

全国高等院校法律英语专业统编教材
法律英语证书 (LEC) 全国统一考试指定用书

英美法律 文化教程

Anglo-American
Legal Culture Course

张法连 姜芳 主编



北京大学出版社
PEKING UNIVERSITY PRESS



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前言

法律英语是法律科学与英语语言学有机结合形成的一门实践性很强的交叉学科,是ESP (English for Specific Purposes)最重要的分支之一。法律英语是以普通英语为基础,在立法和司法等活动中形成和使用的具有法律专业特点的语言,是指表述法律科学概念以及诉讼或非诉讼法律实务时所使用的英语。当今世界的发展日新月异,经济全球化进程突飞猛进,国际交流合作日益加强,涉外法务活动空前频繁。中国已经成为经济全球化的引领者。十八届四中全会提出加强涉外法律工作;司法部等四部委办联合印发了《关于发展涉外法律服务业的意见》,对大力发展涉外法律服务业做出全面部署。经济全球化过程中我们所面临的很多问题其实都是法律问题,而这些法律问题中的绝大多数又都属于涉外法律的工作范畴,法律英语则是完成涉外法律工作不可或缺的工具。国家急需明晰国际法律规则、通晓英语语言的“精英明法”复合型人才,法律英语的重要性日益彰显,掌握专业外语已经成为法律人必备的职业素质。法律英语证书(LEC)全国统一考试的成功推出和中央政法委、教育部“卓越法律人才计划”的顺利启动无疑把法律英语的学习和研究推向了高潮。

法律英语是高校英语、法学等专业教学改革的新方向。随着高校英语、法学专业教学改革不断深化,国内许多高校在外语、法学院系开设了法律英语课程,有的院系设置了法律英语方向,有些高校大胆创新,开始尝试设置法律英语专业,收到了良好的社会效果。2013年高等教育出版社出版发行《法律英语专业教学大纲》,标志着法律英语专业的诞生,给高校外语、法学院系设置法律英语专业或涉外法律专业指明了方向。本套教材正是以该大纲为重要依据编写而成。

语言是文化的载体,法律文化知识是法律英语学习过程中不可或缺的内容。英美法作为西方法律文明的重要分支之一,具有独特的历史传统、文化意蕴、发展路径、表现形式、价值取向以及运作机制。英美法的发展具有历史的连续性;法律、权利与自由之间相互关联。可以说,英国历史上的实践性学徒制法律教育是与其本国的经验主义传统分不开的;而实证主义的产生又对英国法律科学的发展产生深刻影响,它甚至直接促进了英国学院制法律教育的产生与发展。由于受到英国法律文化的影响,学徒制法律教育也曾是美国法律教育的源

头；但是在兰代尔主义法律科学思想的影响下，法学院逐渐在美国兴起和变革，美国的法律教育在普通法传统的背景下一度呈现科学化发展趋势；后来，法律现实主义使美国的法律教育重新回归到对实践性教育的重视。英美法程序正义优于实体正义；在法律价值上，更重视个人、实用和经验。近代以来，特别是改革开放以来，英美法的一些概念、理念和原则被移植到中国，产生了不同程度的影响。深入、系统地研究英美法，对于当代中国合理地借鉴英美法，具有重要的价值。学习英美法，就应该了解英美法的本质特征和法系特点。唯有掌握了这一点，才能理解英美法上的许多看似不合理的制度其实恰恰具有很强的合理性。

本套教材共包括《法律英语精读教程(上、下)》《法律英语泛读教程(上、下)》《法律英语写作教程》《法律英语翻译教程》和《英美法律文化教程》《法律英语视听说》《大学法律英语》以及配套学习使用的《英美法律术语双解》。

编写本书的过程中，编者参考了大量的英美原版法学书籍资料，包括英美法学院教材及大量判例，力求实现教材内容的权威性和丰富性。教材在编写上遵循由总述到具体、由浅入深的原则，基本上达到《法律英语专业教学大纲》提出的目标要求。本书共由三部分组成：第一部分是英国法律文化知识简介；第二部分主要介绍美国法律文化知识；第三部分为选择阅读，主要介绍英美法系的加拿大、澳大利亚及新加坡的法律文化知识。这三部分内容浑然一体，又相互独立。学习本教材不一定要严格按照前后编写顺序进行，教师完全可以根据学生的具体情况挑选合适的内容安排教学。编写本书过程中，我们参考了大量国内外有关资料，在此谨对原作者表示谢忱。

参加本书编写工作的还有河南工业大学杜巧阁副教授、北京信息科技大学赵玉华老师、甘肃政法学院唐丽玲教授、中国音乐学院社科部张桂萍教授等。感谢法律英语证书(LEC)全国统一考试指导委员会将该套教材指定为复习应考LEC的参考用书。

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Part I

The United Kingdom of Great
Britain and Northern Ireland

Chapter 1

THE BASICS OF LEGAL SYSTEM IN THE UNITED KINGDOM

The United Kingdom of Great Britain and Northern Ireland consists of England, Wales, Scotland and Northern Ireland. It was established in 1801 with the union of Great Britain and Ireland, but only achieved its present form in 1922, with the partition of Ireland and the establishment of the independent Irish Free State (later the Republic of Ireland).

England and Wales have a combined judicial system, while Scotland and Northern Ireland have their own judicial systems.

The Queen is the Head of State, although in practice the supreme authority of the Crown is exercised by the government of the day. The UK legislature is a bicameral parliament, consisting of the House of Commons and the House of Lords. The House of Commons consists of 650 Members of Parliament (MPs) elected by simple majority vote in a general election every five years. The House of Lords has more than 700 members, who fall into three categories: life peers (the largest group), hereditary peers, and bishops; most peers are appointed on the recommendation of the Prime Minister or the House of Lords Appointments Commission.

Sources of UK Law

The three principal sources of UK law are legislation, common law and European Union law. There is no single series of documents that contains the whole of the law of the UK.

Legislation

The principal legislature is the UK Parliament, which is based in London. This is the only body that has the power to pass laws that apply in all four countries. The UK Parliament consists of the House of Commons and the House of Lords.

The House of Commons consists of 650 Members of Parliament (MPs). Each MP represents a defined geographic constituency, whose electors vote using a “first-past-the-post” system. Each elector has one vote, and the candidate with the highest number of votes is elected as MP for that constituency. MPs are only allowed to sit for the lifetime of the Parliament, that is, the length of time between General Elections when a new set of MPs is elected. However, MPs can be reelected a limitless number of times.

The House of Lords consists of nearly 800 peers, of whom 600 are formally appointed by the Queen on the recommendation of the Prime Minister. The other members of the House of Lords are people who have inherited aristocratic titles such as “Lord” or “Lady”, and senior bishops of the Church of England.

Notwithstanding its common law heritage, the modern UK legal system relies heavily on statutory law. We should bear in mind that there is no official compilation of all UK statutes currently in force comparable to the United States Code. Nevertheless, consolidated legislation, which incorporates all subsequent revisions and amendments made to the original legislation, is readily accessible from both official and unofficial sources.

Acts of Parliament (Primary Legislation)

Acts of Parliament, sometimes referred to as primary legislation, are the supreme law in the United Kingdom. Most Acts of Parliament fall into one of two broad categories: Public General Acts of universal application and Private Acts affecting only specified localities, entities or individuals. A third category of Hybrid Acts combines elements of both public and private acts. The vast majority of UK legal research involves Public General Acts.

The Scottish Parliament, the Welsh Assembly, and the Northern Ireland Assembly each enact primary legislation for their respective jurisdictions, but only with respect to those matters that have been devolved to them by the national Parliament in London.

Secondary (Delegated) Legislation

Secondary legislation refers to specialized rules and regulations issued by ministers or governmental entities acting under authority delegated to them by an Act of Parliament. Such rules, also known as delegated legislation, have the force of law and are analogous to regulations issued by administrative agencies in the United States.

The most common type of secondary legislation is known as a Statutory Instrument (SI). Other types of secondary legislation include Orders in Council and Orders of Council.

The Scottish Parliament, the Welsh Assembly, and the Northern Ireland Assembly also enact primary legislation that authorizes the creation of secondary legislation applicable within their respective jurisdictions.

Common Law

Common law, also known as case law or precedent, is law developed by judges, courts, and similar tribunals, stated in decisions that nominally decide individual cases but that, in addition, have precedential effect on future cases. Common law is a third branch of law, in contrast to and on equal footing with statutes which are adopted through the legislative process, and regulations which are promulgated by the executive branch. In cases where the parties disagree on what the law is, a common law court looks to past precedential decisions of relevant courts. If a similar dispute has been resolved in the past, the court is usually bound to follow the reasoning used in the prior decision, which is a principle known as *stare decisis*. If, however, the court finds that the current dispute is fundamentally distinct from all previous cases, which is called a “matter of first impression”, judges have the authority and duty to resolve the issue, in which one party or the other has to win, and on disagreements of law, judges make that decision. Resolution of the issue in one case becomes precedent that binds future courts. *Stare decisis*, the

principle that cases should be decided according to consistent principled rules so that similar facts will yield similar results, lies at the heart of all common law systems.

The concept “common law system” refers to a legal system that gives great precedential weight to common law. Common law systems originated during the Middle Ages in England, and from there propagated to the colonies of the British Empire. Today, one third of the world’s population live in common law jurisdictions or in systems mixed with civil law. The legal system of England and Wales is a common law one, so the decisions of the senior appellate courts (see below) become part of the law.

EU Law and the European Convention on Human Rights

The UK joined the European Economic Community, the predecessor of the European Union in 1973, since when it has been a requirement to incorporate European Union legislation into UK law and to recognise the jurisdiction of the European Court of Justice in matters of EU law.

The British government led by David Cameron held a referendum on the UK’s withdrawal from the EU in 2016, a commonly used term for which is Brexit; a majority voted to leave the EU. On 29 March 2017, Theresa May’s administration invoked Article 50 of the Treaty on the European Union in a letter to the President of the European Council. The UK is set to leave by March 2019. The terms of withdrawal have not yet been negotiated, and the UK remains a full member of the EU. May said that the UK government would not seek permanent single market membership, and promised a Great Repeal Bill that would repeal the European Communities Act and would incorporate existing European Union law into the domestic law of the UK.

The Court System

In England and Wales, all criminal cases start in the magistrates’ court, but the most serious matters are then sent to the Crown Court. Civil cases are sometimes heard in the magistrates’ court, but most are heard by the County Court. Above these courts are the High Court, Court of Appeal and the Supreme Court.

The Supreme Court is the final court of appeal for all UK civil cases, and for criminal cases in England, Wales and Northern Ireland. The Supreme Court took over the judicial functions of the Appellate Committee of the House of Lords in October 2009, under the Constitutional Reform Act 2005, thereby making a constitutional separation between the legislature and the judiciary.

A further appellate court is the Judicial Committee of the Privy Council, which hears cases from the British overseas territories and dependencies and some Commonwealth countries, as well as certain highly specialised domestic appeals.

Her Majesty's Courts and Tribunals Service (HMCTS), an executive agency of the Ministry of Justice, is responsible for administration of the court and tribunal system in England and Wales.

The Senior Appellate Courts of the UK

Appellate courts are those that only hear appeals from other courts. The two most senior appellate courts are the Court of Appeal and the Supreme Court.

The Court of Appeal, which encompasses only England and Wales, consists of a Civil Division and a Criminal Division. The Civil Division hears appeals against decisions of the High Court, while the Criminal Division hears appeals about alleged errors of law in the Magistrates' and Crown Courts. Cases are heard by three Lords Justices of Appeal, each of whom reaches an individual decision that may consist of a lengthy speech. The Court's decision may be reached either by unanimity or by a 2:1 majority.

Appeals from the Court of Appeal are heard by the Supreme Court, which is the highest court in the UK. It hears civil appeals from all four countries, and criminal appeals from England, Wales and Northern Ireland. Permission to appeal to the Supreme Court will be given only if a case raises a point of general public importance. Cases are heard by five, seven or nine of the 12 Justices of the Supreme Court, each of whom reaches an individual decision that may consist of a lengthy speech. The Court's decision may be reached either by unanimity or by a simple majority.

Decisions made in the Court of Appeal, the Supreme Court and the Supreme Court's

predecessor, the Appellate Committee of the House of Lords become precedents that must be followed by courts in all future cases. This ensures that similar cases are treated similarly, which many people regard as one of the most important aspects of justice.

Traditions of the Courts

The Royal Coat of Arms

The Royal Coat of Arms came into being in 1399 under King Henry IV. It is used by the reigning monarch.

The Royal Arms appear in every courtroom in England and Wales, with the exception of the magistrates' court in the City of London, demonstrating that justice comes from the monarch, and a law court is part of the Royal Court (hence its name).

Judges and magistrates are therefore officially representatives of the Crown.

The presence of the Royal Arms explains why lawyers and court officials bow to the judge or magistrates' bench when they enter the room. They are not bowing to the judge, but to the coat of arms, to show respect for the Queen's justice.

Gavels

Although they're often seen in cartoons and TV programmes and mentioned in almost everything else involving judges, the one place you won't see a gavel is an English or Welsh courtroom—they are not used there and have never been used in the criminal courts.

The Black Cap

The black cap, based on court headgear in Tudor times, was traditionally put on by judges passing sentence of death.

Since the permanent abolition of capital punishment in 1969, there has been no need for the cap to be worn. High Court judges still carry the black cap, but only on an occasion where they are wearing full ceremonial dress.

Red Ribbons

Red or "pink" tape was once used to tie up official papers; indeed, that is where

the term “red tape” to describe excessive bureaucracy comes from. The tape is still used by the legal profession for briefs (the documents outlining a case) from private citizens. White tape is used for briefs from the Crown.

Oaths

Judges, magistrates and tribunal members take two oaths when they are sworn in. The first is the oath of allegiance to the reigning monarch, and the second the judicial oath; these are collectively referred to as the judicial oath.

Witnesses giving evidence in court also take an oath, which can be religious (different versions exist for members of different faiths) or secular—where the witness simply affirms that they will tell the truth.

Oaths were used at least as far back as Anglo-Saxon and Roman times.

History of Court Dress

The costumes worn by judges are just about the most distinctive working wardrobe in existence. But that’s not altogether surprising: after all, not many uniforms have had seven centuries to evolve....

When Robes and Wigs Weren’t Traditional

Strange as it might seem now, when judges first started wearing robes and wigs they probably wouldn’t have stood out on the street.

The costume of a High Court judge, for example—a long robe, a full hood with a cowl covering the shoulders and a mantle (or cloak)—was more or less established by the time of Edward III (1327–1377) and was based on the correct dress for attending the royal court.

The material for these robes was originally given to judges as a grant from the Crown, and included ermine and taffeta or silk. The colours were violet for winter and green in summer, with scarlet for best, but the last mention of green robes dates back to 1534.

In 1635 the definitive guide to court dress was published in the Judges Rules. But

this didn't introduce new costumes; it just set out what existing robes should be worn, and when.

So after 1635, the correctly-dressed judge would have worn a black robe faced with miniver (a light-coloured fur) in winter, and violet or scarlet robes, faced with shot-pink taffeta, in summer. A black girdle, or cincture, was worn with all robes.

Breaking the Rules?

Not that these guidelines made the matter of correct court dress simple.

By the mid-eighteenth century, the rules of 1635 were not being stuck to as strictly as the author might have hoped.

A less formal version of the robes—a scarlet robe, black scarf and scarlet casting-hood, also known as a tippet or stole, was used for criminal trials, and for civil trials some judges had begun to wear a black silk gown.

When sitting in Westminster Hall, at the time the home of the courts of law, the mantle was not worn; this was now saved for ceremonial wear. And grey taffeta was becoming increasingly popular as an alternative to the pink taffeta used on summer robes.

Plain linen bands began to be worn at the neck, in place of the ruffs associated with Queen Elizabeth I. These were originally wide collars, but by the 1680s had become what we see today: two rectangles of linen, tied at the throat.

Bands are still usually worn with a winged collar, rather than the turn-down-collar seen on a typical shirt today.

New Courts, New Codes

Sometimes changes to the court structure itself have had a major effect on what is worn by judges.

The High Court, for example, was created by the Judicature Acts of 1873 and 1875, absorbing the courts of Chancery, Admiralty, Probate and Matrimonial Causes. This led to a new dress dilemma; trial judges in these courts were used to wearing plain black silk gowns.

These judges were allowed to keep the dress code they were used to, and even today,