizing principle necessary to order society according to Catholic values was explicit.\textsuperscript{103} For Caro’s attackers, the government was interpreting very narrowly the conception of liberty advanced by the Catholic Church. Caro answered to his attackers quoting a Papal encyclical called Libertas.\textsuperscript{104} He emphasized that in this document, the Pope portrayed men as corruptible and needy of guidance in their decisions; individuals required a higher force that could eliminate the possibility of evil choices. Since the government derived its authority from God, it was entitled to regulate private actions and prohibit any act it considered evil. The strong repression against subversive publications, according to Caro, was

\textsuperscript{100} Id. at 419.
\textsuperscript{101} SAMPER II, supra note 8 at 471.
\textsuperscript{102} Decree 151 of 1888.
\textsuperscript{103} Caro, supra note 61 at 162.
\textsuperscript{104} See: Pope Leo XIII, supra note 91.
merely a reflection of this duty the government had to educate individuals, offering them only morally good possibilities for their decision. In his own words, “public convenience” and the fact that “God had created authority delegating in [the civil government] the power to prevent and suppress all evils” justified strong restrictions of the press.

Caro was, indeed, closely reading Leo’s Libertas encyclical of 1888. Following the line established in Diuturnum about obeying civil authorities that derived their power from God, Libertas established that “the highest duty [for Catholics] is to respect authority, and obediently submit to just law; and by this the members of a community are effectively protected from the wrong-doing of evil men. Lawful power is from God, and whosoever resisteth authority resisteth the ordinance of God.” The encyclical followed the lines of Diuturnum placing an emphasis on the obedience that should be observed to established authorities and criticized liberal doctrines commanding that Catholics should not “follow the steps of Lucifer, and adopt as their own his rebellious cry, ‘I will not serve’ and consequently substitute for true liberty what is sheer and most foolish license. Such, for instance, are the men belonging to that widely spread and powerful organization, who, usurping the name of liberty, style themselves Liberals.” Further on, Leo XIII established his ideas about natural liberties; he recognized their existence but they had to be harmonized with God’s design. The decision about the unjust or just could not be subject to “opinion and judgment”; instead, a criterion higher than individual morality was necessary to establish a “real distinction between good and evil” avoiding a “way to universal corruption.” If the multitude was convinced that the people themselves were sovereign ignoring

---

105 Caro, supra note 61 at 163.
106 Id. at 164.
107 Id. at 165.
108 Pope Leo XIII, supra note 91 at section 13.
109 Id. at section 14.
the necessary recognition of God and religion, then “tumult and sedition will be common amongst people.”

The encyclical argued for the overcoming of a liberal fallacy that made every individual sovereign of his or her life regardless any external criterion for the determination of the goodness or evil of his or her actions.

The criterion that liberals ignored, according to the Church, was the Divine Providence. God, as creator of all things, privileged men amongst other creatures of the world giving them reason—and not merely instincts—in order to guide their acts. Reason allowed men to choose some means above others to achieve their ends; thus, freedom of choice was a consequence of humankind’s privileged nature that allowed him/her to identify different options to accomplish the ends proposed. Considering this, the encyclical defined freedom as “the faculty of choosing means fitted for the end proposed.” Nonetheless, not every free choice of men could be reputed as good; sometimes choices were seen as good by men due to a misapprehension of human intellect. When men chose evil—that is, a wrong and sinful means to achieve its ends—above good in a particular situation, this was not an act of reason given to men by God. Instead, these wrong choices reflected human imperfection that needed the aid of superior criteria—the Divine Providence—to distinguish right from wrong. Reason made freedom possible, and since the latter was the faculty to choose appropriate and rightful means to achieve an end, then when men chose evil means above right ones they were acting outside reason and, thus, not freely.

In Leo’s words,

---

110 Id. at section 16.
112 Pope Leo XIII, supra note 91 at section 3.
113 Id. at sections 710.
Man is by nature rational. When, therefore, he acts according to reason, he acts of himself and according to his free will; and this is liberty. Whereas, when he sins, he acts in opposition to reason, is moved by another, and is the victim of foreign misapprehensions. [...] Such, then, being the condition of human liberty, it necessarily stands in need of light and strength to direct its actions to good and to restrain them from evil. Without this, the freedom of our will would be our ruin. [...] Therefore, the true liberty of human society does not consist in every man doing what he pleases, for this would simply end in turmoil and confusion, and bring on the overthrow of the State.  

This was the background of Caro’s vision about individual rights and liberties. It was obvious that he did not see them as an end in themselves but as moralizing tools in the quest for a Catholic social order. This was the criticism against Liberalism that he entertained since the 1860s when he wrote his essay about Utilitarianism; in 1886 he had the opportunity of enacting it as positive laws.  

The restriction of liberties, in Caro, was not justified simply for the sake of broadening the sphere of action of the State; instead, liberties and rights had to be restricted by a Catholic ruler to ensure the correct moral choices of the population that would bring a harmonious political community inspired in the Divine Providence. As he argued before Congress in 1888, restrictions should be stronger when legislating for “fallen men and sinners and for modern societies widely corrupted and highly demoralized.”  

For Caro it was evident that the desired collectivity, as an expression of the Divine Providence, was above the individuals and the latter should be sacrificed to preserve the former. Even though the Colombian Constitution established in article 19 that authorities were

---

114 Id. at sections 6 and 10.  
115 See: Caro supra note 39.  
116 Caro, supra note 61 at 163
established to protect the life of individuals,\textsuperscript{117} he was in favor of the Constitution’s permission of death penalty in case of atrocious crimes. Caro criticized the 1863 charter for abolishing the death penalty\textsuperscript{118} and argued instead that article 19 was expressing a right everyone had no to be “killed by assassins […] and a […] mere translation and incorporation in the civil laws of the divine precept \textit{thou shalt not kill}.\textsuperscript{119} But beyond the individuals’ protection with the death penalty, Caro thought that capital punishment was a natural way through which the political community got rid of the individuals that threatened the order:

[S]ociety, due to natural law, following a conservation and defense instinct that every organism has, repudiates the crime that threatens to destroy her and she takes arms against the evil. Every organized people, every civilization have punished assassination with death in order to reestablish the violated social order through the atonement of the guilty and thus prevent new infringements. [The logical consequence of article 19 is to sustain that] criminal laws, a well organized police and a fair justice administration are the true guarantees for persons.\textsuperscript{120}

Hence, Caro was expressing his commitment to the idea that a collective entity which expressed a divine order was above the State and the individual. He was willing to give rights the necessary scope that would allow individuals to choose good options for the improvement of the divinely-inspired collectivity he called “society.” In short, rights were subject to the common good of the community which at its turn had to be identified according to the moral principles found in the teachings of the Catholic Church.\textsuperscript{121} Thus, he represented a strong criticism against

\textsuperscript{117} Miguel-Antonio Caro, Dogmas incompatibles in Miguel Antonio Caro. Estudios Constitucionales y Jurídicos, Segunda Serie 386 (Carlos Valderrama-Andrade ed., 1986)
\textsuperscript{118} Id. at 394.
\textsuperscript{119} Id. at 388.
\textsuperscript{120} Id. at 394-5.
\textsuperscript{121} Jaramillo-Urbe, supra note 20 at 324-8.
CLT as he portrayed individuals and the State as merely temporal actors that had to find a harmonious coexistence according to the Divine Providence.

Regarding rights and liberties, Samper had some different views from Caro which he framed around the general explanation regarding article 19 and around his interpretation of the broad faculties assumed by the government in free press issues. As mentioned above, article 19 affirmed that authorities of the republic were established “to protect every person living in Colombia in its life, honor and possessions and to ensure the reciprocal respect of natural rights, preventing and punishing criminal offenses.” As argued before, Samper did not carried on the idea of natural order—or natural rights—further from a descriptive matter and thus did not explain what the words “natural rights” meant in the scope of this article. Instead, he focused in the fact that rights were established not only in favor of individuals but also to protect the State:

All constitutions and laws, every creation of authorities and public officials and all the actions that they execute are based in two paramount purposes: give security to the members of the collectivity called society, and to administrate the interests of the conventional entity called State or Nation […] If the Constitution would not tend to give such security and enhance the administration […] the work of the constituents would be of no use. And this is precisely what distinguishes constitutional from despotic regimes: the former recognize and establish permanent civil rights and social guarantees in favor of its associates and the State.123

Samper emphasized that the purpose of rights was not exclusively the fulfillment of the will of individuals but also the realization of the will of the State which had to provide security

122 Samper II, supra note 9 at 39-41.
123 Id. at 39.
and a good administration of the country. Unlike Caro, Samper’s explanation about rights did not have the stress in the educational purpose of the State but expressed the concern of limiting the sphere of action of the individuals and broadening the State’s. This explains why, at the end of the last quote, he affirmed rights and guarantees in a constitutional regime were in favor of the State. Thus, he highlighted the word *reciprocal* in his explanation of this article; this maneuver allowed him to focus in the constitutional duties of individuals.\textsuperscript{124} The inclusion of reciprocity and the consequent recognition of individual duties led Samper to argue the superiority of the 1886 Constitution with respect to the 1863 charter, which had understood individual rights as absolute entities.\textsuperscript{125} The preponderance of individual duties –and not rights– enabled Samper to justify the authoritarian regime on the grounds that civil authority needed a wider scope of action to ensure the fulfillment of such duties essential to bring order to society.\textsuperscript{126}

Even though he also supported the authoritarian project restricting individuals, Samper thought this reaction had gone too far in aspects such as freedom of press. I argued above that the restriction of a free press was fundamental for Caro’s vision of educating society through law. Samper’s disagreement in the government’s discretion in this aspect shows the difference between traditionalism and CLT in rights’ issues. Samper argued that article K was unnecessary because “the government, with the new Constitution, was going to have all the authority and force to defend itself, and did not need to submit printing to an arbitrary regime [of previous censorship].”\textsuperscript{127} Thus, he saw that with all the attributions that broadened the sphere of action of the State there was no legitimate justification for the government to repress and punish printing through a decree. Samper approached this problem in a different way from Caro because the

\begin{flushleft}
\textsuperscript{124} Id. at 40.  
\textsuperscript{125} Id.  
\textsuperscript{126} Id. at 41.  
\textsuperscript{127} Id. at 471.
\end{flushleft}
former did not see in rights a tool to moralize and educate society. He only saw that rights had to be limited sufficiently to allow the State a margin of action in which it was possible to maintain order and avoid anarchy. Meanwhile, Caro’s support for this article relied on his traditionalist vision that society had to be reordered through a recovery of the moral customs lost in the liberal revolutions. Therefore, Samper saw in this regulation an expression of dictatorship, arbitrariness, absolutism and anti-republicanism, unnecessary to the extent government was sufficiently armed with the provisions of the constitution establishing reciprocal duties in the exercise of every right.

Samper’s bitterness for the authoritarian trend of some provisions of the constitution was expressed in the last pages of his Derecho Publico Interno when he talked about the mistakes of the constitutional convention of 1886:

The major mistake of the Constituent Body, or in other terms, of the majority of it, was the confusion of ideas regarding the notion of authority and its distribution and exercise. The entire Nation felt the compelling need of recasting authority against license or the abuse of liberty [for the purposes of achieving] order, peace, true guarantees and stability. It was necessary to suppress all absolute liberties that reciprocally annulled themselves and that placed the individual right above the State or the entire society. Hence, it was desired that authority would have a protective and defensive force and would be respected by all. But if the power of authority was wanted [what was needed] was the legitimate equilibrium in itself and vis-à-vis liberty.129

---

128 Id. at 472.
129 Id. at 481.
Samper was upset because the problem to be solved with the 1886 Constitution was the balance between liberty and authority, or among the will of individuals and the will of the State. However, the majority of the constitutional delegates altered the foundations of authority and led the discussion towards the enactment of a particular conservative ideology in the Constitution that made Samper uncomfortable. Even though this last passage reflects his uneasiness with Caro’s reconfiguration of authority, Samper was an “authoritarian-liberal classical-legal-thinker” who believed in the State’s limitations of individual rights in favor of the maintenance of public order. His analysis of property rights further illustrates this point.

The 1886 Colombian Constitution contained a clause about takings of private property and proper compensation. It also established that the legislator had the competence for enacting a statute defining the “public utility” reasons that could be invoked by the government in cases of expropriation. Explaining these articles, Samper argued property was an absolute right that had to be recognized by the State; however, when there was a clash between the public and the private interest the latter should yield. This did not mean, according to Samper, that property was diminished in such cases because there was always an obligation to compensate: the “State [could] disrespect, by necessity, the form of such property in order to achieve some common interest; but [the property] must be returned, represented in another form, that is, paying compensation.”

Up to this point, Samper sounded as a CLT who saw individual rights prevailing over the State’s public interest, which at its turn always needed to previously compensate expropriations. However, this view changed further on his explanation regarding takings of property owned by individuals that were not loyal to the government during civil wars. Even though in the express constitutional text (article 33) there was not a reference to a different

\[130\] Id. at 61.
treatment between individuals loyal or not to the government, Samper read in this provision a justification to distinguish between them. The text of the article was the following:

In cases of war, and only to achieve the reestablishment of the public order, the necessity of a taking may be decreed by non-judicial authorities and without an order of a previous compensation. In such case, real estate can only be temporarily occupied to attend the needs of the war or to destine its fruits when there has been a previous economic punishment imposed to the owners according to the laws. The Nation will always be responsible for the takings carried on by the Government or its agents.

This article authorized administrative takings in some particular cases but it also included a broad clause about the responsibility of the State in this kind of expropriations. Samper deemphasized this latter part and explained that the article conferred an attribution to the government takings of property of those not loyal to the regime without any kind of compensation. In his words,

[All the members of the Constitutional Convention] recognized the need, in times of war, of avoiding the previous judicial process and compensation in cases of takings. And also everyone admitted that takings could be a very fair and effective coercive method [to use against] the rebel or mischievous individuals that alter the public order, as well as their collaborators. But it was necessary not to leave the property of neutral and harmless individuals in the discretion of public officials. \(^{131}\)

This shows Samper as a classical legal thinker who believed that the will of the State, expressed in this case as takings without compensation for individual considered disloyal to the government, had a wider range than the sphere of individuals’ power. This was another

\(^{131}\) Id. at 63 (emphasis added).
expression of his balance in favor of order and not personal liberties, which he saw as the main issue the 1886 Constitution had to solve. This balance in favor of the notion of “order”, achieved through the strengthening of the will of the State, led him to argue that even though the government had a wide margin of discretion to order takings without previous compensations, this article was an “important progress” made by Colombian jurists.\textsuperscript{132} Also, since Samper argued that the “public function” of voting should be trusted to those who had some kind of economic autonomy –expressed principally in rights of property over land–,\textsuperscript{133} the possibility of taking the property away from “mischievous individuals” was also an opportunity to disenfranchise political opponents or persons not loyal to the government.

Samper’s position about takings in times of war was influential for the government’s regulation of the issue and also for the cases the Supreme Court of Justice –with Samper as a Justice during the first year– decided between 1887 and 1901. Problems about takings in the midst of war were a hot issue since the 1860s due to the repeated armed conflicts across the Nation. Attempting to solve this problem, the government established a special procedure for individuals seeking compensation for takings performed by government officials in times of war.\textsuperscript{134} These regulations created a special agency of the government –\textit{Comision de Suministros, Emprestitos y Expropiaciones}– in charge of deciding whether it was lawful to indemnify individuals that sought redress from the government; if the parties did not agree with the decision of this administrative body, they were entitled to ask the Supreme Court to review such decision.

Even though this regulations showed that the Colombian government was apparently willing to protect the individual right to property, Samper’s concern about “order” as a

\textsuperscript{132} Id. at 65.
\textsuperscript{133} See supra note 92.
\textsuperscript{134} Law 44 of 1886
justification for the expansion of the will of the State appeared in the decisions of the Supreme Court. Two types of cases showed this expansion: i) those dealing with individuals considered disloyal to the government and ii) those that involved the possibility of recognizing interest rates over the compensation the government owed to individuals. These cases illustrate how the Court argued that an affectation to individual property was not a sufficient justification for ordering any kind of compensation. The arguments of the Court regarding the first kind of cases were captured in an opinion delivered in 1889 where the Court said that a mere verbal rejection of the revolution was not a proper proof of an individual’s allegiance to the government in the Civil War. It was necessary to prove it through affiliations, contributions and unequivocal declarations confirmed by witnesses that a particular person was truly loyal to the cause of the government. Otherwise, the petition for compensation would be rejected by the Court in observation of the laws and the Constitution.135

In a case decided in 1897 the Court repeated the line of argument mentioned above. The discussion was about a claim brought by an Italian citizen whose property was taken by troops of the government in the 1885 Civil War. He was dwelling in a friend’s house, also Italian, when the government army took over the house and seized some papers, letters, food, and clothes he owned.136 The Court reached the conclusion that he had the right to file a suit because he observed neutrality in the armed conflict, something that was required from foreigners. In the Court’s words, this person that filed the claim was a “respected foreigner and of good position as it can be gathered from the services he gave to the country […] and due to the neutrality he observed in his politics and in the [Colombian civil] strife.”137 In contrast, the Court argued that

135 CORTE SUPREMA DE JUSTICIA, GACETA JUDICIAL NO. 167 81 (1889).
136 CORTE SUPREMA DE JUSTICIA, GACETA JUDICIAL NO. 608 280 (1897).
137 Id. at 281.
any confiscation the troops had performed over the goods of the owner of the house would have been lawful since he was not considered loyal to the government.138

The other cases where the Court found a limitation to the rights of property had to do with the possibility of recognizing an interest rate over the State’s compensation of a taking. For instances, in cases when a estate was expropriated in 1885 and the claim was finally decided in 1897 ordering the State to pay an amount of money equal to the 1885 price of the estate, claimants argued that the price had to be adjusted to the “real value” of the land in 1897. In order to adjust the amount of money owed by the government, claimants argued, the State had to recognize an interest rate over the money paid twelve years later. In a case decided in 1899 petitioners based this claim in article 33 of the Constitution which, as mentioned above, regulated the cases of takings during war. We must recall this article established that in any case of expropriation the Nation was fully responsible for it; thus, claimants understood this article provided that the State was compelled to indemnify entirely the individuals affected with such action. Petitioners saw the denial to pay interest rates over the money owed as a breach of the “total responsibility” clause contained in article 33.139 The Court rejected this line of thought and argued that they had wrongly based their claim in this constitutional text. Since this was a taking that occurred in the 1885 Civil War and there was a special regulation dealing with such cases, petitioners should look only to this law –Law 44 of 1886– because it was more specific than the Constitution. This was the application, according to the Court, of the principle of specificity which argues that in cases where there is a doubt about the application of two conflicting norms apparently regulating the same matter, the more specific will prevail over the more general –lex specialis derogat lex generalis. Therefore, the Court continued, since the special law did not

138 Id. at 285.
139 CORTE SUPREMA DE JUSTICIA – COLOMBIA, GACETA JUDICIAL NO. 675 407 (1899).
contain any explicit provision about recognizing interest rates, it was impossible to decide in favor of the petitioners; a decision favoring them “would cause additional damages to the national budget.”\textsuperscript{140} These cases showed individual rights reduced by the will of the State represented not only in public order considerations\textsuperscript{141}—as in the cases of non-loyal individuals—but also in budgetary constraints.

The final case in which the Supreme Court argued that rights would be respected up to the State’s possibilities was decided in 1901.\textsuperscript{142} The case was also about the recognition of interest rates to sums of money owed by the government to individuals after taking their property during civil conflicts. In this case, the Court said that the provisions of the Constitution that required full compensation should be read in the following terms:

\begin{quote}
What is promised [by the Constitution is that] any breach of private property [the government] felt it was compelling to cause during the social cataclysm that War implies, will be compensated \textit{up to the extent the government can do so}; but this should not be done by civil law but by \textit{natural law}, that is, issuing the government the indispensable laws to recognize, up to its possibilities, the existence of the right to property affected.\textsuperscript{143}
\end{quote}

The argument that the obligation of the government was one of natural law submitted to the special legislation the government enacted, showed that the Court understood that if the State decided to compensate fully expropriations occurred during the civil wars, then this was a mere act of generosity impossible to be judicially enforced. This is the meaning of the term “natural obligation” used in this opinion; it means it is a moral obligation existing in the “conscience” of

\begin{footnotesize}
\textsuperscript{140} Id. at 407-8.
\textsuperscript{141} Id. at 408.
\textsuperscript{142} \textit{Corte Suprema de Justicia – Colombia, Gaceta Judicial No. 737 33} (1901).
\textsuperscript{143} Id. at 36 (Emphasis added).
\end{footnotesize}
individuals and thus, if paid, such payment is held valid. However, the payment cannot be required by judicial means.\(^{144}\)

These cases can be seen as a final testimony that confirms the Supreme Court was following a CLT orientation similar to Samper’s. This was the idea that a balance should be struck between the will of the State and that of the individuals. The 1863 represented the “liberal” regime that had moved the “pendulum” too far in the direction of the latter and it degenerated in anarchy and license. Therefore, the pendulum had to be moved towards strengthening the sphere of action of the State and this was evident in the property rights discussion that appeared in the Court between 1887 and 1901. This re-accommodation of CLT towards the expansion of the sphere of action of the State in constitutional law should be understood as just one of the modes of legal thought at play during this period of time. Traditionalism, represented by Caro, had posed a threat to CLT’s predominance; the re-accommodation of CLT towards an authoritarian version should be understood as a response to this challenge posed from traditionalism. However, CLT was also attacked in this period by a social-based mode of legal thought in the realm of private law. I turn my attention to this attack in the next section of this paper.

### III. A Social-Based Legal Consciousness: A Second Attack against CLT

Progressive legal thought\(^{145}\) or “the social”\(^{146}\) have been labels used to characterize the period in which legal elites in the U.S. and around the world reacted against CLT during the first three decades of the twentieth century. Ihering and Geny were the main characters of this mode

---

\(^{144}\) See Article 1526 Colombian Civil Code.  
\(^{145}\) See Horwitz supra note 14.  
\(^{146}\) Kennedy, supra note 2 at 37.
of legal thought that globalized around the world between 1900 and 1930. The main slogan of
this legal consciousness was “law as a means to an end;” in contrast with CLT this meant that
law was understood not simply as the realization of the will of the State or individuals but as an
instrument to achieve social purposes. The social-based legal consciousness also saw law full of
gaps that could not be filled through the old deductive methods in which CLT relied on; thus, it
proposed a transparent purposive legal reasoning that acknowledged social ends to fill such
gaps.\textsuperscript{147}

I believe that it is important to distinguish the social oriented legal thought from the
authoritarian version of CLT. In the latter, the idea was that society was composed of powers
absolute within their spheres. Law regulated the size of this spheres held by State or individuals.
Therefore, law set boundaries between the powers; in its authoritarian version it expanded the
sphere where the State could exercise its will and reduced the individuals’ scope of action. The
social legal thinkers thought that purposive legal reasoning was not simply the realization of the
will of the State; they believed that the conflict between capital and labor, which appeared in the
times of industrialization and urbanization, could not be resolved widening or reducing the
scopes of action of the State or the individuals. A first obvious reason to reject this view was the
fact that the social arena was now composed not only by the State and individuals but also
unions and other kinds of organizations mediating between the State and individuals.\textsuperscript{148} The
second reason to discard this view was that social thinkers saw that drawing lines between legal
actors produced unstable equilibria which ended in conflicts –like wars or ruthless clashes
between employers and employees. To avoid these threats, they argued, there was a collective
goal above the States or individuals which should be achieved through the cooperation of the

\textsuperscript{147} FRANCOIS GENY, METHOD AND SOURCES IN THE INTERPRETATION OF PRIVATE LAW (1899, 1919).
\textsuperscript{148} Kennedy, supra note 2 at 40-1.
different legal actors. Therefore, law was not the realization of the will of either parties but the expression of a collective goal that, pursued in cooperation by the different sectors of society, will result in a peaceful coexistence.\footnote{See generally Pope Leo XII, Rerum Novarum (1891) and Pope Pius XI, Quadragesimo Anno (1932).}

Since it was perceived that private law –in the realms of property, contracts and torts– was highly individualistic and extremely deductive, the social-based legal thought directed its attack against this area. This social criticism against CLT was strongly felt in Colombia since the last years of the nineteenth century and developed a strong version around the 1920s. The first private law treatises and case law produced during the period showed the tensions between a social-based mode of legal thought and CLT. The main private law treatise writers understood that something was disturbing CLT’s dominance; this was even more apparent in the opinions of the Supreme Court. However, some writers tried to resist the attack embracing an authoritarian view of CLT in which “public law” –the will of the State– was being expanded through a sacrifice of “private law” –the will of the individuals. In the lines that follow I show this dispute between social-based legal thought and CLT in the discussions about property, contracts and torts.

\textit{A. The Nature of Property Rights in Private Law Discussions}

The limits of property rights were a concern of private law treatise writers. The discussions about property by private law treatise writers started with a question about the scope of property according to article 669 of the Colombian Civil Code, which established that property involved an \textit{arbitrary} attribution for the proprietor to use, enjoy and transfer the thing.
owned, under the limits established by the law and the rights of third parties. The word “arbitrary” in this article raised the question whether property rights were absolute or not. In his 1909 treatise, Fernando Velez\textsuperscript{150} tried to answer this question. This treatise, along with his compilations of Colombian statutes since 1810\textsuperscript{151} and mining regulations enacted during the second half of the nineteenth century\textsuperscript{152} placed him as one of the most prolific legal writers of the period between 1895 and 1905. Velez’s voice appears clearly in the private law treatise where he did not merely compiled statutes and regulations, but actually offered theoretical explanations about private law institutions.

Regarding the characteristics of property established in article 669, Velez recognized it was an absolute natural right to the extent that “a man could not exist without using things … as he pleases;” however, a couple of lines below he qualified this broad assertion stressing that the article established some limitations for its exercise: the rights of others and the laws.\textsuperscript{153} Velez did not find any trouble explaining this provision as a classical legal thinker; he saw the article established that individuals had an absolute power within their sphere and that the limits of such power was limited by the spheres of the State –the laws– and individuals.\textsuperscript{154} It is also striking that even though Velez mentioned the natural-right character of property, he did not push forward to establish whether there was an essence of this right that could not be touched by the State’s laws. In other words, Velez understood that the Code gave a broad attribution to the “laws” to draw lines limiting property rights. Therefore, the assertion of absolute property rights

\textsuperscript{150} Fernando Velez, Estudio sobre Derecho Civil, Tomo 3 (1909). Even though Champeau & Uribe’s treatise was published earlier and was actually the first treatise to be published. Regarding Velez’s treatise, the first volume was published in 1899 but volume 3, in which the issues about property were explained, was only published until 1909.
\textsuperscript{151} Fernando Velez, Datos para la Historia del Derecho Nacional (1891).
\textsuperscript{152} Fernando Velez & Antonio Jose Uribe, Codigo de Minas Concordado y Anotado (1904).
\textsuperscript{153} Velez, supra note 150 at 25.
\textsuperscript{154} Id. at 26.
with which Velez opened his explanation of article 669 progressively diluted along his text and he finally focused on the “limitations on property;”\textsuperscript{155} one type of these limits was catalogued by Velez as private law boundaries that had to do with the mutual respect of the spheres of power between individuals. Public law limitations, as a second type, were expanding in the years he wrote his treatise due to regulations about public budget, takings, forced contributions and taxes. These kinds of regulations, according to Velez, were of no interest for private law, which should only worry about the individuals’ sphere of action contained in the Civil Code.\textsuperscript{156}

Velez saw that article 669 opened the door for the contamination of private with public law. To preserve the purity of private –individualistic- law, he explained that a broad portion of the regulations limiting property rights were an issue of public law.\textsuperscript{157} The plausibility of this view relied on the assumption that the Civil Code was a gapless and coherent body of legal dogma in which all situations were regulated in a complete fashion.\textsuperscript{158} This could be true as long as the public law limitations were the exception of the general rules established in the Code. However, if public law started an invasive move over the Civil Code building a parallel regime, the question was whether CLT’s way of explaining the problem was still convincing. I believe Velez’s treatise shows this turning point at the beginning of the twentieth century when it became increasingly difficult for legal elites to justify the merge of private with public law through the will theory inherited from CLT.

\textsuperscript{155} Id. at 27.
\textsuperscript{156} Id. at 27.
\textsuperscript{157} See: FERNANDO DE TRAZEGNIES GRANDA, POSTMODERNIDAD Y DERECHO (1998). This can be analogical to what HORWITZ supra note 14, has observed for the American legal consciousness in which some late classical legal thinkers tried to shrink their old conceptual frameworks in order to exclude new kinds of regulations from their original understanding and argue the coherence of their previous thinking. Thus, contract law was shrunk to exclude quasi contracts that challenged some of their liberal principles.
\textsuperscript{158} See: LOPEZ supra note 5 at 129-233.
This complexity was more apparent in the Supreme Court’s decisions regarding vacant lands and taxes during the first years of the twentieth century. Vacant lands’ cases have interested historians because they are seen as the background of the Colombian peasant movement that articulated political demands that led to a progressive constitutional and land reform in 1936.\textsuperscript{159} Even though most of these cases were solved at the local level, in 1902 the Supreme Court delivered an opinion regarding conflicts between settlers and title holders of property rights.\textsuperscript{160} According to the regulations of the time, the government was authorized to recognize the property right to any person that reported the existence of a vacant land; an administrative procedure started after the report was brought before the authorities, and the government sent experts to establish whether the land was actually vacant. If the land was occupied by settlers, they were paid a compensation for the improvements they had made on the land; also, since they possessed the land they had a preferential right to buy it from the government as long as they offered the same price the claimant had offered to the government.\textsuperscript{161} The problems arose in this case when the administrative procedure finished and the claimant was reputed the owner of the land whereas the settlers, who had apparently been in possession of the alleged vacant land since 1876, without knowing about this procedure sold the land that they possessed to a third party. Since the public official in charge of the administrative procedure over the vacant land never notified the settlers about the claim, they were not able to offer a price for the land they occupied since 1876. They also rejected the compensation because it only recognized the small plantations surrounding the house; the settlers argued that the government

\textsuperscript{159} See: MARULANDA supra note 33 & CATHERINE LEBRAND, FRONTIER EXPANSION AND PEASANT PROTEST IN COLOMBIA 1850-1936 (1986).
\textsuperscript{160} CORTE SUPREMA DE JUSTICIA – COLOMBIA, GACETA JUDICIAL NO. 788 26 (1903).
\textsuperscript{161} Generally, the people that reported the existence of a vacant land were landowners that were familiarized with the legal system. Through this method, many settlers were expropriated as it was happening in this case. See: MARULANDA supra note 33.
should considerate in its compensation the increment on the value of the land caused by their work in the estate. This work made the land suitable for agricultural production and thus they found unfair that the title-holder would benefit from something that the settlers had done.\textsuperscript{162}

The case embodied a clash between capital and labor. The settlers represented the potential workers in an agricultural society, while the title-holders resembled the capitalists that owned the land. The kind of conflicts encompassed in this case were the ones that social legal thinkers view as threatening to paralyze production and thus a harmonizing decision was needed to overcome the challenges. In her decision, the Court questioned the administrative procedure in which the government decided that settlers should be compensated only for their house and the small plantations surrounding it. Instead, the Court focused in the fact that the settlers had used their force to make the lands suitable for agricultural production and ruled against the title-holder.\textsuperscript{163} The Court argued that the laws protected the “real interests of the nation and the principle that land should be owned, when it has not been previously adjudicated, to the first one that […] occupies it and uses it with the sole strength of his arm” making it productive and adequate to carry on agricultural activities and other “needs of life.”\textsuperscript{164} Therefore, the settlers were entitled to offer the price for the land and if it matched the offer of the claimant they should be preferred above him.

This decision reflects that the criterion the Court employed was difficult to articulate within the scheme of CLT. The decision was not reached because it was the expression of the will of the State or the will of the parties. Instead, the Court recognized that there was a conflict

\textsuperscript{162} See: CORTE SUPREMA DE JUSTICIA, supra note 164 at 26-30.
\textsuperscript{163} Id. at 29-30. Nevertheless the settlers had to pay some amount of money to the government for the land and this was impossible many times.
\textsuperscript{164} Id. at 30.
in which a weak party was subjected by a powerful one. The way to solve this conflict was according to the social interest of productivity: what is the best decision to enhance production? The Court thought that it was fair to compensate the settlers who had made the land able for agricultural production and they should have the right to buy it. However, if they could not buy the estate, the law established that an entrepreneur, who would be more able to maintain the productivity of the land, should acquire it. Something different from the will of the parties operated to decide the case: i) the law tried to level the legal participants to avoid the conflict, and then ii) allocated the right to the party that was in a better position to foster the social end—in many cases productivity.

The conception of taxes advanced by the Supreme Court between 1887 and 1915 captured these two faces of the new mode of legal thought. The cases around taxes drew the line between takings and lawful ways in which the government could extract a contribution from individuals. The Court moved toward the reallocation of rights as a way to avoid conflicts and advance social collective purposes. For instance, in 1897 the Court upheld a tax imposed to the alcohol transported from one city to another inside the same Province. The decree, challenged under the idea that it hindered the freedom of commerce and violated the right to property of producers, was upheld by the Court that stressed the idea that it was important to help weak economic actors in the market. The decision of the Court was articulated in the following terms:

To struck down this provision would be dreadful [because] it is clear that some towns of the province, due to the natural conditions of its soil, weather and other situations, produce distilled liquors in a larger amount and with more favorable conditions than other towns […] If the provision is struck down in many of [these latter towns] there would be no production [of alcohol] at all and thus no rent [and] its advantage will be
only for producers. [Henceforth] the provision is fair and equitable because it is natural that producers who seek [the growth] of their business with the transportation [of alcohol] to other towns contribute to the budget of the Province with the tax provided by the latter.¹⁶⁵

Using the language of fairness and equity, the Court envisioned that the leveling of economic actors was important to avoid the paralysis of production. Just as in the case about vacant lands, the leveling of the parties was not simply a necessary result deductively derived from a right to equality. The point was that when social legal thinkers saw risks of conflicts between different legal participants, they decided to harmonize the interests involved in order to avoid a conflict that could paralyze production.

In 1904 the Court eluded a conflict between rich and poor inhabitants of a particular town in a case that involved progressive taxation. In this case, local authorities of a Province heavily charged wealthy individuals in order to complete public works of the town’s sidewalks.¹⁶⁶ The decree was challenged on the grounds that charging only the wealthy ones of the town violated the generality requirement for contributions and taxes. This requirement implied that contributions and taxes should be decreed in a general basis, without making any kind of differentiations among individuals based on considerations such as wealth. If this was ignored, then the tax could be reputed as a confiscation –prohibited by the Constitution. The Court upheld the decree interpreting the requirement of “generality” in different terms: for the Court a tax could burden differently several individuals without breaching the generality requirement. The latter would only be violated in cases in which authorities burdened in a different way individuals that were in the same situation of wealth: therefore individuals able to contribute for

¹⁶⁶ CORTE SUPREMA DE JUSTICIA – COLOMBIA, GACETA JUDICIAL No. 824 318 (1904).
finishing these public works should be burdened equally although the poor ones were not compelled to pay this contribution.\textsuperscript{167} If the Court would have struck down the decree, it would have paralyzed the public works needed in the interest of society.

The avoidance of paralysis and the use of law as an instrument to advance the collective good was also a topic of the Catholic Church within this period. Considering that the Colombian government built strong bonds with the Holy See since 1886 –as seen above–, the influence of the change in legal consciousness of Colombian jurists echoed the views contained in the 1891 encyclical \textit{Rerum Novarum}.\textsuperscript{168} The encyclical, less reactionary than the ones Leo enacted in the 1880s and that were analyzed above, was concerned with the conflict between capital and labor, including the Pope’s views about the limits of property rights. In this document, taxation was justified on the basis that the rights to property should not be held as “sacred and inviolable;”\textsuperscript{169} also, the government was not able to impose so much taxes to the point of making itself an unfair and cruel regime. The State had to limit property rights, said the Pope, only “in the interest of the public good.”\textsuperscript{170} At this point, it was clear that the Holy See, just as the Colombian Supreme Court, rejected the idea that rights’ limitations should be sustained on the grounds of an increasing will of the State. Collective good was the new criteria determining the outcomes of legal processes and it was necessary to overcome the conflicts that were arising between capital and labor.\textsuperscript{171}

Even though it was clear that the social mode of legal thought argued for the protection of the collective interest, there was also a question about the criteria to determine the best decision

\begin{itemize}
\item \textsuperscript{167} Id. at 318-9
\item \textsuperscript{168} \textsc{Pope Leo XIII}, \textit{Encyclical Rerum Novarum} (1891).
\item \textsuperscript{169} Id. at section 46.
\item \textsuperscript{170} Id. at section 47.
\item \textsuperscript{171} Id. at section 37
\end{itemize}
that would advance this social good. The Supreme Court confronted this problem in 1913 in a case that involved a controversy around a tax of a Province that charged cargoes going between two different cities of the same Province, or when the cargo was going to one of these cities and came from outside the Province. The Court upheld the measure understanding that it did not tax the transit of cargo initiated in a city outside the Province that ended in a third Province’s town.\textsuperscript{172} In a concurring opinion, one of the justices also favored the constitutionality of the rule but also argued that there was no reason for a restrictive interpretation as the one the majority opinion had advanced. Thus, he did not agree with the Court’s declaration that the Province was not allowed to tax transit of cargo originated outside the Province when it was going to a city in the territory of a third Province. Instead, he thought that this kind of tax was based in “a philosophical reason, [but also in] a principle that the science of Political Economy establishes: the right of requiring retribution for services. Why do the merchants of Cundinamarca should not pay the province of Tolima, for instance, for the services received transiting their roads?”\textsuperscript{173} This concurring opinion opened a consideration of what was the criterion to determine the best decision that would enhance the achievement of the collective good. The idea of deciding legal issues relying on the analysis of the sphere of action of individuals or that of the State was absent in these cases; some justices in the Court had gone as far as to affirm that political economy determined the best results for society.

By 1917, other legal thinkers thought that political economy was not the main criterion to solve the conflicts present in society. Instead, they found the teachings of the Catholic Church and a notion of Catholic Sociology as the appropriate standard to deal with these problems. Indeed, they called for courses at all levels –school and university– that included this kind of

\begin{footnotesize}
\begin{enumerate}
\item \textsc{Corte Suprema de Justicia – Colombia, Gaceta Judicial Nos. 1081-1082, 334, 337 (1913).}
\item Id. at 339-340 (emphasis added).
\end{enumerate}
\end{footnotesize}
views. However, in the private law literature this was not predominant. Instead, in 1919 a new private law treatise written by liberal Eduardo Rodriguez Piñeres showed that the explanation about property did not rely in the will theory nor in catholic sociology, but in political economy. Rodriguez-Piñeres was a liberal lawyer who’s most important publication, besides his treatise, was Por el Reinado del Derecho where, among other things, he defended the recently established Colombian version of judicial review. In his treatise, Rodriguez argued that law was not an exact science such as mathematics, but something that “lived and was eternally transformed;” and even though “political economy is not a legal science, its knowledge is necessary for legislators and those that cultivate the science of law, because its principles should inform positive laws.” In this sense, the science of law was permeated not only by logic but also by social utility translated to these ideas of political economy. A study merely based on logic, for Rodriguez-Piñeres, hindered the real jurist from a huge amount of knowledge given by “history, political economy, comparative legislation, judicial opinions and doctrine.” Therefore he despised those who saw the Civil Code as a “sort of intangible Koran, considering its dead text as the only thing that should be studied.” This was a departure from Velez’s efforts seen earlier to conserve the coherence and gaplessness of the Code; Rodriguez-Piñeres argued that political economy was a complement for the interpretation of the Code making it now impossible for legal thinkers to argue its intangibility.

Convinced that the idea of “political economy” had overridden the old provisions of the Code based on individual rights, the Colombian legal elites of 1919 thought that the definition of

174 Antonio Jose Uribe, La Legislación y la Economía Sociales in LA REFORMA ADMINISTRATIVA 696, 704 (1917).
175 EDUARDO RODRIGUEZ PIÑERES, DERECHO CIVIL COLOMBIANO TOMO I (1919).
176 EDUARDO RODRIGUEZ PIÑERES, POR EL REINADO DEL DERECHO (1927).
177 See: RODRIGUEZ–PIÑERES supra note 170 at 34 (emphasis added).
178 Id. at 113-114.
179 Id. at 114.
private property as an absolute and arbitrary right was incorrect. As I mentioned above, article 669 stated that property was the right that a person had over a thing to “arbitrarily” use it, enjoy it and transfer it limited by the law and rights of third parties. Rodriguez-Piñeres found this provision outdated because it used the word “arbitrarily;” instead, the provision should be drafted stating that property was a right over a thing to use, enjoy or dispose it within the limits of the laws.\textsuperscript{180} Further on, he continued, the limits upon property were of a very wide variety and could be justified in considerations such as hygiene, morality, security and fiscal interests.\textsuperscript{181} This led him to sustain overtly that the classical individualist conception was being replaced, for a “system in which property should be dominated by social needs and the general interest.”\textsuperscript{182} This was a very different road from Velez’s. While the latter was interested in moving away from the private law realm all public law’s considerations, Rodriguez-Piñeres integrated them to a broad notion of law that had to consider political economy and social needs to achieve the correct solutions for social problems. The collective goals of society and not the will theory explained law; CLT’s explanation of property rights as “absolute” was under attack and was displaced from its dominant position by a socially-based legal consciousness.

A final case from this period, decided in 1919 by the Supreme Court, shows this feeling that CLT was disintegrating.\textsuperscript{183} The case was about petroleum mining, which had been a hot issue in the reorganization of Colombia as a Unitarian-Republican State in 1886. Some of the old States (that were turned into Provinces –departamentos– by the new Constitution) granted the owners of the land the right to property over the natural resources found underneath it. However, from a nation-wide perspective imposed after 1886, the problem was how to enable the national

\textsuperscript{180} Id. at 277.  
\textsuperscript{181} Id. at 283.  
\textsuperscript{182} Id. at 282.  
\textsuperscript{183} CORTE SUPREMA DE JUSTICIA – COLOMBIA, GACETA JUDICIAL NO. 1406 177 (1919).
State to regulate the extraction of these resources in order to authorize mining companies to carry on oil exploitation. The government wanted to avoid a conflict with the landowners that would end up hindering economic development.\textsuperscript{184}

Bearing in mind this situation the President enacted a decree that took for granted that all the goods underneath the ground were owned by the Nation, and thus the individual that found petroleum in his land was compelled to celebrate a contract with the government for its extraction. Petitioners challenged the constitutionality of this decree and argued that the government was affecting a vested right lawfully conceded by prior laws enacted in the years of the federation. Therefore, petitioners said, the government was performing a confiscation of property prohibited under the 1886 Constitution. The Court split its decision: the majority struck down the decree deciding that Congress was in charge of this regulation and not the executive branch. For the majority, there was a lacuna in the general regulations of mining that, when enacted, did not have in mind the cases of petroleum exploration; this issue was not included in the general framework of mines that Congress had enacted, making necessary a new intervention by the legislative body regarding petroleum issues. In any case, the Court said that Congress, in its regulation, should harmonize “the common [or public] welfare” with the rights of the individuals and “reconcile the economic development of the Nation and the protection of the resources used to extract national resources.”\textsuperscript{185} Therefore, the Court saw that a harmonization should be carried out by the government and also recognized that sometimes individual interests clashed against the common welfare and the economic development of the nation. This was an

\textsuperscript{184} The issue was confronted also by two of the Private Law treatise writers of the period, Velez and Uribe, who acknowledged the difficulty in elaborating a principle to determine the solution for the problem. However they compiled all of the laws that regulated matters regarding mining. I do not use this text as a direct source for studying the legal consciousness of the time since the book is merely a compilation where the voice of the authors does not appear. See: VELEZ & URIBE, supra note 152.

\textsuperscript{185} CORTE SUPREMA DE JUSTICIA, supra note 183 at 179.
acknowledgement of the Court that private rights did not clash only with the will of the State, but with a social end called public welfare and economic development. This was the extension of the idea that law was permeated with “political economy” as Rodríguez Piñeres also recognized in 1919, and that such a criterion would be able to reconcile the problems posed by new realities.

The minority of the Court did not strike down the decree. In fact, the dissenting opinion argued that it should have been upheld because the executive had attributions to regulate issues regarding petroleum exploitation according to the general laws about mining; petroleum mining was just a special case for regulation. Besides this “constitutional procedure” argument, the dissenting opinion was also concerned with this new reality of petroleum mining and thought that upholding the decree was better for advancing economic development and avoid the paralysis of industrial progress:

Due to its indisputable advantages, petroleum has displaced coal, from trains, ships, and in general, from all vapor machines; the petroleum industry has a colossal development and is thus object of special provisions, that are related not only with the public welfare […] but also with the independence and security of all nations […] [T]his motivated the executive decree […] Our mining laws do not refer to mineral combustibles including petroleum which […] requires special provisions of scientific and economic order [to be issued by the executive].

Besides the difference in the practical results of these two views, the opinions are useful to see how there was a common ground in which the cases were argued in 1919. While the majority opinion was concerned that the conflict with landowners would ultimately hinder industrial development, the minority thought that the intervention of Congress was not the proper

\[186\] Id.
way to solve the issue because the subject had to be resolved according to economic and scientific considerations. Both of these decisions saw the fostering of industrial development as the key to resolve the issue; however, the politics among the different justices led some to argue for a solution based on the democratic process as a means to harmonize the conflicts and avoid further paralysis, while others thought that since the issue was technical it had to be decided professionally by the executive.

The cases discussed in this section show how Colombian legal elites thought law was a means to overcome the threats posed by conflicts arising due to industrialization and a notion of economic progress. These conflicts threatened to paralyze production—either in agriculture or industry—making it possible to re-conceptualize the right to property. Some private law treatise writers, as Velez, felt this right should be limited by the will of the state or the rights of other parties. However, by the 1920s it was difficult to explain this right relying in this scheme; instead, the regulations and limitations to the right of property were the product of a belief that this right was not absolute because it was subject to a social consideration. This did not mean that takings necessarily occurred in order to redistribute wealth; it means that the allocation of property was decided according to the purpose of fostering production and avoiding social conflicts that could paralyze society. In general terms, the problems that appeared during this period in Colombia resemble what Ihering, writing in 1877, had called the pressure of law upon the individual where he argued that it was false that, property involves in its idea the absolute power of disposition. Property in such a form society cannot tolerate and never has tolerated. The ‘idea’ of property cannot contain anything which is in contradiction with the ‘idea’ of society. This standpoint is a last

\[187\] Rudolph von Ihering, Law as a Means to an End (Isaac Husik, trans. 1921).
remnant of that unhealthy conception of the Law of Nature which isolated the individual as a being all apart. It needs no proof to show where it would lead to if an owner could retire to his property as to an inaccessible fortress. The resistance of a single person would prevent the construction of a public road or a railway […] works upon which may depend the well-being of thousands, the prosperity of an entire province, perhaps the safety of the State.\footnote{Id. at 389.}

The changes in the conceptions of property were echoed in the law of obligations – contract and torts law. I turn my attention to this issue in the next sections.

\textit{B. Interpreting Contracts}

Within a civil law jurisdiction, contracts and torts are seen as the two main sources of obligations giving rise to the two types of civil liability: the first one is derived from entering into contracts and the second one emanates from accidents and harms caused between two persons that had no previous bond. This has caused the distinction between contractual and extra-contractual (or torts) liability in civil law jurisdictions. These two areas were also affected by the changes that legal elites saw necessary in a country that needed to “progress;” a process of industrialization and technological development in agricultural production, and the construction of new infrastructure to communicate the country were a cornerstone for Colombian “development.” This affected the way legal elites saw the scope of private agreements and the basis for determining liability for torts; both of them were walking towards the path in which the will of the parties did not explain the new developments that were taking place. In this section I focus in contract interpretation leaving torts for the next and final section of this third part.
The problems of contract interpretation were captured by the explanation of legal treatises about two provisions of the Civil Code about the limits on the will of the parties whenever they celebrated contracts or any other kinds of agreements. The first of these texts was article 16; it provided that free will could not go against “laws in which their fulfillment order and good customs [were] involve[d].” Meanwhile, article 1524 dealt with the effects of such contracts but in slightly different terms when it said that acts reputed against the “laws, good customs or public order” were void and could be judicially annulled. Within the scope of these two provisions, treatise writers started to determine where were the limits of the free will of the parties and how it should be interpreted in order to respect the limits of the laws, public order and good customs included in the Civil Code. In contract interpretation, the move was from a CLT explanation for the limits of private autonomy towards social considerations. The first trend was present in private law treatises, while the Supreme Court solved some cases taking into account the social-based legal thought described in the last section.

The first treatise that considered this problem was published by Uribe and Champeau in 1898. In this text they explained the notions of article 16 as embracing the idea that the will of the State, represented in the notion of order, was above the will of the parties. Uribe and Champeau asserted that some institutions regulated by the Civil Code were in the “interest of society”\textsuperscript{189} and for the preservation of the fundamental principles of the “social and political organization of [the] State.”\textsuperscript{190} Therefore, religious, social, economic and political issues\textsuperscript{191} should be considered by the judge in order to determine the validity of a particular act or

\textsuperscript{189} See: CHAMPEAU \& URIBE, supra note 10 at 36.
\textsuperscript{190} Id. at 37.
\textsuperscript{191} Id. at 38.
agreement. In general terms, these authors saw that the cluster “order and good customs” could be included in a broad conception of “public order” as the main limit for the action of private parties. It is also important to notice that Uribe and Champeau were claiming that the limit for agreements of the parties protected two different entities: society and the State. Besides the idea that the marriage and family regime were part of the social institutions to be preserved by the provision regarding public order, there was not a clear line to limit the will of the State—or the parties’—in Uribe and Champeau. Anyway their view appeared to be very similar to Samper’s, who thought that law should be explained as a balance between liberty—individuals—and order—the State. An authoritarian version of CLT would expand the will of the state through relaxed notions of society and the State, reducing the sphere of action of individuals.

In his treatise, Fernando Velez refined the explanation of article 16 tying it with the provision contained in article 1524 of the Civil Code regarding the effects of agreements reputed contrary to public order and good customs. He explained how good customs and public order included two different kinds of limitations that should be considered separately. In his account of article 1524 of the Civil Code, Velez tried to limit the idea of public order arguing this was not an open ended notion that could be deduced from general abstract and undetermined principles. Instead, he argued these notions derived from some written provisions that were necessary for the preservation and conservation of i) the State and ii) the “actual social institutions.” In short, he was conserving the idea that society and the State limited the will of the parties in a contract, but he did not say these were abstract principles. Since the first purpose of these legal

---

192 Id. at 38.
193 FERNANDO VELEZ, ESTUDIO SOBRE EL DERECHO CIVIL COLOMBIANO. TOMO VI 67 (1908).
194 Id. at 73.
195 Id. at 71.
196 Id. at 72.
provisions was the protection of the State, within this scope there were laws about its political organization, the attribution of each power –such as provisions about the police power– and even tax laws, to the point that any agreement “that could diminish or harm the fiscal system of the Nation” should be declared void.\textsuperscript{197} Regarding social institutions, the examples brought by Velez were specially the provisions regulating family and marriage,\textsuperscript{198} which could not be contracted away by private parties –an issue that was coherent with the Catholic organization of the family protected by the Civil Code and considered as the cornerstone for the new order established after 1887 against the liberal past.\textsuperscript{199} Also, an act was void for going against good customs when its purpose –\textit{objeto}– or cause –\textit{causa}– was “bluntly immoral,” such as in contracts which its purpose was running businesses that dealt with gambling, smuggling or prostitution.\textsuperscript{200}

Uribe and Velez differed in their explanation about the limits of free will in the point that Uribe thought that these were some open ended principles that could be considered by the judges in a case by case rationale, while Velez sought to limit the scope arguing that this was not an abstract principle but some particular written provisions. In any case, both of them were classical legal thinkers who saw law in terms of powers absolute within their spheres. Velez was neither a libertarian since he was not arguing that there were some essential features of individuals that could not be touched by the State’s regulation. He conceived that the government was entitled to establish positive provisions limiting individual rights either through legislation or administrative regulations. The legislature or administrative bodies could easily end with strong faculties to produce provisions of public order that could not be contracted away by the parties. It is true that

\begin{itemize}
\item \textsuperscript{197} Id. at 67.
\item \textsuperscript{198} Id. at 72.
\item \textsuperscript{199} See: ISABEL CRISTINA JARAMILLO, HISTORIA DEL DERECHO DE FAMILIA EN COLOMBIA (2007) (SJD Dissertation HLS).
\item \textsuperscript{200} VELEZ, supra note 193 at 68.
\end{itemize}
within the structure of the Code their main goal was to protect the family from free will, but outside the Civil Code there were also public order provisions that could be created anytime by the legislator or the administrative bodies in the scope of police power. It must be recalled at this point that Velez tried to push away from the Code some regulations he considered a matter of public law in order to conserve the idea of a complete, gapless and coherent Code. Neither Velez nor Champeau and Uribe drew a clear limit beyond which the State –either through the legislature or the administrative bodies– was unable to go.

While treatise writers provided theoretical justifications for submitting the will of individuals to the will of the State, the Supreme Court started to move towards another idea, one that was closer to social-based legal thought. One of the first cases during this period that had to do with the rights and obligations of parties in the performance of contracts was an opinion delivered in 1897\textsuperscript{201} about a lighthouse administered by the Compañía de Ferrocarriles de Panama.\textsuperscript{202} The company signed a concession contract with the government of Colombia in 1867 establishing that the corporation had the possibility of administering everything necessary for carrying on the enterprise’s ordinary businesses. The ordinary purpose of the company was the transportation of cargo and passengers from the Pacific to the Atlantic coast through a railroad that went from Colon to Panama. A couple of lighthouses (one in each Coast) were administered by the company and thus they charged a lighthouse-fee to the ships that came to the port. When at the end of the 1890s the Colombian government authorized two individuals to build and administer two additional lighthouses –one in the Pacific and the other in the Atlantic– and obtain profits charging fees to the ships that came through the ports, the Company sued the

\textsuperscript{201} CORTE SUPREMA DE JUSTICIA – COLOMBIA, GACETA JUDICIAL NO. 614 329 (1898).

\textsuperscript{202} Panama was a part of Colombia until it seceded in 1903 after a bloody Civil War and an active help of the United States that had a specific interest in the administration of the Canal. Before its separation and in the times of this case, multiple legal problems arose.
Nation. It claimed that they had a vested and exclusive right established in this contract that was signed in 1867 to administer the lighthouses. Allowing new lighthouses, the petitioners argued, would increase the costs for ships that came to the coast because they had to pay for this new service. Therefore, the ships would seek an alternative cheaper route different from Panama for making the inter-oceanic trip, and that would cause the Company great harm. Besides that, the Company argued it needed the fees to run the business.\textsuperscript{203}

The problem posed to the Court was whether she should interpret that the administration of the lighthouses was included as an exclusive right of the Company according to the terms of the contract or not. The Company argued that the contract had actually given them an exclusive right because the fee they charged was necessary to run their ordinary business of transportation; since the words of the contract said that the Company was entitled to run everything necessary for carrying on its business, exclusive lighthouse administration should be included. However, the Court did not agree with the Company’s arguments and ruled in favor of the Nation interpreting the contract in a different way. For the Court, the express text of the 1867 contract did not say anything about the administration of lighthouses and thus they should be understood as excluded from the administration grant given to the Company. Further on, the Court argued that the rationale for this result was that the new lighthouses were going to improve the “safety and comfort” for the ships that got close to the harbor. These new lighthouses, said the Court, were going to provide an extremely important service\textsuperscript{204} and thus it was better to have more lighthouses for the goals of security. The case showed how the wills of the parties were not simply subjected to the will of the State; instead there was a collective good consideration in the decision of the Court that had to do with the fostering of commerce. The question that the Court

\begin{flushright}
\textsuperscript{203} Corte Suprema de Justicia supra note 196 at 330. \\
\textsuperscript{204} Id. at 334.
\end{flushright}
answered was which option was better for advancing the social good: letting the Company alone provide the service or permitting other individuals to improve the safety conditions of the port. The Court decided for the latter.

It could be argued that in the last case the Court was simply advancing a formalist interpretation where only the exact words of the contract were used to interpret the will of the parties. However, this argument can be dismissed taking into account a similar case decided by the Court in 1893 regarding a claim of the same Company about the exclusivity of putting light posts along the railroad line.\textsuperscript{205} The claim was, again, based in the 1867 contract which established that the “government of the United States of Colombia gives the Panama Railroad Company the use and possession over 90 years of the railroad built between Colon and Panama. This concession includes not only the railway but also buildings, warehouses […] And generally all the works possessed today by the company, necessary for the service and development of the enterprise and all of them required in the future due to its object.”\textsuperscript{206} The Court agreed with the company in the following terms: “The Company can establish all the things that it considers precise and necessary, according to the commercial needs \textit{in order to give security} in the transit of passengers, things and commodities that it is obliged to transport; this security \textit{will contribute increasingly to the growth of the enterprise}.”\textsuperscript{207} The company was authorized, according to the Court, to all of the accessories that were considered necessary in the face of “universal progress.” Thus “it is not correct to cast some doubt that lighting of the way is necessary for the night service and to properly watch or keep an eye on the way, such as it is doubtless the utilities and

\begin{footnotes}
\item[205] CORTE SUPREMA DE JUSTICIA – COLOMBIA, GACETA JUDICIAL NO.423 49 (1893).
\item[206] Id. at 54.
\item[207] Id. (emphasis added).
\end{footnotes}
advantages of the telegraphic service.\textsuperscript{208} Even though the contract did not mention the light posts, the Court understood this was something clearly included by the contract because it was necessary for the service. This shows how the Court interpreted contracts with the purpose of avoiding the paralysis of public services and fostering a better public service in light of universal progress.

In a similar way the Supreme Court interpreted a lease contract in 1906 showing that for this kind of cases there was a superior consideration that overrode the actual will of the parties. This was an opinion about a controversy that arose due to a lease contract of a cattle farm in which the tenants were conferred the right to exploit it with due diligence, and return the estate in good conditions at the end of the lease.\textsuperscript{209} The terms of the contract were not exactly the ones provided by the Civil Code for leases so the Court analyzed whether the particular agreements contained in this contract were not against the notions of “public order” and “good customs” established in the Code. One of the controversies relied on the fact that the contract said that at the end of the agreement the tenants should give back the estate in good conditions to the owner for the continuation of the business. The tenants argued that this obligation was only to be verified at the end of the contract but that they did not have any duty during the contract to maintain the estate in good conditions. The fulfillment of this obligation should be verified at the end of the lease and thus the tenants rejected the claims of the owner who argued that they had not maintained the estate in proper conditions for exploitation during the lease. The Court rejected the arguments of the tenants and decided the contract should be interpreted to include a

\textsuperscript{208} Id. at 55.
\textsuperscript{209} Corte Suprema de Justicia – Colombia, Gaceta Judicial No. 894-5 65 (1908).
duty to maintain the estate in good conditions during the lease; thus, the obligation was not only fulfilled when they returned the estate at the end of it.\textsuperscript{210}

The arguments of the opinion were framed in the idea that lease contracts had moved away from the regulations of the Civil Code due to the “progress in agriculture and industries” and the need that “those progresses should be taken into account, something that is difficult […] in a permanent Code of slow reform that because of this, with imperative and compulsory provisions, would be back in time bearing in mind industrial advance.”\textsuperscript{211} Within this framework, the Court rejected the arguments of the tenants considering that, a decision otherwise would cause a great harm to the industrial ends of the land; the Court’s main concern in favoring the tenant’s interpretation was the fate of leases of “agricultural or industrial enterprises, stores, plants, railroads. If by returning the thing in proper conditions at the end of the lease the tenants fulfill their duties [they could] destroy the business leased to [them] allowing customers to flow away from it.”\textsuperscript{212}

These cases reflect how legal elites thought about the interpretation of the will of the parties as submitted to superior considerations regarding social collective goals such as “security”, “public service” and “agricultural and industrial progress.” The three of them involved an idea of economic progress of the country: the Panama transportation connected the country with a global movement of population going from the Atlantic to the Pacific, while the agricultural and industrial progress was the way elites saw their possible connection with global

\textsuperscript{210} Id. at 74  
\textsuperscript{211} Id. at 70  
\textsuperscript{212} Id. at 74.
markets. A threat to paralyze either was highly costly for legal elites. It was clear also in contract law, as it was in property rights, that the social purpose of seeking economic progress had to be protected and that was the criterion used to interpret contracts. In the case of the lighthouses the Court read the contract in a textual fashion stressing that the administration of them was not included in the contract. Meanwhile, in the other couple of cases, the Court rejected a textual interpretation considering that the continued public service and the protection of the industry were paramount interests that had to be protected. The view that the contract was not simply the will of the parties, but a means to advance the social end of industrial and commercial progress challenged the views of Velez, Champeau and Uribe, who explained the limits of the free will in terms of CLT. However, the Court was moving away from this mode of legal thought since the second half of the 1890s. This different approach between CLT and social-based legal thought was also evident in torts as I analyze in the next section.

C. Torts: Between subjective and Strict Liability

Political leaders struggled to build roads and railroads during the period analyzed. The new means of transportation posed some challenges for the traditional visions about torts in the Western world. The legal consciousness thus confronted the problem of whether the notion of subjective responsibility should apply for all the cases that involved a tort. This system was based on the ideas of fault and causation, which established that a person had the duty to compensate for any damage he caused directly to other parties due to a faulty behavior. Thus, the

214 JORGE L. MARTINEZ, LA REGENERACION SOBRE RIELES (1925).
215 HORWITZ, supra note 14 at 51-64.
plaintiff should prove the defendant’s fault and direct causation to obtain redress. In cases that involved railroad accidents, the Supreme Court started to consider torts caused by industrial accidents as a realm outside subjective liability where fault and direct causation were not necessary to obtain compensation.

This move began with the interpretation of the 1887 Civil Code’s provisions about torts; article 2341 established that all injury caused to another person by its “offense or fault” should be compensated. Legal doctrine had trouble understanding the scope of the cluster “offense and fault” and explained that the problem was whether these two words established that subjective responsibility was always applicable regardless the specificities of the case. Indeed, if ‘offense’ was understood as ‘criminal offense’, then the system of torts was designed on the basis that it was always necessary to set an inquiry about the will of the defendant. This was possible as long as criminal law was based on an inquiry about the fault of the offender; this was true until the enactment of a Criminal Code in 1936 based on the “positivist school,” which based the determination of punishment in the danger the criminal posed for society. In 1911 Velez saw the article was, in general terms, establishing such a system stressing that offense should be assimilated with “malice or intent,” while when it was talking about fault it should be understood as “negligence.”

Velez’s position was not that straightforward because the Code also established, in article 2347, that there were special cases in which a person was also liable for the actions committed.

---

216 One of them was whether “offense” referred to “criminal offenses” and thus it was regulating something that should be done so in the Criminal Code.
217 These theories of Criminal Law were transplanted by Colombian elites from Italian Enrico Ferri. The 1936 Criminal Code, valid until the 1980s, expressed this view where the will of the offender was not relevant in the determination of “guilt”. See: Bersarion Gomez, Desarrollo del Pensamiento Jurídico Colombiano. Perspectiva Historica del Derecho Penal en Colombia in 24 DIALOGOS DE SABERES 85 (2006).
218 FERNANDO VELEZ, ESTUDIO SOBRE EL DERECHO CIVIL COLOMBIANO TOMO 9, 1-5 (1911).
by the ones that were under his dependence or care. Thus, parents were responsible for the torts committed by their children and entrepreneurs could be held liable for the action of their “dependents.” The responsibility ceased to exist when parents or entrepreneurs had used all the available means at their hand to avoid the damage. Seemingly, the Code opened a door for arguing that some cases did not require an inquiry about the fault, intent or malice of the person compelled to compensate the injury. However, Velez saw that this article was merely establishing indirect liability, assuming that the father or entrepreneur acted with a degree of fault when he inadequately educated his child or wrongly chose his dependent. These were the ideas of fault in vigilando –not watching out properly for his kids– and in eligendo –wrongfully choosing one’s dependents or agents.\footnote{Id. at 22-5.} Therefore, Velez concluded, the system was still based in some degree of fault of the defendant obligated to compensate.

Even though Velez insisted in explaining the Civil Code’s provisions about torts based articulated in the idea of subjective liability, things got messy when he analyzed a special statute related with accidents by railroad companies.\footnote{Id. at 19-20} These special regulations had started in 1887 and explicitly allowed private parties to seek redress from the owners of the companies and not from the drivers of the trains who had directly caused the injury.\footnote{Id. at 19.} It was possible to explain these regulations in the frame of Velez’s explanation of article 2347 about fault in eligendo, but a case decided by the Supreme Court in 1897 showed that the justices understood that the discussion was between subjective and strict liability. In the case, the owner of a railroad company was held liable and the Court ordered that he had to compensate some individuals for the destruction of their house and the things inside them due to some sparks that went out from

\footnote{Id. at 22-5.}
\footnote{Id. at 19-20}
\footnote{Id. at 19.}
the train operated by the company he owned.\textsuperscript{222} The defendant argued that there was no proof that he had caused the harm as a result of an “offense or fault[y behavior]” so no legal obligation to compensate existed. However, the Court ruled that even though article 2341 of the Civil Code established that fault was a requirement for ruling for a compensation in favor of the plaintiff, this was not an absolute principle; unlike Velez, the justices of the Court understood that article 2347 established an exception to the principle of subjective liability when it provided that even though a person did not act with negligence or intent he could have an obligation to compensate the aggrieved party.\textsuperscript{223} The majority opinion also saw that Law 62 of 1887 –about railroads– was an exception to the general principle. This law established that in the determination of railroad responsibility, entrepreneurs were liable not only for torts caused due to their carelessness or negligence, but also for any violation of regulations regarding their activity.\textsuperscript{224} This was a move towards strict liability where it was understood that the company was liable for causing an unlawful harm, regardless the intention or fault of the agent. In such cases, the justices argued that the only possibility the defendant had for exonerating was a proof that he had used all the means at his disposal to avoid the harm.\textsuperscript{225} The Court reached this conclusion extending the scope of another provision of the Civil Code, article 1604, which said that the burden of proof of due diligence and care relied on the party required to act in such way. Since in this case the company had this duty due to its “risky” business, then she had the burden of proof.\textsuperscript{226} Therefore, in these railroad cases, the Court relieved the plaintiff from proving fault or intent and shifted the burden to the defendant.

\textsuperscript{222} \textsc{Corte Suprema de Justicia – Colombia, Gaceta Judicial No. 652-3 217 (1899).}
\textsuperscript{223} Id. at 220.
\textsuperscript{224} See: article 5 of Law 62, 1887.
\textsuperscript{225} \textsc{Corte Suprema de Justicia, supra note 222 at 222.}
\textsuperscript{226} Id.
The Court’s explanation recognized that the problem was between subjective and strict liability. The expansion of the latter undermined the will theory: while a subjective liability approach suggests that the will of the parties should be limited to avoid conflicts with other individuals, strict liability assumes that the problem of torts does not have to do with the will of legal participants but with the risky nature inherent to activities such as railroad transportation. For social legal thinkers, this move was necessary because it allocated the prevention of the harm on the party that was better equipped to avoid the injury (the railroad company), envisioning that a strict liability for enterprises promoted safety and security for a transforming –industrializing– society.  

This conclusion reached by the majority was resisted in a CLT-type of dissenting opinion that did not share the solution and the reasons used by the majority in this case. The lonely dissenter thought that the majority’s reading of the Law of 1887 and its extensive interpretation of article 1604 of the Civil Code was a terrible mistake. For him, the special Law that moved the balance of tort law towards a system of strict liability disrupted the wise system established in the Code, especially because it was adopted in the midst of hot debates in Congress. Besides that, he said that article 1604 was not applicable to this case because it was part of the Civil Code’s section regarding contractual obligations; tort law had a special section based on the concepts of fault and offense, making it impossible to apply article 1604. Fault and offense, the dissenter continued, should be interpreted according to criminal law where they referred to subjective liability. Therefore, the change in the burden of proof was unjustifiable according to

---

228 CORTE SUPREMA DE JUSTICIA, supra note 222 at 223.
229 Id. at 224.
230 Id. at 226.
the traditional principles that governed a system articulated in the idea of malice, intent and negligence. The dissenting opinion thought that it was possible to draw a clear line between public and private law –understood as the Civil Code. Public law corrupted the Civil Code and the Court should resist merging these two realms. Inside the Civil Code, as well, there was a strict differentiation between contracts and torts that the majority opinion imprudently blurred. The dissent rejected the idea that a tort existed without any inquiry about the will of the parties.

The other polemic aspect of the decision was the problem of holding the entrepreneur liable for a harm that he had not caused directly. For the Court and the Law of 1887, the entrepreneur was responsible when the damage was caused in the execution of the business that he ran.231 This was a dismissal of the idea of direct causation. The dissenting opinion also captured the issues at stake with this abandonment of direct causation by the majority and argued that the owner of the company was in Europe, that he had chosen responsibly the workers of his railroad, and that there was a material impossibility for him to avoid the injury. In the view of this dissenting opinion, the majority was making him liable for the fault of the train operator, who had caused directly the harm to the plaintiffs’ property. Therefore, the Court should have held liable the train driver because he was directly involved in the harm.232 Even though this dissenting opinion was plausible on CLT grounds, the social mode of legal thought feared that such a decision could paralyze railroad transportation; holding liable the machine drivers could discourage individuals to operate the trains causing the paralysis of the services or even strikes among train operators that would be ordered to pay amounts of money they did not have. Meanwhile, the cost of compensating damages was not extraordinarily high for railroad companies who could still obtain profits despite this strict liability system.

231 Id. at 222.
232 Id. at 226.
Although legal doctrine did not recognize expressly that their system was sailing away from a fault-based liability, it recognized that the reality of industrialization demanded new laws and special interpretations due to the risk involved in the activities. This was evident in Velez’s 1911 treatise on torts when he commented this same case and argued that it was possible to seek redress from railroad companies even when they were not carrying cargo or passengers and, thus, not technically performing the service or business. Showing his fear towards the activities of this new enterprise, Velez went on to say that even though laws did not provide so,\textsuperscript{233} this broad interpretation was necessary because otherwise railroad companies “had a blank check when they were not carrying passengers or any type of cargo to commit all kinds of grievances and it is impossible to suppose that this was the purpose of the legislator.”\textsuperscript{234} These activities required new and different legislation that met a reality not present when the provisions of the Civil Code were originally drafted.\textsuperscript{235} Further on, Velez thought that there should not be a textual interpretation of the law but a broad one to include other kinds of damages the railroads could cause.

This discussion of torts around the ideas of subjective and strict liability was related to a new kind of business that appeared in the Colombian landscape. It showed the interdependence between different interests: society had a “collective interest” in the service because railroads were a key for progress; the enterprises wanted to profit from the new business; individuals living around the railroad were interested in protecting their property against the risks involved in railroad operation. Striking the balance between the different actors, for the social legal thinkers, should protect especially the interest of society. Therefore, the solutions that the “social

\textsuperscript{233} Law 62 of 1887.
\textsuperscript{234} VELEZ, supra note 212 at 20.
\textsuperscript{235} Bello’s Civil Code project was from 1853.
people” reached had to be read with these lenses. In the case of torts, they believed it was easier for the companies to prevent the harm and thus they allocated the responsibility in the entrepreneurs; this was a move away from the will theory and CLT. A part of Colombian legal thought was prepared to accept that

all rights of private law, even though primarily having the individual as their purpose, are influences and bound by regard for society. There is not a single right in which the subject can say, this I have exclusively for myself, I am lord and master over it, the consequences of the concept of right demand that society shall not limit me. One need not be a prophet to recognize that this social conception of private law will continually gain ground over the individualistic.236

IV. Conclusions

This paper has been an attempt to link the developments in different areas of law through a historical approach to Colombian legal thought. This historical understanding covers a gap between private and public law literature giving a picture of legal thought as a complex interaction between common ideas that find different expressions through several fields of law. I have shown in this paper how CLT was attacked from two different fronts: traditionalism and social-based legal thought. CLT did not observe passively the disintegration of its structure. It tried to fight back and explain the changes and views that threatened its main traits under its own conceptual apparatus. Therefore, when traditionalism understood that a more authoritarian

236 THERING, supra note 187 at 396
constitutional framework was needed, CLT tried to show that it also had an authoritarian trend. Also, when social-based legal thought articulated the idea of law as a means to social ends, CLT tried to make more flexible its notions of “public order” or “good customs.” Therefore social-based legal thought in Colombia was not dialoguing with an individualistic type of CLT\(^\text{237}\) but with an authoritarian one that was willing to expand the sphere of the State.

Although my work is in legal history, this paper gives some clues to understand how lawyers think in Colombia. Traditionalism, CLT and a socially-based legal thought are not predominant in Colombian contemporary legal thought; however, this does not mean that these modes of thought have been fully abandoned in the present. It is possible to find contemporary debates articulated in these terms; clearing out its main traits can give transparency to the discussions about the role of law and legal institutions. In this sense, this paper is an attempt to show that the formation of legal thought is not an evolutionary progression of ideas that slowly replace the previous ones but a complex debate that is not fully resolved. This is why the sections of this paper did not close with the synthesis of the debate; instead I tried to show the argument across the collapse of CLT in Colombia to give the feeling of ongoing tensions that do not finish with the total elimination of opposing modes of legal thought.

Within the Colombian legal academia there has been a trend to see the legal field as a discussion between formalism and anti-formalism. Since this dichotomy sees legal debates as problems about “method”, it dangerously neutralizes positions that have more political edge and

\(^{237}\) This was probably the case in the United States where progressive or social-based legal thinkers reacted against a vision of the will theory in which the individual was given a broad sphere vis-à-vis the government. In United States’ legal history this has been called the Lochner era. See: HORWITZ, supra note 14.
are not only “methodological” problems. In this paper I have moved away from seeing the history of Colombian legal thought as an extension of this problem and thus the questions that arise at the end of this paper are wider: is there some relationship between CLT and Catholic thought we are missing? What happened with traditionalism in constitutional thought along the twentieth century? Did social-based legal thought have some articulation in constitutional thought? Were there some periods in the history of Colombian legal thought that CLT was able to strike back against social-based legal thought in a strong fashion? Linking this paper with politic we can also ask: bearing in mind lawyers have been the base in the history of political parties in Colombia, do the politics of these parties are a reflection of the discussions of the legal matters treated in this paper? To what extent is legal thought the engine that moves the political arena in Colombia? These are some of the questions this paper opens that are not simply a matter of “methodology” but of the politics of law –or “ideology”.

One of the neutralized books is DIEGO LOPEZ, EL DERECHO DE LOS JUECES (2000). The book is about the consolidation of the Constitutional Court as a political actor between 1993 and 2000 through the adoption of a precedent system for constitutional cases. However, the chapter where this political argument was carried out had less impact than the tools Lopez offered for reading case-law.