高等院校法学专业高级系列丛书

Legal English

法律英语

马庆林

高级教程

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马庆林　孟　超　编著

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21 世纪以来，经济全球化蓬勃兴起，而随着我国加入世贸组织，我国正在融入经济全球化的大环境之中；同时，我国改革开放也经过了 30 余年，国内的形势正在发生着新的变化。这样一来，就不可避免产生一系列新的法律问题，也给国内的法学教育提出了新的课题，对法学教材也提出了更高的要求。

鉴于此，我们延请中国政法大学、对外经济贸易大学、中国人民大学、中央财经大学、复旦大学、上海交通大学、西南政法大学、武汉大学、华中师范大学、厦门大学、西北政法大学等众多知名学府的权威学者，并联合实务界人士，共同推出一套高等院校法学专业高级系列丛书。这套丛书，可以作为法学研究生的教材，也可以作为法学本科生（高年级）的深度阅读图书；同时对于法学界实务工作者而言，也有很大的参考价值。

本套丛书，在精简基本知识内容的基础上，对重点内容及其最新发展进行了极大的丰富与深化，并在一定程度上打破教材只阐述通说的常规；在知识结构安排上，更加完善，并具有前瞻性和系统性。其每本书中都包含着诸多新的观点及引发思考的提示，并融入相关的现实案例，有助于读者扩大知识视野，提高对知识理解的深度，拓宽思考现实问题的广度，从而形成自己的法学知识架构，最终有助于在实践中解决问题。

本套丛书的体例，主要设置四个模块：（一）核心提示——核心的导读性提示，即正文的阅读重点，具有一定的启发性，引导学生进行思考；（二）正文；（三）深度思考——提供学生思考的开放性主题，从而使所学知识得以巩固和实际运用；（四）推荐阅读/扩展阅读索引——为学生继续更深入地学习，推荐相关的阅读书目，或提供相关的学习资料索引以方便搜索。这些模块不是孤立的，而是作为一个整体，交互融合，共同起到引导、运用和深入的作用。

本套丛书的每一本都是作者的倾力之作，愿她们的出版对我国的法学教育、人才的培养有所助益！

对外经济贸易大学出版社

前　言

《法律英语高级教程》是为法学各专业学生及英语专业学生在学习完《大学英语》或《基础英语》后进一步学习法律英语知识而编写的，旨在通过这套教材的实践，帮助学生掌握法律英语的基础词汇及基本法律常识，了解国外法律制度及法学研究的最新动向并通过教学实践获得运用法律英语的基本技能，熟练阅读理解国外法学文献，掌握基础的法律方面的英汉互译。

本书共有 15 个单元。每单元分为主课文(Text)、练习(Exercise)、辅课文(Extended Reading)、思考练习(Thinking in Depth)及相关资料(Suggested Reading Materials)。每单元的教学需 6 学时，全册书约需 60 学时。

主课文（Text）作为精度文章讲解，课文后设计有生词、音标、单词释义、课文注释，供教师和学生开展课堂教学。

练习（Exercise）包括阅读理解、判断、术语解释、完形填空和英译汉，旨在帮助学习者更好地掌握每单元的核心知识点以及为教师提供一个课堂练习和课后作业的素材。

辅课文（Extended Reading）是与每单元的论题相配套的辅助阅读材料，在学习完主课文之后可用作进一步掌握相关知识的阅读材料。

思考练习（Thinking in Depth）是在学习每单元的主课文(有时包括辅课文)之后，结合该单元所讨论的论题，所提出的一系列思考题。一方面旨在帮助学习者回顾该单元的重点信息；另一方面则以提问的方式促使学习者对相关论题形成自己的认识和观点。

相关资料（Suggested Reading Materials）是在学习完整个单元之后，为学习者进一步学习及教师备课方便而提供的相关信息，包括：国内法律书籍、国外法律书籍、机构官方网站及在线百科全书网址。

全书各单元选材均来自近年出版的国外原版法律书籍的原文。题材结合法律各专业特点，力求内容新颖丰富，文章体裁多样。主课文是每个单元的核心，在课时分配上应当有所侧重。辅课文则是与主课文相配合的文章，教师可根据授课情况有选择地进行讲解。本教程广泛听取了一些法学专家及多年从事法律英语教学的同行意见，通过注释对课文中的相关法律知识、法律文化进行了补充和调整。在编写过程中，本书参考了国内外法律专业的原版资料，并在编写和出版过程中，得到了对外经济贸易大学出版社的

大力支持。在此，编者向他们表示最真挚的谢意。

由于编者才疏学浅，错讹之处在所难免，诚恳希望广大读者和同行批评指正。

编 者

2010 年 8 月

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Unit 1 The Law and Legal System

Some laws are unwritten but they are better established than all written ones.
有些法律虽未明文规定，但约定俗成行之有效。

— Marcus Annaeus Seneca the Elder

Text

Lead-in

本单元介绍法律体系的基本知识，着重分析了以英国为代表的普通法体系形成的历史原因及发展过程，强调英国和美国法律体系的一脉相承性，同时也在论述过程中，指出了普通法系与大陆法系之间的差异。

Body

American Common Law Systems

The American legal system[1], and all others that have grown from English roots, are characterized as common law[2], in contrast with the system of continental Europe that are derived from Roman law[3] and are called civil law[4] systems. England never absorbed Roman law principles and methodology, but developed its law from singular, native sources which, with the spread of English social culture, have become the foundation of the law in most English-speaking countries[5], including the United States.

The earliest idea of the common law was advanced by the English kings' judges some 900 years ago in an attempt to create a national legal system and to consolidate royal power[6] through the centralization of the administration of justice.[7] The national, royal courts proved very attractive to litigants because of their relative freedom from corruption and their ability to enforce judgments on a national basis through the executive power of royal officials. The law they applied was said to be "common", because it allegedly represented customs common to

the whole kingdom, in contrast with rules applied only locally, or with the law in ecclesiastical courts that were applying in a foreign system.[8] The common law thus had a unifying, state-building aspect which had both a practical and an ideological appeal.[9]

What were the origins of this emerging common law? While there were some royal statutes even from the earliest times, the primary sources were not legislative[10]. The common law was declared by the judges, although it was certainly not wholly invented by them. While its identification with the general customs of the nation was certainly exaggerated, there is no doubt that much of it consisted of a blending of Anglo-Saxon[11] customary rules and principles with northern French practices and procedures familiar to the governing Anglo-Norman elite.[12] In the process of selecting customary rules and practices from two cultures, from a very early date, the judges displayed the practical genius of common law culture in building a structure of acceptable and efficient rules and principles. For, while the judges stated that the law existed already and that they were merely discovering or declaring it, there can be no doubt that in early times the process was a highly creative one of choosing and elaborating.[13] To take one example, the common law judges held that primogeniture[14] (the exclusive inheritance of real property by the oldest son, when there were male children) was part of the common law, although it is clear that, before the courts took this position, primogeniture was in fact only one customary mode of inheritance for certain kinds of military land-holding, competing with older English customs of equal division and other forms of inheritance.[15]

The early centuries also exhibited an important phenomenon that has always continued to characterize common law systems. England developed at a very early date a powerful group of learned lawyers (the Bar[16]), who enjoyed a high status and who were regarded as virtual equals by the judges. The arguments these barristers, as they were called, addressed to the courts are preserved in ancient law reports.[17] They rely heavily on appeals to the authority of particular earlier decisions of the courts (precedent), which are treated as being worthy of the greatest respect if not absolutely binding. At the same time there is vigorous argument among the lawyers and the judges about the best way of understanding earlier decisions in the light of general considerations of efficiency and justice. In this way the law developed through a dialogue between judges and lawyers, with the courts often adopting the reasoning and language urged upon them by the members of the Bar.[18]

Through this process of ongoing argument and adjudication, the common law became not merely a collection of individual authoritative decisions, but also a body of principles and

concepts of public policy expressed and repeated by judges from one generation to another.[19] From the earliest days, the common law did not show slavish respect for individual decisions, but sought to uncover the general principles and policy that best expressed the development of a line of cases in an area. So, in the nineteenth century, an English judge defined the common law as a system which consisted in applying to new combinations of circumstances those rules which we derive from legal principles and judicial precedents.[20]

In this way, through the interaction of the judges and lawyers, the common law in its early centuries laid the foundations of the modern Anglo-American law of contracts torts (civil wrongs), criminal law and the law of real property (interests in land). While there has been later statutory intervention in all these areas, the underlying governing principles and style of argument and decision-making are still those worked out long ago in the emerging years of the common law.[21]

As commercial activity increased and became more sophisticated, an important additional field of jurisdiction was acquired by the common law. Disputes between commercial buyers and sellers, and those engaged in other commercial transactions, were traditionally resolved by arbitration under customary rules developed by traders (the law merchant[22]). Always anxious to increase their jurisdiction, and always willing to incorporate reasonable and convenient customs, the common law courts in the eighteenth century absorbed the customs of the law merchant and soon became the forum for commercial litigation and for developing and modernizing this body of law[23]: then large sections of commercial law were later codified, as in the *English Sale of Goods Act 1893*[24] and the twentieth century *American Uniform Commercial Code*[25], although some reforms were introduced, much of the statutory content represented a restatement of common law principles. One other fundamental theme must be noticed in the early evolution of the common law: While the common law evolved in the royal courts and was enforced by royal officers, its fundamental justification from the first identified itself with the idea and the ideal of the traditional and binding customs of the English people.[26]

Doctrines of absolute royal sovereignty, that were a part of continental European Roman law systems, were rejected by common law theory.[27] As conflicts between King and Parliament grew sharper in the seventeenth century, the common law judges became leading advocates of the Parliamentary position[28], and the great Chief Justice Coke observed in 1611 that the King "hath no prerogative but that which the law of the land allows him".

Early declarations of the liberty of the subject and of restrictions on royal power (such as

the famous Magna Carta[29] [Great Charter] of 1215) came to be seen as part of the common law tradition.[30] The result was that, in the English civil war in the seventeenth century between King and Parliament, the common law lawyers for the most part were on the Parliamentary side whose victory strengthened the view that the common law was an embodiment of fundamental liberties and human rights.[31]

This ideological aspect had a powerful influence on the American colonies in their war of independence against England. The Americans invoked their rights under the common law as against royal prerogatives and saw themselves not as rebels, but as upholding the true and best traditions of their English heritage.[32] Rights and privileges that later came to be embodied in the United States Constitution, such as the general requirement that no one may be deprived of life, liberty, or property without due process of law, can be traced back to Magna Carta and the general principles of the common law.

New Words & Phrases

legal system	法律体系，法律制度
characterize /'kærəktəˌraiz/ *v.*	给予……特征；成为……的特色
methodology /ˌmeθə'dɔlədʒi/ *n.*	方法论，方法学
advance /əd'vɑːns/ *v.*	（使）前进，（使）发展，促进
consolidate /kən'sɔlideit/ *v.*	使某事物巩固，加固，加强
centralization /ˌsentrəlai'zeiʃən/ *n.*	集中（化），中央集权（化）
administration /ədˌminis'treiʃən/ *n.*	管理，（对政府的）支配，掌管
litigant /'litigənt/ *n.*	诉讼当事人
custom /'kʌstəm/ *n.*	习惯，风俗，惯例
corruption /kə'rʌpʃən/ *n.*	腐化，腐败；败坏，贿赂
allegedly /ə'ledʒidli/ *adv.*	（不论真伪）据称地，据传闻地
ecclesiastical /iˌkliːziː'æstikl/ *adj.*	（基督）教会的，与教会有关的
unify /'juːnifai/ *v.*	统一
statute /'stætjuːt/ *n.*	成文法，法规，法令
legislative /'ledʒiˌsleitiv/ *adj.*	立法上的，有立法权的
identification /aiˌdentifi'keiʃən/ *n.*	同一化，成为一体
exaggerate /ig'zædʒəreit/ *v.*	夸张，夸大，言过其实
elaborate /i'læbəreit/ *v.*	详尽说明，详细制定

primogeniture /ˌpraimə'dʒenitʃə/ *n.*	长子身份，长子继承权
inheritance /in'heritəns/ *n.*	继承物，遗产，继承
barrister /'bæristə/ *n.*	（英）大律师；专门律师
precedent /'presidənt/ *n.*	先例，范例，判例
vigorous /'vigərəs/ *adj.*	有力的，精力充沛的
binding /'baindiŋ/ *adj.*	有约束力的，应履行的
adjudication /əˌdʒu:di'keiʃən/ *n.*	（法院的）宣告，宣判，审判，裁定
arbitration /ˌɑ:bi'treiʃən/ *n.*	仲裁；公断
tort /tɔrt/ *n.*	民事侵权行为
real property	不动产
intervention /intə'venʃən/ *n.*	介入，干涉，干预
Parliament /'pɑ:ləmənt/ *n.*	（英国）议会
chief Justice	首席法官，审判长，法院院长，（大写）（美）首席大法官
prerogative /pri'rɔgətiv/ *n.*	权利，特权；（英史）大主教法庭

Notes

1 legal system: 法律体系
It is a system for interpreting and enforcing the laws.

2 common law: 共同法（也译作普通法）
The system of laws originated and developed in England and based on court decisions, on the doctrines implicit in those decisions, and on customs and usages rather than on codified written laws.

3 Roman law: 罗马法
The legal system of ancient Rome, forming the basis for modern civil law.

4 civil law:（本文）罗马法，大陆法系（或罗马法系）国家的法律制度
A system of law having its origin in Roman law, as opposed to common law or canon law.

5 English-speaking countries: English is the primary language in the following countries: Australia, Canada, New Zealand, Singapore, the United Kingdom, the United States and some other countries and areas.

6 royal: royal power 王权，皇权；royal court 皇家法院；royal officials 皇家官员；royal statutes 皇家法规

7 ...through the centralization of the administration of justice.

通过对司法的集权化管理……

8 The law they applied was said to be "common", because it allegedly represented customs common to the whole kingdom, in contrast with rules applied only locally, or with the law in ecclesiastical courts that were applying in a foreign system.

他们（英国皇家官员）所应用的法律称作"共同法"（common law），那是因为这些法律体现了全国范围内的共同传统。与共同法相对应的是，当时仍有许多法规仅适用于某一区域或来自另一法律体系的宗教法庭。

编者注：Common law 的译法较多，常见的有"普通法"、"共同法"，本书采用"共同法"。

（参见：何家弘. 法律英语——美国法律制度. 4 版. 北京：法律出版社，2008.）

9 The common law thus had a unifying, state-building aspect which had both a practical and an ideological appeal.

因此，共同法就有了一个在国家层面统一的，既有来自现实方面的，又有来自观念方面的需求。

10 While there were some royal statutes even from the earliest times, the primary sources were not legislative.

虽然早期就有皇家法规，但（共同法）的最初来源却不具备立法性。

11 Anglo-Saxon: 盎格鲁－撒克逊人

A member of one of the Germanic peoples, the Angles, the Saxons, and the Jutes, who settled in Britain in the fifth and sixth centuries; or, any of the descendants of the Anglo-Saxons, who were dominant in England until the Norman Conquest of 1066.

12 While its identification with the general customs of the nation was certainly exaggerated, there is no doubt that much of it consisted of a blending of Anglo-Saxon customary rules and principles with northern French practices and procedures familiar to the governing Anglo-Norman elite.

虽然认为共同法即就是国家的传统习俗的观点有失偏颇，但毫无疑问，共同法的确是盎格鲁－撒克逊人的传统习俗和沿袭的规则以及来自法国北部的（诺曼公爵）法律制度的结合，用以巩固对盎格鲁-诺曼社会的统治。

13 For, while the judges stated that the law existed already and that they were merely discovering or declaring it, there can be no doubt that in early times the process was a highly creative one of choosing and elaborating.

虽然法官的工作就是陈述已有的法律，寻求并宣读适用的法规，但毫无疑问在法律法规形成之初，这是一项极富创造力的选择和精心考虑的过程。

14 primogeniture: 长子继承权

15 To take one example, the common law judges held that primogeniture (the exclusive inheritance of real property by the oldest son, when there were male children) was part of the common law, although it is clear that, before the courts took this position, primogeniture was in fact only one customary mode of inheritance for certain kinds of military land-holding, competing with older English customs of equal division and other forms of inheritance.

例如，虽然共同法法官认为长子继承权为共同法之一部分，即便法庭现已认同这一观点，但长子继承权在当时也仅是对抗平均分配或其他的英国继承方式的，用于继承武力占据领土的一种传统模式。

16 the Bar: 律师职业；律师界

The bar means all those who belong to the profession of law.

17 The arguments these barristers, as they were called, addressed to the courts are preserved in ancient law reports.

当时为人们敬仰的大律师出庭进行辩论的陈词保留在了当时的案例汇编中（law report）。

18 In this way the law developed through a dialogue between judges and lawyers, with the courts often adopting the reasoning and language urged upon them by the members of the Bar.

以这种方式，随着律师们竭力推荐的法庭推理和陈述语言的方式的推广，法官和律师之间的对话就逐渐演变成了法律。

19 Through this process of ongoing argument and adjudication, the common law became not merely a collection of individual authoritative decisions, but also a body of principles and concepts of public policy expressed and repeated by judges from one generation to another.

在日常的法庭辩论和裁决的程序中，共同法不仅演变成为一部个人权威决断的集合，积年累月它也成为法官们所重复和表达的公共政策的概念和原则。

20 So, in the nineteenth century, an English judge defined the common law as a system which consisted in applying to new combinations of circumstances those rules which we derive from legal principles and judicial precedents.

因此，在 19 世纪，一位英国法官将共同法定义为：将从法律准则和司法判例中产生的法规应用于不同情况的新组合的一个法律体系。

21 While there has been later statutory intervention in all these areas, the underlying