NATIONAL RESEARCH UNIVERSITY
HIGHER SCHOOL OF ECONOMICS

Mikhail Antonov

THE NORMATIVITY OF LEGAL RULES ACCORDING TO EUGEN EHRLICH

BASIC RESEARCH PROGRAM

WORKING PAPERS

SERIES: LAW
WP BRP 21/LAW/2013

Mikhail Antonov[1]

THE NORMATIVITY OF LEGAL RULES ACCORDING TO EUGEN EHRLICH

In this paper the author questions the role of Eugen Ehrlich's sociological jurisprudence for contemporary debates regarding the sources of binding rules that have their (ontological) foundation in societal practices, but whose validity cannot be extracted from these practices. The question on the normativity of legal rules for Ehrlich was not identical with the thesis on the normativity of social practices and the patterns of behavior that are capable of having a biding force if fixed in a legally recognized form (i.e., recognized by the legal community). As a result, the process of norm-creation requires an intellectual reconstruction of these practices and patterns by jurists, judges, and legislators who reshape societal relations into legal ones with the help of particular intellectual images. It is this reshaping that gives rise to legal rules. The process of such reconstruction cannot be anything but intellectual, and therefore cannot be conceived of without reference to the creative work of lawyers. Consequently, legal rules cannot emerge directly from societal practices. The practices in which the lawyers are engaged or which they simply contemplate, can influence their creative activity, but cannot replace it, and thus cannot provide a mechanical transformation of the factual into the intellectual or normative.

JEL Classification: K1.
Key words: sociology of law, living law, official law, normativity, binding force of law.

[1] National Research University Higher School of Economics (St. Petersburg). Associate Professor of Law.

Introduction

Legal rules are always directed at some behavioral acts, and to be effective the rules have to be in certain concordance with the acts. From this standpoint, the factual behavioral patterns can be legally relevant and influence lawmaking: this fact is attested by the example of customary law. Although, the proposal to look for rules in factual behavior can seem provocative for the partisans of a strict division between the normative and the empirical dimensions of law - between what *ought* to be and what actually *is*. The idea of this divide has often been discussed in the 20th century. Paradoxically, the idea was first shaped in 1907 by one of the founding fathers of legal sociology, Max Weber, who reproached Rudolf Stammler for an uncritical mixture of legal norms, value judgments, and social practices (Weber, 1977). Several years later in 1915-16, Hans Kelsen reiterated this idea in his polemics against another founding father of legal sociology, Eugen Ehrlich and his *Fundamental Principles of Sociology of Law* (1913), and in a last resort this idea was partly turned by Kelsen against Weber as well (see the materials of these debates: Paulson, 1992). The pedigree of the sociology of law is hence closely connected with this factual-normative divide, such that investigating the details of this divide can provide some important clues for better understanding this discipline and its perspectives.

Here we will limit ourselves to an examination of the work of Eugen Ehrlich, which, in our opinion, offers the best example of the difficulties and misunderstandings that legal sociology can face in reassessing law from an empirical position. We will herein assert that sociological jurisprudence (at least in the context of Ehrlich's conception) does not necessarily undermine the normativity of law. Rather the empirical dimension of law can be seen as one of the sources for defining normativity with regard to a given society, but this dimension is not normative *per se*. The distinction introduced by Joseph Raz between the justified and the social normativity of law (Raz, 1979, 122 ff.) results neither in a complete separation of Ought and Is, nor in their fusion. These distinctions are not commensurable, they relate to the different aspects of law, both normative and ontological.

These aspects can be analytically separated from each other but their real separation is not possible. Throughout this paper we will keep an eye on a conception concurring to that of Ehrlich. The theory of Hans Kelsen, who required a strong and complete separation between norms and facts, while Ehrlich accepted this separation only partially, in what concerns the different lines of normativity that give rise to two different lines of law - the living (social) law and the official (state and juristic) law. But this methodological question is not of such importance as it might appear at first glance. Neither a strong or complete separation (Kelsen),

nor does a weak or partial separation (Ehrlich) necessarily lead to the conclusion that the creation of legal rules is dependent or independent on societal practices.

1. Sociological normativity? Back to the debates between Eugen Ehrlich and Hans Kelsen

The issue at the stake between Ehrlich and Kelsen in 1915-16 was purely that of scientific pragmatism. Namely, how can one better construct the science of law, either based on the neo-Kantian thesis of "one science - one method" (a position employed in the Pure Theory), or on the bases of a broader understanding of the science of law, which was devised by Ehrlich to combine several methods, in order to achieve somewhat different scientific goals than those envisaged by Kelsen.

From this point of view, there was no contradiction in Ehrlich's position when he presumed that living law, which exists along with juristic law and state law, can have its ontological foundation directly in social practices without the intermediary of any authoritative commands or established processes, and at the same time asserted that law possesses its own normativity that is reflected in particular psychological and emotional attitudes toward the "facts of law". When these attitudes are fixed and reconstructed by lawyers through particular linguistic expressions and pursuant to a process specific for each community, one can speak of them as of the legal rules. In spite of Kelsen's accusations, Ehrlich does not fall in contradiction when he claims that every legal rule has its source in society (the famous foreword to *Fundamental Principles* announces that "the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decisions, but in society itself" - Ehrlich, 2001, XV), and simultaneously maintains that society itself, without the intermediary of lawyers, is incapable of producing legal rules.

There is no separate world of Ought that stands in opposition to that of Is, and legal development relates at the same time to both these aspects. Such a jump from the factual into the normative was choking for Kelsen, who firmly stood on the Kantian doctrine of two worlds. Precisely this Ought/Is separation, essential from the neo-Kantian philosophical outlook, served as a base for the Kelsenian critic against the legal sociology of Ehrlich in 1915-16. For a long time this criticism blurred the real purpose of the sociological enterprise undertaken by Ehrlich, whose position in the debates 1915-16 was quite unpersuasive, and, to some extent, continues to exert its influence on current debates about the commensurability of Ehrlich's conception with

the strong (in the sense of a distinction between strong and weak pluralism, introduced by John Griffiths - see: Griffiths, 1986) legal pluralism that aims to obliterate the boundaries between legal and other regulative mechanisms of society (Antonov, 2013).

The controversy between Kelsen and Ehrlich about the normativity of law is mostly due to the unfortunate misreading of normativity, which was understood by these two jurists in somewhat different modalities. Kelsen saw the normativity of law as justified through an appeal to the unity of legal order guaranteed by the hypothesis (and later by the fiction) of *Grundnorm*. For Ehrlich, as for Kelsen, law possesses its own *Gesetzlichkeit*, which is synonymous to normativity but which, in Ehrlich's opinion, is revealed through the reconstruction of social facts, and is not purely a product of postulating an artificial *Grundnorm* as in the Pure Theory of Law. It is on the point of normativity of law that Kelsen principally attacks Ehrlich's conception of living law, which is central to the legal sociology of this latter thinker (Antonov, 2011). For Kelsen, there could be no "normative force of the factual" (Rudolf Jhering), as facts and norms belong to two different universes. Kelsen accused his opponent of dissolving the normativity of law in various patterns of behavior, which are incapable of translating the meaning of legal norms, and asserted that they can be reconstructed by lawyers regardless of any facts, and are not derived from the facts in any manner.

The assumed impossibility to derive norms from facts can have two different implications. On the one hand, one may not consider the facts themselves as having binding (normative) force. On the other, one may be required to refrain from taking the facts into account when considering the rules. Ehrlich does not dispute veracity of the first thesis, though he resolutely rejects the second one. There is not necessarily any connection between these two theses such that acknowledgement of the conceptual impossibility of considering the facts as having normativity *per se* (able to directly impose legal rights and obligations) does not impede Ehrlich from claiming that normativity can be better understood in light of the facts onto which legal rules are putatively directed. Also, the Pure Theory's strict methodological barring the science of law from examining social facts does not rule out the fact that the creation, interpretation, and implementation of legal rules can be more productively examined with reference to the social environment in which these rules exist. This is especially true in the Kelsenian understanding of "existence of norms" as having an objective meaning, insofar as any meanings can hardly be grasped without connection with the social world where they acquire their significance and thus obtain their objective form (see: Van Hoecke, 2002). The fact of obedience of the people to some established rules does not prove that there is a binding force in these facts, which might underpin the validity of legal rules, but looking at the societal practices

of this, people can help in establishing whether these rules possess a minimum of effectiveness and how they are actually implemented in ‘individual norms' (those of contracts, wills, etc.).

Ehrlich stood on the same grounds in his sociolegal project. In the debates of 1915-16 he did not try to contest the accusations thrown by Kelsen on their merits, and in his rejoinders simply insisted that he was misunderstood and misinterpreted (a detailed account of the mutual misunderstandings on the part of both thinkers has been made by Klaus Luderssen, 2005). With such an unsuccessful and weak position in the harsh scientific discussion initiated by the young and ambitious Kelsen, it is not surprising that many researchers maintain that Ehrlich had lost these debates (van Klink, 2008), at least in the eyes of his contemporaries (See: Rehbinder, 1986, 119 ff.). Although, Ehrlich could remark against Kelsen that there is no practical difference between *a posteriori* derivation of rules from facts and their *a priori* reconstruction, as this reconstruction in any sound account of law (including that of Kelsen) always presumes *some* connection with social reality. This connection has never been pictured by Ehrlich as a causal relation between facts and rules, though in his *Fundamental Principles* (Ehrlich, 2001) he did not formulate a clear position on it. In his later writings, Ehrlich (Ehrlich, 1917; Ehrlich, 1918) explicitly sustained that this connection is created by jurists, judges, and legislators - in this paper jointly referred to as "lawyers" – who reshape societal relations into legal ones with the help of particular intellectual images (*Denkgebilde*).

Stefan Vogl (Vogl, 2008) justly invokes the need for a more careful analysis of this problematic in the perspective of these two more elaborate works by Ehrlich, where the Austrian jurist toughens his stance toward the loose methods of the school of *Freie Rechtsfindung* and where the judge was supposed to be free from any legal constraints and able to create any rules whatsoever. Vogl convincingly demonstrates that Ehrlich's position on the normativity of law was much more subtle than one could picture from the description given by Kelsen and from some unhappy expressions used by Ehrlich himself in *Fundamental Principles*. In the two mentioned works Ehrlich maintains that the freedom of a judge in finding law is far from being absolute. On the contrary, the judge is bound by ideological, institutional, conceptual, and political dimensions of the community which shape and undergird the legal order in question, such that he or she cannot act arbitrarily under the risk that his or her decisions will be rejected by the legal community (even if these decisions remain formally valid).

To revert to the famous example discussed by Kelsen in 1915 in his criticism of Ehrlich's book, the judge cannot extract a binding rule from the customary habits of members of a family, except in cases where the positive law of a community permits him to do so (Ehrlich, 1918, p. 395). This permission can be strong (where the judge is allowed some action by some established rule) or weak (where there is simply no prohibition to perform this action). When one has such

power to find or create law (these different terms in this context describe almost the same situation of legal gaps, like the prohibition in Napoleon's Code to restrict access to justice for reasons of the incompleteness of laws, or the proposition of the Swiss Civil Code that a judge shall in some situations take place of the legislator), the judge shall not act arbitrary and is expected to balance the different social interests which potentially have legal protection, and to thereby find the missing ad hoc rule to fill in the gap. In order to detect and correctly formulate these interests, which previously only partly have been expressed in the legal rules, the judge needs methods for investigating the social environment where these rules and their expressions (*Rechtssätze*) were posited. And again, such a recurrence to the sociological study of rules and of the process of their positing does not imply that, in case there is a discrepancy between the literal meaning of a legal rule and the social interests underpinning this rule, the judge has to prevail social interests. The position of Ehrlich, decisively formed in 1918, was quite the opposite: The role of the sociological findings is but auxiliary, while these findings cannot strip the legal rule of its binding force, even if they can be helpful in interpreting this rule.

Here lies the principal message of Ehrlich's sociological jurisprudence, which did not pretend to deny the official law of its legal character or to confer this character to any regular factual relations. Its main function was to give the judge a useful methodological tool in creating "individual norms". Ehrlich maintained - and Kelsen did not seem to be willing to contest - that "a lot of social interests were and remain outside the law formulated in the form of rules of law" (Ehrlich, 1918, 184), and that many issues were deliberately left by the legislator without explicit regulation or simply were not foreseen by him. The Pure Theory of Law stands before the doors of the empirical study of law, and leaves the judge with empty hands when he or she needs some material criteria to fill in gaps or to derogate obsolete rules that lag far behind social development. Studying customary law, corporate law, and other forms of what is nowadays called "soft law", in examining the basic institutions underpinning official law: In these and other cases, using sociological methods could be useful for finding and fixing law (see: Cotterrell, 2012). But for Ehrlich, such a sociological analysis shall have no say in resolving conflicts between official and living law.

2. Bridging the normativity between the justified and the social

The possibility of collecting and using empirical data is not excluded in the case of legal gaps, even if the legal orders do not usually require that judges do so. A judge dealing with a legal gap in a concrete case has several alternatives. He or she can acknowledge that the choice

in creating an ad hoc rule is purely subjective, and that he or she is entitled to choose authoritatively between the different options of adjudicating the case, having no legal constraints to do so. The judge can either disguise the subjective character of the choice as some putatively objective values or explicitly admit her subjectivity. Another strategy is to keep fidelity with the legal text by trying to deduce a rule from it that the judge is lacking for the concrete case. This explanation is not convincing, as if there already is a necessary rule in the legal text, and then there would be no true gap. And if there is no such rule, the judge does not extract it from the text but simply creates it under the pretext of extracting it. The well-known declaratory theory of precedent, where the English judge is not supposed to create but simply to find a virtually existing law, is an example of this. A judge can also turn to factual data to establish what social interests brought about the law to be interpreted, and to fill in the gap in this law with reference to these sociologically established interests that occasionally have no due protection in the interpreted law. It is this latter alternative that Ehrlich advocates in his *Fundamental Principles*.

From this point of view, Ehrlich's proposal was a rather political one - to add to legal orders the corresponding requirements for more objectivity in interpreting legal texts. This objectivity could be secured by analyzing different "social trends" on the basis that the judge had to find, construct, or create the rules lacking for adjudicating particular cases. For Ehrlich, such a method would allow for reconstructing the true will of the legislator, which is to say not the will of the members of parliament, but the social interests these members were presumed to represent when adopting the law in question. This proposal did not stand in any logical contradiction to the strict normative analysis of law proposed by Kelsen. For the latter, this proposal would nevertheless go outside the scope of legal science, which is to be protected from the "methodological syncretism" through dispensing with political and moral justifications of law - they must be abandoned in favor of normative justifications. But this conflict of different justifications does not prevent the legal scholar from using empirical data when interpreting (searching for and establishing the objective meaning of) legal rules. The use of these data does not depend on accepting them as the source of binding force or of legitimacy of the rules.

The contradiction between sociological and normative methods remains flagrant only on the surface, and does not exclude applying both methods in examining the social reality of law, which also plays an important role in the Pure Theory of Law. Here one can recall the notorious Kelsenian thesis of minimal effectiveness of law as a condition of its validity. Neither the difference between social normativity (reconstructed on the base of some social facts) and justified normativity (reconstructed with reference to some hypothetical conditions) is necessarily linked with the issue of validity of law. Maintaining the social normativity of law, Ehrlich was far from supposing that validity of the rules depends on social facts. In spite of the

allegations of Kelsen, such a thesis is neither implicitly nor explicitly formulated in Ehrlich's works. In this aspect, it is useful to distinguish between the *normativity* of law and the *normative claim* of law (see: Bertea, 2009). Examining if there is a normative claim of law to justify the obligation to obey legal rules was not Ehrlich's concern; he was certain that no obligation to obey could be inferred from the fact of obedience. The need for social integration, the ideas of justice that work in society, and other factors can induce individuals to respect the rules, but the existence of rules is a fact irreducible from any justification, be it axiological, factual, or conceptual.

It is another matter whether the state has a monopoly to create law, and also whether a judge can grant judicial protection to those interests which are not directly mentioned in legal texts, but which fall in the scope of the protection the society (exactly one or several communities composing the society), is ready to be provided at that moment of time. For Ehrlich, society is represented in the figure of a lawyer whose opinion is expected to reflect the basic beliefs of the respective community, although it is not always the case. This view does not constitute an encroachment onto the lawmaking powers of the state, as it might seem. The state is not a monolith entity possessing its own will: This juristic construction is utilizable for certain goals, as in the late Kelsenian theory, but it does not pretend to discover any real social facts, which was the main concern for Ehrlich's sociology. After Jeremy Bentham, John Austin, and the German *Rechtswissenschaft* of the second half of the XIX century there are few "true positivists" who are eager to defend the view that the state is or shall be the only lawmaker in society. Kelsen himself was far from this contention, and his conception of dynamic legal order (*Stufenbau*) left spacious room for the judge to go beyond the legal rules ("general norms") in adjudicating cases and creating rights and obligations by introducing "individual norms" into legal order. From this standpoint, there is no irretrievable hiatus between the respective positions of Ehrlich and Kelsen, between the social and the justified normativity that were accordingly defended by each of them. It is likely that Kelsen himself felt afterward that his and Ehrlich's positions were not as irreconcilable as he had thought in 1915-16. Martin Rehbinder symptomatically stresses the fact that later on "Kelsen was sorry that due to his fierce polemic he had barred the way for the recognition of Ehrlich and of the sociology of law" (Rehbinder, 1967, 547). In fact, the ideas Kelsen developed in his *Society and Nature* (Kelsen, 1946) were not so far from the ideas pronounced by Ehrlich in his *Juristische Logik* (Ehrlich, 1918).

Another sign witnessing that there is no complete divide between the empirical and analytical (sociological and normative) dimensions of law is connected with the nature of the normativity. An old positivist account of normativity (Karl Bergbom and other partisans of *Begriffsjurisprudenz*) implied that legal rules necessarily give reasons for action because of the

very fact of their being issued by a competent organ. This account discarded the specificity of the normative Ought, which does not work like a chain in a causal scheme. Insisting that rules are not obeyed only due to the fear of sanctions or due to any other factual cause, Kelsen introduced the concept of imputation that worked as a conditional link (the "scheme of interpretation") between an act and a (negative) reaction to it by authorities. Stanley Paulson qualifies this scheme as "modal normativity", which can be seen as bridging the justified and the social normativity (Paulson, 2006), and which turns out to be coextensive with the variant of the social normativity defended by Ehrlich. Nonetheless, the conditional character of this link requires justification of the lawmaking power in society, be it through invoking a formal *Grundnorm* or certain material rules of recognition (the central conceptual problems for Kelsen and for H.L.A. Hart - see: Spaak, 2005), or through appealing to some moral standards. A strictly positivist - be it realist, normative, or sociological - justification cannot be achieved only pursuant to analysis of the conditions under which a rule has been issued, though an analysis of the reasons underpinning this rule is not indispensable for the statement that some rules are valid in some legal community (see: Bix, 2012).

From this point of view, the fact that Hart accepted sociality as constitutive both for lawmaking (secondary rules) and for the understanding of law (the rule(s) of recognition as the basic criterion for differentiating legal rules from moral and other rules) can be viewed rather as a move forward in developing Kelsenian positivism toward a broader account of social facts, than as overcoming the normativism. Even if Hart was confident that the Pure Theory of Law was doomed to remain in the quandary of the Is-Ought divide and to abstain from including social facts in the province of jurisprudence (see: Hart, 1994, 145 ff.). In fact, a direct reference to the factual societal forces which brought about the conditions for creating some legal texts would be helpless for such a justification, as Ought is not derivable from Is, according to Hume's law.

Thus, it is not the societal forces themselves but the institutional orders created by their interplay that serve the purposes of such a justification. Here, the analysis of the normative conventions used by lawyers (including schemes elaborated by Kelsen, Hart, and others) in their construction of legal order can be helpful. To some extent, the task of Ehrlich's legal sociology was similar to the enterprise undertaken recently by Andrei Marmor, who sought to reconcile the social or institutional setting constitutive of the obligation to comply with some reasons for action (deep conventions) and surface conventions - the reasons for action established in the relevant institution or social practice (Marmor, 2011a, 2011b). In this regard, Ehrlich can be seen as an analyst of the deep societal conventions that give rise to the surface (not in a pejorative sense of superficiality) conventions adopted by the lawyers.

Analyzing these deep conventions (the societal institutions) and connecting them with surface conventions (the legal rules) might be the exact point where Ehrlich's findings might be interesting for the normative philosophy of law. Law in society always displays its functional integrity, even if composed of many inner social orders, which was so carefully described by Ehrlich and later by legal pluralists. As shown above, Ehrlich conceptually divided law into two logical units: Official (state and juristic) law and living law. This latter, as David Nelken masterly distinguishes, stands in a threefold relation to the state, as it can be recognized, banned, or ignored by the state (Nelken, 2008, 446). A conflict between living and official law is not unavoidable for Ehrlich, and rather represents an exclusion from the rule: A sign that official legal rules are becoming obsolete, though replacing these rules is not possible without the interference of lawyers. A custom contradicting official law is possible. It can be also be classified as "living law", but which type of law would triumph is a contingent matter; it depends on the jurisdiction where this collision will be examined and resolved, on the social trends that can influence the activities of this jurisdiction, on the personal beliefs of those who compose the jurisdiction. The idea that living law must anyways take over official law, frequently advocated by many researchers (e.g., Tamanaha, 2001, 224 ff.), is absent in Ehrlich's works: It was wrongly ascribed to him by Roscoe Pound (Pound, 1922) and Max Rheinstein, the first English reviewer of the translated *Fundamental Principles* (Rheinstein, 1938).

The two kinds of law (living and official) are rather analytical constructions that are introduced by Ehrlich to demonstrate that real law consists of these two normative aspects and is not reducible to any of them. Ehrlich was not the first who claimed that lawmaking and law-enforcement are not syllogistic activities - that the judge in fact is free in adjudicating the cases before him or her, and that the science of law should generate some *conceptual* constraints (if the judge is not bound at all by any *factual* constraints; see: Troper, 2001) to limit this freedom, and that for such an effect this science should take into consideration a variety of social factors. This assertion was rather a common place in the legal science of that époque: Here one can recall, for example, "law in action" by Roscoe Pound or "social law" by Georges Gurvitch. Ehrlich describes these factors, but he does not identify them with the "norms of decision" on the basis of which judges adjudicate or with legal rules. The process of transforming the factual behavior into "facts of law" is not mechanical at all, neither is the process of converting these facts of law into rules of law. The creative work of lawyers is indispensable, in that "the rule of law does not proceed directly from society, it is devised by legislators and jurists … who derive the rule of law from the primary legal order by very intricate processes" (Ehrlich, 1922, 584).

Conclusion

A succinct analysis of the ideas developed by Eugen Ehrlich on normativity allows us to state that there was no pretention on the part of this legal sociologist to consider the societal practices as binding in a legal sense. These practices can influence lawmaking activities, the processes of interpretation and implementation of the legal rules, but no rule can be inferred from a practice without the intermediary of the lawyers (those who create, interpret, and apply legal rules). This creative role of lawyers is somewhat blurred in contemporary Western law, where state law prevails and lawmaking is imputed (to use a term of Kelsen) to the state - this situation aliments the illusion that laws are created by this impersonal force. But the decisive role of lawyers is apparent in societies where precedential, customary, and doctrinal law take the upper hand. These were exactly the cases of English law, of medieval law, and of Roman law, which were in the focus of Ehrlich's attention in his *opus magna* of 1913. The continental legal systems of his époque were not thoroughly examined in *Fundamental Problems of Sociology of Law*, and Ehrlich turned to studying these systems only in his later works, especially in *Juridical Logic* (1918). In this work he has more profoundly explained the mechanism of lawmaking and of law-enforcement in the continental law of his time, stressing that the sociological methods proposed earlier for examining other legal cultures are not fully applicable to these continental legal systems. Here attention shall be paid to the particular role of the judge in the system. According to the ideology prevailing after the French Revolution, the judge is "*la bouche de la loi*" (Montesquieu), but this ideology rather misrepresents the real state of affairs. The judge has no external legal constraints when adjudicating the cases before him or her; he or she can introduce or even distort the official legal rules under the guise of interpretation or of mending gaps. The task of legal sociology here is to provide the judge with data about the social balances and equilibriums which at once have given rise to certain legal rules and which thence can be taken into consideration when interpreting these rules, or filling in gaps in the legislation. This particular task stressed by Ehrlich is still relative for contemporary jurisprudence, and this relativeness seems to be confirmed by many contemporary studies made by supporters of sociological or realist jurisprudence. Although, as Ehrlich insisted, the sociological data describing patterns of behavior, mentality, cultural trends, and other dimensions of social life do not possess normativity - only when posited by lawyers into special linguistic expressions pursuant to special procedures can these practices become rules that have binding force in the corresponding legal communities and that are perceived in these communities as normative.

Literature:

1. Antonov, Mikhail (2011), ‘History of Schism: the Debates between Hans Kelsen and Eugen Ehrlich', *International Constitutional Law*, 2011. No. 5, pp. 5-21.
2. Antonov, Mikhail (2013), Global Legal Pluralism: A New Way of Legal Thinking / Higher School of Economics Research Paper No. WP BPR 10/LAW/2013. Available at: http://ssrn.com/abstract=2209809.
3. Bertea, Stefano (2009), *The Normative Claim of Law*, Oxford: Hart Publishing.
4. Bix, Brian (2012), ‘The Nature of Law and Reasons for Action', *Problema,* No. 5, pp. 399-415.
5. Cotterrell, Roger (2012), Socio-Legal Studies, Law Schools, and Legal and Social Theory / Queen Mary School of Law Legal Studies Research Paper No. 126/2012. Available at: http://ssrn.com/abstract=2154404.
6. Ehrlich, Eugen (1916), ‘Montesquieu and Sociological Jurisprudence', *Harvard Law Review*, vol. 29, pp. 582-600.
7. Ehrlich, Eugen (1917), ‘Die richterliche Rechtsfindung auf Grund des Rechtssatzes. Vier Stücke aus dem in Vorbereitung begriffenen Werke: Theorie der richterlichen Rechtsfindung', *Jhering Jahrbücher für die Dogmatik des bürgerlichen Rechts*, vol. 67, pp. 1-80.
8. Ehrlich, Eugen (1918), *Die Juristische Logik*, Tübingen: J.C.B. Mohr.
9. Ehrlich, Eugen (2001), *Fundamental Principles of the Sociology of Law*. New Brunswick: Transaction Publishers.
10. Griffiths, John (1986), ‘What is Legal Pluralism?', *Journal of Legal Pluralism and Unofficial Law*, No. 24, pp. 1-55.
11. Hart, Herbert L. A., *The Concept of Law*, 2d. ed., Oxford: OUP, 1994.
12. Kelsen, Hans (1946), *Society and Nature: A Sociological Inquiry*, London: K. Kegan Paul, Trench, Trubner & Co., Ltd.
13. Klink, Bart van (2008), ‘Facts and Norms. The Unfinished Debate between Eugen Ehrlich and Hans Kelsen', in: Marc Hertogh (ed.), *Living Law. Rediscovering Eugen Ehrlich*, Oxford: Hart Publishing, pp. 239-282.
14. Lüderssen, Klaus (2005), ‘Hans Kelsen und Eugen Ehrlich', in: Stanley L. Paulson, Michael Stolleis (ed.), *Hans Kelsen Staatsrechtslehrer des 20. Jahrhunderts*, Tübingen: Mohr Siebeck, pp. 264-275.
15. Marmor, Andrei (2011a), ‘The Dilemma of Authority', *Jurisprudence*, No. 2 (1), pp. 121-141.

16. Marmor, Andrei (2011b), ‘Conventions Revisited: A Reply to Critics', *Jurisprudence*, No. 2 (2), pp. 493-506.
17. Nelken, David (2008), ‘Eugen Ehrlich, Living Law, and Plural Legalities', *Theoretical Inquiries in Law*. 2008. Vol. 2 (2), pp. 443-471.
18. Paulson, Stanley L. ‘Der Normativismus Hans Kelsens', *Juristen-Zeitung*, 2006, vol. 61, pp. 529-536.
19. Paulson, Stanley L. (ed.) (1992), *Hans Kelsen und die Rechtssoziologie: Auseinandersetzungen mit Hermann U. Kantorowicz, Eugen Ehrlich und Max Weber*, Aalen: Scientia-Verlag.
20. Pound, Roscoe (1922), ‘An Appreciation of Eugen Ehrlich', *Harvard Law Review*, 1922, vol. 36, pp. 129-131.
21. Raz, Joseph (1979), *The Authority of Law*, Oxford: OUP.
22. Rehbinder, Martin (1986), *Die Begründung der Rechtssoziologie durch Eugen Ehrlich*, 2 Aufl. Berlin: Duncker und Humblot.
23. Rheinstein, Max (1938), ‘Sociology of Law: Apropos Moll's Translation of Eugen Ehrlich's Grundlegung der Soziologie des Rechts', *Journal of Ethics*, 1938. No. 48 (2), pp. 232-239.
24. Spaak, Torben (2005), ‘Kelsen and Hart on the Normativity of Law', Peter Wahlgren (ed.). *Perspectives on Jurisprudence: Essays in honour of Jes Bjarup*, Stockholm: Stockholm Institute for Scandinavian Law, pp. 397-414.
25. Tamanaha, Brian Z. (2001), *A General Jurisprudence of Law and Society*. Oxford: OUP.
26. Troper, Michel (2001), ‘Les contraintes de l'argumentation juridique dans la production des normes', Pfersmann O., Timsit G. (ed.), *Raisonnement juridique et interprétation - Journée d'étude internationale du 14 juin 1999*, Paris: Publications de la Sorbonne, pp. 35-48.
27. Van Hoecke, Mark (2002), *Law as Communication*, Oxford: Hart Publishing.
28. Vogl, Stefan (2008), ‘Eugen Ehrlich's Linking of Sociology and Jurisprudence and the Reception of his Work in Japan', in: Marc Hertogh (ed.), *Living Law. Rediscovering Eugen Ehrlich*, Oxford: Hart Publishing, pp. 95-123.
29. Weber, Max (1977), *Critique of Stammler*. New York: Free Press.

Dr. Mikhail Antonov
National Research University Higher School of Economics (St. Petersburg, Russia).
Associate Professor of Law
E-mail: mantonov@hse.ru, Tel. +7 (921) 3832673

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