

第二卷

夏勇  
编

# 公法

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公法與私法之分，是學界研究的重要取  
此視角有益於加強對法律性質和功能的認識，  
有益於國家法制建設。在依法治國建設社會  
主義法治國家過程中，作為胡哲平甘苦倖間  
美係和法因世十分重要，胡哲平甘苦倖間  
國家與社會、中央與地方和國家機關上下美係的  
公法與私法重要，尤其中國二十年來開始的改

革是自上而下有領導進行的。毛澤東是經濟體制改革、發展社會主義市場經濟，還是改革政治體制、加強民主法治建設保障公民基本權利，都需要加強立法研究。目前，國內綜合性法學研究刊物為數不少，如《法學》、《法學研究》、《法學評論》等，但法院校出版之部門法研究論文也陸續轉開去，但《法學》、《法學評論》等刊物為數不多，我建議《法學》、《法學評論》等刊物應多出版一些研究論文，相信《法學》、《法學評論》等刊物應多出版一些研究論文。

仁的共同努力下，它一定會成為一棵奇花，在  
中國科學園地里展現麗姿。

劉海年

## 卷 首 语

“西学东渐”百余年，吾国人文学术之变尤在关涉公共生活领域。公法是为一隅。丁韪良译书《万国公法》先行于世，沈氏法律馆编译踵接而出，复有清末修律厘分民刑，民国立宪规设共和。虽征实言之，可谓有法律而无法治、立宪法而阙宪政、言仁道而疏人权，然吾国之有现代公法名称、律条与学问，盖自此耳。揆度吾国旧时公法学问，有改制变法、据摄西律及民主革命经验积为深厚资源，有戴雪《英宪精义》、狄骥《公法变迁》、康有为《实理公法》及王钱二氏《比较宪法》等著译蔚为大观。功之不昧，过亦足惕。或因动乱频仍，时政所需，公法研究惯受政治思潮裹挟，统治权宜左右，辩不实之理、习乡愿之技俱为时俗。是故热热闹闹、弄潮抒臆之作枝繁叶茂，平心静气、洞幽究微之学鲜且冷矣。

最近二十年改革开放，拨乱反正，公法学术生机重现。然比之于当世学术先进，衡之于时下民众需求，公法学问之滞塞令吾辈愧然失色矣。本刊之创立，意在偕志同道合者，荟汉语世界公法著译之精粹，为推进公法研究、译介与教育尽绵薄之力。

编辑方针如下：

1. 每卷于“主题研讨”之外，设固定栏目“理论前沿”、“改革建言”、“国际人权公约与中国法”、“传媒与法律”、“书评”、“学术对话”、“名作鉴赏”、“学位论文选萃”及“小资料”；

2. 收文范围按学科包括国际公法、宪法、行政法、刑法、诉讼法、大众传播法以及人权理论、法律哲学、中国传统政治哲学；

3. 每卷拟根据需要在海内外聘请主编，并主持主题研讨和相关会议；

4. 鉴于我国公法研究现状,拟在近年内以较大比重译介国外公法学问。

5. 每年不定期出版若干卷。如资金及人力无虞,可考虑定期。

夏 勇

一九九八年十一月

於北京



## Preface

After more than 150 years of the "Dissemination of Western Learning in China", great changes have occurred in the humanities studies in China, especially in those areas relating to public life. Public law is one such area. Following the first Chinese translation of English law book, Wheaton's *Elements of International Law*, by W. A. P. Martin and his Chinese associates, a series of Western books on public law were translated and published by Mr. Shen Jiben's Institute of Law Revision in the late Qing Dynasty. Since that time, the legal reform was carried out which abolished the Chinese legal tradition of amalgamating different laws into one single code and separated civil from the criminal law. With the founding of the Republic of China in 1911, a constitution was adopted which established the principles of republicanism and a democratic government. It was during this period that the concept, provisions and study of public law in its modern form began to emerge in China. However, one may well argue that at that time China enacted laws without establishing the rule of law, adopted a constitution without embodying the principle of constitutionalism and stressed benevolence without respecting human rights.

A review of the history of public law studies in China has revealed both remarkable achievements and serious shortcomings. The achievements include the rich experiences of political and legal reforms, the assimilation of western laws, republican revolu-

tions and a splendid array of works and translated works in the field of public law, such as Dicey's *Essentials of the British Constitution*, Duiguit's *Evolution of the Public Law*, Kang Youwei's *Positive Theory of Public Law* and Wang and Qian's *Comparative Constitutional Law*. The shortcomings are reflected in the fact that, due to the frequent social turmoil and political needs of the time, the study of public law has often been influenced by the trend of political fashions and controlled by the experience of the political rulers. It was often the fashion of the time for scholars of public law to engage in meaningless debates, cater to the whims of the rulers or practice hypocrisy. As a result, many of them indulged in writing superficial and subjective articles and few were able to do any serious and indepth research.

The reform and the implementation of an open policy in the past two decades has restored order and brought new life to the research of public law in China. However, the enormous gap that still exists between China and the advanced Scholarship in the field of public law, whether in terms of carrying forward legal heritage, development of new theories, or possession of materials, has made us flush with shame. The inability of public law research in China to meet social demands, whether in terms of analyzing national conditions, upholding justice or changing the legal system, has given us many sleepless nights. The purpose of initiating this publication is to bring together legal scholars who share the same ideals and interests, to collect the best works on public law, whether written by Chinese or foreign scholars, and to contribute to the promotion of the research, translation, as well as education in the field of public law in China. It is also our hope that through this publication we are able to lay the necessary theoretical foundation for an exploration, from the perspective of legal research, of

the ways to reform the political system.

The guiding principles for this publication are as follows:

1. Apart from the "Subject Discussion", each volume will include the following regular contents: "Frontier of Theories", "Proposals of Legal Reform in China", "International Human Rights Treaties and Chinese Law", "Mass Media and Law", "Book Review", "Academic Dialogue", "Appreciation of Masterpieces", "Excerpts from Excellent Dissertations of Students" and "Database".

2. The contents of this publication are primarily within the scope the following fields: public international law, constitutional law, criminal law, legal procedure, mass media law, human rights theories, legal philosophy and traditional Chinese political philosophy.

3. According to the actual needs of each volume, we may invite Chinese or foreign scholars to be the editors-in-chief of this publication and to chair the subject discussions or other relevant meetings.

4. In light of the current situation of the study of public law in China, in the next few years we plan to put the emphasis of the publication on the translation and introduction of the researches of public law in foreign countries.

5. This publication is a non-periodical, published irregularly several times a year. We will consider turning it into a periodical if we are able to secure sufficient funding and staff.

Xia Yong

November 1998 in Beijing

为了权力与  
权利的平衡

丁元才

夏勇编《公法》第2卷

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