



*EXPRESS
YOUR LEGAL VIEW
IN ENGLISH*

用**英语表达**
你的法律观点

——第四届全国法律英语大赛论文集



法律出版社
LAW PRESS · CHINA

本书出版得到北京第二外国语学院出版资助，特此致谢。

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图书在版编目(CIP)数据

用英语表达你的法律观点:第四届全国法律英语大赛论文集 / 杨富斌,鲁勤主编. —北京:法律出版社, 2012. 11

ISBN 978 - 7 - 5118 - 4124 - 7

I. ①用… II. ①杨…②鲁… III. ①法律—文集—英文 IV. ①D9 - 53

中国版本图书馆 CIP 数据核字(2012)第 244486 号

用英语表达你的法律观点

——第四届全国法律英语大赛论文集

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装帧设计 李 瞻

© 法律出版社·中国

开本 A5

版本 2012 年 12 月第 1 版

出版 法律出版社

总发行 中国法律图书有限公司

印刷 世纪千禧印刷(北京)有限公司

印张 16.25 字数 584 千

印次 2012 年 12 月第 1 次印刷

编辑统筹 学术·对外出版分社

经销 新华书店

责任印制 陶 松

法律出版社/北京市丰台区莲花池西里 7 号(100073)

电子邮件/info@lawpress.com.cn

网址/www.lawpress.com.cn

销售热线/010-63939792/9779

咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里 7 号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782

重庆公司/023-65382816/2908

北京分公司/010-62534456

西安分公司/029-85388843

上海公司/021-62071010/1636

深圳公司/0755-83072995

书号:ISBN 978 - 7 - 5118 - 4124 - 7

定价:38.00 元

(如有缺页或倒装,中国法律图书有限公司负责退换)

编者前言

本书是第四届全国高校法律英语大赛论文比赛优秀论文集。全书共收论文 82 篇,主要涉及法理学、宪法学、行政法学、刑事法学、刑事诉讼法学、民商法学、知识产权法学、国际法学和外国法学等。因此,根据论文的主题,本论文集分为五个部分:

第一部分是法理学及相关论文(Jurisprudence and concerned topic),共收录 16 篇论文;

第二部分是宪法和行政法学及相关论文(Administration Law and concerned topic),共收录 7 篇论文;

第三部分是刑法和刑事诉讼法学有关论文(Criminal Law and criminal procedure Law),共收录 14 篇论文;

第四部分是民商法、公司法和知识产权法(Civil law, commercial law and intellectual property law)等有关论文,共收录论文 38 篇;

第五部分是国际法和外国法(International law and foreign law)有关论文,共收录论文 7 篇。

本届论文大赛提交的论文,首先,选题非常广泛,几乎涉及各个主要的法律部门及其相关话题。从上述统计数字可见,绝大多数参赛学生对民商法、公司法和知识产权法等内容比较感兴趣。其次,大多数参赛学生对社会现实问题和热点问题比较感兴趣,这表明当代中国的大学生和研究生们,并非只是关注书本上的法律知识;相反,他们对诸多社会现实问题及其涉及的有关法律问题有兴趣、有思考,愿意对它们发表自己的独立见解。再次,从论文的规范性、逻辑性和运用的材料看,总体上明显地比以往参赛的论文水平和质量高,而且大多数论文注明了指导教师,并在后记中对老师们的指导表示感谢。在这里,我们作为本论文集的主编,对这些指导教师为学生们撰写英

文学学术论文悉心指导,付出许多辛苦,表示衷心的感谢。只是由于篇幅原因,本书未能一一收入他们的名字。最后,由于本届提交的论文和有意出版的论文数量比较多,而且有的论文超出我们在比赛通知中规定的字数,为了尽量使更多的论文能得以出版,我们在每篇较长的论文的字数和格式上有所删减:一是去掉了所有的“内容摘要”和“关键词”;二是去掉了所有的注释——因为这些注释占了太多的版面,这一点请作者谅解,也请被引用的作品或材料的作者谅解;三是对有些太长的论文作了部分删节,有的直接标明“删节”,有的从内容上作了压缩。

不用讳言,收入本论文集集中的 82 篇论文,学术价值和英文写作的水平均参差不齐,有的论文学术和英文写作水平都很高,观点上也很有新意,而且行文规范,符合英文的学术逻辑和规范;有的论文则水平一般,且有明显的“中国式英语”的表述痕迹。至于究竟哪些论文水平高,有较大的学术价值或者或以作进一步研究时的参考材料,读者自然会根据自己的水平和鉴赏能力来分辨和取舍。

难能可贵的是,这些以学习法律为专业的大学生和研究生们,敢于尝试用不是自己母语的英语来表达自己的法律观点,能使我们当代中国青年学子的法律思想和观点为那些读不懂汉语的英语读者所了解,从而多多少少能为中国法律文化“走出去”做一点贡献,这也是我们两位主编牺牲休息时间,不辞辛苦,为他们的稿子进行加工处理和编辑,以达到出版要求的一点儿内在动力吧。

杨富斌

2012 年 7 月 31 日于望京花园东区

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Part I

Jurisprudence and Concerned Topic

Judicial Independence and Public Opinion

By Liu Yaqing

Southwest University of Political Science and Law

Introduction

Thanks to the massive media coverage, we have recently been well informed of such cases as Qiu Xinghua case, Xu Ting case, Deng Yujiao case, and many others. There can be no doubt that heated debates about these cases now have crept into the conversations of ordinary people. Some have expressed their points of view in the newspapers or on the television broadcasts; while others may express their ideas through forums, or even through the newly developed micro-blogs. This makes what used to be the consideration of mere lawyers now a nation-wide concern. Faced with the overwhelming flood of the public opinion, what shall our judges do? Shall they make their decisions as these opinions never exist? Or shall the judges make a sense out of these ideas and adjudicate the cases to everyone's satisfaction? The answer is not a simple "yes" or "no".

For a democratic and free society, judicial independence and supervision by public opinion are indispensable. Although ideologically they should stand side by side, the truth is that they constantly run into conflicts. These disputes do not merely stem from different understandings of facts and laws, but also arise from the contrastive views on life and values. To fully comprehend this question, we need first of all to look into the very definitions of two concepts.

1. Judicial Independence

With the advent of the increased "judicialization" of society, judicial independence as the universal principle of nearly every nation's judicial system plays a significant role in protecting justice and freedom, and furthermore it is the cornerstone of the realization of fairness and righteousness. But what is judicial independence, how do we define and classify such a term?

Judicial independence has two dimensions: "the independence of the

individual judges and the independence of the judiciary as a body. " Generally, it is a truth universally known that in a democratic society the separation of powers detaches judicial system from the political nature of the other two branches. The idea of separation of powers entails the considerations of having each of them act as a "check and balance" on others, of preventing the misuse of authority and of bringing government into account for the abuse of power. The role of the judiciary branch is to fairly and appropriately resolve disputes and conflicts between persons, companies, or even government entities. Besides, it is also the duty of the judiciary to protect the freedom and rights of the individuals, to safeguard the interests of the public, to prevent crimes and to punish those who not willing to abide by the law. All these aims can only be attained when the judiciary is neutral, just and objective. While in the circumstances of China, judicial independence not only includes the independence of the judiciary, but also the independence of the procuratorate. Law shall be enforced as well as applied independently. The terminal goal of law is the realization of rule of law in society. Rule of law, as different from rule of people, is ruling based on laws rather than on the wills of an individual. The laws are not only regarded as a tool for domination but as a concept of value. As the prerequisite of rule of law, judicial independence has always been the core of legal scholar's interests. Only with the realization of judicial independence can the rule of law be achieved.

Secondly, from the perspective of individual impartiality, judicial independence indicates that judges depending on the merits and the rules of law are free to decide cases in a fair and impartial manner. It means that judges shall be released from the pressure of politics, legislation, media, public, finance, special interests, or even personal relations. "The details of independence are fairness, impartiality, and good faith. Thus, an independent judge gives every party a full and fair opportunity to be heard without regard to the party's identity or position in society. An independent judge presides impartially, free from extraneous influences and immune to outside pressure. An independent judge rules in good faith, determined to follow the law as he/she understands it, unmindful of possible personal, political, or financial repercussions." A decision shall be made independently by the presiding judge not influenced by powers from the institution or the outside. To illustrate, American federal judges are appointed for a life time unless impeached. Once they sit on the bench, American federal judges can make judgments unlike the president or other leaders of governmental branches without sweating about whether they will be elected next

year, or whether they will lose their supporters if they rule particular case against what the supporter wants. By contrast, in the absence of life tenure, the state judges facing with additional burden of running for retention or reelection are more inclined to be controlled by considerations other than the merits of a specific case.

2. Public Opinion

Public opinion has always been a broad and elusive subject. It can be defined as “the aggregate of individual attitudes and beliefs held by the adult population.” It can also be said as the complex collection of opinions of many different people and the sum of all their view. It is composed of two factors: “personal and environmental”. “The former pertains to both tangible and intangible attitudes of an individual”. It mainly refers to the values, stereotypes, motives of a person. The latter tends to be connected with the one’s growing environment, family, church, education, and even media that are more crucial in shaping one’s ideas.

The thought of regarding public opinion as the combination of all the thoughts and values of every single individual is not wrong. It is in a way the true definition of public opinion. While this concept is a lot different from what we are usually talking about, it still to some degree rests with us the subjectivity of our perceptions and comprehensions. Of all the comments and remarks we heard, it is an enormously difficult task to decide whose opinions are more rational and relatively objective, so many of us just pick up the so-called majority’s preference as the public opinion like what others did instead of posting questionnaires everywhere and undertaking quantitative researches. The “public opinion” we referred to in fact is the opinion that we heard the most through our ways of communicating with the outside world.

Mass media as an effective fashion of information communication are in delicate interactions with popular opinion. As Potter Stewart’s speech in Yale of 1994 went: “to create a fourth institution outside the government as an additional check on the three official branches”, the institutional autonomy of the press is always thought to be legitimized by the Constitution.

3. The Reasons Why Public Opinion Affects Judicial Independence

It is well-known that the famous Xu Ting case has caused a stir not only in

law-connected professions but also in the lives of ordinary persons. People with different ideologies argue fiercely about whether Xu Ting has to be convicted and what kind of charges shall be held against him. As it is said by Huang Yunlong, vice governor of Guangdong Province, Xu Ting case is a reflection of the great change in social ideology and represents the orientation of social values. He believes that the judgment can be a leading factor in the shaping of social values. Wu Shujian, the leading judge of Guangdong Intermediate People's Court, holds that law is a rational and professional discipline, and legal judgment would not always be in consistent with public emotional sensations, thus judges shall keep their senses while deciding and shall not be influenced by public wrath. Along with other controversial cases, Xu Ting case on one hand has triggered great public wrath and incurred divided opinion conflicts among the legal professionals; on the other hand, it demonstrates that public opinion does have an impact on the judicial decisions. This conclusion can be found in many other countries as well, for example in the U. S. , "rather than overruling *Roe v. Wade*, the Court continues to decide individual cases that significantly narrow the abortion right; rather than outlawing affirmative action, the Court has made it significantly more difficult to sustain; rather than jettisoning *Miranda* altogether, the Court has limited its application, including in the three cases from the most recent term; rather than abandoning the exclusionary rule, the Court has adopted a cost-benefit calculus that limits its application significantly; and rather than holding unconstitutional section 5 of the Voting Rights Act, the Court expressed significant doubts about the statute's validity absent further revision by Congress. Each of those lines of decisions represents an important development in constitutional law but is sufficiently incremental that it tends not to generate significant public controversy".

Although it is written in many regulations that judges shall make their rulings impartially and shall resist the enticement of self-interest, public pressure, and religious beliefs, while in practice it is nearly impossible to follow these rules. But it is indisputable that public opinion does have influence on judges' decision making. The question here is why public opinion affects judicial independence.

One crucial reason lies in human nature. Humans are emotional. Even though we are of higher intelligence and the ability of using tools, we are in nature incapable of being purely rational. The notion of law itself in the rule of law can be interpreted to some degree as the pure rationality of all humans.

However, it is exceedingly difficult for one to just look at the facts and make impartial decisions while paying no attention to what others been saying, no matter it is his or her boss, parent, friend, lover, relative or even teacher for law. People naturally tend to live in a social group, and most of us were brought up in an environment of particular views. Where we come from, how we are raised, what we have experienced can tell a lot about what we believe in; those three matters even count more than our knowledge of law, especially on cases that only principles can apply.

To take vanity as an illustration, as the case in the United States, “it likewise has been suggested that the fallout from *Bush v. Gore* acutely affected Kennedy because the public viewed the result as politically motive: “Of the five justices in the majority, Kennedy had the hardest time with the aftermath of *Bush v. Gore* . . . There would be, it turned out, two Anthony Kennedys on the Supreme Court—the one before December 12, 2000, and the one after—and his transformation was surely one of the most unexpected legacies of the epochal case.”

Another reason exists in the very idea of democracy. Democracy is often thought to be connected with the preference of the majority. What most people deem to be right and proper will be done. The realization of democracy in another sense is a symbol for rooting the idea of “majority wins” in most people. The question here is what if the majority is wrong. People other than law professions do not usually have knowledge of law. They often adopt an approach they believe to be fair and just pursuant to their value preferences towards the matter in dispute. The opinions published on many websites and forums probably and mostly from the hands of people with little legal learning. This is perhaps the reason why sometimes public wrath appears. As in the case of Yao Jiaxin, a voting by the side of the related news on Tencent website displays that 94% people think he should be sentenced to death. While according to many expert opinions, Yao Jiaxin shouldn't have been sentenced to death and death penalty itself should be abolished. Furthermore, to their professional viewpoints, the abolition of death penalty is an advancement of civil rights and will bring harmony to society, however, that is in complete contrast with the public opinion. Among people voted, 92% is for death penalty, and most of them consider the abolition of death penalty a form of falling backwards. The decision of this case not surprisingly is a death penalty executed immediately. I still remember some of the comments I've read during that period, such as “either he dies or justice dies” or “he or fairness can only survive one”. Lots of them are of pure anger