２０２２年度大学院博士後期課程入学試験問題

研 究 科 名	科　目　名
法学研究科 法律学専攻	英　　語(No. 1)

次の問１と問２の両方について解答しなさい。

問１　次の英文を日本語に訳しなさい。

THE doctrine of contract has been so thoroughly remodelled to meet the needs of modern times, that there is less necessity here than elsewhere for historical research. It has been so ably discussed that there is less room here than elsewhere for essentially new analysis. But a short account of the growth of modern doctrines, whether necessary or not, will at least be interesting, while an analysis of their main characteristics cannot be omitted, and may present some new features.

It is popularly supposed that the oldest forms of contract known to our law are covenant and debt, and they are of early date, no doubt. But there are other contracts still in use which, although they have in some degree put on modern forms, at least suggest the question whether they were not of equally early appearance.

One of these, the promissory oath, is no longer the foundation of any rights in private law. It is used, but mainly as a solemnity connected with entering upon a public office. The judge swears that he will execute justice according to law, the juryman that he will find his verdict according to law and the evidence, the newly adopted citizen that he will bear true faith and allegiance to the government of his choice.

But there is another contract which plays a more important part. It may, perhaps, sound paradoxical to mention the contract of suretyship. Suretyship, nowadays, is only an accessory obligation, which presupposes a principal undertaking, and which, so far as the nature of the contract goes, is just like any other. But, as has been pointed out by Laferrière, and very likely by earlier writers, the surety of ancient law was the hostage, and the giving of hostages was by no means confined to international dealings.

出典：Oliver Wendell Jr. Holmes. *The Common Law (1923)*, pp. 247-248. (McGill Guide 9th ed., Boston: Little, Brown, and Company., 1923, Content Downloaded from HeinOnline)

（原文にある本文中の注は省略）

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法学研究科 法律学専攻	英　　語(No. 2)

問２　次の英文を日本語に訳しなさい。

Positive law, which is the object of the Pure Theory of Law, is an order by which human conduct is regulated in a specific way. The regulation is accomplished by provisions which set forth how men ought to behave. Such provisions are called norms, and either arise through custom, as do the norms of the common law, or are enacted by conscious acts of certain organs aiming to create law, as a legislature acting in its law-making capacity.

Legal norms may be general or individual in character. They may regulate beforehand, in an abstract way, an undetermined number of cases, as does the norm that if anyone steals he is to be punished by a court; or they may relate to a single case, as does a judicial decision which decrees that A is to suffer imprisonment for six months because he stole a horse from B. Jurisprudence sees the law as a system of general and individual norms. Facts are considered in this jurisprudence only to the extent that they form the content of legal norms. For example: jurisprudence takes cognizance of the procedure by which legal norms are created, for this procedure is prescribed by the norms of the constitution; of the delict, because it is defined by a norm as a condition of the sanction; of the sanction, which is ordered by a legal norm as a consequence of a delict. Only norms---provisions as to how individuals ought to behave---are objects of jurisprudence, never the actual behavior of individuals.

If we say that a norm "exists" we mean that a norm is valid. Norms are valid for those whose conduct they regulate. To say that a norm is valid for an individual means that the individual ought to conduct himself as the norm prescribes; it does not mean that the individual necessarily behaves so that his conduct actually corresponds to the norm. The latter relationship is expressed by saying that the norm is efficacious. Validity and efficacy are two distinct qualities; and yet there is a certain connection between the two. Jurisprudence regards a legal norm as valid only if it belongs to a legal order that is by and large efficacious; that is, if the individuals whose conduct is regulated by the legal order in the main actually do conduct themselves as they should according to the legal order. If a legal order loses its efficacy for any reason, then jurisprudence regards its norms as no longer valid. Still, the distinction between validity and efficacy is a necessary one, for it is possible that in a legal order which is on the whole efficacious, and hence regarded as valid, a single legal norm may be valid but not efficacious in a concrete instance, because, as a matter of fact, it was not obeyed or applied although it ought to have been. Jurisprudence regards law as a system of valid norms. It cannot dispense with the concept of validity as a different concept from that of efficacy if it wishes to present the specific sense of "ought" in which the norms of the law apply to the individuals whose conduct they regulate. It is this "ought" which is expressed in the concept of validity as distinguished from efficacy.

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If jurisprudence is to present law as a system of valid norms, the propositions by which it describes its object must be "ought" propositions, statements in which an "ought," not an "is," is expressed. But the propositions of jurisprudence are not themselves norms. They establish neither duties nor rights. Norms by which individuals are obligated and empowered issue only from the law-creating authority. The jurist, as the theoretical exponent of the law, presents these norms in propositions that have a purely descriptive sense, statements which only describe the "ought" of the legal norm. It is of the greatest importance to distinguish clearly between legal norms which comprise the object of jurisprudence and the statements of jurisprudence describing that object. These statements may be called "rules of law" in contradistinction to the "legal norms" issued by the legal authority.

The rule of law, using the term in a descriptive sense, is, like the law of nature, a hypothetical judgment that attaches a specific consequence to a specific condition. But between the law of nature and the rule of law there exists only an analogy. The difference lies in the sense in which condition and consequence are connected. The law of nature affirms that when an occurrence (the cause) takes place, another occurrence (the effect) follows. The rule of law, using the term in a descriptive sense, says that if one individual behaves in a certain manner, another individual ought to behave in a given way. The difference between natural science and jurisprudence lies not in the logical structure of the propositions describing the object, but rather in the object itself, and hence in the meaning of the description. Natural science describes its object---nature---in *is*-propositions; jurisprudence describes its object---law---in *ought*-propositions. In view of the specific sense of the propositions in which jurisprudence describes its object, it can be called a normative theory of the law. This is what is meant by a specifically "juristic" view of the law.

出典：　Hans Kelsen. *What is Justice: Justice, Law, and Politics in the Mirror of Science* (1960), pp.267-269. (McGill Guide 9th ed., Berkeley: University of California Press., 1960, Content Downloaded from HeinOnline)