

1999 年修订版

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# 走向权利的时代

## 中国公民权利发展研究

中国政法大学出版社  
1999 年·北京

## 图书在版编目 (CIP) 数据

走向权利的时代(修订本)/夏勇主编. - 北京:中国政法大学出版社,  
1999.12

ISBN 7-5620-0991-0

I. 走… II. 夏… III. 公民权-研究-中国 IV. D921.04

中国版本图书馆 CIP 数据核字(1999)第 71000 号

责任编辑 丁小宣

出版发行 中国政法大学出版社

经 销 全国各地新华书店

承 印 军事科学院印刷厂

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开本 850×1168 1/32 印张 28.625 字数 770 千字

2000 年 1 月第 1 版 2000 年 1 月第 1 次印刷

ISBN 7-5620-0991-0/D·942

印数:1-3000 册 定价:49.50 元

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仁遠乎哉？我欲仁，斯仁至矣。

——《論語·述而》

Hk72/19

## 修订版前言

1993年初春，我和四位学友怀着对民权保护的热忱和对书本外资源的虔敬，发起一项名为“中国社会发展与公民权利保护”的研究，并有幸联合十余位优秀的同道者一起完成。当初的课题设想是雄心勃勃的：我们期望通过社会调查对中国人的权利观念、权利保护的司法机制和社会机制以及政治权利、人身权利、财产权利的享有状况作出学术描述和分析，并期望这种描述和分析不但为改进中国的法学理论和国内外关于中国人权利问题的研究提供途径和资源，而且为中国进一步推进旨在保护公民权利的制度变革提供富有智识的、可操作的方案和建议。书名“走向权利的时代”已经将我们当初的事实判断和价值预设表露无遗。研究过程虽然紧张、痛苦且充满挑战，但又是认真、诚实且有几分烂漫的。例如，回想起我和同伴在村子里（如，辽宁辽阳的南坨子村、河南洛阳的殷沟村和开封的胜利村以及云南景洪的傣族村寨）与农人攀谈时那份竭尽全力去体认和发掘“权利话语”的执著，我对那个时候的自己真不免有几分“肃然起敬”。两年后，也是一个初春时节，我们把各自的研究所得汇集起来，作为一个初步的成果交付出版。此乃本书的由来。

书出来时我出国，且一去便是两年。回国后，责任编辑丁小宣先生告诉我，这本书发行后很快告罄，出版社有意重印，问有无修订的必要。我想，从理论上讲，修订应该是绝对必要的。因为，几年来，本书的作者们仍然在不同程度上继续着他们各自在本书所展

示的研究，心得体会自然日新月异。例如，高鸿钧教授一直在整理课题问卷，并同西方社会学学者一起作了不少卓有建树的统计分析；贺卫方教授、张志铭教授的司法研究正如火如荼；仍旧龟守于权利哲学一域的我也时有新得；其他诸位作者除学衔、职衔焕然一新外，相关的学问无疑也是日益进取的。此其一。

其二，当初出版时在技术和内容方面的确留有不少的遗憾。最大的遗憾恐怕是，千辛万苦收集得来的包括问卷、访谈记录在内的第一手材料大多没能派上理想的用场。除了时间方面的原因外，更重要的原因应该说是理论准备的不足。以我自己为例。在进村访谈和收集相关资料后，我感到最缺乏的不是实证材料，而是对中国公民的权利生成或不生成的可能性与现实性给予创造性学术解释的能力。倘若没有足够的理论解释能力，只是用一些空泛的或许是漂亮的理论把材料串起来，不仅于学术无所长进，也可惜了一些宝贵的第一手材料。所以，最后我不得不回过头来，花功夫去建构一个试图圆满解释权利发展的理论模型。这一点，可以从我写的《乡民公法权利的生成》一文中看出。

其三，围绕本书的各种评论持续三年有余。评论者们对本书所发表的坦率而真诚的评论、对本书作者们的热情鼓励和鞭策以及围绕本书展开的激烈争论，除了于无意间给本书增添了“中国法学批评试验品”这一项殊荣外，更重要的是，让我们看到了一些在研究过程中自己不曾注意到的观念问题和方法问题，从而对今后的研究有所警示。我曾就一组关于本书的讨论纪要和评论文章写过这样一段话：“古人云：‘文章千古事，得失寸心知’。有人知你所知之得失，且知你所不知之得失，其乐融融也。”<sup>〔1〕</sup>尽管就本书所涉的内容和问题而言，迄今为止的评论显然还是很不够的，而且有一些令

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〔1〕 夏勇：“批评本该多一些——答谢、反思与商榷”，载《中国书评》1996年5月总第10期，第116~133页。

人遗憾的误读与误解，但其中有不少意见至少于我弥足珍贵，理应通过修改认真加以吸收。

以上三条，讲的都是应该大事修改的道理。问题在于能否修改、怎样修改。今年年初，我们订立了“修订须知”，相约动手修改。一段时间后，方知绝大多数文章的确是不大改得动的，而保持原貌似乎才是最佳的选择。究其原由，一方面，大概是由于这些文章在当时的确有某种“拓荒”的意味，尽管现在看来有不少的缺憾，作者们却希望保持所谓“原创的真实”；另一方面，可能是由于这些文章虽然采用了社会学的视角和某些社会学方法，但在知识、立论和结构上却又不同程度地具有某种相对独立于或超脱于现实社会和制度的品性。因此，不管法律怎样修改，不管时尚如何变动，它们都是可以居常而不变的。我想，这大概是学术之为学术的品格所在吧。

现在展示在读者面前的修订版，与原版相比，最大的变动是发表了全部的问卷原件，并增加了基本的分类统计资料，作为第六编。统计资料是在本书出版后，经过艰苦的数据重新录入后整理而来。其次的变动是相关的文章涉及数据的部分根据新的统计资料作了相应的更改，同时，对于使用其他来源的数据较多而难以同本项目统计资料相谐和的一篇文章不得不作了忍痛割舍的处理（在此，我要向这篇文章的作者深表歉意）。再次，各篇文章都由作者们或多或少地作了一些在自己看来是恰当的修改。

值此修订本出版之际，我首先要感谢课题组的列位成员。这一段合作，既是一段不凡的学术经历，也是一段珍贵的人生经历。在我看来，成员们真诚合作、相濡以沫的风尚和淳朴谦逊、相待以礼的品德或许比这部书本身更有价值，也更为隽永。

其次，我要感谢先后组织学者们评论本书的中国艺术研究院法文化研究中心、哈佛大学法学院东亚法律研究中心、《中国法学》编辑部、《中国书评》编委会以及湘潭大学法学院，感谢参加各次

评论活动的多位学者。谅我在此不一一列出他们的姓名。我想，无论是批评还是反批评，抑或反批评之反批评，也无论评论的对与错、是与非，都是为学术进步所作出的宝贵努力，有着开风气之先的价值。同时，学术评论活动本身也是对我们这一代学者的学品与人品的一种难得的磨砺。我们仍然期待着更多的学术评论。

最后，我要代表课题组的其他几位负责人和本书的作者们衷心感谢自 1993 年以来对我们的研究给予许多支持、帮助和鼓励的各位朋友和同事，相关的政府机构和组织，访谈过的乡民、市民、法官、律师和行政官员，还有美国福特基金会及其两位功不可没的项目官员——何杰森先生和张乐伦女士。

夏勇 谨识

1998 年 12 月于北京东总布胡同 19 号

## FOREWORD TO THE EXPANDED EDITION

In the early Spring of 1993, four colleagues and I, harboring a devotion to the protection of civil rights and a respect for the experience outside the ivory tower, launched a research project titled “Social Development and Civil Rights Protection in China.” We had the good fortune of completing this project through the joint efforts of more than ten additional eminent scholars. Our original conception of the project was extremely ambitious: By way of a series of social surveys, we hoped to complete a scholarly description and analysis of rights consciousness in China, of formal judicial and informal social mechanisms for the protection of rights in China, and of the current state of Chinese people’ s enjoyment of political rights, corporeal rights, and property rights. We also hoped that our descriptive and analytical work would not only improve Chinese legal scholarship and serve as a source of information and guide for future studies on Chinese rights issues conducted by Chinese and foreign scholars, but would also advance well – informed proposals and suggestions to the Chinese government for the reform of the institutions protecting citizen’ s rights in China. The title of the book, *Towards An Age of Rights*, clearly reveals the nature of our assessment and values. Although the research process was mentally and physically taxing and presented continuous challenges, it was also serious, honest, and somewhat pure. For example, when I recall the tenacity with which my research companions and I devoted ourselves to



digging "rights discourse" out of informal conversations with farmers in various villages across the country (such as Nantuozi Village in Liaoyang, Liaoning Province; Henan Province's Yin Gou Village in Luoyang and Shengli Village in Kaifeng; and a Dai Nationality Village in Jinghong, Yunnan Province), I cannot help but feel proud of the person I was back then. Two years later, also in the early Spring, we compiled the respective research findings of all project members and published them as preliminary results. Hence this book.

I was studying overseas when the book was first published. Upon returning to China two years later, the editor of the book, Mr. Ding Xiaoxuan, told me that the book sold out very quickly and that the publishing house was interested in reprinting it. He asked whether the book required any revisions. I felt that a revision of the book should, in principle, be absolutely necessary. After all, for the past few years each author had continued, in varying degrees, to work on the research he or she had originally presented in this book; scholarly progress had continued to accumulate. For example, Professor Gao Hongjun had been productive in his work with a Western sociologist analyzing data from the survey component of our project. Some exciting developments were made by Professors He Weifang and Zhang Zhiming in their research on the administration of justice. Remaining devoted to the philosophical exposition of rights, I, too, had continued to keep abreast of new developments in my field. Other authors who were promoted to new academic and administrative posts showed corresponding growth in their research. This is the first reason for thinking about revision.

Second, when the book was first published there remained many technical and editorial weaknesses we would come to regret. The greatest regret was our inability to put to good use all the primary survey, case -

study, and interview data we had so painstakingly gathered. Time constraints aside, the main reason for this is inadequate theoretical refinement. Take my work as an example. After conducting interviews in the villages and collecting supporting materials, I found that the biggest challenge in my work was no longer a lack of evidence, but rather a lack of creative scholarly explanation for the possibility and realism of the emergence of citizen rights in contemporary. If we lack sufficient capacity for theoretical explanation, then our work merely becomes a compilation of vague, albeit attractive, theoretical ideas used to string together our primary data. Not only is this an impediment to academic progress, but also a waste of valuable data. Consequently, I decided to start from scratch and attempt to construct a satisfactory theoretical model to describe and explain the citizen rights. This process was shown in my article of this book, *The Formation of Rural Citizen's Rights in Public Law*.

Third, public commentary of all stripes has surrounded this book for more than three years. Those who have participated in this public debate have honored us by making this book an ongoing experimental product shaped by their collective criticism. More importantly, their criticism, the warm encouragement they have given the authors of this book, and all their intense debate revolving around this book have helped draw our attention to ideas and methods we otherwise would have overlooked. In a separate summary essay on the public debate over this book, I wrote: "There is an old saying: 'published literature is eternal, so authors should take all merits and demerits very seriously.' An author is gratified by readers who recognize the merits and demerits known to the author. But an author is even more gratified by readers who recognize the merits and demerits unknown to

the author.”<sup>[1]</sup> Therefore all debates and commentaries on this book should be taken seriously and incorporated into our revision work, although they seemed far from covering the main contents of this book and contained some misinterpretations and misunderstandings .

The foregoing three points all concern the need for revision. But this leads to a new set of questions: Are we capable of revision? How should we carry out revision? At the beginning of this year we established revision guidelines and agreed to begin our work. Not long afterwards it became apparent that the majority of chapters could not be revised in any substantial way; it seemed that retaining their original form was the best choice. First, these chapters represent maiden voyages into uncharted territory. Despite the many shortcomings we can see with the benefit of hindsight, the authors want to preserve the verity of “first discovery”. Second, despite the adoption of sociological perspectives and methods, owing to the fact that they are, in varying degrees, at a level of abstraction independent of or transcending the particular normative character of society and social institutions, the chapters remain sound and intact regardless of changes in the law or new social currents. I believe this is the basic virtue and mission of scholarship.

In comparison with the first edition, the most significant change in this revised edition is the addition of six part containing basic cross - tabulations of variables from our survey data. After the publication of the first edition, these tables were prepared through painstaking data re-entry and data cleaning work to supplement and correct the original data set. All statistics in this book derived from the survey data were calculated using the revised

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[ 1 ] Xia Yong, “More Criticism Welcomed——Gratitude, Reexamination, and Discussion,” *China Book Review*, Vol. 10, May 1996, pp. 116 ~ 133.

data set. It was unfortunate that we were unable to include a paper that relied heavily on a different source of survey data and which therefore did not quite fit with the other chapters in this book. (I would like to express my deep apologies to the authors of this paper.) Finally, all revisions were made by each chapter's respective authors according to what they deemed appropriate and necessary.

On the occasion of the publication of this book, I would first and foremost like to thank all members of this research project. This collaboration was both an extraordinary professional experience and a valuable personal experience. It seems to me that the sincere cooperation, selflessness, and high integrity of all project members is more valuable, more meaningful and therefore more eternal than the book itself.

I would also like to acknowledge the institutions and people who organized scholarly reviews of this book, namely, the Chinese Academy of Art's Research Center for Legal Culture, the East Asian Legal Studies at Harvard University, the editorial department of *Chinese Law Studies*, the editorial committee of *China Book Review*, Xiangtan University's Law School, and all the scholars who offered their comments and suggestions. Please forgive me for not listing the names of everyone who deserves credit. I believe that regardless of whether help was in the form of criticism or anti-criticism, or even anti-anti-criticism, and regardless of whether review was correct or incorrect, it was all valuable effort aimed toward the common advancement of scholarship which is still in great need in contemporary China. At the same time, scholarly comments is a useful process through which scholars of this generation can improve and discipline themselves and their work. We eagerly await further scholarly comments.

I represent all members of the research group and all authors of the book in extending my wholehearted gratitude to friends, colleagues,

government departments and organizations, villagers, city residents, judges, lawyers, and administrative officials who have provided their ongoing support, help, and encouragement since 1993. Finally, special thanks go to Ford Foundation and Mr. Jonathan Hecht and Ms. Phyllis L. Chang , without whose help this project would not have been possible.

Xia Yong

Beijing

December 1998

NOTE: Thanks to Mr. Ethan Machelson who translated this foreword.

## 原版前言

本书是“中国社会发展与公民权利保护”课题的一个研究成果。

在过去两年多的时间里，我们这些来自中国社会科学院、中国政法大学以及其他机构的中青年学者本着共同的学术兴趣，一起探讨权利问题，并到全国若干城市和乡村做了社会调查。在此基础上，我们对中国社会转型过程中的权利观念、权利保护机制、基本权利以及特殊主体的权利作了一些描述和解释，提出了若干见解和建议。随着社会的发展，权利越来越成为我国法律理论与实践的核心问题。我们深信，中国公民权利意识的逐渐强化以及与此相呼应的权利体系和权利保护机制的不断走向完善，将是推进中国法律现代化进程的最为关键的因素。同时，我们也相信，权利领域中任何真正意义上的进步，都不仅仅取决于意识的觉醒和价值的执著（虽然这是十分重要的），我们更需要衔接细密的程序设计和扎实有效的机制运作。

这个项目由本书五位编者共同提出并负责，由夏勇主持。一批志同道合、各有专攻的学界同行的参与使得最后成果比初期的设想要更为丰满和扎实。各分课题完稿之后，我们意外地发现提交稿件的篇幅已远远超过了一册书的装订限度。于是只好又请各撰稿人加以压缩，其中若干部分曾由编者代为割爱，最后终于使全书降至目前这个篇幅。我们为大家对此表现出的理解而深表谢意。

应该得到感谢的不只是每一位诚实合作的课题组成员，这项研

究还得益于海内外许多机构和人士的关怀和支持。福特基金会的资助使我们能够进行广泛的调查，也使得本书得以顺利出版。中国社会科学院法学研究所为项目的运作和管理做了许多工作，除了所长刘海年教授外，还有王家福教授、李步云教授、刘瀚教授、王保树教授、梁慧星教授、任允正教授、陈春龙教授、肖贤富教授、叶维钧教授等。中国政法大学江平教授，《中国法学》杂志总编辑郭道晖教授、编辑饶方先生，《中国律师》主编方向先生，中国社会科学院社会学研究所所长陆学艺教授，河南大学法律系主任陈景良先生，以及《法学研究》杂志社的编辑们，都给予了不同形式的关心和帮助。我们调查所至的各地立法机构、司法机构、行政部门、学术界人士以及普通民众提供了许多关照和协助；美国哈佛大学法学院的何杰森（Jonathan Hecht）先生、美国丹佛大学权利发展研究中心的范乃思（Peter Van Ness）先生提供过有价值的学术建议和资料；在中国社会科学院法学研究所进修的美国纽约大学法学院的杜鸣（Micheal Dowdle）先生审读过本书的英文部分；中国政法大学出版社，尤其是第一编辑室的丁小宣先生、宋军女士对本书的出版颇多协助之功。各界人士的热情关怀、参与和合作不仅使这一项目得以顺利完成，而且也激励我们今后以更多的努力深化这个领域的研究。

编 者

1995年3月于北京

## PREFACE FOR THE FIRST PUBLISHED EDITION

This book is one of the results of the research project "Social Development and Protection of Civil Rights in China".

For more than two years, We, young and middle-aged scholars from the Chinese Academy of Social Sciences, China University of Politics and Law and various other institutes, have carried out extensive social investigations in many cities and provinces. From these investigations, previous theories, and our academic experiences, we verified and analyzed the collected materials and put forward our opinions and reform proposals on a wide variety of issues, such as the idea of civil rights, right protection mechanisms, basic rights, and the rights of particular subjects. The reason for this research is that with the development of our society, rights have increasingly become the central issue in the legal theories and practices of our country. We firmly believe that the strengthening of civil rights consciousness and the corresponding improvement of a rights system and of rights protection mechanisms will play a key role in the process of China's legal modernization. Meanwhile, we also believe that the awakening of the right consciousness and the enthusiasm alone (although is very important) will not bring about any real progress in the field of civil rights. More importantly, we need to link up detailed and elaborate institutional designs with effective and down-to-earth operation of mechanisms.



The research project was proposed and organized by the five editors of this book, and was directed by Dr. Xia Yong. Although the book covers a wide range of topics, it is not intended, nor is it possible, to include all issues related to civil rights. Nevertheless, thanks to the participation of colleagues and scholars who cherish the same ideals and follow the same path as we do, the final results of this project were much richer and much more solid than we had anticipated. After essays for each topic had been submitted, we were surprised to discover that the total length of the collection had far exceeded the binding limit of a one-volume book. Reluctantly, we asked contributors to condense their articles, and we made abridgments to several articles on behalf of authors. The book was finally reduced into the present length. Here, we would like to express our deep appreciation to our contributors for their understanding.

Our co-authors, however, are not the only persons who deserve our deep appreciation. This project has received much assistance from many other institutions and individuals, both in China and abroad. We are especially grateful to the Ford Foundation, whose financial aid enabled us to carry out extensive investigations and to publish this book successfully; and to the Institute of Law of the Chinese Academy of Social Sciences, which administered this project. We wish to pay tribute to the following persons for their encouragement and supports: Professors Liu Hainian, Wang Jiafu, Liu Han, Li Buyun, Wang Baoshu and Liang Huixing from the Institute of Law, Chinese Academy of Social Sciences; Professor Jiang Ping from China University of Politics and Law; Professor Guo Daohui, Editor-in-Chief of *China Law Journal*; and Mr. Rao Fang, and editor of that same journal; Mr. Fang Xiang, Editor-in-Chief of the journal *China Lawyers*; and all the editors of the journal *Studies in law*. We would also like to thank Mr.