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Comparative Legal Traditions

2nd Edition

比较法律传统

[第2版]



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Mary A. Glendon
Michael W. Gordon
Paolo G. Carozza

【美】玛丽·A·格林顿
迈克·W·戈登
保罗·G·卡罗兹 合著



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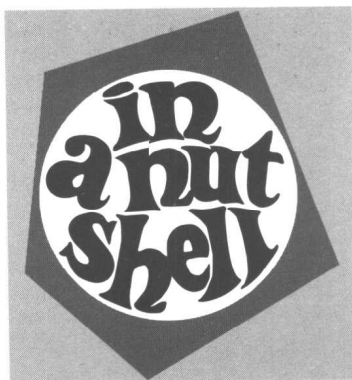
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总 序

许传玺*

在美国法律教育界与律师实务界,这套“美国法精要”(Nutshell Series)是颇具特色的一套丛书。这套书最突出的特点当推它们的简捷明快、深入浅出。每种书均由富有教学经验的法学教授执笔,在三、四百页的篇幅内介绍某一法律部门的基本原理、主要法规和重点案例。

由于这些特点,这套丛书受到了无数美国读者的欢迎和喜爱。众多法学院的学生将这套书作为课外的辅助教材,由此掌握美国各主要部门法的精义。执业律师也经常借助这套书,以迅速了解自己尚未熟习的某些部门法,或者温习过去曾经学过的某些课程。

相信这套丛书也能赢得国内读者的欢迎。无论是法律专业的本科生、研究生,还是执业律师或其他人士,都能从这套丛书中获得有关美国法律的大量知识,对自己的学习和工作有所助益。此外,通过阅读原汁原味的英文来学习美国法律也应能提高读者的法律英语水平,促进与美国同行的直接对话与交流。

* 美国哈佛大学法博士(J. D.);耶鲁大学社会文化人类学博士;现任中国政法大学中美法学院院长、教授。

应原出版者的要求,这套丛书的国内版增加了中文前言,以介绍美国各部门法的概况、每种书的内容及原书作者等等。这些前言作者都是在美国受过专业教育或从事专门研究的法律学者甚或专家。相信他们的介绍会对读者有所帮助。

Happy reading!

1999 年 4 月
于哈佛法学院

前言

彭亚楠*

《比较法律传统》是美国法学院比较法课程的概要读物,该书从美国律师的实践需要和学术兴趣出发,选取了西方几大重要的法律体系,进行深入浅出的论述和比较。本书是1999年的第二版,共分四个部分,依次为“法律比较研究导论”、“民法传统”、“普通法传统”、“欧洲超国家法律与制度”。

与欧洲各国以及发展中国家的同行相比,美国法律界对比较法的重视程度显得相对不足。在导论中,作者首先对此进行了反思,分析了原因,并在这一语境下论述了比较法的意义、目的和功用。在研究方法上,作者强调了功能主义和语境论的重要性,并讨论了“法律传统”的概念。这里所称的“传统”,并非凝固的过去,而是指经过长期历史积淀,至今仍具有活力的现实动态体系。将书名定为“比较法律传统”,而非“比较法”,反映了作者主张超越实定法而注重法律系统研究的立场。

导论之后,作者以全书五分之四的篇幅,分别介绍了西

* 中国人民大学法学院法学学士、法学硕士;现任美国耶鲁大学法学院法学博士(JSD)候选人。

方两大法律传统:民法传统和普通法传统,即我们更常说的大陆法系和英美法系。本书依次探讨了这两大法律传统的历史起源、文化背景、传播分布、组织机构、职业群体、法律程序、法的渊源和部门等。但要指出的是,本书对普通法传统的讨论,实际上主要针对的只是英国法。而美国法,虽同为普通法系重要一支,但却并无系统介绍,而只是作为一个远景和衬托,隐现于全书对其他法律传统的论述之中。这体现了该书的美国视角,是中国读者需要注意的。

在1982年第一版中,作者曾将社会主义法律传统与民法、普通法并列,作为西方文明的三大法律传统之一,用相同的篇幅加以介绍。第二版的一个重要变化,就是根据社会变迁和时代发展的需要,删去了这部分内容,而代之以欧洲联盟法律体系和欧洲人权保障机制,简要介绍了两者的历史、主旨、机构和范围等情况。

本书共有三名作者,其中两位也参与了第一版的写作。玛丽·A·格林顿是哈佛大学法学院教授,著名学者,在比较法、宪法、人权和法理等领域著述颇丰,其代表作有《权利话语》(Rights Talk, 1991年)、《法律人之国》(A Nation Under Lawyers, 1994年)和《打造新世界》(A World Made New, 2001年)等。她毕业于芝加哥大学法学院,1961年获法律博士(J.D.)学位,1963年获比较法硕士学位。格兰顿是本书1982年第一版的三位作者之一,当时她是波士顿学院的法学教授。

另一位作者是迈克·W·戈登,他是佛罗里达大学法学院教授,比较法、公司法、国际商法专家,1963年毕业于康涅狄格大学法学院,获法律学士(LL.B.,法律博士的旧称)学位。戈登也是本书第一版的作者之一。

作者中相对比较年轻的是保罗·G·卡罗兹,他1989年

毕业于哈佛大学法学院,获法律博士(J. D.)学位,现为美国圣母大学法学院(Notre Dame Law School)副教授。他的主要研究领域包括国际法、国际人权、欧洲和拉丁美洲法律体系、比较法和法理等。

本书结构完整,内容翔实,用语简练,是中国读者了解西方法律传统和学习法律英语的极好材料。

2003 年 12 月 20 日于美国康涅狄格州纽黑文市

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INTRODUCTION TO THE COMPARATIVE STUDY OF LAW

§ 1. What is "Comparative Law"?

When the first learned societies dealing with cross-national legal comparisons were established in France, Germany, and England in the late nineteenth century, their founders took for granted that comparative methods would advance the understanding of a broad range of legal issues. In that expectation, legal scholars were in accord with the best of their counterparts in other disciplines. Emile Durkheim had gone so far as to claim that, "Comparative sociology is not a particular branch of sociology; it is sociology itself." The great legal historian F.W. Maitland had insisted that, "The English lawyer who knew nothing and cared nothing for any system but his own, hardly came in sight of the idea of legal history."

The question arises, however: Why, if the benefits of comparative studies are so substantial and obvious, did comparative law remain a relative backwater in twentieth century American legal education? No doubt there are several reasons, not least of which is the increasing burden of keeping up with developments in our own legal system, the most complex the world has ever known. To achieve even

minimal competence in another country's legal system requires a major expenditure of time and effort, including, in many cases, learning another language. The main reason is probably that Americans have long tended to assume that they could get along quite well without casting their gaze beyond national borders. Like Roman jurists of old, many U.S. lawyers were convinced of the self-sufficiency of their legal and political arrangements.

In recent years, however, that insular posture has become untenable. With unprecedented global interdependence, and with commerce and instant communication linking all regions of the earth, nearly every legal field has acquired an international dimension. We live in a world where national boundaries are of diminishing significance in relation to technology, finance, trade, ecology, information, consumerism, entertainment, the arts, and ideas of universal human rights. Legal education, accordingly, has had to adjust to demands for the skills required by lawyers in the "global village" or "McWorld." As the twenty-first century dawns, international legal studies are burgeoning to a degree that early comparatists could scarcely have imagined. Yet, as Basil Markesinis has written, comparative law is "still searching for an audience even where it has found a place of sorts in the university curriculum."

In the years to come, it is likely that comparative law will find many different sorts of audiences as it takes its rightful place among the methods required for the effective study and practice of law. Certain

fields have always had a comparative dimension: conflict of laws, inter national business law, public international law, and area studies where the object is to become familiar with a particular foreign legal system. In those fields, cross-national studies are now assuming greater importance than ever. Contracts and commercial law teachers are having to spend an increasingly large proportion of course time on the international aspects of their subjects if they wish to keep pace with developments in the practice. Increasingly, law professors in many other fields are moving in the direction counselled by Roscoe Pound in the 1930s—exploring the approaches of other legal systems to the issues that arise “in the course of teaching the law of the land.” The increasing importance of supranational law will present new challenges for comparatists as the roles of nation states and national law undergo transformation.

§ 2. Aims and Uses of Comparative Law

It is fair to say that comparative law, as befits a developing field, is experiencing something of an identity crisis. The existence of lively debate concerning aims and methods, however, has not hindered comparatists from happily pursuing cross-national studies in a variety of ways and for a wide range of purposes. Nor has it prevented those studies from yielding important contributions to the understanding, practice, and reform of contemporary law. In all likelihood, the diversity of aims and methods among comparatists promotes the vitality