高等学校“十二五”规划教材

TEXTBOOK FOR HIGHER EDUCATION

BRITISH AND AMERICAN LEGAL SYSTEM

英美法律制度

李金玉　金　博　编

西北工业大学出版社

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【内容简介】 本书是为积极响应国家、社会和市场对涉外型、复合型和实用型卓越法律人才的急迫需求，开拓和培养学生的国际视野而编写的双语教材。本书分三大部分：第一部分8篇，侧重讲述英、美国家法律制度中极具传统与特色的基本理论和制度；第二部分5篇，选取了百年来影响美国宪政历程的重大经典案例；第三部分主要介绍美国联邦民事诉讼程序中的几个重要司法文书。每篇课文都由中英文两部分内容组成，中文相关知识背景内容与英文遥相呼应但又非机械对应；内容的编写注重知识性和趣味性的融合；篇章的构架兼顾理论学习与案例解析的衔接；课后思考题启发学生对相关问题进行客观分析、评价以及理性借鉴。

本书适合作为法学专业专科、本科学生以及研究生的双语教材，也适合作为其他相关专业的选修课教材，同时还适合相关实务部门的工作人员使用。

图书在版编目(CIP)数据

英美法律制度/李金玉，金博编．—西安：西北工业大学出版社，2014.1
ISBN 978-7-5612-3909-4

Ⅰ.①英… Ⅱ.①李…②金… Ⅲ.①法律—研究—英国②法律—研究—美国 Ⅳ.①D956.1②D971.2

中国版本图书馆CIP数据核字(2014)第012922号

出版发行：西北工业大学出版社
通信地址：西安市友谊西路127号　　邮编：710072
电　　话：(029)88493844　88491757
网　　址：www.nwpup.com
印 刷 者：兴平市博闻印务有限公司
开　　本：787 mm×1 092 mm　1/16
印　　张：13.5
字　　数：328千字
版　　次：2014年1月第1版　　2014年1月第1次印刷
定　　价：29.00元

序

目前，随着全球化趋势的进一步加快以及涉外法律领域内的交流往来日益频繁，我国法律实务迫切需要既熟悉中外法律且又精通外语的人才。2011 年教育部颁发实施的“卓越法律人才培养计划”关于应用型、复合型、涉外型卓越法律人才培养要求，正是顺应时代发展客观需求的科学举措。法学教育中加强双语教学是践行卓越法律人才培养计划的重要途径之一。但学好英语难，学好专业类英语则是难上加难。它既要求学生具有较好的英语功底，同时又要求学生知晓英美国家的法律制度。另外，大量生僻的法律词汇、术语、法律长句也使初学者倍感吃力。目前市场上关于本课程的双语教学图书为数不少，但内容要么过于艰涩深奥，要么过于粗浅直白，均不太适合法学专业学生使用。为了进一步提高法学专业双语教学质量，编者根据多年的双语教学经验，结合法学专业发展趋势及要求，编写了这本《英美法律制度》。

本书包括英美法律基础理论和制度、经典案例和司法文书三大部分。其鲜明特色在于难易适度、适用性强。由于英美国家实行判例法，注释法学不受重视，故而在理论上缺乏对相关制度细致、系统的梳理与整合，因此，体系庞杂、内容繁多的英美法律制度不可能被任何一本教科书所穷尽。本书在编写中着重选取作为英美法律制度根基部分中的核心理论和制度，如普通法与衡平法、遵循先例原则、法系、美国宪政、美国司法系统、法律职业、陪审团制度、司法审查制度等内容。当然，由于英美两国法律制度在许多方面具有相似性且美国法律制度更具有代表性，故而本书在编写中侧重对美国法律制度的介绍。每篇课文用英文详细介绍了相关制度，重点术语、长句的注释全面、细致；中文相关知识背景的介绍内容更为丰富、信息量更为庞大，且并非是英文原文的机械翻译，避免学生养成依赖性。书中经典案例包括布朗诉教育局案、罗伊诉韦德案、马伯里诉麦迪逊案、米兰达诉亚利桑那州案以及纽约时报公司诉萨利文案等百年来影响美国宪政历程的重大案件，在案例的选取上同时注重了趣味性。课后均附有相关思考题，启发学生能用比较的方法对中外相关法律制度进行分析思考。司法文书部分主要介绍了几种常用的文书格式，包括起诉状、答辩状、传票、裁决书等。教材内容取材广泛，主要来源于期刊、网站、期刊文章和图书，同时借鉴参考了其他同类教材，并根据需要对英文原材料进行了一定的编辑和修改。

本书由李金玉执笔，由金博对结构提出修改，并对内容进行审核。在本教材编写过程中，相关同仁给予了极大的支持、关注与鼓励，在此，一并谨表谢忱！

由于水平与经验，本书必存诸多缺憾之处，敬请读者谅解，同时欢迎批评指正。

编　者

2013 年 7 月

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1.1 The Common Law

Ⅰ. History of the Common Law

Under the Anglo-Saxons[①] here was not such a thing as English law. Communities were small and isolated because travel was dangerous and difficult. The administration of justice was centred locally, each small community having its own court where customs, according to that part of the country, were applied. There was a court in each Shire[②], and one in each Hundred[③] (a sub-division of a Shire). These courts were dominated by wealthy local landowners and noblemen. There were a few written laws known as King Alfred's laws.[④]

The Norman Conquest replaces this with a stronger centralised system. The Normans

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① Anglo-Saxons 盎格鲁-撒克逊人，居住在爱日德兰半岛南部的盎格鲁人和居住在易北河、威悉河下游的撒克逊人，由于二者语言风格很难区分，因此被称为盎格鲁-撒克逊人。入侵不列颠群岛的盎格鲁-撒克逊人由盎格鲁人(Angles)、撒克逊人(Saxons)和朱特人(Jutes)组成。从5世纪中叶盎格鲁-撒克逊人侵入不列颠，建立英吉利早期封建国家，到1066年威廉征服英吉利，这一时期被称为英国法律史上的盎格鲁-撒克逊时代。

② Shire 1)(英国的)郡 (=county);2(the S-s)(尤指以猎狐出名的)英国中部各郡地区;3)=shire horse 英国中部出产的;高大有力的拉车马。a knight of the shire【英史】郡选议员。come from the shires[英国]是中部地方的(人)。get in the shire what one loses in the hundred 失之东隅，收之桑榆。

③ Hundred a sub-division of a Shire【英史】郡的分区;【美史】县的分区。

④ 890年，阿尔弗雷德大帝研究了盎格鲁-撒克逊时代早期的成文法以及《圣经》和教会规则，制定了著名的《阿尔弗雷德法典》。

utilized the existing structure of courts, developing it and appointing their own judges. The country was divided into "circuits", which judges would follow, administering justice.① They were called *itinerant*② *justices in eyre*. They each visited a circuit of county towns hearing③ all the cases that had amounted since their last visit to the county.

As the judges became more established in their travelling of circuits, there was a unification of the various local customs. In 1154, Henry Ⅱ became the first Plantagenet④ king. Among many achievements, Henry institutionalized Common law by creating a unified system of law "common" to the country through incorporating and elevating local custom to the national, ending local control and peculiarities⑤, eliminating arbitrary remedies and reinstating⑥ a jury system-citizens sworn on oath to investigate reliable criminal accusations and civil claims. The jury reached its verdict through evaluating common local knowledge, not necessarily through the presentation of evidence, a distinguishing factor from today's civil and criminal court systems.

Henry Ⅱ developed the practice of sending judges from his own central court to hear the various disputes throughout the country. His judges would resolve disputes on an *ad hoc*⑦ basis according to what they interpreted the customs to be. The king's judges would then return to London and often discuss their cases and the decisions they made with the other judges. These decisions would be recorded and filed. There were few statutes⑧ or written laws and judges would look to similar cases to guide them. Thus, a rule, known as stare decisis⑨(also commonly known as precedent) developed, which is where a judge would be bound to follow the decision of an earlier judge; he was required to adopt the earlier judge's interpretation of the law and apply the same principles promulgated⑩ by that earlier judge if the two cases had similar facts to one another. By this system of precedent, decisions

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① administer justice 执行法律,审判。

② itinerant 巡回的,流动的/巡回者(如巡回传教士;巡回法官;行商)。itinerant peddlers 行商;an itinerant judge 巡回法官;an itinerant library 流动图书馆。

③ hearing 听证,审讯,开审。 court hearing 庭审。Hearing is the product of democratic process. 听证是民主进程的产物。

④ Plantagenet 【英史】金雀花王朝的,安茹王朝的,不兰他日奈王朝的(指由 12 世纪亨利二世即位至 15 世纪理查三世死这一历史时期)。

⑤ peculiar 专有的特权或私产;(不受当地司法机关管辖的)特殊教会或教区/个人的、特有的/特权;【宗教】特殊教区。〔P-〕【基督教】上帝的特选子民(指基督徒);犹太人。

⑥ reinstate 1)使复原;使恢复;使复任,使复位,使复职;2)使恢复健康;3)修补,修理。be reinstated in an office (to lost privileges)复职(恢复特权)。

⑦ ad hoc[拉丁语]1)(介词片语)特别是;2)(用作修饰语)特别的。an ad hoc commission of inquiry 特别调查委员会。

⑧ Statute 成文法,制定法,法令,法规(laws enacted by the legislature)。statutory law 成文法,制定法。

⑨ stare decisis [拉丁语]照章办事。

⑩ promulgate 颁布、公布、宣布(法令等);传播、宣传(知识、信仰);普及。promulgate regulation 颁布法令。

"stuck" and became ossified[①], and so the pre-Norman system of disparate[②] local customs was replaced by an elaborate and consistent system of law that was common throughout the whole country, hence the name, "Common law."

Ⅱ. Primary Definitions of Common Law

The termcommon law has three main connotations[③].

1. Common law as opposed to statutory law and regulatory law

This connotation distinguishes between the authorities that promulgate a law. For example, in most areas of law in most jurisdictions[④] in countries that trace their legal heritage to Britain (members of the Commonwealth of Nations and the United States), there are "statutes" enacted by a legislature, "regulations" promulgated by executive branch agencies pursuant to a delegation of rule-making authority from a legislature, and Common law or "case law"[⑤], i. e. decisions issued by courts (or quasi-judicial tribunals[⑥] within agencies).

2. Common law legal system as opposed to civil law legal system[⑦]

The main alternative to the common law system is thecivil law system, which is used in Continental Europe, and most of the rest of the world(the former Soviet Bloc[⑧] and other Socialist countries used a Socialist law system, and some of them use civil law system, for example, Lithuania). This connotation differentiates "common law" jurisdictions and legal systems from "civil law" or "code" jurisdictions. Common law systems place great weight on court decisions, which are considered "law" with the same force of law as statutes. By contrast, in civil law jurisdictions judicial precedent is given relatively less weight, and scholarly literature is given relatively more.

3. Law as opposed to equity[⑨]

This connotation differentiates "common law" (or just "law") from "equity". Before 1873,England had two parallel court systems: courts of "law" that could only award money damages and recognized only the legal owner of property, and courts of "equity" that could

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① ossify (-fied; -fying) 1)骨化;使(像骨头一样)硬化。2)使僵化;使无情,使冷酷;使顽固;使不进展。

② disparate 根本不相同的;(种类)全异的;不能互相比拟的;【逻辑学】异类的。disparate ideas 根本不相同的看法/(常pl.)无法比较的东西。

③ connotation 言外之意,含蓄;(词的)含义。

④ jurisdiction 司法权,审判权,管辖权;权限,权力。

⑤ case law 判例法。

⑥ quasi-judicial tribunals within agencies 准司法机构。

⑦ civil law legal systems 大陆法系,民法法系,与普通法法系(common law legal system)是当今世界最主要的两大法系。

⑧ 苏维埃共和国。

⑨ equity 衡平法,公平,公正。

issue injunctive relief and recognized trusts of property. This split propagated① to many of the colonies, including the United States.

1.2 Equity

Ⅰ. the Emergence Reasons: the Defects of the Common Law

The development and growth of the Common law system had not been expected and caused difficulties. Jurisdiction of the common law courts was limited severely by a writ system.② A civil action lay before one of the courts only where a specific writ was available from a high official ("where there is no writ, there is no right"). For example, in order to bring an action in the Common law courts a writ had to be issued by the chancellor. Early writs included debt, detinue, covenant, replevin③, which were very specific in nature, and neither the judges nor the Chancellor could freely create new writs. The provisions of Oxford 1258 prevented the chancellor's office from creating new writs which led to a very rigid system. So if there was no writ available to fit your particular action, then you would be without redress. Besides, the form of relief was limited: Only money damages. If you suffer a trespasser④, you could only receive money damages but no injunctive⑤ relief from the court. So, many deserving plaintiffs⑥ were denied relief or insufficient remedied. The narrow limits of the forms of action and the limited recourse⑦ they provided led to the emergence of equity.

Ⅱ. The Development of Equity

Many people who complained about the injustices that were inherent in the system, made pleas to the King for protection. As the number of petitioners rapidly grew, the King

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① propagate 普及,传播;宣传。

② writ [英]指调取案件令状,如认定欺诈的令状(writ of deceit);归还财产令(writ of elivery)。[美]批准向最高法院上诉令状。

③ detinue 请求返还扣留物的诉讼(指一方因其动产、契据或文件为他方非法扣留所提起请求返还的一种诉讼);对他人动产的非法扣留。
covenant 盟约、合同(契约)条款(尤其指合同或契约中大家同意的条款);违反合同的诉讼/订立合同;缔结盟约。
replevin 财务的发还,取回被扣押物的令状。Right of replevin 取回被扣押动产的权利。

④ trespasser 侵入;【体育】非法侵入(犯);侵入(私人)房屋(土地);侵害诉讼;(宗教道德上的)冒犯,罪过;叨扰,打扰/侵占,侵入(土地等);侵犯,侵害(权利等)(on; upon);〔古语〕犯天理;违犯,犯罪 (against)/ 违犯;破坏。

⑤ injunctive 【法律】禁令的。

⑥ plaintiff 原告,与被告(defendant)相对。

⑦ recourse 追索权、追偿权。have (a) recourse to 求助于;without recourse 无追偿权,无返还请求权;right of recourse 追偿权,返还请求权。

delegated the task of hearing petitions to the Lord Chancellor①, an important member of the King's Council②. At the time, the Chancellor was usually a clergyman and the King's confessor, so he was literally the keeper of the King's conscience. By the fourteenth century the Chancery, the Crown's secretarial department, began to resemble a judicial body and became known as the "Court of Chancery" ("Court of equity"), competing with the ordinary common law courts.

Equity, as a body of rules, varied from Chancellor to Chancellor, until the end of the 16th century. After the end of the 17th century, only lawyers were appointed to the office of Chancellor. Criticisms continued. The 17th century Jurist John Selden once said that "equity varies with the length of the Chancellor's foot".

The first Chancellors were men of the cloth③, and they were required to pass judgment guided by conscience and based on morals and equality. As these Chancellors had no formal legal training, and were not guided by precedent, their decisions were often widely diverse. However, in 1529 a lawyer, Sir Thomas More, was appointed as Chancellor, marking the beginning of a new era. After this time, all future Chancellors were lawyers, and from around 1557 onwards, records of proceedings in the Courts of Chancery were kept, leading to the development of a number of equitable doctrines, such as (1) Equity will not suffer a wrong to be without remedy;④(2) Equity follows the law;⑤(3) He who comes to equity must come with clean hands;⑥(4) He who seeks equity must do equity;⑦(5) Equity looks at the intent rather than the form;⑧(6) Equity acts in personal;⑨(7) Delay defeats equity;⑩(8) Equity is equity;⑪ and so on.

Special characters of equity include: relief in the form of performances (in contrast to the common law award of compensatory damages), the injunction (a temporary or final

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① Chancellor 大法官，是大法官庭 Chancery 的首脑，同时也是英国御前会议 Curia Regins 的重要成员，作为英格兰国王的掌玺大臣，大法官有权以国王的名义签发不同法令状。后来，大法官根据国王赋予的最高司法权威依据，根据公平正义等衡平原则，对案件进行独立审理。

② the King's Council 皇室法院。

③ cloth （职业）制服，（特指）黑色教士服；the cloth 牧师，教士。

④ 衡平法不允许有不法行为而无补救。大意即是在普通法无补救或无适当补救时，就应给予衡平法上的救济。

⑤ 衡平法遵循法律。即衡平法当然不能违背议会制定的法，同时，凡是普通法承认的权益，衡平法也予以承认，不能拒绝。

⑥ 向衡平法院请求的人必须自己清白。意即如果提起诉讼的人本身有违法行为或违反公平原则，衡平法院应拒绝受理。

⑦ 请求衡平的人必须自己为衡平行为。寻求衡平法救济的原告，必须准备对被告公平地采取行动。如一个丈夫在普通法上享有对其妻子的财产份额权利，如果他仅仅以丈夫的身份而请求取得该财产所有权的衡平救济时，法院应加以拒绝，除非他能公正地对待其妻，如提出一份能使其妻获得他的某些财产的文件。

⑧ 衡平重意思而轻形式。衡平法应探求案件的实质内容而后再及于形式，不像普通法那样仅仅顾及案件形式而不顾案件的实质。

⑨ 衡平法对人为一定的行为。普通法代表着对物程序，衡平法代表对人程序。如要使甲向乙交付一项财产，普通法法院一般命令郡长先取得该财产然后转交给乙；而衡平法院可以通过强制手段，如监禁、查封等强迫甲亲自交还财产。这种对人诉讼可以扩大法院的管辖权。

⑩ 延误是衡平的大敌。衡平法不帮助怠于行使权利的人，即请求衡平救济的人如果不及时起诉或采取其他法律手段，衡平法院就不予受理，否则就有损他人利益，有失公平。

⑪ 平等即公平，意即对同一类的人应给予相同待遇。该原则特别适用于处理共同财产和合伙财产。

order to do or not to do a special act), and the development of so-called maxims of equity[①] which permeated the entire legal system. However, equitable relief regularly will lie only when the common law relief is inadequate.

1.3 Distinctions Between Common Law and Equity

In modern practice, perhaps the most important distinction between Common Law and Equity is the set of remedies each offers. The most common civil remedy a Court of law can award is money damages. Equity, however, enters injunctions or decrees directing someone either to act or to forbear from acting. Often this form of relief is in practical terms more valuable to a litigant.[②] A plaintiff whose neighbor will not return his only milk cow, which wandered onto the neighbor's property, for example, may want that particular cow back and not just its monetary value. However, in general, a litigant cannot obtain equitable relief unless there is "no adequate remedy at law"— that is, a court will not grant an injunction unless monetary damages are an insufficient remedy for the injury in question. Law courts also enter orders, called "writs" but they are less flexible and less easily obtained than an injunction.

Another distinction is the unavailability of a jury in equity: the judge is thetrier of fact. In the American legal system, the right of jury trial in civil cases tried in Federal Court is guaranteed by the Seventh Amendment, but only "in Suits at common law," i. e. , in cases that traditionally would have been handled by the law courts. The question of whether a case should be determined by a jury depends largely on the type of relief the plaintiff requests. If a plaintiff requests damages in the form of money or certain other forms of relief, such as the return of a specific item of property, the remedy is considered legal, and a jury is available as the fact-finder. On the other hand, if the plaintiff requests an injunction, declaratory judgment, specific performance or modification of contract, or other non-monetary relief, the claim would usually be one in equity.

A final important distinction between law and equity is the source of the rules governing the decisions. In law, decisions are made by reference to legal doctrines orstatutes. In contrast, equity, with its emphasis on fairness and flexibility, has only general guides known as the maxims[③] of equity. As noted above, a historic criticism of equity as it developed was that it had no fixed rules of its own, with the Lord Chancellor from time to time judging in the main according to his own conscience. As time went on the rules of equity did lose much of their flexibility and from the 17th century onwards equity was rapidly consolidated into a system of precedents much like its cousin common law.

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① maxims of equity 衡平法格言。

② litigant 诉讼当事人(someone involved in the litigation)。litigant 诉讼,官司。

③ maxims 格言,箴言;谚语;原理,主义;(行为的)准则。

1.4 Fusion of the Courts of Common Law and Equity

As the law of equity developed, it began to rival① and conflict with the common law. Litigants would go "jurisdiction shopping" and often would seek an equitable injunction prohibiting the enforcement of a common law court order. The penalty for disobeying an equitable "common injunction" and enforcing a common law judgment was imprisonment. The Chief Justice of the King's Bench, Sir Edward Coke began the practice of issuing writs of habeas corpus② that required the release of people imprisoned for contempt of chancery orders.

This tension grew to an all-time high in the Earl of Oxford's case (1615), where a judgment of Coke CJ was allegedly obtained by fraud. The Lord Chancellor, Lord Ellesmere, issued a common injunction out of the Chancery prohibiting the enforcement of the common law order. The two courts became locked in a stalemate,③ and the matter was eventually referred to the Attorney-General,④ Sir Francis Bacon., by authority of King James I, upheld the use of the common injunction and concluded that in the event of any conflict between the common law and the equity, equity would prevail.

At the same time, equity eventually became as rigid in form as the Common law and it suffered many defects. It became overburdened and very slow. Reform became necessary and this came in the shape of the Judicature Acts⑤ of 1873 and 1875, which fused the courts of common law and equity together (although emphatically not the systems themselves).

Consequently the Judicature Act was established, which is the basis of the court structure inEngland to this date, and that there would no longer be different procedures for seeking equitable and common law remedies.⑥ The Judicature Acts fused only the administration of common law and equity; there is still a body of rules of equity which is quite distinct from that of common law rules, and acts as an addition to it. Although they are implemented⑦ by the same courts, the three branches of the law are separate.⑧ Where there is conflict, equity still prevails.

In the United States, parallel systems of law (providing money damages, with cases heard by a jury upon either party's request) and equity (fashioning a remedy to fit the

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① rival ([英]竞争,对抗;匹敌。竞争的,对抗的。rival suitors 情敌;相竞争的求婚者。竞争者,对手,敌手;匹敌者,对等的人[物]。a rival in love 情敌。without a rival 无与匹敌,无敌。

② habeas corpus [拉丁语]【法律】1)人身保护令(要求把拘留或监禁的人限时送交法院处理的法令)(= a writ of habeas corpus)。2)人身保护权。Habeas Corpus Act 人身保护法〔英王查理二世于 1679 年颁布实施〕。

③ stalemate 1)僵持,相持,困境。2)【国际象棋】僵局,王棋受困。

④ the Attorney General (美国的)司法部长,(英国的)总检察长。

⑤ The Judicature Acts 法院法,司法组织法。

⑥ 此处用虚拟语气,表示本不应该再出现寻求普通法或衡平法上的救济的区分。

⑦ implement [苏格兰语]【法律】履行(契约等)/执行,履行(契约);落实(政策);贯彻,实施;使生效。

⑧ the three branches of the law 是指作为英国法三大法源的普通法、衡平法和法典法。

situation, including injunctive relief, heard by a judge) survived well into the 20th century. The United States federal courts procedurally separated law and equity: the same judges could hear either kind of case, but a given case could only pursue causes in law or in equity, and the two kinds of cases proceeded under different procedural rules. This became problematic when a given case required both money damages and injunctive relief. In 1937, the new Federal Rules of Civil Procedure combined law and equity into one form of action, the "civil action." Fed. R. Civ. P. 2.

Alabama, Delaware, Mississippi and New Jersey still have separate courts of law and equity, for example, the Court of Chancery. In many states there are separate divisions for law and equity within one court.

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[3] Jan. MxCormick-Watson, Essential English Legal System (Second Edition), Wu han University Press, 2004.

Questions

1. What are the advantages and disadvantages of the Common law and Equity?
2. What do you think about the future of the Common Law and Equity?

普通法与衡平法

一、普通法的历史渊源

丘吉尔曾将不列颠群岛描述为物资充足、气候宜人的富庶之地，历史上凯尔特人、丹麦人、撒克逊人等诸多民族都曾在该岛上定居。他们按照各自的习惯交往，过着氏族制度生活[①]。公元1世纪中期即公元43年，罗马皇帝征服了此地，不列颠群岛成为罗马的第45个行省。随后，罗马思潮不断涌入，罗马人的习惯和法律逐渐渗入。3世纪中期起，罗马帝国内战频起，在奴隶起义和日耳曼人入侵的双重打击下，经济崩溃、政治混乱。公元407年，罗马人在内外交困的情况下被迫从边远行省撤军，从而结束了在不列颠长达4个世纪的统治。

公元5世纪，日耳曼族盎格鲁-撒克逊人(Anglo Saxons)从北欧借机入侵不列颠群岛，日尔曼人的习惯法又渗透到岛国居民的社会生活中，罗马帝国在语言、法律与制度等方面的痕迹

① 参见[英]丘吉尔著：《英语言民族史》，南方出版社，2007年版，第5页。

已经荡然无存。日耳曼人在岛上建立了7个分立的王国，成为英格兰王国的雏形，这一时期又被称为“七国时代”。各王国下面分为若干个郡；郡下面又分为若干个“百户区”；“百户区”下面再分为若干个“十户区”。各王国分立自治，各郡乃至各个百户区都有很大的自治权。当地贵族担任郡长和百户长，同时兼任地方行政长官和郡法院（百户区）法官[①]。但由于多民族共存，各地区法律文化传统和习俗均存在较大差异。各王国以日耳曼习惯为基础，根据部落或地方性色彩的习惯法制定了法典，如《伊尼法典》《埃塞尔伯特法典》《怀特莱德法典》和《阿尔弗雷德法典》等。公元9世纪，威塞克斯国王埃格伯特贝（Egbert，802－838）被各国共同尊为不列颠的统治者，建立了统一的盎格鲁-撒克逊王国，即英吉利王国。

1066年，英王爱德华逝世，诺曼底公爵威廉率军征服英吉利，加冕称王，史称诺曼征服。至此，从5世纪中叶开始的英国法律史上的盎格鲁-撒克逊时代结束。诺曼人征服英国，成为英国法律史上具有划时代意义的事件。诺曼人在英国建立中央集权统治并推行一系列的改革措施，在一定程度上决定了英国法不同于大陆法系的发展方向。

随着王权的增强和王室利益的扩张，国王对英国地方自治历史传统下地方法官掌管司法权的现状日益不满。为了统一司法权，从12世纪开始，亨利一世把英国划分为一系列巡区，任命巡回法官（Justices in Eyre）代表国王巡视全国审理和解决纷争。1791年，亨利二世颁布《温莎诏令》，进一步扩大巡回审判，使之成为一种定期的制度，即巡回审判制度，每年向巡回区派遣巡回法官代表国王行使“正义”。这些巡回法官依据国王的诏书、敕令以及日耳曼人的习惯法审理各类案件，然后从各地回到威斯敏斯特共同分析案例，商讨适用的法律，总结办案经验，并结合当地的社会实际，将国王敕令、地方习惯法、教会法和罗马法融为一体，久而久之，形成一些一般的、普遍的原则和制度，并对以后类似案件具有约束力，这就是遵循先例原则（Stare Decisis）的起源。按照遵循先例原则，法院必须遵循与以前案件事实类似的判决对法律问题进行裁决，以保证司法审判的一致性和稳定性，同时，又允许法院给基于非常强烈的理由偏离判例，以防止错误永久化。伴随法律的统一，全国通用的习惯法即普通法逐渐形成。在一定意义上讲，普通法就是由国家意志统一了的习惯法，就是普通适用的法律，或者共同适用的法律。

二、普通法中的令状制度（writ system）

令状制度是普通法的核心。12世纪时，大概受到古罗马法中诉讼种类的影响，英国普通法对诉讼请求的种类有明确具体的规定，形成了令状制度。早期的令状基本以行政化的样态出现，如“国王致×××，我命令你毫不迟疑地……”后来经过亨利二世的改革，令状由单纯的行政命令转为具有司法性质的法律文书。如亨利二世所确立的“未经审判，任何人自由保有地产的权利都不受侵犯，没有国王的命令和令状，他也不必出庭答辩”原则[②]，使令状在诉讼中具有特殊的意义与地位。令状包括起始令状和司法令状。起始令状（original writ）是由大法官以国王名义颁发的、责令被告到王室法院出庭的正式书面文件。刑事案件的审理是先由国王首席大臣，即大法官向被告所在地的行政长官发出诉讼起始令状或人身保护令；民事案件的审理，则从原告向大法官庭申请发给诉讼起始令状开始。任何诉讼必须以已经存在的法院启动诉讼的令状为前提，如索求赔偿令状、转交财产令状等。每一种诉讼理由都有相应的诉讼形

① 参见李学军编：《美国刑事诉讼规则》，中国检察出版社，2003年版，第3页。

② 参见[英] 梅特兰著：《普通法的诉讼形式》，王云霞等译，商务印书馆，2009年版，第9页。

式，同时发给相应的令状。如果原告选错了令状种类，其案件就会被驳回，或终止审理，只能从头开始重新申请领令状。例如，如果法院在过去的判决中发布过关于土地授予权纠纷的令状，那么有人就该类不动产发生纠纷，就可以起诉到法院；而法院没有就某种合同争议或侵权行为发布过令状，人们遇到此类纠纷就无权诉求法院，只能等待法院就该类诉讼发布新的令状[①]。在现实中，一些人很正当的诉讼请求也会因为没有令状前例而得不到法院的救济。自亨利二世时期，已经基本形成"无令状即无救助"的原则。

令状制度扩大了王室法院的管辖权，相应则剥夺了地方法院的管辖权。贵族们纷纷对此表示不满，限制王权的呼声渐高。1215 年《大宪章》明确规定，王室法官只能改进而不能改变法律，未经民众大会同意，国王颁发的令状可以超越（go beyond）法律，但不能违背（go against）法律。同时规定国王不得就租约地签发指令令状，以保护当事人到其他法院（地方法院）进行诉讼的权利。据此，令状的种类和数量都得到了很大的限制。1258 年《牛津条例》进一步禁止大法官庭签发新的令状。令状制度虽成为普通法的重要特征，但其僵化呆板的形式和种类已成为普通法发展的重大阻碍。

三、衡平法的兴起

伴随着海内外贸易以及资本主义的成长和发展，英国社会关系日益复杂化。已成体系的普通法因为其僵化的程序（如令人恐惧的令状制度）、有限的救济种类（如仅能提供损害补偿）以及陈旧有限的实体内容，难以有效应对社会发展之需，新的社会调整机制的产生已成必然。衡平法正是在这样的背景下应运而生的。

衡平法一词首先出现在十三十四世纪的英国，是指通过大法官（Chancellor）的司法实践发展起来的旨在补救普通法不足的一整套独立的规则体系。从 13 世纪开始，那些在普通法法庭上因种种原因得不到保护的当事人，开始转而向国王申诉，请求国王主持正义。在人们的心中，国王是公平正义的化身和最终的裁决者。国王在审理这些案件时最终因不堪重负而将此重任交给了大法官。大法官是大法官庭（Chancery）的首脑，同时也是御前会议的重要成员，作为英格兰的掌玺大臣，大法官有权以国王的名义发布普通法令状。大法官根据国王赋予的最高司法权，本着公平、正义等原则审理案件。这些原则即衡平法。

与此同时，大法官庭也经过不断演化，发展成为完全独立于普通法院的法院系统，即衡平法院。大法官庭最早由诺曼底征服者带入英国，最初是王室的秘书机关，13 世纪中叶，从王室内府中独立出来，但只相当于一个政府部门，没有法院的性质，更与衡平法无关。1340 年一项条例将其正式列入英吉利王国法院系统，1390 年一项王室训令规定，一切可由大法官审理的案件均应直接送交大法官庭，大法官庭具备了衡平法院的基本性质和功能。1474 年，大法官庭首次以自己的名义发布命令，标志着完全独立的衡平法院正式诞生。衡平法院也称为良心法院（Court of Conscinenc），法官凭良心断案。衡平法院不实行陪审制，由大法官独自审理，自由裁量的余地很大，每个法官的判决都有很大差别。有人批评说衡平法院的判决是由大法官脚的长短来决定的。

随着案件的不断积累，传统的遵循先例的习惯又一次发生了作用，从而形成一套不同于普

① 参见钱弘道著：《英美法讲座》，清华大学出版社，2004 年版，第 32－34 页。

通法的独特原则，其中主要有[①]：

(1)衡平法不允许有不法行为而无补救(Equity will not suffer a wrong to be without remedy)。大意即是在普通法无补救或无适当补救时，就应给予衡平法上的救济。

(2)衡平法遵循法律(Equity follows the law)。即衡平法当然不能违背议会制定的法，同时，凡是普通法承认的权益，衡平法也予以承认，不能拒绝。

(3)向衡平法院请求的人必须自己清白(He who comes to equity must come with clean hands)。意即如果提起诉讼的人本身有违法行为或违反公平原则，衡平法院应拒绝受理。

(4)请求衡平的人必须自己为衡平行为(He who seeks equity must do equity)。寻求衡平法救济的原告，必须准备对被告公平地采取行动。如一个丈夫在普通法上享有对其妻子的财产份额权利，如果他仅仅以丈夫的身份而请求取得该财产所有权的衡平救济时，法院应加以拒绝，除非他能公正地对待其妻，如提出一份能使其妻获得他的某些财产的文件。

(5)衡平重意思而轻形式(Equity looks at the intent rather than the form)。衡平法应探求案件的实质内容而后再及于形式，不同于普通法仅仅顾及案件形式而不顾案件的实质。

(6)衡平法对人为一定的行为(Equity acts in personal)。普通法代表着对物程序，衡平法代表对人程序。如要使甲向乙交付一项财产，普通法法院一般命令郡长先取得该财产然后转交给乙；而衡平法院可以通过强制手段如监禁、查封等强迫甲亲自交还财产。这种对人诉讼可以扩大法院的管辖权。

(7)延误是衡平的大敌(Delay defeats equity)。衡平法不帮助怠于行使权利的人。即请求衡平救济的人如果不及时起诉或采取其他法律手段，衡平法院就不予受理，否则就有损他人利益，有失公平。

(8)平等即公平(Equity is equity)。意即对同一类的人应给予相同待遇。该原则特别适用于处理共同财产和合伙财产。

可以认为，英国衡平法的历史就是英国大法官的历史。在衡平法形成和发展的早期，大法官主要由熟悉罗马法的教士担任，所以衡平法的内容、性质及形式具有明显的罗马法和教会法的印记。16 世纪后，普通法法学家担任大法官(1529 年，著名的普通法律师 Six Tomas More 担任衡平法院院长，自此，废除了只能由牧师担任衡平法院院长的制度)，他们按照普通法模式塑造衡平法，对大量的判例进行汇编、整理，对其制度和原则进行系统化，将衡平法制度完全确定下来。到 19 世纪，衡平法院已不再是良心法院，衡平法最终也成为一种采用遵循先例原则、建立在确定的基础之上的法律体系，从而成为现代英国判例法的一部分。

四、衡平法与普通法的区别

衡平法与普通法的区别，主要表现在下列几个方面：

(1)起源不同。普通法以各地习惯法为基础，通过普通法院及其法官的审判实践，通过判例宣示一系列的法律原则；衡平法则由衡平法院和大法官凭公平、良心进行自由裁量，其原则和精神主要由著名的格言来表达，在内容上包括或涉及了当时彼此联系又相互影响的富含资本主义因素的某些教会法、罗马法、习惯法、城市法和西欧商法等诸法法律精神、原则和救济制度。

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① 参见钱弘道著：《英美法讲座》，清华大学出版社，2004 年版，第 50 - 52 页。