

Eugen Ehrlich's Work. The Living Law

Empirical investigation of the concept of 'living law' - Methodological problems of the research on legal consciousness I.*

I. Introduction

The central question of my study just turned 100 years old, at least in its first iteration, which was as follows: 'How shall we quarry that part of the living law that has not been embodied in a legal document but which nevertheless is a large and important part thereof?'³ Eugen Ehrlich, who is considered one of the 'founding fathers' of the sociology of law, published his book entitled *Grundlegung der Soziologie des Rechts* (Fundamental Principles of the Sociology of Law) in 1913. This book is usually referred to as Ehrlich's most important work⁴ and has been the subject of numerous criticisms, some of which I will review in detail (see especially the section on the Ehrlich-Kelsen debate). But these criticisms mark only one aspect of Ehrlich's persisting influence. In Marc Hertogh's words, 'many scholars either like or hate Ehrlich's work, or, to make things more complicated, both like and dislike his work at the same time'.⁵ Yet the controversy surrounding some of Ehrlich's ideas is only an indication that his work is still 'alive', despite the long time that has passed since its first publication. The present study is also inspired by the notion that looking to Ehrlich's ideas in seeking sources for a renewal of the thinking about contemporary sociology of law is a worthwhile enterprise.

Obviously, I am not alone as a proponent of this idea. As it will become apparent in the course of this study, the particular context wherein Ehrlich worked, namely the relations that prevailed between the empire (the Austro-Hungarian Monarchy) and its periphery (the Bukovina), which exerted a decisive influence on his scientific thought, has in some sense become timely again in the context of the European Union and its member states. In the view of many European academic writers, this justifies 'rediscovering and rethinking' Ehrlich.⁶ The aforementioned aspirations of rediscovery also involve an ambition to reclaim the traditions of European sociology of law, since Anglo-Saxon scholars and academic schools tend to define the sociological study of law to this day, while the continental tradition tends to be dominated by a positivist approach rooted in legal theory. Ehrlich himself had close ties to contemporary legal realists (e.g. Roscoe Pound), who evinced a greater appreciation and fuller understanding of his work than his colleagues in Central Europe. On the whole, it appears that in many respects the continental sociology of law is not in a better or stronger position than at the turn of the previous century, nor have Ehrlich's ideas and scientific programme become outdated.

As far as the current study's previously mentioned narrower research question is concerned, it is closely related to the controversial but nevertheless intellectually fertile definition that Ehrlich

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* This article is part of a series which will be published in three separate parts. For research support I thank the Hungarian Scientific Research Fund (OTKA K 109439: *Normative arguments in everyday use*). For helpful comments, I thank Júlia Vajda, Zoltán Fleck, Domonkos Sik and the members of the Research Workshop of the Centre for Theory of Law and Society. For the extended help with the translation, I thank Gábor Györi.

³ Ehrlich 2002: 498

⁴ Pound 1922: 129

⁵ Hertogh 2009b: 2

⁶ Hertogh 2009a

provided on the role of the law. The notion of living law regards legal norms as they emerge from societal 'associations' (*Verbände*) as the objects of scientific investigations of the law and of the 'theoretical science of law' (*Rechtswissenschaft*). At the same time, Ehrlich pointedly distinguishes the aforementioned from the prevailing tradition of practical legal analysis or 'practical science of law' (*Rechtslehre*) as they are pursued in continental European academic workshops and universities, which stress the analysis of official law.⁷ He describes the relationship as one between foundational research which provides 'pure knowledge' on the one hand⁸ and applied science that serves practical purposes on the other.⁹ Ehrlich regards the legalistic elements of the internal order of associations as the fundamental sources of law, which are – ideally – reflected by, expressed in or followed by applied state law, the norms that guide legal decision-making, and by the law that the state creates. This expression of the social determination of law diverges substantially from the positivist approach which traditionally dominates continental legal thought, as I will elaborate in more detail in the context of Kelsen's critique.¹⁰ The latter idea of the law stresses the practices of laypersons, as well as their notions of the law, and this also separates it significantly from the issues explored by Anglo-Saxon authors raised in the tradition of legal realism. I will elaborate these points of connection and differences in the context of the detailed discussion of living law (*see* the part entitled Living law and legal realism – A comparison of ideas of the law in Ehrlich and Pound) The central feature of the definition of living law are laypersons' ideas of the law, essentially the fact that they identify some of the norms that govern our lives as legal in nature. Ehrlich's failure to provide a more precise definition has made this the most controversial element of his theory.¹¹ My position is that rather than trying to defend this statement,¹² one ought to take it seriously instead: This definition of the law could be a sound theoretical starting point for transcending the existing framework of research on legal knowledge and attitudes concerning the law. The objectives and limitations of studies pertaining to laypersons' attitudes towards official law can be properly described by the concept of applied legal sciences – as criticised by Ehrlich – which more or less serve the needs of practical considerations (in this case legislating), while in this respect the theoretical and scientific investigation of the law must be aimed at legal consciousness, which so aptly reflects the above mentioned approach to the law.

The question of which method is most suitable for the scientific investigation of the law also goes back to Ehrlich, who addressed it in the last chapter of the *Fundamental Principles of the Sociology of Law*.¹³ Though in this chapter Ehrlich identifies legal documents (written agreements, wills and testaments) as the 'sources' of living law, he also takes a detailed look at the limitations of this method:

Still the value of the document would be greatly over-estimated if one should think that one could, without more ado, read the living law from it. [...] But the legally operative content of the document gives no reliable information as to the effects not intended by the parties nor yet as to those intended. There is much in the document that is simply traditional; this part is copied from a book by a person who drafts the document but it never reaches the consciousness of the parties. [...] There are other provisions which the parties will permit to be embodied in the document only in order to be prepared for the worst. It is self-evident that they are not to be mentioned as long as

⁷ Ehrlich 2002: 3–4

⁸ Ehrlich 2002: 4

⁹ Ehrlich 2002: 5–6

¹⁰ It should be noted that it would be an oversimplification to claim that Ehrlich's ideas cannot be reconciled with the definitions of the law provided by certain positivist authors, such as for example Hart (Hart 1994: 110–117). Contrasting sociology of law and legal positivism in this way was the dominant approach when the sociology of law first emerged. Nevertheless, the authors in question often debate an artificially constructed and ill-defined 'statutory positivist' position that cannot be attributed to any specific author. The main objective of this juxtaposition is to stress and define the special aspects of the new way of thinking about the law (a good example would be Pound 1910).

¹¹ For a detailed discussion see Hertogh 2009b

¹² e.g. Hertogh 2009b or especially Van Klink 2009

¹³ Ehrlich 2002: 487–506

*there is no controversy. The other party understands this very well. He accepts the most extreme rigours of a contract of this sort calmly, but haggles most obstinately over all provisions that are intended to be taken seriously.*¹⁴

Hence ‘the standard therefore according to which the Sociological School of jurisprudence must test not only the legal propositions but also the legal document, is actual life’.¹⁵ In terms of the methodology to be used for this, he provides the following summary instruction: ‘there is no other means but this, to open one’s eyes, to inform oneself by observing life attentively to ask people and note down their replies’.¹⁶ Ehrlich sought to put these theses to practical use, as we will show in more detail during the discussion of his university seminar on living law. The aforementioned should allow us to draw some guidance as to the proper method of investigation, but Ehrlich himself is very permissive in this regard:

*There is no antithesis between science and art. Every true work of science is a work of art, and the man who is not an artist is a poor man of science. Production of a work of science requires the same qualifications as production of a work of art; both require a certain receptivity of mind, imagination and power to give shape to one’s material. For this reason every independent investigator must create his own method, just as every creative artist must create his own technique.*¹⁷

The last sentence in the Fundamental Principles of the Sociology of Law reinforces this impression. Following a detailed analysis of which social sciences might offer a useful perspective in the scientific examination of the law, Ehrlich concludes his work with the following statement: ‘Method is as infinite as science itself.’¹⁸

In the present study I will argue that the proper method for examining living law are in-depth interviews, in particular narrative life history interviews. These will be used instead of analysing documents and ethnographic descriptions, the former of which Ehrlich himself considered only an auxiliary and secondary instrument, while the latter – for which Ehrlich also laid solid foundations in his work – can be useful in research on legal pluralism.¹⁹ In addition to capturing phenomena that are identified as legal in nature, this method also proffers the significant advantage that it allows for analysing legal types of arguments, experiences and norms governing everyday life in the context of a life history. In my study I will (also) rely on the traditions of the qualitative turn in the research on legal consciousness as I seek to rebut doubts concerning qualitative methods in general – especially concerning their generalisability –, and against the use of life history interviews in particular.

What justifies the present study's choice of topic is that the question of 'What is the law?' has not lost any of its popularity; as Hart noted, this seemingly simple question has been answered in

¹⁴ Ehrlich 2002: 497; Macaulay (1963) arrived at similar conclusions in his research of businesspersons.

¹⁵ Ehrlich 2002: 498

¹⁶ Ehrlich 2002: 498

¹⁷ Ehrlich 2002: 472

¹⁸ Ehrlich 2002: 506

¹⁹ *Legal pluralism* is a concept that is central to contemporary and post-modern legal theory (see for example de Sousa Santos 1987, Griffiths 1986, Moore 1973, Merry 1988, Tamanaha 2008). Griffiths (1986: 1) defines the concept of legal pluralism as the existence of more than one legal order in one social field. In these - anthropologically-oriented - writings Bukovina has emerged as a metaphor for the intermixing and co-existence of various legal traditions, 'cultures' and orders (see for example Teubner 1997, or its critique in Nelken 2007). The Ehrlich tradition and the notion of living law play a significant role in these studies. There is a tradition here of citing Ehrlich as a classic and a spiritual forebear, or at least including an honorary mention. Nelken (2007: 189) points out that rereading classical authors, including Ehrlich, and the application of century-old theories to contemporary problems, inevitably raises questions as to how much said rereadings and reinterpretations are really about revealing what an earlier scholar thought about a given issue rather than formulating a contemporary author's own position, or an 'uncertain compromise' between the two.

legal theory and in the sociology of law in very diverse – and often contradictory – ways, which often seem awfully divorced from reality once severed from their original context.²⁰ Thus I would argue that while this topic is both interesting and relevant, the present study must clearly respond to legitimate doubts as to whether it can add a new perspective on the issues it discusses. It should inspire confidence, however, that I do not seek to develop a new definition of the law, but rather to elaborate an existing theory, and to develop it further by drawing up a new research programme, linking areas whose interaction might prove fruitful in terms of attaining some empirical insights about (living) law by further extrapolating Ehrlich's answer to the abovementioned question.

In the present study I will first review the concept of living law on the basis of Eugen Ehrlich's work. Next, I address research on legal consciousness, reviewing previous domestic and international work in this field, as well as the problems apparent therein. On this basis I will expound on the question of how narrative life history interviews might be an answer to the abovementioned century-old question. I will also present the opportunities inherent in the application of this method by analysing an interview.

II. Eugen Ehrlich's Work. The Living Law

II.1. Course of life

The present study does not seek to provide a detailed biography of Ehrlich, nor is this necessary to answer the main questions I investigate. That is also fortunate because the biographical data on Ehrlich are spotty, on occasion even contradictory.²¹ In addition to reviewing his career, the environment wherein he worked is also central to understanding his oeuvre, which is why in this part I must also devote some space to the history of the Bukovina around the turn of the century.

II.1.1. Biographical data

Ehrlich was born on 14 September 1862 in the town then known as Czernowitz.²² At the time the town was part of the Habsburg Empire. During most of Ehrlich's life it served as the centre of the Duchy of Bukovina which belonged to the Austro-Hungarian Monarchy. Following World War I, this area was awarded to Romania, and when Ehrlich died it was still part of that country. Today, it belongs to Ukraine (Chernivisti).

All we know about Ehrlich's life can be summed up in a few sentences. Despite his significant impact on both Anglo-Saxon and continental sociology of law and legal theory, we know surprisingly little about the man himself.²³ It is telling that there are only two publicly known photographs of him.²⁴

His father, Simon Ehrlich, was a lawyer; his mother was Eleonore Donnerfeld and he had a brother, Oswald.²⁵ His birth name was Elias. His mother tongue was Polish, but he spoke excellent German, French and English, and he published in numerous major legal journals in these languages.²⁶ There was a substantial Jewish community in the town at this time and Ehrlich's family

²⁰ Hart 1994: 1

²¹ For a biography see Rehbinder 1986: 13–28

²² I use this particular of the town's many names because it was the official designation in the time period I investigated. This was the practice I generally followed when it came to place names referred to in this section of the study.

²³ Eppinger 2009: 21

²⁴ Hertogh 2009b: 16

²⁵ Rehbinder 1986: 16

²⁶ Pound 1922: 130

was also a part of this community, though he later, in his years in Vienna, converted to Catholicism. He never married. He lived in most of his adult life in Czernowitz, under Steingasse 28.²⁷



Figure 1. One of the publicly known photographs of Eugen Ehrlich²⁸

He attended secondary school in the Galician city of Sambor, and then read law in Lemberg and subsequently at the University of Vienna (between 1881 and 1883). He attained a doctorate in law in 1886 and habilitated in 1895, both at the University of Vienna. He specialised in Roman law. He taught as an associate professor (*Privatdozent*) at the University of Vienna and also worked as a lawyer, until he was offered a professorship (*ausserordentlicher Professor*) at the Franz Joseph University in Czernowitz in 1896, where he was appointed full professor in 1900. He was the only active Roman law lecturer in the university, therefore he gave 6 lessons per week.²⁹ In the academic year 1906-1907 he served as the university's vice chancellor.³⁰

World War I had a grave impact on the region. In 1914 Russian troops entered Czernowitz and Ehrlich fled to Vienna, later spending a year in Switzerland and then returning to Vienna. Even though Bukovina was annexed to Romania after the war, Ehrlich planned to return to Czernowitz and to continue teaching in Romanian in his previous place of employment. This failed to materialise, however, as he died of diabetes in Vienna on 2 May 1922.

II.1.2. Bukovina

The striking differences between the imperial law of the Austro-Hungarian Monarchy and the conceptions of the law and legal practices which prevailed in individual provinces, and of

²⁷ Rehbinder 1986: 16

²⁸ Rehbinder 1986: 2

²⁹ Rehbinder 1986: 15

³⁰ In a speech he gave on the occasion of his commission as university vice chancellor on 2 December 1906 (Ehrlich 1907), Ehrlich discussed numerous important ideas regarding the mission and reform of legal training.

course among the ethnic groups that were frequently – but not necessarily – segregated in the Bukovina, had a substantial, one might say inspiring impact on Ehrlich's work.³¹

The Bukovina was annexed by the Habsburg Empire in 1774, and at the turn of the century it was one of the most ethnically diverse provinces of the Austro-Hungarian empire. Several sources refer to Czernowitz as the easternmost bastion of German culture, remembering it as 'little Vienna'.³² Though the town became part of Romania in 1918, a majority of its population was Ukrainian, and it had substantial German and Jewish minorities as well. The sources disagree as to how many ethnic groups lived there in any relevant numbers, apart from the four main ethnic/national and religious groups.³³ Livezeanu³⁴ states that based on 1910 census data, the share of the largest group, those of Ukrainian ethnicity, stood at 38.4%, while ethnic Romanians made up 34.4% of the population, Jews 12% and Germans 9.3%. He also refers to Poles, Hungarians, Russians and Gypsies (in descending order in terms of their respective share of the total population). Livezeanu notes that in many respects relations between the two major ethnic groups resembled Polish-Ukrainian relations in Galicia.

In the period when the Monarchy was falling apart, the representatives of the surging nationalist groups - in the Bukovina it was the Romanians³⁵ - noted several factors that might be 'held accountable' for the fact that a naturally Romanian area harboured more Ukrainians (linguistic assimilation, Slavification of names, mass migration of Ukrainians from neighbouring Galicia, and the Monarchy's policy towards nationalities, which sought to suppress the Romanian majority). It would be difficult to ascertain the truth based on the available sources; all they allow for is to unfold the details of the discourse on the nationality question. This emerged as a decisive factor in the subsequent history of the region,³⁶ but in the final days of the Monarchy the goal of state policy was to encourage the peaceful coexistence of various nationalities and to develop and foster some kind of common Bukovina identity. Those who endorsed this objective stood opposed to those who supported aspirations to establish nation-states. The assessment of Austrian rule was hence a divisive issue.

What is relevant from our perspective is that as a member of the Jewish community in Czernowitz, Ehrlich belong to a group that was experiencing its golden age at the time. Czernowitz was not only considered 'little Vienna' but also the 'Jerusalem of the East'. Sometimes the members of this group in the faraway province stood up for the German spirit even more forcefully than 'ethnic Germans', though they were also carriers of a particular Jewish identity and culture. At the turn of the century the Jewish community in the Bukovina numbered around 24,000 souls, and the region was home to one of the most accepted and least persecuted Jewish communities in Eastern Europe. Ehrlich was only affected by the first wave of the tragedy afflicting the Jewish community in Bukovina, namely World War I. Yet the loss, which only become complete with World War II, was immense: Czernowitz become a metaphor in this context, so much so that certain authors argue that what the destruction refers to in the context of Czernowitz is not even an actual physical

³¹ Nigh every writing on Ehrlich confirms this, but see especially Eppinger 2009 and Likhovski 2008

³² E.g. Stambrook 2003: 2, Hirsch-Spitzer 2010: 20

³³ Ehrlich (1967: 43) named nine such groups: Armenians, Germans, Jews, Romanians, Russians, Ruthenians, Slovaks, Hungarians and Gypsies. Incidentally, terminological differences also have a substantial impact on the listing of ethnic groups. Livezeanu (1995: 49), for example, also includes the Hutsuls and does not use Ruthenian as a designation. Just as the Ukrainians, upon closer inspection the Jews, too, can be divided into further subgroups (orthodox, Hasidic and Haskalah (progressive), and the Hasidim can be divided further still into groups depending on what religious leader (Tzaddik) they followed (Stambrook 2003 4–5)). Taking religious and ethnic elements jointly into account along with assimilation processes, the above mentioned 'Bukovina identity' no longer appears as a colonising and imperial fusion of identities. Instead, it seems an apt description of reality, which was of course coloured by nationalist and pro-Monarchy stances.

³⁴ Livezeanu 1995: 49

³⁵ Ion Nistor was an especially important personality in this group.

³⁶ On Czernowitz's 'affiliation' in the 20th century see Map 1. in the Appendix.

locality but rather the loss of an idyllic home which continues to live on in cultural memory.³⁷ This process is poignantly illustrated by the following interview segment:

I was born in Czernowitz. The war broke out nine months later. The Russians bombarded the city. I learned to run before I could walk. The First World War shoved me one thousand miles to the west, from Czernowitz to Vienna. The Second World War, which for me began on March 13, 1938, brought me seven thousand miles further west, from Vienna to Ecuador. I was a westward moving Eastern Jew, and I said to myself: two more wars like these and I will again be back in Czernowitz. In 1943, in Ecuador, I applied for a travel document for foreigners. Under the rubric "Nationality," the Ecuadorian official filled in "German." I protested. ... "Why do you deny being German? After all, you have an expired German passport!" "It was forced on me," I responded. "My homeland was invaded. I am Austrian." The man looked at me sympathetically and said, "Austria doesn't exist any longer. Where were you born?" "Let's not get into that," I implored; "it will only complicate matters."³⁸

Like so many others, Ehrlich sought to return to this lost home, and his death is 'just as much a casualty of war' as if it had happened on the front, amidst battle.³⁹

The disappearance of this community, which had played a vital role in Ehrlich's earlier work, marked a tragic turn in his individual biography. As Likhovski points out,⁴⁰ Ehrlich lived at the periphery of an empire, in a place where various cultures clashed, and where the hold of the imperial centre's legal culture was shaky at best. This formulation is alluring, though Likhovski may somewhat overstate the colonising element and intent in his analysis. Ehrlich's work may have been inspired by the fact that he viewed his environment through the lens of imperial law (and especially its historical evolution) and a peculiar German culture. But the judgmental and civilising/colonising motif is absent in his oeuvre, which is primarily motivated by the insight that whatever state law may be, 'the center of gravity of legal development [...] from time immemorial has not lain in the activity of the state but in society itself, and must be sought there in the present time'.⁴¹ I believe that the key to understanding Ehrlich, and to correctly construing his writing, is the concept of the 'Bukovina identity'.

When they look at the particularities of the Bukovina environment that Ehrlich worked in, those who investigate the issue of legal pluralism emphasise the diversity of national/ethnic groups and the mutual interplay and coexistence of various legal orders. At the same time, if we think of this specific context as a complex interrelationship between the empire and its peripheries,⁴² then this may also help us to describe and capture Hungary's relations with the European Union today. Ehrlich treated the coexistence of various peoples – and correspondingly the intermixing of their respective legal orders – as a fact, and he argued for preserving the empire as a multicultural entity. In Cotterrell's formulation,⁴³ our contemporary ideas of constitutional patriotism⁴⁴ – which are markedly distinct from nationalism – are not at all alien from the spirit of Ehrlich's life work. Another argument in favour of rediscovering Ehrlich may be his position on the role of 'empire', which might have become timely again recently in Hungary, and Europe in general, in the context of debates about the role and future of the European Union.

³⁷ Morris 2007

³⁸ Benno Weiser Varon, cited in Hirsch-Spitzer 2010: 3

³⁹ Littlefield (1967): 1

⁴⁰ Likhovski 2003: 621-622

⁴¹ Ehrlich 2002: 390

⁴² Cotterrell 2009

⁴³ Cotterrell 2009: 80

⁴⁴ Habermas 2001

II.2. His works. The idea of living law (*lebendes Recht*)

In the laudation he wrote on the occasion of Ehrlich's death, Pound mentions⁴⁵ Ehrlich's early study on tacit consent⁴⁶ as his first widely known work. In that study Ehrlich elaborated his ideas that certain vague concepts (such as for example 'tacit consent') create legal gaps, which makes him one of the most prominent representatives of the German *Freirechtslehre* (doctrine of free law). The year 1902 saw the publication of his *Beiträge zur Theorie der Rechtsquellen* on the sources of law, and in 1903 his *Freie Rechtsfindung und freie Rechtswissenschaft* was published.

In the latter work, the Free Finding of the Law and Free Legal Science, he deals with similar questions as other scholars in the tradition of the free law doctrine,⁴⁷ addressing the gap separating statutory law from the judicial application of the law. As I will explain in more detail when comparing Ehrlich's and Pound's views, this version of the 'gap' problem was not among Ehrlich's main preoccupations in his more mature work, but his investigation of the issue meshes well with the basic inquiry underlying the legal realist school of thought. In his book Ehrlich argues that in legal systems based on the reception of Roman law a conviction has emerged – though it is completely alien to Roman law – that 'every decision has to be founded on statutory law, every decision has to be the last step of a logical chain, a syllogism in which the legal norm qualifies as major premise and the facts of the case as minor premise'.⁴⁸ Ehrlich attributes the emergence of such an expectation to a common notion with regard to codified Roman law, which posits that it offers a solution for any and all imaginable cases, even though that is obviously illusory, for it involves a body of law whose substantial evolution came to a halt in the 6th century. Ehrlich harshly criticises the position – which is associated with pandectists – that if a judge were to fail to find guidance in statutory law, he should seek a solution by way of analogy:

*We can not expect that technical finding of the law will lead to fairer decisions than free finding of the law. But at the end of the day, it is unmeasurably easier to find a just solution to in a single case than to set a general norm which will be fairly applicable to every imaginable future occurrences. Not to mention that one can not state seriously that a norm will be fairly applicable to a problem which was not even imaginable for the legislator. In fact, the aim of technical finding of the law is not being fair but being foreseeable and certain [...]*⁴⁹

Yet formalism ('technical finding of the law') cannot achieve this objective. Indeed, Ehrlich would argue that it cannot even come near, and hence 'the only safeguard of the finding of the law is the personality of the judge'.⁵⁰ It is futile to seek to exclude the judge's personality from the decision, thus Ehrlich, which is why the judicial corps ought to be an assembly of exemplary men, and the whole organisation of the administration of justice should be of a nature that does not impede the

⁴⁵ Pound 1922: 129

⁴⁶ Ehrlich 1893

⁴⁷ The main theses advanced by the authors who are identified with the free finding of law (such as for example Hermann Kantorowicz (1877–1940) or François Gény (1861–1959)) was that in cases when official law fails to provide guidance (legal gap), the judge must solve the case she is handling by way of free finding of law (that is she may not refuse administer justice citing the failure of state law to instruct her in the particular case). In discussions of the free finding of law tradition it is often mentioned that Article 1 of the Swiss Civil Code (ZGB) contains a provision with instructions for judges that reflects this spirit. It states that '[i]n the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. [...]' (cited in Mezei 2002).

⁴⁸ 'Jetzt kommt erst der Grundsatz auf, daß eine Entscheidung sich aus bereits festgelegten Regeln des geltenden Rechts ergeben muß, daß sie eine Schlußfolgerung sein muß in einer logischen Reihe, in der eine Rechtsregel den Obersatz, der Rechtsfall den Untersatz bildet.' Ehrlich 2001 [1903]: 30

⁴⁹ Ehrlich 2001 [1903]: 41

⁵⁰ Ehrlich 2001 [1903]: 42

'success of strong personalities'.^{51,52} Already in the last part of the study he defines - after abandoning the fruitless enterprise of further refining the theoretical concept of a gap-free law - what subjects the scientific exploration of the law must address, but here he only refers in passing to 'life circumstances wholly independent of their legal regulation'⁵³ and their juxtaposition with legal statutes.

This work was translated into English, and this is also the period when Ehrlich's Anglo-Saxon relations developed. His comparatively greater impact in Anglo-Saxon countries did not emerge only after his death; already during his lifetime his work was recognised there and followed with great interest, especially in the US. In 1914 he accepted an invitation to hold a series of lectures at the Lowell Institute in Boston, and in December 1914 he was asked to do the same for the Association of American Law Schools, though the trip was prevented by the war and the opportunity did not arise later.⁵⁴ In the United States it was especially his university courses on his research about living law that received considerable attention. Those meshed well with the emerging legal clinic movement (Pound was an enthusiastic proponent of this idea), though there were also significant differences between the legal clinic perspective and the research on living law. The legal clinic approach, as the name shows, takes the professional education in the medical profession as its model, in other words its goal is to give students of law practical knowledge during their training, with corresponding university courses. This movement is still flourishing and is spreading in Europe as well now. Though it resembles said movement in many respects, Ehrlich's seminar did not primarily seek to prepare students for applied legal work but aimed at promoting 'pure scientific knowledge'.⁵⁵ Ehrlich published a description of his seminar in his *Erforschung des lebenden Rechts* in 1911, and the following years saw further publications of his on this issue.⁵⁶ William Herbert Page's presentation at the 14th annual meeting of the Association of American Law Schools about the seminar based on the living law research⁵⁷ was published in 1914.

His main work, the *Fundamental Principles of the Sociology of Law* (*Grundlegung der Soziologie des Rechts*⁵⁸), was published in 1914, and his last major work, *The Juridical Logic* (*Die juristische Logik*⁵⁹) was released in 1918.

The starting point of the concept of living law is the previously cited thesis positing that 'the center of gravity of legal development [...] from time immemorial has not lain in the activity of the

⁵¹ Ehrlich 2001 [1903]: 50

⁵² It is interesting to compare Ehrlich's analysis with Max Weber's ideas regarding the formally rational features of modern legal systems: 'Economic conditions have, as we have seen, everywhere played an important role, but they have nowhere been decisive alone and by themselves. To the extent that they contributed to the formation of the specifically modern features of present-day occidental law, the direction in which they worked has been by and the following: To those who had interests in the commodity market, the rationalization and systematization of the law in general and, [...] the calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of economic enterprise intended to function' with stability and, especially, of capitalistic enterprise, which cannot do without legal security. [...] On the other hand, the modern and, to a certain extent, the ancient Roman, legal developments have contained tendencies favorable to the dilution of legal formalism. (Weber 1978: 883–884) These demands are aimed at the detection of material truth (eg. the free evaluation of proof) or the enforcement of material justice (social law). According to Weber, besides these materialistic tendencies 'status ideologies of the lawyers themselves have been operative in legal theory and practice along with those influences which have been engendered by both the social demands of democracy and the welfare ideology of monarchical bureaucracy (Weber 1978: 886) In Weber's interpretation, the views held by Ehrlich and the representatives of the free law doctrine are conclusions that sometimes bolster the prestige of theoreticians, while at other times they bolster that of practicing lawyers (Weber 1995: 886), challenging the image of 'slot machines' which formalism projects. Weber's *Economy and Society* was published in 1921–1922, so Ehrlich could no longer debate its theses.

⁵³ Ehrlich 2001 [1903]: 54

⁵⁴ Pound 1922: 129

⁵⁵ Ehrlich 2002: 3–6

⁵⁶ E.g. *Das lebende Recht der Völker von Bukowina*, 1913

⁵⁷ Page 1977

⁵⁸ Ehrlich 2002

⁵⁹ Ehrlich 1918

state but in society itself, and must be sought there in the present time'.⁶⁰ In analysing Ehrlich's insights, it is common to stress the importance of the 'gap' he observed between imperial/official law and the legal customs of his home region.⁶¹ Though it is undeniable that the concepts of the law and the legal practices of the various ethnic/national groups in the Bukovina play a central role in his oeuvre (*see above*), and in many respects they inspired his work, the concept of living law is broader than this, it is not closely connected to ethnic or religious diversity, though such striking differences play a major role in the basic insights underlying the living law.

Pursuant to the concept of living law, legal norms are part of the system of social norms, which have emerged to ensure the internal order of communities or - according to the original terminology - associations (*Verbände*). In other words the self-regulation of communities involves norms of a legal character. Ehrlich distinguishes between three main forms of the law: social law, norms of decision and state law. The terminology employed by Ehrlich has been the subject of considerable criticism, also with respect to the concept of association,⁶² which some authors consider too broad and vague. Ehrlich's concept of *Verbände* is indeed very broad: it ranges from the family, over the national all the way to the world economy and extends to all communities made up of humans.⁶³

'All of us then are living within numberless, more or less compactly, occasionally quite loosely, organized associations, and our fate in life will, in the main, be conditioned by the kind of position we are able to achieve within them.'⁶⁴ The internal order of communities is structured by their members, who define the community's hierarchies and the framework of everyday co-existence. Ehrlich sketches the community's complex and interlaced normative system which ensures internal order.⁶⁵ Group membership yields numerous advantages for the individual, and the price of these advantages is an expectation of behaviour that conforms with the prevailing norms. Were the individual to violate these rules, she would find the group's solidarity towards her weakened 'He will gradually be deserted, avoided, excluded'.⁶⁶ This is the process that underlies all societies' normative sanctions schemes, the source of their power to compel and constrain individual behaviour. This explains why rules tend to be followed en masse, for this phenomenon is far less contingent on the prevailing practices in the application of the law or on state regulations than jurists like to believe or like to make believe based on their own law-centred 'internal' perspective.⁶⁷

What is decisive, however, is that rules are only part of the living law if the members of a group regularly comply with and follow them. Rules that the parties ignore when drawing up their agreements - especially when they put them in writing - qualify as norms of decision that is norms which the forums of the administration of justice consider in adjudicating a case, when there is a dispute among parties which is brought before such a forum for resolution. Norms of decision are constructed by lawyers so that they can help resolve legal disputes. Most of the laws laid down in statutes are codified applied formal law that is norms of decision. In Ehrlich's theories, state norms traditionally refer to a group of norms associated with the existence of the state (as a particular form of association), but in the *Fundamental Principles of the Sociology of Law* he analyses the changes in the interaction between society and law as well, and in that context he also looks at norms of intervention. The latter are norms that instruct state agencies to intervene in certain cases

⁶⁰ Ehrlich 2002: 390

⁶¹ Badó 1995 emphasises this, too, for example

⁶² Badó 2005

⁶³ In this respect the following illustrative enumeration by Ehrlich is instructive: '[...] nevertheless there is no one to whom country, native land, religious communion, family, friends, social relations, political party, are mere words' (Ehrlich 2002: 63) This is later complemented by further examples, such as business and industrial associations.

⁶⁴ Ehrlich 2002: 63

⁶⁵ 'The norms of ethical custom, morality, religion, tact, decorum, etiquette, and fashion would be quite meaningless if they did not exercise a certain amount of coercion.' (Ehrlich 2002: 62)

⁶⁶ Ehrlich 2002: 63

⁶⁷ Ehrlich 2002: 83

(*Eingriffsnormen*). The norms of decision codified by the state tend to blind lawyers to the more complex social reality of normative systems, but in Ehrlich's words:

*The effect of state norms for decision is usually very much over-estimated. The whole matter hinges upon action by the parties, who very often fail to act altogether. Often the statute remains unknown to a considerable part of the population; again the parties for whose benefit it was enacted often lack the material means to enforce their claim, or, because of the actual distribution of power, they lack self-confidence or confidence in the authorities.*⁶⁸

Ehrlich's distinction between legal norms and other norms that regulate the community's life has been the subject of considerably more criticism than his - deliberately broadly defined - concept of association: 'Law and legal relation is a matter of intellect which does not exist in the sphere of tangible reality but in the minds of men. There would be no law if there were not men who bear the concept of law in their consciousness'.⁶⁹ Ehrlich identifies legal facts as the source of legal norms; legal facts are the tangible elements of reality that shape our conceptions of law. These are practice (*Übung*), rule (*Herrschaft*), property (*Besitz*) and declarations of will (*Willenserklärung*). These are the manifestations of social relations which according to Ehrlich's ideas could emerge as the sources of norms of legal character.

At the same time norms of legal character differ from other norms not only in terms of their source. Indeed, according to Ehrlich's theories the source of a norm is unsuitable for distinguishing various types of norms from one another. The definition he provided is probably one of the most controversial aspects of his theory.⁷⁰

Difficult though it may be to draw the line with scientific exactitude between the legal norm and other kinds of norms, practically this difficulty exists but rarely. In general anyone will be in position to tell without hesitation whether a given norm is a legal norm or whether it belongs to the sphere of religion, ethical custom, morality, decorum, tact, fashion, or etiquette. [...] The question as to the difference between the legal and the non-legal norm is a question not of social science but of social psychology. The various classes of norms release various overtones of feeling [...] Peculiar to the legal norm is the reaction for which the jurists of the Continental common law have coined the term *opinio necessitatis*.⁷¹

Many have criticised Ehrlich's *opinio necessitatis* theses in a variety of ways.⁷² But I will argue that this definition of the (living) law can successfully aligned with the legal consciousness research tradition and the broader social constructivist approach.

III. The doctrine of living law and legal positivism. The Ehrlich–Kelsen debate

The Ehrlich-Kelsen debate can hardly be called a real debate in the sense that in many respects Ehrlich failed to exhaustively respond to Hans Kelsen's critique.⁷³ Nevertheless, the articles, which appeared on the pages of the journal *Archiv für Sozialwissenschaft und Sozialpolitik* after the publication of Ehrlich's *Fundamental Principles of the Sociology of Law* in 1915, are important pieces in an uninterrupted series of legal theory debates which indicate that the fundamental underlying problem is still one that those engaged in legal theory grapple with. The examination of the law from a positivist and sociological perspective, or, put more generally, its factuality and normativity, its idiosyncratic Janus face, was over and over again the source of

⁶⁸ Ehrlich 2002: 368

⁶⁹ Ehrlich 2002: 84

⁷⁰ Hertogh 2009b

⁷¹ Ehrlich 2002: 164–165

⁷² see Hertogh 2009b

⁷³ On the debate see Kelsen-Ehrlich 2003.

substantial debates (thus for example between Herbert L. A. Hart and Lon L. Fuller, or between Joseph Raz and Ronald Dworkin). These 'clashes' continue to figure on the agenda of the legal sciences.⁷⁴ In assessing these debates today, a look at the 'original' arguments by Kelsen and Ehrlich's answers in the early 20th century may prove instructive.

As I pointed out above, Ehrlich took a grim view of the positivist examination of the law. He thought of it as a refinement of applied formal law, essentially as an important aspect of producing professional knowledge - but at the same time he did not regard it as science, and beyond a certain point he considered it fruitless. This is the starting point of the *Fundamental Principles of the Sociology of Law*, which he concludes with a research programme, wherein Ehrlich makes clear what the scientific investigation of the law ought to entail: The exploration of living law, of the origins of law in society, in an interdisciplinary approach that is not loath to borrow perspectives, knowledge and methodologies from other social science disciplines in the interest of learning in as much depth about the object of its scholarship as possible. Kelsen's pure legal doctrine⁷⁵ – though Ehrlich did not have a chance to encounter it – was a perfect embodiment of everything Ehrlich argued against. It conceived of the law as a closed and gapless system made up exclusively of laws created by the state. Kelsen related with similar abhorrence to Ehrlich's legal theories conflating 'is' with 'ought' postulates. The notion that law arises from particular patterns of life circumstances, such as the ones which Ehrlich considered legal facts, was astonishing for Kelsen. Apart from proffering an energetic rebuttal of the suggestion that he is not aware of the importance of the difference between 'is' and 'ought' postulates by arguing that 'to accuse someone of confusing an ought rule with a law of nature [...] comes close to calling him a fool',⁷⁶ Ehrlich failed to provide a persuasive answer to the questions inquiring about the origins of the normativity of social law (the living law) and argued that Kelsen had misunderstood and misconstrued his work. This debate might play some role in the fact that Ehrlich's impact on continental legal theory continues to remain marginal to this very day.

In Bart van Klink's summary of what the debate was essentially about:

[In the introduction of his Fundamental Principles of the Sociology of Law Ehrlich writes] 'Now it is true that a rule of conduct is not only a rule according to which men customarily regulate their

⁷⁴ Antonov 2011: 5

⁷⁵ One of Kelsen's most important works, *The Pure Theory of Law (Reine Rechtslehre)* was published long after this debate, in 1934. The underlying tenet of that book is the goal of purifying legal sciences from law policy elements, of separating *Sein* and *Sollen*, in other words the consistent separation of Is and Ought which goes back to Kant. It is in this sense that we can talk of *pure* legal theory (also see Cs. Kiss 2005 and Cs. Kiss 2007) The famous first line of this work, '[t]he pure theory of law is a theory of positive law. It is a theory of positive law in general, not of a specific legal order' (Kelsen 2005), makes clear that 'Kelsen was not interested in law in the various forms in which it has manifested itself historically and socially, but in its common »essence«, that is he was looking for the unchanged principles underlying all positive lawmaking' (Karácsony 2005: 43). The goal of the pure theory of law is to formulate indisputable postulates concerning the validity of legal norms. Kelsen's theory of legal 'steps and stairs (Stufenbau)', which essentially suggests that the validity of all rules in a legal system derives from certain high-level 'Is' postulates, is also connected to this idea. Using a consistent application of this postulate we arrive at the basic norm (*Grundnorm*), which is itself essentially an 'Is' postulate that cannot be derived from other norms of justification: 'Only if this basic norm referring to a specific constitution, is presupposed [...] only then can the subjective meaning of a constitution-creating act and of the acts created according to this constitution be interpreted as their objective meaning, that is, as objectively valid legal norms, and the relationships established by these norms as legal relations.' (Kelsen 2005: 204). Though the nature of the hypothetical basic norm is – in my view – sufficiently vague to also allow for natural law principles and justifications, Kelsen excluded the natural law-type issues of justice and morality from scientific examinations of the law and relegated these questions into the domain of (legal) policy. He characterised the sociological investigation of the law as the natural scientific investigation of the law; in other words he saw law legal sociology as a science investigating 'fact of being' (*Seinstatsache*) (Kelsen 2005). Kelsen argued for the strict separation between the normativity and factuality of the law (cf. Habermas 1996) rather than the superfluousness of sociological examinations.

⁷⁶ Kelsen–Ehrlich 2003: 57 cited in van Klink 2009: 133

conduct, but also a rule according to which they ought to do so [...]’ As if stung by a bee, Kelsen reacts: ‘Evidently, this sentence is wrong!’⁷⁷

When Ehrlich expounds on his idea that various institutions that were later regulated by law, such as for example marriage, family or the state, first emerged from social relations, Kelsen retorts by saying that Ehrlich’s analysis primitively falls into the trap of ‘primitive confusion of temporal and logical relation’.⁷⁸ And so forth, in the same spirit. Kelsen’s position is that an attempt seeking to identify the foundations of the legal system in social relations is doomed from the start, and he discusses the issue of the validity of legal norms in the same vein that he latter elaborated in the Pure Theory of Law.

The question is what one might reply to these 'charges'? My own position is that the views held by these two authors are nowhere near incompatible. Kelsen delineates the object of his research more clearly and hence he builds his theory on more solid foundations, or one might rather say: He concentrates all uncertainties into a single point. But certain elements of social practices sneak back in through the vagueness surrounding the nature of the basic norm. It is one of the essential features of Kelsen's theory that he rules out this possibility, but it is not something that other theorists - even those who subscribe to a positivist theory of law - necessarily share. The conventionality of law, its basis in some sort of social consensus, is a characteristic feature of positivist approaches,⁷⁹ but in discussing the nature of this convention it appears impossible to disregard social practices.⁸⁰

IV. Living law and legal realism. A comparison of Ehrlich's and Pound's ideas of the law

A detailed review of the 'debate' between Ehrlich and Kelsen was also worthwhile because - as I noted - it might have played a role in the fact that Ehrlich's sociological theory of the law was to some extent relegated to the background on the European continent; though it might be more appropriate to say that the popularity of positivism, its hegemonic position in general has played a role in this development. As noted before, Ehrlich's theories were received considerably more sympathetically and with greater interest in common law countries, foremost the US. Yet this sympathy did not necessarily imply full agreement. As I will explain in more detail below, the point is rather that in a somewhat simplifying manner, Ehrlich's views were interpreted by his overseas readers as being congruent with Roscoe Pound's theories.

Roscoe Pound published his study entitled *Law in Books, Law in Action*, which went on to fame, in 1910.⁸¹ There are many similarities between the views of Ehrlich and Pound, but in many respects their ideas can also be contrasted with one another. Their positions are markedly antithetical, for example, when it comes to the to the state’s lawmaking activities. As I have shown, Ehrlich was no friend of state intervention. For one, he did not believe it to be useful. More importantly, he did not think that state regulation could have a decisive impact on society (*see above*, norms of intervention). Pound, by contrast, had already in his previously mentioned study of

⁷⁷ van Klink 2009: 130

⁷⁸ Kelsen–Ehrlich 2003: 16, cited in van Klink 2009: 131

⁷⁹ This approach is opposed to the theory of natural law. According to this, law is based on divine revelation or, later on principles of eternal and absolute justice. These principles are cogitable to the rational mind. In the theory of natural law, statutory law has to be based on these universal principles.

⁸⁰ A good example is Herbert Hart's practice-oriented theory about the law (see Hart 1994). In his theory Hart distinguishes internal and external viewpoints in analysing legal systems, which could also be connected to Kelsen's humanities/natural science approach. A central element in Hart's theory is the so-called 'rule of recognition', which Hart defines considerably more practically than Kelsen's basic norm, arguing that the rule of recognition exists in practice as long as it is accepted and followed: it is simultaneously a norm and a fact (see Hart 1994: Chapter VI, especially 103). Essentially we can say that Hart's moderate positivism reconciles Ehrlich's and Kelsen's considerations in a coherent theory of law.

⁸¹ Pound 1910

1910 decisively argued in favour of using the law as an 'instrument of social engineering'. He also believed that by expanding its codification activities, the state should put this instrument to more extensive use in the interest of giving social developments a proper legal framework. What dominated in this line of thought was a critique of the 'cumbersome' development of the law in common law systems, but it also included the notion that social development can be nudged in the right direction by 'smart' legal regulations that are sensitive to social processes.

Rather than drawing up an exhaustive list of their differences and similarities, it may be more useful to compare the fundamental differences between their theories. In so doing, I will take Brian Tamanaha's idea of the twofold conceptions of the gap problem as my starting point:

There are two distinct versions of the gap problem. The first version is the gap between 'law-in-the-books' and 'law-in-action'— the gap between the written law and actual the practices of lawyers and judges. This gap was a favourite subject of the Legal Realists [...]. The second version is the gap between the legal rules and what people in the community actually do. Studies of the latter gap went under the rubric of the 'inefficacy of law' or efficacy studies.⁸²

Though it is not expressly Ehrlich's position that Tamanaha contrasts here with the fundamental tenet of legal realism, in my view this is once again the locus of the basic difference between them. Ehrlich's approach identifies laypersons' use of the law and their opinions about the law (legal consciousness) as the essence of law – in other words the sources of living law – while the realist school and Pound, as its emblematic representative, do not move beyond an analysis of the contrast between the texts of the rules and their application in professional practice. As a result, the definitions of law obviously differ in Pound and Ehrlich. I have already reviewed Ehrlich's conception of the law. By contrast, Pound unequivocally identified law with state law, and thus the theoretical difficulties he encountered were considerably more minor in magnitude.⁸³ Based on the above, the contrast between living law and norms of decision is definitely not analogous to the paired concepts of law in books – law in action. Though both Pound and Ehrlich made vivid pronouncements drawing on the tension between living law and dead letters, it is important to distinguish between their views.

This is necessary because just as I will show in the context of the research on legal consciousness, legal knowledge and the use of law, the sociological investigation of the law relies on a concept of the law which is also open to social theory.⁸⁴ And despite all the criticisms and misinterpretations above, Ehrlich's social conception of the law meshes better with this desire than even Pound's own starting point based on legal realism. By contrast, approaches that identify law with state or official law provide a far less suitable basis for empirical research. They always stay within the same confines and are ill-equipped for viewing in parallel the normativity of the law and its factualness, also being unable to capture the Janus-faced nature of this relationship. This is the easier route to understanding the law, but it is certainly not the more useful one in terms of understanding how the law works.

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⁸² Tamanaha 2001: 131

⁸³ Nelken 2009b: 35

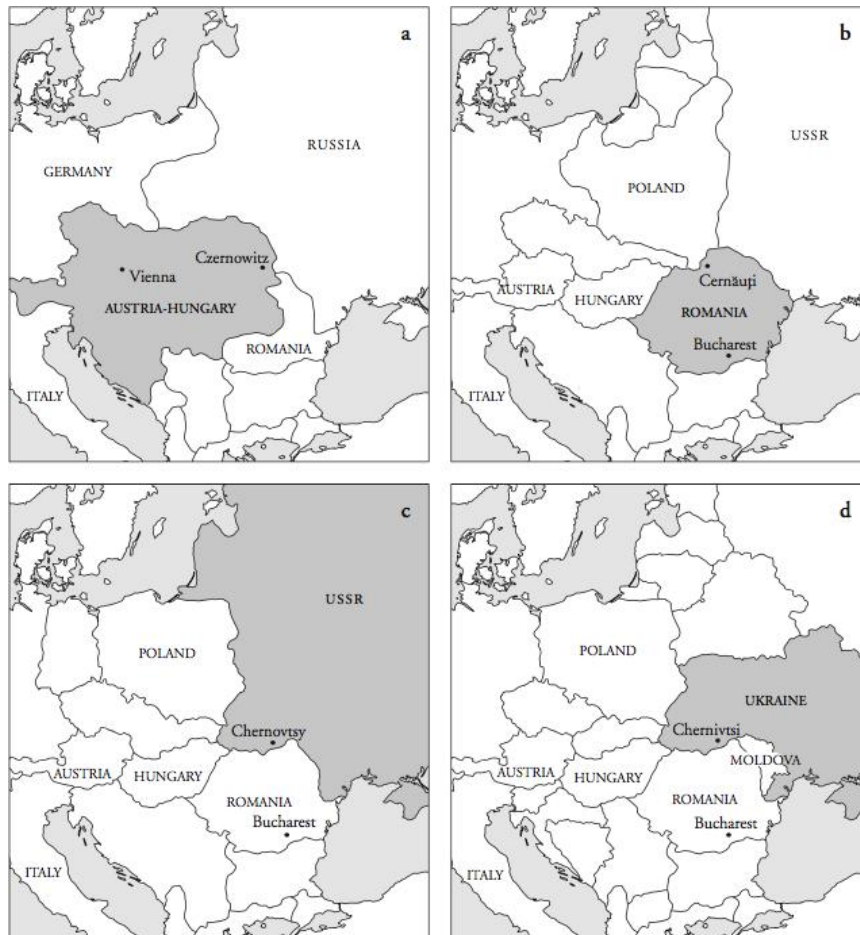
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V. Appendix

Appendix 1. *The History of the Bukovina and Czernowitz*



Map 1. From Czernowitz to Chernivtsi (Hirsch–Spitzer 2010: XXV)

(a) Czernowitz under the Austro-Hungarian Empire, 1774–1918; (b) Cernăuți in Romania, 1918–45; (c) Chernovtsy in the USSR, 1945–89; (d) Chernivtsi in the Ukraine, since 1989

Appendix 2. *Ehrlich's Major Publications*

Ehrlich, Eugen (1893): *Die stillschweigende Willenserklärung*. Berlin: Carl Heymanns Verlag

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