



法学系列

英美法判例读写教程

高凌云 编著



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法学系列

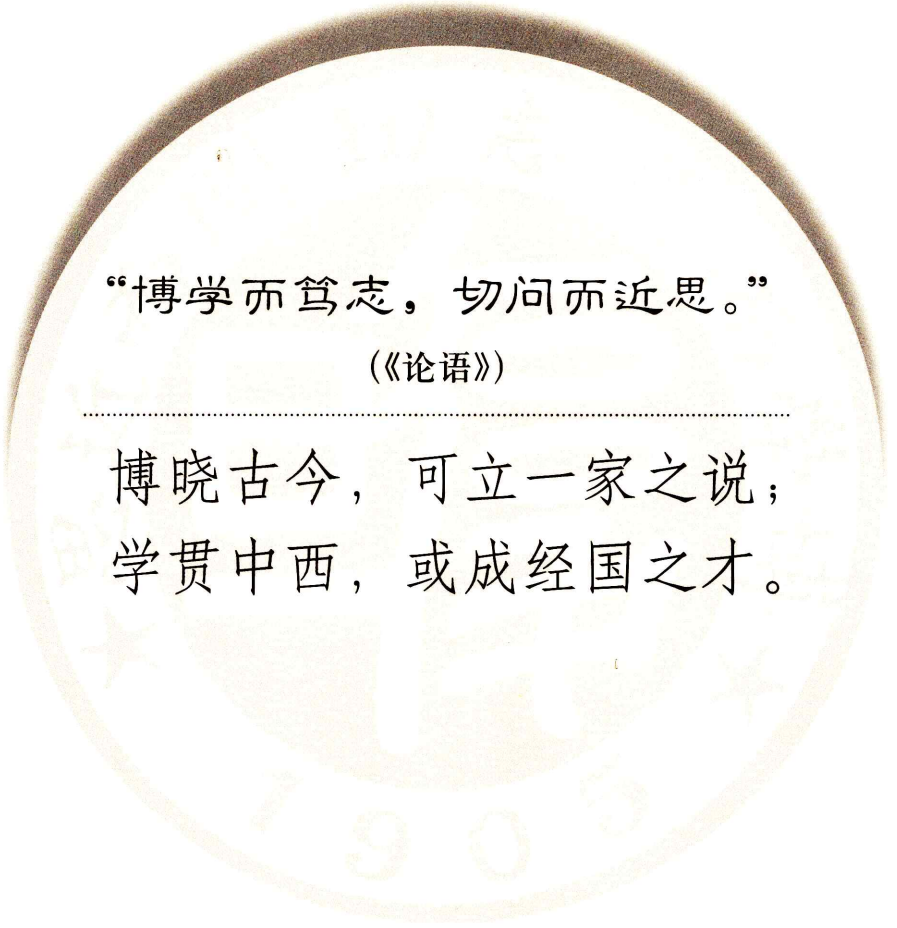
英美法判例读写教程

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内容提要

本书主要介绍学习英美法的方法，包括如何阅读英美法判例及如何撰写英文法律文件。第一部分介绍英美法律制度的基础知识，第二部分介绍判例法的遵循先例原则及其适用，第三部分详细介绍判例阅读与分析路径，以及撰写案情精要的方法，第四部分有关法律文件的撰写要点与格式。本书的特点之一是配有大量的判例与写作范例，以及写作材料，可供读者练习，实用性较强。二是采用原版判例，语言准确，并辅以适当的中文解释，减轻初学者的学习难度。三是本书的内容，对于英美法的任何学科都是敲门砖，因为本书的主题是学习方法，而不是只针对某一法律领域。四是本书适应的读者群比较广泛，既可以用作法科学生学习英美法或比较法全英文课程的教材，也可以用于法律英语课程的教学，还可以为其他对英美法感兴趣的读者提供全面的英美法的知识。对于计划到英美法系国家攻读法学位的读者而言，本书是一个很好的预备；而对于没有计划出国学习的读者而言，本书是可以据此一窥全豹的工具。



“博学而笃志，切问而近思。”

(《论语》)

博晓古今，可立一家之说；
学贯中西，或成经国之才。

主编简介

高凌云，复旦大学法学院教授，美国纽约州、俄勒冈州律师，美国纽约大学法学院Hauser Global Senior Fellow（海外高级研究员），美国圣约翰大学法学院国际法与比较法研究中心客座高级研究员，曾任美国凯斯西储大学、圣约翰大学和杜兰大学客座教授，为美国JD/LLM学生讲授国际商事交易法、中国商法和比较信托法等三门课程，并先后应邀在比利时根特大学法学院、美国哈佛法学院、加州大学尔湾分校、纽约大学、康奈尔大学、哥伦比亚法学院、福德姆大学以及国际信托协会与美国纽约律师公会等发表公开演讲或做有关信托法和商法的学术报告。出版*Chinese Business Law*（合著，美国Thomson West法律出版公司）、《被误读的信托——信托法原论》《中华人民共和国民法总则（中英对照）》《金融创新与监管前沿文集》等专著、译著和教材，并在国内外法学期刊发表信托法与比较法内容相关论文。主要研究与授课领域为英美法、信托法、国际金融法、国际商法和法律英语。

前 言

随着全球经济一体化的发展以及法律在我国地位的不断提升,法律英语的学习成为我国法科学子的必修课以及大多数综合大学学生的选修课。法律英语应包括两个层面:一是以英语表达的外国法,主要以英美普通法为主;二是以英语表达的中国法,主要包括中国法条英译以及中国法律概念、法律文献的英译等。而要做到能够准确将我国的法条与法律文献翻译成英语,首先必须了解在英美法系和其他英语国家是否有类似的法律概念以及这些概念是否有约定俗成的表达方式,否则即便把我国的法律概念翻译成英文也可能牛头不对马嘴。因此,学习英美法是将我国法律准确翻译成英语的基础。

一般而言,学习英语要同时注重听说读写,学习法律英语也是如此。

以前网络不发达,寻找原版听力材料比较困难,只能依靠国内的有声出版物或者电台。而有声出版物大多经过编辑,可能失去原汁原味;收听电台也有很多不便,诸如信号问题以及时间问题。现在我们处于网络时代,通过网络很容易找到各种音频和视频资料,英美国家的有些法院也把庭审资料放到官方网站。因此,我们有条件听到未经编删的原版资料,“听”的资源问题比较容易解决,只要我们坚持不懈地听就能够提高法律英语学习中的听力水平。另外,通过参加法律英语课或者其他全英语法律课的学习,在课堂上一边听老师和同学们用英语讨论法律问题,这本身也是提高听力的一个好办法。

“说”对于中国学生一直是个大问题,因为缺少说的环境,且通过上课来锻炼说的能力也很有限。由于上课时间较短,班上同学可能较多,不大可能轮到每个人发言。我建议有心练习口语的同学在课下自己组织类似“英语角”等活动,作为法科学子,也可以积极组织或参加英美法模拟法庭,用英语辩论。当然,在课堂上应该主动积极用英语发言。曾有学生告诉我,他们在连续上英语课或者全英语法律课之后,到食堂打饭时都不由自主对着打饭的阿姨说起英语来。这充分说明“说”的能力是完全可以培养的。

“读”和“写”对中国学生来说相对容易,尤其“读”,我们同学的阅读能力一般都很强。可是法律英语的读和写与普通英语不同,因为面对的是英语法条、判例或法律文献,里面大量的法律词汇对英语是母语的学子而言也很难,何况我们的母语不是英语。因此,

学习法律英语,一定要重视读和写。英美法的特点是以判例法为主,因而读案例就成为英美律师每天最重要的功课,而对于我们来说,也是学习英美法的基本功。能够读懂一般的英语并不一定能读懂案例。“写”也是如此,即便能够用英语写信,写短文,甚至写小说,却并不一定能够写法律文书,除了特殊的法律英语词汇外,法律文书的写作有其特殊的格式与要求。

因此,本书着重介绍如何阅读英美判例,如何撰写案例综述,如何用英语撰写一种最重要的法律文书——法律分析报告,又叫备忘录(memorandum)。本书的前身是《英美法:案例分析与法律写作》,曾在复旦大学法学院作为法律英语教材使用了6年多,且经过了超过1000多名法科学学生的验证,并于2006年荣获上海市优秀教材三等奖。2012年再版后,又经过了6年多的教学检验,成就了现在的版本。

感谢复旦大学出版社的张炼编辑对本书所做的贡献,她在本书稿的修订过程中认真细致,一丝不苟,提出了很多宝贵意见。另外,复旦大学法学院国际法专业2018级研究生管洁泉和丁伯韬同学在帮助审阅本书稿的同时还帮忙选定了一些较难的法律词汇并翻译成中文,复旦大学2015级本科生罗杰韬同学协助最后审稿,在此一并表示感谢。

限于篇幅,本书着重于案例分析,并不需要读者具备某一部门法的知识,因此适用性较强;然而这同时也是本书的短处,如果读者想要学习英美法中的部门法,例如英美合同法、侵权法等,仅仅看这本书是不够的。目前国内市场上有不少很好的法律英语教材,由浅入深地介绍英国或美国的各个部门法,并附有词语解释和翻译练习等,适合非法科学生或者对自己的英语程度不够自信的同学使用。另外国内还出版了不少原版法律书的影印本,大都是英美等国法学院的教材,适合英语程度较高,又对某一部门法有特殊兴趣的同学学习。另外,复旦大学出版社于2016年7月出版的《英美合同侵权法(第二版)》作为本书的姊妹篇,针对合同法和侵权法这两门部门法,可供有心者配套学习。

我建议有志于提高法律英语能力并希望学习英美法的同学在学习本书的同时还可以根据自己的英语程度购买一本或一套其他法律英语教材,不在多,而在于把书从头读到尾。

最后,由于能力与时间所限,错误在所难免,敬请指正。

高凌云

2019年4月于纽约大学曼哈顿校区

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PART I

**INTRODUCTION TO
COMMON LAW SYSTEM**

legal system 法系

civil law system 大陆法系,指包括欧洲大陆大部分国家从19世纪初以罗马法为基础建立起来的、以1804年《法国民法典》和1896年《德国民法典》为代表的法律制度以及其他国家或地区仿效这种制度而建立的法律制度。它是西方国家中与英美法系并列的渊源久远和影响较大的法系,以制定法为判案依据。

written statute 成文法

common law system 共同法系,国内普遍译为普通法系,是以英国共同法为基础发展起来的法律的总称,指英国从11世纪起主要以源于日耳曼习惯法的共同法为基础,逐渐形成的一种独特的法律制度以及仿效英国的其他一些国家和地区的法律制度,产生于英国,后扩大到曾经是英国殖民地、附属国的许多国家和地区,是西方国家中与大陆法系并列的历史悠久和影响较大的法系,注重法典的延续性,以传统、判例和习惯为判案依据。

case law 判例法,是指由一个个实际案件中的司法判决所确立的原则和规则集合的总称,是一种区别于制定法或其他形式法律的法律渊源;从学理意义上来说,是由判例所构成的一套法理。

sources of law 法律渊源,指法律的创制方式和外部表现形式。

THERE are two main legal systems in the world: one is civil law system under which written statutes play an important role, and the other is common law system whereby case law has been in a dominant position. Chinese legal system roughly belongs to the civil law system because written statutes are the main sources of law in China, although some scholars would name it as an independent "Chinese Legal System." The differences between civil law system and common law system are not only reflected in the forms of the law (written statutes or case law), but also reflected in the methodologies of teaching and studying the law. While a law student in China normally learns the general theories of law and the framework of the written statutes, a law student in a common law country would read cases from the day he enters law school. Therefore, understanding and analyzing cases is one of the most fundamental skills that a common law lawyer must possess. This book will focus on common law case analysis and legal writing, and Part I will introduce the basic features of common law.

Chapter 1

COMMON LAW

1.1 Law

What is the law? Even experienced judges, law professors, or lawyers may not be able to give an answer to it right away. Even if they may, the definitions given by different people are different. It is almost impossible to give an accurate definition of “law” that covers every aspect of it. There is simply not a unified or all-inclusive definition of law. It is probably wiser not to probe the exact meaning of law; instead, it is more important to understand what the law is mainly comprised of, who made the law, and what will happen if the law is not observed.

Among the various definitions and descriptions of law, one commonality is that they all agree laws are rules. There are many rules in our life but only the legal rules are laws. *Webster’s New World Dictionary* defines a legal rule as

- a) a regulation or guide established by a court governing court practice and procedure;
- b) a declaration, order, etc. made by a judge or court in deciding a specific question or point of law;
- c) a legal principle or maxim.

This description of legal rules is not complete because in common law system legal rules require the participation of government in their creation and enforcement and may be made by the legislature, the executive, and the judiciary. The laws made by the legislature are called statutes or acts; the laws made by the executive are named administrative regulations or administrative rules; and the laws made by the judiciary in the course of deciding cases are known as case law. The executive and the judicial courts have power to enforce the law. Any disputes will be

observe 遵守

rule 规则

regulation 规章, 条例
guide 指南, 指导
court 法院; 法庭
procedure 程序
declaration 声明
order 命令, 指示
legal principle 法律原则
maxim 法律准则, 基本原理

enforcement 执行
the legislature 立法机关
the executive 行政机关
the judiciary 司法机关
statute 法规, 法令
act 法案, 法令

enforce 实施, 执行
dispute 争端, 纠纷

resolve 解决

punish 惩罚

regime 社会制度, 管理体制

back by force 以武力为后盾

security 保障

judge-made law 判例法, 法官创制的法。

decision 判决

isolated 孤立的

justice 正义

apply 适用

local custom 当地习惯

divergent 不同的

Norman Conquest 诺曼底征服

circuit 巡回审判区

Magna Carta 《大宪章》, 英格兰国王约翰在封建领主迫使下于 1215 年 6 月 15 日在伦敦签署的保证公民自由和政治权利的宪法性文件, 被公认为英格兰宪法自由权的基础。

content ... with ... 满足于

trial by jury 由陪审团参与的审判

contest 争夺

property 财产

personal injury 人身伤害

contract 合同

resolved and any person who fails to observe the law will be punished through the procedure provided by the legal rules.

Therefore, law can generally be understood as rules and the underlying policies for guiding or regulating people's behavior in society. It is the regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society. BLACK'S LAW DICTIONARY (9th Ed.) 962 (West 2009). It tells people what is allowed to do and what is not allowed to do, what procedures must be followed, and what happens to those who do not follow them. Law defines relations among individuals and groups and helps people arrange or conduct their business with greater security.

1.2 Common Law

Common law is also called case law or judge-made law, which is the basis of law in countries that have been at some time under British influence, with England and the United States as the representative countries. This system had been well established since 1215 and it "originates from English law, consisting of the decisions given by English judges in tens of thousands of individual disputes, as set down in records and reports published over the past five hundred years." Michael H. Whincup, CONTRACT LAW AND PRACTICE, THE ENGLISH SYSTEM AND CONTINENTAL COMPARISONS 1-2 (3d Ed., Kluwer Law Int'l 1996).

Owing to the underdeveloped economy and the difficulties for people to travel around, the British communities in their early history were small and isolated. Justice was maintained by local courts through applying local customs and rules which were divergent and different from community to community. Since the Norman Conquest in 1066, the English had started to establish a stronger centralized legal system. They divided the whole country into circuits which judges would follow and administer justice. They decided not to write down all known laws on paper. "They won basic rights from their rulers, such as Magna Carta from King John in 1215. For the rest, they contented themselves with the developing courts and with trials by jury for contests between individual citizens over property, personal injuries and contracts." Zhongcheng Chen, A SELECTION FROM LEGAL LITERATURE IN ENGLISH 17 - 18

(Shanghai Translation Publishing Co. 1987). As the judges became more established in their traveling of circuits, the King created new legal rules for the whole country in order to unify the rules on the land, and gradually, local customs were replaced by these unified new rules. Since these legal rules were commonly applied throughout the whole country, they eventually became known as the common law.

In the beginning of common law, there were few statutes or written laws, and judges would look to prior similar cases for guidance. The prior cases are called precedents. Later on, the English Parliament started to enact acts to define specific crimes and to prescribe penalties. These acts were relied on by judges when resolving disputes; they gradually formed part of the common law. Judges and the members of Parliament made British law by bits and pieces. Therefore, the English common law is composed of custom, tradition, decisions by judges in specific cases, and acts of Parliament.

After the common law had been established in England, it started to spread and develop in the countries under the British influence. For example, it has become the most important single root of the American legal system. Now English law and American law constitute a legal family with a closer relation to each other than is the case of the civil law system. The following excerpt may help us better understand the development of American legal history:

American legal history begins with the first English settlement in Jamestown, Virginia in 1607. Its phases comprise the history of the English colonial period, the Declaration of Independence by the then thirteen colonies in 1776, the period of state formation (1776-1788), and the period of independent statehood of the "United States" which began with the ratification of the Federal Constitution (1788) and the assumption of office by President Washington (1789). During the colonial period English law was in force, statutory law as well as case law. It was supplemented by colonial legislation tailored to local conditions and needs. The different colonies varied in their legal structure and, with it, in the legislative competences they possessed. Some of them were provinces of the Crown and were subject to

unify 统一

precedent 先例
the English Parliament 英国议会
enact 颁布
crime 罪行
prescribe 规定
penalty 处罚、惩罚
by bits and pieces 一点一滴地
custom 习惯

spread 传播

excerpt 摘录, 节选

settlement (争端的) 解决

colonial period 殖民时期
the Declaration of Independence 《美国独立宣言》

ratification 批准
the Federal Constitution 《联邦宪法》
assumption of office 担任职务

colonial legislation 殖民地立法
tailor to 使合适

competence 权限
Crown 王国政府

Royal Patent 王室特许
charter 特许

citation 援引
render 作出

constitution 宪法
breach 违反

codification 法典
Civil Code 民法典

family property law 家庭财产法

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Blackstone's Commentaries 《英
国法释义》, 作者是威廉·布莱克斯
通。该书论述了英国法的基本原理和
英国民主政体的形成基础, 对英国宪
法的起源、历史及其合理性作了涵盖
甚广的阐述。

facilitate 促进, 推动

legal methodology 法学方法论

private law 私法

grow apart 往不同的方向发展

modify 修改

superimpose 附加, 安装

American gloss 美国元素

a royal governor. Others were administered by private companies or groups on the basis of a Royal Patent, while a third group were independent legal entities chartered by Royal Patent and therefore possessed greater independence from the English Crown.

The revolution resulted in reactions against the application of English law. The legislation of some of the states prohibited the citation of English decisions which had been rendered after independence; alone the circumstance of the adoption of a written constitution appeared “as a breach with the English tradition.” Louisiana, admitted to the Federation in 1812, continued to follow its French law tradition, adopted codifications modeled after the French example (among them a Civil Code) and adheres to this tradition into modern times. In Western and Southwestern States there is still today a remarkable influence of originally Spanish and French legal concepts, for instance, in the area of family property law. In general, however, the nineteenth century saw a return to English legal tradition to which the great works of James Kent and Joseph Story contributed decisively. Blackstone's Commentaries first appeared in America in 1803 and facilitated access to English law.

Legal methodology, legal language, and the basic concepts of private law in the United States thus are still “English” today and many State statutes provide expressly for the reception of English Common Law. Approximately at the time of the American Civil War (1861–1865) the English and American legal systems began to grow apart. American legislation increasingly modified and developed the case law of the common law and judicial decisions superimposed an “American gloss” on the received common law. American courts today rarely refer to English decisions. The legal literature seeks solutions for modern problems in the structure of its own law, at times under consideration of English developments in comparative perspective.

See Peter Hay, *AN INTRODUCTION TO UNITED STATES LAW* (American Elsevier Pub. Co. 1976).