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法律社会学基本原理

FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW

[奥]尤根·埃利希 著

(一)

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## 出版说明

在西方学术思想的发展流变中,出现过很多影响深远的经典著作,这些著作穿越时空,为人们长久研读,有的甚至影响了整个人类文明的发展进程。这套《西方学术经典文库》(英汉对照本),精选了其中最有代表性的一些名著,计划达到一百部,将陆续分批出版直至全部完成。

《西方学术经典文库》由多位专家学者指导分类选目,内容涵盖哲学、文学、宗教学、政治学、经济学、社会学、人类学、心理学、法学、历史学等类,注重权威性、学术性和影响性,收录了不同国家、不同时代、不同流派的诸多名著。

《西方学术经典文库》中译本译自英文原著或其他文种的英文译本,以英汉对照的形式出版,读者可以参照原文对作品有更加客观的理解,更好地把握西方学术思想的精髓。

为加以区别,原文中的英文注释,注释号用①、②……形式表示;中文译者注释则以〔1〕、〔2〕……形式表示。至于英译本中出现的原文页码和特殊索引等问题,中文译者在“译者后记”中将予以解释、说明。另外,在英文原著中,有一些表示着重意义的斜体或大写等字体,考虑到读者可以在对照英文阅读中看到,因此在中文译文中,没有照样标出,还望读者理解。

九州出版社

Fundamental Principles Of The Sociology Of Law

By *Eugen Ehrlich*

English Translation

By *Walter L. Moll*

本书根据 Harvard University Press 1936 年版本译出

## FOREWORD

It is often said that a book must be written in a manner that permits of summing up its content in a single sentence. If the present volume were to be subjected to this test, the sentence might be the following: 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. This sentence, perhaps, contains the substance of every attempt to state the fundamental principles of the sociology of law.

THE AUTHOR

Paris, on Christmas Day, 1912.

## 前 言

人们常说著书应采取这样的方式,即该书的内容可以用一个句子来概括。若将此检验标准适用于本书,则本书可用下面这句话来概括:不论是现在还是其他任何时候,法律发展的重心不在立法、法学,也不在司法裁决,而在社会本身。或许,这句话涵括了对法律社会学基本原理作出阐释的每一次尝试的主旨。

作 者

1912年圣诞节于巴黎



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# I

## The Practical Concept Of Law

There was a time, and indeed it does not lie very far behind us, when the university trained the physician for his future profession by requiring him to commit to memory the symptoms of the various diseases and the names of such remedies for them as were known at the time. This time is past. The modern physician is a natural scientist who has chosen the human body as his field of investigation. Similarly, not much more than a century ago, the mechanical engineer was little more than a mechanic to whom his master had imparted the manual skill required for the building of machines. Here too a change has taken place. The present-day mechanical engineer is a physicist who studies the nature of the materials which he is to use and the extent to which their reactions to various external influences take place in conformity with observed and observable laws. Neither the physician nor the mechanical engineer any longer, in a purely craftsman-like manner, acquires merely the skill required for his profession, but chiefly an understanding of its scientific basis. The same development has taken place long ago in countless other fields.

In jurisprudence, however, the distinction between the theoretical science of law (*Rechtswissenschaft*) and the practical science of law (*Rechtslehre*), i. e. practical juristic science, is being made only

## 第一章 法律的实用观念

曾经有一个时代,这一时代离我们确实并不遥远。那时候,大学培养未来的执业医师时,会要求他们牢记当时已知的各种疾病的症状和相应的治疗方法名称。这一时代已经过去了。现代的医师是选择了人体作为其研究领域的自然科学家。同样地,不到一个世纪以前,机械工程师和从师傅那儿学习机械制造所必需的手工技艺的技工并无差别。这一点上也已经发生了变化。当代的机械工程师是一个物理学家,他要研究他所使用的材料的性质,并探究在何种程度上这些材料在各种外界影响下的反应会与已发现、可发现的规律相一致。医师和机械工程师都不再单纯以手艺人的方式仅仅掌握职业所必需的技巧,而主要是理解其技艺的科学基础。很久以前,在无数的其他领域中也发生了同样的变化。

但是,在法学<sup>[1]</sup>中,理论法学(*Rechtswissenschaft*)与实用法学(*Rechtslehre*)二者只是在最近才被区分开来。并且在这一领域从

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[1] 德国著者通常将广义上的法学/法律科学(*Science of law*)分为狭义上的法学(*Jurisprudence*,对应的德语单词为*Jurisprudenz*)和法哲学(*Philosophy of law*)。这是欧洲大陆,特别是法国的用法,在那里,*Jurisprudence*实际上类似于“*Practical science of law*”或“*caselaw*”。不过,本书的英译者采用

just now, and, for the time being, the greater number of those that are working in this field are not aware that it is being made. This distinction, however, is the basis of an independent science of law, whose purpose is not to subserve practical ends but to serve pure knowledge, which is concerned not with words but with facts. This change, then, which has taken place long since in the natural sciences is taking place in jurisprudence also, in the science which Anton Menger has called the most backward of all sciences, "to be likened to an out-of-the-way town in the provinces, where the discarded fashions of the metropolis are being worn as novelties." And it will not be barren of good results. The new science of law will bring about much enlightenment as to the nature of law and of legal institutions that has hitherto been withheld from us, and doubtless it will also yield results that are of practical usefulness.

There is little that is more instructive to the jurist than the study of those spheres of juristic knowledge in which the change has already taken place, e. g. that of the general theory of the state or that of history of law. Let us glance at the latter for a moment. The idea that the law is to be interpreted in its historical relations was not unknown to the Romans. Both Gaius and the fragments of the Digest abound with historical references. Even the glossators and the postglossators have made abundant use of the data of legal history. Moreover the great French scholars and the fine Dutch scholars of the sixteenth, seventeenth, and eighteenth centuries can properly be referred to as historical and philological jurists. The German publicists of the seventeenth century have also worked along historical lines. The same is true of the English, possibly from the days of Fortescue. Blackstone is a

事研究的多数学者暂时还没有注意到这种区分。但是,这种区分是独立的法律科学的基础,这一法律科学的目的是为了促进实用的目的而是为了服务于纯粹的知识。这种区分所关注的不是用语本身,而是事实。由此,这一早已在自然科学领域发生的转变也在法学领域发生了,安东·门格将法学这个所有学科中最为滞后的学科比作是“外省的一个偏远的城镇,大都市已经抛弃的服装式样在这里还正在被当作新潮流行着”。这一变化并非毫无善果。这种新的法律科学将促成那些迄今我们仍无从知晓的法律和法律制度之性质的启蒙。无疑,它也将带来实用的结果。

对法学家而言,几乎没有什么比那些已经发生变化的法学领域的知识的研究有更多启发了。诸如国家的一般理论<sup>[1]</sup>或法律史。让我们稍稍浏览一下法律史。罗马人并非不知法律应当在历史的关联中得以阐释这一理念。盖尤斯和《学说汇纂》的诸段落中都充斥着历史概述。甚至连注释法学派与后注释法学派都运用了大量的法律史资料。此外伟大的法国学者和16、17、18世纪杰出的荷兰学者都可以完全称得上是历史的和语言学的法学家。德国17世纪的国际法学家也是沿着历史路径展开研究工作的。英国也是如此,并且很可能是从福蒂斯丘的时代就是如此。布莱克斯通是一位用历史方法解释现行法中看似无法解释的那些部分

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美国的习惯用法,在表达广义的法学/法律科学时使用“Jurisprudence”或“Science of law”,在表达实用法学时用“Practical science of law”或“Juristic science”。由于此中译本从该英译本转译而来,因而对照阅读时宜分清。

[1] *Allgemeine Staatslehre*,这是十九世纪末二十世纪初发展起来的科学,这一学科和政治学之间区分界线并未获得相当程度上的统一。



perfect master of the art of explaining historically such parts of the existing law as appear to be inexplicable. But it was the Historical School of jurisprudence that first made the history of law, which until then had been studied exclusively for the sake of a better understanding of the positive law, an independent science; made her the mistress of her own household. To the modern legal historian it is a matter of indifference whether the results of his investigations are of any practical usefulness or not. They are to him not a means, but an end. Nevertheless, ever since legal history ceased to be a handmaiden to dogmatic legal science, she has rendered the most invaluable services to the latter. Present-day dogmatics owes its greatest scientific achievements to fructification by legal history. The importance of legal history for legal science, however, rests not so much upon the fact that it is history as upon the fact that it is a pure science, perhaps the only science of law that is in existence today. And what an inexhaustible source of stimulation and instruction legal history has become for theoretical and practical economics, as well as for legislation! Would this have been possible if it had not given up its original limited aims and methods?

Human thinking is necessarily dominated by the concept of purpose, which determines its direction, the selection of its materials, and its methods. And with reference to these things the thinking of the jurist is conditioned by the practical purposes pursued by juristic science. When a structural-iron engineer is thinking of iron, he does not have the chemical element in mind, but the article of commerce with which the foundries are supplying him for his buildings. He will be interested only in those properties of iron that are of moment for iron construction, and when he studies these properties he will employ such methods as are suitable for the workshop of the builder who erects iron structures. He will not take thought to develop methods of scientific investigation, for the structural-iron engineer is not interested in scientific results; for practical purposes scientific exactness would be not only superfluous, but too expensive, time-consuming, and difficult. It is sufficient if the structural-iron engineer does those things which he can do best, and leaves to others the things which they can do better. This, of course, is not, in itself, a detriment.