ISSN 1982-0496

THE LEGAL CONCEPTIONS OF HANS KELSEN AND EUGEN EHRLICH: WEIGHTING HUMAN RIGHTS AND SOVEREIGNTY[1]

AS CONCEPÇÕES JURÍDICAS DE HANS KELSEN E EUGEN EHRLICH: PONDERAÇÃO ENTRE DIREITOS HUMANOS E SOBERANIA

Mikhail Antonov

Associate professor at the Law Faculty at the National Research University "Higher School of Economics" in Saint Petersburg (Russia).

Resumo

Este artigo considera a relevância das concepções jurídicas de Eugen Ehrlich e Hans Kelsen para os debates contemporâneos sobre direitos humanos e seus limites. Afirma-se que as concepções de Ehrlich e Kelsen reforçam uma abordagem multifacetada do Direito e, ao mesmo tempo, asseguram a autonomia humana e a liberdade em face das "grandes narrativas" e das intervenções governamentais. Essa perspectiva abre uma variedade de oportunidades para uma melhor compreensão do equilíbrio entre os interesses individuais e coletivos, entre o significado dos direitos e a soberania. Ambas as concepções são ainda atuais para os debates nos campos do Direito Internacional, do Direito Constitucional e da Filosofia do Direito sobre os limites dos direitos humanos e sobre as condições epistêmicas de identificação destes direitos, de compreensão de como esses direitos são e, ao mesmo tempo, podem reivindicar um caráter universal, permanecendo culturalmente incorporados. O princípio e o valor da relatividade que sustentam a Teoria Pura do Direito de Kelsen e a Sociologia do Direito de Ehrlich são de particular importância para a discussão da "universalidade relativa" dos direitos humanos.

Palavras-Chave: Constitucionalização. Convenções Sociais. Direitos Humanos. Eugen Ehrlich. Hans Kelsen. Normatividade. Teoria Pura do Direito. Sociologia do Direito.

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

Abstract

This paper considers the relevance of the legal conceptions of Eugen Ehglich and Hans Kelsen for the contemporary debates on human rights and on their limits. It is asserted that the conceptions of Ehrlich and Kelsen enhance a multifaceted approach to the law and, at the same time, such 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, between the significance of rights and sovereignty. Both conceptions are still actual for the debates in the fields of international or constitutional law, and legal philosophy about the limits of human rights and about epistemic conditions for identifying these rights, for understanding how these rights are the same time can claim for a universal character and remain culturally 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" of human rights.

Key-words: Constitutionalization. Eugen Ehrlich. Hans Kelsen. Human Rights. Legal Sociology. Normativity. Pure Theory of Law. Social Conventions.

1. INTRODUCTION

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

Even if these legal scholars diverged significantly on some points, and represent two different legal theories (analytical jurisprudence and sociological jurisprudence),

[2] See detailed accounts on such views: TREVINO, 2013, p. 26-47; SOMEK, 2007, p. 409-451.

there are two major dimensions that bring these them together. Their conceptions were formulated to meet the same epistemic challenges that legal science faced in the first decades of the XXth century, and both Kelsen and Ehrlich sought to work out such a pluralistic understanding of law that would take a better account of relativity of legal knowledge. This led Kelsen and Ehrlich to methodological pluralism which was reflected in value pluralism to which both legal scholars adhered. Substantially, such pluralism favoured personal choice both in the epistemic and axiological aspects, and promoted democracy where human beings were considered to be autonomous authors of the rules by which is governed 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 more beneficent effect than eloquent diatribes about such ideal dimensions of the law 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 can be important for the contemporary debates about correlation between human rights and sovereign rights of states.

2. PROBLEMATIZING THE HUMAN RIGHTS ISSUE IN LEGAL SOCIOLOGY AND IN NORMATIVISM

Human rights are one of the most controversial and the same time stimulating topics for the contemporary legal philosophy. In the scope of the on-going 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 validity of legislation.(HAAS, 2008) Some thinkers, on the contrary, may admit that there are no rights before their positivation in statutes and international treaties, or even if such rights are existent, their effect is weak, unsatisfactory and dependent on political arrangements.(POSNER, 2014) There are a variety of intermediate conceptions searching for a solution of this issue in-between these two

extremities. (ISHAY, 2004, p. 359-373) In the light of this variety it could 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 existing variations in understanding of nature and limits of fundamental rights. (HAFNER-BURTON; TSURTSUI, 2007, p. 396-426)

To a large extent, in the contemporary debates “human rights” became one of the “essentially contested notions” (GALLIE, 1956, p. 167-198) that is impossible to exhaustively define and that at the same time is unavoidable for every discourse about legal rights and obligation (ALLAN, 2014). This state of affairs allows referring to human rights in order to legitimize almost any political program or judicial decision, which can benefit from weighting and balancing and which thus can acquire legitimate, binding effect(ALEXY; KOCH; KUHLEN; RUSSMANN, 2013). It is often asserted that in order to procure this effect, acts of weighting and balancing will always yield the only one right answer (DWORKIN, 1985) that is (claims to be) objectively correct (ALEXY, 2010, p. 20-32) and that thereby rules out all other solutions. However, adopting a more sceptical perspective, it is possible to argue that this approach finally hinges on certain subjective convictions and cannot be therefore really objective(BULYGIN, 2000a, p. 133-137). This objection indirectly undermines the supposedly universal value of human rights making them dependent on political endorsement (BULYGIN, 2000b, p. 175-181).

If we approach this issue in another perspective, we can also discover 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 passing judgments on (absence of) binding force of certain positive enactments of state authorities(MOYN, 2010). 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 cannot tolerate serious infringements on basic rights and freedoms any longer (BERNSTROFF, 2008, p. 903-924). This discussion is undoubtedly important and its mere description would require a lengthy scientific article. However, the question about limits of human rights can, in our opinion, be answered without referring to the post-war debates and treaties about human rights. That is why, here we can put these debates aside, without contending that they are inutile or have less importance for other research purposes. Anyways, these debates did not emerge from nothing and there surely have been some furrows ploughed on the field of human rights already in the pre-war legal philosophy (BUERGENTHAL, 2004, p. 783-807).

Quite a lot of literature is dedicated to the pre-war proponents of natural-law doctrines who are traditionally considered to be inspirers and supporters of human-rights discourse in the first half of the XXth century (PAULSON, 1995, p. 489-500). Just after the war had been finished in 1945, Gustav Radbruch threw down the gauntlet to legal positivists, vehemently accusing them of their servility and incapacity to fight the "statutory injustice" because of the "*Gesetz ist Gesezt*" principle. Radbruch's accusations were turned foremost against the proponents of the first positivism in the style of John Austin who identified the law with the commands of a sovereign (AUSTIN, 1995).[3] But Radbruch's critical remarks were taken in much broader sense — they were uncritically expanded by human-rights activists onto all those who shared the positivist account of law (those who admit that the law is a set of posited social rules whose validity is independent on value judgments) (MAIHOFER, 1962) (KAUFMANN, 1988, p. 1629-1634) (OTT; BUOB, 1993, p. 91-104) (LIPPMAN, 1997, p. 199-308) (ALEXY, 2002). It became one of the common places in the philosophical 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 the state sovereignty (SCHEIPERS, 2009).

This accusation is, nonetheless, far from being justified. As a matter of fact, most of the positivist-minded legal philosophers did not take seriously the Austin-styled command theories of law already in the first decades of the XXth century, and by that time *Gezetzespositivismus* had lost almost all of its allure because of the insurmountable epistemological complications in explaining what sovereign's will is and how it can be accurately established (KELSEN, 1992).

Curiously enough, it is the legal positivists such as Hans Kelsen who by their relentless criticism of the command theories stripped these theories of scientific value in the eyes of, at least, many German lawyers. In a series of his pre-war works and especially in the first edition of his *Pure Theory of Law* (1934) Kelsen has demonstrated that law is constantly reinterpreted and therefore reformulated at every stage of its application; and from this standpoint the law-creation is at the same time the law-application. In his view, the "*Gesetz ist Gesezt*" 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 engaging 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 (KELSEN, 1956, p. 597-620). This topic has been famously discussed also in the Hart-Fuller post-war debates about validity of the Nazi statutes and responsibility of those who had inexorably applied them (HART,1958, p. 593-629. ; FULLER, 1958, p. 630-672) (KELSEN, 1947, p. 153-171).

The command theories of law suffered also from the criticism of sociologically minded legal scholars. To a considerable extent, Eugen Ehrlich has conceived his *Fundamental Principles of the Legal Sociology* in 1913 as an attempt to divulge and dismantle the false ideologies behind the first legal positivism (EHRLICH, 2002). Law cannot be taken as exclusively a product of lawmakers' will or as a simple command — law exists as a social phenomenon, so that the existing social environment prefigures creation and application of the law, and thereby sets out constraints for lawmaking and judicial organs.

However, this sociological approach is quite multifaceted. Among other trends, it gave also the birth to a series of utterly conservative ideologies, such as the conception of *Rechtserneuerung* which legitimized 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 (RUETHERS, 2004). Paradoxically, the Nazi legal ideologists, such as Karl Larenz (LARENZ, 1969, p. 461-486), largely based their conceptions on the viewpoints that contradicted the idea Radbruch famously imputed to the Nazi regime and its lawyers. In fact, fidelity to texts of the statutes was not, by far, a merit of the Nazi lawyers and legal philosophers (ZIMMERMANN, 2010, p. 221-232) (HALDMANN, 2005, p. 162-178). 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 shall discover in the collective mentality, in the spirit of the people (nation). Following this line, Karl Schmitt famously defined the state as an entity that can rule on a state of exception and therefore its officials are entitled to overrule any positive enactments (SEITZER; THORNHILL, 2008, p. 1-50).

But this Schmittian decisionism formed only one of the trends in sociological examination of law. Other trends in the sociological jurisprudence focused attention on such normative constraints in the social life that bind the state and other powerful organizations in their lawmaking activities. Several leading legal sociologists of the mid-XXth century set out the ambitious task to examine law as an "ideal-realist"

phenomenon (GURVITCH, 1931) or as a combination of ethical and factual constraints coordinating human behaviour (TIMASHEFF, Nicholas, 2009) (TREVINO, 1998, 155-202) (BANAKAR, 2003). This approach, in our opinion, stems, at least partly, from the ideas underpinning Eugen Ehrlich's legal sociology which had been already outlined in the beginning of the XXth century (REHBINDER, 2005, p. 135-139). It can serve as an effective counter-balance to the preconceived ideals of social totality that enslave human beings to allegedly universal ideals and make individual choices dependent on collective strategies (one can think here about Auguste Comte's idea of the society as of a *Grand Être* or Emile Durkheim's conviction that the collective mentality supersedes every individual consciousness). Such a counter-balance is secured by certain epistemic elements incorporated into "ideal-realist" sociological theories of law, that allow splitting the abstract totality of society into innumerable sets of groups, communities, and factions, whose conventional standards are thus relativized and therefore may not claim to have universal validity (BANAKAR, 2002).

In such a light these two philosophical conceptions, — the normative or analytical jurisprudence and the sociological jurisprudence, — can be examined as to their propensity or hostility to the human-rights discourse. The most important dimension here is that these 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 that underpin these rights (DONNELLY, 2007, p. 281-306) (GOODHART, 2008, p. 183-193).[4] However, "the arrogant universalism of the powerful" is not a good tool for protection of human rights, as justly asserts Jack Donnelly who for that reason calls for a "relative universalism" (DONNELLY, 2007, p. 301).[5] From this perspective, the fact that analytical and sociological conceptions of law are based on axiologically neutral assumptions may, on the contrary, provide balances that protect human individuality from enslavement to purportedly universal (objective) values and great narratives (MANELI, 1981, p. 101-115).

[4] See important debates on this issue: DONNELLY, 2007, p. 281-306; GOODHART, 2008, p. 183-193.

[5] DONNELLY, 2007, p. 301 ff. Although, using this oxymoron of "relative universality" does not seem to be the best choice for arguing in favor of a flexibility in understanding of rights; and in this context we would prefer to speak plainly about relativity of human rights which, however, shall not be interpreted to diminish their utmost significance for the contemporary societies.

In order to investigate this dimension in the implicit discussions about fundamental rights in the pre-war positivist philosophy of law,[6] we will address conceptions elaborated by two already mentioned Austrian scholars that largely outlined further development of analytical and sociological jurisprudence in the European legal philosophy.[7] On the one hand, it is Hans Kelsen — the leader of legal positivism considered by some researchers as the "lawyer of the XXth century" (DREIER, 1993, p. 705-731), — and, on the other hand, it is Eugen Ehrlich who is generally considered to be the founding father of legal sociology. Kelsen had lived the terrific experience of the rise of Nazism in the late 1920-s and in 1930-s in Austria and Germany (he excitedly debated with Karl Schmitt (DREIER, 1999, p. 71-79) (PINELLI, 2010, p. 493-504) (DYZENHAUS, p. 337-366) trying to defend liberal values in the law) and then fled to Switzerland and the US, resolutely condemning the practice and ideology of Nazism. Eugen Ehrlich died in 1922 and did not witness the ensuing atrocities of the Nazi regime (REHBINDER, 1978, 403-418), but having lived most of his professional life in the pluralistic society of Bukovina (NELKEN, 2008, p. 443-471), he felt the importance of guarantying minorities' rights, which led him to the issue of constitutionalization of fundamental rights (MALISKA, 2015, p. 129-148).

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. 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 bring about legal regulation through the intermediary of individual consciousness. Even if at some points Ehrlich shared objectivist sociological ideas of Emile Durkheim and his school, he has 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* (EHRLICH, 1967, p.

[6] We shall underscore once again that we reconstruct here this implicit discussion which in reality has not taken place, at least in the 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.

[7] 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 XXth century. See: ZIEGERT, 2009; VOGL, Stefan. 2009, p. 95-124.

170-202) (RIEBSCHLAGER, 1968, p. 95-97*)*, Ehrlich preferred to form his own socio-legal conception which did not endorse purely individualist account of the law. In 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 the law (EHRLICH, 1917, p. 47-85) (REHBINDER, 1995, p. 191-202). 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 we will examine combination of the positivist methodology and the relativist axiology in the two legal conceptions elaborated respectively by Hans Kelsen and Eugen Ehrlich. We will try to determine which implications this combination could have for the issue of human rights, and to reassess relevance of these two legal conceptions for the contemporary theoretical debates about human rights. To this effect, we will first analyse the general situation in legal philosophy in the XIXth 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 can be expected from these theories in this discourse.

3. THE EPISTEMIC CHALLENGES TO LEGAL KNOWLEDGE

One of advantages for reconsidering the intellectual heritage of Kelsen and Ehrlich in the view of the human rights issue resides in the pluralistic principles which imbue the both conceptions that are considered here. The pressing need for pluralism in various dimensions (methods, values, ideologies) at the end of the XIXth century was not only the concern of legal sciences. Accepting the view that the turn of the XIX/XX centuries was the period when the classical rationality with its linear schemes and monistic methodologies have been challenged and shattered by the new scientific revolution that brought the principle of relativity into the core of scientific research (HOLLIS; LUKES, 1982) (KUHN, 1970), it comes as no wonder that jurisprudence also needed new insights and ideas to get rid of the preconceived opinions. Legal philosophy could not stand aloof from the general development of sciences; and quite normally that the reconsideration of the methodological arsenal of the legal scholarship in the 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

science in the first decades of the XXth century (BERMAN, 1983).

This agenda in the law as in many other sciences implied, unlike two precedent centuries, relativization instead of any further rationalization of legal knowledge. One of the ways of this reconsideration was to apply some of the Neo-Kantian ideas in the province of jurisprudence. If accepted that neither nature, nor societies are subject to any immutable principles or laws that universally govern a linear evolution, then references to any necessary values or dimensions of law will inevitably appear as doubtful. These references shall be either held as culturally biased, or as merely conventional (BANAKAR, 2008, p. 151-175; 168-172). Rationalist explanatory schemes based on naturalist assumptions (implying that there are some natural laws which are hidden in the nature and await of someone who discovers them) failed to meet new challenges and to respond to the problems formulated in the scope of the hard sciences (HALL, 1970). If this thesis turned out to be true in hard sciences, also social sciences such as ethics or law moreover had to abandon the idea about some eternal precepts which are identical for every society and basing on which one could explain all about normativity (the traditional posture of the natural-law doctrines) (CARO, 2010). However, the question was not to do away with any epistemic certainty (even if some philosophers like Kierkegaard suggested it), but to refine and to relativize the principles of this certainty within the new paradigm of relativity (SANKEY, 1997, p. 149-184).

However, if there are no universal truths or concepts, how then to secure coherence of thinking, to establish veracity of propositions, and how to explain binding force of law? Eugen Ehrlich and Hans Kelsen have proposed two exemplary, though different solutions to this epistemic conundrum in legal science. The former insisted that criteria of veracity of legal knowledge and of validity of legal rules reside in the social reality itself and, correspondingly, different social structures and environments provide for varying standards for defining what is right or wrong, true or false (ZIEGERT, 2014, p. 17-38). For the latter, there was no solution to this problem in empiric reality at all; and in order to tackle it, Kelsen proposed to relativize the issue of truth and of validity admitting that in the law no ultimate criterion can be formulated without falling in metaphysical fallacies. His was the idea to replace such criterion in the law by postulating that the starting point of legal thinking is a pure hypothesis or even a fiction, and therefore legal knowledge contains no universal truths — this was the main objective of Kelsen's *Grundnorm* (KELSEN, 1959, p. 107-110).

To understand relevance of these solutions, we shall consider the "archaeology

of legal knowledge" in the preceding century. The XIXth century had been the time when the natural-law jurisprudence based on metaphysical precepts started falling apart, provoking thereby the collapse of the traditional legal philosophy. This philosophy was rooted in the idealist method that sought to deduce some general principles from nature and to use them for evaluation of posited legal rules. This resulted in a dualism between the positive law and the natural law, the former being subordinated to the latter (WEINREB, 1987). In 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 (it could reasonable, social, moral nature of man, or nature as the chain of causality). Respectively, positive legal rules were taken to be void if they were found irrational, unjust, or immoral. As to legal knowledge, truth about legal statements was also supposed to be deductible from assertions about some supreme truths and eternal principles governing nature and society, *i.e.* from the natural law (D'ENTREVES, 2009) (RICE, 1989, p.539-567).

By that time, the main epistemic problem of the 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. Almost 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 even the common sense is different for various peoples and different époques, because it depends on human conditions and on the paradigms of rationality accepted in the given society. The natural-law doctrines, which had been dominating in jurisprudence before the XIXth century, could not stand this criticism: without forwarding claims to universality (be it universal morality or rationality) these conceptions were,to a considerable extent, devoid of sense.[8]

In the XIXth century the natural-law doctrines have been attacked from two different sides. The initial attacks have been 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; what does not come from the sovereign and his will, is not legally binding and can be considered only as "positive morality". There is no "law" in

[8] KELSEN, 1957, p. 137-173. A caveat is to be added here: in the present analysis we are limited by the mainstream natural-law doctrines and do 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.

general, but only *the* law (with a definitive article), which consists of legal rules, posited in the given country by the 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, basing on his or her personal experience, defines what is rational, moral for everyone), and proposed to consider 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 this country is, we shall examine the collective mentality prevalent in this country, how it expresses itself in customs, rites, cultural habits, and other informal regulations. The written law is only of secondary significance because it is only about the signs with the help of which are expressed the rules that already had existed before their positivation in the texts. Law is similar to language, it grows and develops in collective mentality and practice, so that legislators just fix what has already grown up spontaneously, like linguists just fix, describe and sometimes propose to ameliorate language uses.

However, after the first enthusiasm had passed away, by the end of the XIXth century it became clear that these two conceptions (the positivist and the historicist ones) were unable to offer a more accurate account of the law than the natural-law doctrines did. Law cannot be conceived simply as a set of commands issued by a sovereign as this latter must first be defined through legal rules. At the same time, references to a 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* is rather a subjective projection, a wishful thinking of the conservatively minded philosophers who tried to discover in the collective mentality some immutable, transcendental values that take different forms in different historical eras but remain essentially the same, conserving particularity of each people. One of the last representatives of the historical school of law, Karl Beseler, underscored this idealist dimension with particular clarity (REIMANN, 1990, 837-897; 869-875).

It is at that time of the crisis of the natural-law doctrines, of the historical school and of the first legal positivism and its continuators (*l’école d’exégèse* in France, *Begriffsjurisprudenz* in Germany, *etc*.) that Kelsen and Ehrlich have written their first influential works (KELSEN, 1911a) (EHRLICH, 1913), which gradually became topical for heated discussions among legal philosophers of that time. To be mentioned *en*

passant that this crisis has provoked similar reactions not only in the German-speaking scientific community but also in other communities. As examples can be cited the US legal scholars who at that time developed their research in a similar way: Christopher Langdell or Wesley Hohfeld, Oliver Holmes Jr. or Roscoe Pound (LIKHOVSKI, 2003, p. 621-657), Russian legal philosophers such as Nicolai Korkunov or Leon Petrazycki (COTTERREL, 2015, p. 1-16). 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 XXth century, such philosophers as Ernest Mach demonstrated that under the guise of objective principles of cognition scholars deal with their own subjective convictions, that may seem self-evident within the given common-sense frameworks, but which however are not universal (COHEN, 1994, p. 37-45). The pretended objectivity turned 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 were under the evident influence of Mach's philosophy (LIKHOVSKI, p. 48-71), — the main problem of legal knowledge resided in the metaphysical assumptions on which were based the methods traditionally used by legal scholars. These assumptions implied that the law has an immutable ideal dimension composed of absolute values or truths. It is true also for the first positivism as evidently based on the assumption that order, security and certainty absolutely 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 goes from the sovereign (PRIEL, 2011).

Such value absolutism had its counterpart in the one-sided vision of the law 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 sciences.[9] 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 it will be shown in the next section, Kelsen and Ehrlich have significantly helped to formulate the new agenda for the legal

[9] Kelsen's idea to construct legal science basing only one method (imputation) can 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 implied just a more accurate distinction between methods and scholarly discipline, without excluding the possibility of cooperation between these disciplines and combination of various methods in studying the law.

philosophy in the XXth century.

4. THE METHODOLOGICAL RESPONSES BY KELSEN AND EHRLICH

We will start with Kelsen who is justly qualified as “the lawyer of the XXth century” because of the immense influence of his ideas on positivistic-minded legal scholars. Unlike the most civil-law legal philosophers, he succeeded to get quite well known and discussed also in the Anglo-Saxon world. Kelsen’s radical program was to purify the legal science from odd and unnecessary elements, which blur our vision of the law (STEWART, 1990, p. 273-308). Legal science, as asserted Kelsen, was imbued with value judgments hidden behind the pretended objectivity of the moral obligation to obey legal rules. Such apology of the moral obligation led to syncretism, as legal propositions (*Rechtssätze*), from this vantage point, should have been understood as consisting of heterogeneous elements (the will of the rulers, values and maxims, factual behaviour). On the other hand, such prevalence of disguised evaluations finally results in ideologization of this science. It is normal that some believe that the law is about justice, common good, or justified interests, some say that the law is about solidarity, some 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 tend to consider their beliefs to be objective truths. What is then wrong with the legal science? Kelsen’s reply was – the mystification resulting in syncretism (EBENSTEIN, 1971, p. 167-652).

As a Neo-Kantian, Kelsen believed that each science has its own method, and that of jurisprudence shall not be confused with methods of sociology, ethics or psychology which can also study the law, but from other standpoints that are irrelevant for lawyers concerned with validity of legal rules (PAULSON, 1992, p. 311-332). Basing on the Kantian distinction between Is (*Sein*) and Ought (*Sollen*), the Austrian thinker asserted that this unique method for establishing validity was the method of imputation. Kelsen explains (KELSEN, 1950, p. 1-11) that when a sociologist or psychologist observes some facts, he or she explains them through the principle of causality. So, if it is supposed that when the average level of life drops down, it usually leads to rise of criminality rate because some people cannot earn their bread otherwise than committing crimes, *etc*. This is one way to describe the legal phenomena. Another way is to ascribe liability. If someone steals, he or she shall be punished with imprisonment of so many years: this ascription does not depend on any regularity and does not

describe any factual state of affairs.

For Kelsen, the difference is decisive: in the first case we just utter statements of facts, and in the second case we ascribe to a behavioural act some legal consequences that shall follow this act. The fact that lawyers usually fail to make difference 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 the legal science is to connect certain facts with their sequences as established in legal texts, or in other words, to impute these sequences to such facts; all the rest goes beyond the borders of jurisprudence and falls within 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 explain validity of the law and understand the specific *modus vivendi* of the law (the binding character of legal rules) (LANGFORD, 2013, p. 85-110).

Traditionally, in order to justify the binding force of the law, lawyers sought for moral principles, religious dogmas, or social facts (like that of solidarity or reasonableness) that make people believe that they are under the obligation to obey certain posited legal rules and to respect the axiomatic principles that underpin these rules. In Kelsen's view, this moral absolutism disrupts methodological purity of jurisprudence. He contended that validity or the binding force of the law can 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) (GREEN, 2003, p. 365-413). We obey and execute judicial decisions because someone called "judge" has the competence to authoritatively settle disputes and his or her decisions, therefore, have obligatory character. This competence is derived from certain legal rules (be they fixed in procedural codes or in substantive laws), which, in their turn, are valid insofar as they are voted 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 come to the historically first constitution, which serves as the first empowerment. No matter if this constitution has ever existed in reality: for legal thinking it is not important as it simply needs a starting point in order to coherently explain the legal order and its validity (BINDREITER, 2003).

Here comes the hypothesis of a basic norm (*Grundnorm*) as a shortcut for this first constitution. This basic norm is just a hypothesis or, as Kelsen concedes later, a

fiction or something that is presupposed but does not exist in reality. Such a presupposition is inevitable for Kelsen to perceive the law in the specific legal manner and purify it from ideology (PAULSON, 2000, p. 279-293). Another question is whether Kelsen's own conception was free from ideological stances. His critics insisted that similar ideological stances were present also in the *Pure Theory of Law*, showing that Kelsen evidently favoured certainty in the law (as some assert, with prejudice to justice (ROONEY, 1948, p. 140-172) and that his basic norm had striking resemblance with some metaphysical presuppositions of natural law.[10] But this question falls out of the scope of the present paper.

With the help of these two key concepts (imputation and basic norm), Kelsen arrives to construct legal science as an independent discipline and supposedly purify it from evaluations and biases. In spite of the frequently occurring misunderstanding, Kelsen's theory was exactly about purification of legal knowledge and not about purification of the law itself. The Austrian thinker was far from contending that the law is made only of rules: he explicitly admitted that also ideas, social facts, politics are important to understand what the law is and how it functions in reality (KELSEN, 1257, p. 1-24). But examining the law from these standpoints is not in the province of the legal science, which has to examine the law only in the perspective of imputation. Nonetheless, it does not preclude multi-disciplinary research in the law, or combination of methods in the scope of particular projects.

This short description of Kelsen's Pure Theory of Law, — the theory that has already been sketched by its author in the first decades of the XXth century, — allows figuring out what could have been be the annoyance of Kelsen when his compatriot, Eugen Ehrlich, had 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 better: to the multiplicity of orders that exist in various social groups and communities. The law works to coordinate social relations, to attribute to individuals their places in the social structure; and this jural coordination is not a function of someone's will.[11] The society coordinates itself, more precisely – it is various social groups that shape their own forms, borders, structures, and relations within themselves

[10] See the criticism of the ius-naturalist inclinations of Kelsen in the writings of his contemporaries: SANDER, 1928, p. 507 ff.; HORVATH, 1930, p. 531 ff.; ROSS,1961*,* v. 4, p. 46-90

[11] "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, 2002, p. 77).

and with other groups in the constant flux of communication (ZIEGERT, 1979, p. 225-273). Ehrlich explains: the law lies in the very foundations of the social order and is a constitutive part of this order, so that social life (which *per definitionem* is an organized life) is impossible without the law. When amidst the social spontaneity arises some more or less constant relations, when these relations acquire a relative stability, when this stability is somehow reflected and justified in human minds, we can, following Ehrlich, state that the law works in this social milieu (REHBINDER, 1986).

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 (EHRLICH, p. 123). These vital human interactions are regulated everywhere, although differently — because of the difference 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 ask him how marriages are concluded there, how can one enter into a valid contract or make a will, but we hardly ever would ask him what paragraphs of the statutes are that contain the rules on marriage, contract, or testament. These legal propositions also have significance for legal science, but stand in the second place: first, we need to know 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 (ZIEGERT, 2009, p. 223-236). The analytical jurisprudence is wrong when confines itself only to examination of the official law and its prescriptions; the most important thing for lawyers and for ordinary people is exactly the living law which practically binds human behavior (FRIEDMAN, 1977).

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" (EHRLICH, p. 35-36). He argues that doctrinal lawyers are wrong when denying validity of the social conventions that shape human behaviour, because if we want to predict real consequences and their impact on strategies of human beings, we need also encompass these unwritten conventions: habits, usages, traditions. Ultimately, it is in these conventions that Ehrlich searches for sources of

validity of the law. This idea underpins the famous diction of Ehrlich placed 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" (EHRLICH, p.15).

It is easy to see that the conceptions of Kelsen and Ehrlich were based on significantly diverging methodological principles, and there is no wonder that a couple years after this publication these two scholars entered into debates. These debates were published in two issues of one German journal in 1915 and 1916 (KELSEN; EHRLICH, 2003). Two main reproaches of Kelsen were that Ehrlich did not see difference between the law, on the one hand, and morality, religion, and other regulative mechanisms of society that bring about the social order, and, on the other hand, that Ehrlich did not respect the irreconcilable gap between Is and Ought, deducing mandatory rules from factual behaviour. Ehrlich tried to defend his position offering psychological criteria for differentiation between law, morality, and etiquette; he also insisted that some legal phenomena cannot be explained without reference to the factual behaviour (like the customary law) and this reference does not imply amalgamation of causality and modality.[12] But he seemingly has lost the debates because of the chosen strategy of reiterating terminological issues and avoiding substantial discussion, while Kelsen had challenged the very foundations of the legal sociology (VAN KLINK, p. 127-156).

After the debates had been over, Ehrlich re-elaborated the chief ideas of his legal sociology, conceding much more attention to legal statements (propositions), to the judicial application of the law, and to analytical jurisprudence — this is patent in his two later works, published in 1917-1918 (EHRLICH, 1917, p. 1-80) (EHRLICH, 1925). The turbulence of the years of the First World War and of the following years impeded the Bukovina legal scholar to finalize the revision of his socio-legal conception, and Ehrlich's premature death in 1922 put the end on further development of his methodological project (REHBINDER, 2005, p.140-146). As to Kelsen, he has lived a longer life and in the 1940-s he has considerably revised his ideas about the Is and Ought divide, inquiring more profoundly in factual conditions for normative regulation in different societies (KELSEN, 1941).[13]

[12] In this aspect, there is no unbridgeable gulf between the ideas of Kelsen and the conception of Ehrlich. See: ANTONOV, 2011, p. 5-21.
[13] Compare with Kelsen's initial position: KELSEN, 1911(b).

These two thinkers offered the insights that became the guidelines for the discussions between the Western legal philosophers throughout the XXth century. One of the main contributions of Kelsen was his consecutive criticism against the dogmatic idea of mechanical application of legal rules: no rule can in advance foretell what will be peculiarities of a concrete situation and how the judge shall decide on this situation (PAULSON, 2008, p. 7-39). That is why legal rules are only frameworks that are filled with regulatory prescriptions by judges who create individual legal directives and thereby definitively regulate behaviour of the parties to a court case. With the help of this idea of dynamic legal order and of the continued law-creation, which is at the same time the law-application, Kelsen resolutely rejects ideological schemes of the traditional jurisprudence such as the distinction between public and private law, between subjective and objective law. In his turn, Ehrlich has shown that legal regulation in society is not based on some transcendental values but is in the process of contact flux, is constantly reshaping itself — is an autopoietic process, if to employ the modern terminology. For him, the law is about the question of a momentary equilibrium of social forces, interests, and ideas; this is what brings about the social order, even if this order is subject to further spontaneous modifications. But this equilibrium is not everything about 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 in what is considered to be sources of law in the given society.

5. EHRLICH AND KELSEN IN THE HUMAN-RIGHTS DISCOURSE

Such a methodological posture of these two thinkers was favourable to advance of human rights for several reasons which we will enumerate in the following. This enumeration does not pretend to be exhaustive and our purpose here is merely to draw attention to this dimension of the work of Kelsen and Ehrlich.

If we take these conceptions of these 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 reputed to be the

stronghold of the exclusive (or hard) positivism which rules out the very possibility of any supra-legal principles that supersede the posited legal enactments. Also Ehrlich's legal sociology can be easily misinterpreted as a denial of democracy and constitutionalism because of its focus on facticity. Taken in the sense of the famous sociological Schmittean criticism directed against formal normativity of the law and favouring indeterminacy of political decision (ROTTLEUTHNER, 1983, p. 20-35), Ehrlich's conception could have been interpreted as a threat to human rights. But both these interpretations would be incorrect.

As we have insisted in this paper, Kelsen's *Pure Theory of Law* did not intend to strip the law of its ideal dimension and to ban from its province all value judgments. For the Austrian legal scholar, the law is a technique of enforcement of peaceful co-existence of human beings, none of which is entitled to impose his or her views or values on other people. All people living in society are equally subordinated to the law, no matter what are values they praise more (justice, certainty, equality, peace…), and the law shall be applied equally to all. This dimension of the law is described by Kelsen as the static aspect. In reality this aspect is often thwarted by individual choices made by judges who consider cases differently, consciously or unconsciously preferring certain values and, correspondingly, providing the same legal texts with different interpretations. It is clear that concrete judges of flesh and blood, 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 a non-posited law as a purported criterion of validity of the 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 and are important for it (INGRAM, 2014, p. 237-267). On the one hand, his philosophy exceptionally favours legal certainty and peaceful coexistence which are cornerstones for protection of human rights. On the other hand, Kelsen indicates at the principle of relativity that guarantees human freedom which includes also the freedom to balance and to range different values.

This approach yields a viable conception of democracy which can be stable, in Kelsen's opinion, only in the situation of value pluralism. In its turn, it is this pluralism that underpins the value of human individuality and protects human autonomy from totalitarian pretentions based on such ideas as social solidarity or public good

(KELSEN, 1920) (KELSEN, 1955, p.1-101). Therefore, only positive philosophy can make someone free, liberate him or her from the moral authority of supra-individual totalities such as Society, State and the like. Contrary to the widespread opinion, Kelsen did not claim that justice shall make no part of the law — his requirement of purity concerns only the legal science which shall be value-free when examining the law, and does not concern the law as such. He explicitly admitted that application and interpretation of the law undoubtedly involves also legal values such as justice or equity (KELSEN, 1957).

As to Eugen Ehrlich, at the first sight his legal sociology excludes any ideal dimension that stands above the 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 — it derives from certain implicit societal conventions embodied in practical behaviour and in 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 about “normative force of the factual” (JELLINEK, 1960, p. 308). 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.

In this perspective, law grows from the facticity and reaffirms the factual links that are already existent in the societal environment, providing these links with the normative (binding) force (ANTONOV, 2013a, p. 263-272). Such an environment can be propitious to protection of individual freedoms, or not, but in any case the regulation created in this environment will be binding, no matter how its contents be evaluated from the standpoint of protection of human freedom. Therefore, the law as facticity will preserve the binding force, even if its posited enactments overtly violate human rights (ANTONOV, 2013b, p. 287-313). 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 that carries out the same function as the 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 impedes any authority or totality interfering with personal value choice and superposes its value over the value of individual human

being, constraining his/her freedoms for the sake of protection of any superior values. However, this interference can take place in real life where the pluralism is subjugated to authoritative practices of regulation and governance.

One of the main epistemic difficulties of human rights is connected with uncertainty of the sources of their validity and with delimitating 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 societal implicit conventions, the very machinery of the law cannot normally function without addressing and considering these convictions and conventions. Human rights are quite a new instrument of the contemporary Western societies hardly conceivable in the Antiquity or in the Middle Ages, and even nowadays stumbling in non-Western countries. In the 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 idea that this empowerment is valid only to the extent it does not contravene the basic rights. What are such rights, how they shall be balanced, where are their limits and what is their correct interpretation — all this is subject to particularities of local legal cultures and to local/regional normative frameworks (ANTONOV, 2013c, p. 15-30).

As to Kelsen, if one assert that human rights are presupposed in the way the basic norm is presupposed, then human rights can be said to stay hanging in the air as pure hypotheses or fictions. On the one hand, this objection is partly true because for Kelsen human rights, as any rights and obligations whatsoever, are not natural kinds and cannot be found somewhere in nature or in society. All the edifice of the law, in this sense, hangs in the air or, more correctly, is just a model of thinking (*Denkenbild*) that allows human beings to authoritatively coordinate their mutual behaviour acting as if (*als ob* — in the sense of Vaihinger’s philosophy (VAIHINGER,1924) 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 what is the constitution (written or, more often, unwritten) of their society. If this constitution includes certain guarantees of individual freedoms, they shall be respected, whatever are feelings of people about these freedoms (it happens quite frequently and even in the Western societies that some rights or freedoms are not approved of by the majority), what are opinions of the

ruling elites about 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 the national and the 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 advocated in favour of monist system putting the international law above the national law, insofar as only international law can define the limits of state and its sovereign rights, including the right to legislate. If efficacy of protection of human rights in the given country depends 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 about subsidiary or primordial role of international courts in defending human rights. However, we can suppose that generally international law and international courts normally provide more guarantees (at least, some additional guarantees) to individual freedoms, and, in this respect, Kelsen’s conception is favourable to protection of human rights.

Ehrlich has remained rather silent on the issue of priority of the monist or the dualist systems. But two important considerations can be taken into account here. Firstly, Ehrlich reiterated that the state law may not claim to have supreme validity and its effect is, in the final resort, dependent on how the state law is accepted, interpreted and applied in communities. Given this, societal conventions on human rights normally shall triumph over the state law and its restrictions, regardless of what are the concerns about sovereignty and its limits. Secondly, the international law is essentially akin to customary law; it establishes as binding what has been followed so far by the states in their mutual relations and what is admitted in the international community. In this sense, the 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 utilized to defend the state from interferences with its legislative policies (in a broad sense including also the law made by courts and administration), even if such policies considered to contravene human rights.[14] In the light of Kelsen’s thesis about coincidence of law and state, insofar as the state is a synonym for centralized legal order, there is no analytical possibility to oppose the

[14] As an example, can be cited the situation in Russia: ANTONOV, 2014, p. 1-40.

parliamentary sovereignty and the (human) rights (KELSEN, 1920). 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. Taken in this perspective, parliamentary sovereignty cannot be utilised to impose constraints on fundamental rights, because it simply indicates at the specific modality of reproduction of legal rules containing, among other rights and obligations, also fundamental rights sheltering 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 gain over pluralistic society, its communities and legal orders. Sovereignty can be important only in the aspect of state legal order which, as fervently insists Ehrlich, has not any preestablished precedence over other legal orders of society. If the issue of prevalence of state legal order and other legal orders is decided in the view of their respective authority over behaviour of those who are subject to them, then sovereignty has no normative weight to tip the scale when the state legal order collides with other orders.

One more aspect is connected with the application of the law. Kelsen assumed that this is a continued process and that is why legal rules cannot be “applied” in the very sense of this verb. Rules are created or, in other words, endowed with meaning, at every stage of application. Therefore, what matters for the protection of human rights are not written texts but rather mentality of judges (here and below “judges” include also other law-officers) — the way how they make a link between the factual situation and the first constitution (the basic norm) that endorses to reinterpret and apply rules. 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 at the same time a decision-maker and a lawmaker who is responsible for the meaning he or she attributes to the rule (it means for Kelsen: “creates the rule”) to be applied in this given situation. Formal legal rules provide for a framework to be filled in by judges.

Surely, this can be a very dangerous trump for judges, which can transform “rule of law” into *gouvernment des juges*. But, on the other side, this approach reveals the real power possessed by judges and, by this fact, justifies the greatest responsibility of judges for the outcome of court proceedings. Here, a judge is not a puppet speaking the words of the law (to remind of Montesquieu’s celebrated metaphor), but the real master of legal system who cannot excuse his or her wrong decisions 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 can create “dead norms” or, at best, give some very general instructions which shall be implemented in the way corresponding to the practical uses and conventions accepted in the given community. Here sociology of law works for providing the factual material needed for further interpretation, application of laws, which ultimately means — for remodelling these laws. Statutes are very imprecise instruments and their utilization in every situation requires that judge considers also the bulk of legal documents, factual engagements and other sources which help to discover what the living law for this community is, and which interpretation shall be given to the respective statutory provisions.

This approach to parliamentary sovereignty can have an ambiguous effect. On the one side, in a “sound” community even unjust rules will be applied in the way this community protects the freedom of human beings. On the other side, a “sick” community with an underdeveloped (or, putting it more smoothly, non-Western) legal culture can obstruct working of the formally recognized instruments (constitution or/and international treaties). This is something that happens frequently in some underdeveloped non-Western countries, where the instruments for protection of human rights remain largely idle because of unpreparedness on the part of the population to use them. In a similar prism can be considered the question about constitutional review; 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 Kelsen became the founding father of the continental model of constitutional review.

Here arises another dimension which is important in the prism of protection of 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 purposes and failures of the so called “responsibility to protect” inevitably endanger the authority of human rights: these rights, their claim to universality quite often fall under the criticism when condemning the “humanitarian interventions” in Libya, Yugoslavia and elsewhere. Which solutions can be found in the conceptions of Kelsen and Ehrlich to these challenges? Their conceptions are designed in the 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 organization of its internal life, and in their peaceful collaboration these communities create the normative web of legal regulation in the entire society. For Kelsen, even if the state may establish some rules and principles in the texts of statutes, it is up to judge to attribute the due meaning to these texts in the light of the concrete situation, considering the ultimate goal of the law: to set up a peaceful coexistence. In this perspective, interventions and interferences constitute something abnormal for legal regulation which in an ordinary situation comes from below (i.e., it is communities — for Ehrlich, or judges — for Kelsen) who create the really binding rules. Here sovereignty seems to benefit from the both conceptions, although sovereignty is not supposed to be absolute.

As justly mentions Petra Gumplova, “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”. This means that the law is justified insofar as it secures the peaceful coexistence of individual and states, and the purpose of functioning of the machinery of the law resides exactly in such securing. In the spectre of the monist system advocated by Kelsen, human rights as *ius cogens* of the contemporary international law prime over rules of the state law. The international law, therefore, indirectly endorses coercive intervention inhuman policies of the sovereign states, but this law still lacks effective dispute-resolution organs and enforcement bodies to secure the protection of the internationally recognized human rights. That is why Kelsen aspired for establishing a world legal order, a *civitas maxima*, that would effectively secure enforcing a peaceful protection of human rights (ZOLO, 1998, p. 306-324). Even if this project of Kelsen (along with his conception of democracy and formal normativity) is qualified by some scholars as “utopia of legality”(VINX, 2008, p. 66-68), it still remains an important topic for discussions among international lawyers.

As to Ehrlich, he was critical about all attempts of state authorities to interfere with internal legal regulation in communities. Equally, it is expectable that no intervention of the "civilized nations" into a national legal order (for regime-change or other purposes) composed out of communitarian legal orders will be legitimate because such interventions would putatively endanger the normal functioning of the law in these societies. This happens nowadays in Iraq, Libya and in some other countries. Although, in certain circumstances interference can be welcomed, e.g., in what concerns protection of (national, religious, cultural and other) minorities and provided that such an interference is not destructive for the concerned society.

6. CONCLUSION

Above we have attempted to outline the main methodological and epistemic properties of the legal conceptions of Hans Kelsen and Eugen Ehrlich in the light of their presumed relevance for the human-rights discussions in the contemporary world. This relevance is examined against the background of the principle of sovereignty that is nowadays often used to restrict interventions into policies of the states. Universalist claims seem to lay in the foundation of human rights which strive to be the superior criteria for assessment of laws and policies of the states. Sovereignty in its classical, Westphalian sense potentially can encounter these claims and even rebuff them referring to the power of discretion or, to put it more mildly, margin of appreciation that allows to national governments to decide about the limits that can be allocated for rights and obligations of their citizens and for cooperation with international courts and other supra-national bodies. Two conceptions examined above offer a nuanced and careful account of the ways the law is created in society. Ehrlich and Kelsen proposed to combine several perspectives, — methodological, epistemic, axiological, — which enhances a multifaceted approach to the law and, at the same time, such 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, between the significance of rights and sovereignty. We have tried to sketch the most important dimensions in which these theories can be useful for the contemporary legal science. Our objective here was to suggest and to argue that the legal conceptions of Ehrlich and Kelsen are still actual for the debates in the fields of international or constitutional

law, and legal philosophy about the limits of human rights and about epistemic conditions for identifying these rights, for understanding how these rights are the same time can claim for a universal character and remain culturally 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" (Jack Donnelly) of human rights. Relativity of human rights and of the values that underlie them does not impede from recognizing and protecting 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 into the foundation of the Western-type legal orders. The theories considered above, suggest many insights about the way human rights be understood as relative, but fundamental norms.

REFERÊNCIAS

ALEXY, Robert. **The Arguments from Injustice**: A Reply to Legal Positivism. Oxford, 2002.

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

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

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

ANTONOV, Mikhail. Conservatism in Russia and Sovereignty in Human Rights. In: **Review of Central and East European Law.** 2014, v. 39, p. 1-40.

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

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.

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 (c), p. 15-30.

ANTONOV, Mikhail. Normativity and Facticity of Law in the Legal Sociology of Eugen Ehrlich. In: **Pravo Ukrainy**. 2013 (a), v. 4, p. 263-272.

AUSTIN, John. **The Province of Jurisprudence Determined.** Cambridge,1995.

BANAKAR, Reza. **Sociological Jurisprudence**. In: BANAKAR, Reza & TRAVERS,

Max. An Introduction to Law and Social Theory. Oxford, 2002.

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

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

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.

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

BULYGIN, Eugenio. Alexy's Thesis of the Necessary Connection between Law and Morality. In: **Ratio Juris,** 2000 (a), v. 13(2), p. 133-137.

BULYGIN, Eugenio. Zum Problem der Begründung der Menschenrechte. In: **Politische Herrschaftsstrukturen und Neuer Konstitutionalismus –¬ Iberoamerika und Europa in theorievergleichender Perspektive.** Berlin, 2000 (b), p. 175-181.

CARO, Mario & MACARTHUR, David (eds.). **Naturalism and Normativity. New York,** Press, 2010.

CHIASSONI, Pierluigi. Kelsen on Natural Law Theory. In: **Revus.** 2014, v. 23, p. 135–163.

COHEN, Hendrik Florens. **The Scientific Revolution:** A Historiographical Inquiry. Chicago, 1994, p. 37-45.

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

DONNELLY, Jack. The Relative Universality of Human Rights. In: **Human Rights Quarterly.** 2007, v. 29(2), p. 281-306.

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.

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.

DWORKIN, Ronald. **A Matter of Principle.** Cambridge, MA, 1985.

DYZENHAUS, David. **Kelsen, Heller and Schmitt:** Paradigms of Sovereignty Thought. In: Theoretical Inquiries in Law. 2015, v. 16 (2), p. 337-366.

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

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.

EBENSTEIN, William. **The Pure Theory of Law:** Demythologizing Legal Thought. In: California Law Review. 1971, v. 59, p. 617-652.

EHRLICH, Eugen. **Die juristische Logik.** 2te Aufl. Tübingen, 1925.

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. Freie Rechtfindung 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].

EHRLICH, Eugen. **Fundamental Principles of the Sociology of Law.** London, 2002.

EHRLICH, Eugen. **Grundlegung der Soziologie des Rechts**. Wien, 1913.

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.

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; GROSSEGGER, Elisabeth.

FOLJANTY, Lena. **Recht oder Gesetz. Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit.** Tübingen, 2013.

FRIEDMAN, Lawrence M. **Law and Society:** An Introduction. Prentice Hall, 1977.

FULLER, Lon. **Positivism and Fidelity to Law:** A Reply to Professor Hart. In: Harvard Law Review. 1958, v. 71, p. 630-672.

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

GOODHART Michael E. **Neither Relative nor Universal:** A Response to Donnelly. In: Human Rights Quarterly. 2008, v. 30(1), p. 183-193.

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

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

GUMPLOVA, Petra. **Law, Sovereignty, and Democracy:** Hans Kelsen's Critique of Sovere

GURVITCH, Georges. **Le temps présent et l'idée du droit social.** Paris, 1931.

HAAS, Michael. **International Human Rights.** London and New York, 2008.

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.

HALDMANN, Frank. Gustav Radbruch vs Hans Kelsen: A Debate on Nazi Law. In: **Ratio Juris.** 2005, v. 18(2), p. 162-178.

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

HART, Herbert L. A. Positivism and the Separation of Law and Morals. In: **Harvard Law Review.** 1958, v. 71, p. 593-629.

HOLLIS, Martin & LUKES, Steven. Rationality and Relativism, Oxford, 1982.

HORVATH, Barna. **Die ungarische Rechtsphilosophie.** In: Archiv für Rechts- und Wirtschaftsphilosophie. 1930, v. 24, p. 531 ff.

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.

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

JELLINEK, Georg. **Allgemeine Staatslehre.** 3d ed. 1960, Bad Homburg, p. 308 ff.

KELSEN, Hans & EHRLICH, Eugen. **Rechtssoziologie und Rechtswissenschaft. Eine Kontroverse (1915/1917)**. Baden Baden, 2003.

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

KELSEN, Hans. Causality and Imputation. In: **Ethics.** 1950, v. 61(1), p. 1-11.

KELSEN, Hans. **Das Problem der Souveränität und die Theorie des Völkerrechts. Tübingen,** 1920.

KELSEN, Hans. Foundations of Democracy. In: **Ethics.** 1955, v. 66(1/2), p. 1-101.

KELSEN, Hans. **General Theory of Law and State.** Cambridge MA, 1945, p. 330–339.

KELSEN, Hans. **Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatze.** Tübingen, 1911 (a).

KELSEN, Hans. **Introduction to the Problems of Legal Theory (Boniie Litschewski and Stanley Paulson trans.).** Oxford, 1992.

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

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.

KELSEN, Hans. **Über Grenzen zwischen juristischer und soziologischer Methode.**

Tübingen, 1911 (b).

KELSEN, Hans. **Vergeltung und Kausalität:** Eine soziologische Untersuchung. Chicago, 1941.

KELSEN, Hans. **Vom Wesen und Wert der Demokratie.** Tübingen, 1. Aufl, 1920, 2. Aufl, 1929.

KELSEN, Hans. What is Justice? In: KELSEN, Hans. **What is Justice? Justice, Law, and Politics in the Mirror of Science.** Berkley, 1957, p. 1-24.

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.

KUHN, Thomas, **The Structure of Scientific Revolutions.** Chicago, 1970.

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

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.

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

LIKHOVSKI, Assaf. Venus in Czernowitz: Sacher-Masoch, Ehrlich and the Fin de Siècle Crisis of Legal Reason. In: HERTOGH, Marc (ed.). **Living Law:** Reconsidering Eugen Ehrlich, p. 48-71.

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.

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.

MALISKA, Marcos Augusto. **Introdução à Sociologia do Direito de Eugen Ehrlich. Curitiba,** 2015, p. 129-148.

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.

MATINELLI-KONIG, Gertraud; STACHEL, Peter; UHL, Heidemarie (eds.). **Schauplatz Kultur Zentraleuropa. Transdisziplinäre Annäherungen. Innsbruck–Wien–Bozen,** 2006, p. 297-306.

MOYN, Samuel. **The Last Utopia:** Human Rights in History. Cambridge, 2010.

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

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.

PALOMBELLA, Gianluigi. From Human Rights to Fundamental Rights. In: **Archiv für Rechts- und Sozialphilosophie.** 2007, v. 93, p. 396-426.

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.

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

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

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.

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;

POSNER, Eric. **The Twilight of Human Rights Law.** Oxford, 2014.

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

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.

REHBINDER, Manfred. **Die Begründung der Rechtssoziologie durch Eugen Ehrlich.** 2 Aufl. Berlin, 1986.

REHBINDER, Manfred. Eugen Ehrlichs Seminar für lebendes Recht: eine Einrichtung für die Weiterbildung von Rechtspraktikern. In: **Problemi filosofii prava.** 2005, v. III(2), p. 135-139.

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

REHBINDER, Manfred. Richterliche Rechtsfortbildung in der Sicht von Eugen Ehrlich. In: REHBINDER, Manfred. **Abhandlungen zur Rechtssoziologie.** Berlin, 1995, p. 191-202.

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

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

ROSS, Alf. Validity and the conflict between Legal Positivism and Natural Law. In: **Revista Juridica de Buenos Aires.** 1961, v. 4, p. 46-90

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

RUETHERS, Bernd. **Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus.** 6. Aufl. Tübingen, 2004.

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.

SANKEY, Howard. **Rationality, Relativism and Incommensurability,** Aldershot, 1997, p. 149-184.

SCHEIPERS, Sybille. **Negotiating sovereignty and human rights. Manchester,** 2009.

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.

SOMEK, Alexander. In: **European Journal of International Law.** 2007, v. 18, p. 409-451.

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

TIMASHEFF, Nicholas. **The Introduction to the Sociology of Law.** New Brunswick, 2009.

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.

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].

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.

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

VINX, Lars. Hans Kelsen's Pure Theory of Law. **Legality and Legitimacy**. Oxford, 2008, p. 66-68.

VOGL, Stefan. Eugen Ehrlich's Linking of Sociology and Jurisprudence and the Reception of his Work in Japan. In: HERTOGH, Marc (ed.). **Living Law:** Reconsidering Eugen Ehrlich. Oxford and Portland, 2009, p. 95-124.

WEINREB, Lloyd. **Natural Law and Justice.** Cambridge MA, 1987.

ZIEGERT, Klaus A. Introduction to the Transaction Edition. In: EHRLICH, Eugen. **Fundamental Principles of the Sociology of Law.** New Brunswick, 2009, p. XIX-XLIX.

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.

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

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

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.

ZOLO, Danilo. Hans Kelsen: International Peace through International Law. In: **European Journal International Law.** 1998. 9 (2), p. 306-324.

Recebido em 23/08/2016
Aprovado em 23/08/2016
Received in 23/08/2016
Approved in 23/08/2016