法学英语选读

陈忠诚　编

上海翻译出版公司

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A Selection
from
Legal Literature in English

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前　言

本书以基础英语已过关的法律专业本科生、各省市司法干部管理院校学员、具有大专以上英语专业毕业生程度的司法工作者和对外经济贸易工作者为主要对象。

考虑到对教学实际的体会和一九八四年夏黄山《大学文科统编英语教科书法律分册》审稿会议上所反映的情况和意见，本书各篇力求以较短的篇幅，提供多样化的法律信息。这样既可保证提供覆盖面较广的法律专业词汇量并体现其复现率，又可为读者提供外国法（主要是英美法）的信息，使读者在法律与英语两方面都能有所得益。

书中各篇的先后排列次序以文字的难易长短和内容的学科体系两个标准综合平衡而定，因为既然是法学英语，势必兼顾语言和法律两方面的深浅难易。但这种综合平衡，亦有其弊：鱼与熊掌不可得兼——未必能两全其美。因此，实际使用时，根据教学情况，不妨作出必要的调整。

本书除本文外，另作注释并附有参考译文。参考译文仅供参考；注释以法律专业用语为主，属基本词汇或非法律文字特有之语音和语法特点一般不注，旨在使读者有独立工作、提高阅读理解能力之自学余地。为求实效并节约篇幅，本书不配练习，以便教师能根据学员情况布置有针对性的作业。对自学者来说，可在掌握词汇和整篇课文后，对课文试行来回翻译（英→汉→英）。

以本书进行教学，可培养读者阅读、理解英语法律文字

并用汉语予以表达的知识和技能，故主要的教学方法，是历史悠久但为本书目的却还是行之有效的语法翻译法（这种教学法英语教师都知道，不必在此细说）。如果具体对象有具体要求（如需进行法律英语口译），自应另行采用其他的教学方法。

本书取材来源大多是八十年代的英语原版读物。各篇大多有所删节并在文字上作必要的加工，但加工以无损于原作风貌者为限。

法律英语教材建设尚在初创阶段，有待进一步开发。欢迎读者的反馈，以便编者能对本书的效果做到心中有数，以利改革。

陈忠诚

一九八六年于上海

目　录

1

Family of Socialist Laws

The socialist *laws*[1] make up a separate family, distinct from the other *legal families*[2]. Those socialist countries which formerly belonged to the *Romano-Germanic*[3] family have preserved some of the characteristics of Romano-Germanic law. But apart from these points of similarity, there do exist such differences that it seems proper to consider the socialist laws as detached from the Romano-Germanic family — the socialist *jurists*[4] most decidedly do — and as constituting a distinct legal family, at least at the present time.

The originality of socialist laws is particularly evident because of the revolutionary nature attributed to them, in opposition to the somewhat static character of Romano-Germanic laws, the proclaimed ambition of socialist jurists is to overturn society and create the conditions of a new social order in which the very concepts of state and law will disappear. The sole source of Socialist rules of law lies with legislators who express popular will, narrowly guided by the Communist Party. However, *legal science*[5] is not principally counted upon to create the new order; law according to Marxism-Leninism — a scientific truth — is strictly subordinate to the task of creating a new economic structure. In execution of its teachings, all means of production have been collectivized. As a result, the field of possible *private law*[6] relationships between citizens is extraordinarily limited compared to the pre-Marxist period; private law has lost its preeminence — all has now become *public law*[7]. This new concept sub-

tracts from the realm of law a whole series of rules which jurists of the bourgeois countries would consider legal rules.

The family of socialist laws originated in the Union of Soviet Socialist Republics where these ideas prevailed and a new law developed since the 1917 Revolution. However, the laws of the socialist or people's republics of Europe and Asia must be classed as groups distinct from *Soviet law*[8]. These laws belong to the socialist family, but in the first group a greater persistence of characteristics properly Romano-Germanic is detected, while in the second it is useful to enquire how these new concepts are reconciled in practice with the principles of Far Eastern civilization which governed those societies before the Socialist era.

注 释

1. law: 法(律)，法学
2. legal family: 法系
3. Romano-Germanic: 罗马日耳曼的
4. jurist: 法学家
5. legal science: 法(律科)学
6. private law: 私法
7. public law: 公法
8. Soviet law: 苏维埃法

社会主义法系

社会主义的法独自构成一个法系，与其它法系迥异。那些过去属罗马日耳曼法系的社会主义国家，至今仍保存着罗马日耳曼法系的某些特征。但是除这些相似点之外，也确实存在着如此这般的区别，因此至少在今天，把社会主义的法看作是独立于罗马日耳曼法系而构成一个与之不同的法系（社会主义的法学家是十分坚持这一看法的），看来是恰当的。

社会主义法的独到之处，因该法所具有的革命性而尤为明显。与罗马日耳曼法的不无静止的特征相反，社会主义法学家们公开宣告的雄心壮志，是推翻旧社会，从而为连国家与法的概念本身也将消亡的社会新秩序创造条件。社会主义法律规则的唯一渊源在于表达人民意

志的立法者，他们是严格地受共产党领导的。但法学不是建立新秩序的主要依靠对象。根据马克思列宁主义这一科学的真理，法是严格地从属于创立新的经济结构这一任务的。遵循马克思列宁主义的教导，一切生产资料都集体化了。结果，同马克思以前的时期比较起来，公民之间可能发生私法关系的范围大为缩小了，如今，私法既如强弩之末，一切也就都成了公法。这一新概念把资产阶级各国法学家看作是法律规则的一整套规则，从法的王国中排除出去了。

社会主义法系起源于苏维埃社会主义共和国联盟。那里，上述概念占绝对优势，自一九一七年革命以来，一套新法也已形成。但在分类上，必须把欧、亚社会主义共和国或人民共和国的法列入不同于苏维埃法的类别。虽然这些法律都属社会主义法系，但在欧洲一类中反映出原属罗马日耳曼法特征的残余较多，而在亚洲一类中，则以下探索是有用的，上述新概念是怎样在实践中同社会主义时期以前统治各该社会的远东文明的原则调和起来的。

* * *

Actori incumbit onus probandi.
The burden of proof lies on the plaintiff.
举证之责在于原告。

Aliquis non debet esse judex in propria causa, quia non potest esse judex et pars.
A person ought not to be judge in his own cause, because he cannot act both as judge and party.
任何人不应判断自己的案件，因为谁也不能既是法官又是当事人。

Dormiunt aliquando leges, nunquam moriuntur.
Laws sometimes sleep, but never die.
法律有时会睡着，但决不会死掉。

2

Principle of Socialist Legality in the U.S.S.R.

The utopian position taken up at the time of revolutionary communism, when it was thought possible to *abolish*[1] immediately the *principle of legality*[2] and replace law by revolutionary conscience, has long been a thing of the past. With the affirmation of the principle of socialist legality, law has been given the character and authority it deserves.

At present, discipline is the keynote in all fields: *labour discipline*[3], planning discipline — and *coercion*[4] and law both play an incontestable role. By *conforming* strictly *to*[5] the law, the various parts of the administration, state enterprises, co-operatives and citizens work for the accomplishment of government policy and make way for the advent of communism. Strict *compliance with*[6] the principle of socialist legality, in other words, strict *conformity to*[7] the Soviet *legal order*[8], is absolutely imperative.

But it was only during the period of the *N. E. P.*[9] that the principle of legality was first asserted in the U.S.S.R. Many jurists at the time adopted a noncommittal attitude towards these laws because of their suspicion of subsisting capitalist elements. The full adherence of Soviet jurists to the principle, and the complete victory of the principle, only came about after the abandonment of the N.E.P., when the U.S.S.R. became a completely socialist state. *Under*[10] *current* Soviet *law*[11], *litigation*[12] of any importance involving state enterprises is not resolved by the courts established *under*[10] the *Soviet Constitution*[13], but submitted to distinct *arbitration*[14] organs. As employed here, the word

arbitration is equivocal. It suggests that in dealings between state enterprises, a strict *application of the law*[15] is not made, or that such application may be tempered by other considerations. Whatever the situation may have been originally, it is now quite clear that state enterprises, like citizens, *are* strictly *subject to*[16] the principle of socialist legality, and that dealings among them are rigorously governed by law; the arbitration organs must apply rules of law in the solution of *disputes*[17] among these enterprises, to the exclusion of any decision based on *equity*[18] or some other *non-juridical*[19] consideration.

注 释

1. abolish: 废除
2. principle of legality: 法制原则
3. labour discipline: 劳动纪律
4. coercion: 强制
5. conform to: 遵守
6. compliance with: 遵守
7. conformity to: 遵守
8. legal order: 法律秩序
9. N.E.P. (New Economic Policy): 新经济政策
10. under: 根据
11. current law: 现行法
12. litigation: 诉讼
13. Soviet Constitution: 苏维埃宪法，苏联宪法
14. arbitration: 仲裁
15. application of the law: 法律的适用，适用法律
16. be subject to: 服从
17. dispute: 纠纷
18. equity: 公道
19. non-juridical ['nɔndʒə'ridikəl]: 非法律的

苏联的社会主义法制原则

在革命共产主义时期，人们以为立即废除法制原则并以革命的良知去代替法律是可能的。当时所采取的这一乌托邦式的立场早已成为明日黄花。随着社会主义法制原则的确认，法律被赋予了其应有的特性与权威。

目前，纪律是一切领域的基调：劳动纪律、计划纪律——而强制与法都起着无可争辩的作用。政府各部门、国营企业、合作社和公民都严格守法，从而致力于贯彻政府的政策并为共产主义社会的来临扫清道路。严格遵守社会主义法制原则，亦即严格遵守苏维埃法的秩序——这是绝对必要的。

但只是在新经济政策时期，苏联才第一次断然主张法制原则的。当时的许多法学家对这些法律采取了袖手旁观的态度，因为他们对当时的资本主义分子有怀疑。只是在苏联放弃了新经济政策而成了一个不折不扣的社会主义国家之后，苏联法学家才百分之百地拥护这一原则，这一原则才获得全面的胜利。根据现行苏维埃法，凡涉及国营企业的诉讼(不问其重要程度如何)不是由根据苏维埃宪法成立的各级法院来解决，而是交付独特的仲裁机构去处理的。这里所用的"仲裁"一词，其含义是模糊的。它意味着在国营企业相互打交道中，并不严格适用法律，或者说严格适用法律可因其它考虑而打折扣。但不管原来的情况如何，现在有一点是非常明确的：同公民一样，国营企业要严格服从社会主义法制原则，国营企业间的往来应严格地依法办事；仲裁机构解决国营企业之间的纠纷，必须适用法律规则，而丝毫不能根据公道或其它某种非法律的因素作出任何决定。

3

Res Judicata[1] and *Stare Decisis*[2]

An English judge once said: "A case is only authority for what it actually decides. I entirely deny that it can ever be quoted for a *proposition*[3] that many seem to flow logically from it". Taken literally this view would destroy the doctrine of *stare decisis*, for a case only actually decides the issue between the parties to it, and every application of the *decision*[4] to another case involves an element of abstraction, that is, a *judgment*[5] that the differences between the first case and the second are not legally *material*[6]. A judicial decision has two separate effects. It determines an issue between the parties to a dispute, and it establishes some rule or principle for the future. Every decision is at once an application of the law and a contribution to the fabric of the law itself.

All *legal systems*[7] have a rule that a judicial determination of a case is final. Human institutions are imperfect. Courts will commit errors, but decided cases cannot be reopened simply on an allegation of error. If judicial determination of cases were not final, the legal system would be failing to fulfil its chief purpose, that is, *dispute settlement*[8]. The rule of finality, often called *res judicata* (matter adjudicated) can at times seem to come into direct conflict with principles of *substantive law*[9]. Suppose a *taxpayer*[10] *disputes*[11] an assessment of *income tax*[12], loses, and pays. A month later the Supreme Court of Canada decides a case just like his that establishes that no tax was payable after all. This is very galling to the taxpayer but he has no *remedy*[13]. His case cannot be *heard*[14] again (assuming it is too late for an

appeal[15]), though had it been delayed for a month it would have been decided differently. Further, if A and B are two taxpayers in identical circumstances, and A's case is heard before the Supreme Court of Canada decision, and B's afterwards, the court will be compelled to decide identical cases in contrary ways.

A case in which the court was faced very starkly with such a conflict between finality and justice was *Re Waring*[16]. A and B were *beneficiaries*[17] *under*[18] a single provision in a will. They were left annuities to be paid by the *trustees*[19] of the will tax-free. A question arose as to whether the effect of a certain statute was to reduce the amount payable under this provision. A *litigated*[20] the case in 1942, and lost in the *Court of Appeal*[21]. The trustees then reduced both annuities. In 1946, in another case, the House of Lords held that the Court of Appeal in 1942 had been wrong and that the effect of the statute was not to reduce the amount payable. A and B then demanded payment of the full amount. It seems a strange result that the court should hold that two beneficiaries in identical circumstances were to be treated differently. What of the principle that like cases are to be decided alike? Yet the *anomaly*[22] is inescapable. A is bound by the 1942 case and cannot reopen the same issue. B is entitled, according to the law as declared by the House of Lords in 1946, to be paid in full. It was held that A was entitled only to the reduced amount, but that B could claim the full amount, including *arrears*[23] that ought to have been paid according to the 1946 decision of the House of Lords.

注 释

1. *res judicata* [reis (亦有作 ri:z 的) 'dʒu:di'keite] (matter adjudicated) (亦作 *res adjudicata*)：一事不再理（已经判决的事项）
2. *stare decisis* ['stɑ:rei de'saisis]：

遵循先例

3. proposition: 命题
4. decision: 决定，判决
5. judgment: 判断，判决
6. material: 有关的
7. legal system: 法律制度。有些人把"legal system"(法律制度) 误解为"民主与法制"的"法制"。"法制",英语作"legality"或"justice"等。
8. dispute (n.) settlement: 解决纠纷 (试比较 "to settle disputes")。又,"解决纠纷"亦作 "dispute resolution"。
9. substantive law: 实体法
10. taxpayer: 纳税人
11. dispute (vt.): 对……提出争议
12. income tax: 所得税
13. remedy: 救济
14. hear. 审理，讯问，审问
15. appeal: 上诉
16. Re (关于) Waring: 魏龄一案(案名)
17. beneficiary: 受益人
18. under: 根据
19. trustee: 受(信)托人
20. litigate: 打官司，进行诉讼
21. court of appeal(s): 上诉法院
22. anomaly: 异乎寻常
23. arrears: [多用复数]欠款

一事不再理与遵循先例

一位英国法官曾经说过，"任何一个案件仅仅对于其所实际判决的事项才有权威。引用一个案件来阐明一个看来象是该案逻辑推理结果的命题——这种做法是我完全不同意的。"从字面上理解，上述观点会破坏遵循先例说——任何案件都只是实际判决该案当事人双方之间的争执点，而该判决之适用于另一个案件，则每次都含有抽象概括的因素，亦即每次都把前案与后案之间的差异断定为在法律上是无关紧要的。法院的一项裁判有两个独立的效果：它判定纠纷双方之间的争点，它也为今后立下了某条规则或原则。每一项裁判既是在适用法律，也是在替法律大厦本身添砖加瓦。

一切法律制度都有一条规则：案件在审判上定案之后就终结了。人类社会的各种具体的制度不是十全十美的。法院会犯错误，但已经判定的案件不能只因为有人说声办错了就推倒重来。法院判案如悬而不决，那么法律制度就不能完成解决纠纷这一个主要目的了。这条往

往有"一事不再理"之称的"终结"规则，有时候似乎会同实体法直接发生矛盾。假如某纳税人对所得税的评估提出了异议，结果败诉并缴了税；而一个月以后，加拿大最高法院判了一个与该纳税人的案件正好同样的案件并确定根本不必纳税；这对该纳税人来说是非常令人恼火的，但他无法获得救济。他的案件(假定上诉期已过)不能再次审理了——尽管如果他迟一个月提起诉讼，判决就会不同。又如甲与乙是处境完全相同的两个纳税人，甲案在加拿大最高法院判决之前审理，而乙则在判决之后开审；那么法院就不得不对完全同样的案件作完全相反的处理了。

一个使法院严格地面对如上所述的终结性与公正性两者间的矛盾的案件，是魏龄一案。按某遗嘱中一项简单条款所规定，甲乙两人是受益人。立遗嘱人有年金留给他们俩，年金由受托人具体给付且不必纳税。结果发生了个这样一个问题：根据该条款的应付金额是否要按制定法的规定而减少。甲于一九四二年为此案提起了诉讼，结果在上诉法院败诉。于是受托人就减少了两人的年金。至一九四六年，上议院在另一个案件中认为一九四二年上诉法院判决有误而且有关制定法的要旨不是要减少应付的年金金额。于是甲乙两人要求给付全部金额。结果看来很怪：法院认为处于完全同一情况下的甲乙两受益人得受不同的待遇。这会置类似案件作类似判决这条原则于何地呢？但这种异常现象却又无法回避。甲受一九四二年一案之约束而不能旧事重提；乙则根据上议院一九四六年所宣布的法律而有权获得全部金额。法院认为：甲只有权取得减额年金而乙有权要求年金的全部金额，包括按一九四六年上议院判决早该给付的前欠在内。

4

Law and Morality

It can be presumed that all or most societies distinguish legal rules from moral precepts in some fashion. The *positivistic legal doctrine*[1] of the nineteenth century attempted to carry this tendency to its consummation. *John Austin*[2] emphasized the need for eliminating ethical value judgments and moral reasoning from the application and *enforcement*[3] of the law. *Hans Kelsen*[4] bluntly declared that, in his view of the positive legal order, "the concept of law has no moral connotations whatsoever." More recently, *Herbert Hart*[5] has offered a defense, with some qualifications of the positivistic insistence on separation of the *two agencies*[6].

The separation doctrine is generally not extended to the *making of law*[7]. *Justice Holmes*[8], for example, who was a protagonist of the doctrine, declared that "the law is the witness and external deposit of our moral life." The *makers of the law*[9] are frequently influenced by traditional or novel ideas of social morality. It is not only true that the most basic tenets of this morality are almost inevitably received into the *body of law*[10]. It should also be noted that there is a wavering line of demarcation between those moral principles which become part of the law and those which stand outside its orbit.

In the *law of unfair competition*[11], for example, some changes accomplished in recent times by courts and *legislatures*[12] must be attributed to a sharpening and refinement of the moral sense, accompanied by a conviction that the business community must be protected against certain rep-