E. EHRLICH

FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW

EUGEN EHRLICH

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Dedicated To

PAUL FRÉDÉRIC GIRARD

AS A TOKEN OF FRIENDSHIP AND ESTEEM

TRANSLATOR'S PREFACE

THE present volume is a translation of *Grundlegung der Soziologie des Rechts* by Eugen Ehrlich; this is one of the most important works of the trend in jurisprudence that has been called the Sociological School. During the course of the nineteenth century a succession of schools of jurisprudence appeared in Europe, each of which arose by way of reaction from the teachings of its predecessor, which it superseded for the time being. Each school laid especial emphasis on some particular basic point of doctrine or method. Perhaps it over-emphasized its particular point of view, and thereby made a reaction from this over-emphasis inevitable. Thus a new school would arise with a new doctrine or with a new method, which it in turn over-emphasized, thus setting the stage for the appearance of another school of juristic thought. Each school gave way to its successor. But the new school by no means destroyed the work its predecessor had done. Each school has made a contribution of more or less abiding value to the scientific study of law, and so there has grown up a vast store of permanent juristic material, of generally accepted principles and points of view. Let it be remembered that a school of jurisprudence is not identical with the method which it chiefly employs. Neither the Historical School of Savigny and Puchta, for example, nor the Historical School of Sir Henry Maine is identical with the historical method. The school of Savigny has passed away, but the historical method has remained. All that has passed away is the one-sided emphasis on certain self-imposed limitations and principles. Modern writers have availed themselves of the abiding truths and principles found by these various schools of juristic thinking, and while it is true that each writer has selected his own particular method of approach and his own particular point of departure under the influence of the particular school by the teachings of which his own thinking is chiefly dominated, it is also true that juristic writers have come much closer together in their forms and modes of thinking than hereto-

fore, and many have found a common ground in the principle that the basic thing in the formulation of legal theory is not the individual as such, with his individual will, purposes and aims, but society as a whole; not the various legal precepts as such, but the social order, i.e. the just (*richtig*) ordering of modern society through law; not the old abstract individualist legal justice, but the new "social justice." One of the chief among recent Continental exponents of this new trend in jurisprudence is Eugen Ehrlich.

Ehrlich was born at Czernowitz in Bukowina [1] in 1862. After he had taken his doctor's degree in Vienna, he, according to the established routine of German universities, became a "*Privatdozent*," or docent, of law at Vienna. In 1897 he was called to the university at Czernowitz as professor of Roman law. At this university he did his life's work. And an extremely busy, useful, and fruitful life it has been, as is attested by the long series of books and treatises which he published, a list of which is appended below.[2] He died shortly after the close of the war.

[1] The duchy of Bukowina at that time was a part of the Austro-Hungarian monarchy. In the division of the spoils of war in 1919 it was handed over to Roumania.

[2] 1. Die stillschweigende Willenserklärung (1893).
2. Das zwingende und nichtzwingende Recht im bürgerlichen Gesetzbuch. In Otto Fischer's Abhandlungen zum Privatrecht und Civilprozess (1899).
3. Beiträge zur Theorie der Rechtsquellen (1902).
4. Freie Rechtsfindung und freie Rechtswissenschaft (1903). (Translated in part in volume IX of the Modern Legal Philosophy Series.)
5. Die Anfänge des *testamentum per aes et libram*. Reprint from the Zeitschrift für vergleichende Rechtswissenschaft (1903).
6. Les tendences actuelles du droit international privé. Traduit par Robert Caillemer (Deutsche Rundschau, 1906).
7. Soziologie und Jurisprudenz (1906).
8. Anton Menger, Reprint from Süddeutsche Monatshefte (September 1906).
9. Die Tatsachen des Gewohnheitsrechts. Inaugurationsrede (1907).
10. Zur Frage der juristischen Person (1907).
11. Die Rechtsfähigkeit, in Kobler's Das Recht (1909).
12. Gutachten über die Frage: Was kann geschehen, um bei der Ausbildung (vor oder nach Abschluss des Universitätsstudiums) das Verständnis des Juristen für psychologische, wirtschaftliche und soziologische Fragen in erhöhtem Masse zu fördern?
In Verhandlungen des 31 ten Deutschen Juristentags (Zweiter Band) (1912).
13. Die Erforschung des lebenden Rechts, in Schmoller's Jahrbuch für Gesetzgebung XXXV, 129 (1911).
14. Das lebende Recht der Völker der Bukowina. Fragebogen für das Seminar für lebendes Recht mit Einleitung (1913).

In his *Grundlegung der Soziologie des Rechts*, Ehrlich has shown that the phenomena of legal life arise in society, and in turn exercise a profound influence upon society. In his *Die juristische Logik*, he has discussed and rejected the idea that predominated among jurists of his day that every judicial decision must be derived by a purely logical process from established legal premises, the provisions of a code or of statutes or of juristic or judge-made law. He has set forth the social interrelations from which this idea has arisen, and has shown the social consequences of the idea. To this extent this work supplements the *Grundlegung der Soziologie des Rechts*.

These two books may be called a summary of Ehrlich's views and teachings; for in them he has discussed in a connected fashion the fundamental ideas of all his works. In view of Ehrlich's article, "The Sociology of Law," in 36 Harvard Law Review 130, it would be carrying coals to Newcastle to give a résumé of these two books here; for in this article Ehrlich has given a concise statement of their contents in his own inimitable manner. I shall quote two paragraphs from his article because they contain a clear and succinct statement of what is, in his view, the nature of law. He says on page 131:

> Those who proclaim a multiplicity of Laws understand by "Law" nothing other than Legal Provisions, and these are, at least today, different in every state. On the other hand, those who emphasize the common element in the midst of this variety are centering their attention not on Legal Provisions but on the Social Order, and this is among civilized states and peoples similar in its main outlines. In fact many of its features they possess in common even with the uncivilized and the half-civilized.
>
> The Social Order rests on the fundamental social institutions: marriage, family, possession, contract, succession. A social institution is, however, not a physical, tangible thing like a table or a wardrobe. It is, nevertheless, perceptible to the senses in that persons who stand in social relations to each

15. Grundlegung der Soziologie des Rechts (1913).
16. Montesquieu and Sociological Jurisprudence. 29 H. L. R. 582 (1916).
17. Die juristische Logik. Reprinted from volume 115, numbers 2 and 3 of the Archiv für die Civilistische Praxis (1918).
18. The Sociology of Law. 36 H. L. R. 128 (1922). Translated by Nathan Isaacs.
19. National Problems in Austria in the Central Organization for a Durable Peace.

other act in their dealings according to established norms. We know how husband and wife, or members of a family, conduct themselves toward each other; we know that possession must be respected, contracts performed, that property after the death of its possessor must pass to his relatives or those persons mentioned in the last will, and we behave accordingly. If we travel in a strange country, of course we encounter some deviations from the system we are accustomed to and become involved in difficulties as a result, but soon we become sufficiently instructed through what we see and hear around us to manage to avoid collisions, even without acquiring a knowledge of the provisions of the law. A Legal Provision is an instruction framed in words addressed to courts as to how to decide legal cases (*Entscheidungsnorm*) or a similar instruction addressed to administrative officials as to how to deal with particular cases (*Verwaltungsnorm*). The modern practical jurist understands by the word "Law" generally only Legal Provisions because that is the part of Law which interests him primarily in his everyday practice.

In the Proceedings of the Fourteenth Annual Meeting of the Association of American Law Schools (1914), Professor William Herbert Page has stated and discussed Ehrlich's aims and methods, chiefly on the basis of the last two chapters of the *Grundlegung der Soziologie des Rechts*, the article in Schmoller's *Jahrbuch* entitled "*Die Erforschung des lebenden Rechts*," and the pamphlet *Das lebende Recht der Völker der Bukowina*, together with the questionnaire *Fragebogen für lebendes Recht mit Einleitung*.

A glance at the table of contents of the present volume will suffice to give the reader an idea of the way in which Ehrlich has developed and presented his ideas.

Under twenty heads, which are practically independent discussions, he treats of a number of subjects. All of these discussions, however, are intimately connected and related, and emphasize, iterate, and reiterate his basic idea that law is not a series of legal propositions but the Social Order, which is practically the same among all civilized peoples since the main institutions and facts of human society are practically identical everywhere. One of the most valuable chapters, perhaps the most important, is the chapter on the theory of customary law, in which he chiefly sets forth the rôle of non-litigious custom in the development of law. This chapter alone may be called a significant contribution of abiding value for all study of the development of law. In addition he devotes a chapter, the sixteenth, to the law-making function of the state, which, in view of the popular over-estimation among

lawyers and laymen of state legislation, is of invaluable importance inasmuch as it points out the limitations upon effective law-making by the state. For the literature on the general question of making legal precepts effective in action see Pound, Outlines of Lectures on Jurisprudence, Fourth Edition, page 17, section 3.

In Chapters XX and XXI, he sets forth his methods of studying the *living law*, as he calls it, i.e. the law that has actually become a rule of conduct, which he distinguishes from the law that is applied by the courts. These two chapters may be called the coping-stone of his whole work. They have been a fruitful source of studies and surveys of many kinds, particularly in the United States.

Like all sociological jurists on the Continent of Europe, Ehrlich is an adherent of the free-finding-of-law school, and perhaps some of his best work has been done in this field. In one of his earliest efforts, "*Über Lücken im Recht*" (Gaps in the Law), published in the *Juristische Blätter* (1888), he expressed his views briefly and haltingly. In his *Freie Rechtsfindung und freie Rechtswissenschaft*, he stated his views more fully and with a more elaborate argumentation. In the twelfth chapter of the present volume, in which he discusses juristic science in England, he expresses the view, which he had set forth on the first page of his *Freie Rechtsfindung und freie Rechtswissenschaft*, that the English method of applying law is practically a free finding of law.[1]

[1] As to the free finding of law in America and England, see especially Pound, Roscoe, The Enforcement of Law, 20 Green Bag 401 (1908), and The Scope and Purpose of Sociological Jurisprudence, 25 Harvard Law Review at page 515. See also Pound, Roscoe, Courts and Legislation, 7 American Political Science Review 361–383, Science of Legal Method (Modern Legal Philosophy Series, vol. IX), 202–228; Science of Legal Method, chaps. 1–5; Wigmore, Problems of Law, 65–101.

See also Brown, Jethro, Administration of Law in England, 1906–1923; Drake, Joseph, The Sociological Interpretation of Law, 16 Michigan Law Review 599.

For an analysis of the judicial function as a whole, see Pound, Roscoe, The Theory of Judicial Decision, 36 Harvard Law Review 641, 802, 940. For the literature on the whole question, see Pound, Roscoe, Outlines of Lectures on Jurisprudence, chap. XIX.

See also Goodhart, Arthur L., Essays in Jurisprudence and the Common Law, Essay I; Goodhart, Arthur L., Determining the Ratio Decidendi of a Case, 40 Yale Law Journal 161; Pound, Roscoe, The Call for a Realist Jurisprudence, 44 Harvard

In practically every chapter of the book he emphasizes the truth, which he has set forth quite convincingly in *Die juristische Logik*, that even today when a new situation is to be decided upon, no less than in the very beginnings of the administration of justice through appointed tribunals, judicial decisions may be derived from the facts of the law independently of received legal materials.

It has been the aim of the translator to present a faithful rendering of Ehrlich's thought in English. He has not attempted to reproduce Ehrlich's incursions into familiar, homely, or archaic speech, nor has he attempted to achieve literary elegance. Ehrlich's style is simple and direct, and his sentences are somewhat loosely strung together. There are no involved sentences, no turgid periods, no striving for rhetorical effect. When he does rise into the higher ranges of language, it is because the thought is fraught with emotion. All of this makes for clearness, directness, and simplicity. And the translator has attempted to hew as closely to the line as possible. At times faithful adherence to the form in which Ehrlich has clothed his thoughts may seem somewhat pedantic, particularly the reproduction of his persistent use of asyndetons, whether the series be one of two or more words, phrases, or clauses. The translator, however, believes that Ehrlich intentionally used this form of expression in conscious imitation of the Roman sources, and for this reason has thought it proper to reproduce it in the translation. By adhering as closely as possible to Ehrlich's manner, the translator hopes that he has succeeded in avoiding that gravest sin of translators, the sin of stating either more or less than the original. Of course it may be said that all translation is an interpretation, and in a measure this is true: the author's thought must pass through the alembic of the translator's mind. But there are translations and translations. The translator hopes that he has been able to present Ehrlich's thought without any admixture of his own thoughts and in a way that makes the same impression upon the American

Law Review 697; Llewellyn, Karl N., Some Realism about Realism, 44 Harvard Law Review 1222; Pound, Roscoe, The Ideal Element in American Judicial Decision, 45 Harvard Law Review 136; Oliphant, Herman, A Return to Stare Decisis, Proceedings of the Twenty-fifth Annual Meeting of the Association of American Law Schools (1927).

reader that Ehrlich's words make upon the reader of the original German.

As to terminology, the translator has always been on the alert to avoid doing violence to the author's thought through the use of a convenient common law term which in a general way conveys the same idea as the civil law term that was used by the author, but which has a more or less divergent connotation. He has attempted to use the terminology that has been established by English and American writers on Roman law and civil law subjects and by translators of Roman law and civil law codes and juristic writings, as well as by English and American writers on the science of law. In the translation of Chapters XX and XXI he has freely availed himself of the work of Professor Page referred to above.

The translator would express his deep indebtedness to Dean Roscoe Pound of the Harvard Law School for encouragement, advice, and information. And he would thank his friend Dr. Anton Chroust for an occasional bit of valuable information as to the meaning of terms of the ancient Germanic law and of the older German law.

W. L. M.

HARVARD LAW SCHOOL
September 1, 1936.

FOREWORD

It is often said that a book must be written in a manner that permits of summing up its content in a single sentence. If the present volume were to be subjected to this test, the sentence might be the following: At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. This sentence, perhaps, contains the substance of every attempt to state the fundamental principles of the sociology of law.

The Author

Paris, on Christmas Day, 1912.

ANALYSIS OF CHAPTERS

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