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# **EUGEN EHRLICH – STATE LAW AND LAW ENFORCEMENT IN SOCIETAL SYSTEMS**

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## **EUGEN EHRLICH – STATE LAW AND LAW ENFORCEMENT IN SOCIETAL SYSTEMS**

In this article, the author examines the socio-legal conception of Eugen Ehrlich and its relation to state law and judicial law enforcement. The attention is focused on the practical implications of this conception on the functioning of judicial systems. Analyzing the criticism raised against Ehrlich's conception, the author emphasizes that this thinker stood on a scientific platform which did not necessitate any strict distinction between the factual and the normative — between Is and Ought — considering any attempt to draw a net distinction between societal phenomena as pointless. Ehrlich sought to enlarge the province of jurisprudence through the application of sociological methods to the factual material from which arise social institutions. These institutions crystallize social practices into rules of behaviour, but this crystallization does not happen automatically. It requires an intellectual reconstruction of these practices by the actors acting in the legal order. A scientific examination of law implies that all these components (social facts, institutions, mental constructions, rules and norms) are taken into consideration. Ehrlich critically assesses both the state-centrist ideology of the doctrinal law and the metaphysic speculations about law, arguing that correct law enforcement needs to rely on sociological analysis. The judge should take advantage of methods of sociological research, which allows stating the actual trends of justice in society and comparing these trends with those existing at the time the applicable legal rules were adopted. This comparison leads to a correct balancing of the conflicting interests with a view to the values protected by the legal order. At the same time, the sociological data just help the judge to reveal the will of the lawmaker who would protect the conflicting interests in the same manner as those which were protected when the lawmaker adopted the legal rules in question.

**JEL Classification:** K10

**Keywords:** Eugen Ehrlich, sociology of law, judiciary, rules of law, law enforcement, free finding of the law, normativity

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## Introduction

The title of the present article might seem provoking inasmuch as Eugen Ehrlich, the founding father of the sociology of law, was quite often characterized as a theoretical adversary of legislative regulation and the traditional legal doctrine<sup>1</sup>. His concept of “living law” is used in the sociolegal literature as a counterbalance to the official law, which in this paired comparison can be depicted as a “dead law”.<sup>2</sup> Surely, Ehrlich himself sometimes gave for a thought to drawing such parallels; e.g., when he compared legislative activity to “the futile effort to catch a stream and hold it in a pond: the part that may be caught is no longer a living stream but a *stagnant pool* — and a great deal cannot be caught at all”.<sup>3</sup> Not a gracious comparison, implying that Ehrlich was sceptical about the regulative capacities of the state and its law, that he primes the “living” sociality over the “stagnant” official law. It is on this implication that many interpretations of Ehrlich’s sociology of law are based.

If these interpretations are taken as gospel truth, Ehrlich’s attitude can be identified with nihilism or with anarchism. In the *Grundlegung*, we read: “The state existed before the constitution; the family is older than the order of the family; possession antedates ownership; there were contracts before there was a law of contracts; and even the testament, where it is of native origin, is much older than the law of last wills and testaments”.<sup>4</sup> From such statements one can further (but erroneously, to our mind) conclude the anarchist stance of their author. So, Jeremy Webber finds strong affinities between the sociolegal literature (Ehrlich’s writings inclusive) and the classical anarchism, suggesting that sociolegal writers “seek to affirm

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<sup>1</sup> Max Weber was one of those who challenged Ehrlich’s legal sociology because of its alleged inattention to the rules of law. Reading Ehrlich’s *Grundlegung der Soziologie des Rechts* [*Fundamental Principles of the Sociology of Law*], hereinafter referred to as ‘*Grundlegung*’, Weber found that here “true foundation of the law is entirely sociological,” meaning that judges should respond to “norms which are factually valid in the course of everyday life and independently of their reaffirmation or declaration in legal procedure” (Max Weber, *Economy and Society: an Outline of Interpretive Sociology* (G. Roth, C. Wittich (eds.)). Berkeley, 1978, p. 887–888). For Weber, it meant that statutory enactment are degraded to “mere symptoms” of sociological validity, so that to resolve the case the judge should engage in free balancing of values in each individual case (Ibid).

<sup>2</sup> Herbert Spencer in 1900 asserted that “law formulates the rule of the dead over the living” (Herbert Spencer, *Principles of Sociology*. New York, 1900, p. 514), implying here official law. Later, this comparison became a common place. For example, Professor Reh binder insists that from the viewpoint of Ehrlich’s conception of living law “normativity without facticity is a *dead law* (i.e. normatively valid law that cannot and will not be realized: paper rule), and facticity opposed to normativity is non-law” (Manfred Reh binder, *Rechtssoziologie*, 4<sup>th</sup> ed. München, 2000, p. 2, emphasis added). The same parallel draws Marc Hertogh who reads Ehrlich’s conception in the sense that it shows “that much legislation, which did not correspond with local understandings of the living law, was ‘*dead law*’” (Marc Hertogh, “From ‘Men of Files’ to ‘Men of the Senses’: A Brief Characterization of Eugen Ehrlich’s Sociology of Law”, in: M. Hertogh (ed.) *Living Law: Reconsidering Eugen Ehrlich*. Oxford/Portland, 2009, pp. 1–17, at p. 15, emphasis added).

Here and below the translation into English is by the present author, except some fragments from Ehrlich’s “*Juristische Logik*” where we sometimes use the successful variants of translation by Stefan Vogl (Stefan Vogl, “Eugen Ehrlich’s Linking of Sociology and Jurisprudence and the Reception of his Work in Japan”, in: M. Hertogh (ed.) *Living Law: Reconsidering Eugen Ehrlich*. Oxford/Portland, 2009, pp. 95–124; id., *Soziale Gesetzgebungspolitik, freie Rechtsfindung und soziologische Rechtswissenschaft bei Eugen Ehrlich*. Baden-Baden, 2003).

<sup>3</sup> Eugen Ehrlich, “The Sociology of Law”, *Harvard Law Review*, Vol 36, No. 2 (Dec., 1922), pp. 130–145, at p. 133 (emphasis added).

<sup>4</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*. New Brunswick, 2009: reprint of the 1936 edition, p. 35–36.

means of social organisation that are taken to be consensual, untainted by authority and imposition”.<sup>5</sup> In this sense, Webber hints that “Ehrlich was tempted by the attractions of anarchism” and finds many “thought-provoking parallels” between his writings and those of the leading anarchists (Proudhon or Kropotkin).<sup>6</sup>

So far, so good: the statist claims are turned down<sup>7</sup> and the received dogma about the state standing in the centre of the life of law is really refuted in Ehrlich’s writings. Although, if destruction is to be the lot of the statist legal science, this destruction need not be complete and one could reasonably expect from Ehrlich some reservations about the respective roles of state law and living law. In the chapter of the *Grundlegung* with the title “Changes in the Law, in the State, and in the Society”<sup>8</sup> explicit and unambiguous reservations are missing. At best, Ehrlich was ready to accept that the influence of state law grows according to the intensification of solidarity: “the fact that state law is manifestly gaining ground is merely the expression of the intensified solidarity of society”.<sup>9</sup> It sounds as if he was unaware that to make state law dependent on the “intensification of solidarity” means to make it depend on living law (which is the immediate manifestation of social solidarity). Wherefrom it results that the latter precedes the former both temporarily and logically — this inference (which is quite evident even if Ehrlich did not formulate it explicitly) expectedly gave rise to a rigorous criticism. In the subsequent works (published after the *Grundlegung*), Ehrlich seemed to be well informed about this danger (particularly stressed in the Kelsen—Ehrlich debates) and introduced numerous caveats like: “One must not, however, conclude from this that there is no such thing as state law, that is to say, law created by the state through legislation. The state brings law into existence by creating institutions through its power of compulsion... and provides them with a legal regulation”.<sup>10</sup>

From the perspective of these later works, it is questionable whether Ehrlich, as Jeremy Webber asserts, “stressed upon the alienation of state law from the rules of conduct within a society”.<sup>11</sup> Should we take the above-cited phrases from the *Grundlegung* with the

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<sup>5</sup> Jeremy Webber, “Naturalism and Agency in the Living Law”, in: M. Hertogh (ed.) *Living Law: Reconsidering Eugen Ehrlich*, pp. 201–222, at p. 206.

<sup>6</sup> *Ibid.*

<sup>7</sup> Jeremy Webber argues that “Ehrlich’s arguments for the insufficiency of state law — his attempts, in other words, to remove state law from the centre of legal theory — are very well taken” (*Ibid.*, p. 212). For justice’s sake, it needs to be mentioned that Ehrlich added in his *Grundlegung* some provisos about the respective role of the state law in social development. E.g.: “Scientific and judge-made law everywhere surpasses statute law in wealth of material, adaptability, and mobility; but in more advanced stages of development mankind is brought face to face with a number of problems of legal life that can be satisfactorily dealt with only by the state” (Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. 184).

<sup>8</sup> *Ibid.*, p. 391–411.

<sup>9</sup> *Ibid.*, p. 155.

<sup>10</sup> Eugen Ehrlich, “The Sociology of Law”, p. 136.

<sup>11</sup> Jeremy Webber, “Naturalism and Agency in the Living Law”, p. 212.

allegations downgrading state law as representative of Ehrlich's views or rather consider these expressions as hasty and collateral? Evidently, Ehrlich's *Grundlegung* contains an accentuated anti-formalist conception of law, expressing an overt reaction to the excessive rigidity of legal doctrine in the Austro-Hungarian Empire (which ignored other kinds of law except state law). But, as Roger Cotterrell justly prevents us, "Ehrlich's intellectual outlook must not be seen as setting social norms *against* state law (i.e. periphery challenging juristic and political centre). His project is rather to demand of the state a new, deeper self-awareness to ensure its absolutely necessary survival faced with powerful disintegrating tendencies produced in its periphery".<sup>12</sup> We entirely share this conviction of Professor Cotterrell (and of other authors underscoring this aspect). To contribute to this conviction, the present article addresses the question of relations between Ehrlich's legal sociology and of his attitude toward state law and law enforcement. Our objective is to investigate the internal logic of Ehrlich's conception, which analytically excluded (despite some inaccurate phrases in the *Grundlegung*) the confrontation between official law and living law; on the contrary, the logic of Ehrlich's conception inevitably led him to recognition of the state's contribution to the development of the life of law.

### **1. Ehrlich's sociology of law and official law**

Max Weber, Hans Kelsen and many other prominent critics accused Ehrlich of theoretically isolating the state from lawmaking. Ehrlich's scepticism toward state law was totally subversive, as suggested by Kelsen in his debate of 1915–17 with Ehrlich where he dismantled the latter's arguments as based on a "primitive confusion of temporal and logical relations"<sup>13</sup> and accused Ehrlich of not understanding that "legal norms logically precede any concrete legal facts or relations".<sup>14</sup> This issue was central to the Kelsen–Ehrlich debate<sup>15</sup> and touches on the Kantian distinction between Is and Ought. For Ehrlich to contend that state

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<sup>12</sup> Roger Cotterrell, "Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies", in: M. Hertogh (ed.) *Living Law: Reconsidering Eugen Ehrlich*, 2009, pp. 75–94, at p. 88.

<sup>13</sup> Hans Kelsen, „Eine Grundlegung der Rechtssoziologie“, in: H. Kelsen, E. Ehrlich, *Rechtssoziologie und Rechtswissenschaft. Eine Kontroverse (1915/1917)*, Baden-Baden, 2003, p. 16.

<sup>14</sup> *Ibid.*, p. 72.

<sup>15</sup> These debates were thoroughly analyzed, i.a., by Professor Van Klink: Bart Van Klink, "Can There be Law Without the State? The Ehrlich–Kelsen Debate Revisited in a Globalizing Setting", in: H. van Schooten, J. Verschuuren (eds.) *International Governance and Law: State Regulation and Non-state Law*. Cheltenham, 2008, pp. 74–93; id., "Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen", in: M. Hertogh (ed.) *Living Law: Reconsidering Eugen Ehrlich*, pp. 127–156.

law<sup>16</sup> is derived from social order was not tantamount to asserting that social law<sup>17</sup> has priority over state law. Kelsen held this idea of deductibility of law from society as “evidently wrong”<sup>18</sup> and insisted that from ‘Ought’ propositions, no ‘Is’ propositions can be deduced — “otherwise, how can one speak of right and duty?”<sup>19</sup> In the view of this distinction, Kelsen firmly dismissed Ehrlich’s arguments that “the perception of law and legal relation are made from the material that we extract from sensory perceptible reality”.<sup>20</sup> Ehrlich vigorously defended himself from Kelsen’s attacks, but did not succeed in persuading his contemporaries, so that his sociology of law remained stigmatized for many years as one mixing the normative and the factual coercion.<sup>21</sup>

How could one draw at least a provisional line of differentiation between state and social law, if it is possible at all? Efficiency and social importance cannot provide any criterion. The official law can in some situations even go ahead of other kinds of law and be more efficient, which means: be congruent with social development. Neither sanction can serve as a criterion for distinction, as other social norms (etiquette, ethics, decorum...) are also coercive; they “would be quite meaningless if they did not exercise a certain amount of coercion”.<sup>22</sup> Each way of making the distinction also has two versions: whether the difference lies in the way the law regulates its subject matter or in the subject matter itself. Ehrlich took the former view, holding that official (state) law is evidently one of the ‘social orders’, and represents only a phase in the dialectics of law as social phenomenon. This stance is starkly evident when Ehrlich extends the social law beyond the realm of the inner social orders and admits that norms of the state law are ‘social’ in their content: “These norms are made

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<sup>16</sup> Ehrlich defines state law as “created by the state, not indeed as to its form, but as to its content; it is law that came into being solely through the state, and that could not exist without the state” (Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. 137).

<sup>17</sup> The two terms “social law” and “living law” are used by Ehrlich as equivalent and interchangeable ones (sometimes he also refers to the term ‘scientific law’ which points out at the methodologically correct procedures of finding the law). However, they can be separated from other standpoints. For instance, Georges Gurvitch developed his famous conception of social law in contrast to Ehrlich’s conception of living law. Characterizing Ehrlich’s ideas, Gurvitch intentionally avoids using the term “social law”, and translates “*gesellschaftliches Recht*” (social law) as “*droit de la Société*” (law of the society) (Georges Gurvitch, *Le temps présent et l’idée du droit social*. Paris, 1931, p. 264–278) to distinguish his own conception against the background of Ehrlich’s sociology of law.

<sup>18</sup> Hans Kelsen, „Eine Grundlegung der Rechtssoziologie“, p. 9.

<sup>19</sup> Ibid, p. 14.

<sup>20</sup> Ehrlich, Eugen, “Entgegnung”, in: H. Kelsen, E. Ehrlich, *Rechtssoziologie und Rechtswissenschaft. Eine Kontroverse (1915/1917)*, p. 57.

<sup>21</sup> This understanding of this sociological conception of Ehrlich was shared not only by Kelsen. One can again mention Georges Gurvitch, who writes that “Ehrlich make it apparent that the most important problem for him is that of the living law created outside the scope of legislative activities, this problem being concentrated in the phenomenon of the law of the society (*gesellschaftliches Recht*) opposed both to the state law, and to the law created by the judges and by the juristic doctrine” (Georges Gurvitch, *Le temps présent et l’idée du droit social*, p. 264).

<sup>22</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. 62.

effective through the same kinds of social pressure that are employed by the smaller associations in enforcing their norms against the individual”.<sup>23</sup>

There is also a subtle but essential difference between state law and the commands with the help of which the state structures social life, although this difference is not explicitly explained in Ehrlich’s writings. He is often reluctant to use the term “law” for state regulation, as “the state does not find law, it can only command...; state law... consists of commands directed by the state to its tribunals”.<sup>24</sup> The difference is rather due to the polisemious meaning of the word “law” which implies both spontaneous factual order of relations between human beings, the commands of state authorities, societal institutions, and legal science.<sup>25</sup> The reader of the *Grundlegung* can perceive hesitations of its author between the intention to reserve this word only for institutions directly engendered by society, and the counter-intention to use this word also for the state-centred rules and structures. This vacillation might be one of the major reasons for misunderstanding the key ideas of his sociology of law.<sup>26</sup>

Reassessing the distinction between state law, juristic law, and living law, Javier Trevino rightly comments that “Ehrlich’s distinction holds simply that all law is made of the same material as social life at large”.<sup>27</sup> The material of law is the same in different realms of the social reality, be it inner orders of social groups, state organisations, or routine interactions guided by a sense of justice. In fact, the central place of the *Grundlegung* is occupied by living law, in the background of Ehrlich’s theory stands juristic law, and state law is examined only insofar as it has importance for the characterization of both aforementioned kinds of law. This scheme has undergone a serious critical examination in the literature because of the alleged prevalence of living law over both juristic law and state law.<sup>28</sup>

Ehrlich’s position was that of scepticism, or at least, inattention toward state law — as a matter of fact, this is the first impression which remains after lecture of the *Grundlegung*

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<sup>23</sup> Ibid., p. 152.

<sup>24</sup> Ibid., p. 188.

<sup>25</sup> These dialectics cannot be adequately translated through the difference between ‘statute’ (*Gesetz*) and ‘law’ (*Recht*), as Ehrlich repeatedly insists that state law is not identical to statutory law (Ibid., p. 137 ff.).

<sup>26</sup> See: Martin Rehbinder, *Die Begründung der Rechtssoziologie durch Eugen Ehrlich*. 2<sup>nd</sup> ed. Berlin, 1986.

<sup>27</sup> Javier A. Trevino (ed.) *Classical Writings in Law and Society*. 2<sup>nd</sup> ed. New Brunswick, 2011, p. 132.

<sup>28</sup> Here we imply the most influential writings which prefigured the reception of Ehrlich’s ideas in English speaking countries — along with Kelsen, there can be mentioned, first of all, Ehrlich’s “promoter” in the US, Roscoe Pound (Roscoe Pound, “An Appreciation of Eugen Ehrlich”, *Harvard Law Review*, Vol. XXXVI, No. 2 (1922), pp. 129–130), who accused Ehrlich of “phobia of state and of sovereignty” (cited after: David Nelken, “Law in Action or Living Law? Back to the Beginning in Sociology of Law”, *Legal Studies*, No. 4 (1984), pp. 157–174, at p. 157) and the first English reviewer of the translated *Grundlegung*, Max Rheinstein (Max Rheinstein, “Sociology of Law: Apropos Moll’s Translation of Eugen Ehrlich’s *Grundlegung der Soziologie des Rechts*”, *International Journal of Ethics*, Vol. 48, No. 2 (Jan., 1938), pp. 232–239). The reviews published later (e.g., by Neil Littlefield (“Eugen Ehrlich’s Fundamental Principles of the Sociology of Law”, *Main Law Review*, Vol. 19, No. 1 (1967), pp. 1–28) or Nicholas Timasheff (“Fundamental Principles of the Sociology of Law by Eugen Ehrlich / Transl. by W. L. Moll; With an Introduction by Roscoe Pound. Cambridge, 1936”, *American Sociological Review*, Vol. 2, No. 1 (Feb. 1937), pp. 120–124) with a more accurate account of Ehrlich’s sociology of law did not considerably improved the situation.

where Ehrlich concentrates himself on investigation of the customary law, the ancient law (especially, the Roman law which was the hobbyhorse of Ehrlich, along with the medieval law of England and of Germany). State law is evoked only when the author needed to show that “the vulgar, state-centred conception of law” is wrong in considering state law as the primary or even the sole source of valid legal rules. One can easily explain this lack of attention, addressing the famous epigraph to the *Grundlegung*: “The centre of gravity of legal development lies not in legislation, not in juristic science, nor in judicial decision, but in society itself”.<sup>29</sup> Ehrlich is quite eloquent about his objectives pursued in this volume — he attacks the statist conception of law which reduces all law to that issued or recognised by the state. This is the neuralgic point of his *magnum opus*.

To substantiate his position, which nowadays does not look radical at all, Ehrlich thoroughly examines customary and trade law, doctrine, juridical and judicial practice of various époques and countries — all his findings expose the fraud of the statist conception of law. There is even no need to refer to any particular passage of the *Grundlegung* to indicate these findings — any page opened at random would yield a direct or indirect conclusion of the author in favour of this position. In the most condensed form, these considerations can be found in the corresponding chapters of the *Grundlegung* where the author deals with the correlation between the state and the law.<sup>30</sup> The conception of living law is, to a considerable extent, also a part of this general project. Ehrlich insists on the independence of this law: “The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages and of all associations, not only those that the law has recognised but also of those that it has overlooked and passed by, indeed even of those that it has disapproved”.<sup>31</sup>

Ehrlich is mostly known in the English-speaking world as the author of the *Grundlegung* — his ideas are accepted or reproved mainly in the context of this book, to be exact — of its 1936 translation.<sup>32</sup> Other works are available for the most part in German,<sup>33</sup>

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<sup>29</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. LIX.

<sup>30</sup> *Ibid.*, pp. 137–170; 366–390.

<sup>31</sup> *Ibid.*, p. 493.

<sup>32</sup> Alex Ziegert confirms that the fact that this book “remained the only major publication of Ehrlich’s sociological theory of law is due to the difficult circumstances of Ehrlich’s work in the last years of his life and happened by default” (Klaus A. Ziegert, “World Society, Nation State and Living Law in the Twenty-first Century”, in: M. Hertogh (ed.) *Living Law: Reconsidering Eugen Ehrlich*, pp. 223–236, at p. 223), regretting that Moll’s English translation of 1936 “has difficulties in dealing with Ehrlich’s inimitable and for that matter ‘untranslatable’ sarcastic style in the German original” (*Ibid.*). Professor Ziegert warns that “it would in certain respects be misleading to judge Ehrlich’s sociology of law by this text alone” (Klaus A. Ziegert, “Introduction to the Transaction Edition”, in: E. Ehrlich, *Fundamental Principles of the Sociology of Law*. New Brunswick, 2009, pp. XIX–XLIX, at p. XX).



and are accessible for this reason to a relatively narrow circle of researchers, although these works contain very important developments of the sociolegal conception of Ehrlich. The *Grundlegung*, moreover, was only a part of a more ambitious series of publications on judicial decision-making.<sup>34</sup> In the two other major works of this series, which form an incomplete trilogy, Ehrlich develops the problems of interpretation of laws and judicial lawmaking<sup>35</sup> and carefully examines the role theoretical activity of lawyers (the legal doctrine) plays in the functioning of the social machinery of law.<sup>36</sup> Within this planned series of works the *Grundlegung* is only an introductory part where the author sets out to undermine self-confidence of those lawyers who are reluctant to take into consideration anything but state law and the sources approved or accepted by it.

It is not evident whether Ehrlich himself was prepared for the resonance that *Grundlegung* would bring in the community of lawyers in 1913. Not that this resonance was colossal, as most of the lawyers just ignored it for the very reason Ehrlich was struggling against — the book did not deal with state law then in the focus of the Austrian legal scholarship. But the criticism of those who had read it and wished to express their attitude was rather malicious, including first of all Kelsen's poignant attacks.<sup>37</sup> At first sight, the sharpness of this criticism does not seem to be proportional. The theses about integration of legal science with empirical research had already been formulated by Ehrlich (and not only by him!) shortly before publication of the *Grundlegung*: during the Congress of German lawyers in 1911<sup>38</sup> and in three other important publications.<sup>39</sup> The very ideas of incompleteness of state law and the impossibility for the judge to remain within the narrow limits of legal syllogism were common place in the movement of free finding of the law [*Freie*

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<sup>33</sup> Along with the article of 1915 about Montesquieu, Ehrlich has also published in 1917 in English an interesting elaboration on judicial lawmaking (Eugen Ehrlich, "Judicial Freedom of Decision: Its Principles and Objects", in: *Science of Legal Method: Select Essays by Various Authors*. Boston, 1917, pp. 47–85) which is partial translation of his "*Freie Rechtsfindung und freie Rechtswissenschaft*" (Eugen Ehrlich, „Freie Rechtsfindung und freie Rechtswissenschaft“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, pp. 170–202 [first published in 1903]).

<sup>34</sup> Eugen Ehrlich, "Judicial Freedom of Decision: Its Principles and Objects", p. XXI.

<sup>35</sup> Eugen Ehrlich, "Die richterliche Rechtsfindung auf Grund des Rechtssatzes: vier Stücke aus dem in Vorbereitung begriffenen Werke: Theorie der richterlichen Rechtsfindung", in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, pp. 203–252 [first published in 1917].

<sup>36</sup> Eugen Ehrlich, *Die juristische Logik*. Aalen, 1966 [first published in 1918].

<sup>37</sup> Hans Kelsen, „Eine Grundlegung der Rechtssoziologie“.

<sup>38</sup> Eugen Ehrlich, „Was kann geschehen, um bei der Ausbildung das Verständnis der Juristen für psychologische, wirtschaftliche und soziologische Fragen in erhöhtem Masse zu fördern?“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, pp. 61–79 [first published in 1912].

<sup>39</sup> Eugen Ehrlich, „Die Erforschung des lebendes Rechts“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, pp. 11–27 [first published in 1911]; id., „Das Lebende Recht der Völker in der Bukowina“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, pp. 43–60 [first published in 1912]; id., „Ein Institut für lebendes Recht“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, pp. 28–42 [first published in 1912].

*Rechtsfindung*] to which Ehrlich belonged at the turn of the 20th century,<sup>40</sup> and to which he sympathized even earlier.<sup>41</sup> What was the reason of this scandalous success of the *Grundlegung*, and what factors motivated Kelsen and other lawyers to ruthlessly attack Ehrlich after the publication of this book?

It should be mentioned here that the main scientific project of Ehrlich was to introduce applied empirical methods into the training of law students. Ehrlich formulated this major task in his 1906 inauguration speech as rector at the Chernowitz University,<sup>42</sup> and already in 1909 a new teaching course, “Living Law”, was listed on the curriculum of that University.<sup>43</sup> After the organisational failure of the empirical research project in Bukovina, Ehrlich was discouraged to the point of denying any heuristical value of empirical research in law.<sup>44</sup> Meanwhile, the legal community of the Austro-Hungarian Empire kept ignoring the new components Ehrlich wanted to add into the stream of the *Freie Rechtsfindung* movement. The harsh, ironical and to certain extent categorical<sup>45</sup> tonality of the *Grundlegung* can be explained not so much by the exorbitant pretensions of Ehrlich, but rather by his anger with the long-lasting silence of the legal community of his country<sup>46</sup> and with his resolution to wake this community up.

If this was the objective pursued by Ehrlich when on Christmas Eve of 1912 he finalized his *Grundlegung*, this objective was attained — sociolegal studies have acquired the status of a scientific discipline and gained some more attention in Europe, the US, and in Japan.<sup>47</sup> The *Grundlegung* became a kind of “visiting card” for Ehrlich, and in the following

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<sup>40</sup> Eugen Ehrlich, „Freie Rechtsfindung und freie Rechtswissenschaft“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, Berlin, 1967, pp. 170–202 [first published in 1903].

<sup>41</sup> Eugen Ehrlich, „Über Lücken im Rechte“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, pp. 80–169 [first published in 1888].

<sup>42</sup> Eugen Ehrlich, „Die Tatsachen des Gewohnheitsrechts. Inaugurationsrede“, in: E. Ehrlich, *Gesetz und lebendes Recht. Vermischte kleinere Schriften*, M. Rehbinder (ed.), Berlin, 1986, pp. 104–132 [first published in 1907].

<sup>43</sup> Martin Rehbinder, „Eugen Ehrlichs Seminar für lebendes Recht: eine Einrichtung für die Weiterbildung von Rechtspraktikern“, *Problemi filosofii prava*, Vol. III, No. 2 (2005), pp. 135–139; William Page, “Professor Ehrlich’s Czernowitz Seminar of Living Law”, *Proceedings of the Fourteenth Annual Meeting of the Association of American Law Schools*, Chicago, 1914, pp. 46–75.

<sup>44</sup> “Public inquiry and questionnaire poll allow, at best, only to throw a look at the intentions, wishes and aspirations of the people occasionally selected for the poll, but they do not provide any picture of the surrounding reality” (Eugen Ehrlich, „Ein Institut für lebendes Recht“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, pp. 28–42 [first published in 1912], at p. 42).

<sup>45</sup> Nonetheless, Ehrlich does not employ anywhere in the *Grundlegung* such words as “ever”, “never”, “always”, and abstains from final judgments about life of the law and the role of living law in it. Carefully read, this book of Ehrlich does not allow for concluding that Ehrlich pretended that his findings would yield universal or definite answers, although the bitterness of feeling ignored can be traced between the lines of it. It might be that Ehrlich conceived this book as a kind of “marketing action” to draw the attention to sociolegal studies and to prove their applicability, hoping to provide clearer and more accurate analysis in the consequent parts of the planned trilogy.

<sup>46</sup> Many researchers insisted that Ehrlich’s work drew more attention in the US, Japan and some other countries outside the German-speaking world where this work remained unrecognized over many years (Stefan Vogl, “Eugen Ehrlich’s Linking of Sociology and Jurisprudence and the Reception of his Work in Japan”, p. 109–115).

<sup>47</sup> Martin Rehbinder, „Einleitung“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, pp. 7–11.

years, advantages and disadvantages of his scientific project were estimated chiefly across the ideas the author exposed in it. But Ehrlich became a victim of his success. Ehrlich had formulated some “extravagant” (for the state-centred mentality of lawyers of his époque) theses without sufficient argumentation. An avalanche of negative responses followed the publication of the book. The most annihilating criticism was formulated by Hans Kelsen who, in the opinion of many researchers, won the debates with the author of the *Grundlegung* — this result was disastrous for the development of the entire sociology of law discipline.<sup>48</sup>

Some passages of the *Grundlegung* indicated that Ehrlich gave an evident preference to social law, priming it over official law, which logically would lead the author to consider the former as legally valid in case of conflicts with the latter, whose validity is thus called into question. If Ehrlich was so inclined, he consequently had to claim the inutility of the doctrine, concepts and schemes of official law — much it matters, if the living law could break any conflicting concepts and schemes! Such claims equated to an encroachment on the very foundations of Western legal science, cultivated as the official, “reasonable”, “professorial” law intended to overcome the “barbaric”, customary, traditional law. Legal science could not tolerate such an encroachment,<sup>49</sup> taking vengeance on Ehrlich by means of a long silence (at least, in European legal science the name of Ehrlich was hardly mentioned before the mid-20th century).

Such questions about the correctness of this attitude still persist, and such authors as R. Cotterrell, K.A. Ziegert, S. Vogl, and others forward persuasive arguments in the defence of Ehrlich’s project from misunderstandings. Some researchers refer to Ehrlich’s project to substantiate their own guesses about the contemporary development of law. As a noteworthy example, the attempt of Gunther Teubner to picture Ehrlich as a pioneer of legal pluralism<sup>50</sup> — the attempt stimulated vivid polemics and a mass of critical literature.<sup>51</sup> For the purposes of this article it suffices to assert here that the contemporary problems of legal philosophy are not relevant for the evaluation of Ehrlich’s own ideas (evidently, he wrote his *Grundlegung*

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<sup>48</sup> Hubert Rottleuthner, *Rechtstheorie und Rechtssoziologie*. Freiburg/München, 1981, p. 31.

<sup>49</sup> Without, however, noticing that Ehrlich, as justly points out Littlefield, recognizes the “enormous importance of the state for the law which is based upon the fact that society avails itself of the state as an organization in order to give effectual support to the law arising in society” (Neil Littlefield, “Eugen Ehrlich’s Fundamental Principles of the Sociology of Law”, p. 21).

<sup>50</sup> Gunther Teubner, “Global Bukowina: Legal Pluralism in the World Society”, in: G. Teubner (ed.) *Global Law Without a State*. Dartmouth, 1997, pp. 3–28.

<sup>51</sup> See, e.g., David Nelken, “An e-mail from Global Bukowina”, *International Journal of Law in Context*, No. 3 (2007), pp. 189–202; Brian Tamanaha, “A Vision of Socio-Legal Change: Rescuing Ehrlich from ‘Living Law’”, *Law and Social Inquiry*, No. 1 (2011), pp. 297–318; Marc Hertogh, “Rescuing Living Law From Jurisprudence”, *Jurisprudence. An International Journal of Legal and Political Thought*, No. 1 (2012), pp. 135–152

and other works without encompassing these problems).<sup>52</sup> For the same reason we can freely ignore critical attacks against legal pluralism, free market ideology, soft law theories and similar legal-philosophical constructs of our days when discussing the ideas of this author.

It is true that Ehrlich severely reprimanded the jurisprudence of his days for its insensitivity to the social reality of law, for treating law merely as a tool of state policy — this erroneous position resulted, according to Ehrlich, in the reduction of legal science to the activities of state officials. From the standpoint of this criticism, Ehrlich was confident that the main part of life of the law runs without intermediary of state officials, even if in the great number of real-life situations the state legal order provides for applying such an intermediary.<sup>53</sup>

One of the advantages of the statist vision of law resides in its seeming ability to clearly define the borderline of law which more or less coincides with sovereign will. Once this vision is abandoned, other criteria are needed to identify the subject area of legal studies and to delimit it from those of religion or ethics. Ehrlich was clearly at pains to cope with this question, and hardly believed that there might be any definite identification. In his paper of 1911 he wrote that “each lawyer knows that it is impossible to draw a distinction between morality and law: something which yesterday has been morality, today becomes law — law is the morality of yesterday”.<sup>54</sup> Ehrlich is even more ardent in one of the subsequent papers: “I leave to those who can waste their time for a fruitless terminology to decide whether we deal with law or with morality”.<sup>55</sup> In the *Grundlegung*: “Generally speaking, the extra-legal norms of morality, ethical custom, and decorum become legal norms so readily that in most cases a differentiation is altogether impossible”.<sup>56</sup> He stresses that “in view of the present state of the science of the law, it is difficult to indicate precisely” where the legal norm differs from other norms, and therefore it is impossible “to state the difference between law and morality in a brief, simple formula in the manner of the juristic science that has hitherto been current”.<sup>57</sup>

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<sup>52</sup> Elsewhere we have presented our negative opinion about endeavours to involve Ehrlich and other classical authors in the contemporary debates about globalization and similar issues (Mikhail Antonov, “Living Law vs. Legal Pluralism”, *Pravovedenie*, No. 1 (2013), 151–175 [In Russian]; id., “In the Quest of Global Legal Pluralism”, in: A. Aarnio et al. (eds.) *Positivität, Normativität und Institutionalität des Rechts. Festschrift für Werner Krawietz zum 80. Geburtstag*. Berlin, 2013, pp. 15–30).

<sup>53</sup> Although, the state and its legal order are always in the background of societal relations and of the norms that regulate them: in the contemporary complex societies many real-life situations leave to individuals the opportunity of choice between remedies of the state law and other societal regulative mechanisms, so that there is rather an interplay than an opposition of state law and other kinds of law.

<sup>54</sup> Eugen Ehrlich, „Die Erforschung des lebendes Rechts“, p. 20.

<sup>55</sup> Id., „Das Lebende Recht der Völker in der Bukowina“, p. 48.

<sup>56</sup> Id., *Fundamental Principles of the Sociology of Law*, p. 130.

<sup>57</sup> *Ibid.*, p. 167.

The solution proposed by Ehrlich was to distinguish different kinds of social regulation through difference in psychological emotions — he supposed that violation of law induces “the feeling of revolt”, violation of moral rules leads to “indignation”, breach of etiquette norms stirs “the feeling of disgust”, and so on.<sup>58</sup> Ehrlich’s criteria for categorizing social norms appeared to Kelsen as “the most ridiculous among all”.<sup>59</sup> However, framing these criteria into the general development of social sciences in the first half of the 20<sup>th</sup> century might lead to a different evaluation.<sup>60</sup>

For the purposes of this article we can leave this question aside. What matters here is that from this perspective one cannot resolve whether state law can be classified as “law”.<sup>61</sup> A seemingly convincing attempt at confronting state law with social law does not work. Ehrlich does not exclude the possibility of state law becoming socially efficient. On the contrary, the rules of state law cannot be ‘unsocial’, as far as they are created in the course of the social development.<sup>62</sup> An “enlightened legislator” can become the best herald of living law: “By enlarging the insight into society and its forces for which knowledge of human nature is the condition, we may realize the control of society by legislation just as an engineer who directs a steam engine controls it with the help of his knowledge of the mechanism”.<sup>63</sup> Nothing analytically impedes state law from becoming “social law” (or “living law”); especially, given that state law can put into operation or stop social development: “direct action by the state is much more effective than a norm for decision”.<sup>64</sup> The main difference that Ehrlich finds between living law and state law does not seem to be a yawning chasm completely separating them. This difference denotes that norms of state law “do not constitute the inner order of the associations, but the inner order of society, which imposes them upon the smaller associations as an external order. This order, to a much greater extent than the inner order of the

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<sup>58</sup> Ibid., p. 165 ff.

<sup>59</sup> Hans Kelsen, „Eine Grundlegung der Rechtssoziologie“, p. 34; see also: Roger Cotterrell, “Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies”, p. 124.

<sup>60</sup> Similar attempts have been undertaken at the beginning of the XXth century by Leon Petrazycki in Russia and continued by his followers, especially Georges Gurvitch and Nicholas Timasheff. See: Javier A. Trevino, “Toward a General Theoretical-Methodological Framework for the Sociology of Law: Another Look at the Eastern European Pioneers”, in: J. T. Ulmer (ed.), *Sociology of Crime, Law, and Deviance*. Greenwich, 1998, Vol. 1, pp. 155–202.

<sup>61</sup> As shown above, Ehrlich was uncertain about this basic terminological question of the legal philosophy (what is law and how to define it), and his inconsequent phrasing in the *Grundlegung* is due for the most part to this uncertainty.

<sup>62</sup> “A law is generally first promulgated after the conflicts of interests in society have become so sharp that state interference becomes inevitable. The Legal Provision [*rule of law* — M.A.] is applicable, on the other hand, only so far and so long as its presuppositions endure in society” (Eugen Ehrlich, “The Sociology of Law”, p. 142).

<sup>63</sup> Eugen Ehrlich, “Montesquieu and Sociological Jurisprudence”, *Harvard Law Review*, Vol. 29 (1915–1916), pp. 585–600, at p. 591. However, this supposition implied a potential conflict of validity and of value between living law and the socially effective state law.

<sup>64</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. 371. In this context, Stefan Vogl concludes that “Ehrlich’s living law might consist of any type of law, for example, also of law created by the state, if the latter prevails over societal and juristic law” (Stefan Vogl, “Eugen Ehrlich’s Linking of Sociology and Jurisprudence and the Reception of his Work in Japan”, p. 102).

associations, bears the stamp of an order of domination, of conflict”.<sup>65</sup> Here again, no factual or even analytical opposition between state law and social law is implied.

Another typical misunderstanding is connected with the asserted lack of differentiation between Is and Ought, between facts and norms, between the social and the legal — an accusation first formulated by Hans Kelsen.<sup>66</sup> Ehrlich did his best to dismiss the interpretation of his conception from the perspective of the Is—Ought divide, emphasizing that this divide is not fruitful when examining the social reality of law. He also insisted that negation of an original character and the omnipotence of state law does not necessarily mean negation or disparagement of this law. Ehrlich was neither so short-sighted to ignore the extent to which the official law is capable of restructuring social life, nor inclined to draw a clear-cut borderline between various manifestations (kinds) of law, because he believed that there could be no such simple line in the social reality (although, “it is impossible to deny the existence of this difference”<sup>67</sup>).

Certain passages of the *Grundlegung* could lead to accusing its author of mixing facts with norms.<sup>68</sup> Ehrlich was furious with such accusations to the point of considering himself offended (“called a fool”).<sup>69</sup> The main reason for these accusations is that Ehrlich describes certain “facts of law” (*Tatsachen des Rechts*) which regulate social relations immediately, without intermediary of any institutions or written codes. He clarifies his position in “*Die juristische Logik*” where he argues that the task of the sociology of law is to establish facts but not to evaluate them. On the one hand, given that conflict-resolution necessarily implies evaluation, judges are not required to apply facts instead of the legislative norms when resolving cases.<sup>70</sup> Rebuking “the vulgar, state-centred conception of law”,<sup>71</sup> Ehrlich did not intend to replace state law with a competing legal order, even that of living law, whose validity logically cannot coincide temporarily or spatially with that of the state legal order.<sup>72</sup>

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<sup>65</sup> Ibid, p. 152.

<sup>66</sup> Hans Kelsen, „Eine Grundlegung der Rechtssoziologie“, p. 46 ff.

<sup>67</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. 164.

<sup>68</sup> Analyzing “the unfinished debate between Eugen Ehrlich and Hans Kelsen”, Professor Van Klink even finds that “the confusion Ehrlich creates between ‘is’ and ‘ought’... is precisely what makes Ehrlich’s project possible and undermines it at the same time” (Bart Van Klink, “Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen”, p. 133).

<sup>69</sup> Eugen Ehrlich, “Entgegnung”, p. 57. In our opinion, normativity of legal rules in Ehrlich’s sociology of law can be constructed and explained without reference to the factual (Mikhail Antonov, “The Normativity of Rules of law According to Eugen Ehrlich”, *Law of Ukraine*, Vol. 4 (2013), p. 263-272).

<sup>70</sup> Eugen Ehrlich, *Die juristische Logik*, p. 389.

<sup>71</sup> Ibid, p. 82.

<sup>72</sup> Repeating the formulas that Professor Van Klink utilized for the description of the debates between Kelsen and Ehrlich about identification of Is and Ought in Ehrlich’s sociology of law, from the assertion about the factual “living law rules!” does not follow the normative assertion “Let living law rule!” (Bart Van Klink, “Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen”, p. 133).

On the other hand, Ehrlich could not accept the deductivist image of law enforcement where the judge is thought to automatically extract decisions from norms. Following the direction of R. von Jhering, Ehrlich tried to discover certain societal<sup>73</sup> interests in the rules of law (*Rechtssätzen*<sup>74</sup>), which were putatively pursued by the lawmakers,<sup>75</sup> and fill possible gaps in legal regulation with reference to these interests. From this angle, Ehrlich's sociology of law did not propose to challenge the legal validity of official law when admitting the possibility of its confrontation with living or juristic law — the ultimate purpose of the sociology of law was to bind the judges and other law enforcement agents with the “real will” of the legislator.<sup>76</sup> This “real will” is to be ascertained not through metaphysical speculations (about final ends of the law or objective laws of history...), but through a sociological investigation of empirical facts.

## 2. Law enforcement in the context of Ehrlich's legal sociology

For Ehrlich, rules of law were not lifeless constructions which existed independently of the social reality. On the contrary, they are parts of the “living”, i.e. functioning and effective order of social communications, which protect certain interests privileged by society<sup>77</sup> and discriminates those interests that are denounced and disapproved by society.<sup>78</sup> Society itself engenders a general order of societal relations, which later is put into legal forms by social groups and individuals who act thereby in the capacity of lawmakers (in the broader meaning, as specified above).<sup>79</sup>

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<sup>73</sup> On the difference between “social” and “societal” see the analysis of Professor Krawietz (Werner Krawietz, „Ausdifferenzierung des modernen Rechtssystems und normative strukturelle Kopplung — sozietal oder sozial?“, G. Peter, R.-M. Krauß (eds.) *Selbstbeobachtung der modernen Gesellschaft und die neuen Grenzen des Sozialen*. Wiesbaden, 2012, pp. 73–101).

<sup>74</sup> There are several other translations of *Rechtssatz*: as legal proposition, legal sentence, statutory rule, legal provision... We prefer the term “rule of law” as it better allows keeping the element of normativity implied in it; in this paper we will follow it. For Ehrlich this term meant “the precise, universally binding formulation of the legal precept in a book of statutes or in a law book” (Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. 38). In Moll's 1936 translation, *Rechtssatz* is translated as “legal proposition” and is the most widely-spread version in the literature. It is worth mentioning that in his rejoinder to Oliver W. Holmes, Jr. (the only article which Ehrlich has written in English himself), he used the term “rule of law” in the context where *Rechtssatz* would evidently be used in German (Eugen Ehrlich, “Montesquieu and Sociological Jurisprudence”, pp. 584; 598).

<sup>75</sup> In a broader sense, including judges who create the precedential law, lawyers who put together legal doctrine, and anonymous creators of the customary law.

<sup>76</sup> As Stefan Vogl rightfully remarks, “his aim was not to minimize legislation, but to establish a scientific basis for it (Stefan Vogl, “Eugen Ehrlich's Linking of Sociology and Jurisprudence and the Reception of his Work in Japan”, p. 119).

<sup>77</sup> Taken formally, this privileging means fixation of this interest by the competent legislator in one of the sources of law (Eugen Ehrlich, “The Sociology of Law”, p. 142).

<sup>78</sup> Werner Krawietz, “Legal Communication in Modern Law and Legal Systems. A Multi-Level Approach to the Theory and Philosophy of Law”, L. J. Wintgens (ed.). *My Philosophy of Law. The Law in Philosophical Perspectives*. Dordrecht/Boston, 1999, pp. 69–120.

<sup>79</sup> When defining a social association as “plurality of human beings who, in their relations with one another, recognize certain rules of conduct as binding, and, generally at least, actually regulate their conduct according to them” (Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. 39), Ehrlich recognizes that living law is a basic precondition for societal interaction and sociability. In this aspect, his ‘social associations’ play the role similar to that of ‘normative facts’ in the conception of Georges Gurvitch.

At the same time, Ehrlich did not share the “naïve” naturalist propositions of Charles Montesquieu’s social philosophy, who thought (in Ehrlich’s interpretation) that society orders itself and organizes its development autonomously; that it is “a living body, begotten by natural forces and to a certain degree existent independently of state government”,<sup>80</sup> and driven by “a spirit of laws”. The critical remarks made by Ehrlich about Montesquieu’s philosophy for its reliance on causal explanations of legal phenomena and for its failure to “draw a sharp line between the law that ought to be and the law that is” and to examine “the social institutions forming the intermediate link between the rule of law and the society”<sup>81</sup> are very helpful in protecting Ehrlich’s ideas from similar interpretations. From this vantage point, the accusations brought against Ehrlich by Pound and some other scholars for excessive reliance on causal explanation of the machinery of law (with an alleged accent on customary law) do not sound convincing enough.<sup>82</sup> In contrast to the historical school of law and Montesquieu’s naturalism, Ehrlich pays more attention to the individual efforts in lawmaking — not only the legislators who conceive of the actual societal needs and fix them in the rules of law, but also jurists and ordinary people who pursue their own strategies, at the same time contributing to legal development through their everyday practices.<sup>83</sup>

So far, Ehrlich cannot be blamed for confusing norms, notions and values with facts. The facts of law (usage, domination, possession and declaration of will) are described by this legal scholar as societal relations “crystallized” into certain practice and vested by the human mind with legal meaning.<sup>84</sup> But if Ehrlich constantly repeats the célèbre diction of Jhering about “the normative force of the factual”, he is far from implying that facts are coercive themselves, without a social authority intervening and establishing the appropriate social institutions. “Force” can be interpreted here as a pressure that social environment exerts on lawmakers, as a feeling of necessity that is experienced by judges, parliament members, and other people empowered in this legal order to issue rules of law. It is this “force” that pushes lawmakers to confer legal protection on some of societal relations, and to strip other relations of such protection.

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<sup>80</sup> Eugen Ehrlich, “Montesquieu and Sociological Jurisprudence”, p. 585.

<sup>81</sup> *Ibid.*, pp. 583; 589.

<sup>82</sup> One of the earlier works of Ehrlich was dedicated to critical reassessment of application of the trade custom (Eugen Ehrlich, *Das zwingende und nichtzwingende Recht. Bürgerliches Gesetzbuch für das Deutschen Reich*. Jena, 1899).

<sup>83</sup> Although, it is true that the concept of living law does not have any definite scope and, as justly underscores Professor Cotterrell, “was devised solely for polemical purposes” and is unable to serve as a guide for research (Roger Cotterrell, *The Sociology of Law: An Introduction*. London, 1992, p. 34). Really, Ehrlich defines ‘living law’ too broadly, through a “contradistinction to that which is being enforced in the courts and other tribunals. The living law is the law, which dominates life itself” (Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. 493).

<sup>84</sup> *Ibid.*, p. 83 ff.



Not every relation, and not every interest achieves legal protection. It is contingent that they are considered as socially relevant and valuable, that this way they will become facts of law. Many interests can “remain at least initially, some even permanently, outside of the law fixed in rules of law”.<sup>85</sup> The final say about conferring protection on such interests belongs to the competent authorities. They can either act at their discretion or be duped by some metaphysical ideals. The best they can do is to make use of the “scientific method of jurisprudence”, to wit: the sociology of law outlined by Ehrlich. This “scientific method” can be laid out in the following manner of investigation of the prevailing interests:<sup>86</sup> first, “there appears certain social interest which tends to be valid in a concrete situation”; then, this interest “gradually gets crystallized..., obtains a status of socially recognized and melts into the form of custom, possession or declaration of will”; and only in the last instance are some interests fixed in rules of law (those of state law, juristic law, precedents, customs...). Therefore, the creation of rules of law out of social practices “requires that further intellectual effort be applied to the latter; for we must extract from them that which is universally valid and state it in a proper manner.”<sup>87</sup>

It was evident for Ehrlich that “a mass of social interests... remain (at least, initially and some of them — constantly) outside the law and its rules”.<sup>88</sup> The thinker stresses that “the legal institutions existing in society can form the legal order irrespectively of their being regulated by rules of law. These institutions depend on rules of law (especially, on the laws) only insofar as these rules are capable to determine, how they are to be assessed by the judge, specifically whether the judge has to provide protection to conflicting interests possibly contained in them”.<sup>89</sup> In other words, if the judge finds that some relations or interests are worth being protected, but in fact are not, his duty is to redefine the scope of legal protection, taking into consideration not only the wording of the corresponding rules of law, but also the juristic doctrine, ideas, and feeling of justice which prevail in the society. In this way, the judge does not act on his own, but exercises the will of lawmakers (insofar as the judge can read this will from the societal practice). In contrast to Francois Gény and other representatives of the movement of free finding of the law who believed that the jurist should check his abstractions against an intuitive appreciation of living reality, Ehrlich insists that there are some objective limits of judicial discretion. And this is for several reasons.

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<sup>85</sup> Ibid, p. 184.

<sup>86</sup> Ibid, p. 191–193.

<sup>87</sup> Ibid, p. 175.

<sup>88</sup> Ibid, p. 184.

<sup>89</sup> Ibid, p. 219.

Firstly, judicial discretion is admissible only in situations where interests are not legally balanced: neither directly, nor indirectly. This means that no rules of law are applicable and that no clear hierarchy of the related interests can be constructed on the base of the acting rules of law. Even in these situations, the judge is to “balance the interests pursuant to the order set out in rules of law”.<sup>90</sup> The task of the judge is to reveal sociological facts, attesting to the existence of certain interests, and to find a place for them among other legally (i.e. by rules of law) protected interests. In the absence of applicable rules of law, the judge creates a “norm for decision” [*Entscheidungsnorm*] from the existing legal and sociological material and which is only relevant for the case in question. The “norm of decision” can be in conflict with other norms and rules of this legal order — formally, this contradiction rules out the validity of this norm and its further application, though political and other constellations can be favourable to the survival of this norm. If the criterion of adequacy is met, the decision and the appropriate “norm for decision” which was applied to arrive at this decision can be considered as just. This “just decision” and the underpinning norm remain only “an initiative of a lawyer” which has to go through “a battle of opinions” to become a rule of law — and this means, to be integrated into the legal order.<sup>91</sup>

Secondly, judicial finding of the law is not derived from intuition. Ehrlich was far from the assertions of Hermann Kantorowicz and other leaders of the free finding of the law movement, who believed that judicial opinions are fully discretionary acts only ornamented with legal arguments after the actual decision had been taken based on a judge’s intuitions. Ehrlich agrees that a judicial decision can result from discretion or intuitive insight, specifying at the same time that nothing hinders a judge from replacing her/his convictions by a firm scientific knowledge based on facts. To arrive to a scientifically plausible decision, the judge has to find and compare the conflicting interests with those protected by the rules of law. The common denominator for evaluation is therefore the concept of interest, as “a legal norm that does not protect an interest against encroachment is not a rule of law or at least no complete rule of law”.<sup>92</sup> The sociology of law can be particularly helpful here to demonstrate that the received beliefs and convictions which might intuitively be felt as “objectively correct and purposeful”, in fact, can be socially inadequate.<sup>93</sup>

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<sup>90</sup> Eugen Ehrlich, *Die juristische Logik*, p. 191.

<sup>91</sup> Ehrlich, Eugen, „Soziologie und Jurisprudenz“, *Die Zukunft*, No. 10 (1906), pp. 212–240.

<sup>92</sup> Eugen Ehrlich, *Die juristische Logik*, p. 187.

<sup>93</sup> Eugen Ehrlich, “Die richterliche Rechtsfindung auf Grund des Rechtssatzes: vier Stücke aus dem in Vorbereitung begriffenen Werke: Theorie der richterlichen Rechtsfindung“, p. 226.

This comparison of interests yields a measure for determining their relative value — the judge is to make sure that “the interest which seeks protection before the court does not diverge from the interest which was balanced and fixed in the rule of law”.<sup>94</sup> Although, the interests defended by the lawmakers at the time they had formulated the rule of law cannot be identical to those interests which are brought by litigants before the court some time ago. The situation is more or less clear when the concerned interest either contradicts that protected by a rule of law, or complies with it. The judge’s duty is either to dismiss the petition or to allow it: “Since it is the function of the sociological science of law, like that of every other science, to record facts, not to evaluate them, it cannot possibly, as some have believed, tend to establish, at the present stage of human development, a doctrine which might enable the judge to violate his judicial oath”.<sup>95</sup>

It can turn out that the interests of litigants are not congruent with those fixed in rules of law. In this case the judge may not deny the access to justice for the reason that there is no corresponding rule to settle the conflict, and has to resolve the case even in the absence of such rules. At the same time, the judge may not dismiss or allow the claim solely at his discretion: “as long as the judge interprets the rule of law he has to refer to the interests of expediency of its creator not to his own interests of expediency”.<sup>96</sup> The dilemma between the intention of the judge and the intention of the lawmaker can be avoided, as believed Ehrlich, through “balancing independently the conflicting interests and granting the protection of the courts to the interest he deems as the higher one”.<sup>97</sup> And still, it is not the “force” of an interest which is decisive here (as taught Jhering) — a scientifically accurate balancing shall be based on the investigation of the societal context in which the lawmaker introduced the corresponding legal text. In a case when no relevant text exists in the legal order, the judge has to determine the moment from which the interest matured to the extent to be eligible for legal protection. Here a delicate nuance can be felt between the position of Ehrlich and that adopted in Swiss Civil Code, article 4 of which prescribes the judge to act in place of lawmakers in case of gaps in law. Ehrlich did not go so far, limiting the judge with rather instrumental, and not creative, function.

Ehrlich shares the general conviction of his time that lawmakers cannot fully foresee societal development and therefore cannot create rules of law for all possible situations; even

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<sup>94</sup> Eugen Ehrlich, *Die juristische Logik*, p. 192.

<sup>95</sup> *Ibid.*, p. 389.

<sup>96</sup> Eugen Ehrlich, “Die richterliche Rechtsfindung auf Grund des Rechtssatzes: vier Stücke aus dem in Vorbereitung begriffenen Werke: Theorie der richterlichen Rechtsfindung“, p. 226.

<sup>97</sup> *Ibid.*, p. 223.

if to admit that there is a legally perfect (full, consistent and irredundant) set of legal norms, it will quickly become outdated, lagging behind the pace of life. The judge neither can stop this societal development, nor may abstain from the application of the previously established rules of law which could have already become obsolete by the moment they must be applied. Standing before this dilemma, the judge has to reconcile fluidity of social life with rigidity of rules of law — this is possible by revealing and analyzing the interests initially pursued by lawmakers, and comparing them with those conflicting in the case which lies before the judge. If the judge finds that the lawmakers had tried to protect certain societal interests but failed to do it because of imperfect wording of the rule of law in question, the judge is called to overcome the literal meaning of this rule and to provide a relief for the interest which had to be protected. Here, again, the judge does not act discretionally, but is to utilize the methods of “scientific research”, i.e. of the sociology of law “teaching the judges to apply the law”.<sup>98</sup>

Without this scientific foundation the judge cannot correctly (which for Ehrlich is synonymous to scientifically, sociologically) resolve the disputes brought before him by litigants. The naïve conception of law enforcement which dominated in the German and Austrian state-centrist ideology of the doctrinal law (*Rechtswissenschaft*) at the beginning of the 20<sup>th</sup> century was unacceptable for Ehrlich, as here the ideology of strict fidelity to the letter of law obscured the unlimited freedom of discretion enjoyed by the judge. He was convinced that the deductivist picture of law enforcement had nothing to do with the real functioning of law.<sup>99</sup>

## Conclusion

It is clear, therefore, that in Ehrlich’s sociological conception facts are neither opposed nor identified with rules (norms)<sup>100</sup> of law. His position can be criticized for “the lack of

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<sup>98</sup> Eugen Ehrlich, *Die juristische Logik*, p. 2.

<sup>99</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. 171 ff. The idea that the deductivist picture of law enforcement just hides the unconditional freedom of judges behind the veil of prevailing ideology was reiterated by many legal thinkers of that time, especially by the partisans of legal realism.

<sup>100</sup> Here lies a distinction important for understanding the argumentation of Ehrlich — that of a rule (*Regel* or *Satz*) and a norm. The scholar explains that a legal rule is “precise, universally binding formulation of the legal precept in a book of statutes or in a law book”, and a legal norm is “the legal command, reduced to practice, as it obtains in a definite association” (Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. 38). Furthermore, he insists that “there are *rules* that are not *norms* because they do not refer to the social life of human beings: e.g. the *rules* of language, of taste, or of hygiene” (Ibid., p. 39, emphasis added). The distinction is far from being evident. But it imposes a nuanced difference between the terms describing the factual regularities (*Regeln*) and the linguistic expressions (*Sätze*), which do not possess binding force *par excellence*, on the one hand, and the norms (*Normen*) which “assign to each member of the social association his position and function” (Ibid, p. 169). It would be too simplistic to find here a clear-cut division between Is-propositions and Ought-norms, as for Ehrlich these two spheres are interrelated and interdependent — there are some elements of normativity in *Regeln* and *Sätzen*. Analyzing the later works of Ehrlich, Vogl considers legal propositions [legal rules] in Ehrlich’s legal sociology as “decisions of the legislator about a conflict of interests in general terms” (Stefan Vogl, “Eugen Ehrlich’s Linking of Sociology and Jurisprudence and the Reception of his Work in Japan”, p. 110), which evidently indicates at some normative (binding force) of these propositions (or better — rules). As well as there is the factual in *Normen* which “flow

discrimination between the concrete description of legal configurations and the nomographic study of law”<sup>101</sup> or even in certain aspects for amalgamation of Is and Ought.<sup>102</sup> But a caveat must be added that Ehrlich stood on a different scientific platform which did not necessitate any strict distinction between the factual and the normative, for “our concepts are fashioned from the material which we take from tangible reality. They are always based on facts which we have observed”.<sup>103</sup> As shown above, Ehrlich condemned any attempt to draw net distinctions between societal phenomena as pointless, pure metaphysics. In fact, this can lead some theorists to the conclusion (erroneous, as we believe) that Ehrlich’s conception was in affinity with the utterly liberal positions close to the ideas of Friedrich Hayek who saw the main source of law in the spontaneous self-ordering of society<sup>104</sup> or even with anarchism.

Our normative knowledge is in reciprocity with and is inseparable from our knowledge about facts — this assertion does not undermine normativity of law. Ehrlich’s aim was not to replace the commonly (at that time) accepted scheme of normativity of law by a chain of causality (which was wrongly supposed by Kelsen), but to add some factual material to better understand the social machinery of law and the origin of the binding force of its norms. Ehrlich’s interest was concentrated rather on the situations of silence or dysfunction of the law — gaps, redundancy, collisions, unclear wording of legal rules... Here, in hard cases, the dominant *Rechtswissenschaft* of his time was almost of no use, and the sociology of law, as argued the Chernowitz professor, was the best designed to provide the scientific clues necessary for law enforcement agencies when the law kept silence. From this vantage point, there are no solid grounds to accuse Ehrlich of ignoring the official law and its role in society, as he was, contrariwise, confident that this role is determinant in contemporary complex societies.<sup>105</sup>

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from the facts of the law... and arise from the legal propositions [*rules of law* — M.A.]” (Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. 169). As we suggested above and elsewhere (Mikhail Antonov, “The Normativity of Rules of law According to Eugen Ehrlich”), this does not lead to confusion of the factual and the normative, neither does it imply their separation — this dialectic hides a stumbling block, which was at the origin of much of the criticism against Ehrlich particularly, and the legal sociology in general. It might be supposed that the distinction between these mental constructions (*Denkgebilde*) is not essential, but conventional, referring to different aspects of description of the same social phenomenon.

<sup>101</sup> Nicholas Timasheff, *The Introduction to the Sociology of Law*, X. Trevino (ed.). New Brunswick, 2009, p. 53.

<sup>102</sup> Hans Kelsen, „Eine Grundlegung der Rechtssoziologie“, p. 16 ff.

<sup>103</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, p. 84.

<sup>104</sup> Friedrich A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*. London, 1973-1979.

<sup>105</sup> A detailed and informative account of Ehrlich’s position on this matter can be found in a stimulating research work of Stefan Vogl (Stefan Vogl, *Soziale Gesetzgebungspolitik, freie Rechtsfindung und soziologische Rechtswissenschaft bei Eugen Ehrlich*. Baden-Baden, 2003). This problematic was also analyzed by the present author in the context of the Kelsen—Ehrlich debate (Mikhail Antonov, “History of Schism: the Debates between Hans Kelsen and Eugen Ehrlich”, *International Journal of Constitutional Law*, Vol. 5, No. 1 (2011), pp. 5–21). However, it must be admitted that certain phrases from the *Grundlegung* allow drawing contrary conclusions and urge some theoreticians “to save Ehrlich from his living law conception” (Brian Tamanaha, “A Vision of Socio-Legal Change: Rescuing Ehrlich from ‘Living Law’”, *Law and Social Inquiry*, No. 1 (2011), pp. 297–318).

A judge cannot avoid situations of normative ambiguity where no clear guidance will be available in books of law.<sup>106</sup> Seen as “the mouth that pronounces the words of the law” (Montesquieu), the judge in these situations will have either to protect the most influential interest or to resolve the case at his own discretion — both solutions imply subjectivity and political engagement, and for this reason evidently do not fit the idea of justice. To secure the realization of justice in societal practice, judges should take advantage of methods of sociological research which allow stating the actual trends of justice in society and comparing these trends with those existing at the time the applicable legal rules were adopted. This comparison leads to a correct balancing of the conflicting interests with a view to the values protected by the legal order. Albeit the judge extracts a “norm for decision” from the social practice (social facts), he does not resolve the case directly on the base of this practice (these facts): “the rule of law is derived by jurists and legislators by very intricate processes...”<sup>107</sup> The sociological data just help the judge to reveal the “real will” of the lawmaker who putatively would prefer to protect the conflicting interests in the same manner as those which were protected by him before.<sup>108</sup>

This perspective is not “realist” properly said — Ehrlich does not propose to examine the factual impulsions which led the parliament members or other lawmakers to adopt certain acts (though this approach was often mistakenly attributed to him). These impulsions, if discovered by the judge, do not serve as guidance for him, even on the generalized level — like *Volksgeist* of the historical school of lawyers, or “social solidarity” in Durkheimian sociology. The judge cannot be discharged from his burden of responsibility for resolving cases according to the laws.<sup>109</sup> A just decision in hard cases can be found not through a literal analysis of the words of a statute, but through weighting and balancing interests on a scientific foundation, to wit: on the methodology of empirical sociology. A hundred years after *Grundlegung* was published, the reconciliation of normative and empirical elements in the research of legal science is still far from being finished.<sup>110</sup>

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<sup>106</sup> We do not enter into seemingly endless debates about the extent to which rules (norms, policies, principles...) can determine a judicial decision. This issue is reiterated in various contexts and by the most prominent authors (H. L. A. Hart, L. Fuller, R. Dworkin, et al.), and no indisputable answer is available, except the fact that nowadays hardly any theorist would adhere to the Langdellian conception of law which sees law as a closed system of deductive propositions, and would deny that there are at least some hard cases which cannot be resolved on the base of legal texts.

<sup>107</sup> Eugen Ehrlich, “Montesquieu and Sociological Jurisprudence”, p. 584.

<sup>108</sup> In this perspective, we fully join Vogl’s conclusion that “the aim of his [Ehrlich’s] alternative method was to bind the judge more effectively to the will of the legislator on the one hand and give him freedom of decision in case of a ‘gap’ in statutory law on the other hand” (Stefan Vogl, “Eugen Ehrlich’s Linking of Sociology and Jurisprudence and the Reception of his Work in Japan”, p. 110).

<sup>109</sup> Martin Reh binder, „Richterliche Rechtsfortbildung in der Sicht von Eugen Ehrlich“, in: M. Reh binder, *Abhandlungen zur Rechtssoziologie*. Berlin, 1995, pp. 191–202.

<sup>110</sup> Niklas Luhmann wrote: “The sociological intention of Ehrlich, his research into the ‘legal reality’ or pre-legal social life, remains inadequately founded in theory, relatively unproductive, and his concept of law unclear” (Niklas Luhmann, *A*

## Bibliography

1. Antonov, Mikhail, “History of Schism: the Debates between Hans Kelsen and Eugen Ehrlich”, *International Journal of Constitutional Law*, Vol. 5, No. 1 (2011), pp. 5–21.
2. Antonov, Mikhail, “In the Quest of Global Legal Pluralism”, in: A. Aarnio et al. (eds.) *Positivität, Normativität und Institutionalität des Rechts. Festschrift für Werner Krawietz zum 80. Geburtstag* (Berlin, Duncker und Humblot, 2013), pp. 15–30.
3. Antonov, Mikhail, “Living Law vs. Legal Pluralism”, *Pravovedenie*, No. 1 (2013), 151–175 [In Russian].
4. Antonov, Mikhail, “The Normativity of Rules of law According to Eugen Ehrlich”, *Law of Ukraine*. No. 4 (2013), pp. 263-272.
5. Cotterrell, Roger, “Ehrlich at the Edge of Empire: Centers and Peripheries in Legal Studies”, in: M. Hertogh (ed.) *Living Law: Reconsidering Eugen Ehrlich* (Oxford and Portland, Hart Publishing, 2009), pp. 75–94.
6. Ehrlich, Eugen, “Die richterliche Rechtsfindung auf Grund des Rechtssatzes: vier Stücke aus dem in Vorbereitung begriffenen Werke: Theorie der richterlichen Rechtsfindung“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, M. Rehbinder (ed.) (Berlin, Duncker und Humblot, 1967), pp. 203–252 [first published in Jherings Jahrbüchern in 1917].
7. Ehrlich, Eugen, “Entgegnung”, in: H. Kelsen, E. Ehrlich, *Rechtssoziologie und Rechtswissenschaft. Eine Kontroverse (1915/1917)* (Berlin, Nomos Verlagsgesellschaft, 2003).
8. Ehrlich, Eugen, “Judicial Freedom of Decision: Its Principles and Objects”, in: *Science of Legal Method: Select Essays by Various Authors* (Boston, Boston Book Company, 1917), pp. 47–85.
9. Ehrlich, Eugen, “Montesquieu and Sociological Jurisprudence”, *Harvard Law Review*, Vol. 29 (1915–1916), pp. 585–600.
10. Ehrlich, Eugen, “The Sociology of Law”, *Harvard Law Review*, Vol 36, No. 2 (Dec., 1922), pp. 130–145.
11. Ehrlich, Eugen, „Das Lebende Recht der Völker in der Bukowina“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, M. Rehbinder (ed.) (Berlin, Duncker und Humblot, 1967), pp. 43–60 [first published in 1912].

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*Sociological Theory of Law*, M. Albrow (ed.), 2<sup>nd</sup> ed. London, 2014, p. 24), although, “there are hardly any indications of advances in this area beyond Ehrlich” (Ibid.). About the theoretical framework of this issue see: Werner Krawietz, „Ausdifferenzierung von Praxis und Theorie in juristischer systemtheoretischer Perspektive“, *Rechtstheorie*, Vol. 32 (2001), pp. 345–357.

12. Ehrlich, Eugen, „Die Erforschung des lebendes Rechts“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, M. Rehbinder (ed.) (Berlin, Duncker und Humblot, 1967), pp. 11–27 [first published in Jherings Jahrbüchern in 1911].
13. Ehrlich, Eugen, „Die Tatsachen des Gewohnheitsrechts. Inaugurationsrede“, in: E. Ehrlich, *Gesetz und lebendes Recht. Vermischte kleinere Schriften*, M. Rehbinder (ed.) (Berlin, Duncker & Humblot, 1986), pp. 104–132 [first published in 1907].
14. Ehrlich, Eugen, „Ein Institut für lebendes Recht“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, M. Rehbinder (ed.) (Berlin, Duncker und Humblot, 1967), pp. 28–42 [first published in 1912].
15. Ehrlich, Eugen, „Freie Rechtsfindung und freie Rechtswissenschaft“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, M. Rehbinder (ed.) (Berlin, Duncker und Humblot, 1967), pp. 170–202 [first published in 1903].
16. Ehrlich, Eugen, „Soziologie und Jurisprudenz“, *Die Zukunft*, No. 10 (1906), pp. 212–240.
17. Ehrlich, Eugen, „Über Lücken im Rechte“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, M. Rehbinder (ed.) (Berlin, Duncker und Humblot, 1967), pp. 80–169 [first published in 1888].
18. Ehrlich, Eugen, „Was kann geschehen, um bei der Ausbildung das Verständnis der Juristen für psychologische, wirtschaftliche und soziologische Fragen in erhöhtem Masse zu fördern?“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, M. Rehbinder (ed.) (Berlin, Duncker und Humblot, 1967), pp. 61–79 [first published in 1912].
19. Ehrlich, Eugen, *Das zwingende und nichtzwingende Recht. Bürgerliches Gesetzbuch für das Deutschen Reich* (Jena, 1899).
20. Ehrlich, Eugen, *Die juristische Logik* (Aalen, Scientia Verlag, 1966) [first published in 1918].
21. Ehrlich, Eugen, *Fundamental Principles of the Sociology of Law* (New Brunswick, Transaction Publishers, 2009), reprint of the 1936 edition.
22. Gromitsaris, Athanasios, *Theorie der Rechtsnormen bei Rudolph von Ihering: Eine Untersuchung der Grundlagen des deutschen Rechtsrealismus* (Berlin, Duncker und Humblot, 1998).
23. Gurvitch, Georges, *Le temps présent et l'idée du droit social* (Paris, Sirey, 1931).
24. Hayek, Friedrich A., *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London, Roulledge & Kegan Paul, 1973-1979).



25. Hertogh, Marc, “Rescuing Living Law From Jurisprudence”, *Jurisprudence. An International Journal of Legal and Political Thought*, No. 1 (2012), pp. 135–152.
26. Kelsen, Hans, „Eine Grundlegung der Rechtssoziologie“, in: H. Kelsen, E. Ehrlich, *Rechtssoziologie und Rechtswissenschaft. Eine Kontroverse (1915/1917)* (Nomos Verlagsgesellschaft, 2003).
27. Krawietz, Werner, “Legal Communication in Modern Law and Legal Systems. A Multi-Level Approach to the Theory and Philosophy of Law”, L. J. Wintgens (ed.). *My Philosophy of Law. The Law in Philosophical Perspectives* (Dordrecht & Boston, Springer, 1999), pp. 69–120.
28. Krawietz, Werner, „Ausdifferenzierung des modernen Rechtssystems und normative strukturelle Kopplung — sozietal oder sozial?“, G. Peter, R.-M. Krauß (eds.) *Selbstbeobachtung der modernen Gesellschaft und die neuen Grenzen des Sozialen* (Wiesbaden, Springer, 2012), pp. 73–101.
29. Krawietz, Werner, „Ausdifferenzierung von Praxis und Theorie in juristischer systemtheoretischer Perspektive“, *Rechtstheorie*, Vol. 32 (2001), pp. 345–357.
30. Littlefield, Neil, “Eugen Ehrlich's Fundamental Principles of the Sociology of Law”, *Main Law Review*, Vol. 19, No. 1 (1967), pp. 1–28.
31. Luhmann, Niklas, *A Sociological Theory of Law*, M. Albrow (ed.), 2<sup>nd</sup> ed. (London, Routledge, 2014).
32. Nelken, David, “An e-mail from Global Bukowina”, *International Journal of Law in Context*, No. 3 (2007), pp. 189–202.
33. Nelken, David, “Law in Action or Living Law? Back to the Beginning in Sociology of Law”, *Legal Studies*, No. 4 (1984), pp. 157–174.
34. Pound, Roscoe, “An Appreciation of Eugen Ehrlich”, *Harvard Law Review*, Vol. XXXVI, No. 2 (1922), pp. 129–130.
35. Rehbinder Martin, „Eugen Ehrlichs Seminar für lebendes Recht: eine Einrichtung für die Weiterbildung von Rechtspraktikern“, *Problemi filosofii prava*, Vol. III, No. 2 (2005), pp. 135–139.
36. Rehbinder, Manfred, *Rechtssoziologie*, 4<sup>th</sup> ed. (Munich, Beck'sche Buchhandlung, 2000).
37. Rehbinder, Martin, „Einleitung“, in: E. Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, M. Rehbinder (ed.) (Berlin, Duncker und Humblot, 1967), pp. 7–11.

38. Rehbinder, Martin, „Richterliche Rechtsfortbildung in der Sicht von Eugen Ehrlich“, in: M. Rehbinder, *Abhandlungen zur Rechtssoziologie* (Berlin, Duncker und Humblot, 1995), pp. 191–202.
39. Rehbinder, Martin, *Die Begründung der Rechtssoziologie durch Eugen Ehrlich*. 2<sup>nd</sup> ed. (Berlin, Duncker und Humblot, 1986).
40. Rheinstein, Max, “Sociology of Law: Apropos Moll’s Translation of Eugen Ehrlich’s Grundlegung der Soziologie des Rechts”, *International Journal of Ethics*, Vol. 48, No. 2 (Jan., 1938), pp. 232–239.
41. Rottleuthner, Hubert, *Rechtstheorie und Rechtssoziologie* (Freiburg & München, Verlag Karl Alber, 1981).
42. Tamanaha, Brian, “A Vision of Socio-Legal Change: Rescuing Ehrlich from ‘Living Law’”, *Law and Social Inquiry*, No. 1 (2011), pp. 297–318.
43. Teubner, Gunther, “Global Bukowina: Legal Pluralism in the World Society”, in: G. Teubner (ed.) *Global Law Without a State* (Dartmouth, Aldershot, 1997), pp. 3–28.
44. Timasheff, Nicholas, *The Introduction to the Sociology of Law*, X. Trevino (ed.) (New Brunswick, Transaction Publishers, 2009).
45. Timasheff, Nicolas, “Fundamental Principles of the Sociology of Law by Eugen Ehrlich / Transl. by W. L. Moll; With an Introduction by Roscoe Pound. Cambridge, 1936”, *American Sociological Review*, Vol. 2, No. 1 (Feb. 1937), pp. 120–124.
46. Trevino, Javier (ed.) *Classical Writings in Law and Society*. 2<sup>nd</sup> ed. (New Brunswick, Transaction Publishers, 2011).
47. Trevino, Javier, “Toward a General Theoretical-Methodological Framework for the Sociology of Law: Another Look at the Eastern European Pioneers”, in: J. T. Ulmer (ed.). *Sociology of Crime, Law, and Deviance* (Greenwich, JAI Press, 1998), Vol. 1, pp. 155–202.
48. Van Klink, Bart, “Can There be Law Without the State? The Ehrlich–Kelsen Debate Revisited in a Globalizing Setting”, in: H. van Schooten, J. Verschuuren (eds.) *International Governance and Law: State Regulation and Non-state Law* (Cheltenham, Edward Elgar Publishing, 2008), pp. 74–93.
49. Van Klink, Bart, “Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen”, in: M. Hertogh (ed.) *Living Law: Reconsidering Eugen Ehrlich* (Oxford and Portland, Hart Publishing, 2009), pp. 127–156.
50. Vogl, Stefan, “Eugen Ehrlich’s Linking of Sociology and Jurisprudence and the Reception of his Work in Japan”, in: M. Hertogh (ed.) *Living Law: Reconsidering Eugen Ehrlich* (Oxford and Portland, Hart Publishing, 2009), pp. 95–124.

51. Vogl, Stefan, *Soziale Gesetzgebungspolitik, freie Rechtsfindung und soziologische Rechtswissenschaft bei Eugen Ehrlich* (Baden-Baden, Nomos, 2003).
52. Webber, Jeremy, “Naturalism and Agency in the Living Law”, in: M. Hertogh (ed.) *Living Law: Reconsidering Eugen Ehrlich* (Hart Publishing, 2009), pp. 201–222.
53. Weber, Max, *Economy and Society: an Outline of Interpretive Sociology*, G. Roth, C. Wittich (eds.) (University of California Press, 1978).
54. Ziegert, Klaus A., “Introduction to the Transaction Edition”, in: E. Ehrlich, *Fundamental Principles of the Sociology of Law* (New Brunswick, Transaction Publishers, 2009), pp. XIX–XLIX.
55. Ziegert, Klaus A., “World Society, Nation State and Living Law in the Twenty-first Century”, in: M. Hertogh (ed.) *Living Law: Reconsidering Eugen Ehrlich* (Oxford and Portland, Hart Publishing, 2009), pp. 223–236.

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