研|究|生|英|语|教|程

Legal English

法律英语

（第三版）

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修订说明

《法律英语》一书通过经典原著介绍了英美法律体系，涵盖了法律英语的必备知识和词汇，主要供法律专业研究生和涉外法律从业人员及水平相当的学习者使用。

在全球化时代的今天，各国间的联系和往来愈加频繁，因此对既懂法律又懂外语的高素质复合型人才的需求与日俱增。法学院学生和法律专业人士学习法律英语的热情越来越高，人数越来越多，对教材的需求量不断增加，对教材的质量要求也在不断提高。为了适应这一形势的要求，我们修订出版了《法律英语》一书。

本书作者均具有国内外法学教育经历，多年从事本科生和研究生法律英语教学，我们希望通过本书，以自己丰富的外语教学经验和法学知识为国家的人才培养做出微薄的贡献。本书经过几年的广泛使用受到社会的好评，于2006年被评为“北京市精品教材”。为更好地发挥本书的作用，最大地满足教学的需要，作者再次对本书进行了修订。此次修订基本保持原书特点，对部分文字内容进行了修改、调整，使之更加完善。

本书的编写既遵循语言学习规律，又体现了法律英语的特点。在课文选材上，以介绍法律制度和部门法为主，并辅以相关法律必备知识和术语。本书练习比较丰富，包括阅读理解、法律术语练习、完型填空、短文翻译、听写、补充阅读、词义辨析和讨论等。练习的编排既注重培养学习者听、说、读、写、译等基本语言技能，又注重帮助学习者掌握相关的法律知识，从而全面提高学习者的法律英语水平。

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编　者

2010年8月

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Unit 1 Legal Systems

Because the United States is federation, Americans are usually well aware that the law may vary from jurisdiction to jurisdiction. Politically, it is certainly true to say that each independent jurisdiction has its own independent legal system. However, in terms of legal traditions and legal methods, most of the world's legal systems belong to one of a few legal traditions. In the Western World, and in parts of the world that have been colonized or strongly influenced by the West, there are two main legal traditions or legal families—the civil law and the common law. The U. S. legal system belongs to the common law tradition (Louisiana excepted).

This note will introduce you to the origins and development of the common law and the civil law and to the main distinctions between these two systems, especially in terms of legal methods.

1. Origins of the Two Legal Traditions and Their Diffusion Around the World

1) The Common Law

The common law tradition originated in England. A new legal order was established as early as 1066 by the Norman conquest, but the common law did not exist in 1066. William the Conqueror did not abolish the local customs and the local courts. Local courts continued to apply local customs. There was no law common to the whole kingdom. The King did however establish some royal courts at Westminster. Their jurisdiction was at first very limited but eventually expanded to the point where the local courts fell into disuse. The decisions of the royal courts became the law common to the whole kingdom, the common law.

The common law has its source in previous court decisions. The main traditional source of the common law is therefore not legislation but cases. This is so true that when the common law evolved into an unfair set of rigid and formal procedural rules the King, rather than legislate to amend the law, created a new court. When a subject thought that a common law decision lead to an unfair result he (and at the time usually not she) would petition the King. There were so many petitions that the King created the court of Chancery which could grant a discretionary relief "in equity" to correct the common law. The decisions of this court gave birth to a body of law called equity which is also based on previous judicial decisions. Both law and equity are part of what is called the common law

tradition.

The British Empire brought the common law to all continents. The common law was "received" in many countries but its reception has been most successful in countries where the European settlers became a majority and imposed their law over indigenous populations. This is the case in Australia, English Canada, New Zealand and the United States (except Louisiana where the civil law was in place before the United States gained jurisdiction). The common law was also imposed on many other colonies but usually with some adaptions to take into account the local customs. In some cases, the United States imposed parts of the common law on newly entrusted territories (e. g., the Philippines). Still today in Africa and Asia, former British colonies continue to apply the common law. Today, India is the most populous common law country.

Following the second world war, the economic hegemony of the United States also contributed to the expansion of the common law. Contracts were drafted in common law terms and international arbitrators often applied common law principles.

A note about the common law in the United States. Because of the early independence of the United States, the common law here has evolved separately from the common law of England and of other Commonwealth countries. Commonwealth nations became independent only fairly recently, and even long after they were independent, some nations continued to allow appeals to the Judicial Committee of the Privy Council in London (some countries still allow such appeals). This has had a unifying effect on the law of these countries and still today the courts of one country will consider the decisions of the courts of another Commonwealth country as very persuasive. By contrast, only rarely, if ever, does a United States court determining a matter of domestic law invoke a decision of a foreign country's courts. It is therefore even more striking that notwithstanding years of "legal separation" the law of this country still has so much in common with the law of other common law countries.

2) The Civil Law

The origins of the civil law go further back. They can be traced to the Twelve Tables of the Republic of Rome (probably in the fifth century B. C.). In its origin, it is the law of the city of Rome, the law applied to a citizen (in Latin, *civis*) of Rome as opposed to the law applied to a non-citizen. The expression "civil law," in Latin *jus civilis*, literally means the law of the citizens of Rome.

After the fall of the Western Roman Empire (476 A. D.), the so-called barbarians brought their law to Rome, although Roman law continued to apply to the Romans, the Germanic influence grew quickly and the law became more and more a mixture of Germanic and Roman law. This would later be known as the vulgarized Roman law. This law had very little in common with the classic Roman law. Canon law, the law of the Catholic Church, was the only Western legal system that kept intact many elements of the Roman law. However, in 529—534, the Eastern Roman Emperor Justinian published the *Corpus Juris Civilis*, an articulation and reformulation of Roman law. The Justinian Code and accompanying compendia remained in force in Byzantium until and even after the fifteenth-century conquest by the Ottoman Turks.

At the end of the eleventh century, the University of Bologna started teaching Roman law, more specifically the *Corpus Juris Civilis*. This was at first a purely intellectual endeavor since Roman law was no longer the law anywhere in Western Europe. This marked the beginning of what would later be known as the resources of Roman law. Soon other Western European universities followed the Bologna's lead and after a few centuries and for reasons too complex to be considered here, the Roman law was received almost everywhere in continental Europe. It became the *jus commune* (the "common law") of continental Europe.

The Roman law actually "received" was in fact limited to what we call "private law" (property, torts, contracts, etc.). That is why civilian jurists refer to what we call private law simply as "the civil law" (persons, property and obligations).

Although most civil law countries now have a civil code, codification is in fact a fairly recent phenomenon. The first French Civil Code dates back only to 1804 and the first German Civil Code, to 1896 (in force in 1900).

The French and German Codes are the two main civil law models. Napoleon brought his Code wherever he and his armies traveled. The French model has been influential in Latin countries both in Europe and in America (Central and South America, Louisiana and Quebec). It has also influenced former European countries before the Soviet occupation. German law has also been received by Japan.

2. Legal Methods—A Comparison

You must understand that a civil-law legal method course would be completely different from the course you are now taking. It is important at the beginning of

your legal career that you realize that law can take different forms and play different roles in different societies and cultures. What you will be studying is not the law as it necessarily has to be but the law as it is in the United States. Here are a few differences between the civil law and common law.

First and foremost, in common law countries, cases are usually considered to be the primary source of law. Your legal method class starts with the study of cases. In civil law countries, cases are simply not a source of law—at least in theory. The reality might well be that legislation has become extremely relevant in common law countries and that cases are becoming more and more relevant in civil law countries, but the attitudes of civilians and common lawyers toward legislation and cases differ greatly.

Civil law jurists will consider the civil code as an all encompassing document. They will interpret it generously in order to allow it to reach its goal of regulating the whole private law. The code lends itself to this kind of interpretation since its articles are usually drafted in very general and abstract terms.

On the contrary in common law jurisdictions legislation tends to be considered as an exception to the case law. The courts therefore have a tendency to interpret legislation more restrictively. In consequence both the courts and the legislator tend to enunciate legal rules in very specific terms meant to resolve very specific problems. Generally, cases and legislation will not tend to use abstract terms or to enunciate general principles.

Civil law students will read "law doctrine" more than cases. The "doctrine" is the cumulated writings of law professors on what the law is or should be. In civil law the "doctrine" is considered to be a source of law and a highly respected one. You have to remember that the University, not the courts, reintroduced the civil law in Continental Europe. It is therefore not surprising that law professors still have an important role in defining the law. Common law professors generally do not enjoy a similar prestige within their own jurisdiction. Here the judges get most of the prestige.

Legal education differs a lot from country to country but it is fair to say that American legal education is very original and in many respects unique. The case method or Socratic method is peculiar to this country. It must be clear to you by now that the "case" method could not have been thought of in a civil law country. In those countries (as in the case in England) law is an undergraduate degree. Legal education tends to be longer than in the United States. The teaching style is

magisterial—the professor exposes the law to his or her students, who take notes and do not intervene in class.

Legal Terms

federation n. 联邦
jurisdiction n. 管辖权,管辖区
common law 普通法;习惯法;判例法
civil law 罗马法;民法
legislation n. 立法
petition v. 诉请;向……提出请求; ***n.*** 申诉;申请;(美)起诉状
equity n. 衡平法
Chancery n. (英)文秘署;衡平法院;大法官法庭
judicial adj. 法院的;司法的
Privy Council (英)枢密院
canon law 教会法

Notes

1. This passage is contributed by Professor Gary F. Bell of McGill University (Montreal, QC, Canada) to the *Legal Methods* by Jane Ginsgurg who is the Justice of the U. S. Supreme Court.

2. William the Conqueror did not abolish the local customs and the local courts. William wanted to be seen as the successor of the previous king but not as a conqueror.

3. The decisions of this court gave birth to a body of law called equity which is also based on previous judicial decisions.

Today, in almost all common law countries, the same court exercises both the common law and the equity jurisdictions.

4. The common law was "received" in many countries but its reception has been most successful in countries where the European settlers became a majority and imposed their law over indigenous populations.

"Reception" refers to the process by which one political entity adopts the law of another.

5. Twelve Tables
The earliest statute or code of Roman law, framed by a commission of ten men, B. C.

450, upon the return of a commission of three who had been sent abroad to study foreign laws and institutions. The Twelve Tables consisted partly of laws transcribed from the institutions of other nations, partly of such as were altered and accommodated to the manners of the Romans, partly of new provisions, and mainly, perhaps, of laws and usages under their ancient kings. They formed the whole later development of Roman jurisprudence. They exist now only in fragmentary form. These laws were substantially codification, and not merely an incorporation, of the customary law of the people. There were Greek elements in them, but still they were essentially Roman.

6. In its origins, it is the law of the city of Rome, the law applied to a citizen of Rome as opposed to the law applied to a non-citizen.

In the New Testament, St. Paul, because he was a citizen of Rome, was entitled to be tried according to Roman law. In fact, according to the New Testament, Paul was even entitled to be tried in Rome in front of an imperial court.

7. Although most civil law countries now have a civil code, codification is in fact a fairly recent phenomenon.

Scotland—in many respects a civil law jurisdiction—does not have a civil code.

Exercises

I. Answer the following questions.

1. How was common law established?

2. What does the common law tradition include according to the text?

3. How different is the legal system of Louisiana from the rest of the United States?

4. What does "civil law" mean?

5. What is the main difference between the civil law system and the common law system?

6. What different attitudes do the civil law system and the common law system hold toward case law?

7. What is significant about the American legal education? How is law school teaching different from ours?

8. Is law degree an undergraduate degree in the U. S. ? How do people get a law degree in the U. S. ?

9. Can you compare the legal method employed in American legal education and the

legal method used in other countries?

10. Who play an important role in defining the law in civil law system, law professors or judges? What about the common law system?

II. Fill in the blanks with the legal terms given below and change the form if necessary.

jurisdiction legislation equity common law civil law
judicial petition arbitration private law precedent

1. In 1848 the state of New York enacted a code of civil procedure (drafted by David Dudley Field) that merged law and equity into one _____.

2. The concept of "inalienable rights" reflects the influence of _____ on the Declaration of Independence.

3. Veto power is one of the most important and most specific powers of the President, the power to veto _____.

4. The term "_____" is sometimes used to refer to all judicial decisions in a system where those decisions have precedential effect.

5. _____ independence was thought necessary to assure immunity from pressure from the political branches to decide cases a particular way.

6. Court decisions not only resolve past controversies; a decision of a case is considered to be a "_____" that has legal effect in the future.

7. _____ is a method of dispute resolution involving one or more neutral third parties who are chosen by or agreed to by the disputing parties, and whose decision is binding.

8. The right of the people to _____ for redress of grievances is guaranteed by the First Amendment, United States Constitution.

9. The term "_____" means all that part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals.

10. In _____ system, the idea of legislative supremacy was really one of legislative *exclusivity*—that legislation was the sole legitimate source of law. Judicial lawmaking was formally denied.

III. Choose the proper words from the list below and fill in the blanks.

precedents research published case law previous
judge-made resolve attorney-influenced U. S. Supreme Court appointed
relevant precedent on-line interaction cases

One considerable difference that exists between common law and civil law countries is the amount of ____1____ an attorney must do. American attorneys will search to find the ____2____ relating to a statute before they can say they have thoroughly researched the problem. Without locating and reading the cases that explain the application of the statute or constitutional provision, they have not even begun their research. Modern ____3____ services have made it faster and more efficient to find cases that might be relevant, but it is still hard work.

Once ____4____ pertaining to the issue have been found, they have to be analyzed to see if they are ____5____. Or, if the attorney thinks that his or her case is different from ____6____ cases, he or she must explain why those cases and their decisions are not applicable.

In this way, case law is not only ____7____ but also "____8____" law. We can say that the common law is the law that is created daily through the ____9____ of judges and attorneys in the courtroom across the United States at all levels, from local courts to the ____10____.

All types of judges, whether ____11____ or elected, have the legal right to make certain types of decisions. Once a judge makes a decision, that decision becomes a ____12____. Of course, that judge's decision itself was based on the ____13____ taken from previous decisions of earlier judges. In that way, every decision can serve two purposes: to ____14____ the case that the judge is currently hearing and, if the decision is ____15____, to provide other judges precedent to follow.

IV. Translate the following paragraphs into Chinese.

Calling the United States a "common law" country is misleading to the extent that it suggests that the most prevalent form of law is common law. While this might have been true at one point, it is emphatically not true today. Since the turn of the 20th century and particularly since the 1930s, there has been an "orgy of statute-making" ushering in what has been called the "Age of Statute." The "center of gravity" of the state law has also been shifted to statutes. Indeed, it is probably fair to say that the average state law in the United States has as many statutes as the average civil law country in Europe. If one multiplies that amount of statutory law by 50 states, one can see just

how prevalent statutory law is in the United States.

Some statutes have replaced common law, but many more have created entirely new areas of law. On the federal level, volumes of federal taxation, social security, environmental, financial securities and banking law fill the United States Code. On the state level, numerous statutes regulating businesses, consumer rights, commercial transactions, and family relations have been enacted. Common law has not disappeared. Many areas of private law in the states—contracts, torts and property law—are governed primarily by common law with some statutory modifications. In most areas of law, however, statutes are the rule rather than the exception.

V. Spot dictation.

Common law decisions and rules are based on ____ 1 ____. However, all cases differ somewhat from ____ 2 ____. Consequently, a judge deciding a case must, to a greater or lesser degree, rely on ____ 3 ____ beyond what is set out in prior cases. Moreover, when a court is faced with making the *first* decision in a given area of the law—the "____ 4 ____"there is often little precedent on which to rely. This gives rise to the question: what is the ultimate source of common law rules and the nature of the judicial process in common law ____ 5 ____? This question has been answered differently at different times.

Today, we know that the creative component of the common law comes from judges. ____ 6 ____. If there is law from prior ____ 7 ____ to be applied, it should be applied. But whether in applying prior case law or striking out in a completely new direction, it is unavoidable that judges infuse notions of public policy ____ 8 ____. Thus, it is customary today to describe judges as "____ 9 ____" common law or ____ 10 ____ when they develop common law.

VI. Supplementary reading.

Case Law: Origins, Nature and Authority

How Cases Make Law

The decisions of judges, or of other officials empowered by the constitution or laws of a political entity to hear and decide controversies, create case law. As the name "case law" suggests, a particular decision, or a collection of particular decisions, generate law—that is, rules of general application. How is it that a court's determination of the rights and obligations of the particular parties before it can apply to the disputes of persons who were not before the court? From the point of view of parties to a lawsuit or other contested controversy, what matters is the immediate outcome, the result the tribunal reaches in their case. Suppose that A has sued B for damages for asserted

breach of contract, and that the court has reached a decision in their case. For **A** and **B**, the decision has immediate and specific significance: **B** either will or will not have to pay a determined amount of damages to **A**. In the view of judges, lawyers and law students, however, the decision takes on broader perspective. The decision becomes a possible source of general applicable case law. In other words, the decision in **A** v. **B** becomes authority for determining subsequent controversies. Just as the court in **A** v. **B** will have sought guidance from prior, similar, decisions, so later judges and advocates will look to **A** v. **B** for a rule by which to measure later parties' conduct.

The wider authority of prior decisions in individual cases may not seem self-evident at first, but consider the possible proposition. Suppose a society in which every disputed claim is heard and decided on its own individual merits, and with no regard whatever for consistency of the results from case to case. This society offers the means of setting disputes, but the society has no "case law." Each decision presents a result unto itself. Each decision is therefore unpredictable. Unpredictability in adjudication may provoke both instability in social relations, and the fear that little more than personal whim controls the judge's decision.

In fact, there is a strong urge to make general law from particular decisions in most societies.

How are we to account for this widespread inclination to make general law from particular decisions? Karl N. Llewellyn, the leading spokesman for the group of legal philosophers known as the American Legal Realists, offered the following explanation:

"Case law in some form and to some extent is found wherever there is law. A mere series of decisions of individual cases does not of course in itself constitute a system of law. But in any judicial system rules of law arise sooner or later out of such decisions of cases, as rules of action arise out of the solution of particular problems, whether or not such formulations are desired, intended or consciously recognized. These generalizations contained in, or built upon, past decisions, when taken as normative for future disputes, create a legal system of precedent. Precedent, however, is operative before it is recognized. Toward its operation drive all those phases of human make-up which build habit in the individual and institutions in the group: laziness as to the reworking of a problem once solved; the time and energy saved by routine as a curb on arbitrariness and as a prop of weakness, inexperience and instability; the social values of predictability; the power of whatever exists to produce expectations and the power of expectations to become normative. The force of precedent in the law is heightened by an additional factor: that curious, almost universal, sense of justice which urges that all men are properly to be treated alike in like circumstances. As the social system varies we meet infinite variations as to what men or treatments or circumstances are to be classed as 'like'; but the pressure to accept the views of the time and place remains."

Students will become aware, as their study of law proceeds, that adherence to precedent has its other side. A court that follows precedent mechanically or too strictly will at times perpetuate legal rules and concepts that have outlived their usefulness. The continuing problem in a legal system that recognizes past decisions as authoritative sources of law for future cases is how to maintain an acceptable accommodation of the competing values of stability in a law, served by adherence to precedent, and responsiveness to social change, which may call for the abandonment of an outworn legal doctrine. This problem of stability versus change will be a recurring theme in this casebook.

The Common Law Doctrine of Precedent

Professor Llewellyn was undoubtedly right in his contention that case law can be found "in some form and to some extent" in every legal system. But case law is uniquely authoritative and influential in a "common law country," which the United States is by inheritance from England. The Anglo-American legal system, unlike the "civil law" system which prevails with variations in most of the other non-Commonwealth countries of the world, explicitly recognizes the doctrine of precedent, known also as the principle of *stare decisis*. It is the distinctive policy of a "common law" legal system that past judicial decisions are formally and "generally binding" for the disposition of factually similar present controversies. This basic principle, firmly established centuries ago in the royal courts of England, was naturalized as American by the "reception" of common law in the United States.

When, and for what future cases, will a judicial decision or groups of decisions operate as precedent? The term "precedent" is a crucially important term of art in the vocabulary of our law. Let us note, first, a kind of territorial limitation: a judicial decision is a precedent in the full sense of the word only within the same judicial system or "jurisdiction." Thus a decision of the Supreme Court of California is a precedent and so generally binding in future "like" cases in that court and in "lower" California courts, but it is not a full-fledged precedent for future case arising in the courts of Ohio or Vermont or some other states. Even a decision of the Supreme Court of the United States is not a binding precedent in a state court, say the Court of Appeals of New York, unless the legal issue decided by the Supreme Court decision was a federal question, that is, one involving the interpretation or effect of a federal statute or regulation or of the Constitution of the United States.

Even within the same jurisdiction, a decision is precedent only for "like," that is, factually similar, future cases. To put the matter more precisely, a judicial decision is a precedent, and so generally binding, only in future cases involving the *same material facts*. As the first-year law students will soon discover, this limitation is far easier to state in general terms than to apply in concrete situations. No two disputes will ever be identical in every factual particular. How is one to determine or argue, that a factual

difference between a past decided case and a case now presented for decision is, or is not, a difference in *material* facts? Case law processes require careful analysis, matching and distinguishing of the facts of cases. By the end of the first semester, the beginning law student will find that case matching and comparison has become a matter of his or her second nature.

Even when the jurisdiction is the same and the pending new case is found to possess the same material facts, some judicial decisions will have greater weight as precedent than others. Thus, for example, the weight or influence of a precedent is greatly affected by the place of the court that decided it in the judicial hierarchy of its jurisdiction, that is, by whether it was a "higher court" decision or a "lower court" decision. Three tiers of courts exist in the federal judicial structure and in the more populous states: (1) trial courts, (2) intermediate appellate courts, and (3) a highest appellate court or "court of last resort," called in most jurisdictions the Supreme Court. Less populous states are likely to have only two tiers in their judicial structures: trial courts and an appellate court of last resort. One should not assign the same force as precedent to the decision of a state intermediate appellate court as to a decision of that state's court of last resort, and should not expect a decision of a United States Court of Appeals to have the same precedent force as a decision of the Supreme Court of the United States. As to the decisions of the trial courts, particularly State trial courts, where most of law's day-to-day business is done, these are rarely published and, even when published, are not likely to have much force as precedent except in future cases in the same trial court. As a result, the overwhelming majority of the cases included in the law school casebooks are decisions of appellate courts.

"Res Judicata" and "Stare Decisis"; "Reversal" and "Overruling"

Every final decision of an appellate court has a dual impact or effect: (1) as an authoritative settlement of a particular controversy then before the court; and (2) as a precedent, or potential precedent, for future cases. A lawyer's Latin expression denominates each of these effects: *stare decisis*, as we have seen, for the impact of the decision as precedent; *res judicata* for its effect as a resolution of the immediate controversy. Do not confuse these Latin terms and the concepts they symbolize. The latter addresses a decision's impact in the individual case; the former, its impact on the legal norm of conduct.

The following example should illustrate the difference. Suppose that *P*(plaintiff) sued *D* (defendant) advertiser in State X, for using *P*'s photograph without his permission in an advertisement for breakfast cereal. The trial court decides in *D*'s favor, on the ground that in State X, there is no claim against the non consensual use of private citizens' private photographs for purposes of trade, nor have the courts there recognized a "right of privacy."