

Book Review

LIVING LAW: RECONSIDERING EUGEN EHRLICH, edited by Marc Hertogh¹

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EUGEN EHRLICH (1862-1922) IS A CLASSIC FIGURE of legal sociology and one of the most important theoreticians of legal pluralism to date. Born in Czernowitz in what was then the province of Bukovina in Austria-Hungary (now Chernivtsi in Ukraine), Ehrlich was trained as a jurist and legal historian, specializing in Roman law. He later became the rector of the German-speaking Franz-Josef University of Czernowitz. Alongside Hermann Kantorowicz, he was one of the founders of the German legal realist “free-law movement” (*Freirechtsbewegung*), which influenced, among others, its American counterparts: sociological jurisprudence and legal realism. However, Ehrlich’s most outstanding and lasting achievement was in the field of legal sociology, with his *opus magnum* called the *Fundamental Principles of the Sociology of Law* (*Grundlegung der Soziologie des Rechts*).³ Ehrlich was of Jewish descent and therefore was forced to resign from his post at Czernowitz after the First World War because of rising nationalist and anti-Semitic sentiments. He died in Vienna in 1922.

Although a significant number of articles have been published in English about Ehrlich’s relevance for legal sociology, there has not been an English book dedicated in its entirety to this important scholar until now. The publication of the collective work *Living Law: Reconsidering Eugen Ehrlich (Living Law)*, which is based on an international workshop held in May 2006 at the Oñati Institute for the Sociology of Law (in the Spanish Basque Country), is, indeed, most

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1. (Oxford: Oñati International Series in Law and Society, Hart Publishing, 2009) 280 pages [Hertogh, *Living Law*].
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 3. (Munich: Duncker & Humblot, 1913). For the English translation, see Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. by Walter L. Moll (Cambridge, MA: Harvard University Press, 1936) (with an introduction by Roscoe Pound).

welcome. The book, without a doubt, will be of great interest to all readers involved in legal sociology, legal anthropology, and, more broadly, in “law and society” scholarship. The contributors to this collection of essays are all highly learned and talented scholars, including well-known academics such as Roger Cotterell, David Nelken, and Franz and Keebet von Benda-Beckmann. In addition to information about Ehrlich’s life, historical and socio-cultural background, and scholarly trajectory, the book also provides an in-depth analysis of Ehrlich’s views about legal sociology, empirical research, and the shortcomings of legal dogmatics, which, at the time, were overly influenced by the “jurisprudence of concepts” (“*Begriffsjurisprudenz*”).⁴ Moreover, in doing justice to the highly sophisticated views of Ehrlich in the field of legal sociology, most contributors give their own assessment of today’s relevance of the *Fundamental Principles of the Sociology of Law* for contemporary socio-legal studies.

Living Law is divided into four parts that follow Hertogh’s introduction and general overview.⁵ In his introduction, Hertogh stresses both the strengths (e.g., Ehrlich’s study, backed by empirical material, of the ineffectiveness of State law) and the weaknesses (e.g., the vagueness of his definition of law with regard to other rules of conduct) of Ehrlich’s work.⁶ The first part of the book looks at the life and work of Ehrlich and the socio-cultural context behind his academic achievements. In particular, Monica Eppinger⁷ draws an interesting parallel between *fin de siècle* Austria as a fragmented state, and Ehrlich’s own legal pluralism. The second part of the book analyzes some of the main features of the *Fundamental Principles of the Sociology of Law*, such as the reversal of what are central and peripheral forms of law according to mainstream legal theory,⁸ and Ehrlich’s views on the relationship between sociology and jurisprudence.⁹

Of the other parts of the book, the third discusses the topic of “Ehrlich and his Contemporaries,” and, in particular, the controversy with Hans Kelsen—a

4. This term was coined by Rudolf von Jhering in a pejorative sense, but nevertheless aptly describes German jurisprudence at the time.

5. Marc Hertogh, “From ‘Men of Files’ to ‘Men of the Senses’: A Brief Characterization of Eugen Ehrlich’s Sociology of Law” in Hertogh, *Living Law*, *supra* note 1, 1.

6. *Ibid.* For a discussion of this point, see topic 1, below.

7. Monica Eppinger, “Governing in the Vernacular: Eugen Ehrlich and Late Habsburg Ethnography” in Hertogh, *Living Law*, *supra* note 1, 21.

8. Roger Cotterell, “Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies” in Hertogh, *Living Law*, *ibid.*, 75.

9. *Ibid.*

debate that, according to most observers, was lost by Ehrlich.¹⁰ This part also contrasts Ehrlich's concept of "living law" (*lebendes Recht*) with Roscoe Pound's notion of the "law in action."¹¹ The fourth part of the book examines Ehrlich's relevance for contemporary socio-legal studies. In this regard, Jeremy Webber¹² criticizes the idealized view Ehrlich had of "societal law" when compared to "state law." Klaus Ziegert¹³ describes a possible extension of Ehrlich's living law argument in understanding the world-society that is based upon a global society of non-governmental associations. Lastly, David Nelken¹⁴ focuses his attention on what remains of Ehrlich's sociological theory today. If we look at what Ehrlich actually meant, we might certainly find his understanding of legal pluralism of great importance. However, the relevance of Ehrlich's ideas for contemporary socio-legal studies goes beyond legal pluralism. Some of his influence may also be a result of how scholars have (constructively) misread or reinterpreted Ehrlich's work. One example, according to Nelken, is Gunther Teubner's treatment of Ehrlich's ideas in advancing his arguments about legal autopoiesis.

As the contributors to *Living Law* would acknowledge, there are many paths that could have been followed when dealing with the complex thinking of such an important and influential scholar. For example, under the topic "Ehrlich and his contemporaries," Ehrlich's relationship with Hermann Kantorowicz—a co-founder of the "Free School of Law" and a strong proponent of legal sociology who had much in common with Ehrlich—might have been explored. Ehrlich's influence on the outstanding labour law theoretician and legal sociologist, Hugo Sinzheimer, might have also been considered,¹⁵ as well as his impact on the work of Georges Gurvitch, a key figure in the historical development of legal pluralism.¹⁶ One notable scholar absent from the analysis of the authors is Max

10. Bart van Klink, "Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen" in Hertogh, *Living Law*, *supra* note 1, 127.

11. Salif Namiga, "Pounding on Ehrlich. Again?" in Hertogh, *Living Law*, *ibid.*, 157.

12. Jeremy Webber, "Naturalism and Agency in the Living Law" in Hertogh, *Living Law*, *ibid.*, 201.

13. Klaus Ziegert, "World Society, Nation State and the Living Law in the Twenty First Century" in Hertogh, *Living Law*, *ibid.*, 223.

14. David Nelken, "Ehrlich's Legacies: Back to the Future in the Sociology of Law?" in Hertogh, *Living Law*, *ibid.*, 237.

15. See Hugo Sinzheimer, *Jüdische Klassiker der deutschen Rechtswissenschaft* (Frankfurt: Klosterman, 1953) at 187-206.

16. See Georges Gurvitch, *Sociology of Law* (London: Routledge & Kegan Paul, 1947).

Weber, whose importance for contemporary sociology of law cannot be underestimated. As previously noted, the *Fundamental Principles of the Sociology of Law* was originally published in 1913, the same year, incidentally, that Max Weber finished his *Sociology of Law* as part of his general treatise, *Economy and Society* (“*Wirtschaft und Gesellschaft*”), which was published as a whole in 1921. Weber is often portrayed as completely hostile to Ehrlich’s ideas, but that is a superficial view that reveals only part of the truth: as a matter of fact, Weber accepted Ehrlich’s distinction between state law and non-state law, combining it with his own dichotomy between empirical and normative legal orders. Weber also refers, at times with approval, to Ehrlich’s account of the history of Roman law. Basically, however, Weber rejects what appeared to him as a fundamental confusion by Ehrlich between “is” (“*sein*”) and “ought” (“*sollen*”).¹⁷ As will be discussed later, Kelsen’s critique, aimed at Ehrlich’s understanding of the relationship between jurisprudence and legal sociology, was directly influenced by Weber’s writings on this topic.

This discussion should in no way be understood as criticism of the work of Marc Hertogh and his colleagues. Quite to the contrary, many paths can be taken in exploring Ehrlich’s scholarship, and very rich avenues of enquiry are indeed followed in *Living Law*. I have identified four controversial topics of critical importance from an epistemological and methodological standpoint:

1. *The definition of law.* As is often emphasized by the authors,¹⁸ Ehrlich’s definition of “law” remains one of the weakest and less convincing parts of his work. He resorts to the concept of *opinio necessitatis* (of use in analysing customary law) to draw a line between legal norms and other social rules. Accordingly, it is the intensity of the negative feelings about behaviour that offends members of a community—especially a feeling of indignation, which allows one to differentiate law from other kinds of social norms. In so doing, Ehrlich explicitly rejects any attempt to define law in relation to the presence of sanctions or constraints on behaviour. In a complex society, any such psychological understanding of law appears much too vague and of little practical use for empirical research. As a matter of fact, Ehrlich points to one dimension of legal phenomena which other legal sociologists would call law’s “legitimacy.” From a *sociological* viewpoint, Kelsen’s opposite insistence upon the presence of sanctions as the defining

17. See topic 3, below.

18. See *e.g.* Hertogh, *Living Law*, *supra* note 1 at 3, 90, 99.

characteristic of law is also too narrow. In my view, sound sociological theory should utilize both concepts of recognition *and* constraint.

2. *State and societal law.* Although blurred by definitional vagueness, Ehrlich's distinction between state and societal law still holds great relevance for contemporary legal sociology. Expanding upon the institutionalist approach initiated by Otto Gierke, Ehrlich shows that the legal sphere cannot be restricted to state law only. For legal history conceived as a social science, that should be self-evident. State monopoly of the creation of legal norms appeared only in modern times, as a precept of political theory and natural law doctrines in the wake of the absolutist state. Despite being presented as obvious by legal positivism, this monopoly was never fully realised, and it appears rather shaky in an era of globalization. In this regard, it is quite interesting to note that Max Weber, who is sometimes mistakenly associated with legal positivism, made use of the same terms as Ehrlich when contrasting state law (*staatliches Rechts*) to non-state law (*außerstaatliches Recht*).¹⁹ Without a doubt, Ehrlich's scholarship was fundamental to stimulating legal pluralism theory.

3. *A confusion of "is" and "ought"?* In his thorough, but harsh, critique of Ehrlich, Hans Kelsen uses the Neo-Kantian dichotomy of "*sein*" and "*sollen*" to disqualify Ehrlich's attempts at founding a pluralistic sociology of law on new grounds. Kelsen's article "Eine Grundlegung der Rechtssoziologie"²⁰ first appeared in 1915 in the *Archiv für Sozialwissenschaft und Sozialpolitik*, a journal headed by Werner Sombart, Max Weber, and Edgar Jaffé. Although he does not explicitly refer to Weber, it is apparent that Kelsen relies heavily on Weber's previous work, especially his "Critique of Stammler," first published in 1907.²¹ In this piece, Weber contrasted the normative science of law or jurisprudence (an analysis of what "ought to be") to the social science of law (an analysis of what "is"). According to Kelsen, Ehrlich confuses the two levels by disqualifying legal dogmatics as "state law" ("*Juristenrecht*") and celebrating, to the contrary, "societal law," or as he describes it, the "inner order of associations" ("*Verbände*"). From Kelsen's viewpoint, this approach is an unacceptable intermingling of

19. Max Weber, *Wirtschaft und Gesellschaft*, 5th ed. (Tübingen: J.C.B. Mohr, 1982). See also Ehrlich, *supra* note 3.

20. Hans Kelsen, "Eine Grundlegung der Rechtssoziologie" in Hans Kelsen & Eugen Ehrlich, *Rechtssoziologie und Rechtswissenschaft: Eine Kontroverse (1915/1917)* (Baden-Baden: Nomos Verlagsgesellschaft, 2003) 3.

21. Max Weber, *Critique of Stammler*, trans. by G. Oakes (Glenco: The Free Press, 1977).

“*sein*” and “*sollen*”: norms of jurisprudence are assimilated to rules of conduct, and, from there, are reduced to “norms of decision,” which interest mainly judges and state officials. At the same time, “living law”—which is, for the most part, societal law—is said to be based upon “legal norms,” as such.²² Ehrlich does not realize, Kelsen goes on, that the construction of concepts, the methodology, and the object itself of (normative) legal science remain, for a sound theory of knowledge, totally different from those of a (causal) social science of law. So far so good, at least when one assumes a Weberian perspective. But Kelsen himself blurs the distinction between “*sein*” and “*sollen*” when he affirms his basic thesis about the identity of the law and the state.²³ As a result, the normative standpoint prevails; Kelsen rejects any distinction between state and non-state law, and defends the purely normative meaning of the concept of the “state.” No space is left for a truly autonomous sociology of law.

4. *Domination and legal pluralism.* As Jeremy Webber remarks,²⁴ Ehrlich’s work embodies an idealized view of the “living law” and non-state legal orders, which echoes his rejection of constraint and conflict when defining “law.” Societal law is based upon cooperation and voluntary adherence, whereas state law is grounded in “domination” (“*Herrschaft*”) and constraint. Such a dichotomy between two basic kinds of law was later radicalized by Georges Gurvitch. But there is no reason for a sociological theory of legal pluralism to adhere to such an idealized view of social law, which amounts to a subordination of empirical research to built-in value judgements. The amount of cooperation or domination characterizing social interaction remains an empirical question. Moreover, one should expect to find an apparatus of constraint ensuring the inner order of each legal sphere, whether or not it is part of the “state.”

What remains, then, of Ehrlich’s efforts? Indeed, quite a lot in addition to his contributions to legal pluralism²⁵ and the understanding of the fundamental distinction between state and non-state law. I would like to stress the following: the concept of “living law,” a notion far more encompassing than Pound’s “law in action”;²⁶ an endeavour, perhaps challenged by Ehrlich’s commitment to the “free law movement,” to promote legal sociology as aiming at descriptive and

22. See van Klink, *supra* note 10 at 130.

23. But see *ibid.* at 148.

24. *Supra* note 12 at 202.

25. See Cotterell, *supra* note 8.

26. See Nelken, *supra* note 14 at 260; Nimaga, *supra* note 11 at 166ff.

analytical knowledge, not serving practical ends *per se*;²⁷ an insistence, from an institutionalist perspective, upon the sociolegal relevance of associations in, for example, the field of labour law;²⁸ a critical stance towards legal formalism which portrays the legal sphere in a sociologically irrelevant way;²⁹ a strong and specialized linkage with legal history, as Ehrlich's sociology of law is, to some extent, a historical science; the necessity of skilled empirical research, taking into account the social facts of law (*Rechtsstatsachen*); and, not to be overlooked, a detailed analysis of state law and "*Juristenrecht*."³⁰

As I hope to have shown, any reader interested in legal sociology and legal pluralism should find Hertogh's collective work, *Living Law: Reconsidering Eugen Ehrlich*, full of relevant information about Ehrlich, and also highly stimulating. That such a work has been published is proof that Ehrlich's thought is alive and well today. That is excellent news for the future of the sociology of law.

27. See Hertogh, *Living Law*, *supra* note 1 at 5ff.

28. See Ehrlich, *supra* note 3 at 19.

29. See Eppinger, *supra* note 7 at 39ff.

30. See Cotterell, *supra* note 8 at 87.