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肇建近代德國國家法學與基本權體系 ——Georg Jellinek 之人與事（1851-1911）

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言及近代德國國家法學，Georg Jellinek（1851-1911）是一個絕對不能被忽略的名字；國家要素如領土、人民與主權，係由他而起；位居當代憲法學核心之基本權體系，亦以其主觀公權利體系開展而來。所有的學者都在回應其所處年代的問題，欲探析法學理論，則不應忽略其來由；法制史或憲法史研究於當代法學之必要，便是如此。在帝國主義與民族主義浪潮的歷史背景下，出生於德國政治自由主張的猶太人家庭、先後旅居奧地利、瑞士，最後又定居德國擔任教職的猶太學者 Georg Jellinek 如何結合哲學之新康德主義與法實證主義，跨越既有的國家理解，提供國家理論於社會及於法之建構以及作為基本權基礎之主觀公權利體系，是為本文宗旨。

關鍵詞：Georg Jellinek、憲法史、法學家、國家法學、基本權體系

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Founding German Political Science and the System of Basic Rights in the Modern Era: Georg Jellinek's Life and Work (1851-1911)

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Georg Jellinek (1851-1911) is a name which cannot be ignored when speaking about German constitutional law in the modern age. The elements of the nation like territory, people and sovereignty come from him; the system of basic rights as the core of modern constitutional law arose also from his system of the subjective right. Since all scholars respond to the problems of their own eras, legal theories should also be traced back to understand and analyze them. How, then, did Georg Jellinek, who was born into a Jewish family that advocated German political liberalism at a time of imperialism, nationalism and even anti-Semitism, who traveled in Austria and Switzerland, and who finally settled down in Germany as a professor, combine Neo-Kantianism in philosophy with legal positivism; overcome the existing understanding of the nation; and then construct a theory of the nation in terms of society as well as of the law, and the system of the subjective right.

Keywords: Georg Jellinek, history of constitutional law, jurist, constitutional law, system of basic rights

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