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仲　人 注译

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凡　例

一、中央司法部有鉴于法律英语之迫切需要，决定于1985年春在华东政法学院举办全国首届法律英语师资进修班，以各政法学院和大学法律系的现有英语和法律教师为对象。本书编者担任主讲并负责编写教本。此即本书之由来。

二、鉴于进修教师结业后的工作对象，为求实用，本书之编选注译均以法律专业大学本科高年级生、研究生以及涉外律师和其他涉外司法人员以及外贸工作者为对象。

三、取材来源有来自报章、也有来自专书；包括广泛的法律部门和不同的法律文体；涉及的虽以英美法为主，亦兼及其它国家（包括南斯拉夫、荷兰、突尼斯、古巴等等）的法律；文字则深浅兼顾，难易互见。其目的在于加强本教材对读者对象的适应性。

四、对英语原文，基本上只作删节而不予改写，仅于确因删节所必需时才由编者作必要的文字加工。这样，使读者在学好本书后能直接阅读英语法学原著。

五、为便利教学，各篇之后都附有注释和参考译文。注释，原则上以法律术语和表达法为重点，属基础普通英语语言问题一般不注。词语之含义和用法在参考译文中概然可见的，一般也不再作注释。考虑到教学上可根据具体情况改变本书

各篇的排列次序并体现重复率，故某些常用的法律术语在全书注释中反复出现。

六、本教材初稿在使用中蒙学员热情鼓励并提出宝贵意见，从而使编注者得以斟酌情况于本书定稿时有所修正。为此，特志谢忱，并希望本书读者亦能不吝指教，以便再版时改进。

编　者

1985年国庆节于上海

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1. Law and Linguistics

Language being the law's vehicle of expression,it is important for the lawyer to give special attention to the study of language. Lord Mansfield, one of the most famous of English judges, once observed that"most of the disputes in the world arise from words". This is a direct result of the lack of precision in the meaning of nearly every word. Till this century neither law nor linguistic science was sufficiently conscious of this fact.

Einsteinian physics indicated to the world of scholarship the lack of exactitude even in scientific language and the lack of certainty in concepts. The researches of Bertrand Russell and Wittgenstein drew attention to the difficulties of working out legal language free of all the emotive values attendant on its ordinary use. The work of Wittgenstein in particular had a profound influence on the thinking of linguistic researchers and of lawyers concerned with the meaning of words and the vagueness of the law.

The work of scientists and logicians thus gave a fillip to semantics, a branch of study concerned with the meaning of meaning. Developments in semantics caused lawyers to see legal language in a new light, especially through the stress laid by semantics on the lack of "referents" for much legal terminology. If a person uses the word-symbol "table", there is a clearly demonstrable "referent" lying behind the symbol. If on the other hand one speaks of "right" or "duty" or "justice",

there is no such "referent" to which one can point and consequently a need to define the abstraction in question by reference to other abstractions. Legal language then becomes largely a parade of abstractions. Each attempt at definition enlists the aid of words which themselves need definition and thus the process continues without at any stage enjoying the benefit of an anchor in some material "referent". Jerome Frank, the American realist jurist, took up this study in relation to the law and from his work there has resulted a greater realisation of the uncertainties of many concepts and terms which lawyers had earlier assumed to be definite. The sciences have also shown that most words turn "cloudy at the edges", for, apart from their core meaning (on which there might be agreement), every word has overtones which are different to different recipients.

All these difficulties make for problems of draftsmanship as well as of interpretation. The legal draftsman attempts to cover every situation that might arise in the operation of his statute but may fail to foreshadow some interpretations which may be placed upon the words he has chosen. Likewise he may fail to foreshadow some situation which arises under the statute and when it does arise there is again a question of interpretation of the words he has used to determine whether they can be stretched to cover the unforeseen situation. Rules of interpretation have been worked out to assist judges and lawyers in this process. One difficulty peculiar to legal language is that neither draftsman nor judge nor legislator can be consulted at a later

point of time regarding the meanings of words used by them. It is therefore necessary for the language to be construed objectively and for a reasonable meaning to be placed upon it even though that meaning might in fact be different to that which was in fact intended by the writer.

The difficulties of interpreting language can be demonstrated also from the old scholastic problems given to students of logic in the middle ages:"How many hairs make a beard?" "How many books make a library?" If a hundred do, would 75 or 50 or 40? A stage comes when one begins to be somewhat uncertain, although there are cases which clearly fall on one side or the other. It is these marginal cases that present most difficulty in problems of legal interpretation. Stuart Chase, a semanticist, has pointed out that the more culture grows in complexity the less reliable language becomes and the more simple it is to undermine people's rights. In the legal process there is so much confusion that he even suggests a mandatory study of some kind of semantic discipline for every judge, lawyer and jury-man.

Law is an exercise in communication between authority and the public. There was a time when the rudiments of the law applicable to a community could have been communicated adequately to the public by discussion among the tribe or in the market place. Today the problem is far too complex to be attempted without specialized study. Especially in multi-lingual societies, there is a great problem for there is often for some sections of the population, a legal blackout caused

by difficulties in communication. The question whether language can be planned to suit the needs of a community is becoming the subject of specialised study. This is an inter-disciplinary study where law and linguistics must go hand in hand.

注 释

law：法(律)，法学

lawyer：律师，法学家，法律工作者

Lord Mansfield：曼斯斐尔德勋爵(1705-1793)，生于苏格兰，姓 Murray 名 William，历任英司法部次长(1742 年)，司法总长(1754)和王座法院院长(1756-1788)，继 Sir John Holt(1642-1710)之后，最终完成了把商事习惯法(law merchant)纳入普通法(common law)的工作。

dispute：纠纷

Bertrand Russell：伯特兰·罗素(1872-1970)，英国数学家，哲学家。

Ludwig Joseph Johan Wittgenstein：维特根斯坦(1889-1951)，奥地利哲学家，语言问题在其所著《哲学的探索》中占主要地位。

fillip：刺激；give a fillip to…促进……

Semantics：语义学

referent：语词对象

right：权利

duty：义务

Justice：公正、司法、法制

Jerome Frank：杰罗姆·弗兰克(1889-1957)，美国法学家，曾长期当律师。1941 年后任联邦巡回上诉法院法官，继承了霍姆斯的现实主义而成了新现实主义法学派的代表人物。他认为，在作出判决之前，只能有法律的推测，而超脱于一个个具体判决的一般地抽象的法律，那纯粹是徒有其名的。由此出发，他认为所谓法律的稳定性，

只是出于儿童心理的一种错觉而已。

jurist：法学家

draftsmanship：起草艺术，起草工作

legal draftsman：法律起草工作者

operation：实施，施行

statute：制定法，法律（单行法）

construe：解释

参考译文

法律与语言学

语言是表述法律的工具，因此从事法律的人应特别重视语言研究。英国最著名的法官之一曼斯斐尔德勋爵曾经指出："世界上的大多数纠纷都是由词语所引起的"。其直接原因在于几乎每一个词的含义都缺乏精确性。这一事实直到本世纪前还没有被法律和语言学所充分认识到。

爱因斯坦的物理学向学术世界表明：甚至连科学语言也缺乏确切性，各种概念都缺乏其确定性。伯特兰·罗素和维特根斯坦的研究唤起了人们的注意：要形成一种丝毫不带一般语言之感情色彩的法律语言会有多少困难。特别是维特根斯坦的著作，对语言学研究者的想法和关心词语含义、关心法律之含糊不清的律师的想法，都具有深远的影响。

这样，科学家和逻辑学家就促进了语义学——一门研究意义之意义的学问。语义学的发展使法律工作者重新认识法律语言，特别是因为语义学强调许多法律术语都缺乏"语词对象"。如果有人使用词语符号"桌子"，那么这一符号就在客观上代表一个明确可指的"语词对象"。另一方面，如果有人谈到"权利"或"义务"或"公正"，那么就不存在上述明确可指的"语词对象"，从而势必借助于其它抽象概念来给这些抽象概念下定义了。于是，法律语言基本上就成为抽象概念的展览了。每一个下定义的尝试，都得求助于词语，而那些词语本身也需要有人去下定

义；因此，这一过程就会一直继续下去而不论到哪个阶段也无法在某种物质性的"语词对象"上享受有所依傍之利。对此，美国现实主义法学家杰罗姆·弗兰克结合法律，进行了研究；结果，人们进一步认识到，许多概念和术语是不确定的，而在以前，法律工作者们还以为那许多概念和术语已是确定不移的呢。各门科学也表明：大多数语词到了"外缘就模糊不清"了，因为除了其核心含义（这是可以取得一致理解的）之外，每个词都有其次要的词义；而对这种次要含义，却仁者见仁、智者见智了。

所有这些困难都给法律的起草和解释工作造成了许多问题。法律起草工作者试图把该法实施时可能发生的各种情况都包罗无遗，而对人们可能就他所选用的语词所作的某些解释，却会暗于预见。同样，他也可能没有预见到适用该法而出现的某种情况；而这种情况确实出现时，就会发生这样的问题：如何解释他所使用的词语以便确定这些词语是否能扩大适用于未能预见的情况。为了帮助法官和律师进行解释，人们订出了种种解释规则。法律语言所特有的一个困难是：不论是起草人、法官还是立法者所使用的词语，其含义如何，事后是无法再去请教他们的。因此，必须对语言作客观的解释并赋予合理的含义——即使该含义也许事实上是不同于执笔人实际意图的。

解释语言所遇到的种种困难也可以从中世纪老学究出给逻辑学学生的这些习题中得到印证："多少根须毛才算得上有胡须？""多少本书才算得上一个图书馆？"如果得一百根或一百本才行，那么七十五或五十或四十行不行呢？总会有这样一个阶段：人们开始有点儿说不上了——尽管明确地属于"行"或"不行"的情况有的是。法律解释问题中的大部分困难，正是这些边缘情况所引起的。语义学家司徒契士指出：文化越复杂，语言越不可靠；于是就越容易侵犯人民的权利。法律程序中词义之如此含混不清，以致他甚至提出了这样的建议：凡法官、律师和陪审官都必须学习一门语义学的课程。

法律是权威与群众之间的一项交际活动。历史上有过这样的时代：当初适用于社会的法律，尚处于萌芽状态，能通过部落内或市集上的讨论而适当地传达给群众。时至今日，问题实在太复杂了，以致未经专门研究是无人去问津的。特别在多种语言的社会里，由于对某些阶层的群

众来说往往因交际障碍而形成法律空白，所以问题很大。是否能使语言适应社会需要的问题正逐渐成为专门研究的课题。这是一种法律与语言学必须联合进行的学科间研究。

2. Language in International Business Transactions

Differences in language understanding between negotiating opposites raise some peril in every international business transaction because each negotiating party quite naturally prefers to use the language whose nuances he knows best. For at least one of the parties that language is not American(United States). Words which have a clear and culturally acceptable meaning in English or American (United States) may be unclear or culturally offensive in another tongue; the converse may be true as well. For example, "Detente", as a French word, has a clear meaning but does not translate easily into the English language; the consequences of the translation difficulty have worldwide importance. Because some hand gestures and body movements are acceptable in one culture yet deeply offensive in another culture, they are rarely an appropriate communications aid in international negotiations. The use of interpreters substantially slows the pace of negotiations and may spawn further difficulties to the extent that the interpreter is one more fallible person taking part in the negotiations; interpreting is exhausting work which requires its own periods of rest. During an international commercial arbitration in Los Angeles, a German witness testified in German alongside a skilled interpreter whose job was to translate the testimony into English. While the judges waited, it sometimes took the interpreter's efforts, the efforts of a United States law-

yer fluent in German, and the efforts of a German lawyer fluent in English to produce an oral translation which all agreed was adequately accurate. Even assuming the availability of an accurate literal translation, a Japanese person saying "yes" in answer to a question may not be signifying agreement with the question proposed but may only mean, "Yes, I understand the question."

The peril of language difficulty is most acute in negotiations between an investor from the United States and a negotiating opposite who speaks the English language because each party may be embarrassed to raise a language question. For example, in the middle of a telephone conversation between a caller from the United States and another person in England, a London operator interrupted to ask if the caller was "through". Upon hearing the American answer, "No, I am not through", the operator disconnected the circuit, apologized, and once again dialed the call "through". A few minutes later the London operator came on the line again, interrupting the parties' conversation, to ask again if the United States caller was "through". Desiring to continue the conversation without further interruption, the caller this time said "Yes, thank you", and the operator left the line connected.

Even exceptionally able interpreters may have difficulty if a United States investor uses American slang in communicating during an international negotiation. The American business person's penchant for using "ball park" figures may not be shared or understood in countries where baseball is not a popular sport.

A United States investor in Australia, who wishes to "root" for his favorite team in a public place, may be subject to legal liability for suggesting sexual intercourse in that public place; Australians "barrack" for a favorite team.

The careful language normally used by American lawyers in commercial contracts may prove risky. While legally trained persons in some countries (e. g., the Soviet Union) share, with United States lawyers, an affinity for written contracts which set out the full extent of every right and duty of each party, the practice in other countries tends toward more generally worded agreements that leave it to the parties (e.g., in Japan) or to the courts (e.g., in Germany) to supply any necessary details. A detailed, exhaustively worded, draft contract which is introduced during negotiations with Japanese persons, may arouse resentment and distrust; a contract relationship between the parties is perceived by Japanese to be something which is shaped mutually as mutual understanding is developed. A German negotiating opposite may not be willing to sign an exhaustively worded contract because he knows that German courts dislike such agreements; the courts take the position that they know the law and do not need a contract to state what is already known.

An assumption that lawyers "on the other side will balance things out" may be displaced because lawyers in many countries play a different, and far less powerful, role than United States lawyers play in shaping an international business transaction. A United States investor's negotiating opposite's team does not contain