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‘Global Bukovina’: Gunther Teubner’s Homage to Eugen Ehrlich

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https://doi.org/10.1515/zfrs-2024-1005

Abstract: Gunther Teubner’s theory of transnational, globalised and fragmented law is founded on the polycentric emergence of law in the context of social interactions. This article examines the link, established by Gunther Teubner himself, between his understanding and Eugen Ehrlich’s theory of ‘living law’. This link is analysed as the result of an opposition between two fundamental paradigms of legal theory: the ‘creationist’ understanding and the ‘evolutionist’ understanding of law. Gunther Teubner’s homage to Eugen Ehrlich contributes to revealing the critical power and current relevance of the thought of this founder of legal sociology. Based on the theories defended today by Gunther Teubner, Eugen Ehrlich’s work thus still seems useful for thinking about the contemporary state of law.

Keywords: Legal sociology, theory of law, global law, living law, social systems, autopoiesis

Zusammenfassung: Gunther Teubners Theorie des transnationalen, globalisierten und fragmentierten Rechts beruht auf der polyzentrischen Entstehung von Recht im Kontext sozialer Interaktionen. In diesem Artikel wird die von Gunther Teubner selbst hergestellte Verbindung zwischen seinem Verständnis und Eugen Ehrlichs Theorie des „lebendigen Rechts“ untersucht. Diese Verbindung wird als Ergebnis eines Gegensatzes zwischen zwei grundlegenden Paradigmen der Rechtstheorie analysiert: dem „kreationistischen“ und dem „evolutionistischen“ Verständnis des Rechts. Gunther Teubners Hommage an Eugen Ehrlich trägt dazu bei, die kritische Kraft und aktuelle Relevanz des Denkens dieses Begründers der Rechtssoziologie aufzuzeigen. Ausgehend von Theorien, die Gunther Teubner heute vertritt, scheint

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das Werk von Eugen Ehrlich also immer noch nützlich zu sein, um über den heutigen Stand des Rechts zu reflektieren.

Keywords: Rechtssoziologie, Rechtstheorie, globales Recht, lebendiges Recht, soziale Systeme, Autopoiesis

The title of Gunther Teubner's article, 'Global Bukowina: Legal Pluralism in the World Society' (1997), is an explicit reference, a homage by the author, to the work of Eugen Ehrlich.[1] It is striking owing to its metaphorical style, through which globalised society is compared to Eugen Ehrlich's homeland, an outlying province of the Danubian monarchy. Gunther Teubner's article is now a classic point of reference, both in the literature on global law theory and in scholarship on Ehrlich's contribution to legal sociology. In the latter case, it is often cited as evidence of the topicality of Eugen Ehrlich's contribution to legal sociology (Nelken 2008: 444, footnote 2).

Eugen Ehrlich, who was professor of Roman Law at the University of Czernowitz from 1896 to 1922, used his native Bukovina as a laboratory for his sociological theory of law. It seemed to him that in Czernowitz, the capital of this eastern province located far from the imperial capital of Vienna, national, state law was reinterpreted by the practices of the various ethnic groups in the empire:

> 'Nine main ethnic groups live peacefully in the Duchy of Bukovina today: the Armenians, Germans, Jews, Romanians, Russians (Lipovans [see Prygarine 2004]), Ruthenians, Slovaks (who are often classed as Poles), Hungarians and Gypsies. A jurist schooled in the traditional approach would probably argue that these peoples are all subject to a single, identical Austrian law which applies to the whole of Austria. And yet, even a cursory look would be enough to convince him that each of these ethnic groups follows entirely different rules in all their everyday legal relationships. […] For my seminar on living law, I decided to bring together the living laws of the nine ethnic groups in Bukovina.' (Ehrlich quoted in Rehbinder 2014: V–VI.)

Ehrlich insisted that there was a disparity between the notion of the family enshrined in official civil law and the understandings that prevailed among local people (1936 [1913]: 370–371; 1989 [1913]: 314–315). This was one origin of the deep exploration of the issue of continuity between state law and social attitudes that was so usefully developed in, for example, France by Jean Carbonnier (1992). In a previous work, Gunther Teubner emphasised the tension highlighted by Eugen

1 This study focuses on those works which give the final form of Eugen Ehrlich's thought (1925 [1918]; 1936 [1913]; 1989 [1913]). The classic study of Eugen Ehrlich is Rehbinder's (1986). For an introductory study, see Raiser (2009: 71–85); Baer (2011: 32–35); Rehbinder (2014: V–VIII). See also Treves (1993: 112–117); Carbonnier (2008: 110–111).

Ehrlich between the authoritarian law of the state and the spontaneous law of the people, 'the resistance of the peasants of Bukovina to the official, centralised law' (Teubner 1989: 95; 1993a: 77; 1993b: 121) This tension was indissociable from the issue of the nationalities in the Habsburg empire. It was in this way that Ehrlich opposed the rigidity of state law to the flexibility of a spontaneous law derived from civil society.

Eugen Ehrlich was the founder of a specific form of legal sociology: the sociology of jurists. All the large systems of sociology have made a space for the sociology of law. This is true of Durkheim's and Bourdieu's sociologies, for example. Yet not all sociologists were jurists. Max Weber and Niklas Luhmann were sociologists who were trained in law, but they wanted to develop a sociological system that went beyond the circles of the debates in legal theory. Eugen Ehrlich, on the other hand, represented a specific form of the sociology of law: the sociology of a jurist aimed at jurists.[2] It would perhaps be appropriate to talk of a 'legal sociology', a *juristische Soziologie* – namely, a sociology for legal use, a sociological legal theory or a *soziologische Rechtstheorie* –, in English a *sociological jurisprudence* –, rather than a 'sociology of law' or a *Rechtssoziologie* in the broadest sense, i.e. a sociological approach to legal phenomena. For Ehrlich, sociology is used as a tactic in the context of legal debates, of a scientific inquiry, of a 'self-description' of law.

The reference to Eugen Ehrlich makes sense considering the positioning of Gunther Teubner's approach within the trend started by Ehrlich. Gunther Teubner's work is not a speculative approach aimed at the academic field of sociology, but the approach of a jurist which utilises a sociological perspective in debates specific to jurists. We are, then, dealing with a legal sociology that has to do with the theory of law rather than a specialised branch of sociology. The link between Eugen Ehrlich and Gunther Teubner may be examined through Ehrlich's well-known concept of 'living law' (1936 [1913]: 486–506; 1989 [1913]: 409–426). This article aims to show how Gunther Teubner contributes to a new theory of 'living law', based in particular on the theory of 'autopoietic law' derived from Luhmann. This approach will shed light on the issues of this theory in the contemporary context of legal change. The article will argue that the notion of autopoiesis, when applied to law, can revive the idea of 'living law' (*lebendes Recht*), which is the central concept of Ehrlich's system. The metaphor of 'global Bukovina' establishes a direct link between the

2 According to Luhmann (1987: 21–22): 'Unlike other jurists such as Rudolf von Jhering, Philipp Heck and Roscoe Pound, who settled for a sociologising legal science which focuses on interests to interpret norms, in his *Fundamental Principles of the Sociology of Law* (1913) Ehrlich seeks to base legal science itself on the sociology of law. For him, the law is the factual organisation of behaviour in social organisations (*Verbände*) […].' In this passage, Luhmann argues that Ehrlich was one of the rare jurists to take seriously the idea of a legal sociology in the content of legal science.

much earlier theory of the spontaneous law of society, or 'living law', promoted by Eugen Ehrlich and the theory of 'autopoietic' and globalised law today. This article will examine the link between the perspective introduced by Eugen Ehrlich and the contemporary theory of global law. It will, in short, offer a reflection on the history of the idea of non-state law.

The Tradition of a Theory of Non-State Law

Eugen Ehrlich's legal sociology is first and foremost an argument about statist theories of law. Ehrlich argues that the law is a product not of the state but of society (1936 [1913]: 12–13; 1989 [1913]: 23). In the first decades of the twentieth century, however, the idea of a spontaneous law derived from social practices was not unheard of. The opposition of state law (*staatliches Recht*) and 'societal law' (*gesellschaftliches Recht*) had already begun to form in the debates on the role of custom in the nineteenth century. Ehrlich's well-known theory of 'living law' is linked to the theory of 'customary law' (*Gewohnheitsrecht*) (1936 [1913]: 436–471; 1989 [1913]: 368–397), which was the cornerstone of the German historical school. Ehrlich staunchly defended the school's founders, particularly from the label of 'romanticism' (1936 [1913]: 321; 1989 [1913]: 274). For Ehrlich, the base arguments of the representatives of the school expressed a form not of romanticism but of true sociological (1936 [1913]: 443–445; 1989 [1913]: 374–376)[3] realism.[4]

Furthermore, the first theorists of labour law, such as Hugo Sinzheimer (1921) and Georges Gurvitch (1940), saw it as linked to Pierre-Joseph Proudhon's theory of 'economic law' (1895: 210–214) and as a form of 'societal law' in that it was a direct result of power relations within the workplace. In the minds of these theorists, what was called 'workers law' (Leroy 1913), which was a spontaneous result of social relations, was meant to compete with outside state law. The idea that the law could be born outside the state was therefore widespread and stemmed from a controversial relationship with the state. In the same way, Henry Sumner Maine's (Ehrlich 1936 [1913]: 37; 112; 1989 [1913]: 43; 104) well-known theory on the development of contract law, which can be summed up by the phrase 'from status to contract' (Maine 1861: 170), expresses the theory of the social construction of law. Herbert Spencer, one of the founders of the sociology to which Eugen Ehrlich alluded (Ehrlich 1936

3 Ehrlich pays homage to Georg Friedrich Puchta's treatise (1828–1837) on customary law.

4 André-Jean Arnaud (1981: 106–111) emphasises the influence of Ehrlich's thought on the emergence of American legal realism.

[1913]: 150; 1989 [1913]: 135),[5] adapted this type of idea for the purposes of general sociology through his theory of the shift from a military to an industrial type of society and the restriction of the state's sphere of intervention owing to the 'progressive limitation of political functions' in favour of contractual relations (Spencer 1883: 873).

Herbert Spencer's work shows that an origin of sociology as an autonomous discipline lies in the idea that social relations cannot be understood as exclusively political relations. Politics and the state are but one small element of social reality. Legal theory accounts for this by raising the issue of the existence of law outside the state or the sphere of politics, and beyond the issue of relations of power or hierarchical order.

The Decline of the Tradition of a Theory of Non-State Law

From the interwar period, and in the aftermath of the Second World War, however, the theory of non-state law declined. This change was due to the success, which could not have been predicted by nineteenth-century jurists, of the modern state. As those writing on the work of Herbert Spencer observe, his popularity fell dramatically with the First World War (Blot 2007: 20). The fate of continental labour law explains the decline of theories of non-state law. 'Workers law', the result of power relations within the workplace, became labour law, a law managed and controlled by the state and based on strict codification and state jurisdiction.

The relative decline of theories of the social spontaneity of law can be attributed to the development of the welfare state. This development should not, however, be seen as the victory of democracy over totalitarianism. The idea of state control over social issues can be found both in the socialist regime in Soviet Russia and in the corporatist regimes which multiplied in the 1930s (Rabault 2018: 222–225). This is why Gunther Teubner could describe the welfare state that was established after the Second World War as a form of neo-corporatism (Teubner 2012a: 64–67; 2012b: 36–38; 2016: 81–84). There was, then, a reinforcement of state power between the First World War and the end of the twentieth century, which explains why Eugen Ehrlich's legal theory was marginalised. The notion of 'global Bukovina' suggests, on the other hand, an interpretation of the often noted (Habermas 2000; Rabault

5 Ehrlich shows the influence of both Auguste Comte and Herbert Spencer in founding the idea of legal sociology as constitutive of a 'science of society'.

2012: 171–217) phenomenon of state decline at the end of the twentieth century. This is why, in the mind of Gunther Teubner, Ehrlich's theory of the social spontaneity of law would have a sort of deferred victory today.

This brief historical outline explains why Gunther Teubner acknowledges that Eugen Ehrlich's theory failed as far as Austrian national law was concerned. Ehrlich highlighted the flexibility and suppleness of the law, since it was constantly influenced by social practices. Clearly, he did not anticipate the tragic story of Bukovina, where the state demonstrated all its power, and the neutralisation of ethnic groups went beyond their interpretation of the law. The state showed its capacity for destruction at a concrete level. What remains of the homeland Eugen Ehrlich described as the idyllic place where communities coexisted and whose capital was likened to a Jerusalem of central Europe? Bukovina was subject to policies of Romanianisation, Nazification and Sovietisation.

The Applicability of the Notion of 'Living Law' to the Current Legal Context

The history of the twentieth century demonstrates the normative power of the state. Ehrlich's theory was disproved in the case of Bukovina, but it should not be rejected:

> 'Although Eugen Ehrlich's theory turned out to be wrong for the national law of Austria, I believe that it will turn out to be right, both empirically and normatively, for the newly emerging global law.' (Teubner 1997: 1)

The *lex mercatoria* is allegedly the 'the most successful example of global law without a state'. Likewise, Gunther Teubner calls for the 'internal legal regimes of multinational enterprises', or labour law in which businesses and trade unions are the 'dominant law-makers'. Likewise, the 'discourse on Human Rights has become globalized' and is imposed 'against the states themselves' (Teubner 1997: 1–2). Gunther Teubner emphasises the opposition between the concept of international law – that is, law based on agreements between states – and that of non-state transnational law. The article on global Bukovina lays the foundations of the arguments developed in the *Constitutional Fragments* (Teubner 2012a; 2012b; 2016):

> 'On the global level, Eugen Ehrlich seems to be vindicated in his opinion that a centrally produced political law is marginal compared with the lawyers' law in practical decision-making and especially with the living law of the Bukowina.' (Teubner 1997: 3)

> 'The modern experience, however, is of a fragmented rather than a uniform globalization. Today's globalization is not a gradual emergence of a world society under the leadership of inter-state politics, but is a highly contradictory and highly fragmented process in which politics has lost its leading role.' (Teubner 1997: 3)

The theory of fragmented law is based on 'a shift from territorial to functional differentiation on the world level'. (Teubner 1997: 3, footnote 6)

A return to Eugen Ehrlich is justified given the contemporary state of globalised law. For a theory of global law, 'his living law seems to be the best candidate':

> 'From this, the main thesis follows: global law will grow mainly from the social peripheries, not from the political centres of nation states and international institutions.' (Teubner 1997: 4)

The adaptability of Eugen Ehrlich's theory to the contemporary situation makes it possible to formulate a concept appropriate to current law and which is likely to establish a point of contact between legal sociology of the beginning of the twentieth century and our theory of global law. This would be characterised by the emergence of a 'new living law' (Teubner 1997: 4–5).

Ehrlich's theory should, however, be revised. The notion of 'living law' would make it possible to show how law develops in a decentralised way. In Ehrlich's theory, the centre of production of law was social organisation (*Verband*), the business, association, ethnic group, family and even the state. Later on, legal pluralism was able to rely on examples such as personal status in the colonial context (Teubner, 1991a: 528–530, 538–541; 1991b: 127–128; 147–148; 1996: 149–151, 160–161). Today, the theory of living law can draw on sociological theories of 'communication' and 'functional social differentiation':

> 'Theories of legal pluralism will have to reformulate their core concepts shifting their focus from groups and communities to discourses and communicative networks. The social source of global law is not the lifeworld of globalized personal networks, but the proto-law of specialized, organisational and functional networks which are forming a global, but sharply limited identity.' (Teubner 1997: 4–5)

Gunther Teubner therefore gives a new meaning to Ehrlich's idea of 'living law'. The notion of 'living law' seems to represent this new law, which develops from 'the social peripheries, not from the political centres of nation states and international institutions', and to explain the pluralism characteristic of contemporary globalised law. Teubner reformulates the notion of 'living law', calling for a 'new living law growing out of fragmented social institutions which had followed their own paths' (1997: 4). Even if Ehrlich's approach must be revised, the notion of

'living law' might be the cornerstone of the 'theory of legal pluralism' necessary today (Teubner 1991a: 545; 1991b: 139; 1996: 167). Several themes emerge from this which warrant developing.

The Critical Power of Eugen Ehrlich's Theory

According to Gunther Teubner, the value of Ehrlich's work is that it offers an interpretation distinct from 'political theories of law', 'positivist theories which stress the unity of state and law as well as for those critical theories which tend to dissolve law into power politics' (Teubner 1997: 3).

The idea of 'political theories of law' goes back to the approach derived from Hans Kelsen and Carl Schmitt. Kelsen did not identify law and the state absolutely. He saw the state as a centralised form of legal system (1949 [1945]: 181–206; 1962 [1960]: 378–419; 1997 [1945]: 235–259; 2005 [1960]: 286–319). This understanding, however, tended to view modern state law as a particularly accomplished form or model of the idea of law. In this respect, Kelsen's work represented the modernist cult of the state. The formalism and abstract notion of 'pure theory' were expressions of the idealisation of the legal technology of the state such that, in Kelsen's theory, state law ultimately took over the reality of law. For Schmitt, on the other hand, the denationalisation of law seemed to be a central problem. In his view, this possibility was a threat.[6] The state represented a value which needed to be defended against the dissolution likely to result from the joining of revolutionary subversion with de-territorialised capitalism. This is why the theory of these authors tended to link state and law closely and intrinsically.

Similarly, Jürgen Habermas's work seems resistant to the charms of non-state law (Habermas 1994; Rabault 2012: 219–242). The democratic rule of law appears as the privileged site of discussion procedures or the embodiment of discursive rationality. Habermas's theory probably does not preclude the idea of discussion of private spaces, but his primary concern is with the convergence of interests in the space created by society as a whole. Habermas's theory is resistant to the idea of a breaking up of public space. In this sense, only the democratic state or discussion between a multitude of democratic states makes discursive rationality possible. From this perspective, despite their differences, the theories of Hans Kelsen, Carl Schmitt and Jürgen Habermas converge on the issue of an identity, real or ideal, between law and the state. For these three authors, the state brings legitimacy to

6 Critiquing legal pluralism is central to Schmitt's work. See: 'The State, the Form of Political Unity, being challenged by Pluralism' (Schmitt 1972 [1932, 1963]: 77).

law through the idea of political democracy as the end point of the history of society. The idea of an identity between law and the state would, then, seemingly be valid at least for the modern state – that is to say, according to the concept derived from Hegel, for a time when the state is once more conceivable as the end political form of civil society.

The theory of 'living law', on the other hand, recognises the specific rationality of law in everyday social life and its spontaneous development at the microsocial level. The theory of global law revises the idea of 'living law' by designating spheres of communication, such as the network created by business groups, as the place where it develops. This is why, for Gunther Teubner, the *lex mercatoria* – that is, the standards on which private processing of disputes between businesses is based – seems to be the model of 'new living law'. This raises a point of tension in legal theory. Proponents of the intrinsic 'statism' (*Staatlichkeit*), to borrow an expression from Carl Schmitt, of law deny any authentic existence to this *lex mercatoria* and reject outright the idea of the development of law outside the state. Opponents of notion of *lex mercatoria* denounce it 'as "law fiction", as a "phantom" conjured up by a few speculative Sorbonne professors.[7] Their arguments are based on the nineteenth century notion of the unity of law and state: so-called 'anational' law is unthinkable!' (Teubner 1997: 6–7) Opponents of a theory of the *lex mercatoria* are keen to identify global law with a development of inter-state law and an extension of international public law:

> 'If legal globalization is really necessary, then, the view asserts, the only legitimate sources are international treaties and conventions under the authority of international public law.' (Teubner 1997: 7)

In terms of legal controversies, power relations show that the notion of 'non-state law' has lost none of its critical power.

> 'The bitterness of the controversy indicates that we are nudging at a taboo, deeply rooted in practices, doctrines and theories of law. It demonstrates the tremendous resistance that Ehrlich's global Bukowina has to face in a legal world still conceptually dominated by the nation state.' (Teubner 1997: 7)

We must therefore clarify the theoretical foundations of the theory of global law, so as to answer the question: 'How can authentic law 'spontaneously' emerge on a transnational scale without the authority of the state, without its sanctioning power,

7 In the law department in Paris, the theory of the *lex mercatoria* is associated to Berthold Goldman (Goldman 1980; Philippe Fouchard et al. 1996; 1999).

without its political control and without the legitimacy of democratic processes?' (Teubner 1997: 7)

The Critique of 'Legal Theology'

Carl Schmitt uses the notion of 'political theology' to refer to the idea that nineteenth-century constitutionalism incorporated into its own conceptual field elements derived from theology.[8] This notion can be retained in the sense that it seems to express how religion was able to be differentiated from politics – that is, through a political recycling of the semantic field of theology.[9] However, in opposition to Schmitt, legal semantics should be distinguished from political semantics (Rabault 2020). This is why 'legal theology' will be discussed alongside the 'political theology' alluded to by Schmitt.

To the fundamental question about the origin of law – that is, where law comes from – normative theology gives a simple answer derived from the Old Testament (Deuteronomy 5, 6–21). A benefit of Schmitt's approach over Kelsen's lies in the fact that he deliberately returns to the theological imaginary. In Kelsen's work, on the other hand, the structures of theological thought are hidden behind a dense epistemological framework drawn from scientific positivism. Kelsen wanted to give law a scientific status proportionate to scientific modernity (1996 [1979]: 79–103). In Kelsen's statist doctrine, however, law is theorised in terms of biblical representation. The norm is conceived as an 'act of will', a 'commandment' (Kelsen 1962 [1960]: 6–13; 1996 [1979]: 1–10; 2005 [1960]: 4–10), an act made up of the dual dimension of intention and will. Law is conceived in terms of divine commandment. Norms become messages with an author and an 'addressee' (Kelsen 1996 [1979]: 10).

The notion of 'living law', on the other hand, moves away from the idea of a transcending author, subject of the norm. When legal positivism speaks of law as a 'commandment', as John Austin puts it (1861: 1–25), all it does is adapt traditional theological concepts for the modern scientific imaginary. In legal positivism, even law detached from its divine origin still requires an author. The polysemic concept of the state can, in legal semantics, thus take the place of the concept of God. The state origin of law makes it possible to save the notions of an intention and a will

8 'All significant concepts of the modern theory of the state are secularised theological concepts' (Schmitt 1985 [1922]: 36; 1988 [1922, 1969]: 46).

9 For instance, the distinction between 'constituent power' and 'constituted power' was a reproduction of that between 'naturing nature' and 'natured nature' in scholastic theology. (See, for example, Olga Weijers 1978)

that underlie the norm. Legal norms must be read on the basis of the projection of the fiction of a finalist rationality.

The benefit of legal sociology is precisely to enable us to break from this teleology, with its myth of the subject, the 'author', of the norm. In a legal sociology-based approach, law is not a downward dynamic but a phenomenon that moves with social interactions. Niklas Luhmann speaks of law as a function of 'establishing and stabilizing normative expectations' (1995 [1993]: 136; 2004 [1993]: 151). A contract would serve such a function just as much as the law. This is why, from a sociological point of view, it becomes impossible to identify the centre of production of law and why concepts of evolutionary theory are imposed on legal theory. Legal norms are, it should be repeated, born of a capillary effect, of a phenomenon of 'congruence', to borrow Luhmann's term (1987: 94–106). This does not prevent an entity, which we call 'the state' but which could also be the Church, from monopolising law in certain periods or places. As Eugen Ehrlich notes in his theory of 'living law', however, this monopolisation is never complete. Law cannot be prevented from completing or conflicting with official law, from existing *praeter* or *contra legem*, as the saying goes.

The Critique of the Voluntarist Ontology

Today, the notion of 'living law' may refer to the idea of an 'emergence' of law. Hermann Kantorowicz, another representative of the so-called 'Free Law' School, uses the notion of 'nascent law' (*werdendes Recht*) (1962 [1928]: 94). The opposition between the creationist paradigm and the evolutionist paradigm already exists in legal sociology of the beginning of the twentieth century. Statist positivism, which today we call 'normativism', is unable to extricate itself from a 'creationist' representation of law. This is why norms demand the existence of an author who has both will and intention and is the cause of the mistrust towards practice and custom. Who is the author of custom? This weight of a creationist imaginary in modern law explains why norm is defined as an 'act of will'. The reality of law disappears into something concrete: human will. In the work of Thomas Aquinas, it is the world itself, the cosmos, that was conceived as a result of thought and will (*Summa contra gentiles*: 'Deus est intelligens' (I, 44); 'Deus est volens' (I, 72)). The norm can be theorised, to borrow the metaphor usually used by Thomas Aquinas, as the arrow fired by an archer. It can only follow an intention.

Contracts, or state norms, seem to be the result of decisions. These decisions, however, intervene in a context; they do not produce legal reality out of nothing. This is what is symbolised by legal sociology through the notions of 'living law' or

'nascent law'. Law is never created; rather, it is modified in the margins. Law is not subject to a process of 'creation' but, rather, to 'evolution'. In Niklas Luhmann's analysis, the norm is an element of a pre-existing communicational space designated by the notion of semantics. Legal semantics cannot be reduced to the idea of 'will' any more than can any other semantics. All the notion of 'act of will' does is symbolise the contingency of law. Neither the state nor contractors created law as semantics. This is why the notion of 'evolution' seems more pertinent than 'creation' for describing law. In its most recent expression, legal sociology may identify law with an evolving communicational system, rather than an accumulation of 'acts of will'. The sociological approach to law recognises no identifiable creator, and it is in this sense that it escapes from the structures of thought derived from theological cosmogony.

The theory of 'living law' formulated by Ehrlich posits the theory of law not as the creation of an identifiable author but as the result of 'emergence' within society and 'evolution'. This theory makes it possible to understand the polycentric nature of the emergence of law. In this sense, following Ehrlich, we are free to recognise that, as a site of production of law, the concept of the state is only one social organisation among many. The process by which law emerges seems, then, to be highly polycentric in nature. Yet Ehrlich's theory remains dependent on a vague idea of the function of law, which relates to the notion of justice (*Gerechtigkeit*). Ehrlich overlooks the function of justice and offers no clear analysis of the 'social function of law' (Luhmann 1995 [1993]: 124–164; 2004 [1993]: 142–172. See Rabault 2020). These are limits that can be overcome with the help of contemporary theories of legal sociology.

From 'Living Law' to 'Autopoietic Law'

Contemporary systems theory as developed by Luhmann follows on from Ehrlich's sociology in the sense that it is derived from the theory of organisations (Luhmann 1964), which are described as social systems (Luhmann 1996 [1984]: 15–29). Systems theory holds that the fundamental problem encountered by any organisation would be its own closure – that is, a non-transparent relationship to its environment, particularly that which is established through relationships to other organisations or systems. How can the emergence of law be explained in this context? The idea of the social function of law is helpful here. The system's non-transparent relationship to its environment corresponds to a risk, namely the contingency of events to come or, more concretely, the unpredictability of social interactions. Systems theory postulates that experiencing contingency is the major problem with which social systems

are faced. This contingency in principle can be expressed by the idea of instability. For the organisation, the contingency of the relationship to its environment is a source of internal instability. A reciprocal non-transparent relationship results in a reciprocated contingency which in systems theory is referred to as the notion of 'double contingency' (Luhmann 1996 [1984]: 148–190).

Niklas Luhmann's sociology presents various communicational tools through which systems limit the effects of contingency and thus stabilise themselves. One form of limitation lies in knowledge (Luhmann 1990). Social norms represent another means of controlling contingency that focuses on shared expectations about behaviour (Luhmann 1996 [1984]: 436–452). Contracts and other types of agreements can be included within the notion of norm. It goes without saying that a contractual relationship is a form of programming of reciprocal relationships, such as between businesses. The way in which partner businesses come to an agreement contributes in an obvious way to reducing the contingency of their relationship. The norm can be understood as a means of performing the internal function of stabilising systems. Contracts therefore appear to be operations of mutual stabilisation for systems operating together.

It is with good reason that Ehrlich, influenced by the theory of Herbert Spencer, takes a microsociological theory as the starting point for his approach. This theory comes under a sociology that did not exist in his day: the sociology of organisations. For Kelsen, society is considered to be a whole; for Ehrlich, it is fragmentary. This fragmentation resurfaces in contemporary systems theory and on the topic of the functional differentiation of society (Luhmann 1998 [1997]: 743–776). Ehrlich's theory paves the way for a perspective that sees law not as a creation derived from a will that transcends a greater whole but as an emergence, the result of capillary effect and congruence.

With the theory of the autopoiesis of law, it is possible to explain the polycentric nature of the emergence of law already described by Eugen Ehrlich. This explanation can be completed by the idea that law has a dimension of reflexivity. It is this reflexivity that enables systems to construct the norms which contribute to their (self-)stabilisation. Luhmann describes law as society's immune system (1995 [1993]: 565–568; 2004 [1993]: 475–477). It can be supposed that law performs this immunising function both at the macrosocial level – that is, as a functional system of the whole of society – and at the microsocial level of businesses, associations and so on. At the microsocial level, norms can be understood as the system's immune response to the 'double contingency' – that is to say, to the unpredictability of its relationship to its environment.

The Social Spontaneity of Law

For Eugen Ehrlich, law is a necessity to which all social organisations, peoples, firms, families and so on are answerable (1936 [1913]: 26–38; 1989 [1913]: 34–44). In Ehrlich's description, the state is not the central institution of society but one social organisation among many (1936 [1913]: 410; 1989 [1913]: 347). An ethnic or religious community, a firm or a family thus tends to develop its own internal law. According to Ehrlich, state law developed in this way, firstly as the internal law of administration or administrative law (1936 [1913]: 149–150; 1989 [1913]: 134). In the usual concept of public law, administrative law would be a branch of public law, or 'materialised constitutional law' (*konkretisiertes Verfassungsrecht*) (Werner 1959), to use one expression of German origin. Ehrlich contrasts this systematic vision to a genetic theory, so to speak, of public law. This law would be born in society, with the state as a bureaucratic and military organisation, and modern public law would merely be a means of applying this (originally administrative) law to the whole of society. The law of society is therefore not described as something indivisible but as a composite whole not unified by the state, which only competes with other forms of law. Using the sociology of Niklas Luhmann, it is possible to complete Ehrlich's once law is no longer considered as a product of intention or matter of will but, rather, as an emergence and evolution. The notion of emergence offers a fresh perspective on 'living law' and makes it possible to realise the pertinence of Eugen Ehrlich's legal sociology.

Luhmann did not, however, deal with the sites where the legal/illegal binary code emerges. The theory of global law makes it possible to refine the problem at this point: 'To avoid misunderstanding,' writes Gunther Teubner, 'I hasten to add that the binary code legal/illegal is not peculiar to the law of the nation state.' (1997: 10) We should consider the emergence of this code from a microsocial point of view: 'Of course, this presupposes a pluralistic theory of norm production which treats political, legal and social law production on equal footing.' (Teubner 1997: 8) The contribution of Luhmann's sociology is, however, important to the theory of functional social differentiation:

> "The difference from Eugen Ehrlich's 'living law' (1913)' states Gunther Teubner, 'can be provisionally formulated as follows: [...] the new legal pluralism does not focus primarily on the local law of ethnic communites as the old legal pluralism did. The focus is rather on the proto-law of specialized organizational and functional systems. The new living law therefore lives not from stores of tradition but from the ongoing self-production of highly specialized, often formally organized system of an economic, academic or technical nature" (1991b: 139; 1996: 167)

The simple distinction, made by Ehrlich, between 'state law' and 'societal law' raises a new complexity:

> "The conflict between state law and various social quasi-legal orders, or conflict among the latter, is another area of concern for the new law of conflict" (Teubner 1989: 135; 1993a: 111; 1993b: 175).

Although in the work of Eugen Ehrlich there was indeed competition between 'state law' and 'societal law', it takes new forms under the effect of functional social differentiation. The economy, science, religion and so on must seemingly develop their own normative systems to compete with state law.

The idea of a social emergence of law can therefore be retained. The notion of 'living law' used by Eugen Ehrlich, however, warrants revisiting. The expression 'living law' is a metaphor in the sense that it is an image. As is always the case when this type of stylistic process is used, the image summarises, and therefore hides, a part of the reality. This is why the notion of 'living law' can be updated with the idea of a social 'spontaneity'[10] of law or through the notion of 'autopoiesis'. The notion of 'living law' implied an opposition between this law and state law as a 'dead' law, a law made sterile by formalism. It showed the contrast between the 'suppleness' and adaptability of 'living law' and the rigidity of state law. Through the notion of 'autopoiesis', we can get to the heart of the process of engendering non-state law, a law that is not exclusively derived from a conscious and rational process such as the enactment of a law by a representative body.

Conclusion

The most important benefit of Eugen Ehrlich's theory of 'living law' is that it enables a change of 'paradigm', to borrow Thomas Kuhn's term (1962; see Firinci 2016). It is important, here, to refer to Herbert Spencer. In Spencer's work, the parallel between social life and biology made it possible to generalise the shift from a thematics of 'creation' to a theory of 'evolution'. The idea of 'emergence' is a consequence of

10 Friedrich August von Hayek develops a theory of 'spontaneous orders', or a theory of the social spontaneity of law and its 'evolution' (1982 [1973]: 35–54)). There is however a difference between Hayek's and Gunther Teubner's approaches of social 'spontaneity' of law. In Hayek's conception, 'spontaneity' of law opposes to 'rational constructivism' of planned economy. In Gunther Teubner's conception it opposes social production of law to state law. Spontaneous law can then be, according to Gunther Teubner, rationally planned and written, as we can see, for instance, in agreements between companies.

abandoning the notion of an external and superior 'creator'. From a Thomist perspective, the world was understood as the result of intelligence, so it had to link original intention and original will. Modern biology, which has abandoned the principle of creation, assumes that life is the result of auto-creation, or autopoiesis. The evolutionist paradigm has thus replaced the creationist paradigm. Through the analogy of law and life, the theory of 'living law' adapts the evolutionist paradigm for law, which is why the conflict between theories of 'creation' and 'emergence' appear in the theory of law today. In this sense, Ehrlich was at the root of an evolution in legal theory which culminates in the theory of 'autopoietic law'. Just as Carl Schmitt uses the notion of 'political theology' to talk about the existence of semantic structures derived from theology within politics, we can say that the theories of 'living law' and 'autopoietic law' oppose a 'legal theology' – that is, a 'creationist' conception of law in which the state takes the place of God the Creator. In other words, it is possible to see in Ehrlich's work an attempt to 'de-theologise' law.

Faced with the enigma of law – a phenomenon in which we are immersed but which we only partially understand – the creationist paradigm offered a simple solution. Law was represented as a system of messages coming from an authority whose manner was that of a transcendent subject. The idea of a message, an author, an addressee and so on is an obvious reproduction of the founding representation of normative theology. Comparing the theory of norms to legal sociology therefore reveals an opposition of 'paradigms' in the contemporary epistemological sense. The 'normativist' understanding uses a 'creationist' representation whereas the legal sociology approach uses the concepts of 'evolutionism'.

This article sought to show that this splitting of legal theory between a statist theory and a sociological theory, which is at the heart of Gunther Teubner's work, did in fact emerge from the work of Eugen Ehrlich. While the idea of transcendence and will in biology was abandoned by the natural sciences a long time ago, the social sciences continue to be strongly influenced by a 'creationist' imaginary. For instance, the notion of the social contract, despite the criticisms levelled at it by sociology, has not disappeared. This type of concept is even more widespread in the theory of law. Eugen Ehrlich's work is a first step towards formulating a paradigm of law as a spontaneous social emergence, rather than as an intentional, conscious and rational production. Eugen Ehrlich's contribution to legal thought explains Gunther Teubner's homage to Ehrlich's pioneering steps towards developing a theory of the spontaneous, polycentric emergence, or 'autopoietic' theory, of the law of globalised society.

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