EUGEN EHRLICH

FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW

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WITH AN INTRODUCTION BY
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FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW

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 mechanician 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 craftsmanlike 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[1] (*Rechtswissenschaft*) and the practical

[1] The formal, theoretical science of law, as distinguished from the practical science. "The Germans classify Science of Law (*Rechtswissenschaft*) into Jurisprudence, on one side, and Philosophy of Law, on the other. In this scheme Jurisprudence embraces the concrete elements of the law, while Philosophy of Law deals with its abstract and fundamental side. It is accordingly possible for German writers to consider Jurisprudence not strictly as a science of universal principles, but as something limited by time or place. They may therefore speak freely of a Jurisprudence of modern times, or the Jurisprudence of a particular state. . . . This is the usage of the European continent, and especially of France, where jurisprudence is practically synonymous with case-law. It has also found a wide reception in our language. . . . In this connection it is obvious, of course, as has often been remarked, that if Jurisprudence is a science it can hardly be localized as such." — Gareis, Introduction to the Science of Law, translated by Kocourek, p. 22, n. 3.

The translator of the present volume has avoided the use of Jurisprudence in any sense other than its proper sense of the science of law. But where Ehrlich has used *Jurisprudenz* in the sense of the "*practical* science of law" — a use in which the

science of law (*Rechtslehre*), i.e. practical juristic science, is being made only 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 hasalready taken place, e.g. that of the general theory of the state[1] 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 perfect master of the art of explaining historically such parts of the

idea of juristic technique bulks large —, the translator has used the term *juristic science*. In this case the use of *science* can be justified on the ground that he is using *science* in the sense of practical science, of technique, as it were. He speaks therefore, for example, of a juristic science of the Continental common law.

This and all succeeding notes, unless specifically credited to the author, are by the translator.

[1] *Allgemeine Staatslehre*. This is a recently developed science, the line of demarcation between which and political science is not drawn with any degree of uniformity.

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.

It is true that, because of this necessary limitation, the structural-iron engineer fails to observe many a thing that might be of importance not only for science but for the technic of iron construction. But as soon as men of science and specialists in other branches of iron work find something that is of value for iron construction, he will avail himself of it. Good work done by him within his narrow sphere and with the limited means at his disposal is of scientific as well as of practical value. The observations of the practical man have at all times been providing nourishment for science; a great deal of the scientific botany of our time has been derived from the old herbalism of the apothecaries.

The situation would be quite different if there were no science dealing with iron but structural-iron engineering; if there were no botany but the herbalism of the apothecaries: not only research but practical work as well would suffer tremendously. In addition to pharmacognosy and pharmacology, which have replaced the herbalism of the apothecaries, the nature of plants is being studied by the sciences of agriculture, forestry, horticulture, and many others. Scientific botany studies it quite independently, and the results of its investigations, of course, avail the practical sciences referred to; and at the same time the results of the labor of the practical men working in all of these fields offer to the botanist a multitude of suggestions.

It is the tragic fate of juristic science that, though at the present time it is an exclusively practical science of law, it is at the same time the only science of law in existence. The result of this situation is that its teaching on the subject of law and legal relations is, as to tendency, subject matter, and method, only that which the practical science of law can give. Indeed it is as if mineralogy and chemistry could teach us no more about iron than that which has been discovered for the purposes of structural-iron engineering; as if botany could teach us no more about plants than is contained in the text-books on pharmacognosy and pharmacology. This state of the science of law is an extremely sad one, particularly in view of the fact that the present-day practical science of law is far from covering the whole field of the practical activity of the jurist. Properly speaking there ought to be as

many practical sciences of law as there are juristic activities. The Romans divided the activity of the jurist into *respondere*, *agere*, *cavere*; which, being expressed in modern terminology, is: the activity of the judge, of the draftsman of legal documents, and of the attorney; and it seems that in the days of the Republic at least, research, literature, and instruction were engaged in the service of each of these three activities. In England practical juristic science (*Rechtslehre*) is concerned with the activity of the judge and the attorney; whereas the art of drafting legal documents (conveyancing) exists as a distinct, highly developed branch of legal science. But the judge, the draftsman of legal documents, and the attorney are by no means the only representatives of professional juristic activity. In addition to the administration of the affairs of the state, the administration of private affairs is a fruitful sphere of juristic activity, e.g. agriculture, commerce, and industry. To these may be added participation in legislation, politics, journalism.

The practical juristic science of the Continent is considerably poorer than that of the Romans and of the English. Since the reception of Roman law, it has made its abode exclusively at the universities, which, for the most part, were founded, and are being maintained, by the state, and to which, after the rise of a learned judiciary, the task of training the future judge for his calling has chiefly been assigned. Had legal instruction been given in private schools, undoubtedly there would have been schools for attorneys and notaries in addition to schools for judges, and the various practical sciences of law would have enjoyed a corresponding development. As it was, a juristic science arose whose content can be defined exhaustively as practical instruction in the performance of the duties of a judge. Slowly and haltingly there was added the preparation for the diplomatic and administrative services. Accordingly the practical and the theoretical science of law began to comprise also international law and public law. Paulsen therefore quite properly described the present-day juristic faculties as technical training schools for judges and administrative officials. Since the majority of students, however, were bent upon a career on the bench, the law that

the judge requires remained in the center of legal teaching. This may perhaps account for the fact that the study of public law and international law became a scientific study long before private law, penal law, and procedure. Public law in the narrow sense (*allgemeines Staatsrecht*,[1] later called *allgemeine Staatslehre*) was the first branch of juristic science, which, disregarding the practical utility of its results, pursued purely scientific aims. But the juristic faculties could and would not become anything but training schools for judges and government officials; and this aim became the determining factor not only in legal education but also in research and literature. For this reason it is not very likely that the draftsman of legal documents or the attorney-at-law will find a book from which he can learn how to perform the duties of his profession, difficult, important, and involving grave responsibilities though they be. Most of the information he needs he must obtain in a purely tradesmanlike fashion in the practice, and the most valuable knowledge gained by professional experience dies with him who has acquired it. But — and this is the important consideration here — these things are also being ignored by the science of law, which knows only the law required by the judge, although even a hasty glance at legal life shows that a great deal of the administration of justice and of the development of law takes place in the offices of attorneys and notaries, and that legal science can gather valuable material therefrom. Moreover the modern jurist can, if need be, get all the information he requires as to the importance of the legal document as a lever for the development of law from any handbook of legal history. The fact that practical juristic science limits itself in its own sphere in accordance with the same point of view is quite in keeping with this. It excludes important matters from discussion if the judge does not generally concern himself with them in his professional capacity. About a decade ago, Lotmar first discovered for juristic science the existence of law concerning contracts of labor — after the great industrial development in Germany

[1] *Public law in the narrow sense*; so translated to distinguish *Staatsrecht* from international law. See Garcis, Introduction to the Science of Law (Kocourek's translation, p. 94 n.). *Staatsrecht* is divided into *Verfassungsrecht* (constitutional law) and *Verwaltungsrecht* (administrative law).

had begun to make it a matter of ever-increasing concern to the administration of justice. The most significant juristic problems of our time, the problems of trade unions, of trusts, and of cartels, do not exist for practical juristic science; doubtless for the simple reason that, although they play an important part in legal life, their rôle is not nearly so important in the administration of justice.

The most disastrous consequence of this state of affairs has been its effect on the method of juristic science. The first and foremost function of all research is to find a method adapted to its subject matter. The life of many a great scholar has been spent in the endeavor to find a method. Once the method was found, the work could be carried on by inferior minds. Ultimately, even the analysis of the spectrum is nothing more than a method. With the sole exception of the general theory of the state (*Staatslehre*), which is already infused with a scientific spirit, the science of law knows no other method than that which has been developed by practical juristic science for the application of law by the judge. According to the prevailing conception of the judicial office, which arose in the sixteenth century, the judge must derive his decision of the individual case from the existing general propositions. Practical juristic science, which had been designed for the use of the judge, was to supply the judge with legal propositions, formulated in the most general terms possible, in order that the greatest possible number of decisions might be derived from them. It was to teach the judge how to apply the general propositions to the specific cases. Its method therefore had to be a method of abstraction and deduction. With the exception of public law in the narrow sense, however, juristic science as a whole proceeds by abstraction and deduction just as if the human mind were incapable of any higher attainment than the creation of bloodless shapes that lose contact with reality proportionately to the measure of abstractness that they attain. In this respect it is altogether different from true science, the prevailing method of which is inductive, and which seeks to increase the depth of our insight into the nature of things through observation and experience.

Accordingly juristic science has no scientific concept of law.

Just as the technical expert in iron construction, when speaking of iron, is not thinking of the chemically pure substance which the chemist or the mineralogist refers to as iron, but rather of the chemically very impure compound that is used in iron construction, so the jurist does not mean by law that which lives and is operative in human society as law, but, apart from a few branches of public law, exclusively that which is of importance as law in the judicial administration of justice. An occasional flash of deeper insight ought not to mislead anyone. A technical expert in iron construction may perhaps, in making an attempt to be scientific, state the chemical formula of the compound which is being used in iron construction as iron, but in the course of his practical discussion he will deal only with this compound; for iron in the scientific sense is of no interest to him. The important thing is not the definitions that are found in the introductory chapters of handbooks or monographs, but the concept of law with which juristic science actually works; for concepts are not merely external ornamentation, but implements for the erection of a structure of scientific thought.

From the point of view of the judge, the law is a rule according to which the judge must decide the legal disputes that are brought before him. According to the definition which is current in juristic science, particularly in Germany, the law is a rule of human conduct. The rule of human conduct and the rule according to which the judges decide legal disputes may be two quite distinct things; for men do not always act according to the rules that will be applied in settling their disputes. No doubt the legal historian conceives of law as a rule of human conduct; he states the rules according to which, in antiquity or in the Middle Ages, marriages were entered into, husband and wife, parents and children lived together in the family; he tells whether property was held individually or in common, whether the soil was tilled by the owner or by a lessee paying rent or by a serf rendering services; how contracts were entered into, and how property descended. One would hear the same thing if one should ask a traveler returning from foreign lands to give an account of the law of the peoples he has become acquainted with. He will tell of marriage customs, of family life,

of the manner of entering into contracts; but he will have little to say about the rules according to which law-suits are being decided.

This concept of law, which the jurist adopts quite instinctively when he is studying the law of a foreign nation or of remote times for a purely scientific purpose, he will give up at once when he turns to the positive law of his own country and of his own time. Without his becoming aware of it, secretly as it were, the rule according to which men act becomes the rule according to which their acts are being adjudged by courts and other tribunals. The latter, indeed, is also a rule of conduct,but it is such for but a small part of the people, i.e. for the authorities, entrusted with the application of the law; but not like the former, for the generality of the people. The scientific view has given way to the practical view, adapted to the requirements of the judicial official, who, to be sure, is interested in knowing the rule according to which he must proceed. It is true, jurists look upon these rules as rules of conduct as well, but they arrive at this view by a jump in their thinking. They mean to say that the rules according to which courts decide are the rules according to which men ought to regulate their conduct. To this is added a vague notion that in the course of time men will actually regulate their conduct in accordance with the rules according to which the courts render their decisions. Now it is true that a rule of conduct is not only a rule according to which men customarily regulate their conduct, but also a rule according to which they ought to do so, but it is an altogether inadmissible assumption that this "ought" is determined either exclusively or even preponderantly by the courts. Daily experience teaches the contrary. Surely no one denies that judicial decisions influence the conduct of men, but we must first of all inquire to what extent this is true and upon what circumstances it depends.

Every page of a law book, every lecture on a legal subject, bears out the statement just made. Each and every word shows that the jurist who is discussing a legal relation invariably has in mind the problem how the legal disputes arising from this relation are to be adjudged, and not the totally different question how men

conduct themselves, and how they ought to conduct themselves in this relation. Even a man of the mental stature of a Maitland said that to write the history of the English actions is to write the history of English law. This juristic line of thought has been given a positively naïve expression in the doctrine of error in law. A juristic science which conceives of law as a rule of conduct could not consistently have laid down a principle that men are bound by the law even though they do not know it; for one cannot act according to a rule that one does not know. On the contrary, it ought to have discussed the question how much of a given legal material is known as a rule of conduct and is followed as such, and, at most, what can be done to make it known. In fact, Binding understood the whole problem in this way years ago, and posited the proposition that only the norms of penal law, not the penal law itself, are generally known, and in fact regulate human conduct. Only Max Ernst Mayer has followed him, without however adding anything to the requisite experiential material. But if we say, as is usually done, that the law binds him who does not know the law as well as him who does, we are evidently giving up the concept of law as a rule of human conduct altogether; we are laying down a rule for the courts and other tribunals, which the latter are to apply whether the person concerned knew it or not. We are not improving the situation by requiring everyone to know the law or by setting up the fiction that the law, if properly published, is known to everyone.

The prevailing notion as to the origin of law is a result of this very line of thought. Whence comes the rule of law, and who breathes life and efficacy into it? It is extremely interesting to note the answers that have been made in reply to these questions; for they clearly and unambiguously reflect the fact that even perfectly correct scientific knowledge is not sufficient to guide the human mind when the necessity of serving a practical need suggests another path. Today, a century after Savigny and Puchta, no scientifically trained jurist doubts that a considerable part of the law of the past was not created by the state, and that even today it is derived to a great extent from other sources. That is the theory. Now comes the question: Where is this non-state

law[1] to be studied? Where is an exposition of it to be found? Where is it being taught? Perhaps we are not too daring if we make the assertion that today research, literature, and legal education on the Continent know of no other law than statute law.

To be sure one soothes one's conscience by saying that customary law — a collective term, an expression which for centuries has been used to lump together the whole heterogeneous mass of non-state law — is a "negligible quantity" at the present time. This statement is found in the writings of Savigny and Puchta themselves. Since that time it has been repeated time and again in various forms, and even writers who do not make the statement in so many words adhere to it. A jurist who holds this opinion has ceased to look upon law as a rule of general human conduct; he has clearly demonstrated that law is to him, preponderantly at least, a rule for the conduct of courts and other tribunals; for even the believers in the doctrine of the omnipotence of the state have not very often seriously thought that the state can make rules to regulate the whole field of human conduct. Perhaps the only exception within the whole range of European civilization was the Emperor Josef II, whose program split on the rock of this idea. For this reason the relation of juristic science to non-state law, quite independently of scientific conviction, has been undergoing changes in accordance with the changing attitude of the state toward the courts. And if juristic science today is devoted exclusively to state law, the reason for this must be sought in the fact that the state, in the course of historical development, has come to believe that it is able to add to the monopoly of the administration of law, which it acquired long ago, a monopoly of the creation of law. And I do not doubt, therefore, that the modern free-finding-of-law movement marks not only an advance in scientific insight, but also an actual shift in the relation of the state and society — a shift which has taken place long ago in other spheres.

Where the judge renders his decisions chiefly according to cus-

[1] Ehrlich speaks of "*ausserstaatliches Recht*" and "*staatliches Recht.*" The translator has translated the former "non-state law," the latter "state law," i.e. law not created by the state and law created by the state.