

高等学校法学教材

新编法律英语教程

——英美法律制度概要

刘显正 刘红卫 编

中国法制出版社

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NEW COURSE IN LEGAL ENGLISH

——Introduction to Anglo-American Law

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编者简介

刘显正，1969年7月毕业于武汉大学外语系，长期从事英语和法学英语教学，治学严谨，经验丰富。现为中南财经政法大学外语系副教授。曾在《大学英语》，《汉英语言文化研究》，《语言教学与文化研究》，《法律英语世界》，《英语世界》等刊物上发表多篇论文或译文；著有《英美合同法概述——国际商贸法律基础英语》（辽宁人民出版社出版）；参编书有《大学英语泛读教程》（武汉大学出版社出版），《大学英语六级考试试题荟萃》（中国地质大学出版社出版）等。

刘红卫，1998年毕业于武汉大学外语系，获英语语言文学硕士。现为中南财经政法大学外语系讲师。曾参与《大学英语常考句型例解》（副主编）等书的编写，并发表有数篇法学英语方面的论文。

说 明

为了适应我国社会主义现代化建设和实施依法治国方略对法律人才的需求,全面提高法律人才的素质,根据教育部关于普通高等学校法学专业教学要求,我们邀请政法院校和实际部门的法学教授和专家编写出版了这批教材。

这批教材以邓小平理论为指导,吸收国内外法学教育的最新成果,面向 21 世纪的法学教育,正确阐述本学科的基本理论、基础知识,坚持理论联系实际的原则,努力做到科学性、系统性和实践性的统一。

本书适用于已通过全国大学英语四、六级考试的法商专业本科生、研究生,已掌握英语基础知识进入高年级学习的其他专业的学生和法学英语爱好者。

本书力求编写规范,选材丰富,难易适中。学生能从中接触到英美法律体系的不同侧面、法律英语的语言和词汇,吸收广泛的知识。学生在学完本书后一定能较大幅度地提高自身阅读法律原著的能力。

课文与练习的安排如下:每篇课文开始前附有导读;课文结束后附有注释,旨在帮助学生了解背景知识,理解课文内容。词汇与词组的设计方便和帮助学生扫除阅读和理解中的拦路虎。练习包括:(1) 内容理解部分:讨论

题，课文片断翻译；(2) 补充读物：文章和案例。

从内容上看，课文以美国法为主；补充读物以英国法为主；案例既有美国的也有英国的。考虑到课文的篇幅不宜过长，有些本应属于课文的内容只能安排到补充读物中去，如第三单元的合同法等。这样做的目的是让学生对某些法律知识有较多、较全面的了解。此外，书末附有案例分析与摘录的方法以及词汇表，便于学生查阅和记忆。

本书由刘显正、刘红卫编写，各单元安排如下：

刘显正：第一、三、四、八、九单元；

刘红卫：第二、五、六、七单元。

由于时间紧迫，加上编者水平有限，书中一定存在不少的缺点错误，恳请使用者提出宝贵的意见。

2001 年 3 月

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Unit One

Introduction to Law and Legal System

Lesson One The Nature of Law

Guidance :

什么是法律？法律就是概括性的规范、通则或规则。然而不是所有的规则都是法律，因为有些规则只涉及道义上的责任或社交礼仪或常规。法律指的是那些既供人们遵守又供司法机关强制执行的规则。换句话说，法律是国家意志的表现。立法机关和政府制定法规，为人类的事务提供指南，为人们的言行提供规范，为司法机关提供强制执行的依据。诚然，在某些领域，法律也包括了一些惯例。

法律不是静止的。新的实用的规则代替旧的不实用的规则，新的审判原则取代陈旧的不公正的审判原则，这是法律发展的客观规律，也是社会由人治发展到法治的必然结果。

法律有公法和私法之分或刑法和民法之分。不过在英美法律体系中，由于不存在民法典，民法指的是包括商法在内的具有实质意义的法规体系，所以民法的含义不同于大陆法系。

Text

Probably you have heard of the famous case of *Baby M* in the United States.

Surrogate mother Mary Beth Whitehead entered into a

surrogacy contract, agreeing to be inseminated with the sperm of William Stern. She was supposed to give the baby to Mr Stern and his wife when it was born, and they would then become the legal parents of the child. Whitehead changed her mind after her baby was born. Taking the baby, she fled from New Jersey to Florida. A lawsuit was filed and the Florida authorities returned the baby to the Sterns in New Jersey and a court action was instituted regarding the child's future custody and the rights of the biological mother and father. This case tells us something about law.

Law affects us all from the moment we are born. Whether we like it or not, we live in a society that is bounded by rules. No one is allowed to be addicted to cocaine; no parking on a double yellow line; one shall not hit another; anybody must not dance nude in a local tavern—all these rules are legal ones, but many will simply be moral ones or social conventions. For instance, it is a convention not to tell lie or to take off hats in silent tribute.

Society, by one means or another, has developed a formal system of rules that are designed to be both observed and enforced^①. The police and the courts are the principal enforcement agencies. If a person breaks a legal rule, he/she will be penalized in some way. That is what the law is about; it consists of minimum standards of conduct, which all members of society are expected to follow.

What is law? Law is a complete body of general norms, principles or rules that bind society or that are made for the

guidance of human affairs imposed by a sovereign body on the people of a given state, and enforced by law enforcement agencies consisting of the police, the courts and the prison services. The law also means the process by which rules are made and applied. The development, the content and the application of those rules add up to a legal system, complete with judges, courts, solicitors, barristers, police and indeed politicians, in their role as lawmakers^②.

The law may give people some unfriendly overtones with prison, the expense of hiring a lawyer, or sheer frustration of trying to establish what a particular legal rule means in everyday context, for legal language is often a “law unto itself”.

The law, as indicated above affects every citizen at many points in his/her life. We marry, we inherit property, and we die with or without making a will. We make almost daily contracts or agreements, if only in the purchase of a minor item of food. We park on yellow lines. All these activities are subject to rules that society has intended to be legally binding.

The law does not stand still. In the climate of opinions the legal system including judicial outlook has to accommodate itself to the changing attitudes and habits of the public. The public plays its part in many areas of the law. This was clearly reflected in the changing nature of the law of contract and the law of tort from the late nineteenth century onwards. In the recent years, people have come to expect a greater degree of governmental and parliamentary interference than our forefathers ever encountered. The era of economic freewheeling as epitomized by the Industrial Revolution has probably gone for all time. Truism

as it may sound, we live a technological, informational and complex society. Nowadays the emphasis is much more upon regulation and standardization and upon fairness and equality of opportunity. Both the legislature and the judiciary were not enthusiastic about extending the boundaries of the law of tort, for fear of opening up a Pandora's Box of litigation³. Only in the twentieth century have certain tortious liabilities such as negligent misstatements been clearly established by the legislators and the courts. The law, therefore, is by no means a static, rigid structure, despite on occasion a popular image to that effect. On the contrary, the legal system is full of contrasting colors, many of them of a political hue. From time to time the law must embrace freshly defined values and codes of behavior. Nonetheless the law may move slowly; change, whether societal or legal, is not necessarily rapid. As John Farrar has argued, the legal system is rooted in political compromise, at least where it attempts to pursue the twin yet contradictory goals of stability and change⁴.

The Law can be divided into public law and private law. Public law is that part of law which deals with the state and its relations with its citizens. The state will itself enforce public law, the elements of which are constitutional law, criminal law, administrative law, etc. Private law is law that the state will not enforce except at the request of an aggrieved party. Sometimes called civil law, and it provides a framework within which individual citizens operate on such matters as contracts, torts (civil wrongs), and the law of property and the laws of succession. The object of civil law is to compensate the injured

party, rather than to punish the “wrong-doer”^⑤. The term “civil” is used in opposition to “criminal”. In the United States the term “civil law” is not ordinarily used to refer to the subject matter of a civil code, in opposition, for example, to “commercial law”.

Notes to the Text:

- ① Society, by one means or another, has developed a formal system of rules that are designed to be both observed and enforced. 社会靠一种或另一种方式发展和设计出一套正规的既供人们遵守又供司法机关强制执行的法规体系。
- ② The development, the content and the application of those rules add up to a legal system, complete with judges, courts, solicitors, barristers, police and indeed politicians in their role as lawmakers. 那些规则的发展,充实和运用共同形成一种法律体系;加上法官,法院,律师,警察,还有起立法作用的政治家们构成一种完整的法律体系。
- ③ Pandora's Box of litigation 据希腊神话,宙斯命潘朵拉带着一个盒子下凡,潘朵拉私自打开盒子,于是里面的疾病、罪恶、疯狂等各种祸害全都跑出来散布到世上。此语比喻诉讼成灾。
- ④ As John Farrar has argued, the legal system is rooted in political compromise, at least where it attempts to pursue the twin yet contradictory goals of stability and change. 正如约翰·法拉所说,法律制度,至少是在试图寻求两个既相关又对立的目标——稳定和变更时,扎根于政治上的妥协。
- ⑤ The object of civil law is to compensate the injured party, rather than to punish the “wrong-doer”. 民法的目的是对受害的一方做出赔偿,而不是惩罚民事过失行为人。

Words and Special Terms

surrogate mother 代孕母亲

custody 监护

tavern 小旅馆

convention 常规, 惯例

silent tribute 默哀

overtone 联想

frustration 挫折

accommodate 适应

epitomize 概括

misstatement 不真实陈述

aggrieved 受侵害的

framework 框架

civil wrong 民事不法行为

succession 继承

Exercises

I. Questions for Discussion:

1. What do you think of rules?
2. What is law?
3. What are the meanings of the terms "imposed by a sovereign body" and "enforced by a legal regime of courts"?
4. Will you give some examples to illustrate what aspects of life legal rules influence?
5. How do you understand legal language is often a law unto itself?
6. Why do we say the law does not stand still?
7. What is the emphasis of law nowadays?
8. What does the phrase mean "for fear of opening up a Pandora's Box of litigation"?
9. Could you talk something about the classification of law?
10. What subject matter does civil law refer to in the United States?

II. Translation :

1. If a person breaks a legal rule he/she will be penalized in some way. That is what the law is about: it consists of minimum standards of conduct, which all members of society are expected to follow.
2. Law is a complete body of rules that bind society or that are made for the guidance of human affairs imposed by a sovereign body on the people of a given state, and enforced by law enforcement agencies consisting of the police, the courts and the prison services
3. We marry, we inherit property, and we die with or without making a will. We make almost daily contracts or agreements, if only in the purchase of a minor item of food. We park on yellow lines. All these activities are subject to rules that society has intended to be legally binding.
4. The state will itself enforce public law, the elements of which are constitutional law, criminal law, administrative law, etc.
5. Civil law provides a framework within which individual citizens operate on such matters as contracts, torts (civil wrongs), and the law of property and the laws of succession.

III. Supplementary Reading :

Legal Rules

Legal rules are statements of law that provide the basis and structure for legal analysis. They are often general principles

that can be applied to several situations, such as constitutional (宪法的) provisions or statutes. Sometimes they are derived from (源出) cases, where a judge has used a common law principle as the basis for the analysis. When a rule derives from cases, the writer must determine what rule previous courts used by looking at the court's foundation for its reasoning. When a rule is not explicitly stated, the writer must synthesize (综合) previous holdings to establish the general rule to be applied in this case.

Rules fall into a hierarchy (等级) of authority. Thus, if a constitutional provision is involved in your issues, it should be discussed first. If a statute is involved, it should come next, or first if no constitutional provision is involved. Case law comes last. If there is no constitutional provision or statute, then case law provides the rules.

What law will the case involve?

Judith Davis, the petitioner in a divorce action and her husband, Frank Davis, agree that the marriage is irretrievably (无可挽回地) broken, they disagree on who should get custody of their children and on the distribution of their property.

The couple have two children: Jason, age 11, and Elizabeth, age 5. When the children were very young, Ms Davis stayed home with them. Three years ago, though, she decided to fulfill a lifelong goal to become a doctor. Despite the fact that her husband disagreed with this plan, she applied to and was accepted into medical school. She is now in the second year of an eight-year program. The program is a demanding one, and Ms Davis currently spends approximately twelve hours a day at

school, either in class or studying. She admits that she finds this schedule exhausting and that when she is home she has very little energy. She says, though, that what energy she has goes into caring for the children. She still fixes their dinner, helps with homework, and puts them to bed.

Mr Davis is a partner in a local law firm. Although he too has a demanding schedule, he has always played an active role in raising the children. He has spent whatever free time he has with them, and he has accompanied them to the doctor's and dentist's offices and has been active in their school activities. Although Ms Davis says that Mr Davis is a good father, she believes that on occasion he drinks too much.

Both parents agree that the parent who gets custody of the two children should get possession of the family home. They disagree, though, on how the other assets should be divided. Mr Davis wants to split the remaining property in half. Ms Davis wants fifty percent plus the cost of her medical school education. She states that because the cost of her husband's law school education was paid from community funds, the cost of her medical school education should also be paid from community funds.

Questions:

1. What case is it likely to be?
2. What issues are involved in this action if it is brought before the court?
3. What law will it involve?