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Methodological directions of Latin American legal science

Elena E. Rafalyuk  

The Secretariat of the Court of the Eurasian Economic Union, *Minsk, Republic of Belarus*

rafaliuk_e@mail.ru

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Abstract. The methodology of legal science in Latin America has common features with the global trends in the development of the methodology of legal research; at the same time, there are features of the development of legal thought and legal understanding that have a cultural and historical nature. The purpose of the study is to consider certain areas of the methodology of Latin American legal science. Philosophical and legal thought in Latin America develops within the framework of jusnaturalism and positivism and various variants of these theories. Latin American legal science is characterized by an appeal to customary Indian law, and its elements are included in the current legal systems of Latin American countries (legal pluralism). In the focus of the Latin American legal doctrine, law appears as a social phenomenon, a cultural phenomenon and part of social philosophy. The development of information technologies, their introduction into lawmaking and legal proceedings, the creation of machine-readable law raises the question of further ways of developing law and legal thought in two areas – technical improvement and traditional reflection on social processes in the humanitarian science.

Key words: methodology, legal science, Latin America, positivism, jusnaturalism, egological theory of law, legal pluralism, sociology of law, legal pluralism, interdisciplinarity

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Методологические направления латиноамериканской юридической науки

Е.Е. Рафалюк  

Секретариат Суда Евразийского экономического союза, г. Минск, Республика Беларусь
rafaliuk_e@mail.ru

Перевод А.Р. Левко

Аннотация. Методология юридической науки в Латинской Америке имеет общие черты с мировыми тенденциями развития методологии правовых исследований, вместе с тем отмечаются особенности развития правовой мысли и правопонимания, имеющие культурно-историческую природу. Целью статьи является исследование отдельных направлений методологии латиноамериканской юридической науки. Философско-правовая мысль в Латинской Америке развивается в рамках юснатурализма и позитивизма и различных вариантов данных теорий. Латиноамериканскую юридическую науку характеризует обращение к обычному индейскому праву, а его элементы включаются в действующие правовые системы латиноамериканских стран (юридический плюрализм). В фокусе латиноамериканской правовой доктрины право предстает как социальное явление, феномен культуры и часть социальной философии. Развитие информационных технологий, внедрение их в законотворческую деятельность и судопроизводство, создание машиночитаемого права ставят вопрос о дальнейших путях развития права и правовой мысли в рамках двух направлений – технического совершенствования и традиционного для гуманитарных наук осмысления социальных процессов.

Ключевые слова: методология, Латинская Америка, позитивизм, юснатурализм, эгологическая теория права, правовой триализм, социология права, юридический плюрализм, междисциплинарность

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Introduction

The methodology of legal science in Latin America has common features with global trends in the development of the methodology of legal research, meanwhile, there are features of the development of legal thought and legal understanding that have a cultural and historical nature. The methodology of law is formed not only as theoretical knowledge, but has applied value in practical legal activities, for example, in the interpretation of law by courts. Within the framework of this article, it is proposed to consider certain areas of the methodology of legal science in Latin America, which includes both worldview and general theoretical concepts, and special scientific methods, as well as their impact on legal practice.

Directions of the development of legal thought

1. Doctor of Law Lorenzo Zolezzi and Doctor of Law Fernando de Trazegnies' research "Legal Research, Legal Philosophy and Social Structure in Latin America" made in the middle of 1970s (based on an analysis of information from Chile, Costa Rica and Peru), published in the 1975 Legal Yearbook of the Institute of Legal Research of the National Autonomous University of Mexico (Zolezzi & Trazegnies, 1975), contains an overview of directions that guide intellectual activity in law in Latin America. Defining law as part of society, the authors note the importance of research in legal methodology for understanding Latin American reality.

2. Turning to the origins of Latin American legal thought, Jorge Alonso Benítez Hurtado draws attention to the fact that during the colonial period in Latin America, theological thought prevailed, and therefore legal philosophy and positive law were due to scholasticism, which prevailed in medieval European schools, especially the ideas and main directions of late scholasticism (the second half of XVI century – the middle of XVIII century). At the end of XVIII century, Eugenio Espejo, an Ecuadorian enlightener, physician, and lawyer, criticized traditional jusphilosophy and tried to introduce new scientific and philosophical ideas to justify the independence of mind from faith, the human right to intellectual activity (philosophy, law, culture, etc.). Placing natural law in the historical context of that time, Espejo argued for its orientation towards new philosophy, including those inspired by French influence. The "enlightened" lawyers of that time prepared the Creole-led reaction that has brought about the first call to independence in 1809 and the subsequent struggle of the colonies for independence in Latin America. In the first half of XIX century, the spreading theory of positivism gave rise to the formalist conceptions of law, which came to prominence in South America through the school of codification thanks to Andrés Bello and his civil code and the subsequent development of the codification movement (Benítez Hurtado, 2018:419–421).

3. In general, Lorenzo Zolezzi and Fernando de Trazegnies note the predominance of the ideas of natural law (jusnaturalism) and positivism, including the doctrine of Hans Kelsen, as two global trends of Latin American legal consciousness. In addition to the two types of legal understanding, the authors point to ideas and trends that have such specific names as "juristic existentialism", "vitalism" and others, which form an eclectic combination of natural law and positivism (Zolezzi & Trazegnies, 1975:396).

4. Lorenzo Zolezzi and Fernando de Trazegnies note the spread of the natural law theory of Heinrich Ahrens, which has an eclectic character, in XIX century in Latin America. According to Ahrens, the idea of freedom, as scientists note, is subordinate to the idea of the good, and the good is the harmonization of social groups, values and institutions. Law, according to Ahrens, is a tool for arranging the society based on the following principle: it provides for individual freedom but also provides for traditional values, which in turn supports social stratification.

5. The authors of the research also note that in the first half of XIX century one of the tasks of the Latin American states after the war of independence was the development of constitutions and codes of new republics and the arrangement of social regulations based on these laws. In this regard, there was a need for a philosophy of law, which would

simultaneously cover the idea of freedom, the idea of progress and state the foundations of capitalist development, protecting the status of traditionally privileged classes. In the late XIX – early XX centuries, the philosophy of natural law is gradually being replaced by positivism, the prevalence of the English analytical school is evidenced, in particular the ideas of J. Austin, according to which law is reduced to the will of the legislator. After the 1930s, as scientists note, this approach was consolidated with the doctrine of “pure law” by Hans Kelsen, which “liberated” law from any reflection that went beyond the legal text. At the same time, this did not mean the end of the development of natural law. Lorenzo Zolezzi and Fernando de Trazegnies note the acquisition of an eclectic nature by natural law and its focus, on the one hand, on limiting the legislative power of the state, on the other hand, on the adoption of the absolute validity of the law.

6. As an ideological and legal direction different from jusnaturalism and positivism, in the Latin American legal doctrine one can find an indication of jusmaterialism (Salamanca, 2018, 2013), which is based on historical dialectical materialism in its enriched form. According to jusmaterialism, the life of peoples is the historical material practice of reality, and the foundation of law forms the obligation prescribed by “living matter” to satisfy a person’s system of material needs and realize his abilities in order to be able to create his own life and reproduce the life of future generations.

7. Another page in the history of legal thought, different from positivism, is related to the egological theory of law of the Argentine lawyer Carlos Cossio (Cossio, 1964). According to this theory, law is understood as “behavior in intersubjective interference” (human behavior in its intersubjective collisions and contradictions¹). The egological theory of law offers a phenomenological approach to law based on the critical phenomenology of Edmund Husserl and the existentialism of Martin Heidegger. As Marta P. de Catalini notes in her article (Pisi de Catalini, 1991–1992), law, according to egological theory, is an object of culture, the knowledge of which requires intuition (according to Husserl), understanding and normative thinking. In accordance with this theory, the legal norm ceases to be the focus of attention of lawyers as a logical object, the knowledge of which is possible through a rational procedure, and instead a specific experience of law is established in all its epistemological-existential-evaluative complexity (Pisi de Catalini, 1991-1992:53–54). When the egological theory says that human behavior is the substratum of law, it declares that behavior is law to the extent that it is the object of knowledge of a lawyer through understanding in its meaning (Pisi de Catalini, 1991-1992:55).

According to Cossio, understanding of law as human behavior and as an object of culture of anegological type formed the main divergence from the theory of Hans Kelsen, based on the identification of law and legal norm. Published in the book “Selected Problems of the Pure Theory of Law. The Egological Theory and the Pure Theory” (Kelsen-Cossio, 1952) lectures given by Hans Kelsen in 1949 in Buenos Aires reveal the most important aspects of the relationship between pure and egological theories of law and contain the Kelsen-Cossio polemics built in a dialogical form on the divergence of two theories. Hans Kelsen criticized the egological theory of law for its metaphysical nature and considered it is necessary to build a theory of law without resorting to the

¹ See: (Sorokin, 2016; Strigalev, 2009–2011).

metaphysical hypothesis of freedom based on the determinism of reality. Carlos Cossio, opposing the science of law to the natural sciences, considered the problem of human existential freedom as an integral element of law since this category was related to the concepts of human, culture and history.

8. The metaphysical philosophical tradition of law can be opposed by the development of the logical and legal school in Argentina within the framework of juristic positivism and creation of the normative systems theory (E.V. Bulygin, C.E. Alchourrón, etc.)².

9. As a methodological direction developed by Brazilian and Argentine lawyers (M. Reale (Reale, 1980), V. Goldschmidt (Goldschmidt, 1967), M.A. Ciuro Caldani and others), one can note concepts that involve consideration of law in a triune composition (“teoría tridimensional”, “three-dimensional theory”; “trialismo jurídico”, “legal trialism”), as: 1) originating from humans behavior – the sociological aspect, 2) perceived from the point of view of normative significance – the normological aspect, 3) assessed from the standpoint of fairness – the “dikelological” aspect (Campos, 2006:163). The interaction of three elements (fact, norm and value) can be expressed in three ways:

Legal Science → Fact → Value → Norm

Sociology of Law → Norm → Value → Fact

Philosophy of Law → Norm → Fact → Value (Robledo Rodríguez, 2007–2008:272).

According to Alejandro Robledo Rodríguez, “trialism” enriches juristic methodology by explaining law in terms of a triune approach (as fact, value and norm), and thus forming a holistic understanding of law (Robledo Rodríguez, 2007–2008:278).

10. The above mentioned methodological directions indicate the relations between law and social theory since law and sociology deal with the same object – society (Carvajal Martínez, 2016), although each of the areas of knowledge has a different focus on the juristic norm, the preparation process of a juristic text and a professional lawyer. According to Jorge Enrique Carvajal Martínez, in Latin America in XX century, legal dogma prevailed which was far from social sciences and social reality. The development of post-juspositivism contribute to the emergence of various theoretical directions in sociology of law, including the culturology of law, juristic pluralism. The researches that have become widespread in sociology of law can be divided into four components: first, these are researches related to law and state institutions, in particular, the administration of justice; second, the study of relations between social movements and the role of law in the implementation of their demands; third, papers that study different legal systems, known as researches of legal pluralism; and, finally, an area of research that analyzes the transformation and role of legal institutions in the context of globalization.

11. As noted above, the sociology of law focuses on the study of legal systems in a broad sense, which include not only the system of state law, but also other “legal systems” coexisting with it (complexes of local customs, corporate rules, traditional law, etc.) (Antúnez Sánchez & Díaz Ocampo, 2017). According to the basic idea of juristic pluralism, along with the legal order established and maintained by the state, another one arises, to a certain extent autonomous in relation to the first one (Kostogryzov, 2015:105).

² See: (Antonov & Lisanyuk, 2013).

Juristic pluralism, which became widespread in the late XIX – early XX centuries, as a reaction against positivism, became the central topic for discussions within the framework of anthropology and sociology of law only in the 60-s of XX century, and received new directions of development in the constitutions of Latin American countries in the late XX – early XXI century. New generation Latin American constitutions recognize the right of Native Americans to live in accordance with their “customs, traditions, forms of social arrangement” (Constitution of Guatemala 1985, article 66), “to preserve, develop, apply and practice their own customary law” (Constitution of Ecuador 2008, articles 57, 10) (Kostogryzov, 2015:105). Article 2 of the Bolivian Constitution 2009 refers to guaranteeing, within a single state, the rights of the indigenous Native American population to autonomy, self-government, original culture, recognition of their institutions and unification of territorial entities in accordance with the Constitution and law.

The constitutionally guaranteed right to indigenous peoples to preserve and develop traditional forms of existence and social arrangement is an expression of the idea of interculturality and can be implemented in various forms. Thus, for example, the constitutional proclamation of Ecuador as a multinational and intercultural state involves the creation of “new form of co-existence of citizens in their diversity and harmony with nature in order to achieve good living³, *sumak kawsay*” (preamble to the Constitution of Ecuador 2008). At the same time, “development”, according to the Constitution, means an arranged, sustainable and dynamic set of economic, political, social, cultural and ecological systems that guarantee the implementation of worthy living, *sumak kawsay* (article 275 of the Constitution of Ecuador).

The appeal to such a philosophical idea as “*Buen Vivir*” (Spanish) (“Good living” (English), *Sumak kawsay* (Quechua) and *Suma qamaña* (Guarani))⁴, which in essence means “life in its entirety”, was necessary to justify an alternative to neoliberalism and a possible way out of the crisis that the Andean region experienced at the dawn of XXI century. Based on the traditional worldview of the indigenous peoples of the Andes and Amazon forests, the concept of “*Buen Vivir*” is seen as a progress of collaborative improvement in the quality of life, based not only on extended access to goods and services that meet human needs, but also through the strengthening of social cohesion, community values, active participation of society in decision-making, respect for cultural diversity, sustainable interrelation between economy and nature, a harmonious relationship between person and nature (Larrea, 2015:2).

12. Moving from the conceptual directions of the methodology of law in Latin America to special research methods, one can refer to the project on the methodology and paradigms of juristic research implemented at the University of Columbia (Bogota) and published as “*The Matter of Method*” collection (Agudelo-Giraldo, 2018:189). In the final part of the scientific paper, the methods used in juristic research are presented in a generalized form (see Table 1⁵).

The choice of a research method or methods depends on which aspect of law (normative, factual, or normative-factual) the researcher plans to study. Thus, to study

³ Note: worthy, good, happy life (synonymous words forming possible translation of “*buen vivir*”).

⁴ See: (Cardoso-Ruiz, 2016).

⁵ Note: The Table is given in the author’s translation from Spanish into Russian (Agudelo-Giraldo, 2018:189).

the normative aspect of law, it is necessary to research the validity and force of legislative acts, to apply dogmatic and hermeneutical analysis of law, whereas for the study of the factual aspect of law, research in the effectiveness of the force of legal norms, research of a social and legal nature will be essential. The economic analysis of law, as the authors of the research note, includes the methods of the sociology of law and the theory of law. A special group of research are those that involve the construction or reconstruction of legal concepts taken from legal practice. Legal research requires consistent use of methods, types of research and levels of analysis (Agudelo-Giraldo, 2018:186). As an independent scientific direction of research, the authors point to the methodology of legislative activity, which is based on compliance with the criterion of logical sequence (coherence) in order to ensure the harmonious functioning of the legal system (internal perspective) and effective influence on the behavior of normative subjects to solve social problems (external perspective) (Agudelo-Giraldo, 2018:188).

Table 1. Research methods

Logical and mathematical	Legal	Political	Economic	Social	Semiotic (language analysis)
Deductive	Weighing	Comparative	Statistical	Quantitative	Analytical
Inductive	Economic analysis		Futurological	Qualitative	Synthetic
Abductive	Grammatical interpretation			Triangulation	Analytical and synthetic
Dialectical	Teleological interpretation			Critical	Paraphrase
Systematic	Contextual interpretation			Case studies	
	Systematic interpretation				

13. Interdisciplinarity in Latin American science is part of the heritage of critical Latin American social thought, which was born from philosophers who considered it necessary to use a combination of history, sociology, economy, psychology, literature, culture and philosophy to solve social and political problems of the early XX century (Oliver Costilla, 2007:135). The meaning of interdisciplinarity is defined not as an artificial connection of disciplines, but as serious work between related disciplines that can share the means available to them whenever they include an internal *dialogue* of epistemology, methodology and theoretical categories that differentiate them (Oliver Costilla, 2007:139).

As an interdisciplinary category, the author of the article “Interpretation in law and in art. Initial approaches” Leticia Bonifaz examines “interpretation” in law and in art (Bonifaz, 2012). Law, like a work of art, is created by human and exists in order to be explained or clarified. Law, as the author notes, does not exist only in codes, but in the interpretation in normative statements that are exercised by subjects of law. The creative nature of the interpretation of works of art and law, despite the differences in the subjects of interpretation, limits, rules once again emphasizes the relation between law and culture as the result of human creative activity. According to the author, the judge in the process

of interpretation always strives to ensure that the language of law at the same time reveals the meaning and contains opportunities for settling specific situations (Bonifaz, 2012:154).

Interdisciplinary areas of research can also include research in interstate integration and its legal support, philosophical and legal understanding of integration processes (Bermúdez Torres, 2011; Ciuro Caldani (coord.), 1997).

14. Special juristic methods are used not only in theoretical research in law, but also in resolving regulatory conflicts, for example, in the practice of the Court of Justice of the Andean Community. Thus, for example, the Court of Justice of the Andean Community has developed the criteria for granting an intercession for interim measures within the process of annulment (nullification) of an act of the Community on the basis of systematic and teleological interpretation of Article 21 of the Treaty Creating the Court of Justice and Articles 35 and 105 of the Statute of the Andean Court. The Court stressed the importance of systematic interpretation of rules of procedure of the Andean Community, based on the provisions of Article 35 of the Statute of the Andean Court, which states that court proceedings under this Statute are intended to ensure the effectiveness of the rights of persons being under its jurisdiction; maintaining the integration spirit; observance of the legal equality of the parties and guarantee of competent legal procedure. The systematic interpretation of Article 21 of the Treaty Creating the Court of Justice together with Articles 35 and 105 of its Statute, which takes into account the teleological element (the purpose of the norm) and ratio legis (the meaning of the norm), has enabled the Court to come to the conclusion that the rule contained in paragraph 3 of Article 105 of the Statute of the Court⁶, does not establish a time limit in relation to: the exercise of the right by the complainant to demand a temporary suspension of the application of a norm or an act disputed in the manner of a claim for annulment, or the application of other provisional measures; the exercise by the Court of its power to impose an provisional measure during the consideration of a claim in a case on recognizing an act as invalid and until an appropriate decision is made on the merits⁷.

15. The development of information technologies, their introduction into lawmaking activity and proceedings, creation of machine-readable law raise the question of further ways of development of law and legal thought in the framework of two directions – technical improvement of “digital law” and traditional for the human sciences understanding of social processes⁸ (Núñez Ponce, 2021). These problems are the matter of discussion in Latin America within the framework of scientific workshops, and certain thematic courses in digitalization of law have been introduced into the educational

⁶ Article 105. Temporary Suspension and Provisional Measures (The Statute of the Court of Justice of the Andean Community, adopted by the Decision of the Andean Council of Foreign Affairs No. 500 dated June 22, 2001).

⁷ See: The Decision of the Court of Justice of the Andean Community dated July 31, 2020 in case 02-AN-2019 on invalidation of the Decision of the Commission of the Andean Community No. 848. Available at: <https://www.tribunalandino.org.ec/decisiones/AN/02-AN-2019.pdf> [Accessed 20th October 2022]. (in Spanish).

⁸ Vivant, M. (2019) The "digital law": between a technical approach and a societal reflection / ICT law in Latin America. Montevideo: la Ley, 1311-1320. (in Spanish).

process in legal specialities. Digitalization brings new methods of analysis of legal documents and decision making on the basis of the usage of artificial intelligence programs. Thus, modern methods of work with algorithmized law, as well as methods for solving legal cases on the basis of artificial intelligence programs (Poryvaeva, 2022; Gavrilov, 2022; Ponkin, 2021) can compete with the traditional for the human sciences methods of research. The balance between the customary and the newest directions in the methodology of legal science can be found, for example, in improving the technological part of legal practice, the legal technique of legal acts, the operations of searching and analyzing legal information, while maintaining the traditional research methods for legal science that involve direct human intellectual activity. Lawyer and philosopher Luis Recasens wrote that “Law is an objectified social life”⁹. At the same time, Recasens explained that law is an objectified human life, when we contemplate it as pre-established and pre-formulated legal norms. This is a formula, a model of the activity of a typical human who lives in a society that is currently computerized, robotized, but is still a social life (Santiago Carretero, 2017:19). It seems that despite the changes in the surrounding reality, law research cannot be separated from society and perform outside the reflection of a human who continues his way in a changed reality.

Final Statement

A review of methodological directions in the legal science of Latin America concludes that there are two main directions of the development of philosophical and legal thought – jusnaturalism and positivism, and various variants of both. In addition, Latin American legal science and practice is characterized by an appeal to the historical roots of law, traditional Indian law, inclusion of its elements in the current legal systems of Latin American countries (legal pluralism). All this emphasizes the versatility of the phenomenon of law as the social feature in the focus of Latin American legal doctrine.

Law has a rich set of tools for solving scientific and practical tasks, and these methods are either properly legal or borrowed from other sciences, which expands the possibilities for researching law and its institutions on the basis of interdisciplinary and transdisciplinary approaches.

The development of information technologies and “digitalization” of law create additional opportunities for analyzing legal information and solving specific legal situations but cannot replace the essential basis of law as the feature of culture and part of social philosophy.

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⁹ Recasens Siches, L. (2003) Human life, society and law. Edition of the Universal Virtual Library. Available at: <https://www.pensamientopenal.com.ar/system/files/2015/11/doctrina42310.pdf> [Accessed 28th October 2022]. (in Spanish).

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About the author:

Elena E. Rafalyuk – Candidate of Legal Sciences, Counsel of the Expert-Analytical Department of the Secretariat of the Court of the Eurasian Economic Union; 5 Kirova str., Minsk, 220006, Republic of Belarus

ORCID ID: 0000-0002-1563-8926

e-mail: rafaliuk_e@mail.ru

Сведения об авторах:

Рафалюк Елена Евгеньевна – кандидат юридических наук, советник экспертно-аналитического отдела, Секретариат Суда Евразийского экономического союза; Республика Беларусь, 220006, г. Минск, ул. Кирова, д. 5

ORCID ID: 0000-0002-1563-8926

e-mail: rafaliuk_e@mail.ru