

EUGEN EHRLICH AND ROMANIAN SOCIOLOGY

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Eugen Ehrlich is unanimously considered as one of the founders of the sociology of law. Thus, Dimitrie Gusti claims that Eugen Ehrlich occupied a special place in the juridical science as a live and creative spirit¹, while George Gurvitch claimed that the most interesting and elaborated 'sociology of law' is the work of an Austrian sociologist – Eugen Ehrlich².

In spite of all this, the personality and work of E. Ehrlich is little known in our country, just as some exegists of his work abroad fail to know the fact that he published a series of studies in Romanian, in "The Archive for the Social Science and Reform" and also they do not know the content of the conference text he held at the South-Eastern European Studies (December 12 and 19, 1920), entitled "On the live law", text which was published in "Neamul Romanesc" by Nicolae Iorga in the 29-31 december 1920 and 1-6 January 1921 issues.

Given all these reasons we will make a short presentation of the biography and sociological ideas of this personality.

1. Eugen Ehrlich – biographical data

E. Ehrlich was born on September 14, 1862 in Cernauti. He undertook his undergraduate studies in Vienna where in 1895 he got the abilitation for the Roman Law.

He carried out his didactical and scientific activity beginning with 1897 at the University of Cernauti, firstly as assistant and then after 1901 as professor of Roman law. He was dean of the Law Faculty and then rector of the same university. With the occasion of his appointing as rector, E. Ehrlich held the inaugural speech with a dissertation entitled: *Die Tatsachen des Gewohnheitsrechts*.³

¹ D. Gusti, *Sociologia militans*, vol. I, Bucharest, 1934, p. 146

² G. Gurvitch, *Problemes de la sociologie du droit*, in *Traite de sociologie*, 2nd volume, 1960, p. 191. Also G. Gurvitch made a synthetic presentation of E. Ehrlich's sociology of law in *Elements de sociologie juridique*, Editions Montaigne, Paris, 1940, pp 125-133

³ *Die Fehliche Inauguration des Rektors der K.K. Franz Josphs in Czernowitz. Studienjahr 1906*, pp. 27-66
Romanian Journal of Sociology, X, 1-2, 1999.

He received the title of doctor honoris causa of the Groningen University (the Netherlands). After the fall of the Austro-Hungarian empire he settled in Bucharest obtaining the Romanian citizenship. He also became member of the Romanian Social Institute led by D. Gusti.

Little before his appointment as professor at the University of Bucharest he dies after an unsuccessful surgery in Vienna on the 2nd of May 1922. Among his works we find: *Beitrage zur Theorie der Rechtsquellen* (1902); *Freie Rechtsfindung und freie Rechtswissenschaft* (1903); *Das lebende Recht der Volker der Bukowina. Fragebogen fur das Seminar fur lebendes Recht* (1913); *Grundelung der Soziologie des Rechts* (1913); *Die Erforschung des lebenden Rechts* (1911); *Die juristische Logik* (1918); *Memoriomania generalilor* (1920); *Sfarsitul unei mari imparatii* (1921); *K. Marx si chestiunea sociala* (1922).

One of the first characterizations of Ehrlich's personality and work was made by Dimitrie Gusti: " Since I was extremely preoccupied by the topic of (customary law – our note, I.F.) I found at the wonderful library of the Criminology seminar two older works by Eugen Ehrlich which appeared one in 1922, *Beitrage zur Theorie der Rechtsquellen* and the other in 1903, *Freie Rechtsfindung und freie Rechtswissenschaft*, in which the author finds that the fundamental problem of the customary law is concentrated in the so-called *Gesellschaftsrecht* (society's law), opposed to the state law, to the law created by the law courts (*Gerichtsrecht*) and to doctrine (*Juristenrecht*). Many years after this bibliographical and theoretical discovery I had the chance to meet E Ehrlich in some very awkward circumstances for him. In my quality of dean of the Philosophy and Letters Faculty of the Bucharest University, after the fall of the Austro-Hungarian empire Eugen Ehrlich (since the University where he taught was closed) visited and asked me for help to reopen his department. I fought energetically so that Ehrlich would get this right, as one who spoke Romanian as well as being a remarkable scientist. But there was also an opposing professor who out of political reasons, was afraid of Ehrlich as professor [...] and would not vote in his favor [...] at the elections for the University's senate. That is how I could closely meet and appreciate E. Ehrlich's personality: his erudition and originality, the liveliness of his spirit and the optimism of his attitude, together with humor who were always present."⁴

⁴ D. Gusti. Opere, Vol. V, Academiei publishing house, Bucharest, 1971, pp. 197-198

2. Sociology of law and customary law.

Realizing the discrepancy between the Austrian civil law and the mosaic of the customary norms according to which the peoples of the Austro-Hungarian empire were led E. Ehrlich claims: “ The main point of the development of law today, as at all times, does not reside in legislation, in the juridical science or in jurisprudence, but in the society as such.”⁵ There is therefore a law of society, opposed to the state law as well as to the law created in the courts of law or juridical doctrine. “ The code is only the law which as I have proven in the *Sociology of law* does not contain , generally, but the rule which serves as basis for the juridical decision (*Entscheidungsnorm*) which is a secondary , derived and late form of law and containing only a little part of it, exactly the one which interests primarily the professional legal expert reason why it is considered by him as ‘the whole law’”⁶.

Beyond the formal positive law which covers only the superficial layer of the juridical reality there is the customary law which is the law of society (*Gesellschaftsrecht*). This represents the profound layer of the social life. As such it cannot be recognized and understood but by field research. So, the sociology of law must begin with the study of the customary law. “If you want to find the principle <<of the nationality of law>> said E. Ehrlich at the conference held at the South-Eastern European Institute (1920) you should not limit yourselves to that rule of the juridical decision, because *the law must be regarded in relation with the society where that national life took place, so we should study the principle on which the founding of the society is based*⁷ (our stress – I.F.) The founding of society has the property at its base. “The principle on which the founding of the society is based is in an intimate relation with the economic and social condition and through this with the national life”⁸. In the case of the agrarian societies the property principle comes out of the way in which the land is used.

The customary law represents the main form of manifestation of the *live law*. Thus according to the Roman law sources the head of the family is the ‘pater familias’, a chief of the family. “When I arrived in Cernauti, 30 years ago I found a situation which greatly amazed me. Here, at the Romanian peasants, the father was the only owner of the family’s income and not only the one coming from inheritance or donations but also the one acquired through work. When a

⁵ E. Ehrlich, *Grundelgug der Sociologie des Rechts*, (Vorrede), Munchen – Leipzig, 1913.

⁶ E. Ehrlich, *Despre dreptul viu*, in “*Neamul romanesc*”, December 29, 1920, p.2

⁷ *ibid.*, p. 2

⁸ *ibid.*

child was hired for some job in Cernauti his/her father would go every month to get his/her salary [...]. If the child would not consent his/her father to collect the salary the latter would get angry considering himself as deprived of his rights. But since the resistance to this custom has increased lately I did not hear about this old habit"⁹. Thus we find here an old juridical organization of the family which corresponds to the old Romanian household. "According to the old domestic economy each member of the family would contribute to the family's fund by work out of which he himself would live; no member of the family would buy or sell anything, would not need money for everything was found in the family. As long as the father would engage a child's services to an owner or neighbor so that the child would not go far from the house where he found all he needed this custom survived"¹⁰. As soon as "the child was hired in the city, his ties with his parents were broken and the old custom became irrational, survived for a while through inertia but died as a consequence of the destruction of the traditional family organization. However there is still left a trace of his characteristic feature. Here the members of the family work in common and consume together the product of their work. We could say that in the peasant family there is still a community of goods"¹¹.

E. Ehrlich noticed through his field work the existence of the customary law with specific forms to other ethnic groups in Bucovina: "the making up of the land property in villages, the organization of the family, the contracts, the wills show remarkable differences"¹² among themselves.

The contract represents another component of the *live law*: "In today's social organization the contract is the most powerful instrument. If the property right serves as base the contract is the propelling force which starts the machinery"¹³. The organization of labor in the big land property, in the industry, in commerce houses, restaurants, coffee-shops, is based on contract: "There are contacts with engineers, clerks, workers, apprentices, servants, and if the owner does not want or cannot administer his property by himself he makes a contract with the tenant. Besides this, all modern enterprises: trusts, holdings, are based on contract. There is also a contractual organization of work into trade unions and the tariffs contract. The exchange of goods is achieved by a series of buying-selling contracts"¹⁴. The selling contract is the essential element of the great organization of the national economy. It is closely

⁹ *ibid.*, December 30, 1920, p.2

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *Ibid.*, January 5, 1921, p.2

¹³ *Ibid.*, January 1, 1921, p.2

¹⁴ *Ibid.*

connected with the credit contract. "But if we look at the present codices we will not find but traces of all these. This is easily understandable if we remember that the codices are made for the practical purposes of the jurisprudence, so they only contain what is of a practical interest to a law expert"¹⁵. But the rules contained by the code are not always in agreement with the organization of the society. "Given the tendency of the law to be unified, so widely spread among the law-makers a lot of conflicts have been caused, for they crossed the real relationships of the economic and social life neglecting the fact that the rule followed in life cannot be unified as we could with the rule of the juridical decision, by making a unique code"¹⁶. The cause of these conflicts has its origin in the fact that the jurists do not know the 'live law', that the legal experts "are happy with whatever is written, especially the Roman law without being interested about what happens in life"¹⁷. But in life it find the present social organization expressed by the 'live law'. The *live law* must be studied, but not by researching word by word there where we will not find anything but there where it is, in villages, towns, fields, forests, mines, factories, commerce houses, banks, and then study the documents"¹⁸. This means that we know our country. "But to know our country does not mean to know the names of towns, mountain peaks, but to know the condition of the society. For this the live law is indispensable because it is the one which shows us the real organization of the society and the true manifestation of the national life"¹⁹. Its knowing is achieved only by sociological field research. In this sense, E. Ehrlich founded in 1905 the '*Live law*' Seminar

3. The Seminar for the 'live law' research

Methodologically Eugen Ehrlich left from the belief that just as sociology has to study according to the empirical research the sociology of law has to start from the field investigation of the 'live law'. In order to study the normative life of collectivities, customs, habits and their practice E. Ehrlich founded the Seminar of 'live law' at the University of Cernauti.

He also made up a questionnaire which he published in 1913 entitled: *Das lebende Recht der Volker der Bukowina. Fragebogen fur das Seminar fur lebendes Rechts*. When elaborating the questionnaire Ehrlich used as model the questionnaire made by the Croat Bogisic, Savigny's disciple, for the study of Slovenians' customs. Ehrlich's questionnaire was handy to any

¹⁵ Ibid.

¹⁶ Ibid., January 2, 1921, p.1

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid., January 6, 1921, p.2

student interested by the field research of the 'live law'. "During the holidays – said Ehrlich – each had the opportunity to answer the questions referring to the family's constitution in villages, land law, contracts, the right to succession. After that we made trips to visit the pastures in villages. The results were very interesting. Each pasture had its real and particular law. After the works made by the students among which the most valuable were the ones of Mr. Cotlarciuc²⁰ which were published I made a systematic collection of documents which was unfortunately destroyed during the war"²¹.

The seminar had a scientific as well as a pedagogical goal. "It is of course impossible to teach the young law experts so that they know all the sciences which can be connected to the juridical research. But we could form a pedagogical method which would develop in these students the indispensable capacity to face any of a life's experiences. If you ask me which are the qualities of a law expert that I praise I will answer that it won't be the intelligence, the spirits' acuteness, which is so praised, nor the historical understanding [...] and even less the philological understanding [...], what I appreciate are the eyes that see and the ears that listen. I require a law expert to know to use his senses and the most difficult task of the juridical education is to educate the senses in this respect. It is extremely bad that we study law only from the books and papers.

The paper we use for the university courses, seminars, exams ...]. The student is required science and not memorizing. *The 'live law' seminar is meant to remedy this inconvenient and so far the goal was reached. Immediately after the first lesson my students' whole mentality has changed. Nobody studies texts and their interpretations but one was telling me about a strange custom in his village, another a deal which attracted his attention, a third about a sort of bizarre obligation. The empty abstractions and foggy generalizations disappear. The law becomes concrete, precise, feeling, perceptible, for pupils start to learn to use their eyes and ears*"²² (our stress – I.F.)

Instead of the deduction used by some formal jurists E. Ehrlich suggests as the basic method induction which starts from the empirical data of the 'live law'. From this point of view R.

²⁰ Considering the information received from the academician Vladimir Trebici it is about the future professor at the Theology Faculty of the Cernauti University, Nicolae, (his lay name Nectarie Cotlarciuc (1875-1935), Bucovina's bishop, learned theologian appreciated until today by Austrian and German historians. Details in Mircea Pacuraru "Dictionary of Romanian Theologians" (1996)

²¹ Ibid.

²² Ibid., January 6, 1921, p.1

Pound was right when he was placing E. Ehrlich's work in the *sociological jurisprudence*.²³

The 'live law' seminar represented a real scientific field research unit of the juridical phenomena study such as those of the customary law. By that the future judges would acquire solid knowledge of the local law which they could afterwards use in the situations in which the existing legislation was not sufficient.

4. Some critical considerations

Such as other representatives of the 'live law' E. Ehrlich claimed the existence of a plurality of 'rights'. They develop spontaneously and 'peacefully' by the individual and collective (social groups) wills as opposed to the state law. Max Weber reproached Ehrlich with the fact that he did not understand the specificity of the juridical point of view as opposed to the 'sociological' one²⁴. At the same time M. Weber claims that "Ehrlich, among others, rightly insisted in the presentation of the way in which the Roman institutions had to completely abandon their national character and reach the sphere of the logical abstraction; the Roman law itself, had to be idealized, under the shape of the just logic law."²⁵ This process is intimately connected to the constitution of the Roman empire.

Also Geza Kiss sustains the necessity of the affirmation of the specificity of law as opposed to the sociological perspective on law. In the study *Law and Sociology* he wrote: "Our exposition discloses the truth which is found in Ehrlich's theory. Taking into account the variance and the complexity of social phenomena which form the constitutive elements of law, taking into account especially that the law changes in connection with the social customs transformations. This is only a part of the field and scope of the positive law science. It would be too exaggerated to consider the research of these social phenomena as the *aim* and *essence* of law"²⁶.

Accordingly "the law must remain law, and its application must be a special juridical work through which the concrete cases of the practical life should be judged according to the existent norms of the law"²⁷.

²³ R. Pound, Introduction to E. Ehrlich, *Fundamental Principles of Sociology of the Law*, 1936

²⁴ M. Weber. *Sociologie du droit*, Paris, P.U.F. 1986, p. 117

²⁵ *ibid.*, p.201

²⁶ G. Kiss, *Drept si sociologie*, in "Arhiva pentru Stiinta si Reforma Sociala", 3rd year, no. 1, April 1921, pp. 23-

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²⁷ G. Kiss, *ibid.*, p. 10

One of the major ideas in E. Ehrlich's work is the statement of the meaning of the empirical research for the founding of the sociology of law. From this point of view E. Ehrlich's work was positively received by the members of the Bucharest Sociological School, especially by those who studied the customary law of the Romanian villages. In this sense, H.H. Stahl wrote: "The opportunity to find out some things about the sociology of law from Eugen Ehrlich also influenced me, Ehrlich who rightly considered as the creator of this discipline. His basic treatise, less known in our country, are printed today in the United States which are still perceived as the gates opening new roads. Ehrlich, professor at the Cernauti University is the first jurist who made researches about the Romanian customary law. In Bucovina, by using questionnaires, so a more <<sociological>> method than the one used at the same time by the historian George Popovici"²⁸

²⁸ H.H.Stahl, *Amintiri si ganduri...* Meridiane Publishing House, 1981 pp. 20-21