



法律专业教材

# 法律专业英语

朱义坤

暨南大学出版社

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## 总 序

跨世纪的人才培养，是所有教育工作者的共同心愿，也是我们责无旁贷的责任。以什么知识教育青年一代，使他们能敲开二十一世纪的大门去迎接新的挑战，这是我们的紧迫任务。为此，我们编写了这套崭新的经济法专业系列教材，由暨南大学出版社陆续出版。

本系列教材是动员了我系大部分力量，总结长期教学经验和科研探索的联手之作。为了使本套教材更具操作性，也吸纳了一些实际从事司法工作的资深人士参与。在内容上，我们力求以新和高的精品之作为目标。直接援引最新的法律、法规和国内外最新的出版物，吸收国内外有名望、造诣较深的专家学者的学术成果，博采众长。在论述我国在相应领域中的经济法律规范同时，注意及时反映我国包括港澳台地区经济立法的最新进展和总结有关的实践经验，突出中国特色，理论联系实际，力求科学性、知识性、操作性的统一。

在编撰体例上，本系列教材注意到不同类型读者的不同要求，做到重点突出，条理分明，材料翔实，深入浅出，采用案例和比较方法编写，注重训练和培养读者分析问题、解决问题的能力。正文中在对若干重要理论问题进行学术探讨之外，还分别翻译和辑集一些重要的原始文档，以供司法界、学术界有心人士进一步查证、发掘和争鸣。

本系列教材的出版，有助于提高经济法专业教学质量，繁荣法学教研，由于时间仓促，水平有限，疏漏败笔之处，在所

难免，敬请法学界同仁和广大读者不吝指正、赐教。

谨以此套教材奉献给跨世纪的青年们！

**《经济法专业系列教材》编委会**

1997年5月

## 前 言

中国需要了解世界，世界更需要了解中国，尤其是中国法制。改革开放 18 年来，中国法制建设成就令人瞩目，虽与完善、成熟的目标相距甚远，但社会主义市场经济法律体系确已具雏形，尤其是在对外开放领域基本上做到了有法可依。“徒法不足以自行”，欲使这些法律得以实施，尤其是让在中国从事商事活动的外商遵守中国法律，首先得让其知晓、了解中国法制。

我有幸于 1995 年 4 月下旬赴港参加“国际商业论坛组织”举办的“亚太地区技术转让与许可证贸易”研讨会，并作了题为“中国技术转让与许可证贸易法制（英文）”的讲演，引起与会有关跨国公司高级管理人员较大的兴趣。讲演完毕，他们提出了许多实践性的问题，诸如合资与合作的区别何在，国家科学技术委员会与对外贸易经济合作部在技术引进管理中如何分工，以及开发区中引进技术应由谁审批等等。我深深地感到他们渴望了解中国法律，同时也发现外部世界对中国法律了解甚少。为此，我在 1995 年与一位美国律师合作，先后用英文撰写了 9 篇文章，发表于《香港法律年鉴（1995 年）》以及《新公报》，旨在传播中国知识产权法律制度。为系统传播中国法制，我撰写了《中国商事法（英文）》，以便让外商了解经济贸易法制环境之概貌，其中《中国商事合同：判例与格式（英文）》一书已与 Butterworths 出版社签约出版。

由于社会制度、语言文化、法律制度等差异的存在，与国外同行交流，并非易事。这就要求我们尽快培养出一大批外向型的法律人才，我以为这也是《法律专业英语》课程之根本目标。同其他法律专业课程相比，本课程主旨在于培养综合技能，而不是

## 2 前 言

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法学原理的分析与综合。为此，本书着重突出实用性和实践技能的训练。全书以企业从事商事活动之基本过程为线索，用8个单元介绍了有关主要商事法律制度，在正文中尽量采用案例阐明有关问题。每课之后配有背景知识、重要术语英汉对照、思考题和讨论题，讨论题目多数采用案例分析形式，也有部分采用辩论式，如时间充裕，最好能将讨论题的思想写成书面文字，以利提高英文写作表达能力。

本书的写作方式系一种新尝试，加之受到篇幅限制，有些章节只能忍痛割爱，不过，由此而生的各种错漏当属作者个人责任，诚望读者批评指正。

本书写作过程中，廖朝晖小姐在打印等方面给予极大帮助和支持，特此致谢。

朱义坤  
1996年6月3日

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## **Unit 1. Legal Background**

## Lesson 1. The Concept of Law

### a. Physical Law and Normative Law

The term “law” has two distinct meanings. Laws describing natural phenomena, such as the movements of heavenly bodies, the seasons, biological reproduction and the properties of various materials which we have studied in natural sciences such as physics, chemistry and biology, belong to the first meaning, namely physical laws or laws of nature. The second meaning of “law” refers to rules governing human behaviour. They require people to act in such and such a way. They also tell people that deviations from or violation against those rules are liable to be met with disapproval, administrative or even criminal sanctions. A law prohibiting stealing does not make it physically impossible for a person to steal; but it makes it an offense to do so. It tells people that one should not steal, else, one will be punished if convicted guilty of theft.

Therefore our discussions will be confined to the second meaning of “law”, not the first. This does not imply that physical laws or laws of nature is irrelevant with normative laws. In fact, normative laws should mirror or reflect laws of nature or physical laws. For instance, there are a growing number of technical standards and norms in the fields of economy, technology and trade. These rules are closely connected with laws of nature, though normative laws reflect or mirror imperfectly requirements of laws of nature from time to

time.

## **b. Law and Rules**

In appearance, law consists of rules deriving from various authoritative sources, e.g. the the Constitution, legislation, administrative decrees, judicial interpretations and local regulations. As the Chinese suffered a lot during the lawless cultural revolution from 1966 to 1976, China started to reconstruct and strengthen its legal system from 1979 when China decided to shift its focus of work to economic reconstruction. Over the last seventeen (17) years, the National People's Congress ("NPC") and its Standing Committee adopted 172 laws and 76 decisions and resolutions on legal matters. The State Council also promulgated numerous regulations. Many of these laws and regulations embody hundreds of articles. So there are a vast number of rules which are still growing, governing various aspects of our social life.

Why we need these rules? The answer lies in the nature and demands of human beings, group living and society. Group living inevitably produces friction between people, e.g. conflicting purposes, competing for scarce social and economic resources and disagreements over how things should be handled. If these conflicts get out of hand, our society collapses and the machinery of economy ceases operation. So rules helps deal with reasonable certainty on having normal expectations met, for instance, people will receive the agreed wages for their work; they will be reasonably and fairly compensated for injury caused by fault of another. In so doing, rules promote a reasonably harmonious society. In addition, rules also provide means

#### 4 Unit 1. Legal Background

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for the creation of various devices needed in economic and trade activities. For example, they have provisions for setting up limited companies, for creating partnership, for entering into joint venture, for registration of patents and trademarks, for transferring property and licensing technology and know – how and so on.

There was a misconception that law is just a system of rules in traditional Chinese. In their opinion, law students should have a greater memory so as to memorize as many rules as possible. This notion still exists. However, law is more than a set of unrelated separate rules. The rules that constitute a country's law are organized and knit together into a coherent structure. For this reason a country's law is usually referred to as its legal system. But what is it that gives order, structures and coherence to a set of rules? what is it that welds various rules into a legal system? It is basic principles. Principles are themselves rules of a general kind underlying and providing reasons for the more specific rules which constitute most of our law. First, they give reasons, purpose and direction to rules which would otherwise be simply there because they are. Second, they underlie at one and the same time rules in many different areas of law. For instance, honesty and good faith is a principle of China's civil and commercial law. In a trademark passing – off case, an infringer passed off part of the plaintiff's trademark. If the plaintiff wanted to seek compensation under trademark law, it shall establish that the trademark used by said infringer is the same or similar to that of the plaintiff. The plaintiff failed to do so because the infringer passed off merely part of its trademark which did not amount to "similarity". However the plaintiff did suffer losses and the infringer did profit from so doing. Instead of using the trademark

law, the trial court used the foregoing principle of civil and commercial law. The court held that the infringer violated the foregoing principle and resorted to unfair competition, and ruled that the infringer should stop such action and compensate the plaintiff's losses. In this case, the judge used principles, other than rules in trademark law. The decision of the case is highly commended by legal and economic experts.

### **c. Law and Justice**

As we have seen above, our society produces friction on competing interests between members, and the law is required to adjust such competing interests and resolve disputes. That's why many legal scholars consider the law as a tool of social engineering to be used for consciously evaluating and adjusting such competing interests. Some even say law is to create balance between competing interests. So the law is not just a set of rules. On the contrary it is an regime whose end and prime function is the achievement of justice. Such a regime will make the goods of existence, the means of satisfying human desires to have things and do things, and go round as far as possible with the least friction and waste. Such function of law is reflected in English language. When people talk of organizations of law enforcement, they use "ministry of justice", "courts of justice", "Chief Justice" and "criminal justice". It is reflected in the oaths sworn by judges to do justices in most courts of the world. It is also important to find that a pair of scales is universally used to depict the law courts. Finally, it is reflected in the lay criticism and resentment of legal and judicial injustice.

**背景知识:**

“法律”在中英文中均有多重含义。在英文中,“law”除指“法律”外,还有“规律”之义项,如价值规律(law of value)。法律当然包含无数规则,但并非规则之简单堆积,而是有着内在逻辑的规则体系,正义就是这一体系的灵魂。

**Terms to Understand**

1. physical law: 自然法
2. normative law: 规范性法
3. rule: 规则, 规范
4. NPC: 系“全国人民代表大会”之简写, 本书其他地方亦有此用法
5. decision: 决定
6. resolution: 决议
7. honesty and good faith: 诚实信用
8. justice: 正义
9. ministry of justice: 司法部
10. court of justice: 法院

**Questions for Review**

1. *What are the differences between physical and normative laws?*
2. *Describe the relationship between law and rules.*
3. *Is an unjust law still law?*

**Questions for Discussion**

1. *Mary Brown was at home tending her sick eighteen-month-old baby. He had a high temperature caused by an undermined virus. Suddenly she realized that the child had lapsed into a coma. Fearing that he was in a state of convulsion and might die, she rushed the child to her car and drove to the nearest hospital. Within a few moments she was driving 110km/h in a 50km/h zone. On arrival at the hospital the child was placed in emergency*



care, and the doctor commended her for having saved the life of her child. A police officer arrived on the scene and presented her with a summons for dangerous driving (Smyth etc, *The Law and Business Administration in Canada*, 1991, P1).

① Is Mary right to break the law? Why?

2. Three men and a boy were shipwrecked in a small boat 1000 miles at sea in the south Atlantic. What little food they had was exhausted within a few days. All three men were married, with young families. Two of the men suggested that if no relief came someone should be sacrificed to save the rest. The third man dissented and the boy was not consulted. A day later, the two men suggested to the third that they should cast lots to determine who should be put to death to save the rest, but the third refused to consent. The proposal was not put to the boy, who at that time was very much weakened and lying helpless in the bottom of the boat. The three men spoke of their families and suggested it would be better to kill the boy so as to save the rest. The first man proposed that if there was no vessel in sight by the next morning, the boy should be killed. On the following day, the two men offered a prayer for forgiveness for committing so rash an act, and then proceeded to kill the boy with a knife. The three men fed upon the body of the boy for four days until they were picked up by a passing ship. The first two men were charged with murder while the third was not charged with any offence.

(Smyth etc, *The Law and Business Administration in Canada*, 1991, PP8-9).

① Do these men constitute a miniature community that can make its own law to suit its needs?

② If the law of China is applied to them, should they be acquitted of any crime on the grounds that their dire circumstances justified their actions?