American Common Law System

美国的普通法法系

The American legal system, and all others that have grown from English roots, are characterized as 'common law', in contrast with the system of continental Europe that are derived from Roman law and are called 'civil law' 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, including the United States.

美国和其他一些国家的法律体系源自英国的传统，具有“普通法”的特征。与此相应的是，起源于罗马法的欧洲大陆国家的法律体系被称为“大陆法系”。英国从来没有借鉴罗马法的法律原则和方法，而是通过单一的、本土的资源来促进其法律的发展。随着英国社会文化的传播，英国的法律（体系）已经成为包括美国在内的大多数讲英语国家的法律基础。

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 through the centralization of the administration of justice. 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. The common law thus had a unifying, state-building aspect which had both a practical and an ideological appeal.

建立普通法的想法最早源于英国王室法官。大约 900 年前，英国王室法官试图通过对司法的集权化管理来创建一个全国性的法律体系，以巩固王室的权力。国家级的皇家法院对诉讼当事人很有吸引力，因为这些机构相对清廉，通过皇家官员行使行政权的方式有能力在全国范围内执行判决。法院所适用的法律被认为是“共同的”，因为这些法律据说体现了整个国家的共同传统。与之相对应的而不相同的是，当时还存在仅适用于某一区域的法律，或宗教法庭适用外国法系的法律。因此，普通法就有了国家建设层面上的统一，它的需求既来自现实方

面，也来自观念方面。

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. 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 customary rules and principles with northern French practices and procedures familiar to the governing Anglo-Norman elite. 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. 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.

那么，这个新兴的普通法的起源是什么呢?皇家法规在很早之前就已经存在，然而，普通法的主要渊源却不是立法通过的法律。虽然法律不完全由法官们创造，但却是由他们正式宣布的。尽管认为普通法即是国家的一般传统习俗的观点有失偏颇，但毫无疑问，普通法的确是将盎格鲁-撒克逊人的习俗规则和原则与统治法国北部盎格鲁-诺尔曼精英们所熟悉的实践与程序。在早期，对两种文化的规则和习惯进行筛选的过程中，在构建既能被人们接受又能有效实施的制度和原则结构时，法官们充分展现了普通法文化实用之才。虽然法官们的工作就是陈述已有的法律，寻找并宣布适用的法规，但在法律法规形成之初，这项极富创造力的选择和精心论述的过程却不容质疑。例如，虽然普通法系的法官认为长子继承权(即，家中有男孩时，长子对财产的绝对继承)是普通法的一部分，即便法庭之前也认同这一观点，但长子继承权在当时也只是对抗平均分配或其他继承方式，用于继承武力占据领土的一种传统模式。

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), 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. 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 a 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.

早期还存在一种能持续促进普通法特征形成的重要现象。英国在早期形成了一群博学、有实力的律师团队权威，他们享有很高的地位，实际上被认为与法官的地位相同。这些大律师们在法庭上进行辩论的陈词保留在过去的案例汇编中。这些汇编严重依赖对早期法院判决的上诉意见(先例)。即使判决没有绝对的法律约束力，它也会受到人们极大的尊重。同时，根据人们对审判效率和公正的思考，怎样才能更好地理解先前的判决，这一问题在法官和律师之间也存在激烈的争论。这样一来，法律是通过法官和律师的对话形式，而法官常常采纳的是律师们施压给法庭的推理和语言。

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. 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.

通过这种不断演变的法庭辩论和裁决程序，普通法不仅演变为个人权威决断的汇集，而且也成为历代法官们表达与重复的公共政策概念和原则的汇编。起初，普通法并没有体现出对个人决断的盲目崇拜，只是试图发现一种最能够反映出某个领域相关案件发展过程的普遍原则与政策。因此在十九世纪，一位英国法官将

普通法定义为一种包括从法律原则以及司法先例中演变而来的法律并适用于不同情况下的制度。

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.

这样，普通法通过法官和律师的互动，在早期便奠定了现代英美国家的合同法、侵权法、刑法以及不动产法的基础。虽然这些领域在之后都受到了成文法的干预，但其根本的指导性原则以及辩论和判决的风格在普通法形成初期早已确定下来。

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). 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: then large sections of commercial law were later codified, as in the *English Sale of Goods Act 1893* and the twentieth century *American Uniform Commercial Code*, 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.

随着商业活动的增加以及商业活动的不断复杂化，普通法获得了另一重要领域，即司法管辖权。买卖双方以及其他商业交易者之间的纠纷在过去均通过仲裁方式来解决，依照商人的习惯法。因为急于扩大其司法管辖权，而且愿意与合理可行的传统保持一致，普通法院于是在十八世纪吸收了商人习惯法，很快成为商

业诉讼的场所，并且还发展和改进商人习惯法。之后，大部分商法的内容被法典化，被列入 1893 年颁布的《英国货物买卖法》和二十世纪的《美国统一商法典》中。尽管法典化的过程也有一些改革，但成文法的大部分内容只是对早期普通法原则的重述。早期普通法演变的过程中另一个必须关注的基本主题是：尽管普通法出自王室法庭，由王室官员执行，但其基本的法律解说从一开始就与英国民众的思想以及传统的并具有约束力的习俗相吻合。

Doctrines of absolute royal sovereignty, that were a part of continental European Roman law systems, were rejected by common law theory. As conflicts between King and Parliament grew sharper in the seventeenth century, the common law judges became leading advocates of the Parliamentary position, 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”.

作为欧洲大陆罗马法体系所强调的绝对君权原则被普通法拒之门外。在十七世纪，国王与议会之间的冲突越来越尖锐，普通法系的法官们成为议会的主要倡导者。1611 年，首席大法官库克这样概括国王的权利：“除非法律允许，否则他就没有特权”。

Early declarations of the liberty of the subject and of restrictions on royal power (such as the famous Magna Carta [Great Charter] of 1215) came to be seen as part of the common law tradition. 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.

早期宣扬的臣民自由和限制君权的理念(例如著名的大宪章)成为普通法传统的一部分。其结果是，十七世纪在国王和议会之间发生的“英国内战”中，大部分普通法律师支持的议会派最终赢得了胜利。这场胜利进一步加强了普通法中体现的自由和人权的理念。

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. 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.

这种自由和人权的理念在北美殖民地反抗英国的独立战争中产生了极大的影响。美国人民援引普通法所赋予的权利，认为反对英国天赋君权的独立战争并非是反抗，而是他们真正坚持继承英国最佳传统的行为。之后被写入美国宪法的基本权利，如未经法定程序，不得随意剥夺任何人的生命、自由和财产等基本要求，都可以追朔到大宪章和普通法的基本原则的规定中。