psychology, logic, grammar, and legal casuistry. The author is unaware of when he is hovering over any of these problems and hence of the relations between them.

The student who looks to this book for a systematic theory will find instead a few commonplace remarks about what is involved in thinking. In addition to this, he will find a few disconnected bits of information which he might otherwise have gleaned from a hasty reading of contemporary textbooks in logic. The student will find that "legal thinking, like all purposive thinking, is directed toward the solution of problems." He will discover the simplest figure of the syllogism, that words can be used with a variety of meanings, and that to assert that all S is P implies some S is P, whereas to assert that some S is P does not imply all S is P. He will see, too, that these things have something to do with applying rules of law to particular cases. Assuming that he has an ordinary man's intelligence and familiarity with the law, the student will not learn a thing from this book that he did not know before he read it. In so far as the book contributes anything to its purpose, it does so by furnishing another example which illustrates the importance of having an explicit theory of critical thinking before one attempts to communicate it to others.

No lawyer thinks the way Mr. Morris says lawyers do, nor would they want to if they could. Thinking is not a matter of making definitions in one place, classifying things in another, inferring in a third, and making practical judgments in some fourth place. How these activities are organically related to each other and to the use of language, a systematic exposition of the nature of thinking should make clear. Mr. Morris's book does not do this.

It is clear that lawyers may be successful without ever having engaged in any special study of philosophy or of the arts of logic, grammar and rhetoric. This is not the place to consider whether the study of philosophy and special training in these arts would either produce better lawyers according to contemporary standards or produce a different kind of lawyer altogether. However, those who hold to either of these positions clearly will receive no encouragement from Mr. Morris's book. If the relations between the study of philosophy, logic, grammar and rhetoric and the solution of legal problems are as trivial and insignificant as they appear to be in Mr. Morris's presentation, legal educators and practitioners are thoroughly justified in not giving these studies even the slightest consideration. Philosophy and the liberal arts might well say of some of their friends as Voltaire said of his, "God protect me from them; I'll take care of my enemies myself."

ARTHUR L. H. RUBIN*

Fundamental Principles of the Sociology of Law. By Eugen Ehrlich, translated by Walter L. Moll, with an introduction by Roscoe Pound. Cambridge: Harvard University Press, 1936. Pp. xxxvi, 541.

Eugen Ehrlich's book is one, the reading of which can afford great pleasure and instruction, but only at the cost of unusual patience and concentration. It is an utterly unsystematic book. It contains twenty-one chapters which follow each other in a sequence, the logic of which is not apparent to the reader.[1] The author remarks in pass-

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[1] The German original, published in 1913, contains neither an index nor an analysis of chapters. The addition of both to the English version of Ehrlich's book is a great improvement. If I may offer advice to the reader it is this. Read first the last two chapters of the book which

ing[2] that "the man who is not an artist is a poor man of science." As a matter of fact Ehrlich's attitude towards the problems he deals with in this book is much more the attitude of an artist than of a scholar, in spite of the fact that he shows a quite extraordinary mastery of legal history and foreign law. His strength does not lie in the clear-cut statement and exposition of theses. It is the abundance of legal and extra-legal material which gives the book its particular flavor and makes it so stimulating.

The choice of this material is not made without conscious purpose; the author intends to evidence from these facts the fruitfulness of the sociological method. Sociology —including the sociology of law—, as he sees it, must be a science of observation, and its attention will be directed primarily to the concrete, not the abstract.[3]

The concrete consists of the individual facts which we observe here and now and from which we derive our conclusions by way of generalization. The conclusions may be erroneous but in any case they are based on real facts; the error arises by way of false deductions which misinterpret the observed data. "Our perceptions and sensations are always true; only the conclusions we draw from them can be false."[4]

In order to acquire an adequate understanding of legal reality, it seems to Ehrlich, that all we have to do is to approach the social facts without any preconceptions, to let them speak for themselves, and to use them as our guide. Theoretically the whole book is directed by this maxim for research.

But what are facts which have not been interpreted, correlated and evaluated by the observer? He must, first, be at some distance from the factual sphere before he can hope to describe and distinguish the relevant features of a particular fact. Whether or not his statements concerning factual material are to be recognized as true by everybody, whether his interpretation of the data is correct, depends entirely upon the right choice of the observer's standpoint.

Although Ehrlich does not express himself on the point, he also has chosen a definite standpoint on the basis of which he judges. In the selection and interpretation of the material, he is guided by some general ideas as to the function of law. It is not the plenitude of material facts which, in the last analysis, counts, but the underlying ideas which are to become apparent from consideration of numerous and often repeated illustrations derived from legal history, foreign laws and recent developments of law. The fact that those ideas need so ample a documentation implies a strain of the abstract inherent in them. The barer and more abstract the ideas, the greater the necessity to clothe them with the concreteness of illustration.

To distinguish and assemble Ehrlich's leading ideas, we must put together many remarks scattered in many repetitions, throughout the book.[6] The distinction between the following is fundamental: *facts of the law, legal norms, legal propositions, norms for decision.*

By *facts of the law*, he understands certain primary basic phenomena of social life which form the immediate basis of the legal order in human society. "The whole eco-

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deal with the methods of the sociology of law. Then go back to chapter V (the facts of the law) and, after that, read the following chapters in the order given: II, III, VII, XVI, VIII, IX, X, VI, IV, XI to XV.

[2] P. 472. [3] P. 501. [4] P. 74.

[6] The reader will find very helpful Roscoe Pounds' introduction to the English translation. In addition to that, the reading of Ehrlich's short article in 36 Harv. L. Rev. 130 ff. (1923) may be of great value for the American student of Ehrlich's sociological theory of law.

nomic and social order of the human race is based upon the following small number of facts: usage, domination, possession, disposition (usually by contract or by testamentary disposition)."[7] These facts of the law are social structures to be found wherever human beings are living together. The facts of the law exist before any positive law arises, even before any social order consisting of general rules of conduct comes into existence. Thus: "The family is older than the order of the family; possession antecedes ownership; there were contracts before there was a law of contracts."[8]

Ehrlich, to be sure, realizes the anomaly of speaking of facts of the law before any legal order was created. He regards law, however, as not something which has been added to the facts of the law from above or outside. These facts, by their very existence, determine the rules of conduct for the human associations; they are the elements into which the diversities of our legal world, and in part of the world of the other norms, resolve themselves.[9]

Wherever such facts of the law come to exist—and we find them, though in various manifestations, in every human society—there arises at the same time also a legal order. The facts of the law "determine" the rules of conduct for human associations; rules of conduct "derive" from the facts of the law.[10]

What kind of legal order can this be which comes into existence on such a purely factual basis? It is certainly not the law created by the state. No more is it a legal system developed by juristic science. Both these systems, although in the foreground of interest for lawyers of today,—a narrowness of viewpoint sharply criticized by Ehrlich,—must not be identified with the legal order. One must take a long step behind the codes of law and, moreover, the decisions of the courts and legal literature to reach "the basic form" of the law; a legal order which is not mere doctrine, dogma or theory, but "dominates life itself even though it has not been posited in legal propositions," *i.e.*, the *living law*.[11]

Law in its basic form coincides according to Ehrlich with the inner order of the associations (*Verbaende*) which is determined by *legal norms*. "The inner order of the associations of human beings is not only the original, but also, down to the present time, the basic form of law."[12] That which is truly vital in the law is rooted in such a genuine social order.

We here come upon the gist of Ehrlich's theories. Social reality appears to him as a complex of various associations which he considers as the building stones of the social world.

What is meant by an *association?* For Ehrlich it is the common denominator of all groups of human beings which do not have the character of a *society*; e.g., family, clan, house-community, and also churches, professions, political parties, states, business corporations, etc.[13]

[7] P. 118, *cf.* pp. 192, 474.
[8] Pp. 35, 36.
[9] P. 118.
[10] P. 192.
[11] Pp. 493, 41.
[12] Pp. 77 ff.

[13] Modern sociology has introduced the fundamental distinction between *associations*, i.e. such groups of human beings as are organized for a limited and definite purpose, on the one hand, and *communities* which have grown up without a conscious purpose, on the other hand. See especially, Cole, Social Theory 37 (1920); MacIver, Community 25 ff. (1920). German sociologists distinguish similarly, since Toennies, *Gemeinschaft und Gesellschaft* (5th ed. 1927), between *Gesellschaft* and *Gemeinschaft*. Ehrlich's description of social life within groups suffers from an over-simplification of the character of social relations which in fact vary greatly according to the sociological structure of the particular group.

Every association possesses its independent inner order.[14] This order constitutes the organization of the group. "Organization is the rule which assigns to each individual his position and his functions."[15] The individual exists as a member of one or more associations; he is never actually an isolated individual.[16] Whatever the individual accomplishes, he does as the exponent of the social group to which he belongs.[17] That view pushes to the utmost the theory of the interdependence of the individual and his community. Ehrlich was quite right in opposing to a purely individualistic conception of law as it prevailed at the end of the nineteenth century, the idea of a social law and social justice.[18] The antagonism existing toward these ideas led him into unjustified overstatement. Ehrlich does not take into consideration the possibility of a man's leaving one association and entering another, a contingency which may, indeed, have a great influence upon the man but certainly does not destroy his identity as an individual.

Moreover, Ehrlich fails to see that the innate creative powers of man, that endowment which distinguishes man from animals, is rooted in supra-national humanity. Is it not true that every really original work, whether in the field of art, science or literature, isolates the individual from the community to which he belongs and sets him apart from the common throng who live in the thrall of the traditional? And is it true that law in its basic form is nothing more and nothing else than the inner order of the particular group of human beings? Ehrlich further observes :"The order of the associations is determined by legal norms . . . . that flow from the facts of the law, to wit: from usages which assign to each member of the social association his position and function" (pp. 38, 169). But it is not only legal norms which regulate the conduct of members of the association; there exist also other rules of various kinds; rules of religion, of custom, of honor, of decorum, etc. The common quality of all these various rules is that they are the resultants of the forces that are operative in society.[19]

In early times, we find a multiplicity of associations, each of them having its own individual law. Ehrlich emphasizes the uniqueness of every association, no matter how small, and of its law. The legal norms of which the order of the associations is comprised, are concrete, being applicable to individual cases. "One may contend that each and every, even the smallest, social association, every family, every house, every village . . . . every country has its own law, its own religion."[20]

On the other hand, it is not only the association which creates legal norms; in the course of historical development, the heterogeneous associations lose their independence; they become members of a *society* which possesses an order consisting of legal norms of general validity.[21]

"What is a *society?* Society is the sum total of the human associations that have mutual relations with one another."[22] Society of the highest order is "a society consisting of the civilized nations of the earth; within this society are various narrower societies, e.g., a society of the Christian and of the Mohammedan nations, and lastly societies that comprise only the individual civilized nations."

[14] Pp. 26 ff., 39. [15] P. 85. [16] P. 62.

[17] In Ehrlich's opinion this is true also in the case of creative work in the field of science and art. "An invention is not the deed of an individual, but a deed of society through an individual. . . . . The inventive thought will spring up in every mind that has received sufficient training as soon as the requisite conditions exist," p. 408.

[18] *Cf.* p. 53. [20] P. 151, *cf.* p. 159. [22] P. 26.

[19] P. 31. [21] P. 152.

But can one really assign these very different things to a single category? Ehrlich's definition of society is an abstract construction to which no sociological entity corresponds. His book is entirely wanting in any analysis of such basic social phenomena as a political community, a people, a nation, a community of law, and their interrelation. Ehrlich holds that the *state* is an organ of the society.[23] To accept this statement as true we must interpret "society" as a definite political community which has achieved a permanent legal organization. According to Ehrlich the state is a relatively late product of history. Originally a purely military formation[24] under the leadership of a king, the state gradually developed by absorbing more and more extraneous functions, including the administration of justice.[25] At that point a state law comes into existence which steps in beside its predecessor, the non-state law, which, however, even though curtailed, does not cease to exist. The time has now come for the formulation of *legal propositions—Rechtssätzen*—which Ehrlich sharply differentiates from *legal norms* (*Rechtsnormen*). "The legal proposition is the precise, universal binding formulation of the legal precept in a book of statutes or in a law book. The legal norm is the legal command, reduced to practice,[26] as it obtains in a definite association, perhaps of very small size, even without formulation in words. . . . . The legal proposition is always couched in general terms; it can never be as concrete as the case itself. . . . . Legal propositions are created by jurists."[27]

In every society *the legal norm* predominates; in comparison to it *the legal proposition* fills a secondary place. Ehrlich goes so far[28] as to place legal propositions in a *second legal order* which he describes as an order "which has been imposed by society upon the associations." This order has been created by means of legal propositions, and is enforced solely by means of the activity of the courts, and the other tribunals of the state. Legal propositions owe their existence to a process of generalization. The creation of legal propositions frequently results in an enrichment of legal life in that from the newly created propositions new legal norms originate. By reaching this result, the legal propositions serve their ultimate purpose, to become a part of the living law.[29]

Ehrlich holds that there exists a third category of rules of law, consisting of the *norms for decision* (*Entscheidungsnormen*). The norm for decision is a rule of conduct for the courts, in contrast to the legal norms which contain general rules of conduct.[30]

[23] Pp. 130, 154.

[24] *Cf.* the chapter, The Birth of the State in Edward Jenk's book on State and Nation (1919), in which the same idea has been developed more fully.

[25] Pp. 138 ff.

[26] This phrase reads in the German original (p. 30) "der ins Handeln umgesetzte Rechtsbefehl," the English equivalent of which is, it seems to me: "the legal command put into action." The present case is among the very rare cases where the translation is not quite satisfactory. On the whole it is a very competent one. The translator as a rule adheres faithfully to the author's wording, in some instances following him a bit too closely. Thus the word "selbstverständlich," a rather colloquial expression which Ehrlich uses again and again, is translated throughout by "self-evident(ly)" whereas sometimes the context gives it the sense of "it goes without saying," "naturally," "it stands to reason," and there are also not a few instances where the best thing is just to omit it.

[27] Pp. 38, 173, 175.

[28] Pp. 197, cf. p. 211.

[29] Pp. 38, 192 ff.

[30] Pp. 122 ff.

Norms for decision become effective only in the rare cases of legal controversy.[31] If such a controversy arises, the inner order of the association has been already disturbed. Law in its basic form as manifested in legal norms is of a static nature; it coincides with the non-controversial law of social associations and is antecedent to the judge. The norm for decision must be created by the judge in each particular case even when he decides the controversy on the basis of a legal proposition. Ehrlich strongly opposes the contemporary European doctrine, which today also receives support from many Continental writers, according to which the function of the judge is merely to apply the statute.[32] For Ehrlich the realm of norms for decision is in the field of judge-made law.

On the other hand, Ehrlich points out that the norm for decision is not yet a part of the living law. The route to that goal passes over the bridge of the legal proposition, which for its part assumes the character of a rule of the living law in so far as social relations are actually ruled thereby. Thus "a legal proposition which dictates to the courts and administrative tribunals the course of action which they are to follow contains what amounts to a legal norm for the courts and administrative tribunals as soon as these bodies actually carry it out."[33] Every norm for decision, to be sure, already contains the germ of a legal proposition. But to establish a legal proposition further intellectual efforts are required: we must extract from the norm for decision that which is universally valid, and state it in a proper manner.[34] It is up to the learned jurist to accomplish this. Formulating the legal proposition he acts as a person commissioned by society.[35] The shaping out of legal propositions on the basis of judge-made norms for decision is the specific task of such creative jurisprudence as was developed by the Roman jurists: a juristic science not content to limit itself to making a faithful and unprejudiced presentation of that which is law, but striving to create norms.[36] A great part of the content of statutes has been taken from the juristic law (*Juristenrecht*). The legal proposition does not therefore cease to be juristic law because it is given statutory form.

Ehrlich makes a clear distinction between state law and juristic law.[37] In his opinion state law in the proper sense of the word is to be found only where the particular rule has been created by the state.[38] The part played by the state in the creation of law is generally much overrated; it is in truth a very limited one.[39] The bulk of rules of state law consists primarily of norms concerning the organization of public authority, and of legal commands directed to courts and administrative bodies. When the state goes beyond this field of legal operation, as a rule it borrows the contents of its legal provisions from juristic law as it has been developed by legal writers, lawyers and judges. Ehrlich mentions in this connection a further factor from which a restriction of the significance of state law results. A statute once in force, goes its own way irrespective of the intent of its author. "Whether the legal proposition is effective, whether it has the effect that was desired, depends exclusively upon whether it is a means adapted to its purpose."[40] The statute per se—whether state law proper or juristic law—is not a part of the living law. To enter the sphere of living law, the statute must undergo a process of transformation which is beyond the control of state-power. The state is powerless in this sphere in which society sets the standards.

[31] P. 41.
[32] Pp. 177 ff.
[33] Pp. 192–93.
[34] P. 175.
[35] P. 197, *cf.* pp. 211 ff.
[36] P. 128.
[37] Pp. 188 ff.
[38] P. 367.
[39] Pp. 368 ff., 389, 397.
[40] P. 375.

To concentrate its energies almost exclusively upon the study of legal propositions, and to neglect the legal norms as living in the people's thoughts and acts, this Ehrlich considers the great mistake of Continental juristic science of pre-war times. "The law does not consist of legal propositions, but of legal institutions."[41] Legal institutions spring from the social and economic constitution of society, independently of the state and legal propositions.[42] They are the basic phenomena of legal life,[43] the skeleton of the living law.

Which are the sources of knowledge of the living law? Ehrlich deals with this question in the last chapter of his book under the head "The study of the living law." He holds that the judicial decision, though of outstanding significance for an understanding of the legal order, does not give a perfect picture of legal life. In our days the most important source of knowledge of the living law is the legal document. Modern legal life is predominantly controlled not by statute law but by the business document,[44] which must be interpreted, however, in a proper manner, i.e., as a part of the living law. Only that part of the document which the parties normally put into action, is living law. The legal document must be measured by actual life.

In addition we have to study the living law which has not been embodied in a legal document. "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."[45] In doing so one will note many survivals of the old law which lives on under the thin surface of modern statute law, but more important is the observation of the germs of new legal developments yet unknown to the codes. Only by using such methods of sociological research will we ascertain the law which dominates life itself, the living law.

The fruitfulness of Ehrlich's point of view is undeniable. We cannot suppress, however, some doubts as to the adequacy of his conception of the legal order. There seems to be a danger that the jurist who concentrates his attention upon the so-called facts of the law and the living law, will lose sight of the real topic of his investigation: the social order which is called law.

Roscoe Pound is correct when in the introduction to the English translation of Ehrlich's book he points out that "we may use a variety of instruments for the understanding of a complex mechanism of social control in a complex social order."[46] We may admit furthermore "the validity of different points or modes of approach." No doubt you can proceed from different starting points to an analysis of the basic problems of law. There is, however, a necessary limitation as to the choice of standpoint and methods of research. Before I choose ways and means of investigation I must so realize my goal as to have a guide in the selection of the appropriate approach. The goal is to understand, and make comprehensible to others, the phenomena of law in their essentially legal character. To achieve this, an *adequate* approach must be made. An approach to legal phenomena is inadequate which does not differentiate phenomena of legal character from non-legal social phenomena.

[41] P. 84. [42] Pp. 477 ff., 470.

[43] Ehrlich's theory here has point of contact with the "institutional theory" as it was developed by the French jurist Maurice Hauriou at about the same time when Ehrlich's book was written, a theory of law which has exerted great influence on the post-war jurisprudence of France. See Jennings, The Institutional Theory, Modern Theories of Law 68 ff. (1933).

[44] P. 595. [45] P. 498. [46] P. xxxvi.

Ehrlich's theory is open to question on just this point. Does the so-called living law deserve the name of law in its proper sense? What guaranties the legal character of the facts of the law and distinguishes them from other, non-legal facts of social life? We are accustomed to distinguish between questions of facts and questions of law, a difference which is of particular significance in Anglo-American Common Law. In Ehrlich's theory this difference has become very much obscured.[47] I cannot help feeling that Ehrlich misses the fundamental contrast existing between factual social relations on the one hand, and the rules of law which regulate them on the other.

Ehrlich, to be sure, makes a distinction between facts of the law and the legal norms which "derive" from them. This analysis does not remove our objections but rather intensifies them. From facts only facts follow. The continuous usage within a particular group of human beings may be lawful or unlawful or may be neither. The mere fact of usage can never serve as a criterion for the question whether the norms according to which the members of the group act possess the quality of legal norms. Ehrlich criticizes at great length[48] the theory of "customary law" as developed by Savigny, Puchta and their followers during the nineteenth century. He himself while avoiding this term develops in his theory of the living law a customary law on so large a scale that the posited law plays a very subordinate role.

Like his forerunners Ehrlich fails to demonstrate convincingly a reason for the legal validity of rules of customary law. The statement that the validity of customary law is based on *opinio necessitatis* on the part of the members of the group which it controls does not offer an explanation, but itself demands an explanation. In fact Ehrlich does not show great interest in this question. He holds that legal validity is not essential to *legal norms;* it is characteristic of the *legal proposition* that it has acquired legal validity, but not so of the legal norm. Binding contracts do not presuppose the existence of a legal proposition. "Rights arise not from legal propositions, but from the relations of man to man, from marriage, contract, last will and testament."[49] But what distinguishes the valid from the invalid contract? For Ehrlich that is only a matter of degree: in the first case the contract is under the protection of rules of the "second legal order" whereas the invalid contract is ranged among the facts of the law which lack recognition by the state law.

But how are we to know which facts are facts of the law? And in which cases are we justified in calling rules of conduct legal norms? Whenever he touches the problem of delimitation of legal norms and other rules of conduct—non-legal norms—,Ehrlich shows some uneasiness. He gives the impression of not having reached a definite view on this matter. He disposes of the question, what is to be called law, incidentally[50] by the remark that we are dealing here with a question of terminology. He lays emphasis on the supposition that in early times the legal norm is as yet undifferentiated from the norm of religion, and of ethical custom.[51] We learn from another passage of the book[52] that "the legal norm is merely one rule of conduct, of the same nature as all other rules of conduct." According to Ehrlich the antithesis between legal and other social norms has been unduly stressed by the dominant school of jurisprudence. He admits, however,[53] that there is an unmistakable difference between the legal and non-

[47] P. 172.
[48] Chapter XIX.
[49] P. 36.
[50] P. 370.
[51] P. 73.
[52] Pp. 39.
[53] Pp. 164 ff.

legal norms, although the lines of demarcation between the various kinds of norms are undoubtedly somewhat arbitrary.

Ehrlich holds that it is not the task of juristic science but of social psychology to define this difference. Yet we find quite a few attempts in Ehrlich's book to ascertain the distinguishing features of the law and other norms of conduct. He points to the following characteristics of the legal order. The legal order regulates such matters as, at least in the opinion of members of the group within which it has its origin, are of basic significance. Only matters of lesser significance are left to other social norms.[54] In a strange misunderstanding of the true order of rank Ehrlich speaks in this connection of an elevation of religious norms to the rank of legal norms. It is furthermore characteristic of the legal norm, according to Ehrlich, that it can always be stated in clear definite terms. Here also we cannot suppress some doubts, esp. in regard to those legal norms which he describes as existing in every family, every home, every village,—"even without any formulation in words."[55]

Ehrlich, moreover, describes as peculiar to the legal order the specific reaction which it releases in the social group in which it has its origin. Only in the case of norms of law does such reaction have the character of *opinio necessitatis*. For the delimitation of legal norms "the overtones of feeling as reactions to violations of the various species of norms" must serve as guides in our investigation, which is to be based upon a thorough examination of psychic and social facts.[56]

I cannot imagine that any jurist nowadays will be satisfied by this theory which makes one of the most vital problems of jurisprudence dependent upon imponderables, not to be estimated by juristic science.

In later chapters[57] the correct point of view is taken by the author. The guiding principle in the province of law is justice (*Gerechtigkeit*). The concept of justice manifests itself in that social order which is called "legal order."[58] Let us hear Ehrlich again: "A statute, a judicial decision, an administrative action by the state, is judged according to its inherent justice. . . . The creation of the legal proposition takes place everywhere under the influence of the concept of justice."[59] Ehrlich unfortunately depreciates the value of these statements by an inadequate analysis of the concept of justice. He describes justice as a social force; "a power wielded over the minds of men by society.[60] What men consider just depends upon the ideas they have concerning the end of human endeavour on earth." These ideas are subject to change in time and place, a fact which Ehrlich tries to prove by various examples taken from legal history.

In conceiving of justice as a purely historical phenomenon and failing to distinguish between justice itself and the ideas of men about justice, Ehrlich cuts himself off from a true understanding of the concept of justice, which is by its very nature a timeless concept, transcending national lines. The ideas of justice are subject to change in time and place, but there persists one concept of justice which throughout its various manifestations on the stage of history will preserve its identity.[61] Only by realizing

[54] Pp. 165 ff. [55] P. 38. [56] P. 165. [57] Chapters IX, X.

[58] *Cf.* Husserl, Justice, 47 International Journal of Ethics 271 ff. (1937).

[59] P. 214.

[60] P. 202, *eine Macht der Gesellschaft über die Gemüter.*

[1] See Ehrlich on p. 211.

the supra-temporal character of justice can we find an unerring guide by which to orient social life in its course to a world of justice.

Ehrlich's statements concerning justice require particular consideration also from another point of view. The province of the operation of justice is, according to Ehrlich, the administration of law by the state and its various functionaries. The *second legal order* which has been imposed by society (the state acting as an organ of society), and which consists of legal propositions,[62] comes into existence under the influence of the concept of justice.

What a strange and discordant picture results from this theory! The law in its basic form, consisting of facts of the law from which the different legal norms derive, grows up gradually and unintentionally in the small circle of associations, unchecked by any influence of the concept of justice. In a later period of legal history this genuine sphere of legal life comes up against the second legal order, which and which alone is controlled by the ideas of justice and aims at a remodelling of the first legal order after the image of justice. But legal propositions and norms for decision, in so far as they are actually observed and carried out, are themselves transformed into "legal norms" and become thereby a part of the living law,—a process which brings about a relapse, as it were, into the first stage of legal development: the concept of justice, losing its dominant power, leaves the field to social forces which do not accept its sovereignty.

There is much to be said for the correctness of this description of the phenomena Ehrlich is dealing with. We cannot, however, accept the conclusions which he draws. By limiting the field of operation of justice to the sphere of norms for decision and legal propositions he in fact denies the legal character of the so-called legal norms. A legal order that is partly a manifestation of the concept of justice and partly not is an absurdity. Rules of conduct which derive from facts, i. e. which become established by long usage and traditional habits, without a need of being tested by courts of law, belong to the pre-legal sphere of custom which for its part is strongly influenced by religious ideas. The region of the law is entered upon when the law courts begin to interfere with social relations, and consequently legal propositions are created. The transformation of legal propositions into legal norms as Ehrlich understands this process takes us again out of the sphere of law. The living law, in the particular sense attached to it by Ehrlich, is not only different from any state law, it is no law at all. We are concerned here with non-legal phenomena the observation of which the jurist certainly should not neglect. But to call them a living law amounts to a misuse of the term law.[63]

We cannot agree therefore with some of the basic ideas of Ehrlich's theory. This fact, however, does not prevent us from recognizing the lasting value of his book. One cannot do justice to Ehrlich's book without taking into consideration the time factor. It was published in 1913, *viz.* the last year of that ever remarkable period of European history, called the 19th century, which extends from 1789 to the outbreak of the world-war. Social life during the last two generations of the 19th century was characterized by a stormy technical progress and, in connection with this, by economic revolutions of proportions hardly ever seen before. Ehrlich was among the few jurists who, realizing the bearing of such developments upon the legal order, demanded a new orientation of juristic science and the practice of law. He belonged to the small group

[62] Cf. p. 197. [63] See Alf Ross, Theorie der Rechtsquellen 225 ff. (1929).

of Continental legal writers who waged a war against the attitude of self-satisfaction prevailing among contemporary jurists; he was one of those who opposed the naive belief in the omnipotence of state legislation, which belief was dominant in the legal literature of that time. In numerous writings, the most important of which is the book with which we are dealing, Ehrlich has taken the viewpoint that the legal technique of Continental law as manifested in codes, statutes and legal literature, is unable to cope with the needs of present social life. The rising of new social forces requires the establishing of a different social order based upon a new idea of social law. Ehrlich was on a level with the founders and adherents of the German school of the free-finding-of-law (H. Kantorowicz, E. Fuchs and others) and of the French sociological school (Gény and others).

The heat of the battle in which he was engaged carried him away; many exaggerated statements found in his writings are due to this fact.

Ehrlich did not exert great influence on the European continent. The above mentioned lack of clarity in his theories is primarily responsible for that. Much greater has been his influence outside his own country, esp. in the United States. This extra-territorial effect of his ideas is based upon the fact that the ground for a sociological interpretation of law had been prepared much better in this country (primarily by Roscoe Pound's writings on Sociological Jurisprudence) than in Europe. I hardly need to call the attention of the reader to the marked similarity which exists between some of Ehrlich's fundamental theses and the recent trends in the field of American jurisprudence which are known collectively as legal realism. We find in both cases a strong reaction against the over-intellectual and individualistic attitude of the nineteenth century. Such reaction was a historical necessity. It is a question, however, whether these and similar tendencies of legal theorizing have not already fulfilled their historical function. We have heard enough for some time, it seems to me, of the importance of facts of the law.

We are living in a period of world-wide unrest and instability in almost every field of human activity. Certainly not the mere observation of the manifold social facts which underlie the world crisis—which is by no means exclusively based on economic factors—will show us a way out of the chaotic status of the modern world. In such critical periods of social life reflection upon some simple truths is wanted. To replace chaos with order the most important thing is, to reestablish within the nation and among the nations the authority of a legal order rooted in the idea of social justice. A realistic approach to legal and extra-legal social problems is indeed necessary in the sense that we must free ourselves from all dogmatism and unfounded speculations about the social order and the law. That does not mean, however, that we are to sacrifice the belief in a higher order of legal principles. It is from them that the legal character of the facts of the law is derived. The thinker who can free from the debris of circumstance and fact those eternal concepts of justice and social order which live in the soul of every upright man will be not merely the jurist but the savior of this generation.

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