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Edward H. Levi

法律推理引论

An Introduction to Legal Reasoning

庄 重 译

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出版说明

"美国法律文库"系根据中华人民共和国主席江泽民在 1997年 10 月访美期间与美国总统克林顿达成的"中美元首法治计划"(Presidential Rule of Law Initiative),由美国新闻署策划主办、中国政法大学出版社翻译出版的一大型法律图书翻译项的大学出版社制译出版的一大型法律图书翻译项的表示。"文库"所选书目均以能够体现美国法律教育的技术等,既包括经典法学专著。他山之石,可以攻玉,相信"文库"的出版不仅有助于促进中美文化交流,将为建立和完善中国的法治体系提供重要的理论借鉴。

美国法律文库编委会 2001年3月

列维教授生平

爱德华·H·列维(Edward H. Levi) (1911-2000) 是美国 20 世纪最杰出、最受景仰的律师之一。他既是一位学者,也是一位教育先锋,同时还是一位在 1974 年至 1977 年间出任过联邦司法部长一职的公务员。虽然一般大众更多地是因为他在"水门事件"后恢复了联邦司法部受损的信誉而将他牢记在心,但他留给美国社会最经久的遗产则可能是他在法学教育以及法学思想领域的贡献。

他生于一个犹太教家庭,父亲和祖父都是教会的神职人员。祖父同时也是芝加哥大学法学院最早的教员之一。他先是在芝加哥大学的预科学校念书,后进了芝加哥大学的学院,接着又在芝加哥大学的法学院学习法律,在耶鲁大学法学院

接受了法学的研究生教育。耶鲁的研究生学习结 束后、他先是在芝加哥大学教书、但不久第二次 世界大战即告爆发,他又转往司法部反垄断处工 作,不过这以后他还是回到了芝加哥大学,先后 任过法学院院长、芝加哥大学校监(负责整个大 学学术事务的一把手) 以及芝加哥大学校长。作 为教师和学者、列维对芝加哥大学跨学科教育体 制的奠定功莫大焉。他的教育理念,就是要集中 不同领域的专家来一起研究解决那些无法按常规 标准清楚地加以分科的问题。在这方面,一个最 好的例子就是他创建的并且被他视为是跨学科教 育典范的"芝加哥大学社会思想教育委员会" (Committee on Social Thought)。在他出任法学院院 长还有校监期间、他积极支持跨学科教学和研究 工作。在招聘专业经济学者来与法学教师一同教 授反垄断法、教授其他涉及政府对商业管制的法 律方面, 列维可以说是一个开路先锋。

1949年列维出版了他惟一的一部单行本著作《法律推理导论》。这本书扼要阐述并分析

批判了法律推理在判例法、制定法以及宪法这三 个主要领域中的表现。列维以阐述与法律解释有 关的学说变迁为重点,在这三个领域中引经据典 地论证了法律是如何随着时间的推移而演化的。 这本书在观点上自成体系,是对在一战与第二次 世界大战间盛行的美国"法律现实主义运动" (legal realist movement)的一个回应。所谓的"法 律现实主义者"是一些法学教授,他们在跨度大 约 20 年的时间里围绕着一个共同的主题发表了 大量的文章,认为虽然法律在列维所论述的这三 个领域中在形式上是逻辑的与客观的,但在事实 上却是政策导向式的与主观的 (policy - oriented and subjective)。这也就是说,主要以法官意见来 表现的法律语言实际上并不像它们表面看上去的 那样是对权威规则的精到而谨严的分析,而实则 不过是修辞练习的汇编,目的不过是为了使一个 设定的结果获得支持罢了。虽然列维在这本书中 并没有明确地点出任何"现实主义者"的观点, 但他的确努力表明了这样一个看法、就是法律系

统的运作要比批判者——"现实主义者"所认为的更富有秩序而较少那种因案而异的个别正义。他强调指出,对法律分析中的逻辑瑕疵所进行的批判没有批到问题的要害,因为"将逻辑与事实上的法律方法相对立对这两个方面都是损害;法律理里自有它本身的一套逻辑"。

列维对法律系统的这番辩护不是一个单纯的学术练习。他坚信司法的质量取决于司法活动所赖以为基石的法律的完整性。在他宣誓为联邦司法部长时他曾说道,"我们曾经历过的这段王子在对崇高理念的讥诮。如果我们不能以言行表明对亲的法律不是达成派系目的的工具、也不能以高价值的工具,那么这将极大地恶化我们生活的品质,将极大地损及我们去实现那些我们所珍视的目标"。

列维在结束他的司法部长任期后又回到了芝加哥大学,在芝加哥大学的学院部还有法学院又

任教达 10 年之久,而我在此期间作为他的同事曾与他有过相当紧密的合作。他去世后,出席追思仪式上的包括法律界、教育界还有政府部门的许多一流人物。前总统福特说道,"随着时间的流逝,越来越清楚,列维是司法部长一职的的流逝,是所有其他出任这一职务的人都要加以衡量的一个尺度……他的遗产永在,他的风范不灭。他的睿智、耿直还有他对人深厚的爱有如一盏明灯、生生不息"。

何景松 (Dennis J. Hutchinson) 芝加哥大学院部威廉-雷内-哈伯讲座教授 芝加哥大学法学院高级讲师

Edward H. Levi

Edward Hirsch Levi (1911 – 2000) was one of the most distinguished and admired American lawyers of the twentieth century. He was a scholar, an educational leader, and a public servant whose career culminated as Attorney – General of the United States (1974 – 1977). Although he is most remembered for restoring the integrity of the United States Department of Justice following the scandals known collectively as "Watergate", his most enduring legacy may be his contributions to legal education and legal thought.

He was the son and grandson of rabbis. He attended the preparatory school, college and law school of the university of Chicago, where his grandfather was a founding member of the faculty. He did graduate work in law at

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Yale Law School, then began his teaching career at the University of Chicago just before World War II. After service with the Antitrust Division of the Department of Justice during the war, Levi returned to Chicago where he successively became Dean of the law School, Provost (the principal academic officer of the institution), and president of the University. As teacher and scholar, he worked to establish structures that would bring together experts from different disciplines to discuss problems that did not fall neatly into conventional academic categories; the most enduring example is the Committee on Social Thought, of which he was a member and which he saw as one model of interdisciplinary work. As Dean and Provost, he encouraged and supported interdisciplinary teaching and scholarship; he pioneered the employment of professional economists to join legal scholars in teaching antitrust law and other areas of government regulation of commercial activity.

In 1949 he published his only sustained monographic

work, An Introduction to Legal Reasoning. The work provides an elegant exposure and critique of the three principal domains of law in a customary legal system: common law, statutory interpretation, and constitutional law. Using historical examples from each area, Levi demonstrates how the law develops over time, with emphasis on changes in interpretation.

The work is self – contained and elegant in its own right, but it is most richly understood as a response to the American "legal realist" movement, which flourished between World Wars I and II. The so – called "realist" were a loosely knit group of professional law teachers who wrote numerous papers spanning a 20 – year period that were largely united by a common theme: that law (in the domains surveyed by Levi) was logical and objective in form, but policy – oriented and subjective in fact. That is, that the language of law – the opinions of judges, primarily – were simply rhetorical exercises designed to produce support for an outcome and were not what they

4 Edward H. Levi

purported to be, carefully disciplined analyses of authoritative principles. Without directly engaging any specific argument by the "realists", Levi attempted to show that the operation of the legal system was both more orderly and less ad hoc than the critics claimed. He emphasized that the attack on logical flaws in legal analysis was mis – placed: "The contrast between logic and the actual legal method is a disservice to both. Legal reasoning has a logic of its own."

Levi's defense of the legal system, was not an a-cademic exercise. He believed that the quality of justice depended on the integrity of the law upon which it was based: "We have lived," he said when he was sworn in as Attorney General, "in a time of change and corrosive skepticism and cynicism concerning the administration of justice. Nothing can weaken the quality of life or more imperil realization of the goals we all hold dear than our failure to make clear by word and deed that our law is not an instrument for partisan purposes and it is not an instru-

ment to be used in ways which are careless of the higher values within all of us."

After he finished his term as Attorney General, Levi returned once again to the University of Chicago where he taught for another decade, in both the College and the Law School, and where I worked closely with him as a colleague. The memorial service after his death included remarks by distinguished figures from the worlds of law, education, and public service. Former President Gerald Ford said on that occasion: "With each passing year, it becomes more and more self - evident - Ed Levi is the Attorney General against whom all others are measured . . . [H] is legacy lives on, and so does his example. The lamp of his luminous mind, his unassailable integrity, and his profound humanity still cast its glow."

> Dennis J. Hutchinson William Rainey Harper Professor in the College Senior Lecturer in Law The University of Chicago

/原书序/

我想借着写作这个前言的机会,简短地谈一谈最近几个涉及法理问题的争论。争论之一关系到我在本文中所做的分析,也就是说,这样的一种分析在初审级别上成立的可能性究竟有多大。考虑到我在文中所用基本上都是那些已进入上诉阶段的案例,自由裁量的余地相当有限,所以,就像斐如歌法官(Judge Frank)在他的 Courts on Trial [1] 一书中早已指出的,也可以说这种研究的路径确是忽视了初审法院至关重要的事实界定(fact - finding)过程,忽视了"在与先前案例的比较过程中分娩出本案系争事实的阵痛",忽视了诸如证人和当事方衣着服饰之类的有可能影响

^[1] Frnak, Courts on Trial, 321, 325 (1949).

Ⅱ 原书序

事实裁判者的主观因素,等等。斐法官强调了自由裁量对初审中事实分类的影响,但争论另一户的何默如院长(Dean O'Meara)却以为,虽然自然为一个人。在此时,是一个人。这样所有的话动余地时却是言过其那些因为在他看来,对许多案件来说,特别是对那里不会进入上诉程序甚至根本就不会交明是是对那里的原则,仅其本身便足以解决涉案纠纷"。[2] 斐的原则,仅其本身便足以解决涉案纠纷"。[2] 斐的原则,仅其本身便足以解决涉案纠纷"。[2] 斐的原则,仅其本身便足以解决涉案纠纷"。[2] 斐符、如果我没理解错的话,那么他主张的则是在这一阶段,具有更大的确定性。

我相信,目前正在芝加哥大学法学院进行的 有关陪审制度及仲裁的研究,^[3]将会有助于我们 洞察某些主观因素对此问题的影响,或者如果它

^[2] O'Meara, natural Law and Everyday Law, 5 Natural L. Forum 83, 87 (1960).

^[3] Kalven, The Jury, the Law and the Personal Injury Damage

争议之二与孟卓士 (Professor Montrose)[4] 教

^[4] Montrose, Return to Austin's College, 10, 11 (1960).