

【英汉对照全译本】

LECTURES ON JURISPRUDENCE

# 法学讲演录

[英] 约翰·奥斯丁 著

(四)

中国社会科学出版社

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# LECTURES ON JURISPRUDENCE.

## ANALYSIS OF PERVADING NOTIONS

### LECTURE XII<sup>①</sup>

#### ANALYSIS OF THE TERM RIGHT.

I HAVE endeavoured in the preceding Lectures to accomplish LECT · XII the following objects: 1st, To determine the essentials of a *Law* (in the largest signification which can be given to the term *properly*): 2ndly, To distinguish the laws proper which are set by God to Man, and the laws proper and improper which are sanctioned or oblige *morally*, from the laws proper which are sanctioned or oblige *legally*, or are established directly or indirectly by *sovereign* authority.

Having attempted to determine generally the nature of Law, and to mark the boundaries of the field which is occupied by the science of Jurisprudence, I shall now endeavour to unfold (as briefly as I can) the essential properties of Rights: meaning *by* Rights, *legal* rights, or rights which are creatures of Law, strictly or simply so called.

There are, indeed, Rights which arise from other sources: namely, from the laws of God or Nature, and from laws which are

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① This lecture was marked xii. in the former edition, being the twelfth lecture in *one* of the courses as delivered by the author. I have thought it advisable for the purposes of reference to adhere to the same numbering. There is, however, no *hiatus* between this and the last lecture, which in fact contained the matter of several of the lectures orally delivered. —R. C.

## 对几个常见概念的分析

### 第十二讲<sup>①</sup>

#### 对权利这个词语的分析

在前几次演讲中,我一直在努力完成以下几个目标:第一,确定法(在可以正当给予这个词语的最广泛意义上)的本质;第二,将准确意义上的上帝为人制定的法、准确意义上的和非准确意义上的具有道德制裁或强制的法与准确意义上的具有法律制裁或强制的或由主权当局的直接或间接制定的法相区分。

由于我一直尝试着一般地确定法律的本质,以及划定法学这门科学所占领域的边界,所以现在我将尽力(尽可能简明扼要地)阐明各种权利的种种本质特性:即阐明权利,法律权利,或者严格意义上的或朴素意义上如此称谓的法律所创设的权利所承载的意义。

实际上,还有一些权利是来自其他一些渊源的:如神法、自然

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① 在原先的版本中,这个演讲被标注为第十二,因为它是作者在他所担任的一次课程中所作的第十二次演讲。我一直认为,为方便查找,在此坚持原先的编排序号是明智的。然而,在这次演讲和上次演讲之间并没有什么脱字漏句的地方,而上一次演讲实际上也包含了他的几次口头演讲所谈的主题。——R. C.



sanctioned morally. But the *peculiarities* of these may be easily *collected*, by considering the peculiarities of the sources from which they flow. Accordingly, I shall not pause to examine them in a direct or formal manner, although I shall *advert to* them occasionally in the course of the *ensuing* Lectures. At present I dismiss them with the following remarks. 1st, Like the Obligations to which they correspond, natural and moral Rights (or rights which are merely sanctioned religiously or morally) are *imperfect*. In other words, they are not armed with the legal sanction, or cannot be enforced judicially. 2ndly, The Rights (if such they can be called) which are conferred by positive morality, *partake* of the nature of the source from which they *emanate*. —So far as positive morality consists of laws *improper*, the rights which are said to arise from it are rights *by way of analogy*.

For example, rights which are derived from the Law of Nations are related to rights which are derived from positive Law, by a remote or faint resemblance. They are neither armed with the legal sanction, nor are they creatures of Law established by *determinate* superiors.

Ideas, the analysis of which is inevitably involved in that of right. Strictly speaking, there are no rights but those which are the creatures of law; and I *speak of* any other kind of rights only in order that I *may conform* to the received language, which certainly does allow us to speak of moral rights not sanctioned by law; thus, for example, we speak of rights created by treaty.

In attempting to explain the nature of a legal Right, I shall inevitably advert to the import of the following terms:

1st, Law, Duty, and Sanction. For, though every law does not create a right, every right is the creature of Law. And, though every obligation and sanction does not imply a right, every right implies an obligation and a sanction.

法以及具有道德制裁的法。但是,通过考虑这些权利所渊源的来源的种种独特性,我们可以轻松地概括出它们的特性。在此,我将不特意停下来以一种直接的或正式的方式检视它们,尽管在接下来的演讲中,我将会对它们偶有提及。此刻,我用以下这些评述来打发掉它们。第一,自然权利和道德权利(或者只具有宗教或道德制裁力的权利),正如它们所对应的那些义务,是不完整的。换句话说,就是它们是缺乏法律制裁的武装的,或者是不能通过司法予以实施的。第二,实在道德所授予的权利(如果它们能够被如此称谓的话)带有它们所渊源的那些来源的性质。——只要实在道德构成非准确意义上的法,那些据说是产生于它的权利就是一些类推意义上的权利。

自然权利,或者只具有宗教或道德制裁力的权利

譬如,那些渊源于国家法的权利与那些渊源于实在法的权利是联系在一起的,彼此之间具有一种模糊的或微弱的相似性。它们既没有配备法律制裁这样的武装,也并非某些确定的优位者所建立的法律的创制物。

严格来讲,只有法律所创设的那些权利才是权利;我也确曾提及另一种权利,但是我这样说只是为了能够不与大家都已接受的那种语言撕破脸皮,因为,毫无疑问,它是允许我们说没有法律制裁的道德权利的;因此,譬如,我们会说协约所创设的权利。

有着种种概念,对它们的分析不可避免地要涉及权利

在试图说明法律权利之本质过程中,我将不得不说一说下列这些词语的含义:

第一,法、义务和制裁。因为,尽管并不是所有的法都创设权利,但是所有的权利却都是法的创造物。而且,尽管并不是每一个义务和强制都蕴含着一个权利,但是每一个权利却都蕴含着一个义务、一个制裁。



2ndly, Person, Thing, Act and Forbearance. For rights are exercised by persons; or if not *exercised* by persons, *reside* in persons. And persons, things, acts and forbearances, are the *subjects* or *objects* of rights and obligations, or (changing the shape of the expression) are the *matter* about which they are *conversant*.

3rdly, Injury;—Wrong;—or Breach of Obligation or Duty by *commission* or *omission*. For as rights suppose or imply obligations and sanctions, so do obligations or sanctions suppose injuries or wrongs. In other words, their ends or purposes are the *prevention* of injuries or wrongs, and the *redress* of the damage or mischief which is commonly the consequence or effect.

4thly, Intention and Negligence (including under the latter of these terms what may be called rashness or temerity). For every wrong (whether it be positive or negative, or consist of a *commission* or *omission*) supposes intention or negligence on the part of the wrongdoer.

5thly, Will and Motive. For the import of the expressions '*will*' and '*motive*' is implied in the import of the expressions '*intention*' and '*negligence*.' And, further obligation and sanction *operate upon* the *will of the obliged*, and are thereby distinguished from the *compulsion* or *restraint*, which (*for want of a better name*) *may be styled merely physical*. Nothing is more frequent in jurisprudence than the confusion of motive with intention; and of this confusion the law of England affords a *flagrant instance*, when it lays down that murder must be committed of *malice a forethought*. By this is merely meant that it must be committed intentionally. Malice is properly the name of a motive; namely, that of malevolence or ill-will; but it is not by any means necessary in the law of England that the act should have been committed from ill-will; on the contrary, the great majority of murders are committed from motives altogether different—such as that of obtaining the property of the murdered person — : it is only necessary



第二，人、物、作为和不作为。因为权利是由人实施的；即使不是由人实施的，也是属于人的。而人、物、作为和不作为则要么是权利和义务的主体或客体，（换句话说）要么是它们所密切相关的事情。

第三，不法侵害、不法行为或因不当履行或疏于履行而导致的对义务或责任的违反。因为正如权利假定了或者说蕴含了义务和制裁一样，义务或制裁也假定了不法侵害或不法行为的存在。换句话说，它们的目的或目标在于防止不法侵害或不法行为，并救济那些通常作为它们的结果或后果的伤害或损失。

第四，故意和过失（这些词语中的后者包括那些可能被人们叫做轻率或鲁莽的东西）。因为每一个不法行为（无论是积极的还是消极的，也无论是由于不当履行的还是由于疏于履行的），都要以不法行为人的故意或过失为条件。

第五，意志和动机。因为“故意”和“过失”这两个词语的含义已经蕴含了“意志”和“动机”这两个词语的含义。而且，进一步的义务和制裁是作用于受约束者的意志的，它们也因此而有别于那种强制或约束，（由于还没有为它们找到一个更好的名字）人们只能称之为物理性的强制或约束。在法学当中，再没有什么比动机和故意更经常地为人们所混淆了；当英格兰法律规定谋杀必须要有预谋时，它为我们提供了一个臭名昭著的实例。这样规定所意指的仅仅是它必须是出于故意的。恶意正是一种动机的名称：也即，对邪恶意念或敌意的称谓；但是，无论如何，英格兰法律所规定的谋杀行为并不必定都是基于恶意而为的，恰恰相反，大多数谋杀行为都是出于与此完全不同的动机而做出的——譬如，谋取被谋杀者的财产——：必定的只

that the murder should be intentional. *There is one case of peculiar absurdity, that of murders said to be committed out of malice or ill-will to all mankind.* For example, if a *workman* throws rubbish from the top of a building without giving warning to the passers-by, and if he consequently kills one of them, it would be too obvious an absurdity to pretend that he acted from ill-will towards the particular person, whom in all probability he has never before seen or heard of, but he is said to have acted from malice or ill-will towards all mankind; the real ground for his punishment being that he has acted with *gross and mischievous* negligence; that he has shown a want of regard for the lives and safety of others, which ought to subject him to legal punishment. He has committed the offence not from a peculiar motive but from *the want of a certain motive*, and his state of mind requires to be distinguished from intention, as intention and negligence both require to be distinguished from motives.

Finally, Political or Civil *Liberty* :—a term which, not unfrequently, is synonymous with *right*; but which often *denotes* simply *exemption from obligation*, conferred in a peculiar manner: namely by the indirect or *circuitous* process which is styled '*permission*.' For it will be shown in the *sequel* that when the law only permits, it as clearly confers a right as when it commands.

Having attempted to explain the import of the term '*Right*,' and having touched upon the import of the terms which I have now enumerated, I shall advert to the ambiguities by which some of these expressions are obscured. I shall point particularly at the varying significations of '*Law*,' '*Right*,' and '*Obligation*.' In attempting to unfold the notions which are signified by the term '*Right*,' and to indicate the import of the terms with which it is inseparably connected,



是它们都是故意的行为。有一类极为荒唐的案例,说的是一些谋杀案,它们的动机是对全人类的恶意或敌视。譬如,有一个工人,他事先没有对楼下过往行人做任何警告就从楼上往下扔东西,结果砸死了一个行人,此时,如果我们硬说他之所以这样做,是因为他对该受害人怀有敌意,那将是十分荒谬的,因为他们根本素不相识,在这以前,他们甚至彼此都没有听说过对方,但是,我们却可以说,他这样的行动的动机是对全人类的敌视。对他进行惩罚的真正依据是,他的行为有着十分严重的而有害的过失;他已经显露出了其对他人的生命和安全的漠视,而他应当因此受到法律的惩罚。他犯下这样的罪行,不是由于他有一个特定的动机,而是由于他缺乏一个特定的动机,而且,我们必须将他的精神状态与故意区别开,正如我们必须将故意和过失与动机区别开一样。

最后,政治的或者公民的自由——这个词语常常与权利同义;但是,它常常指的仅是义务的免除,它被以一种特殊的方式赋予人们,也就是以一种被称做“许可”的间接的或迂回的方式。因为,正如我下面将表明的那样,当法律只是许可时,它便是授予了一项权利,正如它在命令时便是授予一项权利一样的清晰。

在试图阐明“权利”这个词语的含义和简单论及了我在此列举的这些词语的含义之后,我将谈一谈一些模糊了这些词语的含混之处。我将特别说明一下“法”、“权利”和“义务”这些词语的种种变动不居的含义。在试图阐明“权利”这个词语所表示的那些概念,以及揭示那些与它不可分割地联系在一起的词语的含义的过程中,我将会发现,我可能必须一而再地重复。因为,这些词语中的每一个都与其余的有着



I shall scarcely find it possible to avoid repetition. For each of these expressions is so implicated with the rest, that the explication of any of them involves allusions to the others. For the same reason, the parts of the analysis will probably be obscure: though I hope that the whole may express the intended meaning, or, at least, may suggest it to the hearer.

Obligations or Duties are positive or negative. Having briefly pointed at the purpose of the following analysis, and apologised for its repetitions and obscurities, I now proceed to the subject of it.

Every Law (properly so called) is an express or tacit, a direct or circuitous *Command*.

By every command, an *Obligation* is imposed upon the party to whom it is addressed or intimated. Or (changing the expression) it *obliges* the party by virtue of the corresponding sanction.

Every Obligation or Duty (terms, which, for the present, I consider as synonymous) is *positive* or *negative*. In other words, the party upon whom it is incumbent is commanded to do or perform, or is commanded to forbear or abstain.

In order to the fulfilment of a positive obligation, the act or acts which are enjoined by the Command must be done or performed by, or on the part of, the obliged. In order to the fulfilment of a negative obligation, he must forbear from the act or acts which the Command prohibits or forbids. In the one case, the active intervention of the obliged is necessary. In the other case, the active intervention of the obliged is not only needless but is inconsistent with the purpose of the obligation.

An obligation to deliver goods agreeably to a contract, to pay damages in satisfaction of a wrong, or to yield the possession of land in pursuance of a judicial order, is a positive obligation. An obligation to abstain from killing, from taking the goods of another without his consent, or from entering his land without his licence, is a negative obligation.

I observe that *forbearances* have been styled by Mr. Bentham<sup>①</sup>

① *Traité de Législation*, I. p. 154.

千丝万缕的联系、有着剪不断理还乱的关联,它们彼此是那样的难以割裂,以至于对其中任一个的说明都必然要提到其他的。由于同样的原因,各部分的分析可能会有些晦涩:尽管我希望整个的分析能够表达出预想的含义,或者,至少能够给各位听众一点启发。

我已经简明扼要地摆明了下面所做分析的目的,也为可能会有重复以及晦涩向大家道了歉,现在就书归正传吧。

每一个法(准确意义上如此称谓的)都是一个明示的或默示的,直接的或间接的命令。

通过每一个命令,它明示地或暗示地关涉的那个人就被强加了一项义务,或者(换句话说)它依靠相应的制裁约束了那个人。

每一项义务或责任(在此,我认为这些词语是同义词)或者是积极的,或者是消极的。换句话说,负有义务的人被命令去做或完成某个或某些行为,或者被命令不去做或戒绝某个或某些行为。

为了一个积极义务的完成,要求义务人或义务方必须做出或者完成该命令所责成的某个或某些行为。为了一个消极义务的践履,则要求他必须避免去做该命令所禁止的某个或某些行为。在一种情形中,义务人的积极介入是必需的。而在另一种情况下,义务人的积极介入不仅是不需要的,而且是与该义务的目的相违背的。

按合同约定的方式交付货物的义务,赔偿不法行为所造成的损害,或者放弃所拥有的地产以执行法院的命令,这是积极义务。而不杀人,没有得到他人同意不拿走他人的财物,或者没有他人的许可不进入他人的土地,这样的义务就是消极义务。

我注意到边沁先生<sup>①</sup>一直将不作为称做消极服务。因此,如

义务或  
责任是  
积极的,  
或者是  
消极的

<sup>①</sup> 《立法原理》卷一,第154页。



Forbearances cannot be styled with propriety negative services.

*negative services*. And, if we like, we may call them by that, or by any other name. But whether established language authorise the expressions seems to be doubtful. If you abstain from knocking me on the head, or from taking my purse, or from blackening my reputation, it can scarcely be said with propriety that 'you render me a service.'

In ordinary language 'you forbear from doing me a mischief.' It would seem that Mr. Bentham has transferred to the *object* of an obligation, an expression which applies correctly to the obligation itself. A forbearance, in pursuance of an obligation, is hardly a 'negative service,' though the obligation of which it is the object is properly a 'negative obligation.'

Obligations may also be distinguished into *relative* and *absolute*.

Obligations are relative or absolute.

A relative obligation is incumbent upon one party, and correlates with a right residing in another party. Changing the expression, A relative obligation corresponds or answers to a right, or implies, and is implied by, a Right. Where an obligation is absolute, there is no right with which it correlates. There is no right to which it corresponds or answers. It neither implies, nor is implied by a right. Here, as elsewhere, the term 'absolute' is a negative or privative expression. Here, as elsewhere, it denotes the *absence* of an object to which the speaker or writer expressly or tacitly refers.

But, in order to the complete explanation of a negative or privative expression, we must first explain the object of which it denotes the absence. Consequently, I shall begin with rights, and with the obligations which are implied by rights; and I shall then proceed to the obligations which have *no* corresponding rights, or which (in a word) are *absolute*.



果我们喜欢,我们完全可以那样来称谓它们,也可以用另外一些名字来称谓它们。但是,我们现在的已经确立起来的语言是否准许这样的表述似乎尚有疑问。你保持了不作为,没有敲我的脑壳儿,没有拿走我的钱包,也没有毁坏我的名誉,但却很难就此说“你为我提供了一项服务”,这样说很不适宜。在日常语言中,我们说的是“你保持了不作为,没有伤害我”。看起来似乎是,边沁先生把一个可以正确地用于义务本身的称谓用到了义务的客体上了。在践履一个义务时,不作为基本上算不上一项“消极服务”,尽管一个客体为消极服务的义务完全可以被正确地称为是一个“消极义务”。

不作为  
不能被  
正确称  
为消极  
的服务

义务还可以被区分为相对的和绝对的。

相对义务是这样一种义务:一方行为人负有义务,而与之相连的另一方行为人则拥有权利。换句话说,一个相对义务对应着或响应着一个权利,或者说,一个相对义务蕴含了一个权利或者蕴含在一个权利之中。而义务如果是绝对的,那么它就并不与什么权利相互关联在一起。它没有与之相对应或响应的权利。它既不蕴含什么权利,也不为某个权利所蕴含。无论是在此处还是在其他任何地方,“绝对的”这个词都是一个消极性或者否定性的词语。无论是在此处还是在其他任何地方,它都意味着缺乏一个言说者或书写者明确地或者含蓄地所指向的对象。

义务或  
者是相  
对的,或  
者是绝  
对的

但是,要完全说清楚一个消极性的或者否定性的词语,我们必须首先解释一下它所表明的那个缺乏了的对象。因此,作为开始,我将谈谈权利以及它们所暗含的那些义务;而接下来,我将继续探讨一下那种没有相对应的权利的义务,或者(简而言之)也就是绝对义务。

Since rights reside in *persons*, and since *persons*, *things*, *acts*, and *forbearances* are the subjects or objects of rights, I must advert to the respective significations of these various related expressions, before I address myself to rights and to the obligations with which they correlate.

Persons are divisible into two classes :—physical or natural persons, and legal or fictitious persons.

Rights  
imply  
*persons*,  
*things*,  
*acts*,  
and  
*forbearances*.

In this instance, '*physical*' or '*natural*' bears the signification which is usually attached to it in the language of Jurisprudence, and (I believe) in the language of other sciences. Its import is negative.

It denotes a person not fictitious or legal, and is used to distinguish persons, properly so called, from persons which are such by a fig-

Persons  
natural  
or fic-  
titious.

ment, and for the sake of brevity in discourse. Consequently, when we speak of '*persons*' simply, and without *opposing* them to legal or fictitious persons, we mean persons properly so called, or persons physical or natural.

By a physical or natural *person*, or, by a *person* simply, I mean

Meaning  
of '*ph-*  
*ysical*

*per-*  
son,'  
or '*pe-*  
*rson*' s-  
imply.

*homo*, or a *man*, in the largest signification of the term: that is to say, as including *every* being which can be deemed *human*. This is the meaning which is given to the term *person*, in familiar discourse.



既然权利是人的权利,而人、物、作为和不作为又是权利的主体或客体,所以,在我自己着手论述权利及与其相联系的义务之前,我必须先谈谈这些彼此错综复杂地联系在一起的词语的各自含义。

人可以分为两类:生物学意义上的人或自然人与法人或拟制的人。

权利蕴含着人、物、作为和不作为

在这种情况下,“生物学意义上的”或“自然的”这两个词带有法学语言和(我相信还有)其他科学语言中通常赋予它们的那个含义。它的含义是消极的。它意味着一个人不是拟制的人,也不是法人,而这常常被用来区分那些准确意义上的人与那些为了言说便捷而拟制的人。因此,当我们说的只是“人”,而没有要将之与法律上的或拟制的人相对而言的意思时,我们指的是准确意义上的人,或者说是生物学意义上的人或自然人。

自然人或拟制人

“生物学意义上的人”的朴素含义

但我说一个生物学意义上的人、自然人或者仅仅是一个人时,我想指的是这个词最广义上所指称的人,也就是一个“霍谟”<sup>[1]</sup>(或

[1] *homo* 一词是罗马法中“一个人”的概念。它指的是生物学意义上的人,不一定是权利义务的主体。例如,奴隶也是 *homo*,但是他原则上不能作为权利义务的主体,而只能作为自由人权利义务的客体。罗马法中还有两个人的概念,即 *caput* 和 *persona*。*caput* 原意指的是头颅或书籍的一章。因为在古罗马时期,户籍登记时,每一家长在登记册上都占有一章,家属则名列其下。当时只有家长有权利能力,所以 *caput* 就被转借指称权利义务的主体,也就是法人格。*persona* 则表示某种身份,它是从演员演角色的面具引申而来的。假面具可用于表示剧中的不同角色,*persona* 也就被用来指权利义务主体的各种身份了,譬如,一个人可以是家长、官吏、监护人等不同的角色。在翻译时,中国学者一般将之音译,*homo*、*caput* 和 *persona* 分别译为“霍谟”、“卡布特”和“泊尔索那”三词。在本文中,由于原作者是大量地将这些词与英语中的相应词语相对应地使用的,其用意不外乎是引古证今,所以本译者就相应地采用音译方法将它们译出,以显示出原作者的用意和行文方式。为方便行文,下文中对于这些拉丁语词的中文含义不再一一做出说明。