

现代法学教材

法律英语

Education
Cultivation
Innovation
Intellectual

● 主编 / 李广辉
宋永新

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出版说明

为了适应我国社会主义现代化建设和实施依法治国方略对法律人才的需求，全面提高法律人才的素质，根据教育部关于普通高等学校法学专业教学要求，我们邀请政法院校和实际部门的法学教授和专家编写出版了这批教材。

这批教材以邓小平理论为指导，吸收国内外法学教育的最新成果，面向21世纪的法学教育。正确阐述本学科的基本理论、基础知识，坚持理论联系实际的原则，努力做到科学性、系统性和实践性的统一。

《法律英语》是其中的一种。各章撰稿分工如下：

李广辉 Lesson 4、Lesson 5、Lesson 11

宋永新 Lesson 1、Lesson 3

李红 Lesson 4、Lesson 11、附录一

曾二秀 Lesson 7、Lesson 8、Lesson 9

秦国荣 Lesson 2、Lesson 12

金振豹 Lesson 6、Lesson 10

澳大利亚 Griffith University Law School 的 Benjamin Cochrane 语言编辑审定

2006年8月

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序 言

本书主编长期从事法律英语教学工作，也曾在国外多所大学讲学多年，在法律英语教学方面积累了丰富的经验。曾与罗俊明教授联合撰写《法学英语》，获得教育部高等法学教育优秀教材二等奖。

国内法律英语教材已有不少版本，也各有所长，但却普遍存在着一些问题：一是选材偏重于国外法学文献。二是法律英语教材难度偏高，与学生接受能力之间存在着明显的差距。三是现行法律英语教材普遍强调阅读，而忽视写作与口语的训练。鉴于此，我们遵循一种新思路组织编写了这本法律英语教科书，希望能够对我国法律英语教学有所帮助，更希望它能够有利于学生正确、高效地学习法律英语。

一、本教材的特色及使用

基于上述认识，本教材在编写过程中进行了一系列的改革。首先，在选材内容方面，为了使法律英语更贴近于实际和生活，全部选用有关中国法律的材料作为课文。其次，尽可能降低教材难度，入选的课文都比较容易为学生所理解。第三，强调写作与口语的训练。加强国内学生在英语学习中的普遍薄弱环节，帮助学生将书本上的英语变成活的、在实际生活中用得上的英语。

为此，我们在教材编写时做了以下几方面的尝试：1. 在课文之后用英文对课文中出现的生词和术语进行解释，同时也提供中文解释。有效帮助学生逐渐适应用英文表述一个意思，对英文写作很有益处。2. 在课文后面编写了法律术语与表达法的学习内容。每个术语或表达法都有几个例句，目的是让学生注意这些术语与惯用表达法的实际用法及与其相近词汇的细微差别，以便在写作时能够在特定语言环境中准确予以运用。3. 编写了中译英练习。这些句子一般与课文中出现的术语和表达法有关，同时也是一些有实际意义的法律语言。4. 要求学生在学习完每课之后进行写作练习，完成一篇法律小论文，题目应与课文内容相一致，便于摹仿课文中的表达法与句子。为此在课

后为学生写作短文提供了5个可供选择的参考题目，同时要求学生在全班同学面前演讲自己的论文。达到既有利于进行摹仿性写作，又有利于学生锤炼口语的综合效果。

考虑到学生英语程度不尽一致，我们还为水平较高的学生在每课之后提供了一篇泛读文章。但是泛读材料没有提供词汇解释，目的在于敦促学生通过查词典这项基本功来提高英语水平。

在本书最后编写了两个附录。附录一是按字母顺序编排的全书词汇总表（不包括泛读材料中的词汇），提供中文解释以及出现该词汇的课文。附录二是常用法律术语表，提供一些常用的但不限于本教材中出现的法律术语。读者可从该术语表前面的目录找到需要的法律术语可能归属的组别，然后找到多个意思相同或相近或有联系的法律术语的表述法。

二、本教材的使用对象、教学安排及与其他教材的衔接

本教材可由法学院高年级的本科生使用，也可由低年级的研究生使用。因此，如果学校安排两个学期或更长时间的法律英语教学，本教材可作为第一个学期教材，第二个学期即可过渡到外国法律制度的教材上去。

此外，感谢各位课文作者允许我们在教材中使用其文章。同时需要说明，因篇幅所限，本书选编时删除了一些注释，请各位作者和有关人士予以谅解。

最后，本书的出版获得了汕头大学教材出版补贴的资助，在此一并致谢！

李广辉 宋永新
2006年7月

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Lesson One

THE TRADITIONAL CHINESE LEGAL SYSTEM

1. Why are the Chinese not Litigious?^①

Why are the Chinese generally not **litigious**? And why has China not developed such democracy as that of the ancient Greeks or Romans? Asking and answering these questions would greatly assist in reaching an understanding of contemporary China. The answer to these questions is **complex** and **spans** a history of over five thousand years. However, two major **themes** form the underlying answer: “the family **ethos**” and “a belief in the **inherent** greatness of man”.

(1) The Family Ethos

The family unit plays a fundamental role in any society. Chinese history sees the ethos of the family unit raised to even greater heights, where it provides the **paradigm** through which the entire social order is constructed. Family members all have a role to play, with certain rights and privileges **attendant** on each role, thus forming the ‘**status**’ of each individual within a family. From the 21st Century B. C., the Chinese legal system began to **take shape** with a mixture of State **Ordinances** and **Primitive** Customary law. The distinct feature of this period was **status orientation**. The state and family were **merged** into one. State power was divided into several **layers**, with the **administration** of the state similar to that of a family. The **populace** represented the sons and daughters of the state leaders. Society constituted one big family where the emperor acted as the wise old grandfather, with his **agents** (“children”) acting as parents to the general

① The author of this part of the lesson is Richie-Marie Ryan, Griffith University Law School, Australia.

populous, who were **deemed** to be young children **presumed** as ignorant, requiring education and training.

Therefore, it was not desirable for ‘**siblings**’ to fight and quarrel (be litigious) one with another. Further, it was highly improper for ‘children’ to argue and disagree with ‘parents’ (as in a Western democracy).

(2) A Belief in the Inherent Greatness of Man

China has long placed great emphasis on man’s inherent ability to become great. While it is true that the **legalist school**-whereby all humans were presumed to commit evils inherently-played a strong role in some of China’s early history, particularly during the Qing Dynasty, two of the major forces behind the historical development of China were the **Daoist school** and **Confucianism**. The Daoist School **advocated** that all things would develop in their own, natural way. Broadly speaking, by doing nothing one could gain everything. This takes the emphasis away from control and **subordination**. One finds it difficult to argue with this school in light of China’s remarkable development over the past twenty years through the gradual **implementation** of the natural market economy forces.

Furthermore, Confucianism **arguably** played the most important role in China’s history. With the recovery of China’s national economy under Daoist influence, the ruling class gradually became discontented with such theory and abandoned it. Emperor Wu **abolished** all schools to make way for the Confucian school. Three fundamental principles of Confucianism all point towards the inherent greatness of man. Firstly, the Rule of Li was based on “ren”; the love between fellow men (**benevolence**). Secondly, the Rule of **Morality** placed a **focus** upon man’s **conscience**. Morality was seen as a means to clean the criminal intent out of the heart of the people, leaving no room for crimes, **penalties** or litigation. Thirdly, the **Rule of Man** provided the core of Confucian political theory. The ruling class consisted of ideal persons with a “high **personality**” of self-control. Law was unnecessary for these individuals, and the general people were expected to voluntarily follow the good without any ordinances. Confucianism opened the way for a personal **dictatorship**, rather than a Western-type democracy.

2. The Essence of the Traditional Chinese Legal System^①

For over 2000 years before the revolution in 1911, the Chinese legal system reflected Confucian philosophy. Confucianism stresses an ideal universe of harmony in which nature and human society **assume** their proper places, in which **virtue** and **propriety** in ruler and ruled follow **hierarchical pathways**. That is, the children must obey parents, the wives must obey the husbands, and the parents must obey the grandparents and so on. This “**obedience**” is essential to the development of the legal system, as it is believed that how one administers his family, is the way one should administer the country. This concept is evident in the term “*guo jia*”, which means “*country, or state*”. The term has two Chinese characters, the first character “*guo*” meaning “*state*”, the second character “*jia*” meaning “*the family unit*”. In other words, the country is seen as an extended family in which those in the lower social status must obey those in the higher status, that is, the governed must obey the governing. The Chinese believe that if you respect those who should be respected, there will be good social order. It must also be noted that this concept is **embodied** in the **notion** of *li*. *Li* **literally** means “*politeness*”, but actually it represented a whole political and moral system, and served as the internal relations among the ruling class. In comparison, *fa* (which means “*law*” and was **adopted** much later than *li*) only operated for the ordinary people.

Over the years, China has adopted new notions of law. Traditional China based her legal system upon “*ren zhi*”, which means “*rule of man.*” In a sense, this implies that, “*whose status is the highest, whose words are the law.*” This is especially evident in ancient China when the emperor’s words were seen as the law. However, in **contemporary** China, the legal system is based upon “*fa zhi*” - “*rule of law.*” In other words, contemporary China is gradually adopting a new system of law in which no man will be above the law. The contemporary Chinese legal system is now turning towards strict rules and regulations both for the ruling and the ruled. However, the two most significant changes of the Chinese legal system are the 1982 amendment of the Constitution and the introduction of human rights. China also

① The author of this part of the lesson is Rosanna Chan, Griffith University School of Law, Australia.

amended the **Criminal Code** in which it now states that if the Criminal Code does not recognize an action to be a **wrong**, then under the law, it is not a wrong. This concept is **operative** even if the entire general public sees the action as a wrong. Also, in 1997, the amendment of the Criminal Procedural Law together with the 1998 amendment of the Criminal Code states-that is, in a literal sense- if there is not enough evidence to prove someone **guilty**, you cannot bring him to court. In a practical sense, it means, **innocent** until proven guilty. Also, in 1989, the **amendment** of the **Administrative Procedural Law** took place. This allowed the public to **sue** the government. This law was effectively carried out on the 1st of October, 1990. In addition, in 1995, the **State Compensation Law** came into effect, which provided compensation to those who **unjustly** suffered **detriment** caused by the government. In conclusion, the Chinese legal system that was once based on the rule of man **encompassing** strict **regulations** and **harsh** penalties is now being transformed to one that is based on rule of law, encompassing strict regulations and penalties with an element of human rights.

3. Chinese Legal Tradition and Modern China^①

An old proverb expresses the ancient Chinese view of **lawsuits**: “it is better to die of starvation than to become a thief; it is better to be **vexed** to death than to bring a lawsuit. [1]” And “it’s better to keep a friend, than to win a victory.” [2] This traditional tendency to avoid litigation has at least two sources: Confucian philosophy, and the unavailability and inadequacy of **relief** in court. Moreover, customary **ethical** rules of behavior, which emphasized the necessity of maintaining group harmony and status, greatly **inhibited** the **assertion of rights** and probably led to the fact that democracy never developed in China.

For most of the more than two thousand years before the revolution in 1911, the Chinese legal system reflected societal **mores** established by the Confucian philosophy which was in all **facets** of life until the State Compensation Law was introduced, which provided compensation to those who unjustly suffered detriment caused by the government. The aim of government and of all human relations was to

① The author of this part is Lisa Lo, Griffith University School of Law, Australia.

Lesson One

preserve natural harmony, which was expressed in ethical behavior. Harmony and “no litigation” was the ideal social order. As Confucius said, “Although I listen to the cases as other judges do, I must make my best effort to instruct people to live without litigation.” According to him, “no litigation” meant that all the people were conditioned ethically by the instruction of morality, and that this should be the duty and **ultimate** aim of **governors**. Thus the prevailing **glory** of the people was having no lawsuit in their area because that showed they had good ethical relations in their community. Conversely, they were **ashamed** if lawsuits happened very often since that **identified** them as **vulgar** and **immoral**. That was why most relatives would rather **mediate** disputes by themselves than allow the cases to be sent to the government. Traditionally, many big families had their family rules instructing **descendants** not to be involved in litigation in order to keep the family’s reputation. Litigious people were strongly **condemned** by society.

And the officials too, when they dealt with lawsuits, had always to consider the feelings between relatives, so they were very cautious about **intervening** in family matters because that would result in **feuds** within a **patriarchal clan**. Many officers wrote down their experiences of cases as such: “There is no need to make the right and the wrong clear, that will make **enmity** between relatives,” “Do not punish the **offenders** even if they need it, but make the reason clear to them and let them **regret** what they did,” and “the best result of a solution rests upon a mediation of the relatives.”

Also, the other reason why Chinese people are not litigious is because of the incomplete **legislation**, its shortage of logic and details, and its **vague provisions**, which are difficult to explain **precisely** and to argue seriously. In some cases, even if the judgment has been made by a court of law, the enforcement might be difficult due to financial **constraints**.

As for the question of why China never developed a democracy, perhaps the meaning of “democracy” needs to be defined. Definition of Democracy: country with government which encourages and allows rights of citizenship such as **freedom of speech**, religion, opinion and association, the assertion of the rule of law and majority rule, accompanied by respect for the rights of minorities; society in which there is treatment of each other by citizens as equals and in the absence of class