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THE CONCEPT OF «LIVING LAW» BY E. ERHLICH FROM THE POINT OF VIEW OF THE SPECIFITY OF SOCIAL RELATIONS IN THE GLOBALIZED WORLD.

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Shcherbaniuk O.V., Manyk A.Z. The concept of «living law» by E. Erhlich from the point of view of the specifity of social relations in the globalized world.

The article defines the content and meaning of E. Ehrlich's concept of «living law» from the point of view of the specifics of social relations in the globalized world. According to the author, adhering to Ehrlich's theory of «living law», the study of law exclusively as a written, static phenomenon, limited by law, significantly narrows its scope. In this regard, social relations, their dynamics, social practice, the emergence of new needs, mechanisms for the protection of interests, and other social transformations should be recognized as a social source of law formation.

It was established that, according to E. Ehrlich's concept, the phenomena of society's law are «state law», «law of lawyers», «law of social unions».

The interpretation of E. Ehrlich's concept of «living law» should not contrast it with official law. Positive state law does not exclude the possibility of acquiring social effectiveness and obtaining the status of «living law». Within the framework of the sociological understanding of law, it is noted that the state, refraining from interfering in certain fields, should delegate the freedom of self-regulation to the unions, since the state is one of the types of social unions. According to the law of the state, the role of defender of the established system should remain first of all.

It has been established that Ehrlich's legal understanding of the phenomenon of «law of lawyers» involves an agreement between the content of the norm and the content of a specific case, that is, the ability to endow the norm with the content and features that could fully ensure the regulation of a specific case. «Law of lawyers» is a creative activity, the essence of which boils down to the formulation of norms-decisions that directly follow from the essence of social relations. In today's globalized world, this phenomenon has an analogue in the legal activism of international judicial institutions.

It is emphasized that the effectiveness of law from the point of view of its social action directly depends on the actions of individual social unions. Every social order contains elements of coercion (these are norms of custom, morality, religion, tact, decency) that ensure the subjugation of the individuals of the union without limited their freedom of action. According to the author, a parallel of such ideas can be found in the dynamics and transformations of social relations in the modern globalized world.

Key words: sociology law, the concept of «living law», E. Ehrlich, the law of social unions, the law of lawyers, state law, social order, legal order.

Щербанюк О.В., Маник А.З. Концепція «живого права» Е. Ерліха з точки зору специфіки суспільних відносин у глобалізованому світі.

У статті визначено зміст і значення поняття «живе право» Е. Ерліха з точки зору специфіки суспільних відносин у глобалізованому світі. На думку автора, дотримуючись теорії «живого права» Ерліха, вивчення права виключно як писаного, статичного явища, обмеженого законом, суттєво звужує його рамки. У зв'язку з цим соціальним джерелом правоутворення слід визнати суспільні відносини, їх динаміку, суспільну практику, появу нових потреб, механізми захисту інтересів, інші суспільні перетворення.

Встановлено, що, згідно з концепцією Е. Ерліха, феноменами права суспільства є «право держави», «право юристів», «право суспільних спілок».

Інтерпретація концепції «живого права» Е. Ерліха не повинна протиставляти її офіційному праву. Позитивне державне право не виключає

можливості набуття соціальної дієвості та статусу «живого права». У рамках соціологічного правороз уміння зазначається, що держава, утримуючись від втручання в певні сфери, повинна делегувати свободу саморегуляції профспілкам, оскільки держава є одним із видів суспільних союзів. Відповідно до закону держави, перш за все має залишатися роль захисника встановленого ладу.

Встановлено, що праворозуміння Ерліхом феномену «права юристів» передбачає узгодженість змісту норми зі змістом конкретної справи, тобто здатність наділити норму змістом і ознаками, які могли б повністю забезпечити регулювання конкретної справи. «Право юристів» – це творча діяльність, сутність якої зводиться до формулювання норм-рішень, що безпосередньо випливають із суті суспільних відносин. У сучасному глобалізованому світі це явище має аналог у правовій діяльності міжнародних судових інституцій.

Підкреслюється, що ефективність права з точки зору його соціальної дії безпосередньо залежить від дій окремих соціальних об'єднань. Будь-який суспільний лад містить елементи примусу (це норми звичаю, моралі, релігії, такту, пристойності), які забезпечують підкорення індивідів союзу без обмеження їх свободи дій. На думку автора, паралель таким ідеям можна знайти в динаміці та трансформаціях суспільних відносин у сучасному глобалізованому світі.

Ключові слова: соціологічне право, концепція «живого права», Е. Ерліх, право соціальних спілок, право юристів, державне право, суспільний лад, правопорядок.

Statement of the problem. The substantiation and methodological explanation of law as «living», that is, as a system capable of evolving and changing in response to objective changes in social relations was carried out by one of the founders of the theory of sociology of law – Professor E. Ehrlich of the University of Chernivtsi. His research was based on the multinational and then polyjuridical Bukovinian society, where culture, morality, and customs of various peoples living in the region were intertwined. The polyjurisdiction (or legal pluralism) of Bukovyna was the coexistence of various legal complexes based on the respective ethnic, cultural and religious characteristics of these peoples; they were effectively applied in practice and often did not coincide with the unified national legislation of Austria-Hungary. Such a large number of nationalities and their legal complexes was the impetus for the development of the theory of the law of unions and the theory of «living» law. Such Bukovinian multiculturalism became the basis for E. Ehrlich's idea of «living» law, which in legal doctrine can become a mini-prototype of the «living» law of national identity and the international community and characterize the dynamics and specifics of social relations in the modern globalized world.

The state of the art of the problem. As a conceptual basis for understanding the nature of the socio-legal study of law as a factual order of social life and the importance of implementing the ideas of Evhen Ehrlich's concept of «living» law in law-making, law enforcement and law interpretation practice of modern law, the study uses provisions from the scientific works of V. Bigun, V. Butkevych, O. Butkevych, N. Huralenko, V. Marchuk, S. Savchuk and others.

The purpose of the study is to determine the content and significance of E. Ehrlich's concept of «living law» in terms of the specifics of social relations in the globalized world.

Summary of the main research material. E. Ehrlich explained legal phenomena and processes based on the sociological approach, according to which law is not only a system of formal rules established by the state but also «living» i.e. developed in the process of human coexistence. To reveal the content and familiarize with the concept of «living» law, Austrian scholars organized a seminar on «living law» at the Law Faculty of Chernivtsi University. The first mention of the seminar dates back to October 10, 1909. The main task of this seminar was to collect and process numerous factual materials, which resulted in a severe criticism of the limited study of legal reality by only studying the texts of normative acts and mechanisms of their implementation.

Based on the data obtained as a result of the seminar, the researcher put forward and substantiated the thesis that the legal science developed by lawyers at that time was limited to achieving a temporary goal, which in turn led to a superficial perception of the law. According to E. Ehrlich, there are always excellent rules and decisions for legal practitioners. However, despite their formal identity, in different situations, they may be subject to implementation and application in completely different ways. Therefore, it is always necessary to penetrate deep into the content that lies behind the external formality of the rule. Just as it is impossible to study family law without a description of the family or to explain property law without knowing the types of things, it is impossible to study contract law without penetrating the content of the contracts themselves (interpretation of an international treaty by international judicial institutions) [4; 6].

In the Fundamentals of the Sociology of Law, the Austrian scholar convincingly demonstrated that although law is inherently unified not only within a country but also on a global scale, acting as a normative mode of social reality, it is externally manifested in several qualitatively different phenomena. At least, this is the law of the state, the

law of lawyers, the law of social unions, and, in fact, the «living» law, which is a phenomenon of the law of society as a whole.

Beginning to characterize the law of social unions, the scientist noted that the concept of society is the primary basis of any sociological analysis. Society, according to the author, is a set of human associations that are closely connected. All these associations make up the world and intersect with each other, connecting society within the limits in which the interaction between them is closest. To grasp the origins, evolution, and nature of law, E. Ehrlich suggests that we begin by examining the structure of unions. Previous attempts to define law have failed because they focused solely on legal provisions and disregarded the established order. Just like in ancient times when law governed clans, families, and households, today it is enforced through rules that outline the inner workings of the union, as well as through agreements and laws created through negotiation. From this point of view, the norm is the way people associate and arises through direct communication between them. The norm isn't only a result of a powerful individual's will or basic coordination of interests but is used to control the internal workings of social groups.

Every society has established rules of conduct that, in turn, include some forms of pressure, such as customary norms, morality, religion, comitas gentium, civility, decorum, and fashion. These ensure that individuals comply with society's standards while granting them the freedom to act as they desire. The strong link between legal and extra-legal norms is due to the fact that the social influence of the law relies on certain undisclosed behaviors of individuals or groups. This is illustrated by examples such as the fear of losing business credibility, public confidence, or even being kicked out of a specific community. A church, family, or social group is the best way to stop crime and handle those responsible. An individual determines his or her behavior in accordance with the norms to which social ties force him or her. This confirms the fact that the actions taken by the state to authorize law in accordance with its own will are much less important. It is also obvious in this context that their absence would not in any way adversely affect the rule of law within the Union.

It is not uncommon to hear statements that E. Ehrlich's concept of «living» law is a direct denial and criticism of ineffective official law; that E. Ehrlich kind of absolutized the exclusive creation of law by social unions, thereby trying to remove the state from this process, and also defined law as a product of exclusively interpersonal communication [5, P. 24]. However, this idea and critique may be incorrect. Evidence suggests that this division of law is not present in the Austrian scholar's beliefs. In his opinion, law is essentially a single social whole, based on a plurality of social orders. Therefore, the criticism of Ehrlich's concept from the standpoint of leveling or denying official law and the role of the state in creating the latter is groundless. However, opponents did not fully grasp Ehrlich's meaning of state law. Although Ehrlich's works commented on the self-sufficiency of state law, none opposed state and social law's legal force and effectiveness directly. Moreover, the professor from Chernivtsi University has not excluded the possibility for state law to become socially effective and serve as a «real guide» for legal entities by obtaining the status of «living» law. According to the scholar, state law is not identical to law in its broadest sense, and, most importantly, «state legal norms rarely differ from social ones» because both norms arise from social necessity. Recognizing the idea that legal development is primarily located in social life does not mean that such development cannot be subject to control by public authorities. The latter can either allow social organizations to freely create and apply their own law, or, while refraining from interfering in certain areas, grant unions the freedom of self-regulation. This excerpt illustrates the independent nature of «soft» law, but it does not imply the absoluteness of this autonomy or the full separation of social law from state law. E. Ehrlich merely observed that social unions and associations can regulate themselves without state intervention, but this does not mean that self-regulation always occurs or should occur outside of formal legal contexts [8].

For E. Ehrlich, the state was a type of social agreement. Therefore, while developing and building the theory of «living» law, the researcher often focused on the issues related to the connection between the state and social law. This is because the self-governing order that exists in society gives rise to generally recognized rules of conduct, and it transforms into state law due to its specific importanceFor instance, when the structure of the state and public order is founded on the family order, showing respect for one's parents becomes an established legal position. The shared bond between parents and children established through a direct connection with God becomes impactful, leading religious principles to transmute into legal standards [4; 6]. In addition, one could say that the Austrian scholar understood how state law is effective in punishment. This effectiveness is as follows: within social unions, as noted above, there are norms of morality, customs, religion, and tact, comitas gentium, which apply to all members of the unionAnd in the event of a violation of these norms by individuals outside of the union, or by members of the union, state law comes into effect. This is why the scholar acknowledges the primary role of state law as that of a defender of the existing system.

Ehrlich's social and legal theory remains applicable during the era of globalization, as it allows

for the creation of self-regulating social subsystems independent of the state (such as transnational corporations and international organizations). E. Ehrlich was among the pioneers to suggest the presence of a global communication network that results in the emergence of global law as a new social – legal reality.

He associated their existence with the imperfection and incompleteness of social relations regulation by organizational norms, with their inability to resolve conflicts and complex situations. As mentioned earlier, Ernst Erlich's understanding of the law was not only limited to law as a rule but also to the lawyers' law (das Juristenrecht) – a set of decision norms (Entscheidung normen), that is, legal provisions according to which courts decide legal disputes.

The explanation for the existence of such a right is the fact that all social reality and social relations do not arise according to some rule or program but in accordance with the development of society. That is why the scope of legal norms that regulate such relations should emerge, change, transform, and adapt to the conditions of social and legal reality, which they are intended to regulate. At the same time, the scholar did not deny that the coordination between the content of the rule and the content of a particular case is not an easy process. In such circumstances, as the scholar noted, a great role is assigned to the personality of a lawyer. Specifically, the lawyer's ability and skill to infuse a legal provision with content and features that guarantee full regulation of a particular case is pivotal.

Therefore, the practical actions of lawyers should not be restricted to the content that was outlined in the regulation upon its creation. First and foremost, a lawyer must apply the laws of formal logic, establish stereotypes and ideas, and then begin to consider specific empirical facts and, as a result, move on to certain generalizations. When conducting such activities, it is crucial to acknowledge the dynamic nature of both social and legal relationships, which are not always consistent.

The law practiced by attorneys can be seen as a creative activity that involves forming normative decisions directly stemming from social relations. The content of these decisions can change depending on shifts in the underlying relationships. This is exemplified by the acceptance of Roman law, the peculiarity of which is that borrowings are made in favor of Roman rules and decisions and not in favor of Roman legal relations. The constant alteration of the content of reciprocal norms to fit societal changes is their distinguishing feature. E. Ehrlich observed that every instance of adopting another's law expresses the principle of permanence. Consequently, some rules invented by the Roman pontiffs two millennia ago remain in effect thanks to their adoption. In this context, the scholar argues that the question may arise: if it is true that norms arose from the relations they were supposed to regulate, how is it possible that such an ancient norm can remain applicable in a completely different social and economic system so long after its inception? The scholar believes that the constantly evolving norms rooted in Roman law have been enriched over thousands of years, enabling them to adapt to varying conditions while acquiring a significant social and abstract significance.

The law of lawyers serves as a bridge between decision rules and legal norms. Decision rules are initially reduced to a set of principles that guarantee case resolutions in similar situations, ensuring their longevity as long as the relationships they apply to exist. If the relationship is long-term, these decision norms may become codified in law. However, this consolidation does not imply that those standards should not be adapted to meet the demands of social ties.

Conclusions. Thus, analyzing the above, it can be stated that, following the Ehrlichian theory of «living» law, the study of law exclusively as a written, static phenomenon limited by law significantly narrows its scope. In this regard, the social source of law formation should be recognized as social relations, their dynamics, social practice, the emergence of new needs, mechanisms of interest protection, and other social transformations.

Only the law that emerges from social life and becomes a standardized norm is «living» law, while everything else is simply a «bare» doctrine, dogma, or theory. The true regulator of social relations is the law that crystallizes into a living order, which is not prescribed by anyone but constantly meets the demands of life in a customized manner. The development of law should be determined by this living law alone, as it embodies a truly scientific understanding of law. The integrity of the law is not a deliberate creation of the legislature but rather a product of the social construction of three autonomous legal systems – state law, lawyer law, and union law – that are not mutually exclusive. The interaction of social norms offers a comprehensive view of social mechanisms. The flexible and adaptable conventional model of multisource law can take into account specific life situations for dispute resolution. Furthermore, it provides a mechanism for regulating social relations and protecting individual rights, freedoms, and interests within societal norms and traditions.

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