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History of Schism: the Debates between Hans Kelsen and Eugen Ehrlich

I. INTRODUCTION

The conflict of the two seemingly controversial approaches to law, the normative and the sociological ones, has been continuing throughout the history of the legal philosophy of the 20th century. It is hardly possible to state that this conflict is over now, as we are still facing numerous debates which touch at the issue of facticity and normativity of law (to use the terms of Habermas), this issue being the subject matter of the controversy between H.L.A. Hart and L.L. Fuller in the 1950-s, or of these between J. Raz and R. Dworkin, E. Bulygin and R. Alexy, and many others which are still on-going. The focal point of this issue has been for the first time plainly found in the debates between H. Kelsen and E. Ehrlich about the premises and applications of the sociological analysis of law. The consequent development of the legal theories has always involved an explicit or implicit continuation of these debates, so that a better understanding of their underpinning grounds is useful for solving the contemporary theoretical problems of law.

At the beginning of the 20th century it was possible to observe an important shift in the development of the philosophy of law. The natural law conceptions which had dominated this branch of legal science in the previous centuries began fading away rapidly, giving rise to an alternative approach which claimed to be the only scientific one. It was the positivist philosophy of law which took control over the principal fields of legal thought. Hardly was it possible to find a professor of any branch of law who would dare to challenge positivist understanding of law as something imperatively established by authorities. Nonetheless, as soon as the principal enemy (*jusnaturalism*) had been overthrown, there began serious quarrels in the ranks of legal positivists. Positivism attracted many researchers by its world-view simplicity at the background theoretical level which left a large room for applied studies and practically oriented researches. But this main advantage of positivism became its weak point as soon as instrumentalism of the legal theory had proved its insufficiency, and the conception of law as an effective practice of sanctioning through the governmental bodies could no longer stand the theoretical attacks.

As a result, several serious attempts were taken to justify the positivist approach from other perspectives, and the most influential among them were the pure theory of law by Hans Kelsen and the sociological theory of law by Eugen Ehrlich. Kelsen's theory equated existence of law to its validity conditioned by a hierarchy of legal norms with a basic norm (*Grundnorm*) in its fundament. Generally speaking, it is the coherence of this hierarchy that constituted validity

for Kelsen who was a dedicated partisan of the neo-Kantian distinction between *ought* and *is*. As opposed to this view, Ehrlich's sociological approach searched to undermine this apparently immutable distinction – the pretentious title of his chief research¹ marks truly this objective. These conflicting views of the legal methodology have soon met, officially after publication in 1913 of *Fundamental Principles of Sociology of Law* by Ehrlich, though one can imagine that latent hostility had existed even before the famous discussion 1915-1917 between Kelsen and Ehrlich which has been documented in one of the German scientific journals.

The discussion was provoked by Ehrlich's challenge to the prevailing theory with its sacred distinction between *is* and *ought* and his claim to incorporate into the legal science not only normative analysis but also the data of psychology, economics and especially of sociology. The principal fields of battle of the two prominent Austrian theorists of law were the demarcation line between morality and law, a possible psychological analysis of law, and the legal role and function of the State and its officials. And, first of all, the disagreement about the limits of the application of sociological methods to the study of law. In his attacks Ehrlich pointed at two main targets: to undermine the legal dogmatism which reduced the science of law to a mere description and systematisation of legal rules, and to contest the dominance of State law in the hierarchy of legal sources. This controversy became classical for development of legal theory in the 20th century. Even if the rise of Kelsen's and Ehrlich's theories took place quite independently of each other, both Ehrlich and Kelsen took profit of this discussion. One can clearly observe that during the discussion and several years after it Kelsen had formed his conception as we know it today, with the strict distinction between facts and norms, between power and duty as its cornerstone. Nevertheless, later Kelsen became more flexible in recognizing the relative character of his theses about law, and still more tolerable to possible inclusions of sociological and psychological elements into his legal doctrine (the second edition of *Pure Theory of Law* is particularly revealing in this regard).

In the following lines we shall denote the major points of bifurcation between the respective conceptions of Ehrlich and Kelsen which led these thinkers to the fruitful exchange of ideas². We shall try to situate the arguments of both theorists around two principal poles of the discussion: the limits of purity of a

1 Eugen Ehrlich. *Grundlagen der Soziologie des Rechts* (1913). This book is cited in this article according to the English translation: Eugen Ehrlich, *Fundamental Principles of Sociology of Law* (1936).

2 In this short contribution we do not intend to offer a full description of the Ehrlich-Kelsen discussion which has been masterly pictured in the research papers of Hubert Rottleuthner, *Rechtstheoretische Probleme der Soziologie des Rechts. Die Kontroverse zwischen Hans Kelsen und Eugen Ehrlich (1915-1917)*, 5 *Rechtstheorie* (1984); Agostino Carrino, *Eugen Ehrlich e Hans Kelsen: una controversia sulla sociologia del diritto* (1993). ddd.uab.cat/pub/worpaper/1993/hdl_2072_1401/ICPS79.pdf; Klaus Lüderssen, *Hans Kelsen und Eugen Ehrlich*, in Hans Kelsen: *Staatsrechtslehrer und Rechts theoretiker des 20. Jahrhunderts* (Stanley L. Paulson and Michael Stolleis eds., 2005); Bart Van Klink, *Facts and Norms. The Unfinished Debate between Eugen Ehrlich and Hans Kelsen*, in *Living Law: Reconsidering Eugen Ehrlich* (Marc Hertogh ed., 2009), available at <http://ssrn.com/abstract=980957>. Our objective here is just to summarise the pivotal poles and underlying motifs of these debates.

science, and the possibility of the pluralisation of law. We are aware that these landmarks are conditional and cannot claim to exhaust the variety of real and potential conflicts between the two opposing standpoints, but in our opinion they can offer a useful tool for a better understanding of the positions taken by Kelsen and Ehrlich in the debates of 1915-1917 at the pages of *Archiv für Sozialwissenschaft und Sozialpolitik*. We shall as well precede this analysis with some remarks about psychological and existential motives which could (at least partly) explain the tonality of the debates.

1. The motives for the quarrel

The first question which arises when analysing the critical review of Kelsen is about inner motives of the hostile position taken by the Vienna professor. Surely, publication of Kelsen's acrid overview of Ehrlich's *Grundlegung der Soziologie des Rechts* in 1915 in one of the issues of *Archiv für Sozialwissenschaft und Sozialpolitik* had not been a revelation, because at that time few of the legal thinkers could tolerate attempts to include into the notion of law any factual (social or psychological) contents. At the same time the proposition to combine the studies of law with sociological researches, or at least to take into account the data obtained in these researches for a more nuanced understanding of the machinery of law was not a discovery at all, and Kelsen himself was not likely to object this idea when sustaining his thesis in 1911³. The movement of free law (*la libre recherche du droit, Freirechtsbewegung*) had already made some important steps in France (Francois Gény), in Germany (Hermann Kantorowicz, Ernst Fuchs); let alone the American realist jurisprudence headed by Roscoe Pound. The conclusions drawn by the partisans of this movement were treated as heuristically admissible by many legal theorists, including Kelsen. Thus, criticizing Kantorowicz's sociological conception in the same issue of *Archiv für Sozialwissenschaft und Sozialpolitik*, Kelsen even admitted that sociological studies of law could be of interest from the perspective of the examination of the casual consequences that the legal norms produce in the society in which they work,⁴ but he did not hold the same opinion in his attack of Ehrlich's theory proclaiming Ehrlich's sociology of law to be devoid of any scientific value.

It therefore seems that there was something which distinguished the project of Ehrlich from these conceptions and which bestowed on this essay such careful attention of the legal theorists. After publication of the pioneer researches

3 Cf. Hans Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*. 42ff (1911). He still was persuaded of the usefulness of sociological method for practical targets in the following public lecture especially dedicated to this matter: Hans Kelsen, *Über Grenzen zwischen juristischer und soziologischer Methode*. Vortrag gehalten in der Soziologischen Gesellschaft zu Wien (1911). In his later works Kelsen clearly explains that his Pure Theory of law "does not consider the contents of the legal norms as irrelevant" (Hans Kelsen, *On the Pure Theory of Law*, in 1 *Israel Law Review* 4 (1966), so that casual analysis shall not be eliminated, but to be "added to normative interpretation" (Hans Kelsen, *The Communist Theory of Law* 194 (1955).

4 Hans Kelsen, *Zur Soziologie des Rechts. Kritische Bemerkungen*, in 39 *Archiv für Sozialwissenschaft und Sozialpolitik*, 602 (1912).

performed by Gabriel Tarde and Emil Durkheim at the beginning of the 20th century, the sociological approach became alluring for many researchers. Dionisio Anzilotti had already found the epithet of "sociology of law", and the idea of the creation of a new sociological science of law was in the air. Even if one agrees with Manfred Rehbinder that Ehrlich's work had gained much more respect and success overseas than in Europe, it was Ehrlich and his *Grundlegung* which marked the rise of a new scientific discipline⁵. Nonetheless, Ehrlich's treatise contained much lesser than one could expect from the claim to create a sociological science of law, and one can fully share the astonishment of Theodor Geiger who did not find in the *Grundlegung* anything but "the self-evident truths described with exaggerated meticulousness"⁶. Quite understandable is also the disappointment of Kelsen who at the very first page of his critical diatribe blames Ehrlich for lack of coherence and unnecessary minuteness which suddenly results in an arbitrary identification of law and society⁷. One can suppose that the critics of Kelsen would be much softer (if there were any at all), if Ehrlich's doctrine had been limited by the vague ideas of *Freie Rechtsfindung* without claiming to create an independent sociological science of law designed to unveil the shortcomings of the dogmatic jurisprudence⁸.

But Ehrlich did not aim at a mere collection and description of factual material and its arrangement for the needs of dogmatic jurisprudence. His enterprise was to undermine the aplomb of the lawyers believing that they deal with the very law when working with the texts about law – such angle of view can provide lawyers only with an uncertain and disguised picture of the law. To achieve his objectives, Ehrlich outlines the difference between the dogmatist (juristic) approach to law⁹ and the scientific (sociological) approach – the thesis at the denouncement of which Kelsen directed his most virulent attacks in the review¹⁰. Ehrlich made enormous efforts (which seemed somewhat exaggerated) to demonstrate the penury of the normative conception of law and to prove that lawyers deal only with the infinitesimal part of the law ("which is of importance

5 Manfred Rehbinder, *Die Begründung der Rechtssoziologie durch Eugen Ehrlich* (1967).

6 Theodor Geiger, *Ehrlichs Grundlegung der Soziologie des Rechts*, in 1 *Archiv für angewandte Soziologie* 44 (1929).

7 Hans Kelsen, *Eugen Ehrlich, Rechtssoziologie und Rechtswissenschaft. Eine Kontroverse* (1915-1917) (Manfred Rehbinder ed., 2003) 46.

8 Ideas about a cooperation between sociology and legal theory had already been brought forward in German-speaking countries several years before the publication of Ehrlich's *Grundlegung*. There can be mentioned the article Ehrlich himself had published in 1906 (Eugen Ehrlich, *Soziologie und Jurisprudenz*, in 3 *Österreichische Richter-Zeitung* (1906), 57-72) which evolved in the 1909 discussion with Hugo Sinzheimer (Cf. the paper of this latter: Hugo Sinzheimer, *Die Soziologische Methode der Privatrechtswissenschaft*, in Hugo Sinzheimer, *Arbeitsrecht und Rechtssoziologie* 3-23 (1967), and the first probing attack by Kelsen (See, *supra*, note 4).

9 This approach being merely "a more emphatic form of publication of statutes". Ehrlich (note 1), 19.

10 In his later work Ehrlich masterly replies by catching the core idea of Kelsen's "hypothetical/fictive" theory of norms: "not to verify a finding according to the rules of human thought but merely to make a finding to appear as such" (Eugen Ehrlich, *Die juristische Logik* 74 (1918); the translation is given according to Alex Ziegert. A Note on Eugen Ehrlich and the Production of Legal Knowledge, 20(1) *Sydney Law Review* 7 (1998).

as law in the judicial administration of justice"), ignoring all the rest ("which lives and is operative in human society as law")¹¹. That is why the lawyers who refuse to take account of the factual life and practice of law (*is*) because of anxiety to disturb the normative purity of jurisprudence (*ought*) are throwing the baby along with the bathwater.

The Czernowitz professor believed that the new methodological tools for studying this factual material could help lawyers to get out of their blindness to the positive and true science of law, so that sociology of law was proclaimed to be "the sole possible science of law" capable to free the legal practice from "ridicule infantilism"¹². In this project the focal importance is accorded by Ehrlich to investigations into the living law which organises behaviour, exchange, communities, and which "dominates life itself even though it has not been posited in legal propositions"¹³. State law has only an auxiliary function – to intervene in situations where the community itself is unable to settle the conflicts through standard means of social compulsion and where the coercive actions of a public power are needed. Therefore, law resides mainly outside the scope of State law in the way that both, the validity and efficacy of legal norms depend much more upon recognition and respect of people than upon coercion by the State and its officials¹⁴. Ehrlich was not unaware that such assertions were to meet baleful looks of the "dogmatically oriented" legal scholars, and Kelsen was one of the first who impeached the credibility of the ideas brought forward by the founder of a new science, but not the last¹⁵.

Along with these general methodological observations there are some existential circumstances which most probably influenced the theories of both scientists. Roger Cotterrell justly points out the dialectics of centre and periphery constantly shaping and reshaping the ideas of Ehrlich who lived at the Eastern edge of the Austro-Hungarian Empire¹⁶. As a representative of the prevailing German culture in his region of Bukovina, Ehrlich at the same time kept a marginal position in this culture both, because of his Jewish origin and his academic position in a

11 Ehrlich (note 1), 9-10.

12 Id., 274ff. In Ehrlich's opinion, "we need but open our eyes and ears in order to learn everything that is of significance for law of our time" (Id., 489). Such "methodological" proposals necessarily provoked the sincerest indignation of Kelsen.

13 Id., 493.

14 Id., 132ff.

15 The first attack against Ehrlich's *Grundlegung* undertaken by Friedrich Hahn had provoked Ehrlich's vivid reaction. Cf. Eugen Ehrlich, *Zur Soziologie des Rechts. Entgegnung auf eine Rezension von Friedrich Hahn*, in 7 *Der Kampf. Sozialdemokratische Monatsschrift* (1914) 461-463. Among the critics can be particularly mentioned: Nickolas Timasheff, *Review of Ehrlich's Fundamental Principles of the Sociology of Law*, in 2 *American Sociological Review* (1937); Paul Vinogradoff, *The Crisis of Modern Jurisprudence*, in *The Collected Papers of Paul Vinogradoff* 2 (1964) 222-224; Gerhard Husserl, *Review of Ehrlich's Fundamental Principles of the Sociology of Law*, in 5 *University of Chicago Law Review* (1938); N.O. Littlefield, *Eugen Ehrlich's Fundamental Principles of the Sociology of Law*, in 19 *Maine Law Review* (1967); F.L. Neumann, *Review of Ehrlich's Fundamental Principles of the Sociology of Law*, in 43 *American Journal of Sociology* (1973).

16 Rodger Cotterrell, *Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies*, in *Living Law: Reconsidering Eugen Ehrlich 75-94* (Marc Hertogh ed., 2009).

distant Czernowitz university. In Cotterrell's opinion, it is exactly this ambiguous marginal situation which directed the legal thinking of Ehrlich pushing him towards integration projects capable of reconciling the cultures. The key-words of these projects were pluralism, recognition of multiculturalism, admittance of different traditions at equal standing into the social and political life of the Empire¹⁷.

Kelsen was in a similar existential situation. Beginning his academic career in 1910s on the eve of the breakdown of the Austro-Hungarian Empire, he could not be unaware of these ideas. Also marginal because of his Jewish origin, Kelsen had to cope with the problems of the relations between the dominant and the minority cultures. And he had chosen another project of integration based on unilateralist approach which, as Kelsen believed, could have saved an edifice (of a scientific theory, of a system of norms, of a large Empire) from falling apart. To translate the basic thought of Kelsen, in order to take control of the variety and differences in life one must rise beyond this life. This fear of a diversity that is capable of destroying the already unstable reality underpinned Kelsen's mental outlook and pushed him towards the unreachable realm of theoretical monism. This existential discrepancy might well explain the harsh tone of the discussion between the two Austrian thinkers which took place exactly at the moment when their country started to fall to pieces under the events of the First World War¹⁸.

From this perspective, some political motives which underlined the theoretical discrepancy between Ehrlich and Kelsen can also be distinguished. The latter had framed his critical assaults against Ehrlich's sociology into the broader campaign against a total vision of law and State which substantiated (for Kelsen) the antidemocratic and totalitarian political projects¹⁹. If one looks through the mainlines of the discussions which Kelsen led at that time and in the following years with such partisans of the holist approach to society as Othmar Spann or Carl Schmidt, it is possible to reveal between the lines also the reasons for the rejection of Ehrlich's sociology of law by Kelsen. Summarizing these discussions, one can induce that the sociological theory of law and State was basically unacceptable for Kelsen, as such theory would inevitably be grounded on a holist vision of society which he associated with social mysticism. He sturdily fought against any explanation of social unity other than through normative character of the legal system, and even was ready to sacrifice authenticity of description of the real legal phenomena for the sake of "exclusive normativism" in the understanding of the State and of the law. At the same time, one can recall that the accentuated neutrality of Kelsen's *Normlogik* brought success to his theory in the époque of National-Socialism in Germany. On the contrary, Ehrlich's legal pluralism repulsed both, those who (like Kelsen) feared that

17 Cf. Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in *Global Law Without a State* (Gunther Teubner ed., 1997).

18 One of the existential underpinnings of misunderstanding also was the difference of the research fields of both thinkers. Trained in the strict logic of constitutional law, Kelsen could not accept the frivolous manner to play with facts which was characteristic for the method of Ehrlich who mainly worked in the field of Roman law.

19 Cf. Hans Kelsen, *Verteidigung der Demokratie*, in 2 *Blätter der Staatspartei* 90-98 (1932).

pluralisation could result in a breakdown of the State, and those who were afraid that the lack of a centralised legal regulation could lead to the dominance of the powerful groups and elites in society²⁰.

2. The poles of the controversy

Methodology of science was one of the crucial points where the opinions of Ehrlich and Kelsen confronted each other. Starting from the Kantian ideal of purity (*Reinheit*) of the theoretical knowledge, Kelsen affirmed that law could only be understood through examination of legal propositions (*Rechtssätze*). From this point of view, *jus strictum* or the law purified of all concomitant factual elements (of economical, social, moral or historical character)²¹ was the only true subject-matter of scientific research as opposed to practical studies. Scientific investigation thence had to limit itself to the normative structure of law, such as it should be in the perspective of the pure *ought* (*rein Sollen*).

In Kelsen's opinion, this *ought* exists as a set of meanings independently on any moral considerations or on the casual investigation of any empirical facts²², and law is a *Ding an sich* (thing in itself) which is not expected to have any impact on the real social relations. Observation of the factual function of law can be useful and even important for the policy of law, but it has nothing to do with the science of law (*Rechtswissenschaft*) which studies the pure structure of legal norms. This science undertakes to delimit the cognition of law not because it ignores (or denies) the connection of law with morals or psychology, but because it wishes "to avoid the uncritical mixture of methodologically different disciplines which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject-matter"²³. In this line of thought, jurisprudence and sociology could not have a common set of methods, the first examining the order of *ought* governing in law and the second studying the order of *is* or casual relations between legal facts. This distinction of *is* and *ought* appears so obvious for Kelsen that he admits that it cannot be rationally explained – we just have to accept this distinction as the precondition for the further analysis of law²⁴. At the same time, neither Kelsen nor other proponents of the normative analysis of law dared to challenge the influence the social life

20 Reh binder (note 5), 94.

21 In Kelsen's terminology: "purified of all political ideology and natural-scientific elements" (Hans Kelsen, *Reine Rechtslehre* 3 (1934).

22 Hans Kelsen, *The Pure Theory of Law* 94ff. (1967).

23 Id., 1. Cf. about the attitude of Kelsen to the sociology of law: Renato Treves, *Hans Kelsen et la sociologie du droit*, in *Droit et société* 1 (1985); Hans Kelsen und die Rechtssoziologie (Stanley L. Paulson ed., 1992); Charles Eisenmann, *Science du droit et sociologie dans la pensée de Kelsen*, in *Méthode sociologique et droit* (Henri Battifol, Norberto Bobbio eds., 1958).

24 Kelsen explains that *is* and *ought* have "different substratum": the will (emotion) and the reason (logic). Cf. Kelsen (note 22), 5-7. One shall nonetheless note that Kelsen invests quite a broad meaning in his conception of *ought* – it includes not only legal proposition in the form of commands, but also the factual power to give these commands: authorisation and permission (Id., 5).

actually exercised on the law-making, law-enforcement and the legal practice in general, thus influencing law as such. Evidently, Kelsen was conscious that the real object of legal regulation – human behaviour²⁵ – and Ehrlich's assaults on the "prevailing legal theory" (*herrschende Rechtslehre*) which "denied" the social reality of law were flawed.

The truth was that the doctrinal jurisprudence practiced a kind of "intellectual economy"²⁶ fixing its attention on the formal analysis of the legal propositions and omitting the discussions about morality, social reality and other facets of law. In his latest works Kelsen chose another methodology following the ideas of Hans Vaihingen (his philosophy of *Als-ob*) and straightforwardly acknowledged that his basic norm was nothing but a fiction facilitating our understanding of the law. Without such a fiction our cognitive capacities are insufficient to grasp what is the law, and the best solution Kelsen finds in this situation is to oppose an ideal norm of ought to the reality (*Widerspruch zur Wirklichkeit*). In other words, the task of the philosophy of law is to contradict the reality in order to grasp it²⁷. The hypothesis/fiction of a basic norm allows cutting the long way of the validation of the legal order by a simple short-cut leading directly to this hypothetical norm. This method did not mean that such phenomena were considered as devoid of meaning and not worth an investigation. Such investigation was simply pushed out of the domain of jurisprudence – a solution which was completely unacceptable for Ehrlich who did not spare his energy to unmask the antiscientific proceeds of the "dogmatically oriented lawyers". As demonstrated above, these efforts had no success because Kelsen and his allies anyway had no chance to escape the social reality of law because even the purest legal imputation establishing a logical connection from one norm to another, was at the same time inevitably bound to produce certain factual effects in the reality²⁸.

Especially in his later works, Kelsen did not hesitate to admit that social relations and human behaviour constituted the authentic object of legal regulation. But this factual filling of the legal relations was reserved to investigations of other scientific disciplines which deal with casual relations²⁹. Among others, the sociological science could describe what manifestations of law in the social

25 Kelsen offered a methodological tool for the study of the connection between legal norms and human behaviour, which was referred to as imputation (*Zurechnung*) meaning "every connection of a human behaviour with the condition under which it is commanded or prohibited in a norm" (Kelsen (note 22), 92).

26 According to the doctrine of Ernst Mach, which was popular during these times, this was the way to cut a long chain of intellectual deliberations to arrive at the required conclusion by the fastest way economizing thereby the intellectual energy. Cf. John T. Blackmore, *Ernst Mach – His Life, Work, an Influence* (1972).

27 We shall not go into the details of the evolution of Kelsen's conception of the Basic norm and refer to the research paper of Prof. Paulson (Stanley L. Paulson, *Die unterschiedlichen Formulierungen der 'Grundnorm'* in *Rechtsnorm und Rechtswirklichkeit*. Festschrift für Werner Krawietz (Aulis Aarnio, Ota Weinberger et al. eds., 1993).

28 Kelsen was far from the denial of the usefulness of this kind of investigation, and did not stop wondering that Ehrlich decided to create a new scientific discipline just for putting forward such truisms (Hans Kelsen, *Eine Grundlegung der Rechtssoziologie*, in Kelsen, Ehrlich (note 7), 54ff.

29 Kelsen (note 22), 85.

environment are³⁰. The data obtained in these researches can be helpful for the applied legal sciences, but they reflect only the context in which the law acts without giving a picture of the law as such. Even an analysis of the impulses urging the people to obey the law like that practised by Max Weber's *verstehende Soziologie*, in Kelsen's opinion was unable to give account of the law, because this kind of analysis works only *a posteriori*, by submitting a casual explanation of what has had legally to be done³¹.

This cardinal divergence of the scientific positions could not but lead to a conflict. Kelsen advocates the net and clear benchmark to differentiate the science of law (jurisprudence) from the sciences about the law (sociological analysis, etc.), and Ehrlich formulates a perilous challenge to this standpoint: "At the present as well as at any other time, the centre of gravity of legal development lies not in legislation, nor in juristic science, not in judicial decision, but in society itself"³². This challenge seemed to be a deadly threat for the "prevailing jurisprudence", because it contested not only the traditional beliefs of the lawyers but also their *modus vivendi* – earning their daily bread through the application of fixed legal rules for the settlement of social conflicts. Not only practical verifiability and capacity to explain the atmosphere of the legal life were put at stake – in his book Ehrlich accuses of ineffectuality the very foundation of the "traditional" legal practice³³. The consequences possibly were not fully foreseen by Ehrlich himself who aimed not to deconstruction of the legal science and practice, but only to their enrichment through utilisation of the new fruitful sociological methods.

Kelsen masterly moves his pieces in this match and stresses the severity of this accusation forwarded by Ehrlich as one of the major postulates underlying other ideas of "*Grundlegung*", and this made Kelsen's further attacks supported by the majority of the lawyers. From this aspect we can partly understand the hesitations of Ehrlich in the debates with Kelsen – realizing that in fact he accuses the lawyers of their needlessness Ehrlich stops the further substantial

30 Hans Kelsen, *Allgemeine Theorie der Normen* 215 (1979).

31 Kelsen insisted that the subject-matter of jurisprudence is composed only of "ideally valid legal norms", and is substantially different from the field of sociological researches – calculation of probability that people should believe in validity of a given order and act according to this order (Hans Kelsen, *General Theory of Law and State* 175-176 (1961). Kelsen did not admit that these fields of research could ever converge and be melted into an amalgam science like the sociology of law – in his opinion, the subject-matter of the sociology of law is not law as such, but "certain natural phenomena which are parallel to law" (Kelsen (note 22), 82).

32 Ehrlich (note 1), Preface.

33 It is symptomatic that the ideas of Ehrlich were attacked also by such partisans of the sociological jurisprudence as Hugo Sinzheimer who was reluctant to undermine the liaison between the law and the State. Cf. his intervention in 1910 at the famous conference about "Jurisprudence and Sociology of Law": Hugo Sinzheimer, *Die Fortentwicklung des Arbeitsrechts und die Aufgabe der Rechtslehre*, in *Soziale Praxis und Archiv für Volkswohlfahrt* (1911). Hermann Kantorowicz during the said conference demanded only a closer attention to the values which make law achieve socially beneficial objectives (Hermann Kantorowicz, *Rechtswissenschaft und Soziologie*, in Hermann Kantorowicz, *Rechtswissenschaft und Soziologie. Ausgewählte Schriften zur Wissenschaftslehre* (1962)). His position also was not the same as the audacious challenge Ehrlich put against his contemporary jurisprudence.

argumentation, tries to convert the discussion into pure verbal dispute and to keep neutrality in this delicate situation³⁴. But he cannot override this difficulty and, as Ehrlich convinces throughout his pioneer book, the task of the lawyer is not to deduct the legal consequences from the given normative material, but to gather the factual materials and to establish what the law is. Evidently, few of lawyers were capable to perform such a task and there was in fact one alternative – to change the legal consciousness of the lawyers, or in more practical terms – to introduce the new one in the heads of the future lawyers. Ehrlich was completely aware of the impossibility to achieve his objectives without a reformation of the legal education³⁵.

Kelsen finds another weak point in Ehrlich's position and does not miss the chance of getting profit out of it and to make another master move in the game: to ask Ehrlich how to distinguish the legal from the economical, the social, the religious, and other aspects of the human action? Ehrlich was aware of this problem but was utterly reluctant to reply to it. So, in 1911 he wrote: "Each lawyer knows that it is impossible to fix boundaries between law and morals; and quite often today there shall become law what has been the morals yesterday, so that law is the morals of yesterdays"³⁶. In the research published in 1912 Ehrlich is even more uncompromising: "I leave to decide whether then we deal with morals or with law to those who have opportunity to spare more time than me to a useless terminology"³⁷. In his masterpiece of 1913 Ehrlich had to be more flexible as far as he pretended to lay the foundations of a new scientific discipline, and thence could not just disregard this question, even when making reservations that the sociological science of law is not able "to state the difference between law and morals in a brief simple formula"³⁸. This position is not devoid of interest in the context of the ensuing researches of the Scandinavian realists and the relativist approach to the knowledge of law as it is exposed in the Critical Legal Studies, or in Luhmann's theory. Law, morals, society – all of them are mere words which describe the reality, but these descriptions and definitions (in Ehrlich's terms – "intellectual things" [*gedanklichen Dingen*]) can never be fully adequate, so that "non-legal norms become legal so readily that in most cases a differentiation is altogether impossible"³⁹. In this perspective, law is only an

34 Eugen Ehrlich, *Entgegnung*, in Kelsen, Ehrlich (note 7), 57.

35 Cf. Manfred Rehbinder, *Richterliche Rechtsfortbildung in der Sicht von Eugen Ehrlich*, in Manfred Rehbinder, *Abhandlungen zur Rechtssoziologie* (1995). The title of the rector's inauguration dispute in 1911 reveals this central purpose of Ehrlich (Eugen Ehrlich, *Was kann geschehen, um bei der Ausbildung das Verständnis der Juristen für psychologische, wirtschaftliche und soziologische Fragen in erhöhtem Masse zu fördern?*, in *Verhandlungen des 31 Deutschen Juristentages* (1912).

36 Eugen Ehrlich, *Die Erforschung des lebenden Rechts*, in Eugen Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, 20 (Manfred Rehbinder ed., 1967).

37 Eugen Ehrlich, *Das Lebende Recht der Völker in der Bukowina*, in Eugen Ehrlich, *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre*, 48 (Manfred Rehbinder ed., 1967).

38 Ehrlich (note 1), 167.

39 Id., 130.

"intellectual picture" (*Gedankengebilde*) in people's heads which refers to the ideas about the law regardless of what is officially recognised as law. It is from these ideas which are taken from tangible reality that people construct social reality⁴⁰. Anticipating the postmodernist thesis, Ehrlich suggests that one cannot pretend that definitions ever give a real and fully adequate picture of reality – these definitions are "dependent variables" which are not provided by the researcher, but form part of the empirical enquiry itself⁴¹.

Thus, the debates about the borderline between law and morals constituted another focal point of the discussion among the two Austrian philosophers. Ehrlich incessantly pointed out the impossibility for the human mind and language to provide an exact description of the law. From this perspective he attacked the unilateral approach to the distinction between jural and non-jural phenomena, the only criterion for this distinction being the mode of creation and application of the law. The simple formula proposed by Kelsen was characteristic for this unilateralism – if prescription is created by the State, backed by the sanctions which are applied by State officials then we deal with law⁴². Otherwise, we confront another phenomenon which can have influence upon human behaviour and the capacity to govern such behaviour, but the examination of which nevertheless goes beyond the realm of jurisprudence as a pure science of norms. In this way Kelsen invests legal character only in those norms which are connected with constraint's order (*Zwangsordnung*). This facilitates a logical purification of the law of the moral elements that are not endowed with the sanctions, but at the same time it brings the lawyer as far as possible from understanding of the function of law. Gurvitch explains this position: "Law, being nothing but a pure norm, admits only a normative and formalistic method of study, every other method being destructive of the very object of research"⁴³.

Ehrlich outlines quite a different strategy which is once again closely tied with the idea of legal pluralism. Ehrlich supposes that the legal communication gives rise to several different codes for the distinction between jural and non-jural (or extra-jural, if one follows Ehrlich's terminology – "*außerrechtlich*"). There is a variety of such codes, such as emotional tune (*Gefühlstone*), relative social weight of the normative prescriptions, frequency of their application, ideological role, etc.⁴⁴ In the last analysis, the exact demarcation line between law and other social regulators is "a question of social power"⁴⁵. Evidently, this approach could not but appear "curious" to Kelsen⁴⁶, who was fighting for the basic distinction between the theoretical and the practical. But from another angle this "curiosity"

40 Id., 84ff.

41 Cf. Hertogh M. A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich, in *Journal of Law and Society* 4 (2004), 474-475.

42 And therefore "it is the task of the science of law to represent the law of a community, i.e. the material produced by the legal authority in the law-making procedure, in the form of statements" (Hans Kelsen, *General Theory of Law and State* 45 (1961).

43 Georges Gurvitch. *Sociology of Law* 5 (1947).

44 Ehrlich (note 1), 165ff.

45 Id., 170.

46 Hans Kelsen, *Eine Grundlegung der Rechtssoziologie*, in Kelsen, Ehrlich (note 7), 32.

can become an advantage which allows escaping the simplicity of abstract schemes (dividing the legal reality into blocks and categories, as if it were a tangible thing). As Ehrlich repeats, law is not something ready for examination – it is constructed during the social action and even during the scientific examination itself. These "postmodernist" notes play the first fiddle in Ehrlich's analysis of law, and it is pointless to criticize his theory for lack of strict divisions and categorisations, as far as such have never been the objective for the Czernowitz philosopher. So, van Klink asserts that the project of the living law has fallen because of the incapacity to make a distinction between law and power, justice, and State law. In this perspective, the best outcome for the living law is to become "a mere addition to the State's law" and "a source of inspiration to State officials"⁴⁷. The Dutch researcher suggests a dubious continuation of Kelsen's criticism, referring not only to purity as a theoretical value of the normative approach, but also to its practical utility (an easier applicability in the legal practice). The idea is that the officials should feel better, if they have a clear understanding of what law is (the set of norms backed by State coercion) and add to this understanding some reflections about the social nature of the law. This unexpected conclusion is deceiving, because it brings us back to the XIX century methodology and turns a deaf ear to the development of the sociology of law throughout the XX century.

Following this line of their debates, theorists could not escape discussion about the nature of the reality jurisprudence has to investigate: whether it is composed of homologue elements or whether it is pluralist, capable of combining heteronymous elements. Kelsen is far from contesting the intrinsic plurality of the legal orders and their contents, but he disagrees with Ehrlich as to the question of what aspect of these orders is assigned to the legal science. For Kelsen there is only one "positive" aspect of law (its normative structure) and nothing beyond. Therefore he shows no interest in the investigation of the legal systems in their peculiarities, and chooses to "think in terms of the whole legal order"⁴⁸. Law as the object of scientific investigation everywhere is the same – a legal community (*Rechtsgemeinschaft*) which controls individual behaviour through authoritative issuance of norms, and to which the highest normative power in society is attributed. Such community for Kelsen coincides with the State, and in this perspective every legal order is a State legal order (*staatliche Rechtsordnung*)⁴⁹, existing mainly in the consciousness of the lawyers.

Thus, the normative analysis of the law considers the State as a fictional personification of the legal order⁵⁰. According to Kelsen, no further extension of legal science can be accepted which threatens the autonomy of the law which shall be completely isolated from the real policymaking and from counterbalancing the opposing social powers. Any deeper insight into the social foundation of law will bring up debates about the law's efficacy, legitimacy, and adequacy for the given social environment; these debates unavoidably involve a critical appreciation of

47 Van Klink (note 2), 30-31.

48 Kelsen (note 22), 165.

49 Id., 32 ff.

50 Kelsen (note 42), 191-192.

the law from the value-laden personal standpoints. Such personal evaluations go beyond the limited domain of jurisprudence, which has to study law as an axiomatic order without touching the real function of law. Kelsen is explicit in his assertions that the State is "an entirely extra-individual authority", and thence the positive law or the legal order exist independently of the individual wills, "over and above their feelings" (even those of the lawmakers)⁵¹. For this reason law is completely heteronymous and objective, though Kelsen admits that this objectivity is nothing more than an "objectivation" or a projection of the meanings.

Such position opposed the innermost creed of Ehrlich who was persuaded that the only way to the knowledge of law lies through the exploration of the social reality of a given legal system⁵². Law cannot precede State and society, and cannot come into being, if there are no institutions to which it refers – in this aspect Kelsen's theory of law turns into a lifeless abstraction which ignores that the concrete necessarily precedes the abstract. There can be no ideal extra-temporal order governing human interaction, no matter who is supposed to be creator of this order – a Divinity, a State or a community of lawyers⁵³. Studying the norms for decision (*Entscheidungsnormen*) inside the juristic law (*Juristenrecht*) provides an important tool in the investigation of law. These norms grasp only the minor part of the legal reality which is subject to perpetual legal conflicts and for this reason requires a set of norms elaborated by national lawyers to allow deciding the conflicts in an easier and quicker manner. All the rest of the legal reality is free from fixed (by State or by lawyers) rules, and is composed of the facts of law (*Tatsachen des Rechts*) created through independent legal communication.

Given such a deep divergence of conceptions, both theorists could not escape from engaging their swords also at this battlefield. Kelsen insisted on the exclusivity of law as to any practical considerations including the dominating political ideology and moral views, so that he could not accept Ehrlich's "practical concept of law"⁵⁴. Ehrlich defends the inclusive thesis and fights Kelsen's approach which stands in an evident conflict with reality of law which is always imbued with morals and politics, and is hardly conceivable outside this intrinsic connection. A legal norm is valid as long as it is supposed to be binding on the members of a social association and generally obeyed in this association. A norm which has come out of use becomes a mere dead letter to which the term "law" cannot be

51 This position was expressed in the first chapter of "Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze" (1911), and Kelsen was unlikely to change it in the following works (except the evolution of his ideas from a hypothetical character of the basic norm to recognising it as a pure fiction).

52 For Ehrlich, the source of our knowledge of law is "first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages and of all associations" including those ignored by the official law (Ehrlich (note 1), 493).

53 It is characteristic that Kelsen does not hesitate to draw parallels between Divinity and State in his theory, both being omnipotent and proceed through acts of self-limitation to their creation (Hans Kelsen, *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht* 221-227 (2nd ed., 1928), and especially at p. 249 where he frankly asserts that the relations between the State and the law are alike to the theological conception of the relations between God and nature).

54 This conception was at length developed in: Ehrlich (note 10), 2.

applied. This circularity between legal validity and efficacy is devoid of sense for Kelsen who believes that the legal norms are introduced exactly for situations where they are expected to regulate the behaviour contrary to these norms⁵⁵.

Kelsen fears that any normative conflict inside the legal order could undermine the authoritative character of the *ought-commands* which thus can be converted into conditional recommendations dependent on particular axiological preferences⁵⁶. This threat seems so awful that Kelsen fights pluralisation of law in each possible facet – let alone Ehrlich's ideas of the social roots of law, Kelsen contests also the commonly agreed division of law into public and private, into national and international. Even a thought to trace the distinction between the law and the State is excluded as challenging the normative character of law. On the contrary, for Ehrlich law and legal reality are almost synonyms, and the very nature of legal reality is pluralist insomuch as it is composed of a multiplicity of private legal orders (those of associations, communities, families, corporations, etc.). Moreover, law is not simply a tool for ordering the social communication in the hands of the State – law is perceived by Ehrlich as one of the aspects of the social communication itself. The legal form of this communication affords to the social associations to manage their affairs by themselves, and sets out a general frame of references in conflict situations.

II. CONCLUSION

One can evidently continue to enumerate other inner reasons and motives underlying the controversy. But, as in each fruitful scientific dispute not only disagreements and mutual accusations, but also some important ideas were brought forward which proved to be capable of enriching the further development of the two opposing (sociological and normativist) approaches to law. The divergence of these two positions cannot be overestimated, and at some points of the debates Kelsen and Ehrlich seemed to take almost the same ground though using different terminology. Both intellectuals tend to admit the auto-regulation of law, and for Kelsen it is produced through a circulation of validity between the basic norm and other norms of the given legal system. Both Kelsen and Ehrlich are far from admitting that legal propositions can provide a solution for each possible legal case. Ehrlich constructs a legal order from the bottom level where the living law works. This living law is partly consolidated into the juristic law, which in its turn is consolidated into the legal propositions issued by the State. Kelsen does not conceive the legal order as a gapless system⁵⁷, and

55 Although Kelsen cannot disregard the difference between the really working norms and "law in books", in this aspect he suggests that a norm loses its validity after the large part of population abstains from observing it (Kelsen (note 22), 111ff); but in this way validity and efficacy become again the interlaced and interdependent notions.

56 In this very aspect Kelsen suggests to trace the borderline between the normative science of law unsusceptible to any evaluations, and the practical study of norms which is connected with evaluations (Id., 86).

57 Exactly, the legal order is closed logically in the sense that each action is deontologically qualified. Cf. VON WRIGHT G. H. *An Essay in Deontic Logic and the General Theory of Action*, in

suggests that it is a set of mutually counterbalanced hierarchies. He introduces a special rule for the closure of gaps – when there is no adequate norm applicable to the case, the legal order is applicable as a whole⁵⁸. This idea was ruthlessly attacked by Ehrlich in his reply to Kelsen's review, but here the debates stopped at the point of mutual accusations in wrong terminology. Nevertheless, both Kelsen and Ehrlich tried to express the same thought – that the legal order is capable of self-reproduction and self-regulation; so their ardent disputes touched more the choice of correct terms than the essence of the problem.

At the same time, it is worth mentioning that both thinkers did not imply to refuse a deductive approach to law and society, and the real difference between their positions is not as deep as it could appear. Both, Ehrlich and Kelsen envisaged the basis of validity of the law in terms of normative structures. What divides the two philosophers is the question about the nature of these structures. Ehrlich establishes the normative order of law on the given social structure, Kelsen introduces a hypothetical ideal structure underpinned by a basic norm (*Grundnorm*) which does not exist in reality but which is conceived as logical condition of the validity of law. The failure of this construction is that it sheds no light on the origins and functions of this structure, and therefore only has a very limited heuristic value. Moreover, the existence of a legal order is conceivable and explicable without recourse to any basic norm or a primary constitution. These latter do not give any clues about how the basic norm of law can be distinguished from other social norms believed by some social groups to be the fundament for the orders competing with the State order (e.g. why the so-called gangster law with its primary norm to respect the criminal hierarchy and to obey the mafia bosses is not a genuine law). The fiction of the basic norm simply urges people to obey the primary constitution and the legal order in general, giving no clues to investigations of the regulative machinery of law.

From this intellectual reconstruction made by Kelsen we can only understand why people can/may/ought consider a legal order as binding. but not why a certain legal order is binding. Law in this perspective is identified with the State, this latter being no more than an "ideal entity" (*geistiges Gebilde*) which serves as a tool of theoretical explanation and which has no factual support in reality⁵⁹. The purpose of this scheme is not an adequate description of reality but simply an authorisation of coercion. One could expect that Ehrlich with his realist ambitions would pay more attention to the actual legal structures using them as a framework for further studies. But assuming the realist inspiration, Ehrlich is still subject to the legal dogmatism that becomes apparent from the proceeds employed by him. Gathering some factual data from field researches and historical investigations, Ehrlich aims not to analyse them as they are, but tries to generalize these findings, to use them for filling in an already preconceived

21 Acta Philosophica Fennica 83 (1968). But in reality there are always some gaps which shall be filled in either through lawmaking, or through interpretation of law (Cf. Kelsen (note 22), 70-71). Or, in the terms of Kelsen himself: "The doctrine of hierarchy of the legal order comprehends the law in motion, in its perpetually renewed process of self-regeneration" (Id., 279).

58 This idea was developed at length in: Kelsen (note 22), 106ff.

59 Hans Kelsen. Der Staat als Integration (1930), 25.

framework where these findings shall be duly shelved in order to prove the veracity of this framework.

This method could be said to enrich the jurisprudence due to the introduction of the empirical facts, but it does not change its methodology as cardinally as Ehrlich pretended to. So far, Kelsen and Ehrlich are wrong in their mutual accusations of anti-scientism – both follow the mainstream of the contemporary jurisprudence of their époque. Ehrlich shapes and develops his thinking in a way similar to that of Kelsen – he investigates the "general"⁶⁰ in his findings and reveals (one had better say, "confirms") an *opinio necessitatis* underpinning the legal communication. Here Ehrlich also made a mental leap in his thinking which could otherwise lead him from empirical facts to generalization⁶¹. This latter is implicitly and explicitly formulated in the volume of 1913 starting from the first pages, so that Ehrlich does not use the facts for an inductive investigation of the law, but only situates these facts in order to support his ideas prefabricated through historical and comparative research. The "centre of gravity" is already found at the very first page, and the further work of Ehrlich was to support (if not to prove) this initial thesis. In this regard, Ehrlich and Kelsen both stayed true to the concepts and methods of their time, sharing the classical standards of thinking. They were conscious that building a chain of inferences and conclusions could lead to infinity, and the only way out was to establish the preconditioned algorithm of scientific discussion about the law. Therefore both, the omnipresent social living law and the miraculous fictive basic norm have had to be nothing more but the points of closure of further discussions about the nature of law, its contents, structure, origins, validity and other principal issues of jurisprudence.

Thence, the controversy between the normative and sociological understanding of law is not absolute. The pure theory of law cannot logically be left in its purity and badly needs to be connected to the reality either through some metaphysical idealist premises, or through recognition of the facticity of the contents of law.⁶² On the other hand, the sociological perspective of law cannot avoid accepting the normative dimension of law,⁶³ and thus is bound to follow the analytical rules established by Hans Kelsen and his followers, such as Herbert Hart or Joseph Raz. Kelsen in his second edition of "Pure Theory of Law" (1961) had to reconcile the law with social reality, and in the works of Hart and Raz the analytical jurisprudence finally loses its purity in the sense of a

60 "The whole social law" (*das ganze gesellschaftliche Recht*) – cf. Ehrlich (note 10), 193.

61 Kelsen describes such a mental leap as a way of thinking where law and State are considered as totalities through "hypothesizing of unity of thought into a real, volitional and powerful being" (Kelsen (note 53), 127).

62 Alf Ross, *Validity and the Conflict between Legal Positivism and Natural Law*, in 4 *Revista Juridica de Buenos Aires* (1961); Ota Weinberger, *Normentheorie als Grundlage der Jurisprudenz und der Ethik. Ein Auseinandersetzung mit Hans Kelsen* (1981); Eugenio Bulygin, *An Antinomy in Kelsen's Pure Theory of Law*, in 3 *Ratio Juris* (1990); Deryck Beylveld, *From the "Middle-Way" to Normative Irrationalism: Hans Kelsen's General Theory of Norms*, in 56 *Modern Law Review* (1998); Carlos S. Nino, *Some Confusions surrounding Kelsen's Concept of Validity* (1998), in *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (S. Paulson, D. Litschewski eds.), 253-261.

63 Mark Hertogh, *A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich*, in 4 *Journal of Law and Society* (2004).

normative closeness, and becomes intertwined with the socio-legal analysis of the facts of law. Surely, after many years of the evolution of the philosophy of law the ideas pronounced by Kelsen and Ehrlich seem to be somewhat naïve and exaggerated. But the conflict of these respective antagonist positions revealed in the debates between the two Austrian legal thinkers is still of great methodological importance as it shows what are the theoretical extremities of both positions and what methodological problems loom large when strictly adhering to one of these extremes.

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