

法律英语新编

——现代中国法概论

An Introduction to
Contemporary Chinese Law

NEW LEGAL ENGLISH

主 编 任海涛 刘艺工

副主编 田 坤

中国石化出版社

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内 容 提 要

以前的法律英语教材对英美法的介绍可以说已经面面俱到了,但是学完这些法律英语的读者会发现他们用英语表达中国法律的能力仍然没有明显提高。原因很简单,中国属于大陆法系国家,英美法的英语表达与中国法律的英语表达无法对应。但是另一方面,我们在对外交流过程中越来越需要把中国法律用英语表达出来,因此编写一部用英语表达中国法律的著作日益迫切。

本书即是应对上述时势之需而编写的。全书共包括导论、公法篇、私法篇、程序法篇和国际法篇五个主要部分,分别对我国的宪法、行政法、刑法、民法、商法、民事诉讼法、刑事诉讼法、行政诉讼法、国际私法、国际经济法进行了介绍,内容全面,难易适中。通过学习本书,读者可以熟练掌握中国法律的英语表达,对于全面提高英语水平有很大帮助。

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前 言

随着中国加入 WTO 以及经济全球化进程的日益加快,“让中国了解世界,让世界了解中国”已经成为我们努力奋斗的目标。对于从事法律、英语、企业管理等方面研究和实务的工作者而言,全面掌握法律英语已经成为不可或缺的一项技能。

以前的法律英语教材对英美法的介绍可以说已经面面俱到了,但是学完这些法律英语的读者会发现他们用英语表达中国法律的能力仍然没有明显提高。原因很简单,中国属于大陆法系国家,英美法的英语表达与中国法律的英语表达无法对应。但是另一方面,我们在对外交流过程中越来越需要把中国法律用英语表达出来,因此编写一部用英语表达中国法律的英文版著作日益迫切。

本书即是应对上述时势之需而编写的,全书共包括导论、公法篇、私法篇、程序法篇和国际法篇五个主要部分,分别对我国的法学基本理论、宪法、行政法、刑法、民法、商法、民事诉讼法、刑事诉讼法、行政诉讼法、国际私法、国际经济法进行了介绍,内容全面,难易适中。通过学习本书,读者可以熟练掌握中国法律的英语表达,对于全面提高英语水平有很大帮助。

中国古代法律曾经一度领先于世界,以中国法为主体的“中华法系”也独具特色。但是从近代开始,我国即从西方移植法律。中国现行的整个法律体系基本上是从西方移植而来。现代中国法律应该包括大陆地区和港、澳、台地区的法律,但是限于篇幅和写作目的,本书所讲的“中国法”仅指中华人民共和国大陆地区现行的法律,而不包括港、澳、台地区现行的法律。

本书各部分内容都以中国现行法律法规为基础进行编写,全书反映了现行中国法的全貌。

本书适合于法律、英语、经济管理等学科的本科生 硕士生 博

士生以及研究者阅读，也适合于从事涉外法律事务的法律实务工作者、涉外企业工作人员以及想学习中国法律的外国友人阅读。

本书主编由任海涛、刘艺工担任，副主编由田坤担任。全书大纲拟定和统稿整理由任海涛和田坤负责，全程指导以及最后定稿由刘艺工完成。具体分工如下：任海涛，导论、宪法、行政法、民法、民事诉讼法、国际经济法；刘艺工，导论；田坤，刑法、刑事诉讼法；郭恒，国际经济法、国际私法；刘华楠，行政法、行政诉讼法；李芳，宪法；蒲亨莲、吕威龙，商法；谢静，民法；管纪尧、于洋，民事诉讼法。在初稿基础上刘艺工教授进行了部分内容的修改并最后定稿。

西北民族大学葛少芸教授为本书的编写提供了大量的资料，虽然由于工作原因，葛教授没有参加编写，但是仍在此表示诚挚谢意。在本书的编写过程中，先后得到了我的导师贾登勋教授、兰州大学法学院刘志坚院长、曹爱辉书记、俞树毅、胡晓红（现为南京大学教授）、马明贤、刘光华、陈航、汪振江、胡珀、吴双全、陈国文、康建胜、尹彦芳等教授和老师的支持帮助，特此表示感谢。

由于编写者水平有限，疏漏在所难免。诚恳欢迎各位专家学者及广大读者提出宝贵的意见，以便于今后进一步修改完善。

任海涛

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Introduction

1 Chinese Legal Tradition

1.1 The Origin and Development of Chinese Law

China has its own legal tradition for thousands years. From first Dynasty Xia Dynasty (21th century BC) to last Dynasty Qing Dynasty (1644 – 1911), every Dynasty had its own specific legal system. During the Spring and Autumn and Warring States periods (770 BC – 221 BC), the first law code emerged and various legal thoughts flourished. The first law code *Fa Jing* was written by Li Kui, a legalist in warriors states period. The code had 6 parts, mainly on criminal law. During Spring-Autumn and warriors states periods, various academic schools appeared. This was the period of a “Hundred Schools of Thought”^①, comprising Taoism, Confucianism, Legalism, and famous thinkers including Confucius, Meng Zi, Lao Zi, Zhuang Zi, Hanfei, etc. They all dealt with law and had different perspectives on it. For example, Laozi paid attention to natural law, Confucius emphasized morality rather than law, and Hanfei advocated “rule by law”. After Qin Shihuang, the first emperor who unified China^②, China became a feudal dictatorship country and many academic schools disappeared. Chinese feudal society was established in the 500 BC and ended in 1840. It lasted for more than 2000 years. In the year of 1911, when the last feudal Dynasty Qing Dynasty (1644 – 1911) was overthrown by revolutionaries, China’s legal modernization started.

The Chinese law dated back to 21st century BC. Along with the emergence of family, class, private ownership, the customs and tradition of tribes who lived in Yellow River basin and the Yangtze River Basin translated into customary law. These customary law turned to law after the government institutions were established. But all the law was monopolized by the nobles. Until the 6th century BC, statutory law was made and promulgated, which broke the noble’s monopoly. In 5th century BC, Li Kui compiled a law called *Fa Jing*, which was the first systematic code. The style and structure created by it affected the Chinese law until 20 century. The legist stratum, who specialized in the studying of law, lawsuit participation, formulation of laws, writing law books, was formed in 770 BC – 220 BC. Han Fei was the most representative figures in them. His theory was adopted by Qin Dynasty, on the base of which law of Qin Dynasty was formulated referring to *Fa Jing*. *Qin Lv*^③

① The Hundred Schools of Thought (诸子百家) was an era of great cultural and intellectual expansion in China that lasted from 770 BC to 222 BC. Coinciding with the Spring and Autumn and Warring States periods, and also known as the Golden Age of Chinese thought and The Contention of a Hundred Schools of Thought (百家争鸣), the period saw the rise of many different schools of thought. Many of the great Chinese classic texts that originated during this period had profound influences on Chinese lifestyle and social consciousness. The intellectual society of this era was characterized by itinerant intellectuals, who were usually employed by various state rulers as advisers on the methods of government, war, and diplomacy.

② Qin Dynasty, 221 BC – 207 BC

③ 《秦律》,以《法经》为蓝本,以韩非的法家思想为指导。

was referred by other dynasties during the following 2000 years.

Chinese law reached the summit at the stage of Tang Dynasty. *Tang Lv* became one of the most representative codes in feudal period, which was as great as *Roman Law* in the slavery time and *French Civil Code* in the period of capitalism. There were no substantive changes until the middle of Qing Dynasty. After The Opium War in 1840, Chinese law began to change.

After the Opium War, western powers invaded China, getting consular jurisdiction. As a result, China lost her independent Jurisdiction and legislative power. The Republic of China kept on fighting for the independence of Jurisdiction. But because of the poverty and weakness, Jurisdiction and legislative power was controlled by western powers essentially until the foundation of People's Republic of China.

Since 1840, a lot of western law was introduced to China, which has great influence on the modernization of Chinese law. The process of learning western legal theory and legal practice has been on till present day.

After the foundation of new China, great progress has been made in legal system in mainland. Especially after the Opening and Reforming, a complete law system of law has been established.

1.2 Perspectives on Law in Ancient China

Xu Shen

In 147 AD, Eastern Han Dynasty, Xu Shen edited a book named "Note Articles and Words"^①. It was the first dictionary of China. In this dictionary, he traced the evolution of the word "Fa" (Law). "Fa" (法) in the original form (pictograph) has three meanings: equal, justice, and punishment.

Confucianism

Confucianism was the body of thought, which was the most influential thought in Ancient China. Confucian doctrine later became the foundation of traditional Chinese society. The leading scholars of Confucianism were Confucius (551 BC - 479 BC), Kong Zi and Mencius (371 BC - 289 BC), and Meng Zi. Kong Zi believed that the ideal socio-political order would be: "Let the ruler be a ruler and the subject a subject", but ruler should be kind to his people. According to Confucius, "Li" (morality) was more important than "Xing" (punishment) for social control. Meng Zi, was a Confucian disciple who made major contributions to the spread of humanism in Confucian thought, declaring that man, by nature, was inherently good. He argued that a ruler could not govern without the people's tacit consent, and ordinary people should have the rights to overthrow the tyrant.

Legalism

School of Law or Legalism flourished in Qin Dynasty. The doctrine of Legalism was formulated by Han Fei (233 BC) and Li Si (208 BC), who maintained that human nature was incorrigibly selfish. Accordingly, the only way to preserve the social order was to impose discipline from above and to see to a strict enforcement of laws. Han Fei, insisted that the ruler must always rely on penal law and the imposition of heavy punishments as the main instrument of government. Legalism greatly

^① 说文解字

influenced the philosophical basis for the imperial form of government^①. During the Han Dynasty, the most practical elements of Confucianism and Legalism were taken to form a sort of synthesis, marking the creation of a new form of government that would remain largely intact until the late 19th century.

2 Main Characteristics of Traditional Chinese Law

Patriarch system

As far as the legal ideology was concerned, patriarchy and ethics were key characteristics of Chinese traditional law. Self-sufficient small-scale peasant economy and patriarch system based on family unit and blood ties, which was coordinate with agricultural economy, were the social soil of the growth and development of Chinese feudal law system. Patriarchal system originated from paternalism of primitive society, but it existed for thousands years in China.

Confucian legal thought played a key role in Chinese legal tradition

The Prime Minister Dong Zhongshu^② of Han Dynasty initiated the cultural movement that was to ban the hundred schools and to uphold only Confucianism. It has been nearly over 2000 years since Confucianism as the guarding ideology first began to dominate the Chinese feudal society. Even sometimes, legal cases have been judged in the light of Confucian classics, for example “*Chunqiu Jueyu*”^③. Also, Confucianism attached great importance to the patriarch tradition, which pointed out emphatically that the human relationship of feudal society and the relationship of the elders and betters between monarch and his subjects, father and his children or brothers, husband and his wife should be respected. It had insisted that the law purport to safeguard the order of feudal rule. To uphold the feudal monarchy, Confucianism thought that both gentle and tough means were supposed to be used. One was “Li” (rites, courtesy, ethics), and the other was “Xing” (criminal law, punishment). This taught that ethics teaching should be combined with punishment to rule a country. Basically, Confucianism advocated that the relationship between courtesy and punishment was the relationship between principal and subordinate, and that ethics and courtesy were the essence of political teaching, while punishment was the use of political teaching “*Tanglu Shuyi*”^④. When the function of courtesy didn't work effectively, punishment would be used. That meant the punishment was always subordinate to the courtesy to be applied.

Criminal law and law code

Traditional Chinese law was mainly related to criminal law and administrative regulations. Criminal law controlled the populace, and administrative law disciplined the feudal officials. But the functions of these two laws were to maintain the feudal autocratic rule and order, and to suppress the civilian revolts. From the beginning to the end, the laws made light of rights, and put more emphasis

① 政体

② 董仲舒

③ “春秋决狱”, adjudicate suits in line with the spirit of *Spring and Autumn* written by Confucius.

④ 《唐律疏义》, commentaries on *Tang Codes*.

on obligations. It was short of the laws to regulate the equal civil relationship.

As far as the external form of manifestation of law was concerned, most Chinese feudal dynasties of past ages compiled a statute book, such as *Jiuzhang Code* in Han Dynasty^①, *Kaihuang Code* and *Tangliudian Code* in Tang Dynasty^②, and *Daqing Code* in Qing Dynasty^③. Though the contents in all these codes were complex, the structures were discreet. They also adopted mixed laws and attached great importance to punishment among legal structure.

Non litigation

"Social Harmony" and "Non litigation" are the goal of Chinese legal tradition. Confucius stressed that "Something you do not like to do, do not ask some other to do"^④. When people have dispute, they would like to mediate rather than go to court. Non litigation is the final goal for Confucianism.

Dictatorship

In ancient China, there existed no independent administrative, legislative and judicial departments. Emperor alone centralized these three powers on himself; the officials made the law and dealt with jurisdiction fully according to the authority from the Emperor. The central government set up judicial officials and departments like criminal department, court of justice and procuratorate, and so on. In local places, administrative officials doubled the status of jurisdiction. There was no independent judicial system.

In ancient China, there existed laws to rule the populaces and to supervise the officials. But there was no laws to place restrictions on the monarch. Feudal monarchs were so powerful that they had privilege above the law. In Chinese feudal society, the power of legislation was fully centralized into the government. That meant the power was in the hand of the monarchs. The departments with legislation and the departments in charge of the legislation did not exist. The officials who were responsible to profile the code were chosen and appointed by the monarch. So all the important laws across the feudal times were promulgated in the name of monarch. In feudal China, since the law was made according to the will or given will from monarch, he could create law and abolish law arbitrarily. So the law was not binding on him.

3 Impacts of Traditional Chinese Law on Modern China

Although Chinese legal tradition had already withered away in form due to the impact from western law, the ideology and the tradition of feudal law would still remain for a long time. Until the opium war, China was gradually reduced to the status of half a colony of west developed countries. Feudal law mechanism, which had existed for thousands of years, subjected itself to the huge impact and challenge from the western law. By the end of Qing Dynasty, traditional Chinese feudal law

① 《九章律》

② 《开皇律》和《唐六典》

③ 《大清律》

④ 己所不欲,勿施于人

system came to disintegrate under the impact of western law. Then Shen Jiaben^① who was the official in charge of amending the law of Qing Dynasty had collected the various legislations world wide and invited foreign law experts to help China to amend the law. So, modern law system of China founded in the light of western law system — mainly Roman law system. Shen Jiaben was responsible for amending Criminal law draft, Civil law draft, business law draft, and so on. Government of the Northern Warlords and the Kuomintang later inherited all these law drafts. Ultimately these laws turned out to be the sources of Chinese law.

In terms of form, traditional Chinese law system have already died out in system and structure. It would persist for a long time and block modernization of the Chinese law system. For example, now we still lay stress on people controlling people, and belittle the use of law. We lay stress on punishment and neglect the people's rights. We attach importance to obligations, and make light of rights. We take words for law, and take administration for law. And we consider the official's will as the law. So, as far as the Chinese traditional law system is concerned, we should study it seriously, preserving its rational parts, discarding its irrational parts. Meanwhile, we should be aware of assimilating and utilizing the legislation experience of other countries for reference, guiding Chinese law onto the orderly and healthy course to develop. We also should comply with historical and world trends, to keep up the pace with international prevalent law.

4 Contemporary Chinese Law Department

The contemporary Chinese law has realized the modernization. The basic legal branches are as follow:

Constitutional law: The constitution has special positions in the contemporary Chinese legal system as a law department, it is a foundation of the whole legal system.

Administrative law: The administrative law is the total different legal norm^② of the social relationships while adjusting national administrative management activity.

The civil law is adjusting between the citizens regarded as the equal subject, between the legal persons, the laws of property relation and personal relation between the citizen and legal person, etc.

Commercial law: After proposing setting up market economic system clearly, the status as law department of commercial law is known by people. The commercial law is to adjust commercial affairs relation or law of the commercial act between the equal subjects.

Economic law: The economic law is to adjust the law of economic relation taking place in the economic management of the country.

Environment and natural resources protection law: This law department is about protecting the environment with the natural resources, prevent and cure the laws of pollution and other public hazards, is usually divided into a law of natural resources and Law on Environmental Protection.

Criminal law: Criminal law is a law which stipulates the crime and penalty, is a basic law

① 沈家本, Law reformist at late Qing Dynasty.

② 法律规范

department in contemporary China's legal system.

Law of legal procedure: the law of legal procedure is a law about various kinds of lawsuit activities, it guarantees the correct implementation of the substantive law from the contentious procedure respect, guarantee entity's right, the realization of the obligation.

This book is mostly concentrated on the law department of contemporary Chinese law which is mentioned above.

5 Legal Education in China

China is an old country with 5000 years history, Chinese law can be traced back to 21th century BC when first dynasty Xia Dynasty established. In 6th century BC, China enacted her first law code called "*Fa Jing*". After that, each dynasty had made its own law codes. Generally speaking, traditional Chinese law is based on agricultural society, it focuses on public law (especially criminal law). For legal philosophy, it incorporates elements of both Legalist and Confucian traditions of social order and governance. Legalists focuses on rule by law and Confucian scholars focus on morality. Since 1840s, China has begun to modernize its legal system^①. Traditional Chinese law has been replaced by European civil law. Modern Chinese law is mainly based on civil law traditions, judges decides case by statutes or codes not by precedent.

5.1 Development of Chinese Legal Education

Since 1840s, China has begun her modernization. China's modern legal education started in later 19th century, along with the introduction of western law. The first modern law school of China is called "Legal-Political School", which was founded by Qing government in 1907. Up to 1909, China had 47 law schools with 12,282 students in campus^②. In 1911, Qing government had been overthrown by revolutionaries led by Sun Yet Sen. China became a Republic (Republic of China). In 1949, the government of Republic of China had been moved to Taiwan due to failure in civil war, People's Republic of China established in mainland of China. In the first half of the 20th century, the legal education got rapid development, providing a great deal of personnel for judicial and governmental agencies. During 1911—1949, law major was a very popular major in University, about half of the students were law students. When students finished their study, they would qualify to be lawyers and judges without Judicial exam. Chaoyang University law school (founded in 1911) and Soochow University law school (founded in 1915) were two famous private law schools during this period. During 1940s, American law professor Roscoe Pound had been invited to China for being legal advisor for Chinese government, Socratic method had been introduced to China.

Since the founding of the People's Republic in 1949, China's legal education has experienced a hard time. In early 1950s, Chinese Government abolished the entire legal system of the ROC and the law codes practiced in China before 1949. As a result of merger and reorganization of the law schools in 1950s, a new system of legal education was initiated, that was strongly influenced by the Soviet

① 法律体系

② Li Long and Qi Shaoming, *Chinese Legal Education: 100 years history*, *Modern Law*, 1999(6).

model. The enrollment of law students was 2,824 in 1956. Then, responding to the political campaigns, the development of legal education was restricted. Anyhow, in 1965 there were still nine law schools with 4,144 on-campus students and 857 graduates. During the Cultural Revolution (1966 – 1976) almost all the law schools were closed and dissolved, only two law schools in Beijing and Chongqing survived. In 1976, only 49 law students graduated and 410 in campus and virtually no law course provided^①.

The present system of legal education commenced in 1977 when the Chinese universities began to recruit students by national examinations again. Chinese government began to carry out open door policy in 1978, since then more and more law schools were restored or newly-established year by year. With the developments of more than 20 years, a new system of legal education with Chinese character has come into being. This system is one that encompasses many forms, levels and channels of legal education and training. Besides higher legal education as the principal part, we also have vocational, self-study and continued legal education through correspondence, radio, TV, multimedia and other long-distance means, spare-time courses, “qualification examination after self-study” and so on. Till 1999, China had 330 law schools in higher learning with about 70,000 students on-campus and 90,000 out-of-campus^②. All of these schools grant LL. B degree and some of them grant LL. M and even LL. D degrees.

5.2 Curriculum and Teaching Method

Type of law schools and academic degrees

As far as the administrative affiliation is concerned, contemporary Chinese law schools could be classified into mainly three categories: universities or institutes of political science and law under the administration of the Ministry of Justice, as China University of Political Science and Law in Beijing; law departments or law schools at the comprehensive universities under the administration of the Ministry of Education; law departments or law schools at the universities subordinating to local governments (usually provincial governments). The first two groups played a leading role in the legal education.

For Bachelor of Law program, almost all the undergraduate students in law schools come from senior middle schools. They must pass the national entrance examination, which is unified and organized by the State. Law schools recruit new students in light with the number planned by the State. Candidates choose the schools voluntarily and law schools make a choice among them in accordance with their examination results. Entrance to key universities, such as the China University of Political Science and Law, law schools of Peking University, is always extremely competitive. The period of Bachelor of Law program on-campus students covers 4 academic years.

We have two kinds of Master of Law Program, Master of Law and Juris Master. People graduated from universities or colleges law school and got Bachelor of Law degree, who have passed the entrance examinations for law schools, shall be enrolled by Master of Law Program. People graduated from universities or colleges with degrees other than Law, who have passed the entrance

① Wang Weiguo, *A Brief Introduction to the Legal Education in China*.

② Huang Jin, *The Structure of Legal Education in China*.