

经济法

孟 霜/编著

高等院校教

高等院校教材

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孟 霜 编著

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前言

本书是一本介绍我国经济法律制度的著作,阐述了法学及经济法基础理论以及一些重要的经济部门法。同时也涉及一些与经济法密切联系的民商部门法。具体包括公司法、合伙企业法、个人独资企业法、企业破产法、合同法、工业产权法、产品质量法、反不正当竞争法、消费者权益保护法、证券法等。本书以已颁布的现行法律、法规为依据,尽量使用通俗易懂的语言,以激发学生的学习兴趣。本书以中英文对照方式写成,以适应高等教育国际化的趋势,适合高等院校本专科专业学生、经济类学生及法学类学生使用。

经济法既是新兴的独立的法学部门,也是一个复杂的系统科学。 而双语教学更是一个富有挑战的新尝试,我深知本人水平有限,且由 于时间仓促,本教材肯定存在许多不足之处,恳请读者批评指正。同 时,对给予本课程巨大支持的天津商业大学的领导、同仁及给予本书 出版以巨大帮助的中国政法大学出版社表示深深的谢意!

> 孟 霜 2009年9月

Preface

This book is about the economic legal system of our mother country. This book debated basic theory of law and economic law. It also focused important economic, civil and business legal system such as company law, partnership law, sole proprietorship enterprise law, bankrupt law, contract law, industrial property law, product quality law, anti – unfair competition law, protection of the rights and interests of consumers law, securities law, and so on. According to our laws and regulations in effect, we should accomplish this book in plain language. This book is written by English and Chinese in order to follow the trend that education will be internationalized, which is suitable for economic and legal students of college and university.

Economic law is a new and sole legal department, but also a completed science system. Bio-language teaching is a new taste full of charging. Because of my limited knowledge and time, there must be lots of shortcomings in this book. I urged the readers could give me critics and advices. Meanwhile, much thanks for leaders and comrades of Tianjin University of commerce and China university of Politics Science and Law Press who give me great help.

Meng Shuang Sep. 2009



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第一章 法学基础理论 Chapter 1 Basic Theory of Law

第一节 法的概念

Section 1 What is Law?

一、法的概念

Concept of law

什么是法?虽然很多人都试图给法下一个完整而明确的定义,但同时也会遭 到很多人的反对。或许我们最好可以这样定义法: 法是调整个人、组织与社会之 间各种关系的具有执行力的规则的总称。而法学是一门以法及其价值为研究对象 的学科。法哲学家们认为逻辑推理、社会理想、人类历史、宗教文化也促成了法 律的形成。自然法学派学者亚里士多德和圣・托玛斯・阿奎那认为法应体现公众 的普遍的道德伦理准则,是应然的法。200 年前托玛斯·杰斐逊在美国《独立宣 言》中写道:

Law is difficult to define. Many people have tried to develop a complete and precise definition of law, and many people disagree about the definition of law. Perhaps the best definition of law is "the enforceable rules that govern relationships between individuals and organizations and their society". Jurisprudence is the study of law and the values that are used in determining what the law is or should be. Legal philosophers believe that logic, ideals, history, religion, and culture help form law. Natural law theorists, such as Aristotle and Saint Thomas Aquinas, believed that law should reflect universal moral and ethical principles, a type of ideal law. Thomas Jefferson wrote in the United States Declaration of Independence over 200 years ago:

在人类事务发展的过程中,当一个民族必须解除同另一个民族的联系,并按 照自然法则和上帝的旨意,以独立平等的身份立于世界列国之林时,出于对人类 舆论的尊重,必须把驱使他们独立的原因予以宣布。

When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes, which impel them to the separation.

我们认为下述真理是不言而喻的:人人生而平等,造物主赋予他们若干不可让 让与的权利,其中包括生存权、自由权和追求幸福的权利。为了保障这些权利, 人们才在他们中间建立政府,而政府的正当权利,则是经被统治者同意授予的。

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness, that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

在西方国家,法被看成是由议会或法院所制定的能被公众普遍接受的一系列原则的总和。因而法是人类为自己而设定的个人、组织与政府之间,具有强制执行力的行为规则。如果违反了这些行为规则,法律还会提供解决这些争端的途径,并对违法行为加以处罚。

In the west, the law is a body of generally accepted principles established by Parliament and by the courts. Law is therefore made by us for us, is legally enforceable and has developed to set standards of conduct between people, businesses and government. If these standards of conduct are not adhered to, the law provides for resolving the conflicts that arise, and punishing those who breach these standards of conduct.

依据马克思主义法学原理,法是体现掌握国家政权的统治阶级的意志、由国家制定或认可并由国家强制力保证实施的、具有普遍约束力的社会规范的总和。

On Marxism, the law are enforceable social rules embodying the will of ruling class, which established and recognized by nation.

在我国当代法学理论中,法律有广义和狭义之分。广义的"法律"指法律的整体。例如,就我国现在的法律而论,它包括作为根本法的宪法、全国人民代表大会及其常务委员会制定的法律、国务院制定的行政法规、地方国家权力机关制定的地方性法规、国务院各部委和省级人民政府制定的规章等。狭义的法律仅指全国人民代表大会及其常务委员会制定的法律。

In the legal theory, law is explained in broad and narrow sense. The law means a body of the law in broad sense. For example, in the legal system of our country the law including constitution, the law which formulated by the National people's Congress, administrative regulations formulated by the State Council local regulations formulated by local authority, the orders formulated by departments of senate and province government. The law in narrow sense means the law formulated by the National People's Con-

gress and the Standing Committee.

二、法的特征

Characters of law

法的特征是法的本质的外化,是法区别于其他事物和现象的特征和标志。法是调整人们行为的社会规范,但社会规范却不限于法律,还有道德规范、宗教规范以及党派、团体等非国家组织的章程、条例和习惯,等等。作为特殊的社会规范,法与其他社会规范有着明显的区别,其主要特征表现为:

The characteristics of law, which reflect the nature of law, are the mark and symbol that distinguish law from other things and phenomena. Law is one of social norms that regulate behaviors of people. However, not all social norms are law. Social norms also include other norms such as moral standards, religious norms and customs, regulations and rules of other non-governmental organizations. Law, as a special part of social norms, has an apparent difference from other norms. Following are the main characteristics of law:

(一) 法是调整人的行为的社会规范

Law is a social norm regulating human behaviors

在社会体系中,法属于社会规范的范畴。人的行为是法的调整对象。也可以说,法的调整对象是社会关系。法调整人的行为,同时也就调整了社会关系。社会关系是人们之间相互交往所发生的关系,法通过调整人们的行为来调控社会关系。法的规范性表现在:它明确规定人们的行为模式,即允许做什么,禁止做什么,必须做什么。同时,它还规定了违背法定行为模式所要承担的法律后果。法的概括性表现在,它适用于一般的人而不是具体的、特定的人,它可以在相同的情况下反复多次使用。

Law are the rules adjusted human behavior. In the social system, laws are the social rules. Human being's behavior is adjusted by law. That is to say law's objects are social relations. Law adjust human being's behavior meanwhile regulate social relations which are established during the contact among people by means of regulating people's behaviors. The regulation by law can be summarized as follows: it provides a behavioral pattern for people, namely, permitting people to do something, prohibiting people from doing something. It also stipulates the legal responsibility for someone breaking the legal behavior pattern. The generality of law is that law applies to general populace, not to a specific person, and it can be used repeatedly under the same situation.

(二) 法是具有国家意志的社会规范

Law is a social norm reflecting the will of a state

社会规范的种类繁多,除了法之外,还有道德规范、宗教规范、风俗习惯、

社会礼仪、职业规范、社会组织的规章制度等。法区别于其他规范的首要之处在于,法是由国家创立的社会规范。国家创立法的方式主要有两种:一是制定,即国家机关通过立法活动创制出新的规范;二是认可,即国家机关赋予某些既存的社会规范以法律效力。如国家司法机关在法律没有相应规定的情况下,依据社会的风俗习惯、一般道德规范来审判案件,实际上就是认可这些风俗习惯、道德规范为法;或者赋予先前的判决所确认的规范以法律效力,这种情况仅仅存在于英国、美国等实行判例法制度的国家。

There are so many kinds of society rules: law, morality, religion, customs, social etiquette, professional regulations, organization bylaws. The difference between law and other rules is that law are the rules formulated by nation. There are two approaches to create laws by nation: one is formulation, which means the authority create new rules; the other is ratification, that means the authority endowed existing social rules with validity. For example, judicial organizations try a case according to social custom or morality without related laws. Or endowed the regulations from forgoing judgment with validity. Such as English, America and so on common law countries.

法在本质上是统治阶级意志的体现,但并非统治阶级意志都能表现为法律。 统治阶级意志只有上升为国家意志才能表现为法律。这种国家意志性表现为三个 方面:第一,法是由国家制定和认可的。非经国家制定或认可的规范,不具有国 家意志性,也就不能获得法律表现形式;第二,法由国家强制力保证实施。法是 国家意志的体现,并以国家强制力保障其实施;第三,法对全体公民具有普遍约 束力。法的国家意志性要求全体社会成员都无一例外地普遍遵守,任何国家机 关、社会团体均没有超越法律之上的特权。

Law reflects basically the will of a ruling class while not all the will of a ruling class can be reflected in law, and only when the will is turned into the will of a state it becomes law. The will of a state can be shown in the following three aspects: ① law is enacted or accepted by the state, and the norm without being enacted or accepted by the state should not be the will of a state and should not take the form of law; ② law, as the will of a state, is guaranteed by the enforcement of the state power; and ③ law has a universally binding force on all the citizens in a country. Every citizen is required to obey law, and neither state organ, social organization nor individual is privileged to go beyond the law.

(三) 法是规定人们权利和义务的社会规范

Law is a social norm providing rights and obligations for people

凡是社会规范,一般都涉及权利和义务。法是以权利和义务为机制来影响人

们的行为动机,达到指引人们的行为、调节社会关系的目的,因而法以设定权利义务为主要内容。权利和义务的实现,能使有利于统治阶级的现实社会关系得到规范和巩固,使社会生活形成秩序。

In general, all social norms involve both rights and duties. Law affects People's behaviors through the mechanism of rights and obligations. To achieve the aim of guiding people's behaviors and regulating social relations, the main content of law is to stipulate rights and obligations. When rights and obligations made in law come true, the realistic social relations that are favorable to ruling class would be regulated and strengthened, and the social life is put into order.

第二节 法的渊源

Section 2 Sources of Law

法的渊源是指法的表现形式,根据法的制定机关和法的效力不同,我国法的 渊源可以有如下划分:

Sources of law refer to expressive formats of law. According to the different enacting organ and effect of law, sources of law of China can be classified as follows:

一、宪法

Constitution

宪法是国家的根本法。宪法规定国家的根本性问题,即规定一个国家的根本制度、根本原则、根本任务、公民的基本权利和义务、国家机构等国家最根本、最重大的问题。宪法具有最高的法律效力。我国宪法修改权由全国人民代表大会进行。

Constitution is the basic law of the state. Constitution stipulates the basic affairs of the state, including the basic systems, principles and tasks of the state, the fundamental rights and duties of citizens, the structure of the state. The constitution has the supreme authority. Being amended of our state's constitution by the National People's Congress.

二、法律

Law

全国人民代表大会和全国人民代表大会常务委员会行使国家立法权。全国人民代表大会制定和修改刑事、民事、国家机构的和其他的基本法律。全国人民代表大会常务委员会制定和修改除应当由全国人民代表大会制定的法律以外的其他

法律;在全国人民代表大会闭会期间,对全国人民代表大会制定的法律进行部分补充和修改,但是不得同该法律的基本原则相抵触。

State legislative power shall be exercised by the National People's Congress and its Standing Committee. The National People's Congress enacts and amends criminal, civil, and state organic laws and other basic laws. The Standing Committee of the National People's Congress enacts and amends laws other than those that shall be enacted by the National People's Congress; during the period of prorogation of the National People's Congress, the Standing Committee thereof may make partial amendments and supplements to the laws enacted by the National People's Congress, but such amendment or supplement shall not contravene the basic principles of the corresponding laws.

三、行政法规

Administrative regulations

国务院根据宪法和法律,制定行政法规。行政法规由国务院组织起草。国务院有关部门认为需要制定行政法规的,应当向国务院报请立项。

The State Council enacts administrative regulations in accordance with the Constitution and laws. An administrative regulation shall be drafted by the State Council. Where a relevant agency of the State Council deems it necessary to formulate an administrative regulation, it shall apply to the State Council for relevant arrangements to be made.

应当由全国人民代表大会及其常务委员会制定法律的事项,国务院根据全国 人民代表大会及其常务委员会的授权决定先制定行政法规,经过实践检验,制定 法律的条件成熟时,国务院应当及时提请全国人民代表大会及其常务委员会制定 法律。行政法规由总理签署国务院令公布。

For a matter for which a law should have been formulated by the National People's Congress and its Standing Committee, the State Council may, according to the enabling decision of the National People's Congress and its Standing Committee, formulate an administrative regulation instead. If such an administrative regulation proves viable in practice, when necessary conditions for enacting a relevant law arise, the State Council shall, in timely fashion, propose such enactment to the National People's Congress and its Standing Committee. An administrative regulation shall be promulgated by way of an Order of the State Council signed by the Premier.

四、地方性法规、自治条例和单行条例

Local regulations, autonomous regulations and special rules

省、自治区、直辖市的人民代表大会及其常务委员会根据本行政区域的具体情况和实际需要,在不同宪法、法律、行政法规相抵触的前提下,可以制定地方