THE ACTUALIZATION OF THE CONCEPT «FREE FINDING LAW» IN THE WORKS OF EUGEN EHRLICH

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The cognitive activity in the field of law is as versatile as the law itself. Existent distinctions in the process of perception are caused by the detachment of separate sides of the object of perception, the usage of different sets of techniques, methods, approaches to the analysis of law that in turn promotes the discovery of new sides, features and qualities in the course of immersion in the legal reality.

According to the traditional approach, cognition is the formation of mental representations, which display/reflect the legal reality. The objective world of phenomena, on one hand, and subjective mental world of thoughts and feelings, on the other hand, should be differentiated accurately and unambiguously. Moreover, objective legal reality doesn't depend on the subject, that cognizes it, the role of subject boils down only to collection of information and mental models building, but acquirement of new knowledge by the subject is the result of presentation manipulation, appearing within these models. To understand the phenomenon as a legal one, it is necessary to place it mentally into the legal space, in other words, to imagine yourself and others as subjects of law, refusing because of this mental operation the rest of qualities, inherent to a human as an active participant in social processes. In this context, the legal reality excludes any other reality, and understanding of law itself provides its isolation from other spheres of social life. The legal reality emerges as an autonomous entity, its subject is the sphere of objective world, placed "outside the world" subject; this is the field of dispassionate expert formation, who doesn't differentiate neither himself nor the position from which he sees the various manifestations of law.

However, with such positioning of accents in the question of law existence, according to the fair remark of the founder of modern field of sociology of law, the founder of the movement of living law, Austrian jurist, the former Rector of Chernivtsi University – Eugen Ehrlich, the important side of the problem is ignored – the more often reflections on the law take place, the more often it's necessary to return to ourselves, because the adoption of any decisions becomes possible only if there are prompting it to life social needs, legal feelings, methodological orientations, value guidelines. Ehrlich state: "Society is the sum total of the human associations that have mutual relation with one another". He makes little effort to define a social association. He does identify a great number of these association (presumably those having legal significance) ranging from family, clan, or tribe to state, nation, or the community of state. The associations may be genetic (to which he gives chronological primacy), religious, political, economic, or otherwise characterized and typed. Ehrlich is principally interested in those social associations which evidence an "inner order". This inner order of the association has the characteristics of law long before the formation or development of law in the positivist sense. An ordering is evident in the associations which is not due to the imposition of a legal system.

Ehrlich uses a number of examples to demonstrate the distinction to be made between an inner order independent of the fixed rules of law and the law discussed by jurists. Family and clan determine for them-selves the prerequisites and consequences of a valid marriage and the mutual relations of the members of the family or clan. The force of the inner order is evident not only in the primitive stage of legal development where it was the entire legal order but also in more advanced stages. As to the then prevailing juristic notion that the legal propositions control the determination of questions relating to fact of society, Ehrlich says: "But this is due solely

to a juristic habit of thought. 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" [7, 103].

During the cognition of law not officially established norms are important, but expectations, attitudes, legal assessments of the subject.

Cognitive intensity of law can't be not transformed by the subjectivity of the recipient. Coming through the consciousness of the functionary and becoming his legal conscience, it can't not to be influenced by the peculiarities of his own conscience. The same process happens in the course of judicial activity, in which realizes not the pure law of the state, but how the judge treats and understands it; that is caused by personal and professional qualities of the judge-specialist. In such process the legal aim passes to the aim of subject, transforming the identity of the judge in a kind of "creator" of his legal actions. During the judges' perception occurs the selection of cognitive facts flow by the judge from the point of practical interest. The information doesn't flows into him from the objective reality, but rather, the judge, investigating the reality, actively excludes from the flow of information the data, that unconsciously seem important for a fair decision-making. Ehrlich defined three significant factors that influenced court decision-making, the administration of justice: the first factor – value judgments in judicial interpretation. Ehrlich pointed at the presence of normative assumptions about the necessity of "loyal" decision; the second factor – social and historical context of the case. Each case should be considered due to its historical and social characteristics. Ehrlich interpreted the circumstances of each case called them "coefficients of the social trends." Ehrlich believed that wide recognition of the socio-historical aspect of the law would enable the judges to understanding the absence of absolute legal norms through time and space, and would free them from "heavy fetters "of technicism; the third factor – the "personality of a judge." Ehrlich determined it as a significant factor in particular free justicEhrlich maintained that judge's liberty and freedom are conservative latitude of responsible attitude to legal development, judge's concern for belonging to his personality. Such "person" thoroughly considers all the factors, written law, historical and social context, discerns "living energy" in the legal norms.

To understand which law is "living" it is necessary to investigate the environment of its origin and validity as an empirical reality. Therefore, the source of legal cognition should be not laws, legal dogma, but the observation of deeds, studying of documents, which reflects its implementation. Considering the law as the reflection of social tendencies and ethical interests, Ehrlich pointed out that the certainty of law is not the result of logical operations but the result of the organic ordering of the free implementation of judicial power process. He believed that justice is an inductive process of creating legal norms in increasing proportion; just as the experimental science doctrines are formed, forms the case-law by applying the law to the facts of each case. A significant factor in the development of law is the judge's personality, his position as a free and creative but limited by practice of discretionary status subject. The judge should be able to find the norm for solving the particular case, whether he solves this case on the basis of legal norm or without it.

It is the "personality" of a judge, believes Ehrlich, that decides to adhere to the "letter of the law" or the spirit of the law. Imperfection of "personality" may cause abuse and incompatible realization of natural law norms. Only a human with high legal consciousness and perfect thinking has to be entrusted the solution of cases in the society at his discretion. Consequently, judicial reform should first begin not with permanent debates about the ideal judicial system structure, but with real improvement of quality of judicial personnel.

Cognition of actual side of the case by the judge is the content of the practical perception with application of the legal norm. In contrast to the theoretical cognitive activity, judicial cognition does not require a focused, planned, systematic and practically endless accumulation of knowledge about the surrounding world in the variety of its manifestations. The judge has to cognize only separate isolated phenomena of reality. The object of such cognition is not "objective", i.e. real, material, social and natural processes expressed in concrete events but specific facts of the case. As a result – the local subject of study and relatively limited objectives are inherent in the judicial cognitive activities. Such cognition being not spontaneous and random has purposeful character, it is aimed at a fair settlement of a legal conflict.

However, if the choice of veritable cognitive directions – descriptive (normative) or perspective (valuable, estimated) – is important for any perception, then for the perception in the field of justice, the results of which determine the specific social consequences, it (the choice) gets a special significance that lays down special demands on its subjects (their cognitive abilities). Only when the judge as a subject of the law enforcement delves into the legal situation, when he avoids "mechanical garbling" of a certain norm to a separate incident, without considering its features, the law will provide a real solution of the dispute about

the law. In such cases it comes to the special cognitive means which are used during the perception of the empirical world because they combine cognitive and evaluative aspects. The judge should solve the case primarily in terms of deontology – free will, obligation, responsibility – and only then in terms of the empirical ontology, i.e. the social environment, without substituting the first for the second.

It is known, that a legal institution exists as such only if it has one meaning for everyone, and the norm becomes legal, if contains the identical scale of behavior. But life doesn't always fit into the known definitions and social mechanism of the law realization includes the qualities of law enforcing person – his values, legal knowledge, the idea of justice.

According a skeptical attitude to formalism, perceived absolutes, "perfect" systems, Ehrlich opposed the urgent issues of the "dynamic" legal practice to the "static" regulatory basis. The scholar achnowledged that the contemporary legal thinking should be based on a functional approach and on a tendency to explore how the legal norms operate, how they should be created to reach with their help the appropriate results, rather than the fact if the meaning in the formal understanding of these norms is correct. All legal theories are nothing but a struggle for reconciliation of conflicting with each other requirements: stability requirements and requirements of changes; law must be stable but it can't stand still.

Being notable for static dogmatic character, the law doesn't always get time to develop according to the dynamics of social changes, and sometimes doesn't suit the new economic conditions of managing and social interactions; it can't cover the whole variety of their qualities, that's why it doesn't promote the perception of the veritable nature of its dynamic institutes, and the law remains actually in "abruption" from the real demands of practice. The important component of the contextual problem remains aside, that in the ideological world view sphere characterizes more underlying, more active, dynamic, nonlinear, synergistic mediated aspects of dynamic formation of reality, which according to such conditions principally can't be veritably defined and predicted in the static positive legal doctrine.

Intensity of research in the mentioned sphere, according to Ehrlich, is essentially intensified by dynamics of social life, which is sometimes not only impossible to predict, but also hard to legislate. At the moment of trial any legislative act has already had a certain "age", and that's why it can't sufficiently display the today's real situation in the society. Outdated norms-definitions can not realize the today's idea of justice. Taking this into account the judge who seeks to take a fair decision, should be not only a jurisprudent, but also a sociologist and should obligatory consider the real social relations, which cause a "living law".

In the concept of the outlined above Ehrlich's philosophical and legal discourse a special sense gets the problem of static dynamic complexity of legal reality and the dogma of law. This problem is caused by the fact, that on one hand, to provide the legal accuracy, clarity, orderliness the dogma should be static against the dynamic reality, that it defines. On the other hand, as the definition is always a stop in development, a conservation of the cognitive process, dogma has to be clarified and improved, to fulfill the constantly changing social reality, destroying herewith the stability of the law. Acknowledgement of law as a bearer of the basic social regulator function inevitably promotes the complex comprehensive research of the legal reality, the studying of its actual underground, the disclosure of the channels of interconnection between factual and legislative bases.

Ehrlich devoted chapters of his book to a discussion of the creation and the structure of the legal proposition. Legal proposition may be merely formal – without normative (guiding) content. In his discussion, Ehrlich confines himself to those legal propositions, "which contain legal norms. Their purpose is to serve as the basis for judicial decisions or for direct administrative action" [7, 88].

There are a number of important characteristics of the legal proposition discussed by Ehrlich. He attacks the inaccuracy of the then prevailing notion that a judicial decision follows a syllogistic pattern from a legal proposition as a major premise and the fact situation as a minor premise to the result as a conclusion. Historically speaking, fact situation provided the major premises upon which judges operated, and "the judge who, in the beginning of the administration of justice, awards a penalty to the plaintiff has found the existence of a concrete relation of domination and subjection, a relation of possession, a usage, or a contract, and a violation thereof, and thereupon has independently found the norm fixing the penalty".

The abstract legal proposition of which juristic science treats was not in the mind of the judge prior to the decision. He dealt rather with the concrete, namely, the fact of the case and the legal relation he found there (or found broken). Note that in using the term "legal relation" here, Ehrlich reaffirms his thesis that there are legal relations before there are legal propositions.

Universal legal propositions are culled from a line of decisions and in no way, Ehrlich would say, caused the line of decisions.

This foregoing analysis is also the basis for Ehrlich's writings on the "free-finding" of the law. It must be emphasizing that in Fundamental Principles Ehrlich is not saying that judges should engage in free-finding of the law. He is simply describing what judges do and have done in the earlier stages of the development of the law. Ehrlich says that the judge finds the law from the Tatsaches des Rechts in the case before him.

This process has application even in more advanced stage of the development of law. Ehrlich indicates that it is applied were there is no legal proposition in point. The judge may have norms of decision to guide him in deciding on various juristic facts presented, but he is not necessarily led to the determination of the case on these facts alone. Even in the light of a legal proposition which is applicable, the decision is not reached automatically. The legal proposition is never so narrow, as any given set of facts. The judge must play an active role in determining how far the facts of the case before him relate to the legal proposition.

In deciding a concrete case before him, the judge makes use of norms of decision. The distinction between legal propositions and norms of decision as contemplated by Ehrlich is important. Briefly, norms of decision are less general than legal propositions, and apparently there is greater freedom offered the judge in finding the norms of decision to apply in a particular case. A legal proposition may define the conditions under which an object becomes a fixture. But in determining whether a particular object is a fixture, a judge always has leeway. He utilizes a norm of decision in reasoning the result. The judge has a choice of deciding that the article is a fixture because it in affixed or of deciding that it is not a fixture because the affixer intended to remove.

Ehrlich admits that a norm of decision may become a legal proposition. He writes: "The creation of a legal proposition out of the norms for decision 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. This intellectual labor, whosoever it may be that is able to do it, is called juristic science" [7, 95].

During the research of law existence as the most general notion that absorbs the whole totality of legal phenomena and processes, the normativity acts as its immanent feature. The general norm is an element of the legal matter, the immaterial expression of order, the base legal form building. The vector of the legal reality comprehension under these conditions is aimed at determining the patterns of influence of legal phenomena and processes on the facts of reality. According to the above outlined approach, the basic patterns of the legal matter motion are reduced to reduction, simplification and schematization. Among the variety of legal situations the similar situations for their legal essences are searched, that are defined by the similar life circumstances, the legal assessment of which is close to the degree of necessity of making the same decision. Under these conditions the pre-modeled system of rules of behavior considers the "adjusting" of reality to the typical repeating pattern. Decomposing a situation the judge "adopts" the established relationships of the parties to known legal models. However, his legal thinking is characterized by a constant search in the legal consciousness of the similar legal situations using past experience and arsenal of legal situations solving methods. In the described inaterpretation the law as a generalized abstract form tries to regulate all social relations, but exactly this generalization is its disadvantage: simplification is always the fear of complexity and diversity of life/existence. Stressing the importance of situational approach in the perception of legal reality in critical law sociology of Ehrlich, the attention is reasonably drawn to the fact that legal phenomena are not characterized by events recurring everywhere in space and time. The legal phenomenon is the product of endless, diverse and unique social existentiality. Therefore every social fact, however it was uniform and similar to the other, will be always determined by the individual characteristics and specific differences.

The variety of life circumstances, their unpredictability and also complexity of the law (understanding of its nature) do not allow with absolute precision, "mathematically", resolve any legal situation. This abstraction inevitably will face difficulties of realization if there are atypical, single, extraordinary life circumstances. Abstract positive norm can never be finally formulated, it does not tolerate absolute wording and applies one general rule to different social situations. The positive norm can not lead to justice. It begins with an appeal to "equality", as if equality means fair way of life. In fact, all life situations are different and it is impossible to determine their characteristics in one abstract norm.

The more formal and abstract the concepts of law are, the more clearly the possible forms and ways of law realization are written, the less flexible and more complex becomes the adoption of norms to the features of the concrete legal situation. The law can become a reality only in the living interaction of people, their legal relationships as the law is nothing but a "right action and right decision in a particular situation", but not what is contained in norms, not the scheme for a proper action. During the reduction of the law

exclusively to a set of norms, it becomes something external, amorphous to human, imposed to him from above. The basic premise of this object-centered position of understanding of person is that not a person asserts himself in the world, develops and implements moral values, but formally enshrined conditions dictate him the form of life.

Legal reality is ontological, and its actuality becomes objective through subjectivity and creative principles of law realizing subjects activity. In modern society the judge can not remain faceless executor of the letter of the law, he must creatively apply the current legislation proceeding in his work from consciousness, life and professional experience. Legal awareness is situated in the perfect sphere where emerges the ideas which define, change, and in some cases, cancel certain legal norms, institutions, procedures, mechanisms and means. It lives in the space of spirit, depends on it and should express its nature. The legal act is impossible without the subject as well as the legal consciousness does not exist outside the spirit. Life in the spirit provides an opportunity to legal awareness to be creative principle of legal existence and influence the quality of legal culture. The legal culture arises as a crucial element, the optical focal point through which legal awareness influences the real relations in society.

The veritable justice is not a mechanical process. Without embedding intelligence, moral principles in the process of studying of any legal conflict the judge, resorting only to legal knowledge, manifests himself only as a craftsman. But the vocation of a judge is not to condemn but to judge, relying not only on the statute, but also on the whole range of moral and ethical foundations of society, his experience and understanding of the application of law. It is important to note that if the judge is a craftsman, he in the search of matches imposes the laws to the legal reality as a stencil. In the absence of matches such judge loses his head and doesn't find a right answer. Giving a specific professional direction to theoretical knowledge is possible due adopting the ideas about the limits of the internal morality of justice, deep comprehension of legal sciences, especially those which study the law from the philosophical and methodological positions. The effectiveness of enforcement and judicial authorities is largely dependent on the moral qualities of personnel than on perfect legislation. Even the high-quality law would be ineffective if the practice of its application by courts will not fit advanced moral requirements.

Actualizing the problem of judicial legal location and the free jurisprudence, Ehrlich stressed on the need to create a new approach, which would direct the efforts of jurisprudence to the court practice, would overcome the gap between the law and actual social relations, would manage to adopt the law to the life realities [1]. Criticizing the normative understanding of law as such that is not able to cover the entire diversity of legal life, Ehrlich opposed this understanding to his own "free" interpretation of law. He noted that not all current legislation is applied or performed, there are many relationships which are not regulated by the law at all, but there are also other norms which are valid and sometimes are used by courts, they were made during the cohabitation process – "living law". Their validity is less than the force of formal law, but their practical value is sometimes more because there is less probability of legal disputes existence than when using clear formal defined law. Living law is only the law that "comes in life, becomes a living norm, anything else is just a bare doctrine, rule, decision, dogma or theory" [7]. Living law answers the permanently changeable inquiries of reality; it varies according to the necessities of life, organically develops and improves in the context of social relations – that's why it should be the regulator of social relations.

USED MATERIALS

1. Антонов М. В. Запоздавшая реплика: об одной из последних работ Ойгена Эрлиха / М.В. Антонов // Российский ежегодник теории права. – 2009. – № 2. – С. 320–331.

2. Антонов М. В. У истоков социологии права: Ойген Эрлих / М. В. Антонов // Российский ежегодник теории права. – 2008. – № 1. – С. 565–592.

3. Бігун В. Євген Ерліх: життя і право значна спадщина (актуальний наукознавчий процес) / В. Бігун // Проблеми філософії права. – Т. ІІІ. – № 1–2. – Київ; Чернівці : Рута, 2005. – С. 105–126.

4. Эрлих О. Судейское нахождение права на основании правового предложения. Четыре отрывка из незавершенной работы «Теория судейского нахождения права» / О. Эрлих // Российский ежегодник теории права. – 2009. – № 2. – С. 332–376.

5. Коттеррелл Р. Эрлих на окраине империи: центры и периферии в правовых исследованиях / Р. Коттеррелл // Российский ежегодник теории права. – 2008. – № 1. – С. 546–564.

6. Лейбниц Г.-В. Сочинения о четырех томах / Г.-В. Лейбниц : в 4 т. – Т. 1. / ред. и примеч. В.В. Соколов; пер. Я.М. Боровского. – М.: Мысль, 1982. – 636 с.

7. Ehrlich E. Grundlegung der Soziologie des Rechts / E. Ehrlich. – München und Leipzig : Duncker & Humblot, 1913. – 409 s.

8. Ehrlich E. Sociale Gesetzgebungspolitik aua dem Gebiete des Deutschen Privatrechts / E. Ehrlich // Unsere Zeit. – 1890. – I – S. 433–451.

9. Ehrlich E. Der Gang der Culturentwicklung / E. Ehrlich // Neue Revue. – 1896. – VII l. – S. 690–696.

REFERENCES

1.Antonov M. (2009). Zapozdavshaja replika: ob odnoj iz poslednih rabot Ojgena Jerliha [A belated retort: about one of the latest works of Eugen Ehrlich]. *Rossijskij ezhegodnik teorii prava* [Russian Yearbook of the Theory of Law], 2, 320–331. (In Russian).

2.Antonov M. (2008). U istokov sociologii prava: Ojgen Jerlih [At the origins of the sociology of law: Eugen Erlich]. *Rossijskij ezhegodnik teorii prava* [Russian Yearbook of the Theory of Law], 1, 565–592. (In Russian).

3.Bihun, B. (2005). Yevhen Erlikh: zhyttia i pravoznavcha spadschyna (aktual'nyj naukoznavchyj narys) [Eugene Ehrlich: life and jurisprudential legacy]. *Problemy filosofii prava. Mizhnarodnyj chasopys* [The Problems of philosophy of law. International Journal], III, 1–2, 105–106. (In Ukrainian).

4.Ehrlich O. (2009). Sudejskoe nahozhdenie prava na osnovanii pravovogo predlozhenija. Chetyre otryvka iz nezavershennoj raboty «Teorija sudejskogo nahozhdenija prava» [Judicial finding of the law on the basis of the legal proposal. Four fragments from the unfinished work 'The Theory of Judicial Finding of Law']. *Rossijskij ezhegodnik teorii prava* [Russian Yearbook of the Theory of Law], 2, 332–376. (In Russian).

5.Kotterrell R. (2008). Jerlih na okraine imperii: centry i periferii v pravovyh issledovanijah [Ehrlich on the suburb of the Empire: Centers and Provinces in Legal Studies]. *Rossijskij ezhegodnik teorii prava* [Russian Yearbook of the Theory of Law], 1, 546–564. (In Russian).

6.Lejbnic G. (1982). *Sochinenija v chetyreh tomah* (Ja.Borovskiy, Trans.). (Vol. 1). Moskva: Mysl'. (In Russian).

7.Ehrlich E. (1913). *Grundlegung der Soziologie des Rechts* [Foundation of the sociology of law]. München und Leipzig: Duncker & Humblot. (In German).

8.Ehrlich E. (1890). Sociale Gesetzgebungspolitik aua dem Gebiete des Deutschen Privatrechts [Social legislation on the area of German private law]. *Unsere Zeit*, I, 433–451. (In German).

9.Ehrlich E. (1896). Der Gang der Kulturentwicklung [The course of the cultural development]. In *Neue Revue*, VII, 690–696. (In German).

Гураленко Н. **Актуалізація проблеми «вільного правознаходження» у роботах Є. Ерліха**

Анотація. У статті критикується нормативне розуміння права як таке, що не здатне охопити всю багатогранність правового життя. Визначається роль та місце соціології права Є. Ерліха в контексті сучасних дебатів співвідношення права держави та права суспільства. Актуалізується розуміння та прояв права як єдиного цілого, яке складається з безлічі соціальних порядків. Зауважено, що концептуально право може бути розділене на дві логічні спільності: право держави, право юристів та живе право (право соціальних союзів). Зазначено, що чимало тверджень представників правового плюралізму суперечать науковій позиції Є. Ерліха. Віддаючи належне соціологічному методу, який свого часу розвинув Є. Ерліх у теорії «живого права», встановлено, що його значення для юридичних досліджень, зокрема для розвідок з вільного суддівського правознаходження, полягає в тому, що цей метод слугує свого роду прологом ідейно-ціннісних узагальнень, моделює суддівську дискреційність, підкреслює вагомість соціальних функцій суддівської діяльності, визначає та інтерпретує останню через соціальну сутність і природу.

Ключові слова: соціологія права, живе право, фактичність, правовий плюралізм, нормативність, держава, соціальні союзи, суспільство, правова держава.

Huralenko N. **The actualization of the concept «free finding law» in the works of Eugen Ehrlich**

Abstract. In this article the author questions the role of Eugen Ehrlich's sociological jurisprudence in contemporary debates about legal pluralism. This dualist understanding of law was not typical for Ehrlich who considered that law always manifests itself as a unified social integrity, though it consists of many social orders. Law can be conceptually divided into two logical categories: official law (the law of a state and lawyers) and living (social) law. Neither was Ehrlich inclined to advocate for mechanical transformation of facticity into normativity – this requires additional creative work of lawyers. From this point of view, it is not practicable to use Ehrlich's socio-legal theory for justification of the project of anthropological jurisprudence to include all normative systems of social regulation in the category of law under the slogan of legal pluralism. Citing Ehrlich as one of the founding fathers of legal pluralism is not undisputable because legal pluralism itself is not a unified scientific doctrine, and many assertions of legal pluralists contradict Ehrlich's scientific position. Ehrlich was not inclined to undermine the role of law and judiciary in legal reality, which sometimes is typical for some legal pluralists.

Key words: sociology of law, living law, legal pluralism, normativity, state, social unions, society, law-bound state.