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Revisiting Pound's Law in Action and Ehrlich's Living Law to Find the "Gap": A Compilation of Lecture Notes

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Abstract

Finding research "gaps" is an important aspect that must always be done when starting research. Especially if the research is a sociological research. This article aims to shed light on the sociological approach in legal research into approaches, namely the Sociology of Law approach and the approach of Socio-legal Studies. These two approaches have different and unique ways of defining research "gaps." This article will examine using empirical methods that rely on primary and secondary data, as well as inductive methods to analyze data. A comparison will also be made between Ehrlich's "living law" and Pound's "law in action" so that the differences between the two ideas can be found so that in the future, future researchers will not consider the two ideas identical.

A. INTRODUCTION

As per the dominant narrative, a key component of how social sciences and law collaborate is currently organised in the scholarly and occasionally also institutional divide among people who employ sociology to comprehend how law works and people who are focused in law because of the potential insights it can provide into the nature of one's societal structure. They former is frequently referred to as sociology of law, while the latter is known as socio-legal studies or legal sociology (Nelken, 1981). It was this statement from Professor David Nelken[1] that finally became the inspiration in writing this compilation of lecture notes so that his wisdom can be spread to readers everywhere.

[1] Professor David Nelken is a Professor of Comparative and Transnational Law at King's College London (University of London), where he also teaches the LLM course "Law and the Social Sciences" along with Dr Nicola Palmer and "Sociology of Law." Between 1976 and 1989, Professor Nelken lectured law at Cambridge, Edinburgh, and University College, London. That was before he moved to Italy in 1990 to serve as the University of Macerata's Distinguished Professor of Legal Institutions and Social Change. He previously served as Visiting Professor of Criminology at Oxford University from 2010 to 2014 and Distinguished Research Professor of Law at Cardiff University (Wales) between 1995 to 2013.

Often in law and sociology we encounter the prominent jargon "law in book" and "law in action" or "living law." Although these jargons are very prominent among legal scholars, understanding these jargons correctly is very important—as the author have been constantly reminded. In an effort to remind the writers and to disseminate this understanding beyond the walls of the Strand Building, the writers on their own initiative are motivated to compile what has been learned during several lectures and immortalise it into a written article.

Sometimes the term coined by Eugen Ehrlich and Roscoe Pound is often used interchangeably and considered to describe the same thing. Although in fact it has a different comprehension. Therefore, the purpose of this article is to show these differences by elaborating the big divide between the sociology of law and legal sociology, along with the in-depth elaboration on the birth of living law by Eugen Ehrlich and law in action by Roscoe Pound.

This article is never intended to replace nor it is intended to interpret the articles or great works of Professor Nelken, but is expected to be an introduction for readers who are interested in learning law and social scinces to knowing and further exploring Professor Nelken's masterpieces that was compiled in a laymen's point-of-view. If there is a difference from what is written with any of Professor Nelken's masterpieces, then the work of Professor Nelken remains as the main reference and shall prevails over this article.

B. RESEARCH METHOD

This paper is an essay that aims to shed light on a literary legal phenomenon that seems similar, but has different meanings and values. Therefore, the method used is an empirical study in which the author examines the relevant literature for comparison, and the empirical aspect of this study will focus on observation and in-depth interviews with figures who are experts, directly experienced, and have been in contact with others. directly with the topic raised. This research data will come from primary data and secondary data. Primary data will be obtained by means of observation and in-depth interviews, while secondary data will be obtained by conducting a literature study on secondary legal materials (Tan, 2021). The data obtained will then be analysed inductively, namely tries to reproduce ideas in a methodical manner that is anchored in specific examples of empirical observation (Sonata, 2014).

C. RESULTS AND DISCUSSIONS

Sociology of Law, Socio-legal Studies, and the Gap Problem

Some research is done by individuals who delve into topics like "access to justice" or "legal effectiveness," frequently in an effort to discover a solution to the "problems" that, more or less openly, define those study areas. To the contrary, some consider law as an illustration or component of sociological ideas like "social

solidarity," "social control," "social order," or "capitalist discipline" whose theoretical and empirical features they aim to investigate (Nelken, 1981).

Numerous members of the first faction believe that sociologists ought to be "on tap but not on top," therefore they are fairly satisfied to limit their involvement in the finer parts of sociological theory. On the other hand, legal sociologists are adamant that their field cannot grow out of issues like "how to make law more effective" or "how to render its values more attainable." They define their objective as the creation of sound social theory, reserving socio-legal studies to be classified as a particular branch of applied science (Nelken, 1981).

In order to better understand the earlier question, the sociology of organisations have suggested that it is vital to refrain from the urge to inquire why an organization is not successful in accomplishing its goals, but rather to understand of how members of organisations realistically construct their goals in the first place. The same applies for sociologist of deviance. It has been difficult for sociologists of deviance to go past their focus on "incarceration" topics like how to minimise crime or deviance or why people are committing crimes. What they should ask instead is why specific behaviours tend to be regarded as criminal or deviant.

It is challenging to support the idea that "applied" sociology exists independently of theoretical issues and advancements. The same holds true of any assertion that socio-legal studies are just interested in outlining how the law is applied. Occasionally it is argued that socio-legal studies adherence to pragmatic, policy-making goals is their main flaw. The socio-legal studies dedication to real-world, policy-making goals is its most compelling justification. The most persuasive criticism of socio-legal studies is that they tend to "take" rather than "make" the problems they focus on. It is true that using pre-made problems might create inquiry subjects that are inaccurate or misleading. This flaw has been exploited by the majority of significant theoretical attacks on socio-legal subjects of inquiry, which can ask, for instance, of research on the accessibility of justice, "Who claims that there exists an "unmet legal need"?" What issues are raised by examining why legislation "failed" in the context of study on the application of legislation?

Since so much of this pioneering works began with the "impact" of legislation, the "gap problem" became crucial. Studies comparing the "law in the books" with the "law in action" gave pioneers of a new field the kind of unflinching proof they needed to support the consequences of normative legal or administrative standards. This type of research yields valuable results for decision-makers and those involved in using the laws to manipulate or influence society. It also has the not insignificant appeal of enabling research to simulate the thrill of muck-raking, exposé journalism (Nelken, 1981). The allegation that this study relied on flawed, untested, and oftentimes unreasonable beliefs about how norms could be thought

to influence behaviour was one of the main lines of critique. Nevertheless, a more comprehensive theoretical framework in which they can be dealt and to which their research can contribute is necessary for a meaningful analysis of these issues.

The classifying and conflict research methods that were common in the sociology of law symbolize the second method to the "gap problem" that can be differentiated. This point of view sought to see society as an ill-defined, transient structure where many individuals and organisations attempted to influence their will on others. The party with the most resources won the contest over whose interests and values should take precedence.

Eugen Ehrlich's "Norms for Decision" and "Living Law"

In the year 1862, Eugen Ehrlich was born in Czernowitz (now located in Ukraine) in the Duchy of Bukowina (formerly a part of the Austrian-Habsburg empire, which now comprises of half of Romania). As a "*Privatdozent*," or "teacher of law," he was educated in law in Vienna. He then got appointed as Roman Law Professor at the University of Czernowitz in 1897. The publications of Ehrlich demonstrate his proficiency in German, French, and English. His main work, *Grundlegung der Sociologie des Recbts*, was published in 1913, and this was the work that made him famous all over the world (O'Day, 1966).

Ehrlich elaborated on the perceived need for a fresh legal posture. The living law was his response. He successfully contested the traditional view that state legislation was foolproof due to its innate nature, hence turning the "established" notion of law upside down. Ehrlich, makes a distinction between two (or even more) types of law. Particularly, the laws and principles contained in court rulings, legislative provisions of the act, and civil codes served as norms for decision-making (which he dubbed "norm for decision"). These were the "norms whereby the judiciary would impose in the event that the parties pursue litigation. " Ehrlich subsequently divides this group into sub-groups that are judicially and legislatively created legislation for several uses. As opposed to standards for judgment (the "norm for decision"), "living law" is described as:

> *"the law that dominates life itself, even though it has not been printed in legal propositions. The source of our knowledge of this law is, 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 or passed by, indeed of those that it has disapproved."*

According to this interpretation, the living law would be equivalent to the legal standards of behaviour, or the guidelines that individuals as part of the society or group (or association) really abide by on a daily basis. According to Ehrlich, numerous interactions are governed by moral standards that are ingrained into everyday interactions and accepted as valid by members of social groups. It became

required to look into the internal structure of these social groups in order to examine the living law. It is the responsibility of the sociologist to ascertain how the laws that are acknowledged as obligatory by individuals of a certain social group function.

Ehrlich was criticised by Hans Kelsen for conflating normative and descriptive analysis as soon as he came up with this definition of living law. Legal theory was inevitably monist, even though the sociologist might seek to delineate between various sorts of law (Nelken, 1984). Kelsen argued that Ehrlich is confusing between what the law is ought to and what is the fact in law. Kelsen's philosophy of law is you should look at law from top to bottom (which can be observed by Kelsen's *Stufenbau* (hierarchy of laws) theory).

Ehrlich used the usage of parents pocketing the salaries of children placed into labour as an illustration of the Bukowina living law, despite the fact it was against Austrian Civil Code. Ehrlich claimed that it was an illustration of the current "living law" in Bukowina by saying that we simply would just be informed that resisting is uncharacteristic if we questioned why the childrens would put up with this treatment by their parents.

Here we can see the fight between sociology of law movement against legal dogmatics. Kelsen was unable to comprehend this. Ehrlich's "living law," in the opinion of Kelsen and the majority of analytical philosophers of the twentieth century, is incorrectly labelled as law. This lead to the argument between Ehrlich and Kelsen, which Kelsen replied:

> *"Will Herr Professor Ehrlich reply, you are legally obliged to put up with the fact that your parents dispose of your income without your consent? I don't doubt that Ehrlich would help the child obtain his rights - even in Bukowina."*
> Or in a nutshell the author rephrases: Wouldn't [Herr Ehrlich] defend that boy and his rights?

Both theories were forced to draw their blades on this fight due to the extreme disparity in their concepts. Ehrlich's "practical idea of law" was not acceptable to Kelsen since he claimed that law represented the only valid consideration for all practical matters, including the prevailing political ideology and moral beliefs. Ehrlich maintains the inclusionary thesis and combats Kelsen's viewpoint, which is obviously at odds with the actuality of law, that is inherently connected to ethics and politics and is rarely imaginable beyond this context (Antonov, 2011).

Ehrlich believes Kelsen made a mistake in his comprehension of the living law. Ehrlich notes that the majority of his critic's misinterpretation of his work originates from the definitional issue, despite his repeated declarations that it was not his goal to engage in a heated debate with Kelsen. Ehrlich contends that in order to be grasped intellectually, he had to use novel terms. claiming that Kelsen was confused about the notion of living law. Despite the fact that the majority of

research on this debate refer to it as an ongoing debate, Kelsen's stance is commonly seen as actually winning this debate because it was more accepted by the academic community. Ehrlich, unfortunately, did not yet have a large enough audience or enough backing to establish a brand-new school of thought.

One unique insight about this debate that was told by Professor Nelken was, Ehrlich who is a good swordsman (or at least according to his biographer, Manfred Rehbinder), once challenged Kelsen to a duel (swordfight) to settle this debate. This duel, of course, never materialised. Professor Nelken even had the honor of meeting Kelsen in person and talking about this at Kelsen's residence in California, United States of America. Professor Nelken believes that by asking Kelsen to a duel, Ehrlich is actually making a point. He knows that at that time, swordfight is not legal, but this is the real life. Challenging someone to a duel to defend honour is still a thing at that time in the Austro-Habsburg Empire. The challenge displays a proving point, not argumenting what is law, but argumenting what actually shapes behaviour and life. For Ehrlich, it is how far law shapes behaviour, or maybe it is living law that shapes behaviour. Living law was never about power or legal authority.

The living law was critical to Ehrlich. It was an account as to how people behaved in various common social situations. The living law that is currently in effect should always be distinguishable from the law found in legislation and case law. The living law is exactly what it sounds like: how the law is practiced in daily interactions between men as part of the society. This idea encompasses more than just the written law because it is possible that the living law was never embodied in the books or that it existed however was in opposition to it.

The differences between statutory law, the civil code (*Allgemeines Bürgerliches Gesetzbuch*), and what Ehrlich referred to as "living law" were the primary concern of Ehrlich's sociology of law. Ehrlich demonstrated the limitations of the legal framework created by the imperial authority by researching the specifics of local practise. Living law was not the result of laws passed by the government, according to Ehrlich, but rather a variety of "associations," each of which had its very own legal existence and formulated rules to govern obligations of the members pertaining to fundamental "legal truths," namely: usage, domination, possession and declarations of will (Fillafer, 2022).

Ehrlich believed that no legal edict or judgment made by any group of individuals or society is fully effective until the underpinning law—which he called the "living law"—is also understood and taken into account. Ehrlich contends that in order to create a real legal system that is in line with peoples' social customs, one has to dig beyond statute books, published judgements, writings, and legal tomes to establish what constitutes the living law (O'Day, 1966).

According to Ehrlich, the concepts of usage, domination, possession, and declarations of will form the foundation of the entire socioeconomic system. The

living law explains how persons link their actions (rationale) to one another in the context of such concepts. Ehrlich argued that while some of the living law can be obtained in the legal instruments regulating these legal relationships, it can also be discovered more extensively in how persons behave in their associations (relationships) and pursuits with other socioeconomic actors (O'Day, 1966).

Ehrlich's attention on the differences between the laws written on the books and living law is partly explained by the reality that his native Bukowina (where he authored, researched, and examined the living laws), had a society that was mainly diverse. The ethnic groups that lived in Bukowina during Ehrlich's time, were Romanians, Germans, Jews, Russians, Slovaks, Hungarians, and gipsies. He held the opinion that the living law should be established in all facets of society via empirical observation of daily activities, commercial activity, societal conventions and customs, and all associations, not just those that were addressed by the written law.

In Ehrlich's home Germany, his ideas are not widely accepted. Well after second edition, the Nazis silenced his work (Nelken, 1984). Ehrlich's works however, gave the sociological movement in the United States a significant boost (O'Day, 1966). Ehrlich's legal theory was founded on pillars that have survived the sway of a complex and significantly shifting society. Ehrlich paved the way for many other brilliant minds, like Pound, Cardozo, and Brandeis that have built a "rock of ages" of legal theory upon the pillars Ehrlich erected.

Roscoe Pound's "Law in Books" and "Law in Action"

There is conflict between the normative and factual elements in society (social norms). This conflict is frequently referred to as "law in books" and "law in action," as Roscoe Pound initially put it (Blewer, 2021). The "gap" between the law and the objectives of policymakers is a common topic of study for socio-legal scholars. Roscoe Pound stressed the manner law truly works in people's lives when he coined the phrase "law in action" (Karton, 2020). Lawyers should make the law in action correspond to the law in books, according to Pound, who attributed inconsistencies on "our machinery of justice" that is "too slow, too burdensome, and too costly" (Gilbert, 2015).

During the last quarter of the nineteenth century as well as the early twentieth century, the United States underwent enormous and quick shifts, including the emergence of massive industrial companies, the progression of state and federal bureaucracies and their operations, the development of large metropolises, the spread of electricity, improvements in modes of transportation and communication, and much more. A string of financial depressions contributed to the period's extreme social unrest and instability (Tamanaha, 2020).

Roscoe Pound entered the dilemma at this point. According to Pound, the contemporary public sense of fairness is at odds with the rulings of the judiciary,

which is why the rule of law is eroding. Law, which would be set in stone by stare decisis and enduring doctrines, changes more slowly than the socioeconomic realities and public sentiment (Harding, 2016). Pound reasoned that research into the interaction between law and society will help identify the existence of and explanations for "law in books and law in action"—namely gaps between the stipulated legal rules, what legal officials do in regards to the norms, and real social behaviour in the society that the rules are intended to regulate (Nelken, 1984; Tamanaha, 2020).

To govern the behaviors of men in their quest to fulfill their needs so as to facilitate fulfilment of as much of the entire scheme of needs with the smallest friction and wastage, is how Pound phrased the goal of law, which he took from William James's definition of the social benefit. He described an obsession as a need or want that people, whether acting alone, in groups, affiliations, or relationships, seek to be met (Tamanaha, 2020). He listed five key distinctions of sociological jurisprudence and other theoretical schools of thought: It emphasises the social functions of law, looks to the actual operation of law instead of abstract subject matter, outlooks legal precepts as guides to outcomes that are socially just and less as rigid designs, and is composed of a variety of philosophical leanings, such as pragmatism and various sociological and social philosophical schools.

Take Pound's persistent assertion that "Law is a tool, not an end" into consideration. He also stated that "the norms are really not created and implemented solely for their sake, but in order to promote societal goals." The best way to look at the law is from the perspective of society, never from the perspective of the law alone. Instead of society being formed for the law, the law being formed for society. The purposes of the law are inferior to the society's best interests. The law is the precursor of society. In Professor Nelken's words, he said that Pound remains resolute in the fact that there is no point in a law in book if it is different from what is done in the world (law in action). We need to understand the questions about social world, to make law better. Change the law then, close the gap between the law in books and the law in action by bringing the law in action closer to the law in books, or vice versa. In short, Pound uses the law to solve real-world problems. In order to do that, judges should see the reality of the society rather than being kept in the "free-law" movement.

Pound's "Law in Action" is Not Ehrlich's "Living Law," and Vice Versa

Eugen Ehrlich (1862-1922) and Roscoe Pound (1870-1964) were near contemporaries. At one point, Pound started his lengthy and stellar profession at American law schools, ultimately peaked by his Deanship at Harvard, while Ehrlich was a legal professor at Czernowitz in the province of Bukowina on the near edge of the Austrian-Habsburg empire, which ended in 1918 (Müller-Funk, 2020). The term "living law" was first used by Eugen Ehrlich in his discursive but

insightful essay under the Anglicised title, Fundamental Principles of the Sociology of Law (*Grundlegung der Sociologie des Rechts*), published in 1913 (O'Day, 1966). Meanwhile, the ground-breaking essay "Law in Books and Law in Action" by Rocoe Pound was released in 1910.

Eugen Ehrlich is the less well-known of the two scholars, in part since Roscoe Pound enjoyed the benefit of longevity, while mainly since it was Pound who translated Ehrlich's book for English-speaking readers (Nelken, 1984). Some contemporary theorists believe Roscoe Pound accurately reflected Eugen Ehrlich's beliefs and thoughts. However, in Pound's case, United States of America provided a favourable environment for Pound's framework due to its respect for both science and technology, as well as its practical interest in finding solutions to societal issues. In the overly bureaucratic administrations of Continental Europe with its codified legal codes, Ehrlich's theories found little fertile ground.

It is crucial to highlight that Pound deliberately separates Ehrlich's views in this work by differentiating between the school of thoughts. This distinction itself has been rooted on a more fundamental conflict between Ehrlich's affiliation with what Pound dubbed "the European tradition of sociology of law" and the American "sociological jurisprudence" school that Pound advocated. It is important to look at the context of Pound and Ehrlich's thoughts in order to comprehend how different they are from one another.

There is simply one criterion that pertains to Pound to make a law valid, namely to define to the laws established by the government in a society with a politically constitutional structure. In short, according to Pound, only norms supported by the state qualify as legal, hence other norms do not. Pound even refers to ineffective rules as laws. In some ways, Pound's obsession with "law in books" and "law in action" might be interpreted as an effort to alleviate the conflict in his definition (Nelken, 1984). Ehrlich, on the other hand, makes a distinction between two (or even more) types of law. Particularly, the laws and principles contained in court rulings, legislative provisions of the act, and civil codes served as norms for decision-making (which he dubbed "norm for decision"). These were the "norms whereby the judiciary would impose in the event that the parties pursue litigation. " Ehrlich subsequently divides this group into sub-groups that are judicially and legislatively created legislation for several uses. As opposed to standards for judgment (the "norm for decision"), "living law" is described as:

> "*the law that dominates life itself, even though it has not been printed in legal propositions. The source of our knowledge of this law is, 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 or passed by, indeed of those that it has disapproved.*"

Pound viewed legislation in terms of its intended outcome because of his scientific credentials and affinity for pragmatism. Law was viewed as a tool that might be used to address social issues. Pound saw the law as a tool for "social control." Tremendous socioeconomic transformation and social disorder at that time in United States of America had been caused by the expansion of industry and the expansion of cities. Law was required to fill the void caused by the dissolution (failure) of major group and religious tradition-based constraints. In the notion that it may aid in preventing and resolving societal problems with the lowest amount of waste and inefficiencies, law need to be acted as a social engineering instrument. Hence, it was crucial to define law in terms of its efficiency (and its inefficiencies) with these goals in mind.

Ehrlich had a somewhat distinct viewpoint. Law, understood as "norms for decision," does contribute to the development of strategies for resolving social problems. But, the constant dynamics of relationship, control, ownership, and agreement, as well as the shifting demands of community production and consumption, lay behind the so-called notion of "living law." These in turn led to the continuous development of business and family life as well as the legal relationships of ownership, property rights, heredity, and contracts. Law was therefore to be viewed less as an instructional tool (intermediary variable) and instead as the product of social dynamics and societal transformation. It was a component of social and economic life that was naturally linked to and formed by prevalent patterns of living, working, and relating in communities and other organized groups. Therefore, Ehrlich's norm for decision covers Pound's ideas of both law in books and law in action. That the notion of Ehrlich's living law was a category that Pound has not looked into. This viewpoint can be found in Ehrlich's framework. In comparison to Pound's work, understanding the creation and upkeep of the "living law" provides a significantly more nuanced and insightful understanding of laws. For Pound, laws must have a purpose for individuals or organisations, or else they are useless. However, Ehrlich's writings include considerations of the relationship between social structure, behaviour, and norms.

In light of this, it is simpler to compare and contrast Pound's and Ehrlich's differences in terms of both their meaning and their purpose. The phrases "law in books" and "law in action" by Pound both fundamentally pertain to the actions of legislators and law enforcement. On the contrary, Ehrlich's classification refers to "norms for decision" as only including the actions of law-makers, judges, jurists, and other legal officials. However, "living law" primarily corresponds to the values that citizens acknowledge as compulsory in their role as association members. In comparison, Ehrlich's "living law" does not fit Pound's definition of the "law in action" since it primarily relates to obligations instead of real action. Now it becomes clear why the two typologies do not correspond to one another.

In addition, harmonising between the "law in books" with the "law in action" was Pound's main concern. As they both addressed the same topic under the same circumstances. On the contrary hand, dispersion did not pose a concern for Ehrlich in terms of policy. Since they were used in different circumstances, Ehrlich's "living law" and "norm for decision" were not always in opposition to one another. "Norm for decision" are really only necessary in conflict and disagreement situations, whereby in all other situations, "living law" is the everyday norm.

Each scholar has a different perspective on society, which is intertwined. According to Pound, society is made up of conflicting factions that compete for limited resources. People were viewed as belonging to these factions or groups when they pursued interests in commonality. In being able to restrict their urges and balance the antagonistic and collaborative aspects of human nature, their members needed social control "to support the exertion of will power." Akin to individuals, groups also needed legal intervention to stop detrimental rivalry, so that both individual and collective power could then be put to the greater good.

Ehrlich, in contrast, disagreed with both Pound's ideology and his lingering faith in the fundamentally humanist assumptions of classical liberalism. His emphasis was on the functioning of organisations, institutions, and associations. Ehrlich believed that group norms, interpersonal interactions, and social and economic growth governed individual behaviour. That organisation or group is the rule which allocates every individual his place and his role in the group itself.

Crucially, each scholar presented their ideas under quite distinct societal contexts. Pound envisioned the function of creative law-making as being more interventionist. Ehrlich, who resided in a remote area of a near broken-down Austro-Habsburg Empire[2] and observed the peaceful co-existence of several cultural groups in the province of Bukowina, perceived centralised law-making from Vienna as an incursion into a system of functioning normative codes.

We may now finish the narrative by examining the similarities between Pound and Ehrlich's theories after highlighting some of their key distinctions. Both authors use the analogy of "alive" and "dead" law. Pound and Ehrlich both felt it was important to draw a difference between the "law as being acted" and "mere written regulations" during their careers. Ehrlich believed that the law of the civil codes was frequently the most blatant example of dead law, and that the true normative patterns of collective and social life were where the law truly lived.

D. CONCLUDING REMARKS

[2] According to Professor Nelken, Ehrlich's living law as the law that dominates law itself is not to be interpreted as every living situation in which people are being pushed by dominant power. Professor Nelken thinks there is more to that, and he means that this law will go further than the [law being enacted by authorities] itself. He gave an example where at the time of Ehrlich, the Austrian-Habsburg Empire is about to collapse. Perhaps the term dominate does not mean power, but the [living] law that go ahead of the laws in the Austrian-Habsburg Empire.

The gap problem is considerably the most important aspect of research in the discipline of law. To identify the gap problem, there are commonly two approaches differentiated by its discipline and school of thought. Sociology of Law and Socio-legal Studies approaches to find the gap problem are truly different. In Sociology of Law, it is the sense of understanding it as a discipline and about how sociology make sense of law. In its works, Sociology of Law aims in developing itself as a discipline (that is how discipline works), not to solve practical problem. Whereas, Socio-legal Studies is much more practical since it is at the border line of sociology and law. Socio-legal Studies in practice is more interested in studies which are useful in policy-making. To help identify the gap, most researches employ the comparison between the "alive" and "dead" law.

As near contemporaries, Eugen Ehrlich's "living law" is often regarded as the same as Roscoe Pound's "law in action." According to Pound, only norms supported by the state qualify as legal, hence other norms do not. Consequently, Pound even refers to ineffective rules as laws as a result. Ehrlich, on the other hand, makes a distinction between "norm for decision" and the "living law," the latter presumably includes both Pound's "law in books" and "law in action." Pound viewed legislation in terms of its intended outcome since law was viewed as a tool that might be used to address social issues. In contrary, Ehrlich understood that for "norms for decision," does contribute to the development of strategies for resolving social problems, but the shifting demands of community production and consumption, lay behind the so-called notion of "living law." Law was therefore to be viewed less as Pound's instructional tool and instead as the product of social dynamics and societal transformation. In addition, harmonising between the "law in books" with the "law in action" was Pound's main concern. On the contrary hand, the same issue did not pose a concern for Ehrlich in terms of policy. Since for "norms for decision" and for "living law" were used in different circumstances.

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