

THE ENGLISH LANGUAGE AND THE COMMON LAW

What is common to you, as students studying the Common Law in Beijing, and students studying the same in Berlin or Baghdad, is the English language.

Perhaps most of you, having achieved a competence in the language at school, regard English as a way of achieving some knowledge of another legal system which will help you in your careers after you leave university.

A few of you may perhaps be so intrigued with the common law that you will want to study it full time.

Whether this course has been a brief flirtation with the common law or the start of a love affair with the subject, I ask you to give some thought to the English Language as the means of bringing the common law to you.

Put to one side your legal skills and listen to the story of English and the Common Law. It is a story worth telling.

It is a story of a language developing to be the common tongue of England over a thousand years ago and then suddenly being eclipsed by two rival languages from the Continent of Europe spoken by a foreign elite governing class, a bit like the Manchus in China in the Seventeenth Century.

It is about the times when speaking English was the mark of being a nobody in the eyes of the ruling classes.

The story also shows that governments cannot suppress or discourage a living language indefinitely if the speakers of the language refuse to give it up. Languages are defining markers of a people. They set them apart from others. They are symbols of identity. They are worth fighting for.

It was by no means certain that English would be the language of the law of England eight hundred years ago. French was one of these two new languages and was a likely contender. Latin was another rival for use in royal administration.

And English law would probably not be the common law, at least not as we would recognise it.

It would be a kind of Civil Law with some common law traits, like the law of the US State of Louisiana which was a French possession until 1803 until sold to the USA. Over 100 years of French rule.

In that US state, relations between individuals-contracts-and property owning rights are governed by civil law principles while the common law governs a citizen's relations with the state, criminal law for example.

Or like the laws of the Seychelles and Mauritius, islands in the Indian Ocean, which were also French possessions and had civil law systems until the Napoleonic wars in the early nineteenth century, when Great Britain acquired them.

In cases like this the common law was superimposed on an established civil law system and the two systems operated together, as is the case today.

England was in the reverse position of Mauritius and the Seychelles a thousand years ago. It was conquered by Frenchmen in 1066 who brought over their language and institutions. French was the new language used in the courts and English speakers needed interpreters.

Why did the common law survive? I say it was because of the resilience of the English language and the strong sense of identity of the common people who spoke it.

An early form of Common Law—a system of custom based rules commonly applied across the country—operated in England about a thousand years ago.

The language of the law was Old English or Anglo-Saxon as sometimes called. It bears some resemblance to existing German and Dutch dialects.

Here is an example of Anglo-Saxon law. It is taken from a seventh-century code on regulating conduct. The code was issued in the name of a King Aethelbert. He had a mini-kingdom in the South of England.

You can see that the king had a problem regulating morals of his subjects but that everything had its price then.

Gif man wið cyninges mægdenman geligeþ, L scillinga gebete.

Gif hio grindende þeowa sio, XXV scillinga gebete.

Sio þridde, XII scillingas.

In modern English: if a man lies with the king's maiden, he pays 50 shilling compensation: if she is a grinding slave-i.e. prepares corn to be ground-, 25 shillings; and 12 shillings for the third class.

The language is plain. There are no loan words from French or Latin. The sentence structure is recognisable too.

Up until 1066 the other significant influence on Old English came from settlers from Scandinavia-Vikings-who brought words that have remained until this day, including the words 'law' and 'by-law', the latter meaning 'town-law' and 'by'-as in Grimsby or Rugby- meaning 'town'.

It helped that Britain was an island. Latin was the language of the Catholic church and, priests and monks in continental Europe, being able to read and write Latin, were the clerks and scribes of kings who wrote to one another.

The Catholic church and Latin provided a kind of legal infrastructure on the Continent based on Roman law that was not reproduced in England. There Christianity only arrived in the sixth century and priests and monks used Anglo-Saxon when communicating with one another.

Although there were regional variations in Old English-dialects- the speakers were largely mutually intelligible and all classes spoke the same language.

The arrival of William the Conqueror in 1066 with an army changed everything. The Anglo Saxon ruling classes were deprived of all political power and their lands confiscated and given to Frenchmen who supported William.

He and his successors introduced a system of king's courts with judges and lawyers who spoke French and Latin and recorded proceedings in the last language.

Englishmen in these courts needed interpreters. Churchmen from the Continent introduced the tradition of record keeping in Latin. They also brought in some civil law concepts via Church Law.

I think that the changes were as dramatic as when the Manchus moved into Beijing after the last Ming Emperor, Chongzhen, hanged himself in 1644. Society was stratified then into Manchu Qing gentry upper class and *liangmin* (good people) and the rest, the *jianmin*. (ignoble people).

In 1215 the most famous English legal document was promulgated. It was 'Magna Carta', a legal settlement between the king and his most powerful nobles who had threatened revolt.

The Magna Carta contained legal guarantees that are referred to even today as being the inspiration for constitutions and human rights instruments.

A copy of Magna Carta toured China in 2015 and came to Beijing so some of you may have seen it, even though it could only be viewed at the UK Embassy.

Most of you will, I hope, be familiar with this promise made by the king from the Magna Carta:

'to no one will we sell, to no one deny or delay right or justice'

nulli vendemus, nulli negabimus aut differemos, rectum aut justitiam'.

That is Latin, the language of administration of the day. To over 95% of the population, the English speakers, those words were unintelligible.

The English were an underclass and there was nothing to be proud about speaking English. The first written translations of the Magna Carta were not translations into English but into French, the first language of the ruling classes.

Up until C14 the elite spoke French, even if they could also speak English. In the same century the courts system improved and the first recognizable professional lawyers, judges and attorneys, appeared. They not only spoke French, but because they were cultivating an elite image, they developed by choice a professional dialect we call Law French.

However, the common law survived. English kings preferred to keep a distance from the Continent, except from France where the English kings claimed the lands of their ancestors until the fifteenth century when they gave up.

They resisted the Catholic Church introducing civil law structures and confined civil law issues to matters of Church self-regulation. The pope was, after all, across the sea and 2000 kilometres distant.

A mark of the preference for French over English and Latin was the fact that in the thirteenth century, when Parliament-another French word-began to play a part in making laws the first recognizable Acts of Parliament-as opposed to decrees by the king-French was chosen, not English.

Here are the words of an Act of Parliament in the Freedom of Election Act 1275.

AND because Elections ought to be free, the King commands upon great Forfeiture, that no Man by force of Arms nor by Malice, or Menacing, shall disturb any to make free Election.

In the original it appears as

Et pur ceo que elections doivent estre franchises le Roi defende sur la grave forfeiture, qe nul haut homme, nature, per poiar des armes, ne per menaces, ne distourb de fair fraunche election.

Things therefore had not improved a great deal since 1215 for the English speaker. You now would be puzzled by French and not so much by Latin

You will be interested to know that around this time scores of French words made their way into common law that you come across in legal studies almost every day.

I give you some that you will likely know: 'defendant', 'plaintiff', 'bailiff', 'court', 'judge', 'attorney', 'jury' 'tort' 'parole', 'mortgage' 'chattel' and 'accomplice' and there are lots more.

However, changes were occurring in society. The connection with France were broken as French kings took over the lands owned by William the Conqueror and his supporters. There were no longer second homes in France to go back to.

Also, there was intermarrying with English women and 'French' children started speak English as well as French at home.

The clue to this change was the publication of a book in English in about 1250 instructing parents how to teach children French, indicating that French was becoming a second language in upper class households. King Edward I, who was king in 1300, was probably the first king to speak English as a second language competently.

The English language started making a comeback. Books and poems began to be written in English after a break of 350 years.

The varied subject matter of the poems indicated that the readership ranged from aristocrats to middle class people who could read and write.

A Chinese comparison might be made to the roughly contemporary Romance of the Three Kingdoms and Water Margin books by Luo Guanzhong which enjoyed widespread popularity amongst those who could read.

Although lawyers still insisted on using French in courts, its days were numbered, although it took many years to clear French and Latin out of the system.

For a start, even though judges might have French family names, their first language was English. Interpreters were no longer necessary. Also, English speaking people came to court with documents written in English. It seemed a pointless exercise to translate these into French or Latin.

Because of the trend towards using English the Statute of Pleading Act (1362) was passed requiring English to be used for court proceedings.

The words of the Act denounced the use of French in emphatic terms noting that French was "much unknown" and litigants did not understand what was being said in the courts for or against them by lawyers.

The irony was that the Act was written in French.

The Statute of Pleading did not succeed in getting rid of Law French entirely. Although English was used in oral argument, the law allowed the use of "ancient terms and forms" in Latin and French if they were considered to be more convenient.

Because old habits die hard and lawyers loved to appear elite, this meant that most of the pleading continued in French.

Eventually, Law French degenerated into refined nonsense, with French, Latin and English terms used indiscriminately and with no attempt to make sense to the ordinary English speaker.

There is a famous piece of Law French from the seventeenth century in a law report which I will read aloud. It is difficult for native English speakers to understand so I will give you first the passage in modern English.

To set the scene, a judge has gone to a town in the country to try criminals. He has just sentenced a man to death. The defendant disagrees with the verdict. He shows his disagreement in a dramatic way.

When Chief Justice Richardson of the Common Bench was sitting at the Assizes [a criminal court held outside London] in the summer of 1631 he was assaulted by a prisoner who had been condemned for a felony [an offence carrying the death penalty] who, after being condemned, threw a brickbat [a hard missile, such as a piece of brick] at the said justice that narrowly missed, and for this, an indictment [formal charge] was immediately drawn [prepared] by Noy [the name of a prosecuting barrister] against the prisoner and his right hand was cut off and fastened on the gibbet [usually a platform for exposing the body of an executed criminal, sometimes the place of execution] on which he himself was hanged in the presence of the Court.

Richardson Chief Justice de Common Banc al assises de Salisbury in Summer 1631 fuit assault per prisoner la condemne pur felony, que puis son condemnation ject un brickbat a le dit justice, que narrowly mist, et pur ceo immediately fuit indictment drawn per Noy envers le prisoner et son dexter manus ampute et fix al gibbet, sur que luy mesme immediatement hange in presence de Court.

This nonsense staggered on until the 1731 when another Act of Parliament-this time in English-totally killed off the use of any language other than English in courts. This law made the same point as did the Act of 1362, that people going to court did not understand what was going on and that was an impediment to justice.

That is not to say that you do not hear other languages in court in England today.

A non-English speaker in court will have the advantage of an interpreter to explain matters and, very rarely, a lawyer might have to refer to a court old report written in Law French. Other French and Latin terms have been so completely absorbed into the legal lexicon that they are used on a daily basis, like the words I mentioned earlier.

But you will hear another language being used officially in courts in Britain. That language is Welsh. Constitutionally, Wales is principality, that is to say a country with a Prince as the head. Since 1301 the Prince of Wales has always been the eldest son of the monarch. The proper title of the English part of the political union of the UK is 'the kingdom of England & Wales'.

Welsh is a totally different language to English. It is the language spoken in Britain before the tribes that made up the English people arrived in the 5th century. After

centuries of being oppressed by French speakers when English speakers recovered their language they, predictably, started discouraging Welsh speakers from using their language and asserting their identity through it.

This oppression only ended in the last century. The British Government reversed its policies and began to encourage the use of Welsh. It now has the status of an official language in Wales and government officials are expected to be able to communicate with the public using Welsh.

The use of some Welsh was first permitted by an Act of Parliament in 1942 but it was not until 1967 that another Act gave Welsh speakers the right to use Welsh in court.

I leave you not with Anglo Saxon, or Latin or French but Welsh.

Diolch in fawr am wrando.

(Thank you for listening)

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