UNIT 1

Jurisprudence

Text Ⅰ Reasoning

Before You Read

1. Perhaps the term 'legal reasoning' is much familiar to you. Can you explain the proposition that "Reason is the life of the law"?
2. Can you name some elements of legal reasoning?
3. Can you give examples to show how to use inductive or deductive methods in legal reasoning?

First Reading Exercises

1. What is the type of rigor stated in Paragraph 2?
2. What is the author's opinion about judges' discretion in applying rules?
3. Can the most important elements of legal reasoning be accounted for by induction? Why?
4. What gave rise to "rule skepticism"?
5. Is the situation with regard to statutes much the same as that of legal rules? Why?

1 Ever since law became a specialized discipline, it has been assumed that legal reasoning exhibits a greater rigor than other types of non-formal argumentation. Explaining why this is so, however, has not been easy. It is this inability to articulate a satisfactory theory of legal reasoning that has undercut the perceptive criticisms of the United States Supreme Court by the late Professor Henry M. Hart[1], who was unable to do much more than

remind the legal profession that "reason is the life of the law", and by Professor Wechsler in his famous call for "neutral principles"[2] for the adjudication of constitutional issues.

2 The type of rigor in reasoning that scholars are seeking to find in the law is the type that would permit people who strongly disagree over the merits of a judicial decision to agree that the case was properly decided or, if this is impossible, at least to agree that the decision was adequately justified. Most scholars attempting to identify an "objective" method of legal reasoning, in the sense just described, have assumed that the law consists of rules. When they have been unable to account for actual decisions solely in terms of rules, some scholars have enlarged their description of the law to include more general rulelike statements called principles and still broader propositions called standards. It has been recognized, however, that if objectivity in legal reasoning exists because legal reasoning consists of reasoning from rules, then legal rules must theoretically be capable of complete statement, although as a practical matter such completeness may be difficult to attain.

3 Furthermore, once the rule has been completely stated, it must be possible to ascertain from the formulation itself the factual situations to which the rule applies. Unless this can be done, one is obliged to admit that judges have a large measure of discretion in applying legal rules and to conclude that the assumption that the law consists of general rules precludes any possibility of objective decision-making. But experienced lawyers would agree that it is counter-intuitive to contend that the so-called rules of law can be completely stated and that it is still more implausible to maintain that the statement of a rule can completely indicate the situations to which it is applicable. Even the Restatement's formulation of the Rule in Shelley's Case[3] specifically disclaims completeness. Indeed, the difficulty of adequately formulating legal "rules" is acknowledged as a factor that seriously limits the benefits that might be obtained from applying the techniques of modern logic to legal analysis.

4 It is not surprising that legal rules are unable to fulfill such stringent requirements. If legal rules were complete and self-applying, their application by the courts would be largely a deductive process, which it

所有人享有各种产权的前提下来研究投资、销售和购买活动的。

(二)房地产的特性

房地产作为不动产,其首要特点是它与土地的联系。由此可将其特点归纳为两类:(1)物理的或自然的;(2)经济方面的。房地产作为实物资产具有不同于其他资产尤其是金融资产的基本特征。主要表现为:

1. 物理特性

(1)不可移动性(Immobility)

房地产最主要的特征是其位置的不可移动性。土地是不可移动的,构筑在土地上的建筑物也是不可移动的。因此,房地产不能像一般商品那样可以通过交通运输工具将某一地区充裕的产品补给供给不足的另一地区,从而获得某种程度的市场均衡。一方面,房地产的不可移动性特征导致房地产市场是一个地区性市场,或者说不存在像工业产成品和农产品那样的全国性市场。但是,对某些房地产而言,市场可以是地区性的、全国性的,甚至是国际性的,这有赖于资产的用途和所涉及到的权利。比如,在美国,许多商业区的办公楼的交易是国际性的,很多非美国人购买美国的办公楼。另一方面,不同区域的房地产可以产生不同的经济效益。于是,房地产投资者通常会面临两种情形:当所持房地产所处区域市场处于供给不足时,投资者会因价格的大幅上扬而获得可观利润;反之,当所持房地产所处区域的市场处于供给过剩时,投资者则可能因价格的大幅下跌而遭受重大损失。

(2)异质性(Nonhomogeneity)

所谓房地产的异质性又称独一无二性,即不存在相同的房地产。任何一宗房地产无论是在结构和外观上,还是在所处的地理位置和环境上都有其特殊性,都是惟一的,也就是说每份房地产都有一个惟一的、不可能复制的位置。每份房地产是惟一的、独特的,因而是异质的。相比之下,粮食、煤等有形商品或者长虹股份

that inductive arguments are as sound and compelling as deductive ones, legal decisions are no more compelled by induction than by deduction. Induction, like deduction, is largely only a tool in judicial decisionmaking.

7 Because identifiable "rules," "principles" and "standards" in this strict sense do not exist, any theory of legal reasoning that requires them is necessarily incomplete. If one asks himself what the so-called rules of law are, he would, it is submitted, be obliged to conclude that they are constructs formed by scholars writing books and articles, by lawyers litigating cases, and by judges preparing to decide cases. As such they serve a very useful purpose. They are, first of all, a helpful mnemonic device for classifying large numbers of cases. They provide a concise shorthand for referring to matters which, at any particular moment, are not in issue. As general statements of our expectations and preferences, they also provide a means of predicting the outcomes of future cases and for arguing about the desirability of those outcomes. Yet the position that such rules are the actual content of the law, rather than a means of understanding it, is untenable because there are any number of so-called rules which logically can be constructed out of any given number of cases, and there is no authoritative statement of which is correct. Under traditional theory, as we shall see, not even a court's express attempt to state the correct rule is authoritative; it is only evidence of what the rule is, and sometimes not even the best evidence. It is these inadequacies of a model of rules which gave rise to the "rule skepticism" of the American legal realists. It is these same inadequacies which, as we shall see, have led legal scholars —many of whom did not share the rule skepticism of the realists —to devote so much time and effort to the subject of legal reasoning over the years. Finally, we might briefly note that the situation is not really much different with regard to statutes. It is true a statute has a fixed verbal form, but what the statute means is another question. Statutes, like common-law rules, require interpretation and application by the courts.

8 The subject of legal reasoning is a vast one. It is one of the most important questions in any detailed study of the law from a philosophical point of view. However, we cannot present anything like a complete view of this vast subject. Indeed, anything like a "complete" view would take a

lifetime and more of study.

(1 275 words)

Notes

1. H. M. Hart, Foreword: The Time Chart of the Justices, The Supreme Court 1958 Term, 73 HARV. L. REV. 84, 125 (1959).
2. Toward Neutral Principles of Constitutional Law, by Professor Wechsler, an article published in 73 Harvard Law Review, 1, 7, 9 Selected Essays 1938—62 (1963) at pp. 463 and 468.
3. Rule in Shelley's Case: an important decision in the law of real property. The litigation was brought about by the settlement made by Sir William Shelley (c. 1480—1549), a judge of the common pleas, of an estate which he had purchased on the dissolution of Sion Monastery. After prolonged argument the celebrated rule was laid down by Lord Chancellor Sir Thomas Bromley, who presided over an assembly of all the judges to hear the case in Easter term 1580—1581.

Vocabulary

adjudication	[əˌdʒuːdiˈkeiʃən]	n.	(法庭的) 判决；裁定
discretion	[disˈkreʃən]	n.	自由裁量权
contend	[kənˈtend]	v.	争论，争辩
implausible	[imˈplɔːzəbl]	adj.	难以置信的，似乎不合情理的
disclaim	[disˈkleim]	v.	放弃，否认
stringent	[ˈstrindʒənt]	adj.	严苛的，严格的，严厉的
nub	[nʌb]	n.	要点；核心
go-karts	[ˈgənˌkaːt]	n.	微型赛车
litigate	[ˈlitiɡeit]	v.	诉讼，打官司
debauchery	[diˈbɔːtʃəri]	n.	堕落，道德败坏
cavort	[kəˈvɔːt]	v.	欢跃；跳跃
refute	[riˈfjuːt]	v.	驳斥，驳倒
compelling	[kəmˈpeliŋ]	adj.	强制的，强迫的
mnemonic	[niˈ(ː)mɔnik]	adj.	记忆的，记忆术的
untenable	[ˈʌnˈtenəbl]	adj.	站不住脚的，难以维持的
skepticism	[ˈskeptisizəm]	n.	怀疑论

After-reading Exercises

Ⅰ. Multiple Choice

1. The first paragraph mainly exemplifies _____.

A. the importance of legal reasoning

B. the significance of the discussion on legal reasoning

C. the inability of experts to explain legal reasoning

D. the inadequacies of criticisms

2. Which is NOT what scholars are seeking? _____

A. A type of rigor of legal reasoning

B. Objective method of legal reasoning

C. Complete statement of the legal rule

D. Disagreement over the merits of judicial decisions

3. Experienced lawyers would agree that _____.

A. rules of law can be completely stated

B. the statement of a rule can not completely indicate the situations to which it is applicable

C. legal rules can be adequately formulated

D. legal rules can not be formulated

4. The woman-transporting case explains that _____.

A. the purpose of the act is immoral

B. the act is trivial

C. the substantive and logical concepts do not merge

D. the inductive method cannot be applied

5. Because application of legal rules by the courts is not a deductive process, _____.

A. legal rules are complete and self-applying

B. one is able to ascertain from the statement of the rule when it is applicable

C. one is unable to state a legal rule completely

D. the statute that defines "motor vehicles" can include go-karts

6. Application of law is _____.

A. basically a deductive process

B. basically an inductive process

C. at least partially a creative process

D . a process of applying preexisting rules

7 . According to the author , rules of law _____ .

A . do not exist

B . are the actual content of the law

C . are constructs formed by scholars , lawyers and judges

D . only provide a means of predicting the outcomes of future cases

8 . The author's opinion about statutes is _____ .

A . that because of their fixed verbal form , they are different from common-law rules

B . what the rule means is as its verbal form suggests

C . statutes do not involve interpretation

D . statutes require interpretation by the courts

Ⅱ . True or False Statements

1 . The author thinks that it's possible to identify an objective method of legal reasoning . _____

2 . Scholars have the desire that adequate formulation of legal rules can facilitate the application of modern logic to legal analysis . _____

3 . It is not known when the rule is applicable because legal reasoning is primarily deductive . _____

4 . The author thinks that any theory of legal reasoning is incomplete . _____

5 . The inadequacies of a model of rules gave rise to rule skepticism and have led scholars to spend much time on the subject of legal reasoning . _____

Ⅲ . Vocabulary Exercises

Fill in the blanks with one of the words in the box . Change the form if necessary . Each word can be used only once .

articulate , cavort , discretion , litigate , contend , formulate , suffice , stringent , compel , untenable , submit , disclaim , verify , refute , implausible

1 . Law students are expected to be able to _____ their opinions on the

reasoning of the courts and on policy judgments.

2. The Court of Appeal will not interfere with the exercise of a judge's _____ unless that judge has erred in principle or there was no material on which he could have properly exercised his _____

3. The plaintiffs _____ that the law is discriminatory and violates their constitutional rights to equal protection and free speech.

4. US law recognizes that parties may _____ or limit implied warranties.

5. The Government was considering enacting a separate law with _____ provisions as the existing copyright act had proved inadequate.

6. This lawyer _____ employment law matters such as discrimination claims based on race, sex, religion, national origin, age, or disability.

7. Considering that evidence, she claims it is not _____ that her father should have volunteered to transport cargo to support a cause close to his heart.

8. The National Bureau of Statistics shall, in accordance with this Law, _____ rules for its implementation and submit them to the State Council for approval before they are put into effect.

9. _____ it to say that although many superior courts have found the law unconstitutional on *ex post facto* grounds, the courts of appeal have uniformly upheld the law.

10. The evidence is sufficient to _____ the *prima facie* validity of the proof of claim.

11. The court found that the act of production would _____ respondent to admit that the records exist, that they are in his possession, and that they are authentic.

12. Senior Labour Party Ministers are touting a flawed and _____ adjustment to the existing prohibition.

13. He _____ that discrimination was probable and that the case should be remitted to a commissioner for him to decide the matter after considering the evidence.

14. The Department will not undertake to gather evidence for the individual, but does reserve the right to _____ the evidence.

15. It's also surprising to _____ with famous people and realize that they're not everything you've thought they would be.

Ⅳ. Oral Practice

1. Choose a familiar case or imagine a case to illustrate the process of legal reasoning.
2. Explain to your classmates the interrelationship between deductive reasoning and inductive reasoning.

Text Ⅱ Law as a Normative Order and the Problem of Legal Certainty

Fast Reading Exercises

1. Some scholars think that _____.

A. the level of legal certainty is too low and they try to give different interpretations

B. there is no legal certainty and they strongly believe so

C. the level of legal certainty is low but they have much faith in it

D. the level of legal certainty is too low and they have no faith in it

2. The implication of Frank's work is _____.

A. that interpreters seriously determine legal content

B. that social and psychological factors might not influence the application of the most concisely defined rule

C. that internal contradiction of the rules may not give rise to the maximization of the range of possible choices by judicial and legal functionaries

D. that the formal rules delimit and predict judicial behavior

3. The situation in the Kachin Hills Area of Burma is cited to exemplify _____.

A. the importance of interpretation

B. that the mythology is sacred

C. that political action and conquest must be rationalized

D. that the level of legal certainty is high

4. When talking about legal norms, the author thinks that _____.

A. legal norms are sufficiently specific

B. legal norms are often in conflict with each other

C. the facts bearing any issue are not subject to any interpretation

D. legal norms always enable judges to arrive at correct decisions

5. As regards the two facets of the legal processes, the author holds the opinion that _____.

A. there is no close relationship between adjective law and substantive law

B. adjective law and substantive law are interdependent in the real world

C. substantive law gives judicial officials the right to make judgments

D. adjective law regulates the action of a population

1 The debate over legal certainty is fundamentally concerned with the question, "To what extent is the law a legal order in the sense of a complex of interrelated rules"? If the working lawyer is to protect his clients' interests effectively, he must work on the assumption that there is a legal order and that his advice and action are based on a reasonable knowledge of that order. It is this knowledge which will supposedly allow him to predict the response of the judiciary to a particular legal issue and thereby circumscribe the various action alternatives relevant to his clients' welfare.

2 A number of legal scholars feel that the level of legal certainty is too low and have tried to explain why this is the case. Jerome Frank argues that there are two basic types of explanations: those made by the "rule skeptics" and those by the "fact skeptics." Neither of these groups have a great deal of faith in the possibility of lawyers being able to predict from the formal legal rules, or what they call "paper rules," but the "rule skeptics" believe that they can find behind the "paper rules" a set of "real rules" or norms from which they can predict with some accuracy. The fact skeptics, like Frank[1], think the pursuit of greatly increased legal certainty is, for the most part, futile.

3 The bulk of Frank's work is devoted to the various social and psychological factors (especially the latter) which may intervene and structure the perception of the facts and thereby influence the application of even the most concisely defined rule. The obvious implication is that whoever has the interpreter's role seriously determines legal content. We may even go beyond this and contend that the same biasing factors enter into the interpretation of even the most concisely defined rules even when there is agreement on the facts. And in those cases where there is internal contradiction of the rules, the range of possible choices by judicial and legal

functionaries is maximized. That is to say, the formal rules do not adequately delimit, therefore do not predict, judicial behavior. This legal dilemma should be of great interest to the social scientist since it illustrates the difficulty of predicting behavior from the most concisely defined normative propositions.

4 With these considerations in mind it becomes apparent that the judge's "will"[2] is important and that his power is considerable. The same is also true of the attorney whose function is to coerce the judicial authorities dialectically toward specific definitions of legal norms and facts which complement his client's interests.

5 It is no wonder that the level of legal certainty is low. At the same time we must recognize the fact that major social issues are commonly argued within the context of the law and that this probably has a stabilizing effect, in that whatever decisions are ultimately made are made within a cultural frame of reference which legitimates the decision. This despite the fact that the words involved may have widely divergent meanings for different sectors of the population. And, of course, whoever has the authority to interpret or place meaning on these words is in a position of great power and influence.

6 What is being suggested is that legal norms do not sufficiently circumscribe the decision of the judge to justify the definition of legal decrees as reflecting the values of the larger society; at the same time the judiciary system is more or less accepted as the rightful authority over issues in conflict, making the legal system an important resource of power and control. This is due to the facts that (1) legal norms are not sufficiently specific to assure only one interpretation; (2) the facts bearing on any issue are always subject to interpretation by an imperfect and sometimes deceitful instrument; and (3) legal norms even when concise and relatively concrete are often found to be in conflict with an equally concise and concrete legal norm located elsewhere in the statutes or case files.

7 Legal processes are legitimated in two ways, and the distinction here parallels Hans Kelsen's differentiation of adjective and substantive law[3]. Adjective law involves those norms which legitimate judicial authority or give judicial officials the right to make judgments and the power to be

obeyed. While substantive law are those legal norms designed to regulate the action of a population. A strong belief in law and order is basically a facet of adjective law and yields positive and prior sanctions to the decisions of the judiciary. However, the analytic distinction between these norms should not be allowed to obscure their interdependence in the real world.

(770 words)

Notes

1. Jerome Frank, *Law and Modern Mind*, Garden City, New York: Anchor Books, 1963, p. xi.
2. will: A desire, purpose, or determination, especially of one in authority
3. Hans Kelsen, *General Theory of Law and State*, Cambridge: Harvard University Press, 1945.

Vocabulary

thereby	[ˈðɛəˈbai]	adv.	因此，从而
circumscribe	[ˈsəːkəmskraib]	v.	确定...的界限；限制；约束
welfare	[ˈwelfɛə]	n.	福利，福祉
skeptic	[ˈskeptik]	n.	怀疑论者
futile	[ˈfjuːtail]	adj.	无用的，琐碎的
bulk	[bʌlk]	n.	主体，大多数，大批量
biasing	[ˈbaiəsiŋ]	adj.	偏颇的
functionary	[ˈfʌŋkʃənəri]	adj.	功能的，机能的
delimit	[diːˈlimit]	v.	界定，划界，定界限
coerce	[kəuˈəːs]	v.	强制，强迫，胁迫
dialectically	[ˌdaiəˈlektikəli]	adv.	辩证地
divergent	[daiˈvəːdʒənt]	adj.	分歧的，不同的
decree	[diˈkriː]	n.	法令，政令，教令
adjective	[ˈædʒiktiv]	adj.	程序的
facet	[ˈfæsit]	n.	面，方面

Reading Comprehension Exercises

1. What causes the problem of legal certainty?
2. Give an example to illustrate the problem of legal certainty as you

understand it.

3. Why are some scholars called "rule skeptics" and some "fact skeptics"?

4. According to some scholars, do judges and lawyers have considerable power in handling cases? Please justify your answer.

5. What is the relationship between adjective law and substantive law?

JOKE

A doctor vacationing on the Riviera met an old lawyer friend and asked him what he was doing there.

The lawyer replied, "Remember that lousy real estate I bought? Well, it caught fire, so here I am with the fire insurance proceeds. What are you doing here?"

The doctor replied, "Remember that lousy real estate I had in Mississippi? Well, the river overflowed, and here I am with the flood insurance proceeds."

The lawyer looked puzzled. "Gee," he asked, "how do you start a flood?"

UNIT 2

Historical Development of Constitutional Law

Text Ⅰ The Historical Development of the British Constitution

Before You Read

1. What is a constitution?
2. What are the functions of a constitution?

First Reading Exercises

1. Why has the British Constitution been called a "historic constitution"?
2. How many clauses did Magna Carta consist of according to the traditional view?
3. What were the four principles of the Petition of Right?
4. What practices of James II's were declared illegal by the English Bill of Rights?
5. What necessitated the Reform Act?

1 The British Constitution has been called a "historic constitution", for it was not fashioned at one point in history, but developed more or less spontaneously over centuries, adapting to historical circumstances. Except for New Zealand, the United Kingdom of Great Britain and Northern Ireland is the only constitutional monarchy without one single codified constitutional document. Yet, there are a number of legal documents defining the Sovereign's role and functions. They all helped to develop a

system in which the Sovereign owes her or his position not only to hereditary rights, but also to parliamentary consent.

Magna Carta

2 Magna Carta, English GREAT CHARTER[1], was granted by King John in 1215 under threat of civil war and reissued with alterations in 1216, 1217, and 1225. The charter meant less to contemporaries than it has to subsequent generations. The solemn circumstances of its first granting have given to Magna Carta of 1215 a unique place in popular imagination; quite early in its history it became a symbol and a battle cry against oppression, each successive generation reading into it a protection of its own threatened liberties. In England the Petition of Right (1628) and the Habeas Corpus Act (1679) looked directly back to clause 39 of the charter of 1215, which stated that "no free man shall be ... imprisoned or disseised [dispossessed] ... except by the lawful judgment of his peers or by the law of the land." In the United States both the national and the state constitutions show ideas and even phrases directly traceable to Magna Carta.

3 Although written continuously, the charter has been traditionally discussed as consisting of a preamble and 63 clauses. Roughly, its contents may be divided into nine groups. The first concerned the church, asserting that it was to be "free." A second group provided statements of feudal law of particular concern to those holding lands directly from the crown, and the third assured similar rights to subtenants. A fourth group of clauses referred to towns, trade, and merchants. A particularly large group was concerned with the reform of the law and of justice, and another with control of the behaviour of royal officials. A seventh group concerned the royal forests, and another dealt with immediate issues, requiring, for instance, the dismissal of John's foreign mercenaries. The final clauses provided a form of security for the king's adherence to the charter, by which a council of 25 barons should have the ultimate right to levy war upon him should he seriously infringe it.

The Petition of Right

4 Darnel's Case (1627 ~ 1628), also called Five Knights' Case, contributed to the enactment of the Petition of Right. In March 1627, Sir Thomas Darnel —together with four other knights, Sir John Corbet, Sir Walter Earl, Sir Edmund Hampden, and Sir John Hevingham —was arrested by the order of King Charles I for refusing to contribute to forced loans. The knights demanded that the crown show cause for their imprisonment or that they be released on bail. In November 1627 their appeal for a writ of habeas corpus was argued before the King's Bench[2]. Counsel for the knights appealed mostly to medieval precedents, including clause 39 of the Magna Carta, which stipulated that no man should lose his liberty without due process of law. On Tudor precedents the crown argued that it had a large discretionary power of arrest. The judges refused bail but did not decide that the crown could always commit without cause. After the release of the knights in 1628, the issue continued to be debated in Parliament.

5 By the time Charles's third Parliament met (March 1628), Buckingham's expedition to aid the French Protestants at La Rochelle had been decisively repelled and the King's government was thoroughly discredited. The House of Commons at once passed resolutions condemning arbitrary taxation and arbitrary imprisonment and then set out its complaints in the Petition of Right, which sought recognition of four principles —no taxes without consent of Parliament; no imprisonment without cause; no quartering of soldiers on subjects; no martial law in peacetime. The King, despite his efforts to avoid approving this petition, was compelled to give his formal consent.

The English Bill of Rights

6 The English Bill of Rights, formally An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (1689) and one of the basic instruments of the British constitution, was the result of the long 17th-century struggle between the Stuart kings and the English people and Parliament. It incorporated the provisions of the Declaration of Rights, acceptance of which had been the condition upon which the