

LIVING LAW

INTRODUCTION

Writing in 1912, Eugen Ehrlich, a law professor at Czernowitz University, in Bukowina, a city in the then Austro-Hungarian Empire, summarized his “fundamental principles of the sociology of law” with the following sentence: “At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.”¹ But how is such a non-official or state law to be studied? This question preoccupied not only Ehrlich, who coined the expression “living law” (*das lebenden Recht*), but subsequent generations of legal sociologists, anthropologists and, more recently, comparative lawyers.

It was Ehrlich’s contention that the men who composed influential early compilations of European law, such as the Roman law of the Twelve Tables, the *Lex Salica* or the *Sachsenspiegel*, had a direct personal knowledge of the living law of their own time. Such first-hand acquaintance with living law was absent in the draftsmanship of many, if not most, of the nineteenth and twentieth century European codes, except in the area of commercial law where commercial custom was of considerable influence. For Ehrlich, the living law that “dominates life itself even though it has not been posited in legal propositions.”² The source of our knowledge of such a law must be “first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages, and of all associations, not only of those that the law has recognized but also of those that it has overlooked and passed by, indeed even of those that it has disapproved.”³ This was wise counsel, as the reader of Paul Karon’s study of non-institutional credit in Mexico will discover, or as the students of consumer credit in Costa Rica found out when reading the C.F. Knight, B. Kozolchyk and R. Rausch study.⁴

In contrast with traditional studies on legislative history or ideology or on judicial policy, whether reflected in concepts or attitudes, living law

1. E. EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (W.L. Moll trans. 1962).

2. *Id.* at 493.

3. *Id.*

4. C.F. Knight, B. Kozolchyk & R. Rausch, *Law and Consumer Credit in Costa Rica: Preliminary Draft* (1969) (unpublished manuscript) (available in the Foreign Law Collection, University of Arizona College of Law Library).

studies focus primarily on acts or transactions that seldom reach the courtroom or the legislative or administrative hearing hall. This is not to say that "official" law is ignored by the living law researcher. On the contrary, the living law researcher must be keenly aware of "official" law, if for no other reason than to be able to establish the contrast with, and thereby the presence of, living law. This contrast is, as often as not, the key to a better understanding of the law of Central and South American countries.

Many reasons have been given by those attempting to explain the presence of the inevitable gap between official and living law in Latin America. Some, including this writer, thought that there was something peculiar in the Hispanic-Portuguese legal culture that encouraged the enactment of an official law that was almost purposefully at odds with social behavior and particularly with compliance patterns; "*Obedezcase pero no se cumpla*" ("Let it be obeyed but not complied with.") is a typical Spanish depiction of attitudes toward official law. Yet, while studying the history of usury law, the same sharp contrasts were discovered not only in Spanish (Catholic), Jewish and Islamic law, but also in English (Protestant) law. The gap, therefore, has been pervasive in many legal cultures. Nevertheless, differences in the gap's pervasiveness and in its effects upon society's ability to attain its goals were also observable in the same legal cultures. Where the gap is all-encompassing, as it is in Central and South America, there are many social goals that cannot be attained or whose cost of attainment is excessively high. Take for example the goal of encouraging market economy transactions between strangers, such as brokers or salesmen of a corporate equity or debt securities and members of the public. As long as the living law teaches the members of the public that it is only safe to enter into such transactions with family members or friends, it is easily predictable that the official law of sales or brokerage of equity or debt securities will remain dead letter. Clearly then an understanding of the elements of market trustworthiness (a living law institution) is crucial to an understanding of official market transactions law. This understanding is also aided by the comparative datum. If the experiment succeeded or failed elsewhere, there is obviously much to be learned, particularly once the similarities and contrasts with the other legal culture are established. Furthermore, the experience of the model jurisdiction or of the jurisdiction whose official law inspired the local experiment is crucial in isolating those elements essential in assuring the viability of the legal institution.

The goal of the *Journal's* living law section is to provide a broad enough spectrum of studies to aid in the understanding of official law's successes and failures both north and south of the Rio Grande.

Accordingly, legal documents, customs, usages and associations will be examined in an attempt to acquire the truest possible vision of legal life, whether in a private or public law context. At times the study's aim will be no more ambitious than to describe what is going on with respect to a given type of transaction or legal relationship, whether it involves the financing of commercial or industrial construction, the importation and exportation of produce or plea bargaining and its counterparts. At times the study will describe attitudes, opinions, views and policies of influential decisionmakers. Occasionally, an ambitious researcher will attempt the finding of "jural postulates" in the certain communities, as done by Llewellyn and Hoebel,⁵ or, more ambitiously still, the functioning of an entire legal system, as done by C.J. Gutiérrez.⁶

The need for all living law studies is apparent, the researchers are serious, and eager, and masters have shown the way; may this living law section have the long and fruitful life it deserves.

—Boris Kozolchyk*



5. K. LLEWELLYN & E.A. HOEBEL, *THE CHEYENNE WAY* (1941).

6. C.J. GUTIERREZ, *EL FUNCIONAMIENTO DEL SISTEMA JURIDICO* (1979).

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