新编实用英语口译丛书

新编实用英语

法律口译

丛书主编 王 波 王一多 主 编 王 晔



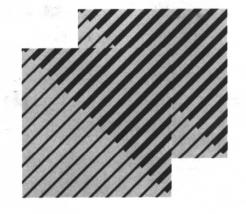
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前 言

根据中国人才法律网的统计,85%的职位要求应聘者熟练掌握法律英语。在中国,有近64%的涉外案件,因通晓法律英语的法律工作者严重匮乏,而极少有人问津!在中国,82%以上的法律工作者只有单一的法律知识背景!面对不可阻挡的开放潮流,中国各行业、各领域表现出对国际型法律人才的渴求。尤其随着中国人世,国际型法律人才匮乏的问题更加突出。那么,什么是国际型法律人才呢?所谓国际型法律人才,是指既有扎实的法律专业知识和技能又有娴熟的外语运用能力,达到从事国际业务水准的复合型、应用型法律人才。

在法律学习中,学习者面临很多问题。首先,中国法律体系与普通法有很大不同,中国法律理论与普通法也有很大不同,这些会造成语言上的障碍。其次,法律英语在词汇、词类使用和句型结构三方面有独特的语言特点。编者在编写本书时,充分考虑到上述情况。本书对外国法(主要是英美法)中一些重要的制度作了介绍。《法律口译》除了适合作为高等院校法律系学生的法律英语教材,也可供辅修法律、外交、国际贸易、国际金融等专业的本科学习者学习法律和英语之用。本教程还可作为律师以及立法、司法等部门的公务员作为提高专业和英语水平的教材。

本教程介绍了法律口译的难点与对策共分为14个单元,每单元包括三部分内容:

- (1) Background Material,这部分主要介绍中外相关的司法体系和部门法;(2) Dialogue;
- (3) Exercise。每部分都有对应文字部分的脚注、相关词汇和问答题。

本教程配有练习部分的 MP3,同时为了方便自学,书后提供录音文本和练习答案。在使用过程中,教师根据学习者的具体情况和水平,对某些单元的内容和练习可有所取舍。

这里,对我的导师王波表示感谢。他为本书的出版竭尽全力。

由于编者水平有限,错误和不当之处在所难免,恳请读者朋友们指正。

王 晔 2006年8月

法律口译学习的特点与策略

所谓法律英语,在英语国家中被称为 Legal Language of Language of the Law,即法律语言,在英语中指表述法律科学概念以及诉讼或非诉讼法律事务时所用的语种或某一语种的部分用语^①。学法律的人,大多学过英语。但精通法律英语的人却很少。其主要原因既有宏观上的,也有微观上的。宏观上指的是过分重视字词、语法、句型等"微观"的语言现象,用学习语言的方法学习法律英语。殊不知不同的法律体系其内涵、运用、环境和表述也不尽相同。法律是一个有机的理论体系,有着内在的逻辑联系。微观上指的是法律英语中有众多具有法律专门意义的特殊词汇。这些规定人们权利和义务的法律、法令或契约等法律文书、法律语言所表述的内容必须准确、严密、客观和规范,不容许丝毫的引伸、推理或抒发和表达感情,因而,在法律英语中又形成了许多其特有的字词、语法、句型等特点。

法律是一个有机的理论体系,有着内在的逻辑联系,而语言只是表述法律的工具。法律的原则有限,其表述的方法也有一定的特点。因此,不仅要注重表达,同时也要注重法律的实质。所以,宏观学习法和微观学习法都要兼顾。就是要求学习者,把各种微观的语言现象放在宏观的法律语境中去学习。这样,法律理解了,英语随之精通,可谓事半功倍、一举两得。

在法律英语口译学习中同样也存在着宏观学习法和微观学习法的兼顾问题。法律英语口译涉及面较宽,译者不仅要具备一般口译者的基本素质还要同时具备法律英语方面的素养。译者既要掌握法律英语中书面语体的翻译同时也要掌握法律英语中口语体的翻译。这是因为译者在具体的实践过程中由于法律的特殊性要接触大量的文字材料。针对法律口译活动中的特点,法律口译学习者必须从以下两方面着手:

一、宏观学习法

首先,中国法律体系与普通法有很大不同,也会造成语言上的障碍。首先要注意英汉民族的文化背景和思维方式上的差异。法律文化的形成是由某一个民族的社会背景、物质基础和价值标准决定的,这是一个共同体的问题。法律文化在不同时期、不同国家或地区、不同民族都具有不同的表现形式。英汉民族在思维方式上存有较大差异,他们在观察事物和现象时采取的角度和思维方式上有差异性。我发现西方关于刑法的书,读得比较顺畅,语言障碍也少;而财产法却艰涩、难懂,念起来非常吃力。我想原因在于,西方的刑法理论与中国相似;由于对法律本身熟悉,所以,觉得刑法英语很容易理解和掌握。相反,西方的财产法继承了英国的传统,诸如财产权的相对性、衡平法产权等等理论,在国内,几乎接触不到。对法律原则的陌生会导致阅读的吃力。所以,从某种程度上说,英语本身无难易,难易取决于法律本身。对法律原则的理解越深、越透,法律英语的表述,就越简单、易理解。比如国内的很多英文合同,经常会

① 潘庆云. 中国法律语言鉴衡. 上海: 汉语大辞典出版社

涉及到某某条款是 "condition"或 "warranty",当时就直译为"条件"或"保证",仅知道"条件" 是合同的重要条款,"保证"是非重要条款,但这两者又有什么区别呢? 学过普通法的人才理解,这种区别的法律意义在于违约后的法律后果不同:如果违反 "condition",则守约方有权终止合同,同时要求损害赔偿;但如果违反 "warranty",守约方虽然有权要求损害赔偿,但必须继续履行合同,否则,也是违约。"condition" 和 "warranty" 是两个再普通不过的单词了,但在法律语境里,却有着特定的含义。

其次,中国法律理论与普通法有很大不同,因此,多数英文的法律名词和术语,都很难在中文中找到与此相对应的确切的词语。如 "unjust enrichment"可直译为"不当得利",但其法律含义却比我国《民法通则》中的"不当得利"宽泛得多,不仅包含了《民法通则》中第 92 条"不当得利"、第 93 条"无因管理"的情况,而且还包含违反信托义务(fiduciary duty)和侵犯他人知识产权所取得的利益。另外,"agreement"和 "contract",可以翻译为"协议"和"合同",在我国法律中,似乎没有什么区别。但是,根据普通法规定,有要约和承诺,便是一个 "agreement",而 "agreement"只有在采取书面形式(deed)或有对价(consideration)支持的情况下,才能成为 "contract",具有法律效力。这样的例子,不胜枚举。所以,一定要按照法律的原意,理解英文。不可望文生义,生搬硬套。

与任何其他学问一样,法律有其自身的学习规律。法律的学习方法,就是要从基础学起,了解法律术语的特定含义,把握法律的整体构架。另外,法律涉及面较广,因此,必须有专业方向,有选择,有取舍,有主次,有先后。否则将会枉费心血,一事无成。我国法律英语的学习者,难以深入的一个重要原因,就是没有按照这一规律,按部就班地学习法律,在一些法律基本概念和分类都没有搞清楚的情况下,就开始盲目自修。我个人认为只有当掌握了法律基础知识之后,才是开卷有益,否则,只能造成理解上的艰难和混乱。学习法律英语,就是学习法律;学习法律,就必须知道"what they are talking about?",要知道法律在说什么,就要找到那个议论的逻辑起点;要找到这个起点,就必须从法律的基础学起。这就是宏观学习法的全部内涵。有了基础知识,便找到了法律的逻辑起点;找到了起点,就会了解一项具体法律原则提出的前提、意义和适用范围;这样就能学好英语国家的法律;法律通了,法律英语也就精通了。

二、微观学习法

法律英语作为一种具有规约性语言的分支,有其独特的语言风格特点。法律是国家统治阶级、集团的意志体现,它有鲜明的政治性、权威性。为了维护法律的严肃性,法律、法规遣词造句力求准确,用词正式,语意严谨。为了显示法律语言的神圣性、权威性和严密性,法律英语词汇在词源上大量收录了拉丁语、法语、德语和西班牙语中的法律词汇。法律英语用词特点:用词准确;庄重、规范,书面语较多;古词和外来词出现频率高。

根据句子的使用目的不同,英语句子可以分为:陈述句、疑问句、祈使句和感叹句四大类。由于法律语言是用来固定和确认法律关系,规定人们的权利和义务以及陈述案件的事实的专用语言,所以法律英语的基本句式通常是陈述句结构。在法律英语句子的使用中,一般采用主语、谓语都具备的完全主谓句。通常不使用省略句或单句,以免造成因省略或句子缺省而出现歧义,甚至被人任意歪曲。法律英语的句法特点是和法律英语的文体特征密切相联的。正式的法律条规和文本中由于对中心词的限定过多,对某一法律概念成立的条件限定很多,所以法律英语的长句居多,短句少,引语少。另外,法律文书中关于义务部分的陈述是至关重要的,

它是享受权利的前提和条件。在法律英语中关于义务的陈述表现在句子结构往往使用条件状语分句或让步状语分句,这就成为法律英语长句多的主要原因。法律英语较之普通英语更准确,限定更严谨,所以限定性定语从句这一必不可少的定语运用得比较普遍。而作为补充、说明、解释性的非限制性定语从句用得比较少。再者,法律英语的正式条文法规中,一般只采用有条件的、符合逻辑推理的、能出现或产生真实结果的条件状语从句。很少使用虚拟语气的句子,但虚拟语气的句子有时候也出现在律师的陈述与辩状及案情的推测中。最后,法律英语句子中还会大量地使用被动句,是因为法律文书的客观性所决定的。在法律英语中使用被动句正是实现这一目的的一个重要手段,所以,在法律英语中被动句的使用可谓缤纷繁多。

研究法律英语在词汇、词类使用和句型结构三方面特点有助于我们归纳、掌握法律英语的语言特点。只有把学习语言的本末搞清楚了,我们在学法律英语时才不至于迷失方向。法律英语的学习特点在于日积月累,需要把你认为细小的词语或是用法加以归纳,并为一些关键概念的用语而"斤斤计较"。关于如何学好法律英语口译,每个人的基础不一样,学习习惯不一样,所以很难有一个"万精油"的方法。这里有几点个人经验供读者参考:1. 坚持看原版法律新闻,哪怕是时间只够把新闻标题看完。2. 坚持用原版的法律词典,最好的当然是 Black's Law Dictionary。3. 坚持读原版的法律书籍。4. 坚持听原版的法律节目。5. 坚持用法律英语进行对话。

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Unit 1 Legal System (1)

Background Material

American Court System

The first area of the American court system that needs to be explored is that of the dual system of courts (federal and state courts) that exists in the U. S. The jurisdiction of these courts is mandated by state and federal statutes. This dual system of courts was the result of the federal system of government created by our founding Fathers. In their attempt to strengthen our central government and maintain state sovereignty they had recourse to a two-court system. Separate courts were needed to judge and interpret federal and state statutes. The state court systems were already in place when the federal court system was created by Article III of the U. S. Constitution and the Judiciary Act of 1789.

Before going any further an examination of civil law and English common law must be made. For they formed the basis from which these courts operate. The Random House Dictionary of the English Language the Unabridged Edition defines civil law as the body of laws of a state or nation regulating private matter. The courts use these laws in administering justice and formulating decisions.

One source which influenced American civil laws was the Roman Justinian Code⁴. This code was developed in the sixth century A. D. It spread throughout the European continent. The Justinian Code was transported to the colonies by the French, the Spanish, and the Dutch, where it was modified so as to be useful and applicable to situations encountered by early American settlers. Another source of American civil laws was the Napoleonic Code⁵, which also has its basis in Roman law. In fact the Napoleonic Code still plays a part in the Quebec and Louisiana legal system. As America developed it gave rise to fifty-one individual codes of civil laws. They were established by federal statutes and the state statutes of the fifty states. If someone wanted to know what the law pertaining to alcohol was in the U. S., they would have to examine the federal statutes and the state statutes of every state in the union concerning alcohol.

A solution was built into the U. S. Constitution to help federal and state courts deal with conflicts, which arise when state statutes are in direct conflict with federal statutes. The solution is the supremacy Clause found in Article VI of the U. S. Constitution, which states:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

What makes Article VI effective is the fact that all public officials, federal and state, are bound by an oath to support the U. S. Constitution, which is administered prior to taking a public office.

Prior to the development of civil law in the U. S. the court systems relied on English common law. Common law is defined as the unwritten law⁶, especially of England, based on custom or court decisions, distinct from statute law. After the Revolutionary War the American courts became detached from the English court system. Each colony began to develop its own distinct common laws. As time passed, U. S. Law developed from a combination of English common law and American statutes. It must be emphasized that common law develops from the decisions of judges over a period of time.

There still exists a common thread between English and American common law that could not be cut and that was stare decisis⁷. Stare decisis is the legal rule that past precedents determine the outcome of contemporary legal disputes A person attempts to establish precedent between their case and a case from the past in hopes of receiving a similar verdict⁸. Stare decisis still plays a major role in determining the outcome of cases in federal and state courts.

Another aspect of the English legal system adapted by most U. S. legal systems is the grand jury⁹. A grand jury is a body of citizens (chosen in the same manner as jurors) whose responsibility is to determine if there is enough evidence¹⁰ to justify¹¹ bringing charges against an individual. The grand jury was instigated in order to avoid the official persecution by a prosecutor without just cause. Grand juries are not a part of every state judicial system while a grand jury indictment¹² is necessary for federal prosecution.

Two types of cases are handled by state courts: 1) Criminal cases: it is alleged that a state law has been broken. 2) Civil cases: cases involving a dispute between two or more individuals. Criminal cases can be classified as either felonies¹³ or misdemeanors¹⁴. Felonies are the more serious crimes usually involving murder, kidnapping, or burglary. The less serious offenses¹⁵ such as traffic violations, disorderly conduct¹⁶, or indecent exposure¹⁷ are referred to as misdemeanors.

The organization of state courts varies from state to state. There are three types of courts found in most states. They are a trial court¹⁸, an appellate court¹⁹, and a state supreme court. A case is first heard in a trial court. If the decision is unsatisfactory, it may be appealed in the state appellate court. If the case is still unresolved it can be bound over to the



state supreme court. There are two courts a litigant can take his case after the state supreme court. They are the U. S. Court of Appeals and the U. S. Supreme Court. I have heard many a middle and high school student utter the phrase; I take it to the U. S. Supreme Court if necessary. Usually the case or problem is petty in nature. Students need to realize that state and federal appellate courts will hear a case only under certain circumstances. They tend to hear cases in which they feel a lower court has handled the case improperly or due process²⁰ denied. The circumstances in which the Supreme Court becomes involved will be discussed later.

Amendment VI of the U. S. Constitution guarantees every U. S. citizen a speedy and public trial by jury. The state and federal juries are composed of twelve, or sometimes six, individuals chosen at random, usually from the voter registration list. The jury is sequestered while hearing a case and is not allowed to discuss the case with anyone, including other members of the jury. Jurors may discuss the case with the other jurors only during the deliberation part of the trial. Unlike the Athenian jury system, a unanimous vote is necessary for acquittal or guilty verdict in the American court system. In the U. S. a person is innocent until proven guilty and guilt must be proven to a jury beyond a reasonable doubt. A tie can result in an acquittal²¹ or a new trial.

Judges in the state court system are chosen in a variety of ways. They are:

- 1) A partisan election, in which the judge is nominated by a political party and runs on that ticket.
- 2) Election by the legislature.
- 3) Non-partisan election, in which restrictions are put on political parties in designating candidates.
- 4) The governor can appoint the judges.
- 5) The Missouri Plan, in which the governor chooses from a list recommended by a special commission.

In any case the state judge is always beholden to a political party. Judges for the federal courts, on the other hand, are appointed by the President with the approval of the Senate. These judges serve for life. Judges in federal and state courts can overturn guilty verdicts if they feel that the judge in the original trial committed an error or the jury made an error in judgment based on the overwhelming weight of evidence presented.

The major defect in the state court system is court congestion. (Connecticut is one of the worst off in that regard.) This is due to the enormous caseload and the fact that every person has a right to a trial by jury, in all but the most trivial cases. This problem of court congestion could lead to the release of a guilty individual on the grounds that the state violated his civil rights by not granting him a speedy trial as outlined in the sixth amendment of the U. S. Constitution.

The federal court system is made up of U. S. District Courts, U. S. Appeal Courts, the

Supreme Court, and several special courts established by Congress.

The U. S. District Courts hear cases involving federal statutes as mandated by the Constitution and the Judiciary Act of 1789. There are 93 district courts. The U. S. Court of Appeals hears cases in which individuals have chosen to appeal the decision of the district court or a state court. There are eleven U. S. Courts of Appeals. If satisfaction is not achieved at this level, the case may be appealed to the Supreme Court. There are three writs that a lawyer can use to get a case heard before the Supreme Court. The first involves an appeal based on the fact that a state statute is in direct conflict with a federal statute. Or, an appeal can be filed if the federal law in question is alleged to be unconstitutional. The second type of writ that can be obtained is one of certiorari? This writ is issued when four Supreme Court justices feel that a case deserves the court's attention. The third (rarely used), is a writ of certification? Which can be obtained if a lower federal court wishes to have the Supreme Court examine a case in which the lower court is in doubt as to a course of action to take.

The special courts that were established by Congress are as follows:

- 1) The Court of Claims: cases against the government are heard in this court.
- 2) The Customs Court: cases involving import taxes or tariffs are heard in this court.
- 3) The Court of Customs and Patent Appeals: cases appealing the decisions of the Custom Court or the Patent Office are held here.
- 4) The Territorial Courts: cases of people who live in U.S. territories are held here.
- 5) The Tax Court: appeals concerning payment of taxes are held here.

Words and Expressions

1 Jurisdiction:司法管辖权,审判管辖权。多指法院广义的受理及审判案件的能力,决定法院或准司法机构,如行政法庭审判案件的范围,如法院的受案范围便为"subject-matter jurisdiction"。

例句: The court has no jurisdiction over foreign diplomats living in this country. 法院对居住在本国的外交官无裁判权。

2 Mandate: 授权

例句: If the parties agree to have one arbitrator to form an arbitration tribunal, the arbitrator shall be selected jointly by the parties or be nominated by the chairman of the arbitration commission in accordance with a joint mandate given by the parties. 当事人约定由一名仲裁员成立仲裁庭的,应当由当事人共同选定或者共同委托仲裁委员会主任指定仲裁员。

- 3 Judiciary: 司法的,法院的;司法部,审判员例句: A local member of the judiciary has limited jurisdiction, especially in criminal cases. 地方法官拥有有限司法权,尤其是在刑事案件中有司法权的司法官中的地方成员。
- 4 Roman Justinian Code: 罗马《优士丁尼法典》。公元 507 年, 东罗马帝国皇帝优士丁尼即位, 被后世称为"中兴之英主"。他对外发动了战争, 企图恢复罗马帝国的版图, 对内通过法

典编纂,振兴法制。这一时期,罗马法体系上十分混乱,学说法、三部敕法汇编及狄奥西多以后的新敕法等并立存在,极不统一。通过法典编纂实现法和法源统一,有其法政策上的理由。另一理由是,在恢复地中海周边罗马旧领土,成功地再次确立罗马主权之后,优士丁尼企图通过统一的法典编纂以恢复旧时代的荣光。此外,侵入意大利的日耳曼人以敕法和学说为素材编纂法典的成功,可能对于高傲的东罗马帝国皇帝也是一个刺激,于是公元528年2月13日,优士丁尼任命法制长官特里波尼安和康斯坦丁法学校等的教授共10人组成了法典编纂委员会,负责领导法典编纂工作。529年公布《旧敕法汇编》(Codex Vetus),它是在法编审定历代罗马皇帝敕令和元老院决议的基础上,删去过时的部分,保留其继续有效的部分,整理编辑而成。

- 5 Napoleonic Code:《拿破仑法典》,是拿破仑组织民法家编定,经法国立法院通过,于 1804年 3 月颁布实施的。《拿破仑法典》内容十分丰富,除了总则一章外,正文共有 3 编 35章 2281条。其内容可以归结为以下几个原则。第一,全体公民民事权利平等。这是《人权宣言》关于法律面前人人平等的原则在民法上的具体贯彻和反映。第二,私有财产无限制和不受侵犯。按照《人权宣言》"财产是不可侵犯的神圣权利"的精神,民法典对私有财产问题作了详细而具体的规定。第三,契约自由。契约是两个或两个以上的人的意志表示的一致,具有法律的约束力。法典规定:契约一经合法成立,当事人必须按照约订切实履行,非经订约人的相互同意或法律的制止,不得任意修改和废除。《拿破仑法典》是资本主义国家中最早的一部系统的成文民法典,是"典型的资产阶级社会法律"(恩格斯)。
- 6 Unwritten law: 不成文法,习惯法
- 7 Stare decisis: 依照过去判例,援引。先例原则(the doctrine of precedent)和遵循先例原则 (the doctrine of stare decisis)简单地说,先例原则是关于先例的效力,如何得以成立及其 适用的规则即先例规则的学说、原则。先例规则与先例确立的法律规则是不同的概念。法 律规则规范当事人之间的权利义务关系;而先例规则是法官适用法律规则的规则,确定先 前判决(判例)构成本案的先例,对本案是否具有约束力,先前判决(判例)与本案不同,例如 是可辨别的(distinguish)。 the doctrine of precedent 和 the doctrine of stare decisis 在英 美法实践中是通用的,美国习惯用后者。但也有学者认为历史上二者是有区别的,前者 在 19 世纪之前就存在,后者则是在 19 世纪逐渐发展起来的,是前者的严格化。任何法 院都不可能完全忽视上级法院和它本身就同一法律问题先前作出的判决,这些判决刊 载在判例集上成为判例;而关键在于这些判决(判例)究竟对本案有多大效力。在英美 法中判决(判例)对本案的效力在程度上有两种:一种是劝导性(persuasive)效力,只具 有参考价值;另一种是约束性(binding)效力,法院应当遵循。有相对效力和绝对效力两 种学说。但先例可以作为判决的合法性根据,具有在法律渊源上的意义,符合依法审判 的原则。任何人都有依惯例办事的趋向,法官也一样。在大陆法国家,也存在判决前后 一致的现象,这是司法一致性原则的体现,是判决在更广泛意义上的一种效力,而不是 法律渊源意义上的司法效力。先例的识别、适用规则、判例集的汇编、出版、援引制度, 以及相关的法院审级、管辖制度等构成先例制度(precedent system),也可以称之为判例 制度(case system)。

- 8 Verdict: 陪审团的判决,判断性意见,决定
 - 例如: We would like to know your verdict in this matter. 我们想知道你对此事的判断。相关词组: the verdict of history(历史的定论); a verdict for the plaintiff(有利于原告的裁决); an open verdict(死因未详的裁决); a partial verdict(部分有罪裁决); a popular verdict(公众意见)等。
- 9 Grand jury:大陪审团。联邦法及差不多有 1/2 的州规定重罪案件需经大陪审团审核之后才能起诉。大陪审团的目的在防止检察官滥用起诉,对被告名誉造成损害,故宪法增修第五条规定被告应经大陪审团审核始能起诉,但联邦最高法院曾作出判决称该规定只适用于联邦,州的重罪刑事被告不经大陪审团审核即可起诉。大陪审团的成员通常为 23 人,但有的州以少于 23 人的成员组成大陪审团。通常大陪审团是以多数决定起诉或不起诉。大陪审团的讯问程序为秘密不公开,若讯问被告时,被告的辩护律师不得在场,辩护律师也不会被通知讯问的内容为何。讯问其他证人时,被告或其证人也不得在场。大陪审团的目的虽然在限制检察官的滥行起诉,但实际上却为检察官所操控。因为法律规定检察官为大陪审团的法律顾问,23 人的大陪审团通常不可能知道应如何调查证据,由检察官决定传什么证人、调查什么证据。所以只要是检察官想起诉的人,大陪审团一定会起诉,即使有不起诉的情形发生,也多是因为检察官发现证据不足而建议大陪审团不起诉。

10 Evidence: 证据

例如: documentary evidence(书证); material evidence(物证)。hearsay evidence(传闻证据、非直接证据); hearsay evidence,不是证人从亲身经历而得的证据,而只是听取其他人的转述,或者呈交由他人制定的证明文件。作为法律用语的传闻(hearsay)—词来源于英国判例法。在普通法时代,关于传闻的定义,英美学者曾经众说纷纭,莫衷—是。美国学者曾作过统计,在美国《联邦证据规则》颁布之前,关于传闻的定义竟有上百种之多,但没有一个定义能为大家所接受。美国《联邦证据规则》第 801 条(c)项规定: "'传闻'是指除陈述者在审理或听证作证时所作陈述外的陈述,行为人提供它旨在用作证据来证明所主张事实的真实性。"可见,传闻一般是指庭外的陈述。"传闻"一词是作为证据来源意义上讲的,一旦作为证明方式提出,即为"传闻证据"(hearsay evidence)。当然,这里的"证据"并非在"查证属实的事实"的意义上使用,而是作为"证明材料"或"证明的根据"来理解,否则就不可能有什么"传闻证据"一说。

什么是 hearsay evidence(传闻证据)? 各国学者基本上都同意其内涵,即"用来证明所述事实为真的庭外陈述",但对于其外延存在较大的分歧。传闻证据的定义应当包含这样三层意思.第一,传闻证据的形式可以是口头的或书面的陈述,也可以是意图表示某主张的行为(如点头,打手势),无意识的行为不在此列。第二,传闻证据是在法庭上提出法庭外的人作出的意思表示,也就是说,原作出意思者并没有出庭。第三,提出传闻证据的目的是为了证明其内容为真。要判断一项证据是否为传闻证据,一条比较简单的规则就是明确提出该证据的目的什么——是为了证明某人曾经说过这样的话,还是证明他所说的话是真实的。

一般来说,传闻证据的形成过程涉及两个主体——原陈述人和证人,涉及两个环节——原陈述人在庭外对事实的感知和陈述,以及法庭上的证人对前者陈述的转述。传

闻证据规则(the Hearsay Rule)又称反传闻规则(the Rule Against Hearsay),是指在审判中一般不能采纳传闻证据,已经在法庭上提出的,不得交陪审团作为评议的依据。美国《联邦证据规则》第802条规定:"传闻证据,除本法或联邦最高法院依法定授权制定的其他规则或国会立法另有规定外,不予采纳"。澳大利亚《1995年证据法典》第59条规定:"不得采纳他人先前陈述的证据,以证明该人陈述所宣称的事实。"

设立传闻证据规则的理由:① 存在陈述虚假的危险;② 与英美法系的诉讼程序相关。证人陈述证言通常必须遵守三大条件:宣誓、亲自到庭以及接受交叉询问。英美法系国家庭审采用对抗式,证据由一方提出,而由另一方进行反驳,对证人的交叉询问可以说是其中最重要的一环。美国宪法第六修正案就规定,在所有的刑事指控中,被告人都应当有权与证人对质,而联合国《公民权利和政治权利公约》第 14 条也规定,与证人对质是被告人的权利。③ 与作为事实审理者的法官和陪审团有关。在证人出庭的时候,法官和陪审团可以观察证人面容、证人态度、证人表情,可以听见证人声音及说话情绪,这些都是审查判断证言必不可少的态度证据(demeanor evidence)。如果采纳传闻,证人证言所蕴涵的这些丰富信息都将无从知晓。

传闻证据规则否定了传闻证据的可采性,但如果严格地排除所有传闻证据,显然对查明案情不利。按照判例法的规定,法官可以在特别情形下以"必要性(necessity)"和"可靠性(reliability)"为准则采纳传闻证据。对传闻证据规则例外规定的典范无疑是美国 1975 年生效的《联邦证据规则》。在该法的第 803 条和 804 条,一共列举了 30 条例外。这些例外可以分为两类:第一类是陈述者能否出庭作证不具有实质意义,也就是说原陈述者"不必"出庭作证(第 803 条);第二类为原陈述者"不能"出庭(第 804 条(b))。

- **11** Justify: 证明……正当
 - 例句: You have to justify why you did it. 你必须解释你为什么做了这事。
- 12 Indictment: 起诉, 控告 例句: This is an indictment for government. 这是对政府的控诉。
- 13 Felony: 重罪 例句: He was sentenced to be felony and confined in a prison. 他被判有重罪并羁于 狱中。
- 14 Misdemeanor: 轻罪 例句: They were fined for their misdemeanors. 他们因犯了轻罪而被处以罚金。
- 15 Offense: 罪行。如: offense against property(侵犯动产罪)
 例句: They were arrested for drug offenses. 他们因吸毒罪而被捕。
- 16 Disorderly conduct: 妨害治安行为,涉及到扰乱公共治安和礼仪的不法行为
- 17 Indecent exposure: 有伤分化的暴露
- 18 Trial court: 初审法院
- 19 Appellate court: 上诉法院
- 20 Due process: 法律上的正当程序
- 21 Acquittal: 宣判无罪。如: a sentence of acquittal(无罪释放的判决) 例句: The attorney has won two acquittals. 这位律师已有两次使委托人无罪获释。