

THE CRISIS OF MODERN JURISPRUDENCE

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The twentieth century has witnessed many events which would have been regarded some fifty years ago as entirely outside the sphere of possibility. Educated people of the Victorian era used to look forward with complacency to a steady progress of the world towards freedom and peace: their sons have seen the whole fabric of political relations overturned and have fought for bare existence in the most terrible war in history. The progress of science and education seemed to ensure a higher level of humanitarian civilization all round: our daily reading nowadays is supplied by tales of massacre, torture, reckless riots, and class hatred. By the side of all these catastrophes the disputes of philosophers and jurists may seem very faint and dull, and yet the tremendous changes in the outlook of the world are reflected in them in a most characteristic way and give a clue to the fateful revolutions of European society.

In the domain of jurisprudence the past thirty years have been marked by ominous unrest. Instead of working out problems of systematization, construction and application, leading jurists have been querying and contesting the most fundamental doctrines of the theory of law. Stammler in Germany,¹ Saleilles and Charmont in France² have laid stress on the contrast between positive law and *right* law, the latter being conceived as a modernised law of nature sitting in judgment over the injustice and conventionalism of the rules imposed by the courts. Duguit maintained that it is idle to speak of the State as the subject of rights and that altogether there is no such thing as rights in distinction from organized social functions and services. American teachers of law³ insisted on the necessity of establishing the closest connection between jurisprudence and sociology. Continental lawyers like Gén⁴ and Bülow⁵ traced the barrenness of modern judicial practice to the slavish respect for forms and logical deductions.

¹ Stammler, *Die Lehre von dem richtigen Rechte* (1902-07) 2 vols.

² Saleilles, *Fondement et développement du droit* (1891) 22 *Revue internationale de l'enseignement*, 39; Charmont, *La renaissance du droit naturel* (1910).

³ Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (1911) 24 *HARV. L. REV.*, 591 (1911) 25 *ibid.*, 140 (1912) 25 *ibid.*, 489; Wigmore, *Nova Methodus Discendae Docendaeque Jurisprudentiae* (1917) 30 *ibid.*, 812.

⁴ Gén, *Méthod d'interprétation du droit* (1900).

⁵ Bülow, *Gesetz und Richteramt*.

and demanded a free interpretation and application of juridical rules by judges attentive to the varied expressions of public opinions and public needs. I am only mentioning a few examples among many but I should like to illustrate the aspirations and claims of this reform movement by considering somewhat more closely one new work of that kind, Ehrlich's *Foundations of a Sociology of Law*.⁶

Professor Ehrlich's book is mainly devoted to the development of an idea which, although perfectly justified by the facts, is very seldom recognized by legal theorists, namely the view that the law applied by the courts is entirely insufficient to explain the jural relations current in social intercourse. The law of the courts is a complex of rules meant to guide the judges in their decisions. But a trial in court may be considered as an exceptional occurrence in comparison with the manifold relations and agreements of a juridical nature which constitute the daily life of the community. As soon as a child is born a juridical career begins: certain attributes of *status*, family condition, property rights, personal rights and duties have been created, and constitute sometimes a very intricate combination, dependent not only on the manipulations of solicitors and other professional experts, but also on the wishes and intentions of the individual concerned and of other laymen who come into contact with him. In most cases solicitors will strive to invest the wishes and intentions of their clients with the requisite complements of legal cautions and forms, but undoubtedly the management of landed property, of marriage settlements, of trusts and wills reflects to a large extent the views of ordinary citizens on the subject, and most of the litigation flowing from such arrangements remains, as it were, on the surface of professional speculation and requirements. It is evident that most of the fundamental rules concerning real property or succession have grown out of customary practices which have been crystallized in daily intercourse quite independently of deliberate legislation or of judicial decisions. No legislative or judicial origin can be assigned, for instance, to such rules as that of coverture or of the curtesy of England, while it is very easy to see how the preponderance of the husband in the mediaeval household naturally led to the temporary incapacity of the wife to deal with her separate property, or how family ties and the continuity of acquired advantages led to the granting of rights of enjoyment to the surviving husband on his wife's demise. In the same way, it is to economic requirements and considerations that we have to look in order to explain rights of common or regulations as to the use of streams. The work of the professional lawyer or pleader and the judge generally begins on the debatable borderland of relations, created by social intercourse. Does coverture empower the husband to deal so freely

⁶ Ehrlich, *Grundlegung einer Soziologie des Rechts* (München und Leipzig, 1913).

with the estate of the wife as to jeopardize or to destroy the possibility of resumption? How is the curtesy of England to be adjusted to a case when a woman has married twice? How are commoners to be protected against alienations of a common by the lord? How can the owner of a plot lying up-stream be prevented from damaging the interests of settlers whose farms lie down-stream?

What is more, it is most important to realize that the influence of non-litigious arrangements on law is by no means restricted to early stages of development. It may be observed any day in the most varied directions in our own time.

"In the chapter of the Austrian Civil Code which deals with marriage contracts there are four small paragraphs, which according to the marginal title are concerned with community of property. Anyone who has occasion to come in contact with the Austro-German peasants knows that they live almost without exception under the régime of community of conjugal property. But this community of conjugal property which is the prevailing and agreed condition in regard to property among the Austro-German peasantry, has nothing to do with that dealt with in the Austrian Civil Code, and the enactments of the latter do not apply to it, since they are always superseded by marriage contracts in the usual form."

"Or again take agricultural leases. The few enactments which modern codes, especially the Austrian and German civil codes, contain on that subject are for the most part taken from Roman law, originate in the exhausted soil of Italy in the period of the Roman Empire, with its thoroughly intensive system of cultivation usual on the *latifundia* and the depressed condition of its farmers. They would be completely inadequate nowadays. A glance at the facts shows that they scarcely apply at all; they are almost entirely deprived of validity and the clauses of the leases are substituted for them, as they are agreed upon between lessor and lessee in accordance with the present state of development of our rural husbandry, and with modern social and economic conditions. They vary according to the locality, the kind of property farmed, the *status* of the parties, but still they follow in spite of these limitations certain typical and ever-recurring contents. It is therefore quite clear that a presentation, however exact, of the law of leases given in the civil codes could not furnish a true picture of the law of leases actually practiced in Germany and Austria."

"The only branch of the law in which the theory is not only occasionally but always based on actual practice is commercial law. In this case trade-custom and usage have been recognized officially by jurisprudence. The organization of the great estate and of the factory, even of the bank, is a sealed book to the modern jurist, but that of the commercial house is known to him at least in outline from the commercial code."

All these facts are derived, according to Ehrlich, from one fundamental principle: law as a complex of rules of conduct depends

⁷ *Ibid.*, 396.

⁸ *Ibid.*, 397.

⁹ *Ibid.*, 398.

primarily on the common-sense relations between members of social unions of various kinds: families, farms, workshop organizations, factories, trade associations, etc. Law is therefore in truth the settled form of social order and deals with institutions rather than with rules. Our author tabulates the social facts which serve as basis for legal rules under four heads: practice, domination, possession, and agreement. In each of these species legal doctrines arise and rules are formulated, but their roots are discernible in business intercourse.

"Even in so highly developed a political system as that of the Roman Commonwealth or of Great Britain the constitutional position of the different parts of the State depends mainly on *practice*."¹⁰

"The ordering and regulating power of practice in associations depends on the fact that it gives expression to the balance of forces within the associations."¹¹

"The only association the regulation of which even at the present time depends chiefly on practice is the house community of the family, not merely as a moral and social, but as an economic association. It is an association for production and consumption in the country, purely for consumption in towns, almost exclusively for housing purposes among a certain class of workers."¹²

The notion of *domination* is taken in a very wide sense and covers all situations in which submission to orders is a necessary feature. Such relations are especially common in ancient society but they occur also in modern times.

"On the economic productivity of labor is based the question of personal subjection; it becomes a part of the legal system because the labor of the subordinate is of paramount importance for the economic organization of society at large. The unfree man may be a servant in a peasant household, or a footman at a royal court; he may with thousands of his fellow-men work on a plantation or in a mine; he may live in a cottage with wife and children, as a rent paying farmer on the estate of his lord and make his living as a serf on his own account from the land leased to him on moderate conditions; he may be a teacher, a steward, or a riding-sergeant in his lord's service, or carry on independently a business or trade in the town. Whether he is one or another of these depends not on the caprice of the lord, but on the whole economic condition of the country."¹³

As regards *possession* the famous controversy about its relation to property may be explained by the peculiar situation of the *ager privatus* in ancient Rome, which gave rise to the abstract doctrine of *dominium*. From a wider point of view

"possession is the power of effective disposal over . . . goods, and this extends as far as our authority is actually respected by neighbors.

¹⁰ *Ibid.*, 69.

¹¹ *Ibid.*, 69.

¹² *Ibid.*, 70.

¹³ *Ibid.*, 73.

Whether this is the case is a question of actual experience and the answer varies in accordance with the difference as to the objects of possession, as to the power of possessors, as to the conditions of public security, public morals, and economic development."¹⁴

"Possession is a fact of law in the sense that it is the possessor who uses and gets the value from things conformably to their economic purpose. In the economic use of things the possessor is protected in all systems of law. It makes no difference whether the protection is effected as in Roman law by means of special legal remedies, or as in English law by private actions in trespass, or again as in Scandinavia mainly by criminal jurisdiction."¹⁵

As regards *agreements* the characteristic feature of Ehrlich's teaching is the stress laid on informal agreements destitute of coercive force (*pacta*) and on the "natural obligations" resulting from them.

"It must be pointed out emphatically that for economic life we depend above all on obligation and not on responsibility, and that in the great majority of cases it is almost immaterial whether a contract is actionable or not, . . . provided that one can count upon its fulfilment according to the rules of business intercourse."¹⁶

"A large part of stock exchange business has been carried on now for at least a century with considerable security outside the limits of the actionable and even of what is legally permissible. It is especially in connection with social struggles and the economic movement that a number of non-actionable agreements have been concluded; many trusts of employers, many wage agreements of workers, as well as most agreements about prices, could not be enforced in a court of law."¹⁷

The prevailing method of legal reasoning and study, which starts from a supposed transformation of energy on the part of a central motive power, the State, is thoroughly inadequate. True, the modern State has indeed, on the strength of *sovereignty*, assumed the part of universal legislator and judge, but far from being omnipotent it is as little able to direct and command the conduct of the society included in it as King Canute was able to rule over the tide. Ehrlich notes that the fiction of the omnipotence of the State is giving way of late. The doctrine represented by old jurisprudence so well known in England and the United States from the works of Austin and of his followers can hardly be maintained in view of the staggering advance of new social formations, for instance, of the labor unions, which began as illegal combinations, almost conspiracies, and have grown to be one of the most powerful factors in the social arrangements of the present day. The old theory of State and law bears the mark of its origin in periods when society was tending principally towards unification and simplification, was fighting privileges and factious groups, and therefore sacrificed all other considerations to

¹⁴ Randa, *Der Besitz* (Leipzig, 1879). ¹⁶ *Ibid.*, 88.

¹⁵ *Ibid.*, 76.

¹⁷ *Ibid.*, 88.

that of the rule of State law. The reaction against such uniformity and against the pulverization of society into a congeries of isolated individuals transacting business by the sole help of free contract and "cash nexus" is certainly very noticeable in our days, and Professor Ehrlich's book may serve as an interesting expression of this tendency.

Curiously enough this social bent of our author has led him back to a seemingly antiquated school, to the "Historical School of law" which flourished on the continent of Europe in the first half of the nineteenth century. Professor Ehrlich is bold enough to maintain that jurisprudence has deteriorated since the days of Savigny, Puchta, and Beseler. His remarks on the subject are worth quoting.

"The respective relations of these kinds of law can be shown best by quoting from a note book of Savigny's lectures delivered in 1819. 'Thus law can be formulated on scientific lines first by scientifically trained jurists and then through legislation. To fix in this way the essential invisible spirit of national law ought to be the single aim of legislation. Unfortunately many legislators have not acted in this spirit, and so law in its essence has suffered much harm. . . . In the latter case the written sources are not according to our view the origin, but only the signs and tokens of law, from which we infer backwards to underlying rights.'"¹⁸

"Savigny's principal follower, Puchta, develops this view further. 'The theory of law which existed before the coming in of the so-called Historical School entirely cut off the State from its natural basis, the nation, and turned it into a purely arbitrary and mechanical establishment. Law was derived solely from the action of legislative power, and insomuch as other forces had to be recognised as creating right, they were considered as a direct [?indirect] product of legislation. . . . The Historical School took another road; it went back to the concept of the National, and found in the latter the natural basis of Law and of the State.'"¹⁹

Ehrlich wants to build on the foundations laid down by these teachers: he characterizes the most famous representatives of modern German jurisprudence, Windscheid, Brinz, even Ihering in his first period, as "mathematicians" busy with symbols, but devoid of the sentiment of reality, and leading juridical thought into a labyrinth of abstractions. He makes an exception for Gierke, as a student of the "*Genossenschaft*" and a militant Germanist, representing the tradition of the Historical School of law, but he seeks inspiration mainly in the works of the early spokesmen of the school; while Ihering, even the Ihering of the second period, hardly plays any part in our author's presentation. It is not less characteristic of Ehrlich's standpoint that he ridicules in a few lines the achievements of "ethnological" jurisprudence on the ground that it is no use seeking to explain difficulties

¹⁸ Ehrlich, *op. cit.*, 360.

¹⁹ *Ibid.*, 361.

by turning to distant times, even less amenable to observation and explanation than our own epoch.

We may start with this point in our critical remarks on Ehrlich's work. It is almost inconceivable how an author who rightly describes the conception of evolution as the basis of our outlook on life, who constantly refers to the state of law in early communities, could have treated ethnological and, for that matter, anthropological investigations in such a superficial manner! What is the use of talking in a vague manner of the "*Sippe*" or of the "*Gütergemeinschaft*" of husband and wife among the peasantry, if the immense and invaluable materials supplied by the life of tribes whom we can observe with our own eyes and by the folklore of societies in various stages of development are neglected or confused? Professor Ehrlich should turn to Frazer's volume²⁰ or make a real study of his countryman Ficker's²¹ exceedingly tangled but suggestive studies on the development of systems of succession and of married women's property "rights." This would help him to form a competent opinion on these matters. It is not a question of substituting what is more obscure for what is less obscure, but the task of obtaining a broad social background for any generalization on inheritance, land tenure, marriage, *status* of dependent populations, etc., that induces us to study primitive institutions and Professor Ehrlich himself is driven on every page of his book to make surmises as to the social antecedents of modern rules of law. This being so, it is no use pretending that exact results can be obtained in this direction without exact study. Other jurists—Jellinek and Maitland—have protested against certain exaggerations of the ethnological method, but their hostility was the product either of an analytical treatment of juridical subjects, of which Professor Ehrlich emphatically disapproves, or of a critical examination of the facts from a point of view derived from common law and not wholly applicable to folklore.

The strange treatment of Ihering's doctrines in the book under discussion is also very significant. Ihering started as an adept of the Historical School and, in so far, the reproach addressed to him as a "mathematician" is hardly justified. In fact Ihering, though a great master of dialectic analysis, was as averse to logical exercises in "abstractions" as Professor Ehrlich himself, but in his second period, he came to realize clearly the main defect of the Historical School—its inability to do justice to conscious, creative effort, and the great work of his closing years²² shows how keenly he felt the necessity of a social background for any generalization on the growth and the aims

²⁰ Frazer, *Totemism and Exogamy* (London, 1910) 4 vols.; Frazer, *Folklore of the Old Testament* (London, 1918) 3 vols.

²¹ Ficker, *Studien zur Erbfolge in den germanischen Rechten* (1891-1904) 6 vols.

²² Ihering, *Zweck im Recht*.

of law. The reproach of having disregarded the moral and cultural forces which surround and support legal rules in social intercourse can certainly not be directed against the author of the "*Zweck im Recht*." I can explain Ehrlich's aloofness only by his wish to steer clear as far as possible from the history of legal systems and to concentrate on the study of their social surroundings; indeed the accent always falls on the latter in his chapters. But that points to an important limitation of our author's range of view and of reasoning. However much we recognize the necessity of connecting legal rules with the social phenomena which it is intended to regulate by means of them, these legal rules form mighty structures of their own, co-ordinated and balanced by the necessity to settle conflicting claims. These claims arise out of the interests and energies of the various individuals and communities held together by the State, and the balance is adjusted and maintained by the State and its courts. In exercising their functions of umpires and authorities the judges have to guide themselves not only by their general views as to the practical, the useful, and the just, but by propositions of law, which like all other human propositions are under the control of logic. It is this twofold character of legal thought that makes it particularly difficult and particularly important to estimate at its right value; and one feels almost tempted to address to Professor Ehrlich in this respect the warning of a German saying: "*Man muss nicht das Kind mit dem Bade ausschütten.*"²³

In fact it seems that the propagandists of a reformed jurisprudence, as represented by Professor Ehrlich, are much more at home in the field of legal doctrine than in that of the "sociology" they are appealing to for rescue from juridical pedantry. "Sociology" is yet too indefinite and too incomplete to serve as a scientific basis to law. The best among its promoters, men like Durkheim, like Jellinek, were very well aware that the general theory of the subject excelled rather in nomenclature and commonplaces than in substantial results. Their work stands for the scientific study of society, not yet for the premature generalization of these studies. Ehrlich's endeavors are at bottom directed towards the same aim: Therefore his book had better be called "*Studies on the Social Conditions of Law*" not "*Foundations of a Sociology of Law*." Notice that it does not stand in any relation to the best known systems of sociology—to Comte, to Spencer, to Giddings, to Simmel.

When this has been admitted, it is not difficult to perceive that the author has neglected one of the principal methods of such a study, namely the historical one. Chance excursions and vague allusions to "early times" and ancient formations like the Kindred (*Sippe*) or Slavery do not make up for the absence of a genuine investigation of

²³ Don't throw the child out together with its bath.

historical development. The only point on which something like a study of juridical evolution can be traced is the part dealing with the Reception of Roman law. Though far from complete, it presents an interesting survey and contains many valuable remarks on the work of the glossators and commentators. This side of the inquiry is so material for the arguments and conclusions of the writer that it might be worth while to point out one or two particular points connected with it.

An attentive reader of the book under discussion will be puzzled on almost every page by the sudden transitions from the Rome of the Twelve Tables to nineteenth century England or to seventeenth century Germany. It is hardly too much to ask that comparisons and generalizations should take into account the relative setting of the various phenomena within certain types of legal and social formation. The conception of the family is not the same in the midst of a tribal group, of a Greek *πóλις*, of the mediaeval world regulated by canon and feudal law, of the individualistic society of modern times. Nor does any other juridical formation remain identical within varying social types. Now Ehrlich's "*Foundations of a Sociology of Law*," though bristling with allusions to these shifting surroundings, does not make any attempt at settling the conditions of the historical perspective through which these types have passed, nor does it seem to realize that such a perspective is absolutely necessary from a critical point of view.

I should not like, however, to conclude on a note of discord. The book with all its shortcomings is a most valuable contribution to the theory of jurisprudence. It is full of suggestive ideas and of brilliant observations. And the direction of its effort, the onslaught on the barren symbolism of legal mathematicians, is thoroughly justified in the present state of jurisprudence.