



## RESEARCHING LEGAL HISTORY IN 2020: PROBLEMS, METHODS AND POTENTIAL

Tadas Valančius

*Mykolas Romeris University, Lithuania*  
*tavalanciu@stud.mruni.eu*

### Abstract

**Purpose.** To consolidate development of legal law in Lithuania and to synthesize the value and perspective of the discipline in it.

**Design/methodology/approach.** The research uses a set of systematic analysis, content analysis, generalization, linguistic, analytical and descriptive social sciences methods.

**Research limitations/implications.** This paper does not claim to presuppose a detailed development of the history of law or historiography analysis, to capture or evaluate personal or institutional merits for development of science. The research efforts are purposefully focused to identify a place and shift of the history of law in relation to other scientific disciplines, to distinguish research methods and problems that are relevant today, and to look at the perspective of scientific change. The scope of the publication is the statehood period of the Republic of Lithuania.

**Originality/Value.** This research can be considered as an intention to identify tendencies and problems of the legal history science that determine researchers and practitioners' working methods. Simultaneously, it may be seen as an attempt to actualize the science of legal history in general, in order to inspire interest in this interdisciplinary and complex branch of science and to ascertain its value in the future.

**Practical implications.** This work aims to reveal changes in the discipline of legal history in Lithuania and to contribute to a more effective research and practical work: by revealing global changes in the discipline, effective work methods, indicating possible challenges for the researcher and practical benefits of science.

**Keywords:** legal history, methodology, methods.

**Research type:** general review.

### Introduction

The discipline of legal history, that in today's socio-human space-time is being intertwined in the environment of interdisciplinary sciences, is changing and naturally resistless to objective and subjective shifts of science evolution. First of all, to objective external factors: global processes, ongoing international and national science policy, the quality of the study process educating researchers, and technological achievements. Also, to subjective factors, such as the provisions and changes of personalities shaping science policy and environment, the size and activity of the scientific community, and the quantitative and qualitative parameters of research works. The combination of these factors becomes an important inspiration for the progress (or regression) of science, determining the value,

direction of development and destiny created by science itself. As well as, working methods, tools, current challenges and future goals of the scientific community.

Deepening existing and translating new bars of national legal history, it is unfortunate to detect concerns in them about the hitherto unformed conceptual historiography of legal history and the fading footprint of the discipline in academic and scientific environment. What are the reasons causing those concerns? Why should an interdisciplinary science itself flourish in a space where interdisciplinarity becomes a norm and a challenge to other disciplines? Alternatively, maybe we are confronted with a natural evolution of science, which encourages change even in the fundamental sciences? What does it mean to study legal history in the face of these questions today?

There have not been that many attempts to answer these questions. They have mostly interested representatives of two Lithuanian academic poles - Mykolas Romeris University Prof. Habil Dr. Mindaugas Maksimaitis (Maksimaitis, 1996, 1998, 2003) and Vilnius University Prof. Dr. Jevgenij Machovenko (Machovenko 2013, 2019). Retrospectively, their constant efforts to synthesize the development of legal history science and to draw attention to its recent existential problems, has become a monumental illustration that this question remains relevant.

The structure of this paper is shaped as if following the classical concept of the growth of law, assuming that a consistent analysis of evolution can reveal causal links of the present and provide an opportunity to model a future perspective.

### **A retrospective of legal history**

As the object of the research, the development of legal history science and studies in Lithuania was primarily of interest to representatives of this branch of science. In the doctrine of Lithuanian Law, legal history is treated in three ways:

As a science - "the totality of knowledge of the history of law as a process belonging to social sciences, not humanities, and developed as a branch of law, not the science of history."; As a study subject - "a part of the science of legal history, conditionally separated and adapted for teaching purposes, taught to law students as a subject of university law studies."; As a process - "subordinate to particular laws, meaningful presentation of law to qualitatively even higher tier, taking place in conditions of pluralism, coexistence, cooperation and competition of legal systems." (Machovenko, 2019, p. 11)

In historiography, they have been analyzed evaluating the work of individual science and institutions of studies, identifying the evolution of science itself, as well as paying tribute to researchers of today and previous periods, who have left a bright mark in the medium of this science. Although the national heritage of the history of law has been analyzed in problems of different origins, educational or occasional contexts, so far, it has not been generalized by a unified historiography or a complex research work dedicated to its development. However, the legacy of this science that has been presumed to this day provides an opportunity to distinguish essential milestones in the evolution of legal history in the state.

#### ***The first milestone: legal history (before and) after the restoration of statehood***

The science of legal history in a Western European tradition methodologically formed in the 19th century. (Maksimaitis, 2003, p. 19) When the very nature of law in the evolution of legal thought is conceptually perceived as a constantly changing historical phenomenon determined by the past, which can be correctly understood only through the mediation of history (Šenavičius, 2013, p. 65).

Therefore, it is natural that in Lithuania, which restored its statehood in 1918, this branch of science, inseparably from other law disciplines, formalized in centers of science of that time - in higher education institutions (Vansevicius, 1997, p. 24). Researchers describe the educational and scientific work of law that happened in there, throughout the period of the First Republic, as "unthinkable without a deep analysis of the historical legal heritage <...> which was devoted to many academic hours" (Machovenko, 2013, p. 8). It is important to note that considering from a historical perspective such attentiveness has developed naturally. Legal history has been taught at Vilnius University since the 19th century, and a sustainable tradition of this science was essentially formed by personal efforts of scholars, especially Ignas Danilevicius, a professor of the Faculty of Law, who is credited with an idea mentioned in legal academic works stating that "in order to create new laws, one must first know what was before" (*From the History of Lithuanian Law and the State*, 2001, p. 6)

Higher education institutions operating in 1918-1940 also gathered a scientific research potential, which was mainly dedicated to study the state and society system of the Grand Duchy of Lithuania, its attributes and heritage problems (Maksimaitis and Vansevicius, 1997, p. 34). Worth to mention that among conducted studies of the period, it is possible to find features reflecting the mature level of scientific development. Research results have been compared with foreign practice (Janulaitis, 1927). In addition, interdisciplinary research has also been conducted, covering not only the study of legal monuments, but also incorporating its content into political, social and economic themes (Lappo, 1938).

It is believed, that a scientific tradition that was formed before the restoration of the state, timely reception and expression of the Western European legal thought, productive academic and research work using advanced research methods of the time - marked the scientific maturity of legal history and its significant contribution forming the national legal doctrine during the interwar period.

### ***The second milestone: the fate of legal history in the Soviet era***

After the occupation of Lithuania in 1940, and soon after its annexation, this direction of progress was brutally destroyed. The ideological plug-in, which at that time consistently marked science disciplines, was also imposed on the science of law. However, development of legal science suffered a fundamental breakthrough because of the absolute legal positivism of Soviet ideology, which originated law first (or only) from the state (Machovenko, 2019, p. 21). Thus, legal history that gained autonomy in relation to other disciplines has undergone a tectonic break. During the Soviet period, the science of legal theory was blindly followed and it was officially declared as the methodological basis of all other legal sciences. This change is unambiguously described as a "deep [science] crisis" (Machovenko, 2019, p. 45).

A turning point was also recorded in the academic dimension of the history of law. The history of the national Lithuanian law that was taught from 1920 at the Faculty of Law, which was transferred to Vilnius University in 1940, once Lithuania was incorporated into the USSR in accordance with the procedure in force throughout the Soviet Union, gave way to the history of the Soviet Union and foreign law (Maksimaitis, 2003, p. 23). The object of study subject analysis was expanded identifying it with the history of the state.

An ideological implication soon began to reflect in scientific research: historiography was mainly filled with legal problems of the same period, focusing on the history of the Soviet court, socialist industry, agriculture, labor, family law, criminal and civil law, the creation of criminal and civil process. An ideological trace is particularly noticeable in studies of legal history in the period of 1918-1940. Problems of the abolition of the state, introduction of Soviet power, and the issues of authoritarian regime era were analyzed. Particular attention was given to courts that were called "a tool in the hands of the bourgeoisie", political parties

and the situation of peasants (Vansevičius, 2001, p. 41). It is important to note, that during the Soviet era, new codes, their comments, and textbooks were based on the conclusions of historiography, which includes over 300 scientific works (Vansevičius, 2001, p. 42).

However, it would not be accurate to compare the interwar and Soviet periods due to fundamental contradictions of the paradigm. One can agree that the elimination of ideological declarations of the period would make it possible to see a sufficiently objective social, economic and political legal situation of the society. However, following the tradition of Western law, in which the separation of law from history and the identification of legal history with national history is considered as a fundamental mistake (H. Berman 1999, p. 12), consensus prevailing in the Soviet era, could be equated with it. Moreover, the considered era, in our opinion, allows identifying cracks of the history of law as a perception of science.

### ***The third (and the last one?) milestone: legal history after the restoration of independence***

In 1990 once Lithuania and science liberated from ideological shackles, a positivist conception of law was rejected and the science of legal history returned to the medium of the history of the legal system development. During this period, two narratives relevant to the scientific perspective of legal history must be distinguished.

The first one encourages a dispute about the last one's milestone of the development of legal history (and in general?), or following the "Berman" kind of idea - about the last "legal revolution" (Berman, 1999, p.19). Proponents of the evolutionary architecture of typological legal history, the structure of which presupposes Ancient-type law, Medieval-type law, Modern-type law, and Postmodern-type law, propose that the formal starting point of the latter type could be the Universal Declaration of Human Rights adopted by the United Nations General Assembly in Paris on 10 December, 1948 (Machovenko, 2019, p. 13). In other words, the mentioned document could be the first to remain on the fringes of the legal history science. In Lithuania, due to the interrupted development of the history of law, it is proposed to draw the line of postmodernism "along the existing constitution - everything that appeared after its entry into force is the present, and what was before - is the past [...] as long as the constitution has not been changed, no changes in ordinary law can fundamentally change the regulation of public relations" (Machovenko, 2013, p. 38). Thus, 25 October, 1992, the date when the highest legal act of the Republic of Lithuania was adopted by referendum, from the perspective of legal history science, could become the starting point of science and studies of legal history. However, that would close possibilities for the legal historian to study the development of individual fields of law, such as labor, family, administrative law and their contexts, in the context of economic, social, political and legal relations; or to identify national law shifts in the constant evolution of international law. Therefore, the place of this milestone (in general) is debatable.

The second narrative, related to the place of legal history in academic environment, is more remarkable. Having started in the last decade of the last century, it continues up to this day.

After the restoration of independence, the discipline of legal history was returned to the higher education institutions in Lithuania. Since 1991 at Vilnius University and since 1997 at the Academy of Law (now Mykolas Romeris University) the discipline of legal history has been taught in a dualistic model - by separating the History of Lithuanian Law and the History of Foreign Law into two separate courses. The first event that resonated (Maksimaitis, 1998, p. 2) was the elimination of the discipline of legal history from legal sciences and its transfer to the field of history in the humanities (Lietuvos Respublikos švietimo ir mokslo ministerijos įsakymas, 1998). Shortly after this decision, two more important events contrasted in the

community of legal historians. In 2000, when the Academy of Law was reorganized into the Law University of Lithuania, for the first time since the restoration of independence, a department dedicated to the history of law was established in the university's new structure - the Department of Law History. However, simultaneously the Law Department of the Lithuanian Institute of Philosophy and Sociology was abolished, and its researchers almost exclusively researched the issues of law and legal thought. The community assessed coincidence of both events unambiguously (Maksimaitis, 2003, p. 26). The dynamics that shaped the vector of academic discipline of the first new millennium decade did not falter. Although researchers distinguish scientific-academic activities of that time as particularly productive (Šapoka, 2013, p. 19), however, attention is drawn to a noticeably declining number of academic hours devoted to the study of legal history (Machovenko, 2013, p. 8), and at the end of the decade - to the abolition of the only department dedicated to the history of law in the higher education. Currently, the subject of the legal history is taught in three higher education institutions: Vilnius University, Mykolas Romeris University and Vytautas Magnus University. However, only at Vilnius University it has remained an autonomous subject of the semester scope (*Subject (module) Description*, 2019).

However, it should be noted that this regression testifying discourse testifies only about conjunctural changes. Researchers of the typology of legal history pay attention to the change in the paradigm of law itself and grasp the formation process of "pure" science of legal history, the ongoing integration of legal theory and legal history (Machovenko, 2019, p. 11).

### **The perspective of legal history**

Scientific perturbations of legal history remaining in the recent past have left a mark in the scientific community, that exacerbated questions already raised about what kind of residual phenomena a shortage of skilled professionals may cause (Maksimaitis, 2003, p. 26).

The concept of the Western legal traditions proposed by J. H. Berman identified law as a phenomenon in the continuous growth process, and history - as an inseparable feature of law. Law and its institutes are described as a consequence of past decisions, and the causal links that have shaped them are the result of the scholars and practitioners' work. However, there is observed nihilism in relation to this constant in the doctrine, evaluating it as "a tribute to tradition" and "a beautiful ritual phrase that everyone agrees to, but from which nothing real comes out" (Kazlauskienė, p. 96).

Taking in consideration the supposed discourse of the retrospective of the legal history development, a question naturally arises regarding its present and perspective: problems of research, effectiveness of applied methods and global trends.

### **Challenges for the researcher**

The research methodology doctrine summarized the universal duty and task of a researcher engaged in research of the past: "using all available sources to evaluate past events correctly (impartially and free from bias) and draw reasoned conclusions based on historical facts. [...] All of it imposes a certain moral duty of analysis, analogy, induction, abstraction and modeling on the researcher" (Kardelis, 2005, p. 242). However, the science of legal history as per its nature presupposes a much wider range of a relevant responsibility, in which three interrelated elements can be consolidated:

1. A component of science purity. Proponents of the typological consolidation of legal history argue that results of legal history research can be useful when patriarchal ancient type of law or medieval caste type of law identify so-called "pure" legal constructions that are freed from conjuncture, context and specifics of that time (Machovenko, 2019, p. 25). In other

words, according to the law growth concept, origins of its institutes should be crystallized in the first place. It is debatable, if for example a researcher of legal history deconstructing a specific issue in modern times or on a global scale may find a deep retrospective and primitive legal constructions directly relevant, but the component of science purity marks another unquestionable duty of a legal history researcher - to be able to critically and comprehensively evaluate law that existed in the past, its nature and consequences in contexts of social, political, economic and other relations. By transferring this duty to a practical level, a legal historian seeking to solve scientific problems effectively, must be able to refine operation of the law that existed in the past and to potentially offer modelling solutions of obtained results.

2. A component of deisolation. In legal history, the phenomenon of isolation can be comprehended in two ways: in terms of science and in terms of time and space. The first one is found in interdisciplinary interactions, primarily in the face of arising threat of the legal history and national history identification. It is noted that for example historians' research in the field of law usually represents the source science of history and distances itself from legal thought research (Maksimaitis, 2003, p. 26). In the meanwhile, a legal history researcher has a presumed responsibility to crystallize the essence of research and conduct interdisciplinary research, not limiting the field of research to a separate discipline. The second potential challenge may form itself in a time and space dimension. The history of law is assigned to a transnational history of law as a general social phenomenon (Machovenko, 2019, p. 47). It means that research results can be compared to legal phenomena that are unrelated to a particular period of time or territory. Isolation in relation to the development or territoriality of the object, without assessing a broader context, can obstruct achievement of correct research conclusions, determining: the causality of phenomena, object development, opinions diversity, and systemic approach.

3. A component of objectivity. Separation from values is the first task of law, and therefore of the history of law (Valančienė, 2015, p. 96). In practical terms, it could be equated to subjectivity, which embodies perhaps the most relevant challenge for any researcher. The researcher must have a clear idea of what he wants to know - to have a specific research hypothesis, which is essentially necessary for effective data selection and verification of their reliability and authenticity (Kardelis, 2005, p. 249). However, in addition to external evaluation of sources, there is inevitably performed internal evaluation of data, when a decision is made partly following subjective motives. Value dimension and an ability to distance oneself from it play a critical role at this stage. Unreasonable conclusions and non-objectivity of the research itself can be presumed by relying on one, but as if the substantiating a causal connection factor, also by relying on a separate group of sources that is favorable for the research hypothesis. Even though subjectivity is inevitable, however as it can be seen, subjectivity does not have to turn into subjectivism, i.e. deliberate distortion of facts, ignoring some of them and presenting only the appropriate (for the research hypothesis) ones (Maksimaitis ir Vansevičius, 1997, p. 13).

### ***Expression of innovation***

In the science of law, interdisciplinarity is understood as perhaps the most relevant science trend of today, encouraging pluralism, openness and more intense integrity of diverse branches of science (Beinoravičius, 2013, p. 26). How should science change in the future, the essential feature of which is interdisciplinarity, and considering that the researcher of this science cannot function effectively without universal competence?

Recently, the science of law has been affected by innovations as never before - every new way of cognition, every new look contributes to the science improvement and influences

practice (Valančienė, 2015, p. 97). Even though in some disciplines innovation can be directly linked to technological aspects, regarding the history of law, due to its nature and applied research methods, it would be difficult to capture technological change. Obviously, computerization and digitalization, just as in other disciplines, allow the researcher to operate more effectively. An effort to digitize data sources relevant the legal historian is also noteworthy (Lietuvos vyriausiojo archyvaro tarnyba, 2019).

However, the main innovations in the discipline of legal history, in respect of which legal discourse is practically not existing in Lithuania, can be identified in globalization, digitalization, and justice denationalisation processes, which have been happening over the last few decades. Intensifying dissemination of legal thought and experience and their absorption is becoming a natural development of different legal systems (Duve, 2014, p. 129). Presupposed and these processes defining neologism "glocalisation", mean changing relationship of legal history in global and national contexts (Duve, 2016, p. 8). Formed as a local (national) discipline, due to intensifying influence of international law on national law, the history of law is also forced to change and integrate wider social and cultural phenomena in its research. The idea of progress inevitably changes the science of legal history and its mission (Hespanha, 2004, p. 41). The ability to purify primitive legal constructions and model them in a current situation may become less relevant than crystallization of legal development and processes affecting it, the adaptation and impact of legal norms in different cultures and their perspective.

### ***Shifts of methodology***

Law as an object can be studied from a perspective, current and retrospective point of view. In the first case, the theory of law and the philosophy of law are considered as essential scientific disciplines, in the second case - constitutional, criminal, civil and other sciences of law, in the third case - focusing on genesis, a previous situation, and regularities and tendencies of development - legal history (Machovenko, 2019, p. 47). Their relationship essentially reveals the essence of legal research evolution, in which the history of law just like a locomotive attracts the development of the "promising" sciences. It is a natural process in which science studying fundamental legal constructions and causal relations, presupposes factology and provides the basis as well as a reason for its modelling in the future perspective.

This relationship essentially presupposes a method definition of the science of legal history: "a way of researching factual material and perceiving the obtained information, which being applied creates new theories about historical legal systems and historical elements of current legal systems" (Machovenko, 2019, p. 16).

Interdisciplinarity and complexity of legal history, as per science, are also revealed in the width of the spectrum of methods that are relevant to this science. In addition to traditional methods of legal science - analysis of law, analogy, induction, abstraction, and modeling - legal history research uses a whole set of methods of other humanitarian and social sciences: historical method, teleological method, linguistic method, systemic method, and comparative method. The latter ones should be considered as an integral part of each research. However, depending on an object and aim of research, specific methods can also be used: researching the development of legal mentality - connection among psychology, law and society - methods of sociology may be used (Machovenko, 2013, p. 41). Moreover, the totality of historical, logical, problem - theoretical, comparative and chronological research methods is identified as a necessary condition for obtaining accurate research summaries and conclusions (Maksimaitis ir Vansevičius, 1997, p. 13).

It is believed, that growing trend of science integration will determine that the range of legal history methods will be supplemented with methods of physical, biomedical and

technological sciences (Machovenko, 2019). This perspective testifies to a vision that a science researching social relations will become more integrated and will cover not only social and humanitarian sciences, but also the exact sciences. This would mean enriching social relations research with information based on facts allowing to identify new or to make more sustainable identified causal relations in a society governed by law.

However, considering intensifying development of the legal history discipline and its growing importance in the global and intercultural context (Duve, 2016, p. 8), it is believed that the comparative historical method will acquire more and more importance and new forms of research. One of the main features of this method is comparison and restoration of the oldest elements and ideas that are common to different cultures, political, legal social and scientific fields (Tidikis, 2003, p. 409). With the acceleration of globalization processes and the development of international law influence on national law (and vice versa) (Duve, 2014, p. 129), this method will become relevant comparing different periods of social phenomena development, clarifying changes that have occurred, reconstructing development trends, also enabling to predict current and even future trends of their change. Global phenomena of law, according to the nature of law, are not static and corresponding to a certain state of the present. In order to anticipate their potential impact on national legal systems, it is necessary to use legal history that has methodological tools meant to refine their evolution.

## Conclusions

The development of legal history science illustrates a sustainable national tradition of science: progress and high maturity reached during the interwar period, however, undermined in the Soviet era by the stigma of legal positivism, which can still be met in a dispute forming legal nihilism over the relationship between legal history and history. In the scientific environment of Lithuania, which has regained its independence, the history of law is experiencing turbulence: high and mature positions that were won in just a decade were altered by conjunctural institutional and paradigmatic changes.

The researcher of legal history gets a difficult and complex responsibility, which can be properly implemented after reaching a certain level of scientific maturity: to be able to effectively use different scientific research methods, critically evaluate phenomena of the past, be able to crystallize them in the context of other social phenomena, carry out transnational research and research of different eras. Naturally, it is possible to acquire such a competence by accumulating many years of experience and patiently as well as actively deepening bars of science. The doctrine draws attention to an emerging challenge of training qualified specialists.

At the same time, the perspective of legal history is acquiring new features internationally. Ongoing processes of globalization, digitalization and justice denationalisation encourage the research of these phenomena within boundaries of national law, expand boundaries of legal history, and promote faster integration with other scientific disciplines. The spectrum of legal history methods is expanding at the cost of the methodology of the exact sciences. The weight of the comparative method is increasing due to the transnational aspect. It will inevitably affect an already complex competence of the researcher of legal history. Therefore, in order to objectively assess perspective of legal history, the need for national discourse arises.

As long as this narrative is not being developed in a national doctrine, the impact of the globalization expression in the discipline, in the long run, may presuppose a conceptual methodological gap and create a vacuum of relevant research in the history of law.



Simultaneously, turning to global trends and pushing from the field of self-isolation research, can actualize the potential of this scientific discipline in the field of legal science and practice.

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