Interview

Bartolomé Clavero

Ivan de Andrade Vellasco*

Resumo

A entrevista com o professor Bartolomé Clavero, catedrático da Universidad de Sevilla, com vasta obra na área de história do direito e das instituições, foi realizada no mês de abril de 2011 com a participação dos seguintes pesquisadores brasileiros que enviaram perguntas às quais o professor Clavero respondeu por escrito: José Reinaldo de Lima Lopes, professor associado (livre docente) da Universidade de São Paulo (USP), Andréa Slemian, professora adjunta da Universidade Federal de São Paulo (Unifesp), Keila Grinberg, professora associada da Universidade Federal do Estado do Rio de Janeiro (UniRio) e Ivan de Andrade Vellasco, professor associado da Universidade Federal de São João Del Rei (UFSJ). Para aqueles que desejarem mais informações sobre a trajetória e a obra de Bartolomé Clavero, recomendamos sua página: clavero.derechosindigenas.org/

Abstract

The interview with Professor Bartolomé Clavero, Chair of History at Universidad de Sevilla, with a vast body of work in the area of the history of law and institutions, was carried out in April 2011 with the participation of the following Brazilian researchers who sent questions to which Professor Clavero replied in writing: José Reinaldo de Lima Lopes, associate professor (*livre docente*), Universidade de São Paulo (USP), Andréa Slemian, associate professor, Universidade Federal de São Paulo (Unifesp), Keila Grinberg, associate professor, Universidade Federal do Estado do Rio de Janeiro (UFRJ) and Ivan de Andrade Vellasco, associate professor, Universidade Federal de São João Del Rei (UFSJ). For those who require further information about the trajectory and work of Bartolomé Clavero, we recommend his page: http://clavero.derechosindigenas.org/

* PhD, Associate Professor at Universidade Federal de São João Del-Rei (UFSJ). Praça Dom Helvécio, 74 – Fábricas. 36301-160 São João Del-Rei – MG – Brasil. vellasco.ivan@gmail.com

1.Profesor Clavero, we would like to start this interview with a question about your trajectory and your work: why history and why the history of law? Did being raised under the Franco dictatorship have any influence on your interest in law?

Ivan Vellasco, UFSJ / Keila Grinberg, UniRio

Let us begin with the dictatorship, about which I was not aware, having recently left a Catholic school and having been under the influence of a priest who was supportive of the Francoist regime, I decided to enter the faculty of law. In University my developing of a political consciousness was coupled to my dissatisfaction with legal studies in which the weight of the dictatorship was really felt. Having crossed the equator of the licentiate, I shifted towards studies of philosophy and history, without losing all my interest in law. I recovered this fully when, having finished my licentiate, I chose to do a doctorate in legal history and not to become a historian, but rather to dedicate myself to the study of law without committing myself to the established order, especially that of the dictatorship. I was already, shall we say, a politically aware subject. By then I had become a peculiar form of Marxist who did not locate law in the superstructure, but, in forms and degrees that varied according to time and space, in the infrastructure. In my first controversies I faced a Marxist orthodoxy that literally despised the study of law, especially that in service of the dominant system. In those long final years of the Franco dictatorship there already were journals in Spain where these types of debates could be publically carried out, journals that were important, at least for Spain at that time, such as *Sistema*, *Materiales*, *Zona Abierta*, *Negaciones*… For me they were agents of an education that was not just intellectual, but also sentimental. My education as a historian of law did not only occur in the academic field, even less in the strict terrain of the history of law. And not only my education. I believe that my trajectory continued under this mark of the connection of theory and politics to law, with effects that I dare say were positive both for research and for teaching. Either way, I would never have managed to make progress alone. If I had not had the luck to be in tune intellectually and humanly with specialists from previous and later generations (Francisco Tomás y Valiente, Paolo Grossi, António Hespanha, Marta Lorente, José María Portillo, Jesús Vallejo, Carlos Garriga…) I am sure that the course of my work would have been much shorter. One builds not only on personal work, but also through interactive dialogue. A collective interview, which would be much more interesting and in this I would have to be one, but not the first in this place. Sadly this is no longer possible, because Tomás y Valiente was assassinated by the terrorist

group ETA fifteen years ago. It also seems to be that anyone who approaches my work without taking into account at some time the work of others would not fully understand my trajectory. There is no work of value in itself alone. Why would there be exceptions in the specialty to which someone dedicates himself? There are not in history, nor in law, nor in the history of law.

2. What is its raison d'être and what is the future of the history of law in law faculties and in the legal field? In the Americas does this role and future have any particularity?

José Reinaldo Lopes, USP

In the case of Spain, the history of law had been serving as a discipline that supported the established order through its projection of the past, as if its foundations were atemporal, which was accentuated on behalf of the Franco dictatorship. Its principal practitioner in this specialty was a bad historian and worse jurist, Alfonso García Gallo, who still enjoys some prestige in academic circles, though more in the Americas than in Spain. In Trans-Pyrenean Europe he never represented anything. Between the second half of the 1960s and the first half of the 1970s, the years of my education as a jurist, who created an opening against the dictatorship in the history of law was Tomás y Valiente, my master and friend who joined with me on many things and disagreed on a few, one of which was related to the question of what a specialty like history is doing in a place like a law faculty. Tomás y Valiente believed that as an investigative activity the role of the history of law was alongside general history and other historiographic specialties, whereas as a teaching activity it has to contribute to the education of jurists in basic questions in faculties of law. I, on the other hand, argued and continue to argue, that historical and legal research must above all contribute to the locating, understanding and analysis of the legal order and its disorders, helping to overcome the servility of the prevailing doctrine, and that the history of law must especially be taught in the advanced courses not the lower lever ones in faculties of law. We agreed about what can be offered in other faculties, but among them I do not necessarily include that of history, because it seems to me to be dispensable. I thought and continue to think that a generalist historiography, without any specialization, makes no sense, so the teaching of history and historical research should be in advanced courses of the area an object of specialization, such as law. Nor is my position very original. From the beginning I was inspired by the position

reserved for philosophy in university studies by Manuel Sacristán, a solid thinker who towards the end of the 1960s provoked a debate about this with a philosopher who until then enjoyed much prestige within Spanish Marxism and who moved towards being a pure charlatanism. I am referring to Gustavo Bueno, a good example of the danger of a generalist philosophy which in my understanding stalks non-specialized history. Accepting the pretensions of a general historiography without any specialty would be the same as accepting a generalist and unique science, without specialties, or the exploration of the present, something like the intentions of European sociology in the early nineteenth century.

In relation to the Americas, I do not believe that it is apt to generalize, since there is everything there, including the absence of studies of history of law in both legal and historiographic faculties. Where space has been opened and it is rooted in the former, law faculties, it is not rare that this is predominantly used in positions serving the established order, and one can even say to the right of it. It is enough to highlight the significant case of Chile. In Spain things are not very different, since the majority of the professional historians of law carry out work that has neither scientific nor political impact, perfectly free except when it comes to its own maintenance, I mean the prospect of a salary at the cost of the public coffers along with other sinecures. When university reform began in Spain in the 1980s, I argued that the history of law should disappear from lower level courses and move to more advanced ones, which would have meant of course that many would have dropped out of the game due to an absolute lack of non-superficial knowledge and a drastic reduction of the public to whom manuals that were basically similar could be sold. I am not saying that these were the only reasons, because there were serious reasons, such as the ones already mentioned held by Tomás y Valiente, but I am stressing it because it what was and is argued by the dominant group of the specialty in Spain.

3. Among us the history of law has traditionally been written by people with a background in law, which, due to the non-existence of the discipline itself or their marginalization in careers in law, does not always provide them with the instruments of analysis for this task. On the other hand, historians who start to dedicate themselves to the question appear to have little familiarity with the doctrinal or jurisprudence literature, which tends to generate what you have

criticized as a history of institutions without either sensitivity or attention to the question of law. Is there a solution?

Ivan Vellasco, UFSJ

You can say there is certainly, but not one that can be improvised through policies of inclusion, without more history of law in curriculums and calls for research. The situation in Latin America is often what the question points out in relation to Brazil. The history of dominant law is a excretion of law itself, of those who are concerned with the task of extending the illustrations of the past to justify in the present, this is the task for the constituted order to which I have been referring. The extension of the past sometimes happens with a critical purpose, though in an equally servile manner to current positions. This is an approach in which I do not think that the history of law can create any entity, neither as a study of history nor as the analysis of law. How then to open space for a history of law that serves for something in the understanding of history and in the approach of law? If done through general policies, through law or other form, spaces will be opened, though they will be filled with those extensions to the past with commonly apologetic purposes. It seems to me that these spaces are the universities themselves, with proper autonomy for these and for other effects, which can open spaces with greater guarantees, in view of the existence of persons and the formation of groups with the capacity for research and teaching in the subject of the history of law. General policies can assist with the funding of research, for which concrete projects and the qualification of those responsible are valued. And when I say the history of law, I do not include in this the history of institutions without sensitivity to or interest in the intrinsic legal mechanisms to which the question also refers. I have criticized this on more than one occasion because in Spain this is what now prevails in the field of the history of law after the crisis produced by the decline and disappearance of the Franco dictatorship because of his services for the faculties of law. It is an external history of institutions, such as the council of this and the secretariat of that, as is usually done in general historiography, but hard to find in the terrain of law faculties, in order not to suffer the neighborly contrast with the comparatively more professional historiography of the existing courses of history, apart from other reasons, such as exploiting a captive market for manuals in courses busier than those specialized in historiography. The training of jurists offers nothing at all for the understanding of history for training in relation to the present. It does not serve for the understanding of the history of law which competes with training in relation to law itself.

4. Iberian America has evident problems related to the effectiveness of formal law. Authors such as Carlos Santiago Nino, Guillermo O'Donell, Mauricio García Villegas and also Ugo Mattei have dealt with the problem from the point of view of philosophy and political science, legal sociology and comparative law, respectively. As a historian how do you deal with this problem? What kind of contribution can historians give? If it is true that the state is in crisis, what kind of impact would this crisis of the state have on the democratic ideal?

José Reinaldo Lopes, USP

On my part, nothing academically representative, as you can see, beginning by positively valorizing the historical ineffectiveness of official law in both colonial and constitutional epochs, in what is above all the continuity of colonialism, both internally within the Americas and foreign European. I stress this because here can be found the reasons for my evaluation of the phenomenon of the ineffectiveness of official law. Thanks to this, for example, on the margin of official law there have remained people with their own law, as is the case of part of the indigenous peoples of the Americas. The challenge resides in reproducing the marginalization while keeping in one form or another official law in the center of the field of observation. The comparative constitutional history that I am developing not only deals with state systems, but the main question it deals with is the legal problem of the resistance of peoples, particularly indigenous peoples. From this perspective, the relative ineffectiveness of formal law does not constitute a problem to be solved, but evidence for what has to be answered. We should do this through the decentralization of all law, starting with official law, for the recovery of the integrity of its history, a history which does not assume itself to be marginalized, discriminated against and excluded as fait accompli, neither in the past nor the present. There is a difference between critically confronting the situation given and radically rethinking the question determined by this same situation. I see the latter as the instrument of historiography because I believe that the problem lies not where the official law encounters limits, most marked where there are indigenous peoples, but that the problem is taking as legitimate the intention of the state to monopolize the production and reproduction of law internally through its constitutional powers and externally through the United Nations. Historiography is the best instrument for showing the amplitude of this intention, training people to understand and confront it. At least this is my experience as a researcher.

5. While we can say that we are today experiencing the crisis of the model of the representative state and its legitimacy, which undermines not only how people in the world (in different places) react to it, but also marks the perspective with which scholars focus on its history, especially the constitutional crisis. Could you take a position on this issue?

Andrea Slemian, Unifesp

This crisis of the state was mentioned in the previous question and I did not say anything about it. If we neither enclose ourselves in the present nor accept the complacent tales about the historical appearance of the state in its constitutional form, we can appreciate that the representative state has been a state in crisis since it began, since its inception, because it was an invention, both in the United States and in France, born in an explicitly anti-democratic tone. State democracy, with all its virtues for the former, for the democratic, and all its limits for the latter, for the state, did not emerge as an organic development of the first formation of the constitutional state, but rather against it. It is enough to analyze issues such as slavery, the servitude of women, or laboring for others, in relation to the constitutional history of the state and not in an isolated form to evaluate to what extent the history of constitutionalism has been a deeply discontinuous history and predictably will remain so in the future. Once again, I can say that, in my opinion, the best instrument to open these perspectives of understanding the past and the expensive entitlement to the future is that of the historical research specializing in the field of law.

6. Can we say that this state in crisis never responded to its own demands in terms of the valorization of rights, but rather, to the contrary, it excluded many more individuals than it included, and created many more differences than equalities? Should there continue to be a paradigm, a utopia, to be followed?

Andrea Slemian, Unifesp

I agree more with the statement than the allocation. The state never seriously raised demands that valorize rights with an actual democratic scope, without exclusions or discrimination that is already understood, already expressed as it if were the basic requirement of nationality. That the constitutional state will emerge for the protection of rights and has been enabled to do so is not evidence of the historian, but an outgrowth of ideology,

an object of legal historiography since ideology is also a normative factor. I will say about the paradigm or Utopia what I have said about law: we should not let the former define and the latter appropriate the state, no matter how democratic that may be. The state is the subject of powers, whereas the subjects of rights are individuals, communities and peoples. The former, powers, can be put at the service of the latter, rights, but it is better not to do this to the point of confusion. It is a risk that is now in view in the most advanced constitutionalist states in Latin American. I am thinking about the Ecuador and Bolivia. Rights will be lost if, in one way or another, they are entirely entrusted in the hands of the state. I am not a philosopher who regards the State as an inevitably perverse entity, but a historian who is, I hope, aware of its constitutive limitations.

7. How can this question of rights be discussed thinking about the Arab world and the real fermentation which we have been witnessing in recent months throughout North Africa? Do its inhabitants have anything to learn from the West?

Andrea Slemian, Unifesp

I can answer more clearly in negative terms than in positive. I do not believe that they have nothing to learn from colonial history and without a resolution of the postcolonial continuity of supremacist constitutionalism in a form which we can say is Western, but I would not dare to add much about where the cradle of wisdom should be but among themselves, in their history and their own experiences. The question reminds me a personal mistake of those young times when I turned toward studies of history and philosophy. I began to study Arabic and I did not do so bad. But after a couple of years, when I decided to specialize in legal history, I gave in to the recommendation that I should not distract myself with living languages and focus instead on a dead language, Latin. I cannot remember much more in Arabic today other than the letters of the alphabet. Now I am surprised at anyone who pontificates about Arab countries without knowing a word of its lingua franca. I remember then the local knowledge of Clifford Geertz. From something with such colonial roots as anthropology one can always learn something useful which, as in this case, is decolonializing. The same can happen with the law with a tradition we can call Western if it really does, if there really is one, if it really is decolonalized in all its dimensions, including the ideological but also the normative.

8. Going back to a debate with Tomas y Valiente in the 1970s (the Forum for Young Legal Historians, Seville, 05-08/09/2007), you asked if the problems of the present should be taken into account when we study the past. At that time you answered no. What would you say today?

Keila Grinberg, UniRio

I have already referred to those discussions with Tomás y Valiente which were so decisive in my training as a historian of law, but not to this specific point in which I now think I was wrong or at least was not fully right. I remember the occasion when the issue arose. It was the summer of 1975 and a group of teachers of history of law, philosophy of law, Roman law and political law were assembled to discuss the future of our subjects. The life of the dictator was slipping away and the fate of the dictatorship was uncertain, but there was a group in the meeting who defended it, people for example who today, as if they had always been constitutionalists, are dedicated to constitutional history under an apologetic sign that brings nothing to either history or to law. However, they are involved in politics, planning things such as the celebration of the bicentennial of the Constitution of Cádiz for the exaltation of current day Spain and its alleged role as guide for, as they say, Latin America. Let me return to 1975. In that climate of uncertainty about so many things, Tomás y Valiente defended in an anti-Francoist manner an approach to history with current concerns, as he had done in his studies about the practice of torture. What preoccupied me was the pollution of research by immediate concerns which were not beyond the horizon of the confrontation with the dictatorship. I defended an investigation, not one of turning our backs on the present, but distanced from it in order to tackle deeper problems which could still be weighing on the present; for example, as I was doing at that time, research on the particular Spanish bourgeois revolution in the first half of the 19th century in order to examine the law that had been established and, in part, it touched on the Franco dictatorship. In relation to Tomas y Valiente, my dissent was nevertheless inferior to that then, in that meeting, I think. Of that meeting only a few minutes were published, which unfortunately do not include the debates.

9. Is being a historian today a profession or vocation? Do historians have some civic responsibility?

Keila Grinberg, UniRio

There are factors of both personal inclination and professional training. If the first is missing, it will be difficult to achieve the second. If the latter fails, there is no industriousness that can overcome it. For the history of law, the training must be at least double, with regard to each. There are many jurists doubling as historian of law without having been trained in history producing ideology poorly disguised by the alleged data. I have said that for the history of law the training must be at least double because the reference to law requires multiplication. What is law today may not be at other times and vice versa. At certain times in European history religion, for example, was more lawful than the law itself. To research and teach legal history one has to know the place of law in society, but also law in other societies and other times. In relation to civic responsibility, it seems to me that it is in principle what is shared with any citizen in their respective professional activities. You do not have a special quality or a higher qualification. Historiography has always participated in the education of civic mentality, though the poor construction of houses or fraudulent administration of politics can be more dangerous to the public than publishing bad history or biased teaching. Highlighting a special civic responsibility of historiography can also encourage supremacist pretentions of forecasts for the present and the future through the presumption of knowledge of the past. In this vein, during the last couple of centuries historiography that has intended to be a general science of society has produced many frustrations. I know that this also happens with economics, sociology and others, but we are talking about the responsibility of historians.

10. In the mid-20th century there were many contributions to the theory and methodology of history. On the one hand, approaches closer to Anthropology (particularly in France), on the other ones derived from analytic philosophy (Collingwood, Pocock, Skinner), and a third perspective the history of the concepts of Koselleck. Are these already exhausted? If so, what is currently emerging? If not what their importance for the history of law?

José Reinaldo Lopes, USP

They do not seem trends that are alternatives to each other, nor that they are exhausted. As far as they are of interest to the history of law and concerned with all written documentation, both the history of concepts (O. Brunner, Koselleck…) and that of texts in context (Pocock, Skinner…) are of interest not only because they are substantively concerned with, as they are, legal questions, but also because methodologically they are very reflexive in being located in time, thereby limiting the scope of categories, even those with apparently more general values. According to my personal experience, what is striking is the ease with which both tendencies commit anachronisms in the strict terrain of law. Anthropology can also help, as I have already said, though not referring to a French name (above all I would cite Godelier, rather than Clastres). The requirement for local knowledge, in the sense of Geertz, for the analysis of societies must be applied not only in space, but also in time, which means that the knowledge of historical societies should be dealt with using their categories and not ours. And for old cases in which law and even religion had a more infrastructural value, as in the Europe we call pre-constitutional, legal history can provide local knowledge that gives access to the bowels of the corresponding society, using the expression. Outlining this briefly, I understand that it may sound strange, but I have research that follows these approaches with the capacity to at least raise the non-localist debate. I refer for example to the monograph section of the last issue of *Annales* in 2001.

11. Profesor Clavero, in Brazil at the moment dozens of researchers, including young researchers, have begun to be interested in questions that until now have been little dealt with in our historiography, such as legal culture, coding and laws, justice and its institutions. What is the advice you consider essential for those that focus on these issues?

Ivan Vellasco, UFSJ

I know personally this interest in the case of Brazil. For example, on the organizational committee of the Forum for Young Legal Historians held in Seville a few years ago, to which a question made reference to, there was a Brazilian historian of law, Laura Beck Varela. There have been publications that testify to the success of the convocation and in these there are quite a few guidelines. As for what advice I can offer, it would be different depending on whether it is for studies of history or of law, though there would be a common recommendation for both cases. In the former, the need to study law has to be

insisted on, and in the latter, likewise with respect to the history, not substantive history, or its narratives, but to what are often improperly referred to as its auxiliary sciences, which enable one to do research. The recommendation in common is that it is not enough to dominate current law in its actual environment because its exclusive knowledge can also hinder the approach to history with its strong ideological load, even in the law we call Western, which presumes deep roots in the past and lush foliage in the present and in the future. Law is a complex and changing object in time and space, which should not be approached nor absorbed from the inside nor distanced from the outside. It requires specialization, but a specialization that cannot be reduced to current legal studies, which are usually insufficiently inclusive studies to understand current law in all its variety and extension. To liberate it from the burden of normative ideologies, I believe that it is also important not to enclose oneself in the field of the history of law, but rather to maintain a commitment to the current problem of the policies of law. I am extracting lessons from my personal experience. I know that it does not get easy, but ease is the best route towards inanity. If you have the inclination and determination, you have to do the training, that which is at least double, in history and in law, including its policies, both of one and of the other.

Would you like to add anything, Profesor Clavero?

I would like to think *Revista Brasileira de História* for its hospitality and send warm greetings to its readers.

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