

Index:



Introduction p. 1



Overview of the law p. 2



The legal procedure p. 6



Comparison of laws p. 6



Case study p. 8



Checklist p. 9

- CHINA -

LEGAL BULLETIN



For the Foreigner: A Guide to China's Criminal Legal System

Nowadays it seems like more and more foreigners are getting into legal trouble in China. Regardless of whether this assumption is based on increased media attention, public speculation, or an actual greater number of foreigners traveling to or residing in China, the simple truth is....it happens. From unpaid taxes, expired visas, public brawls or drug possession, foreigners in China are getting arrested. And what's worse – many of them don't realize the severity of the consequences they face until it's too late.

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So, for the foreigner visiting or living in China, we hope this article provides you some valuable information. If anything, it will summarize what we believe to be a comprehensive outline of the legal system, from the specific laws that apply to foreigners to the legal process that plays out after someone has been charged by the public authorities. But hopefully, more than that, it will also help to warn you of the many legal risks you take should you decide to walk on the wild side of things in China. Because, just like any other country with its fines and penalties, public embarrassment and headache of a judicial process, it's really not going to be worth it.



Please note this article is intended to provide an overview of the Chinese legal system, specifically in regards to foreigners visiting or living abroad in China. While every effort is made to provide accurate information, laws are subject to change and the enforcement of the laws in various jurisdictions may differ. This article is not intended to provide legal or other advice. The reader is encouraged to retain a lawyer if detained or arrested, and to supplement this article's information with independent research and legal advice.

THE LAW

“The People’s Republic of China protects the lawful rights and interests of foreigners within Chinese territory; foreigners on Chinese territory must abide by the laws of the People’s Republic of China.”

Constitution of the People’s Republic of China, Article 32

The Constitution makes it clear that foreigners are protected under the laws of China. However, take note – foreigners must also FOLLOW the laws of China. Upon lawful entry into this country, you have made a promise to obey all Chinese laws (even if you don’t know them all). Therefore, if you break the law in China, you will be subject to the judicial system and legal processes of China. Being a foreigner and not knowing the local laws is NOT an excuse.



Now, generally, staying out of trouble, behaving decently, and using common sense is a good start. But even as an ever-cautious foreigner, you may still find yourself talking to a police officer at some point during your stay in China. Having a basic understanding of the rules and regulations here in China may help put you at ease should you find yourself in this situation.

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Let's begin with the laws you are required to follow upon entry into China. Below is a chart on the relevant provisions of China's exit and entry laws applicable to foreigners, including the requirements for visas, residence registration and permits. Depending on your situation, you may be required to provide additional travel and identification documents, or go through an interview process if requested.

Please note this chart is by no means an exhaustive list of the exit and entry requirements of China. Additional information may be included in the specific article provisions cited below.

Exit and Entry Administration Law of the People's Republic of China:

PRC Article No.	Requirement
Articles 15-27, 71, 76	Enter the country with a valid visa and passport. This one seems straightforward but we hear of cases where foreign nationals attempt to enter the country on someone else's passport or travel documents. The penalties can be harsh, including fines, detention and/or deportation.
Article 38	Carry your passport (travel documents or residence permit) at all times. Failure to produce proper identification when demanded carry stiff penalties, including fines, further interrogation at the police station, and possible detention. In certain situations, a photocopy of your passport or permit may suffice, but you will need to make sure the original copy can be readily produced upon demand.
Articles 39, 76	Register your presence (or place of residence) within 24 hours of arrival into China. This usually needs to be done at the nearest public security office (likely a police station). If you stay at a hotel, the hotel will register your arrival.
Articles 15-27, 71, 76	Do not let your visa expire. This one also seems straightforward, but it can easily happen where people forget to renew their visa and the time limit lapses. If this happens, go to your nearest visa office immediately and explain your situation to them. As you read above, being in China without a valid visa can subject you to fines, detention and/or deportation.
Articles 44, 77	Restricted foreigner areas. Some areas, on the basis of national and public security, will be restricted to foreigners and foreign institutions. If you see a sign or are told by an official, leave the area immediately. Restricted military areas. Military areas and buildings can pop-up unexpectedly, and the signs to show you are entering a restricted area may be inconspicuous (or not in English). There may be no signs at all. If you are approached by a military officer, be polite and apologize, and leave the area immediately. If an area is clearly military in nature, DO NOT, under any circumstances, point your camera at it or take pictures.
Articles 41-43, 80	Work permit. If you work in China, make sure you have a valid and appropriate work permit and work-type residence permit. Foreigners who work in China illegally will be fined, and possibly detained if the circumstances are serious. Individuals or entities who employ foreigners illegally will be fined, with any illegal gains confiscated by the state.
Articles 30-38, 78-79	Residence permit. If you live or plan to live in China, make sure you apply for the appropriate residence permit. Foreigners who reside in China illegally will first be given a warning, and fined (or possibly detained) if the circumstances are serious.
Article 3	This provision specifically states that foreigners in China shall abide by Chinese laws, and shall not endanger China's national security, harm public interests and disrupt social and public order.

Once you've entered China, it's important to remember that China's criminal law applies to both Chinese nationals and foreigners who commit crimes in the territory of China. Depending on your home country, what China defines as "criminal" may differ in regards to specific crimes as well as the forms of punishment it assigns to those crimes. Take a look at the chart below to review some of the relevant provisions of China's criminal law, including the application of the law to foreigners, specific crimes, and types of punishment.

Please note that this chart is by no means an exhaustive list of crimes or a complete summary of the criminal law. Additional information may be included in the specific article provisions cited below.

Criminal Law of the People's Republic of China:

PRC Article No.	Requirement
Articles 6-8	The criminal law is applicable to ALL persons who commit crimes within China (Chinese citizens and foreigners). This includes crimes aboard a Chinese ship or aircraft, or foreigners outside the PRC territory who commit crimes against China or its citizens.
Article 13-16	All actions that endanger the security of the state, undermine social and economic order, violate citizens' private property rights, or otherwise endanger society are crimes and will be criminally punished. There are some exceptions for negligent crimes or circumstances that are minor with minimal harm (but this is less clear).
Articles 32-37	Types of punishment. Principal punishment measures include criminal detention, fixed-term imprisonment, life imprisonment, and the death penalty. Supplementary punishment measures include fines and loss of political rights or property. If a victim suffers an economic loss due to the criminal act, you may need to pay criminal fines and compensate the victim for its loss. Deportation may apply to foreigners in a principal or supplementary manner.
Articles 102-113	Endangering national security. Collusion with foreign states or plots to undermine or harm the country will lead to fixed-term imprisonment, criminal detention, control. Acts that endanger national security, cause serious harms to the country and people, and are especially vile in nature will lead to the death penalty.
Articles 114-139	Endangering public security. While acts that cause explosions, poison, or other deadly means are more obviously criminal in nature, acts that sabotage public buildings or private property are also considered crimes. Depending on the severity of the crime, punishments include fixed-term imprisonment, life imprisonment and death.
Articles 151-157	Smuggling offenses. There are a number of smuggling restrictions, including arms and ammunition, nuclear materials, counterfeit currency notes, as well as obscene movies, books and articles for profits. You also cannot smuggle out of China any cultural relics, gold, silver and other precious metals, and rare plants and animals. Punishments include fines with imprisonment, and possible death (for extraordinarily serious offenses).
Articles 170-200	Undermining financial management and fraud. This includes counterfeit money, illegal money transfers or fraudulent loans, insider trading, and forging bank and other financial documents, issuing checks without guaranteed funds, and false insurance claims. Depending on the severity of the circumstances, punishments include fines, fixed-term imprisonment, life imprisonment, or death.
Articles 201-212	Tax Offenses. Individuals who work and conduct business in China are required to pay taxes. Refusing to pay the taxes due, or forging or falsifying business documents or sales invoices will subject you to stiff fines, forfeiture of property, and possible imprisonment.
Articles 213-220	Infringement of intellectual property rights. Companies and individuals who forge or sell merchandise without the registered trademark owner's permission, counterfeit others' patents, reproduce or distribute literary or artistic works without the copyright owner's permission, or steal trade secrets will be subject to fines and possible imprisonment.

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Article 232-262	Infringing upon the rights of the person. This includes murder, intentional and negligent death or injury of another, rape and sexual humiliation, kidnapping, abduction and trafficking of women and children, and extortion by force or torture. Depending on the severity of the crimes, punishments include criminal detention, fixed-term imprisonment, life imprisonment, or death.
Articles 263-276	Encroaching on property. Those who rob, steal, extort, misappropriate or illegally obtain another's property (or public or private money) will be subject to a harsh imprisonment term. Committing the crime with a lethal weapon will earn you more time.
Articles 277-304	Disrupting public order. If you assemble a crowd that disturbs public order, injures a person or public or private property, or somehow violates the peace of society, you will be looking at a strict imprisonment sentence. You also cannot burn, destroy, or otherwise insult the national flag or emblem of the PRC.
Articles 318-323	Disrupting administration at the border. Beyond sabotaging boundary markers or tablets, you also cannot provide fake or altered exit and entry documents (visas and passports) or secretly transport people across the border. Punishments include fines, criminal detention, and imprisonment.
Articles 347-357	Drugs. You cannot possess, sell, buy, transport or make drugs (including growing marijuana or opium poppy plants). Smuggling, trafficking, transporting or manufacturing drugs of large amounts will be punished by 15-years of fixed-term imprisonment, life imprisonment, or death sentence (see the Case Summary below).
Articles 358-367	Prostitution and obscene materials. No form of prostitution is legal anywhere in China. The obvious crimes prohibiting the organization or force of prostitution will carry a high fixed-term imprisonment or life imprisonment. However, you also cannot engage in prostitution whatsoever, "visit a whorehouse" (exact language of the law), or distribute or sell pornography or other obscene materials. These crimes carry punishments of fines, criminal detention or surveillance, or imprisonment.
Articles 382-396	Bribery. Accepting bribes that misappropriate public funds or involve other illegal activities is a crime. Demanding a bribe will carry a heavier punishment.

As you can see from this list, similar to many other countries, China has a long list of crimes to protect its citizens and safeguard social order. Beyond this list, Chinese authorities also operate under another section of law – the **Law of the People's Republic of China on Public Security Administration**. Public indecency, physical brawls, and other disruptions to society, public safety, or the lawful rights and interests of citizens all fall under this section of law. We have heard reports that foreigners who get into trouble in China are often cited with violating sections of this law. As a foreigner, you must understand that, regardless of how much you stand out in the Chinese crowd, the authorities simply want to ensure public order is always maintained. They demand it of their own citizens, but they also expect it from every visitor to their country.



So, what happens if you are stopped by the police or arrested?



Besides knowing the law and the types of activities you should refrain from, it is just as important to understand China's judicial system and the legal procedure it employs to carry out its laws.

THE LEGAL PROCEDURE

The law affords the police and public security agencies a great deal of discretion to maintain public safety and order. Foreigners may be stopped and required to provide proper identification documents (passport, permits) upon demand, and random drug test are not uncommon if the police suspect you of drug possession or sale. We've heard a reports that establishments frequented by foreigners and/or suspected of drug sales have been subject to late-night police raids.

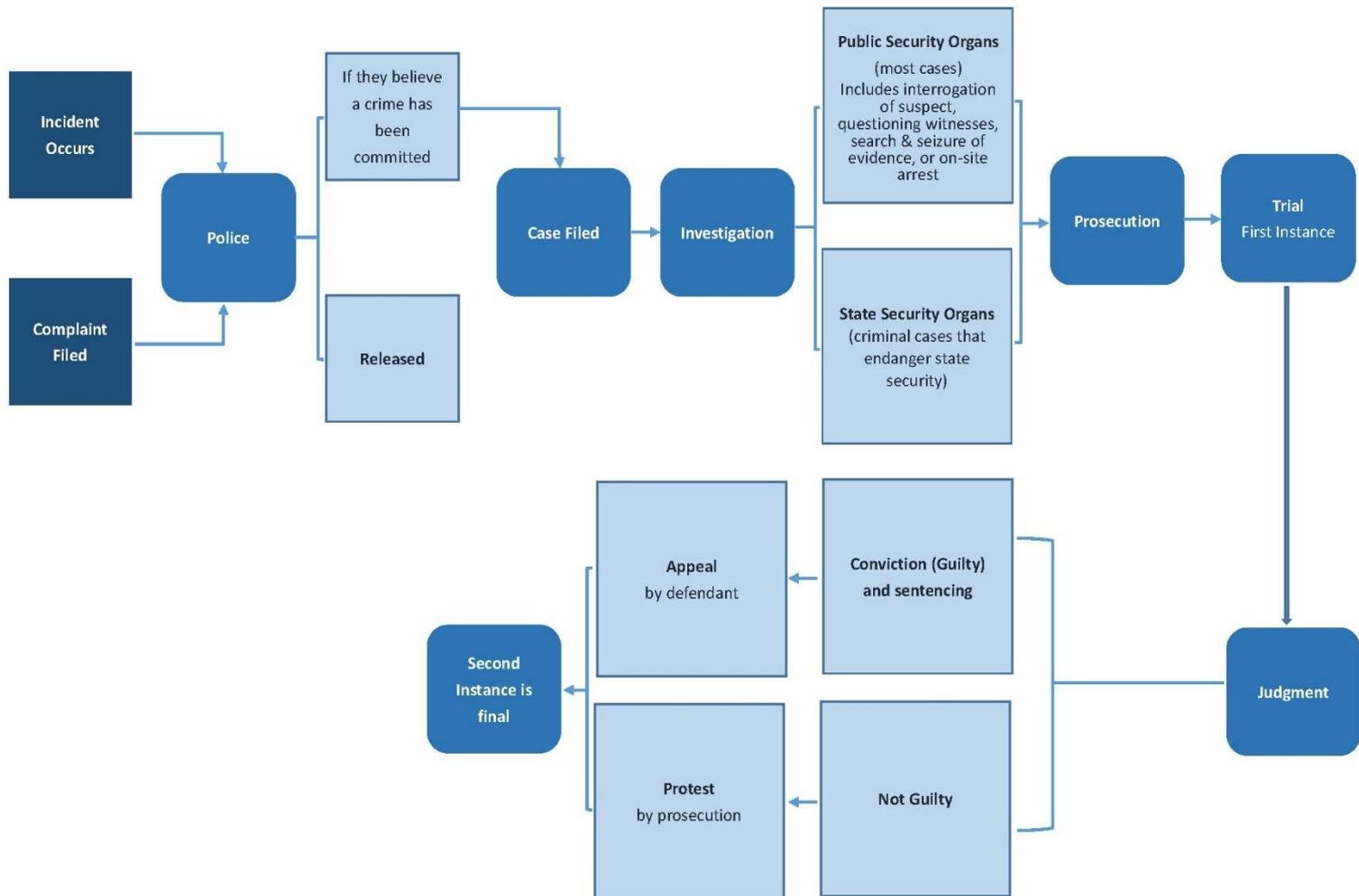


COMPARISON OF CHINA'S LAWS TO OTHER COUNTRIES:

The Chinese criminal law system may be significantly different than the criminal law system of your home country. For example:

- Similar to many other western countries, China's law includes a **presumption of innocence** (meaning a person shall not be found guilty without being judged by a people's court of law), and the **right to defense** (meaning the defendant has the right to defend the case himself or through counsel). However, unlike these countries, China does NOT recognize the **right to remain silent**. The Chinese authorities will require you to cooperate in the investigation process and answer all relevant questions, and you will be provided an interpreter if you are unable to communicate in Chinese.
- China's law does recognize the **privilege against self-incrimination**, meaning the investigators cannot compel or force a suspect to confess to the crime. Recent Chinese regulations have banned forced confessions or other evidence obtained through illegal methods (like threat, torture or subterfuge).
- China's law incorporates the defendant's **right to a fair trial**, including the **right to a public trial**, and the **right to challenge the panel**. In China, the basic people's courts are heard by one judge; and the intermediate and higher people's courts are heard by a collegial panel of judges, or a mix of judges and lay assessors. In common law jurisdictions, the right to be tried by a jury is a constitutional right. However, in China, the decision to have law assessors on the panel is a judicial decision (the defendant has no right to apply for the use of assessors).
- Economic crime is broader in China. Business disputes between two parties are likely treated as a civil matter in the U.S. and Europe. However, some business matters in China may be subject to criminal enforcement, including the sale of defective goods, or the refusal to return a deposit.

The diagram below provides a very general (and simplified) illustration of China's criminal legal procedure.



China has four levels of courts. The highest judicial level is the **Supreme People's Court** located in Beijing. In every province, there is a **High People's Court**, which functions as the second highest judicial level. Thereafter, there are the **intermediate people's courts** and the **primary people's courts**. Generally, the primary people's courts have jurisdiction over all ordinary criminal cases, except those cases that fall under the jurisdiction of the people's courts at higher levels. In more developed cities like Beijing, Shanghai, Guangzhou, etc., less serious criminal offenses involving foreigners will be heard by a preliminary court designated by the local intermediate or high people's court in the place where the crime was committed. Typically, the preliminary court is the district court, as it is set-up and operated in a given district of a city (or a given county in a province). In a remote or rural area, a less criminal offense involving a foreigner may be heard by an intermediate court.

Once the court in the first instance trial issues its judgment, the defendant can either appeal or the prosecution can protest the court's decision. In 2015, Chief Justice and CCP Central Committee member, Zhou Qiang, announced at the National People's Congress that China's criminal conviction rate had dropped to 99.92%, however, by 2017, the criminal conviction rate had increased to 99.99%. Mr. Zhou Qiang addressed the 1,376 criminal cases retried and

amended (0.0012% of the criminal cases), stating that the Chinese courts would “strengthen [their] responsibilities in handling cases and improve legal procedures to prevent wrongful convictions.” Nonetheless, given the high likelihood of conviction in China, it’s important you (and your attorney) consider plea deals, reduced sentencing, or other means of resolution before your case goes to trial.

“China always protects the legitimate rights and interests of foreigners in China. But they should also abide by all Chinese laws and regulations.”

China Foreign Ministry

In addition to the high conviction rate, it is also important to note that China’s law includes more than 50 crimes punishable by death (over 30 of which are non-violent offenses, including drug trafficking, smuggling weapons, ammunition, nuclear materials or counterfeit currency, and raising funds by means of fraud).

Foreigner cases with the death penalty that receive the most media attention appear to be drug-trafficking related. Other countries with the death penalty for drug-trafficking include Iran, Saudi Arabia, Indonesia, Myanmar and Singapore. And while China is known to have one of the lowest homicide rates in the world, as well as an overall crime rate (compared to the U.S. and European countries), Amnesty International indicates the death penalty is highest here.



The chart above provides only an estimate of China’s executions. Each year, the exact number of death sentences and executions are unknown and unreported.

CASE STUDY

In July 2014, a young foreigner was approached by an international drug ring and convinced to carry a suitcase out of Guangzhou’s Baiyun Airport. Customs officials found nearly 9 kilograms of methamphetamine (“ice”) hidden in the inner lining of the suitcase, and the foreigner was detained on a criminal charge of drug smuggling. In December 2016, the Guangzhou intermediate people’s court convicted the foreigner and imposed the death penalty with immediate execution. Our firm’s partner, Jiang Guoyong, and his criminal defense team appealed the case to the High Court of Guangdong Province, and in February 2017, the High Court suspended the death sentence for two years.

The death penalty with immediate execution is required to be executed within 7 days of the order from the supreme people’s court (if it has reaffirmed the death sentence). However, in some cases, the execution of the death sentence may be postponed due to the discovery of specific legal facts (like an error in judgment, or new facts regarding the defendant that merit revision) or suspended. In this case, the second instance court revised the death penalty to a two-year suspension. This means, if the defendant does not commit a crime within the two years of his sentencing, his sentence could be commuted to life imprisonment 3 years after which the life imprisonment sentence could be reduced to 25 years, and every 2 years thereafter, it could be further reduced from 6 months to 2 years depending on the performance of the defendant.. You can see, from this case example, that drug smuggling and drug-related crimes are a serious issue in China, and having a good criminal defense team can literally save your life.

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In the event you are arrested or detained, the following checklist will provide you some important information and considerations.

Checklist of considerations should you be arrested or detained in China:

<p>1. <i>Contact your embassy or local consulate for assistance. Your embassy or consulate may be able to help you with the following:</i></p>
<p>(a) Providing you with a list of local attorneys who speak your native language;</p> <p>(b) Contacting your family, friends, and employer;</p> <p>(c) Visiting you in jail (or detention) and providing you with reading materials or food;</p> <p>(d) Monitoring your situation in jail (or detention) and helping to ensure you are treated appropriately;</p> <p>(e) Providing you with an overview of the local criminal justice process.</p>
<p>2. <i>Hire a local (Chinese) criminal attorney. You will NEED this:</i></p>
<p>(a) It is absolutely critical to hire a good LOCAL criminal lawyer as quickly as possible. Often times the detainee's family or friends may believe the arrest was a "mistake" and no lawyer is need to handle the case. Some may claim they do not need a lawyer because they "know someone" with sufficient <i>guanxi</i> to handle the case lawyer-free. Even if they are right (which they rarely are), it is in your best interests to hire a LOCAL criminal attorney immediately who knows the laws and procedure, and will work efficiently to effectively handle your case.</p> <p>(b) Many Chinese criminal attorneys will require a relatively low upfront flat fee to take on a new matter for a new client. This means it may easy to find a reasonably priced Chinese lawyer, but few may speak English (or your native language). Our firm has a group of specialized and highly-qualified criminal defense lawyers with an abundance of experience in all levels of China's courts and judicial systems. Our criminal defense team also speaks both Chinese and English, and offers competitive rates within the local market. Contact the authors of this article at burgett@wjnc.com or jiangguoyong@wjnc.com for additional information.</p> <p>(c) How to find a local criminal attorney for your case:</p> <p>(i) Contact your embassy or local consulate (see above);</p> <p>(ii) Contact a Chinese lawyer for referrals or recommendations;</p> <p>(iii) Contact the authors of this article at burgett@wjnc.com and jiangguoyong@wjnc.com. Our firm has offices in Guangzhou, Beijing, Shanghai, Tianjin, Qingdao, Xiamen and Shenzhen, and has worked successfully on individual cases with various consulate authorities throughout China.</p>
<p>3. <i>Hire an attorney in your home country. You may SOMETIMES need this:</i></p>
<p>(a) More often than not, you will not need a lawyer from your home country. The foreign attorney will be able to do little more than provide you with some tips, or helping you find a local Chinese criminal attorney and translator.</p> <p>(b) Keep in mind a foreign attorney from your home country may have little to no understanding of China's laws or criminal legal procedure. While a Chinese attorney may recommend a plea deal to avoid a higher sentence, a foreign attorney may find this advice to be ridiculous if they aren't aware of China's 99% conviction rate. Make sure there are open lines of communications amongst your lawyers so that both of them understand what needs to be done to effectively manage your case.</p> <p>(c) However, on more complex or higher sentencing cases, a foreign attorney may be able to do much more, including:</p> <p>(i) Finding you a top-tier local criminal attorney and serving as an intermediary;</p> <p>(ii) Serving also as an intermediary with the embassy or consulate;</p> <p>(iii) Gathering key mitigating documents from your home country or other countries outside of China;</p>

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- (iv) Explaining the China legal system in comparison to your home countries' legal system, as well as any benefits to admitting to the crime(s) charged and the procedures for sentencing, early release, or rehabilitation.

4. *Contact your family and friends but keep them quiet.*

- (a) Often times, a detainee's family and friends on the outside will want to scream up and down about the arrest (or detention) and go straight to the media. This is not always the best idea (and may sometimes make the situation worse). China is not going to release you simply because your hometown newspaper or social media outlets are saying you are innocent and being held unfairly. It is generally a good idea NOT to publicize your case unless your local criminal attorney instructs you to do so.

China is no different from other countries that regulate foreign visitors and require people in their country to abide by the laws. Even as a foreign traveler, you can likely appreciate some (if not all) of your home country's laws to protect its citizens from harm. Tourists that travel to your home country acting in a disrespectful or offensive manner, desecrating landmark sites, getting into bar fights, or illegal behavior are not well tolerated or appreciated, right? So, when you come to China, we hope that you can keep that in mind. China's legal system may be strict, but the country is resolute in its commitment to protect all people (citizens and foreigners) from harm and social disorder. Stay on the right side of the law and show your respect. China will be a lot more enjoyable that way.

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