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元照英美法词典

(缩印版)

收录及注释五万余词条, 包含词、词组的一般法律用法,并附图表三十幅、历史文献八件

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倪 序

倪征噢 联合国国际法院前法官

由中外法学者合作编纂的《元照英美法词典》观已付梓,这是中国法律界的一个重要事件。它既是法律专业领域里的一部大型工具书,又是中西文化之间的一次交流。

所谓英美法,不仅是指英美两国的法律,而且也包括所有其他英语系国家的法律。这些国家的法制基于历史原因,或则渊源于英美法制,或则后来采用英美法。旧中国从19世纪中叶起,迫于清政府与列强所订的不平等条约,实行丧权辱国的"领事裁判权",英美法一度成为适用于在华外国人,或者中外人士间纠纷的法律。直至抗日战争晚期,在中国实行了百年的领事裁判权才被宣告撤销。

英美法,亦称普通法或判例法,因为法官断案,不采用成文法或法典,而根据法院既往的 判例。庭审时,主要是由双方律师向当事人、证人发问,法官作最终裁断。因此,不论在实体 法还是在程序法方面,英美法与一般采用法典条文和纠问制度的其他国家法制有显著不同。

昔年在上海开设的东吴大学法学院教授英美法,所授课程和美国各大学法学院大致相同。当时东吴法学院的毕业生多在上海等地做律师,办理"华洋案件"。天津的北洋大学(今天津大学)和北京大学亦曾讲授个别的英美法课程或英美法总论。故英美法在中国并不陌生,而也有过一段相当长的实践时期。

时移世易,今日中国已屹立于世界,英美法之为用与旧日大异其趣。尤自 1979 年以来,中国参与的国际交往日益频繁,合作与交涉共存。为此,必须善于掌握"知己知彼"的规律,而且按照普遍接受的国际私法的法律适用规范,在某些条件下也须适用交涉对方的法律。在现代国际生活中,须通晓英美法的知识,无待烦言。但要理会英美法的实质和适用,则又离不开其词汇这个锁钥。

我还要指出的是,这部作品的编纂有着一番独特而曲折的经过。中国政法大学的比较法 教授潘汉典和薛波硕士联合几位学者锲而不舍,殚精竭虑,组织各大学法学院教授学者,乃至 港台和海外专家,补阙拾遗,经年不辍。他们为此一事业付出了极大的辛劳。

此外,仰赖海外机构和国内社会人士出资匡济,使中国第一部以释义为特征的英美法词 典的诞生成为现实。最后,对词典的出版表示直诚的祝贺。

PREFACE

by Ni Zhengyu, former Judge of International Court of Justice

The appearance of the English-Chinese Dictionary of Anglo-American Law, compiled jointly by Chinese and foreign specialists in law, is an important event of Chinese legal profession. It is not only a comprehensive law dictionary, but also another step forward in the cultural exchanges between China and the West.

Anglo-American law refers not only to the law of Great Britain and the United States; it also includes the laws of all other English-speaking countries. This is because, for historical reasons, their legal systems originated in the Anglo-American legal system or later, adopted it. In the mid-19th century, China was forced to adopt the humiliating "consular jurisdiction" after the government of the Qing Dynasty signed unequal treaties with the imperialist powers. Thus, Anglo-American law was for a time applicable to foreigners in China and also in disputes between foreigners and Chinese citizens. Consular jurisdiction had been in force in China for about 100 years before

it was declared abolished near the end of the War of Resistance Against Japan.

Anglo-American law is also known as common law or case law. Under this system, cases are judged according to precedents, not according to written law or codes. During a trial, it is mainly the attorneys representing both parties who are to question the parties concerned and witness(es), and the judge makes the final ruling. So, with respect to either substantive or procedural law, Anglo-American law is markedly different from the legal system of those countries that generally employ codes and the inquisitorial system.

The Anglo-American law courses taught at the Comparative Law School of China (the former Soochow Law School) in Shanghai in the old days were not much different from those offered in the law schools of the American universities. Many law graduates from Soochow University at that time became lawyers in Shanghai and some other cities, handling cases involving Chinese citizens and foreigners. A few courses on Anglo-American law or its general principles were also given at Peiyang University (today's Tianjin University) and Peking University at that time. So, Anglo-American law is not something new in China, having been practiced for quite a long time here.

The times have changed, and with China rising to prominence in the world the application of Anglo-American law is now vastly different from the old days. In particular, since 1979, China has become an ever more active participant in international exchanges, which entails cooperation as well as negotiation. For this purpose, we must understand ourselves as well as others. When it comes to the application of private international law, a commonly accepted practice is that, in certain circumstances, the law of the counterpart to the negotiation should be adopted. Therefore, it is clear that in today's international life, a lucid understanding of Anglo-American law is a necessity. And to understand the essence and application of Anglo-American law, we must first understand its vocabulary.

The compilation of this dictionary was a unique and tortuous process. Pan Handian, a professor of comparative law, and Xue Bo, a master of laws at the China University of Political Science and Law, together with several other scholars, went to great pains to organize professors and scholars from the law schools of universities all over China, including those from Hong Kong, Taiwan and overseas, to actively get involved in the project.

In addition, this English-Chinese Dictionary of Anglo-American Law could not have been published without generous financial support from overseas institutions as well as individuals in China. Finally, I would like to extend my sincere congratulations on its publication.

PREFACE

by Professor Arthur C.Y.Yao, St. Mary's Univesity, U.S.A.

The English-Chinese Dictionary of Anglo-American Law has been prepared with the conviction that it will meet the growing demand for a translation that will help lighten the task of learning Anglo-American law. The editors have used every effort to adhere as closely as possible to the original languages, English and Latin, and to make the translation in a readable style according to current Chinese usage.

With the influx of the advancement of scientific inventions, the development of the means of communication and the growth of international trade, disputes and misunderstandings will greatly increase in number and demand for knowledge of foreign law will also increase.

This dictionary is now sent forth in the hope that all who use it will find it an indispensable helpmate.

姚 序 姚启型 美国圣玛丽大学教授

《元照英美法词典》编纂有年,深信这部词典将能满足不断增长的翻译需要,这一成果无 疑能减轻学习英美法过程中的艰难困苦。编者竭尽所能贴近原文,即英文和拉丁文的原意, 并且根据当代汉语的用法来译述,以期提供易懂的文体。

随着科学发明创造的涌进、通讯手段的发展以及国际贸易的增长,争端和误解为数势将大大增加,了解外国法的需要亦随之大为增多。

本词典的刊行希望能成为所有的使用者不可或缺的良伴。

卢 序 卢峻 上海社会科学院教授

霍姆斯大法官尝言:"法律的生命不在于逻辑,而在于经验。"倘若这一论断是真实的,那么,对过去的经验、对他人的经验的学习无疑包含更大的价值。发端于中世纪英格兰的习惯 法经历几个世纪的风雨变迁,演变成了如今洋洋大观的英美普通法系。

中国自清末沈家本以降,以东洋日本为跳板与榜样,在法律制度方面借鉴与学习西洋的基本上是欧陆罗马法系的概念与学理。现代汉语中许多法律用语,在早期曾直接借用日本人的汉字译文,历经百年的沉淀,这套法律词汇已成为我们分析法律概念,进行学理探讨的基本语言工具,我们对它的历史源头已谈忘而浑然不觉。当我们用这一套法律词汇来翻译英美普通法系的东西时,它的历史源头就鲜明地显现出来。欧陆罗马法系与英美普通法系在概念与学理上迥然不同,两者之间在很多方面找不到精确的对译文。比如,英美地产法,尤其是英格兰地产法中的许多内容,无法用欧陆罗马法系里的"物权法"的概念阐释,如"freehold estate"、"copyhold estate"、"fee simple absolute"等。英美合同法中的"consideration"也是常被人提到的例子。普通法与衡平法进而与制定法的二分亦是欧陆罗马法系所没有的。司法救济优先的观念所导致的诉权及司法技术的丰富与错综复杂局面对翻译提出了挑战。凡此种种,毋需一一列举。对全面的、大型的英美法词典的编修者而言,这些都构成了实实在在的障碍和困难,完全无法取巧回避。这部词典历经多年方玉成其事也正说明了此种工作的艰巨。我在耄耋之年看到首部此类词典问世,欣喜之余,乐为之序。

PREFACE

by Professor Lu Jun, Shanghai Academy of Social Sciences

"The life of law," said Justice Holmes, "has not been logic; it has been experience." If that comment is true, it would undoubtedly be more than worthwhile to learn from past experience, including the experience of others. Originating in the Middle Ages, the customary law of England has, through centuries of thick and thin, developed into the impressive corpus of Anglo-American common law system of today.

Ever since the time of Shen Jiaben at the end of the Qing Dynasty (1644 – 1911), what China has learned and introduced from the west with respect to the legal system are basically, with Japan as bridge and model, the concepts and theories of the Roman law system of continental Europe. Many of the legal terms now used in the Chinese language were directly borrowed at the early stage from Japanese translations using Chinese characters. A hundred years later, such legal terminology has become our ordinary working language when analyzing legal concepts and discussing legal theories, its historical origin having faded from memory. However, when one comes to use this legal terminology to translate matters of Anglo-American common law system, its historical origin spontaneously reappears. That is because the Roman law system of continental Europe and the Anglo-American common law system are utterly different in concepts and theories. In many instances, there are no exactly corresponding terms that may be used in reciprocal translations. For example, many terms in the Anglo-American law of real property, and especially those in the English law, such as "freehold estate", "copyhold estate" and "fee simple absolute" cannot be ex-

pounded with the concept in the Roman law of "real right". The term "consideration" used in Anglo-American contract law is another commonly cited example. From common law to the law of equity and then to statutory law, this dichotomy of Anglo-American common law system is also not found in the Roman law system. The multifarious and complex aspects involved in procedural rights and judicial technique brought about by the concept of prioritization of judicial remedy pose further challenges to legal translation. There are too many examples of this kind to be cited one by one. Suffice it to say that they have caused great difficulties for and handicaps to the editors of a comprehensive Anglo-American law dictionary, and there is no way to avoid them. This is also the reason why it has taken so many years to complete the compilation of this dictionary. I am pleased at my advanced age to witness the first publication of such a dictionary and it is a privilege for me to write this preface for it.

D11 (元繁英姜法词典)集1版

PREFACE

by Sir T.L. Yang, former Chief Justice of Hong Kong; Barrister-at-Law of England

The timely publication of this monumental work is to be celebrated by all students, both Chinese and foreign, of Chinese Law. In the past twenty-four years, China has worked hard at developing the nation's legal and judicial systems. In so doing, China has made in-depth researches into laws of different legal systems, principally the Common Law. The results of their endeavours have been encouraging and commendable.

It therefore gives me great pleasure in congratulating the Sponsors, Supporters and my fellow members on the Editorial Team, without whom the launching of this Dictionary would not have been possible.

To each and everyone of them I extend my deepest respects.

杨序

杨铁樑 香港最高法院前首席大法官,英格兰出庭律师

此鸿篇巨构之作,应时代之需求问世,定将使中国与四海治中国法之学人颔首称庆。盖近廿四年间,中国全力发展国家的法律与司法制度。与此相应,中国遂开展深人研究各不同法系的法律,尤其普通法。其努力的成果殊令人鼓舞,应予颂扬。

有鉴于此,余欣然恭贺此词典的主办者、赞助者及编纂组同仁。含诸君竭力以赴,此词典 曷克问世哉。

为此,不吝谨向上述诸君致以衷心敬意。

PREFACE

by Professor George J. Siedel, the University of Michigan, U.S.A.

CROSS-CULTURAL LEXICOGRAPHY AND THE LAW

The compilation of a dictionary is inevitably a challenging process. The creation of a legal dictionary is especially daunting because law, as the instrument that allows civilized society to exist, touches every aspect of life. As the late A. Bartlett Giamatti observed when he served as President of Yale University, law "is a vast body of knowledge, compounded of historical materials, modes of textual analysis and various philosophical concerns. It is a formal inquiry into our behavior and ideals that proceeds essentially through language."

The compilation of a comprehensive dictionary like The English-Chinese Dictionary of Anglo-American Law represents the ultimate lexicographic challenge because legal terminology, even within one culture, frequently does not have a precise and clear meaning. The attempt to define legal terminology in the language of another culture, with different historical and social traditions, requires unusual resolve and patience. However, the benefits from this effort are significant:

- 1. By offering an opportunity for increased understanding of the law in China and the United States, this dictionary will enable continuing development of strong and fair legal institutions.
- 2. The dictionary will provide a foundation for closer ties between the legal profession in China and the United States. For example, it is likely that the dictionary will be an essential tool in the comparative law training of lawyers in both nations, similar to the traditional use of Black's Law Dictionary in legal training in the United States.
- 3. The dictionary will be an especially valuable reference for legal scholars and in all likelihood will provide the impetus for translations of legal works.
- 4. Because the legal infrastructure is a critical element in the development of business institutions and a stable economy, the above benefits will solidify business relations between the United States and China. The relationship between these two great nations is increasingly important in the global economy.

These benefits led a team of my colleagues at the University of Michigan Business School (Professors George D. Cameron, Lynda J. Oswald and Cindy A. Schipani) and me to join with researchers in the United Kingdom in providing assistance to the scholars in China who have worked diligently on the dictionary for many years. We are deeply grateful to the individuals, law firms and other organizations, such as the British Council and the Ford Foundation, that provided funds for this project. We especially appreciate the support of two organizations that provided funding that enabled completion of the dictionary: (1) The William Davidson Institute at The University of Michigan Business School, the world's leading center of expertise on business in emerging economies, and (2) the U.S.-China Legal Cooperation Fund, a program of The China Business Forum, which is the education and research arm of the U.S.-China Business Council.

西德尔序 乔治·J.西德尔 美国密歇根大学教授

跨文化词典编纂与法律

编纂一部词典的过程不可避免地充满了挑战。编纂一部法律词典尤其令人望而生畏,原因在于:法律作为致使文明社会存在的工具,涉及生活的方方面面。诚如已故巴特利·贾玛蒂先生担任耶鲁大学校长期间的评述,法律"是一个巨大的知识体,包含了历史材料、文本分析的各种式样以及多方面的哲学关注。它主要借助语言对我们的行为和思想进行系统的探究。"

编纂一部像《元照英美法词典》这样的综合性词典面临最大的词典编纂工作的挑战,因为 法律术语,即使在同一文化域内,通常也并无精确、清晰的含义。使用另外一种文化的语言, 加上不同的历史和社会传统,来试图界定法律术语,需要非同寻常的决心和耐心。尽管如此, 这一努力的益处还是相当显著的;

- 1. 通过为不断增长的中美间法律上的理解提供一个机会,这部词典将能促使强有力的、 公正的法律制度得到持续发展。
- 2. 这部词典将为中美法律界提供更紧密联系的基础。例如,这部词典很可能成为两国律师的比较法培训的必备工具,一如《布莱克法律词典》在美国法律训练中的传统功用。
- 3. 本词典将会成为对法律学者具有特别价值的参考书,而且,极有可能对法律著作的翻译起到促进作用。
- 4. 因为法律基础对于商业制度的发展和一个稳定的经济发展来说,都是至关重要的因素,上述的益处将会巩固中美之间的商业关系。两个伟大的国家间的关系在全球经济中将愈来愈重要。

如此多的益处导致我在密歇根大学商学院的一些同事(乔治·D.卡梅伦教授、林达·J.奥斯瓦尔德教授和辛迪·A.斯基帕尼教授)和我一起,与联合王国的研究者们共同为中国的学者提供支助,这些中国学者已经坚持不懈地为这一词典奋斗多年。我们深深地感谢那些为这一项目提供资金的个人、律师事务所以及其他机构,诸如英国文化协会和福特基金会。我们还特别感激以下两个机构,他们提供的资金使得词典的编纂能顺利完成:(1)世界上首列的新兴经济商业的研究中心密歇根大学商学院的威廉·戴维信研究所;以及(2)美中法律合作基金、该基金作为中国商业论坛的一个项目,是美中贸易全国委员会附属的教育和研究机构。