Лекції
Lectures

ВАЖЛИВІСТЬ ТЕОРІЇ ПРАВА ЄВГЕНА ЕРЛІХА ДЛЯ КОНСТИТУЦІЙНОГО ПРАВА*

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Анотація. Ерліхівські концепції "живого права" та "асоціацій" можуть допомогти в дослідженні конституційним правом взаємозв'язку між конституцією та плюралізмом. Коли Ерліх описує силу суспільства, яке через асоціації формує живий закон, він показує конституційному праву значення права, що існує поза державним правом. Конституція не лише регулює діяльність держави, але й містить норми для суспільства. Основні права є обов'язковими стандартами як для держави, так і для громадянського суспільства. Таким чином, нинішня концепція Конституції робить легітимність права більше в Конституції, а не в державному праві. Тобто, сутність живого права, створеного соціальними асоціаціями, відображається в Конституції. Співвідношення між конституційним правом і соціологією права мають в працях Ерліха найбільш істотні елементи зв'язку. Відкриття Конституції до плюралізму – це не лише процес, який починається та закінчується тлумаченням конституційного тексту. Відкритість до плюралізму означає визнання права, яке існує на практиці і рухає суспільством. Конституційна інтерпретація повинна бути уважною до цього права. Конституційна легітимність права передбачає необхідні обмеження, яких соціологічний аналіз закону часто не дотримується. Плюралістичні суспільства XXI століття визнають недостатність законодавства, що є єдиною та винятковою формою соціального регулювання. Виникають нові правові форми і їх слід розглядати теорією права, відкритою до плюралізму правових джерел.

Ключові слова: Євген Ерліх; живе право; соціальна асоціація; конституційний плюралізм; конституційна герменевтика.

ON THE IMPORTANCE OF EUGEN EHRLICH'S THEORY OF LAW FOR CONSTITUTIONAL LAW*

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Abstract. The Ehrlichian concepts of "living law" and "association" can help constitutional law in the investigation of the relationship between constitution and pluralism. When Ehrlich describes the forces of society, which produce through their various associations a living law, he shows constitutional law the importance of law existing outside the State Law. The Constitution does not only regulate the State, but it also contains norms for society. Fundamental rights are binding standards for both the state and civil society. Thus, the current concept of Constitution makes the validity of law no longer in State law, but in the Constitution. In this way, the existence of a living law produced by the social associations finds its validity in the Constitution. The relation between constitutional law and sociology of law has in Ehrlich's work one of the most significant elements of connection. The opening of the Constitution to pluralism is not only a process that begins and ends in the interpretation of the constitutional text. Openness to pluralism implies the recognition of a law that exists in practice and moves society. Constitutional interpretation must be attentive to this law. The constitutional validity of the law brings the necessary limits that a sociological analysis of law often fails to observe. The pluralistic societies of the 21st century recognize the insufficiency of the legislated law as the sole and exclusive form of social regulation. New legal forms emerge and need to be contemplated by a theory of law open to the pluralism of legal sources.

Keywords: Eugen Ehlrich; Living law; Social Association; Constitutional Pluralism; Constitutional Hermeneutic.

Initially I would like to say my satisfaction to be in Ukraine, this great and beautiful country that has a near relation with my city Curitiba and my State Paraná, in Brazil.

The Ukrainians are the second largest contingent of Slavic emigrants in Brazil, second only to the Poles. They arrived in Brazil in 1895 and 1896. The largest numbers of Ukrainian descendants in Brazil live in Paraná. There is a city in Paraná called Prudentópolis, with a population of fifty thousand inhabitants, which is considered the Brazilian Ukraine. In the public schools of Prudentópolis they have classes in Portuguese and Ukrainian. In Curitiba, there is a beautiful park dedicated to the Ukrainian people.

In addition to this historical proximity to Ukraine, the coincidences made my academic work also take a turn for this region. Since 1994, I have studied and researched the work of the Professor of the University of Chernivtsi Eugen Ehrlich [1, 77]. Ehrlich was a student of the Faculty of Law of the University of Lviv for a short period, between 1880 and 1881 [2, 903]. Considered one of the founders of Legal Sociology, Ehrlich referred to this region in his work showing the cultural wealth of its peoples. Ehrlich's work can not be understood without a thorough analysis of his biography and the history of this region. The fact that he lived in this region was decisive for his understanding of law.

My interest in Ehrlich's work is based on possible dialogues between his work and constitutional law. As Professor of Constitutional Law, I think that the Ehrlichian concepts of "living law" and "association" can help constitutional law in the investigation of the relationship between constitution and pluralism. When Ehrlich describes the forces of society, which produce through their various associations a living law, he shows constitutional law the importance of law existing outside the State Law. In this context, the concept of political community is more adequate than that of society, because it does not seek to oppose State and civil society, but to understand citizenship within the broad idea of Constitution [3, 15]. The Constitution does not only regulate the State, but it also contains norms for society. Fundamental rights are binding standards for both the state and civil society. Thus, the current concept of Constitution makes the validity of law no longer in State law, but in the Constitution. In this way, the existence of a living law produced by the social associations finds its validity in the Constitution.

The Ehrlich´s notion of living law can be defined as the binding rules that people voluntarily observe in social live. The living law, says Ehrlich, is found in the dynamics of life, in the challenges brought by technological development, in the new social practices; in contrast to the prevailing law before the courts and State organs, living law dominates life. The sources to know it are, above all, modern documents, as well as the day–to-day observation of commerce and customs [4, 415].

Society by Ehrlich does not constitute itself as a grouping of isolated individuals, but as a grouping of associations. These associations are the State, the family, the cooperative, the communities, etc. The world of life and the law do not know the individual outside of its context. Every individual belongs to a social association, which is formed by a group of people that in their relations recognize some rules as determinants for their action. The internal order of associations is determined by legal rules [4, 34]

The legal norms, in turn, are not confused with other social norms. Although they represent both the effective state legal precepts and the law of the extra-state society, the legal norms assume a special character and, therefore, they are different from the other social norms. According to Ehrlich, although it is difficult to separate the legal norms from other social norms scientifically, in practice this difficulty rarely appears. The

question of the opposition between legal norms and extralegal norms is not a question of social science but of social psychology. The various types of norms arouse various feelings and one reacts to transgressions in different ways, with different feelings. Compare, says Ehrlich, the feeling of revolt that arises from a legal infraction with indignation at the non-observance of a moral commandment, with the anger occasioned by a rudeness, with the ridicule of some determinations of good manners or with critical distance with which the fashionable heroes contemplate those who do not imitate them [4, 146].

Ehrlich differentiates "legal norm" from "legal precept". The legal precept emanates from the State through the formal mechanisms of state legal creation. The legal norm, in turn, is empirical law, that practiced in associations, which is independent of the legal determination [3, 87].

According to Ehrlich, the concrete as a rule precedes the abstract, that is, the rule of decision creates the legal precept. This idea, which was even the subject of Kelsen's criticism [5], was especially developed when Ehrlich gave his inaugural lecture as Rector of the University of Chernivtsi on December 2, 1906. According to him, facts are present before the human brain begins to elaborate some thinking about law and legal relations. Thus, Ehrlich addresses not the customary law itself (*Gewohnheitsrecht*), but the facts (*Tatsachen*) of customary law [6].

The enormous importance of the State to the Law, says Ehrlich, lies in the fact that society uses the State to support its law and to impose its order on the associations [4, 137]. The State is also a social association and the forces that act in the State are social forces. Ehrlich differentiates *norm* (*Gesetz*) from *State Law* (*staatliches Recht*), when writing that State Law is not linked to the State from the form, but from the content. It is a Law that arises from the State and does not exist without it. It is indifferent to know in what form it arises, whether through acts, regulations, administrative acts or judges' law. Thus, although there may be State law deriving from a legal prescription (*gesetzliche Vorschrift*), nor does any legal prescription contain State law [4, 124].

According to Ehrlich, State law consists of norms of first order and second order. The first order norms express the condition of the State as organ of the society. They are the Constitution of the State, the law of State organs, the State´s rule of decision, the State´s prescriptions for the different fields of economic and social life, such as education and the productive and the financial sectors. The second order norms, in turn, such as criminal law, procedural law and police law, protect the law of society and State law. They do not directly regulate life, but exist to support a more comprehensive regulation [4, 138].

State law provides State peace through State bodies specially created for this purpose. In this way, police law and criminal law, for example, are second order norms that protect social and State institutions [4, 321]. State law produces its effects through decision norms (*Entscheidungsnormen*) or by norms of intervention (*Eingriffsnormen*). The State prescribes to its courts and State organs how the cases that are brought to it must be decided. Most decision norms, however, are the law of jurists (*Juristenrecht*), but when they arise independent of the law of jurists and seek to achieve a State purpose, they are part of State law. The norms of intervention, in turn, instruct the State organs when they will act independently of being called. If the legal precept allows direct intervention or if it works only as a norm of decision, the solution is independent of the legislator or the Act, because what matters, in fact, is the habit actually existing. Administrative law, says Ehrlich, is an example in which one can find norms of decision and norms of intervention [4, 312].

For Ehrlich, it is possible to speak on a unity of law, but not on a unit of legal precepts. The legal precepts form a unity only in the context of society, for which they are in force. If one wishes to conceptualize the unity of law one must understand not only the legal precepts but also the legal relations of the existing legal order [7, 146].

In all fields there are life relations equivalent to those that the State recognizes, protects and regulates. In these cases, the State neither opposes nor protects them. In this situation, there are numerous communities, economic, social, religious and political associations, some contracts and some phenomena in the law of succession and in the law of things. According to Ehrlich, the reasons for this situation are the technical difficulty of regulation and cases of purposive normative anomie, as are the examples of the French Catholic Church, the cartels and some contracts that expressly remove the possibility of lawsuits against them [4, 143].

The sociological analysis of the law will have to distinguish between existing law (*geltendes Recht*) and living law (*lebendes Recht*), to compare reality with both legal prescriptions and documents. The existing law (decision norm) is all valid content of the document that will be brought to the process, but it is only "living law" if the parties observe it, even if they do not think about judicial process [4, 419]. A contractual provision, Ehrlich asks, found in a plethora of agreements, which contains a need or a desire of

the parties, should not prevail over a precept contained in the civil code that is not applied because the parties often do not give effect to it or because replace it with another agreed standard? [8, 20]

According to Schiechtl, the Ehrlichian investigation of living law can be seen in three different perspectives. From the point of view of Ehrlich's field of research, that is, the multicultural Bukowina, living law demonstrates in a sense the relativity of the legal order. The investigation is oriented in norms that dominate, in fact, the legal practice, in a legal order in which in fact one lives. A second perspective demonstrates that the investigation of the living law comprises the norms that effectively have an efficacy in the social relationship between people. A useful legal science can not only be reduced to written law, but must also pay attention to what actually occurs in legal practice. This second perspective presupposes sociological research to demonstrate the influence of society on the creation of law, verifiable in the investigation of the facts of law and in the use of historical sources. The third and final perspective lies in the contribution of law research to legal policy. Legislation gains quality when it gives attention to the forces and norms that, in fact, have effectiveness in society. Laws close to reality can overcome dead law by living law [9, 66].

The importance of Ehrlich's theory of law for constitutional law lies in its complementarity, that is, Ehrlich's work does not replace constitutional hermeneutics but complements it. The binding force of constitutional rules with open content does not depend only on the judge's interpretation, which removes a meaning from them. Thus, when the judge does not apply a State law to apply a constitutional norm, the legal problem to be solved is not only found in these two norms, but also includes the living law that is guiding the judge in the interpretation of the meaning of the constitutional norm. According to modern constitutional hermeneutics, the interpretation of the norm of the Constitution must contemplate the reality for which the norm will be applied. This reality does not consist only of facts, but also of norms. The law lies not only in the Constitution, but also in the living law that regulates the legal relationship that is being recognized as valid by the constitutional jurisdiction. The Ehrlich's work contributes to constitutional law, because it legitimizes legal pluralism existing within the limits of the Constitution.

The Brazilian constitutional jurisdiction has recognized as valid this Ehrlichian living law, which results from repeated social practices in the various social associations. In cases ADPF nº 132 and ADI nº 4.277, the Supremo Tribunal Federal – STF consolidated the jurisprudence that had already been settled by several Brazilian courts and recognized the homosexual union as a family entity, attributing it the legal effects.

The Brazilian Courts are also considering as a law the social practices of unions parallel to marriage. In these cases, one of the parties maintains permanent marital relationship with a third person, forming two parallel families. In cases of breach of the marital relationship, certain decisions of the Court of Justice of the State of Rio Grande do Sul determined the division of assets into three parts. In the case of the death of the person who has both families, the decisions have recognized that the right to pension must be divided between the two remaining parts [10, 17].

The Family Law Court of the City of Manaus, in the State of Amazonas, recognized as law the union between a man and two women. According to the decision, the judge must recognize the existence of such unions in society. If the legislated law does not contemplate these unions, the judge can not ignore them [11].

The Court of Justice of the State of São Paulo (Case number 0006422–26.2011.8) has recognized the right of the person to have in his birth record the name of the adoptive mother alongside the birth mother. The Family Court of the city of Cascavel, in the State of Paraná (Case number 0038958–54.2012.8.16.0021), also recognized the right of the person to have in their birth record the name of the adoptive parents alongside the biological parents.

These cases refer to what Ehrlich calls “living law”, the law that, independent of the legislated law, dominates life, leads people to act. It is the recognition of the Ehrlichian living law, the law that really regulates the lives of people. In the first case, the STF recognized the living law of the repeated practices of homosexual union. It is not only a question of emphasizing the legal effectiveness of the constitutional norms guaranteeing the right to liberty and protecting human dignity, but also of recognizing that there is a repeated legal practice of a non-State law, which has been recognized as a valid law under the Constitution. The normative legal framework (legal/illicit) is replaced by the more comprehensive legal framework of constitutional normativity (constitutional/unconstitutional).

Likewise, unions parallel to marriage imply the recognition of the supremacy of the law that happens in practice over the legislated law. The legislated law is replaced, to use the Ehrlichian terminology, by the law of “legal norms”.

The new family arrangements resulting from the existence of a free society imply new legal forms, which first exist in the facts and then crystallize into legal precepts, either in the form of laws or in the form of judicial decisions. Here, of course, one has the role of the jurist, which for Ehrlich is related to the investigation of law and not to mere adaptation of fact to the norm. The jurist gives legal form to the law created by the society. According to Ehrlich, the development of Roman law and English law is the work of Roman and English jurists. The English jurists, more Roman than the Romanists, according to Maitland, closed themselves to the influence of Roman law and thus were able to develop a proper law, which results from the abstraction of its own living law. Thus, English law freed itself from the incorporation of legal prescriptions developed in another historical and social context.

The relation between constitutional law and sociology of law has in Ehrlich's work one of the most significant elements of connection. The opening of the Constitution to pluralism is not only a process that begins and ends in the interpretation of the constitutional text. Openness to pluralism implies the recognition of a law that exists in practice and moves society. Constitutional interpretation must be attentive to this law. The constitutional validity of the law brings the necessary limits that a sociological analysis of law often fails to observe. The pluralistic societies of the 21st century recognize the insufficiency of the legislated law as the sole and exclusive form of social regulation. New legal forms emerge and need to be contemplated by a theory of law open to the pluralism of legal sources. The constitutional law of the 21st Century is essentially a constitutional law of pluralism.

Thank you very much for your attention.

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