Chapter 103

History of law - epistemological configuration

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Adelcio Machado dos Santos
PhD in Engineering and Knowledge Management (UFSC). Post-Doctor in Knowledge Management (UFSC). Professor and researcher in the Graduate Programs "Stricto Sensu" in Development and Society and Education of Uniarp. Address: Rua Prof. Egídio Ferreira, nº 271, Apto. 303 - 88090-699 Florianópolis (SC) Brazil
E-mail: adelciomachado@gmail.com

ABSTRACT
The History of Law consists of the discipline responsible for the study of the external sources of law, that is, how it is born, evolves and transforms to finally reach the present. Currently, examining and problematizing the relations between History and Law is of the utmost importance, especially when one takes into account the perception of normativity extracted from a certain historical context defined as a past experience that raises awareness and liberates the present. The beginning of the history of law dates back to the time when men began to live in organized groups, giving rise to the formation of communities, and from there they felt the need to discipline their own conduct, outlining norms of respect for the rights of each one. The study of the History of Law results in the legal utility for understanding the origin of the legal system and its connection with the institutes of the past, in which current law has its origin. It is practically impossible to unlink the study of the law from its origins, because the complete understanding of legislation requires knowledge of the history of its formation. Thus, the study of the history of law shows what it was in the past and the path it took to reach contemporary law. It is through the History of Law that the points of contact between the old and the modern legal institutions are established, creating better conditions and greater facilities for the examination and understanding of these same institutions in their current state.

Keywords: Law, history, legal formations.

1 INTRODUCTION

The story comprises the narration of the important legal facts, enabling the retraction of the succeeding of humanity through the ages, pinheiro and bekhor (1997) say. It is the present experience of the present that leads to the historical search. Historiographic making always part of the present, questions and concerns are raised in the present time and answers are sought in the past.

In other words, the historian is part of questioning the present, attributing importance to the facts of the past, in search of proof of them through evidence to be investigated in official and unofficial documentary sources. The sources are subjected to critical analysis to verify the originality of the document.

Thus, if the historian merely narrates a story, simply, even if by artistic form it will not be a science. If not a literary genre. However, from the moment he develops a scientific analysis of past achievements, researching their causes and projections in the future, one cannot fail to recognize that it assumes the position of a legal science (PINHEIRO E BEKHOR, 1997).

History can be understood as a science not in the sense of a laboratory science that follows rigid experimental methods, but as a critical investigation about historical facts, which require the historian rational insight to identify historical truths. The historian questions a notion of time, since the set of historical agents exists in multiple time rhythms; questions about the subject or subjects responsible for the

historical movement; other experiences are incorporated and the pertinence of theoretical concepts and categories is tested in them (MALUF, 1995).

Thus, it is possible to verify that history is not built only on the basis of officially recorded events, because there are a series of documents that are not innocent, but constitute traces that need to be analyzed. Purely scientific history excludes many facts because they are not within scientific rigor. There are a set of varied historical agents that follow different time rhythms and differ as to the perception of time.

The historical study allowed the construction of a conception of human societies as global structures, historically specific, complex but cognoscible organized totalities, subject to regularities and determinations. The historian makes constant clippings in past events, since it is impossible to become aware of all the facts and the exact way they occurred in the past.

Thus, Cardoso (1981) maintains that history is a selection process that takes place in view of historical relevance. Thus, as the historian selects from the infinite ocean of the data those that have importance for its purpose, thus also extracts from the multiplicity of sequences of cause and effect only the historically significant ones. The standard by which it governs historical relevance is its ability to make them fit into their rational framework of explanation and interpretation.

The other cause-and-effect sequences should be refused as something accidental, not because the cause-effect relationship is distinct, but because the sequence itself is irrelevant. The historian can accomplish nothing with it, because it is not reducible to a rational interpretation, it lacks meaning for both the past and the present (CARDOSO, 1981).

Thus, like the most different social institutions, documents, sources, traces, the evolution of law has also always been the object of historical analyses. For Pinheiro and Bekhor (1997), unlinking the study of law from its origins seems to be almost impossible. To know a good legislation, it is necessary to be aware of its history. There is a succession of facts in the evolver of history that intertwine and complete themselves, giving rise to the contemporary system of law.

2 WHAT IS THE HISTORY OF THE RIGHT

According to Pinheiro and Bekhor (1997), the History of Law, as a specific area within history, is one that takes care of the study of the external sources of law, that is: how it is born, evolves and transforms to finally reach the present.

The history of law can be divided into internal and external. The internal history that occupies a specific field of law comprises a material study of public and private institutions, while external history is formal, extrinsic and responsible for examining the sources of law, that is, the way legal norms arise.

The History of Law relates to all disciplines that relate to the sources of general history, such as Psychology, Linguistics, Human Biology, Social Geography, among others. It can also be divided and special law. The first deals with law as a whole, studying the evolution of legal ideas and forms through the ages. The second takes care of the right, from a single angle or from a single branch of law, such as the

History of Political Institutions, Criminal Law, Civil Law, etc. (PINHEIRO E BEKHOR, 1997).em História Geral

The History of Law is not simply constituted of a mere narrative of legal facts, because it cannot be limited to this aspect. This branch of history needs to seek scientific knowledge of the causes that generate the norm, the environment in which it was generated, the human sense that sustained it through the ages.

According to Wolkmer (2003), examining and problematizing the relations between History and Law is of the utmost importance today, especially when one takes into account the perception of normativity extracted from a certain historical context, defined as a past experience that raises awareness and liberates the present. Obviously, this concern is dissociated from a historicity of the legal, outlined by an entire theoretical-empirical tradition based on propositions coated by the force of continuity, predictability, formalism and linearity.

However, in order to achieve a new historical reading of the legal phenomenon, as an expression of ideas, thought and institutions, it is necessary to determine the distinction of the specificities inherent to each scientific field of what is History, of what is Law, as well as the meaning and function of an interpretation that is based on the traditional or critical bias.

In the trajectory of modern legal culture there is consensus that areas of research, such as History of Law, History of Legal Institutions and History of Ideas or Legal Thought, are all identified, sometimes with a formalist, abstract and scholarly knowledge, sometimes with a truth extracted from large legislative texts, exegetical interpretations of magistrates, hermetic formulations of jusphilosophers and archaic and bureaucratic institutes (WOLKMER, 2003).

However, according to Wolkmer (2003), this long tradition has been interrupted in the last two decades by a renewed interest of a critical-ideological nature for methodological issues about the history of law. This change of vision also reflects the exhaustion of a certain type of legal historiography based on liberal-individualistic values.

This resumption of the historicist bias on ideas or legal institutions seeks to overcome the deep crisis that has behit this field of research. The lack of relevance of the discipline is not due to the lack of specialists or aficionados, but much more due to a crisis motivated by its lack of meaning and the difficulty of finding a function that really justifies its existence, argues Wolkmer (2003).

A careful analysis of the reasons for the exhaustion of the History of Law highlights the fact that the legal historiography of modernity, formed largely by liberal-bourgeois principles and values, plays two very clear objectives. The first refers to relativization and, consequently, devaluation of the pre-bourgeois social and legal order, presenting it as founded on irrationality, prejudice and injustice. The second objective concerns the realization of the apology of the struggle of the bourgeoisie against this illegitimate order and in favor of the construction of a 'natural' and harmonious law and society, that is, freed from the arbitrariness and historicity of the previous.

The bourgeois criticism of the former law and the political-feudal organizations had effects and was effective at first historical moment, but ended up losing meaning with the building of liberal-individualistic order and hegemony.

Thus, the mission of historiography has become a mechanism for the farewell of the legal, political and social order of the capitalist mode of production, to the extent that the institutionalized space is now covered by an ideological universe presented as a natural situation and independent of historical becoming. This results in the fact that legal historiography, dependent on legal texts and the exegesis of its greatest highlights, is oriented, at the same time, towards a technical-dogmatic formalism or an old-fashioned erudition of social life (WOLKMER, 2003).

In this way, some jurists-historians declined to a conservative and dogmatic narrative that aimed at justifying the prevailing social and legal order, trying to prove that it immersed it in tradition, in the national spirit, or that it resulted in a slow progress of the 'human spirit.' This attitude developed by jurists historians neglected any explanation of law by a dynamic process, inserted in the context of conflicts and social tensions.

According to Wolkmer (2003), another tendency of legalism operators in academia was the non-consideration of a historicity of institutions that would enable, in the formation of jurists, the practice of effective and legitimately identified conducts with the problems of society.

According to Hespanha (**apud** WOLKMER, 2003), with this, the officialization of an erudite and passadist historiography that tended to take refuge in the most remote historiographic times and in purely theoretical-academic discussions of an idealistic/abstract nature.

The critical problem of historical knowledge is set aside by the outbreak of traditional historicism, hiding in the supposed myth of the neutrality of knowledge and the universality of the principles of positivist science, an expression of the competitive phase of the capitalist system. Thus, the construction of historical knowledge about law is ordered by a linear, static and conservative perspective.

This static way of historical doing forges a historical-elitist knowledge, based on the mutual construction of the neutrality of culture and intellectuals, transformed into a kind of arbitration instance placed above class conflicts.

To the extent that traditional historiography (liberal-bourgeois) becomes a simple discipline of justification of the legal order and the accumulation of knowledge for the so-called "superior culture", without useful purposes towards reality, the History of Law loses its meaning and enters into constant discredit, constituting a field of knowledge of little use, ending their assumptions by succumbing to a crisis of effectiveness.

The profound epistemological transformations in the human sciences, the new interests, the insurgency of social conflicts and the recent transformations that contemporary life forms have been undergoing determine a methodological renewal in the historical studies of legal and political institutions, Wolkmer (2003) maintains.

Thus, it is necessary to redefine, in the historicity of the crisis, the new theoretical and methodological frameworks that make it possible to reach a new paradigm, involving alternative modalities of interpretation, research and historical research. No longer a linear, elitist and cumulative historicity, but problematizing and transformative.

3 NEW MILESTONES IN THE HISTORICITY OF LAW

It was only at the end of the 1960s that critical renewal began to appear in the history of law, within the scope of its historical sources, its ideas and its institutions. According to Wolkmer (2003), it is a movement of substitution of theoretical models, constructed in a very abstract and dogmatized way, by historical investigations, engendered in the dialectics of production and concrete social relations.

It can be described five epistemological events that have exercised and still exert profound influence as a reference framework for new studies on the History of Law in Latin America. They are influences of philosophical thought and social theory that have contributed to the rethinking, both with regard to the historicist understanding of the legal universe, as well as with regard to the critical development of the historiography of law.

The first of these events includes the emergence, at the end of the 1960s, of a progressive current of neo-Marxist nature in Western Europe, which triggered profound changes in the social theory renewal of Marxist studies, politically enabled by the end of the Cold War, consisted of the restocking of the classical texts themselves and the discovery of the theoretical potentialities of gramscian interpretation of Marxism (WOLKMER, 2003).em geral. A

The resumption of Gramsci's writings led to the shift from dogmatism and Leninist mechanism to a more flexible cultural policy open to self-criticism. The growth of the debate about Marxist theory, together with the broad scope of a review of its canons, coincided with the explosion of the movement of 68, impregnated by an anticapitalist strategy, came accompanied by the discourse of the new social subjects and the new contents of the revolution, materializing the ideological criticism of science, institutions and the social division of labor.

The second event comprises the proposal of a critical theory of Neo-Marxist-Freudian inspiration, represented by the Frankfurt School that contributed to propose a historical-social philosophy that would enable the change of society from the constitution of a new type of man. This new conception of man is based on the idea of emancipation from his alienated condition, of his reconciliation with non-repressive nature and with the historical process built by him. The goal of utopian reach lies in the reconciliation between the social subject, the non-repressive nature and history.

According to Wolkmer (2003), this critical theory is evidenced as an operating instrument that enables the awareness of the subjects in history and the rupture of their condition of oppression, spoliation and marginality. In addition, it enables the critique of the great mythological models of the objectivity of bourgeois philosophy, especially positivism and neopositivism. With this, new domains of human and

social reality are brought to the experience of historical research, with which new problems are opened and new explanatory synthesis is required.

The third reference that contributed to the renewal of Western historiography comprises the set of research and analysis criteria put by the "French School of annales". Thus, the so-called New History emerged, which has undergone a great impulse in the last fifteen years, to the point of becoming the most characteristic expression of the French historiography of the present day.

Through the "French School of the Annales", the history of mentalities and problem history came to occupy a space of story-reporting history. According to Wolkmer (2003), the very historical fact that for a long time constituted a safe value of positivist science, became a material like any other. The traditional paradigm of historical narrative has given way to a History that interrelates the various meanings of human activity.

Thus, Hespanha (**apud** WOLKMER, 2003) states that the renewal of history, under the aspect of interdisciplinary meaning focused on the pure description of isolated official events, through an effort to surprise the deepest and most stable structures, namely demographic, economic, cultural and linguistic structures, which explain the verification and chaining of these facts.

In addition, it is intended to remove the obstacles that are raised between the various specialized sectors of history in order to establish a global, interdisciplinary history, restoring the real unity of life, in which the various aspects of human activity are interrelated. We also seek a social history that is involved in the results of the human sciences.

Finally, this renewal of history driven by the "School of Annales" takes into account history not only as a science of the past, but as a science that is part of the questioning of the present, to the extent that, in connection with the human sciences, it investigates the laws of organizations and transformation of human societies.

The fourth reference, according to Wolkmer (2003), concerns the existence of a Latin American liberating thought that is defined by a theoretical-practical struggle against the socio-political situation of domination, oppression, exploitation and injustice. It consists in combating full adversity and the unrestrained search for radical changes.

It is worth mentioning, as a contribution of this Latin American liberating thought, to the new historicity of the forms of legal control of social normativity, the affirmation of emancipatory alterity, through a right free from injustice and coertion, composed of authentic citizen-subjects. Thus, the concepts of "otherness", liberation" and "social justice" are introduced into historical research.

Finally, the fifth and final influencing element of the renewal of the Law History movement corresponds to the most recent presence of the practice and alternative legal hermeneutics. According to Wolkmer (2003), it is not strictly a homogeneous school, with a finished proposal, but much more of a current that emerges in the late 1980s and early 1990s in Brazil.

This perspective implies the strategy of struggle within the legality established within the scope of institutionalized equipment and legality to be instituted in the sphere of pluralities of groups and social movements that have their fundamental rights denied and repressed. Attention is focused on the fissures and deficiencies of the formal-individualistic legal order, seeking to recover, through critical interpretation and humanistic application of legal texts, the transforming dimension of law, putting it at the service of liberation.

For Wolkmer (2003), the highlighted epistemological events reveal themselves as inexhaustible subsidies to make up the new methodological references of a critical and interdisciplinary hermeneutics in the historical study of ideas and institutions in the field of law.

The first objective that results from this whole process of renewal is the rupture with elitist culturalism and positivist dogmatism, enabling the multiple and diverse historical disciplines of law (History of Law, History of Legal Thought, among others) to cease to have the apologetic and illusory meaning of the traditional dominant order, acquiring a demystifying and libertarian form. It is rethought of a new collective subject as a source of legitimation of the new normative historicity.

4 A LITTLE HISTORY OF THE RIGHT

The beginning of the history of law dates back to antiquity, because since the era of physical strength, of the cave, and from the time when men began to live in organized groups, giving rise to the formation of communities, although very prematurely, they felt the need to discipline their own conduct, tracing norms of respect for the rights of each one.

The first rules of law that were instituted were not written, but in customary form. However, over time, man can register his thoughts through writing and, having this resource, soon began to feel the need to register the legal norms, so that they could better be understood and accepted by the community (PINHEIRO, 2000).[1]

According to Pinheiro (2000), written rights arose when civilizations reached a certain degree of development and were determined by men considered predestined, who prudently presented them under the deception of divine bestowal.

The law can be designed as follows, highlighting the Brazilian legislation: 1. Code of Hamurabi; 2. Mosaic Legislation; 3. Manu Code; 4. The law in Ancient Greece: the legislation of Drácon and Solon; 5. Law of the XII Tables; 6. The Quran; Magna Carta; 8. Crimes and Penalties (Beccaria); 9. Declaration of the Rights of Man and The Citizen; 10. Various Rights (Ordination of the Kingdom, Napoleon's Code, Bustamante Code, The Imperial Constitution of Brazil, Consolidation, Teixeira de Freitas' outline); and, 11. Universal Declaration of Human Rights. 7. A

[1] Customary law, according to Sidou (2001), comprises the form of legislation where the precepts are not written, but instinctively formed by a social group and whose obedience is naturally obligatory for all individuals of its components.

The Code of Hamurabi is the oldest of mankind, although its publication date is not known exactly. He was found in 1901 by the Frenchman Jacques de Morgan who, leading a scientific expedition, found him in the vicinity of the city of Susa in Persia. Engraved on a dorita stone rock and written in cuneiform, the Code of Hamurabi has 282 articles (PINHEIRO E BEKHOR, 1997).

Hamurabi was a king of Babylon, a contemporary of Abraham, and reigned for 43 years. According to Pinheiro (2000), this code contains a large number of rules on agriculture and livestock, on employees, doctors, masters-of-work, on loan contracts, mediation, commission, sailors' salary, responsibility of the boatman in case of loss attributable to him, the boat and cargo, etc.

The Mosaic Legislation is based on the Pentateuch, the main part of the Old Testament, which is divided into five books: Genesis, Exodus, Numbers, Leviticus and Deuteronomy, the latter being the most important, representing the last legislative phase of the biblical statesman. The others represent the account of the creation of the world and the history of the Israelite people, although they already contain numerous precepts, which came to be repeated in deuteronomy, a word of Greek origin and which *means exactly second laws*.

Pinheiro and Bekhor (1997) argue that there are controversies regarding the fact that the Mosaic Code is the exclusive authorship of Moses. For those who maintain it is not the exclusive work of Moses, this legislation would be the result of an essential work of Moses, but seconded by collaborators. The dominant consensus, however, does not accept such an idea. The laws of Moses were employed in the primitive customs of Rome, among the Gauls and among the Slavs, and had enormous acceptance and employment in the Middle Ages.

Manu's code comprises the law of India. Its importance is much lower than the Code of Hamurabi and the Mosaic Code, and it has not exerted any influence with other legislation, pinheiro (2000) argues. This code is located approximately in the year .C., being written in Sanskrit, ancient sacred language of the Brahmins and which is the oldest Indo-European family.1.000 a

According to Souza (**apud** PINHEIRO, 2000), in addition to the matters that he ordinarily deals with a code, the Manu Code also maintains a system of cosmogony, metaphysical ideas, determinant precepts of man's conduct in the various periods of his existence, numerous rules relating to religious duties, worship ceremonies, religious observances and atonement, rules of purification and abstinence, morals, senses of politics, military art and trade, an exposed of the penalties and rewards after death, as well as the various transmigrations of the soul and the means of reaching the beatitude.

As for law in Ancient Greece, it has been that the study of legal institutions of that time is not of greater meaning, perhaps because the great development of legal knowledge verified in Rome, in contemporary times, had obscured and neutralized Greek law, preventing its expansion (PINHEIRO E BEKHOR, 1997).

It is undeniable, pinheiro and bekhor (1997) argue, that the Roman people, dissociating the right from any divine and mystical notion that was a constant among the other peoples, built the framework of

Roman law on realistic, practical, objective bases, thereby definitively consolidating themselves, not only due to the expansion of the Roman Empire, but also to the excellence of the precepts elaborated by its legislators.

The law in ancient Greece is characterized by the laws developed by Drácon and Sólon. In the first, it was up to the codification of the laws that were previously applied by the eupátridas, receiving extraordinary powers to do so. His intention was to combat the abuses of family vengeance, replacing private warfare with social repression. Only close relatives had the right to revenge and, in case of composition, there would have to be unanimous agreement. Drácon was a renovator, owing the Athenian people to codify the codification of their laws that came to replace customary law, always uncertain and subject to dangerous interpretations (PINHEIRO, 2000).

Approximately a century later, Sólon was given the greatest glory of reforming his predecessor's legislation, which would culminate in the advent of democracy, considered one of the seven scholars of ancient Greece, divided the people into four political classes, with voting rights and under economic terms. The Senate was formed by the elements of the first class. This legislator also established the right to test, abolished the rigidity of The Drácon's laws and alleviated the misery of the people with the disdain, which forgiven the poorest citizens part of their crimes (PINHEIRO, 2000).em Atenas. Sólon

In Rome was created the Law of the XII Tables, around 462/452 BC, which has high historical significance for the Roman people and for the world elaboration had the formation of a commission of ten members by the Roman Senate, after a political struggle that lasted ten years, and commoners may be part of it, which would give the people the right to reach the judiciary. em geral. Sua

In .C., without the presence of commoners, Gavazzoni (2002) points out, a law was drafted on 10 tablets that was approved by the rallies for centuries. In .C., other decênviros wrote two more tables of laws, which were incorporated into the first ten. The first Roman constitution, the Law of the 12th Tables, was composed, according to the authors.451 a450 a

The subjects related to land, agriculture and related consequences also deserved special treatment from the Law of the XII Tables; procedural matters with detailed provisions on call-to-court; debt collection; inheritance; the seizure of fungible and non-fungible goods, but did not expressly take care of the difference between patricians and commoners, the origin of the decades of the struggles that culminated in their composition and promulgation (GAVAZZONI, 2002).

The Quran is the starting point of Islamic law, being created by Aomé who, according to tradition, was born in the year 571 of the Christian era, in one of the clans of Curaiche, being orphaned as a child. According to Pinheiro and Bekhor (1997), around his forties, Aomé plunged into a period of great spiritual tension, culminating in a vision in which he received the first of the revelations of the many he would later have. The Quran is composed of 114 suratas, which extend at length on the subjects versed, showing themselves to be quite prolix in their dealings. In this book, God appears as powerful and vengeful.

The emergence of the Magna Carta dates back to the year 1215, being signed by John Landless, against his will, but pressed by the nobles and clergy of England. Thus, according to Pinheiro and Bekhor (1997), it is a letter written by the clergy and barons, who were not satisfied with the arbitrariness of John Without Land, forced him to sign, committing himself, from then on, to respect the rights of his subjects. The Magna Carta is considered the traditional basis of English institutions.

The document, whose precepts were not always respected by John Landless, ensured the individual guarantees of citizens. And from these guarantees derive and are incorporated into the constitutions of the free peoples the following precepts: representative government, organization of political assemblies, parliamentary immunities, illegitimacy of taxation without participation of the representatives of the people, *habeas-corpus*, the jury court and numerous principles related to individual rights and guarantees.

As for the work of the Marquis of Beccaria, born in 1738, "Dos Delitos e dos Penas", it was published anonymously in 1764 and aroused deep interest in advocating a new system of criminal law, preaching the suppression of torture, the death penalty, confiscation, secret criminal instruction, etc.

According to Pinheiro (2000), the book of Beccaria was translated, at the time, into twenty-two languages and until the present day are repeated editions of the work responsible for awakening a new mentality, stirring dormant consciences and making it clear to the dominant men of the time that it was absurd, already at that stage of civilization, to employ outdated laws and methods, rigorous, inmane.

Beccaria's penalist view can be considered very broad, no longer registering only advanced provisions that science and social imperatives have imposed over time, as well as, for example, conditional release, conditional suspension of the sentence, induced abortion, violation of correspondence, violation of professional secrecy, etc. (PINHEIRO, 2000).

After beccaria's work, the Declaration of the Rights of Human and Citizen Rights in the French Revolution of 1789 deserves to be highlighted in the History of Law. The French people could no longer tolerate the absolutist regime, in which there were so many privileges and abuses by the sovereign. Moreover, the absolute monarchy represented an obstacle to the rise of the bourgeoisie, the richest and most educated class of the nation.

Thus, a climate favorable to the political and social transformation of 1979 was formed in France, providing the realization of the French Revolution. In the midst of the Revolution, the Constituent Assembly was established, which met on June 14, 1789, and decided to abolish feudal rights, tax privileges and the venality of office, and in twenty-six of the same month, voted on the Declaration of Human Rights, which established, mainly, that all men are born and remain free and equal in rights (PINHEIRO, 2000).

The Declaration also provided that the end of power is to protect man's rights of freedom, property and security, as well as to combat iniquity and injustice. That power exists, not in the interests of those who govern, but in the interests of the governed. That every man enjoys the right to act, to think and to choose his religion, since the law is equal for all. According to Pinheiro (2000), most contemporary constitutions adopt, to this day, the most relevant postulates of the French Declaration.

According to Pinheiro (2000), the Napoleonic Code is also worth mentioning, since Napoleon proved to be a great administrator, reorganizing the country, creating progress and endorsing it with good administrative structures and efficient legislation that France needed.

Napoleon actively participated in the activities of drafting his code, which exerted enormous influence on all the codes that followed him, especially those elaborated in Latin America. This code allowed the triumphant bourgeoisie the means of cutting ties with aristocracy and feudalism.

According to Wolker (2003), the legal culture produced throughout the seventeenth and eighteenth centuries in Western Europe resulted from a specific complex of conditions engendered by bourgeois social formation, capitalist economic development, the justification of liberal-individualistic interests and a centralized state structure.

This understanding not only shares the idea that a dominant legal practice prevails in each historical period, but also confirms the conception that law always derives from organized life as a manifestation of social relations derived from human needs (WOLKMER, 2003).

As for the Bustamante Code, it comprises international legislation. For Pinheiro and Bekhor (1997), the idea of creating norms of international law is very old and has always run into almost insurmountable difficulties. Then was born the thought, on the American continent, of the creation of a Code only intended for it, an idea defended by some and contradicted by others who sought to sustain the inconvenience of a codification restricted to a continent.

This is how the Bustamante Code was created, which survives in its territorial extension, platonically regulating a human immesity, putting itself not by its legislative authority, but by its docile adjustment to the norms and principles already enshrined. According to Altavila (**apud** PINHEIRO, 2000), distributed, with 437 articles, excluding the Preamble, his ideas are not atthe point with the conduct of the American peoples in relation to foreigners and will continue to persist; not so much for their graphic structuring, but for their natural and harmonic content. em dez Títulos

The last major event to be highlighted within the history of law at the world level is the Universal Declaration of Human Rights, developed by the UN – United Nations, an international organization created to preserve international peace and security and promote the economic and social progress of peoples.

The Universal Declaration of Human Rights was adopted on December 10, 1948, in Paris, and consists of 30 articles, being a condensation of the most advanced legal thought of humanity and, at least in the stake, the document of its most expressive achievement, in all time, pinheiro assures (2000).

5 HISTORY OF LAW IN BRAZIL

According to Nascimento (1981), the historical study of Brazilian law involves in its roots two acts of public international law, from dates just before 1500. The first act concerns the Bull Intercoetera, 1493, issued by Pope Alexander VI, which secured the King of Spain rights over America and other undiscovered lands, from a line one hundred leagues west of Cape Verde.

The second act is related to the Treaty of Tordesilhas, 1494, signed between Spain and Portugal, by mediation of the same Pope. As is known, that treaty resulted from a complaint lodged by the Portuguese to that established in that package leaflet. In this treaty, Cape Verde was defined as a starting point in the western direction, the lands that were included up to the limit of three hundred and seventy leagues would belong to Portugal, and those included thereafter, to Spain (NASCIMENTO, 1981).

The legislation of colony Brazil was based on the Ordination of the Kingdom. According to Cury (2002) the three Ordination: Afonsinas, Manuelinas and the Philippines observed the same division into books, according *to the Corpus Juries Civilis*. The Ordinationwas influenced by Roman law, since they praised justice and allied it by force in the service of this righteousness, which becomes a powerful weapon against the power of kings.

For Cury (2002), Brazil began to organize itself socially, politically and economically through an elite, represented by large rural owners, and mostly slave labor, consolidating power without national identity, completely unrelated to the objectives of its population of origin and society as a whole.

The same bureaucratic characteristics of the administration of the Metropolis were implemented, that is, patrimonial, consecrating power in the hands of the owners of the land, in line with the legalist administration imposed by the crown, which is allied to the agrarian elite in the defense of this and the means of production. This allows state interventionism in the social and economic sphere, generating bureaucratic and patrimonialist guidelines already enacted in Rome and the Iberian Peninsula until the formation of Portugal, as well as a conservative administrative organization (CURY, 2002).

It is worth mentioning, in the legislative formation of the country, two events: the elaboration of the Imperial Constitution of Brazil, together with the emergence of legal codes, and the Consolidation, together with the draft of Teixeira de Freitas.

With the proclamation of the country's independence, it felt the need to draft a constitution. Thus, for the elaboration of this first constitution, the Constituent Assembly met in Rio de Janeiro in order to elaborate it, but D. Pedro fell out with the Andrada brothers and dissolved the Assembly, choosing a ten-member Commission for the task, and in sixteen days the orderd law was ready.

On March 25, 1824, this Constitution was granted, and D. Pedro I swore obedience to it. This constitution was in force until November 15, 1889, when the Republic was proclaimed. It was modeled on the French constitution, hence the inclusion, in its text, of individual rights.

This Constitution was composed of 179 articles and paragraphs and its extract, according to Pinheiro (2000), can be summarized as well: Brazil is a free and independent country, its hereditary monarchical government, constitutional and representative. The Catholic religion is adopted, allowing the practice of other religions in their particular cults. Four are the powers of the Empire: legislative, executive, moderator and judiciary. May the emperor, at any time, convene and dissolve the House of Representatives when it requires the public good.

It was also established the organization of a Civil Code and a Criminal Code, drawing them, from the outset, their general lines: guarantee of the right to property in all its fullness. Abolition of fations, hot iron marks and other penalties of excessive cruelty. No penalty will pass the person of the delinquent and *the habeas-corpus is instituted* , although this name is not yet used, which only came with the Criminal Code of 1830 (PINHEIRO, 2000).

Later, in 1851, the Imperial Government hired the jurist Augusto Teixeira de Freitas to, previously, consolidate all the civil legislation homeland. Consolidation was only completed in 1857, when the 1st edition was published, preceded by a masterful introduction.

The long course in the making of the work was due to its greatness, due to the confusing existing legislation, formed by the combination of large amounts of extravagant laws of Portuguese legislation with the precepts of Roman law still observed. According to Pinheiro and Bekhor (1997), the Consolidation was the target of the admiration of all who knew about it, because its repercussion swelled the country's borders.

In 1859, the Imperial Government commissioned Teixeira de Freitas to elaborate the Civil Code Project, which was presented by him in fascicles, from 1865, then gathered in two tomes to which the author, modestly, called "Sketch". It contained 4,908 articles accompanied by notes and comments. However, although considered by the Council of State as a glorious work, it was rejected by the government that, in 1872, terminated the contract with Teixeira de Freitas.1860 a

6 IMPORTANCE OF THE DISCIPLINE OF THE HISTORY OF LAW

It is practically impossible to unlink the study of law from its origins, since the complete understanding of legislation requires knowledge of the history of its formation. The study of the History of Law highlights what it was in the past and the path it took to reach contemporary law.

Thus, the importance of the discipline of History of Law in teaching is due to this dependence that the current right has in relation to the past, because today's right is not something new, but rather results from the action of forces in the past. What is in force today has ssprouted from the germs that exist in the past. As Pinheiro and Bekhor (1997) point out, the law is not invented, as it is a slow product of evolution, adapted to the environment. There is no possibility of making entirely new laws.

The norms in force in contemporary society always constitute a reproduction, with or without modifications of preexisting precepts. However, it is important to emphasize that when talking about reproduction of what already exists, it is not affirming the impossibility of making an unprecedented law.

This placement is carried out by taking the current positive right as a whole, a Code, a Constitution, etc. and not a possible law discipsing an isolated subject, since it could be entirely new, even because, it is known, the law accompanies the evolution of society and scientific and technological progress. Thus, today one can speak of a right to image, spatial right, for example, both unknown in the Antiquities (PINHEIRO And BEKHOR, 1997).

Thus, it is of paramount importance to know the past, because the law in force today constitutes an unfolding of the past. It is only possible to understand the present on the basis of the study of the origin of the law in the past. In this sense, Tylor (**apud** PINHEIRO E BEKHOR, 1997) adds that there does not seem to be such a primitive human thought that it has lost its influence on our own thought, nor so old as to have interrupted its connection with current life.

Also Nascimento (1981), argues that one cannot unlink the law from its origins when one intends to understand it better in the context of today's societies. Moreover, the evolution of law does not constitute a succession of creations and annihilations, since there is something constant and stable in law that resists all changes and, moreover, gives connection to the activity of the legislator man.

Law, as one of the elements that integrate society in its dynamic action, is subject to influences that inexorably modify it and even transfigure it, but in it also distinguish the residues or signs of its origins. Thus, one can reaffirm the usefulness of the History of Law for the study of legal science.

It is through the History of Law that the points of contact between the old and the modern legal institutions are established. According to Beviláqua (**apud** NASCIMENTO, 1981), if the legal historian can reattach the main links of the evolution of law, following the footprints that it has been recording through history, customs and institutions, it is because successive stages are attached to each other, the most recent of the most remote. It is thus, therefore, that better conditions and greater facilities for the examination and understanding of these same institutions in their current state are created.

7 FINAL CONSIDERATIONS

The study of the History of Law results in the awakening of historical interest, as well as in the legal utility for understanding the origin of the legal system and its connection with the institutes of the past, in which current law has its origin. In this sense, Wolkmer (2003) adds that the History of Law only reaches real meaning as a critical-dialectical interpretation of the formation and evolution of sources, guidance ideas, technical forms and legal institutions, aiming at the present transformation of the established legal content and seeking a new historicist understanding of law in a social and humanizing sense.

Contemporary law is the result of a historical evolution that began with the first civilizations. Thus, for example, when examining the evolutionary historical process of The Legal Culture of Brazil, it is evident that, since its beginnings, the legal matrix brought and imposed on the colonies of Latin America, such as Brazil, comes from the implementation and adequacy of luso-romanistic historical sources, as well as from the subsequent process of assimilation and iberian colonialist regulatory institutional legacy, to a dependent and peripheral social structure.

Thus, the study of the discipline of History of Law is of great importance, since it is through this historicity that the points of contact between the old and modern legal institutions are established. It is not feasible to unlink the study of the law from its origins, because the understanding of legislation requires the knowledge of its history.

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