



NATIONAL RESEARCH UNIVERSITY  
HIGHER SCHOOL OF ECONOMICS

*Mikhail Antonov*

**THE LEGAL CONCEPTIONS OF  
HANS KELSEN AND EUGEN  
EHRlich: WEIGHING HUMAN  
RIGHTS AND SOVEREIGNTY**

BASIC RESEARCH PROGRAM

WORKING PAPERS

SERIES: LAW

WP BRP 62/LAW/2016

*Mikhail Antonov\**

## **THE LEGAL CONCEPTIONS OF HANS KELSEN AND EUGEN EHRLICH: WEIGHING HUMAN RIGHTS AND SOVEREIGNTY**

This paper considers the relevance of the legal conceptions put forward by Eugen Ehrlich and Hans Kelsen to the contemporary debate on human rights and their limits. It is asserted that the conceptions of Ehrlich and Kelsen adopt a multifaceted approach to the law and, at the same time, a philosophical perspective that secures human autonomy and freedom from “great narratives” and governmental intervention. This perspective opens up a variety of opportunities for better understanding the balance between individual and collective interests, and between the significance of rights and sovereignty. Both conceptions are still relevant to debates in the fields of international and constitutional law, and to legal philosophies about the limits of human rights and the epistemic conditions for identifying these rights, and how these rights can the same time lay claim to a universal character while remaining culturally embedded. The principle of relativity that underpins the *Pure Theory of Law* of Kelsen and the legal sociology of Ehrlich are of particular importance for discussing the “relative universality” of human rights.

JEL Classification: K10

Keywords: human rights, constitutionalization, Hans Kelsen, pure theory of law, Eugen Ehrlich, legal sociology, normativity, social conventions

---

Dr. Mikhail Antonov is associate professor at the Law Faculty at the National Research University “Higher School of Economics” in Saint Petersburg (Russia).

The present research has been conducted thanks to financial support from a grant from the Russian Humanities Fund No.15-03-00345.

## Introduction

In debates about human rights, referring to the ideas of Hans Kelsen or Eugen Ehrlich sometimes is considered eccentric or even ridiculous. These thinkers and their ideas are often considered obsolete and of no value to contemporary legal problems.<sup>2</sup> Naturally, neither of these two thinkers (Ehrlich died in 1922, and Kelsen in 1973) could anticipate the future development of societies and of corresponding legal problems. We will treat these two conceptions (leaving aside other thinkers whose works can be of no lesser importance) as most illustrative of the positivist approach to law in the first half of the twentieth century and as still influential nowadays (at least, in the continental jurisprudence). Our objective is to demonstrate that both conceptions offer rich potential for discussing the limits of human rights, although indirectly, by means of particular methodological ideas favouring autonomy and the freedom of individuals.

Even if these legal scholars diverged significantly on some points, and represent two different legal theories (analytical jurisprudence and sociological jurisprudence), there are two major points on which their ideas converge. Their conceptions were formulated to meet the epistemic challenges that legal science faced in the first decades of the twentieth century, and both Kelsen and Ehrlich sought to work out a pluralistic understanding of law that would better take into account the relativity of legal knowledge. This led both Kelsen and Ehrlich to a methodological pluralism which was reflected in the value pluralism both legal scholars advocated. Substantially, such pluralism favoured personal choice in both its epistemic and axiological aspects, and promoted democracy where human beings were considered to be autonomous authors of the rules governing their behaviour. For both thinkers, the law is created not by the state or any metaphysical instances, but by human beings themselves: for Kelsen it is judges and lawyers who create legal rules, and for Ehrlich it is members of various social communities that bring about the real legal regulation. From this vantage point, Kelsen's *Pure Theory of Law* and Ehrlich's sociology of law are not hostile to human freedom and, on the contrary, empirical facts (for sociological jurisprudence) or formal normativity (for analytical jurisprudence) can have a more beneficent effect than eloquent diatribes about ideal dimensions of the law, such as justice or proportionality. After analyzing the main challenges to legal knowledge and the responses Kelsen and Ehrlich tried to formulate to meet these challenges, we will assess the main points at which the intellectual legacy of these legal thinkers has bearing on

---

<sup>2</sup> See detailed accounts on such views: TREVINO, Xavier. The Continuing Relevance of the Classics for Contemporary Sociology of Law: The American Context. In: *Jurisprudence: Journal of Higher Education Establishments* [Pravovedenie: Izvestiia vyzov]. 2013, v. 5, p. 26-47 [In Russian]; SOMEK, Alexander. Kelsen Lives. In: *European Journal of International Law*. 2007, v. 18, p. 409-451.

the contemporary debates about the correlation between human rights and the sovereign rights of states.

## 1. Problematizing the human-rights issue in legal sociology and in analytical jurisprudence

Human rights are one of the most controversial, and the same time stimulating, topics for contemporary legal philosophy. In current debates, some thinkers tend to assert the supreme value of these rights, which are supposed to be independent on any authoritative enactment and to serve as ultimate criteria for assessing the validity of legislation.<sup>3</sup> Some thinkers, on the contrary, argue that there are no rights before they are posited in statutes and international treaties, or even if such rights exist, that their effect is weak, unsatisfactory and dependent on political arrangements.<sup>4</sup> A variety of intermediate conceptions search for a compromise solution in-between these two extremes.<sup>5</sup> In light of this variety, it may appear to be a vain undertaking to formulate even a preliminary philosophical conception of human rights that pretends to encompass and to reconcile all the variations in understanding of the nature and limits of fundamental rights.<sup>6</sup>

To a large extent, in contemporary debates “human rights” have become one of the “essentially contested notions”<sup>7</sup> that is impossible to exhaustively define and that at the same time presents itself unavoidably in every discourse about legal rights and obligations.<sup>8</sup> This state of affairs allows referring to human rights in order to legitimize almost any political program or judicial decision which can benefit from weighing and balancing and which thus can acquire legitimate, (and consequently) binding effect.<sup>9</sup> It is often asserted that, in order to procure this effect, acts of weighing and balancing will always yield only one right answer<sup>10</sup> that is (or claims to be) objectively correct,<sup>11</sup> and that rules out all other solutions. However, adopting a more sceptical perspective, it is possible to argue that this approach ultimately hinges on certain

---

<sup>3</sup> HAAS, Michael. *International Human Rights*. London and New York, 2008.

<sup>4</sup> POSNER, Eric. *The Twilight of Human Rights Law*. Oxford, 2014.

<sup>5</sup> ISHAY, Micheline R. What are human rights? Six historical controversies. In: *Human Rights Journal*. 2004, v. 3(3), p. 359-373.

<sup>6</sup> HAFNER-BURTON, Emilie & TSURTSUI, Kiyoteru. Human rights in a globalizing world: the paradox of empty promises. In: *American Journal of Sociology*. 2005, v. 110, p. 1373–1386. For the sake of simplicity we will not differentiate between the concepts of “human rights” and “fundamental rights” in the present paper and will not inquiry into possible conceptual distinctions between them. An interesting analysis of such distinction can be found, e.g., in: PALOMBELLA, Gianluigi. From Human Rights to Fundamental Rights. In: *Archiv für Rechts- und Sozialphilosophie*. 2007, v. 93, p. 396-426.

<sup>7</sup> GALLIE, Wesley B. Essentially Contested Concepts. In: *Proceedings of the Aristotelian Society*. 1956, v. 56, p. 167–198.

<sup>8</sup> ALLAN, James F.P., The idea of human rights. In: *Bond Law Review*. 2014, v. 25(1).

<sup>9</sup> ALEXY, Robert; KOCH, Hans-Joachim; KUHLEN, Lothar; RUSSMANN, Helmut. *Elemente einer juristischen Begründungslehre*. Baden Baden, 2003.

<sup>10</sup> DWORKIN, Ronald. *A Matter of Principle*. Cambridge, MA, 1985.

<sup>11</sup> ALEXY, Robert. The Construction of Constitutional Rights. In: *Law and Ethics of Human Rights*. 2010, v. 4, p. 20-32.

subjective convictions and cannot be therefore really objective.<sup>12</sup> This objection indirectly undermines the supposedly universal value of human rights, as it makes them dependent on political endorsement.<sup>13</sup>

If we approach this issue from another perspective, we can also discover quite a few of opposite opinions as to whether human rights are a new word for the old idea of natural or supra-legislative law, serving as a set of values that allows judgments to be passed on certain positive enactments of state authorities.<sup>14</sup> It is equally possible to admit that human rights are a substantially new idea that reflects a new morality of mankind which, after the atrocities of the Second World War, will not tolerate serious infringements on basic rights and freedoms any longer.<sup>15</sup> This discussion is undoubtedly important and its description alone would require a lengthy academic article. However, the question about the limits of human rights can, in our opinion, be answered without referring to the post-war debates and treaties about human rights. This article, without contending that debates are futile, will not address them directly. In any event, these debates did not emerge from a vacuum, and pre-war legal philosophy certainly blazed a trail for later developments in human rights law.<sup>16</sup>

A considerable literature is dedicated to the pre-war proponents of natural-law doctrines who are traditionally thought to have inspired human-rights discourse in the first half of the twentieth century.<sup>17</sup> Just after the war ended in 1945, Gustav Radbruch threw down the gauntlet to legal positivists, vehemently accusing them of servility and the inability to fight “statutory injustice” because of the principle of “*Gesetz ist Gesetz.*” Radbruch’s accusations were directed most of all against the proponents of positivism in the style of John Austin, who identified the law with the commands of a sovereign.<sup>18</sup> But Radbruch’s critical remarks were taken in much broader sense by human-rights activists, who applied them against everyone who shared the positivist account of law (those who admit that the law is a set of posited social rules whose validity is independent of value judgments).<sup>19</sup> It became a commonplace in philosophical

---

<sup>12</sup> BULYGIN, Eugenio. Alexy’s Thesis of the Necessary Connection between Law and Morality. In: *Ratio Juris*, 2000, v. 13(2), p. 133-137.

<sup>13</sup> BULYGIN, Eugenio. Zum Problem der Begründung der Menschenrechte. In: *Politische Herrschaftsstrukturen und Neuer Konstitutionalismus – Iberoamerika und Europa in theorievergleichender Perspektive*. Berlin, 2000, p. 175-181.

<sup>14</sup> MOYN, Samuel. *The Last Utopia: Human Rights in History*. Cambridge, 2010.

<sup>15</sup> BERNSTROFF, Jochen von. The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law. In: *The European Journal of International Law*. 2008, v. 19(5), p. 903–924.

<sup>16</sup> E.g., BUERGENTHAL, Thomas. The evolving international human rights system. In: *American Journal of International Law*. 2006, v. 100(4), p. 783-807.

<sup>17</sup> PAULSON, Stanley. Radbruch on Unjust Laws: Competing Earlier and Later Views? In: *Oxford Journal of Legal Studies*. 1995, v. 15, p. 489-500.

<sup>18</sup> AUSTIN, John. *The Province of Jurisprudence Determined*. Cambridge, 1995.

<sup>19</sup> MAIHOFER, Werner (Hrsg.). *Naturrecht oder Rechtspositivismus*. Darmstadt, 1962; KAUFMANN, Arthur. National Socialism and German Jurisprudence from 1933 to 1945. In: *Cardozo Law Review*. 1988, v. 9, p. 1629-1634; OTT, Walter & BUOB, Frankzika. Did Legal Positivism Render German Jurists Defenseless During the Third Reich? In: *Social and Legal Studies*. 1993, v. 2, p. 91-104; LIPPMAN, Matthew. Law, Lawyers and Legality in the Third Reich: The Perversion of Principle and Professionalism. In: *Temple International and Comparative Journal of Law*. 1997, v. 11, p. 199-308; ALEXY, Robert. *The Arguments from Injustice: A Reply to Legal Positivism*. Oxford, 2002.

literature to blame followers of sociological and analytical jurisprudence for their alleged readiness to tolerate any infringements on human rights, because for true legal positivists, human rights are supposedly always trumped by state sovereignty or social control.<sup>20</sup>

This accusation is, nonetheless, far from being justified. As a matter of fact, most of the positivist-minded legal philosophers did not take Austin-style command theories of law seriously by the first decades of the twentieth century. By that time *Geetzespositivismus* had lost almost all of its allure because of the insurmountable epistemological complications in explaining what a sovereign's will is and how it can be accurately established.<sup>21</sup>

Curiously enough, it was legal positivists such as Hans Kelsen who thoroughly stripped command theories of their value, at least in the eyes of many German-speaking lawyers. In a series of pre-war works, and especially in the first edition of his *Pure Theory of Law* (1934),<sup>22</sup> Kelsen demonstrated that law is constantly reinterpreted and therefore reformulated at every stage of its application; and from this standpoint, creation of the law is at the same time application of the law. In his view, the “*Gesetz ist Gesetz*” principle should be understood as an ideological tool, suited to the naïve ideals of the Enlightenment and having nothing to do with the machinery of real legal orders. The law cannot be a simple instruction issued by a sovereign; it is a dynamic process of regulation involving every judge and every law enforcement officer and making every such judge or officer responsible for the final outcome of the application of the law.<sup>23</sup> This topic was famously discussed in the Hart-Fuller post-war debates about the validity of Nazi statutes and the responsibility of those who had inexorably applied them.<sup>24</sup>

The command theories of law suffered also from the criticism of sociologically-minded legal scholars. To a considerable extent, Eugen Ehrlich conceived his *Fundamental Principles of Legal Sociology* in 1913 as an attempt to expose and dismantle the false ideologies behind the Austin-style legal positivism.<sup>25</sup> Law cannot be understood exclusively as a product of lawmakers' will or as a simple command, but exists as a social phenomenon, so that the social environment prefigures the creation and application of the law, and thereby sets constraints for lawmaking and judicial organs.

However, this sociological approach is quite multifaceted. It also gave rise to a series of utterly conservative ideologies, such as the conception of *Rechtserneuerung*, which legitimized

---

<sup>20</sup> SCHEIPERS, Sybille. *Negotiating sovereignty and human rights*. Manchester, 2009.

<sup>21</sup> For a view of how the negative attitude towards legal positivism was formed, see: FOLJANTY, Lena. *Recht oder Gesetz. Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit*. Tübingen, 2013; especially the first chapter titled “Abgrenzung als Identitätsfrage: die Konstruktion des Positivismus als mächtiger Gegner” (p. 19-50).

<sup>22</sup> KELSEN, Hans. *Introduction to the Problems of Legal Theory* (Bonnie Litschewski and Stanley Paulson trans.). Oxford, 1992.

<sup>23</sup> KELSEN, Hans. *A Dynamic Theory of Natural Law*. In: *Louisiana Law Review*. 1956, v. 16, p. 597-620.

<sup>24</sup> HART, Herbert L. A. *Positivism and the Separation of Law and Morals*. In: *Harvard Law Review*. 1958, v. 71, p. 593-629; FULLER, Lon. *Positivism and Fidelity to Law: A Reply to Professor Hart*. In: *Harvard Law Review*. 1958, v. 71, p. 630-672. See Kelsen's position: KELSEN, Hans. *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?* In: *The International Law Quarterly*. 1947, v. 1, p. 153-171.

<sup>25</sup> EHRLICH, Eugen. *Fundamental Principles of the Sociology of Law*. London, 2002.

reinterpretation of statutory law in the light of people's presumed feelings of justice (but often contrary to the literal meaning of the interpreted statutes).<sup>26</sup> Paradoxically, the Nazi legal ideologists, such as Karl Larenz,<sup>27</sup> largely based their conceptions on viewpoints that contradicted the idea Radbruch famously imputed to the Nazi regime and its lawyers. In fact, fidelity to the text of statutes was not an important characteristic of Nazi lawyers and legal philosophers.<sup>28</sup> The ultimate criterion of legal validity for them usually did not reside in literal texts of statutes or in the pretended will of lawmakers, but in the prevailing ideas of justice that decision-makers discovered in the collective mentality, or in the spirit of the people (nation). Following this line, Karl Schmitt famously defined the state as an entity that can introduce the state of exception and that its officials are therefore entitled to overrule any positive enactments.<sup>29</sup>

But this Schmittian decisionism formed only one of several trends produced by sociological examination of law. Other trends in sociological jurisprudence brought attention to normative constraints in social life that bind the state and other powerful organizations in their lawmaking activities. Several leading legal sociologists of the mid-twentieth century outlined the task of examining law as an "ideal-realist" phenomenon (Georges Gurvitch<sup>30</sup>) or as a combination of ethical and factual constraints coordinating human behaviour (Nicholas Timasheff<sup>31</sup>).<sup>32</sup> This approach, in our opinion, stems at least in part from the ideas underpinning Eugen Ehrlich's legal sociology, which had been already outlined in the beginning of the twentieth century.<sup>33</sup> The approach can serve as an effective counter-balance to preconceived ideals of social totality that subjugate human beings to allegedly universal ideals and make individual choices dependent on collective strategies (one might think here of Auguste Comte's idea of society as a *Grand Être*, or Emile Durkheim's conviction that the collective mentality supersedes every individual consciousness). Such a counter-balance is accomplished by certain epistemic elements incorporated into "ideal-realist" sociological theories of law. These elements

---

<sup>26</sup> RUETHERS, Bernd. Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus. 6. Aufl. Tübingen, 2004.

<sup>27</sup> LARENZ, Karl. Über Gegenstand und Methode völkischen Rechtsdenkens, Berlin, 1938; HARTMANN, Frank. Methodologische thinking with Karl Larenz. Frankfurt/M., 2001; KAUFMAN, Arthur & HASSEMER, Winfried. Enacted Law and Judicial Decision in German Jurisprudential Thought. In: The University of Toronto Law Journal. 1969, v. 19 (4) 4, p. 461-486.

<sup>28</sup> ZIMMERMANN, Augusto. Legislating Evil: The Philosophical Foundations of the Nazi Legal System. In: International Trade and Business Law Review. 2010, v. 13, p. 221-232; HALDMANN, Frank. Gustav Radbruch vs Hans Kelsen: A Debate on Nazi Law. In: Ratio Juris. 2005, v. 18(2), p. 162-178.

<sup>29</sup> SEITZER, Jeffrey & THORNHILL, Christopher. An Introduction to Carl Schmitt's Constitutional Theory: Issues and Context. In: Carl Schmitt, Constitutional Theory. Durham, 2008, p. 1-50; MCCOCNEY, Michael. Anarchy, Sovereignty, and the State of Exception: Schmitt's Challenge. In: The Independent Review. 2013, v. 17(3), p. 415-428.

<sup>30</sup> GURVITCH, Georges. Le temps présent et l'idée du droit social. Paris, 1931.

<sup>31</sup> TIMASHEFF, Nicholas. The Introduction to the Sociology of Law. New Brunswick, 2009.

<sup>32</sup> TREVINO, Javier A. Toward a General Theoretical-Methodological Framework for the Sociology of Law: Another Look at the Eastern European Pioneers. In: ULMER, Jeffrey T. (ed.). Sociology of Crime, Law, and Deviance. Greenwich, 1998, v. 1, p. 155-202; BANAKAR, Reza. Merging Law and Society: Beyond the Dichotomies in Socio-Legal Research. Berlin, 2003.

<sup>33</sup> REHBINDER, Manfred. Eugen Ehrlichs Seminar für lebendes Recht: eine Einrichtung für die Weiterbildung von Rechtspraktikern. In: Problemi filosofii prava. 2005, v. 3(2), p. 135-139.

allow the abstract totality of society to be split into innumerable sets of groups, communities, and factions, whose conventional standards are thus relativized and therefore may not claim to have universal validity.<sup>34</sup>

In this light, the two philosophical conceptions under discussion here — normative or analytical jurisprudence and sociological jurisprudence — can be examined with a view to their support for, or hostility to, human-rights discourse. A very important dimension is that both conceptions fall into the field of legal positivism and, therefore, are based on relativist philosophies which supposedly exclude human-rights discourse from their domain. This supposition is rooted in the widely-shared (although erroneous, in our opinion) conviction according to which recognition of human rights is possible only when admitting certain objective (universal) values underpinning these rights.<sup>35</sup> However, “the arrogant universalism of the powerful” is not a good tool for protection of human rights, as Jack Donnelly justly asserts in calling for “relative universalism.”<sup>36</sup> From this perspective, the fact that analytical and sociological conceptions of law are based on axiologically neutral assumptions may, on the contrary, provide a balance that protects human individuality from enslavement to purportedly universal (objective) values and great narratives.<sup>37</sup>

In order to investigate this dimension in the implicit discussions about fundamental rights in pre-war positivist philosophies of law,<sup>38</sup> we will address conceptions elaborated by the two Austrian scholars already mentioned which in large part outlined the further development of analytical and sociological jurisprudence in European legal philosophy.<sup>39</sup> These scholars are Hans Kelsen — a leading proponent of legal positivism, taken by some researchers to be “the lawyer of the twentieth century”<sup>40</sup> — and Eugen Ehrlich, generally considered the founding father of legal sociology. Kelsen lived through the terrific experience of the rise of Nazism in the

---

<sup>34</sup> BANAKAR, Reza. *Sociological Jurisprudence*. In: BANAKAR, Reza & TRAVERS, Max. *An Introduction to Law and Social Theory*. Oxford, 2002.

<sup>35</sup> See important debates on this issue: DONNELLY, Jack. *The Relative Universality of Human Rights*. In: *Human Rights Quarterly*. 2007, v. 29(2), p. 281-306; GOODHART Michael E. *Neither Relative nor Universal: A Response to Donnelly*. In: *Human Rights Quarterly*. 2008, v. 30(1), p. 183-193.

<sup>36</sup> DONNELLY, Jack. *The Relative Universality of Human Rights*, p. 301 ff. Using an oxymoron like “relative universality” does not seem to be the best means to argue for flexibility in understanding of rights; and in this context we would prefer to speak plainly about the relativity of human rights which, however, shall not be interpreted to diminish their crucial significance for contemporary societies.

<sup>37</sup> MANELI, Mieczyslaw. *Juridical Positivism and Human Rights*. New York, 1981; DEFLEM, Mathieu. *The Sociological Discourse on Human Rights: Lessons from the Sociology of Law*. In: *Development and Society*. 2011, v. 40(1), p. 101-115.

<sup>38</sup> We shall underscore once again that we are reconstructing here an implicit discussion which in reality did not take place, at least in the explicit terms of fundamental (human) rights. Nonetheless, the respective methodological positions of Ehrlich and Kelsen, as we will try to demonstrate below, logically lead to certain conclusions about the value and the mechanisms of protection of human rights, which became patent in the post-war works of Hans Kelsen.

<sup>39</sup> Even if it is true that Ehrlich has exercised much more influence on scholarly traditions in the US and in Japan than in Europe, at least in the first half of the twentieth century. See: ZIEGERT, Klaus A. *Introduction to the Transaction Edition*. In: EHRlich, Eugen. *Fundamental Principles of the Sociology of Law*. New Brunswick, 2009, p. XIX-XLIX; VOGL, Stefan. *Eugen Ehrlich’s Linking of Sociology and Jurisprudence and the Reception of his Work in Japan*. In: HERTOIGH, Marc (ed.). *Living Law: Reconsidering Eugen Ehrlich*. Oxford and Portland, 2009, p. 95-124.

<sup>40</sup> DREIER, Horst. *Hans Kelsen (1881-1973): „Jurist des Jahrhunderts“?* In: HEINRICH, Helmut, FRANZKI, Harald, SCHMALZ, Klaus, STOLLEIS, Michael (Hrsg.). *Deutsche Juristen jüdischer Herkunft*. München, 1993, p. 705-731.



late 1920's and 1930's in Austria and Germany, engaging in debates with Karl Schmitt<sup>41</sup> in which he defended liberal values in the law. He then fled to Switzerland and the US, from where he resolutely condemned the practice and ideology of Nazism. Eugen Ehrlich died in 1922 and did not witness the ensuing atrocities of the Nazi regime,<sup>42</sup> but having led most of his professional life in the pluralistic society of Bukovina,<sup>43</sup> he felt the importance of guaranteeing minorities' rights, which led him to the issue of constitutionalization of fundamental rights.<sup>44</sup>

From this standpoint, Marcos Maliska is right when claiming that Ehrlich's scientific and existential position was profoundly marked by democratic convictions and expressly favoured human freedoms.<sup>45</sup> In fact, Ehrlich stressed that law does not emerge directly from the society or from any other *Grand Être*, and it cannot be mechanically moulded in societal relations: only after being considered and evaluated by individuals, certain social facts can create normative constraints. Even if at some points Ehrlich shared the objectivist sociological ideas of Emile Durkheim and his school, he never accepted that social facts themselves could produce any "objective" normative regulation. In this sense, Ehrlich was rather closer to the *Verstehende Soziologie* of Max Weber. On the other hand, after having been for some time a follower of the *Freirechtsschule*,<sup>46</sup> Ehrlich preferred to form his own socio-legal conception which did not endorse a purely individualist account of the law. From this perspective, the Czernowitz thinker was overtly sceptical about limitless judicial discretion and did not accept the idea that everything that comes from judges is law.<sup>47</sup> For Ehrlich, judicial lawmaking is only a part of "the law of jurists," which, in its turn, represents only a part of the law.

In the following pages we will examine the combination of the positivist methodology and relativist axiology in the two legal conceptions elaborated respectively by Hans Kelsen and Eugen Ehrlich. We will try to determine what implications this combination could have for the issue of human rights, and to reassess the relevance of these two legal conceptions for the contemporary theoretical debates about human rights. To this end, we will first analyse the

---

<sup>41</sup> DREIER, Horst. The Essence of Democracy — Hans Kelsen and Carl Schmitt Juxtaposed. In: DINER, Dan & STOLLEIS, Michael. Hans Kelsen and Carl Schmitt. A Juxtaposition, Gerlingen, 1999, p. 71-79; PINELLI, Cesare. The Kelsen/Schmitt Controversy and the Evolving Relations between Constitutional and International Law. In: Ratio Juris. 2010, v. 23(4), p. 493-504; DYZENHAUS, David. Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought. In: Theoretical Inquiries in Law. 2015, v. 16 (2), p. 337-366.

<sup>42</sup> REHBINDER, Manfred. Neues über Leben und Werk von Eugen Ehrlich. In: Festschrift für Helmut Schelsky zum 65. Geburtstag. Berlin, 1978, p. 403-418.

<sup>43</sup> NELKEN, David. Eugen Ehrlich, Living Law, and Plural Legalities. In: Theoretical Inquiries in Law. 2008, v. 9(2), p. 443-471.

<sup>44</sup> MALISKA, Marcos Augusto. Introdução à Sociologia do Direito de Eugen Ehrlich. Curitiba, 2001, p. 129-148.

<sup>45</sup> Ibid.

<sup>46</sup> EHRLICH, Eugen. Freie Rechtsfindung und freie Rechtswissenschaft. In: EHRLICH, Eugen. Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freiheitslehre, M. REHBINDER (ed.). Berlin, 1967, p. 170-202 [first published in 1903]. RIEBSCHLAGER, Klaus. Die Freirechtsschule. Zur Entwicklung einer soziologischen Rechtsschule. Berlin, 1968, p. 95-97.

<sup>47</sup> EHRLICH, Eugen. Judicial Freedom of Decision: Its Principles and Objects. In: Science of Legal Method: Select Essays by Various Authors. Boston, 1917, p. 47-85; REHBINDER, Manfred. Richterliche Rechtsfortbildung in der Sicht von Eugen Ehrlich. In: REHBINDER, Manfred. Abhandlungen zur Rechtssoziologie. Berlin, 1995, p. 191-202.

general situation in legal philosophy in the nineteenth century, then will examine the basic principles of Kelsen's *Pure Theory of Law* and Ehrlich's legal sociology in order to draw some conclusions about how these conceptions can be engaged today in the human-rights discourse, and about methodological advantages that these theories might provide in this discourse.

## 2. Epistemic challenges to legal knowledge

One of the reasons to reconsider the intellectual heritage of Kelsen and Ehrlich with a view to the human rights issue resides in the pluralistic principles which imbue both conceptions under consideration here. Addressing the need for pluralism in various dimensions (methods, values, ideologies) at the end of the nineteenth century was not only the concern of the legal sciences. Accepting the view that the turn of the nineteenth and twentieth centuries was the period when classical rationality, with its linear schemes and monistic methodologies, was challenged and shattered by the new scientific revolution that brought the principle of relativity into the core of scientific research,<sup>48</sup> it comes as no surprise that new insights and ideas helped purge jurisprudence of its own preconceived opinions. Legal philosophy could not stand aloof from the general development of sciences; and it is quite natural that reconsidering the methodological arsenal of legal scholarship in light of the new positive philosophy (elaborated mostly in the scope of hard sciences and, also to some extent in social sciences) was on the agenda of legal thought in the first decades of the twentieth century.<sup>49</sup>

This agenda in the law as in many other sciences implied relativization rather than further rationalization of legal knowledge, differing from the trend of the previous two centuries. One of the methods of this reconsideration was to apply Neo-Kantian ideas to the province of jurisprudence. If it is accepted that neither nature nor society is subject to immutable principles or laws that dictate a linear, universal evolution, then references to necessary values or dimensions of law will inevitably appear dubious. Any such references can be considered culturally biased, or merely conventional.<sup>50</sup> Rationalist explanatory schemes based on naturalist assumptions (implying that there are natural laws hidden in nature awaiting discovery) failed to meet new challenges and to respond to various problems formulated in the domain of hard science.<sup>51</sup> If this thesis turned out to be true in hard sciences, then social sciences such as ethics or law also had to abandon the idea of eternal precepts which are identical for every society and

---

<sup>48</sup> HOLLIS, Martin & LUKES, Steven. *Rationality and Relativism*, Oxford, 1982. On the issue of paradigm change see: KUHN, Thomas. *The Structure of Scientific Revolutions*. Chicago, 1970.

<sup>49</sup> BERMAN, Harold J. *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge MA, 1983.

<sup>50</sup> See: BANAKAR, Reza. *The Politics of Legal Cultures*. In: *Scandinavian Studies In Law*. 2008, v. 53, p. 151-175, at 168-172.

<sup>51</sup> HALL, Marie Boas (ed.) *Nature and Nature's Laws: Documents of The Scientific Revolution*. New York, 1970.

allow the development of normative arguments (the traditional posture of natural-law doctrines).<sup>52</sup> However, the task was not to do away with any epistemic certainty (even if some existentialist philosophers suggested this), but to refine and to relativize the principles of this certainty within the new paradigm of relativity.<sup>53</sup>

However, if there are no universal truths or concepts, it became necessary to guarantee coherence of thought and the veracity of propositions, and to explain the binding force of law. Eugen Ehrlich and Hans Kelsen proposed two exemplary, though different, solutions to this epistemic conundrum in legal science. The former insisted that the criteria for veracity of legal knowledge and for validity of legal rules reside in social reality itself and, correspondingly, different social structures and environments provide varying standards for defining right or wrong.<sup>54</sup> For the latter, there was no solution to this problem in empiric reality at all; and in order to tackle it, Kelsen proposed relativizing the issue of truth and of validity, admitting that in the law no ultimate criterion can be formulated without committing metaphysical fallacies. His idea was to replace such criteria in the law by postulating that the starting point of legal thinking is a pure hypothesis or even a fiction, and that legal knowledge therefore contains no universal truths. Demonstrating this was the main objective of Kelsen's *Grundnorm*.<sup>55</sup>

To understand the relevance of these solutions, we should consider the "archaeology of legal knowledge" of the preceding century. Natural-law jurisprudence based on metaphysical precepts had started to fall apart in the nineteenth century, provoking thereby the collapse of traditional legal philosophy. This philosophy was rooted in an idealist method that sought to deduce general principles from nature and to use them to evaluate posited legal rules. This resulted in a dualism between positive law and natural law, the former being subordinated to the latter.<sup>56</sup> From this perspective, nature served as a source of validity, so that posited legal rules used to be considered as binding only insofar as they corresponded to nature (in the sense of the reasonable, social, moral nature of man, or in the sense of nature as the chain of causality). Correspondingly, positive legal rules were considered invalid if they were found irrational, unjust, or immoral. As to legal knowledge, truth about legal statements was also supposed to be deducible from assertions about the supreme truths and eternal principles governing nature and society, *i.e.* from natural law.<sup>57</sup>

---

<sup>52</sup> CARO, Mario & MACARTHUR, David (eds.). *Naturalism and Normativity*. New York, Press, 2010.

<sup>53</sup> SANKEY, Howard. *Rationality, Relativism and Incommensurability*, Aldershot, 1997, p. 149-184.

<sup>54</sup> ZIEGERT, Klaus. *Beyond "Living Law": Eugen Ehrlich's General Theory of Law*. In: PAPENDORF, Knut, MACHURA, Stefan, HELLMUM, Anne (eds.), *Eugen Ehrlich's Sociology of Law*. Wien, 2014, p. 17-38.

<sup>55</sup> KELSEN, Hans. *On the Basic Norm*. In: *California Law Review*. 1959, v. 47, p. 107-110.

<sup>56</sup> WEINREB, Lloyd. *Natural Law and Justice*. Cambridge MA, 1987.

<sup>57</sup> E.g., D'ENTREVES, Alessandro Passerin. *Natural Law: An Introduction to Legal Philosophy*. New York, 2009; RICE, Charles. *Some Reasons for a Restoration of Natural Law Jurisprudence*. In: *Wake Forest Law Review*. 1989, v. 24, p. 539-567.

By that time, the main epistemic problem of natural-law doctrines resided in the fact that they were not able to propose any objective criteria to uniformly and ultimately define rationality, justice, or morality. Each philosopher formulated what he considered to be immutable and eternal principles, basing these considerations on his own intuitive feeling of justice or, at best, on common sense. Quite expectedly, it turned out that common sense is different for various peoples and periods, because it depends on human conditions and on the paradigms of rationality accepted by a given society. The natural-law doctrines, which had dominated jurisprudence before the nineteenth century, could not survive this criticism: and, unable to establish claims to universality (be it universal morality or rationality), these conceptions were, to a considerable extent, meaningless.<sup>58</sup>

In the nineteenth century the natural-law doctrines were attacked from two different sides. The initial attacks were undertaken by the so-called “first positivists” (Jeremy Bentham, John Austin and others), who insisted that the law is nothing but commands of a sovereign; in their view, whatever does not proceed from the sovereign and his will is not legally binding and can be considered only as “positive morality.” There is no “law” in general, but only *the* law (with a definite article), which consists of legal rules, posited in a given country by a given sovereign. On the other hand, German proponents of the historical school of law (Carl Savigny, Georg Puchta and others) criticised the individualist approach of the natural-law doctrines (the approach that implies that someone, based on his or her personal experience, defines what is rational and moral for everyone), and proposed considering the law as a creation of the collective spirit (*Volksgeist*) which is the ultimate source of validity. In other words, if we want to know what the law of a country is, we should examine the collective mentality prevalent in the country, how it expresses itself in customs, rites, cultural habits, and other informal regulations. The written law is only of secondary significance, because it only amounts to the signs with the help of which the rules that already had existed before were formally expressed in texts. In this view, law is similar to language, and grows and develops in collective mentality and practice, so that legislators simply “fix” what has already grown up spontaneously, just as linguists fix, describe and sometimes propose altering language uses.

However, after the first waves of enthusiasm passed away, it became clear by the end of the nineteenth century that these two conceptions (the positivist and the historicist) were unable to offer a more accurate account of the law than did natural-law doctrines. Law cannot be conceived of simply as a set of commands issued by a sovereign, as the sovereign itself must

---

<sup>58</sup> KELSEN, Hans. The Natural Law Doctrine before the Tribunal of Science. In: KELSEN, Hans. What is Justice? Justice, Law, and Politics in the Mirror of Science. Berkley, 1957, p. 137-173. A caveat should be added here: the present analysis is confined to the mainstream natural-law doctrines and does not examine alternative versions of natural-law doctrines, from the so-called “revived natural law” to the contemporary ius-naturalist thinkers such as John Finnis, who relativized the concept of natural law and claimed to have thereby dissolved this conundrum.

first be defined through legal rules. At the same time, references to the will of a sovereign are nothing but metaphors, because “sovereign” is just a common denominator for all those who are engaged in law-making process, who usually pursue diverging interests and goals and who, consequently, have no common will. Also, the *Volksgeist* appeared to be a rather subjective projection of conservatively minded philosophers trying to discover in the collective mentality some immutable, transcendental values that take different forms in different historical eras but remain essentially the same, conserved across each particular people. One of the last representatives of the historical school of law, Karl Beseler, underscored this idealist dimension with particular clarity.<sup>59</sup>

It was at the moment of crisis in natural-law doctrines, and as the historical school and the first legal positivism were being elaborated (*l'école d'exégèse* in France, *Begriffsjurisprudenz* in Germany, etc.) that Kelsen and Ehrlich wrote their first influential works.<sup>60</sup> These works gradually became the grounds for heated discussions among legal philosophers of the time, and it should be mentioned *en passant* that reactions occurred not only in the German-speaking legal community, but also in other countries. Legal scholars in the US, such as Christopher Langdell, Wesley Hohfeld, Oliver Holmes Jr., and Roscoe Pound developed their research in a similar way,<sup>61</sup> as did Russian legal philosophers such as Nicolai Korkunov and Leon Petrazycki.<sup>62</sup> But we will leave these examples aside and turn to the epistemic conceptions elaborated by the two Austrian legal thinkers.

At the outset of the twentieth century, philosophers such as Ernst Mach demonstrated that, under the guise of objective principles of cognition, scholars deal with their own subjective convictions which may seem self-evident within a given common-sense framework, but which are not universal.<sup>63</sup> Pretended objectivity turns out to be a sophisticated subjectivity hidden behind the prevailing common sense that endorses preconceived opinions in concrete societies. For Kelsen, as for Ehrlich, — both wrote under the obvious influence of Mach’s philosophy<sup>64</sup> — the main problem of legal knowledge resided in the metaphysical assumptions on which the methods traditionally used by legal scholars were based. These assumptions implied that the law

---

<sup>59</sup> REIMANN, Mathias. Nineteenth Century German Legal Science. In: Boston College of Law Review. 1990, v. 31, p. 837-897, at p. 869-875.

<sup>60</sup> KELSEN, Hans. Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatze. Tübingen, 1911; EHRLICH, Eugen. Grundlegung der Soziologie des Rechts. Wien, 1913.

<sup>61</sup> LIKHOVSKI, Assaf. Czernowitz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence. In: Theoretical Inquiries in Law. 2003, v. 4(2), p. 621-657.

<sup>62</sup> COTTERRELL, Roger. Leon Petrazycki and Contemporary Socio-Legal Studies. In: International Journal of Law in Context. 2015, v. 11 (1), p. 1-16.

<sup>63</sup> COHEN, Hendrik Florens. The Scientific Revolution: A Historiographical Inquiry. Chicago, 1994, p. 37-45.

<sup>64</sup> LIKHOVSKI, Assaf. Venus in Czernowitz: Sacher-Masoch, Ehrlich and the Fin de Siècle Crisis of Legal Reason. In: HERTOIGH, Marc (ed.). Living Law: Reconsidering Eugen Ehrlich, p. 48-71; FEICHTINGER, Johannes. Das Neue bei Mach, Freud und Kelsen. Zur Aufkündigung der Legitimationsfunktion in den Wissenschaften in Wien und Zentraleuropa um 1900. In: FEICHTINGER, Johannes; GROSSEGGGER, Elisabeth; MATINELLI-KONIG, Gertraud; STACHEL, Peter; UHL, Heidemarie (eds.). Schauplatz Kultur — Zentraleuropa. Transdisziplinäre Annäherungen. Innsbruck–Wien–Bozen, 2006, p. 297-306.

has an immutable ideal dimension composed of absolute values or truths. This dimension was also preserved in the understanding of first positivism, which assumed that order, security and certainty prevail over all other values and thereby justify the absolute power of the sovereign, and the ensuing obligation of the citizenry to accept everything that proceeds from the sovereign.<sup>65</sup>

Such value absolutism had its counterpart in one-sided visions in which the law is reduced to one principle, be it power, justice, collective mentality, and so on. Both Ehrlich and Kelsen argued against this one-dimensional understanding of the law and called, although in different terms, for more pluralism in legal science.<sup>66</sup> Pluralism in this context signifies both methodological and axiological pluralism, the first protecting human knowledge from biases and aberrations, and the second shielding human self-determination from imposed values. In this way, as will be shown below, Kelsen and Ehrlich helped significantly to formulate the new agenda for legal philosophy in the twentieth century.

### 3. The methodological responses by Kelsen and Ehrlich

We will start with Kelsen, who, unlike most civil-law legal philosophers, succeeded in becoming quite well known and discussed in the Anglo-Saxon world. Kelsen's radical program was to purify legal science from odd and unnecessary elements which obstruct understanding of the law.<sup>67</sup> Legal science, as Kelsen asserted, was imbued with value judgments hidden behind the pretended objectivity of the moral obligation to obey legal rules. Apologies for this pretended moral obligation led to syncretism, in the sense of legal propositions (*Rechtssätze*) which from this vantage point should be understood as consisting of heterogeneous elements (the will of the rulers, values and maxims, factual behaviour). On the other hand, the prevalence of disguised evaluations finally results in ideologization of the entire science. It is natural for some people to believe that the law is about justice, the common good, or justified interests, for others to say that the law is about solidarity, and still others to suppose that the law is about special empathic emotions, and so on. The problem is not with these beliefs, but with the fact that such thinkers

---

<sup>65</sup> PRIEL, Dan. Towards Classical Legal Positivism. In: Comparative Research in Law and Political Economy. Research Paper No. 20/2011.

<sup>66</sup> Kelsen's idea of constructing a legal science based only on one method (imputation) might appear to refute this thesis. However, as it will be demonstrated in the next section, this Neo-Kantian perspective does not mean that other dimensions are irrelevant for cognition of the law — Kelsen's approach simply implied a more accurate distinction between methods and scholarly disciplines, without excluding the possibility of cooperation between these disciplines and combination of various methods in studying the law.

<sup>67</sup> STEWART, Iain. The Critical Legal Science of Hans Kelsen. In: Journal of Law and Society. 1990, v. 17(3), p. 273-308.

tend to consider their beliefs to be objective truths. What, then, is wrong with legal science? Kelsen's reply was — mythologizing resulting in syncretism.<sup>68</sup>

As a Neo-Kantian, Kelsen believed that each science has its own method, and that the method proper to jurisprudence must not be confused with the methods proper to sociology, ethics or psychology. These disciplines may also examine the law, but from standpoints that are irrelevant for lawyers concerned with validity of legal rules.<sup>69</sup> Based on the Kantian distinction between Is (*Sein*) and Ought (*Sollen*), the Austrian thinker asserted that the unique method for establishing validity of the law was the method of imputation. Kelsen explained<sup>70</sup> that when a sociologist or psychologist observes facts, he or she explains them by the principle of causality. Such a scientist might be concerned with how, when the average living standard drops, the crime rate rises, because some people cannot earn their bread otherwise than by committing crimes, and so on. This is one way to approach legal phenomena. But another way is to ascribe liability. If someone steals, for example, he or she is subject to a penalty of imprisonment for so many years. This approach does not depend on regular observations and does not describe any factual state of affairs.

For Kelsen, this difference is crucial: in the first case we simply review statements of facts, and in the second case we ascribe to a behavioural act certain legal consequences that shall follow this act. The fact that lawyers usually fail to distinguish between these two different situations is the cause of grave mistakes and misunderstandings, the most dangerous of which consists in bringing ideology into the province of the law. The task of legal science is to connect certain imputed facts with certain sequences established in legal texts, or in other words, to ascribe certain sequences to certain facts; all the rest goes beyond the borders of jurisprudence and falls into the scope of other disciplines, such as sociology, psychology, or ethics. With this unique method of imputation, the legal science is self-sufficient and does not need to address other sciences in order to assert the validity of the law and explain the specific *modus vivendi* of the law (the binding character of legal rules).<sup>71</sup>

Traditionally, in order to justify the binding force of the law, lawyers looked for moral principles, religious dogmas, or social facts (like that of solidarity or reasonableness) that make people believe that they are under an obligation to obey certain posited legal rules and to respect the axiomatic principles that underpin these rules. In Kelsen's view, this moral absolutism pollutes the methodological purity of jurisprudence. He contended that the validity or the binding

---

<sup>68</sup> EBENSTEIN, William. The Pure Theory of Law: Demythologizing Legal Thought. In: California Law Review. 1971, v. 59, p. 617-652.

<sup>69</sup> PAULSON, Stanley. The Neo-Kantian Dimension of Kelsen's Pure Theory of Law. In: Oxford Journal of Legal Studies. 1992, v. 12(3), p. 311-332.

<sup>70</sup> KELSEN, Hans. Causality and Imputation. In: Ethics. 1950, v. 61(1), p. 1-11.

<sup>71</sup> LANGFORD, Peter & BRYAN, Ian. Hans Kelsen's Concept of Normative Imputation. In: Ratio Juris, 2013, v. 26(1), 85-110.

force of the law could be described with the help of legal rules themselves. This is inevitably circular, but this is the way lawyers think about the law (here Kelsen meant mainly continental lawyers).<sup>72</sup> We obey and execute judicial decisions because someone called the “judge” has the competence to authoritatively settle disputes and his or her decisions, therefore, have an obligatory character. This competence is derived from certain legal rules (which might be fixed in procedural codes or in substantive laws), which, in turn, are valid insofar as they are voted for by a parliament; the parliament is empowered to pass laws if it is created and acting in accordance with the constitution; the constitution is valid if it is adopted in the way prescribed by the former constitution. Finally, we arrive at the “first constitution,” which serves as the first empowerment. It does not matter if this constitution has ever existed in reality: legal thinking simply needs a starting point in order to coherently explain the legal order and its validity.<sup>73</sup>

At this point the hypothesis of a basic norm (*Grundnorm*) enters as a shortcut for this first constitution. This basic norm is just a hypothesis or, as Kelsen conceded later, a fiction, something that is merely presupposed but does not exist in reality. Such a presupposition is indispensable for allowing Kelsen to approach the law in the manner proper to the field and purge it of ideology.<sup>74</sup> The question arises of whether Kelsen’s own conception was free from ideological stances. His critics insisted that ideological stances were present in the *Pure Theory of Law*, alleging that Kelsen favoured certainty in the law (with prejudice to justice, some asserted<sup>75</sup>) and that his basic norm bears a striking resemblance to certain metaphysical presuppositions of natural law.<sup>76</sup> But this question falls out of the scope of the present paper.<sup>77</sup>

With the help of these two key concepts (imputation and the basic norm), Kelsen attempted to establish legal science as an independent discipline and purge it of value judgements and biases. Despite widespread misunderstanding, Kelsen’s theory was intended to purify legal knowledge and not the law itself.<sup>78</sup> The Austrian thinker was not contending that the law is made up only of rules: he explicitly admitted that ideas, social facts, and politics are also important for understanding what the law is and how it functions in reality.<sup>79</sup> But examining the law from these standpoints is not the province of legal science, which has to examine the law

---

<sup>72</sup> GREEN, Michael Steven. Hans Kelsen and the Logic of Legal Systems. In: *Alabama Law Review*. 2003, v. 54, p. 365-413.

<sup>73</sup> BINDREITER, Uta. *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine*. Springer, 2003.

<sup>74</sup> PAULSON, Stanley. On the Puzzle Surrounding Hans Kelsen's Basic Norm. In: *Ratio Juris*. 2000, v. 1, p. 279-293.

<sup>75</sup> ROONEY, Miriam. Law Without Justice? The Kelsen and Hall Theories Compared. In: *Notre Dame Law Review*. 1948, v. 23, p. 140-172.

<sup>76</sup> See the criticism of the ius-naturalist inclinations of Kelsen in the writings of his contemporaries: SANDER, Franz. Die Idee der Gerechtigkeit. In: *Zeitschrift für öffentliche Recht*. 1928, v. VII, p. 507 ff.; HORVATH, Barna. Die ungarische Rechtsphilosophie. In: *Archiv für Rechts- und Wirtschaftsphilosophie*. 1930, v. 24, p. 531 ff.; ROSS, Alf. Validity and the conflict between Legal Positivism and Natural Law. In: *Revista Juridica de Buenos Aires*. 1961, v. 4, p. 46-90

<sup>77</sup> See in details: CHIASSONI, Pierluigi. Kelsen on Natural Law Theory. In: *Revus*. 2014, v. 23, p. 135-163.

<sup>78</sup> RAZ, Joseph. The Purity of the Pure Theory of Law. In: PAULSON, Stanley. *Normativity and Norms: Critical Perspectives on Kelsenian Themes*. Oxford, 1999, p. 237-252.

<sup>79</sup> KELSEN, Hans. What is Justice? In: KELSEN, Hans. *What is Justice? Justice, Law, and Politics in the Mirror of Science*. Berkeley, 1957, p. 1-24.



only from the perspective of imputation. Nonetheless, it does not preclude multi-disciplinary research in the law, or combining methods within the frame of particular projects.

This short description of Kelsen's *Pure Theory of Law*, — a theory that was already being outlined by its author in the first decades of the twentieth century — suggests the annoyance Kelsen must have felt when his compatriot, Eugen Ehrlich, published in 1913 his *Fundamental Principles of the Sociology of Law*. The main idea of this book was to show that the law is tantamount to the social order, or more precisely, to the multiplicity of orders that exist in various social groups and communities. According to Ehrlich's idea, the law coordinates social relations, and attributes to individuals their places in the social structure; this jural coordination is not a function of someone's will.<sup>80</sup> The society coordinates itself, or rather, it is the various social groups that shape their own forms, boundaries, structures, and relations within themselves and with other groups in a constant flux of communication.<sup>81</sup> Ehrlich explains that the law lies at the very foundations of the social order and is a constitutive part of this order, so that social life (which *per definitionem* is organized life) is impossible without the law. When, amidst the social spontaneity, some more or less constant relation arises, when these relations acquire a relative stability, and when this stability is somehow reflected and justified in human minds, we can, following Ehrlich, state that the law works in this social milieu.<sup>82</sup>

What is then the law? Ehrlich proposes many examples from history and ethnology to show that what we call the law is a sum of certain facts. In every society there are some basic "facts of the law" (*Tatsachen des Rechts*), such as possession, domination, usage and declaration of will.<sup>83</sup> These vital human interactions are regulated everywhere, although differently, because of differences in social conditions. Studying these facts and the factors that influence them in the given society is the proper subject-matter of legal science. Ehrlich argues: if we meet a voyager who visited a remote country, we may ask him how marriages are concluded there, or how one enters into a valid contract or make a will, but we hardly ever would ask him what the paragraphs of the statutes are that contain the rules on marriage, contract, or testament. These legal propositions also have significance for legal science, but are of secondary importance. We need to know first what the living law is. In fact, the living law and the official law can prescribe different behavioural acts, and quite frequently people prefer to obey the living law and to disregard the official law.<sup>84</sup> The analytical jurisprudence is wrong when confines itself only to

---

<sup>80</sup> "The inner order of the associations of human beings is not only the original, but also, down to the present time, the basic form of law" (EHRlich, Eugen. *Fundamental Principles of the Sociology of Law*, p. 77).

<sup>81</sup> ZIEGERT, Klaus A. *The Sociology behind Eugen Ehrlich's Sociology of Law*. In: *International Journal of Sociology of Law*. 1979, v. 7, p. 225-273.

<sup>82</sup> REHBINDER, Manfred. *Die Begründung der Rechtssoziologie durch Eugen Ehrlich*. 2. Aufl. Berlin, 1986.

<sup>83</sup> EHRlich, Eugen. *Fundamental Principles of the Sociology of Law*, p. 123.

<sup>84</sup> ZIEGERT, Klaus A. *World Society, Nation State and Living Law in the Twenty-first Century*. In: HERTOOGH, Marc (ed.). *Living Law: Reconsidering Eugen Ehrlich*. Oxford/Portland, 2009, p. 223-236.

examination of the official law and its prescriptions; the most important thing for lawyers and for ordinary people is to know exactly the living law which practically binds human behaviour.<sup>85</sup>

Stressing the constitutive and primordial character of legal facts, Ehrlich writes “The state existed before the constitution; the family is older than the order of the family; possession antedates ownership; there were contracts before there was a law of contracts; and even the testament, where it is of native origin, is much older than the law of last wills and testaments.”<sup>86</sup> He argues that doctrinal lawyers are wrong when they deny the validity of social conventions that shape human behaviour, because if we want to predict real consequences and their impact on the strategies of human beings, we also need to encompass these unwritten conventions, habits, usages, and traditions. Ultimately, it is in these conventions that Ehrlich searches for the sources of the validity of the law. This idea underpins the famous dictum Ehrlich included in the foreword to his opus of 1913: “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.”<sup>87</sup>

It is easy to see that the conceptions of Kelsen and Ehrlich were based on significantly diverging methodological principles, and it is no wonder that, a couple years after the publication of Ehrlich’s book in 1913, these two scholars entered into debates with each other. These debates were published in two issues of a German journal in 1915 and 1916.<sup>88</sup> In these debates, Kelsen offered two main criticisms of Ehrlich’s thought. Ehrlich, he wrote, did not see a difference between the law and morality, religion, and other regulative mechanisms of society that bring about the social order. Ehrlich also failed to respect the irreconcilable gap between Is and Ought, deducing mandatory rules from factual behaviour. In his replies, Ehrlich tried to defend his position by offering psychological criteria for differentiating between law, morality, and etiquette; he also insisted that some legal phenomena cannot be explained without reference to factual behaviour (like customary law) and that this reference does not imply amalgamation of causality and modality.<sup>89</sup> But it seems Ehrlich lost the debates because of his strategy of reiterating terminological issues and avoiding substantial discussion, while Kelsen challenged the very foundations of Ehrlich’s legal sociology.<sup>90</sup>

After the debates ended, Ehrlich re-elaborated the chief ideas of his legal sociology,

---

<sup>85</sup> FRIEDMAN, Lawrence M. *Law and Society: An Introduction*. Prentice Hall, 1977.

<sup>86</sup> EHRlich, Eugen. *Fundamental Principles of the Sociology of Law*, p. 35-36.

<sup>87</sup> *Ibid.*, p. 15.

<sup>88</sup> KELSEN, Hans & EHRlich, Eugen. *Rechtssoziologie und Rechtswissenschaft. Eine Kontroverse (1915/1917)*. Baden Baden, 2003.

<sup>89</sup> In this aspect, there is no unbridgeable gulf between the ideas of Kelsen and the conception of Ehrlich. See: ANTONOV, Mikhail. *History of Schism: the Debates between Hans Kelsen and Eugen Ehrlich*. In: *International Journal of Constitutional Law*. 2011, v. 1(5), p. 5-21.

<sup>90</sup> VAN KLINK, Bart. *Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen*. In: In: HERTOIGH, Marc (ed.). *Living Law: Reconsidering Eugen Ehrlich*, p. 127-156.

paying much more attention to legal statements (propositions), to the judicial application of the law, and to analytical jurisprudence. These changes are patent in his two later works, published in 1917-1918.<sup>91</sup> The turbulence of the years of the First World War and of the following years kept the legal scholar from Bukovina from finalizing the revisions to his socio-legal conception, and his premature death in 1922 put an end to further development of his methodological project.<sup>92</sup> Kelsen, on the other hand, lived a longer life, and in the 1940's he considerably revised his ideas about the Is and Ought divide, inquiring more profoundly into factual conditions that determine normative regulation in different societies.<sup>93</sup>

These two thinkers offered insights that became guidelines for discussions among Western legal philosophers throughout the twentieth century. One of the main contributions of Kelsen was his repeated criticism of the dogmatic idea of mechanical application of legal rules: no rule can foretell in advance what the peculiarities of a concrete situation will be and how a judge should decide on this situation.<sup>94</sup> That is why legal rules are only frameworks that are filled with regulatory prescriptions by judges (and other law officers), who create individual legal directives and thereby definitively regulate the behaviour of parties to a court case (to a legal conflict). With the help of the idea of dynamic legal order and of continuous creation of law, which is at the same time application of law, Kelsen resolutely rejected ideological schemes of traditional jurisprudence, such as the distinction between public and private law, between subjective and objective law. In turn, Ehrlich showed that legal regulation in society is not based on transcendental values but is in contact flux, and is constantly reshaping itself in an "autopoietic" process, to employ modern terminology. For Ehrlich, the "law" is a momentary equilibrium of social forces, interests, and ideas; and this social order is subject to further spontaneous modifications. But describing this equilibrium is not all that can be said about the law, as legal regulation appears only after human beings connect a factual state of affairs with their previous experience and with their ideas about justice, and after this combination is ascertained with reference to whatever is considered to be the source of law in a given society.

---

<sup>91</sup> EHRLICH, Eugen. Die richterliche Rechtsfindung auf Grund des Rechtssatzes. In: Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts. 1917. Bd. 67, p. 1-80; EHRLICH, Eugen. Die juristische Logik. 2. Aufl. Tübingen, 1925.

<sup>92</sup> REHBINDER, Manfred. Eugen Ehrlich als Rechtslehrer. In: Problemi filosofii prava. 2005, v. 3(2), p. 140-146.

<sup>93</sup> KELSEN, Hans. Vergeltung und Kausalität: Eine soziologische Untersuchung. Chicago, 1941. Compare with Kelsen's initial position: KELSEN, Hans. Über Grenzen zwischen juristischer und soziologischer Methode. Tübingen, 1911.

<sup>94</sup> PAULSON, Stanley. Formalism, 'Free Law', and the 'Cognition' Quandary: Hans Kelsen's Approaches to Legal Interpretation. In: The University of Queensland Law Journal. 2008, v. 27(2), p. 7-39.

#### 4. Ehrlich and Kelsen in the human-rights discourse

The methodological postures adopted by these two thinkers were favourable to the advance of human rights for several reasons which we will enumerate below. This enumeration does not pretend to be exhaustive and our purpose here is merely to draw attention to this dimension in the work of Kelsen and Ehrlich.

If we employ the conceptions of the two Austrian legal thinkers to illustrate how human rights were conceived in their relations to the state and its sovereignty, it is not because these thinkers are famous of their work in this field. Rather, on the contrary, Hans Kelsen's *Pure Theory of Law* was, as shown above, often considered the bastion of exclusive (or hard) positivism which rules out the very possibility of any supra-legal principles that supersede posited legal enactments. Taken in the sense of the famous Schmittean sociological criticism directed against formal normativity of the law and favouring indeterminacy of political decision,<sup>95</sup> Ehrlich's conception could have been interpreted as a threat to human rights, a denial of democracy and constitutionalism because of its focus on facticity. But both these interpretations would be incorrect.

As we have insisted above in this paper, Kelsen's *Pure Theory of Law* was not intended to strip the law itself of its ideal dimension and to purge it of all value judgments. For the Austrian legal scholar, the law is a technique for enforcing peaceful co-existence between human beings, none of whom is entitled to impose his or her views or values on other people. All people living in society should be equally subordinated to the law, no matter what values they endorse (justice, certainty, equality, peace, etc.), and the law should be applied equally to all. This dimension of the law is described by Kelsen as its static aspect. In reality this aspect is often thwarted by the individual choices made by judges who consider cases differently, and consciously or unconsciously prefer certain values and correspondingly apply the same legal texts with different interpretations. It is clear that actual, flesh-and-blood judges, following their own ethical credos, tend to prioritize different values when adjudicating. This is the dynamic aspect of the law.

Kelsen is reputed to be a relentless critic of natural-law doctrines and similar metaphysical ideas about non-positated law as a purported criterion of validity for posited law. Nonetheless, this criticism of metaphysical stances in law did not preclude Kelsen from formulating certain ideas that are compatible with the contemporary conception of human rights

---

<sup>95</sup> ROTTLEUTHNER, Hubert. Substanzieller Dezisionismus. In: ROTTLEUTHNER, Hubert (Hrsg.). *Recht, Rechtsphilosophie und Nationalsozialismus*. Wiesbaden, 1983, p. 20-35.

and are important for it.<sup>96</sup> On the one hand, his philosophy places special value on legal certainty and peaceful coexistence, which are cornerstones for the protection of human rights. On the other hand, he also acknowledges a principle of relativity that guarantees human freedom, including the freedom to balance different values.

This approach yields a viable conception of democracy which can be stable, in Kelsen's opinion, only in an environment of value pluralism. This pluralism, in turn, underpins the value of human individuality and protects human autonomy from totalitarian pretensions based on such noble ideals as social solidarity or public good.<sup>97</sup> Therefore, only positive philosophy can make someone free, liberate him or her from the moral authority of supra-individual totalities such as Society, the State, and the like. Contrary to widespread opinion, Kelsen did not claim that justice should have no place in the law — his requirement of purity concerns only legal science, which should be value-free when examining the law, and does not concern the law as such. He explicitly admitted that the application and interpretation of the law undoubtedly involves legal values such as justice or equity.<sup>98</sup>

As to Eugen Ehrlich, at first sight his legal sociology appears to exclude any ideal dimension that stands above customary law, the living (soft) law, the official (statutory) law and the law of jurists. For Ehrlich, existence (the binding force) of law does not depend on any personal or supra-personal value judgments, but derives from certain implicit societal conventions embodied in practical behaviour and in the minds of human beings. The very facticity of law guarantees that under certain conditions (repeated application, *opinio necessitatis*, congruence with the social structure of the given community) it will be transformed into normativity, as Ehrlich seemed to assert in his *Fundamental Principles of the Sociology of Law* (1913), following the idea of Georg Jellinek regarding the “normative force of the factual.”<sup>99</sup> Law is therefore a set of constraints that each societal community elaborates to keep itself integrated and to distribute rights and obligations among its members.

From this perspective, law grows from facticity and reaffirms the factual links that are already extant in the societal environment, providing these links with the normative (binding) force.<sup>100</sup> Such an environment can be propitious for the protection of individual freedoms, or not, but in any case the regulation created in this environment will be binding, no matter how its contents are evaluated from the standpoint of protecting human freedom. Therefore, the law as

---

<sup>96</sup> INGRAM, David. Reconciling positivism and realism: Kelsen and Habermas on democracy and human rights. In: *Philosophy and Social Criticism*. 2014, v. 40 (3), p. 237-267.

<sup>97</sup> KELSEN, Hans. *Vom Wesen und Wert der Demokratie*. Tübingen, 1. Aufl, 1920, 2. Aufl, 1929; KELSEN, Hans. *Foundations of Democracy*. In: *Ethics*. 1955, v. 66(1/2), p. 1-101.

<sup>98</sup> KELSEN, Hans. *What is Justice? Justice, Law, and Politics in the Mirror of Science*. Berkley, 1957.

<sup>99</sup> JELLINEK, Georg. *Allgemeine Staatslehre*. 3d ed. 1960, Bad Homburg, p. 308 ff.

<sup>100</sup> ANTONOV, Mikhail. Normativity and Facticity of Law in the Legal Sociology of Eugen Ehrlich. In: *Pravo Ukrainy*. 2013, v. 4, p. 263-272.

facticity will preserve its binding force, even if its posited enactments overtly violate human rights.<sup>101</sup>

But this does not necessarily mean that human rights are irrelevant from the standpoint of legal sociology. As shown above, Ehrlich's conception of the living law underscores legal pluralism, which carries out the same function as methodological and value pluralism in Kelsen's conception. To wit, this legal pluralism (implying a multitude of social orders, groups, regulations, organs, opinion and values) conceptually keeps any authority or totality from interfering with personal value choice and superimposing its value over the value of the individual human being, constraining his or her freedoms. However, this interference can take place in real life, where pluralism is subjugated to authoritative practices of regulation and governance.

One of the main epistemic difficulties of human rights is connected with the uncertainty of the sources of their validity and with delimiting their exact limits. Kelsen and Ehrlich implicitly proposed quite original replies which have analytical consequences for fundamental rights and which differ quite substantially from the supposed disclaimer of human rights generally attributed to legal positivists and legal sociologists. If, following Ehrlich, we admit that the law derives its validity from personal convictions and implicit social conventions, the very machinery of the law cannot function effectively without addressing and considering these convictions and conventions. Human rights are a quite new instrument in contemporary Western societies, hardly conceivable in Antiquity or in the Middle Ages, and even nowadays unevenly received in non-Western countries. In contemporary societies (at least, in what is called "the civilized nations"), the empowerment of authorities to create law is generally linked to the conventionally-accepted notion that this empowerment is valid only to the extent it does not contravene basic rights. The nature of such rights, how they should be balanced, where their limits are and what their correct interpretation is — all this is subject to the particularities of local legal cultures and to local/regional normative frameworks.<sup>102</sup>

As to Kelsen, if one asserts that human rights are presupposed in the way that the basic norm is presupposed, then human rights can be said to be "hanging in the air," as pure hypotheses or fictions. On the one hand, this objection is partly true, because for Kelsen human rights, just as any rights and obligations in general, are not natural kinds, in the sense that they cannot be found somewhere in nature or in society. The entire edifice of the law, in this sense, hangs in the air or, more correctly, is just a model of thinking (*Denkenbild*) that allows human

---

<sup>101</sup> ANTONOV, Mikhail. Eugen Ehrlich – State Law and Law Enforcement in Societal Systems. In: *Rechtstheorie*. 2013, v. 44(3), p. 287-313.

<sup>102</sup> ANTONOV, Mikhail. In the Quest of Global Legal Pluralism. In: *Positivität, Normativität und Institutionalität des Rechts*. Festschrift für Werner Krawietz zum 80. Geburtstag. Berlin, 2013, p. 15-30.

beings authoritatively to coordinate their mutual behaviour acting as if (*als ob* — in the sense of Vaihinger's philosophy<sup>103</sup>) there were a basic norm. Accepting that their behaviour is subject to legal rules, human beings agree to follow the rules as if they were established pursuant to whatever the constitution (written or, more often, unwritten) of their society happens to be. If this constitution includes certain guarantees of individual freedoms, they shall be respected, whatever the feelings are of people about these freedoms (it happens quite frequently, even in Western societies, that some rights or freedoms do not have majority approval), what the opinions of the ruling elites are about the practicability of protecting certain minorities, and what the difference is between the "law in books" on human rights and the "law in action."

It follows, from another perspective, that in the case of a normative conflict between national and international law on human rights, the latter will take precedence, because it is supposed to be the source of validity for rules of national law. Kelsen has famously argued in favour of a monist system, placing international law above national law, insofar as only international law can define the limits of a state and its sovereign rights, including the right to legislate. Could the efficacy of protection of human rights in a given country depend on what system (monist or dualist) this country adheres to? This question is very complicated and cannot be addressed here, as well as the question of whether international courts have a subsidiary or primary role in defending human rights. However, we can suppose generally that international law and international courts provide more guarantees (or at least, some additional guarantees) to individual freedoms, and, in this respect, Kelsen's conception is favourable to protection of human rights.

Ehrlich did not address the issue of whether the monist or the dualist system has primacy. But two important considerations can be taken into account here. Firstly, Ehrlich reiterated that state law may not claim to have supreme validity and its effect is, in the final resort, dependent on how state law is accepted, interpreted and applied in communities. Societal conventions on human rights therefore should take precedent over state law and its restrictions, regardless of any concerns about sovereignty and its limits. Secondly, international law is essentially akin to customary law; it establishes as binding what has been followed so far by states in their mutual relations and what is admitted in the international community. In this sense, international law is created by the international community, and Ehrlich's theory can be construed here to provide a similar response: the state shall not interfere with the internal life and regulation of communities.

The same considerations can be applied to the question of parliamentary sovereignty which sometimes is invoked to defend the state from interference in its legislative policies (in a

---

<sup>103</sup> VAIHINGER, Hans. *The Philosophy of 'As if': A System of the Theoretical, Practical and Religious Fictions of Mankind* (Transl. by Charles Ogden). New York, 1924.

broad sense including also law made by courts and administration), even if such policies are considered to contravene human rights.<sup>104</sup> In light of Kelsen's thesis about the coincidence of law and state, insofar as the state is a synonym for centralized legal order, there is no analytical possibility for opposing parliamentary sovereignty and the (human) rights.<sup>105</sup> This opposition turns out to be one of the erroneous ideological dualisms that Kelsen attempted to overcome in his *Pure Theory of Law*. Opposing rights and sovereignty is the same ideological fallacy as opposing state and law, public and private law, and so on. Consequently, sovereignty is nothing but another word to describe the self-referential character of the law, which prescribes rules for its own creation and application, and is itself the source of its own validity. Viewed from this perspective, parliamentary sovereignty cannot be utilised to impose constraints on fundamental rights, because it simply indicates the way of reproduction of legal rules containing also fundamental rights protecting human freedom. Analytically, therefore, there can be no contradiction between such rights and sovereignty, because they both are signs of the same normative reality — the legal order and its circular scheme of validity.

Ehrlich did not write any works specifically dealing with the issue of parliamentary sovereignty, but the general logic of his conception leads to the conclusion that sovereignty cannot prevail over pluralistic society and its communities and legal orders. Sovereignty can be important only as an aspect of the state legal order which, as Ehrlich fervently insisted, does not have pre-established precedence over other legal orders of society. Even if the issue of precedence between the state legal order and other legal orders is referred to the respective authority of the orders over the behaviour of those who are subject to either, sovereignty still has no normative weight tipping the scale in its favour when the state legal order collides with other orders (including the international legal order).

One further aspect is connected with the application of the law. Kelsen assumed that this is a continuous process, and that therefore legal rules cannot be “applied” in the literal sense of this verb. Rules are created, or endowed with meaning, at every stage of their application. Therefore, what matters for the protection of human rights is not written texts, but rather the mentality of judges (here and below “judges” also includes other law officers) — the way they make a link between the factual situation and the first constitution (the basic norm) that endorses reinterpreting and rules in their application. In this view, so-called “statutory injustice” and the “*Gesetz ist Gesetz*” principle do not determine the factual behaviour of judges and their decisions. Every judge is simultaneously a decision-maker and a lawmaker who is responsible for the meaning he or she attributes to the rule (or, as Kelsen would say, “creates the rule”) to be

---

<sup>104</sup> The situation in Russia can be cited as an example: ANTONOV, Mikhail. Conservatism in Russia and Sovereignty in Human Rights. In: Review of Central and East European Law. 2014, v. 39, p. 1-40.

<sup>105</sup> KELSEN, Hans. Das Problem der Souveränität und die Theorie des Völkerrechts. Tübingen, 1920.



applied in this given situation. Surely, this can be a very dangerous power in the hands of a judge, which can transform “rule of law” into *gouvernement des juges*. But, on the other hand, this approach reveals the real power possessed by judges and, by this fact, justifies holding judges accountable for the outcome of court proceedings. Here, a judge is not a puppet speaking the words of the law (to recall Montesquieu’s celebrated metaphor), but the real master of legal system, who cannot justify a poor decision by referring to bad laws.

Similar remarks can be made about Ehrlich’s sociology of law. In this sociology the real power does not belong to parliaments, which may sometimes create “dead norms” or, at best, give some very general instructions which should be implemented in a manner corresponding to the practical uses and conventions accepted in the given community. Here, the sociology of law provides the factual material needed for further interpretation and application of laws, which ultimately means remodelling these laws. Statutes are very imprecise instruments and their utilization in every situation requires the judge to consider an archive of legal documents, factual engagements and other sources to determine what the living law for a particular community is, and which interpretation should be applied for the relevant statutory provisions.

This approach to parliamentary sovereignty can have an ambiguous effect. On the one hand, in a “healthy” community, even unjust rules will be implemented in a way so that the community protects the freedom of human beings. On the other hand, a “sick” community with an underdeveloped (or, perhaps, non-Western) legal culture might implement the laws in a way that obstructs the function of formally recognized instruments (the constitution or/and international treaties). This is something that happens frequently in some underdeveloped non-Western countries, where the instruments for protecting human rights remain largely idle because the population is not prepared to use them.

The question of constitutional review can be considered in a similar prism; the very idea of such review is intrinsically connected with the presumption that statutes are not the supreme source of legal regulation in society. This implies that courts have to address societal conventions or the hypothetical foundations of their legal order to check how the statute in question is embedded into this legal order. Not by a coincidence did Kelsen become the founding father of the continental model of constitutional review and one of the originators of the Austrian Constitutional Court.

Here another dimension arises which is important in connection with protecting human rights. If some peoples are underdeveloped and do not recognize human rights, are other peoples (the “civilized nations”) entitled to impose such rights? The debates about the purposes and failures of the so-called “responsibility to protect” inevitably endanger the authority of human rights: these rights, and their claim to universality, quite often fall under criticism when

“humanitarian interventions,” such as those in Libya and Yugoslavia, are condemned. Which solutions do Kelsen and Ehrlich offer to these challenges? Their conceptions are designed in a way to mitigate such problematization through relativization of the issue of sovereignty, also in the sense of the “parliamentary sovereignty.” For Ehrlich each community elaborates organic rules (“the living law”) for the organization of its internal life, and in their peaceful collaboration these communities create a normative web of legal regulation for the entire society. For Kelsen, even if the state may establish some rules and principles in the texts of statutes, it is up to a judge to attribute due meaning to these texts in the light of the concrete situation, considering the ultimate goal of the law to establish peaceful coexistence. From this perspective, interventions and interference constitute something abnormal for legal regulation, which in an ordinary situation comes from below (i.e., from communities for Ehrlich, or judges for Kelsen) who create the truly binding rules. Here sovereignty seems to benefit from the both conceptions, although sovereignty is not supposed to be absolute.

As Petra Gumplova justly mentions, “Law in Kelsen’s theory has this unique double normative purpose: it enables a peaceful, nonviolent arbitration of conflicts both between individuals and the states, and it preserves individual freedom to the largest extent possible, especially when organized in conformity with principles and institutions of constitutional democracy.”<sup>106</sup> This means that the law is justified insofar as it secures the peaceful coexistence of individuals and states, and the machinery of the law functions to secure this peaceful coexistence. In the perspective of the monist system advocated by Kelsen, human rights as the *ius cogens* of contemporary international law prevail over rules of the state law.<sup>107</sup> International law, therefore, indirectly endorses coercive intervention in inhumane practices of sovereign states, but this law still lacks effective dispute-resolution organs and enforcement bodies to secure the protection of internationally-recognized human rights. That is why Kelsen aspired to establish a world legal order, a *civitas maxima*, that would effectively enforce the peaceful protection of law-and-order and, we may add here, of human rights.<sup>108</sup> Even if this project of Kelsen’s (along with his conception of democracy and formal normativity) is described by some scholars as a “utopia of legality,”<sup>109</sup> it still remains an important topic for discussion among international lawyers.

Ehrlich, on the other hand, was critical of all attempts by state authorities to interfere with internal legal regulation in communities. His theory provides no basis for concluding that

---

<sup>106</sup> GUMPLOVA, Petra. Law, Sovereignty, and Democracy: Hans Kelsen’s Critique of Sovereignty, p. 2. Available at [http://www.newschool.edu/uploadedFiles/NSSR/Departments\\_and\\_Faculty/Political\\_Science/Recent\\_Placements/Gumplova-Law\\_Sovereignty\\_Democracy.pdf?n=7291](http://www.newschool.edu/uploadedFiles/NSSR/Departments_and_Faculty/Political_Science/Recent_Placements/Gumplova-Law_Sovereignty_Democracy.pdf?n=7291)

<sup>107</sup> KELSEN, Hans, General Theory of Law and State. Cambridge MA, 1945, p. 330–339.

<sup>108</sup> ZOLO, Danilo. Hans Kelsen: International Peace through International Law. In: European Journal International Law. 1998, v. 9 (2), p. 306-324.

<sup>109</sup> VINX, Lars. Hans Kelsen’s Pure Theory of Law. Legality and Legitimacy. Oxford, 2008, p. 66-68.

an intervention of “civilized nations” in a national legal order (for regime-change or other, more honourable purposes) composed of communitarian legal orders would be legitimate, because such interventions would presumably endanger the normal functioning of the law in these societies. This has occurred in the recent past in Somali, Iraq, Afghanistan and in some other countries. In certain circumstances, however, interference can be condoned, e.g., in order to protect (national, religious, cultural and other) minorities, provided that such interference is not destructive to the society in question.

## Conclusion

In this paper we have attempted to outline the main methodological and epistemic properties of the legal conceptions of Hans Kelsen and Eugen Ehrlich in light of their presumed relevance to human-rights discussions in the contemporary world. This relevance is examined against the background of the principle of sovereignty that is currently often used to restrict interventions in the policies of states. Universalist claims seem to lie in a conception of human rights which strives to offer superior criteria for assessing the laws and policies of states. Sovereignty in its classical, Westphalian sense potentially can encounter these claims and even rebuff them by referring to the power of discretion or, to put it more mildly, the margin of appreciation that allows national governments to decide what rights and obligations their citizens enjoy and whether to cooperate with international courts and other supra-national bodies.<sup>110</sup>

The two conceptions examined above offer a nuanced and careful account of the ways law is created in society. Ehrlich and Kelsen proposed combining several perspectives — methodological, epistemic, and axiological — thereby allowing a multifaceted approach to the law and, at the same time, a philosophical perspective that secures human autonomy and freedom from “great narratives” and governmental interventions. This perspective opens a variety of opportunities for better understanding of the balance between individual and collective interests, and between the significance of rights and sovereignty. We have tried to sketch the most important dimensions in which these theories can be useful to contemporary legal science. Our objective here was to argue that the legal conceptions of Ehrlich and Kelsen are still relevant to debates in the fields of international or constitutional law, to legal philosophy about the limits of human rights and the epistemic conditions for identifying these rights, and for understanding how these rights at the same time can claim a universal character and remain culturally

---

<sup>110</sup> PRIBAN, Jiří. *Sovereignty in a Post-Sovereign Society: A Systems Theory of European Constitutionalism*. Ashgate, 2015.

embedded. The principle and the value of relativity that underpins the *Pure Theory of Law* of Kelsen and the legal sociology of Ehrlich are of particular importance for discussing the “relative universality” (in the sense of Jack Donnelly) of human rights. The relativity of human rights and of the values that underlie them does not impede recognition of and protection for these rights, provided that they are taken for what they really are: a set of normative instruments based on the socially accepted standards and rooted in the foundation of Western-type legal orders. The theories considered above suggest many insights about the way human rights be understood as relative but fundamental norms.

Author:

Dr. Mikhail Antonov

National Research University Higher School of Economics.

Associate Professor at the Department of Theory and History of Law and of State (Saint Petersburg, Russia)

E-mail: [mantonov@hse.ru](mailto:mantonov@hse.ru)

**Any opinions or claims contained in this Working Paper do not necessarily reflect the views of HSE.**

© Antonov, 2016