最新不列颠法律袖珍读本（英汉对照）

法理学
Jurisprudence

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法 理 学

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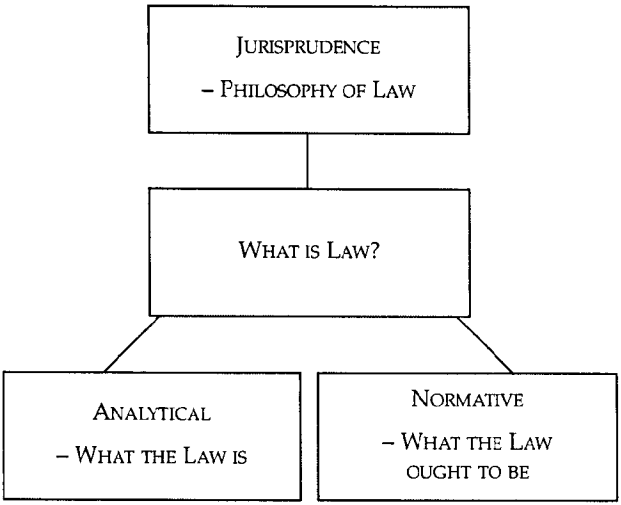
出版说明

最新不列颠法律袖珍读本(英汉对照)系列丛书之原本是英国卡文迪什出版有限公司(Cavendish Publishing Limited)最新推出的,我们采用英汉对照的形式出版,以利于读者研习法律及法律专业英语之用。该读本系列包括了对不列颠法律的广泛介绍,其中每一本都是研习一个专业科目的完整的袖珍指南。其精致的文本、原版的法律专业英语、规范的专业汉译以及简明的格式、友好的界面使得该读本系列成为读者研习各个学科的基本理论和最新研究成果,尤其是学习纯正的法律英语的理想帮手。

1 The nature of jurisprudence

What is jurisprudence?



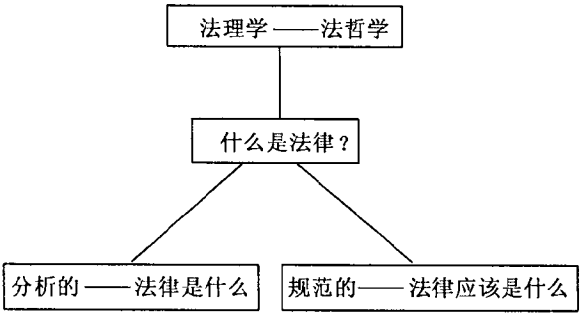
Problems of definition

The word 'jurisprudence' is derived from two Latin words, *juris* – meaning 'of law' and *prudens* – meaning 'skilled'. The term has been used variously at different times, ranging from its use to describe mere knowledge of the law, to its more specific definition as a description of the scientific investigation of fundamental legal phenomena.

A strict definition of jurisprudence is, as is the case with many general terms, difficult to articulate. The main problem with jurisprudence is that its scope of inquiry

1 法理学的本质

什么是法理学?



定义问题

"法理学"这个词来自两个拉丁词汇, *juris*, 意为"法律的", *prudens*, 意为"熟练的"。这个术语在不同的时间被不同地使用, 从被用来描述纯粹的法律知识, 到它更特殊的定义, 即对基本法律现象的科学研究。

像许多一般性术语一样, 法理学的严格定义很难被表述清楚。法理学主要的问题是它的研究范围横跨多个不同主题,

ranges over many different subjects and touches on many other disciplines, such as economics, politics, sociology and psychology, which would normally be regarded as having little to do with law and legal study.

As a subject, jurisprudence may be said to involve the study of a wide range of social phenomena, with the specific aim of understanding the nature, place and role of law within society. The main question which jurisprudence seeks to answer is of a general nature and may be phrased simply as:

What is the nature of law?

This question can be seen as being actually two questions in one, that is:

What is the law?

What constitutes good law?

Answers to these two questions constitute two major divisions in jurisprudential inquiry. These are:

- analytical jurisprudence; and
- normative jurisprudence.

These two divisions were first clearly specified by John Austin in his text *The Province of Jurisprudence Determined* (1832). Other divisions and subdivisions have been identified and argued for as the field of jurisprudence or legal philosophy has expanded.

Some distinctions in jurisprudence

The work of jurists can be divided into various distinctive areas, depending mainly on the specific subject matter with which the study deals. What follows are some of the more important divisions and subdivisions, although it is important to remember that there are others.

触及许多其他学科，比如经济学、政治学、社会学和心理学，这些学科通常被看做与法律和法学研究不太相关。

作为一个学科，法理学可能会被认为与广泛领域内的社会现象研究有关，并特别关注于理解法的本质以及法在社会中的地位和角色。法理学试图回答的主要问题在本质上一般可被简单地描述为：

法的本质是什么？

这个问题也可被看做实际上两个在一起的问题，即：

何谓法律？
良法由什么构成？

对上述两个问题的回答构成了探究法理学的两大分支。它们是：

- 分析法学派；和
- 规范法学派。

这两个分支由约翰·奥斯丁在他的著作《法理学的范围》(1832 年版)中首次清晰地界定。随着法理学或法哲学领域的扩张，其他分支和亚分支也被确定和被主张。

法理学中的一些差别

主要依据研究所涉及的特定的主题，法学家们的工作可以被分为多个不同的领域。尽管要记住尚有其他分支非同小可，但以下是法理学的一些更重要的分支和亚分支。

Analytical jurisprudence
Involves the scientific analysis of legal structures and concepts and the empirical exercise involved in discovering and elucidating the basic elements constituting law in specific legal systems. The question to be answered is: what is the law?

Normative jurisprudence
Refers to the evaluation of legal rules and legal structures on the basis of some standard of perfection and the specification of criteria for what constitutes 'good' law. This involves questions of what the law ought to be.

General jurisprudence
Refers to an abstracted study of the legal rules to be found generally in the more developed legal systems.

Particular jurisprudence
The specific analysis of the structures and other elements of a single legal system.

Historical jurisprudence
A study of the historical development and growth of legal systems and the changes involved in that growth.

Critical jurisprudence
Studies intended to provide an estimation of the real value of existing legal systems with a view to providing proposals for necessary changes to such systems.

Sociological jurisprudence
Seeks to clarify the link between law and other social phenomena and to determine the extent to which its

分析法理学

致力于对法律结构和概念的科学分析，这种经验主义行为用来揭示和阐释特定法律体系中的法律的基本构成要素。其所要回答的问题是：法律是什么？

规范法理学

涉及对法律规则和法律结构的评价，这种评价基于构成"良"法的某种完美的规格和标准的具体要求。这涉及到法律应该是什么的问题。

一般法理学

涉及对在比较发达的法律制度中所普遍发现的法律规则进行的抽象研究。

特殊法理学

对单一法律制度的结构和其他要素进行具体分析。

历史法理学

对法律制度的历史发展和成长进行研究，并研究成长中的嬗变。

批判法理学

本研究意在为现存法律制度提供一个真实价值的评判，其目的在于为该制度提出必要改进的建议。

社会学法学

力求去澄清法律和其他社会现象之间的联系，并确定社

creation and operation are influenced and affected by social interests.

Economic jurisprudence
Investigates the effects on the creation and application of the law of various economic phenomena, for example, private ownership of property.

The terminology of jurisprudence

Many of the terms used in the study of jurisprudence are relatively unfamiliar and belong more to the realm of philosophy than to that of law. The following are some of the more commonly used terms and brief explanations of what they may mean in specific contexts. It is important always to remember that specific meanings are sometimes ascribed to certain terms by particular jurists, and that these meanings may be different from the ordinary usages.

- *Cognitivism* – the view that it is possible to know the absolute truth about things, for example, what constitutes truth about justice.
- *Contractarian* – that is, of assertions or assumptions that human society is based upon a social contract, whether that contract is seen as a genuine historical fact, or whether it is hypothesised as a logical presumption for the establishment and maintenance of the ties of social civility.
- *Dialectical* – that is, of dialectics (from the Latin *dialego* meaning to debate, or discourse). Dialectics refers to the philosophical approach which regards all reality as being characterised by contradictions between opposites. The struggle between these opposites results in new and higher forms, which are in turn 'challenged' by other

会利益对法律制定和运行影响的程度。

经济学法学

研究各种经济现象对法律的制定和运行所产生的影响，例如，财产的私人所有权。

法理学的术语

相对而言，许多在法理学研究中所使用的术语是不为法律界所熟悉的，而更应属于哲学的范畴。以下是一些较常用的术语和它们在特定语境中可能含义的简要解释。需要牢记的是，有时个别法学家的特定术语有特殊含义，这些含义与通常用法可能会有所不同。

● 可知论——该观点认为了解事物的绝对真相是可能的，比如，是什么构成了有关正义的真理。

● 契约论——即断言或设想人类社会基于一个社会契约，无论该契约是否被视为一个真实的历史事实，或是否作为社会文明联系得以建立和维持的逻辑推测的假说。

● 辩证的——即关于辩证法（源自拉丁语 *dialego*，意为辩论，或谈论）的。辩证法指将所有的现实事物都看做由对立面之间的矛盾所表征的哲学方法。对立面之间的斗争导致新的、更高的形式，然后，该形式也被其他对立面所“挑战”。

opposites. The dialectic was first set out by the German philosopher Hegel, who argued that all existence resulted from 'pure thought' or Reason, based on a *Volksgeist* or 'collective consciousness', and that the struggle between various ideas led to the development and change in all things. Hegel set out the dialectic in this form:

› *Thesis:* an existing or established idea.

This is challenged by an:

› *Antithesis:* an opposite and contradictory idea.

The result of the ensuing struggle is a union and interpenetration of the two opposites, and this constitutes the:

› *Synthesis:* a newer and higher form of idea, which contains qualitatively superior elements of the two opposites. The new synthesis, however, will inevitably be challenged by another, newer and opposite idea, and so the synthesis becomes the new thesis, with its antithesis being the new opposite. The continual repetition of this cycle of struggle and resolution constitutes the dialectic and results in development and change in all things.

Note

Hegel's dialectic was adopted as a philosophical model by Karl Marx, who emphasised a materialist approach and argued that the struggle which constituted the dialectic was actually not between ideas, but between natural and social phenomena, including social and economic classes. Marx's philosophical approach thus became dialectical materialism.

- *Discretion* – in judicial decision making – the supposition that judges, in making decisions in 'hard cases', that is,

辩证法由德国哲学家黑格尔首先提出，他认为所有实在都来自基于国民精神或"集体意识"的"纯粹思想"或理性，不同理念之间的斗争导致了一切事物的发展和变化。黑格尔以如下形式展示了辩证法：

○ 正题：一个现存的或已建立的观念。

它被下面的所挑战：

○ 反题：一个对立且矛盾的观念。

由之而来的斗争的结果是双方的统一和相互贯通，并构成了：

○ 合题：一个更新、更高形式的观念，包含了比原对立双方质量上更优越的元素。但这个新的合题，不可避免地要受到另一个更新的对立观念的挑战，于是，在其反题作为新的对立面的情形下，合题成了一个新的正题。这种斗争循环的连续重复和解决构成了辩证法，并导致了所有事物的发展和变化。

注释

黑格尔的辩证法被卡尔·马克思作为一种哲学模式所采用，马克思强调唯物主义方法并主张构成辩证法的斗争实际上并不存在于观念之间，而存在于包括社会和经济阶级在内的自然和社会现象之间。因而马克思的哲学方法变成了辩证唯物主义。

●自由裁量权——在作出司法决定时——法官在"疑难案件"中作决定时的推测，即在没有明确的法律规则可以适用，

cases where there is no clear rule of law which is applicable or where there is an irresolvable conflict of applicable rules, make decisions which are based on their own personal and individual conceptions of right and wrong, or what is best in terms of public policy or social interest, and that in so deciding they are thereby exercising a quasi-legislative function and creating new law.

Many positivists, for example, John Austin and HLA Hart, would allow for the fact that where there is no clearly applicable rule of law judges do in fact exercise their discretion in deciding cases. Ronald Dworkin, however, strongly denies this and argues that judges have no discretion in 'hard cases' and that in every case there is always a 'right answer' to the question of who has a right to win.

- *Efficacy* – effectiveness and efficiency, as in the capacity of a certain measure, structure or process to achieve a particular, desired result.

  For Hans Kelsen, efficacy is a specific requirement for the existence of a legal system and therefore of law, as in the capacity of officials to apply sanctions regularly and efficiently in certain situations.

- *Empiricism* – in legal philosophy – an approach to legal theory which rejects all judgments of value and regards only those statements which can be objectively verifiable as being true propositions about the nature of law. Legal empiricism is based upon an inductive process of reasoning, requiring the empirical observation of facts and the formulation of a hypothesis which is then applied to the facts, before an explanatory theory of legal phenomena can be postulated.