

PRAETORIAN LAW: A CONTRIBUTION TO THE BEGINNINGS OF LEGAL SOCIOLOGY¹

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Abstract: This article describes parallels between Roman procedural law and trends incorporating sociology in legal science. The author is persuaded that legal theoreticians at the end of the nineteenth century must have been inspired by Roman law, and in particular by praetorian law. The leader of these lawyers was a Romanist Eugen Ehrlich, so-called “the founder of legal sociology”. The author gives detailed attention to the dichotomy between the free and bounded approach in the application of law, specifically with regard to the filling-in of gaps in the law. In the conclusion the author proposes that we be inspired by Ehrlich’s theory, especially by the fight against contra-factual norms of state law, which are of course in conflict with social law.

Keywords: Roman law, praetorian law, Roman praetor, Eugen Ehrlich, legal sociology

I. INTRODUCTION

The field of Roman procedural law, even though in the period of ancient Rome we are unable to speak in the true sense of the word about a distinction between substantive and procedural law, and the question of the origin of various sociological trends in jurisprudence present problems that, through a superficial lens, are rather unrelated to each other – but appearances can sometimes be misleading. With respect to the personalities who stood at the imaginary end of the rule of analytic jurisprudence in the nineteenth century, it is possible to conclude that inspiration from several elements of the legal system of the Roman Republic was one of the key factors which began to direct jurisprudence towards emphasizing the social function of law and towards the birth, for instance, of jurisprudence of interests or of the school of free law.

The goal of this short study is the treatment of the above noted theme in relation to the thoughts and work of the Austrian legal sociologist and professor of Roman Law *Eugen Ehrlich*, who has frequently been considered one of the founders of legal-sociological thinking. His approaches to understanding law in the multi-cultural society of Austro-Hungarian Bukovina are even today inspirational and widely cited; nevertheless looking for his starting points in Roman procedural law is a field which has not been stressed very often in connection with his name.

Obviously it is not necessary to argue in a fundamental way the contribution which Roman law has for an understanding of the institutions of contemporary private and public law, and this especially in the region of those states which are traditionally called countries of European continental legal culture. In spite of this, or even precisely because of it, the examination of Roman law and seeking of analogies with recent legal systems is an unusual invitation with many topics to think about. Besides this, the words which *M. Skřejpek* selected as the motto for one of his monographs undoubtedly apply: “*Nescire autem, quid ante quam natus sis, acciderit, id est semper esse puerum.*”²

¹ This article arose as one of the results of the project GA ČR P408/12/1255 „Klíčové pojmy ústavní teorie v čase paradigmatických změn“ [Key concepts of constitutional theory in a time of paradigm changes].

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² Cic. Or. 34.

As regards its structure, this article is divided into four parts, including an introduction and conclusion. In the second part, I primarily deal with the area of Romanist studies, specifically the function of the praetor in civil procedure and an understanding of praetorian, that is, honorary, law itself. The culmination of my thoughts, however, is Part Three, which is devoted to the goal of connecting together some Roman legal institutions with the legal-sociological approach of the above mentioned *Eugen Ehrlich*.

Apart from content I consider it useful to briefly touch in the introduction on methods of research. Today the classical method of Romanist legal science is still exegesis of Roman legal texts. I, however, have chosen a partially different method, even though classical fragments, especially those found in the *Digests*, are represented to a great degree in the text of the article. Thus in my approach a comparative method dominates, or in some cases I also work partially with synthesis and analysis. Historical facts from the period of antiquity are partially and freely linked together with considerations of a political, sociological and legal-theoretical character. In passages where they may disrupt the cohesiveness of the text these considerations are taken up in the footnotes.

II. PRAETORIAN LAW

The praetor above all stood in for or, better said, represented, the Roman state and its authority especially in the framework of Republican justice. Let us now look at his function a bit more in detail. The first question to offer itself is how specifically to define the *officium*³ of the praetor in the framework of the Republican magistrature. Many concepts explaining his function come into consideration. He was undoubtedly a politician, but also at the same time an administrator, a judge in the formal sense of the word, and, not least of all, also in his own manner a law maker. From the perspective of current theory of the division of power, the praetorian office entered into all its components.

Like “every” politician the praetor was elected, in the case of the Roman Republic by the popular assembly, and this for a period of one year, at the beginning (from 367 BC, when the praetorian office appeared) as an individual positioned at the side of the consuls; in the later period the number of praetors grew to sixteen. The activity of all Republican magistratures was limited by several principles, which, according to my thinking, are inspirational for managing all types of societies making use of public power. These were the principle of electability, of a temporary duration of a function in office (the so-called principle of annuity), the principle of collegiality and the principle of non-compensation for performance of a function.

Thus it is not possible to consider the praetor as a professional official in today’s sense of the theory of public service, which in agreement with the thoughts, for example of *M. Weber*, treats public administration as a continuous activity. Such an activity should not be dependent on changes of political relations in the state and should be also appropriately materially compensated. We can thus come to the conclusion that the praetor was thus a representative of state administration, but only for a limited period of time and without the benefit of compensation.

³ As an alternative to the possible concept “office” that of “public office” also offers itself, on the basis of today’s understanding of this phrase.

Characteristic for political representation is the creating of various forms of programme documents. From today's era we are able to mention, for instance, the election programmes of political parties or programme announcements of the government, on the basis of which in parliamentary political systems they ask for an expression of the trust of the lower chambers of parliaments. Historical experience and our own contemporary experience have taught us that this is almost without exception a matter of empty flowery expression offering concepts of a good life to all structures of human society, and this without regard to ideological background. We can trace similar types of political programmes in relation to elected officials of the Roman state only with great difficulty. From my perspective this situation exists above all due to the reason of ideology missing in politics which is typical for today's political society.

Let us pause however at one of the documents concerned with the activities of the praetor, who always on the occasion of his entrance into his function publishes – proclamations, an *edict*. “*In which the principles were formulated according to which they (the praetors – author's remark) in his judicial and extra-judicial activities will proceed, what kind of steps they intend to take and under what conditions, for whom they will grant, or never grant, action (iudicium dabo, iudicium non dabo).*”⁴ Here a certain analogy with programme proclamations of governments and of politicians offers itself, of course only in terms of promises which the politician in the course of his time in office proposes to achieve. While today such a programme touches on all aspects of human life, in the Roman Republic it is fundamental from the point of view of procedural law, and especially therefore as regards the praetor, who from the title of his function is the possessor of jurisdiction.

We come thus to the question of the activity of the praetor in the legislative area, understood *largo sensu*. The sources of law in the framework of the Roman legal system were consisted of unwritten law (*ius non scriptum*), then legal custom (*consuetudo, mos, mores*), and written law (*ius scriptum*). For completeness it is important to add that the concepts *consuetudo* and *mos* have a partially dissimilar character. From today's perspective we understand *mos* rather as an expression of the moral normative system which refers back to the Roman traditions and famous deeds of the ancient Romans, which are expressed in meta-narratives.⁵ *Consuetudo* then is defined above all as classic legal custom in the sense of a formal source of law; it is thus a reflection of established legal practice.

Here we are able to trace the first of the institutions through means of which the praetor participated in the creation of norms. In the beginning the *comitia curiata* passed the laws, and in the later period the *comitia centuriata* and *comitia tributa*; at the same time

⁴ ŽIDLICKÁ, M., SCHELLE, K. *Právní dějiny 1. Starověk*. Brno: Doplněk, 1998, pp. 192–193.

⁵ The institution of Roman morals, such as is described for example in the publication *VERRINAE* (BARTOŠEK, M. *VERRINAE*. Prague: Charles University in Prague, 1977, p. 161), expresses the modern character of Roman society. According to the French sociologist *J. F. Lyotard* modern society legitimizes itself by means of meta-narratives, which touch on famous historical events. Today's European post-modern society, however, does away with these meta-narratives in the schemas of many plays on language, and in our contemporary time through the medium of the internet (blog, chat etc.). See LYOTARD, J. F. *The post-modern condition*. Minneapolis: University of Minnesota Press, 1984.

the legislative initiative in the “legislative procedure” in the latter case was handled, in addition to the consuls, by the praetor as well.⁶

Let us however leave a more detailed examination of the mentioned sources of Roman law aside and devote ourselves to the question of the other activities of the praetor in the area of the creation of law. Let us turn again to the question of edicts, which is undoubtedly interesting from many points of view. One of these is the viewpoint of the study of civil law today, since even in today’s society of the twenty-first century constant tension is evoked from the conflict between two different concepts relating to the activity of the court in the sphere of making the law complete (the free and bounded approach of a judge towards the application of law, specifically with regard to the filling-in of gaps in the law).

If we are to look for points of agreement and divergence between the society of antiquity and today, it is possible to conclude that law has contended with and still does contend with the problem of how to regulate social relationships in the most faithful normative way. In other words, the law always lags behind social development, which necessarily leads to the creation of gaps in the legal orders of individual states. Private law leads in the number of gaps in legal regulation, especially through its use of analogy, which in private law is in principle permissible but in some complicated cases even this does not suffice. It is then up to the specific judge how to put the gap in the law into order and to do this with respect to the given legal regulation. Essentially the principle of a free versus bounded approach of the judge towards the application of law applies.

We constantly encounter the premise that Roman law is the corner stone of continental legal culture. Such a judgement certainly applies for the most part; after all in the preceding text we have already mentioned a similar approach to the explanation of the text of a legal rule. Regarding the freedom versus boundedness of a judge during the application of law, it is necessary however to conduct a specific comparison.

The French *Code Civil* in its text rules out any kind of future bindingness of judicial decision making. This is particularly clear in its Art. 5: “For judges it is forbidden to decide in a manner that is general and prescriptive in cases that are put before them.”⁷ The French civil code legislation presents a relatively strict example of the ideology of a bounded approach of a judge to the application of law, while the French codex had a markedly comprehensive character.

In opposition to this the Swiss model is quite different. If a gap appears in a law the Swiss judge, according to the *ZGB*,⁸ is allowed to act in the place of the legislator and stipulate in his place a binding legal rule for the given specific case, while he “*must pay attention to accepted doctrine and tradition*”.⁹ Just like the Swiss rule, neither was the Austrian legal rule quite as strict as the rule in the *Code Civil*. In relation to this I present the wording

⁶ BONFANTE, P. *Instituce římského práva*. Brno: Čs. A. S. Právník, 1932, p. 24. Legislative initiative, besides that of the consuls and the praetor, was also possessed by the plebeian tribunes and, in rare cases, censors. “That is, only the highest officials, who had *ius cum populo* (plebe) *agendi* – the right to call people to meeting; a lone participant in an assembly was unable to submit any proposals for laws.” KINCL, J., URFUS, V., SKŘEJPEK, M. *Římské právo*. Praha: C. H. Beck, 1997, p. 17.

⁷ GERLOCH, A. et al. *Teorie a praxe tvorby práva*. Praha: ASPI, 2008, p. 87.

⁸ Swiss civil code.

⁹ Sec. 1 of the *ZGB*. Taken from: GERLOCH, A. et al. *Teorie a praxe tvorby práva*. Praha: ASPI, 2008, p. 91.

of the famous sec. 7 of the Austrian civil code (ABGB) of 1811: “If it is not possible to resolve a legal case according to the text or from the natural sense of a provision, then it is necessary to look at similar cases in laws that evidently have been resolved and to the grounds of other laws related to this. If the legal case still remains in doubt, it must be decided according to the natural legal principles, with respect for the circumstances carefully collated and given full consideration.”¹⁰ Stated in other words, an Austrian judge in cases of doubt must first of all use analogy and systematic interpretation; should he not, however, find support for his own decision making through the help of these methods, then he must proceed from natural law (natural legal principles). It is thus a matter of various approaches toward filling-out the gaps in the law through the judge, but it is necessary to add that in all these cases mentioned we are concerned with gaps in substantive law.

Even Roman law was without doubt bothered by the problem of the development of law lagging behind the development of society. In the Roman legal system we cannot so easily establish a boundary between substantive and procedural law; nevertheless the praetor very freely filled in the gaps in procedural law. It is not then a matter of a parallel situation such as European judges found themselves in the period of the great codes of the nineteenth century, but rather the freedom itself is reminiscent of the judges of the Anglo-American legal culture.

The origin of gaps in Roman procedural law certainly already grew out of the essence of the institution of action. While today we understand action as a universal means by which we seek protection of our subjective rights deriving from substantive law, in Roman law we are working with individual types of mutually sharply segregated *actiones*. “According to today’s law an action is likewise a means for exercising the right to paying the market price, just as right for being paid back a loan, paying out a deposit, damage from a wrong etc. In contrast with this Roman *actio venditi* for paying market price is simply not applicable, as after all its name shows, for obtaining a loan (here *actio certae creditae pecuniae* is necessary for collecting, for returning deposits *actio depositi* etc.)”¹¹ The annual praetorian publishing of edicts presents its own kind of unique instrument, by means of which the executive power reacts to the processes of social change and transmits it to the legislative sphere.

The office of the praetor in the intentions of the Roman constitution certainly was not an organ of legislative power, which for the whole period of the existence of the Roman Republic remained reserved for the popular assembly.¹² On this Gaius comments:

“Quos autem praetor vocat ad hereditatem, hi heredes ipso quidem iure non fiunt; nam praetor heredes facere non potest; per legem enim tantum vel similem iuris constitutionem heredes fiunt, veluti per senatusconsultum et constitutionem principalem. Sed cum eis praetor dat bonorum possessionem, loco heredum constituuntur.”

“Those (persons) who the praetor calls to inheritance do not of course become inheritors in the sense of civil law. Since the praetor is not able to make inheritors (from them): to be-

¹⁰ Sec. 7 of the ABGB. See *ibid.*, p. 92.

¹¹ VÁŽNÝ, J. *Římský proces civilní*. Praha: Melantrich, 1935, p. 10.

¹² O. Sommer uses the term “national assembly”. See SOMMER, O. *Prameny soukromého práva římského*. Praha: [self-published], 1932.

come an inheritor is possible only on the basis of the law, or on the basis of a norm of equal legal strength, for instance through the consent of the senate and the constitution of the emperor. But should the praetor give someone ‘possession of the inheritance’, that (person) comes into the position of inheritor (that is, has the same status as an inheritor).¹³

The above excerpt from *The Institutes of Gaius* primarily touches on the question of the right of inheritance but nonetheless illustrates the fact that from a formal point of view it is not possible to consider the praetor as a legislator. Apart from the formal view however we are not able to neglect the material point of view, that is the point of view social and legal experience. The praetorian edict became the basis of a further source of law called *ius honorarium*.¹⁴

Honorary law existed in parallel with *ius civile*, certainly here, but it was not a matter of some form of competition. “For the praetor it was not a matter of creating a legal system deviating from civil law. Civil law was carried out by the praetor in life, never however as a rigid norm, but taking into consideration the changing and developing needs of daily life.”¹⁵

This is illustrated for example in a passage from the *Digests*:

“*Nam et ipsum ius honorarium viva vox est iuris civilis.*”

“*In reality honorary law is one and the same as the living voice of civil law.*”¹⁶

In the framework of administration of justice it came to not only filling-in gaps in law but even to actual creation of new law. This also is written about in the *Digests*:

“*Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam. Quod et honorarium dicitur ad honorem praetorum sic nominatum.*”

“*Praetorian law is that kind which the praetors present in the public interest to help civil law or for its completing or even for correcting civil law. It is also called honorary law since it is also named according to the position¹⁷ of the praetors.*”¹⁸

The above phrase “to help civil law or for its completing” expresses the attempt at filling-in the gaps in a specific legal modification, in contrast with which “for correcting civil law” the praetor deals with in the course of his own specific activity of creating norms. This creating of norms however is not allowed to carry elements of arbitrariness. From the viewpoint of the interpretation of this fragment, from today’s perspective, the concept of “public interest” appears quite problematic. Public interest in today’s theory of administrative law and administrative science is a so-called vague legal concept. Its interpretation and application is a sensitive theme, above all in relation to various forms of limiting proprietary rights.¹⁹ The topic of law created by the praetor was also discussed by *Eugen Ehrlich*: “[T]he work of the praetor constituted an appendix to the *ius civile* in content as well as in form, just as he created praetorian institutions on the model of those of the civil law, (...)”²⁰

¹³ Gai. Inst. 3, 32.

¹⁴ *Honorarium* is derived from the word *honor*, which it is possible to translate as “public office”.

¹⁵ SOMMER, O. *Prameny soukromého práva římského*. Bratislava 1928, pp. 62–63.

¹⁶ Marci. D. 1, 1, 8.

¹⁷ A literal translation would be rather “of high public offices”.

¹⁸ Pap. D. 1, 1, 7, 1.

¹⁹ See for example Art. 11 para. 4 of the Charter of fundamental rights and freedoms: “Expropriation or forced limitation of the right of ownership is possible in the public interest, and this on the basis of law and for compensation.”

In his activity the praetor pays heed to the principle *aequitas*; that is “*he was obligated to pay heed to rules of propriety and generally beneficial interest*”.²¹ Recent jurisprudence does not have an exact analogical expression for the Roman term *aequitas*. To substitute just the word equity for it would be over-simplifying. Equity derives from a system of internal subjective values which each human being forms during the socialization process.²² What is equitable does not have to necessarily be legal nor its opposite. Achievement of equity is the act of directing towards the form of the ideal legal state accepted by the majority, which was formulated for example by the ancient poet *Virgilius*:

“*Saturni gentum haut vincolo nec legibus aequam.*”²³

“*Be our guests and know Saturn's people, the Latins, admirers of law; they without the close fitting shackles of law restrain themselves on their own following the example of the ancient king.*”²⁴

In Roman law the word *aequitas* symbolizes rather the free consideration of the jurist about the extent of forbearance or severity with respect to the circumstances of the specific case.²⁵ The edict thus is not a political programme in today's sense of the word; it is above all a source of law, and some formal characteristics also apply to it. From our point of view this is significant from the perspective of the limits on praetorian activity and also from the point of view of possible responsibility. The freedom of the praetor in the framework of the creation of the edict is wholly incommensurable with that freedom which the above referenced codifications of civil law from the nineteenth century obtained for judges. The Roman Empire would certainly not have been capable of overcoming insufficiencies in law in the course of its boom after the Punic Wars, especially as regards the character of *ius civile*, which was essentially the law of a not very well developed agrarian state. It was through means of the institutions of procedural law that substantive law was specifically created, that is basically through an opposite approach than what is common today. In recent law the legislator establishes substantive-legal support for an action, while in Roman law the praetor, by granting an action, created a substantive-legal regulation.

As already stated in the preceding text, the praetor published edicts always on his taking up his office, and it applied for his entire term in office – this was the so-called *edictum perpetuum*. Ordinarily the edict was announced verbally, but in the interest of preserving legal certainty was always prepared also in writing as a so-called *album*. During the period of his administration the edict could then be changed and filled out in the form of new public notices (*edictum novum, nova clausula*). An edict which proved itself to be successful in legal practice was carried over by later praetors. In the framework of the Roman principle of equity the praetor was able to deviate from his own edict, but at the same time such action disturbed legal certainty in society and it could create suspicion of reckless behaviour.

²⁰ EHRlich, E. *Fundamental Principles of the Sociology of Law*. New Brunswick: Transaction Publishers, 2009, p. 283.

²¹ ŽIDLICKÁ, M., SCHELLE, K. *Právní dějiny 1. Starověk*. Brno: Doplněk, 1998, p. 192.

²² According to contemporary legal sociology a person is aware of what is just and what is unjust even from early childhood. For more detail see for example VEČEŘA, M. *Spravedlnost v právu*. Brno: Masaryk University, 1997.

²³ Verg. Aen. 7, 204.

²⁴ PUBLIUS VERGILIUS MARO. *Aeneis*. Praha: Svoboda, 1970, p. 211.

²⁵ BONFANTE, P. *Instituce římského práva*. Brno: Čs. A. S. Právník, 1932, pp. 8–9.

Apparently on the basis of these reasons in 67 BC the *lex Cornelia*²⁶ established the binding character of his own edict on each praetor during his term in office, which led to unprecedented growth in the volume of honorary law. During the first century AD the praetorian edict was essentially stabilized into a specific form, which became definite in 130 AD, when, given the power ambition of Emperor *Hadrian* changes of the edict were stopped. Based on the emperor's decision *Salvius Iulianus* put together the *edictum perpetuum Hadriani* (the perpetual edict of Hadrian), which *pro futuro* could be changed or supplemented only with the permission of the emperor. Starting from 67 BC the praetorian edict not only became a significant material²⁷ source of law but also a fundamental limit on decision making in the framework of civil judicial administration, more precisely in the framework of the procedural phase *in iure*.

III. THE LEGAL-SOCIOLOGICAL APPROACH OF EUGEN EHRlich

Eugen Ehrlich was born into a Jewish family in Austro-Hungarian Czernowitz (Chernivtsi), at that time in the Bukovina region, and his native language was Polish. This was an area that underwent relatively stormy development, and it is possible, from the perspective of political geography, to consider it as peripheral. Bukovina and Czernowitz were parts of the Austro-Hungarian Monarchy until 1918; after World War I they fell to Romania, after World War II to the Soviet Union, and today they are a part of Ukraine. From today's point of view we can characterize Bukovina as a multi-cultural region where on the whole different language and nationalities live peacefully, for instance Romanians, Poles, Germans, and also Jews or Armenians – that is nationalities which in the twentieth century confronted genocide and where the impact of state power was relatively weak.

The social environment described above as well as the study of Roman law, of which *Ehrlich* became professor at the university in Czernowitz in 1896, undoubtedly led him to lean towards non-positivist directions and towards an attempt to return legal study to an understanding of the close connection between law and society. It was precisely the overall flexible praetorian law, reacting in a real way to the changes of society and also to gaps in the law which in my judgement brought about the rise of legal-sociology. The core of his thinking about law was criticism of positivist and conceptual jurisprudence, which his early book *On gaps in law* deals with already, and whose formation *J. Kosek* characterizes as the origin of legal sociology.²⁸

²⁶ *Lex Cornelia de edictis praetorum*, alternatively *de iurisdictione*. See BARTOŠEK, M. *Encyklopedie římského práva*. Praha: Panorama, 1981, p. 202.

²⁷ We understand the division of sources of law into material and formal in the sense so far differentiated rather than contemporary legal science. In today's concept the formal sources of law are those that have through the legal order a certain prescribed form (in the Czech Republic, statutes, among other things). In contrast, material sources of law are connected with various forms of communication; thus it is a matter of whatever kind of resource tells us about formal sources (especially instruments of mass communication). In Roman law we speak about the volume of honorary law as material law because it is outside of constitutional intention. On the other hand, it carries in itself the state authority given by the imperium of the praetor, which is in today's society the prerogative of formal sources of law.

²⁸ KOSEK, J. Litera zákona a sensus communis v proměnách času. *Právník*. 2012, Vol. 151, No. 5, pp. 456–457.

Ehrlich was very critical of the legal science of his time, because according to him it was too positivist and focused itself only on state law as a product of the influence of public power. He refused this approach because generally formulated laws are not capable of capturing and above all regulating real social life in its diversity and colourfulness. *Ehrlich* described Roman legal science as follows: “Still the very history of juristic science in Rome discloses that essentially, like juristic science everywhere, it was a preserving rather than a propelling force. Hesitatingly, unwillingly, and dispiritedly, it yields to the imperative exigencies of life, and never goes further than is absolutely necessary. And even that which is absolutely necessary it prefers to do unobservedly, disguising the new as something old, doing this by means of impossible interpretations, fictions, and constructions.”²⁹

Nonetheless, the rules of state regulation frequently diverge from those rules according to which people actually live, while on this point legal statutes clearly must be a reflection of social life and continuous changes which it brings. Finally these factors also were present at the inception of praetorian law after the Punic Wars, as I indicated above. *Ehrlich* noticed that the noble praetors Labeo and Sabinus have universalized what they had observed in a conscious, forceful and intelligent manner which forms a proof of their lively understanding of the actual observation. Although the point of view once adopted is usually maintained quiet consistently, the praetor’s opinion was changing continually according to the legal institution he was dealing with.³⁰

The notion of legal science as complete legal dogma connected with the attempt to create statutory law as a conceptually and logically perfect system of thought is according to *Ehrlich* merely a certain kind of legal craftsmanship and an effective form for publishing laws. As *Ehrlich* put it down in the foreword to his book *Fundamental Principles of the Sociology of Law*: “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.”³¹ The fundamental element of law should consequently be agreement with the normative expectations of society. “Thus the basis of law for legal ‘experts’, focused on the letter of the law, slips through the fingers. Law, according to *Ehrlich*, should, on the contrary, try to come close to the rules according to which people conduct themselves in everyday life. These rules, which arise in the framework of social groups, are not only different from but often in direct contradiction with the norms on the basis of which state organs, in particular courts, make their decisions. The so-called living law (in the Anglo-American region ‘law in action’) should have precedence over statutory law (law in books).”³² Thoughts established on the difference between living (real) law and statutory law (created by the state) came into the world. Apart from the division of law into statutory and living *Ehrlich* also distinguished social law, the law of jurists and state law.

Social law, according to *J. Přibáň*, is considered by *Ehrlich* “as that part of legal material which corresponds to the most basic determinant of law, that is the limiting of rules and with the help of given norms the creating of an organization of some kind of human association. This is the fundamental condition of the existence of all forms of social associations,

²⁹ EHRlich, E. *Fundamental Principles of the Sociology of Law*. New Brunswick: Transaction Publishers, 2009, p. 270.

³⁰ *Ibid.*, p. 261.

³¹ *Ibid.*, p. lix.

³² KOSEK, J. Litera zákona a sensus communis v proměnách času. *Právník*. 2012, Vol. 151, No. 5, p. 456.

including informal relationships in the framework of small groups and in the end of the most general and all-inclusive associations, such as the state. Social law is therefore able to distinguish itself as very different in content from law stipulated in legislative laws and in other legal rules, because under this concept Ehrlich has a very broad understanding of all kinds of norms and rules existing in social organizations.”³³ Stated in other words, social law is the law of social groups and of their functioning, while at the same time this law has been characterized even as organizational law, since according to Ehrlich law is primarily organizational law and arises “from below” as an attempt to put things in order normatively and to organize social association (cooperation). Social law is founded on organizational norms, while their enforceability is given through social conventions, that is social condemnation when they are violated.

The law of jurists is sometimes also called the law of lawyers. Such a label however can frequently be misleading. A more fitting label could likely be judicial law, in which it is possible to see a clear parallel with Roman praetorian law, and this taking into consideration that Ehrlich understands the law of jurists as judicial decisions binding for an individual, where these decisions should be of permanent character and recorded in writing. According to Ehrlich, the juristic universalizations were in Rome undoubtedly recognized as norms for decision of the courts which was a demonstration of their enormous power. Even today, the controversies are being decided through the universalizations achieved by the Roman jurists who invented them by the way of observation. We can thus conclude that the universalizations passed over into modern law.³⁴

Judicial decisions are connected with spontaneous social association in the framework of various social interactions, which naturally accompany social conflicts whose solution is essential for further social development. Spontaneously maintained norms do not suffice for such a kind of solution. While an organizational norm is typical for social law, the key factor for the law of jurists is the decision-making norm, whose function is particularly that of ensuring and safeguarding organizational norms, since the primary criterion for any kind of decision making is the maintenance of stability and the integrity of the social organization. “*The process of creating legal rules is thus understood again as one of the social processes for which society provides materials in the form of social conflicts, and lawyers the mould in the form of referenced decision making norms. Lawyers have a dual relationship to these norms, and also to the rules that have emerged from them, because on the one side they discover and formulate them, but at the same time they are bound by them in each process of decision making that follows.*”³⁵

The third kind of Ehrlich’s legal pluralism is state law, whose origin is based in the activity of individual organs of the state organization. By state law we understand all legal statutes which arise through the means of the state and without which they would not be able to exist. In essence we are dealing with classical continental parliamentary creation of norms. The result of creating norms is then the norm of interfering, which has the least capability of potentially faithfully reflecting the social situation. The result can thus be a large number of norms that are contrary to reality.

³³ PŘIBÁŇ, J. *Sociologie práva*. Praha: Sociologické nakladatelství, 1996, pp. 82–83.

³⁴ EHRlich, E. *Fundamental Principles of the Sociology of Law*. New Brunswick: Transaction Publishers, 2009, pp. 263–264.

³⁵ PŘIBÁŇ, J. *Sociologie práva*. Praha: Sociologické nakladatelství, 1996, p. 85.

After this brief contextual exposition a basic question, already stated in the introduction, presents itself in which *Ehrlich's* pluralism is connected in a more detailed way with the Roman Republican system. The question, previously given in isolation, of the existence of legal pluralism, which we are now able to bring face to face with trends of positivism in legal science. Roman law represents a unique and comprehensive system of legal norms which, from today's perspective, is very modern. Roman jurists, inspired by Greek philosophy, established their own method especially in differentiating concepts and defining them precisely, which was the very thing that enabled the creation of more comprehensive systems in the framework of individual legal branches. The Republican legal system was founded on the triad *ius civile*, *ius gentium* and *ius naturale*. *Ius civile* represents positive civil law and is analogous to the Greek *dikaion politikón*, in contrast with *ius gentium* is the law of the customs of business practice and corresponds to the Greek *dikaion ethnikón*. *Ius naturale* derives from the stoic concept of nature. This specification of three pillars of a legal system corresponds to the three Aristotle's bases of ethics, which are comprised of *physis* (nature), *ethos* (custom) and *logos* (contract).

However, we can go even further. Roman Republican law was at least from 67 BC built on three pillars, which were state law (law-making of popular assemblies), the law of jurists (praetorian law) and social law (legal custom). In essence in ancient Rome and also in *Ehrlich's* conception it was a matter of linking together various forms of the creation of law. Social law, just like legal custom, represents a type of normative system which, just like morality, arises from "below", directly in the framework of the behaviour of society in connection with its conventions and to a great extent confronts the appearance of counter-factual norms. As I have already noted above, it is not possible to resolve some conflicts by the application of organizational norms, and therefore we apply judicial (praetorian) law, the advantage of which lies especially in emphasizing social conditions, in flexibility and in freely filling-in gaps in the law. Finally, however, state law (legislation of popular assemblies), in my opinion, fulfills one of the essential principles of the legal state, which is legal certainty, and besides this limits further components of public power, even though it is of more rigid character.

Another possible comment on *Ehrlich's* work is connected in a general way with society – that is the main subject of research of sociology, specifically legal sociology. The existence of social forms of the life of people understandably requires regulation of human behaviour. In so far as society is supposed to function in an orderly manner, it is necessary to regulate social relations in a specific way, since only this maintains it in a specific balance. Regulation is to a significant extent given even by nature itself, the so-called natural lawfulness, but mainly society must create regulative systems for itself on its own. With a certain level of abstraction we can apply this concept even to individual phases of the development of the state-legal arrangement of Roman society. From a familial society under the marked influence of religious imagery, where conflicts are resolved in an arbitrary manner, through the development of Republican law, which was marked by a strengthening of state power and limiting of arbitrary solving of conflicts, up until after the empire, which in its character corresponds especially to the absolute monarchies of the sixteenth and seventeenth centuries on the European continent. What, from the point of view of society, above all connects the autumn of the Austro-Hungarian Monarchy and the Roman Republic after the Punic Wars is emphasis on multi-culturalism and the civil concept of state. Out of such an

understanding of society, in my opinion, an emphasis on living law, that is the functioning of a relatively differentiated society is derived, with which later, for example, the creators of systematic theories in law *N. Luhmann* or *G. Teubner* followed up on.

IV. CONCLUSION

The maintenance of the legal order lies in the maintenance of the criteria that legitimize it. In modern society, into which I include Roman society, “law” was legitimized by grand narrative and the concept of modern society. A necessary result of the vertical differentiation of capitalist society was stratification of society and social division of work – not, however, in the narrow, economic sense of the word.

Stated simply, it was a matter of the division of roles in the framework of the system of society, while with each social role certain, usually fulfilled expectations were associated. *É. Durkheim* wrote on this: “*The division of work is not a specific aspect of the economic world. We can observe its influence in the most varied regions of society. More and more political, administrative or legal functions are becoming more specialized. Similarly this is occurring in the areas of art and science.*”³⁶

Post-modernism brought, along with a denial of the schemes of grand narrative, also often a heterogeneous combination of several social roles in the framework of the functionalities of autopoietic systems.³⁷ In my opinion an essential meta-narrative was often-times an attempt to emphasize or strengthen the role of the individual in the framework of vertical differentiation. A prerequisite of this approach was, on the one hand, the permeability of social subsystems and at the same time clearly their acceptance by society as a whole, legitimacy. About the sunset of meta-narrative we must necessarily think about how we should obtain “new” legitimacy for the legal order. The fight against counter-factual norms and focusing on the close connection of law with society in the sense of *Ehrlich's* theory, inspired by Roman law, can be one of the appropriate paths.

Certainly we can ask how the preceding sentences relate to the relatively precisely defined region of Roman law. In so far as we however reflect in more detail on the characteristics of classic modern European society (differentiation, social division of work etc.), whose cultural expression is modernity, we must state that modern society draws more from the experience of the life of ancient society many times more than we are willing to notice. This is the case in the area of law, specifically in the area of the relationship of the legal and moral normative system. Moreover Roman society and law were changing in history in a substantial way which is in particular related to the transformation of the democratic system into a principate.

³⁶ DURKHEIM, É. *Společenská dělba práce*. Brno: CDK, 2004, pp. 39–40.

³⁷ PŘIBÁŇ, J. *Sociologie práva*. Praha: Sociologické nakladatelství, 1996, pp. 135–143.