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POLSKA AKADEMIA NAUK

XL POLISH YEARBOOK OF INTERNATIONAL LAW
2020
DOI 10.24425/pyil.2021.138433
PL ISSN 0554-498X

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WHAT DO "CROSS-CURRENTS" MEAN IN INTERNATIONAL LAW: FROM ALBERT VENN DICEY TO LUDWIK EHRLICH. SOME REMARKS ON FRAGMENTATION

Abstract: *This article examines the idea of cross-currents in international law, which was proposed almost a century ago by Ludwik Ehrlich. First the theoretical background of this idea is provided, with the focus on Albert Venn Dicey's assumption that there are fundamental differences in public opinion influencing the legislative process. The development of the cross-currents concept is given through the prism of the evolution of Ehrlich's ideas. The article illustrates some aspects of his legal philosophy, which describe the scholar as broad-minded, innovative, and deep-thinking. Four dimensions of cross-currents in international law are discussed: (1) the existence of norms originating from different periods; (2) variations between states in their recognition and interpretation of them; (3) fulfillment of abstract norms; and (4) inconsistencies of theory and practice. They contribute to approximating a fully coherent international law serving as the ideal in comparison to a heterogeneous, contradictory, fragmented one, as is frequently observed at the present time. The idea of cross-currents might be helpful in accepting the view that some of the incompatibilities between the rules and principles of international law are inevitable and do not cause harm to international legality.*

Keywords: Albert Venn Dicey, cross-currents in international law, differences of public opinion, fragmented international law, Ludwik Ehrlich

INTRODUCTION

In comparing international law with the domestic law of states, one observes that in the latter conflicts of norms are ameliorated by the supreme power whenever possible, thus making them more manageable. We can expect from a state that its government takes on the obligation to build and sustain a logically-consistent legal system. Inter-

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national law is not the same in this regard. In contrast to domestic laws, the system of international law is more decentralized. Nearly two hundred equal states (theoretically), together with many more than two hundred intergovernmental organizations, shape it through their consent. Is it possible to merge all states into a homogeneous legal unity? While this question is rather rhetorical, it is obvious that it might shed some light on the complex nature of international law, which deserves to be studied and understood in order to enhance its effectiveness.

This article is largely dedicated to the problem of the fragmentation of international law, which lies at the crossroads of its theory and practice. The quintessence of the fragmentation is to be found in "a shift (or threatened shift) away from the established basement."[1] Among a great number of papers concerning this topic and published in recent years it is worth mentioning a few books: a practical inquiry into fragmentation and constitutionalisation, in which those two aspects are viewed in a series of articles as being in contradiction in international law, although interconnected;[2] a study introducing the concept of legal dilemma in international law, referring to irresolvable norm conflicts;[3] two monographs on how regionalism is interlinked with international law and vice versa;[4] a research volume about the impact of international and national courts upon the process of fragmentation;[5] and a study on the phenomenon of normative parallelism, caused by the co-existence of treaty and customary rules, regional and global ones, etc.[6] These are followed by a list of works that pertain to particular fields of international law[7] and its comparativeness.[8]

What do all these works have in common? Firstly, they were designed to find and explain the reasons why international law falls short of expectations in terms of its uniformity. Secondly, their authors did not analyze the tendencies in public opinion

[1] J. Cogan, *The Idea of Fragmentation*, 105 Proceedings of the Annual Meeting (American Society of International Law) 123 (2011), p. 123.

[2] A. Jakubowski, K. Wierczyńska (eds.), *Fragmentation vs the Constitutionalisation of International Law*, Routledge, Oxon, New York: 2016.

[3] V. Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma*, Oxford University Press, Oxford: 2017.

[4] J. Klučka, L. Elbert, *Regionalism and Its Contribution to General International Law*, UPJŠ in Košice, Košice: 2015; J. Klučka, *Regionalism in International Law*, Routledge, Abingdon: 2018.

[5] O. Fauchald, A. Nollkaemper (eds.), *The Practice of International and National Courts and the (De-) Fragmentation of International Law*, Hart Publishing, Oxford: 2014.

[6] T. Broude, Y. Shany (eds.), *Multi-Sourced Equivalent Norms in International Law*, Hart Publishing, Oxford: 2011.

[7] M. Ajevski, *Fragmentation in International Human Rights Law. Beyond Conflict of Laws*, Routledge, London: 2017; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press, Cambridge: 2009.

[8] A. Roberts et al. (eds.), *Comparative International Law*, Oxford University Press, Oxford: 2018; Y. Shemchushenko, O. Kresin (eds.), Ідея порівняльного міжнародного права: *pro et contra*: Збірник наукових праць на честь іноземного члена НАН України та НАПрН України Уїльяма Елліотта Батлера [The idea of comparative international law: *pro et contra*: Collection of scientific works in honor of William Elliott Butler, a foreign member of the NAS of Ukraine and the National Academy of Legal Sciences of Ukraine], Ліга-прес, Київ-Львів: 2015.

which Albert Venn Dicey described in his 1905 writing. Thirdly, their authors did not look back on the teachings of Ludwik Ehrlich, who investigated conflicts of norms in international law for a quarter of a century. He originally introduced the theory of cross-currents (as he called it) after borrowing the idea of opposite flows in public opinion from Dicey's study published two years before Ehrlich entered university. A short review of the research on the personality of Ehrlich and his achievements was published in the Polish Yearbook of International Law in 2018.[9] To this review may be added a book from last year,[10] which had been expected since the 2018 conference "The force of law instead of the law of force. Ehrlich's school of the science of international relations and international law." That book consists of three parts: "Reception of Ludwik Ehrlich's thoughts in the science of international law;" "Influence of Ludwik Ehrlich's thoughts on the development of the science of international relations;" and "About Ludwik Ehrlich." The first part includes "Ehrlich's theory of international law: ab initio" (in Polish), written by the author of the present article, where the concept of cross-currents is characterised as one of Ehrlich's enduring ideas.[11]

1. THEORETICAL FOUNDATIONS OF THE CROSS-CURRENTS CONCEPT: DICEY, JELLINEK, RENARD

The theoretical background of cross-currents traces back to the heritage of the outstanding British constitutional lawyer Dicey. His *Lectures on the Relation Between Law and Opinion in England, During the Nineteenth Century* (1905),[12] alongside with his *Introduction to the Study of the Law of the Constitution* (1885), are considered to be his major achievements. He perceived the national legal system of England as totally democratic in the then-modern meaning, whereby dominant groups of people (if considering their attitudes toward crucial social issues) have a strong influence on the lawmaking process. He defined public opinion when referring to legislation as follows:

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[9] A. Hachkevych, *The Method of New Positivism as Elaborated by Ludwik Ehrlich*, XXXVIII Polish Yearbook of International Law 99 (2018), pp. 101-103.

[10] P. Grzebyk, R. Tarnogórski (eds.), *Siła prawa zamiast prawa siły. Ludwik Ehrlich i jego wkład w rozwój nauki prawa międzynarodowego oraz nauki o stosunkach międzynarodowych* [The force of law instead of the law of force. Ludwik Ehrlich and his contribution to the development of the science of international law and the science of international relations], Polski Instytut Spraw Międzynarodowych, Warszawa: 2020.

[11] *Ibidem*, pp. 141-142.

[12] "It is safe to say that only one man in England could have written this book. In form it consists of a course of lectures, originally delivered to an American audience; and on every page it gives proof of these qualities - insight and originality in conception, and luminous clearness in exposition – which entitle Mr. Dicey's work on the Constitution to rank as a legal classic. In the hands of a master of style, the rise, the triumph, and the decline of Benthamite Liberalism are as interesting as the story of Napoleon's campaign" (T. Raleigh, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century. By A. V. Dicey, K.C.*, Macmillan & Co. Ltd, London: 1905).

> Merely a short way of describing the belief or conviction prevalent in a given society that particular laws are beneficial, and therefore ought to be maintained, or that they are harmful, and therefore ought to be modified or repealed. And the assertion that public opinion governs legislation in a particular country, means that laws are there maintained or repealed in accordance with the opinion or wishes of its inhabitants. Now this assertion, though it is, if properly understood, true with regard to England at the present day, is clearly not true of all countries, at all times, and indeed has not always been true even of England … public opinion – if by that term be meant speculative views held by the mass of the people as to the alteration or improvement of their institutions.[13]

Dicey made several reservations when clarifying the weight of public opinion. Firstly, it depends on the traditions of particular country, whether it belongs to the Western or Eastern world. Secondly, a state's regime type may be influential – is there a will of a supreme leader (or leaders) to hear the voice of public opinion? Thirdly, the weakness of a parliament or its temporal disability to pass laws may lead to public opinion being misheard.

So what do cross-currents mean in the context of public opinion? Are cross-currents somehow related to counter-currents? To answer these questions, we can resort to etymological roots. The Merriam-Webster online dictionary defines crosscurrents as "a current running counter to the general forward direction" or "a conflicting tendency." "Countercurrent" is explained in the following way: "a current flowing in a direction opposite that of another current."[14] If one converts those meanings to public opinion, they can denote different situations in which a part of the society does not support a particular idea or path. If that part is sufficiently large in quantity, then it influences the democratic lawmaking process. Both terms are close in meaning in that they describe contradicting flows.

Dicey wrote that:

> There exists at any given time a body of beliefs, convictions, sentiments, accepted principles, or firmly-rooted prejudices, which, taken together, make up the public opinion of a particular era, or what we may call the reigning or predominant current of opinion, and, as regards at any rate the last three or four centuries, and especially the nineteenth century, the influence of this dominant current of opinion has, in England, if we look at the matter broadly, determined, directly or indirectly, the course of legislation (…). The large currents, again, of public opinion which in the main determine legislation, acquire their force and volume only by degrees, and are in their turn liable to be checked or superseded by other and adverse currents, which themselves gain strength only after a considerable lapse of time.[15]

These reflections evidence the complexity of the interaction between public opinion and the acting law. Moreover, they show why democratic systems are self-regulatory

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[13] A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, Liberty Fund, Indianapolis: 2008, pp. 4-5.

[14] Merriam-Webster Dictionary, available at: https://www.merriam-webster.com (accessed 30 May 2021).

[15] Dicey, *supra* note 13, pp. 16-17.

and open to inevitable changes, dictated by new tendencies in human nature. Dicey's system of coordinates was oriented towards English political traditions, being very attentive to the general sentiments of the society. When different large groups of people support opposite legal decisions, an important task on the part of a state's officials is to follow their strongest expectations over time. As Dicey suggested, the direction of counter-currents is opposite to that of a prevailing current:

> The reigning legislative opinion of the day has never, at any rate during the nineteenth century, exerted absolute or despotic authority. Its power has always been diminished by the existence of counter-currents or cross-currents of opinion which were not in harmony with the prevalent opinion of the time. A counter-current here means a body of opinion, belief, or sentiment more or less directly opposed to the dominant opinion of a particular era.[16]

Ehrlich called these statements of Dicey "one of the most important statements ever made on what determines law."[17]

There is one more scholar whose teachings contributed to the development of the concept of cross-currents – George Jellinek. He is considered to be "the exponent of public law in Austria."[18] Ehrlich saw the interconnection between Dicey's counter-currents and Jellinek's conflict between two "Rechtsordnungen." Apart from Dicey, who focused on contradictions in publicly-supported ideas, Jellinek investigated conflicts of legal systems. An excerpt from his article[19] on the consequences of the co-existence of two orders within one state was quoted by Ehrlich (in its English translation) as follows:

> It is possible that within one and the same state there should be in conflict with one another, two legal systems (*zwei Rechtsordnungen*) each of which asserts its character of a law actually in force, and not of a law which still requires to be made. But since they are based on conflicting principles and wish to regulate the same fields, therefore they must necessarily come into conflict with one another.[20]

Ehrlich enumerated some of Jellinek's examples, such as the conflict between the *ius quiritium* and *ius honorarium* in ancient Rome, the struggle between church and state etc. He did not fully agree with the statement that two legal systems might co-exist within one state and called it "scientifically anachronistic" ("it uses personification without the slightest need for that antiquated procedure").[21] Perhaps the reason for this is that a legal system consists of a set of rules that are binding on all people in the society. It comes from a state, which possesses its sovereignty in establishing the highest

[16] *Ibidem*, p. 27.

[17] L. Ehrlich, *Comparative Public Law and the Fundamentals of Its Study*, 21 Columbia Law Review 623 (1921), p. 645.

[18] C. Schönberger, *Ein Liberaler zwischen Staatswille und Volkswille. Georg Jellinek und die Krise des staatsrechtlichen Positivismus um die Jahrhundertwende*, in: S. Paulson, M. Schulte (eds.), *Georg Jellinek. Beiträge zu Leben und Werk*, Mohr Siebeck, Tübingen: 2000, p. 3.

[19] G. Jellinek, *Der Kampf des alten mit dem neuen Recht*, Winter, Heidelberg: 1907.

[20] Ehrlich, *supra* note 17, p. 645.

[21] *Ibidem*.

power within a particular territory. The case of Gdansk demonstrated not a hypothetical conflict between legal orders, but one based on actual facts, about which Ehrlich wrote in his textbook and other works.[22] Meanwhile, a particular social relationship often faces the challenge of selecting the most appropriate legal system, because there may be grounds for taking into account at least two of them. In particular, the Turkish Penal Code of 1926 was applied to the criminal prosecution of the French lieutenant Demons in the *Lotus* case.[23] At the same time the French Penal Code of 1791 might have been applied to punish those responsible for shipwreck and manslaughter. We may conclude that this was not a pure conflict of legal systems, but rather a conflict of legal norms that belonged to different legal systems. Ehrlich expressed his doubts:

> It is not that there are at any time any two Rechtsordnungen, which struggle with one another, but that at all times there are (although in different countries to a varying degree) ideas and sentiments derived from various former ages side by side with those developed recently, and ideas adopted from abroad side by side with those worked out at home. It is precisely the constant interaction of such numerous influences, some of them confined to one or a few persons, others widespread; some due to accidental contact with other people, foreign books, or personal experiences, others the result of a long agitation or a laborious development of thought, that eventually results in the actions of judges, legislators, jurisconsults and of the people at large whose behavior is, after all, the outward manifestation of the existence of such laws.[24]

Furthermore, he made an attempt to distinguish between public and private law in terms of the application of abstract norms. There is one more scholar whose teachings laid at the root of the cross-currents concept. In addition to Dicey from England and Jellinek from Austria (Germany), Ehrlich cited the French Georges Renard's article on the role of abstractions in law,[25] which was reviewed by Ehrlich in 1923.[26] It accommodates two ways of formulating laws, which can be explained from the perspective of today's knowledge as follows: first, an "abstract way – the way of presenting rules of law, when circumstances, facts, features of modelling actions, their conditions and consequences are set out in a text in a generalized form, i.e. in the form of an abstract concept"; and second, a "casuistic way – such is the way of presenting rules of law, when modelling actions, their conditions and consequences are not set out in general, but by determining their individual characteristics, listing certain cases (incidents)."[27] In his review Ehrlich examined Renard's ideas and tailored them to the nature of international law:

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[22] *See* L. Ehrlich, *Gdańsk. Zagadnienia prawno-publiczne* [Gdańsk. Issues of public law], K.S. Jakubowski, Lwów: 1926.

[23] PCIJ, *S.S. Lotus (France v. Turkey)*, Judgment, 7 September 1927, PCIJ Series A, no. 10, ICGJ 248.

[24] Ehrlich, *supra* note 17, p. 645.

[25] G. Renard, *Abstraction et réalités dans l'élaboration du Droit Public*, 32-33 La Nouvelle Journée 3 (1922).

[26] L. Ehrlich, *Renard G.: Abstraction et réalités dans l'èlaboration du droit public*, 1 Przegląd Prawa i Administracji 269 (1923).

[27] Г. Саміло, Актуальні проблеми теорії права: Навчальний посібник [Actual problems of the theory of law: Textbook], Просвіта, Запоріжжя: 2014, p. 93.

> On one hand, jurisprudence explores material and psychological facts that determine social life. On the other hand, it explores moral and political ideals, which serves as an example. It seeks principles contributing to the reconcilement of these findings, lifting reality to the ideal and reliance of the ideal on reality… Abstractions dominate in private law, because there those interests subject to possible violation which are less important than the public interest. This dictates the application of general norms (superficial) established from above and possibly permanent to ensure the strongest guarantees of freedom and security of turnover. In public relations, however, there is less space for abstraction but more for casuistry, so as not to jeopardize the public interest… And in public international law this proportion is even more variable and each case may require a different solution. Private law also lacks the pedagogical value that both public and international have. Public law in some sense is intermediate between private and international.[28]

The next statement of Ehrlich, inspired by Renard, deserves to be specially highlighted as an apt wording to describe his concept of law:

> A form is a necessary brake. A behavioral spirit reinforces progress. Their combination creates the continuity that is necessary for the government, both the legislator and the judge.[29]

In the last edition of his textbook Ehrlich enlarged the list of recommended literature to read for a better understanding of cross-currents in international law. It includes sources published after the first edition of *Law of Nations*. Under the strong influence of Léon Duguit's ideas, Nicolas Politis put forward the idea of solidarity in international law, which was shifting the focus from states to individuals as central figures (1927).[30] His teachings concerned the philosophy of international law in general, and in particular the dimension of inconsistencies between theory and practice, as writers on the subject are responsible for their contributions. In the early 1930s James W. Garner was invited to The Hague Academy of International Law to lecture about the tendencies which he had observed in the international arena. He concluded that the First World War facilitated the emergence of a new international law, the progressive development of which was fostered by codification and adjudication. He also wrote about the change in attitude towards wars,[31] which related to the existence of norms deriving from different periods and the fulfillment of abstract norms. Like Ehrlich's textbook, Charles de Visscher's *Théories et réalités en droit international public*, published after WWII, was reissued four times. The first edition was mentioned in the above list.[32] The title gives hints on the dimension of cross-currents which it covers. The author concentrated on international politics as the reality where theories of international law were confirmed (or not). The book by Philip Jessup introduced the concept of a broad set of rules

[28] Ehrlich, *supra* note 26, p. 270.

[29] *Ibidem.*

[30] N. Politis, *Les nouvelles tendances du droit international*, Librairie Hachette, Paris: 1927.

[31] J. Garner, *Le développement et les tendances récentes du droit international*, 35 Recueil des cours de l'Academie de droit international 605 (1931).

[32] C. Vissher, *Théories et réalités en droit international public*, Editions A. Pedone, Paris: 1953.

intended to regulate transnational relations. These rules might derive not only from international law, but also from national legal systems.[33] Jessup's concept could be useful in understanding such conflicts as the existence of norms deriving from different periods and variations between states in their recognition and interpretation.

2. EVOLUTION OF THE CONCEPT OF CROSS-CURRENTS IN THE WORKS OF EHRLICH

Almost exactly a century ago Ehrlich first wrote about cross-currents in his article *Comparative Public Law and the Fundamentals of Its Study*, issued by an authoritative American journal.[34] There seemed to be good reasons for the growth of comparative public law in the world of those times, where lawmakers faced different challenges which required seeking and adapting foreign solutions. Ehrlich observed that the scope of states bodies' powers in different countries had been enlarged. They were interfering in the sphere of individuals' interests, causing an imbalance between the public and the private ("a tendency to assign to the public organization more and more new duties, and to infringe anon and again upon the domain hitherto left to individuals and to their voluntary associations"[35]). Therefore, the need for studying relevant experience was highlighted, especially with respect to the responsibility of a state. The content of that article followed a logical order – it started with the law and later described comparative public law, its sources, and offered a literature review. Finally, it explained two interrelated questions: (1) theory and practice; and (2) cross-currents.

He distinguished between two sides of law – theoretical and practical. Being under strong influence of the common law system after his stay at Oxford, Ehrlich thought of syllogistic reasoning as opposite to deductions drawn from legal practice. He admitted that lawyers of Continental Europe were eager to look for abstract conclusions, whereas a practical grounding, usually "in the form of a legal decision," was demanded in England.[36] His early suggestions paved the way for the method of new positivism, according to which judicial decisions are important for the determination of international law, in addition to international treaties and customs.[37] He added some other arguments to explain why legal theory and legal practice are distinct from each other:

> Secondly – in expounding the actual law men are likely to give way, in perfectly good faith, to their own wishes, and to assert to be law that which they want to be law. Thirdly – we may distinguish between any books and articles, however scholarly and trustworthy, even if they be "authorities" in the strict English sense of the word – and the actual practice (…).

[33] P. Jessup, *Transnational Law*, Yale University Press, New Haven: 1956.
[34] Ehrlich, *supra* note 17, p. 645.
[35] *Ibidem*, p. 625.
[36] *Ibidem*, p. 643.
[37] *See* Hachkevych, *supra* note 9.

Even within the demesne of law, how many enactments actually modify important theoretical pronouncements of "fundamental statutes." In connection with the last point, there may be pronouncements which in outward appearance are statutory rules, but in the legal system of the country in which they have been laid down, lack any possibility of enforcement, and thus, while they are usually enumerated as part of the legal organization, are in practice only blinders, put on in moments of popular excitement, and really amount to what in the case of an individual would be called a confidence trick.[38]

Acting law, as we understand Ehrlich's conception of it, might be slightly different from written rules. His distinction between theory and practice in the context of public law is not that simple to tackle. However, what he meant by "theory" was not only doctrinal provisions, but also many officially binding rules. Although they had entered into force, some of these norms tended to exist exceptionally on paper and remain distant from their real-life enforcement (he gave the example of the Queen's powers in comparison with the Queen's actual position[39]). His comprehension of "practice" encompassed putting law into action – its implementation, proved by the perceptible impact of a legal norm. A consideration of the law as a phenomenon of practical application hints at "social legal theory" and the concept of "living law," presented by another famous Ehrlich.[40]

Several years later Ludwik Ehrlich finished the article *Chwila obecna w ewolucji prawa narodów* (including part IV "Abstractions in the law of nations" and part V "The law of nations and sovereignty"). It was dedicated exclusively to the study of international law or the law of nations, as described in the title.[41] A brief and scattered overview of his scientific legacy, focused on the titles of his works, might open doors for finding differences in the usage of both terms. He preferred the term "prawo narodów" (the Polish equivalent of "the law of nations") while he worked in Lviv (1923-1939). Such was the title of the first (1927)[42] and second (1932)[43] edition of his legendary textbook. His bibliography of scholar's writings includes even works in the French language, showing his great aptitude for languages. One of them contains the term "du droit des gens" ("the law of nations") in its title. It addresses the problem of collective security and discusses different approaches to the concept of security. It was published along with other articles[44], presented at the 8th International Studies Conferences in London (1935). At the same time, there is evidence of Ehrlich's use of the English-

[38] Ehrlich, *supra* note 17, pp. 643-644.

[39] *Ibidem*, p. 644.

[40] *See* Hachkevych, *supra* note 9, pp. 103, 110.

[41] L. Ehrlich, *Chwila obecna w ewolucji prawa narodów* [The current moment and the evolution of international law], 1 Przegląd Prawa i Administracji 105 (1924).

[42] L. Ehrlich, *Prawo narodów* [Law of nations], K.S. Jakubowski, Lwów: 1927.

[43] L. Ehrlich, *Prawo narodów* [Law of nations], K.S. Jakubowski, Lwów: 1932.

[44] L. Ehrlich, *Le développment du droit des gens et le probléme de la sécurité collective; Le respect des engagements internationaux – la révision des traités et des situations internationales; Le probléme des litiges juridiques et des conflicts d'intérêts*, Un-te Jean-Casimir, Lviv: 1935.

language "international law." For instance, he delivered a lecture on the new positivism in international law in the University of London (1937), explaining the theoretical foundations of his method.[45] A change in his attitude towards both terms occurred after WWII, during the "Kraków period" (1940-1968) of his life. Let us note that Ehrlich, together with Jerzy Langrod, in 1949 published the results of a study on the history of Polish public law, containing valuable conclusions in the areas of the law of nations and political and administrative law.[46] A year before that he released the third edition of his textbook under the name *Prawo narodów*[47]. The next and final edition was titled *Międzynarodowe prawo*,[48] which reflected his transition to the term "international law" in the late 1950s. Alfons Klafkowski has suggested that this change could be explained by the tendencies that existed in the Polish legal science in the middle of the 20th century. They were in part a consequence of the legislative adoption of "international public law" as the name for the academic discipline in accordance with the Order of the Polish Ministry of Education dated December 23, 1949.[49] The term "law of nations" afterwards gradually disappeared from doctrinal works. Ehrlich himself did not clarify the distinctions between the usage of both terms. He perceived them as synonyms, meaning "a set of legal norms that are binding within the relations between states belonging to the international community."[50] It is worth mentioning an addiitonal fact pointed out by him. The term "law of nations" denoted traditional or customary international law, whereas international contractual (treaty-based) law corresponded to "international public law" in the French doctrine.[51]

One may ask what gave Ehrlich an impetus to become interested in international law in the interwar period? As a patriotic person, he sought the means of assertion of the new Polish State's interests on the international arena in accordance with the possibilities given by modern international law. The status of Poland as a State relied on strong international law, and the power of international law depended upon its effectiveness. Therefore, Ehrlich described two ways in which international law could progress. The first was the codification of abstract ideas. This is typical for lawyers who were educated under the strong authority of legislative acts, if we consider lawmaking at the national level. The second way was the deduction of rules on the basis of events and

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[45] L. Ehrlich, *The New Positivism in International Law*, Institute of Constitutional and International Law John Casimir University, Lviv: 1938.

[46] L. Ehrlich, J. Langrod, *Zarys historii prawa narodow, prawa politycznego i administracyjnego w Polsce* [Outline on the history of the law of nations, political law and administrative law in Poland], Polska Akademia Umiejętności, Kraków: 1949.

[47] L. Ehrlich, *Prawo narodów* [Law of nations], Wydawnictwo Księgarni Stefana Kamińskiego, Kraków: 1948.

[48] L. Ehrlich, *Międzynarodowe prawo* [International law], Wydawnictwo Prawnicze, Warszawa: 1958.

[49] A. Klafkowski, *Prawo publiczne międzynarodowe* [International public law], Państwowe Wydawnictwo Naukowe, Warszawa: 1969, p. 15.

[50] *See* Ehrlich, *supra* note 42, p. 3.

[51] L. Ehrlich, *Wstęp do nauki o stosunkach międzynarodowych* [Introduction to the science of international relations], Wydawnictwo księgarni Stefana Kamińskiego, Kraków: 1947, p. 52.

relations – for those who were taught to study primarily legal precedents. He went on to say that the application of the latter was difficult for a lawyer who was "brought up on the theory of the omnipotence of the law and the restriction of observing precedents."[52] Ehrlich even faced the threat of being excluded from the circle of specialists in the field of international law unless this difficulty was overcome.[53] He also pondered deeply the issue of abstractions relative to different areas of law:[54]

> Abstractions prevail in the private life, because there the interests that may be violated are less important than the public interest. The latter requires the application of general rules established from above and usually constant to ensure the strongest possible guarantees of freedom and security of turnover. In public relations, on the other hand, there are fewer abstractions but more casuistry so as not to jeopardize the public interest. Finally, in international law these principles are all the more shifting (*malléables*) and each instance should be considered on its own merit. This kind of derivation of rules from cases and relations is particularly easy not only for British and American lawyers, whose common law draws extensively on seeking rules, distinguishing rules etc., but also French ones, because their administrative law developed in a relevant way.[55]

He indicated that the role of international lawmaking treaties was rapidly increasing at that time.[56] In that connection, he recalled Wilson's Fourteen Points, to which he often referred in his textbook and other works (in the first instance on the Free City of Gdansk[57]). He divided these Points into two types: general and particular. He warned that "the more general a principle, the more difficult it is to put it into practice due to the difficulties in the adherence of circumstances in different states of the world to the uniform standard."[58] The refusal of the United States to join the League of Nations was seen by Ehrlich as a conflict between state sovereignty and its limitation by the Covenant of the League of Nations,[59] an observation that makes sense when discussing the various dimensions of cross-currents later in this article. This conflict demonstrated trends vis-à-vis the penetration of international law into internal social, economic. or political relations within an independent state.[60] Moreover, he witnessed the weakening of sovereignty mainly caused by the strengthening of new group-oriented directions in

[52] *See* Ehrlich, *supra* note 41, p. 105.

[53] *Ibidem.*

[54] All the quotes from Ehrlich's works in Polish were translated to English by the author.

[55] *See* Ehrlich, *supra* note 41, pp. 111-112.

[56] *Ibidem*, pp. 112-114.

[57] To a great extent, this is due to the importance of the XIIIth point for Poland: An independent Polish state should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant (C. Hodge, C. Nolan, *U.S. Presidents and Foreign Policy: From 1789 to the Present,* ABC-CLIO, Santa Barbara: 2007, p. 397).

[58] *See* Ehrlich, *supra* note 41, p. 114.

[59] *Ibidem*.

[60] *Ibidem*, p. 115.

science, which gave support to the rights of national, religious and other social groups.[61] Ehrlich wrote that:

> In the law of nations, as in political law, there is nothing special about the coexistence of institutions that come from different periods, as well as provisions that are based on different worldviews and legal systems. It is in the law of nations that the principle of sovereignty will probably coexist for some time with contractual self-restrictions of states concerning their internal affairs, especially when professional, national and religious groups are concerned. However, in the case of ethnic or linguistic groups there is a difficulty that might weaken the authority due to the nature of things. There have been no examples of a powerful state which did not rely on a particular nation. Nevertheless, there exist linguistic, ethnical and other minorities in every strong state.[62]

Above we have examined some aspects of Ehrlich's teachings which were expanded in his early works and provided grounds for elaborating the concept of cross-currents in his textbook a few years later. Now we will analyze them in detail in the third part of this article, having already reviewed the theoretical foundations of cross-currents. Each new edition of his *Law of Nations* (or "International law") brought to light new knowledge to make this concept clearer. And the final result, presented in the last edition, comprises an important complement to the findings that emerged from his 1920s works. In the first edition of his textbook, Ehrlich suggested that:

> Cross-currents theory (A.H. – "sprzeczne prądy" in Polish) explains why provisions originating from different periods of time or different legal systems, or grounded on different types of reasoning, co-exist within a particular legal system. This does not allow us to bring all the norms that are simultaneously binding into a single logical system, and therefore a certain number of exceptions tend to occur during their systematization (…) Although many norms in the law of nations are based on the views expressed in leading states, even between them there are significant variations in the applications of those norms. This fact encompasses the interaction between interpretive and generally-accepted principles. The ideal of the law of nations is the establishment of one set of rules of international relations involving all states. But the implementation of such an ideal will take a long time. The application of the same norm of the law of nations by courts from different states certainly leads to various practical consequences, or acquires different legal significance.[63]

Before the Second World War he extended his suggestions on the expediency of considering cross-currents in the domain of public law:

> The application of the comparative method in public law research always leads to the conclusion that in the public law system of each state there coexist elements that originate from different periods in the development of a particular system, as well as domestic elements and those deriving from foreign countries. Both elements, originating from the past and from abroad, are subject to a substantial evolution. To some extent this is caused

[61] *Ibidem*, p. 116.
[62] *Ibidem*, p. 118.
[63] Ehrlich, *supra* note 42, p. 96.

by a lack of understanding of foreign institutions and by the adaptation of a norm or institution that arose under certain conditions to other conditions.[64]

3. DIMENSIONS OF THE CROSS-CURRENTS IN INTERNATIONAL LAW

Ehrlich distinguished four dimensions of cross-currents in international law, and described them offering examples.

3.1. Norms originating from different periods

Certain situations reveal the feature of historical determinism, which is essential to law. Laws follow the spirit of the time. We may add that the spirit of the time as a rule changes faster than laws. Dicey described the influence of the demonstrations of gender equality and suffrage in the middle of the 19th century on the legislative innovations in the election law, introduced in 1928 (when women achieved the right to vote) and 1958 (when women were allowed to take seats in the House of Lords).[65] In order to confirm these counter-currents in international law, Ehrlich discussed the position of a diplomat. We may match Ehrlich's thoughts with existing theories. One of them – widely held at one time – perceived diplomats as representatives of foreign states, which were governed by monarchs in the Middle Ages and later. The position of a diplomat was thus equated to that of a monarch. Another theory, which approached nearer to the present time, was that of functionality. It was developed in the late 19th century and took into account the expanded competence of a diplomat (i.e. reporting about public opinion in a receiving state[66]). At the beginning of the 20th century they were treated as alter egos of their heads of states, and as officials for whom favourable conditions had to be created so that they could fulfil their responsibilities. There is a third theory, the argumentation for which was not mentioned by Ehrlich in this regard. It is called "extraterritoriality" and, along with "personal representation" and "functional necessity," it serves as a "theoretical justification for diplomatic immunity" in modern studies.[67] There are also two different approaches to the concept of a war, which Ehrlich outlined while describing norms deriving from various epochs. The medieval approach to war emphasized that it was a "population against population" conflict, involving all people belonging to respective nations in war. It made sense to capture ships and cargo at sea if their owners were citizens of the enemy state. The New Age approach was adopted on the assumption that civilians were excluded

[64] L. Ehrlich, *Metoda porównawcza w nauce prawa publicznego* [Comparative method in the science of public law], Drukarnia Uniwersytetu Poznańskiego, Poznań: 1938, p. 71.

[65] A. Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan and Co, London: 1915, p. xlii.

[66] Ehrlich, *supra* note 43, pp. 94-95.

[67] V. Maginnis, *Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations*, 28 Brooklyn Journal of International Law 989 (2003), p. 994.

from being deemed to be taking part in a war unless they were combatants. Since the 18th and 19th centuries wars have been considered as "army against army" conflicts. Does it still make sense to capture the ships and cargo of the enemy's citizens? Ehrlich had strong doubts, however prize cases were observed in 1898 and in the early 20th century.[68]

3.2. Variations between states in the recognition and interpretation of international law

Ehrlich suggested that:

> Dissimilarity among states concerning their mutual relations and national interests in different parts of the world leads to the presence of norms that are recognized only by certain groups of states, as well as special interpretations of generally accepted norms by a state or states. In the latter situation, "a doctrine" is developed, in the former one – a particular international law.[69]

Possibly when he used the word "doctrine" he meant the following: "a stated principle of government policy, mainly in foreign or military affairs."[70] His examples thereof include the American interpretation of the most-favoured-nation clause, the Monroe Doctrine, the British and French practice of application of the law of war prize, as well as of blockades and different approaches to the width of territorial waters. We can look closer at the most-favoured-nation clause, because unlike the other examples it is still relevant today.[71] This clause generalizes the provisions of international commercial treaties "providing that the nationals of the contracting parties will receive treatment in the territories of the other at least as favourable as that granted to third nations."[72] The United States applied it under the condition that a state had a right to receive compensation (a conditional interpretation).[73] Ehrlich did not mention the Harmon Doctrine, but its example is apropos in the context of the present article. It was pronounced by United States Attorney General and is considered to be "perhaps the most notorious theory in all of international natural resources law."[74] The dispute between Mexico and the United States over the usage of the Rio Grande river arose in the 1890s. After American farmers exploited its waters, the level of the river which flowed into Mexican territory was reduced. Harmon claimed that "a state wields absolute sovereignty with regard to that part of a river that lies within its territory."[75]

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[68] A. Knauth, *Prize Law Reconsidered*, 46 Columbia Law Review 69 (1946), p. 69.

[69] Ehrlich, *supra* note 43, p. 95.

[70] Merriam-Webster Dictionary, available at: https://www.merriam-webster.com (accessed 30 May 2021).

[71] *See* M. Kałduński, *Klauzula największego uprzywilejowania* [The most favored nation clause], Dom Organizatora, Toruń: 2006.

[72] E. Conroy, *American Interpretation of the Most Favored Nation Clause*, 12 Cornell Law Review 327 (1927), pp. 327-328.

[73] *Ibidem,* pp. 330-334.

[74] S. Mccaffrey, *The Harmon Doctrine One Hundred Years Later: Burried, Not Praised*, 36(4) Natural Resources Journal 965 (1996), p. 965.

[75] T. Kuokkanen, *Water Security and International Law*, 20 Potchefstroom Electronic Law Journal 1 (2017), p. 6.

Ehrlich raised the question of particular international law and took into consideration the instance of diplomatic asylum in Latin America states: "If several states avoid or modify some generally obligatory norms between subjects of international law, or if they establish or settle norms that are not binding among other states, there exists a particular international law."[76]

He did not perceive it as an alternative international law. It was seen as "the growth or improvement due to the needs of general norms of the law of nations, with detailed comprehension of relations and necessities of America."[77] However, as there is only one international law, accordingly it is more accurate to speak about norms or institutions of particular international law.

3.3. Fulfilment of abstract norms

As was already mentioned above, Ehrlich distinguished two methods of building international law: the codification of abstract ideas; and the deduction of rules from events and relations. He suggested that the latter prevailed in the law of nations before the 19th century, whereas "the quest for the codification of various branches of domestic law in the 19th century was reflected in the works on international law, primarily in the proposals of scholars and private organizations (Fiore, Bluntschli, the Institute of International Law, the International Law Commission), later in the codification of different areas of the law of war, and finally in the establishment of multiple treaty provisions after the First World War."[78] The fulfilment of abstract norms refers to the normativistic approach towards international law, inspired by Hans Kelsen. International treaties tend to state general principles, but they do not provide relevant norms to implement those principles. Ehrlich was convinced that according to the nature of good faith in international relations[79], the recognition of a right brings with it the needed means for its realization.[80]

This dimension exposes a conflict between the generalization and particularization. We mean to say that there is a case for the embodiment of practical benefits to each participating state, alongside with a case for the uniformity that represents the common will of all participating states:

The more states that adopt a norm or create an organization, the stronger this norm or organization becomes separated from an individual state, and the greater becomes the possibility of applying the rules in an abstract way. To ensure the principle of respect for law, it is desirable that the rules of international law should be applied with ever less consideration of the wishes of individual states which are contrary to the rights of others.[81]

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[76] Ehrlich, *supra* note 48, p. 101.

[77] Ehrlich, *supra* note 43, p. 96.

[78] Ehrlich, *supra* note 48, p. 102.

[79] "A Sovereign State is bound in its relations with other States only by its own will, but by its own will it is fully bound" (Ehrlich, *supra* note 45, p. 12).

[80] Ehrlich, *supra* note 42, p. 97.

[81] Ehrlich, *supra* note 48, p. 102.

Bringing states closer together allowed Ehrlich to look to the future with optimism. Due to this, it became possible to switch from the state's strategy of behaving in a way that was based on a decision made by a state in each case, to the states' strategy of a collective solution, prescribing uniform rules.[82] We may add that these strategies are still in place, although the ratio between them has been gradually changing.

3.4. Inconsistencies in theory and practice

Ehrlich indicated four situations when theory and practice did not match: gradual infringement of an established principle; application of a rule considered to be general in some cases but not in others; a practical implementation of a norm serving for a particular purpose in order to achieve another purpose; covering up illegal actions with a veneer of a legal form.[83] He also demonstrated how those situations occurred on the international arena. To his mind, Polish rights to the Free City of Gdańsk, granted by The Treaty of Versailles, were subsequently reduced by imposing a disadvantageous treaty and unfavourable decisions made by the High Commissioner in Gdansk. Moreover, some states had to sign the "minority treaties" after the World War I, while others did not have to. He warned against the abuse of the letter of the law by neglecting its spirit.[84] In modern international relations, inconsistencies between theory and practice are sometimes manifested in the policy of "double standards," whereby different states or international organizations adopt different positions to the same or similar actions, depending on who is involved. Another aspect of this dimension is related to the writings on international law which Ehrlich called "theory." He advised to distinguish political postulates from scientific views on the present state of law.[85]

4. THE CONCEPT OF CROSS-CURRENTS IN THE LIGHT OF THE KOSKENNIEMI REPORT

The importance of the issues discussed above may be proven by the reports of the International Law Commission on the fragmentation of international law, especially the one presented at the 58th session (the Koskenniemi Report).[86] Based on a comparative analysis of Ehrlich's ideas on cross-currents in international law and the theoretical foundations of the fragmentation discussed in the Report, this article tries to evaluate the novelty, consistency, and value of this concept. Moreover, the question is posed whether Erlich's ideas shaped a theory, or were just a set of remarks.

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[82] *Ibidem*, p. 103.
[83] *Ibidem*, p. 104.
[84] Ehrlich, *supra* note 42, p. 98.
[85] Ehrlich, *supra* note 48, p. 105.
[86] Report of the study group on the fragmentation of international law, finalized by Martti Koskenniemi (Geneva, 1 May – 9 June and 3 July – 11 August 2006), 13 April 2006, A/CN.4/L.682.

The cross-currents' explanation of the reasons why conflicts between norms of international law arise rests on the parallel with the influence of large groups of people in the formation of law in England. While the foundations for this explanation seem to be a little simplified because of the different essence of both legal systems, nevertheless it is an innovative and intriguing explanation, not covered by the provisions of the Koskenniemi Report. The latter mentions Wilfred Jenks' statement from his 1953 article *The Conflict of Law-Making Treaties*:

> In the absence of a world legislature with a general mandate, law making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law ... One of the most serious sources of conflict between law-making treaties is the important development of the law governing the revision of multilateral instruments and defining the legal effects of revision.[87]

Ehrlich's parallels reveal certain important features of international law as compared to domestic law: (1) there is no legislative body that "legitimates" the moods prevailing among states; (2) the position of each state in international law is important, while in domestic law the general position of a large group of people matters, which may include the legislators themselves; and (3) there is no intermediary between the population and the adoption of a new law which transforms the expectations of the public into legal changes.

Like the co-authors of the Report, Ehrlich saw the existence of conflicts between norms as being in the very nature of international law. Its logically coherent system serves as a long-term ideal, while there may be intractable contradictions in reality. "A certain number of exceptions" is admitted due to regularities. Some of those conflict situations were thoroughly studied in the Report. Therefore, the coexistence of rules from different periods is examined in "Relations between prior and subsequent law" in section D. The question of interpretation in several contexts pervades the entire report (especially of international treaties). The recognition of the different variations in international law is relevant to regional international law, as considered in section C of the Report, entitled "Conflicts between special law and general law." Ehrlich's abstractions are not so widely discussed in the Report as the topics mentioned above. "Theory and practice" concerns the issue of international law enforcement, and it goes beyond the scope of "fragmentation" in the meaning implied by the co-authors of the Report.

Ehrlich put his ideas on contradicting flows into the theory of cross-currents (as he called it). In order to consider ideas as a theory, they should fulfil some requirements, such as: (1) be based on facts; (2) have a logical interrelation and integrity; and (3) serve to explain real-life situations. In our view, the central points of Ehrlich's cross-currents theory were strongly based on facts. He was taking into account the process of applying international law. A large number of conflicts within its legal system were noted. At

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[87] W. Jenks, *The Conflict of Law-Making Treaties*, 30 British Yearbook of International Law 401 (1953), p. 403.

the same time, those conflicts were not restricted to those between two different rules considered to be in effect in a particular situation. They were not identical to international disputes, even if they might have led to them. Due to the content of the Koskenniemi Report, the fragmentation of international law is generally focused on normative and institutional collisions, whereas cross-currents point at some of normative collisions; at the non-fulfilment of abstract norms; at different interpretations by states; and at the gap between what is legally recognized and the reality. Ehrlich's teachings contained several ahead-of-his-time remarks which are useful for the understanding of the fragmentation of international law, and possibly enlarge its scope (e.g. the role of abstractions). While we cannot consider it as the prototypical theory of fragmentation,[88] it nevertheless can be considered as containing the elements of a theory, or even a theory itself, intended to explain deviations from absolute coherence in international law, regarding the latter more widely than as just a group of norms.

CONCLUSIONS

Although the idea of cross-currents was initially developed to study the different situations in domestic English law, Ehrlich applied it to explain contradicting tendencies in international law. His creation and development of cross-currents was grounded in the reality of interstate relations of his time. After the First World War he made an attempt to understand and interpret unwanted conflicts within the system of international law by analogy with Dicey's fundamental differences in public opinion, influencing legislative initiatives. The concept of cross-currents emerged at the beginning of the 1920s in Ehrlich's *Comparative Public Law and the Fundamentals of Its Study* and evolved into a set of ideas a few years later. Cross-currents permeated most of his works on international law, including all editions of his textbook. The last edition of 1958 presented this set of ideas as a theory, and explained its meaning, origin and underlying dimensions. The Report of the study group on the fragmentation of international law, finalized by Martti Koskenniemi and published half a century later, addresses questions, some of which (e.g. conflicts between successive norms) were raised by Ehrlich when he investigated cross-currents. The concept of cross-currents covered a few aspects of fragmentation and dealt with international legitimacy, observed when interstate relations are in full compliance with international law.

At the heart of Dicey's theory of cross-currents lies the belief that there are different expectations of large groups of people about the rules that should (or should not) be in force regarding a particular issue. Such expectations might serve as a guide for the adoption, amendment, or repeal of national laws. It would seem that the analogies to cross-currents in international law would include the different expectations of states about the rules that should (or should not) be applied on the international arena. Several states might be

[88] Rather a set of remarks.

willing to recognize the sovereignty of the equatorial states over the geostationary orbit, while others are likely to consider it beyond the control of all states, like all outer space objects. Several states might support a categorical ban on extraditing their own citizens, being more important than any of the possible preconditions for extradition, while others tend to follow *aut dedere aut judicare*. But differently from domestic law – where individuals standing behind the public opinion are not entitled to choose laws, which are imposed from above – the will of states is crucial in international law. States are both the "addressees" of its norms and their creators. This is the reason why the consequences of a collision between two currents in the domestic law are not the same as in international law. Thus, conflicts within the system of international law are inevitable so long as states remain sovereign. As far as we can see, Ehrlich was eager to contribute to improving the system of international law so as to achieve a higher level of logical consistency in its norms in his times. He tried to look for the reasons for non-compliances in international law, considering it as a complex, holistic and single system.