

SOCIO-HISTORICAL FACTORS OF LAW PERCEPTION IN “LIVING LAW” CONCEPT BY EUGEN EHRLICH



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The thesis of the social purpose of law, which arises in the process of social interaction and its task is to regulate the "inner order of social associations", can be called a "business card" of the socio-legal philosophy of Eugen Ehrlich (1862-1922). He challenged not only academic circles, relying on normative pluralism of normative prescriptions, and the gap between the practice and the legal doctrine that was observed in Chernivtsi, in Bukovina – he was also able to challenge, firstly, the principle of territoriality and, secondly, the traditionally positivist state-centered concepts of the law, emphasizing the importance of the traditional legal norms existing in the normative prescriptions.

The theoretical and empirical basis of our article is Eugen Ehrlich's works, which are still stored in the library funds of Yuriy Fedkovych Chernivtsi National University, Ukraine. In general, analyzing the degree of scientific development of this issue, it should be said that the problem of "living law" of Eugen Ehrlich was investigated both in Ukrainian and in foreign literature. In this context, there can be distinguished academic researches of such scholars as Antonov M., Birun V., Gavrilyuk R., Hertogh M., Tsiger K., Marchuk V., Pound R., Tsiger K., Singh S. and others.

In our opinion Hertogh's edition "Living Law: Reconsidering Eugen Ehrlich" is a fundamental study in this field. This English-language collection of articles is the first one that is entirely devoted to the work of Eugene Ehrlich. This collection aims at "redefining" the ideas of Eugen Ehrlich by combining the different views of leading international experts, to determine both the historical and theoretical aspects of his work, as well as its relevance for contemporary law and the scientific community [18].

This book is made up of four parts. The first analyzed the political and academic atmosphere at the end of the nineteenth century. Part II deals with the basic concepts and ideas of Ehrlich's law of sociology and the perception of Ehrlich's works in the German-speaking world, in the United States of America and in Japan. Part III explores the relation between the ideas of Ehrlich and some of his contemporaries, including Roscoe Pound, Hans Kelsey and Cornelis Van Vollenhoven. In the fourth part the focus is on the relevance of Ehrlich's work for current socio-legal studies [18]. The reviews state that this publication is a scientific achievement and is defined as a significant contribution to the study of Ehrlich's concept [14].

The purpose of this article is an analysis of socio-historical factors of legal perception in the concept of "living law" by Eugen Ehrlich.

Eugen Ehrlich, like Iering and Petrazhitsky at that time, was convinced of the social causality underlying the foundations of law when he introduced his concept in 1911. Using historiographic methods and methods of questioning, he applied an inductive approach to the construction of his concept. Singh observes that society, according to Ehrlich, consists of a combination of normative and official associations which act through inner order. Ehrlich came to the conclusion that in this inner order "living law" can be found [20]. Therefore, Ehrlich's concept should be considered not as a counterbalance to official law, but as a search for the true law perception.

Eugen Ehrlich distinguished three important factors influencing the court decision-making and the administration of justice.

The first factor is value judgments in judicial interpretation. Eugen Ehrlich pointed out on the existence of a normative assumption about the necessity of a "correct" decision.

The second factor is the socio-historical context of the case. Each case should be considered due to its historical and social characteristics. In Ehrlich's interpretation, the circumstances of each case are "the coefficients of social trends". Eugen Ehrlich believed that the open recognition of this socio-historical aspect of law would make it possible for judges to understand the absence of time and space of absolute legal norms, would free them from "hard chains" of technicalism.

The third factor is the "personality of a judge". Eugen Ehrlich saw it as a significant factor of any, and in particular, free justice. We can agree with the Pr. Mark Hertogh's statement, that according to Ehrlich, as long as the legislator's decision to protect a certain interest existed in the legal proposal, the judiciary had to comply with this proposal. This is explained by the fact that the decision of the case by the judiciary was legitimate itself as a "judicial settlement of interests taking into account orders of a legal proposal" [18]. Mark Hertogh notes that this does not mean that the judge has the right to interpret the legal proposal according to his own conception of expediency: this doctrine, which is often put forward nowadays, is absolutely inadmissible. As long as the judge interprets the legal proposal, he has to refer to the interests of expediency of proposal's creator not to his own ones. The will and freedom of a judge, according to Ehrlich, is a conservative freedom of a responsible attitude towards legal development, a judge's concern for the appropriateness of his personality. Such "person" comprehensively considers all factors, written law, historical and social context, discerns "living energy" in the legal norms [4, 105–106].

In the early 20th century the theories of "free law" (also called "free law movement") were widespread in Austria, Germany, France and other European countries. The emergence of this movement was caused by the fact that the legal system of free competition period turned out to be too "narrow" for that era. There were some gaps in the law, so in practice law-makers had to fill them in. As a result, the legislation was not the only legal source of law: important factors of law-making were legal consciousness of the judge and of the society. The court was declared the main body, which "perceives" the true decision and finds out free law. The application of the law had to be subordinated not only to logic, but also to feelings, emotions, discretion of the judge [13].

Obviously, since perception of the nature of law is a condition for its understanding, so the current state of law development always carries the imprint of past philosophical and legal cognitive traditions. In modern Ukrainian jurisprudential literature there are distinguished some conceptual foundations based on Ehrlich's doctrine. Firstly, there is sociocentricity. Secondly, there is empiricism (including the empiricism of Ehrlich's research) and historicity (knowledge of law history, and principles of its evolution) as the basis for the substantiation of the conclusions, in particular the sociality of law, particularly of sociality of law. Thirdly, the conservatism of Ehrlich's outlook itself – an orientation towards preserving the traditions, tensions, produced by society, is reflected in the moderation of his thoughts [5, 72]. The last foundation is nothing more than a reflection of the law-inheritance bond in temporal dimension.

It is fundamentally important, in our opinion, that Ehrlich defends not only ontological pluralism, which examines the law in different hypostases, at different levels of social life, and monitors the variation of law in different social groups ("social associations", in the terms of Ehrlich). Much more interesting is that Ehrlich bases his concept on methodological pluralism, which combines the methods of various scientific disciplines, including the history of law, psychology and sociology. According to the scientist, such vision of law can rectify the situation, when "the main task of the court proceedings is to deduce the decision of an individual incident from the provisions of laws and statutes ... it is necessary to combine the efforts of epistemology, the history of law, logic, psychology in order to understand where this dominant prevailing prerequisite in the modern jurisprudence comes from, how far it reaches and how where it can lead"[10, 135].

At the same time, it should be noted that in a small article about national associations, Eugen Ehrlich said that "the course of historical events does not depend on the intention that makes human history, but on the elementary forces of society." If we paraphrased the scientist's statement, we would see that the core of law development lays precisely in a permanent search for balance of interests, ability to create, on the basis of such interest, norms and rules to subordinate the factual behavior of members of social associations. In these terms, the right arose as a product of social interaction. In the given perspective, the law arose as a product of social interaction.

Eugen Ehrlich showed that ancestral traditions and patterns of family education, religious and moral requirements that support living law, direct individuals to law-abiding behavior and thereby facilitate the effective functioning of legal norms. Eugen Ehrlich offered the vision of law as a product of a social design. Defining the law as “an imaginary thing” (ein gedankliches Ding), i. e. as an intellectual design, based on observations on social phenomena and facts, Eugen Ehrlich claimed that “there would be no law, if there were no people who understood the meaning of law. But, as always, our understanding is formed from the material that we receive from sensory perception of reality.” It is not accidentally that the academic world rejected attempts to define the law and to distinguish it clearly from other social mechanisms.

The idea of the indissoluble unity of juridical society and creation of law by society is one of Ehrlich's fundamental principles.

Eugen Ehrlich actively used the results of concrete sociological researches, which he conducted independently among the population of Bukovina; he arranged population surveys, examining the role of courts and judicial practice, and analyzing the effect of the Austrian Civil Code with the use of specific empirical data. As a result, he concluded that only about a third of the articles actually acted at that time.

Eugen Ehrlich contended that the requirements of the living law could appear out of juridical regulations and only with the development of history they could join in their content and turn into components of positive law. Whereas the living law is directly involved into the everyday practical life, it is closely linked with other socio-cultural normative formations that are not relevant to the state government institutions. Its practical- spiritual, socio-cultural grounds are much broader than the grounds of positive law, which relies primarily on the will and power of the government.

According to Ehrlich, the living law, unlike the customary law (which is associated with the historical past and its traditions, and is always beyond the positive law), is forward directed, open to innovations, it transforms constantly into normative patterns of the positive law, and serves as its valuable normative reservoir.

In his main work “Fundamental Principles of the Sociology of Law” (1913) Ehrlich concentrated on the scientific study of customary law, legal history (Roman, Medieval English and German law) and didn't pay so much attention to the state law; he mentioned it only to demonstrate that it didn't solve all the issues of legal life, or in the context of protests against the withdrawal of this law to the rank of the most important or even the only source of law. The author summarized his research inimitably in the famous foreword to his work which says, that “at the present as well as at any time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.”

Eugen Ehrlich didn't hide the fact that the refutation of the myth about the dominant significance of the state in the legal life is the main purpose of his work – for this purpose he referred not only to the customary and commercial law, but also to the history of law, legal doctrine and legal practice that proved the failure of this myth. Sahib Singh claims (but we agree with this only partially) that Ehrlich's concept challenges the state-centered traditionalism in three ways. Firstly, his sociological concept of differentiation leads to the state emanating merely second order norms (legal propositions), thus norms which are hierarchically inferior to social norms, but are produced according to the normative order. He, thereby, creates opposite forces of the state law and the societal law in his concept of the 'living law'. Secondly, he broadens the notion of a legal norm including social norms, thereby undermining the traditional legal norm from the state; although, Friedmann criticizes him for not considering the changing relationships between these two norms, due to the influence of the facts of the law [20]. Thirdly, due to the subordination of the state law to the societal law, the state may only assist the society to generalize legal norms in the inner order. From this perspective, the accusations presented to Ehrlich of denying the state law, its effectiveness and strength, of mutually exclusive opposition of social and official (state) law are based on misunderstanding and incorrect analysis which was made of the quotations, separately snatched out of the context. We have the enough reasons to maintain that the challenge of the state monopoly on law-making does not indicate Ehrlich's objection of state's role in the creation, recognition, registration and enforcement of law – in this respect, he mentioned only the capability of social unions and associations to act independently of state regulation, but he didn't claim that such self-regulation should be permanent or should be done outside of the state law.

It is significant in this case that Eugen Ehrlich was far from optimistic supporters of the Historical School in relation to legal custom. In particular, one of the legal scholar's works is devoted to the criticism of the application of trade practices in civil matters (Ehrlich E. Das zwingende und nichtzwingende Recht. Bürgerliches Gesetzbuch für das Deutsche Reich. Jena, 1899). On the other hand, Ehrlich consistently criticizes the Historical School of jurists for the withdrawal of the custom in the rank of a higher source of

law. In this regard, Pound's objection (which later found place in the Anglo-American literature) that he raised to Ehrlich for "undue exaltation of the role of legal custom" [19, 130] turned out to be groundless.

Due to the fact that Eugen Ehrlich called the "principle of thinking measurement", people in regulation of their legal relationship almost always turn to the experience of other societies or refer to their history or the history of other nations.

These examples constitute those "mental images" which, according to Ehrlich, mediate rulemaking processes in social unions, – practice and actual behavior are not norms on their own, but they act as factors which encourage people to organize inner order in their unions with reference to certain samples. The content of these samples includes established practice of social communication, but even this form of law fixation is not formed as a result of the mechanical combination of facts, but through intellectual work of jurists. Usually people create norms not by fixation of a behavioral stereotype (which has nothing in common with normativeness) but taking into account historical experience of their own and associations. Ehrlich brought history of the reception of Roman law in medieval Europe as an evidence of this thesis.

At the same time, in spite of a popular misconception in literature, the main task of sociology of law is not to provide a judge with material to fill the gaps in legislation, but the scientist believes that a judge should not fulfill law-maker's obligations. Sociology of law gives a chance to find a specific rule that balances various interests in the present case with respect to the general balance of interests protected by the legal order. This method for Eugen Ehrlich is the main guarantee of the fairness of the trial as socio-historical search gives judges a broader perspective of social interests: not only those that deal with the dispute, but those that lawmakers ever decided to defend or that the judge would have defended if he were a legislator. Thus, the judge will make a fair decision, which as Ehrlich suggested, can only be achieved only if all interests are scientifically discovered and weighed [1, 151–175].

In order to fully disclose the nature of law, Ehrlich claimed that legal science should be not only historical but also sociological. With the help of his "living law" seminar Ehrlich gathered a lot of factual material, which had to serve as a proof that the restriction of legal science by researching only the text of the law and its technical and legal applications was unpractical.

On the basis of this material Eugen Ehrlich tried to give a "new" theoretical substantiation of the existing law. He paid great attention not only to the study of law, but also the investigation of common (customary) law, legal practice, the phenomena of economic life, trying to comprehend and summarize them from the standpoint of his "sociological" outlook.

The scientist offered to consider the law not as a norm or an order but in several aspects at the same time. According to Ehrlich, there are three autonomous legal orders (Rechtsordnung), but they are not sealed from each other: state law, law for jurists and living law. In different social and historical conditions the role of these orders, as well as the degree of autonomy, varies: syncretism of legal order is typical for primitive societies, whereas in more developed societies, especially nowadays, there has been an increasing tendency to separate these orders.

Eugen Ehrlich did not dispute the role of state law, its autonomy and independence from other social orders. He did not deny the possibility of frequent conflicts between state law and other legal orders, but preferring in this aspect to speak about sociological legitimation of law as a derivative of the correlation of social forces. The question of the primacy of this or that order does not matter – in most cases, the norms of state law are consistent with the rules of law of associations, but sometimes the state creates norms "from scratch" to which the legal life should adapt [2].

Eugen Ehrlich didn't outline clearly the direction of social thought (universalism or individualism) to which his concept belonged, and we can find some contradictory statements in his works. Thus, in his work on legal capacity he emphasized the role of individual origins in the development of law.

We would also like to mention the same divergence between the concepts of Pound and Ehrlich: if Pound concentrated his attention on the actual behavior of people who apply the law (judges, lawyers, etc.), Ehrlich was more interested in "general rules of human behavior" [2].

The fundamental conclusion in Ehrlich's thesis is that every independent researcher should have his own method. The methods of sociology of law are meant here. Social phenomena in the field of jurisprudence related to the scientific knowledge of law are first of all the facts of the law: its implementation determines to each the place, the task and property relations in social unions [16, 381–383].

Eugen Ehrlich in order to build up his concept also used historical method, considering the rulemaking process in "reverse" order, starting it with the review of the decision-making process. He claims that every

legal proposition which gives rise to judicial choice is a verbal expression of law and demands generally binding nature. But it has no connection with the precedent that has given rise to this provision. The current jurisprudence considers judicial decision as a logical end, where the norm of law is expressed in the legal formulation, serves as the main reference; the dispute on this issue is the role of subordinate reference and verdict forms a logical conclusion. So, he actually builds a socio-historical framework of rule-making as an activity that is based on the factual circumstances of the case based on logical techniques [12].

Emphasizing the socio-historical aspect Eugen Ehrlich claimed that the law in the past and the modern society, was the order that exists in a clan, family, as well as in norms and regulations that define the inner order in associations and established with agreement, contracts and statutes of unions and associations. Professor Ehrlich believed that every factory, bank, trade union, business association have their own order, their law, which they create themselves. In practice such statement has led to the idea that "if the civil and commercial code do not give concrete instructions to the resolution of the conflict, you should refer to the statute of the association or union", in other words to the norms of law of the union which are directly related to this legal fact. These norms and facts are exactly "living law". It should be used within the historical rule, which Ehrlich regarded as the only scientific method of interpretation. We share the idea of Hertogh, that the task of the historical rule was to find out empirically the decision of the latest historical legislator and not to harmonize a legal proposition with its historical or sociological, factual or normative background. What got into the legal proposition from the environment it came from, from the law book, which is a part of it, from the remaining legal order that surrounds it, was only the part of the consciousness of the legislator when he created the legal proposition. It is this content of the consciousness of the legislator the interpreter has to clarify, nothing more; if he went further he would not interpret the meaning of the law any more, but give another meaning to it [18].

Eugen Ehrlich's concept was called the concept of "free law", since it was characterized by a "free approach to law", which, according to Ehrlich, can be found in the practice of judicial review where there is freedom of judicial discretion. In the historical-time format judicial decisions are older than the norms of law, and the "law of jurists", richer than the statutory law. Therefore, the legislator, according to Ehrlich, does not create, but only reveals and fixes the relevant norm after it had been found by a jurist in his everyday practice [13].

According to Ehrlich's concept law is a social phenomenon that arises and functions in the society, and on the other hand, law is a phenomenon that exists in the time dimension. Reflecting on methods of the perception of law, Eugen Ehrlich emphasized that we reach understanding of the past through the present and not vice versa. The scientist remarked, that the history of law and legal ethnological science will be always used only for studying the development of law, not for perception of the existing law. So far, the legal science has considered only some of the phenomena of legal life: the legal norm. If there is legitimacy in the phenomenon of legal life, which is disclosed and presented by sociology, then under such circumstances it will be social and economic law; if there is a social legal development, legitimacy can be recognized only in connection with the whole social and economic development.

Therefore, Ehrlich stressed the following: the background of sociology of law is based not on a legal prescription, but on social and economic history. Equally important to the sociology of law are the results of practical jurisprudence. Legal observation of human relations, generalization of its results and relevant norms – this means scientific approach in jurisprudence. The first task of social science of law is to correlate legal relations without taking into account the positive law, which is valid for them, to investigate the differences according to the reasons and impacts. The necessity of creation of new approaches, methods and theories for jurists comes at the turn of times [16, 383–387].

A socio-historical constant of the concept of "living law" is traced in Ehrlich's statement that in the study of the living law both historical and ethnological methods are important, as we can get social laws of development only through the examination of historic and prehistoric (ethnological) facts. Historical and ethnological methods, however, are also absolutely necessary to understand the present legal status. You will be able to understand present only through the prism of the past and vice versa.

Underlining the importance of historical and ethnological facts in the perception of social laws, Ehrlich, however, distinguished his understanding of social-historical factor of the conceptual provisions of the historical school of law. He noticed that the great founders of the historical school didn't mind this view, so they claimed for the historical legal science. There is no doubt, they were engaged mostly not even in legal history, but in legal antiquity ... and the goal they wrote with capital letters above the entrance gate, but

no one could read the label. And this is exactly noteworthy, as later a journal of legal history was established instead of a journal of historical legal science [6].

Eugen Ehrlich was of the same opinion as Friedrich Carl von Savigny and considered that law – a legal status – can be perceived only using a historical connection, but it is not in our old past but at the present time, from which a legal status grows [6].

In his historical generalizations Eugen Ehrlich agreed with the conclusions of the German jurist Otto von Gierke, who in his fundamental work dedicated to the law of associations (in the late half of the 19th century) paid much attention to the inner life and activities of various associations and groups, as a sphere of activity, in which many binding social norms appear. These ideas were picked up later by representatives of institutionalism [11].

We should mention that Paund analyzing Ehrlich's works noted that "Ehrlich built his theory on top of the historical school" [13]. Eugen Ehrlich admitted that he was strongly influenced by the historical school of law and the concepts of such sophists like Rudolf von Jering and Otto von Gierke. The problematic issues of jurisprudence in the 20th century which were marked by the term "sociology of law", in the 19th century considered the debate on the establishment and mechanisms of action of customary law. It is worth mentioning the ideas of the historical school of law when Georg Friedrich Puchta, Friedrich Carl von Savigny and their supporters opposed the attempts to bring German law in coordination with the "spirit of the times", which supporters of a wide legislative regulation saw in French legal dogma. In response to this legislative impulse Puchta decided to present the objective patterns of social development. He transformed this idea later into the concept of "national psyche." This concept was based on the unity of spiritual and psychological experiences of people, their historical memory and common goals of development. All this together meant the existence of another imaginary abstraction – public belief and public will, which is the root cause of the law and its force in the society. The application of the customary law, in this sense, served as a primary indicator of the state of life of legal society, to which legislators and jurists should have referred to. The legal norms and jurists' law are only secondary distorted reflection of the actual legal life of society. Based on the foresaid, Antonov made a conclusion that Eugen Ehrlich was intended to move away from categories ("national psyche") of the historical school and to focus on a specific sociological material ("living law"). Antonov, citing Ehrlich, summarized that the main source of norms along with the contract is the tradition: "In last centuries, all the legal norms that determined inner order in a social union, are based on tradition, contracts and statutes of association – and now we have to look for them in the same way. The key point for the emergence of the norm is gaining recognition inside the union. However, it is not the recognition at the level of the individual psyche, but the recognition by the whole association as a union in general; the recognition that should be reflected in the "regular external observance of this legal rule" [2].

Reflecting on the objectives and methods of history of law Ehrlich emphasized that since the mid 16th century Roman jurisprudence is under increasing influence of historical approach. The goal of any history of law, according to Ehrlich, is examination of the original value and importance of legal norms and relations. He is quite categorical in his conclusion that scientific attempts of law historians have nothing to do with the practical jurisprudence. In his opinion, historians of law don't deal with science but practical jurisprudence. French and Dutch historians of law apparently don't accept any other jurisprudence, but historical. It means only that the historical scientific jurisprudence at the same time should be practical. In any case, this is the view of the historical school in the 20th century in Germany [16, 257–258]. So, we may conclude that Eugen Ehrlich defended a combination of historical and other methods of scientific perception of law.

Eugen Ehrlich refused to acknowledge the thesis of historians of law, that the scientific understanding of each law may only be revealed in history. It is a scientific truth, as the scientist remarked, without practical value. Moreover, Eugen Ehrlich underlined that the leading point of view is the fact that the practical jurisprudence is intertwined with this scientific understanding: and that's why this idea received its own special color. Historical understanding came from the fact that the implementation of legal norms must be based on the notion that the maker has put in it. It comes into force, stressed Ehrlich, in the world-historical antinomy of jurisprudence which changes the form of thinking and its own will to the norms [16, 258].

Even more thoroughly Eugen Ehrlich criticized historians of law for the identification of law and legal norms, noting that, since for historians of law of all time law was not legal relations but legal norms, so they did not care how legal relationship were composed in life. They only demanded legal relations to be assessed by the courts in accordance with the established Roman legal principles. However, with this idea, they failed. If life was influenced by the historical school, becoming again Roman, the use of authentic Roman law

would speak for itself. But life has remained, and must remain modern, therefore, we cannot use Roman law in all legal relations [16, 258–259].

Thus, historians of law, according to Ehrlich, faced great difficulty of combining [16, 259]. We supposed it was about combining various methods and principles of scientific perception of law and, in general, the definition of scientific criteria.

In spite of Ehrlich's strong belief, jurisprudence, which does not want to know anything about combination of the law of the past with the present legal relations, law does not give any practical law, but merely historical. German historians of law actually studied not Roman law, but leading law in Germany, and they had to somehow take into account the combination. They did it in such a way as to look at the results of this combination made by predecessors. Textbooks of jurisprudence of the historical school differed from earlier works, mainly because the combination was no longer discussed, and its results were predicted, in all material respects they represented only the results which had been already achieved by German common law jurists in the 18th century [16, 259–260].

Eugen Ehrlich drew quite an evident conclusion that the result of historians of law strivings to achieve practice jurisprudence came to the limitation of structure by means of falsification and deformation. Legal norms should have been used throughout its original sense. Hence, the impact of the historical approach on practical jurisprudence was extremely large [16, 261].

Eugen Ehrlich claimed that historians of law rejected every conscious extension of law through the content of the source; they had to develop legal methods. All arbitrariness, naive misunderstanding and deliberate falsification of previous law schools served to make law proper to new demands and to fill the norms which were necessary for present. The gap between Roman law and present life becoming wider, should have been smoothed out, and this happened because the legal formation of concepts and structures transformed into mathematics of concepts and constructive systematization [16, 261].

German historical school went a step ahead of this generalization. A constructive jurisprudence aimed to realize certain facts and legal influences in different legal relationships. This type of structure is characterized by the fact that certain facts or legal effects which occurred only interconnected with the whole legal relationship, stroked separately and are used as a part of another legal relationship [16, 269]

Eugen Ehrlich mentioned that the general part of all private legal systems and the statutory law were created due to the method of German historical school of law. Systematization was more important than mathematics of concepts to define integrity of the system. The system is actually a division of existing elements, but it always gives the impression of the whole. Soon, the legal system was considered not just as an existing legal material but as something that covers the whole law; the concepts which expressed not separate legal relations, but the entire types of legal relations, which were like logical categories, which contained the whole world of legal phenomena. In the systematization of the historical school occurred a great antinomy of jurisprudence, which subsequently turned forms of thinking into the norms, and this was their last fateful triumph. But as Eugen Ehrlich had his own critical view and style of thinking about true perception of law, he stressed the following: systematization – is not jurisprudence, its task isn't law-making for the needs of jurisdiction [16, 269–271]. As a participant observer of imperial provincialism and multiculturalism, however, he could create a different perspective in the social laboratory that he found on his doorstep in Czernowitz. The value of Ehrlich's concept is eloquently determined by Hertogh, who observed that the concept originated at that vantage point, the distant imperial centre with its state bureaucracy and official legal order that stood at the periphery of rich but very unstable concentration of local cultures with diverse regulatory expectations and traditions [18]. Hertogh notices, that what makes him special and still important is, firstly, his intricate (if insufficiently developed) conception of legal pluralism and, secondly, the continual unresolved movement of his thought between juristic and wider sociological perspectives. Other pioneer legal sociologists may have been more systematic in their thinking, there are better jurists or more profound social analysts, but the dialectic of centre and periphery in Ehrlich's legal consciousness makes his work endlessly fascinating [18].

Thus, Eugen Ehrlich's concept claims that, on the one hand, law is a social phenomenon which occurs and functions in the society, on the other hand law is a phenomenon that exists in the time dimension.

Ehrlich believed that a wide recognition of the socio-historical aspect of the law would enable the judges to understand the absence of absolute legal norms through time and space, and would free them from "heavy chains" of technicism.

According to Ehrlich, the living law, unlike the customary law (which is associated with the historical past and its traditions, and is always beyond the positive law), it is forward directed and open to innovations,

A retrospective analysis of a legal development, the accumulation of significant experience in the analysis of court decisions formed the basis for a deep penetration into the legal validity and formation of clear conceptual and methodological guidelines by Eugen Ehrlich.

The main determinants of both society and law development are their socio-historical constants which provide temporal-linear, progressive-inheritable development of law.

As to the methods of law perception, Eugen Ehrlich highlighted that in order to fully disclose the nature of law, a legal science should be not only historical but sociological as well.

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Карвацька С. Соціально-історичні чинники правопізнання у концепції "живого права" Є. Ерліха.
Анотація. Послугуючись системним підходом до пізнання права визначено соціально-історичні чинники правопізнання в концепції «живого права» Євгена Ерліха. Було встановлено, що

особливості історико-соціального контексту пізнання права пов'язані, у першу чергу, з особливостями об'єкта цього пізнання, який в загальних рисах може бути визначений як право в історії, або історико-правова реальність. Обґрунтовано, що згідно з концепцією Є. Ерліха, право – це соціальний феномен, який відбувається і функціонує в суспільстві; з іншого боку, право є явище, що існує у часовому вимірі. Доведено, що Євген Ерліх не погоджувався з твердженням істориків права про те, що наукове розуміння права може бути розкрито виключно в контексті історії. Це наукова істина, як зазначав вчений, без практичної цінності. Вказується, що Є. Ерліх критикував істориків права за аналіз правових норм, відзначаючи, що, оскільки для істориків права всіх часів право було не правовими відносинами, а правовими нормами, тому вони залишали поза увагою реальні правові відносини («живе право»). Історики права, на думку Є. Ерліха, не зуміли поєднати різні методи і принципи наукового пізнання права, та, як наслідок, визначити критерії науковості загалом. Тому для повного розкриття природи права, для формулювання методів пізнання права Є. Ерліх визначив основний постулат: правова наука повинна бути не тільки історичною, а й соціологічною.

Ключові слова: «живе право», соціоцентричність, емпіричність, історичність, онтологічний плюралізм.

Karvatska S. Socio-historical factors of law perception in “living law” concept by Eugen Ehrlich

Abstract. Using the systemic approach to the knowledge of law, socio-historical factors of law perception were defined in the concept of “living law” by Eugen Ehrlich. It was established that the features of the historical-social context of cognition of law are connected, first of all, with the features of the object of this knowledge, which in general terms can be defined as the law in history, or historical-legal reality. It was substantiated that according to Ehrlich’s concept, law is a social phenomenon that takes place and functions in society; and on the other hand, law is a phenomenon that exists in the time dimension. It was proved that Eugen Ehrlich disagreed with the assertions of historians that the scientific understanding of law can only be disclosed in the context of history. This is a scientific truth, as the scientist stated, without practical value. It is noted that Ehrlich criticized the historians for the analysis of legal norms, stating that, since for the law historians of all times the law was not legal relations, but only legal norms, so they left out the real legal relations (“living law”). Historians of law, according to Ehrlich, failed to combine different methods and principles of scientific perception of law, and, as a result, they couldn’t define the scientific character criteria as a whole. Therefore, for the full disclosure of the nature of law, for the formulation of law cognition methods, Ehrlich defined the basic postulate: the legal science should be not only historical, but also sociological.

Key words: “living law”, sociocentrism, empiricism, historicity, ontological pluralism.