

西北政法大学自编系列教材



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新编法律英语高级教程

XINBIAN FALŪ YINGYU GAOJI JIAOCHENG



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马庆林 付欣 孟超 编著

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总序

西北政法大学是一所法学特色鲜明，哲学、经济学、管理学、文学等学科相互支撑、协调发展的多科性大学。学校是西北地区法学教育研究中心和人文社会科学研究的重要基地，被誉为政法人才培养国家队的“五院四系”之一，是陕西省重点建设的高水平大学、一流学科建设高校，是全国政法大学“立格联盟”和西安高校“长安联盟”的成员单位。建校 82 年来，学校扎根祖国西部，形成了“政治坚定、实事求是、勇于创新、艰苦奋斗”的“老延大”优良传统，铸就了“严谨、求实、文明、公正”的校训，凝练了“法治信仰、中国立场、国际视野、平民情怀”的育人理念，培养了 15 万余名德才兼备、德法兼修的高素质专门人才。这些人才以“专业扎实、工作踏实、作风朴实、为人诚实”的特点深受用人单位和社会各界好评。

教材体系建设是育人育才的关键，高水平教材是培养德才兼备、德法兼修高素质专门人才的重要依托。习近平总书记提出：“要抓好教材体系建设，形成适应中国特色社会主义发展要求、立足国际学术前沿、门类齐全的哲学社会科学教材体系。”西北政法大学历来高度重视教材建设，在积极推进“马工程”重点教材统一使用的基础上，鼓励和支持专业学术造诣高、教学经验丰富的教师参与教材编写，加强教材研究，创新教材呈现方式和话语体系，大力推进习近平新时代中国特色社会主义思想进教材、进课堂、进头脑。学校自 2017 年启动新一轮自编系列教材建设，重点编写系列特色教材、实践（实验、技能）类教材、双语教材，力求做到重点难点突出、理论与实践结合、深度广度兼容、原理前沿兼顾，确保教材的科学性、前沿性，增强教材的针对性和实效性。

系列教材凝结着全体编写人员和出版社编辑的辛勤付出，欢迎选用，同

时期望广大师生和实务界同行提出宝贵建议和意见。我们将及时根据使用和评价情况，丰富内容，优化结构，持续打造西北政法大学高水平特色系列教材，为哲学社会科学教材体系建设做出贡献。

西北政法大学

2019年8月

前 言

随着“一带一路”倡议和全球经济一体化的持续推进，社会对“外语+法律”“法律+外语”等复合型涉外人才的需求日益增加，培养既懂外语又懂法律的人才也成为我国一些高校（尤其是专业院校）新型人才培养的新举措，有条件的院校在课程设置上专门增加了《法律英语》《法律英语写作》《法律翻译》等课程。在此背景下，收集整理国内外最新法律英语资料，并编写适合于我国当代大学所需，能反映出时代气息，融法律知识、法律术语、案例分析为一体的《新编法律英语高级教程》，成为编写课题组一年来的共同实践和追求。本教程是为法学各专业学生及英语专业学生在学习完《大学英语》或《基础英语》后进一步学习法律英语知识而编写的，旨在通过这本教材的实践，帮助学生掌握法律英语的基础词汇及基本法律常识，了解国外法律制度及法学研究的最新动向，并通过教学实践获得运用法律英语的基本技能，形成熟练阅读理解国外法学文献并对法律基础知识进行英汉互译的能力。

本教程编写的特色突出表现在以下几个方面：①内容新。针对前版部分课文内容较为陈旧等问题，我们对主课文和副课文进行了全面更新。选取的内容均来自世界著名出版社2010年以来出版的教材、论著或世界主流媒体的报道。②体例新。对原有体例进行了优化，适当平衡了公法与私法部门法的比例。本书第一、第二单元增加了对法律、法律功能及世界主要法系方面的介绍。第三、第四、第五单元将宪法、司法制度和法学教育等顺序进行了调整，之后各单元依次是部门法、国际法、案例法。③实用性。根据“洋为中用，服务国家和地方需求”的原则，我们有意增加了有关中国法，尤其是知识产权法、合同法和公司法等部门法内容，力求更接地气，突出实用性。

本教程共有 16 个单元。每个单元分为主课文 (Text)、练习 (Exercises)、辅课文 (Extended Reading)、思考练习 (Thinking in Depth) 和相关资料 (Suggested Reading Materials)。每单元的教学需 6 学时, 全册约需 96 学时。

主课文 (Text) 作为精度文章讲解, 课文后设有生词、音标、单词释义、课文注释, 供教师和学生开展课堂教学。

练习 (Exercises) 包括阅读理解题、是非判断题、术语解释题、完形填空和英译汉, 旨在帮助学习者能够更好地掌握每个单元的核心知识点, 以及为教师提供课堂练习和课后作业的素材。

辅课文 (Extended Reading) 是与每单元的论题相配套的辅助阅读材料, 在学习完主课文之后可用于进一步掌握相关知识的阅读。

思考练习 (Thinking in Depth) 是在学习每单元的主课文 (有时包括辅课文) 之后, 结合该单元所讨论的论题, 所提出的一系列思考题。一方面旨在帮助学习者回顾该单元的重点信息; 另一方面则以提问的方式促使学习者对相关论题形成自己的认识和观点。

相关资料 (Suggested Reading Materials) 是在学习完各单元之后, 为学习者进一步学习及教师备课而提供的相关信息, 包括国内法律书籍、国外法律书籍、机构官方网站和在线百科全书网址。

全书各单元素材均选自近几年出版的国外原版法律书籍及期刊的原文。题材结合法律各专业特点, 力求内容新颖丰富、文章体裁多样。主课文是每个单元的核心, 在课时分配上应当有所侧重。辅课文则是与主课文相配合的文章, 教师可根据授课情况有选择地进行讲解。本教程广泛听取了一些法学专家和从事法律英语教学的同行的意见, 通过注释对课文中的相关法律知识进行了补充和调整。在编写过程中, 本书参考了国内外法律专业的原版资料。本书在出版过程中, 得到了中国政法大学出版社唐朝编辑的重视和支持, 编者对此表示最真挚的谢意。

由于编者才疏学浅, 错误在所难免, 诚恳希望广大读者和同行批评指正。

编者

2020 年 6 月

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UNIT 1 INTRODUCTION

Law is order, and good law is good order.

法律即是秩序，良好的法律是良好的秩序。

—Aristotle

TEXT

➔ LEAD-IN

本单元介绍法律的定义和功能，从法理学各个流派的角度对法律的定义进行全面描述。

➔ Body

What Is Law?

The study of legal philosophy is called jurisprudence.¹ Many of the world's greatest philosophers have theorized about the nature and meaning of law. Jurisprudential philosophers ask questions like these: What is law? Is bad law still law? Is custom law? Is law what it says in the statute books, or what really happens in practice? Philosophers have debated the essential nature of law for centuries, yet there is no single commonly accepted definition. This chapter begins by summarizing some of the schools of legal philosophy in order to introduce students to different ways of answering this fundamental question: What is law?²

I. Law as Power

According to this view, the validity of a law does not depend on whether it is socially good or bad. It is apparent, for example, that tyrannies, monarchies, and democracies have produced socially beneficial laws. They have also produced laws that are unjust and “wrongful”. What these different forms of government have in common is that each is based on power and that possessing the power to enforce its laws is central to each government’s existence. This philosophy can be criticized for ignoring arbitrariness, abuses of power, and tyranny, and for producing bad law.³

II. Natural Law

Natural law philosophers argued that law is that which reflects, or is based on, the built-in sense of right and wrong that exists within every person at birth. This moral barometer, which operates through the functioning of conscience, gives each person the capacity to discover moral truth independently.⁴ Some believed that this sense was God-given; others believed it was an intrinsic part of human nature. Natural law philosophers argued that moral goodness is conceptually independent of institutional views of goodness or evil. Thus, no government can make a morally evil law good or a morally good law evil. Moral goodness exists prior to institutional lawmaking, and sets a moral standard against which positive law should be measured. Thus, even though during apartheid the all-white South African government may have had the power to enact racially discriminatory statutes, such statutes were not truly “law” because they were morally abhorrent.⁵ This natural law philosophy was very influential in seventeenth and eighteenth-century Europe. Revolutionaries who sought to overthrow established monarchies were attracted to natural law because it established a philosophical foundation for political reform.

Natural law thinking has greatly influenced American law as well. American civil rights advocates currently use the same time-tested natural law arguments that were used thirty and forty years ago to oppose racial discrimination. They argue that discriminatory statutes should not be respected as law, because they are

so blatantly unfair. Constitutional provisions that require government to treat all persons fairly and impartially (the due process and *Equal Protection Clauses*) are other examples.⁶

III. Utilitarian Law

The utilitarian school of law concentrated on the social usefulness of legislation rather than on metaphysical notions of goodness and justice.⁷ Utilitarians thought that government was responsible for enacting laws that promote the general public's happiness. They believed that the desire to maximize pleasure and minimize pain is what motivates people, and that legislatures were responsible for inducing people to act in socially desirable ways through a legislated system of incentives and disincentives. For example, if the pain imposed by a criminal sentence exceeds the gain realized by an offender in committing the offense, future criminal actions will be deterred. Additionally, they thought that law should focus on providing people with security and equality of opportunity. They maintained that property rights should be protected because security of property is crucial to attaining happiness.⁸ People, they thought, should perform their contracts because increased commercial activity and economic growth produce socially beneficial increases in employment.

Utilitarians also favored the simplification of legal procedures. They opposed checks and balances, legal technicalities, and complex procedures. They believed that these "formalities" increased the costs and length of the judicial process and made the justice system ineffective and unresponsive to the needs of large numbers of average people. Modern utilitarians would favor small claims courts, with their simplified pleading requirements, informality, low cost, and optional use of lawyers.⁹

IV. Analytical Positivism¹⁰

Analytical positivists asserted that law was a self-sufficient system of legal rules that the sovereign issues in the form of commands to the governed. These commands did not depend for legitimacy on extraneous considerations such as reason, ethics, morals, or even social consequences. However, the sovereign's

will was law only if it was developed according to duly established procedures, such as the enactments of a national legislature.

Thus, the apartheid laws passed by the previously all-white South African legislature were “the law” of that country at that time to the same extent that civil rights legislation enacted by the U. S. Congress was the law of this country. Each of these lawmaking bodies was exercising sovereign power in accordance with provisions of a national constitution. Positivists would maintain that individuals and governmental officials have no right to disobey laws with which they personally disagree due to moral, ethical, or policy objections. Positivists would also maintain that trial jurors have a legal obligation to apply the law according to the judge’s instructions, even if that means disregarding strongly held personal beliefs about the wisdom of the law or its application in a particular factual dispute.¹¹

Members of this philosophical school would view disputes about the goodness or badness of legal rules as extra-legal. They would maintain that such issues do not relate to the law as it is. This approach promotes stability and security. It also legitimizes governmental line drawing (such as laws that specify the age at which people can lawfully drink or vote, or those that determine automobile speed limits).

V. Legal Realists¹²

During the early decades of the twentieth century, the social sciences were emerging. Academics and judges were attempting to borrow the scientific methods that had been used to study the natural and physical sciences and use them to examine social institutions. From the late 1920s through the middle 1930s, juries, and judges in particular, were subjected to empirical scrutiny by reformists such as Jerome Frank¹³ and Karl Llewellyn,¹⁴ who called themselves legal realists. The realists focused on the extent to which actual practices varied from the formal legal rules. They believed that judges were influenced more by their personal convictions than by established and immutable rules. Llewellyn made a very important distinction between the legal rules and precedent-setting cases that were often cited as the basis for deciding why cases were won and lost (which he called “paper” rules) and the “real” rules of decisions that were undisclosed unless re-