法律专业英语

主编　王晨

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内 容 提 要

本教材从法的基本理念开始介绍，逐步引伸到自然法、法理学，最终以部门法为基准，分别讲解宪法、行政法、刑法、民法、商法、知识产权法、诉讼法、国际法、国际私法、国际经济法等重要部门法的专业英语知识，使学生通过本教材的学习，能够掌握并熟练运用法学专业的英语技能，为日后的进一步学习深造和法律实践奠定良好的专业英语基础。本教材内容全面，涵盖了法学专业核心课程的相应专业英语知识，完全符合教育部对法学专业教学内容的要求，并引入国外著名的典型判例原文，以增强本书的生动性和可读性，开阔读者的视野。

本教材适用于法学专业本科生使用，同时也是法学爱好者的理想用书。

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王晨，女，1972 年 1 月出生，黑龙江大庆人，毕业于黑龙江大学、中国政法大学，分别获得哲学学士学位和法学第二学士学位，后取得吉林大学民商法专业硕士学位，现为哈尔滨理工大学法学院副教授，中国人民大学宪法学与行政法学专业博士研究生。先后在核心期刊以及其他国家级、省级刊物发表专业论文近三十篇，主编教材三部，专著两部，主持科研项目多项。

姜帆，女，1979 年 12 月出生，吉林省梅河口市人，毕业于东北师范大学、吉林大学，分别获得法学学士学位、法理学专业硕士学位，现为哈尔滨理工大学法学院讲师，厦门大学法学理论专业博士研究生。先后在国家级、省级刊物发表专业论文十余篇，参加科研项目多项。

穆永强，男，1975 年 12 月生，吉林松原人，先后获兰州大学历史学本科、硕士学位。2003 年起在兰州理工大学人文学院法学系任教，从事《外国法制史》、《法律英语》、《西方法律思想史》（双语）教学。2005 年曾赴美国东德州浸会大学进修。现为中国人民大学法学院法律史专业博士研究生。发表学术论文、译文十余篇。

前　言

如今，我们处于一个开放的时代，一个融合的时代，世界各国在政治、经济、文化等方面的合作日益频繁，"地球村"的特点越来越突出。这就要求我们这个时代的人要大胆地"走出去，引进来"，而作为法学专业的学生更应该在熟悉外国法历史的基础上，以时代的视角、精准的语言去了解、剖析当代国外法制的发展，学习国外先进的最新法治理念和前沿研究成果，洋为中用，以促进

我国的法治建设。而这一切的基础在于掌握优秀的法律英语技能，能够熟练地使用法律英语去阅读英语原文文献。《法律英语》是法学专业基础课之一，属于专业英语的一种。但是就国内现有的《法律英语》教材来看，还是不尽如人意的，种类相对于其他法学专业课程的教材而言，也是比较少的。因此我们产生了编写本书的想法，意在引入国外优秀的法学专业文献，向读者介绍法学专业英语的基本概念及其基本内容，力争帮助学生培养起应有的法学专业英语技能以及较为全面的法学专业综合素养。

本书编写者写作分工如下：第 4 课、第 5 课、第 10 课、第 11 课、附录 1、附录 3、4，参考文献由王晨编写；第 1～3 课、附录 2 由姜帆编写；第 6～9 课、第 12 课、第 13 课、附录 5 由穆永强编写。

由于时间仓促和作者水平有限，本书难免有缺憾之处，欢迎广大读者批评指正。

编者

2010 年 7 月

目　录

Lesson 1 What is Jurisprudence?

By every it obliges generally acts or forbearances of a class, a command is a law or rule.

——John Austin

如果一个命令具有普遍的行为约束力，且对之服从的行为主体也是普遍的，那么这个命令就是法或者规则。

——约翰·奥斯丁

Background

自法学这一学科萌芽、发展、延续至今，虽然“法理学是什么”不再如法学学科独立之初那样难以言说与阐释，但是却依然是一个复杂的问题，或者可以说是一个永远难以得到统一答案的问题。同时，在法学体系中，法理学占据着很重要的地位，是理论法学中的主要学科。如果把法学学问比作一座高山，法理学既是山脚下美丽的平原，也是山顶高耸的雪峰；如果把法学学问比作一条长河，法理学既是河流的发源地，也是河流的入海口。所以，学习法理学，探讨法理学理论体系中的问题是一名法科学生学习的起点和法学理论水平达到一定高度的标志。因此，定义“法理学是什么”是一个很有学术魅力的问题，值得人们不断地思索与探究。

戴维·M·沃克在其所编的《牛津法律大辞典》中给法理学下的定义比较精简而且全面，他指出：“法理学”一词包括多种含义。第一，作为“法律知识”或“法律科学”，在最为广泛的意义上使用，包括法律的研究与知识，与最广义理解的法律科学一词同义。第二，作为最一般地研究法律的法律科学的一个分支，有别于某一特

定法律制度的制定、阐述、解释、评价和应用，是对法律的一般性研究，着重于考察法律中最普遍、最抽象、最基本的理论和问题。该词的这种含义常常可与法律理论、法律科学（狭义上的）、法哲学等词相通。目前，中国法理学界比较流行的关于法理学的界定是：法理学是法的一般理论、基础理论、方法论和意识形态。

Text①

Jurisprudence[1] — Philosophy of Law

What is Law?

Analytical — What the Law is Normative — What the Law ought to be

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 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. [2]

As a subject[3], 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 ques-

① 张万洪. 法理学（最新不列颠法律袖珍读本）[M]. 风值水，译. 武汉：武汉大学出版社，2003：2-35。

tion 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)[4]. 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 to remember 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 the 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.

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[5] — the view that it is possible to know the absolute

truth about things, for example, what constitutes truth about justice.

• Contractarian[6] — 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 hypothesized 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 characterized 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 consciousnesses", 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.[7]

• Discretion — in judicial decision making — the supposition that judges, in making decisions in "hard cases", that is, cases

where 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 concepts 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[8] and HLA Hart[9], 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[10], however, strongly denies this and argues that judges have no discretion in "hard case" 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[11], 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.

• Formalism — in legal theory — the approach which seeks to minimize the element of choice in the interpretation of terms contained in legal rules and emphasizes the necessity of certainty and predictability in the meaning of such rules. Legal formalists would advocate the attribution of specific meanings to certain terms from which the inter-

preter of a legal rule could not deviate, and require that such terms should have those same meanings in every case where the rule is applicable.

• Good — some value or interest which it is generally considered desirable to attain or provide for in social arrangements, for example, liberty, equality or dignity.

• Imperative — with reference to theoretical approaches to the nature of law — the conception which regards law as being constituted generally by the command, orders or coercive actions of a specific, powerful person body of persons in society. The main imperative theories are the positivist approaches of:

★J Bentham and J Austin — law as a set of general commands of a sovereign backed by the threat of sanctions.

★H Kelsen — law as a system of conditional directives (primary norms) to officials to apply sanctions.

• Intuitionism — the view in moral philosophy which regards humans as possessing a faculty, conscience, by which they are able directly to discover and determine what is morally right or wrong, good or evil.

• Libertarian — of or concerning approaches to legal and social arrangements which generally give priority to the concept of liberty, or the specification, attainment and protection of particular basic freedoms.

• Materialism — in Marxist theory — the notion that changes and developments in human society are based on the material conditions of human existence. The two notions of dialectical materialism and historical materialism in Marxist theory are based on the assumption that there are ongoing associations and contradictions between various social, technical, economic and political phenomena which determine the historical development of society.

• Morality[12] — the making, holding or expression of moral judgments, that is, conceptions of what is good and bad, right or wrong or acceptable and unacceptable as judged in accordance with some *a priori* standard which may be a personal or social convention.

• Moral philosophy — the formalized attempt to understand the thinking underlying or reinforcing moral judgments.

• Natural Law — the philosophy of law which proceeds from assumption that law is a social necessity based on the moral perceptions of rational persons and that any law which violates certain moral codes is not valid at all. Human law is thus based on certain universal principles, discoverable through reason or revelation, which are seen as being eternal, immutable, and ultimately based on the nature of human being.

• Norm — a generally accepted standard of social behavior.

• Obligation — for Hart, a distinction must be made between "being obliged" to act or forbear, and being "under an obligation" to act or forbear, the former being motivated by fear of some sanction which occurs as an external stimulus and the latter being comprised of both the external and an internal element whereby the subject feels a sense of duty to act or forebear.

• Policy — a statement of a social or community goal aimed at some improvement of the social, economic or political welfare of the members the group in general. As such, a policy may be pursued sometimes even though this would lead to a restriction of the rights of individuals. Dworkin makes a specific distinction between matters of policy as defined and matters of principle, which he regards as setting out the rights of individuals, and he points out the need for justice and fairness in creating a balance between the two.

• Positivism — the approach to the study of law which regards valid laws as being only those laws that have been "posited", that is,