Eugen Ehrlich was a major figure in the development of sociology of law and, albeit somewhat indirectly, philosophy of law. His major work, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW, has been translated into English twice. Roscoe Pound was a moving force behind the 1936 translation and provided a forward. The work was translated and published again in 2002. Ehrlich’s work influenced Pound’s theory of “living law” and through it the development of Legal Realism in the United States. Ehrlich is (or was) a more central figure in the development of sociology of law in focusing research and theory on non-state sources of legal norms.

LIVING LAW is a collection of essays that originated from a workshop on Ehrlich at the International Institute for the Sociology of Law in Onati Spain. (The book is part of the Onati International Series in Law and Society.) If the essays are a fair reflection, the workshop must have been quite interesting and, in parts, entertaining. The book is organized in four sections, preceded by an able general introduction by Marc Hertogh, the editor. Section I is biographical; Section II focuses on sociology of law; Section III on Ehrlich and his contemporaries; and Section IV looks at Ehrlich in relation to contemporary socio-legal studies. The four sections cover a wide range of topics, wider than the titles suggest, yet maintain a core area of overlap, and hence most of the essays engage with one another. There is some overlap in exposition among the essays, which is to be expected because the essays are largely free-standing – i.e., can read independently of the rest of the book. For me, Sections I and IV were the most interesting, although almost all of the essays were rewarding. And, although Section IV contains the most overtly philosophical essays, there are quite interesting discussions scattered in essays in other sections (notably, Klink’s essay in Section III.) Those coming to the book from a sociology background are likely to have different preferences. All of the essays are well-written and present cogent arguments, notwithstanding reservations about certain of the pieces.

There are, of course, recurring themes in the essays, some more fully developed than others. Ehrlich’s efforts to develop an account of the interaction of social and legal norms and to explain how legal norms may arise outside or independently of the state – i.e., Ehrlich’s “living law” – receives extended discussion. While the discussions are located within sociology, they are also philosophically productive because they illustrate how narrow and inadequate most accounts of social norms or conventions are in legal philosophy. Another topic, adverted to on a number of occasions but which [*642] could have done with more exploration, is Ehrlich’s account of legal norms. Ehrlich sought to identify legal norms as bearing a distinct affective content. In other words, what distinguished legal norms from other norms was the nature of the reaction to violation of the norm (by those for whom it was a norm). According to Ehrlich, violation of legal norms elicits feelings of revolt. While this seems on first look to be a peculiar, if not hopeless, proposal, it deserves further consideration. It would be interesting to see how it relates to Hart’s account distinguishing legal and other norms. Hertogh’s introduction is particularly good. It is not a summary of the essays, but instead an exposition of Ehrlich’s work which provides a very useful framework for the essays which follow.

Section I: Life, Work and Context. Monica Eppinger’s opening essay provides a useful biographical sketch of Ehrlich. Ehrlich did most of his work while at the University of Czernowitz in Bukovina,
until the end of World War I part of the Austro-Hungarian Empire. In Bukovina the institutional constraints of the Empire seem to have overlaid a culturally and linguistically diverse place. Ehrlich was himself multi-lingual and conducted his research in a variety of cultural groups. Eppinger’s essay is followed by one on Ehrlich and Sacher-Masoch. While Assaf Likhovski’s essay is entertaining, it is unclear what other end it could serve. Ehrlich and Sacher-Masoch never met; there is no reason to think either had even heard of the other; and there is no overlap in substance of their respective work, all of which Likhovsky notes. While Likhovski tries to link the two through talk of legal concepts and reasoning, the essay, while diverting, adds nothing to understanding Ehrlich.

Section II: Ehrlich’s Sociology of Law. Roger Cotterell’s “Ehrlich at the Edge of Empire: Centres and Peripheries” is partly about political geography and partly about intellectual geography. The essay is playful, but puts too much weight on the metaphor of center and periphery. “Eugen Ehrlich’s Linking of Sociology and Jurisprudence and the Reception of His Work in Japan” by Stefan Vogl contains a good deal more theoretical analysis than one might expect. Of particular interest is the exploration of Ehrlich’s concept of law and of judicial decision-making.

Section III: Ehrlich and His Contemporaries. Bart van Klink “Facts and Norms: The Unfinished Debate Between Eugen Ehrlich and Hans Kelsen” makes effective use of Kelsen’s critique, which addressed the claim that Erlich conflated is and ought in his analysis of norms. Although Klink is too sympathetic to Kelsen, the discussion is interesting and Klink’s discussion is attentive to the issues. (Kelsen’s distinction turns normative theory into theology – if facts cannot create norms, it is hard to see what could.) Salif Nimaga’s “Pounding on Ehrlich. Again?” provides a careful and clear exposition of Ehrlich’s distinction among legal norms, norms for decision, legal propositions. The exposition is followed by an equally careful discussion of the ways in which Ehrlich’s “living law” is not Pound’s “law in action.” Franz and Keebet von Benda-Beckmann’s essay, “The Social Life of Living Law in Indonesia,” is the least theoretical in the book and one of the most interesting. They provide an [*643] historical discussion of ways in which law in Indonesia, before and after independence, took formal notice of and incorporated a particular class of non-state legal norms.

Section IV: Ehrlich and Contemporary Socio-Legal Studies. Jeremy Webber’s “Naturalism and Agency in the Living Law” explores the treatment of social and legal norms, in particular the tendency to treat social or non-legal norms as natural conventions, more or less consensual in nature in contrast to legal norms seen as coercive imposed norms. Webber effectively explores some of the ways in which social norms are also coercive, and how the decisional ‘geography’ for legal and social norms flow together. The exploration of the role of acquiescence in living legal norms and the decisional qualities of social norms is useful. The discussion of conventions is particularly useful for philosophers, who should abandon their constractive account derived from Lewis. Klaus Ziegert’s contribution, “World Society, Nation State and Living Law in the Twenty-first Century,” is thematically connected, developing the way in which Erhlich contributed to a view of legal norms not fully dependent on state institutions. David Nelken’s “Ehrlich’s Legacies: Back to the Future in Sociology of Law?” discusses three interpretations of Ehrlich’s work on “living law” in relation to the subsequent development of those distinct strands of research. Nelken’s essay is particularly good as the conclusion to the book. It pulls together the most interesting themes and problems from Erhlich – concerning the interrelations of social norms, associations, and legal norms.

REFERENCES:

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