



## **Sociology of law against legal dogmatics: revisiting the Ehrlich-Kelsen debate**

*Sociologia do direito contra dogmática: revisitando o debate Ehrlich-Kelsen*

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**Abstract**

This work revisits the centenary controversy between Eugen Ehrlich and Hans Kelsen on the scientific study of law, based on the analysis of the original texts published in the *Archive for social science and social welfare* (1915-1917). The analysis of Kelsen's critical reaction to Ehrlich's project shows that the trajectory of sociology of law in the history of legal thought has been marked from the beginning by the clash with legal dogmatics.

**Keywords:** Sociology of law; Eugen Ehrlich; Hans Kelsen.

**Resumo**

Este trabalho revisita a centenária controvérsia entre Eugen Ehrlich e Hans Kelsen acerca do estudo científico do direito, com base na análise dos textos originais publicados no *Arquivo para a ciência social e política social* (1915-1917). A análise da reação crítica de Kelsen ao projeto de Ehrlich demonstra que a trajetória da sociologia do direito na história do pensamento jurídico tem sido marcada desde o início pelo embate com a dogmática jurídica.

**Palavras-chave:** Sociologia do direito; Eugen Ehrlich; Hans Kelsen.



## 1 Introduction<sup>1</sup>

This article revisits the controversy between Eugen Ehrlich (1862 – 1922) and Hans Kelsen (1881 – 1973) on the scientific study of law in the context of the early 20<sup>th</sup> century Austro-Hungarian Empire. *Fundamental principles of the sociology of law*,<sup>2</sup> Ehrlich's book published in 1913 is a landmark work for the scientific project aimed at the sociological study of law. Such scientific project, however, succumbed right in its beginning in face of Kelsen's critical reaction and the following success of *Pure theory of law*,<sup>3</sup> the book launched in 1934 that would convert its author in one of the greatest names of legal positivism.

The controversy had its place in the *Archive for social science and social welfare*<sup>4</sup>, one of the first journals to publish sociological studies in the German cultural and academic milieu. The journal, at that time under the direction of Edgar Jaffé, Werner Sombart and Max Weber, published studies that are today considered classics of the social sciences.<sup>5</sup> In 1915, Kelsen publishes *A foundation of sociology of law*,<sup>6</sup> which presents an extensive reflection on Ehrlich's book. In face of such a critical review, Ehrlich counterarguments with a *Reply*,<sup>7</sup> which is followed by Kelsen's *Reply*<sup>8</sup> appearing both in the same issue of the journal, in 1916. Ehrlich still writes a short *Second reply*<sup>9</sup> and the debate ends with Kelsen's *Closing words*,<sup>10</sup> both from 1917.

Through an analysis of the Ehrlich-Kelsen debate, the present study seeks to understand the relationships that sociology of law has established with legal dogmatics in the beginning of its trajectory in the history of legal thought. Is the line of demarcation between sociology of law and legal dogmatics a matter of division of

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<sup>2</sup> In the original title, *Grundlegung der Soziologie des Rechts* (EHRlich, 1913).

<sup>3</sup> In the original title, *Reine Rechtslehre* (KELSEN, 1934).

<sup>4</sup> *Archiv für Sozialwissenschaft und Sozialpolitik*, a German journal that existed until 1933.

<sup>5</sup> Notably, Weber's work *The protestant ethic and the spirit of capitalism* (1999), originally published between 1904 and 1905 in two issues of the journal.

<sup>6</sup> In the original title, *Eine Grundlegung der Rechtssoziologie* (KELSEN, 1915).

<sup>7</sup> In the original title, *Entgegnung* (EHRlich, 1916).

<sup>8</sup> In the original title, *Replik* (KELSEN, 1916).

<sup>9</sup> In the original title, *Replik* (EHRlich, 1917).

<sup>10</sup> In the original title, *Schlusswort* (KELSEN, 1917).



scientific labor? Could this relationship be seen in another way, as a dispute between schools of thought that approach the same object from incompatible viewpoints and compete to establish what it means to study law scientifically? This involves recovering a discussion of epistemological order that remains of interest to problematize the identity of sociology of law as a social science in the current times.

In order to analyze Kelsen's critical reaction to Ehrlich's scientific project, the original texts of the debate published in the *Archive for social science and social welfare* between 1915 and 1917 were used as primary sources of information. These texts, so far available in compilations in German (LÜDERSEN, 2003) and Italian (CARRINO, 1992), were translated into Portuguese prior to the preparation of this article. This translation of the Ehrlich-Kelsen controversy is published in the present issue of *Direito e Praxis*.

The lack of effective engagement with these primary sources consists in one of the most remarkable deficiencies of the literature on the Ehrlich-Kelsen debate available in Brazil – for instance, Maliska (2001), Sparemberger (2003), Ataíde Junior (2010), Carlotti (2015). Amato (2015) is an exception, in spite of the fact that the author seeks to develop a Luhmannian reading of this debate, which is fairly different from the one that is developed here. This situation results in a certain misunderstanding of the positions in dispute and even of the core of the controversy. However, there are a few studies published during the last decade – notably the works of Van Klink (2009)<sup>11</sup> and Maliska (2015)<sup>12</sup> – that revisited the debate using the texts of the *Archive for social science and social welfare*. These studies served as secondary sources of information.

The article is divided into four sections. Initially, the controversy is historically situated in order to highlight that the call for the development of sociology of law arose in a specific context of time and space, in which legal dogmatics already prevailed as a paradigm in the science of law. In the next section, the aim is to present Ehrlich's project of laying the foundations of a sociological science of the legal phenomenon, in opposition to legal dogmatics. Kelsen's critique is analyzed afterwards with the purpose of highlighting the divergences between the two perspectives on the way that they understand the relationships between legal dogmatics and sociology of law. Finally, the

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<sup>11</sup> Van Klink's work integrates the volume *Living law: reconsidering Eugen Ehrlich* (HERTOGH, 2009), which significantly contributed to shed new light on Ehrlich's thought.

<sup>12</sup> Maliska's book (2001) is a fundamental reference in the study of Ehrlich's work in Brazil. In the second edition of the book, reviewed and expanded, a new chapter commenting on the Ehrlich-Kelsen debate was introduced (MALISKA, 2015, p. 35-52).



last section discusses Ehrlich's response to Kelsen's critique in order to show that this controversy is an inaugural moment of an unfinished dispute between two paradigms.

## **2 Legal dogmatics as a paradigm in crisis in the context of the Austro-Hungarian Empire**

The appearance of *Fundamental principles of the sociology of law* occurred in a historical moment in which a paradigm in the science of law had already been established in continental Europe. In the Austro-Hungarian Empire, however, the paradigm of legal dogmatics was going through one of its first crisis. In this section, the concept of paradigm is examined in the context of the theory of scientific paradigms; then, the main constitutive elements of legal dogmatics as a paradigm are identified in order to explain the conditions that disturbed its normal reproduction in the law schools of the Austro-Hungarian Empire in the early 20<sup>th</sup> century.

According to the theory of scientific paradigms (KUHN, 1970), scientific fields are social constructions, because the consideration of knowledge as scientific depends on the existence of paradigms. A scientific paradigm is defined as "the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community" (KUHN, 1970, p. 175). In order to understand the elements that conform a paradigm it is necessary to scrutinize the constellation of group commitments of a given scientific community, which is defined as a group of scientists who are practitioners of the same specialty, passed through a similar professionalization process and share an intersubjective agreement about the normal mode of producing scientific knowledge in their field (KUHN, 1970, p. 177-178).

A paradigm thus consists in a relatively stable structure that conditions the practice of a group of scientists at a given historical moment. This means that crises and paradigm shifts can occur over time. According to the theory of paradigms (KUHN, 1970), this typically happens when a few members of a scientific community realize that the dominant paradigm ceased to function properly. Dissatisfied with the available answers to address research questions of crucial practical importance, they start to search for solutions beyond the boundaries of normal science. This process leads to the development of new schools of thought that compete with each other for support of



those who belong to the scientific community. A turbulent period of transition tends to precede a paradigm shift, which is completed when a given scientific community replaces its constellation of commitments partially or completely.

This theoretical framework suggests that paradigms may exist in many different scientific fields, shaping the way scientific knowledge is produced and consumed. There is indeed a whole literature in sociolegal studies that, based on this theory, argues that legal dogmatics consisted in the prevailing paradigm in the science of law throughout the 20<sup>th</sup> century (ZULETA PUCEIRO, 1981; FARIA, 1988; HAGEN, 1995; ANDRADE, 2003). These analyses suggest that a scientific community focused on the study of law was structured historically, sharing a constellation of commitments that establishes who belongs to the group of scientists and what it means to do science of law in the normal way.

Legal monism is one of the constitutive elements of that constellation of commitments. The law as an object of study is reduced to the legal norms originated from legislative, judicial and administrative decisions of the state. Another belief is that the jurists' scientific task is to describe valid norms in a given space and time. The science of law must build a formal system of legal norms characterized by its logical unity and internal coherence, which requires the elaboration of a set of doctrinal concepts to systematize normative materials. Doctrinal studies of law, which provide a description of what the legal order prescribes about a particular matter, are the quintessential product of research done in accordance with the paradigm of legal dogmatics. The science of law works by serving the practical purpose of establishing the terms for future decision-making in concrete cases of judicial or administrative application of law, promising legal certainty and predictability in dispute resolution (ANDRADE, 2003).

The genesis of the paradigm of legal dogmatics goes back to the School of Historical Law (SANDSTRÖM, 2005, p. 139), which appeared in continental Europe during the 19<sup>th</sup> century, concomitantly with the process of consolidation of the Liberal State model. At that time discussions about the conditions and possibilities of a science of law based on the distinction between positive law and natural law gained momentum. The legal positivism of the German School of Historical Law (its most famous exponent being Friedrich von Savigny) pioneered the efforts in giving scientific status to the study of law, establishing as the task of the science of law to describe the



content of a given system of positive law (SANDSTRÖM, 2005, p. 137). The School of Historical Law is closely associated to the rise of the legal scholar, that is, the law professor who, acting with a certain independence in relation to the political powers, began to play a prominent role in the production and dissemination of the science of law, contributing to the rationalization of the professional work of practical jurists (FERRAZ JR., 1980, p. 54-55).

The book *Fundamental principles of the sociology of law* consists in one of the first significant reactions to legal dogmatics as a paradigm. It is a book that develops not only a strong criticism of the science of law existing at the beginning of the 20<sup>th</sup> century, but also proposes a new constellation of commitments: the sociology of law, a science of law that would be an integral part of sociology. In the widely known foreword in which he synthesizes the meaning of sociology of law, Ehrlich makes clear his project to shift to the center of the concerns of the jurists of his time what had become peripheral: “at the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself” (EHRlich, 2002, p. lvix; EHRlich, 1986, p. 8). The scientific project inaugurated by Ehrlich involves the sociological understanding of law in social reality.

The *Pure theory of law*, in spite of all its originality, is a work that was inserted in the tradition of the paradigm of legal dogmatics. According to its author, “the Pure Theory is not, after all, so extraordinarily novel, contradicting everything that preceded it. It can be understood as a further development of approaches that emerge in the positivist legal science of the 19<sup>th</sup> century” (KELSEN, 1992, p. 2; 1976, 8). It is a scientific project that seeks to purify legal knowledge of all non-legal elements, that is, “the Pure Theory aims to free legal science from all foreign elements” (KELSEN, 1992, p. 7; 1976, 17). Kelsen seeks to strengthen a project concerning the foundations of a science whose role lies in describing and systematizing the norms of the legal order. With the School of Historical Law, the typical characteristics of the paradigm of legal dogmatics were defined. However, this same paradigm was reconfigured in the 20<sup>th</sup> century thanks to the contributions of the School of Legal Positivism (ANDRADE, 2003, p. 28). This school, based on Kelsen’s original contribution, formulated a theory of the legal order (BOBBIO, 1995, p. 197-198).

This epistemological dispute, therefore, represents a moment of crisis of the paradigm of legal dogmatics. In this context, new schools of thought arose, which sought



to rebuild the constellation of commitments that had been established by the School of Historical Law. Such schools of thought, however, could not abstain to position themselves in relation to sociology. After all, sociology was a science that for some time had sought legitimacy as a form of knowledge, assuming the characteristics of modern science. Far from being an isolated episode, Kelsen's critique of Ehrlich's sociology of law integrates a broad discussion about the scientific foundations of the social sciences and their relationship to legal dogmatics (MALISKA, 2015, p. 35). Weber himself, for example, developed an interest in this debate between 1911 and 1913, sustaining the possibility of coexistence of sociology of law and legal dogmatics as two distinct scientific fields (SILVEIRA, 2006, p. 73 e 80). It is not a coincidence that Kelsen's texts on the sociology of law found place in the *Archive for social science and social welfare*.<sup>13</sup>

Both antagonists, through their different epistemological perspectives, reveal a tendency to seek new ways to elevate the study of law to the status of a science. It is true that both Ehrlich and Kelsen shared the ideal of modern scientism, which celebrates the knowledge arising from the scientific method as the most valuable form of knowledge. But what does it mean to do science? Is it possible to study law scientifically? If the questions that troubled Ehrlich and Kelsen were the same, much of the controversy stems from the irremediably different responses that they formulated at a time of crisis, in which the science of law appeared no longer able to account for certain research problems that have gained the attention of the legal community, such as the question of the imperialist governance of a plural society.

The texts of the debate between Ehrlich and Kelsen appeared in the *Archive for social science and social welfare* in the midst of World War I (1914 – 1918), which is the final landmark of the historical period called "The age of empire" (HOBSBAWM, 2015). This epoch was characterized not only by deep social transformations typical of the rise of industrial capitalism, but also by relative political stability, ensured by the coexistence of imperialistic powers in continental Europe, like the Austro-Hungarian Empire (1867 – 1918), which was dissolved by the end of the war.

Austria-Hungary was constituted as a dual state based upon the compromise between the Emperor Franz Joseph I of Austria (1830 – 1916) and the Hungarian

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<sup>13</sup> A few years prior to the debate with Ehrlich, Kelsen had already written an article in the same journal critically positioning himself in relation to the emerging views of sociology of law (KELSEN, 1912).



national elites interested in expanding their autonomy. This agreement marks the passage from an Absolutist State to a Liberal State, in the form of a parliamentary constitutional monarchy, in which fundamental laws and two major legislative bodies limited the power of the emperor but maintained his prerogative to appoint government ministers (MORENO MÍNGUEZ, 2015, p. 16). Due to these events, the role of imperial state law has been strengthened and, therefore, the paradigm of legal dogmatics gradually gained impetus. Located in the main capital city of the Empire, the traditional University of Vienna's Law School, where both Ehrlich and Kelsen graduated, played a central role in the production and reproduction of the science of law and in the training of the elite bureaucrats of the state administrative apparatus.

The Austro-Hungarian Empire controlled a vast territory and an enormous population. On the eve of World War I, it extended from the Tyrol region on the western border to the Bukowina on the eastern border; and from Bohemia, on the northern border, to Bosnia and Herzegovina, on the southern border. However, unlike other European states that were remarkably homogeneous ethnically, linguistically and religiously, Austria-Hungary was home to a great diversity of social groups. In the last pre-war census, the population was estimated at more than fifty million inhabitants, who belonged to eleven different nationalities, not counting the ethnic groups that were not recognized as national groups (MORENO MÍNGUEZ, 2015, p. 15). In this the scenario of plurality, with rising tensions between the local elites and the imperial authorities, the unique political and legal arrangements that for decades had sustained the Empire were already fragile. Not surprisingly, the assassination of the heir of the imperial throne by a Serbian activist in Sarajevo in the region of Bosnia and Herzegovina triggered the armed hostilities.

The preservation of the integrity of the Austro-Hungarian Empire depended not only on the central administration's ability to enforce its laws and on the strength of its military apparatus but also on its cultural power. Under the imperial umbrella, large cities like Vienna, Prague and Budapest emerged as cosmopolitan urban centers, attracting the European bourgeoisie of the *Belle Époque*. At the same time, Franz Joseph's liberal, tolerant and modernizing policies encouraged the expansion of the university system, seen as an instrument for unity preservation and a strategy of common acculturation, whether through German language teaching or the promotion of scientific education (EPPINGER, 2009, p. 25-30). It was in this context that universities



were established in medium-sized urban centers such as Ehrlich's hometown of Czernowitz (currently situated in Ukraine). The University of Czernowitz attracted middle class professors and students of Jewish origin and soon became an effervescent intellectual center in spite of being situated in Bukowina, a predominantly rural and economically backward region at the edge of the Empire (HOBBSAWM, 2015, p. 35-36).

At the University of Czernowitz, relatively distant from the political circles of Vienna, Ehrlich developed most of his academic career, working as a professor of Roman law between 1896 and 1914 and even becoming the rector of the university. Even though working in Bukowina, he was already an experienced and respected scholar when he published *Fundamental principles of the sociology of law* (EHLICH, 1913). His contacts in Europe and with the U.S. have helped the book to find a wider audience. By the end of World War I, with the dismemberment of the Austro-Hungarian Empire and the annexation of Bukowina by Romania, his university career was suddenly interrupted.<sup>14</sup> Though is not among the purposes of this article to analyze the dialectics between "center" and "periphery" that marks Ehrlich's personal and intellectual life (COTTERRELL, 2009), it is noteworthy his enthusiasm for the multinational and multicultural model of state that long characterized Austria-Hungary (MALISKA, 2015, p. 28; EPPINGER, 2009, p. 25-37).

Kelsen, nearly twenty years younger than Ehrlich, was beginning his teaching career at the University of Vienna's Law School when he published the critical review that started the debate in the *Archive for social science and social welfare* (KELSEN, 1915). Having grown up in Vienna close to the local political circles, he would achieve notoriety as a jurist with the establishment of the First Austrian Republic in 1919. After the war, Kelsen was nominated professor for public and administrative law at the University of Vienna and entrusted with the task of drafting the new constitution of Austria, which introduced a court with the power to review the constitutionality of legislation. Between 1921 and 1930, he was a member of the Austrian Constitutional Court. However, he was forced to flee abroad due to rise of Austrofascism in the 1930s<sup>15</sup>. Written in exile, *Pure Theory of Law* (KELSEN, 1934), his most influential work, develops ideas that already appear, to a considerable extent, in the debate with Ehrlich.

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<sup>14</sup> For information on Ehrlich's biography, see Reh binder (1962) and Maliska (2015, p. 17-33).

<sup>15</sup> On biographical data of Kelsen, see Ladavac (1998).



In order to better understand Kelsen's critique of *Fundamental principles of the sociology of law*, it is necessary to discuss Ehrlich's scientific project.

### **3 Ehrlich's scientific project: sociology of law against legal dogmatics**

The first chapter of *Fundamental principles of the sociology of law* (EHRlich, 1986, p. 9-26) can be understood as an eloquent attack on what is conventionally known as legal dogmatics. Ehrlich refers precisely to the science of law that prevailed in continental European universities of the early 20<sup>th</sup> century. Jurists' scientific task was to interpret and describe in a systematic way the existing positive law, that is, the legislation of their own states. He even asserts that the doctrinal studies of law resulting from this juristic science were merely a more elaborated form of publishing the laws of a country (EHRlich, 1986, p. 21).

According to Ehrlich, juristic science consisted in exclusively practical knowledge. Lawyers acquired the skills necessary for the exercise of their profession, without being able to understand the scientific basis of the study of law. Rather than considering the needs of the different legal professions, teaching at law schools was almost exclusively oriented to the training of students in the performance of the duties of a judge or government official (EHRlich, 1986, p. 12-13). Indeed, discussions on legal matters revolved around dispute resolution before courts or bureaucratic agencies of the state. The training of the legal professional consisted in knowing the legal precepts in an abstract way and learning to apply them to the specific cases.

This juristic science was intended to constitute a system of rules of state origin according to which decisions should be made by judges and government officials. Within the legal system there would be answers for every practical question that might arise. Norms for decision would be derived from the legal system, that is, instructions on how to decide legal disputes formulated in the most general terms possible. From the point of view of those who held positions of authority, such norms for decisions contained propositions applicable to the resolution of disputes before courts or administrative agencies (EHRlich, 1986, p. 21-22).

At the moment jurists started to share these postulates, states Ehrlich, they abdicated to study the law not created by the state. In spite of its heterogeneity, non-state law was reduced to the idea of a customary law. To the juristic science there was no other law to be considered as a legitimate object of research than positive state law,



exclusively that which courts and administrative agencies applied as law in the administration of justice, supported by the possibility of using coercion to enforce their decisions. It was possible to arrive at his stage because the state historically has claimed not only the monopoly on the administration of justice and on the legitimated use of physical coercion, but also on the creation of law (EHRlich, 1986, p. 17). The final step was taken when judges were no longer required to know non-state law and parties were asked to prove the existence of customs as a factual matter (EHRlich, 1986, p. 18).

This was a backward and unsatisfactory state of affairs, Ehrlich argues. The science of jurists was fragile in its foundations, especially when compared to the progress achieved in other areas of the human knowledge, in which the distinction between practical knowledge and scientific knowledge had already been consolidated (EHRlich, 1986, p. 9-11). Research, literature and teaching within the science of law deviated from the standards of the other sciences. There were also no scientific methods, since the juristic science only knew the abstract and deductive method developed for the application of law by state authorities (EHRlich, 1986, p. 14). In short, for Ehrlich, legal dogmatics was as a kind of practical and professional knowledge. As such, it cannot be called science under any circumstances.

Ehrlich deepens this first narrative on the shortcomings of legal dogmatics in the following chapters of *Fundamental principles of the sociology of law* and then proceeds to a second narrative about the need for a sociology of law. Ehrlich strongly believed that the adequate development of a sociological science of law was an alternative to overcoming the state of affairs that characterized the science of law of his time. He advocated a science aimed at understanding how law works in social life, which could put aside judgments about the immediate practical utility of scientific knowledge (EHRlich, 1986, p. 9), such as its instrumental use in the decision-making process by judges and government officials.

Sociology of law's subject matter was related to what Ehrlich called "living law". (EHRlich, 1986, p. 384). In this conception, the law would be equal to the legal norms of conduct, that is, the rules that people actually follow in the everyday life. According to Ehrlich, many social relationships are determined by rules of conduct recognized as binding by members of social associations and incorporated into daily actions. In order to study the living law, it was necessary to investigate the inner order



of these social associations. It would be up to the sociologist to find out how rules that are recognized as mandatory by members of a particular social group work.

For Ehrlich, it is not an essential element of the concept of law to have its origin in the state. The state is nothing else than a social association (EHRlich, 1986, p. 39). Like other social associations, the state exercises coercion. Even though, it has historically claimed a monopoly on the use of certain mechanisms of social coercion, including penalty of imprisonment and compulsory execution. In this sense, jurists overestimated state law in comparison with the law of other social associations. Ehrlich criticizes legal monism, the view shared by the jurists of his time that the law that interested to know scientifically was only the law that came from the state.

If traces of the organized human communities were followed, thought Ehrlich, law would be found everywhere, constituting and ordering the social associations that form the backbone of society: families, urban neighborhood, religious communities, farmers' cooperative societies, and so on. Law would consist first and foremost of an order, a form of social organization, which indicates to every member of a social association its position in the community and its duties. Law, thus, exists before its enactment by the state. It is on the basis of the practices that are at the heart of everyday social life, that is, the "facts of law" (EHRlich, 1986, p. 68), that the rules of positive law will be written (EHRlich, 1986, p. 151).

Ehrlich assumes that there are many and varied reasons why people follow certain norms. Court's decisions or the fear of state sanctions are rarely the elements that effectively explain people's behavior. By following norms, people take into account their membership in social associations: they avoid disagreements with family members, and they fear losing their jobs or the possible damage to their reputation in the neighborhood, for example. It is still an open question whether and to what extent judicial decisions or the threat of coercion by the use of physical violence influence human behavior (EHRlich 1986: 53-68).

The legal rules of conduct are thus different and to a certain extent independent of legal propositions. According to Ehrlich, this last concept refers to a much more recent invention in history of law, the idea of commands emanating from the state, a single center of command, through formal mechanisms of legislative creation. With all his erudition of legal historian, he shows, for example, that social institutions like the contracts and the marriage governed relations in society long before



the appearance of modern codes with state law rules on the celebration of agreements of this kind. Legal propositions thus consist in written and structured instructions on how concrete cases are to be judged by courts and government agencies.

There are many legal propositions that are not converted into human actions, because they are unknown to the people or not typically obeyed in social life as norms of conduct. It would be possible to ascertain the distance between the legal propositions that can be derived from the state law in an abstract way and what is seen as customary or rightful behavior in everyday life social relationships by empirical observation. Courts and government agencies, however, may selectively invoke these legal propositions, when the state is responsible for resolving a given dispute. Rules for decision, that is, the rules according to which legal disputes are decided, are just one of the many kinds of norms and, therefore, perform very limited functions.

Being law a social phenomenon, the science of law in the proper sense of the expression is part of the social science, that is, sociology, which at that moment appeared with all its force seeking an understanding of social phenomena such as economy, religion, culture and politics. As the two final chapters of *Fundamental principles of the sociology of law* suggest (EHRlich, 1986, p. 361-388), such a science could employ an infinite variety of empirical methods of research to study the living law. The sociology of law, therefore, would be the true science of law. For Ehrlich, the sociology of law contains all the possibility of a truly scientific knowledge about the legal phenomenon. Kelsen, as it will be seen, would never accept such a conclusion.

#### **4 Kelsen's critical reaction: in defense of the division of scientific labor**

In the beginning of *A foundation of sociology of law* it is already possible to realize that, at the heart of Kelsen's concerns, is the clash between the dogmatic and sociological approaches to law. Surely, he shared a certain dose of distrust regarding the dominant science of law in his time. He recognized the remarkable intellectual leadership of Ehrlich, who emerged as a scholar who has been proved capable of garnering support for a proposal to reform the science of law of his time:



When one of the leaders and founders of the so-called "sociological" science of law, which is new and increasingly stronger, presents to public opinion a great work whose title announces the *foundation* of this new science, there are reasons to address such a curious initiative with high expectations and great hope. Until then, all the numerous attempts to reform the science of law, many of which making passionate attacks on non-scientific and retrograde jurisprudence under the flag of "sociology," have failed. [...] And if one among all could be able to present these foundations, this would surely be Eugen *Ehrlich*. His seductive and captivating writings, in his spirited and lively rhetoric, have attracted a faithful group of followers for more than two decades, indicating the path to be followed in this struggle for the science of law (KELSEN, 1915, p. 839, our translation).

However, he did not consider taking part in the group of Ehrlich's followers. On the contrary, he saw in his colleague's work a threat to his own scientific project, aimed at strengthening the theoretical foundations of the paradigm of legal dogmatics. Hence the urgency of taking Ehrlich as antagonist, reacting to his book *Fundamental principles of the sociology of law*.

The following paragraph of the critical review highlights the importance, for such a project, of discarding from the outset the thesis that suggested a clash between legal dogmatics and sociology of law. Pointing out the two supposedly competing tendencies that sought to analyze the law scientifically, Kelsen contends that there is a clear line of demarcation concerning the object and the method:

The fundamental opposition, which threatens to divide jurisprudence with regard to its object and method into two fundamentally different directions, results from the twofold approach to which it is possible to subject the legal phenomenon. One can consider the law as norm, that is, as a determinate form of *ought*, as a specific rule of *ought*, and accordingly constitute jurisprudence as a normative and deductive science of value, such as ethics or logic. But it could also be understood as part of social reality, as a fact or a process, whose regularity is explained causally, by inductive means. Law is here a science of the *is* of a certain human behavior, the science of law is a science of reality that works according to the model of the natural sciences. [...] a science that endeavors to look for such 'social' rules, the rules of legal life, is called social science, or, if one wants, sociology. [...] It is a clear that sociology of law is essentially different in object and method from a science of law. [...] One cannot, of course, speak of a struggle between the two disciplines, in the sense that, from a general point of view of scientific knowledge, only one or the other is legitimate and possible (KELSEN, 1915, p. 839-840, our translation).

Thus, it is legitimate for a social science, sociology, to assume the specific task of explaining law as part of social reality. After all, the patterns of behavior of



individuals, what people do regularly, should be studied by a science that deals with concrete reality - for example, whether or not there is compliance with a given rule of behavior by a given group of people. A science aimed at studying law in a sociological perspective was interested in understanding social processes that could be explained inductively through the identification of causes and effects, that is, through the verification of concrete reality.

A normative science of law, legal dogmatics, was equally legitimate. When referring to such a science, Kelsen has in mind the concept of norm as a universal and abstract category, which would be a determinate form of a judgment of value in respect to duties. The norm would not correspond to an empirical reality, but to an “ought-to-do” command; it would have nothing to say about what the reality of social life really is, it would only prescribe behaviors that should be followed by individuals in given situations under existing law. The concept of norm would be the starting point of a science of law that was really worthy of this name, a science that employs the deductive procedure. In that regard, Kelsen observes that,

A "sociological" science of law could never say to what and under what conditions a person or a category of persons is legally bound or authorized, but only what certain human beings [...] under certain preconditions usually do or not do. Every notion of a sociological science of law may only include notions of reality, de facto judgments, that is, judgments about the causal nexus of certain regular phenomena, and may include so few value judgments - of the kind 'this is lawful, that, 'illicit', 'someone is obliged to do this, authorized to do so' - as Biology, Chemistry or Psychology, to which there is no good or bad, right or wrong, obligation and authorization, but only facts indifferent to values and their causal nexus (Kelsen, 1915, pp. 841-842, our translation).

Sociology studies the facts of social life, while the science of law deals with the study of norms, each accomplishing a distinct scientific task, both legitimate. The position advocated by Kelsen, therefore, implies that a clear line of demarcation between sociology of law and legal dogmatics should be traced. This is the focus of his critique of Ehrlich's project, which focuses on five points: confusion between “is” and “ought”, the conceptual terminology, definition of the disciplinary boundaries, pluralist conception of law, and identification between law and society.



#### 4.1 *The confusion between “is” and “ought”*

Having clarified how he believes the division of labor between the traditional science of law and the emerging sociology should be established, Kelsen summarizes his epistemological critique: "It is completely inadmissible to confuse the problem of both directions, a syncretism of the methods of normative jurisprudence and explanatory sociology of law" (KELSEN, 1915, pp. 840-841, our translation). In his view, "It must be seen as a serious failure of Ehrlich's work that his foundation of sociology of law, already in its beginning, fails to present a clear separation between considerations of value and considerations of reality" (Kelsen, 1915, p. 842, our translation). The difference between the “is” and the “ought” should be respected in the separation between the sociology of law and the traditional science of law.

The sociology of law lacks the necessary tools to define under which ontological conditions a group of people enjoys or not a legal order, says Kelsen. This is because the concept of law is reduced to the existence of a set of norms that are effectively followed in a given social group. A sociological science of law could only analyze the effective behavior of persons governed by such norms; that is, what the group of people does or does not, but it is not within its scope to analyze such norms. There was an elemental error in Ehrlich's conception of the rules of human action:

What human beings in a given social relationship regularly do and what they must necessarily do by virtue of law must be considered two formally different things, even when the content of the norms that determine what should happen coincides with that of the rules describing what effectively happens (KELSEN, 1915, p. 841, our translation).

It was clear to Kelsen that any attempts to extract normative statements from descriptive statements and vice versa were doomed to failure because there was a logical obstacle. In challenging a constitutive division of modern science, Ehrlich's methodological syncretism was unacceptable. For Kelsen, by contaminating a normative science with factual judgments, he not only did legal science of poor quality, but also failed as a sociologist as he contaminated an explanatory science with value judgements. Describing factual regularities and postulating the existence of norms were incompatible tasks within the realm of a same science and would certainly result in an objectionable confusion of facts and norms, between the “is” and the “ought”.



As Klink (2009, p. 129) highlights, the argument on the confusion between facts and norms has proven to be not only devastating to the future of sociology of the law, but also enormously appealing to the legal community, and would later become the cornerstone of his *Pure Theory of Law*.

#### **4.2 The conceptual terminology**

Kelsen explicitly claims in the sequence that there was a lack of a rigorous conceptual system in *Fundamental principles of the sociology of law*. In his view, in spite of the book's great conceptual novelties, the terminology adopted throughout the book was too arbitrary and distant from the terminology that is normally used in general theory of law. According to him, Ehrlich's concepts were obscure and oscillating, and in order to justify his criticism he begins to look more closely at the content of categories like legal propositions, legal norms, norms for decisions and facts of law.

For Kelsen, Ehrlich's distinction between legal propositions and legal norms did not make sense, since both are universally binding normative prescriptions, that is, valid rules for every member of a given group that externally condition individual free will. Pointing to what he considers to be a logic flaw in Ehrlich's thought, he rejects the existence of an essential difference between legal norms and legal propositions, based on the fact that the latter are inscribed in a code of law or other formal legal text. The historical argument, grounded on the fact that the emergence of written law occurred only in societies that were already in an advanced stage of development, was unable to change the matter, since the legal propositions remain logically equivalent to norms as imperatives of conduct.

The sociological concept of norm underlying Ehrlich's thought is also targeted by Kelsen's acid criticism. According to his view, the idea that norms could lose this status if not followed, that is, if they are not converted into action, was simply unsustainable. Such a perspective, by emphasizing the observable regularities relating to people's behavior instead of the legal valuation and assignment of legal significance, would reflect the confusion between the "is" and the "ought" in which Ehrlich frequently incurred. Or, as Kelsen states,



[...] the legal norm is also law in its own right and even without relation to a concrete fact. However, the *fact* is never law or legal relation, since it is as a being indifferent to values; it is *meaningless* if not placed in relation to a norm. For a consideration interested in facticity, therefore, there are only facts, defective realities, and no value (KELSEN, 1915, p. 855, our translation).

A similar treatment is given to the concept of norms for decision. Relegating the subject to a footnote, Kelsen denies the theoretical utility of this concept, because it would imply a confusion between the way courts and administrative bodies act in reality and the way in which they should act.

Finally, Kelsen accuses Ehrlich of a lack of clarity concerning the facts of law. He suggests that customary social practices, the facts that are regularly repeated, are included in such a problematic concept. Kelsen agrees that regular social practices may eventually turn into representations of ought-to-do for a given social group that keeps practicing them regularly, but strongly disagrees with Ehrlich's distinction between social practices and customary law. According to Kelsen customs are not routine behaviors that follow norms, but regular behaviors in themselves. Thus, Kelsen tries to invalidate Ehrlich's argument by claiming that they are “is”, not “ought”.

For Kelsen, therefore, Ehrlich's conceptual terminology was an unfolding of the epistemological problems that characterized his sociology of law, which disdained the logical distinction between facts and norms, the “is” and the “ought”.

#### **4.3 The definition of disciplinary boundaries**

Kelsen adds that Ehrlich's epistemological and terminological difficulties are directly related to the definition of the boundaries of sociology of law with regard to its object and scope. Here lies the most important aspect of the third part of his critique, the questioning of the definition of the disciplinary boundaries of sociology of law in relation to other sciences that also deal with social phenomena that are to some extent similar to law, such as morality, art or religion.

Quoting several passages from his antagonist's book, Kelsen comments with some perplexity that, while Ehrlich recognizes the problem of tracing the boundaries that separate sociology of law from the other social sciences, he offers a clearly unsatisfactory answer to the problem:



Ehrlich can hardly be taken seriously when he says that: "The legal norm regulates a matter which, at least in the opinion of the group within which it has its origin, is of great importance, of basic significance... Only matters of lesser significance are left to other social norms." [...] Do moral and religious norms really address matters of lesser importance than norms on loans or leases? (KELSEN, 1915, p. 862, our translation)

According to Kelsen's interpretation, the theoretical problem lies in the manifest fragility of the criteria for distinguishing between different types of norms envisaged by Ehrlich, who seems to imply that such criteria is related to the feelings evoked by the breach of these norms. For Kelsen, this was a curious and fruitless attempt to specify the uniqueness of law by turning to social psychology.

#### **4.4 The pluralist conception of law**

In another moment of the critical review, the relationship between law and the State is discussed. Ehrlich struggles throughout his book to separate law as a social phenomenon from the state as kind of social association, an idea that Kelsen found disturbing. According to him, not only the terminology used by Ehrlich to discuss state law was arbitrary and misleading, but also the supposition that the state produces law.

The state, for Kelsen, is a form of social unity, which represents the supreme legal community and is regarded as a unitary order prevailing over the others:

If the higher community, which encloses all subgroups, must really be a social *unity*, that is, should be thought of as unity, then it is necessary to consider the subgroups to be subordinated to the higher social group. It is necessary to represent the legal orders of these partial social groups, which from each other in their singularity, as valid and differentiable only within the limits given by the organization of the higher community that encloses them in a unity. A construction that differs from this *normative* construction of a social unity, however, is not possible. In this conceptual construction - in which only the ideal unity of social groups occurs - the subgroups become organs of the higher community. The legal orders of each subgroup – legal orders that, considering their local and material boundaries, are always different one from another – constitute together with the organization of the higher community, a unitary system of norms, that is, a unitary legal order. This latter community, which is built above the singular groups, is the State as a legal community (KELSEN, 1915, p. 866-867, our translation). If the State is thought as divided into a series of smaller legal communities with their own legal systems different one from the other, and their own legal institutions (courts) independent one from another, which is then the element that binds all these groups together and makes of all these singular groups one single State? A *common legal order* must exist, a legal order that



functions as a barrier against the legal orders of the singular groups! If this order is not a *legal* one, then where would the state boundaries be? (KELSEN, 1915, p. 869, our translation).

For Kelsen, legal norms are related to the State. Every unitary State is a different legal order. Kelsen's monistic theory of law implies that any legal relationship rests ultimately bound to the authority of the State, but only in a potential way. The violation of a legal obligation should result, as a possible consequence, in a reaction of the State, which serves as a barrier against the legal systems of singular groups. Kelsen's critique, in this fourth part of the text, ends with the questioning of the perspective which decades later was named legal pluralism.

#### **4.5 The identification between law and society**

Finally, the fifth part of *A foundation of sociology of law* criticizes the methodological aspects of Ehrlich's work. According to Ehrlich, the sociology of law should be entrusted with the task of observing the empirical facts concerning the legal phenomenon and explaining them theoretically in order to understand how law works in society.

For Kelsen, this identification between law and society was unacceptable. He suggests that a science of law with such pretensions would lose its specificity and cross the threshold between law and the social sciences.

Ehrlich *simply identifies law and society*, that is, he defines as law not only the form, but also the content of social phenomena, when he requires the science of law to present information about the regular political and economic relationships that are the substantive content of legal forms. [...] It is absolutely unprecedented such complete confusion of the boundaries between law and economy, between law and society, as well as between the science of law and all other social sciences! (KELSEN, 1915, p. 872-873, our translation)

The possible scope of sociology of law as a science that differs from other social sciences such as economics, history, and psychology would be to deal with problems involving the genesis – the social origins – and the effectiveness – the social effects – of legal norms. For Kelsen, this sociology of law is not a completely autonomous science, but a fragment of the sociological science that explains social life. The sociology of law, in particular, depends on the possibility of theorizing not only legal



norms, but also other social norms. After all, “the effective behavior of human beings [...] is not, in fact, *motivated* only by legal norms, but also by norms of another kind (Kelsen, 1915, 875, our translation). Since a sociological definition of the concept of law is not possible, in order to clearly delimitate the object of study of sociology of law it is necessary to adopt a normative concept derived from the science of law, whose point of view is distinct from that inherent to the explanatory knowledge sought by sociology.

Kelsen concludes his critique arguing that "Ehrlich's attempt to lay the foundations for sociology of law must be regarded as a complete failure: above all, due to lack of a clear definition of the problem and an adequate method" (KELSEN 1915, p. 876, our translation). For Kelsen, the coexistence of science of law with sociology was only possible on the basis of a compromise founded on the division of scientific labor. In this rigid scheme of separation between a science of the “is” and a science of the “ought”, sociology of law would retain an external and subaltern position towards the science of law considering that even the definition of its object of inquiry required the concept of law provided by legal dogmatics.

### 5 Ehrlich’s response to Kelsen’s critique: an unfinished dispute

In his response, Ehrlich refrained from answering all criticisms directed by Kelsen to *Fundamental principles of the sociology of law*. Claiming some degree of discomfort with the idea of refuting a critical review of his work by another intellectual, Ehrlich limited himself to approach certain points of the critical review that, in his opinion, represented an incorrect and deformed description of the book’s contents, and thus required factual corrections.

Ehrlich’s *Reply* begins by approaching the issue of the supposed confusion between the “is” and the “ought” pointed out by Kelsen:

To expect that someone might confuse an “ought” statement with a law of nature, that is, that someone does not take as fundamentally different things the law of gravitation and the expiration of a letter of credit means to assume that this person is almost an idiot. It is in this level that Kelsen finds himself when he intends to make believe that I would have sustained that every rule of the “is” – therefore every law of nature – is at the same time a rule of the “ought”, and thus that the law of gravitation would be a social norm. And things were not so differently set forth with respect to



the doctrine according to which law is in part rule of the “is” (law of nature), in part rule of the “ought” (EHRlich, 1916, pp. 844, our translation).

Ehrlich considers Kelsen's interpretation to be incorrect. In a tone of indignation he states that throughout his book he had treated “[...] law always as a rule of the ‘ought’ and never as a law of nature, as a rule of the “is”; there is not a single word in the book that justifies Kelsen’s claim” (EHRlich, our translation).

Although Ehrlich once again announces that it is not in his interest to enter into a polemic with Kelsen, he points out that much of his critic's misunderstanding of his work stems from the terminological question, as various passages indicate:

Since I frequently explored a new scientific domain in my book, I had to partly create my own scientific terminology. The distinction between legal norms and legal propositions is there included. (EHRlich, 1916, p. 845, our translation).

Kelsen is certainly free to contest such theses, to confront them if necessary, to refute them. One thing, however, he is not free to do: impose his own terminology and qualify as unreasonable the things I say only because they do not fit into Kelsen’s unique terminological orientations (EHRlich, 1916, p. 847, our translation).

Has anyone ever seen this kind of criticism before? Kelsen submits my theses to his own arbitrary scientific terminology, which is devoid of any scientific value [...] and then holds that they are simply pointless because they do not suit his terminology. A polemic of this nature [...] ultimately ends up in a pure and simple distortion of my thought, which I must resolutely reject (EHRlich, 1916, p. 847-848, our translation).

Ehrlich argues that he needed to create innovative terminology in order to be scientifically understandable. After all, he was problematizing classical concepts of the general theory of law from an almost entirely new perspective. For example, the key categories presented throughout his work, which were heavily criticized by Kelsen due to the lack of systematic explanation, are related to the search for a sociological concept of norm, a concept of significance to a sociological science of law. In this sense, Ehrlich argues that norms are social representations that can be empirically observed:

Kelsen maintains [...] that a “thought-thing”, a representation is not a fact because it is neither perceptible through immediate experience nor observable; which presupposes not only a new terminology, but also a new doctrine. So far representations have been considered among the facts of psychical life and have been considered, if not perceptible, observable. Among others, the science of psychology [...], sociology, economics, the science of religion, and, in my view, also the science of law,



are concerned with the observation of representations (EHRlich, 1916, p. 848, our translation).

Many of the problems that were pointed out by Kelsen concerning the syncretism of methods come from the circumstance that Ehrlich was obliged to develop a whole new conceptual arsenal, which have allowed him to analyze his object of study. In doing so, putting law in context, he sought to bring law closer to social reality.

Instead of what I have said, a kelsenaria is posed, and then it is argued with the logic known from Kelsen's previous works, according to which the main propositions mean nothing and those subordinated even less. Perhaps the most important is to understand the main propositions of Kelsen's criticism that, as I see them, could be the main propositions of the whole legal conception of the world proper to Kelsen. Against my observations that legal abstractions are as more abstract as they lose any contact with reality, Kelsen argues that [...] the science of law, precisely because it is a science, does not need any contact with reality, since in principle it is not intended to be an explanation of the latter. It is surprising to note that a law professor at the University of Vienna at the beginning of the 20<sup>th</sup> century advocates such theses; this truly astonished me (EHRlich, 1916, p. 849, our translation).

At the end of his reply, Ehrlich seeks to draw attention to what really matters in his sociology of law:

I wish to add just one comment: I did not write a book of terminology, as the reader who had eventually read Kelsen's criticism might suspect. In general, I deal with terminology only in the measure that is necessary to make myself scientifically understandable. The object of the sociology of law is not terminology, but rather the relation of law to society (EHRlich, 1916, p. 849, our translation).

Kelsen's *Reply* insists that Ehrlich had incurred throughout the book on a combination of perspectives in his analysis of norms. Confusion between the "is" and "ought" would be evidence of the methodological syncretism that characterized his thought, a mix of causal-explanatory considerations and normative considerations. Kelsen contends against Ehrlich's "[...] absolute inability to understand the methodological problem faced when it comes to the matter of separating sociology of law from the dogmatic science of law" (KELSEN, 1916, p. 853, our translation).

In a short *Second reply*, Ehrlich says that Kelsen quoted fragments of his work in a decontextualized way. Arguing that Kelsen misunderstood his concept of living law,



he once again invokes his right to reply, in the name of the rules of the academic debate:

[...] Kelsen stresses, first, the contradiction in which incurs my claim that law is always only a rule of ought, that the science of law's way of knowledge is not only interested in "what the law prescribes, but also in what really happens". Kelsen puts part of the sentence between quotation marks and argues that this is a quote from my book, which he reproduces in indirect speech. This quote is false; there is not any phrase in my book that has the meaning indicated by Kelsen. Maybe the words in quotation marks highlighted by him are to be found in a sentence that literally says that "here too science, as doctrine of law, poorly accomplishes its task when it limits itself to show what the law prescribes, and not what truly occurs". These words do not make any reference to the content of the legal norm, but to the tasks of the science of law (EHRlich, 1917, p. 609, our translation).

In his *Closing words*, Kelsen seeks to indicate the source of the contested quotation, suggesting that Ehrlich probably could not understand him because he did not read his critique until the end (KELSEN, 1917, p. 611), and closes in a single page one of the most known controversies of the history of the legal thought in the 20<sup>th</sup> century.

Although a substantial part of the studies on this controversy describes it as an unfinished dispute, Kelsen's is widely regarded as the winner considering that his position prevailed at that historical moment – see, for example, Carrino (2002), Lüderssen (2003), Van Klink (2009), Machura (2014). There is no reason to doubt that reading. As Kelsen has shown, at that moment the sociological science of law was more a possibility than a reality. Writing in the early 20<sup>th</sup> century, Ehrlich realized that sociology of law needed to be invented. Kelsen himself did not fail to recognize at a certain point of his criticism that Ehrlich's work contributed to pose new questions to the study of law that go beyond the scope of traditional legal science. The sociology of law could even develop further as an academic subject in its own right, but as an auxiliary science to legal science, in a rigid scheme of division of scientific labor.

Indeed, it is known that, in the decades that followed, the fate of sociology of law was the ostracism, amid the triumphant hegemony of the contemporary positivist school of jurisprudence, headed by Kelsen.



## 6 Conclusion

The clash between legal dogmatics and sociology of law has already been interpreted, based on the theory of scientific paradigms, as a notable case of paradigmatic dispute that endures for a long period of time without necessarily resulting in a paradigm shift (HAGEN, 1995). By revisiting the Ehrlich-Kelsen controversy, it was possible to show that the trajectory of sociology of law in the history of legal thought has been marked from the beginning by the clash with legal dogmatics. Ehrlich's *Fundamental principles of the sociology of law* advanced a call for the development of sociology of law against legal dogmatics, by attacking directly and polemically the prevailing paradigm in the law schools of continental Europe in the early 20<sup>th</sup> century.

For Ehrlich, the relationship between sociology of law and legal dogmatics can be seen a dispute between schools of legal thought that approach the same object from incompatible points of view and compete with each other to establish how law should be scientifically studied. In his view, legal dogmatics was a practical and professional form of knowledge about law that cannot be called science, while sociology of the law provided the very possibility of a scientific knowledge about the legal phenomenon. Ehrlich was not against the existence of legal dogmatics as a form of knowledge, but because he considered it unscientific, he claimed that another way of developing science of law had to be invented.

For Kelsen, Ehrlich's perspective is misleading, being the project of constructing sociology of law a major threat to the scientific status of legal dogmatics that should be firmly resisted. In his view, as it is presented in the *Archive for social science and social welfare*, there is no reason to talk about a clash of sociology of law with legal dogmatics. After all, sociology studies the facts of social life, while the science of law deals with the study of norms, each performing a distinct scientific task. It is, therefore, a matter of division of scientific labor. There was a clear line of demarcation between sociology of law and legal dogmatics. Ehrlich's scientific project was condemned to failure, because sociology of law depends on legal dogmatics even to determine its own subject of inquiry.

Kelsen foresaw with singular clarity the threat to the paradigm of legal dogmatics that Ehrlich's sociology of law represented, especially at a time in which research problems of practical importance challenged the legal community, as the



question of imperialist government of plural societies in the context of the Austro-Hungarian Empire of the early 20<sup>th</sup> century. At that time, however, Ehrlich neither had prominent followers, nor enough support to develop a new school of thought. In the midst of the resurgence of social conflicts and the disintegration of the great empires of continental Europe during World War I, the constellation of commitments that he sought to foster was not attractive enough to lead to the emergence of a scientific community capable of reproducing the paradigm of sociology of the law in a lasting way.

Although Kelsen's position prevailed in the historical moment in which this debate was fought, things are quite different now to what they were a hundred years ago. After a long period of obscurity and neglect, the scientific project defended by Ehrlich is finally getting attention and his name was inscribed in the pantheon of precursors of sociology of law. These developments took place since the 1960s with the emergence of the law and society movement and the institutionalization of a sociolegal scientific community at a transnational level, through initiatives such as the *Law & Society Association* (LSA)<sup>16</sup> and the *Research Committee on Sociology of Law* (ISA-RCSL).<sup>17</sup>

In the current historical moment, in which the signs of decline of the paradigm of legal dogmatics are more and more clear, a reconstruction of the scientific practices related to the study of law is under way. Sociolegal research has finally become reality. This has been happening even in contexts such as the Brazilian one, judging by the notable success of recent initiatives like the Brazilian Network of Empirical Legal Studies (REED)<sup>18</sup> and the Brazilian Association of Researchers in the Sociology of Law (ABraSD).<sup>19</sup> In this scenario, it is to be answered if there is still room for accommodation in a rigid scheme of division of scientific labor, as Kelsen intended. A century after the famous controversy, the perspective of a clash between sociology of law and legal dogmatics, as Ehrlich defended it, returns with more vitality than ever.

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<sup>16</sup> LSA was founded in 1964 in the U.S.. <<http://www.lawandsociety.org>>.

<sup>17</sup> ISA-RCSL was established in 1962, gathering scholars from a dozen of countries, especially from Europe. <<http://rcsl.iscte.pt>>.

<sup>18</sup> REED was established in 2011. <<http://reedpesquisa.org>>.

<sup>19</sup> ABraSD was founded in 2010. <<http://www.abrasd.com.br>>.



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