

ABOUT THE FOUNDERS OF LEGAL SOCIOLOGY AND THEIR IDEAS

MIRELA CRISTIANA NILĂ STRATONE*

Abstract

The main founders of the juridical sociology are considered to be Eugen Ehrlich, Max Weber, Theodor Geiger and Georges Gurvitch, The researches of juridical sociology from Romania are demonstrating the existence of a real tradition in this domain at a national standard. Some roumanian explores of formation jurists have practiced in the cognitive demarche a sociological abordation about the law, what have been fatal conduced to the fixing of the base of the juridical sociology in Romania.

Key words: *juridical sociology, alive law, normative life, social needs, the comprehensive and the rationality of the social actors*

Introduction

In one form or another, the initiators of legal sociology had in mind from the beginning the social needs.

Most jurists argue that the habit and the tradition can not constitute as sources of law. But the habit is formed by repeating the investigations to resolve a social need. Of course he, the habit, with time can join the tradition, that later to get custom. And not anyway, but by an evolutionary process. And if we talk about custom, we are in the area of sociological jurisprudence.

Therefore, starting from social need, it is imperative to analyze the relationship between social order imposed by judicial order, but also reverse legal order determined by social order, the latter being certainly the result of free human action that produces the so-called right living at Eugene Ehrlich.

Social determinism of the rules and legal rules confers the right a social character. This is expressed by the fact that legal norms are not aprioric to the social life of individuals or groups. They are even born from the contradictions that occur in the societal life.

The analytical capacity of sociology as a science inevitably leads to highlighting the deviant behavior compared with the conformist one. Through legal sociology, it has initially tried to capture the degree of internalisation of social norms and determining mechanisms of sanctioning through the dimensions of social control. In this sense, education and coordination of social agents in accordance with social needs, occupied an important place in their essential social role.

The ratio of law and morality sends us in the area of social order as a result of social morality of the time. Choosing by the social actor of a certain type of behavior is actually a result of its social need, coupled with the moral education at which it is situated.

Paper Content

The main founders of the juridical sociology are considered to be Eugen Ehrlich, Max Weber, Theodor Geiger and Georges Gurvitch.

Eugen Ehrlich¹ has been considered as being the founder of the juridical sociology. He considers the law as being a result of a proceeded norme from the individual and social activity of the social actors.

* Lecturer, PhD, "Nicolae Titulescu" University of Bucharest (mrl_cristiana@yahoo.com).

¹ Eugen Ehrlich - Austrian origin, was a professor at the University of Cernauti (Bukovina), where he organized and conduced a sociological seminar for the research of the living law of various ethnic groups, including the Romanian one. Praising the work of Ehrlich in this area, Dimitrie Gusti stated that: "Eugen Ehrlich occupied a place of honor in legal science as a lively and creative spirit, he was a devoted member of the Romanian Social Institute, and

In 1913 Eugen Ehrlich writes the book "*Grundlegung der Soziologie des Rechts*" which appears at Munchen and Leipzig. This work appears in the year 1936 in USA in english language with the title: "*Fundamentals Principles of Sociology of Law*").

"The whole development and evolution of the law doesn't exist neither in legislation nor in the sociology theory of the law or doctrines"².

In this meaning the author underlines the fact that the rules of the behavior transformed in law norms by technical-juridical instruments can be intimate and explicated by the *induction*: This is realized by the base of methods of sociological research and it starts from the observation, the description and the explanation of the individual and social behavior.

Increasing the societal role of the "alive law" Ehrlich has underlined the study on the difference between *the legal* and *positive law* and the "*alive law*". Thus it shows that the official legislation reaches only a part of the juridical order of the society, the biggest part of the law evolves and acts independent of the legal law and of the official order. This part of the law it is named "*the alive law*", creation of the social quarters, result of the interactions between persons.

In this situation the role of the juridical sociology could be that to research systematic in totality and in deepness the alive law.

The alive law take difference and completed form by:

- the contemplation of the positive law and juridical documents
- the direct observation of the normative life of the social quarters

This necessity to explore the alive law has appeared in the succeeding of the evident and official finding, respecting the disability of the official law to control and to regulate the social activity in its totality.

Therewith the author shows that "the juridical sociology must occupy primal with the investigation of the alive law and with the prominence of the role and the social services of the various customs usages and juridical sociology practices and nonjuridical of the social quarters which integrates the society"³.

Regarding to the normative order. Ehrlich have mentioned and explained the notion of "*social order pacifier*". This one is entifying and it works nearby the juridical one and official one of the state and is characterizing by:

- spontaneity
- non-contentious content
- underlain on the free organization
- adjustable by methods and instruments of communication

The importance of the study of the alive law has been assumed by others sociologists too, which have discovered in it the causes of the official law, idea which, all of a sudden with the one of the study of social effects of the official law, have remained to the researchers's base regarding to the study of the object of the juridical sociology.

Max Weber⁴ has denoted in the german sociology from the end of the XX century, by his contributions about the power, juridical sociology and the administrative one.

embraced with loyalty Romanian citizenship. "(Dimitrie Gusti, the individual, society and state in the constitution, in sociology militans, 1934, p. 105, Dan Banciu - Elements of legal sociology, Lumina Lex Publishing House, Bucharest, 2000, p. 32).

² *Ibidem*, p. 30.

³ *Ibidem*, p. 31.

⁴ Max Weber (1864-1921) - was awarded of the Faculty of Law in Berlin. He was a professor at Freiburg and Heidelberg. He lived a long time in Italy and the United States. He was appointed by a German armistice committee of Versailles and in the committee charged with drafting the Weimar Constitution. In 1918 he taught at the University of Vienna and the University of Monaco in 1919. (Sophia Smith - Legal Sociology, Lumina Lex Publishing House, Bucharest, 2001, p.33).

He analyzed insistently the reports between law and society. This thing began with the publication of his first books⁵ concerning to the socio-economic conditions of the prussian peasants, phenomenon which he studied under empiric form.

The results of that research have redounded to the promotion of some reformers ideas which were regarding the legislation.

The main directions to whom the cognitive demarche has straighten were:

- the social action
- the social relations
- the alive law

“The action is social in the extent that in the virtue of the subjective semnification keyed it from the persons who acts, and take adunt of the others behavior and as result it is orientated in that way”⁶.

He defines the sociology as being the science of the social action.

Regarding to the report between the law science and the law sociology, Weber consideres that:

- the law science sees about the correct expression of the normes under form of specific linguistic concepts being a prescriber science, because it express what it have to be;
- the law sociology sees about the study of the manner in which the norms are transpose in usage, with other words it is searching the conformity or nonconformity of the behavior to the norms, it's a descriptive science, because it shows what it is.

Max Weber has redounded to the pointing out of the juridical sociology in the following directions⁷:

1. *The comprehension and the rationality of the social actors*: starting from the human person as base unit, the author shows that this has permanently a comprehensive behavior and the sociology has the merit to furnish explanations regarding to the *reasons* of the type choice of behavior squared up to by person.

Among the reason of the choice of a certain departmental type, Weber has taken in disscution the *well-founded ones*, so the *rational ones*. Thus he tried a differentiation of the rationality in two types: *the symbolic rationality* (the correspondence of the aims with social values) and *the instrumental rationality* (the realization of the aims with the most efficient ways).

2. *Ideals types of authority*: analising the report between the juridical order and the administrative one. At Weber “the state and the administration compose that human partnership which is allocating the monopoly on the physis legitim constraint and which realize a domination report of the people, by people based on the legitim exertion instrument of the constraint”⁸.

For this authority under form of domination to manifest to the persons, appearance the necessity of the existence of some justifications. These can take an interior and exterior form:

a) - *the interior justifications* are recovering in:

- *the traditional authority* – what suppose the unconditional adhesion of the persons to the cutums, become legitim, usages customs, being the oldest form of authority, met to the sovereigns, monarches, pontiffs, etc;

- *the charismatic authority* – the holders of this type of authority interweave the physis qualities with the ethical ones, they are the politician leader, the militants bosses, who we find in the traditional societies and in the modern ones; in antiquity they were gods and herous, today they are the public persons from which is parttakeing mass-media;

⁵ *Wirtschaft und Gesellschaft - Economy and Society* (op.cit)
Rechtssoziologie - Sociology of Law (op.cit).

⁶ N. Popa, I. Mihailescu, M. Eremia - *Legal Sociology*, University Publishing House. Bucharest, 1997, p 26.

⁷ Dan Banciu - *Elements of Legal Sociology*, Lumina Lex Publishing House, Bucharest, 2000, p. 43.

⁸ *Ibidem*, p. 45.

- *the legal authority* - it is underling on the rational conformer of the social actors, convinced by the valability legality of the law state and in the same time the competence and the objective of the public and official authority.

b) - *the exterior justifications* are represented by the law and legislation⁹ agents diverse in space and time.

Weber consideres that the transformations and the revolutions occurred, in conjunction with the law and the representative institutions have fallowed the rationalizing and of the bureaucratic what is determining so order predictibilitation and stabil hierarchy of status at organizational level, and so dissary in some special situations.

An another aspect of the researches undertaken by Weber it referes to the relation: *customs-convention-law*. The custom appears here as attitude wich on recurrence is typifying. The type is maintaining by tradition, being transmited from the forerunners to the progeny by recurrence having to the base the imitation (imitation-custom). In this situation the custom becomes convention, at which the person accedes from his own. The passing from the convention to the cutum ot os made gradual and continued.

In this situation “we are in the presence of the specific law when the interest subjects can ask for the garanty of the observance of the conventional norme or even of the custom, of a coercitiv¹⁰ apparatus”.

An another subject squared up to by Weber in his studies makes reference to the *juridical occupations*. Thus, he sintetize the following ideal types¹¹ of law:

- *the materialistic and irrational law*, that is destitute of the report to a norme, but amenable only to the arbitrary choice of the one who judges; this law type has determinated the advent of a prime development stage of the law in which the base element is constituting the *law creation by the prophets*;

- *the materialistic and rational law* in which the decision it is based on “a sacred book or appealing to the ethic imperatives, to the politics saings”, it is the law type which has determinated the advent of the second development stage of the law and namely the *empiric production of this one, with the help of the anterior*, so a reference base appears;

- *the formal and irrational law* in which the magistrate in his adjudicational act it is based on irrational norms, but existed in religious books or belonging to the divine revelation; this law form is the one who has contoured the third development stage of the law by his assessment by the *theocratic power*, that is the period when the law acts as a divine power, what it have led to the forming of the theocratic state, too;

- *the formal and rational law* – “this exists when the lawgiver and the magistrate decide basing on anterior, relegating to the codificated norms and taking offence his decision, on the base of abstract concepts” ; here we meet with a law type, which it have determinated the advent of the fourth development stage, put across in the listing of the law in the sisthematic cadre, this being a result not of the prophet’s acts, neither effect of the anteriors of the magistrate practice or of the divine act, but purely, *materialization of the jurist’s acts*.

The Weber’s work is imposing, and the aspects squared up to are from far away the most burner subjects and alike problems, with which it has collated among the history the capitalist society.

In the study of the law sociology he analyzes punctilious all the law’s peculiaritys reported to the epoch, but specially the society’s culture of the membership.

⁹ *Ibidem*, p.47.

¹⁰ Popescu - Legal Sociology, Lumina Lex Publishing House, Bucharest, 2001, p. 34.

¹¹ *Ibidem*, p.35.

The contribution of Weber to the sociological theory in different European countries is imposing. More, in USA, weberian conceptions have led to the action's advent and of the symbolic relations, two forms of relations.

Theodor Geiger¹² (1891-1952), another representative of the German sociology have undertaken multiple researches succeeded with results driven in the representative works. Among these, we consider needful to present the following:

“Das uneheliche Kind und seine Mutter im Recht des neuen States” (“The legitim son and his mother in the right of the new state”) – 1920, it's his licence's work in the idea pursuant to whom beyond the law the born child out of marriage belonged to the maternal social medium, while the legitim one belonged to his paternal social medium. In these conditions the legitim kids were in arterial inferiority comparative with the legitim ones.

In 1939 Geiger has published a *sociology tenor in the Danish language*. Offering a definition to the social sciences, he was making the difference between sociology in a large meaning and the sociology in a limited meaning.

To mention is the fact that the sociology in limited meaning is referring to that which is named “the empiric analytic and general theory of the sociology”. One of its discipline is the special sociology, which at its turn is dividing in subdisciplines. One of this subdisciplines is the law sociology, too.

The law represents a namely type of social order and namely the imperative order, existed in second plan than real order. In this work the author presents the difference between the law sociology and the juridical science in the meaning that “the sociology is first interested of the real order, while the jurist is interested of the imperative order.

The sociology discourses the law as genre of social order, in general while the jurists take in consider only the order maintained by the state”¹³.

In 1946 appears in Sweden a work, *centred on the report between law and morality*. Thus, he shows that while in the primal society the law and the morality concurred, in modernism these are separated, in the meaning that each acts in different planes and automatic the morality has lost the attribute of social control instrument about the law.

The preliminary studies concerning to the law sociology appear in 1947 in Denmark and it's named *“Vorstudien zu einer Soziologie des Rechts”*.

In this studies are analyzed the aspects clung: social order and independence, behavior, norm as the law under form of social order, sanctions, systems, law's sources. It emerges that the analysis of the juridical sociology it is differenced from the one of the juridical science, by which she discovers and explains the facts and the social relations, which is constituting premises of the compulsoriness and of validity of the norms of the law's source, the passing from the spontaneous sanction to the organized one.

In this studies, too, Geiger discourses “ the reports of the law with the morality, the politic and the juridical awareness¹⁴” and with them the passing from the social organization to the juridical one,

¹² Theodor Geiger (1891-1952) was awarded the University of Würzburg. From 1918 is set at Berlin, where carried out an intense activity of study and research. In 1928, he was appointed professor at the Higher Technical School in Braunschweig. He took a stand against National Socialism. He was forced to emigrate to Denmark (1938), where obtained a chair. After the German invasion of Denmark is forced to flee to Switzerland. he sets in Stockholm and Uppsala, has lectures and conferences in Lund, too. After the war he returned to Denmark where he is a professor at the University of Aarhus. Between 1951-1952 he taught at the University of Toronto (Canada). He conducted research in empirical legal sociology and wrote theoretical works in this field. His license was a work of sociology that has sustained at the University of Würzburg in 1918 and included Geiger's research findings on 'illegitimate son and mother in law new state ". It was published in 1920 and regarded as one of the first books on the subject. (Sophia Smith - Legal Sociology, Lumina Lex Publishing House, Bucharest, 2001, p. 43).

¹³ *Ibidem*, p.45.

¹⁴ *Ibidem*, p.47.

this on the agency of the sanction, which appears here as a dynamic instrument of the cognitive demarche.

Concerning to the law's sources the author offers information about a namely successive order of those: commonness, juridical practice, legislation, juridical science.

An another subject discoursed by Geiger in his preliminary studies aims scarcely the juridical awareness order "and analyses his cognitive function, the reality of the juridical awareness, its role as a critic instance, the subject of the juridical awareness and positive juridical awareness"¹⁵.

On the other hand, Geiger has launched the theory pursuant to whom the general sociology, by the agency of the subjects amenable the research, represents an ideological criticism.

The work "*Arbeiten zur Sociologie*" ("Sociology study") has been published posthumous, at Berlin, in 1962. In this study, Theodor Geiger explains the difference between the *material juridical sociology* (is regarding the determinant character of the society to the law's address) and the *formal juridical sociology* (the law represents the cultural system which offers reference for the adjustment of the society's life).

The author suggests in this work "as subjects of research" socio-juridical, the actors which persuade the decision of those who are transposing in life the law, the social effects of some juridical institutions, thus like family, property, etc¹⁶.

Georges Gurvitch¹⁷ (1894-1965) has substantial redounded to the substantiation of the juridical sociology as science, by the realization of an definitely bond between sociology and the law science.

His works¹⁸ are constituting in present reference points for the explores of the juridical science domain and of the juridical science ones.

Georges Gurvitch has dignified the contrast between society and state. Thus he show that the state law doesn't constitute the only or the unique law source, and from here he made only a step, namely to show that the juridical order represents the result of the statal action and of the others independent organisms of state which are sources generator of law¹⁹.

The ideas on which have supported his researches have dressed the *form of the juridical pluralism of the normative facts and of social law*.

Regarding to the juridical pluralism, in Gurvitch's opinion this is basing on the theory of the normative facts differenced as followings:

- *relation facts*-facts which endorses the sociability, the relationship with other persons; these facts trains the personal values of the individual and they are in conjunction with the individual law.

- union and sociability facts by communion and interpenetration-facts which implies *transpersonal values* and they are in conjunction with the social law.

The individual law persuades the adjustment of the interpersonal relations, while the social one is manifesting at organization level or human community.

The social law is a integration law, communion and collaboration, manifested specially under two forms: the work's law and the international law.

Georges Gurvitch has defined the juridical sociology under the form "expression of some pluralistic concepts, being that part from the sociology of the human spirit which studies in its totality

¹⁵ *Ibidem*, p. 48.

¹⁶ *Ibidem*, p. 44.

¹⁷ Georges Gurvitch (1894-1965) was a native of Russia. In the period 1915-1920 was professor at Petrograd and then to Tomsk. He was one of the participants in the Russian Revolution of 1917, then emigrated to France. Here he worked as a professor at the University of Strasbourg, then in Paris at the Sorbonne. From France he went to U.S. in New York, where he was professor at the Faculty of Social Sciences.

¹⁸ *L'idée du droit social* (Paris, 1934), *L'expérience juridique et la philosophie pluraliste du droit* (Paris, 1935), *Eléments de sociologie juridique* (Paris, 1940), *Sociology of Law* (New/York, 1942), *Problèmes de sociologie du droit* (in *Traité de sociologie*, Paris 1960).

¹⁹ Dan Banciu - Elements of Legal Sociology, Lumina Lex Publishing House, Bucharest, 2000, p.52.

the social reality of the law and which take count of the variety almost infinite of the experiences of all the societies and all the platoons describing the concrete content of each type of experience and disclosing the law's reality which the schedules and the symbols are more hiding than expressing it²⁰. From here results that that juridical pluralism is a cement between law and social reality.

The juridical sociology in Gurvitch's opinion is dividing in three categories:

a) - *juridical microsociology or the microsociology* of the law which is dividing²¹ in:

- *the horizontal study* – about on the organized societies law which acts by sanctions and organized coercion, exteriors, but about on the unorganized societies law, which forces under spontaneous form and diffuses the collective life.

- *the vertical study* – about on the law's species which acts by the hierarchy's complexity of status existed in interdependence. With the specific social relations.

b) - *the differenced sociology of the law* – the functions which are executing some human collectivity is putting across in manifestations of the law it studies:

- *the juridical typology of the particular active platoons*, able to create organized supstructures(familial, territorial, professional, interes, platoons, etc);

- *the juridical typology* of the global societies which conduces to the constitution of the great law's system.

c) - *the genetic sociology of the law*, whom objects are constituting from:

-*the tendentious regularities* of any type of juridical system

-*the factors* which persuades those regularities of the change of the juridical system: economics, political, demogress, cultural, etc.

The juridical sociology has in Gurvitch's conception a theoretic and philosophical character. In this way it is distancing from that fundamental juridical sociology on the empiric research and although the author doesn't negate the respective research type, he is appreciating selective.

The contribution of Georges Gurvitch to the development of the juridical sociology consists in that, on a hand he has underlain a model for the systematic construction of the juridical sociology, and on the other hand, he offered in a realist mode an ensemble image of the domain and the specific of this science, a thing which conduced to the extending of the research area and to the thoroughgoing study of the study's object.

Conclusions

As a result of attempts to demonstrate the link between social life free of rules and marked by social needs and the rules of law, legal consciousness appears positive in the spotlight.

In its entirety legal order represents the reference system necessary to the regulation of social life. In this context, it is inevitable the contrast between society and state. While the state believes in a form more or less explicitly that state law is the only source of law and implicitly of the legal system, legal sociology demonstrates that legal order can not perform their goal, unless is established as a result of state action coupled action of other bodies, unstated, the latter being undoubtedly sources of law.

Through the connection between the living and the legal right, is justifying the need for legal size evolution of social life. The right can not be an immobile entity, because it is not a dogma: it provides understanding, explanation and especially is in constant change, according to the requirements of the social life. When a legal norm is no longer matching to the social need, it is necessary another. In the absence of this action, anomia appears inevitable, given the social movements.

The sociological research of the evolution of social and legal order is a essential condition of the regulation of societal life.

²⁰ *Ibidem*, p.54.

²¹ *Idem*.

References

- Giddens, *Sociologie*, Ed. Bic All, București, 2000.
- Boudon, R., *Tratat de sociologie*, Ed. Humanitas, București, 1997.
- Dahrendorf, R., *Essays in the theory of society*, Stanford University Press, Stanford, 1968.
- Dan Banciu – *Elemente de sociologie juridică*, Ed. Lumina Lex, București, 2000.
- E. Speranția, *Introducere în sociologie*, vol. I, București, Editura Casa Școalelor, 1944.
- E.M. Litwicky, *Visions of America: Public Holidays and American Culture*, University of Virginia, 1992.
- Ehrlich, E. ([1913] 2001). *Fundamental Principles of the Sociology of Law*. Transaction Publishers, New Brunswick.
- Georges Gurvitch, *Sociology of Law*, London: Routledge & Kegan Paul, 1947.
- James A. Beckford, *The Sociologi of Religion. 1945-1989*, in „SocialCompass”, nr. 37, 1990.
- N. Popa, I. Mihăilescu, M. Eremia – *Sociologie juridică*, Ed. Univ. București, 1997.
- Nilă Stratone Mirela C., *Sociologie juridică*, Ed. Paralela 45, Pitești, 2006.
- Sofia Popescu – *Sociologie juridică*, Ed. Lumina Lex, București, 2001.
- http://www.ohlj.ca/english/documents/6-47_3_Coutu_FINAL.pdf.
- http://mainelaw.maine.edu/academics/maine-law-review/pdf/vol19_1/vol19_me_1_rev_1.pdf.
- <http://plato.stanford.edu/entries/weber/>.
- <http://agso.uni-graz.at/lexikon/klassiker/geiger/17bio.htm>.
- http://books.google.ro/books?id=lwMmnstnHIC&pg=PR3&hl=ro&source=gbs_selected_pages&cad=3#v=onepage&q&f=false.
- <http://www.ruhr-uni-bochum.de/rsozlog/daten/pdf/Roehl%20-Theodor%20Geiger,%20Bemerkungen%20zur%20Soziologie%20des%20Denkens.pdf>.