法律英语实用教程

——美国法律制度要览

何家弘 编

A PRACTICAL COURSE IN LEGAL ENGLISH

—Outline of American Legal System

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内容简介

《法律英语实用教程——美国法律制度要览》系作者根据自己的教学经验以及在美国学习法律的体验编写的。该书将“用专业学外语”和“用外语学专业”这两个目的有机地结合起来，在内容设计上既照顾到语言学习的规律，又照顾到法律学习的体系。该书共分为20课，内容包括：美国的法律历史和法律制度；美国的法律职业；美国的法律教育；美国的法院和法官；宪法；行政法；刑法；民权法；合同法；侵权法；财产法；公司法；保险法；商法；税法；环保法；家庭法；民事诉讼；刑事诉讼；证据法。每课内容包括课文、背景情况、注释、练习和补充读物五部分。课文和补充读物的选材十分广泛且形式多样，其中既有文章和讲稿，也有法典和判例，而且作者对原材料进行了一定的编辑和修改，以适应本教材的需要。每课的练习中都有专门为该课内容设计的讨论和实践，以提高学生的英语表达能力和法律实务能力。其中的专题讨论、案例分析、模拟谈判、法庭辩论、以及案情摘要和法律备忘录等常用法律文书的写作练习等都具有很强的实用性。此外，该书在附录中还设计了两个综合性模拟练习：一个是整个审判过程的模拟练习；一个是建立中外合资企业的合同谈判练习。该书附有补充读物的参考译文和法律词汇表。该书对于有志学习法律英语和对美国法律制度感兴趣的人都很有实用价值。

前　言

笔者在美国留学期间，曾经结识了一位名叫查理的美国青年。他当时一边在大学学习环境保护监测技术，一边参加一个摇滚乐团的演出——打工挣钱。有一次在闲聊中他对我说："其实我对法律也很感兴趣，我从小就想当一名律师。"

"那你为什么不去学法律呢？"

"钱固然是一个原因，但更主要的原因是……我的语言能力太差，不适于学外语。"

"外语？你的意思是说你学法律后准备专为美国的少数民族服务？"我知道在美国有些律师专向某个少数民族的人（如中国人、讲西班牙语的南美人等）提供法律服务。

"不！不！我不是这个意思。"

"那你……？"我大惑不解。

查理笑道："对我来说，法律英语就是一种外语。不过，这不是我一个人的观点，很多美国人都这么说。"

对于英语国家的人来说，法律英语就是"外语"，此话纯属幽默。不过，它也在一定程度上反映了学习法律英语的难度。笔者认为，法律英语比较难学的原因主要有二：其一，法律英语中有相当数量的专门术语，而这些专门术语或者是人们在日常生活中很少用的，或者是其词义与日常用义大相径庭的；其二，英美等英语国家属普通法系，其司法制度以判例法为基础，因此其法律

教育和司法实践都离不开过去的判例——包括几十年乃至数百年前的判例。然而，阅读数百年前的人用英语写下的判例恐难免有中国人读古汉语的感觉。

笔者绝无恐吓学生或使欲学者望而却步之意。笔者只是想让读者充分认识到法律英语的特殊性及其学习的难度，从而在开始学习之前就做好知难而进的心理准备，以免在学习过程中遇难而退，浪费时间。

不过，在现代法律英语的发展中有一个使用简明英语(PLAIN ENGLISH)的趋势。诚然，数百年前的法官写成的判例，似无翻译成简明英语之必要，但是英美很多法律学者都主张在现代法律文书中应使用简明英语。一些在美国法学院中讲授法律写作（LEGAL WRITING）课程的教授告诫其学生在写案情摘要(CASE BRIEF)和法律备忘录（LEGAL MEMORANDUM）等法律文书时切勿使用法律涩语(LEGALESE)，否则会使那些非常繁忙的法官和律师不愿细看你写的文书内容。此外，有些教授还告诉其学生不要在写法律文书时滥用“上文所云”(AFORESAID)和“于此”(HEREIN)之类的词，那种认为不使用这类词就不象律师写的东西的看法纯属谬误，因为这些词语本身并无确切或特别的法律含义。只有那些咬文嚼字和故意炫耀的律师才会执着地使用这类词语。总之，按照大多数人的观点，法律英语应该是简单明确的英语。

学习法律英语，应该掌握正确的方法。诚然，学习方法因人而异，不可千篇一律，但其中仍有些规律性的东西。学习法律英语的方法涉及多方面的问题，笔者在此只想谈谈“读说听写”四种基本语言技能的关系问题。从人类学习语言的一般规律来说，

“听说读写”是一种自然顺序，即先听后说再读再写。但是对于学外语来说，人们往往以“读听说写”为序。学习法律英语，若能四技并进，自然最为理想，但实际上人们在学习外语时相对四种技能终有所偏重。据我所知，很多人在学习法律英语时都以“读”为主，他们认为学习专业外语的目的主要是阅读外文资料。然而，根据笔者学习外语、教授外语、以及在美国攻读法学博士学位的经验，学习法律英语当以“说”为主，用“说”促进“听”和“读”，用“说”带动“写”。在学习法律英语时，放弃“说”者往往事倍功半，而重视“说”者往往事半功倍。其原因就在于“说”不仅可以提高人们对语言的熟练程度，而且可以提高人们使用该语言的兴趣。此外，由于法律事务的特殊性，人们在学习法律英语时也不能放弃“写”的练习。

基于上述观点，笔者在编写本教材时专门设计了以培养学生“说”的能力为主要目的的练习。在每一课之后，笔者都在本课内容和词汇的基础上编排了专题讨论和模拟练习的内容，如案例讨论、模拟审判、模拟规则制定、模拟合同谈判等。由于本书名为“法律英语实用教程”，而且本书的读者都已掌握了英语的基本语法知识，所以笔者在编写本教材时以法律实务为中心，无论在注释还是在练习中都很少有纯语法的内容。

语言都是在一定社会环境中形成和使用的。法律英语自然与相关国家的法律制度有密切关系。因此，学习法律英语，不仅要掌握大量的专业术语和表达方式，而且要了解其赖以生存的法律制度。如果我们对英语国家的法律制度不甚了解，那么我们往往也很难准确把握一些专门术语的含义。例如，英语中有“预审”(PRELIMINARY EXAMINATION)的概念，但是其含义与中国

的“预审”相去甚远。如果不了解英美国家的法律制度，用中国的“预审”去理解英美的“预审”，则恐怕难免误入歧途。因此，本书内容以美国的法律体系为基本框架，课文选材涉及美国的法律历史、法律职业、法律教育、法院和法官、宪法、行政法、刑法、民权法、合同法、侵权法、财产法、公司法、保险法、商法、税法、环保法、家庭法、民事诉讼程序、刑事诉讼程序、证据法等。如果本书的读者在学习法律英语的同时又学习了美国的法律制度，则诚为“一石两鸟”(Kill two birds with one stone)。

笔者在选编本书内容时也考虑了由浅入深、学练结合等语言学习规律。全书共有20课。每课讲一个专题，内容包括课文、背景情况、注释、练习和补充读物五部分。课文都选自美国的法律文件、判例汇编、法律文献和教材讲稿等。为了适应本书的需要，笔者对选材进行了一定程度的编辑和修改。背景情况是笔者根据自己在美国学习法律所获得的知识用中文编写的。笔者力求用最简洁的语言向读者介绍该专题的概况，并列举了一些该专题领域内常见的专业术语，以便为读者学习该课内容和做该课练习提供一定的帮助。注释的重点是法律术语和语言难点。由于本书不是一般性或基础性英语教材，读者在学习本书之前都已掌握了基本的英语语法知识，所以本书的注释一般不涉及语法内容。不过，笔者在本书的前半部对课文中出现的难句给出了整句的参考译文，以便读者加强理解；在后半部则给读者留下了更多的思考余地。每课的练习主要由问答练习、听力练习和讨论练习或模拟练习三部分组成。由于练习的主要目的是提高学生实际运用语言的能力，所以没有编排专门的语法知识练习。讨论练习或模拟练习一般都结合本课的内容编排，形式包括专题讨论、案例分析、模拟谈判、法

庭辩论等。此外还有案情摘要、法律备忘录等常用法律文书的写作练习。补充读物的内容都与本课课文内容相呼应，但难度往往稍大。

本书有三个附录。附录一是模拟练习，包括一个模拟审判和一个建立中外合资企业的模拟合同谈判。练习后面还附上了法庭常用英语和中外合资企业合同英文参考样本。附录二是补充读物的参考译文。附录三是本书中出现的英汉法律词汇表。

本书的特点是内容系统、形式多样、实用性强。本书把“用专业学外语”和“用外语学专业”这两种方法有机地结合起来，因此法学专业的学生、教师、研究人员和涉外法律工作人员，以及对美国法律制度感兴趣的英语专业人员都会从本书中大获裨益。当然，本书的主要用途还是作为高等院校法学专业的高年级本科生和研究生的专业英语教材。

于钦建、王文河、任新萍、刘昊阳、李凌波、武咏、张文进、张桂勇、曹爱莲、虞英倩等人参加了本书的补充读物的翻译工作，笔者在此谨表谢忱。

中国人民大学法学院

何家弘

1994 年 11 月于北京病醒斋

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LESSON ONE

American Legal History and Legal System
(美国的法律历史和法律制度)

Text (课文)

I

The United States is at once a very new nation and a very old nation. It is a new nation compared with many other countries, and it is a new, too, in the sense that it is constantly being renewed by the addition of new elements of population and of new States. But in other senses it is old. It is the oldest of the "new" nations——the first one to be made out of an Old World colony . It has the oldest written constitution, the oldest continuous federal system, and the oldest practice of self-go vernment of any nation.

One of the most interesting features of America's youth is that the whole of its history belongs in the period since the invention of the printing press. The whole of its history is, therefore, recorded; indeed, it is safe to say that no other major nation has so comprehensive a record of its history as has the United States, for events such as those that are lost in the legendary past of Italy or France or England are part of the printed record of the United States. And the American record is not only comprehensive; it is immense. It embraces not only the record of the colonial era and of the Nation since 1776, but of the present fifty States as well, and the intricate network of relationships between States

and Nation. Thus, to take a very elementary example, the reports of the United States Supreme Court fill some 350 volumes, and the reports of some States are almost equally voluminous: the reader who wants to trace the history of law in America is confronted with over 5,000 stout volumes of legal cases.

No one document, no handful of documents, can properly be said to reveal the character of a people or of their government. But when hundreds and thousands of documents strike a consistent note, over more than a hundred years, we have a right to say that is the keynote. When hundreds and thousands of documents address themselves in the same ways, to the same overarching problems, we have a right to read from them certain conclusions which we can call national characteristics.

Ⅱ

The American legal system, like the English, is methodologically mainly a case law system. Most fields of private law still consist primarily of case law and the extensive and steadily growing statutory law continues to be subject to binding interpretation through case law. Knowledge of the case law method as well as of the technique of working with case law therefore are of central importance for an understanding of American law and legal methodology.

The Common Law is historically the common general law——with supremacy over local law——which was decreed by the itinerant judges of the English royal court. The enforcement of a claim presupposed the existence of a special form of action, a writ, with the result that the original common law represented a system of "actions" similar to that of classical Roman law. If a writ existed (in 1227) a claim could be enforced; there was no recourse for a claim without a writ, the claim did not exist. This system became inflexible when the "Provisions of Oxford" (1258) prohibited the creation of new writs, except for the flexi-

bility which the "writ upon the case" allowed and which later led to the development of contract and tort law.

The narrow limits of the forms of action and the limited recourse they provided led to the development of equity law and equity caes law. "Equity", in its general meaning of doing "equity", deciding ex aequo et bono, was first granted by the King, and later by his Chancellor as "keeper of the King's conscience", to afford relief in hardship cases. In the fifteenth century, however, equity law and equity case law developed into an independent legal system and judiciary (Court of Chancery) which competed with the ordinary common law courts. Its rules and maxims became fixed and, to a degree, inflexible as in any legal system. Special characteristics of equity law include: relief in the form of specific performance (in contrast to the common law award of compensatory damages), the injunction (a temporary or final order to do or not to do a specific act), the development of so-called maxims of equity law which permeated the entire legal system and in many cases explain the origin of modern legal concepts. However, equitable relief regularly will lie only when the common law relief is inadequate. For instance, specific performance for the purchase of real property will be granted because common law damages are deemed to be inadequate since they cannot compensate the buyer in view of the uniqueness attributed to real property.

As the common law, equity law became part of American law either through judicial acceptance or through express statutory provision. Today, both legal systems have been merged in many American jurisdictions (beginning with New York in 1848), with the result that there is only one form of civil suit in these jurisdictions as well as in federal practice. Only few States continue to maintain a separate chancery court. Nevertheless, the reference to the historical development is important because, on the one hand, it explains the origin and significance of many con-

temporary legal concepts (for instance the division of title in the law of property) and, on the other hand, is still relevant for the decision of such questions whether, for instance, there is a right to a trial by jury (only in the case of common law suits, in other cases only before the judge). In addition, the differentiation will determine whether the "ordinary" common law relief of damages applies or whether the "extraordinary" equity remedy of specific performance is available.

"Case law" describes the entire body of judge-made law and today includes common law and equity precedents. In imprecise and confusing usage the terms "common law" and "case law" are often used synonomously, with the term "common law" in this usage connoting judge-made law in general as contrasted with statutory law. "Case law" always connotes judge-made law, while "common law" in contrast-depending on the meaning intended-describes either the judge-made law in common law subject matters or, more extensively, all judge-made law.

Background （背景情况）

自从哥伦布（Christopher Columbus）于1492年航行至美洲之后，大批欧洲人便开始拥向这片"新大陆"。不过，人们通常把第一批英国定居者（the first English settlers）于1607年到达弗吉尼亚（Virginia）的詹姆斯顿（Jamestown）视为美国法律制度历史的起点。美国法制史可以大体上分为两个时期，即英属殖民地时期（the Period of the English Colonies）和美利坚合众国时期（the Period of the United States）。虽然美国的法律制度是在英国法律传统的基础上形成和发展起来的，但是在近四百年的历史进程中，美国的法律制度也形成了一些不同于英国法律制度的特点，如公诉制度（public prosecution）等。

美国属于普通法系（Common Law Legal System）国家，其法律制度有两个基本特点：其一是以分散制（decentralization）为原则；其二是以判例法（case law）为主体。美国除联邦政府外，还有州政府、县政府、市政府、镇政府等等，而且这些政府都是相互独立的，各自在其管辖范围内享有一定的立法权和执法权。因此，有人说美国是"一个有许多政府的国家"（a country of many governments）；而美国的法律体系则是一个

"零散的无系统"（fragmental no-system）。诚然，美国现在也有很多成文法（written law）或制定法（statutory law），但是其法律制度仍以判例法为主体。换言之，"遵从前例"（stare decisis）仍然是美国司法活动中最重要的原则之一。以上两点对于理解美国的法律制度具有重要意义。

Notes （注释）

1. Legal system：法律制度或法律体系或法系
2. …at once：…同时；既……也（又）……如：The book is at once interesting and instructive. 该书既有趣又有教益。
3. …and it is new, too, in the sense that it is constantly being renewed by the addition of new elements of population and of new States. ……同时，它（美国）因新人口成分和新州的加入而持续更新，在此意义上，它也是新国家。
4. …the first one to be made out of an Old World colony. ……第一个从旧大陆殖民地脱胎而出的国家。Old World 指与美洲新大陆（New World）相对而言的东半球旧大陆，尤指欧洲。
5. America's youth：美国建国初期
6. …for events such as those that are lost in the legendary past of Italy or France or England are part of the printed record of the United States. ……因为像在意大利、法国或英国过去的传说中湮没的那种事件则是美国有文字记载之历史的一部分。
7. …the intricate network of relationships between States and Nation. ……各州与联邦之间错综复杂的关系。
8. the reports of the United States Superme Court：联邦最高法院判例汇编
9. stout volumes：巨册；厚册
10. …strike a consistent note：敲击出始终如一的音调。
11. binding interpretation：有约束力的（法律）解释
12. itinerant judges of the English royal court：英国皇家法院的巡回法官
13. writ：（以君主名义发出并加盖政府印信的）令状；法院令状
14. The enforcement of a claim presupposed the existence of a special form of action, a writ, with the result that the original common law represented a system of "actions" similar to that

of classical Roman Law. 某项诉讼请求的强制执行是以法院令状这种特殊诉讼行为形式之存在为前提的，而这就使最初的普通法表现为由类似于古罗马法的“诉讼行为”所构成的体系。

15. …there was no recourse for a claim without a writ, the claim did not exist. ……没有法院令状(为前提)的诉讼请求就没有追索权，因而该诉讼请求也不存在。

16. Provisions of Oxford：“牛津条例”，从贵族议会中推选出的24人委员会为限制亨利三世的权力而在1258年制定的一部带有宪法性质的法律。

17. writ upon the case：本案令状，即法院就具体案件所颁布的令状。

18. ex aequo et bono：(拉丁语) 公平且善良

19. …Chancellor as “keeper of the King's conscience”：……作为“国王良知守护人”的大法官（即上议院议长）。

20. …relief in the form of specific performance：……特定履行方式之补救

21. division of title in the law of property：财产法上的所有权分割

Exercises （练习）

1. **Questions about the text**

①Why is the United States a very new nation?

②Why is the United States an old nation as well?

③The record of American history is more comprehensive than those of other major nations in the world, isn't it?

④The American record does not include the records of the present fifty states, does it?

⑤What are the reports of the United States Supreme Court?

⑥What are the important factors, according to the writer's opinion, for understanding American law and legal methodology? And why?

⑦When did the English common law system become inflexible?

⑧What are the special characteristics of equity law?

⑨How did the common law become part of American law?

⑩There is not any separate chancery court in the federal ju-