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# EUGEN EHRLICH'S FAILED EMANCIPATION AND THE EMERGENCE OF EMPIRICAL SOCIOLOGY OF LAW[1]

Eugen Ehrlich is commonly perceived as a founding father of sociology of law and the author of a new, original agenda in social legal research. But he also proposed an agenda to transform legal science by increasing the role of empirical insights in legal reasoning. In this article, we argue that whereas Ehrlich's contribution to sociology of law is overrated by its separation from the theoretical and academic context of legal science, by the same token his contribution to the history of legal science is underrated as a result of his association with sociology. It is our thesis that the key to understanding Ehrlich's proposition and its subsequent failure is the role assigned to sociology in his undertaking: sociology was for Ehrlich an instrument to make law more scientific. Even though it is not easy to propose any precise measure of success or failure in this case, we argue that while Ehrlich was undoubtedly more successful than most of his contemporaries to become an internationally recognisable name and a lasting scholarly reference, this recognition is primarily due to a re-appropriation of Ehrlich's ideas by the emergent sub-discipline of sociology of law, even though, as Roger Cotterrell put it, "Ehrlich created his legal sociology as a by-product of juristic inquiries"[2]. Ehr-

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[2] R. Cotterrell, *Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies*, in: M. Hertogh (ed.), *Living Law: Reconsidering Eugen Ehrlich*, Oxford 2008, p. 75.

lich's proposition is best framed as an emancipatory effort, an "intellectual emancipation of legal application of law and legal theory"[3]. By analysing Ehrlich's attempt to transgress the limitations, both conceptual and practical, imposed by the legal science of his time, we situate the development and the reception of his thought in the field of history and sociology of science.

Legal science is conspicuously underrepresented in the history of science, and the most important reason for this is the division of labour between the history of law and the history of legal science. The latter seems to be secondary to the former, and the former is left to historians of law, who are usually lawyers by training. As a result, they seldom pursue their research goals using mainstream theories of science. That history of law would be outsourced to legally trained historians is a product of the tradition according to which history of law is part of legal training, even though its importance seems to shrink consistently along with the diminishing appeal of the one clearly historical law which had once managed to convince the Europeans that it was pertinent to their business at hand, namely Roman law[4]. Nonetheless, lawyers are trained by lawyers, and if history be the part of the training, it should be done by lawyers, too. This does not just affect the law: wherever history of a discipline is part of training in that discipline, the instructors may confidently be expected to be recruited from within its ranks[5].

Another, more subtle reason why law (overstretched into legal science and its history) is, in common practice, best left to lawyers, is the convergence of the normative and the descriptive element in the law. Whatever theories, concepts, and methods may form a part of legal science, there is a certain difficulty in determining their relation to the normative dimension of the law; a difficulty with which legal philosophy and sociology of law has long struggled (see Deflem 2008).

Whatever the reasons for the separation of history of legal science from history of other sciences, not only is it detrimental to the understanding of social and cultural embeddedness of law, but it also leads to an incomplete and distorted picture of development of science. Law has ever been an important part of European academia, and lawyers have been powerful actors in the academic field. Legal concepts and theories were instrumental in the concept-formation of political and social philosophy, history, sociology, anthropology, ethnogra-

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[3] M. Rumpf, *Was ist Rechtssoziologie?*, in: *Archiv für die civilistische Praxis* N.F. 2.1924 = 122.1924, 36–51, p. 41.

[4] H.-P. Haferkamp, *Die historische Rechtsschule*, Frankfurt am Main: Klostermann 2018, p. 77ff.

[5] On that matter, in the context of history of medicine, see e.g. H.-J. Rheinberger, J. Surman, *Historyzowanie nauki lub jak nowe przychodzi na świat: rozmowa z Hansem-Jörgiem Rheinbergerem*, "Prace Komisji Historii Nauki PAU" 14/2015, pp. 291–306, p. 302.

phy, psychology and economy. This universal connectivity of law is undoubtedly partly due to the very long tradition of systematic reflection on law in European intellectual history, resulting partly from the intimate bond which the law always enjoyed with political power, and partly due to the sheer number of people occupied with making, teaching, learning, applying and enforcing the law, while often also pursuing other intellectual endeavours. From this perspective, it is not the universal connectivity of law that comes as a surprise but rather the obliviousness to this connectivity in the histories of science and of law alike.

But there is one other solution to this puzzle. Law was an established academic discipline, but it lacked a clear self-understanding as a scientific discipline, and such self-understanding was vital to its status, both within the academic field and beyond. In this article, we cover a short period of intense, vivid and widespread academic discussion in which such self-understanding was argued and negotiated, while the status of science has been claimed or re-claimed for the law. In the German-speaking lands, the problem of relationship of law and science has long been present in the academic debate. The powerful German tradition of *Pandektistik* (pandectism) to which we refer in this article was born out of concern for systematic, methodical and conceptual work in legal education, which expressed itself paradigmatically in the form and structure of university coursebooks[6]. This tradition had an impact not only in Germany, but also, mediated through the German discussions, on the European and, to an extent, global developments in philosophy and theory of law.

One important point in these discussions came at the turn of the 19th century, when the so-called *Freirechtsbewegung*, the movement of free law, as well as Ehrlich's sociology of law restated the question of the scientific status of law. Both struggled against tendencies in legal science which they perceived as standing in the way of its development and both sought a solution to the alleged stagnation of legal science and, by extension, of the law itself. Even though Ehrlich is often classified as a member of the movement of free law and a founding father of what is also called *Freirechtsschule* (school of free law)[7],

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[6] H.-P. Haferkamp, *Pandektenwissenschaft*, in: F. Jaeger (ed.), *Enzyklopädie der Neuzeit Online*, 2014. Retrieved from: https://referenceworks.brillonline.com/entries/enzyklopaedie-der-neuzeit/pandektenwissenschaft-a3132000; *idem*, *Historische Rechtsschule*, pp. 95–110.

[7] The notion of *Freirechtsbewegung* was and is used interchangeably with other terms like *Freirechtslehre* or *Freirechtschule*, although the latter can be misleading since it implies the existence of a school where there clearly was none, see L. Lombardi Vallauri, *Geschichte des Freirechts*, Frankfurt am Main 1971, p. 37; J. Rückert, *Die Schlachtrufe im Methodenkampf — ein historischer Überblick*, in: J. Rückert, R. Seinecke (eds.), *Methodik des Zivilrechts — von Savigny bis Teubner*, 2017.

we suggest distinguish his ideas from those of other members of this school, including in particular Hermann Kantorowicz and Ernst Fuchs, in order to catalogue the family resemblances between them without losing track of Ehrlich's unique trait: his affiliation with the later development of sociology of law[8].

We explore the consequences of Ehrlich's idea of turning law into "genuine" empirical science. We argue that to turn law into science was a weapon used against the scientific establishment by relatively few vociferous outsiders in academia (relatively young, mostly of Jewish origin and often working in marginal or peripheral institutions, or else teaching peripheral subjects[9]), in an era when — as Max Rümelin put it — it was not only fashionable, but also necessary "to scream as loud as you could, if you wanted to achieve anything. A more composed tone of voice and a limitation of the debate to a circle of experts would in all probability cause it to take longer for the justified ends, which were undoubtedly there in this movement, to break through"[10]. We further discuss the sociologisation of legal science as the part of their strategy which reinforced the outsider status of this group and finally adversely affected their overall impact on the legal sciences. Drawing the criteria and instruments of scientificity from a relatively new and not yet established discipline of sociology, having in Germany the additional disadvantage of being strongly associated with the French, turned out to be a bad choice as far as the chances of success measured by the scope of reception were concerned. That is why most of those vociferous rebels remained, at best, moderately influential in German legal science and had next to no impact elsewhere in either Europe or the world. In 1925, Kantorowicz had already replied to the voices preaching the triumph of the movement of free law that for his part, he was very far from optimism[11]. Ehrlich, in turn, became a forefather of recent developments in legal sciences which have only a loose connection to his original ideas, such as global legal pluralism (as in Gunther Teubner's famous "global Bukowina",

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[8] H. Rottleuthner, *Das lebende Recht bei Eugen Ehrlich und Ernst Hirsch / Living Law in Eugen Ehrlich and Ernst Hirsch*, "Zeitschrift für Rechtssoziologie" 33 (2), 2016, pp. 191–206.

[9] To name just one example, Hermann Kantorowicz's first ordinary chair was in *Hilfswissenschaften des Rechts*, auxiliary sciences of law, a problematic job description indicating low ranking through its lack of specificity (see K. Muscheler, *Hermann Ulrich Kantorowicz, Eine Biographie*, Berlin 1984, p. 33).

[10] „Möglichst laut zu schreien, wenn man etwas erreichen wollte. Bei ruhigerer Tonart und bei Beschränkung der Diskussion auf die Kreise der Sachverständigen hätte es vermutlich länger gedauert, bis die berechtigten Ziele, die gewiß in der Bewegung enthalten waren, sich durchsetzten", M. Rümelin, *Erlebte Wandlungen in Wissenschaft u. Lehre. Rede, gehalten bei der akademischen Preisverteilung am 6. Nov. 1930*, Tübingen 1930, p. 40. All translations in this article, unless expressly mentioned otherwise, are by the authors.

[11] H. Kantorowicz, *Aus der Vorgeschichte der Freirechtslehre*, in: *idem*, *Rechtswissenschaft und Soziologie*, T. Würtembergered (ed.), Karlsruhe 1962, p. 66.

an allusion to Ehrlich's research[12]) or, indeed, as some argue, legal pluralism as such[13]. Thus, Ehrlich finally seems to have become a figure of authority which he hardly was in his day, but at the same time largely a figure of speech. He became commonly docketed as the first empirical sociologist of law. This transfer might have contributed decisively to his survival, but also to a re-qualification of his work and its relative annulment in legal scholarship. Even though some ideas close to Ehrlich's agenda became very prominent, particularly in the United States, where Ehrlich was promoted by the dean of Harvard Law School, Roscoe Pound, it was an analogy and not a genealogical dependence[14].

## Law as science and the Pandectae: a prelude to the discussion

In the second half of the 19th century and early in the 20th century the debate about what law should be like in a modern state was on the wing. It was the age of legal reforms both in material and procedural law, the time of codifications, reorganisation of the judiciary, new developments in civil and commercial law, and dynamic changes in judicial practice, also as a consequence of the political upheavals of the 19th century. It was also a period of dynamic developments in the academic science of law, whose forerunner was the emergence of the German historical school of jurisprudence (*historische Rechtsschule*) 100 years earlier.

The 19th century was the century of the great figures of German legal thought. The long line of these legists, most if not all of whom were also practitioners of law in one way or another[15], marks a development of a corpus of legal ideas which gave rise to probably the most astonishing setup of law in European history. The German historical school initiated intensive studies of ancient Roman legal texts compiled in the first half of the 6th century in the Eastern Roman empire under the name of Digest or Pandects (*Pandectae*), using the methods of interpretation of biblical sources derived from exegetic theology[16]. After the

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[12] G. Teubner, *Global Bukowina: Legal Pluralism in the World-Society*, in: *idem*, *Global Law Without a State*. Brookfield, WI / Aldershot: Dartmouth Publishing 1997, pp. 3–28.

[13] See D. Nelken, *Eugen Ehrlich, Living Law, and Plural Legalities*, "Theoretical Inquiries in Law" 9 (2), 2008, pp. 443–471; for an argumentation supportive of Ehrlich's contribution to contemporary legal pluralism see K. F. Röhl and S. Machura (2013), *100 Jahre Rechtssoziologie: Eugen Ehrlichs Rechtspluralismus heute*, "Juristenzeitung" 68, pp. 1117–1128.

[14] The assessment of Ehrlich's impact on American jurists should be carefully considered, see B.Z. Tamanaha, *A Vision of Social-Legal Change: Rescuing Ehrlich from "Living Law"*, "Law & Social Inquiry" 36, 1, Winter 2011, pp. 297–318.

[15] H.P. Haferkamp, *Die historische Rechtsschule*, p. 280ff, 329ff.

[16] *Ibidem*, p. 41.

old structures of the Holy Roman Empire of the German Nation collapsed, the historical school used the idea of a *Volksgeist* to connect the Roman law with the concept of a national German law. This provided a rationale not only for its theoretical development, but also its practical application on 1/3 of all German Reich territories: it was also permanently present at all German-speaking universities, notwithstanding the binding force of the sources of Roman law in a given area. In the second half of 19th century, following a philosophical reorientation as well as a separation of historical and dogmatic inquiries, the historical school was transformed into pandectism (*Pandektistik*), the study of Pandects[17]: the law was to be adapted to the new economic conditions in modern society. But the mode of working on source texts as well as interpreting them, which was represented as canonical and scientific due to its systematic character, underwent a crisis in the 1880s and the study of Pandects had been criticised for its estrangement from real life (*Lebensfremdheit*).

The study of Pandects had a direct bearing on the practice of law beyond academia. Moreover, though *Pandektistik* was a German invention, its influence extended over all German-speaking lands, in particular over the Habsburg Empire, where since the 1850s it had influenced the interpretation of the Austrian Civil Code of 1811 (ABGB)[18]. Due to academic mobility within the German-speaking parts of Europe, pandectism became a standard reference point for academic and theoretical reflection even in the lands which did not use Pandects as a source of law. By way of international academic mobility and legal transplants[19], it also made its way beyond the German-speaking lands and even beyond Europe. Legal concepts and theories were formed based on it and within its limitations. Those were anything but unknown to the legal minds of the 19th century: the crisis of *Pandektistik* preceded the movement of free law[20].

The diagnosis of the intrinsic limitations of the study of Pandects was epitomised by the derogatory term "*Begriffsjurisprudenz*", jurisprudence of concepts. The story of *Begriffsjurisprudenz* is fascinating: it tells just as much about the scientific strategies in the struggle for recognition as about the readiness of the younger generations to take the labels coined by their elders for granted.

The term *Begriffsjurisprudenz* was coined by Rudolf von Jhering in his sarcastic philippics against his old masters called *Scherz und Ernst in der*

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17 *Ibidem*, p. 316.

18 F.-S. Meissel, *Joseph Unger und das Römische Recht — Zu Stil und Methoden der österreichichen „Pandektistik"*, in: H.-P. Haferkamp, T. Repgen (eds.), *Wie pandektistisch war die Pandetistik*, Tübingen 2017, pp. 17–33.

19 A. Watson, *Legal Transplants and European Private Law*, "Electronic Journal of Comparative Law" 4 (4), December 2000.

20 *Ibidem*.

*Jurisprudenz* (Joke and Seriousness in Jurisprudence)[21]. Jhering pointed out the difficulties of deriving legal norms from antique legal sources and applying logical operations to concepts which are alienated from real-life economic practice. These criticisms were supported by later authors, inspired by the idea of the yawning gap between the law and the new economic conditions. The notion of *Begriffsjurisprudenz* was initially not prominent in the work of Ehrlich himself or in the legal science of his time. It comes to the fore as a result of the methodological debate (*Methodendebatte*[22]), to reach the height of its popularity in the interwar period and to be overtaken and perpetuated by postwar legal historiography[23].

In this chapter, we use the notion of *Begriffsjurisprudenz* with the following reservations: first, what Ehrlich understands as *Begriffsjurisprudenz* is a set of phenomena which are not uniquely characteristic of the German law in the 18th and 19th centuries. According to Ehrlich, German *Begriffsjurisprudenz* differs from its historical forerunners first and foremost due to its abstract and mathematical methods of working with texts, the paragon of which for Ehrlich was the study of Pandectae. This reference is of primary importance in his seminal work *Grundlegung der Soziologie des Rechts* (*Fundamental Principles of the Sociology of Law*) of 1913. Ehrlich's critique of legal methodology not only covers the specialists of Pandectae, but also the representatives of the earlier German historical school: all of them, including Georg Friedrich Puchta, Adolph von Vangerow, Bernhard Windscheid, Alois von Brinz, are all jointly called "Mathematicians"[24]. On the other hand, in 1913 Ehrlich wrote:

> In the years recently past many a bitter word has been spoken concerning "pandectology," and although these words were not spoken by me, I will not deny that they were spoken, for I know that I bear a great deal of responsibility in the matter. In the heat of battle, this was justified, and perhaps it was necessary. I therefore feel it incumbent upon myself to point out the great achievements of "pandectology." I would remain true especially to the memory of Bernhard Windscheid. In my youth, I studied his writings with great enthusiasm, and if I and those who are pressing forward with me have gone beyond him, we are indebted to his teachings for it. Time has done the rest. Before long the eyes of the last of the German jurists that have seen a living Continental common law will have been closed in death; the last voice

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[21] R. von Jhering, *Scherz und Ernst in der Jurisprudenz: Eine Weihnachtsgabe f. d. juristische Publikum*, Leipzig 1884, p. 337.

[22] See *Gesetzesbindung und Richterfreiheit, Texte zur Methodendebatte 1900–1914*, A. Gängel, K.A. Mollnau (eds.), Freiburg 1992.

[23] See F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, Göttingen 1967, p. 451; K. Larenz, *Methodenlehre der Rechtswissenschaft*. Berlin–Göttingen–Heidelberg 1960, p. 42ff.

[24] E. Ehrlich, *Fundamental Principles of the Sociology of Law* (trans. W.L. Moll, with an introduction by R. Pound), Cambridge, MA 1936, p. 327.

> that has taught a living Continental common law will have been silenced. Let them see to it that the valuable creations of the labours of two thousand years, separated like wheat from the chaff, are handed down to the coming generation. What they do not save will be lost forever. But the three volumes of Windscheid's Pandects will remain as a link between a great past and an unknown future[25].

In recent scholarship, the very existence of *Begriffsjurisprudenz* has been questioned and the whole phenomenon was written down as a strategically useful hypostasis[26]. The notion was undoubtedly used polemically to construe an opponent in the methodological discussions in which Ehrlich took part alongside many others, but the eristic use of the concept prevailed over its descriptive value. Nevertheless, despite the lack of substantiation for the thesis that *Begriffsjurisprudenz* did in fact govern in the world of Pandects, at the end of the 19th century a movement against *Begriffsjurisprudenz* was born which finally confirmed its reality. Before we proceed to the sociological characterisation of this movement, it may be worthwhile to consider the direct impulses which gave it its vital force.

The first and primary stimulus mentioned in all textbook accounts is the (re) discovery that the law has gaps. Of course, the fact that there were gaps in law (understood as an absence of norms of positive law governing a certain case) was known well before the emergence of the movement of the free law[27], and it even found its way to the Art. 7 of the Austrian Civil Code of 1811. However, the fiction of the completeness of a legal system as a whole was postulated either *explicite* of *implicite*, a useful prop in teaching and theorising as well as in the practice of legal reasoning, even though demonstrably inconsistent with any actual historical state of the law[28]. However, the opponents to the so-called *Begriffsjurisprudenz* rejected the practice based on the fiction of completeness, and the existence of the gaps was construed as a failure of legal thinking to comply with the requirements of empirical reality. On the one hand, it could be argued that the fiction of completeness of the legal system was hypostasised and that the legal science had lost the awareness of its fictionality, which could only be remedied by a rejection of the fiction *tout court*. It was probably the double critical moment: the gaps were the spots of vulnerability of the system exactly because it was through the gaps that the extra-systemic phenomena would be

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[25] *Ibidem*, 340.

[26] For a comprehensive list of works on this topic by one of the first researchers in this field see U. Falk, *Haftung des Konkursverwalters*, in: H.P. Haferkamp, T. Repgen, *op. cit.*, p. 102–103.

[27] See J. Schröder, *Recht als Wissenschaft. Geschichte der juristischen Methodenlehre in der Neuzeit (1500–1933)*, BECK 2012, p. 249.

[28] *Ibidem*, p. 250.

getting into the system's own practice. There is an essentially Luhmannian suggestion about the interpretation of opposition against the *Begriffsjurisprudenz* as an act of further positivisation of the legal system, striving to eliminate the obvious threat to its autonomy.

The discovery that empirical reality does make its way into the legal system through the gaps in law went hand in hand with the revision of the model of legal education, which focused on the transfer of intellectual styles, modes of reasoning and habitus. It was an education focusing on the intellectual qualities of future lawyers and not on learning legal norms and provisions by heart, but it was also an affirmation of an education which had (and still has) little to do with the world outside the lecture hall. The dialectical, abstract law of ancient provenience which was strange to all social reality was an alienated construct of doubtless political value for the vested interest in an established institutional order. The lawyers dealing with such law were only encountering reality very late on their way, after passing through the state exams and starting with their legal practice or in the civil service. They were expected to reproduce what they had learned best and refrain from doing anything which would in the final effect deprive them of the familiar tools of their trade.

These political considerations were, however, countered by the new interest in the empirical social reality, essentially strange to European continental legal science as opposed to the traditionally more sociologically-oriented American one. This interest converges with the development of sociology as a distinct social science in the second half of 19th century, starting in France. Early French sociology under the lead of Émile Durkheim tackles the problem of law as a social fact, offering a perspective radically different from either that of the legal science or of German philosophy and sociology of law at roughly the same time[29]. French sociology emerges in a legal culture which was at the same time radically different from the German[30].

It is noteworthy that the criticism against the methods of working with positive law arises not only in Germany but more or less simultaneously in many countries, and first of all in France. A critical movement apparently parallel to the German one occurred there, directed against the so-called "fetishism of written and codified law" (*fétichisme de la loi écrite et codifiée*[31]). The traditional methods of legal work in France amounted allegedly to a view that all legal problems can be solved without ever leaving the field of statutory

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[29] M. Deflem, *Sociology of Law: Visions of a Scholarly Tradition*, Cambridge 2008.

[30] W. Lepenies, *Die drei Kulturen: Soziologie zwischen Literatur und Wissenschaft*, Munich 1985.

[31] F. Gény, *Méthode d'interprétation et sources en droit privé positif*, 2nd Edition, vol. 1, Paris 1919, p. 70.

law, and that the use of pure concepts developed by abstract logic were necessary instruments of fertilisation of legal texts, and of elaboration of independent legal ideas. This critique was uttered by French legal scholar François Gény in his book *Méthode d'interpretation et sources en droit privé positif* (1899). The exact measure to which the movement of free law was influenced by Gény's legal thought and who was the real forerunner of the revisionist approach to legal science, is open to a debate epitomised by a discussion[32] on the French and German influences on the Art. 1 of the Swiss civil code of 1907[33]. However, the work of Gény undoubtedly gave Ehrlich an impulse to advocate his use of "*freie Rechtsfindung*", free law-finding.

Ehrlich came up with the idea of free law-finding to claim priority in respect of the work of Gény published four years earlier, in which the French author proposed under the name of "*libre recherche scientifique*" (free scientific search) a new method of finding the norm applicable in a legal case. It is beyond question that both of them shared the focus on the free search of legal norm in face of gaps in the statutory law (both coming from countries with well-established civil codifications) and in fact Ehrlich had already published his work on gaps in law in 1888[34]. Both stressed the importance of empirical research of the rules governing societies. The agents of this empirical search would be, in the first place, the judges having to apply law to particular cases and discovering empirical reality though the lens of their practical professional concerns. However, the decision-making processes of the judges stood in clear relation to equally practical problems of the people whom they confronted, and who were also practically and directly concerned with the law, though in a different manner. For Gény, who focused on the work of a critique of the interpretation of the codified law by a French lawyer, it was an impulse to opt for *libre recherche scientifique*, a twofold method of finding legal norms. The first aspect of the method was to question reason and conscience, to discover in man's intimate nature the very foundations of justice; the other one, to look into social phenomena to grasp the laws of their harmony and the principles of order which they require[35].

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[32] P. C a r o n i, *Einleitungstitel des Zivilgesetzbuches*, Basel–Frankfurt am Main–Helbing und Lichtenhahn 1996, pp. 158–160.

[33] M.O. G a u y e, *François Gény est-il le père de l'article 1er, 3e alinéa du Code civil suisse*, Revue de droit Suisse vol. 92 (1973), Half-Volume I. No. 3, pp. 271–281.

[34] E. E h r l i c h, *Über Lücken im Rechte*, Juristische Blätter 1888, pp. 447–630.

[35] "*D'une part, interroger la raison et la conscience, pour découvrir en notre nature intime les bases mêmes de la justice ; d'autre part, s'adresser aux phénomènes sociaux pour saisir les lois de leur harmonie et les principes d'ordre qu'il requièrent*", F. G é n y, *Méthode d'interprétation et sources en droit privé positif*, vol. 2, Paris 1919, p. 92.

The figure of the judge also stood in the very centre of the conception of *freie Rechtsfindung*. Freedom, forming part of the very formulation of these theoretical postulates, was understood as an opposition to being bound by systemic logic and was directed towards the outside of the system. It was, essentially, freedom to know things that did not form the part of the legal system despite their legal relevance. However, to know and fruitfully use these extra-systemic things coming from society and pertaining to it, without at the same time resigning all aspiration to systematic thinking, method and academic status, a new self-perception of law was necessary, allowing for a cognitive openness but preserving disciplinary identity and institutional claims. Based on the well-established discussion of method of law in the context of science of law, an attempt on law concentrated on its insufficient scientificity seemed indicated. Sociology, still coping with problems of its disciplinary self-perception, academic institutionalization and methodological specificity, was a potential ally.

Thus, the discussion of legal science and law as science was reintegrated into the discussion of which it had actually always formed a part, regarding the criteria and standards of scientific thinking. The sense of "*Wertlosigkeit der Jurisprudenz als Wissenschaft*", valuelessness of jurisprudence as science, to quote the vicious title by Julius von Kirchmann[36], resulted in the interest in reviving jurisprudence and the law by revitalising their scientific merit and claims. Thus, an intense debate on the criteria of scientificity started in the legal scholarship which had a direct impact in the imaginaries of state powers and in particular of the judiciary. What was at stake in this discussion was, on the one hand, the autonomy of legal science within academia, and on the other, its political relevance, as well as the interests and the careers of the proponents of the new mode of thinking.

## Ehrlich and the members of the movement of free law as academic outsiders

Eugen Ehrlich was born in 1862 in Chernivtsi (Czernowitz) as an Austrian subject. The vicissitudes of his hometown, the capital of the old region of Bukovina, which in the course of 20th century changed hands from Austria to Romania, USSR and, finally, Ukraine, are partly explained by its location on the Eastern outskirts of the Habsburg empire, and partly by the mixed ethnic and religious composition of its population. The Ehrlich family belonged to a big Jewish community in Chernivtsi, but when little Elias (this was the name

[36] J. von Kirchmann, *Die Werthlosigkeit der Jurisprudenz als Wissenschaft: ein Vortrag, gehalten in der juristischen Gesellschaft zu Berlin*, Berlin 1848.

under which Ehrlich was entered into the birth register in the synagogue) was three years old, they moved to Sambor, where the son of the family attended a Polish-speaking gymnasium. He proceeded to study at the recently established University of Czernowitz, then at Lemberg (now Lviv) (where Polish was, again, the language of teaching), and then in Vienna. In Vienna, he was enrolled as a Jewish person by the name of Elias, with an indication that his mother tongue was Polish. Later on, at his habilitation in Wien, he is described as "Eugen (Elias) Ehrlich", and his confession is entered as Catholic. Both the change of religious affiliation and of the name were a condition to further academic career, and — according to Manfred Rehbinder — they did not seem to come to him at any great cost[37]. Upon a lapse of two years after his habilitation in 1894, he became an extraordinary professor in Chernivtsi, and was promoted to ordinary professor in 1900[38].

As a professor in Chernivtsi, Ehrlich was very productive, very innovative and very self-conscious as far as the innovativeness of his approach was concerned. But, he was most celebrated for his insights into legal methodology, "to which he gave a name of the science of free law and for which he received a doctorate *honoris causa* at the Rijksuniversiteit Groningen in Holland, together with the Swiss Eugen Huber and the French François Gény as well as Leon Duguit"[39]. Ehrlich's *Freirechtslehre*, the science of free law, and his idea of studying "legal facts" (*Rechtstatsachenforschung*) were in fact inseparable, and clear priority was given to the former — the latter was an ancillary science or, to use a German term with a slightly different connotation, *Grundlagendisziplin*, a discipline researching the foundations of the law. But, whereas looking for the foundations of law in history, philosophy or psychology was a well-established course of action among lawyers at the time, to turn to social practice was an innovation.

In a paper first published in 1914 as *Soziologie des Rechts* he wrote:

> I am working, almost everywhere on an untouched ground, very often I had to make my way forward through the thick growth with an axe; there was no material, no previous scholarship, no literature; to get a general grasp of the thing I had to learn almost all the European languages and travel far. But the foundation was laid, and if it only allowed for a provisional edifice

[37] M. R e h b i n d e r, *Die politischen Schriften des Rechtssoziologen Eugen Ehrlich auf dem Hintergrund seines bewegten Lebens*, „Anuarul Institutului de Istorie, G. Barițiu' din Cluj-Napoca", vol. XLVI/2007, pp. 269–281, p. 271ff.

[38] For Ehrlich's biography and person, please see M. R e h b i n d e r, *Eugen Ehrlich. The Life and the Work of the Founder of the Sociology of Law*, Ehrlich's Journal, [S.l.], v. 1, p. 9–12, Dec. 2017. Available at: http://ehrlichsjournal.chnu.edu.ua/index.php?journal=ehrlichsjournal&page=article&op=view&path%5B%5D=12. Date accessed: 02 july 2019, as well as R. C o t t e r r e l l, *Ehrlich at the Edge of Empire*.

[39] *Ibidem*, p. 4.

> in some parts, others will surely not be long in coming who will take it upon themselves to develop the building[40].

Ehrlich was seen "in the academic jurisprudence of his time […] as a spiritual leader of the so-called school of free law"[41]. This naturally puts other members of the movement of free law in the ranks of those who would, according to Ehrlich's own words, take up the work on the provisional edifice which he had created. But this was not entirely the case.

Despite the heterogeneity of the movement of free law, which makes it very difficult to precisely demarcate this group, the biographies and professional trajectories of Ehrlich, Kantorowicz and others allow for a few observations[42]. First and foremost, they were all perceived — and they perceived themselves — quite unequivocally as legal scholars. Their work was part of the debates in the legal sciences and what we might qualify as its interdisciplinarity was often looked down upon as amateurism by their contemporaries. The following remark made in 1919 by Max Weber is fully representative:

> I flatter myself that by a sharper and very clear separation of juristic and sociological approaches I can fight off the absolutely amateurish way in which these two disciplines (and sociology in particular) are often treated today, especially by the non-lawyers, but also by the lawyers [Ehrlich! Despite some undoubtful merits!], and discredited as a result.[43]

Second, though they all participated in the academic debates of legal academics, in terms of Patrick Baert's positioning theory it may be stated that they positioned themselves by challenging what they portrayed as the mainstream of established legal science rather than by joining it successfully[44]. Their criticism was a way to mark their distinct position, to distinguish themselves and to draw

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[40] E. Ehrlich, *Gesetz und lebendes Recht: vermischte kleinere Schriften*, M. Rehbinder (ed.), Berlin 1986, p. 192.

[41] T. Raiser, *Grundlagen der Rechtssoziologie. 6th revised and extended edition*, Tübingen 2013, p. 72.

[42] L. Lombardi Vallauri, *Geschichte des Freirechts*, Frankfurt am Main 1971.

[43] „Ich bilde mir tatsächlich ein, die äußerst dilettantische Art, wie diese beiden Fächer (und die Soziologie überhaupt) heute vielfach, zumal von Nicht-Juristen, aber gelegentlich auch von Juristen ["Ehrlich! (trotz mancher zweifelloser Verdienste!)] — behandelt und dadurch diskreditiert worden sind, durch eine schärfere und ganz klare Scheidung juristischer und soziologischer Betrachtungsweise verdrängen zu können", a letter by Max Webers to the Dean of the Faculty of Law Josef Heimberger, 5 Feb 1919, MWG II/10-1 (1. Halbband), p. 428.

[44] P. Baert, *Positioning Theory and Intellectual Interventions*, "Journal for the Theory of Social Behaviour", 42 (3), 2012, pp. 304–324; P. Baert, J. Isaac, *Intellectuals Society. Sociological and Historical Perspectives*, in: G. Delanty, S.P. Turner (eds.), *Routledge International Handbook of Contemporary Social and Political Theory*, London 2011, pp. 200–212.

attention to themselves, and this indeed bring recognition to at least some of them. This attack did not, however, result in the mainstream science engaging with them on an equal footing. Kantorowicz, in particular, was perceived as a person of somewhat quick temper and, despite his undoubtful and still valid contributions to legal history, he was not really taken quite seriously by many.

There was a generational aspect to the movement of free law, but it should not be overrated. The dates of birth (and, incidentally, death) of the thinkers analysed here speak against an unreserved qualification as a rebellion of aspiring scholars against the older mandarins. An alternative and more plausible explanation would refer to their relative outsider status.

By analysing Ehrlich and the movement of free law collectively as an outsider milieu in the German-speaking legal science of their time, we are not oblivious to certain traits which would speak against such a qualification, including, last but not least, the fact that Ehrlich not only held a university chair in, but also was a Rector of the University of Czernowitz in 1906–1907[45]. It might have been, as Cotterrell describes it, the "the edge of the empire", but it was, so to say, the top of the edge. But there are also certain theoretical aspects which deserve closer consideration.

First of all, if the notion of outsiders is applied following Norbert Elias's approach, the intensive networking and evident attempts to consolidate the group do not fit the theory, at least at first glance[46]. Elias insisted that the difference between the outsiders and the establishment does not require any material differentiation of the people belonging to each of the categories: the very duration of the stay in a given social space is sufficient to provide grounds for the growing distance and, as the case may be, hostility between them. On the other hand, one crucial tenet of Elias's theory is that the group strategies applied by the establishment and the outsiders are not symmetrical: whereas the establishment strive to maintain and reinforce their group coherence by distancing themselves from the outsiders, the latter experience deconsolidation and dispersal, and become atomised instead of forming strong structures capable of successfully challenging the domination of the establishment. This effect can be identified in the movement of free law: despite contacts among its adherents, who corresponded intensively and were perceived as a group by the outside world, there are too few links extending from Ehrlich to either of the others which would justify treating them as a single social unit. They shared goals and enemies, but numerous attempts, mainly by Kantorowicz, to give the movement a greater momentum and to institutionalise it barely resulted in a stable common collective identity.

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[45] See R. Cotterrell, *op. cit.*, p. 80.

[46] N. Elias, J. L. Scotson, *The Established and the Outsiders. A Sociological Enquiry into Community Problems*, 2nd ed., London 1994.

One significant attempt to tighten the bonds and to make the movement more visible as a collective was made when Erhlich informed Kantorowicz about his planned trip to Germany in summer 1910[47]. Kantorowicz decided to grab this opportunity to unite the proponents of the movement in order to issue a Manifesto and to launch a series of scholarly publications (*Schriftenreihe*) with the title "Abhandlungen zur Rechts- und Justizreform" (Studies on the reform of law and of the judiciary). He did manage to organize a meeting with Ehrlich and quite a few German legal scholars including Fuchs, Hugo Sinzheimer, Alfred Bozi, Erich Jung, and Gustav Radbruch, but no manifesto resulted and the publication failed. One of the main reasons for this was the resistance of the established and esteemed full professors, Ernst Zitelmann and Max Rümelin, who had been invited to act as editors of the contemplated series. Twenty years later Rümelin wrote:

> The tone in which it was all presented caused an adequately harsh defense and prevented a peaceful and unbiased examination of the claims which they made. Besides, the form of the polemic contributed to no little extent to the crisis of trust in which the jurisprudence and the legal science found themselves at the time.[48]

Elias insisted that the core of the outsider status is the deficit of moral resources which can be mobilised in order to increase the internal cohesion of the group and improve its chance to challenge the power differentials between the establishment and the outsiders. While Elias's approach has certain constructivist aspects as far as the genesis of the outsider status is concerned, he also remarks on the variables enhancing the establishment-outsider dynamic, and the principal one is, of course, the fact of "having been there first". Priority in terms of time and space (also symbolic space in the scientific field) bestows a huge advantage in the power play, and is frequently enough to secure the position of the established against the newcomers. The movement of free law was a group of newcomers, as opposed to the alleged mandarins of *Begriffsjurisprudenz*: their positions in the field had yet to be won.

Their chances of winning were substantially reduced by the prevalence of Jews among the representatives of the movement, as well as by the socialist political sympathies of some of them[49]. Luigi Lombardi Vallauri stressed the role of these factors:

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[47] See K. Muscheler, *Hermann Ulrich Kantorowicz. Eine Biographie*, Berlin 1984, p. 31.

[48] Rümelin, *op. cit*., p. 40.

[49] Ehrlich himself held distance from socialism, calling it an "economic alchemy" see E. Ehrlich, *Karl Marks ta suspilne pitannya*. Translated from Romanian into Ukranian by I.G. Toronchuk, *Problemy filosofii prava*, 3/2005, 1–2:221–226, at p. 226. We are grateful to Stefan Machura for mentioning this reference. See also S. Machura, *Eugen Ehrlich's Legacy in Contemporary*

> Particularly in those authors who wanted to make the new approach into a school: Erhlich, Fuchs, Kantorowicz, Sinzheimer, Sternberg, Radbruch, Stampe und Rumpf, a certain social alienation can be identified, a feeling of resistance against the existing order, which is — so to say — observed from without with a goal to change it rather that to strengthen it. The first five were Jews, Radbuch and Sinzheimer were active socialists. The social position of German Jews was always threatened in some way. Jewishness and Socialism share a more or less conscious prophetic-eschatological attitude (which is by the same token critical in respect of current reality). These circumstances can maybe explain why the members of the free law movement found so few points of understanding with the bureaucratic ideal of positivism, especially of the German and Austrian persuasion. They can maybe also explain the fact that they perceived the new direction as a movement and not as something else[50].

This also explains why the position of the new movement could not be secured by a safe mimicry and following the mainstream: it would have been to no avail to those aspiring to academic independence and consequentiality symbolised by university chairs, all of them taken.

The movement of free law was in fact mainly ignited after the publication of *Der Kampf um die Rechtswissenschaft* by Kantorowicz under the penname Gnaeus Flavius in 1906. From then on, the movement defined a common enemy and employed the same strategy of reclaiming scientificity for law and legal science. This would speak against treating the movement as a scientific school, unless the criterion of methodological consistence were deemed sufficient. The movement had a common set of ideas about what was wrong with the method of law, but their positive programme was not a fully-fledged research agenda, not a common set of concepts, subjects and ideas, but rather an unuttered political one: struggle against the legal academic establishment, in which the idea of law as science and of a truly scientific legal science was the most powerful weapon. One way to employ it was Ehrlich's sociological approach used against the flawed practice of law and legal science of his time.

## Sociologising legal sciences and why it did not work

In fact, Ehrlich was at the same time much less and much more a sociologist than his textbook profiles have him be. To see him as the "founder of sociology of law"[51] undoubtedly requires some reservation, but Ehrlich's influence on later developments in the sociology of law has been convinc-

*German Sociology of Law*, in: K. Papendorf, S. Machura, A. Hellum (eds.), *Eugen Ehrlich's Sociology of Law*, Zürich–Berlin 2014, pp. 39–68.

[50] L. Vallauri, *op. cit.*, p. 42.

[51] D. Nelken, *op. cit.*, p. 444.

ingly documented[52]. For example: in Thomas Raiser's influential *Grundlagen der Rechtssoziologie*, where Ehrlich is listed as one of the main theorists of sociology of law alongside Karl Marx, Friedrich Engels, Max Weber, Émile Durkheim, Theodor Geiger, Niklas Luhmann and Helmut Schelsky, Ehrlich's lifelong occupation with the fundamental questions of legal science is mentioned[53], but in the outline of Ehrlich's approach that follows the main point is the discrepancy between law which the people live by and *law in books* (the term of Pound)[54]. Markus Porsche-Ludwig makes the same point in few simple words:

> In his view, a legal science which would only strive to bring the statutory law in a conceptually and logically correct thought system would not grasp the essence and reality of the law adequately. That is why he wants to study the law as it is actually practised in society: he uses the notion of the "living law" as opposed to the (statutorily) normed law[55].

The ambivalence is that sociology was attractive to Ehrlich because it was empirical, which was enough to discredit him in the eyes of legal academia, for (as Mikhail Antonov observed in the context of the Kelsen-Ehrlich debate[56]), "at that time few legal thinkers could tolerate attempts to include into the notion of law any factual (social or psychological) content"[57]. But, Ehrlich's proximate goal was not to know more about society, but to know more about the law in order to get closer to the "essence and reality of law" (*das Wesen und die Wirklichkeit des Rechts*), and the ultimate goal was to make legal science mode adequate to its proper subject matter. Empirical methods as a basis of scientific law were opposed to the allegedly purely conceptual work in legal science. An immediate effect of this approach would be to transform legal science into a social science, an empirical study of social norms. But there is no sign in Ehrlich of the intention to dissolve legal science in social science: it was rather to provide the legal science with the empirical basis which it sorely needed for its own development.

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[52] See M. Hertogh (ed.), *Living Law: Reconsidering Eugen Ehrlich*, Oxford 2009.

[53] T. Raiser, *op. cit*., p. 71.

[54] See H. Rottleuthner, *Das lebende Recht bei Eugen Ehrlich und Ernst Hirsch / Living Law in Eugen Ehrlich and Ernst Hirsch*, "Zeitschrift für Rechtssoziologie" 33 (2), 2016, pp. 191–206, p. 193.

[55] M. Porsche-Ludwig, *Eugen Ehrlich interkulturell gelesen*, Nordhausen 2011, p. 9.

[56] See B. van Klink, *Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen* (28.8.2006). Available at SSRN: https://ssrn.com/abstract=980957.

[57] M. Antonov, *History of Schism: the Debates between Hans Kelsen and Eugen Ehrlich*, "Vienna Journal on International Constitutional Law" 5 (1), 2011, pp. 5–21, p. 7.

Ehrlich focused on the actual, "living law" (*lebendes Recht*) of the peoples of the Austro-Hungarian empire, treating it as an alternative to the "law in the statutes", devised by lawyers:

> The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages and of all associations, not only those that the law has recognised but also of those that it has overlooked and passed by, indeed even of those of which it has disapproved (Ehrlich 1936).

To be more precise, three kinds of law can be distinguished in Ehrlich's writings. First, there is the law by which people live in a social association (*Verband*), which is the "living law" for which Ehrlich has become famous. Second, there are the rules by which courts decide cases, and which are partly derived from legal science and partly from the third kind of law, of which jurists usually think as fist, namely the "law in the statutes" (*Gesetzesrecht*)[58]. As a consequence, the work of Ehrlich culminates in the work on judicial law-finding (*richterliche Rechtsfindung*)[59]. The direction of Ehrlich's work on "*soziologische Methode der Rechtswissenschaft*"[60], the sociological method of legal science, had already been set forth in his habilitation of 1893. It was — to describe it in the contemporary language of social scientific methodology — a qualitative content analysis of court decisions regarding tacit declaration of intention (*stillschweigende Willenserklärung*). However, he soon resolved that a sociological method of legal science required a direct observation of social life[61].

Such observation would be conducted in Ehrlich's seminar "*Für lebendes Recht*", in living law between 1909 and 1914, and the material would be drawn from the local community of Bukovina. David Nelken insists that "the assumption that Ehrlich was putting forward a strong thesis of legal pluralism rooted in ethnic communities is a tendentious interpretation which is poorly supported" in Ehrlich's works and "displays the genetic fallacy of confusing factors that may have helped give rise to his argument with the substance and validity of his ideas themselves"[62]. Ehrlich's line of reasoning links the law in the statutes

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[58] H. Rottleuthner, *op. cit.*, p. 193.

[59] M. Rehbinder, *op. cit.*, p. 273.

[60] *Idem*, *Eugen Ehrlichs Seminar für Lebendes Recht: eine Einrichtung für die Weiterbildung von Rechtspraktikern*. „Problemi Filosofii Prava" 3, 1–2, 2005, pp. 135–139, p. 135.

[61] *Ibidem*.

[62] D. Nelken, *op. cit.*, p. 444–445.

and the living law together in the systemic knot of the judicial decision-making. If the judge derives his norms both from the normative contents of positive law interpreted according to the standards of legal professional training and from the insights of legal science, then by letting the knowledge of empirical, living law into legal science we let it also into the judiciary process. This led Ehrlich to take a vivid and keen interest not only in legal reasoning, which is arguably his most important contribution to legal theory[63], but also in legal education[64]. Ehrlich's seminar was a seminar in living law, not in sociology of law: it was a study of the legal practices of the many diverse communities sharing Bukovina, and the participants seem to have been looking for, as Nelken put it, "the key to the unfolding of law"[65]. Moreover, it was a seminar designed for practising lawyers, who would know the "legal customs" of Bukovina from their own experience[66]. One of the explicit goals was to compare legal reality to statutory law[67], which suggests that the primary interest driving this seminal research was that in the efficiency and empirical validity of statutory law. Despite the fact that the outbreak of the war stood in the way of the publication of the seminar's proceedings, Ehrlich was pleased with the effects of his teaching[68]. The impact of the experience of participating in this seminar as well as of some of the studies produced as a result was considerable, especially in Romanian legal science[69].

Ehrlich's research design seems to have been far more innovative than his theoretical goal of undermining the *status quo* of legal science. However, a less commonly noticed consequence was the collateral undermining the *status quo* of the practice of law preoccupied with "dead paragraphs", as Ehrlich described it in 1912[70]. What from the point of view of sociology might seem today a rather benign form of slightly amateurish interdisciplinarity was a dangerous *coup*

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63 K.A. Ziegert, *A note of Eugen Ehrlich and the production of legal knowledge*, "Sydney Law Review" 20 (1), 1998, pp. 108–126.

64 See M. Rehbinder, *Die Politischen Schriften des Rechtssoziologen Eugen Ehrlich*, 272ff.

65 D. Nelken, *op. cit.*, p. 449.

66 In the advertisment of the seminar the target group was described as "*Richter und Rechtsanwälte (Advokaten, Notare, Advokatурs- und Notariatskandidaten) […], die sich in der Rechtsausübung bereits betätigt haben und die Rechtssitte zumal auf dem Lande in der Bukowina aus eigener Anschauung kennen*" (judges and lawyers (advocates, notaries, trainees) […] who have already been active in the practice of law and who know the legal customs, especially in the rural Bukovina, from their own view), as quoted by Rehbinder, Eugen Ehrlichs Seminar für Lebendes Recht, p. 136.

67 *Ibidem*, p. 137.

68 *Ibidem*, p. 138.

69 *Idem*, *Die Politischen Schriften des Rechtssoziologen Eugen Ehrlich*, 270.

70 *Idem*, *Eugen Ehrlichs Seminar für Lebendes Recht*, p. 138.

*d'état*, an attempt to land sociology upon the territory of another discipline with a far more established relationship to power and state. Sociology, on the other hand, was a politically suspicious science, the state of which Wolf Lepenies diagnosed in his comparison of three European sociological cultures[71]. It was, if truth be told, much more the case in France, having lost the war in 1871, which was attributed commonly to the superiority of German institutional order, including the university education and the intellectual culture. Durkheim had to explain at length that what he was doing was not "German science". But, in the German-speaking world an empirical sociology which was not pursuing the Neo-Kantian motifs with their inherent focus on culture and values would be strange at the very best: it was more of a French thing.

To sum up, Ehrlich's choice to recur to sociology was not as problematic as his choice of focus on the real-life practices of law as opposed to systemic legal rules, or the official law[72]. To scientifise law and legal science by orientating it towards the empirical social life at the micro level and juxtaposing what people were doing at the micro level to the macro-level system logic was the dangerous point. Ehrlich was not a radical anti-positivist; in fact, his concept of *freie Rechtsfindung* was only applicable to situations where a solution to a case could not be found in the legal system and following its own logic.

For Ehrlich, the concept of "life" in the connection of living law "only played a role in in the methodological debate […] and as a battle concept in the search of a 'real science' of law"[73]. We suggest that this duality of purpose has in fact done an ill service to the concept of living law. A notion which addressed the issue of scientific politics as well as practical problems of application of law and the adequate method of law must have ended up with a split meaning. It increased the chances of its survival in the plural scientific dis-

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[71] W. Lepenies, *Die drei Kulturen: Soziologie zwischen Literatur und Wissenschaft*, Munich 1985.

[72] In his speech given 1930 Max Rümelin confirms it when he states that the conflict around the movement of free law was attenuated by replacing the expression „free law" with „sociological jurisprudence": „Inzwischen haben sich in den Fachkreisen die Gemühter einigermaßen beruhigt und man ist weigehend zu einer Verständigung gelangt. Zur Klärung und Befriedigung hat ach beigetragen, daß vielfach der mehrdeutige und mißverständliche Ausdruck „Freirecht" fallen gelassen und durch die Bezeichnung „soziologische Jurisprudenz" ersetzt wurde." […] Außerdem aber, man wird wohl sagen dürfen, in erster Linie, war das Bestreben der Freirechtsbewegung auf eine weitgehende Befreiung von der gesetzlichen Bindung gerichtet. Diese Tendenz kam in verschiedenen Formen zum Ausdruck, zum Teil dadurch, daß man die Geltungskraft des Gesetztes von Haus aus von seiner tatsächlichen Durchführung abhängig machen wollte, oder dadurch, daß man von der Theorie der objektiven Auslegung ausgehend, den Gesetzesinhalt auf ‚den klaren und unzweideutigen Wotlaut' beschränkte" (M. Rümelin, *op. cit*., p. 41).

[73] R. Seinecke, *Das Recht des Rechtspluralismus. Chapt. III: Eugen Ehrlich: das "lebende Recht"*. Tübingen 2015, pp. 94–107, p. 94.

courses of law and sociology but decreased the probability that the interdependence of method, epistemology and ontology of law would not be unraveled by the reception process.

## Conclusions

The dynamics of centre and peripheries which was pivotal in Ehrlich's biography[74] also seem crucial to the whole trajectory of the movement of free law, but it does not explain all its vicissitudes. Their story illustrates the failed positioning strategy of the outsiders striving to occupy positions in the centre by way of challenging the central figures in the field using the artificial conceptual weapon of *Begriffsjurisprudenz*. Paradoxically enough, even though the weapon itself did catch on rather well and the lasting impression that there was in fact something like *Begriffsjurisprudenz* became a part of stock and trade of history of legal science in Germany, this success did not result in increasing the career chances of the major opponents of *Begriffsjurisprudenz*. The strategy, which was meant to lead to a mainstream academic life, failed and the outsiders ended up on the peripheries.

In Ehrlich's case, the peripheries did not want him, either. After 1918, when Chernivtsi became a part of Romania, Ehrlich — albeit reluctantly and upon collapse of some alternative designs — came back to work and faced a strong opposition overtly attacking him for his alleged pro-Austrian and anti-Romanian inclinations, and covertly for his Jewish origin[75]. After long negotiations, Ehrlich obtained a chair in philosophy and sociology of law in 1921, and Rehbinder mentions as a possible reason for the support he was granted in the circles of Romanian intelligentsia the hope that Ehrlich would be helpful in overcoming one of the main problems of the suddenly grown postwar Romania, namely its legal pluralism. This extended far beyond the living law onto the more conventional pluralism of legal orders in a newly-created state incorporating areas on which various national laws were in force before the war[76]. Nevertheless, the political hopes invested in Ehrlich could not be realised due to the pungent resistance of Romanian nationalists protesting against his return to the university, and the political writings of Ehrlich completed at the end of his life remained of little or no influence. In 1938, Sinzheimer, who emigrated to the Netherlands after 1933, wrote: "Eugen Ehrlich parted with us without

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[74] See R. Cotterrell, *op. cit*.
[75] M. Rehbinder, *Die Politischen Schriften des Rechtssoziologen Eugen Ehrlich*, p. 275ff.
[76] *Ibidem*, p. 277.

a sound. There was no eulogy to celebrate him, and many German lawyers do not even know him by name"[77].

Antonov characterises Ehrlich's project as one operating, essentially, in the enlightenment logic:

> The Czernowitz professor believed that the new methodological tools for studying this factual material could help lawyers to get out of their blindness to the positive and true science of law, so that sociology of law was proclaimed to be "the sole possible science of law" capable of freeing legal practice from "ridicule infantilism"[78].

To promote the maturity of legal science by way of its sociologisation did not work as expected. First of all, neither Ehrlich nor the movement of free law were capable of answering methodical or political questions of the time. They refrained from picking up the old issues of legal reasoning of their day, but they could not react adequately on a theoretical dimension to the new challenges of the world after the Great War, either. Their research questions did not correspond to the tasks which the legal system of their time posed before legal science. Their attempts to offer a more substantial footing to their scientific efforts by transforming legal science according to their preferred profile turned out to be inadequate.

The position of Ehrlich in particular was marked by a certain ambivalence which is only noticeable when his actual views are confronted with his later reception. Contrary to the narrative juxtaposing the movement of free law to positivism, Ehrlich was not a radical anti-positivist, he did value the achievements of German legal science of the 19th century, as demonstrated, among other things, by his appreciation of Windscheid, and he merely sought to solve the problems of legal science by letting an empirical element into the modes of legal thinking. The scientification of law as practice and mode of reasoning and the resulting sociologisation of legal science went hand in hand in a project whose radicalism was more a function of the position of its proponent than of the contents of the project itself.

Neither the ideas of Ehrlich nor any other proposition to make law into a science by using analogical devices drawn from other sciences succeeded at the time. Law did not become a social science and was rationalised on a quite different path, by becoming even more state-oriented, autonomous, academically isolated and scientifically suspicious. The law in Europe rejected the help of thr social sciences, although the idea that they could be of assistance resur-

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[77] H. Sinzheimer, *Jüdische Klassiker der deutschen Rechtswissenschaft*, Amsterdam 1938, p. 254.

[78] M. Antonov, *op. cit.*, p. 9.

faced from time to time[79]. An additional result was that the sociology of law was estranged in social science and developed in a very different direction from what Ehrlich imagined: many things which he had discovered are now rediscovered quite independently (such as the plurality of legal orders, as opposed to legal pluralism[80]) and Ehrlich functions as a free-floating classical inspiration with little research consequence and some legitimising power; "he tends to figure only as a progenitor, a footnote from the past"[81]. It is possible that the dates of Ehrlich's life also mark the last period when an alternative development was possible, and they mark a turning point of the failure of a political epistemology.

## References

Antonov M., *History of Schism: the Debates between Hans Kelsen and Eugen Ehrlich*, „Vienna Journal on International Constitutional Law" 5, 1, 2011.

Baert P., Isaac J., *Intellectuals Society. Sociological and Historical Perspectives*, in: *Routledge International Handbook of Contemporary Social and Political Theory*, G. Delanty, S.P. Turner (ed.), London 2011.

Baert P., *Positioning Theory and Intellectual Interventions*, „Journal for the Theory of Social Behaviour" 42, 3, 2012.

Bucholc M., *A Global Community of Self-Defense. Norbert Elias on Normativity, Culture, And Involvement*, Frankfurt am Main 2015.

Caroni P., *Einleitungstitel des Zivilgesetzbuches*, Basel–Frankfurt am Main 1996.

Cotterrell R., *Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies*, in: *Living Law: Reconsidering Eugen Ehrlich*, M. Hertogh (ed.), Oxford 2008.

Deflem M., *Sociology of Law: Visions of a Scholarly Tradition*. Cambridge 2008.

Ehrlich E., *Fundamental Principles of the Sociology of Law*, Cambridge, MA 1936.

Ehrlich E., *Gesetz und lebendes Recht: vermischte kleinere Schriften*, M. Rehbinder (ed.), Berlin 1986.

Ehrlich E., *Karl Marks ta suspilne pitannya*, „Problemy filosofii prava" 3, 2005.

Ehrlich E., *Über Lücken im Rechte*, „Juristische Blätter" 1888.

Elias N., Scotson J.L., *The Established and the Outsiders. A Sociological Enquiry into Community Problems*, 2nd ed., London 1994.

*Gesetzesbindung und Richterfreiheit, Texte zur Methodendebatte 1900–1914*, A. Gängel, K.A. Mollnau (ed.), Freiburg 1992.

Gauye M.O., *François Gény est-il le père de l'article 1er, 3e alinéa du Code civil suisse*, „Revue de droit Suisse" 92, 1973 (Half-Volume I. No. 3.).

[79] See S. Machura, *The German Sociology of Law: A Case of Path Dependency*, "International Journal of Law in Context" 8, 2012, pp. 506–523, p. 512ff, regarding the reform of legal education in the late 1960. and early 1970.

[80] See M. Bucholc, *A Global Community of Self-Defense. Norbert Elias on Normativity, Culture, And Involvement*, Frankfurt am Main 2015, p. 71ff.

[81] D. Nelken, *op. cit*., p. 444.

Gény F., *Méthode d'interprétation et sources en droit privé positif*, 2nd Edition, vol. 1, Paris 1919.

Gény F., *Méthode d'interprétation et sources en droit privé positif*, vol. 2, Paris 1919.

Haferkamp H.-P., *Die historische Rechtsschule*, Frankfurt am Main 2018.

Haferkamp H.-P., *Pandektenwissenschaft*, in: *Enzyklopädie der Neuzeit Online*, F. Jaeger (ed.), 2014: https://referenceworks.brillonline.com/entries/enzyklopaedie-der-neuzeit/pandekten-wissenschaft-a3132000.

*Living Law: Reconsidering Eugen Ehrlich*, M. Hertogh (ed.), Oxford 2009.

Jhering von. R., *Scherz und Ernst in der Jurisprudenz: Eine Weihnachtsgabe f. d. juristische Publikum*. Leipzig 1884.

Kantorowicz H., *Aus der Vorgeschichte der Freirechtslehre*, in: *idem*, *Rechtswissenschaft und Soziologie*, T. Würtemberger (ed.), Karlsruhe 1962.

Kirchmann von J., *Die Werthlosigkeit der Jurisprudenz als Wissenschaft: ein Vortrag, gehalten in der juristischen Gesellschaft zu Berlin*. Berlin 1848.

Klink van B., *Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen* (28.8.2006). Available at SSRN: https://ssrn.com/abstract=980957.

Larenz K., *Methodenlehre der Rechtswissenschaft*, Berlin–Göttingen–Heidelberg 1960.

Lepenies W., *Die drei Kulturen: Soziologie zwischen Literatur und Wissenschaft*, Munich 1985.

Lombardi Vallauri L., *Geschichte des Freirechts*, Frankfurt am Main 1971.

Machura S., *Eugen Ehrlich's Legacy in Contemporary German Sociology of Law*, in: *Eugen Ehrlich's Sociology of Law*, ed. K. Papendorf, S. Machura, A. Hellum, Zürich–Berlin 2014.

Machura S., *The German Sociology of Law: A Case of Path Dependency*, „International Journal of Law in Context" 8, 2012.

Meissel F.-S., *Joseph Unger und das Römische Recht — Zu Stil und Methoden der österreichichen „Pandektistik"*, in: *Wie pandektistisch war die Pandetistik*, ed. H.-P. Haferkamp, T. Repgen, Mohr Siebek 2017.

Muscheler K., *Hermann Ulrich Kantorowicz, Eine Biographie*, Berlin 1984.

Nelken D., *Eugen Ehrlich, Living Law, and Plural Legalities*, „Theoretical Inquiries in Law" 9, 2, 2008.

Porsche-Ludwig M., *Eugen Ehrlich interkulturell gelesen*, Nordhausen 2011.

Raiser T., *Grundlagen der Rechtssoziologie*. 6th revised and extended edition, Tübingen 2013.

Rehbinder M., *Die politischen Schriften des Rechtssoziologen Eugen Ehrlich auf dem Hintergrund seines bewegten Lebens*, „Anuarul Institutului de Istorie" „G. Bariţiu" din Cluj-Napoca XLVI, 2007.

Rehbinder M., *Eugen Ehrlich. The Life and the Work of the Founder of the Sociology of Law*, „Ehrlich's Journal" 1, Dec. 2017. Available at: http://ehrlichsjournal.chnu.edu.ua/index.php?journal=ehrlichsjournal&page=article&op=view&path%5B%5D=12.

Rehbinder M., *Eugen Ehrlichs Seminar für Lebendes Recht: eine Einrichtung für die Weiterbildung von Rechtspraktikern*. „Problemi Filosofii Prava" 3, 1–2, 2005.

Rheinberger H.-J., Surman J., *Historyzowanie nauki lub jak nowe przychodzi na świat: rozmowa z Hansem-Jörgiem Rheinbergerem*, „Prace Komisji Historii Nauki PAU" 14, 2015.

Röhl K.F., Machura S., *100 Jahre Rechtssoziologie: Eugen Ehrlichs Rechtspluralismus heute*, „Juristenzeitung" 68, 2013.

Rottleuthner H., *Das lebende Recht bei Eugen Ehrlich und Ernst Hirsch / Living Law in Eugen Ehrlich and Ernst Hirsch*, „Zeitschrift für Rechtssoziologie" 33, 2, 2016.

Rückert J., *Die Schlachtrufe im Methodenkampf — ein historischer Überblick*, in: *Methodik des Zivilrechts — von Savigny bis Teubner*, ed. J. Rückert, R. Seinecke, Baden-Baden 2017.

Rümelin M., *Erlebte Wandlungen in Wissenschaft u. Lehre. Rede, gehalten bei der akademischen Preisverteilung am 6. Nov. 1930*, Tübingen 1930.

Schröder J., *Recht als Wissenschaft. Geschichte der juristischen Methodenlehre in der Neuzeit (1500–1933)*, München 2012.

Seinecke R., *Das Recht des Rechtspluralismus*, Tübingen 2015.

Sinzheimer H., *Jüdische Klassiker der deutschen Rechtswissenschaft*, Amsterdam 1938.

Tamanaha B.Z., *A Vision of Social-Legal Change: Rescuing Ehrlich from „Living Law"*, „Law & Social Inquiry" 36, 1, Winter 2011.

Teubner G., *Global Bukowina: Legal Pluralism in the World-Society*, in: *idem*, *Global Law Without a State*, Brookfield, Aldershot 1997.

Watson A., *Legal Transplants and European Private Law*, „Electronic Journal of Comparative Law" 4, 4, December 2000.

Wieacker F., *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, Göttingen 1967.

Ziegert K.A., *A note of Eugen Ehrlich and the production of legal knowledge*, „Sydney Law Review" 20, 1, 1998.