21世纪法学系列教材

英美法导读

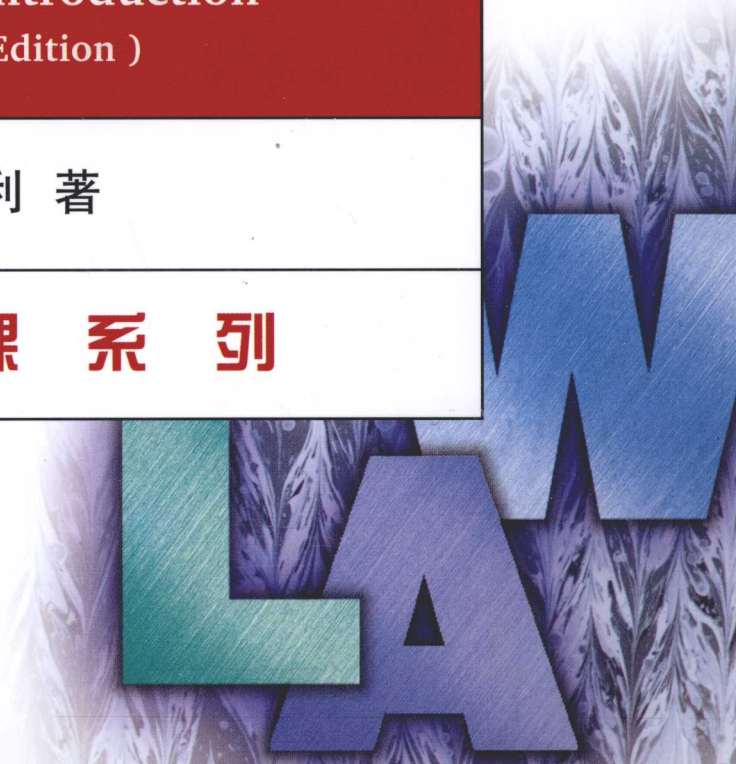
（第二版）

Learning Anglo-American Law : A Thematic Introduction

(Second Edition)

李国利 著

基 础 课 系 列



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内容简介

本书主要以美国的法律和法律体系为阐述对象，采用体系化的研究方法，在体例及内容上力求构建一个有机的英美法体系。本书力图强调英美法体系的组成部分、整体面貌及其个性特征。为正确理解英美法，本书以专题形式从诉讼、法律推理、法律研究、法律资源等方面来阐述美国法，向读者展现一个良好法律体系的构建过程。本书浓墨重彩之处在于法律制定、废除、修改的过程及具体操作，阐明了判决如何确定，判决制订者如何相互作用，以及法律规则如何最终形成等。本书系导读性著作，但又有一定的深度，作者采用英文写作，语言简练易懂，可读性强，为读者创造了一个良好的英美法语境。本书可供大学师生学习英美法使用，也可供科研人员、法律实务人员参考。

作者简介

李国利教授，男，1935 年生于山东烟台，1959 年毕业于台湾大学法律系。1963 离开台湾赴加拿大深造，在麦吉尔大学空间法研究所、图书馆信息科学院攻读，并于 1968 年分别取得这两个专业的硕士学位。此后在麦吉尔大学空间法研究所、麦吉尔大学法学院执教，直到 2000 年退休。

李国利教授对空间法、国际法和法哲学都有浓厚的兴趣。在这些领域发表了很多文章，并著有最全面的多卷本世界空间法百科全书。

Revised Edition Preface

This publication is a revised and updated version of the first edition that is based on the contents of lectures given by me at the school of law, Yantai University. Some of the lectures are based on a number of books on the subject matters included. These books are given in the general references at the end of the book. Other lectures included in this book are the results of my own findings and views. As such, the subject matters of these lectures are not normally found in books on Anglo-American law. But in my opinion, these lectures are very much an integral part of Anglo-American law. The main focus of the contents of this book is on the law and legal system of the United States. This is primarily due to the fact that not only the United States has adopted the Common Law tradition as opposed to the codified system of law as found in civil law countries but also that the United States has the most rich and vibrant law and legal system in the world, and has an unprecedented and unsurpassed influence internationally.

Most if not all existing books on the foundation of the Anglo-American law including the Common law and those of an introductory nature are, to a significant extent, of a non-systematic nature; Not only their forms of presentation lack any organization and structure, the material components included in these foundation or introductory texts are largely an agglomeration or a grab bag of materials, and devoid of any meaningful systematic connectedness.

They unduly attend too much to the individual trees while losing sight of the forest. It is not unreasonable to say that this unfortunate state is largely due to a lack of a proper conception of what counts as law in general and as Anglo-American law in particular. Another weakness is that the authors of these books confuse the sources of law as the real law—the law in action—as well as that they neglect to tackle the most interesting and dynamic authoritative and effective decision-making process through which the law in action ultimately emerges. Another contributing factor for this weakness is that these earlier publications failed to draw attention to the interactivity and the mutually informing and shaping nature of law between elite powers in the political moral arena.

The lectures found in the present book purport to emphasize the systemic components, features, and characteristics of Anglo-American law. This is evident from the contents of the lectures. No subject components of any substantive law, especially those of a private law nature are included. Thus, little or no discussion of and citation to cases or judicial decisions are included. Wherever private law subjects or matters are touched upon, these are dealt with in the broader context of the legal system.

Instead, the emphasis is on real life happenings and issues, namely, juridical case or cases in a much broader sense, if you will. One of such cases is the on-going economic meltdown, financial and banking crises as well as the regulatory programs, bailout plans, and rescue or nationalization attempts. Here the issues and problems involved include the fierce debates over big government versus small government, liberalism versus conservatism, regulatory guidance and control versus laissez-faire free market capitalism, state powers versus social forces, and public versus private. The study also stresses the overwhelming primacy of legislative and executive decisions and negligible role of the judiciary. Above all, we emphasizes the life drama of the interactitivity of mutual informing and mutual shaping of elite powers both within the state realm and with elite participants in the non-state sectors, and the relationship and distinction between authority and efficacy.

What are generally missed or overlooked by other introductory works on Anglo-American law have been particularly chosen to strengthen the systematic nature of Anglo-American law properly understood. Thus, one finds in this work a chapter on Anglo-American law and You, The building of a good legal system, United States law in action and legal reason. Even in the discussion of some of the conventional subjects, issues or matters of a system or process nature are specially chosen.

The systematic emphasis of the lectures particularly stresses the process and operation of the making, unmaking, and remaking of the law rather than the inanimate and rigid nature of substantive rules and the general and pliable (elastic) legal principles. The emphasis is on how decisions are made, how decision-makers interact, and how a rule of law finally emerges. The central theme of the emphasis is the interactivity between sources and decision-makers. We believe how and why decision-makers interact and how and why the law finally emerges should be the central focuses in any studying of Anglo-American law.

For ease of learning and locating any specific text and information, a detailed

table of contents is deliberately structured and provided. In addition, catching headings and distinct paragraphs are specifically created. The unique way of the structure of the table of content also serves to reveal at a quick glance the thematic presentation of lectures and the contents thereof. Instead of a subject index normally featured in books of this nature, it is believed that a detailed table of contents is a better means for quick and easy accessing the substantive contents of the lectures found in this book. In a few instances, text of a more or less similar nature is found in more than one place. This is deliberately done to maintain the holistic structure of the topics concerned.

Thus, this is not just an introductory text. The comprehensiveness, the details and the unique characteristics of the contents, and its thematic structure and in-depth analysis should serve hopefully as a valuable source for information, ideas, insights, perspectives for readers doing advanced research and study in a field of law concerned.

Since the publication of the first edition in 2005, important developments in the law of political morality have happened. Many of such developments have been added to further illustrate the systemic and interactive nature of the Anglo-American law.

In addition to the revision and improvement in the text on substantive issues, correction, change, and improvement in style, spelling, grammar, and syntax have also been made.

The mistakes, defects and weaknesses in the text of the first edition materialized was primarily due to both the negligence on the part of author and the fact that the author was not able to review the text before printing.

In addition to the many books that inform these lectures, an amply number of footnote references have been provided. Footnotes have also been completed and standardized wherever called for. There are still a few places where bibliographical information is not completely given. It is to be hoped that in the advanced age of digitalized world, it is more profitable to resort to online sources, proprietary or those in the public domain, to identify a case, article, or monograph than a printed source that in general is not be readily accessible, especially for students studying outside North America. Ditto the citation of cases to the established format of printed law reports, as these are no less easy to get hold of. Whereas, it is a growing trend for governmental bodies, especially courts to publish their decisions and other

information of public interest on their official websites.

In order to keep the book within a manageable size, Chapter nine on Civil litigation and Chapter ten re Legal research and legal materials have been deleted from this second edition. Please refer to the first edition for discussion.

There have always been voices that the law should be written in the common, everyday language and that legal writings should be equally popularized. Coming from students whose mother tongue is in a language other than English, such voice is quite understandable. However, the language of law has always been drafted, written, and spoken in a sort of normal language heavily informed by certain special terms, concepts, and complex syntaxes which would be extremely cumbersome, if not difficult to be translated into common, ordinary everyday language. Even text that appears to be in popular language may carry a heavy dosage of special, technical meaning. The requirement in some jurisdiction for jury instruction to be given by the presiding judge in plain English is one notable exception. So, the author tries wherever feasible to make the text easily comprehensible; it is highly advisable that one should also try to internalize unique, if not esoteric, language of law.

Fortunately, common language has in fact already found its way in legal text. The legal rules made by judges are factual based and written in plain language. Recently, a strong stream of bright light may soon begin to shine through one of the most important legislation. President Obama's new, no short of a revolutionary nature, proposed overhaul of the financial sectors will five regulators the power to set tough new rules so that companies compete by offering innovative products that consumers actually want and actually understand. Those ridiculous contracts he said—pages of fine print that no one can figure out—will be a thing of the past. You'll be able to compare products, with descriptions in plain language, to see what is best for you.

However, in order to further easy comprehension, we include in this edition a brief introduction for each chapter and a few review and reflective questions at the end of each chapter. Furthermore, many of the hard-to-understand words, terms, concepts, etc., have been translated into Chinese and included in the text.

Special thanks must go to teachers Wang Lujuan , Wang Hongping , Pengjie, Zhang Limin, Shan Chun, who have kindly agreed to participate in the translation project. With their help and participation, the value and importance of this book are considerably enhanced.

Should there be any mistakes, gaps, omissions, inaccuracies, these are the sole responsibility of the author and should not be attributed in any manner and fashion to any institution that is associated with or individual who assisted the author.

Kuolee Li

April, 2010, Toronto, Canada

修订版前言

本教材是根据我在烟台大学法学院的授课内容编写的，是对第一版的修正和更新。其中部分内容参考了相关问题的一些著作，参考文献在本书最后列出。书中其他内容是本人的观点和研究成果，这些在大多数英美法书籍中是没有涉及的，但我相信它们是英美法整体中密不可分的一部分。本书的研究对象主要是美国法和美国法律制度，这是因为美国不仅沿用了与大陆法系国家成文法系统相对的普通法体系，并且美国拥有世界上最丰富和最有影响力的法律和法律制度，它的国际影响是前所未有、无法逾越的。

目前大多数以普通法为内容的英美法专著在一定程度上说是缺乏系统性的，因而实际仅仅是对英美法的简介，其行文没有组织结构，内容很大程度上是一堆相关材料的堆集和罗列，全无有意义的体系构建和前后联结。

这些书可谓只见树木，不见森林。可以说，这样的书之所以不成功主要是由于没有对法律整体以及英美法做适当的概念界定。另一个问题在于这些作者误认为法律渊源是真正的法律，同时，他们也忽视了探寻诉讼中的法律所最终呈现出最具意味的权威有效的动态裁判过程。此外，早期专著没有正确地在政治和道德层面上剖析法律的本质与精英权力之间的互动关系。

本教材中的内容着力于英美法的构成和特征，书中许多地方都表现了这一点，而实体法的内容尤其是私法方面没有涉及。因此，书中几乎没有这方面的讨论，当谈到私法命题时，更多的是从法律制度这一宏观的角度来探讨的。

相反，本教材的重点放在了现实发生的热点问题上，比如司法判例或更广泛领域的一些案例，其中包括正在发生的经济衰退、金融危机以及监管方案、紧急援助计划和国有化与救市计划。这些焦点和问题囊括了各种对立概念的激烈交锋，如大政府与小政府、自由主义与保守主义、控制监管导向与自由放任的资本主义市场经济、国家权力与社会力量、公共权威与私人力量之间的关系和相互作用等。这些研究也强调了立法、裁判执行和司法消极性的基础性地位，最主要的是我们通过现实在国家权力和社会参与两方面阐述了精英权力的本质和影响，以及权力和效力的关系和区别。

其他的英美法导论书籍往往不注重强调对英美法系统性的理解。因此在本书中我们有叫做“英美法与你”的专章讲述良好的法律制度的构建、美国法和法律推理。即使在一些争议性问题上，我们也选择了体制和程序性的问题进行

探讨。

本教材的重点在于造法、法律废除与法律修改的操作过程而非死板无趣的实体法律规范本身或是大而化之的基本原则。我们应当关注裁判如何作出，裁判者与法源如何相互影响以及通过判决最终形成法律规范的过程。其中，中心议题就是法律渊源与裁判者的交互作用。这一点以及法律规范的最终形成就构成了学习和研究英美法的关键。

为便于了解和定位具体章节和信息，我们给读者编排了详细的目录，还特别设置了醒目的标题和明确的段落。这种目录结构的特别之处有利于迅速浏览主题介绍及其内容。比起这类书籍所常用的论题检索，这种方式更有助于读者定位和查找教材中的相关内容。教材中有些相似的内容会出现在不止一个章节中，这也是为了该命题以及整本教材的完整性和体系性。

因此，这不仅仅是一本导论，它的内容、细节、文章特点、命题结构以及深度的分析可以作为读者获取信息、观点、内涵、前景，以及进一步研究和学习相关法律领域的宝贵来源。

本书自从2005年第一版出版以来，政治和道德领域方面又有了很多重要的发展。我们收录了一些新的发展内容来进一步探寻英美法的内在特性和体系。

本书第一版中的错误、瑕疵及不足之处主要是由于作者的疏忽以及作者未能在交付印刷时对文章做全面检查。

除了教材中的参考文献外，相关的大量脚注也在教材中需要的位置做了规范的标注。还有部分文献我们没有标出，这主要是因为，在这样一个数字时代，对读者来说，尤其是非北美地区的学生，比起使用常规的不易获取的印刷材料，上网利用私人或公共资源检索案例、文章、专题报告无疑是更简便易行的办法。照抄那些法律报告上现成的案例是再容易不过的了，现今政府机关尤其是法院确常常将它们的判决及其他有关公众利益的信息公布到官方网站上。

为了控制篇幅，第二版中删除了第九章“民事立法”及第十章“法律检索和法律资源”，相关内容请参见第一版。

人们总是希望用日常语言来表述法律，从而使之被广泛地接受和理解，对于英语是第二语言的学生来说这种想法是可以理解的。然而当起草法规、撰写文书及口头陈述的时候，我们往往使用特定的规范性词汇、术语概念和句式，这就使得法律语言无比晦涩难懂，更别说翻译成普通的日常语言了。即使有的文章看起来是用日常语言书写的，文章的含义和内容也还是十分复杂和专业。当然，有时候主审法官要用通俗易懂的语言指导陪审团的情况除外。因此，作者尽可能地使本书的内容易于理解，建议读者尝试从内在理解这种特殊的而非难

懂的法律语言。

可喜的是，日常语言已经出现在法律写作中，法官造法实际上来源于用日常语言表达，近来这种现象已出现在重要的立法之中。奥巴马总统对金融行业革命性的新一轮检视将敦促权力机关颁布严厉的法规，从而使商家在为消费者提供他们真正需要、真正理解的新产品的层面上竞争。他说，那些厚厚一叠却不知所云的荒唐合同将成为过去，你可以通过日常语言缩写的说明来比较产品，看哪个是适合你的。

不过为了更便于读者理解，我们在第二版中的每一章都增加了简介，并在章末附上了复习及提问。此外，我们将一些难懂的单词、术语、概念翻译成中文附在文中。

特别要感谢参与本书翻译工作的王鲁娟老师、王洪平老师、彭婕老师以及张丽敏、单纯，他们的参与使本书的价值得到了提升。

若书中出现任何错误、缺失、疏忽及不准确之处，由作者本人负责，与协助作者的其他人员无关。

李国利

2010 年 4 月于加拿大多伦多

Preface

This publication is the revised text of the content of lectures given at the Faculty of Law, Yantai University. Some of the lectures are based on a number of books on the subjects included. Other lectures included are the results of my own findings and views. As such, these are not normally found in books of this nature. But in my opinion, they are very much an integral part of the subject matter, Anglo-American Law. The main focus of the lectures is on the law and legal system of the United States. This is primarily due to the fact that not only the United States has adopted the Common law tradition, it has the most rich and vibrant law and legal system in the work and has an unprecedented and unsurpassed influence internationally.

The lectures purport to emphasize the systemic components, features, and characteristics of Anglo-American Law. This is evident from the content of the lectures. No subject components of any substantive law, especially private law are included. What are generally missed or overlooked by other introductory works on Anglo-American Law have been particularly chosen to strengthen the systematic nature of Anglo-American Law properly understood. Thus, one finds in this work a chapter on Anglo-American Law and you, the building of a good legal system, United States law in action, legal reason, legal research and legal materials.

The systematic emphasis of the lectures is purported to stress the process and operation of the making, unmaking and remaking of the law rather than inanimate nature of substantive rules. The emphasis is on how decisions are made, how decision-makers interact and how a rule of law finally emerges. The central theme of the emphasis is interactivity between sources and decision-makers. How and why decision-makers interact and how and why the law finally emerges is believed to be an important element in studying Anglo-American Law.

For ease of learning and locating any specific text and information, a detailed table of content is deliberately structured. In addition, catching headings and distinct paragraphs are specifically created. The unique way of the structure of the table of content also serves to reveal at a quick glance the thematic presentation of lectures and the content thereof. Instead of a subject index normally featured in

books of this nature, it is believed that a detailed table of content is a better means of access. In a few instances, text of a more or less similar nature is found in more than one place. This is deliberately done to maintain the holistic structure of the topic concerned.

In addition to the many books that inform these lectures, an amply number of footnote references have been provided. However, should there be any mistakes, gaps, omissions, inaccuracies, they are the sole responsibility of the author and should not attributed to any institution or individual that is associated with the author.

Kuo-Lee Li
Center for Study of Anglo-American Law
December 28, 2004
Yantai University, China

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