影印版法学基础系列

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ESSENTIAL JURISPRUDENCE

奥斯汀·M·琴亨戈
Austin M Chinhengo

（第二版）
（Second Edition）

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本书导读

对于一个刚刚接触法律的学生来说，面对浩瀚漫长的西方法理学的历史，纷繁复杂的法学派别以及充斥于其中的种种难以辨析的基本概念、陌生的哲学术语，法理学的学习一直是一件折磨人的事情。同时，由于法学是一门实用、世俗、职业的学科，我们大学法学教育的重点往往是传授渗透于部门法中的“技艺理性”（“实践理性”），这是一种关于“know how”（知道如何）的知识。这样，对于那些将来有志于从事法律职业的学生而言，关心什么是法律，法律与正义的关系，法律是如何起源的，法律是否应该尽量客观，法律和政治、经济、道德、文化传统、历史的关系之类“know what”（知道为何）的法理学问题也许是一件吃力不讨好的事情。

尽管如此，法理学所研究的这些远离常识的哲学问题，是可以为我们法学的学习提供一些光亮的。“尽管哲学不能确定告诉我们什么是正确的答案，却可以提出许多可能性，使我们的思想增长，并摆脱习惯的制约。”（罗素语）所以，把法律问题作哲学上的思考，其最大目的不在于提供答案，而在于诱发法律人自己的思考。对于我们法律人来讲，除了懂法条之外，如果想成为一个智慧的法律人，就必须进入法理学领域。

本书正是这样一本提供给刚刚接触法律的学生帮助其对法律问题作初步哲学思考的简明教科书。在本书的第一部分里，作者的写作重点是解释基本概念，本书后面所讨论的问题都是围绕这些概念展开的。这种索引式的写作方式为初次邂逅法理学的学生提供了一幅法理学研究领域的全景图，同时对各种抽象术语的界定也减轻了随后阅读的负担。什么是法律？什么是正义？法律与社会的关系长期以来都是西方法理学中争论不休的问题，接下来本书围绕上述三个问题，为我们细致勾勒了自然法学派、实证主义法学派、功利主义法学、权利法学以及法律与社会理论等不同法学理论的思想脉络和派别分支。通过解读不同时期，不同思想家的法学思想，作者带着我们来回穿行于西方法理学这一交叉小径密布的花园之中。也许经历了一次这样看似复杂其实目标明确的学术旅行之后，我们可以轻松地获得对柏拉图、亚里士多德、边沁、马克思、波斯纳、霍菲尔德、凯尔森、哈特、德沃金、富勒、罗尔斯、昂格尔、麦克金侬等法学家的法律思想的初步认知，也许我们会发现学习法理学可以是有趣的，也是可以向我们的智识提出挑战并

给予我们快乐的。

本书结构体系简洁，内容浅白通晓，文笔流畅明快，对于那些久久徘徊在法理学大门之外而不得其入的学生而言是一本极好的启蒙读物。也许打开这本书之后，你会发现进入神秘变幻的法理学世界的钥匙就在你的手中。

在阅读本书时需要注意的难点问题是：新分析法学与传统分析法学的差异，第二次世界大战后新自然法学派兴起的原因及其内部分歧，自然法学派和分析法学派对法律是什么这一问题的不同理解，功利主义法学的研究重心的转变，霍菲尔德的基本法律概念分析理论与民法基本概念的分析及法学方法论之间的密切关系，以及极具先锋性的女性主义法学对长期以来以“雄性”为特征的法律乃至现代社会结构提出的批评和挑战。

本书目录和索引部分的翻译者为刘诚。

译　　者

2004 年 4 月

To Shamisa and Tanaka
Always

Foreword

This book is part of the Cavendish Essential series. The books in the series are designed to provide useful revision aids for the hard-pressed student. They are not, of course, intended to be substitutes for more detailed treatises. Other textbooks in the Cavendish portfolio must supply these gaps.

Each book in the series follows a uniform format of a checklist of the areas covered in each chapter, followed by expanded treatment of 'Essential' issues looking at examination topics in depth.

The team of authors bring a wealth of lecturing and examining experience to the task in hand. Many of us can even recall what it was like to face law examinations!

Professor Nicholas Bourne AM
General Editor, Essential Series
Conservative Member for Mid and West Wales

Preface

This text presents the essential issues in jurisprudence in a way which enables the student to have easy and illuminating access to the basic ideas propounded by the various thinkers on the subject over the years. Emphasis is placed on an explanation of the basic concepts, methodology and terminology used by writers on the subject, and the student is encouraged to approach the issues from a perspective which locates them within a contemporary context.

Dr Austin Chinhengo
March 2000

Acknowledgments

I wish to express my appreciation to my students, both past and present, who have made it all worthwhile, and my thanks to my father, for keeping my spirits up.

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1 Essential Questions

You should be familiar with the following areas:

- **what is jurisprudence?**
- **what do philosophy and theory have to do with the study of legal rules and the acquisition of legal skills?**
- **what is the meaning and relevance of the various divisions in the schools of thought comprising jurisprudential discourse?**
- **why is the language of jurisprudence so different and so much more convoluted than that of other legal disciplines?**
- **is there anything of value to be gained from apparently pointless theorising about the nature of law?**

Introduction

Unlike the other chapters of *Essential Jurisprudence*, this first chapter sets the scene on the whole area of jurisprudence. It is the aim of this chapter to identify and to clarify some of the more general issues and questions which confront a student approaching jurisprudence as a subject for the first time. Such questions usually concern matters relating to an initial appreciation of the nature and scope of the subject, as well as the mode and purpose of the enquiry which it involves. In the main, these are questions of definition, content and relevance, such as those listed above.

Such questions arise mainly from the fact that, as a subject, jurisprudence is occupied with different issues and generally takes a different approach from the other, mainly black-letter, law subjects, in the manner in which it deals with the subject matter of its enquiry. It is usually this difference in approach which makes many a law student feel disconcerted and disoriented, and much of this has to do with the unfamiliarity of the variety of devices, both terminological and methodological, which this philosophical study of the law employs.

Thus, in dealing with the various issues of definition and clarification, this chapter takes an approach and a style which is distinct from that which will be followed in the rest of this text. This is because it is not possible to explain the subject matter in the same format and an emphasis has been put on explanation, rather than exposition. Essentially, this could be regarded as a reference chapter to which the student may turn from time to time to discover the meaning and implications of various terms, phrases and distinctions which he may encounter, either in the course of this text or elsewhere.

Questions of substance

The meaning of jurisprudence

What is jurisprudence?

Problems of definition

- The term '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 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?' and 'what constitutes good law?'.

Answers to these two questions constitute two major divisions in jurisprudential enquiry. 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. In the following section, we will briefly explain some of these divisions.

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 should be remembered that there are others:

- *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 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.

Questions of definition

The terminology of jurisprudence

Many of the terms which a student may encounter and be required to use in the study of jurisprudence are relatively unfamiliar, belonging more to the realm of philosophy than to that of law. The following are some of the more commonly used terms, together with 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.

The selection of terms explained in this section is necessarily random and has been guided more by a need to clarify issues which shall be dealt with in the rest of this book than by an attempt to provide a generalised glossary of all jurisprudential terms. The student will, therefore, need to make reference to other sources, since there is a whole range of other terms and phrases which he or she will encounter in the study of jurisprudence.

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 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: