



# China Law Review

Volume 1

## 中国法学评论 第1卷

Chief Editor YANG Fubin

主 编 杨富斌

Vice Chief Editor HAN Yang

副主编 韩阳

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Tourism Law of the People's Republic of China (The Draft)

中华人民共和国旅游法（草案）



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# 前言

党的十八大报告指出,文化是民族的血脉,是人民的精神家园。全面建成小康社会,实现中华民族伟大复兴,必须推动社会主义文化大发展大繁荣,兴起社会主义文化建设新高潮,提高国家文化软实力,发挥文化引领风尚、教育人民、服务社会、推动发展的作用。而要建设社会主义文化强国,就必须走中国特色社会主义文化发展道路,建设面向现代化、面向世界、面向未来的,民族的科学的大众的社会主义文化。

我国“十二五”规划纲要强调,我国要着力构建以优秀民族文化为主体、吸收外来有益文化的对外开放格局,积极开拓国际文化市场,创新文化“走出去”模式,增强中华文化国际竞争力和影响力,提升国家软实力。党的十七届六中全会专门讨论了文化建设问题,提出我国要实施“走出去”战略,扩大中华文化的国际影响力。

但是,我们必须认识到,要使中国文化真正“走出去”,形成国际影响力,首先必须解决语言问题,让世界上其他读不懂汉语的人能够读懂进而能够理解我们的文化;其次必须解决话语转化问题,使我国特有的文化以他人能够理解的逻辑和思维方式呈现在世人面前。否则,我们正在进行的中国特色社会主义现代化建设,包括全面推进依法治国,坚持“法治是治国理政的基本方式”的理念,大力推进科学立法、严格执法、公正司法、全民守法,坚持法律面前人人平等,保证有法必依、执法必严、违法必究等,就难以得到世界各国人民的真正了解和理解。因此,许多有识之士大声疾呼,中国文化要“走出去”,首先必须解决如何“走出去”、以什么姿态“走出去”和以何种贡献“走出去”的问题。

本书——《中国法学评论》——正是我们思考和践行中国法律文化如何“走出去”的一个尝试。近三十多年来,我们凭借中华民族的勤劳和智慧,无论是在政治、经济还是在文化领域,都创造了许多人间奇迹,做出了许多制度创新,使我国社会各个领域都发生了翻天覆地的变化。自1978年党的十一届三中全会以来,我国不仅真正地迎来了法治的春天,而且逐步制定了建设社会主

义法治国家的基本方略。到2010年年底,我国已基本建成社会主义法律体系。目前,我国社会各个领域基本上都有法可依。如果我们不满足于我国只是人类物质生产加工厂的地位,就需要我们重新认识自己在世界文化中的位置,重新确定我们前进的方向。我国应当有魄力和勇气参与调整当代世界文明的进程,应该发出自己的声音,而且要把这种声音放大为国际的声音:用目前世界通用的英语表达我们的思想!正如某有识之士所说:我们在争取“物质现代化”的同时,要尽快实现“精神现代化”。中国在向西方学习、“拿来”了一个世纪以后,也要开始“走出去”,给世界“送去”我们的优秀文化,以尽快结束中西文化交流中的“单向透支”和“文化赤字”现象。

任何文化“走出去”都必须借助一定的物质载体。编辑和出版这本英文撰写的以法学领域的学术论文、案例解析和新法介绍等为栏目的著作,就是要为中国法律文化“走出去”搭建一个合适的平台,提供一个传播的载体。

我们诚望这套英文撰写的专门以研究中国的法律问题、介绍中国法治建设进程和法律文化为宗旨的系列学术丛书,能在传播中国法律文化、介绍中国法治建设进展状况和中国学者关于中国法律问题的思考和理念方面,发挥一定的作用,能在加强中西法律学术交流方面尽到我们的绵薄之力。

北京第二外国语学院确定了建设国际化、高满意度大学的建设目标,明确了“国际导向、专业复合”的培养特色。北京第二外国语学院法政学院确定了“专业+外语”的培养模式,坚持走国际化办学之路,依托学校外语教学和学术资源以及多元文化环境,坚持“应用导向,强化实践”的办学特色。本书即是我们的法学学科国际化的一个尝试。原来设想本书叫做“二外中国法学评论”,以突出学校的国际化特色,最后从出版和技术方面考虑,确定了现在这个书名。取“中国法学评论”之名,主要意图是给英语读者介绍中国学者关于中国法律问题的研究、案例解析和新法等,通常不包括关于外国法律的研究、外国案例的介绍等,但基于比较法基础上的研究例外。

最后,作为本书主编,我谨代表本书的全体编辑、作者和编委会,衷心地感谢北京第二外国语学院各位校领导尤其是冯培书记、周烈校长和朱佩芬副校长对本书的编辑和出版给予的大力支持。在学校出版经费并不十分宽裕的情况下,校领导能够慨然批准我们编辑和出版这样一套英文系列法学学术丛书,可

谓是真正的功德无量,既是对我们法学专业和学科的大力支持,也是对中国文化“走出去”的重大贡献。

我们深知,初次编辑和出版这样一本英文法学学术著作,由于经验不足,学识有限,其中不妥之处在所难免。尽管我们已有编辑和出版了四卷《Express Your Legal View in English, 用英语表达你的法律观点——全国法律英语大赛论文集》的经验,但在编辑和出版这部著作的过程中,仍然时时感到诚惶诚恐,遇到了各种困难。编委会要求各位编辑分工负责初审各篇论文,最后,又邀请了中国政法大学外国语学院院长李立教授、副院长沙丽金教授等法律英语专家,对栏目的设立、文章的规范等问题进行了深入探讨,并对论文中的有关疑难问题进行认真的讨论,集体研究解决,最后再由主编和副主编定稿。诚望广大读者、尤其是法律英语专家针对本书中的问题提出宝贵意见,不吝赐教,以便使我们的丛书质量不断提高,越办越好。

我国首位诺贝尔文学奖获得者莫言说过:“人生最遗憾的,莫过于,轻易地放弃了不该放弃的,固执地坚持了不该坚持的。”我们不知道我们现在坚持的是不是应该的,但是,我们知道,只要我们认准是有益的事情就应该矢志不渝地坚持。尽管干成任何事都会面临许多困难,但仍如莫言所说:“没有什么过不去,只是再也回不去。”我们的信念是:坚持不懈,勇往直前!

杨富斌

2012年12月24日平安夜于望京

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# **The Individual's Rights in Criminal Justice in China**

YANG Yuguan \*

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- 1 Organizations in Criminal Justice
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### **II Individuals' Rights in Criminal Justice of China and International Standards**

- 1 The Individuals' rights in China's Criminal Justice
- 2 Comparison of the Rights of the Accused in China and that of the International Standards
- 3 Improving Individuals' Rights in Criminal Justice in China

**Abstract:** This paper contains two parts. Part one makes an introduction on China's criminal procedure law, especially the participants of criminal justice, including the main functions of organizations; part two introduces the individual's rights in China's criminal justice. The paper makes a comparative study of the individual's rights in China and those contained in the international standards, points out the gaps between them,

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analyses the amendments of China's Criminal Procedure Law 2012 in improving individual's rights in criminal justice. The paper provides the readers a profile of individual's rights in criminal justice of present and in the coming future (The revised China's Criminal Procedure Law will be effective in 2013) and helps them to have a basic understanding of China's criminal justice and the individual's rights concerned.

**Key words:** China, criminal justice, individual's rights, international standards, amendments of the Criminal Procedure Law 2012

Criminal procedure law of China is mainly composed of the criminal procedure code (CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA) and some relevant judicial explanations promulgated by legislative body, the Supreme Court and the Supreme Procuratorate.

Criminal procedure code of the PRC, which contains 225 articles (the new law contains 290 articles, hereafter refers as the new law), was adopted by the National People's Congress in July, 1979, revised in March, 1996, and revised again in March 2012. Judicial explanations are promulgated every now and then to enforce criminal procedure law if necessary.

## **I Introduction to China's Criminal Procedure law**

This part is a general introduction about China's Criminal procedure, including the organizations, participants and the criminal proceedings.

### **1 Organizations in Criminal Justice**

#### **1.1 The Court**

Courts in China are called the people's courts. There are four levels of courts, i. e. basic (local) people's courts; intermediate people's courts; high people's courts, and the Supreme People's Court. The levels are the same as that of administration. China has about 2200 counties, 340 districts, and 23 provinces, 5 autonomous regions and 4 municipalities and 2 special administrative regions, i. e. Hong Kong and Macao. Except Taiwan, Hong Kong and Macao, generally speaking, each county has one people's

court, each district has an intermediate court, each province, autonomous region and municipality has one high court, and the whole nation has one Supreme Court. Besides this, there are some special courts, such as the marine courts and military courts.

Each court consists of several divisions. Courts at different levels may have different divisions, however, every court, except for the special court, must have the basic divisions, such as criminal division, civil division, economic division and administrative division.

Criminal justice in China, both the defendant and the prosecutor have the right to appeal against the judgment of the trial court. However, there is no such court as appellate court in China to hear appeal. A court at any level can be the trial court, and any court except the basic court (local court) can hear appeal cases.

## **1.2 The Procuratorate**

In China, the power of public prosecution belongs to the organization called the People's Procuratorate. The People's Procuratorate, besides prosecution, have other important functions, such as issuing arrest warrant, supervising the criminal proceedings at any stage. The structure of the people's procuratorate is the same as that of the people's courts. Therefore, people's procuratorates are organized on four levels. However, the relationship between higher procuratorate and the lower procuratorate is different from that of courts. According to Article 5 of the Public Procurators Law, "the Supreme People's Procuratorate shall exercise leadership over the work of the local People's Procuratorate at various levels and of the special People's Procuratorate. The People's Procuratorate at higher levels shall exercise leadership over the work of the People's Procuratorate at lower levels." By comparison, there is no such leader relationship in court system. The relationship between the Supreme Court and local courts, the higher courts and lower courts is that the higher one gives guidance (guardians) to the lower one.

## **1.3 The Police Department**

The organization in charge of policing at the central level is called the Public Security Ministry. In each province, district and county, there is a public security bureau in charge of policing. There is a special telephone number —"110"— receiving report, information or complaint concerning any offences. Anyone at anywhere may use any tele-

phone set to dial 110 free of charge to provide information on offences or ask police for help. After receiving report, if necessary, the patrol police should arrive at the scene of offence very soon. In each town or community there are police stations in charge of maintaining social order and managing residence registration. A police station can accept information concerning crime, but it has no power and capacity to conduct criminal investigation. Therefore, when a police station receives a report on offence, it should transfer it to investigation department of public security bureau at city level.

## 2 Participants in Criminal Proceedings

### 2.1 Suspect and Defendant

A person who is suspected to commit an offence is called the suspect before he is prosecuted by the procuratorate. After a procuratorate presents a prosecution bill to a court, the person being charged is called a defendant.

### 2.2 Victim

Victim usually is a person whose rights were violated. In China, victims are not deemed as ordinary witnesses as in western countries, but the participants of criminal justice.

## 3 Criminal Proceedings

### 3.1 Filing a Case

Filing a case is the beginning of the criminal procedure, without which the official or formal investigation cannot be undertaken. A case can be filed only if facts of crime exist, and for which criminal responsibility ought to be pursued. This procedure is designed to protect the innocent from the very outset of proceedings and to avoid wasting time and judicial resources.

#### 3.1.1 *Information and Requirements*

There are various resources to get the information for filing a case.

The public security organs or the procuratorate shall, upon discovering facts of crimes or criminal suspects, file the cases for investigation within the scope of their jurisdiction.



Any unit or individual, upon discovering facts of a crime or a criminal suspect, shall have the right and duty to report the case or provide information to a public security organ, a procuratorate or a court.

Any individual whose personal or property rights are infringed upon shall have the right to report to a public security organ, procuratorate or a court about the facts of the crime or bring a complaint to it against the criminal suspect.

Any offender may surrender to the police or other law enforcement agency after committing an offence. According to Article 67 of China's Criminal Law, an offender, who surrenders to the criminal justice authority, may get a lenient treatment or be exempted from punishment.

### 3.1.2 *Proceedings*

The public security organ, the procuratorate or the court shall accept all reports, complaints and information concerning an offence. If the case does not fall under its jurisdiction, it shall refer the case to the competent organ and notify the person who made the report. If the case does not fall under its jurisdiction but calls for emergency measures, it shall take emergency measures before transferring the case to the competent organ.

Reports, complaints and information may be filed in writing or orally, the officer receiving an oral report, complaint or information shall make a written record and read to the reporter, complainant or informant. If there is no error, the person providing information shall sign or seal it.

The officer receiving the complaint or information shall clearly explain to the complainant or the informant the legal responsibility that shall be incurred for making a false accusation. However, a complaint or information that does not accord with the fact or even a mistaken complaint shall be strictly distinguished from an intentional false accusation. As long as no fabrication of facts or falsification of evidence is involved, the information provider is not responsible for the consequence of his reporting.

The public security organs, the procuratorate and the courts shall ensure the safety of reporters, complainants and informants as well as their near relatives. If the reporters, complainants or informants wish not to make their names and acts of reporting,