

许崇德全集

第三卷

中国民主法制出版社



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论文(1995 年—2002 年)



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论澳门法律工作者的培育^{*}

一、澳门培育法律工作者的急迫性

当今世界上的任何一个法制社会都无例外地拥有相当数量的法律工作者。他们的具体职务是法官、检察官、律师和司法行政部门的官员。此外,在立法部门、警务部门以及其他行政部门里,也有不少法律工作者在适应需要,提供法律服务。同时,还存在着诸如学校、培训机构等场所,不断地为社会栽培、教育和输送着法律人才。澳门作为一个法制社会,在这些方面同世界各地比较,基本上是相同的。

但是澳门又有自己的具体情况:

第一,从目前来看,澳门的法律工作者数量不足,其中尤以法律工作者中的中国公民为数过少。如果从长远来看,这种不足必将对澳门社会的发展产生深远的负面影响。何况现有的法律工作者随着年龄增长及健康状况等自然规律的作用以及其他等原因,数量必然渐趋减少。若无新的成员增补,其前景将难以想象。因此,积极采取措施,大力培育澳门的法律工作者,特别是培育澳门居民中的中国公民,使之成为优秀的法律工作者,乃是极其重要、极其急迫的任务。

第二,目前在澳门实施的法律属于葡萄牙法律体系的一部

^{*} 本文载《法学家》,1995年第2期。



分,许多甚至直接适用葡萄牙的法律。这种状态到了1999年当然应该结束。1999年之后,澳门特别行政区的法律体系将与葡萄牙的法律体系脱钩。虽然那些不与基本法相抵触的澳门原有法律(原来由澳门自己在当地制定和实施的法律)可以保留并继续生效,但过去曾在澳门被直接适用的葡国法律将不能再在澳门特别行政区实施。这是毋庸置疑的。为了尽可能使澳门具有比较完备的法制,实现法律本地化乃是当务之急。然而,法律本地化的工作任务非常繁重,不是一蹴而就的。它亟须一批能够参与该项工作的法律专业人才。由此可见,创造条件,抓紧时机,努力培育适应工作需要的法律人才,以保证法律本地化的顺利完成是十分必要的。

第三,中国政府即将在1999年恢复行使对澳门的主权。根据基本法的规定,将来在澳门特别行政区实行的法律为:①基本法;②除同基本法相抵触者以外的澳门原有法律;③澳门特别行政区立法机关制定的法律以及④少量的明列于基本法附件三的全局性法律。在这四个部分之中,①和④是中华人民共和国法律,即全局性法律;而②和③按它们的性质与实施范围来说,是地方性法律。所有这四者总合起来组成澳门特别行政区法律体系。澳门特别行政区法律体系是新的法律体系。它不同于葡萄牙法律体系,不同于中国大陆所实行的社会主义法律体系,也不同于澳门目前的法律体系。无疑地,新的法律体系对于尚未培育成为法律工作者的澳门居民来说,是不熟悉的,即使是对于现在已经成为澳门法律工作者的人来说,亦未必能够熟练掌握,运用自如。这样的实际情况表明,澳门的培育人才的工作是十分复杂和艰巨的。它不仅要针对非专业人士,把他们中的一批可以造就的人培育成为称职的法律工作者,而且还要针对现有的



法律工作者,使他们经过再培育,掌握新知识,成为足以适应新情况的法律工作者。所以这里存在着双重任务。

二、培育人才的质量要求

培育工作所要造就的是适合澳门实际需要的各种层次和各种类型的法律工作者。所谓各种层次是指初级的、中级的和高级的人才,以便分别配置到级别不同的工作岗位上去。所谓各种类型,大体上可以粗分为两大类,即一类是从事实际工作的法律人才;另一类是从事学术研究工作的法律人才。前者例如在司法机关供职的官员;后者例如在科学研究机构或者在大学法科任职的专家、教授等。

澳门法律工作者的培育应坚持一定的质量标准。这些标准主要是:

1. 遵守澳门的法律,尊重澳门的社会公德,品行端正,愿意为广大的澳门居民服务;
2. 具有相当的法学基础理论水平,较好地掌握法律专业知识,能运用专业理论和专业知识分析并解决实际生活中的法律问题;
3. 有较高的中文水平,懂得一至两门外语;
4. 健康的体魄。

这四条是基本的要求。

第一,作为法律工作者,在品德上必须具有较高的素质,既然要从事法律工作,那自己首先应该模范地遵守法律,这是不言而喻的。不仅如此,他还应该有高尚的道德、端庄的风貌。只有精神高洁、作风正派,才能在将来的实际工作中做到公而忘私,刚正不阿,热心为群众排忧解难。



第二,理论基础和专业知识对于法律工作者来说是极其重要的。基础越深厚以及知识越渊博,则分析问题、判断问题和处理问题的能力越强。必须看到,培育澳门的法律工作者,在理论基础与专业知识方面将会比一般要求更高。这是因为澳门的法律体系同葡萄牙法律有着历史的联系。更重要的是因为在1999年以后,澳门法律将属于中华人民共和国的地方性法律。在“一国两制”原则指导下,澳门特别行政区法律的许多内容虽然同国内的法律有很大差异,但是澳门特别行政区的法律体系无疑将与中华人民共和国法律体系同时存在。而二者的联结点就是中华人民共和国澳门特别行政区基本法。正是由于这样的具体特点,决定了将来的澳门法律工作者除了必须很好地掌握基本法和澳门当地的法律之外,还应熟悉中国国内的各种法律,并对于葡萄牙法律也应有相当程度的了解。所以从这方面来看,的确是要求更高。

第三,根据基本法的规定,澳门各机关除使用中文外,还可以使用葡文。葡文也是正式语文。鉴于澳门外商云集,国际交往非常密切,故要求澳门的法律工作者懂得一至二门外国语是必要的。

第四,健康的身体是工作之本。因此,体格也应列为一项指标。

三、培育人才的途径和方式

澳门法律工作者培育的途径和方式可以是多元化的:

(一)大学法律系是培育人才的主要基地

当前应该全力强化澳门大学法律系。具体地说:第一,要充实和增强师资力量以及图书等设施。可以在当地选拔或者从国内其他地区和海外延聘那些学术成就卓著的饱学之士充任教



师,以提高澳门大学法律系的教学质量和学术水平。第二,要适当调整教育与课程设置,使之更加适应澳门当前和未来的实际需要。第三,要尽可能地扩大招生,鼓励当地的青年学生报考法律专业,加速批量培育法律专门人才。第四,要大幅度投入法学教育资金,改善条件,提高师生的待遇。第五,设立法律专业的诸如研修院、研究生院之类的机构,以培育少量杰出的高级专门人才。他们中一部分人可以起工作母机的作用,通过他们培育更多的新的人才。第六,筹设法律专业的各种奖学金,以利于广泛网罗人才,鼓励人才成长。

(二)组织在职训练,提高现有法律工作者的水平

澳门社会处于不断发展之中,法律规范的内容与有关的理论知识也在不断更新,因此,在职的法律工作者的再学习是必要的。培训方式可采取设立诸如进修学院等常设性机构来承担此项任务;也可以采取举办临时性的轮训班、讲习班、进修班等方式,长则一年、半年,短则一个月、两星期,轮流地使现职的法律工作者们都可以获得专题学习的机会。发展函授教育对于在职人员来说是一种很方便的方式。参加函授学习法律的人既可以不必离职,又可以学到很多有用的理论知识。另外,澳门的国际公开大学也应在这方面充分地发挥其作用。

(三)组织并加强法律专业领域里的内外交流

交流包括人员交流、学术信息交流和法律图书资料的交流等。交流的方式例如:第一,派遣澳门的法律工作者和学者到境外留学、进修或短期访问、考察。第二,邀请境外的学者及法律工作者来澳门作长期的或者短期的讲学、访问、研究。第三,澳门的法律工作者、法律工作部门、法学研究机构同境外的相应单位、个人合作选题,联合进行有关法律问题的研究项目。第四,



经常性地澳门举办各种规模的国际的或者跨地区的法律问题研讨会。第五,出版或者同外国、外地区联合出版法律方面的刊物、论著及其他出版物,交流信息,讨论问题。第六,同国外、境外其他地区的有关部门建立固定的联系,经常交换有关法律工作方面的图书资料,以及互相沟通电脑网络,等等。

(四)合作培养、委托培养,加速法律人才的成长

合作培养、委托培养是利用和借助外单位的力量及方便条件来促进澳门法律人才成长的方法。例如目前正在进行中的澳门大学同广东中山大学合作培养研究生,以及澳门选派优秀的高中毕业生委托汕头大学法律系举办澳门班,以造就一批法律专业的大学生。这些都是行之有效的培育人才的途径,亟宜在总结经验的基础上继续并扩大进行。

澳门法律工作者的培育关键在于澳门有关当局的重视和关注。人才的培育是澳门社会发展的根本,法律人才的培育又是澳门法制建设的根本。希望澳门的有关当局高瞻远瞩,统筹规划,针对澳门法律人才匮乏这个不足之点,加强领导,加大力度,下决心通过各种有效的途径和方式,多管齐下。务使早出人才,出好人才。培育人才的工作做好了,将大大有利于澳门的法制建设,大大有利于澳门社会的安定和繁荣。



中华人民共和国宪法 1994 年度概况^{*}

The year 1994 sees the fortieth anniversary of the enactment of the Constitution of the People's Republic of China and the establishment of the National People's Congress. The first Constitution of the People's Republic of China (PRC) was enacted and promulgated by the First National People's Congress in its first meeting in September 1954. In January 1975, the second version of the Constitution of the PRC came into effect by the constitutional revisionary work of the Fourth National People's Congress in its first meeting. Then the third Constitution came into force by the revisionary work of the Fifth National People's Congress in March 1978. The current Constitution is the fourth, promulgated by the Fifth People's Congress in its fifth meeting in December 1982. During the past thirteen years, the fourth Constitution has been amended thirteen times.

To commemorate the fortieth anniversary of the Constitution of the People's Republic of China, Law Societies at national and provincial levels have held many academic symposiums and published hundreds of papers concerning constitutional issues. Some of the pa-

^{*} 本文载澳大利亚《亚太宪法年鉴 1994》,墨尔本大学比较宪法研究中心,1995 年出版。





pers cover comparative studies between the current Constitution and the 1954 Constitution and try to trace the constitutional development of the PRC over the past forty years. This effort can be summarised as follows:

1. The 1954 Constitution was effective when China was in its transitional period from the new democratic revolution to socialist revolution. The current Constitution is in nature a socialist one, by which the basic task of the nation in the years to come is to concentrate its effort on socialist modernisation in the fields of industry, agriculture, national defence, and science and technology, so as to transform China step by step into a prosperous socialist country with a high degree of civilisation and democracy;

2. The 1954 Constitution did not mention anything about an open door policy, but endorsed a planning economy in all areas of economics. The current Constitution provides for continuing reform and opening, so that the PRC permits foreign enterprises, other foreign economic organisations and individual foreigners to invest in China and to enter into various forms of economic cooperation with the law of the PRC. The Constitution also clearly stipulates that "the state practices the socialist market-directed economy."

3. According to the 1954 Constitution, the People's Congress is the sole organ to exercise legislative power, which means that no organ other than the People's Congress was entitled to hold or use legislative power. In contrast, the current Constitution has such provisions as: "The National People's Congress and its Standing Committee exercise the legislative power of the state", and "The State



Council enacts administrative rules and regulations in accordance with the constitution and the statutes”; “The People’s Congress of Provinces and Municipalities directly under the Central Government, and their standing committees, may adopt local regulations, which must not contravene the Constitution, the statutes and the administrative rules and regulations, and they shall report such local regulations to the Standing Committee of the National People’s Congress for the record.”

4. There were no stipulations concerning military organs in the 1954 Constitution, while in the Chapter Ⅲ named “The Structure of the State” of the current Constitution, there is Section Ⅳ, “the Central Military Commission”, which provides a constitutional structure of the Central Commission of the national military force.

5. According to the 1954 Constitution, only the National people’s Congress had a Standing Committee as its permanent body while local ones at different levels did not. The functional powers of standing committee were endowed, rather, to the people’s governments at the corresponding levels. In the current Constitution, local people’s congresses stand above the county level establish standing committees and have their own corresponding functional powers.

6. Both the 1954 and the current Constitution are made up of four chapters and include a chapter on “Fundamental Rights and Duties of Citizens”. The difference is that it was Chapter Ⅲ in the 1954 Constitution while is Chapter Ⅱ in the current Constitution, and its contents of this chapter are much more detailed in the current Constitution than they were in the 1954 Constitution. For in-



stance, terms such as “the personal dignity of citizens is inviolable,” “the state and society help make arrangements for the work livelihood and education of the blind deaf-mutes and other handicapped citizens” etc, have been added to the 1982 Constitution.

In some other papers, several basic constitutional issues that have been interpreted differently are being discussed again. Examples are the following:

1. The concept of the People's Congress

Some scholars regard People's Congresses as merely a systemic and procedural aspect of the constitution; others think the Institution of People's Congresses should include only the procedures and functions of the constitution, but should also consider other state organs that are elected by the people's congress, and the adjustments in the relationships among those different functional organs should be involved as well. There are others who feel that the People's Congress Institution should be regarded as a whole system on the institution of state power and politics and therefore it not only includes all that mentioned above but also include the balance of the relationship between the state and its citizens.

2. Concerning the concept of the Constitution

Some scholars uphold that the spirit of constitution be the separation of power which is different from the traditional stipulating the separation of socialist idea. They said that “constitution is a specific law power and the study of constitutional law is a scientific research



on how to separate state power.”

According to their explanation although the sovereignty of a state is indivisible, its administrative power is not. During the discussion, the idea of “social rights” is endowed with new meanings that are described as including all rights and power within a state, and every element of the “social rights” fall into the scope and objective of the constitutional law study which should include both the studies of state power and individual rights. Some others further opine that a methodology should be established as the basic methodology of study.

3. Concerning property rights of citizens

Should “protection of citizens’ property rights” be a basic constitutional principle? There are different answers to this question. Some think the Constitution of the PRC is a socialist constitution in which admits that the public property is inviolable while does not deny the protection of individual property rights, but the protection of citizen’s property rights should not be deemed a constitutional principle. On the contrary, some others thought that the protection of individual property rights should be treated as a constitutional principle. Especially under the current circumstance of socialist market economy, an article stating “citizen’s property rights are inviolable” should be added to the Constitution.

4. Concerning the scope of political rights

It is commonly held in China that political rights refer to citi-





zens having democratic rights of participation in the politics of the state and the freedom of giving individual opinions on national affairs. Generally, political rights include the right of election and being elected, freedom of speech, publication, assembly, association, parade and demonstration. Some scholars regard the right of equality and the right to criticise, to make suggestions and complaints, and to make charges against and exposures of state officials, as political rights. Others disagree with them and explain their idea with such an example as the following: a criminal, who in reality is deprived of political rights by a court verdict, still has the right of complaint, and the right to make charges against and exposures of, others; how can one explain this phenomenon reasonably without excluding the rights of complaints from political rights? From here some other scholars even go so far as denying that freedom of speech is not a kind of political right at all. The reason is that speeches of citizen are usually expressed privately, and if a person does not spread his or her idea through public media one cannot make sure whether he or she is practicing political rights or not even if national political affairs are mentioned in his or her speech. Nevertheless, freedom of speech as an element of political rights is widely accepted in today's China.

5. Concerning the right for strike

There is no stipulation concerning the right to strike in the Constitution of China. Some scholars notice that as a matter of fact strikes now happen occasionally in China. In enterprises involving foreign elements such as joint ventures, cooperative ventures and