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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

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VIII

The Creation Of The Legal Proposition

The most diversified content may be clothed in the form of a legal proposition, in particular, in the form of a statute. There are therefore legal propositions without any normative content whatsoever, with a non-obligatory legal content, statutes in a purely formal sense. And there are legal propositions from which no legal norms can be derived, but only social norms of some other kind. We shall not discuss either of these species, but only legal propositions which contain legal norms. Their purpose is to serve as the basis for judicial decisions or for direct administrative action.

Every legal proposition which is to serve as the basis for judicial decisions is itself a norm for decision, formulated in words, and published in an authoritative manner, asserting claim to universal validity, but without reference to the case that may have occasioned it. The prevailing school of juristic science treats the judicial decision as a logical syllogism in which a legal proposition is the major premise; the matter litigated, the minor; and the judgment of the court, the conclusion. This idea presupposes that every judgment is preceded in time by a legal proposition. Historically this is quite incorrect. The judge who, in the beginnings of the administration of justice, awards a penalty to the plaintiff has found the existence of a concrete relation of domination and subjection, a relation of possession, a usage, or a contract, and a violation thereof, and thereupon has independently found the norm fixing the penalty. Perhaps in each of these decisions the thought is germinating that in a similar situation, a like or a similar decision ought to be arrived at; but this germ at this time is

第八章 法律命题的创设

法律命题的形式之下,特别是制定法的形式之下可能包含最多样的内容。因为,也存在一些没有任何规范性内容的法律命题,存在包含非强行性的法律内容,存在纯粹形式意义上的制定法。而且存在一些法律命题,从它们无法导出任何法律规范,而只能得出一些其他种类的社会规范。我们此处不讨论这些类型的法律命题,而仅讨论含有法律规范的法律命题。它们的目的是为了作为司法裁判或直接的行政行为的基础。

每一个作为司法裁判基础的法律命题,自己也是一个裁判规范,每一个法律命题都用语言清楚地表达出来,通过权威的方式发布,宣称具有普遍的效力,而不论何种情形会导致该命题的适用。主流法学学派把司法裁决看作是一个逻辑上的三段论,在这个逻辑三段论里,法律命题是大前提,诉讼事实是小前提;法院的判决是结论。这一个观点预设法律命题在时间上早于判决。在历史上,这是完全不正确的。在司法的早期,判决给原告赔偿金的法官发现了具体的支配与服从关系、占有关系、习惯或者契约以及对它们之违反等诸多情势的存在,因此法官要独立地发现确定赔偿金的规范。或许,在每一个这样的判决中,思想的萌芽是这样的:在一个相似的情形中,应当得出一个相同或者类似的判

buried deep in the subliminal consciousness of the judge. If we assume that the judge in primitive times protected possession or contract only because he had assumed the existence of a legal proposition according to which possession or contract ought to be protected by law, we are attributing our own conception to him. He thinks only of the concrete, not of the abstract. The legal historian, who is trying to gather the law of the past from such judgments, may at most read out of them that which was universal, the universal usage, but not that which was universally valid. Nevertheless, in spite of the lack of legal propositions, the norm for decision was not a matter of pure caprice. The judge always drew it from the facts of the law, which had been established either on the basis of his own knowledge or of evidence, i. e. from usages, from relations of domination and of possession, from declarations of wilt, and, chiefly, from contracts. Given these facts, the norm was given; it was impossible to separate the question of fact from the question of law.

Today we have the identical situation when there is no legal proposition in existence for the case that is to be decided. The judge can only ascertain the existence of the usages, of the relations of domination, of the legal relations, of the contract, of the articles of association, of the testamentary disposition involved in the litigation, and on this basis find a legal norm independently. Neither the ascertainment of the facts nor the free finding of the norm for decision appears as a subsumption of the case in litigation under a proposition relating to possession. All attempts to construe, all artificial heaping up of paragraph upon paragraph of a code, can deceive only a biassed mind as to the truth that a decision according to a legal proposition is possible only where there is a legal proposition already in existence.

It is true, according to juristic terminology the question to be determined in a case of this kind is one of fact and not of law. But the judicial decision was rendered not only on the basis of the facts ascertained but also on the basis of a norm for decision which the judge had drawn from the facts. This norm for decision, indeed, is not as yet a legal proposition. It lacks the formulation in words, the claim to universal validity, the authoritative publication,

决;但现在,这种萌芽深埋在法官的潜意识中。如果我们想当然地认为,在原始时代法官保护占有或者契约,仅仅是因为他设想存在着一个法律命题,按照该命题占有或契约应当被法律保护,则我们是在把我们的观念强加于他。他仅仅考虑具体的事情,而不考虑抽象的事情。那些设法从这些判决中搜集以往法律的法律史学家,最多可以发现其中那些普遍存在的法律、普遍存在的习惯,不过却不是普遍有效的法律。然而,尽管缺少法律命题,但裁判规范并非纯粹是一种反复无常的东西。法官总是从法律事实——即从习惯、支配和占有关系、意思表示,以及主要从契约——中获得法律命题,这些法律命题或者建立在法官自身知识基础上,或者建立在证据的基础上。一旦给定这些事实,规范也随之确定;事实问题和法律问题是不可能分开的。

今天,当需要裁决的案件没有对应的法律命题存在时,我们遇到同样的情形。法官只能查明诉讼中涉及的习惯、支配关系、法律关系、契约关系、联合体章程和遗嘱处分的存在,并在此基础上独立发现法律规范。在有关占有命题的诉讼中,作为小前提的既不是事实的确定,也不是规范的自由发现。所有解释的尝试、法典条款的人为堆积,只能蒙蔽那些对——依法律命题裁决只可能在法律命题先已存在的情形下才有可能——这一真理有偏见的人。

诚然,依照法律术语学,在此类情形下要决断的问题是事实问题而不是法律问题。但是,司法裁判的作出不仅要以确证的事实为基础,而且也要以法官从事实中得出的裁判规范为基础。这种裁判规范当然不仅仅是到那时为止的法律命题。这种裁判规范缺乏明确的语言表达、普遍有效的宣称、权威性的公布,但是它

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but it is a part of the valid law, for if this were not true the judge would have no authority to decide the litigation according to it. Even in this case therefore the question of fact cannot be separated from the question of law.

But even where a legal proposition has been found which covers the instant case, the legal proposition does not yield the decision without more ado. The legal proposition is always couched in general terms; it can never be as concrete as the case itself. It may define the term "accessories" (*Zubehör*) never so minutely, the question still remains whether the subject of the litigation falls within this definition or not. Here too the judge must ascertain the facts; here too he must decide independently whether the ascertained facts correspond to the definition of "accessories" contained in the legal proposition. Whether the judge answers this question in the affirmative or in the negative, the judgment is always rendered on the basis of a norm for decision which he has found independently, and which decides the question whether or not the subject matter of the litigation is part of the "accessories." Even where this norm for decision merely individualizes the content of the legal proposition in concrete form, it is nevertheless not identical with the norm found in the legal proposition; for the question what constitutes "accessories" is something different from tile question whether a certain object is a part of the "accessories." In such a case, the prevailing tendency in juristic science invariably assumes that we have a decision as to a question of law; one speaks of a question of fact only where the subsumption under the legal proposition is not controverted or is incontrovertible. But it is clear that in this case, as in the earlier cases, the question of fact, the ascertained facts, cannot be dissociated from the question of law, the norm for decision which the judge has found at this very moment. This concrete norm for decision, which the judge has deduced from the facts, is introduced between the legal proposition which contains the general norm for decision and the ascertainment of the facts by the judge.

Whether the judge, therefore arrives at his decision independently of a legal proposition or on the basis of a legal proposition, he must find a norm for decision; only, in the latter case, the judicial norm for decision is determined by the norm contained in the legal proposition, whereas in the former case it will be found quite

是有效法律的一部分，因为如果不是这样，那么法官将没有权力据此裁决讼案。因此，即使在这一情形下，事实问题也不能和法律问题分开。

但是，即使发现法律命题涵盖一个即时的案件，也不能干脆直接地基于该法律命题作出判决。法律命题总是用一般的术语表达；它从来不可能如案件本身那样具体。法律术语从来不可能如此详细地定义“从物”（*Zubehör*），诉讼主题是否在这一定义的范围内仍然是一个未决的问题。在这里，法官也必须确定法律事实；他还必须独立判定已确证的法律事实是否符合包含在法律命题中“从物”的定义。不管法官是以肯定的方式，还是以否定的方式回答这一问题，判决总是以法官独立发现的裁判规范为基础的，该诉讼裁判决定诉讼标的是否属“从物”的一部分。甚至在裁判规范仅仅是通过具体的方式把法律命题内容个别化的地方，它仍然不同于法律命题中发现的法律规范；因为哪些事物构成了“从物”这个问题，不同于某特定客体是否为“从物”的一部分这个问题。在那种情况下，主流法学的倾向总是假定：我们有一个关于法律问题的裁断；一个人只会在法律命题下的小前提未遭到反驳或无可辩驳的情形下才会提及事实问题。但是非常明显，这种情形下和先前的情形下一样，事实问题，确证事实，不能够与法律问题——法官在这一刻发现的裁判规范——分开。此具体的裁判规范——法官从事实中推导出的裁判规范——是作为介于包含一般裁判规范的法律命题与法官确证的法律事实之间的事物而被引入的。

因此，不管法官是独立于法律命题作出裁决，或者是以法律命题为基础作出裁决，他必须找到裁判规范。仅仅在后一种情形中，裁判规范才由包含在法律命题中的规范决定；反之，在前一种

independently. The more concrete the legal proposition, the more precisely the judicial norm of decision will be determined by the norm of the legal proposition; the more general the legal proposition, the more independently and the more freely the judicial norm will be found. But there are legal propositions which grant an unlimited discretion to the judge. Examples of this kind in private law are the legal propositions on abuse of a legal right, on *grobes und leichtes Verschulden*, on good faith, on unjust enrichment. In criminal law and in administrative law they also play an important part. In these cases, the legal proposition does indeed appear to contain a norm for decision; actually, however, it is merely a direction to the judge to find a norm for decision independently. It is as if the legal norm left the decision to the free discretion of the judge. These cases seem to belong to the second group. This however is a matter of appearance only; in reality they belong to the former, where the judge finds the decision freely. The upshot of all of this is that the difference between a decision according to a legal proposition and one not according to a legal proposition is a difference of degree merely. The judge is never delivered up to the legal proposition, bound hand and foot, without any will of his own, and the more general the legal proposition, the greater the freedom of the judge.

Every norm for decision contains the germ of a legal proposition. Reduced to that part of its content that is basic principle, couched in words, proclaimed authoritatively with a claim to universal validity, the norm for decision becomes a legal proposition. This is true even where it is merely a concrete individualization of the concept contained in the legal proposition. Let us say, for example, that the norm has declared that a certain object is subsumed under the legal concept of "accessories"; there lies in this declaration the germ of the legal proposition that objects of this kind are always "accessories." Considering the matter historically, we may say that most legal propositions arose out of norms for decision. As to the greater part of our codes we call show positively how the legal propositions were extracted from the decisions contained in the *corpus iuris*; and where the *corpus iuris* does not state decisions, but legal propositions, these, with rare

情形下，裁判规范要由法官完全独立地发现。法律命题越具体，裁判规范就越精确地由法律命题的规范决定；法律命题越概括，裁判规范的发现就越独立、越自由。不过，授予法官不受限制之裁量权的法律命题也是存在的。在私法中，此类例子有涉及权利滥用、重大过失或轻微过失、诚信、不当得利等法律命题。在刑法和行政法中，此类命题也起到了非常重要的作用。在这些情形中，看上去法律命题的确包含了裁判规范，然而，实际上它仅仅是指导法官独立发现裁判规范。这些法律规范好像是留给了法官自由裁量的空间。这些情形似乎属于第二种类型。然而这仅仅是表面现象，实际上它们属于法官可以自由作出裁决的第一类情形。这全部的结论就是：在法官依据法律命题作出裁决和法官没有依据法律命题作出裁决之间的区别仅仅是程度上的差异。法官从未把权力完全交给法律命题，从未被法律命题束缚住手脚，从未没有任何自己的意志，并且法律命题越概括，法官就有越大的自由空间。

每一个裁判规范中都包含着法律命题的萌芽。约简为基本原则的那部分自身内容，用文句表达出来，以权威的形式宣称具有普遍效力，这样，裁判规范就变成了一个法律命题。甚至当裁判规范仅仅是包含在法律命题中之概念的具体个别化时，情形也是如此。例如，一个规范宣布特定的物包含在“从物”的法律概念中；此处存在一个法律命题萌芽的宣告：这种类型的物总是“从物”。历史地考察这件事情，我们可以说大部分的法律命题都产生自裁判规范。至于我们的法典中的更多内容，我们可以肯定地证明，这些法律命题是如何从《国法大全》所包含的裁决中抽取出来的。在《国法大全》并没有介绍裁决的地方，则很少有例外，

exceptions, undoubtedly have had their origin in norms for decision which were first enunciated by a jurist when a dispute was submitted to him for decision.

It is possible that now and then legal propositions were thought out by jurists without reference to a definite decision. The rule of the Prussian law about the "*Erbschatz*" perhaps arose in this way; for, according to credible reports, an "*Erbschatz*" has never been met with, either before or after; the same may be said of the so-called *Schulfälle* (moot cases). Of course these can be only very insignificant legal propositions. We can also say that a legal proposition is prior in time to the norms for decision where a statute regulates an institution in order to introduce it, particularly where the latter is imported from a foreign country, as, for instance, the statute concerning companies with limited liability or the statute containing the *Höferecht* of the Austrian peasants. But apart from these exceptions the concrete, as is usual, is prior to the abstract; the norm for decision, to the legal proposition.

The creation of a legal proposition out of the norms for decision requires that further intellectual effort be applied to the latter; for we must extract from them that which is universally valid and state it in a proper manner. This intellectual labor, whosoever it may be that is able to do it, is called juristic science. The Historical School of jurisprudence has taken infinite pains to show how "customary law," or, to put it more accurately, legal propositions of "customary law," arise immediately in the popular consciousness. It is a vain endeavor. Lambert has shown conclusively that with the exception perhaps of legal maxims, legal propositions do not arise in the popular consciousness itself. Legal propositions are created by jurists, preponderantly

这些法律命题毫无疑问地起源于法学家——对提交给他予以裁断的争议——首次阐明的裁判规范。

法学家偶尔也会想出一个与具体裁决无关的法律命题，这种情况也是有可能的。普鲁士民法中关于“*Erbschatz*”[1]的规则可能就是通过这种方式产生的；因为依据可信的报告，“*Erbschatz*”在此前和此后均从未有过。所谓的*Schulfälle*（模拟法庭所审理的案件）也属这类情形。当然这些都是一些非常无关紧要的法律命题。在制定法为了引进一个裁判规范而调整相关制度时，我们也可以说一个法律命题在时间上先于裁判规范，特别是当裁判规范是从外国引进时，例如，关于有限责任公司的制定法，或者包含奥地利农民的有关农场继承法的制定法。但是除了这些例外，通常情况下，具体先于抽象；裁判规范先于法律命题。

从裁判规范中创设法律命题，需要对裁判规范付出进一步的智力劳动；因为我们必须从裁判规范中抽象出普遍有效的命题并通过适当的方式表达。无论是什么智力劳动，只要能完成这一任务，都可以被称为法学。历史法学派的法学家付出不懈的努力来揭示什么是“习惯法”，或者更确切地说，“习惯法”的法律命题是如何直接从民众意识中产生的。这是一种徒然的努力（Lambert）。兰伯特确凿无疑地证明，或许除了一些法律格言外，法律命题不可能从民众意识自身中产生。法律命题是由法学家主要

〔1〕 按照普鲁士法典中的规定，*Erbschatz* 是一种夫妻共同生活期间共同使用的部分财产。这种财产是丈夫和妻子的一部分财产，在丈夫和妻子共同生活期间，由丈夫和妻子共同使用。最后，这些财产归依旧生存者所有，然后毫无阻碍地变为子女的婚姻财产。

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