

李步云
著

法理 探索

湖南人民出版社

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图书在版编目(CIP)数据

法理探索/李步云 著,一长:湖南人民出版社,
2003.7

ISBN 7-5438-3376-X

I.法... II.李... III.法理学-文集

IV.D90-53

中国版本图书馆 CIP 数据核字(2003)第 046559 号

责任编辑:曾赛丰

装帧设计:卜艳冰

法 理 探 索

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湖南人民出版社出版、发行

(长沙市展览馆路 66 号 邮编:410005)

湖南省新华书店经销 湖南望城湘江印刷厂印刷

2003 年 7 月第 1 版第 1 次印刷

开本:850×1168 1/32 印张:21.75 插页:3

字数:517,000 印数:1-3,000

ISBN7-5438-3376-X
D·513 定价:39.80 元

自序

这本文集所收入的主要是1998年《走向法治》出版后撰写的一些论文。少数文章此前已发表过。其中有几篇为合著，我在后记里作了说明。文集中某些篇章的个别重要概念今天似乎已经弃置不用或少用，但为了反映我国思想理论的发展过程，或者考虑到文章的主要观点现在仍具有一定意义，我还是决定收在这个集子里。因此，我仍然想说我曾在这《走向法治》一书自序中说的那句话，请读者不仅把本书的文章作为理论性论著来辨析，而且也当作我国法学发展史之点滴来审视。

“走向法治，建设社会主义法治国家”这一治国方略和奋斗目标自1999年3月被写进宪法后，我还是花了很多精力从理论和实际两个层面和角度来继续研究它。一方面，这是因为这个问题实在太重要，研究的空间也十分宽阔；另一方面，我真没有想到，这个问题在理论层面的解决会是如此之艰难。从80年代初“法治论”、“结合论”与“取消论”这三大派的论争到现在已经20多年，这一治国方略也已入宪，然而却还是有人认为“法治”的含义就是“法的作用”很重要，“人治”的含义就是“人的作用”很重要，因而仍然主张“法治”应当与“人治”相结合；认为法律不是万能，因而提出这样或那样的“方略”来补充，以求克服依法治国的“片

面性”。这使我深切地感到，即使是在依法治国一些基本的概念和理论上，也还得依靠大家用上二三十年的时间去努力研究和宣传它。

人权理论仍然是我近几年来关注和研究的重点问题之一。从2002年2月开始，我虽然不再担任中国社会科学院人权研究中心的副主任，但从2000年10月起，我已在湖南大学组建了一个“法治与人权研究中心”，并同北欧三国以及英、美等国的一些机构开展了有关人权研究与人权教育项目的颇有成效的合作。虽然中国学者对人权理论与实践问题的普遍关注和广泛参与，只是90年代以后的事情，但是学者们已取得不少研究成果，政府官员的观点也有了根本性质的变化，我们在人权理论问题上已经完全可以和西方的学者们进行平等的对话。然而从中国与世界的现实与未来看问题，中国学者所作的工作，恐怕还只是万里长征刚跨出第一步。就我个人而言，我对不少人权问题的理解，还好像是雾里看花，或感到只是刚跨进这一学术殿堂的门槛。近一两年内，我必须完成教育部第一本大学用统编教材《人权法》的主编工作，以及司法部重点课题《人权法的理论与实践》的研究，还有其他几部尚未完成的人权著作。看来，在我有生之年，我的人权情结将难以了断。

本书“法学方法论”收入的文章中，有几篇是属于我个人多年来所主张和倡导的“法哲学”的部分内容。我坚信，它同法理学应当是有区别的，而且自成体系。如果说，法理学是有关法的最一般的概念、范畴、规律、原理与原则的科学，那么法哲学则是有关法律、法律制度 and 法律思想的唯物论与辩证法问题的科学。本质上，法哲学是一种法学认识论和方法论。“法学为体，

哲学为用”，即内容是法学的，形式是哲学的，是其重要特征。在某种意义上，它也是介乎法学与哲学之间的一个边缘学科，但我更倾向于认为，它是法学的一部分。以前我国法律实务界和理论界存在的“五个主义”（见本书《二十一世纪中国法学的发展前景》）实际上就是唯心论和形而上学的认识论和方法论的集中表现。因此，我毫不怀疑，研究与掌握法哲学是很有意义的。

在执笔起草这篇自序时，我突然想起了一件和《对人民代表大会制度的思考》一文有关的往事。1996年12月，全国人大常委会曾在深圳举办过一期人大工作高级研讨班，参加这次会议的有几位副委员长、各专门委员会正副主任、各省人大的主任和秘书长。我应邀参加了这次会议，并在会上作了一次题为“依法治国的理论与实践”的主题发言。发言前一天，一些同志对我说：“李教授，你的讲稿我们已经看过，能不能再讲一些稿子里没有的东西？”我说，“好呀”。第二天，我就讲了“对人大制度改革的十二点建议”（前文的内容就是其中的八条）。这天中午吃饭时我同五个省的人大主任一桌，上海市人大主任叶公琦同志对我说：“你讲的十二条很好，我们都同意，但也有一点不足。”我说，“什么呀？”他说，“你怎么把‘改善党和人大的关系’放在最后一条呢？”我说，“你可能没有注意吧，我曾讲过这最后一条是关键。”这件小事后来常常引发我的一些感慨：法学工作者应多关注我们国家宪政建设中面临的各种理论与现实问题，多研究广大国家工作人员特别是各级领导人经常思考的认识与实践问题，少讲点那些玄而又玄和不着边际的所谓“理论”。法学工作者也应该多一点理论勇气。据我观察，在我国观念更新和制

度变革的很多问题上，从事理论和从事实务的人之间认识常常是一致的。区别在于，从事实际部门工作的人，由于其地位所决定，说话往往比较谨慎。某种新的理论观念或改革建议是否采纳，那是政治家们的事情。但如果学者该说的话不说，该研究的问题不研究，那就失去了学者自身存在的价值。

在这里，我征得两位朋友的同意，刊登他们赠我的诗作各一首。其中一位是俞荣根教授。他曾任西南政法大学副校长、重庆市社会科学院院长，现任重庆市人大常委会法制工作委员会主任，是我国法史学界的著名学者。另一位是中国社会科学院法学研究所的齐钧副研究员。他少时曾历尽坎坷，近二十年始终默默耕耘在法史学的园地里。他们两位都曾在我遭遇困难时赠我诗作以示鼓励与支持。他们的手迹我至今仍然珍藏着。这次刊登的两首，一些评价令我汗颜。但我相信他们是真诚的，况且无激情少浪漫难以成诗，因此我鼓起勇气把它们刊登在这篇自序里，就权作对我未来工作的期盼和鞭策吧。

其一

值步云先生 70 华诞之际，借先生《走向法治》

言志诗原韵，试填一曲而酬之——

上下求索五十年，

为谋法治著新篇。

卫国保家岂惜身，

民胞物与挑一肩。

文章原非无情物，

江山自古任指点。

拼将满腔赤子情，

化作精卫天地间。

俞荣根 写于2002年5月30日

其二

七律 庆李公步云七秩荣寿

雄书椽笔气如山，

为有文化底蕴看。

胸里昆仑丘壑起，

怀中江海波浪翻。

宏编旧著惊天宇，

鉅制新说泣鬼关。

求索人权研法理，

科学峰顶苦登攀。

齐钧作于2003年暮春

李步云

2003年5月于岳麓山

Author's Preface

This collection is selected from the papers written after 1998, when another book of mine called "Towards the Rule of Law" came out. Some of them have already been published. A few of them were co-written, for which I have made a declaration in the postscript. In this collection, some important concepts seem not to be out of use or seldom to be used today. But in order to reflect the development process of the legal ideas and theories in our country, I decide to put them into this collection considering that some of them still make sense today. As I said in the preface of "Towards the Rule of Law", I'd like to ask people not only to take it as a book of theoretical academic writings, but also a book with dribs and drabs of Chinese legal history.

As a state governance strategy and struggling objective, "towards the rule of law, to build a socialist state with the rule of law" was prescribed in the Constitution in March 1999. Since then I have taken great efforts to continue this study both through theory and practice. On the one hand, this issue is of great significance and its research scope is broad; on the other hand, it is beyond my expectation that it is so difficult to solve the issue in theoretical aspect. From the beginning of 1980s up to now, the ar-

gument among “the doctrine of the rule of law”, “the doctrine of combination” (*jie he lun*, people who hold this theory think that the best way to govern a state is to combine the doctrine of the rule of law and the rule of man) and “doctrine of abolishment” (*qu xiao lun*, people with this idea think that the rule of law is not suitable for China and it should be abolished) has lasted more than twenty years. Though the idea of the rule of law has been put into the Constitution, some people still claim the meaning of the rule of law is that “law is of great importance”, which should be combined with the idea of “the rule of man”. They think the rule of law is not perfect; and some supplementary “state governance strategies” should be adopted in order to overcome “the one-sidedness” of the rule of law. I’ve deeply realized that we have to make great efforts to clarify the basic concepts and theories of the rule of law, and to research and propagandize them as well.

In recent years, I also take human rights theory as my concern and research focus. I resigned as vice-director of The Human Rights Research Center of CASS in February 2002. In October 2002, I established Hunan University Research Center for Rule of Law and Human Rights and have acted ever since as director of the center. The center has conducted a series of successful research and education projects with the organizations of Nordic countries, the United States and the United Kingdom in the field of human rights. Though human rights theory did not attract the general concern and participation of Chinese scholars until the nineties of last century, the viewpoints of the government officials have changed fundamentally. We can carry out dialogues on an equal basis with western scholars in the field of human rights. But,

thinking over the gap of the reality and future in the field of human rights between China and the international community, what the Chinese scholars have done is just like the first step of the Long March. As for me, human rights issues are like flowers in the mist. I feel that I have just stepped across the threshold of the academic palace hall. In the coming two years, I must finish editing the first national textbook of Human Rights Law. I'm appointed to act as the editor-in-chief of this book by the Ministry of Education. I must also complete the research work of Theory and Practice of Human Rights Law, which is one of the key research projects of the Ministry of Justice, and some other books on human rights as well. It seems that my love for human rights will not end in my remaining years.

Some of the papers in the part of Methodology of the Science of Law in this book are part of the contents of Philosophy of Law which I have advocated for years. I believe Philosophy of Law is different from Jurisprudence. It has its own system. If we say Jurisprudence is a science about the most general concepts, categories, norms, elements and principles of law, Philosophy of Law is a science about materialism and dialectic issues of law, legal system and legal thoughts. Essentially, Philosophy of Law is epistemology and methodology of law with the characteristic of "law as content and philosophy as form". In some sense, it is a marginal discipline between law and philosophy. But I tend to believe Philosophy of Law is a part of law. There used to be "five isms" in the practical and theoretical circles of law (see "The Development Prospect of Law in China in the 21st Century"), which is the centralized embodiment of epistemology and methodology of ideal-

ism and metaphysics. Therefore, I never doubt it is of great significance to study and master Philosophy of Law.

When I was writing this preface, a past event came into my mind, which is relevant to the paper "Reflection on the System of People's Congress in China". In December 1996, the Standing Committee of the National People's Congress held a senior seminar concerning the work of People's Congress in Shenzhen. The participants included several vice-chairmen of NBC, directors of the sub-commissions of NBC and chairmen and general secretaries of the people's congresses from the provincial level. I was invited to give a lecture at the seminar. The topic was "The Theory and Practice of the Rule of Law". The day before the lecture, some participants said to me: "Professor Li, we have already read your draft. Could you tell us something else beyond the draft of your lecture?" "All right", I answered. The next day, I made a presentation entitled "Twelve Suggestions for the Reform of People's Congress" (the above-mentioned paper touched its eight points). At lunch time, chairmen of the local people's congress from five provinces and I sat at the same table. Chairman Ye Gongqi of Shanghai People's Congress said to me: "Your twelve suggestions are very helpful. We all agree with you. But there's still a defect in your presentation." "What's it?" I asked. "Why did you put the suggestion—to improve the relation between the party and the people's congress—as the last one?" he asked again. "Perhaps you did not pay much attention to my lecture. I said the last suggestion is the key point." I answered. This little event often stirs me with some thoughts and feelings: Law scholars should pay more attention to the theoretical and practical issues we may face

during the process of the constitutional construction. We should study more what the government functionaries and especially the leaders of various state organizations care about, think of and practice. We should not talk too much about abstruse and irrelevant "theory". Law experts should have more courage for theory. As I have observed, the theoretical experts and practical workers in our country often share the same ideas on many issues of concept update and system transformation. The difference is that the practical workers are more cautious due to their positions. Whether a certain new theoretical idea or reform suggestion will be adopted or not depends on the politicians' attitude. But if scholars don't say what they should say, or don't research what they should research, they will lose their value as scholars.

With the consent of my two of friends, I'd like to publish two poems they write for me. One is Professor Yu Ronggen, former vice-president of Southwest University of Political Science and Law, now director of the Commission of Legal Affairs of Chongqing Municipal People's Congress. He is also a distinguished scholar of history of law. The other is an associate research fellow of law from CASS. His early life was full of frustrations. He has been working in the field of history of law for more than twenty years. Both of them wrote poems for me as encouragement during my hard times. I still treasure up their manuscripts today. They speak highly of me in the poems, which makes me feel deeply ashamed because I do not think I'm up to all the praises. But I think they are sincere. It is difficult to write a poem without romance and enthusiasm. So I take heart of grace to put these two poems in the preface as a temporary measure to

encourage my work in the future.

(I)

To Congratulate Mr. Li Buyun on his seventieth birthday, I write a poem using the same tune as his Towards the Rule of Law, which expressed his ambition.

For fifty years striving with all your might,
A new book on the rule of law you write.
To defend the country you don't feel death,
And you love people as long as you've breath.
Writings are not merciless as the cold,
History can be remarked from the old.
Uttering innocence with emotion,
To motherland you've giv'n your devotion.

by Yu Ronggen
May 30, 2002

(II)

To the tune of *Qilu* *
Congratulation on Mr. Li Buyun's
Seventieth Birthday

The grand works written with a big pen like a beam,
Shows that you're a learned scholar in high esteem.
You have rivers and mountains at heart, we can see,
And your broad-mindedness is as vast as the sea.
Your former works won people's great admiration,
And the new book gets even higher estimation.
Seeking for human rights and the rule of law,
You still climb the science summit as hard as before.

* *Qilu* is a Chinese metrical octave with seven characters to each line arranged in a strict tonal pattern and rhyme scheme.

by Qi Jun
in late spring, 2003

Li Buyun
May 2003, in YueLu Mountain

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