LEGAL ENGLISH

Concise Practical

◎高等法学教育“十二五”规划教材

法律英语简明实用教程

主　编　吴喜梅
副主编　岳军要　刘　慧

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前　言

经济全球化和法律服务国际化的发展趋势对高等教育法学人才培养提出了更高要求，传统上仅侧重于法学理论知识的法学教育模式已经不能再满足社会的实际需求，连续多年的法学专业超低就业率已经释放出明显的信号。一边是多数法学毕业生无法找到合适的工作，一边是呈增长之势的涉外法律服务机构招不到人才，也就是说，我们国家懂法律的人才明显供过于求，而懂法律同时又懂英语，并可以用英语工作，胜任涉外法律事务谈判的法律人才奇缺。为此，高等法学教育必须做出理性的调整，旨在培养能够适应法律服务国际化要求的复合型法律人才。根据中国高等法学教育的现实基础和人才培养战略，我们总结了多年教授《法律英语》课程的经验，编写了这部既简明又实用的法律专业英语教材，供我国高等法学院系师生、涉外律师和法律英语爱好者学习使用与执业参阅。

为了做到简明的目的，选材要求摈弃以往法律英语教材那种极端追求专业性的选材标准，选材过于强调专业的法律英语材料用语生僻，注重抽象句式和语法的运用，实际上降低了教材的可读性，反而弄巧成拙，导致学生对法律英语失去兴趣。因此，本教材特别注意选取阅读难度适中的材料，确保绝大多数法学专业学生可以轻松阅读；而实用性则体现在对教材内容篇章的安排，本教材选材内容包括法理学、宪政法学、诉讼仲裁程序和国际法学等教育部所要求的高等法学教育必须开设的14门核心课程，此外，还编入了大量的经典案例分析和法律文书写作。

从教材体例安排上，每篇课文都在文前附有汉语导读，在文后附有英文小结；精读课文后还专设了拓展学生阅读能力的泛读课文；练习题型多样化，覆盖了对学生听说读写译能力的全面培养。此外，本书每篇课文对常用词汇和法律专业术语进行分类归纳整理，便于学生查阅和记忆。

本书由吴喜梅、岳军要、刘慧、王存光、李静、臧开文、时琰、吴悦和林爽编写，全书共十五章，各章分工如下：

吴喜梅、时琰：第十二章国际环境法

岳军要：第四章经济法、第九章刑法与刑诉法、第十章民法与民诉法、第十一章律师执业

刘慧：第二章宪法、第五章合同法、第六章公司法、第十三章国际商事仲裁

臧开文：第一章法理学、第三章行政法与行政诉讼法、第七章保险法

李静：第八章知识产权法

另第十四章国际公法由王存光和吴悦完成，第十五章国际经济法由王存光和林爽完成。

由于编者水平有限，书中一定存在不少缺点错误，恳请使用者和相关专家提供宝贵意见。

编者

2014 年 6 月

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Jurisprudence

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Key Words

Jurisprudence 法理学 / Sociological Jurisprudence 社会法学派 / Historical Jurisprudence 历史法学派 / Analytical Jurisprudence 分析法学派 / Justice 公平正义/ Doctrine 法律原则 / Legal Precepts 法律规则,法律格言 / Administrative Action 行政裁决 /

Guiding Information

本篇课文共分为两部分。Text A 取自美国著名法学家罗斯科·庞德(Roscoe Pound,1870—1964)的巨著《法理学》五卷本第一卷第一章《何为法理学》。1903 年,庞德成为内布拉斯加大学法学院院长。1910 年,他开始在哈佛大学任教,并于 1916 年成为哈佛大学法学院的院长。他是"社会学法学"运动的奠基人,美国法律现实主义运动的早期代表人物,该运动主张更加实用地依据公共利益来解释法律,并侧重于实际发生的法律过程,反对当时美国法学界盛行的法律实证主义。

Text B《什么是法律》摘自另一著名法学家罗纳德·德沃金的名著《法律帝国》。罗纳德·德沃金(Ronald. Myles. Dworkin,1931—2013)是当代最著名、最活跃的法理学家之一,当代新自然法学派的代表人物。德沃金 1962 年成为耶鲁大学教授,1969 年应邀担任英国牛津大学法理学首席教授,直到 1998 年。1975 年开始同时担任纽约大学的法学教授。1977 年德沃金的专著《认真对待权利》(Taking Rights Seriously)出版,这是他的成名之作。德沃金在此书中关于个人权利的法律与道德理论关系的论述使他成为该领域最为著名的学者之一。1985 年,他的第二部专著《原则问题》出版。书中,德沃金对法律的政治基础、法律解释、自由主义与正义以及法律的经济学观点等一系列英美法理学的热点问题作了独创性的阐述。1986 年,他出版了《法律帝国》(Law's Empire)一书,此书在总结前两部著作的基础上,就法律阐释问题和司法审理问题提出了完整的理论体系。在这部巨著的开端,德沃金提出一个问题作为这本书的第一章:什么是法律? 而在经过 9 章的论述之后,在第 11 章即这本书的最后部分,再次重复这一问题并给出自己的答案。本文即摘自这一部分。而这本书的第一章则被节选为本课的补充阅读材料。

TEXT

Text A What is Jurisprudence?

Jurisprudence in its widest sense is the science of law. This is the original and etymological: meaning and is in accord with the best usage. There are, however, three other uses of the term; two of them with some warrant, the third wholly unjustifiable.

The first is peculiar toEngland, British dominions, and the United States. As study of the science of law as such (ie. apart from political science and political philosophy) dates in England and America from Austin's Province of Jurisprudence Determined (1832), and as Austin's method was exclusively analytical, a narrower meaning became current in English-speaking countries. It thinks of law as an aggregate of laws and of laws as rules, and this narrow definition of law gives a narrow limitation of the science of law. In this narrower sense in which the word has been used by many English writers, jurisprudence might be called the comparative anatomy of developed systems of law.

*Holland uses the term in this sense when he defines Jurisprudence as the "formal science of positive law."*① *This definition proceeds on the Aristotelian distinction between substance and form. To give an old-time illustration, a smith has in his hand the raw material, the substance, steel and wood. He has in his mind the idea, that is, the picture of a saw. He fashions the substance to that mental picture and so gives to the substance the form of a saw. Hence the maxim forma dat esse rei. Accordingly, by saying that Jurisprudence is a formal science, Holland means that it has to do with systems of legal precepts but not with legal precepts, the substance given form in those systems. It does not criticize the content of a body of laws except for being out of line with the analytical system. It arranges and systematizes that content. By "positive law" he means the body of legal precepts which actually obtain as authoritative legal materials for decision and authoritative bases of predicting decisions in a given time and in given places; not the received ideals of legal systems, and not the ideal precepts which philosophical or economic or sociological considerations might dictate or indicate.*

This is one side of the science of law. I shall call it *analytical jurisprudence*.

A second use of the term is French, and to some extent American. The French use the word jurisprudence to mean the course of decision in the courts, contrasting it with legislation and with "doctrine," ie. the opinions of learned commentators. In the civilian's theory of forms of law, legislation alone had full authority; jurisprudence (ie. case law) and doctrine (ie. textbook law) were persuasive only. But this has undergone some change.

InAmerica the word "jurisprudence" has been used to some extent in the French sense.

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① Holland:著名法理学家霍兰,参见其著作《法理学》(Jurisprudence)第13版,(1924年出版)第13页。

Thus the phrase "equity jurisprudence" meaning the course of decision in Anglo-American courts of equity, has been fixed in good usage by the classical work of Judge Story.

By a not unnatural transition, the word has come to be used, chiefly in this country, as a polysyllabic synonym for "law".

"Medical jurisprudence" for the forensic applications of medicine or the law relating to or of interest to physicians, "dental jurisprudence" for the law of interest to dentists, "engineering jurisprudence" for the law of interest to engineers, and other phrases of the sort, are quite indefensible. But "medical jurisprudence" is more or less established in good usage.

I shall take it, then, that Jurisprudence means the science of law.

It should be noted, however, that the phrase "science of law" involves difficulties in that there is no agreement as to what constitutes a science, and the word "law" is used in juristic writing in more than one meaning.

Nowadays a question is raised whether we may speak properly of a "science" of law. The answer depends on what we mean by the word "science". In the sense in which I am using it, a science is a body of critically controlled and ordered knowledge about something significant. In that sense we speak, and may properly speak, of a science of language and of religion; we may speak of social sciences and of historical science. The present tendency to a narrower use of the term "science" is due to the positivist philosophers of the last quarter of the nineteenth century. They held that reality was in laws analogous to those of mathematical astronomy and physics. But note how fashions of thought and speech change. In the seventeenth and eighteenth centuries men thought and spoke not of a science but of a philosophy. Descartes wrote on physics as philosophy. Newton's great book on physics is entitled "The Mathematical Principles of Natural Philosophy". In the same way, what we now call the natural sciences were called natural philosophy in the eighteenth century and even later. Also ethics was called moral philosophy until recently, where we now speak of moral science; and psychology was called mental philosophy, where it is now rather mental science. In the nineteenth century, when evolution and historical method were the vogue in thinking, men spoke of natural history, where now they speak of the biological sciences. Thus we have thought of these branches of knowledge as philosophy, as history, as science successively. In the same way, men have thought of the different organized bodies of knowledge of social phenomena as philosophy (seventeenth and eighteenth centuries), as history (nineteenth century e. g. Freeman's dictum as to politics and history;[①] cf. Iowa Applied History Series in which present questions of politics and law are treated as applied history), and as science (twentieth century the "social sciences").

Formerly jurisprudence was held to be a philosophy of law. Austin speaks of "General

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① Freemen:著名法学家,参见其著作《过去的政治是现代的历史》(Past politics are present history)

Jurisprudence, or the Philosophy of Positive Law". But we may very well distinguish philosophical jurisprudence from philosophy of law, as we may distinguish historical jurisprudence from legal history. Philosophical jurisprudence is one form or side of the science of law, organized by philosophical method and directed chiefly to the ideal element of law and to a philosophical critique of legal institutions, legal doctrines, and legal precepts. Philosophy of law is one side of practical philosophy; it is practical philosophy applied to the legal order and its problems, and to the body of authoritative legal materials whereby we seek to maintain that order.

Here we must take note of the distinction between the natural (ie. physical and biological sciences) and normative (ie., social) sciences—the one dealing with what is and the other with what ought to be. But there are two possibilities here, (a) We may study attempts to realize a wished ought-to-be as a what-is, or (b) we may study this what-is from theories of what-it-ought-to-be.

Another not uncommon assertion is that there is no science of law, there is only an art of deciding cases, or of advising litigants, or of predicting the course of judicial and administrative action. An art is a specialized way of doing something. Undoubtedly the administration of justice is an art. But there is an organized body of knowledge about the authoritative materials with which it is administered, the way it is administered, how it may be administered, and how it ought to be administered. Study of the art and of how it is exercised is likely to be more effective if one has a grasp of the science.

As to the term "law" as we use it in English, and the same is largely true of the corresponding word in other languages, we mean any of three things, or sometimes all three.

Historically, the oldest and longest continued use of "law" in juristic writing is to mean the aggregate of laws, the whole body of legal precepts which obtain in a given politically organized society. But in a wider phase of this sense it may mean the body of authoritative grounds of, or guides to, judicial and administrative action, and so of prediction of such action, established or recognized in such a society including precepts, technique, and received ideals. In this sense jurists speak of "systems of law" and "justice according to law" Usually also we use the word in this sense when we speak of "comparative law". We mean the body of received or established materials on which judicial and administrative determinations are to, and on the whole do, proceed. Hereafter, following a logical rather than a chronological order, I shall call this "law in the second sense".

In another sense the term "law" is used to mean the legal order (*ordre juridique*, *Rechtsordnung*). It is used to mean the regime of ordering human activities and adjusting human relations through the systematic application of the force of a politically organized society. Here again, however, there is a wider idea. The legal order is a specialized phase of social control. It is from one standpoint a regime of ordering conduct through social pressure backed by the force of the political organization. If we go back a bit in legal history we come to

regimes of social pressure without such backing. To unify the phenomena of developed societies with those of more primitive social orders, historical jurists have used "law" to mean the whole regime of social control. The word "law" is used in the sense of the legal order when we speak of "respect for law", or of "the end of law". Thus when we speak of respect for law we mean respect for the legal order. One might, for example, respect the legal order and yet object to some particular item of the body of legal precepts, such as a fugitive slave law, or the National Prohibition Act. Most of what is called philosophy of law is a philosophical consideration of the legal order. Also in recent years the science of law has come to be quite as much a science of the legal order as one of the authoritative materials of decision. Hereafter I shall speak of the legal order as "law in the first sense", using a logical rather than a historical sequence.

In still another sense, many who write of"law" mean what Mr. Justice Cardozo has taught us to call "the judicial process". In this sense law is used to mean the process of determining controversies whether as it actually takes place or as it is conceived it ought to take place. To this, today we shall have to add what may well be called the "administrative process," that is, the process of administrative determination, whether as it actually takes place or as it is conceived it ought to take place. The term "law" is used in this sense in most neorealist writing of today, and in such pronouncements as that of Professor Llewellyn that he includes under "law" all that is done officially.

In addition, the term "law" may be used to mean all three of the foregoing as, for example, in much of the discussion of "law and morals" which may mean the relation of morals or morality, or both, to the legal order, or to the body of authoritative materials for the guidance of judicial and administrative action, or to the judicial process, or to all three. Similarly, when we speak of the "science of law" we may mean an organized body of knowledge as to the authoritative materials of judicial and administrative determination, as did the analytical jurists in the last century. In recent times, however, we are more likely to mean a body of knowledge or investigation in which the legal order, the authoritative materials for guidance of judges and officials, and the judicial and administrative processes are all taken into account as somehow making up one subject—the materials and processes of the systematic ordering of human relations by a politically organized society.

Can these three ideas, the legal order, the body of authoritative grounds of decision and bases of prediction, and the judicial and administrative processes be unified so as to make one subject of one science? They may be so unified by the idea of social control. I am not using that term here in the sense in which some economists have been using it, namely, to mean consciously planned guidance of economic processes through those who wield the force of politically organized society. I use it rather in the wider sense in which the term was first given currency by Professor Ross, whom it was my good fortune to have for a colleague atNebraska, and to whom I owe my real start in the science of society. In that sense it means the control of each of us by the pressure of his fellow men, whether unconscious and involuntary or direct and

purposive. It is this pressure, more and more organized and directed, which has established and main-tains our mastery over human nature. All social control is not law in the lawyer's sense, nor achieved through law. Religion, ethical custom, the discipline of kin groups, of religious organizations, and of voluntary associations of all sorts, are also agencies of social control. The province of jurisprudence is social control through the systematic application of the force of politically organized society. That gives rise to the legal order, it requires a body of authoritative materials in which tribunals are to find the grounds of determinations, and in a developed legal order it requires a judicial and administrative process admitting of reasonable prediction.

Hence by the term "science of law" we mean an organized and critically controlled body of knowledge both of legal institutions and legal precepts and of the legal order, that is, of the legal ordering of society. We are to study both the task, social control through the legal ordering of human relations in society, and the means, legal institutions, law in the sense of a body of laws, and the judicial and administrative processes. For it is impossible to keep the end and the means apart in any study which will give a mastery of either. This conception of a process as the subject matter of jurisprudence is recent. In the last century, jurists thought of a science treating of laws. Today, there is a tendency to think of a science of achieving social control by means of or with the aid of laws. In this sense we may speak of a science of the adjustment of human relations through the public administration of justice, or more specifically, a science of the securing of interests in civilized society by means of an ordered judicial and administrative adjustment of relations.

A developed system of law—and we are concerned with undeveloped systems only because and to the extent that they enable us to understand and treat scientifically of developed systems—may be looked at from four points of view.

Analytical-This method consists in examination of the structure, subject matter, and precepts of a legal system in order to reach by analysis the principles, theories, and conceptions which it logically presupposes, and to organize the authoritative materials of judicial and administrative determination on this logical basis. It postulates, or takes as the ideal, a body of logically interdependent precepts. This is only a postulate or perhaps an ideal. There has never been any such completely interdependent body of precepts. But the postulate is useful to make a body of law teachable and intelligible and to make its precepts conform to reason. This is the oldest method of scientific treatment of a particular body of laws.

Having compared cases and thence compared rules in the particular system, the next step is to compare rules of different systems by analysis and formulate general principles of law, ie. authoritative starting points for reasoning. When that is done we get a science of law. Something of this sort may be seen in Roman law in the later years of the Republic.

Historical-This method consists in investigation of the historical origin and development of the legal system and of its institutions, doctrines, and precepts, looking to the past of the law

to disclose the principles of the law of today, and seeking to organize the authoritative materials of judicial and administrative action on the basis of these historically developed materials. It postulates a continuity of development culminating in the authoritative legal materials of the time and place.

This is the last of the three methods recognized in the last century (ie. the analytical, the historical, and the philosophical) to develop as a method of scientific treatment of a particular system. As a method of general legal science, it comes after the philosophical method and as a revolt there from.

There is only a suggestion of this method in the classical Roman law. The pioneer is*Cujas* at Bourges in the sixteenth century.

Philosophical–This method consists in study of the philosophical bases of the institutions and doctrines of the legal system and of its ideal element. It seeks to reach philosophical presuppositions of the legal system, and to understand and organize its ideal element through philosophy. It postulates ideals of the end of law, or purposes of the legal order, with reference to which institutions, doctrines, and precepts may be measured and criticized.

In historical order, this is the second method to develop in the scientific treatment of particular systems. Combination of this method with the analytical method, through the contact of Greek philosophers and Roman lawyers in the later years of the Roman republic and in the classical period of Roman law (Augustus to Alexander Severus—first to third century), marks the beginnings of a general science of law. Hence the philosophical method is the oldest and longest continued method of jurisprudence. It dominated the legal science of Rome from Cicero's time on, and dominated the legal science of the modern world from the seventeenth to the nineteenth century.

Note that the three methods, as pursued in the nineteenth century, either presuppose eighteenth century natural law (ie. an ideal body of precepts of which the law of the time and place is a more or less imperfect ascertainment) or presuppose a metaphysical theory of law as the realization of an idea. Natural law is to be reached, or the idea and its implications are to be reached, by one of these three methods.

Sociological–This method consists in study of a legal system functionally, as a social instrument, as a part of social control, and study of its institutions, doctrines and precepts with respect to the social ends to be served. It presupposes that law is a specialized agency of social control.

Applied to the study of legal systems generally, these four methods are the methods of jurisprudence.

Many name also a comparative method, although the term comparative jurisprudence is not as fashionable as formerly. It began to be urged as a distinct method in the last third of the nineteenth century, and got currency inAmerica through Lord Bryce's Studies in History and Jurisprudence. But the propriety of naming a comparative method, as a distinct method of

jurisprudence, may be doubted. The analytical, historical, and philosophical methods, as methods of jurisprudence must be comparative. Comparative law, a comparison of the precepts, doctrines, and institutions which obtain in different systems of developed law, gives materials for analytical jurisprudence, but is not in itself more than a basis for a science of law. So also investigation and ex-position of the actual course of development of a particular legal system is not historical jurisprudence, it is legal history. This is the more true if the historian accepts the unique-series theory of history. Legal history and the universal legal history, which Kohler urged, give materials for historical jurisprudence. Moreover, the English analytical and historical jurists employed a comparative method, or used their methods comparatively, from the beginning.

Why did jurists make so much of a supposed distinct comparative method in the latter part of the nineteenth century? Chiefly, as it seems, because until then the science of law in Continental Europe had not been, and had not had occasion to be, comparative. In the eighteenth century reason had been held all sufficient. There was no call to look into groupings for reason in this system or that. It was better to go straight to reason, which must ultimately furnish the authoritative precept. Thus the current theory of law made comparison superfluous, and comparative law met no practical need. The development of Germanic law had been arrested. The modern Roman law had a continuous written history extending back almost to the Twelve Tables (450 B. C). In this development during more than two thousand years, it had been four times purged of its archaisms. Moreover, it had been given unity for the nineteenth century by the Code Napoleon, and the many codes drawn in its likeness. There was not, for a time, enough diversity of law in civil-law countries to invite comparison, nor were there problems of legislation and law reform to require the help of comparative law. Hence, Continental jurists readily identified historical jurisprudence with historical treatment of the materials of Roman and modern Roman law. On the other hand, in England, in the middle of the nineteenth century, with but six centuries of legal history as a system, the law was overhauling for the second time, during the legislative reform movement, in the endeavor to rid it of archaisms. Thus there was every reason for the English historical jurist to look into the development of another system, much older than his own, which had passed through the stages of remaking by equity and by legislation, and to consider archaic systems, analogous to that out of which his own had developed at a time, by comparison, so recent. For the same reasons, when Continental jurists began to employ their methods comparatively, the change appeared revolutionary. Yet the result was, not a new method, but that the historical and philosophical methods were used, comparatively and hence more truly as methods of jurisprudence. There was more scientific use of old methods rather than a new method. Indeed, a purely comparative method, apart from analysis, or history, or philosophy, would be barren. Savigny said of a like notion that the task of the Continental jurist should be to compare the practical rules of the classical Roman law with those worked out on a Roman basis in the Middle Ages and in modern