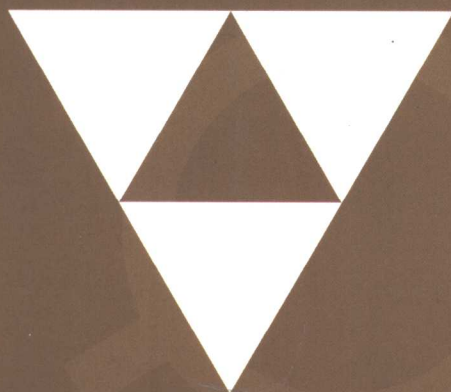


兰州大学教材建设基金资助

法律英语

LEGAL ENGLISH

刘艺工 屈文生 主编



机械工业出版社
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随着中国的改革开放、入世以及市场经济的发展，既懂法律、经济，又懂外语的人才需求量日趋增长。为了适应这种形势的发展需要，有必要加强法律英语教育，提高在校本科生、研究生和有关法律英语水平，使其能够较深入地了解外国法律制度的基本情况，以便将来更好地应对中国入世带来的挑战和参与国际竞争。

本书既可作为高等院校法律院系学生法律英语教材，也可作为课外读物使用或供有兴趣的读者阅读。

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前 言

随着中国的改革开放、入世以及市场经济的发展，既懂法律、经济，又懂外语的人才需求量日趋增长。为了适应这种形势的发展需要，有必要加强法律英语教育，提高在校本科生、研究生和有关法律人员的法律英语水平，使其能够较深入地了解外国法律制度的基本情况，以便将来更好地应对中国入世带来的挑战和参与国际竞争。

本书共选编了 30 篇课文。内容包括法的概念、法的分类、法的发展、世界主要法系、主要法理流派、法的渊源、法律教育、法律职业、法院体系与陪审团制度、宪法、行政法、刑法、侵权行为法、合同法、知识产权法、财产法、家庭法等，旨在使读者对英美法系国家的法律制度有一个基本的了解。课文全部选自英美法系国家著名法学家的论著和教材，内容新颖，难易适中，注释准确、详细。为了适应教学的需要，课文对原文作了部分删节和编辑。本书每课均由以下几个部分组成：（一）法谚、法学家名言；（二）课文正文；（三）课文注释；（四）背景知识补充；（五）课文理解练习。书后还附如下内容：I. 如何阅读英文案例；II. 经典案例选读；III. WTO 基本知识；IV. 法律英语教学中应思考的几个问题；V. 常用法律英语术语；VI. 参考文献。

本书由刘艺工和屈文生主编，参加编写的人员还有邢彩霞。

本书既可作为高等院校法律院系学生法律英语教材，也可作为课外读物使用或供有兴趣的读者阅读。

本书在编写过程中得到了兰州大学教务处和机械工业出版社的大力支持和帮助，在此谨表谢忱。

由于编者水平有限，错误和不当之处在所难免，祈望读者朋友批评指正。

编 者

2003 年 6 月

CONTENTS

前言

Lesson 1 What is Law	1
第 1 课 法的概念	
Lesson 2 Classification of Law	7
第 2 课 法的分类	
Lesson 3 Development of Law	13
第 3 课 法的发展	
Lesson 4 Major Legal Systems in the World Today	23
第 4 课 当今世界的主要法系	
Lesson 5 Jurisprudence	32
第 5 课 主要法理学流派	
Lesson 6 Sources of Law (I)	45
第 6 课 法的渊源 (I)	
Lesson 7 Sources of Law (II)	56
第 7 课 法的渊源 (II)	
Lesson 8 Legal Education	67
第 8 课 法律教育	
Lesson 9 Legal Profession	77
第 9 课 法律职业	
Lesson 10 Wager of Law and Trial by Battle	89
第 10 课 宣誓断讼法与决斗断讼法	
Lesson 11 Jury System	95
第 11 课 陪审团制度	
Lesson 12 British Court System	104
第 12 课 英国法院制度	

IV

Lesson 13	American Court System	112
第 13 课	美国法院制度	
Lesson 14	British Constitution	122
第 14 课	英国宪法	
Lesson 15	American Constitution	133
第 15 课	美国宪法	
Lesson 16	Administrative Law (I)	147
第 16 课	行政法 (I)	
Lesson 17	Administrative Law (II)	159
第 17 课	行政法 (II)	
Lesson 18	Criminal Law (I)	164
第 18 课	刑法 (I)	
Lesson 19	Criminal Law (II)	176
第 19 课	刑法 (II)	
Lesson 20	Criminal Law (III)	188
第 20 课	刑法 (III)	
Lesson 21	Tort Law (I)	196
第 21 课	侵权行为法 (I)	
Lesson 22	Tort Law (II)	211
第 22 课	侵权行为法 (II)	
Lesson 23	Contract Law (I)	223
第 23 课	合同法 (I)	
Lesson 24	Contract Law (II)	243
第 24 课	合同法 (II)	
Lesson 25	Intellectual Property Law (I)	254
第 25 课	知识产权法 (I)	
Lesson 26	Intellectual property Law (II)	269
第 26 课	知识产权法 (II)	
Lesson 27	Real Property Law (I)	279
第 27 课	不动产法 (I)	
Lesson 28	Real Property Law (II)	287

第 28 课 不动产法 (II)	
Lesson 29 Family law (I)	299
第 29 课 家庭法 (I)	
Lesson 30 Family law (II)	311
第 30 课 家庭法 (II)	
Appendix I How to Read English Cases and Citations	320
附录 1 如何阅读英文案例	
Appendix II Classical Cases for Reading	325
附录 2 经典案例选读	
1 Marbury v. Madison (1803)	325
马伯里诉麦迪逊 (1803)	
2 McCulloch v. Maryland (1819)	336
马卡洛诉马里兰州 (1819)	
3 Brown v. Board of Education (1954)	347
布朗诉教育局 (1954)	
4 California v. O. J. Simpson (1996)	352
加利福尼亚州诉辛普森 (1996)	
5 Miranda v. Arizona (1966)	368
米兰达诉亚利桑那州 (1966)	
6 Rylands v. Fletcher (1865)	372
赖兰兹诉弗莱彻 (1865)	
7 Macpherson v. Buick Motor Co. (1916)	374
麦克弗森诉别克汽车公司 (1916)	
8 Palsgraf v. Long Island Railroad Co. (1928)	378
潘尔斯各拉夫诉长岛铁路公司 (1928)	
9 Donoghue v. Stevenson (1932)	392
当纳休诉斯帝芬森 (1932)	
10 Greenman v. Yuba Power Products Inc. (1963)	395
格林曼诉尤巴电力产品公司 (1963)	
11 Hamer v. Sidway (1891)	401
汉默诉席帝威 (1891)	

12 Weaver v. American Oil Co., (1971)	407
韦弗诉美国石油公司 (1971)	
13 Sylvestre v. State of Minnesota (1973)	419
希尔维斯特诉明尼苏达州 (1973)	
14 Newman v. Schiff (1985)	424
纽曼诉席夫 (1985)	
15 Case Summaries of Computer Copyright Cases (1978)	429
计算机版权案件案例摘要 (1978)	
Appendix III WTO in Brief	443
附录 3 WTO 基本知识	
Appendix IV Reflections on Some Issues Concerning Legal	
English Teaching	449
附录 4 法律英语教学中应注意思考的几个问题	
Appendix V Frequently Used Legal Terms of Art	461
附录 5 常用法律英语术语	
Appendix VI References	470
附录 6 参考文献	

Lesson 1 What is Law

Scarcely any law can be made which is beneficial to all; but if it benefits the majority, it is useful.

法谚：法律难顾及全民，于大多数人有利足矣。

Text

Law is the set of enforced rules under which a society is governed. Law is one of the most basic social institutions^① —and one of the most necessary. No society could exist if all people did just as they pleased, without regard for the rights of others. Nor could a society exist if its members did not recognize that they also have certain obligations^② toward one another. The law thus establishes the rules that define a person's rights and obligations. The law also sets penalties for people who violate these rules, and it states how government shall enforce the rules and penalties. However, the laws enforced by government can be changed. In fact, laws frequently are changed to reflect changes in a society's needs and attitudes.

In most societies, various government bodies, especially police agencies and courts, see that the laws are obeyed^③. Because a person can be penalized for disobeying the law, most people agree that laws should be just. Justice is a

① “Social institution 社会制度、社会准则。” Institution: An elementary rule, principle, or practice. 课文中这句话的大概意思是“法律是最基本的社会准则之一，也是最必要的准则之一。”

② “Obligation 此处译为‘义务’；法律英语中“权利”与“义务”的表达便是“rights and obligations”。要注意的是来自罗马法的 obligation，通常还翻译为“债”。

③ “在多数社会中，各种各样的政府部门，特别是警察机构以及法院保证法律得以遵守。” See that 是保证的意思。

moral standard that applies to all human conduct. The laws enforced by government have usually had a strong moral element, and so justice has generally been one of the law's guiding principles. But governments can, and sometimes do, enforce laws that many people believe to be unjust. If this belief becomes widespread, people may lose respect for the law and may even disobey it. However, in democratic societies, the law itself provides ways to amend^① or abolish these unjust laws.

There have been and will continue to be different definitions of law. Aristotle^② saw law as a rule of conduct. Plato^③ believed that law was a form of social control. Cicero^④ contended that law was the agreement of reason and nature, the distinction between the just and the unjust. The British jurist Sir William Blackstone^⑤ described law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong."^⑥ In America, the eminent jurist Oliver Wendell Holmes, Jr.^⑦, contended that law was a set of rules that allowed one to predict how a court would resolve a particular dispute: "The prophecies of what the courts

① "Amend: 修正"。Amendment 修正案。

② "亚里士多德" (Aristotle, 公元前 384—前 332), 是古希腊的伟大思想家。著有《政治学》、《伦理学》、《雅典政制》等。

③ "柏拉图" (Plato, 公元前 427—前 347), 古希腊哲学家, 师从苏格拉底 (Socrates, 前 469—前 399), 又是亚里士多德的老师。著有《理想国》、《政治家》、《法律篇》等。

④ "西塞罗" (Marcus Tullius Cicero, 公元前 106—前 43), 古罗马政治家和杰出的法律思想家。主要著作有《共和国》、《论政治》、《论法律》。在法律思想方面, 他根据斯多葛学派的观点, 首先系统的提出自然法学说。

⑤ "威廉·布莱克斯通公爵" (1723—1780), 布莱克斯通的主要作品有《英国法分析》 (*Analysis of the Laws of England*, 1754), 《大宪章和森林宪章》 (*The Great Charter and Charter of Forest*, 1759) 以及最为著名的《英国法释义》 (*Commentaries on the Laws of England*, 1765—1769), 以至于读 "Blackstone" 成为了 "读法律" 的代名词。

⑥ "英国著名法学家布莱克斯通将法描述为: '由一国最高权力规定的市民行为准则, 命令做正确的事, 禁止做错事'。"

⑦ "奥利弗·温德尔·霍姆斯" (Oliver Wendell Holmes, 1841—1935), 1902 年西奥多·罗斯福总统任命他为联邦最高法院法官, 直到 1932 年。其传世之作首推《普通法》 (*The Common Law*, 1881), 著名论文《法律之道》 (*The Path of the Law*, 1897), 该文于 1897 年在《哈佛法学评论》 (*Harvard Law Review*) 上发表。霍姆斯的 "实用主义法学" 体现在他的 "法律预测说" 之上。

will do in fact, and nothing more pretentious, are what I mean by law. ①”

Although these definitions vary in their particulars, all are based on the following general observation: *law consists of enforceable rules governing relationships among individuals and between individuals and their society*. This very broad definition of law implies the following ②:

1. To have law, there must be established rules, such as constitutions, statutes, administrative agency regulations, and judicial decisions ③.
2. These rules must be capable of enforcement; that is, law and order must prevail with resolution in a judicial system ④.
3. The rules must establish approved conduct by which individuals deal with each other and participate in society ⑤.

Supplementary Reading

Definition of Law (关于法的概念)

Pound's definition: "Some twenty years ago I pointed out two ideas running through definitions of law: one an imperative idea, an idea of a rule laid down by the lawmaking organ of a politically organized society, deriving its force from the authority of the sovereign; and the other a rational or ethical idea, an idea of a rule of right and justice deriving its authority from its intrinsic reasonableness or conformity to ideals of right and merely recognized, not made, by the sovereign." (Roscoe Pound, "More About the Nature of Law,"

① “在美国，杰出的法学家奥利弗·温德尔·霍姆斯则主张法是允许人们去预测法院将如何解决某一特定纠纷的一整套准则：‘对于法院在事实上将如何处理的预测，而绝非其他更虚饰的东西，便是我所谓的法’。”

② “尽管这些定义在它们各自的特别之处有所不同，不过，所有的这些关于法的定义都是建立在下面这一普遍的判断之上的。即：法是由调整个人与个人以及个人与社会之间关系的强制性规则所组成的。这个对法所下的宽泛的定义包含下列意思：”

③ “（1）要有法就必须有制定成文的规则，例如宪法、制定法（法律）、行政机关规章以及司法判例等。”

④ “（2）这些规则必须是可强制执行的，换言之，法律和命令在一司法体系内必须能够坚决占优势地位。”

⑤ “（3）这些规则必须制定一些被认可的行为准则，个人可依此与他人交往或参与社会活动。”

in Legal Essays in Tribute to Orrin Kip McMurray at 513, 515 (1935). 罗斯科·庞德 (Roscoe Pound, 1870—1964), 美国著名法学家, 美国社会法学的创始人和主要代表。庞德关于法的定义。one an imperative idea: 一种强制性的概念; and the other a rational or ethical idea: 一种理性或伦理性的概念。)

Posner's definition: "It will help to distinguish three senses of the word 'law.' The first is law as a distinctive social institution; that is the sense invoked when we ask whether primitive law is really law. The second is law as a collection of sets of propositions—the sets we refer to as antitrust law, the law of torts, the Statutes of Frauds, and so on. The third is law as a source of rights, duties, and powers, as in the sentence 'The law forbids the murdering heir to inherit.'" (Richard Posner, *The Problems of Jurisprudence* 220—21 (1990). 理查德·波斯纳的法律经济学或经济分析法学思想集中体现在他的《法律的经济分析》(*Economic Analysis of Law*)、《法理学问题》(*The Problems of Jurisprudence*) 等著作中。)

Functions of Law (关于法的功能)

(1) **Maintaining Social Control While Facilitating Social Life** (保持社会管理的同时改进社会生活). Perhaps the most important function of law is maintaining social control by enforcing a set of accepted behavioral norms. By spelling out in advance a set of rules and the penalties (or sanctions) (刑罚或制裁) that will be imposed for breaking those rules, the law allows for a needed level of predictability among individuals. In turn, this set of rules make social life easier by providing people with expectations about how others will behave in a given situation. For example, when you take your car onto the road, you need to know that, like you, every other driver will be driving on the right side of the road. The law grants you this necessary expectation by establishing both this rule and the threat that those who disobey it will be punished. Such legal guidelines foster the kind of cooperation that is necessary to build and run a society.

Law, of course, is not the only force maintaining social control: Morals (道德), ethics (伦理), culture, tradition, habit, manners, and even fash-

ion determine how individuals behave in particular situations. To a large extent, these non-legal determinants of social behavior contribute to making society work. Nonetheless, helping to maintain social control is perhaps the primary function of law.

(2) **Protecting the Public Order** (保护公共秩序). On the most apparent level, the law maintains public order by punishing those who deviate from accepted norms. The criminal justice system, which includes the police, judges, and jails, exists to enforce a system of order upon all of society's members. Criminal laws operate to punish those who actually commit crimes (犯罪) and to discourage others from committing illegal acts by promising criminal penalties.

(3) **Resolving Disputes** (解决纠纷). Our behavior is often governed by customs, ethics, and traditions. However, one group's idea of acceptable behavior may give rise to conflict with another group that adheres to a different set of ethical or cultural norms. For example, members of a community located near a river may find it acceptable to dispose of garbage by tossing it into the water. Environmentalists (环境保护主义者), on the other hand, would find this behavior objectionable. The law functions to resolve this dispute both by enacting statutes to establish environmental regulations and by permitting environmentalists to sue the community in court.

(4) **Protecting the Status Quo** (保护现状). Another important function of the law is to protect the status quo—that is, the existing state of affairs at a given time. The structure of our legal system—that is, its rules and procedures will outlive all of the lawyers, judges, and litigants who currently operate within it. The durability of the law thus fosters a sense of order by permitting people to predict how certain things will run both during their lifetimes and beyond.

(5) **Facilitating Orderly Change** (促进有秩序地变化). As in nature, change is an inevitable and wonderful aspect of social life. People are born and die, businesses are created and go out of business (公司创立与灭亡), and human relationships begin and end. The law permits change to occur

while ensuring that it is a rational and minimally disruptive process.

Questions on the text:

1. What is *law*?
2. What are the *functions* of law?
3. What is *Pound's definition* of law?

Lesson 2 Classification of Law

Lex posterior derogat priori. (A later law overrules an earlier one.)

法谚：后法优于前法。

Text

Law can be divided into two main branches: (1) private law and (2) public law^①. Private law deals with the rights and obligations people have in their relations with one another. Public law concerns the rights and obligations people have as members of society and as citizens. Both private law and public law can be subdivided into several branches. However, the various branches of public and private law are closely related, and in many cases they overlap.

Private law is also called civil law^②. It determines a person's legal rights and obligations in many kinds of activities that involve other people. Such activities include everything from borrowing or lending money to buying a home or signing a job contract.

The great majority of lawyers and judges spend most of their time dealing with private-law matters. Lawyers handle most of these matters out of court. But numerous situations arise in which a judge or jury must decide if a person's private-law rights have been violated. More than 10 million such cases are filed in United States courts each year. These cases are called lawsuits or civil suits.

① “私法：private law；公法：public law”。罗马法学家乌尔比安（Ulpianus）将法律划分为公法与私法。“公法是与国家组织有关的法律”，“私法是与个人利益有关的法律”。

② “civil law 民法。”

Private law can be divided into six major branches according to the kinds of legal rights and obligations involved. These branches are (1) contract and commercial law, (2) tort law, (3) property law, (4) inheritance law, (5) family law, and (6) corporation law^①. The dividing line between the various branches is not always clear, however. For example, many cases of property law also involve contract law.

Contract and commercial law deals with the rights and obligations of people who make contracts. A contract is an agreement between two or more persons that can be enforced by law. A wide variety of business activities depend on the use of contracts. A business firm makes contracts both with other firms, such as suppliers and transporters^②, and with private persons, such as customers and employees.

Tort law. A tort is a wrong or injury that a person suffers because of someone else's action. The action may cause bodily harm; damage a person's property, business, or reputation; or make unauthorized use of a person's property. The victim may sue the person or persons responsible. Tort law deals with the rights and obligations of the persons involved in such cases. Many torts are unintentional, such as damages in traffic accidents. But if a tort is deliberate and involves serious harm, it may be treated as a crime.

Property law governs the ownership and use of property. Property may be real, such as land and buildings, or personal, such as an automobile and clothing. The law ensures a person's right to own property. However, the owner must use the property lawfully. People also have the right to sell or lease their property and to buy or rent the property of others. Property law determines a person's rights and obligations involved in such dealings.

Inheritance law, or succession law^③, concerns the transfer of property upon the death of the owner. Nearly every country has basic inheritance laws,

① “私法所包括的这六个部门依次是：合同与商法；侵权行为法；财产法；继承法；家庭法以及公司法。”

② “suppliers and transporters 供货商和运输商。”

③ “inheritance law 也叫 succession law 继承法。”

which list the relatives or other persons who have first rights of inheritance. But in most Western nations, people may will their property to persons other than those specified by law. In such cases, inheritance law also sets the rules for the making of wills.

Family law determines the legal rights and obligations of husbands and wives and of parents and children. It covers such matters as marriage, divorce, adoption, and child support.

Corporation law governs the formation and operation of business corporations. It deals mainly with the powers and obligations of management and the rights of stockholders^①. Corporation law is often classed together with contract and commercial law as business law.

Public law involves government directly. It defines a ~~person's~~ rights and obligations in relation to government. Public law also ~~describes~~ the various divisions of government and their powers.

Public law can be divided into four branches^②: (1) criminal law, (2) constitutional law, (3) administrative law, and (4) international law. In many cases, the branches of public law, like those of private law, ~~overlap~~. For example, a violation of administrative law may also be a violation of criminal law.

Criminal law deals with crimes—that is, actions considered harmful to society. Crimes range in seriousness from disorderly conduct to murder. Criminal law defines these offenses and sets the rules for the arrest, the possible trial, and the punishment of offenders. Some crimes are also classed as torts because the victim may sue for damages under private law.

In the majority of countries, the central government makes most of the criminal laws. In the United States, each state, as well as the federal government, has its own set of criminal laws. However, the criminal laws of each state must protect the rights and freedoms guaranteed by federal constitutional law.

① “stockholder 股东。”

② “公法所包括的这四个部门依次是：刑法、宪法、行政法以及国际法。”