

国家“十二五”重点规划项目

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新核心 大学英语 总主编 蔡基刚

英美普通法读写教程

Understanding the Common Law
Analyzing & Writing as a Lawyer

高凌云 编著

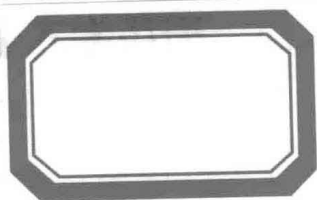


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内 容 提 要

本书以英美法体系为对象,介绍了英美普通法的组织构成、法律来源及法律程序,以丰富的文献为基础,着重于案例的分析与法律文书的写作,旨在帮助读者提高阅读分析法律案例以及撰写法律文书的能力。本书作为“新核心大学英语”系列教程之一,既可供法律专业学生学习英美法使用,也适合非法科学生学习法律英语使用。

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Preface

前言

随着全球经济一体化的发展以及法律在我国地位的不断提升,法律英语成为我国法律专业学生的必修课以及大多数综合大学学生的选修课。法律英语应包括两个层面,一是以英语表达的外国法,主要以英美普通法为主;二是以英语表达的中国法,主要包括中国法条的英译以及中国法律概念、法律文献的英译等。而要做到能够准确将我国的法条与法律文献翻译成英语,首先必须了解在英美法系和其他英语国家是否有类似的法律概念以及这些概念是否有约定俗成的表达方式,否则即便把我国的法律概念翻译成英文也可能牛头不对马嘴。因此,学习英美法是能够做到将我国法律翻译成英文的基础。

一般而言,学习英语要同时注重听说读写,学习法律英语也是如此。

以前网络不发达,寻找原版听力材料比较困难,只能依靠国内的有声出版物或者电台。而有声出版物大多经过编辑,可能失去原汁原味;收听电台也有很多不便,诸如信号问题以及时间问题。现在我们处于网络时代,通过网络很容易找到各种音频和视频资料,英美国家的有些法院也把庭审资料放到官方网站,因此,我们有条件听到未经编删的原版资料,“听”的资源问题比较容易解决,只要我们坚持不懈地听就能够提高法律英语学习中的听力。另外,通过参加法律英语课的学习,在课堂上一直听老师和同学们用英语讨论法律问题,这本身也是提高听力的一个好办法。

“说”对于我国学生一直是个大问题,因为缺少说的环境,并且通过上课来锻炼说的能力也很有限,因为上课时间较短,班上同学可能较多,不大可能轮到每



个人发言。我建议有心练习口语的同学在课下自己组织类似“英语角”等活动,作为法科学生,更可以积极组织或参加英美法模拟法庭,用英文辩论。当然,在课堂上应该主动积极用英文发言。曾有学生告诉我,他们在连续上英语课或者全英文课之后,到食堂打饭时都不由自主对着打饭的阿姨说起英语来。这充分说明“说”的能力是完全可以培养的。

“读”和“写”对中国学生来说相对容易,尤其“读”,我们同学的阅读能力一般都很强。可是法律英语的读和写与普通英语不同,因为面对的是英文法条、判例或法律文献,里面大量的法律词汇对英语是母语的学生而言都很难。因此,学习法律英语,一定要重视读和写。英美法的特点是以判例法为主,因此读案例就成为英美国家的律师每天最重要的功课,而对于我们来说,也是学习英美法的基本功。能够读懂一般的英语并不一定就能读懂案例。“写”也是如此,即便能够用英文写信,写短文,甚至写小说,却并不一定能够写法律文书,除了特殊的法律英语词汇外,法律文书的写作有其特殊的格式与要求。

因此,本书就着重介绍如何读英美案例,撰写案例综述,如何用英文撰写一种最重要的法律文书——法律分析报告,又叫备忘录(memorandum)。本书的前身是《英美法:案例分析与法律写作》,在复旦大学法学院作为法律英语教材已经使用了六年多,经过了超过一千多名法科学学生的验证,并于2006年荣获上海市优秀教材三等奖。这次蒙复旦大学外国语言文学学院蔡基刚教授的邀请,并受到他关于英语分科学习的理念的影响,决定在原先的基础上,根据六年多的教学经验对其进行修订,增删了部分案例,增加了部分法律用语的中文解释,以便扩大该书的读者对象,让非法科学生也能学到法律英语中的精髓。

感谢上海交大出版社的张冠男编辑与滕飞编辑对本书所做的贡献,他们在本书稿的成书过程中认真细致,一丝不苟,提出了很多宝贵意见。另外,复旦大学法学院国际法专业研究生徐凤同学在帮助审阅本书稿的同时还帮忙选定一些较难的法律词汇并翻译成中文,在此一并表示感谢。

限于篇幅,本书着重于案例分析与法律文书写作,并不需要读者具备某一部门法的知识,因此适用性较强;然而这同时也是本书的短处,如果读者想要学习



英美法中的部门法,例如英美合同法、侵权法等,仅仅看这本书是不够的。目前国内市场上有不少很好的法律英语教材,由浅入深地介绍英国或美国的各个部门法,并附有词语解释和翻译练习等,适合非法科学生或者对自己的英语程度不够自信的同学使用。另外国内还出版了不少原版法律书的影印本,大都是英美等国法学院的教材,适合英语程度较高,又对某一部门法有特殊兴趣的同学学习。我建议有志于提高法律英语能力并希望学习英美法的同学在学习本书的同时可以根据自己的英语程度购买一本或一套其他法律英语教材,不在多,而在于把书从头读到尾。

最后,由于能力与时间所限,错误在所难免,敬请指正。

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PART I

INTRODUCTION TO COMMON LAW SYSTEM

THERE are two main legal systems in the world: one is civil law system^① under which written statutes play an important role, and the other is common law system^② whereby case law^③ has been in a dominant position. Chinese legal system roughly belongs to the civil law system because written statutes are the main sources of law in China, although some scholars would name it as a separate “Chinese Legal System.” The differences between the civil law system and the common law system are not only reflected in the forms of law (written statutes or case law), but also reflected in the methodologies of teaching and studying the law. While a law student in China normally starts to learn the general theories of law and the framework of the written statutes, a law student in a common law country would read cases from the day he enters law school. Therefore, understanding and analyzing cases is one of the most fundamental skills that a common law lawyer must possess. This book will focus on common law case analysis and legal writing, and Part I is aimed at introducing the basic features of common law.

① Civil law system (大陆法系) is the system of jurisprudence originated in the Roman Empire and later held and administered by the European continental countries and some other countries, which comprises the statutes, codes, and other written ordinances, as distinguished from the common law of England and the canon law.

② Common law system (共同法系, 国内普遍译为普通法系) is the system of jurisprudence originated in England and later held and administered by the Commonwealth countries and other countries under British influence, which comprises the body of principles and rules derived solely from usages and customs or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs.

③ Case law (判例法) is the aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law.

CHAPTER

COMMON LAW

1.1 Law

What is the law? Even experienced lawyers, judges, or law professors may not be able to give an answer right away. Even if they may, you will find the definitions given by different people are different. It is almost impossible to give an accurate definition of “law” that covers every aspect of it. There is simply not a unified or all-inclusive definition of law. It is probably wiser not to probe the exact meaning of law here in this book; instead, it is more important to understand what the law is mainly comprised of, who made the law, and what will happen if the law is not observed.

Among the various definitions and descriptions of law, one commonality is that they all agree laws are rules. There are many rules in our life but only the legal rules are laws. *Webster's New World Dictionary* defines a legal rule as

- a) a regulation or guide established by a court governing court practice and procedure;
- b) a declaration, order, etc. made by a judge or court in deciding a specific question or point of law;
- c) a legal principle or maxim^①.

① Maxim (法律准则, 基本原理) is a saying that expresses a general truth or rule of conduct.



This description of legal rules is not complete because in common law system legal rules require the participation of government in their creation and enforcement and may be made by the legislature^①, executive^②, and judiciary^③. The laws made by the legislature are called statutes or acts; the laws made by the executive are named administrative regulations or administrative rules; and the laws made by the judiciary in the course of deciding cases are known as case law. The executive and the judicial courts have power to enforce the law. Any disputes will be resolved and any person who fails to observe the law will be punished through the procedure provided by the legal rules.

Therefore, law can generally be understood as the rules and underlying policies for guiding or regulating people's behavior in society. It is the regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society.^④ It tells people what is allowed to do and what is not allowed to do, what procedures must be followed, and what happens to those who do not follow them. Law defines relationships among individuals and groups and helps people arrange or conduct their business with greater security.

1.2 Common Law

Common law is also called case law or judge-made law, which is the basis of law in countries that have been at some time under British influence, with England and the United States as the representative countries. This system had been well established since 1215 and it “originates from English law,

① The legislature (立法机关) is the governmental department, assembly, or body of persons that makes statutory laws for a state or nation.

② The executive (行政机关) refers to the governmental department that is charged with the detail of carrying the laws into effect and securing their due observance.

③ The judiciary (司法机关) is the branch of government invested with the judicial power to interpret, construe and apply the law.

④ Black's Law Dictionary (9th Ed.) 962 (West 2009).