外 国 語

A

英 語

早稲田大学大学院法学研究科

以下のⅠとⅡの問題に答えなさい。

Ⅰ

以下の文章は、イギリスの裁判所の判決文の一部である。これを読んで後の問いに答えなさい。

[20] Much academic learning has been devoted to the topic of distilling from any given judgment that part of it which forms the ratio of the decision. …A detailed review of the territory is to be found in Chapter 2 of Cross and Harris, *Precedent in English Law* (4th Edition). The overall picture is of a broad spectrum of views.
[21] At one end of that spectrum is to be found the approach of Lord Halsbury in *Quinn v Leatham* [1901] AC 459 at 506:

"A case is only authority for what it actually decides."

Taken literally, such an analysis would limit the scope of the ratio of any given case to the material facts upon which it was decided thus excluding from consideration as part of the ratio any broader principles forming part of the reasoning of the court.

[22] In contrast is the view of Devlin J (as he then was) as expressed in *Behrens v Bartram Mill Circus* [1957] 2 QB 1 and summarised thus in Cross and Harris at page 58:

"…the ratio decidendi consists of the reason or reasons for a decision which the judge who gives it wishes to have the full authority of precedent."

[23] Taking a middle course in *R(Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] Q.B. 955 Buxton LJ observed at para 17:

"Cases as such do not bind; their rationes decidendi do. While there has been much academic discussion of the proper way of determining the ratio of a case, we find the clearest and most persuasive guidance, at least in a case such as the present where one is dealing with a single judgment, to be that of Professor Cross in Cross & Harris, *Precedent in English Law*, 4th ed (1991), p 72: "The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him.""

[24] In the circumstances of this case, I am satisfied that the approach of [A] is the appropriate one allowing as it does a degree of latitude as to how the scope of the ratio is demarcated but requiring the application of the rule of law thus defined to be a necessary step towards the conclusion reached in deciding the case.

出典：*R (Youngsam) v Parole Board* [2017] EWHC 729, [2018] 1 All ER 800

※ページ下部に出典を追記しております。

問１ [A]に入る最も適切な先例は、本文で触れられているもののうち、どれか。

問２ 問１の答えを導いた理由を、本文の内容だけを用いて、説明しなさい。

外 国 語

B-1

英 語

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II 次の（イ）～（ニ）の中から２問を選択して答えなさい。

必ず選択した番号を明記すること。

（イ）

It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate. It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters. Thus, "unless there is the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions." The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law. When a statute gives no clear indication of an extraterritorial application, it has none.

（ロ）

Cybercrime is any crime that utilizes networked computer systems wholly, or in part, to undertake illegal activities. Such activities are diverse, ranging from theft of money, data or intellectual property to the distribution of illegal images, bullying, piracy and vandalizing websites, such as in hacktivism. The key to the uniqueness of cybercrime is that networked computers – such as those on the World Wide Web (the 'Web') – allow crimes to take place that are more automated, anonymous and unhindered by time and global barriers. Such activity can also be committed on a huge scale and for very little cost. Criminologists can ask questions about cybercrime in the same way that we approach any other form of criminal activity. Is it new, unique and a real social problem or **a moral or media-led panic**? We can ask questions about the cause of the various activities that might be encompassed within a definition of cybercrime, and we might even ask if the notion of cybercrime is a useful concept in the first place. Yet, many of these basic questions are only just being posed. The starting point, however, is what exactly is cybercrime?

If we are to define cybercrime as any computer-mediated criminal activity, then someone using a smartphone to google the address of the bank they wish to rob might be classified as a cybercriminal.

外 国 語

B－2

英 語

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(ハ)

Our understanding of the morality of war has for many centuries been shaped by a tradition of thought known as the theory of the just war. In its earliest manifestations in ancient and medieval thought, this theory emerged from a synthesis of Christian doctrine and a natural law conception of morality. Its tendency was to understand the morality of war as an adaptation to problems of group conflict of the moral principles governing relations among individuals and to see just warfare as a form of punishment for wrongdoing. Its concern was with a rather pure conception of right and wrong that made few concessions to pragmatic considerations and was unwilling to compromise matters of principle for the sake of considerations of consequences. During this classical phase in the history of the theory, the principles of the just war were quite different from the laws of war in their current form.

(ニ)

Rights-based theories explain private law in terms of rights that individuals hold against other individuals. It is of course common to describe private law using the language of individual rights: lawyers say that contracting parties have rights to the performance of contractual promises, that landowners have rights to quiet enjoyment of their land, and so on. The distinctive feature of rights-based theories, however, is that they regard these legal rights as founded on a deeper, roughly Kantian (or "individualist") conception of rights. In this view, legal rights are grounded in a conception of individual agency or freedom. For rights-based theorists, the law is concerned with duties that, at their foundation, are owed to other individuals qua individuals rather than duties that are imposed to further a collective or social goal. Thus, while rights-based theorists might accept that contract law benefits society, their basic justification for contract law is that contracting parties have obligations, owed to their co-contractors, to perform their contracts. Such theorists give similar explanations for other primary legal duties, such as duties not to trespass, not to cause nuisances, and not to carelessly injure another's person or property.