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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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叶名怡 袁震 译

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XIV

The Historical Trend In The Juristic Science Of The Continental Common Law

Since the middle of the sixteenth century Romanistic juristic science is under the steadily growing influence of the historical trend. The aim of all history of law is to discover the original meaning of the legal propositions and the original significance of the legal relations. These are purely scientific endeavors, which, as such, have nothing to do with practical, juristic science, and which we need not therefore discuss at this point. In so far only as the historical jurists are working in the interest of the application of law, they are concerned, not with pure science, but with practical juristic science. I have not been able to ascertain as a fact that the French and Dutch legal historians anywhere asserted in plain words that the results of their investigations should be authoritative for the practical application of law, but this may be attributable to the fact they do not recognize any science of law other than the historical science. Such an assertion could have only one meaning, to wit that the historical, theoretical science of law is also practical juristic science. At any rate the Historical School of the nineteenth century in Germany has been entertaining this thought, and has been acting according to it. This can be inferred not so much from the faltering and uncertain statements of their programs, several of which, by Savigny, indeed can scarcely be interpreted in any other way, as from their other writings. Especially Savigny's *De possessione*, which has practically become a model for the writing of monographs in the Historical School, proclaims this thought to the world with all the force at its command. Six hundred and ten of its six hundred and fifty-four pages are devoted exclusively to Roman law, without deigning the modern development worthy of as much as a

第十四章 欧陆共同法法学的历史倾向

自从16世纪中叶以后,罗马法学越来越为持续的历史学倾向所左右。法的一切历史的目的都是为了揭示法律命题的原初含义和法律关系的原初意义。这些是纯粹科学的努力,其本身与实用法学无关,因而我们也就不必在本书中予以探讨了。仅就历史法学家为法律之运用而开展工作来说,他们关注实用法学而非纯粹科学。在这里,我并不能够肯定地断言,法国和荷兰法律史学家在某处曾明确表示他们的研究将为法律的实际运用提供权威依据,不过这一点或许可以归因于这样一个事实:除了历史法学之外他们未认可其他任何法律科学。这种断言可能只有一种含义,即,历史的、理论性的法学同时也是一种实用性的法学。无论如何,19世纪德国的历史法学派一直以来都浸淫于这一理念之中,并且,一直依照这一理念而行动。这与其说是从他们的学术研究路径——其中萨维尼的若干研究路径几乎不能以任何其他方式来解释——迟疑而不确定的表述中推断出来,不如说是从他们其他的作品中推断出来。尤其是萨维尼的《论占有》,这一作品实际上成了历史法学派专题著作的范本,它以其掌控的所有力量向世界宣布了这一理念。《论占有》全书654页中的610页全都用来论述罗马法,却对法律现代发展中的值得探讨之处几

single word. As soon as the meaning which a statement of the sources bore in the mouth of a Roman has been ascertained, the practical question is disposed of also. There is nothing in it that might be of any further interest to Savigny. A meager section of thirty-five pages hastily disposes of the “modifications of the Roman law.” He examines them to ascertain whether or not they can be harmonized in principle with that which was law among the Romans. If it can be shown that this is possible, one may accept them. If not, they are to be turned aside with a contemptuous gesture. At a later time, in his *System*, Savigny preached quite different principles of dogmatic treatment of the law, but until that time the *De possessione* alone was authoritative as to method. It would be a difficult matter to find a book of equal influence in the monographic literature not only of Germany but of the whole Continental common law. I have gained the conviction on my travels that in the literature of the world there is not another monograph the name of which and, in part, the content of which is so well known to the jurists of each and every legal system as Savigny’s *De possessione*. It is the true *Programmschrift* (program book) of the Historical School for practical juristic science.

It is not therefore the guiding principle of the historical jurists that a scientific understanding of any legal system can be gained only from history. That is a scientific axiom without any practical significance. The guiding principle is, rather, that this scientific understanding must suffice for practical juristic science. And this thought received its specific coloring from the fact that in the basic conception of law of all legal historians of the Romanistic tendency since the days of Cuiaccius—a conception which they never expressed, but according to which they always acted—law does not consist of legal relations but of legal propositions, so that all that is necessary for a scientific understanding of law is to ascertain the meaning which the legal propositions bore in the mouth of those who first enunciated them. As a practical matter, therefore, the historical conception amounted

乎只字未提。出自罗马人之口有关原始文献之表述的含义一旦确定,实践性问题也随之获得解决。它们无法引起萨维尼的深入兴趣。在区区 35 页的最后一小节中,萨维尼只是草草地提了一下“罗马法的修正”。他探讨罗马法的修正问题是为了确定,这些修正原则上是否能够与罗马人之法律相协调。如果这种协调是可能的;我们就可以接受它;如果这种协调是不可能的,那么我们会嗤之以鼻地将其弃置一边。在之后的《当代罗马法体系》一书中,萨维尼宣扬一种完全不同的对待法律的教条主义原则,但是即使在那个时候,《论占有》一书至少在方法上仍然是不二的权威。很难找到这样的一本专题的学术著作,它不但在德国,而且在整个欧陆共同法领域都具有同等重大的影响。据我的经历,我确信,在世界法学文献中,再也找不到另外一部像萨维尼《论占有》这样的作品,它的书名,乃至其中的部分内容为每个法律体系的法学家所熟知。这本书成了历史法学派为实用法学所作的真正的 *Programmschrift*(纲要书)。

不过,这本书并未因此为历史法学家提供如下指导性原则——任何法律体系都只能从历史中获得科学性的理解。那是一个不具有任何实践意义的科学公理,这个指导原则毋宁是,这种科学性的理解必须满足实用法学的需要。这一思想从以下事实获得了明晰的特色,该事实即:自从居雅士时代起,在研究古罗马法律倾向的所有法律史学家的基本法律观念——他们从未表达过此种观念,但他们总是据此行事——中,法律不是由法律关系而是由法律命题组成的,所以,为获得对法律的科学理解,所需做的一切就是确定某法律命题第一个表述者赋予它的含义。因此,实际上,历史观念等于是:在法律的运用时,该法律

to this, that the practical application of law must attribute only that meaning to a legal proposition which was intended by its originator. Here again the historically significant antinomy of juristic science which converts its modes of thought, even against its own will, into norms becomes operative.

Only this limitation of the "historical view of law," as Savigny has called it, to the legal propositions can explain the attitude and the conduct of the legal historians. Since the days of Jhering, the founders of the Historical School have often been called romanticists in Germany. But this is unjust; for neither the founders of the Historical School nor any of their adherents among the Romanists actually were romanticists. The yearning, which is characteristic of the romanticist, to turn life back into the past was utterly foreign to them. They surely have never evinced any desire that the *patria potestas* should be revived, or that contracts should be made in the form of the *stipulatio*. And if Savigny has spoken bitter words in a book-review of the modern system of land registration, he surely did not mean to urge the adoption of the Roman law of pledge. Since the law, in the eyes of legal historians everywhere, was not the legal relations but the legal propositions, they have not been concerning themselves about the form which the legal relations assume in actual life. They let life take its course; but they did insist that the courts should adjudge the legal relations according to the Roman legal propositions in the form in which they have been ascertained by scientific investigation. But as to this, they could not but make shipwreck. Had life, under the influence of the Historical School, again become Roman, the application of Roman law would have followed as a matter of course. But since life remained modern and necessarily had to remain modern, it was impossible to apply Roman law to legal relations that in part were unknown to the Romans and in part were totally different from those that had existed among them.

之含义的权威表述只能是该法的原创者所创立的法律命题。这里又一次出现了历史视角下法学所呈现的重大自相矛盾：它将自身的思维模式——甚至与它自身的意志相违背地——转换成了规范。

只有这种萨维尼所谓的“历史的法律观”对法律命题的限制才能解释法律史学家们的态度和行为。在德国，自耶林以降，历史法学派的创建者常被冠以浪漫主义者之名。然而如此称呼并不公允；因为，不管是这一学派的创建人，还是罗马派法学家中该学派的支持者，他们都不是浪漫主义者。富有浪漫主义气息的对旧日美好生活的向往与这些人格格不入。不管是家父权应该得到复兴，抑或是契约应该以罗马法上的要式口约的形式缔结，对于这些，他们从来就没有表现出哪怕是丝毫的渴望。即使萨维尼在他对《现代土地登记制度》的书评中言语刻薄，但是他并没有明确主张要采纳罗马担保法。既然在所有的法律史学家眼中，法律并非法律关系，而是法律命题，他们也就不关注实际生活中呈现的法律关系的形式。一方面，他们让生活顺其自然；但另一方面，他们又坚持法院必须依照罗马法的法律命题来调整法律关系，这些法律命题的形式他们都已经通过科学研究予以确定了。在这一点上，他们就无法自圆其说了。只有当我们的生活在历史法学派的影响之下回到古罗马时代时，我们适用罗马法才是顺其自然的。然而，鉴于我们现在过着现代的生活，并且将来势必继续保持这种现代性，而且由于古罗马人对部分现代法律关系一无所知，部分现代法律关系与它们在古罗马时候的状况截然不同，将那种生活中的罗马法适用于现代的法律关系，肯定是行不通的。

Accordingly the legal historians again found themselves face to face with the problem of applying Roman law. And they sinned most grievously as to this difficulty by not seeing it. They did not even investigate it, although, from their point of view, it would have been their first duty to do this rather than to throw light upon a few dark points in the history of Roman law. They never inquired how the glossators, the postglossators, and the German Romanists of the sixteenth century performed the adaptation of Roman law. Savigny's history of Roman law in the Middle Ages was a history of juristic literature. Apart from this, in the hands of the legal historians, the legal history of the time following the reception is almost exclusively a history of legal doctrine. Wherever their glance touched upon jurists of past centuries, they were interested in the way in which the latter understood Roman law, not in their attitude toward the law of their own day. To the present day, we have no presentation of the law of the gloss, of the postglossators, or of the German *usus modernus*. Indeed, even the number of treatises on the history of legal doctrine that treat of the way in which the glossators, the commentators, and the *usus modernus* dealt with individual legal institutions is extremely small.

But you cannot do away with a difficulty by ignoring it. The question of the adaptation of Roman law must be solved daily by judicial decisions. A juristic science that ignores the adaptation of law of the past to the legal relations of the present does not offer practical law but historical law. This judgment does not condemn the Historical School of the French and of the Netherlanders very severely; for, it seems, their aim was to teach law and to let the administration of law get along with it as best it could. But the German legal historians did not profess to teach Roman law but law that was applicable in Germany, and therefore it was incumbent upon them, will he nill he, to consider both the Roman law and its adaptation. Their method of procedure usually was simply to take over the results of the adaptation as

因此,法律史学家又一次发现他们在将罗马法适用于现代生活的这个难题上面面相觑。他们最严重的罪过正是在于对这一困境视而不见。尽管自他们的角度看,他们的第一要务应当是解决这一难题,然而,法律史学家甚至都不曾研究过这个难题,相反,他们将阐明故纸堆里的罗马法中的意义不明之处作为他们的首要职责。他们从不探究注释法学派、后注释法学派和16世纪德国的罗马派法学家是如何对罗马法进行修正的。萨维尼的《中世纪罗马法律史》是一部法学文献的历史。除此之外,在法律史学家的手中,自罗马法继受以降的法律史仅仅是一部法律学说史。当他们面对过往的法学家时,他们只关注这些法学家理解罗马法的方式,对这些法学家对待他们自身时代的法律的态度则显得漠不关心。时至今日,我们没有介绍过注释法学派的、后注释法学派的以及德国的学说汇纂现代应用学派的法律。实际上,即便是在论述法律学说史的文献中,探讨了注释法学派、评注法学派和法律学说汇纂现代应用派对待他们自己独特的法律制度的方式的文献也是极少的。

但我们并不能以忽略的方式来摆脱难题。罗马法的修正问题必须通过日复一日的司法裁决来加以解决。忽视将过去之法修正以适应近日之法律关系的法学无法提供实用之法,而只能提供历史之法。这一判断并不是对法国和荷兰的历史法学派的严苛指责;因为他们的目的似乎是讲授法律,并且让司法尽可能与之协调发展。但是德国的法律史学家认为他们教授的不是罗马法,而是可适用于德国的法律,因此,不管他愿意不愿意,考虑罗马法及其修正对他们来说是责无旁贷的。他们的行动方式常常只是接管他们的先辈先前完成了的修正结果。他们以与他们的