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Sociological Jurisprudence

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AT THE SAME time as Marx, Weber and Durkheim were theorising about law the Polish-Russian jurist Leon Petrazycki (1867–1931) and the Austrian jurist Eugen Ehrlich (1862–1922) also began to explore the relationship between law and society using broadly conceived sociological perspectives. Petrazycki and Ehrlich worked independently of one another and yet their theories came to correspond with each other in at least one respect. Taking issue with the jurisprudence of their time they refuted natural law theories and contested the claims of legal positivism that a norm became a legal rule only if it was posited by the state. This could not be the primary source of law for the simple reason that its existence presupposed and was conditioned by the law. Instead, each in his own way argued for an empirically based concept of law, which was broader than the state law and existed independently of any outside authority. Unlike Durkheim or Weber, Petrazycki and Ehrlich did not strive to grasp the problems of modernity, but employed social sciences in order to improve the science of law. I have, therefore, chosen to introduce their works under the rubric of 'sociological jurisprudence' to distinguish their contributions from the analyses of the law which emerged out of the sociological inquiry into the nature of modernity.

The following starts by briefly describing the context in which the sociological approaches of Leon Petrazycki and Eugen Ehrlich to law were born. It then goes on to present some general features of the socio-legal theories of Petrazycki and Ehrlich. The final part provides empirical examples of the applicability and relevance of these theoretical approaches to the study of socio-legal issues.

1. THE SEEDS OF THE HOSTILITY

The idea that law and other societal forces are interconnected is hardly new and has always been an important part of any systematic reflection on the nature of the law. Having said that, it is difficult to ignore the total lack of understanding—what has at times amounted to outright hostility—which has tainted the relationship between legal scholars and the sociologists of law. For example, when in his *Fundamental Principles of the Sociology of Law* Eugen Ehrlich presented a concept of law based on the distinction between judicial decisions and statutory enactments, on the one hand, and 'living law' defined as 'the law that

dominates life itself, even though it has not been printed in legal propositions',[1] on the other, he was immediately attacked by Hans Kelsen who claimed that Ehrlich had simply confused normative and descriptive analysis and his notion of law was misconceived.[2]

Kelsen's antagonism to and rejection of Ehrlich's theory of living law should be placed in the context of the relationship between law and social sciences at the end of the 19th century. As sociological theory was being developed at the turn of the previous century, and emphases were being placed on *scientific* analysis in all walks of life, a new protest movement began to take shape against the prevailing dogmatic concept of law and the ideology of legal positivism.[3] In continental Europe, feelings of 'uneasiness about the scientific state of jurisprudence' were expressed and voices were raised 'against the self-sufficient activities of legal science and the poor academic standard of jurisprudence'.[4] Critically minded scholars began to question the assumed logical unity of the law and the empirical plausibility of constructing a legal system in logical terms alone. Through the works of scholars such as William Graham Sumner, Leon Petrazycki, Eugen Ehrlich, Emile Durkheim and Max Weber, sociologically orientated studies of law were for the first time introduced and the sociology of law as an academic subject began to take form. These scholars tried to reveal the intrinsic interconnectedness of law and other societal forces, but also to illustrate the primacy of the social in relation to the legal. Their works were distinguished from similar attempts made previously by, for example Montesquieu, Savigny or Maine to study law in its social context, by the application of what can be broadly termed social scientific methods.[5]

It would be misleading to present the friction between traditional legal scholars and sociologists of law as a one-sided affair caused by lawyers' lack of appreciation of sociological insights. Timasheff, for example, argues that '[s]ociology was born in a state of hostility to law', a problem which he then attributes to Auguste Comte's belief—a belief that in turn rested upon Saint-Simon's lack of basic understanding of the law—that 'law was an emanation of the metaphysical spirit and would disappear when the positive stage of development would be reached'.[6] It is, however, a mistake to reduce Comte's attitude in this respect

[1] E. Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge Mass. Harvard University Press 1936 orig. publ. 1913) at 493.

[2] D. Nelken, 'Law in Action or Living Law? Back to the Beginning in Sociology of Law' (1984) 4 *Legal Studies* 157–82, at 161.

[3] K. A. Ziegert, 'The Sociology behind Eugen Ehrlich's Sociology of Law' in (1979) 7 *International Journal of Sociology of Law* 225–273. According to Ziegert (*ibid.*, at 226) Ihering in Germany, Geny in France, Lundstedt in Sweden, Petrazycki in Russia, and Ehrlich in Austria were among those who raised their voices in protest against the prevailing state of affairs within legal science.

[4] Ziegert, *ibid.*, at 226.

[5] See A. Hunt, *The Sociological Movement in Law* (London Macmillan Press 1987). Also see *infra* n. 7.

[6] N. S. Timasheff, *An Introduction to the Sociology of Law* (Westport Greenwood Press 1974), at 45.

to his (or for that matter to Saint-Simon's) lack of understanding of law only. During this period there was a general mistrust of law and legislation, a fact captured by the critical views of the Historical School,[7] and Karl Marx's conceptualisation of the law as a part of the 'superstructure' of the society reflecting the interest of the bourgeoisie. Marx too was of the opinion that law was a transitory phenomenon, which was 'to "wither away" together with the State, after the establishment of classless society'.[8]

The seeds of this antagonism were *consciously* disseminated through the writings of at least two of the founders of the sociology of law, Petrazycki and Ehrlich, provoking hostile reactions among more traditional legal scholars.[9] To make matters worse, this new social scientific perspective on law was not always presented in the most effective way to those interested in legal theory. As Timasheff explains, Petrazycki wasted little time on academic subtlety when debating legal theory and bluntly told his students and colleagues that 'all the existing theories on the nature of the properties of law were essentially wrong because they ignored the nature of its reality' and what they considered to be the reality of the law was simply a figment of their imagination.[10]

It is interesting to note that the writings of Durkheim and Weber were not, to the same extent, perceived as a challenge to the prevailing legal thought, as those of Petrazycki's and Ehrlich's. Durkheim and Weber's discussions on law were developed as a part of their labours to resolve problems arising out of their studies of modernity. Their studies were not limited to the examination of the effects of law on social forces, but also explored legal reasoning, legal ideas and legal doctrine. Durkheim clearly believed that 'the enterprise of understanding

[7] The Historical School emerged almost at the same time as analytical positivism as a reaction to natural law theories at the beginning of nineteenth century. Two names often associated with this school are the Prussian jurist and statesman Friedrich Carl von Savigny (1779–1861) who belonged to the German 'romantic' tradition and Sir Henry Maine (1822–1888). Savigny and Maine had little in common beside their belief that one could not understand the law without grasping its historical development. The central idea of the German romantic school was that law was the manifestation of the spirit or 'the common consciousness of the people' (the *volksgeist*). Cf. F. C. von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (New York Arno Press edn. 1975 orig. publ. 1831) at 28. This also implied that the legislator did not stand above the community to impose his will on them, but was part of the people and as such gave effect to their intuitions and needs. That was, incidentally, why Savigny opposed the codification of the law of the German state. Furthermore, the romantics argued that not only law did, but it also 'should vary from one country to another, since different peoples had different spirits' [J. W. Harris, *Legal Philosophies* 2nd ed. (London Butterworths 1997), at 235–36]. Expressed in sociological terms, for Savigny, custom was the universal source of law, a view that seems to be in line with the theory of 'living law' developed later by Eugen Ehrlich.

[8] Timasheff, *supra* n. 6, at 46.

[9] Georges Gurvitch (1896–1965) should also be mentioned here, because he too developed his theory of 'social law' in opposition to legal positivism. Gurvitch belongs to the generation proceeding Petrazycki and Ehrlich and I shall, therefore, not include him in the discussion here. For an introduction to Gurvitch, see R. Banakar, 'Integrating Reciprocal Perspectives: On Georges Gurvitch's Theory of Immediate Jural Experience' in (2001) 16 *Canadian Journal of Law and Society* 67–92.

[10] N. Timasheff, 'Introduction' in L. Petrazycki *Law and Morality* (Harvard University Press 1955) at xvii.

of law as a doctrine should itself become a field of sociology'.[11] Nonetheless, they did not set out to design an alternative concept of law to revolutionise jurisprudence. Instead, they described and explained the phenomenon of law within what was essentially a sociological project. Expressed in an oversimplified form, Weber focused on social action and by exploring the role of rationality in modern society, contributed to the sociological understanding of forms of action, domination and the problem of legitimacy. Weber's explorations into law, legality, legitimacy, legal training, legal profession, bureaucracy, his typology of legal reasoning, as well as his discourse on the relationship between law and economy, must be placed within the broader context of his sociological project to understand the impact of the increased rationalisation of social life. More importantly, in his attempts to unravel the anatomy of legal domination, Weber took the state law as his point of reference. Far from advancing an alternative to legal positivism, Weber affirmed its underlying assumptions by defining law in terms of state coercion exercised by a staff of people who were specialised in law work. Durkheim's theoretical preoccupations might have been formulated differently from those of Weber, but he too was in pursuit of sociological, rather than legal, knowledge. Durkheim was mainly interested in investigating the evolution of society through differentiation of labour and it was against this evolutionary backdrop that he viewed and explored the law as an 'external' index symbolising the nature of social solidarity.[12] Petrazycki and Ehrlich were, in contrast to Durkheim and Weber, specifically interested in employing social scientific methods to *develop* and *improve* the science of law. This ambition was clearly pronounced in Ehrlich's attempts to use historical analysis and empirical observations to re-evaluate legal theory in order to construct a non-doctrinal scientific approach which could inform both legal practice and education.

As pointed out before, it is a mistake to assume that jurisprudence has been hostile to the understanding of the relationship between law and society or has denied the interconnectedness of social and legal factors. For example, constitutional law has never been strictly separated from political science and has, in fact, demonstrated as much interest in the 'letter of the constitution as its practical application, and in addition to this, the nature of the body to which it was applied' i.e. the state.[13] Yet, it is important to recognise that the interest of jurisprudence in society and social facts is very much a function of its own juristic categories. It is one thing to *recognise* that social forces have an impact on law and legal behaviour, as jurisprudence does, but it is another thing completely to apply sociology as a tool to develop a new concept of law aimed to *improve* legal thinking and practice as Petrazycki and Ehrlich attempted to do. They introduced a new concept of law specifically designed to challenge the

[11] R. Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically' in (1998) 25 *Journal of Law and Society* 171–92, at 172.

[12] E. Durkheim, *The Division of Labor in Society* (New York Free Press 1933 orig. pub. 1893).

[13] Timasheff, *supra* n. 6, at 80.

dominant understanding of the law in the West. Let us now take a closer look at the works of these two scholars before examining how their theories influenced and guided empirical research on law.

2. PETRAZYCKI'S INTUITIVE LAW

Despite the fact that Petrazycki was an influential legal theorist and social scientist of his time with original ideas concerning the study of law, his sociology of law still remains largely unknown and unrecognised.[14] In the heyday of legal positivism, he rejected both legal positivist definitions and natural law theories and joined the first handful of legal scholars attempting to develop a specific social scientific method for the study of law.[15] This led him to develop a concept of law based on the distinction between official and unofficial forms of law and legal behaviour, a contribution which to date also remains unrecognised by many proponents of legal pluralism. The legal scholars of the turn of the 19th and early twentieth century (*not* unlike many legal scholars and sociologists of today) defined law in terms of the coercion of the state, or a command backed by force. They perceived law and its societal effects in terms of the operations of the formal judicial agencies and institutions such as the courts. These decisions were, however, of secondary importance to Petrazycki who was at pains to explain that the actual foundations of legal order lay not in positive law, but in intuitive law, ie in 'those legal experiences which contain no references to outside authorities'.[16] The functions and operations of the formal agencies and institutions of the law represented by the actions of courts, juries, judges, lawyers and so on, captured only violations of the law, reflecting pathological instances of conflicts and legal transgressions. For Petrazycki, to confuse the pathology of the law with the law proper amounted to ignoring the full potential of the law.[17] By broadening the traditional concept of law, he expressed his disenchantment with the legal theory of the time and, at the same time, addressed the political need for regulation arising out of the conditions dictated by industrialisation to guide the development of society by planned policy

[14] Cf. J. Gorecki, *Sociology and Jurisprudence of Leon Petrazycki* (Urbana University of Illinois Press 1975) and A. Podgórecki, 'Unrecognized Father of Sociology of Law: Leon Petrazycki' in (1980) 15 *Law and Society Review* 183–202.

[15] Russian legal theorists such as N. Korkunoff (1833–1902) and V. I. Sergueyevich (1841–1910) had prior, to Petrazycki, made attempts to apply a social scientific approach to the study of law. According to Timasheff, Petrazycki was in particular influenced by Korkunoff who 'combined the sociological heritage of Comte and Spencer with the teaching of R. Ihering'. Cf. Timasheff, *supra* n. 10.

[16] Petrazycki, *supra* n. 10, at 6.

[17] Half a century later, H. L. A. Hart arrived at a rather similar conclusion. He wrote: 'The principal function of the law as a means of social control is not to be seen in private litigation or prosecution, which represents vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court'. See H. L. A. Hart, (reprint) *The Concept of Law* (Oxford Oxford University Press 1988) at 39.

measures. The discrepancies existing inevitably between intuitive and official law are a potential source of conflict, but also of social change.

Distinguishing Law from Morality

Petrazycki's theory of law is part of a larger theoretical construct, specifically designed for social action and includes not only a general methodology, but also elements of psychological, sociological, legal and moral theory. Yet, despite his inter-disciplinary engagement, and the fact that in much of his work he was ultimately concerned with sociological issues, there is little doubt as to the profound influence of psychology on his thought. For him law, but also morality, was to be found within ourselves and not as an independent phenomenon out there; law was a psychic phenomenon or a specific form of ethical *experience*, created partly by the state and partly by various groups and individuals. To explore this experience, Petrazycki turned to the psychology of his day and developed the notion of 'impulsion', indicating a category of psychic stimuli, which unlike emotions and sensory perceptions, both of which constituted passive experiences (and, thus, were 'unilateral' psychic stimuli), demanded both a passive and active experience. Hence, the notion of impulsion, which is incidentally Petrazycki's contribution to the psychology of his day, had a 'bilateral' or relational constitution. A person exposed to an impulsion experiences a stimulus (which causes a passive but at the same time a bilateral experience) upon which he/she is urged to respond (to act). The sense of duty, for example, constitutes such an impulsion; it consists of the awareness of a specific state (the feeling of being under obligation or somehow accountable) and an urge to do something about it. The impulsion of duty belongs, according to Petrazycki, to the broader category of *ethical impulsions*, which in turn consist of two sub-categories: those which are experienced as duties linked to another person's corresponding rights, which he calls law, and those without such a link, which he calls morality. This distinction enabled Petrazycki to separate law from morality (which otherwise belong to the same psychological category of ethical impulsions) without making any universal claims as regards the substance of such norms. The distinction is, however, contextual and essentially sociological, reflecting the existing relations at any intersection of time and place. As Gorecki explains:

> The thus identified legal and moral impulsions are among the main stimuli of the social actions of men. The moral ones are somewhat of a luxury: they stimulate exceptional rather than broadly expected behaviour. (However, in the course of social development many of them become legal: what had been perceived as a gracious obligation by the few noble-minded becomes a widespread experience encompassing rightful claims on the part of the beneficiaries; for example, the duty of equal treatment of minorities in many nations). Consequently their social role is narrower than that of the legal impulsions. Moreover, the legal impulsions are stronger: containing not only the feeling of duty, but also of right, they tend to bring about a greater pressure on those legally bound, and stimulate those who experience their own rights—a stimulation indispensable to the creation of free citizens and to the developments of various kinds of social activities, in particular the economic.[18]

The contextual character of the distinction between law and morality, that the distinction is not carved in stone and is continuously revised and recreated in response to new social needs, turns Petrazycki's understanding of law into a dynamic theory and reveals how different his approach to law and morality was from that of the scholars of his time.

To sum up, according to Petrazycki, law and morality belonged to the same class of ethics consisting of bilateral psychological experiences. Morality was distinguishable from law because it was based on purely imperative impulsions, creating duties only. Law, on the other hand, always consisted of imperative/attributive emotions, creating mutually correlated rights and duties. A person's perception of her *rights* is a state of mind ultimately produced by law—it is a legal experience irrespective of whether or not it is upheld by the state norms—while behaviour motivated by duties alone is a function of morality. This distinction is, in fact, a sociologically useful one and was employed by Petrazycki to conduct a comparative examination of moral and legal phenomena. It was also used later as the basis of Gurvitch's sociological theory of law. More recently, it has formed an important part of the theoretical approach informing nationwide inquiries into the legal attitudes of the Polish people.[19]

The Relationship of Official and Intuitive Law

In *Law and Morality*, which consists of Petrazycki's selected writings translated into English, he argues that law includes not only much of that which lies 'outside the cognisance of the state and does not enjoy positive official recognition and protection, but also much that encounters an attitude of outright hostility on the part of the state and is to be hunted out and eradicated as contrary and antagonistic to the law officially recognized by the state'.[20] An extreme example of such a system of law, which is not recognised by the state, is that of 'the law of criminal organizations', which according to Petrazycki, consists of more or less sophisticated systems of imperative attributive norms aimed at distributing obligations among, designating functions to and bestowing rights on its members. The other example of this type of unofficial law is found among certain classes of society or religious or tribal groups which are otherwise constitutive of the state.

[18] Gorecki, *supra* n. 14 at 6–7.

[19] For examples see A. Podgórecki, *A Sociological Theory of Law* (Milano Dott. A. Giuffre Editore 1991).

[20] Petrazycki, *supra* n. 10.

> The tribal mind holds tenaciously to certain elements of ancient law, so that—for centuries sometimes—a dual system of law continues to exist, with resulting conflicts and occasional tragedies and the imposition of more or less cruel punishments (from organs of official power which follow the official law and consider it alone "law") upon persons acting in accordance with the directions of their legal conscience in effectuating rights sacred in their opinion or in fulfilling the sacred legal duty.[21]

It is, however important to note that there is no absolute polarisation between intuitive and official law. The same discrepancies which cause conflicts between the two types of laws also create a *mutual* relationship between them through which they influence each other, thus making social engineering possible. Intuitive legal experiences can challenge official law forcing the legislature to revise its rules of application. At the same time, the official law can create the basis for intuitive legal experiences or as Gorecki explains:

> Obligations and rights, originally perceived as an outcome of the legal codes become experienced as binding and just in themselves. Thus lawmakers can purposefully shape the (positive and intuitive) legal mind of man, influence the ethos of the social group, and consequently smooth and speed up the otherwise unconsciously emerging ethical progress. This is exactly the role of social engineering through law as understood and recommended by Petrazycki . . .[22]

The recognition that there is a mutual relationship between intuitive and official law allows Petrazycki to develop a legal typology capturing the observable combinations of these two types of laws. As summarised by Podgorecki, he distinguished between:

1. *Positive official law* (law used by the courts and upheld by the state);
2. *Positive unofficial law* (e.g. a mediator or unofficial agency resolving a conflict with reference to positive law or normative facts);
3. *Intuitive official law* (e.g. a decision by English courts on the basis of equity); and
4. *Intuitive unofficial law* (people's spontaneous behaviour guided by their legal intuitions rather than by statutes or other normative facts).[23]

The distinctions made here are, as I hope to demonstrate, empirically relevant and represent an insight which is absent in other theories, such as Ehrlich's theory of living law.

Legal Experience and Legal Norm

Petrazycki's general approach is broadly speaking empirical and as such falls comfortably within the boundaries of recent socio-legal research. Yet, one aspect of his approach to law according to which legality is defined as a subject-

[21] Petrazycki, *supra* n. 10, at 7.
[22] Gorecki, *supra* n. 14, at 11.
[23] Podgorecki, *supra* n. 14, at 191–192.

ive experience could find itself easily at odds with current socio-legal research. He argues that law can be studied as 'a real phenomenon' only in the mind of the person who *experiences* a legal judgement. He writes:

> Observation is the fundamental method of studying phenomena—whether of the physical world or of the spiritual world . . . The legal phenomena occur—and can be found for the purpose of observation—not where optical illusions lead us to suppose they are but much nearer: here within us; in our consciousness of him who is experiencing rights and duties at that given second . . .[24]
>
> The introspective method—simple and experimental 'self knowledge'—is the sole means of observation, *and of the immediate and reliable* cognition and study, of legal and moral phenomenon.[25]

Petrazycki means that only categories of such psychic phenomena which we have already experienced are accessible to our cognition. He is, of course, not interested in ideas as such, but the experience of them by the individual. Although he was acquainted with the works of the sociologists of his time, and also never denied the fact that the experience of ideas could be shared by other individuals (turning into a collective experience) he nonetheless retained his emphasis on the individual and consciously avoided developing a legal theory of collective consciousness. Subsequently, his individualistic approach would restrict us, firstly, to the subjective domain of social life and of studying attitudes to law at the expense of neglecting the structural relations which reproduce legal patterns of behaviour both at the level of the individual (agency) and institution (structure). Secondly, it might mislead us to equate opinion/attitude with action/behaviour. It is now a social psychological commonplace that there can exist a discrepancy between attitudes and behaviour. The fact that a person expresses a belief does not necessarily mean that that person will act in accordance with that belief, which is why it is often said that many people 'do not have the courage of their own convictions'. Having said that, there is undoubtedly a *link* between perception (attitude, opinions, beliefs) and action (behaviour and conduct). The Polish scholars, Adam Podgórecki and Jacek Kurczewski discuss this link in the course of their empirical research.[26] Podgórecki, for example, conducted a study in 1964 to investigate the legal perceptions of the Polish population in general and the population's attitude towards legal sanctions and the general functions of the legal system in particular. Podgórecki admitted readily that there were methodological problems pertaining to the study of the causal relationship between attitude and action and wrote that it was impossible to test how far the views held by a person were consistent with his or her actions. Nevertheless, the data that he collected showed that opinions and attitudes to law were largely determined by psychological factors.[27]

[24] Petrazycki, *supra* n. 10, at 12.
[25] Petrazycki, *supra* n. 10, at 14.
[26] Cf. A. Podgórecki, 'The Prestige of Law' in Britt-Mari Persson Blegvad (ed.) *Contributions to the Sociology of Law* (Copenhagen Munksgaard 1966) and J. Kurczewski, 'The Penal Attitude and Behaviour of Professional Judges' in (1971) 1 *The Polish Sociological Bulletin*, at 127.
[27] Podgórecki, *ibid.*

Jan Gorecki, another Polish scholar, offers an interpretation of Petrazycki's theory that is more susceptible to mainstream sociological analysis. According to Gorecki, Petrazycki did not completely reject the concept of *norm* from the language of his system and, in particular 'when speaking about law as a tool for engineering, he clearly had norms in mind, not experience'.[28] Subsequently, Gorecki suggests that, within the framework of Petrazycki's theory, both norms and experience may be considered as the legitimate subject of socio-legal inquiry, which is more in line with the way it was employed in empirical research later.[29] This interpretation links the concerns of Petrazycki with those of Ehrlich, who made the study of norms the cornerstone of his sociology of law.

In retrospect, Petrazycki's explorations into the issues of law and morality could also be regarded as an early contribution to the sociology of organisations, for by broadening the notion of law in this way he equated the organisational norms of social associations with the law proper. To put it differently, by implication he highlighted the fact that formal legal norms (or positive law in general) were simply a small and specialised part of a much more fundamental societal process of organising social life through rules and norms. In an ideological sense, he 'elevated' these organisational norms to the level of positive law, a tendency which is more pronounced in the works of Eugen Ehrlich and Georges Gurvitch in particular, but more importantly he demonstrated that for positive law to become an effective social tool it had to be understood as an integral part of the larger mechanisms of social organisation, upon which it is dependent for its existence. The validity of positive law is always a function of previous legal decisions or legislation, which in turn presuppose social organisation of some kind, while intuitive law is binding by itself, for it is an intrinsic feature of social organisation. The strength of official positive law lies in the fact that it can be exercised uniformly and its weakness is to be found in the fact that it is by definition 'lagging behind' intuitive law, i.e. there is a gap between widely experienced legal conscience and the legal norms in force.[30]

3. EHRLICH'S LIVING LAW

To what extent the Austrian jurist Eugen Ehrlich was acquainted with and influenced by Petrazycki's social scientifically oriented theory of law, which was published in German before Ehrlich's main work, is a matter of speculation.[31]

[28] Gorecki, *supra* n. 34, at 13.

[29] Petrazycki's ideas have been in fact used to conduct fruitful empirical research by the Polish scholar Adam Podgórecki in a nationwide study of the legal and moral attitudes of the Polish population (see Podgórecki, *supra*, n. 26).

[30] Gorecki, *supra* n. 14, at 8.

[31] The first volume of Petrazycki's introduction to legal policy (*Die Lehre vom Einkommen*) was published in Berlin in 1893 and his theory of law and state was published in *Über die Motive des Handelns und über das Moral und des Rechts* also in Berlin in 1907. Ehrlich's *Grundlegung der Soziologi des Rechts* appeared in print first 6 years later in 1913.

However, the fact remains that Ehrlich went about constructing his theory of law by distinguishing between positive and living law in a fashion that bears some general resemblance to Petrazycki's basic understanding of the law in terms of official and intuitive legal experiences.[32] Having said that, it should be mentioned that there are important epistemological differences between Ehrlich and Petrazycki's approaches to obtaining legal knowledge as a result of which Ehrlich's scholarship can in no sense be regarded as an imitation or reconstruction of Petrazycki's ideas. Whilst Petrazycki focused on the individual's experience of legal phenomenon to obtain knowledge of law, Ehrlich concentrated on social and legal norms to carry out his socio-legal analysis. In contrast to Petrazycki, who for methodological reasons and theoretical preferences, shied away from the notion of collective legal consciousness or experience and used psychological categories to devise and develop his approach, Ehrlich felt comfortable exploring the legal features of groups and associations by employing, broadly speaking, a sociological methodology.

The Inner Ordering of Associations

According to Ehrlich no amount of legislation, official enforcement and coercion could by itself transform a rule into 'law' understood in the social sense of the word.[33] For Ehrlich, who formulated his views with the help of observation and through his empirical study of the habits and customs of numerous ethnocultural groups constituting the Austro-Hungarian Empire of his day, the state was not the source of (legal) order in human society, because order could not be established through coercion alone and the thought of compulsion by the courts did not enter the minds of ordinary men when conducting their everyday business. The order of law was, therefore, not to be found in the law books, but in how social life was *de facto* organised by social networks and groups.

Ehrlich focused on the rules of conduct that people in actual fact obeyed and, thus, in effect governed social behaviour and brought order to social life. He argued that the efficacy, legitimacy and validity of these rules were functions of their acceptance rather than coercion. Ehrlich named these rules, which were based on social behaviour rather than the compulsive norm of the state, 'living law', and argued that they were generated as part of the inner orderings of 'associations' or formal and informal social groupings of various kinds. These associations, which were created through the attempts of people to cooperate and could vary in size and function from business communities to families, constituted for Ehrlich the essence of social organisation of society. In short, according to Ehrlich, society consisted of many associations—some were official and

[32] *Fundamental Principles of the Sociology of Law*, which is Ehrlich's major work (*supra* n. 1), was first translated and published in English in 1936.

[33] Ehrlich, *supra* n. 1, at 21.

formal, many were informal. Positive law represented only the law of one of these associations in society, i.e. the law of the state. Furthermore, the state was not *necessarily* superior to other associations as a source of norms, and positive law could be effective only if it was in line with the inner order of associations it was to regulate.

The modern practical jurist's understanding of the word 'law' is primarily in terms of legal rules or provisions, which according to Ehrlich are norms addressed to courts to guide their decision making (*Entscheidungsnorm*) or are instructions addressed to administrative officials as guidelines to process cases (*Verwaltungsnorm*). Thus, for the lawyer's everyday practical objectives, the law is limited to formal rules for making decisions, to 'the norms for decision'. For Ehrlich, on the other hand, the domain of law is much broader than 'Legal Provisions'. Ehrlich can indeed, imagine a legal system consisting of nothing but social order, 'if only for the reason that society is older than Legal Provisions and must have had some kind of ordering before Legal Provisions came into existence'.[34]

Ehrlich is then not only shifting 'the centre of gravity of legal development' away from the state, legislation, legal science and judiciary to the society itself, but also introducing a sociologically informed concept of law which is much broader than legal science can ever permit.[35] He writes:

> The modern science of society, sociology, looks upon law as a function of society. It cannot limit itself to the legal provision as such. It must consider the whole of law in its social relations and must also fit the legal provision into this social setting. For this purpose obviously the greatest possible knowledge of the whole structure of society, of all its institutions, and not only those regulated by statutes, is prerequisite.[36]

The forces governing legal behaviour are, thus, not to be found in legal documents, doctrines, the decisions of courts or the actions of legal functionaries, but in the larger social world. Ehrlich developed in effect a theory of 'societal law in the form of organizational norms', which contrary to the state law evades conflicts and demonstrates its full social potential when it is 'pitted against a superimposed (state) law'.[37]

An Error or a Paradox?

Ehrlich's 'living law' has been often criticised for its unrestricted scope, which tends towards absurdity by including all rules of conduct as law. This tendency lies at the heart of most theories which subscribe to legal pluralism and has been interpreted as an analytical error underlying the sociological concept of law

[34] E. Ehrlich, 'The Sociology of Law' (1922) 2 *Harvard Law Review* 130–45, at 132.
[35] Ehrlich, *supra* n. 1, at xiv.
[36] Ehrlich, *supra* n. 34, at 144.
[37] Ziegert, *supra* n. 3, at 242.

based on the assumption that legal phenomena include also the non-legal phenomena. To express this error in a more pointed fashion, the living law seems to claim that law is even that which is not law. Putting aside the polemical intentions inherent in such a statement, the contradiction is not entirely caused by sociological theorising, and is indeed to be observed in the operations of the formal law, which, to give an example, under certain conditions recognises the customs and practices of certain groups as valid law. This does not, of course, mean that all norms of organisation are then to be automatically viewed as law proper. Yet it shows that the contradictory element in the sociological concept of law of Ehrlich, and many proponents of legal pluralism, does not necessarily have to be an analytical error and can, indeed, be an empirically observable *paradox*. Notwithstanding such criticisms, Ehrlich's general approach, which is based on questioning the basic ideological premises of jurisprudence and legal practice, is still celebrated by many scholars as *the* approach to the study of law in its social context. And needless to say, the notion of 'living law', which is not the lawyer's formal tool in adversarial battles but the mode of social organisation *par excellence*, poses even today serious challenges to the lawyer's understanding of the law. As Alex Ziegert points out, Ehrlich's discovery of the 'organisational norms', 'idealised as it might be, has a special analytical power and naturally runs counter to any experience of a lawyer. This is the effect Ehrlich wanted to achieve'.[38]

Now looking back at Ehrlich's writings with the intention of placing them in the context of his biography, we can say that it is highly probable that the notion of 'living law' was a product of the ethnic and cultural diversity of Czernowitz in the Bukowina, where Ehrlich worked. There, Ehrlich could observe 'nine tribes: Armenians, Germans, Jews, Rumanians, Russians (Lipowanians), Ruthenians, Slovaks (often taken for Poles), Hungarians, Gypsies' living side by side.[39] He also regarded the attempts of the politicians in Vienna to enforce their laws on the functioning normative order of this culturally diverse, yet harmonious, social group as socially detrimental. Also, being a Roman Catholic of Jewish descent with an interest in the Jewish question in Eastern central Europe, Ehrlich had probably experienced the tensions entailed in living on the point of intersection of cultures, worldviews and ethnic identities. Such experiences convinced him that formal traditional law was not the best instrument for coping with such diversity and directed him along a path which soon took him beyond the pluralistic concerns of Bukowina. According to Ziegert, this path set Ehrlich off on a jurisprudential quest of 'solutions to the burning methodological questions *inside* jurisprudence'.[40] According to Nelken, it led him to reveal the *normative* pluralism inherent in different working normative orders:

[38] *Ibid.*, op. cit.
[39] Quoted by Ziegert (*supra* n. 3, at 229) from E. Ehrlich, 'Das lebende Recht der Völker in der Bukowina' in (1912) 1 *Recht und Wirtschaft*.
[40] Ziegert, *supra* n. 3, at 227.

The general point that emerged from his consideration of Bukowina was the claim that *lawmakers never confront a normative vacuum*. This claim remains valid today in other social circumstances than those of Ehrlich, even if his more particular views about the limited scope for the state activity now seem outdated.[41]

To assess the true impact of Ehrlich's theory of 'living law' on the formation and development of the sociology of law is difficult and cannot be stated with any historical accuracy. However, it is beyond doubt that other sociologists of law have developed ideas very similar to Ehrlich's. 'Social law', legal pluralism and its offshoot 'legal polycentricity', not to mention Roscoe Pound's call for the study of the 'law in action' are only a few examples of theories, which run parallel with and more or less simulate Ehrlich's insight into law and organisational norms, and also in the same manner question the lawyer's understanding of law and legal practice. The two examples that follow illustrate how ideas similar to those of Ehrlich have stimulated empirical research and further theorising. These examples, which are chosen from the works of the Swedish scholar Per Stjernquist, were influenced by Ehrlich's notion of law and organisational norms, yet they take us beyond identifying the discrepancies between formal and informal law.

4. BEYOND THE GAP BETWEEN FORMAL AND INFORMAL LAW

The first example is based on a historical inquiry into the Swedish legislation on sale and draws on a study which Per Stjernquist conducted during the 1930s.[42] Stjernquist interviewed elderly smallholders in the woodlands of southern Sweden to study their understanding of legal issues at the turn of the century. According to his initial findings the national law diverged a great deal from local practices on sale. In a way similar to Ehrlich, Stjernquist demonstrated that social norms existed prior to the legal norms. Yet, unlike Ehrlich, he observed that despite the fact that the formal laws diverged from the living law, the relationship between the customs and practices of the local people, on the one hand, and the laws of the state, on the other, were not defined in terms of conflict and confrontation. In fact, the legal norms were adjusted to, rather than being superimposed upon, their corresponding social norms (incidentally, this observation is in tune with Petrazycki's recognition of the possibility of a fruitful mutual relationship between formal and intuitive law). The Swedish 1905 Sales Act, which emphasised the legal primacy of the formal agreement between contracting parties, at the same time, recognised that, where no formal agreement existed, current commercial customs had the force of valid law. This illustrated,

[41] Nelken, *supra* n. 2, at 164.

[42] All references to Stjernquist's works are based on P. Stjernquist, *Organised Cooperation Facing Law: An Anthropological Study* (Stockholm Almqvist & Wiksell International 2000).

according to Stjernquist, that social and legal norms could form two coherent and independent systems of rules existing side by side for centuries.

This point was further illuminated in another empirical study by Stjernquist that focused on how the formal and informal rules governing corporations were developed in Sweden. Stjernquist argued that it is necessary to adopt a 'social form', such as informal company or cooperative—i.e. an association of two or more people brought together for the purpose of setting up a business endeavour—to stabilise cooperative activity. It also meant that partnership constituted a social form dependent on mutual trust and personal relations among a number of people with a common objective. That is why it does not have a legal personality of its own and partners can be held liable for the obligations and debts of the firm. In addition to this social form, a cooperative venture might also need to adopt a 'formal form' to regulate the future activities, transactions, and financial relations of the participants in the corporation. The need to balance the social form with a formal form arises when the venture expands and the number of participants increases, thus diminishing the role of trust and personal relations as the basis for conducting business. In order to guarantee a degree of stability and continuity in cooperative undertakings, the partnership can reinvent itself by adopting the formal structure of an incorporated company, which has a legal personality distinct from its members and conducts its business in the name of the company. By legally registering what was originally a partnership—ie a 'social form'—as a company, a formal form is employed to underpin the venture and enhance its long-term co-operative stability. Formal documents defining the objectives of the cooperation, the distribution of responsibilities, obligations, and the structure of relationships, are then drawn up and signed by the participants.

Through references to cases and rulings of the Swedish Supreme Court, Stjernquist demonstrated that the social and legal forms of cooperation had a *symbiotic* relationship supplementing each other in the ongoing process of stabilising societal cooperation. The expansion of partnerships (where members are liable for breaches of obligations and duties arising in the course of their mutual business transactions and dealings) necessitated the development of incorporations (where members can no longer be held responsible for business liability). This development soon led to 'innovative' practices motivated by the prevailing socio-economic conditions in society. Some businesses started to separate their activities into various branches, which were then registered under different incorporated company names led by 'dummy members' lacking any interest in the business, in order to reduce their business liability while avoiding risks. The courts initially were not inclined to recognise such constructions as bona fide incorporations. Legislators, however, were eventually resigned to the idea and accepted a limited notion of one-man companies, in the belief that a need for it existed in business. This amounts to the application of the 'formal form' of cooperation to *ad hoc* constructions, but it also demonstrates how the prevailing conditions in society, the norms and values that are generated and

reproduced by these conditions, and actions that are promoted on the basis of these norms and values, can interact with the law and the legal system.

In these studies, Stjernquist was concerned with locating the place of law in the everyday life of ordinary people. Therefore, he devoted much of his attention to investigating the manner in which law may be utilised to facilitate, or alternatively impede, the cooperative efforts of ordinary people to organise their everyday life. The questions he posed and the answers he offered successfully utilised and developed not only insights intrinsic to Ehrlich's living law, but also Malinowski's understanding of social order—which as mentioned above was most probably influenced by Petrazycki—and Nonet and Selznick's concept of 'responsive law'. By taking us through modern Sweden's experience of legal regulation, Stjernquist demonstrated vividly that the activities, goals, and aspirations of ordinary men and women, social groups, communities, associations, and enterprises played a decisive role in how the law is formed, transformed, produced, and reproduced over time. Expressed in terms reminiscent of Ehrlich, official legal rules are only a part of what people take into consideration when planning their everyday cooperations, transactions, and interactions. Social or customary norms ('living law' if you will) growing informally out of the activities of communities and associations of people are also taken into account. These customary norms define patterns of behaviour and set the bases for future interactions and organised activities of individuals and groups. The legal rules are frequently developed or brought about intentionally to protect and assist these patterns of action, which emanate from the informal and often spontaneous attempts to organise social life.

These two studies throw new light on Ehrlich's theoretical insights (which had been also emphasised by Petrazycki) by, firstly, clarifying that although living law and formal law may diverge from each other, they may still exist side by side as two separate entities, without necessarily being drawn into a state of conflict. Secondly, by showing that, under politically democratic and economically stable conditions similar to those which prevailed in Sweden, and where the law and its functionaries are accepted as legitimate agents by the general public, living law and official rules of the state may be brought into interplay, creating a formal/informal symbiosis. This idea of symbiosis takes us beyond the notion of state rules as *merely* superimposed forms of legal norms and shows that studies of the living law should also investigate the interplay between formal and informal rules. The fact that living law comes into existence prior to formal law does not necessarily imply that it develops, or *should* develop, in isolation from the formal law. Neither does it mean that the formal law *should* necessarily be a mirror of the living law to become effective. The data on which Ehrlich based his studies belonged to an environment where the relationship between the official laws and informal rules of social organisation was, by definition, confrontational.

This can easily lead to an interpretation of Ehrlich's living law which emphasises the discrepancies rather than the interaction between the formal and informal rules. Stjernquist's studies were conducted under politically stable conditions,

which enabled him to reveal that the formal and informal rules of organisation may enter into a symbiotic relationship generating formal rules of law which are neither the will of the Sovereign imposed from above, nor a simple articulation of the norms of conduct, generated from below. This type of law production was hardly alien to Petrazycki, who did not sharply distinguish between formal and informal law (as Ehrlich did) and developed his theory of legal policy by recognising the mutual relationship between what he called intuitive law and official law of the state, thus distinguishing between positive official law, positive unofficial law, intuitive official law, and intuitive unofficial law.[43] In this sense Petrazycki was ahead of Ehrlich. The type of law production Stjernquist describes falls within the framework of Petrazycki's third category of intuitive official law. It also demonstrates that formal/state law and living law are not necessarily two distinctly separate forms of law and that a specific form of legal regulation can, indeed, contain elements of both formal and informal law.

[43] Podgórecki, *supra* n. 14, at 191–92 and *supra* n. 19, at 11.