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An e-mail from Global Bukowina[1]

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Abstract

This paper uses Teubner's reinterpretation of Ehrlich's idea of 'living law' in his paper on 'Global Bukowina' as a test case of what is involved in making a classical author speak to current issues. It argues that interpretation is a form of appropriation and that the process of re-contextualising ideas involves an unstable compromise between establishing what an author meant and what an author means.

Why do we still study classical authors? In particular, how can we find a balance between seeking to establish what they actually said – and making them mean something for us today? This paper forms part of a larger study of the influence of Eugen Ehrlich, a professor of Roman law in the city of Czernowitz, in the province of Bukowina, at the outskirts of the Austro-Hungarian Empire.[2] Ehrlich, whose main works were written before the First World War, is generally considered the founder of the sociology of law. So an examination of the way his work has been re-read in the later history of the discipline can provide a good illustration of our theme. I shall be concentrating especially on a well-known paper by Gunther Teubner, provocatively called 'Global Bukowina' (Teubner, 1997). which, as its title suggests, seeks to apply Ehrlich's insights to the changed world in which we live today.

What is the relationship – if any – between Global Bukowina and the province where Ehrlich lived and worked? In the course of searching for references to Ehrlich, I came across the website 'Bukovina Society of the Americas', which caters for those nostalgic about their roots in historical Bukowina. As well as acting as a venue for those seeking to share news or find out more about their ancestors, this well-organised site also includes information on features of life there in the past. Most of these descriptions concern the histories of ethnic Germans living in the province. As far as I have been able to determine, the site has nothing to say about Ehrlich, even if, for sociologists of law, he is one of the intellectual glories of real-life Bukowina. But, curiously, as footnote 1 to this paper shows, someone has actually written in from Brazil to say that they have become interested in Bukowina through Teubner's paper and to thank the creators of the site for rescuing its history! The imposition of the textually constituted 'Global Bukowina' onto the real Bukowina thus seems to reflect something of what Baudrillard was getting at in his analyses of the interaction of virtual and real worlds (see e.g. Baudrillard, 1994). Teubner's Ehrlich, as the progenitor of Global Bukowina, is more 'real' than the historical Ehrlich, and Ehrlich or 'Ehrlich' lives on through Teubner's appropriation of his work. This paper will be concerned with the techniques and implications of such appropriation.

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1 These reflections were stimulated by an e-mail sent to the guest book of the site 'Bukovina Society of the Americas' (www.bukovinasociety.org/guestbook.html). Thursday, 11 January 2007; 09:05:23 – 0800. 'Prezados Senhores, Me interessei pelo tema depois da leitura do texto de Gunther Teubner – "Global Bukowina: Legal Pluralism in the World Society". Parabéns pelo interesse no resgate da história da Bukovina. Abraços Leonardo Arquimimo de Carvalho (São Paulo, Brazil).'

2 Much of this paper will be incorporated in a much longer chapter that will appear in Hertogh (forthcoming).

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Contextualisation, de-contextualisation and re-contextualisation

Why should we still be interested in Ehrlich's controversial philosophical, historical, psychological or sociological propositions? There are many reasons to be concerned with the work of great writers of the past. But for our purposes it is helpful to contrast the aim of seeking to get *a writer's ideas right* with that of trying to decide whether the ideas themselves *were right*. These certainly seem like relatively distinct exercises. The first of these approaches could be said to aim at adding to the footnotes on Ehrlich, the second focuses more on the way Ehrlich figures as a footnote in the work of later writers.

The importance of context varies for the two enquiries. For the first approach it is essential to understand Ehrlich 'in the context' of his time and place. We might, for example, try to explain how a scholar of Roman law could have come to make this sort of breakthrough to sociological fieldwork, or set out to trace similarities and differences between his idea of living law and the ideas about 'social law' in the work of writers such as Savigny or Tönnies. In the second type of enquiry, however, our interest would focus more on what has been made of a scholar's ideas – and on what can still be made of them. So the point would be more the need to get Ehrlich 'out of context' in the sense of describing how his work has been (or can be) made to transcend his setting in Bukowina at the beginning of the twentieth century.[3] If in the one case we would engage in careful exegesis in order to grasp what Ehrlich *meant*, in the other we would be more concerned with showing what Ehrlich *means* for us today.

In practice, however, though there are important differences in emphasis, these enquiries cannot entirely be kept apart. Even if our research is focused on the way Ehrlich's work influenced later authors, we will still need to engage in some exegesis of what he actually said (Nelken, 2008). It would be question-begging to speak of *Ehrlich's* influence unless we can be sure that the ideas others are using are those *actually* espoused by Ehrlich. In fact, writers who try to get Ehrlich right are frequently motivated by the desire to show that the way other commentators have got him wrong is not merely a matter of mere antiquarian interest. Thus, in an earlier paper, I devoted considerable attention to distinguishing Ehrlich's ideas from the ways in which they had been re-presented by Roscoe Pound (Nelken, 1984). But at the same time I also argued that Pound's summary of his views obscured the way Ehrlich's contribution could still be of value. Clearing up the misconceptions about what Ehrlich was wrongly supposed to have argued was a prerequisite to going on to reveal the relevance of what he actually said to current debates. And, as I shall seek to show here, a return to the text not only typically accompanies the claim to have uncovered the 'true' or 'real' historical Ehrlich, but can also figure as part of the search for new meaning in older texts in the light of the later perspectives they are taken to prefigure.

Our interest in relating Ehrlich to his context will also depend on our conception of how the sociology of law progresses. On one (scientistic?) view of sociology of law as a 'science' our prime task is to subject Ehrlich's de-contextualised hypotheses to empirical testing. To contextualise him involves making an imaginative leap back before not only the birth of the discipline of sociology of law but also before there were studies of 'law and psychology' or 'law and economics'. Ehrlich's contribution would then have to be considered as of mainly historical interest on a par with other writings in the sciences of his period. If the sociology of law can 'progress' scientifically, or rather, just because it can progress, we should not expect the founder of the discipline to do more than set out directions to follow. We can learn from Ehrlich only by leaving him behind.

3 This is oversimplifying. It could be argued – it *has* been argued – that it was the marginality of Ehrlich's context – 'on the periphery' of the Austro-Habsburg empire – that enabled him to see 'more' than his contemporaries.

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But most writers (including major textbook writers such as Treves or Cotterrell) see the sociology of law as less assimilable to this idea of scientific progress (Friedman, 1986). They would encourage us to return to Ehrlich, as to other founding fathers, such as Durkheim, Weber or Marx, less because of the empirical validity of their specific claims and more because of the continuing relevance of the fundamental issues they dealt with and the way they dealt with them. On this view, Ehrlich's arguments, as also the criticisms made of them at the time, may be as relevant today as they were then. The earliest reviewers of his work wondered about the relationship between legal sociology and legal history (Vinogradoff, 1920) – but the issue of disciplinary boundaries is as problematic now as it was then. Critics complained about Ehrlich using the term 'law' in talking of living law – most notably in Kelsen's controversial attack on what he saw as Ehrlich's failure to defend the rights of citizens as declared by state law. And there are still heated debates about the normative implications, if any, of claiming that societies are characterised by regimes of legal pluralism.

Even where Ehrlich gets things 'wrong', this can be instructive. Many of the early comments, both on the original German edition and of the later American translation, echo those still being made today. Max Rheinstein, a hard though not unsympathetic critic, applauded Ehrlich for opening jurists' eyes to the relations that actually exist between family members, the way wealth is actually transferred from the dead to the living, and how people actually buy and sell. But he also accused him of peddling half truths. He considered it a (politically motivated!) mistake to describe custom as law; social behaviour patterns do not always coincide with what people really believe are the right values. It was important to see that law does make space for other normative systems, which it may then incorporate. But this should not be taken as a general rule. Ehrlich's arguments applied mainly, Rheinstein claimed, to what can be called 'stop gap law', the rules people make for themselves in private transactions. In terms of legal practice, he argued, it was misleading to reduce legal science to sociology. Whilst legal sociology can be of assistance to judges, questions of justice involve matters of political prudence which do not and often should not coincide with popular sentiment (Rheinstein, 1938).

The philosopher and jurist Morris Cohen, for his part, thought Ehrlich was overreacting against the historical school (Cohen, 1912–1914, pp. 535–7). He too insisted that law should not be confused with custom. The practice of tipping waiters, he pointed out, is custom not law, and there is nothing gained by calling it law. By contrast, the arcane details of wills are law and not custom. Businesses may make their own agreements irrespective of the law, but they always act (in his prescient words) in its shadow. The state may not dictate everyday life, but its importance should never be underestimated. It would otherwise be hard to understand why such hard battles are fought over who should control the government (Cohen, 1936, p. 684.)

The fact that many of the issues raised by his work still do not seem to have found agreed solutions shows how far Ehrlich's ideas do transcend their original context. Nonetheless, it is important to see that any 'return' to Ehrlich also involves a process of re-contextualisation. Later writers give *new* meaning to older authors as they 'appropriate' classical texts so as to make them speak to and for present purposes. And it is this use which makes them classics in the same way that 'traditions' enable 'the past to live in the present' (Krygier, 1986). Even if we were to set out only to repeat exactly what Ehrlich is thought to have said, introducing his ideas can have different 'meaning' depending on the changing context in which he is quoted. They would, for example, likely have a different impact at a time when there is concern about too much state intervention or 'juridification', as compared to a period or extensive privatisation. But most returns to classical authors in any case, to a greater or lesser extent, also involve explicit attempts at (re)interpretations. Since any interpretation of what a past writer has written is contestable, however, other commentators may allege that the new interpretation represents a departure from the correct meaning – and it is through such debates that traditions develop and earlier scholars' arguments are given new life.

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As this suggests, a given response to Ehrlich will therefore often tell us as much if not more about the interpreter than it does about what is being interpreted. On the one hand, Rheinstein thought Ehrlich's arguments were vitiated by their political sub-text. Science disguised as the desire to legitimate only that law that was popularly accepted – what he described as the 'postulate of complete and homogenous democracy'. For him, 'Ehrlich's basic proposition that the norms of law are nothing but the actual customs and habits of the people does not withstand the scrutiny of methodological analysis. It is the statement not of a scientific truth but of a political postulate. Nevertheless, Ehrlich's work occupies 'a high rank in legal sociology' (Rheinstein, 1938, pp. 238–9). By contrast, Maoist writers in China (first introduced to his sociology of law by Pound) wrote of 'the reactionary essence of Ehrlich's sociology of law' (Dong, 1989, p. 904). As we shall see, Ehrlich's ideas have been pressed into service both within a framework of Pound's common-law cultural presuppositions and projects, and in terms of Luhmann's continental and civil law assumptions.

This raises the question of what yardstick to use in order to decide whether the work of an older writer has been so (mis)interpreted so as not to deserve to count as an example of his or her influence. It would have been possible, as in my earlier discussion of Pound on Ehrlich, to write this paper too in the form of a protest at the way Ehrlich continues to be 'appropriated' by later scholars in ways that often pay scant attention to what he really said. As we shall have cause to note, there is indeed more than a little special pleading in the more recent accounts of Ehrlich offered by leading authors such as Alex Ziegert (again), or Gunther Teubner. But my main purpose in this revisiting of Ehrlich is *not* to try, yet again, to 'save' Ehrlich from his interpreters by offering a better reading of his text. If we are concerned with the usefulness of Ehrlich's contribution to the discipline we need also to ask questions about which interpretations have more heuristic value. But once we do this, to insist we are only interested in setting the record 'straight' about what Ehrlich actually said sounds somewhat pedantic if not actually misleading.

If the meaning of an author is inevitably subject to different interpretations, in the search for the most useful interpretation there may often be only a fine line between misinterpretation and creative reinterpretation. Questions about interpretation can arise not only where scholars claim to be explaining what Ehrlich really meant, but also where they argue that he got things wrong. And they, of course, also apply to our efforts to interpret Ehrlich's interpreters 'correctly'. So we need always to ask how any given interpretation *becomes* authoritative. This does not mean, of course, that any interpretation of Ehrlich is as good as any other. There must be some limits to how far we are entitled to rewrite past thinkers in the light of current concerns. But we do need to acknowledge that the value of any interpretations may change from one context of time and place to another.

I may have been justified in trying to prise Ehrlich away from the embrace of Pound's socio-legal engineering *if, at the time I wrote, such an interpretation of his work was as serving as a block on the development of sociology of law*. But that still leaves open the question whether Pound may have made 'good' use of Ehrlich in his own time. Under current conditions, it is arguable that attempts to re-read Ehrlich in the light of a major sociological theorist of the range and sophistication of Niklas Luhmann should not be rejected *tout court*, even if, again, these interpretations do require some straining of Ehrlich's prose. In other words, we also need to ask if reading Ehrlich's work in the light of autopoietic theory of law as a communicative sub-system of society may be helpful in advancing the discipline.

In discussing Teubner's interpretation of Ehrlich's ideas in Global Bukowina, I shall seek to show that he does somewhat mischaracterise what Ehrlich meant at the time he wrote. But I shall also suggest that his paper represents a highly creative effort to apply Ehrlich's ideas to new challenges in the light of new ways of theorising social change. Moreover, as we shall see when discussing his arguments in detail, the question of how we should respond even to his presentation of Ehrlich's work becomes even more complicated when we find ourselves dealing with an interpreter who

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admits that he or she is also changing or developing the ideas they have borrowed from him. As I shall try to demonstrate, such efforts at re-contextualisation produce an unstable compromise between the aims of contextualisation and de-contextualisation – between getting Ehrlich right and claiming that he is right.[4]

From 'law in action' to legal autopoiesis

For a long time there was a tendency (especially, but not only, in English-language discussions) to assimilate Ehrlich's arguments to Anglo-American ways of talking about 'law in society'. This certainly facilitated drawing on him in dealing with socio-legal problems as they are posed in common law jurisdictions. This is most clearly seen in Pound's original introduction to the first translation of Ehrlich's *Grundlegung* (Pound, 1936/1962) and endorsed by Ziegert (Ziegert, 1979). But what we are now witnessing is in some respects an opposite trend, one which treats Ehrlich's work as belonging to the world view of Continental legal systems and adopts him as a forerunner of the one of the most advanced schools of continental sociology of law, that associated with Niklas Luhmann. Curiously, this too is expounded in the introduction to the (new) English translation of Ehrlich's magnum opus (Ziegert, 2001). In this novel framing of Ehrlich's ideas, we are told that Ehrlich represents an approach for which Luhmann's sociology of law is 'the continuation' (Ziegert, 2001, p. xxxi), if not the sociological culmination. All this, even though Luhmann himself does not even refer to Ehrlich!

When I last wrote about Ehrlich, more than twenty years ago, my main goal was to set out the differences between his ideas and those of Pound. Ziegert (one of the few to appreciate the continuing relevance of this then half-forgotten pioneer) had argued that Pound's distinctions between 'law in books' and 'law in action' 'could only be' that put forward by Ehrlich (Ziegert, 1979). In my article I claimed that, on the contrary, the ideas were different. In fact, even Pound himself, in a retrospective towards the end of his career admitted that he had (as he put it) 'developed' living law into the somewhat different concept of 'law in action' (Pound, 1938).[5] Whilst acknowledging that there was some overlap between the concepts of 'law in action' and 'living law', I set out to show that Ehrlich's original idea of living law should be considered a more promising and richer starting point for an approach more open to mainstream sociological concerns and less geared to the problem of legal effectiveness.

I was convinced then of the overriding importance of correcting Pound's misinterpretations: getting Ehrlich 'right' was the only way that his valuable insights could be recovered. I would still argue that Pound's use of Ehrlich limits the potential contribution of the idea of living law. But, whilst it is good that more scholars (including Ziegert) have come to agree that it is important to recognise the differences between these authors, I would now add that simply claiming that Pound got Ehrlich 'wrong' oversimplifies the issue of how classical authors are made relevant to contemporary problems. To a great extent it is impossible to read a past author except through current lenses (Gadamer, 1975).What Pound took from Ehrlich can be seen as having special relevance for his own time – and may be an interpretation that could still be salient in other times and places. Equally, alternative 'readings' have to 'prove' their superiority, now and in the future.

Ziegert's new interpretation in his introduction aims both to present a faithful picture of Ehrlich and also to show him as a forerunner of Luhmannian thinking. This can sometimes lead to

4 My paper on Ehrlich was no exception. In the final footnote (in Nelken, 1984), I proposed drawing on Ehrlich to construct a more 'ecological' approach to law reform (something which Gunther Teubner later asked me to elaborate on).

5 In his introduction to Ehrlich's book, he had already complained that 'Europeans had a phobia of the state'. But he was living in the new deal USA of the 1930s, not in Europe.

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surprising reformulations of his ideas. We are told that Ehrlich is the founder of the 'genuine social level apart from the individual'. For Ehrlich, like Luhmann, in thinking about law, 'expectations not sanctions matter'. What Ehrlich was trying to say in speaking of living law was that:

> 'the norm structure in inner order of associations is what individuals need as reference point to construct themselves as behaving individuals and expect from others what they can reasonably expect from themselves . . . this reflexive domain is the domain of law and has nothing to do with the state governance [sic] or sovereignty.' (Ziegert, 2001, p. xii)

Likewise, the account of Ehrlich's policy sympathies though put in unfamiliar language is not implausible. He is said to be against the self aggrandisement of lawyers and state functionaries, but to believe that 'society' will keep these in check. Ehrlich, we are told, shows law's 'blind spot' which results from the fact that law 'is a trade', and lawyers refer back only to legal practice and so do not see what else is happening. In a few cases, Ziegert's interpretations seem particularly forced ones. For Ehrlich, we are told, the 'evolution of legal decision-making legal practice conditions the social order for further evolution and specialises the court based decision making system as the effective hub of the living law'. But, whilst it is fair to say that Ehrlich did admire the common law and the (somewhat idealised) way he assumed it operated, describing what courts do as 'the hub of the living law' seems a strange way of re-presenting a book that (pace Luhmann) sought to describe how living law was actually rooted in the everyday life of associations.

Arguably, Ziegert's reformulations of Ehrlich also do a disservice to Luhmann by blurring the way his approach to socio-legal theorising involved a 'paradigm' shift from 'open system' to 'closed system' theorising about law in society (Nelken, 1987). On this point, Ziegert explains that 'Ehrlich does not deny the need the fact of legal specialisation and differentiation'. But 'non denial' is hardly the equivalent of the theoretical breakthrough which Luhmann builds on the back of his radical differentiation of legal and other communicative systems. Ziegert goes on to say that, for Ehrlich, '[w]hat makes legal propositions legal is not a higher normativity but the specialised differentiated performance of a subject of social operations responding to pressures of uncertainty' (Ziegert, 2001, p. xxiii). Here, too, it would seem more correct to say that, unlike Luhmann, Ehrlich mixes discussions of law and morals at the level of social pressures but seeks to distinguish them in terms of the psychology of the individuals deciding whether to recognise their legitimacy.

The same applies when Ziegert tells us that, '[l]ike Luhmann, Ehrlich is a scientific observer of law in its social context' (Ziegert, 2001, p. xv). Again, it would seem more appropriate to recognise that 'context' has more of a technical meaning for Luhmann, at least as explained by Teubner, his leading interpreter in legal sociology. Law *makes* its own context – and there are a series of contexts depending on what subsystem we start from. Likewise, when Ziegert affirms that, for Ehrlich, 'Law can never control the factual order itself' we need to avoid confusing two senses of 'control'. Ehrlich thinks that only a better informed form of legal decision making could – and should – do justice to the facts of the living law (this was his legacy to the American Legal Realists). But, for Luhmann, order comes from, or is imposed on the 'noise' of the outside world, and law's role includes maintaining normative expectations by 'not learning' from the antinomian facts of social life. If Ehrlich's message is that we must stop buying into jurists' way of seeing the world, for Luhmann 'scientists' must make a 'second-order' assessment of law's way of observing the world – or as Teubner puts it of 'how the law thinks' (Teubner, 1989).

Though we should appreciate the effort to make Ehrlich speak to present concerns we should also, I think, be cautious about assimilating him to conventional wisdom rather than using him to gain a perspective on it. Whereas Ziegert once told us that Ehrlich's work could provide a valuable resource for improving efforts at social engineering (Ziegert, 1979), he now tells us that Ehrlich, like Luhmann, is sceptical about such efforts and that time has shown the sense of this scepticism (Ziegert, 2001). However, the current period is different from the early 1980s. An obsession with the

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limits of 'legal effectiveness' can easily become a theoretical dead end in a period where everyone assumes an instrumentalist role for law and exaggerates its ability to produce social change. But matters may be different at a time where there is too much cynicism about law's ability to deliver social progress. The same applies to the closely related research obsession with the so called 'gap' between law's promise and achievement (Nelken, 1981). What is a tired approach within pragmatic, technically oriented, Anglo-American legal cultures may be much more heuristically useful in places, such as some continental European jurisdictions, where the 'gap' between legal promise and implementation is typically so wide that it is just taken for granted (Nelken, 2001a). In such societies, filtering Ehrlich's message through Luhmann's formulas may be less innovative than it might otherwise seem.

But all depends on what is done with these ideas. In this respect, it is interesting to contrast Ziegert's re-presentation of Ehrlich with Gunther Teubner's argument about 'Global Bukowina' (Teubner, 1997). Teubner, like Ziegert, is engaged in a rewriting of Ehrlich in Luhmannian terminology. But whereas, for Ziegert, Ehrlich's ideas were right when they were first put forward and (when properly reformulated) are still valuable now, Teubner, more surprisingly, argues that Ehrlich was actually wrong in his own time and only really comes into his own now at a time of globalisation. In addition, whereas both Ziegert and Teubner treat Ehrlich as a forerunner of the Luhmannian doxa, Teubner is explicit about the need also to change and 'update ' Ehrlich's arguments.

These differences are linked to the topics which these authors use Ehrlich to address. Ziegert is concerned with his relevance to law in the nation state, the context Ehrlich was originally writing about. Teubner, on the other hand, in developing a highly original autopoietic excursus on global law explores Ehrlich's relevance in examining the role of law in the international arena in exchanges mainly involving private actors – matters about which Ehrlich said little in his *Grundlegung*. According to Ziegert, Ehrlich is not to be understood primarily as concerned with legal pluralism. Indeed, he uses Luhmannian language to show how different elements of Ehrlich's scheme of thought such as living law and norms for decisions are integrally related. Teubner does take Ehrlich to be a forerunner in the study of legal pluralism, but gives this a very different meaning when re-examined in the light of the Luhmannian theory of autopoiesis.

Ziegert wants us to accept that Luhmannian insights can help get us to the heart of what Ehrlich was really trying to say. In assessing his interpretation, the question we need to ask ourselves is the relatively straightforward one whether we find his reading Ehrlich convincing and suggestive. But, with Teubner, it is difficult to know how seriously he wants us to take his argument as actually an interpretation of Ehrlich. Does his use of the term 'Global Bukowina' represent a genuine effort to apply Ehrlich's ideas to the new global context? Or is it no more (and no less) than a playful – and paradoxical – metaphor. After all, if everywhere is now a periphery, where is the centre? (Can there be only periphery?) What, if anything, is there in common between Ehrlich's Bukowina and the world being remodelled by globalisation? Between a province waiting for ethnic nationalism and a world in which state borders lose meaning? Teubner's audacious proposal that Bukowina has now gone global lays a direct challenge to those who say Ehrlich's ideas necessarily relate to specific space and time conditions of a province in the defunct Austro-Hapsburg empire. But, at the same time, the use of this phrase itself perpetuates the misconception that Ehrlich's ideas get their sense from the (relative) lack of state presence in Bukowina. Ehrlich is seen as able to be relevant now (only) because we have a new situation of normative life again being formed *beyond* the reach of state. Yet it seems more faithful to Ehrlich to say that his arguments concerned the possibilities of normative life being formed *outside* of the state, even if not necessarily *beyond* its jurisdiction.

In any case, Teubner is also quite explicit about what he sees as the need to correct and 'develop' Ehrlich's ideas if we are to grasp the new form of global law beyond the state. This makes it difficult to decide how far Teubner's 'updating' is intended to be true to what Ehrlich might himself have said if asked to theorise *lex mercatoria*. What evidence there is on this point does not go in Teubner's

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favour.[6] What is more clear is that Teubner finds Ehrlich convincing on some points even if he also sees the need for revisions. Thus, he agrees with Ehrlich that the basis of law is in society and not in legal dogmatics – placing Ehrlich's formulation of this truth as the headnote of his paper. He also sees merit in the fact that, as he puts it, Ehrlich 'asks where are norms actually produced and treats politics and social on equal footing' (Teubner, 1997, p. 11). There are also happy parallels in their endeavours. Where Ehrlich's idea of living law, as he says, 'breaks a taboo' that law must be identified with the state so too does the idea that there can be a *lex mercatoria* independent from all nation states.

But, as with Ziegert, the process of translating Ehrlich's ideas into the theoretical language of Luhmannian autopoietic theory can also make it difficult to know where Ehrlich ends and Luhmann begins. Most important, the source of living law for Teubner is not that hypothesised by Ehrlich. Teubner does not anchor this in the order of associations as such (except in so far as he sees law as 'closely coupled' with economic processes). Rather, he relies on the autopoietic theory of law which takes law to be one of a number of self-referring discursive sub-systems each constructing their own environment. But, as we noted when discussing Ziegert's recent work, this Luhmannian idea has no real trace in Ehrlich. Nor was Ehrlich, unlike Teubner, trying to explain how law in general or contract law in particular succeeds in keeping the paradoxes of its self-validation latent. If anything, he observed a lack of wider social validity of much state law.

Teubner talks about law being produced 'at the boundary with economic and technological processes'. He tells us that, likewise, according to Ehrlich, 'living law is produced in the periphery of the legal system in close contact with the external social process of rule formation'. It is true that Ehrlich too suggested that economic development has and will transform law from within (the theme taken up later by Karl Renner, see Renner, 1949). But it is far from obvious that Ehrlich sees the distinction between the centre and the periphery as Teubner does. For example, his definition of living law included lawyers' contracts, which would have been a productive source of law even in Imperial Vienna. What is more, the notion of periphery, as employed by Teubner, is ambiguous as between, on the one hand, Ehrlich's location in the province of Bukowina on the edges of the Austro-Hapsburg empire, and, on the other, everyday life which is *everywhere* peripheral to what goes on in the courts.

Teubner's focus is on the legal regimes created by and for global non-state actors by invisible social networks and invisible professional communities which transcend territorial boundaries. He sees these new forms of global law as growing up in a world characterised by a highly globalised economy and a weakly globalised politics. Even if Ehrlich's own examples were domestic ones, many of the regimes Teubner wishes to analyse do come near to what Ehrlich meant by living law. Transnational contracting, arbitration and the other processes of *lex mercatoria* could be so characterised, as could 'intra organisational regulation in multinational companies'. It would also seem fair to assume that Ehrlich's concept can be applied to 'all forms of rule making by private governments' and 'professional rule production', though it should also be noted that Ehrlich's interest was less in rule making as such and more the way such rule systems are actually applied in practice.

On the other hand, Teubner's example of 'technical standardisation' as an instance of living law has a more dubious pedigree. The whole phenomena of so-called 'bureaucratic administrative law' (Nelken, 1982) seems far from Ehrlich's concerns, and his account of living law gives little indication that he realised that a form of normativity based on technical standards and conventions would become so important. Even Teubner's example of human rights law is not a straightforward case of

6 Michaels (2005) quotes a little known paper by Ehrlich concerning the history of private international law from which it seems likely that he would then have denied the status of law to lex mercatoria. On the other hand, we do not know what Ehrlich would say now and, on our interpretation, it is that which interests Teubner more than what Ehrlich actually said then.

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living law. Much human rights is actually promoted or underwritten by state law or international law. Even if non-state actors such as NGOs, etc., play a crucial activist role it still seems crucial to recognise the extent to which these associations are making rules for others (Nelken, 2006), not, as in Ehrlich's account, only for their own members. As far as these two key elements of global law are concerned, the idea of living law may obscure more than it reveals about them.

Why, then, bring Ehrlich into it, given that he had little to say about such transnational legal regimes? Teubner arrives there by a process of elimination. We cannot, he says, understand legal globalisation via political theories, there is no world constitution to 'structurally couple ' law and politics: these legal regimes are governed less by international courts or worldwide legislation than by multinational law firms. So Ehrlich's 'living law' is the best candidate for describing how the globalisation of law 'creates a multitude of de-centred law making processes in various sectors of civil society independently of national states' (Teubner, 1997, p. xiii). On the other hand, the way Ehrlich himself characterised living law in Bukowina will not as such suffice for understanding these new forms of global living law. Teubner therefore draws a strong contrast between the sense of Ehrlich's arguments in their time and place, and the updating of his ideas for today's world.

As against Ehrlich's idea of living law, Teubner advises, law is 'not drawing its strength now from ethnic communities as the old living law was supposed to do'.[7] 'Ehrlich', Teubner goes on, 'was of course romanticising the law creating role of customs, habits and practices in small scale rural communities'. The global world, by contrast, relies on 'cold technical processes not on warm communal bonds'. But the assumption that Ehrlich is putting forward a thesis of legal pluralism rooted in ethnic communities – even if Teubner is certainly not the only commentator to take such a line – rests on a tendentious interpretation which has poor support in the text itself. This way of reading Ehrlich also displays the genetic fallacy by confusing factors that may have helped give rise to his argument, with the substance and validity of his ideas themselves. In fact, Ehrlich's claims were intended to be potentially universalisable ones, applicable well beyond Bukowina, and had less to do with ethnic differences than with the way law – like norms are created through the life of 'associations', whether peasants' holdings or behaviour of banks and other commercial enterprises in deciding whether to sue their debtors. This helps explain why the question of ethnic pluralism was not the main issue for early critics of Ehrlich such as Kelsen, whose objection was more to Ehrlich linking law to the actual normative practices of groups even when these were inconsistent with the Austrian code.

Teubner's revisions go much further however. For him the problem with applying Ehrlich's ideas is not merely the non-universability of the contingencies of ethnic pluralism in Bukowina. It is the link between the law and people's social experiences which needs to be broken if we are to understand how law reproduces itself. We must recognise that 'the lifeworld of different groups and communities is not the principal source of global law'. Instead, he argues, we should shift:

> 'from groups and communities to discourses and communicative networks, the proto law of specialised organisational and functional networks nourished not by stores of tradition but from the ongoing self-reproduction of highly specialised and often formally organised and rather narrowly defined global networks of an economic, cultural, academic or technological nature.'

7 The formulation of this sentence is somewhat ambiguous and it is therefore not entirely clear whether Teubner himself totally endorses this account of Ehrlich's ideas. Does 'supposed to do' here mean 'as commonly thought'? But, then, if Teubner knows better, why does he makes it seem as if this does represent Ehrlich's views? Or does 'supposed to do' mean what living law 'should' reflect the different laws of ethnic communities? This would be a different claim having less to do with where law comes from than with the need to recognise cultural diversity.

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Teubner inserts Ehrlich's ideas into what he (unlike Ziegert) acknowledges to be a new and unfamiliar framework. We must, he argues, replace:

> 'rule, sanction and social control with speech acts, coding transformation of differences and paradox. It is not rules but communicative events that should be our focus and it is the self-organising process of rules that is important in understanding the symbolic reality of legal validity, not the possibility of imposing sanctions.' (Teubner, 1997, p. 13)

But, at the same time, he suggests that it is only if we make this move towards autopoiesis theory that we can come to discover how, in some respects, Ehrlich's approach is now *more valid* than it was in the past. As he puts it, '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, p. 3).

Once again, however, such striking arguments need to be carefully unpacked. In what sense does the truth of Ehrlich's (many) ideas depend on what happened in the past or on what the future brings? Should scientific claims be judged in the light of historical events? What exactly is Teubner referring to when he asserts that Ehrlich 'turned out' to be 'wrong'? This cannot, for example, include his claims about the centre of gravity of law being in society, since Teubner takes this as his starting point. Have Ehrlich's ideas about living law been discredited? Must we really go beyond the boundaries of state law in order to find merit in Ehrlich's theses? When exactly did Ehrlich's theory 'turn out to be wrong'? When the First World War caused the Austrian empire to collapse? Or when he was forced to teach in Romanian in the last years of his life (before the Nazis and communists then tried to cancel his memory)? Arguably, the rise of ethnic nationalism could actually prove Ehrlich's point about the importance of more local loyalties rather than those to the imperial state (and it is strange for Teubner to call the law of the Austro-Hungarian empire 'the national law of Austria').

What evidence, on the other hand, does Teubner have that Ehrlich will eventually turn out to be right? Even if we choose to look beyond state law it is not obvious why the growth of *lex mercatoria* proves Ehrlich to be 'right'. It certainly shows that there can be forms of normative ordering that some call law, even though they are not based on state recognition. But Ehrlich was not mainly concerned with whether normative orderings were (already) actually called law, but with whether scientific observers had reasons to call them law. And there are, of course, pace Teubner, still many who argue that *lex mercatoria* is not really law whatever it is called. And although Teubner thinks Ehrlich has been proven right through having 'predicted' the rise of non-state global law, he himself asserts that it is only a question of time before these new forms of global law will be, as he says, 're-politicised' (although admittedly he considers that this will not take place through traditional political institutions but via 'structural coupling' with specialised discourses). Once this takes place, would this mean that Ehrlich will again have 'turned out' to be wrong? Is his a thesis that only works for periods of transition-interstitial times as well as places?

Conclusion: interpretation as appropriation

In this review of some recent re-presentations of Ehrlich's ideas we have shown the difficulty of maintaining any simple distinction between efforts to place a writer's work in its context and attempts to get it out of its context. A degree of 'rewriting' forms an important part of re-contextualising projects whether these be carried out by Pound, Ziegert or Teubner. Once we accept that interpretation is a form of appropriation it becomes harder (though not impossible) to distinguish between the appropriation and misappropriation of a previous writer's ideas.

For our purposes it makes sense to ask how far Teubner is faithful to Ehrlich. But we should not be surprised if Teubner's account of what is right and wrong about Ehrlich's arguments tells us at

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least as much about Teubner – and his desire to show the value of the autopoietic approach to law and society – as it does about Ehrlich. Any discussion of Teubner on Ehrlich which is only interested in Ehrlich is therefore going to miss the point of what Teubner is doing. We are dealing with an author who has openly chosen to 'use' Ehrlich as a pretext to introduce a series of papers about non-state law. So the more appropriate question is how far Teubner's reading of Ehrlich's work has helped him throw new light on *lex mercatoria*.

Teubner begins his paper by contrasting a top-down political global order based on American policing (he refers to Clinton's 'humanitarian' peacekeeping) to one constructed by means of an Ehrlich-type bottom-up 'peaceful' legal order. The latter, which he sees as more important, he equates with a range of developments in global non-state law. As it happens, after 9/11 things have 'turned out' differently with respect of the extent of American military engagements than Teubner or anyone else could have anticipated. But the more important issue is whether Global Bukowina really represents the alternative to the imposed Pax Americana that Teubner claims it does. Is *lex mercatoria*, for example, actually emancipated from politics – or is it precisely political by pretending not to be so? It is after all the genius of the common law that it 'appears' to be more geared to bottom up economic necessities than top-down political projects. Hence the growth of *lex mercatoria* can be seen as helping promote American ideas about the relationship between state and market and spread ways of doing law which privilege the symbolic capital of their professional elites (Dezalay and Garth, 1996).

Questions can also be asked about the political implications of Teubner's rewriting of Ehrlich. As is not uncommon in his writings Teubner deliberately blurs the line between describing and advocating (Nelken, 2001b). Here he argues that *lex mercatoria* should be legally recognised for what it is, the prototype of non-state law that is inevitably replacing that of the nation state. As against this, Ralf Michaels, for example, has recently insisted that:

> 'instead of moving the state to the periphery of our analyses and thereby ignoring its importance for our problems, we should move it into the centre of our analysis, so we can critique its role in globalisation.'

According to him:

> 'if we want to emancipate non-state law vis-à-vis the state, then it is not enough to look at the requirements on the side of non-state law. We must also look at what is necessary on the side of the state to make such emancipation possible. And we must ask what kind of emancipation this will be.'

For Michaels:

> 'The simple idea that because globalisation brings about a plurality of legal orders the state should recognise all these orders as law is either too radical or not radical enough. The idea is too radical if it expects the state to do things that run counter to what the state, as it exists right now, is about. In a nutshell, the state will always react as state to the challenges of globalisation, including the challenge from non-state communities and their laws. The idea is not radical enough if it believes that such a change could be brought about without changing the role of the state. In order to overcome the state-focus of conflict of laws, we must, ultimately, overcome the state itself. Ultimately, by acknowledging the right of everyone to make law, we accept that no one has the right to make law anymore. If everyone is able to claim jurisdiction, no one will have a superior position to mediate between conflicting regulations of conflicting communities anymore, at least not from a superior basis.' (Michaels, 2005)

If Teubner is entitled to appropriate Ehrlich for his purposes, the same applies to those who have in turn been stimulated by Teubner's ideas. Some of these writers have in fact gone on to develop

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his creative 'reworking' of Ehrlich in unexpected directions. Whilst Teubner himself counterposed Global Bukowina to the idea of a global political government, Thomas Mathiesen, for example, takes Teubner's idea and uses it to chart the recent growth of a global control system, what he describes as a frightening '*lex vigilatoria*' of surveillance removed from the political control of individual nation-states (Mathiesen, 2005). According to Mathiesen, the signs of this global control without a state may be seen in the ties between, for example, the SIRENE exchange, Eurodac, communication control through retention and tapping of telecommunications traffic data, the spy system Echelon and so on. Mathiesen's account shares with Teubner's a focus on the way legal regimes becoming increasingly untied or 'de-coupled' (to use Teubner's term) from nation-states, but the idea of imposed normative order represented here is a far cry from that described by Teubner – or for that matter by Ehrlich.

As we see, Mathiesen cites Teubner on Global Bukowina in order to make an argument that he would probably not recognise. But other authors offer even more contestable interpretations of Teubner on Ehrlich. In an original discussion of the spread of transgenic technologies through 'timespace', Paul Street draws on the disciplinary resources of critical human geography, post-structuralism and actor network theory. His aim in large part is to show how new developments are challenging the boundaries of existing academic disciplines. Thus he describes modes of ordering that weave together legal and other normative systems through what are made to seem inanimate material technologies. For these technologies to flourish, he argues, a range of interrelationships must occur that cut across social and legal boundaries and mobilise farmers, government departments, texts, individuals, international organisations, corporations, non-governmental organisations and lawyers, as well as the seeds themselves and a host of other 'actants' (as Latour describes them). Law in the form of intellectual property rights plays a special role in bringing dispersed actors together in polymorphic social networks and maintaining the meaning of biotechnologies through time and space so as to enrol farmers into social networks necessary for the purposes of producers.

In the course of developing his argument, Street takes aim at Luhmann who, he alleges, denies that 'law comes out of the social'. He likewise criticises Teubner for his 'attempt to give law an autonomy beyond society' (Street, 2003, p. 9). His case-study, he says, shows rather that all law is always social and that there is no 'global law'. Specific companies invent genetically modified seeds, and use texts, objects, private policing and copyright law with the help of state to enforce their vision of facts about seeds and their claims to exploit their property rights. In the end, even (even?) Ehrlich is seen to have got things wrong. Street concludes his article saying that 'only through examining the particular practices and processes can we glimpse the performative power not of law itself, but of those networks that successfully manage to mobilise law. For law to be successful, it must in one sense be living law. It must be a law that exists beyond the proclamations and practices of lawyers and the state. But this is not Ehrlich's conception of living law. While it is a law that dominates life itself it is a law that lives within, and a law that leads to convergent habitual behaviour, but only for so long as it continues to be mobilised' (Street, 2003, p. 28).

Unlike Teubner, therefore, who tries to anchor his concept of Global Bukowina in Ehrlich's pioneering scholarship, Street prefers to emphasise how new developments require a radical new way of thinking, starting from scratch. It is not entirely clear what Street finds lacking in Ehrlich's approach – his exegesis of what Ehrlich wrote is even more tangential to the real point of his paper than Teubner's use of him. But let us assume that Street is right to say that what he is describing does not correspond to what Ehrlich was talking about when he introduced the concept of living law. It would be all too easy to explain this by saying that Ehrlich did not really anticipate the developments Street describes. *Pace* Ziegert and Teubner we could also wonder why anyone should have expected him to. On the other hand, matters are different if, like them,

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we are interested not only in what Ehrlich once meant but also what Ehrlich now means. In that case we could argue that his legacy includes all that his work has inspired – including efforts to go beyond him.

References

BAUDRILLARD, Jean (1994) *Simulacra and Simulation*. Ann Arbor: University of Michigan Press.

COHEN, Morris Raphael (1912–1914) 'Recent philosophical – legal literature in French, German, and Italian', *International Journal of Ethics* 26: 528–46.

COHEN, Morris Raphael (1936) 'On Absolutisms in Legal Thought', *University of Pennsylvania Law Review* 84: 681–715.

DEZALAY, Yves and GARTH, Bryant (1996) *Dealing in Virtue*. Chicago: University of Chicago Press.

DONG, Ji Wei (1989) 'Sociology of Law in China: Overview and Trends', *Law and Society Review* 23(5): 903–14.

FRIEDMAN, Lawrence (1986) 'The Law and Society Movement', *Stanford Law Review* 763–80.

GADAMER, Hans George, (1975) *Truth and Method*. New York: Seabury Press.

HERTOGH, M. (ed.) (forthcoming) *Re-Discovering Ehrlich*. Oxford: Hart Publishing.

KRYGIER, Martin (1986) 'Law as Tradition', *Law and Philosophy* 5: 237–62.

MICHAELS, Ralf (2005) 'The Re-Statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism', *Wayne Law Review* 51: 1209.

MATHIESEN, Thomas (2005) 'Lex Vigilatoria – Towards a control system without a state?', Essays for civil liberties and democracy, European Civil Liberties Network, available at www.ecln.org/essays/essay-7.pdf.

NELKEN, David (1981) 'The Gap Problem in the Sociology of Law', *Windsor Yearbook of Aceess to Justice* 35–62.

NELKEN, David (1982) 'Is there a crisis in law and legal ideology?', *British Journal of Law and Society* 9: 177–89.

NELKEN, David (1984) 'Law in Action or Living Law? Back to the Beginning in Sociology of Law', *Legal Studies* 4: 157.

NELKEN, David, (1987) 'Changing Paradigms in the Sociology of Law', in G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society*. Berlin: De Gruyter, pp. 191–217.

NELKEN, David (2001a) 'Law's Embrace', *Social and Legal Studies* 3: 444–60.

NELKEN, David (2001b) 'Beyond the Metaphor of Legal Transplants?: Consequences of Autopoietic Theory for the Study of Cross – Cultural Legal Adaptation', in J. Priban and D. Nelken (eds.), *Law's New Boundaries: The Consequences of Legal Autopoiesis*. Aldershot: Dartmouth, pp. 265–302.

NELKEN, David (2006) 'Signaling Conformity: Changing Norms in Japan and China', *Michigan Journal of International Law* 27: 933–72.

NELKEN, David (2008) 'Eugen Ehrlich, Living Law, and Plural Legalities', *Theoretical lnquiries in Law* 9: 2.

POUND, Roscoe (1936/1962) 'Introduction' to E. Ehrlich, *Fundamental Principles of the Sociology of Law* (W. L. Moll, trans.). New York: Russell and Russell.

POUND, Roscoe (1938) 'Fifty Years of Jurisprudence', *Harvard Law Review* 51: 777–812.

RENNER, Karl (1949) *The Institutions of Private Law and their Social Function*. London: Routledge & Kegan Paul.

RHEINSTEIN, Max, (1938) 'Sociology of Law, Apropos Moll's translation of Eugen Ehrlich's Grundlegung der soziologie des Rechts', *Journal of Ethics* 48: 232–9.

STREET, Paul (2003) 'Stabilizing flows in the legal field: Illusions of permanence, intellectual property rights and the transnationalisation of law', *Global Networks* 3: 7–28.

TEUBNER, Gunther (1989) 'How the Law Thinks', *Law and Society Review* 23: 727–57.

https://doi.org/10.1017/S1744552307003011 Published online by Cambridge University Press

TEUBNER, Gunther (1997) 'Global Bukowina: Legal Pluralism in the World Society', in G. Teubner (ed.), *Global Law without a State*. Aldershot: Dartmouth, pp. 3–28.

VINOGRADOFF, Paul (1920) 'The Crisis of Modern Jurisprudence', *Yale Law Journal* 29: 312–20.

ZIEGERT, Kurt Alex (1979) 'The Sociology behind Eugen Ehrlich's Sociology of Law', *International Journal of the Sociology of Law* 7: 225.

ZIEGERT, Kurt Alex (2001) 'Introduction', to Eugen Ehrlich, *The Fundamental Principles of Sociology of Law*. New Brunswick: Transaction Publishers: 19–44.

https://doi.org/10.1017/S1744552307003011 Published online by Cambridge University Press