高等学校法学教材

法律英语（第二版）

LEGAL ENGLISH

何家弘/编

法律出版社

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出版说明

二十多年前，当中国改革开放开始勃兴，法律和法律教育开始再度崛起之时，法律出版社便以精诚态度和极大力度服务于中国的法律教育。针对不同层次的读者，本社陆续推出了多种系列的法学教材，涉及法律教育的各个层面，迄今已达数百种。高等学校教材、教学辅导书是其中重要的组成部分。长期以来，这些教材陪伴中国法律人共同成长，对中国法律教育，以至对中国法律的发展都起了不小的推助作用。

进入新世纪以来，法律教育在取得长足发展的同时，也积极酝酿和展开改革举措，将培养高素质的现代法律人才进一步列为法律教育的重要目标。为此，本社应时而变，不拘一格，力求从教材的品种上、内容上、形式上实现更大突破，为新一代法律人学取专业知识提供更好读本。

就高等学校教材而言，我们立足两种进路：全面革新旧有教材，或推出全新教材。革新旧有教材，意在选取原有教材中的精品，从内容到形式全面更新、修订，重新整合，使这些在时间流变中积淀下来的法律教育的财富，以崭新面目，继续服务于新的读者。推出全新教材，则为约请优秀作者撰写新作，精阐原理，结合实践，关注前沿，努力创造出新世纪的新经典。优秀作者，或为老一辈与盛年名家，或为新生代才俊。或革新，或全新，这些教材统为一名，名之为“高等学校法学教材”。

我们深信，中国的法律教育事业将在改革和发展中不断壮大；我们承诺，本套“高等学校法学教材”以及本社所有法律教育图书都将在发展中不断更新，不断超越。本着竭诚为法律和法律教育服务，竭诚为读者服务的宗旨，我们愿与广大读者和作者一起，共同创造法律教育出版事业、法律教育事业，以至法治事业的未来。

法律出版社法律教育出版中心

2002 年 12 月

第二版前言

2000年的初秋，我作为中国大学教授代表团的成员来到风景如画的日内瓦，与世界贸易组织和联合国贸发会等国际机构的官员和专家就中国“入世”等问题进行交流和会谈。在那两周的时间内，我的感受颇多，其中之一就是进一步认识到，中国太需要熟悉法律而且精通外语的人才了。一方面，虽然目前在中国能讲一口流利英语的人不在少数，但是懂专业而且外语好的人却为数不多，而在法律界能够熟练使用外语的人则更如凤毛麟角；另一方面，随着中国的“入世”，随着中国与外国在涉及法律的领域内的交流和往来日益频繁，我们对“法律＋外语”的复合型人才的需求也在增长。因此，在法学教育中加强法律英语的教学确实具有特别重要的现实意义。

学英语难，学法律英语则是难上加难。其实，不仅中国人以为难，外国人也以为难，甚至连一些以英语为母语的国家的人都会把法律英语称为“外语”。笔者以为，法律英语之所以难学，原因主要有三：第一，在法律英语中有许多生僻的词汇，这些专业术语往往是人们在日常生活中不会使用的，甚至是很难谋面的；第二，有些法律词汇本身虽然不算生僻，或者说，组成这些法律词语的字都是人们所熟知的，但是放在法律语言环境中，其含义却与日常用义大相径庭，使得圈外人读之或听之时，总感到一头雾水；第三，传统的英语法律学者在撰写文章和法律文书时往往喜欢咬文嚼字，甚至使用极长的语句和极晦涩的古语，似乎非此不足以显示其驾驭法律语言的能力，而这种语句往往会使不熟此道的人在阅读时甚感吃力。不过，近年来，在美国的法学教育中，也有学者在极力推广“简明英语”。

学习法律英语，必须以相关的法律知识为基础。因此，要想达到预期的效果，讲授法律英语的教师必须在英美法律制度的领域内有较深的造诣，而学生则必须在学习英语的同时也要认真研习英美国家的法律制度。虽然这提高了教与学的难度，但是就一门课程而言，却可收到“一石两鸟”(to kill two birds with one stone)的成效。而这也正是笔者编辑本教材之宗旨。

《法律英语》自1997年由法律出版社出版以来，已经被许多法律院校采用为教授专业英语的教材，并且受到了教者和学者的欢迎。该书已多次重印的事实，即为证明。然而，笔者在教学过程中也发现了一些问题，并收集了一些修改意见。这次

法律出版社决定将该书纳入新近推出的“高等学校法学教材”系列，为我修订该教材提供了一个很好的契机。

此次修订，我主要增补了“知识产权法”和“世贸组织规则”两课，同时对一些资料进行了更新。法律出版社的编辑则对该书的版式进行了重新设计，使之更便于教学，并给人耳目一新的感觉。在修订过程中，法律出版社的袁方女士和中国人民大学的姚永吉先生帮助我收集了增补课文的资料，黄丽娟小姐则承担了“补充读物”的翻译工作。在此，我谨对他们表示诚挚的谢意。

何家弘

2003 年 3 月于北京痴醒斋

编写说明

《法律英语》是为高等法律院校法学专业的本科生和研究生编写的专业英语教材。编者根据自己在美国学习法律的体会和在国内讲授法律英语的经验，将专业外语教学中“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，在内容设计上既照顾到外语学习的规律，又照顾到法律学科的体系，从而可以使学生收到“一石两鸟”的学习效果。

本书共设20课，包括法律制度、法律职业、法律教育、司法系统、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、环境保护法、家庭法、民事诉讼程序、刑事诉讼程序、证据规则。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，其中既有法典和判例，也有文章和讲稿。编者还对原材料进行了一定的编辑和修改，以适应本教材的需要。本书还有三个附录，即模拟练习、补充读物参考译文和词汇表。

本书最突出的特点是实用性强。每课的练习中都有专门为该课内容设计的讨论和模拟练习，以提高学生的英语表达能力和涉外法律实务能力。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都有很强的实用性。此外，该书在附录中还设计了两个综合性模拟练习：一个是根据轰动一时的辛普森案设计的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。练习后面还附有法庭常用英语、法官给陪审团的指示范例、中外合资企业合同英文参考样本和《中华人民共和国中外合资经营企业法实施条例》英译本，以便学生参考。

于钦建、王文河、任新萍、刘希明、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补充读物的翻译工作，编者在此谨表谢忱。

编者

1997年5月

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LESSON ONE

Legal System
法律制度

Background 背景

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),但是其法律制度仍是以判例法为主体的。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。

Text 课文

Part One

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 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-government 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.

Part Two

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 flexibility 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 case 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 contemporary legal concepts (for instance the division of title in the law of property) and, on the other hand, it 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 synonymously, 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.

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. 该书即有趣又有教益。

【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: 美国的年青性,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. ……因为象在意大利、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 Supreme 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章的)令状;法院令状;诉讼启始令。

【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(或实际履行)方式之救济。

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

【22】…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. ……而"普通法"相对来说则可以指普通法问题上法官制定的法律,也可以在更广范围内指所有法官制定的法律——取决于使用者的用意。

Exercises 练习

1. Questions about the text:

① Why is the United States a very new nation?

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

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

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

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

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

⑦ When did the English common law system become inflexible?

⑧ What are the special characteristics of equity law?

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

⑩ There is not any separate chancery court in the federal jurisdiction in the United States, is there?

2. Dictation

There are many different legal systems in the world. In fact, every nation's legal system has its own characteristics. However, the degree of difference varies, with some systems bearing more resemblance to others. As a result, the world can be divided into several legal families. Without doubt, the Common Law Legal Family and the Roman Law Legal Family are the most important legal families in the world. The former is also called the English Law Legal Family or the English-American Law Legal Family, while the latter is also called the Civil Law Legal Family or the Continental Law Legal Family.

3. Discussion

① Topic: What is the best way to study legal English?

② Questions:

A. Is legal English a knowledge or a skill?

B. Which skill among understanding (listening), speaking, reading and writing is the most important one for studying legal English?

③ Reference arguments:

A1. Legal English is a knowledge because it includes a lot of special information and many technical terms, and it needs understanding and comprehension.

A2. Legal English is a skill because it is an ability and a tool of communication, and it needs training and practice.

B1. Understanding is the most important skill for studying legal English, because legal English is a knowledge and understanding (listening) is the basis of other skills.

B2. Speaking is the most important skill for studying legal English, because legal English is a skill and speaking is the most efficient way to master the skill.

B3. Reading is the most important skill for studying legal English, because the main purpose of Chinese people in studying legal English is to read the legal literature in English.

B4. Writing is the most important skill for studying legal English, because it is

the most difficult one and it is used very often in legal practice.

④ Instructions:

A. The students are divided into several groups and each group is assigned an opinion for the discussion;

B. The groups discuss the issues separately, and each group elects one speaker for the discussion;

C. The speakers give their arguments in big session, and then other students may add arguments, ask questions or give comments.

Supplementary Reading 补充读物

The federal entity created by the Constitution is by far the dominant feature of the American governmental system. But the system itself is in reality a mosaic, composed of thousands of smaller units——building blocks which together make up the whole. There are 50 state governments plus the government of the District of Columbia, and further down the ladder are still smaller units, governing counties, cities, towns and villages.

This multiplicity of governmental units is best understood in terms of the evolution of the United States. The federal system, it has been seen, was the last step in the evolutionary process. Prior to its creation, there were the governments of the separate colonies (later states) and prior to those, the governments of counties and smaller units. One of the first tasks accomplished by the early English settlers was the creation of governmental units for the tiny settlements they established along the Atlantic coast. Even before the Pilgrims disembarked from their ship in 1620, they formulated the Mayflower Compact, the first written American constitution. And as the new nation pushed westward each frontier outpost created its own government to manage its affairs.

Before independence, each colony was governed separately by the British Crown. In the early years of the republic, prior to the adoption of the Constitution, each state was virtually an autonomous unit. The delegates to the Constitutional Convention sought a stronger, more viable federal union, but they were also intent on safeguarding the rights of the states.

In general, matters which lie entirely within state borders are the exclusive concern of state governments. These include internal communications; regulations

relating to property, industry, business and public utilities; the state criminal code; and working conditions within the state. Within this context, the federal government requires that state governments must be republican in form and that they adopt no laws which contradict or violate the federal Constitution or the laws and treaties of the United States.

Once predominantly rural, the United States is today a highly urbanized country, and three-quarters of its citizens now live in towns, large cities or their suburbs. This statistic makes city governments critically important in the over-all pattern of American government. To a greater extent than on the federal or state level, the city ministers directly to the needs of the people, providing everything from police and fire protection to sanitary codes, health regulations, education, public transportation and housing.

Their huge size makes the business of running America's large cities enormously complex. Only seven states of the union, for example, have populations larger than that of New York City. It is often said that, next to the Presidency, the most difficult administrative position in the country is that of Mayor of New York.

The federal, state and city governments by no means cover the whole spectrum of American governmental units. The U. S. Bureau of the Census has identified no less than 78, 218 local go-vernmental units in the United States: counties, municipalities, townships, school districts and special districts.

The county is a subdivision of the state usually—— but not always—— containing two or more townships and several villages. New York City is so large that it is divided into five separate boroughs, each a county in its own right: The Bronx, Manhattan, Brooklyn, Queens and Richmond. On the other hand, Arlington County, Virginia, just across the Potomac River from Washington, D. C. , is both an urbanized and suburban area, governed by a unitary county administration.

In most counties, one town or city is designated as the county seat where the government offices are located and where the board of commissioners or supervisors meets. In small counties, boards are chosen by the county as a whole; in the larger ones, supervisors represent separate districts or townships. The board levies taxes, borrows and appropriates money, fixes the salaries of county employees, supervises election, builds and maintains highways and bridges, and administers national, state and county welfare programs.