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違憲審查與行政訴訟

湯德宗、王鵬翔

主編

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違憲審查與行政訴訟

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出版序

「大陸與港澳法律發展」為本所籌設諮詢委員會經再三研議後，載在「設所規劃書」中的六大重點研究領域之一。兩岸四地（台灣、大陸、香港、澳門）本同文同種，只因歷史偶然而繼受、發展出多元法律制度，形成豐富法律文化；且兩岸四地交流日益頻繁，衍生許多獨特法律問題，亟待研究解決，實乃「區域法律研究」(area legal study) 的絕佳場域。

然而，所謂「區域法律研究」畢竟是個嶄新的研究領域，其內涵及方法仍待摸索。因此我在就任籌備處主任之後，隨即開始多方請教高明，並積極聯繫北京大學、清華大學、華東政法大學、中山大學、香港大學、澳門大學及吉林大學等各校的法學院領導，組成「策劃委員會」(steering committee)，研議規劃每年輪流舉辦「兩岸四地法律發展學術研討會」事宜。承各方熱烈支持，首次會議「2006兩岸四地法律發展學術研討會」由本所於2006年6月2日、3日假本院學術活動中心第一會議室舉辦，以兩岸四地的「司法制度」為主題，分為「違憲審查」、「行政訴訟」、「刑事訴訟」及「民事訴訟」等四個場次，計有來自大陸、香港、澳門法界代表60餘人及台灣本地學者專家總計近200人參加，盛況空前，為兩岸四地區域法律研究邁出了成功的第一步。

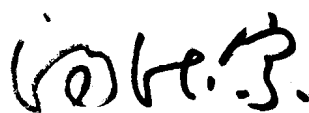
本次會議從我於2005年11月赴大陸會晤各校領導，敲定會議時間、主題及邀請撰稿、評論人選名單起算，籌備過程長達半年。為了確保會議品質，樹立學術典範，本所組成專案小組，函詢各地學者與會意願，先後經過「提交會議論文摘要」、（入選者請限期提出論文初稿供）「論文初稿篩選」、（按各場次選定二至三篇，即請開

始撰寫論文定稿供)「論文複選」(各場次選定論文一篇為會議論文,其餘邀請擔任評論人)等三個階段,是獲邀發表論文、評論者皆一時之選。為促進交流、鼓勵對話,本次會議採取(不同地區)交互評論的方式,並請評論人備妥書面評論文發表。因此會議討論十分精采而熱烈。

本書為「2006兩岸四地法律發展學術研討會」中發表之論文及評論文,由各作者參酌會議討論意見修改後正式投稿,繼由本所送請學者專家進行開放式審查,再由作者按審查意見再予修改,最後經送本所「出版委員會」審議通過,始集結成為上、下兩冊專書,列為本所「法學叢書」之首。本書上冊收錄「違憲審查」與「行政訴訟」,下冊收錄「民事訴訟」與「刑事訴訟」之會議論文及評論文,希能完整呈現兩岸四地四種訴訟制度的由來、現況與展望;至於將論文與評論文並列,則是希望能由不同觀點,相互激盪出智慧的火花,深化學術交流。承蒙吳庚(司法院優遇大法官、台灣大學政治學系教授)、陳弘毅(香港大學法學院教授)、曾華松(司法院優遇大法官)、彭鳳至(司法院大法官)、駱永家(台灣大學法律學院名譽教授)、雷萬來(前台北大學司法學系教授兼系主任)、朱石炎(前司法官訓練所所長、政治大學法學院兼任教授)及陳運財(東海大學法律學系教授)等法學先進,分別擔任上述四場次論文及評論文之審查,備極辛勞,特此致謝。本書問世承蒙本次會議執行秘書王鵬翔博士(本所助研究員)、會議專案助理黃瑞亞小姐及本所編輯助理蕭旭東先生、徐威心小姐等協力甚多,併此致謝。

本次會議期間「策劃委員會」作成決議:2007年(預計11月)由廣州中山大學主辦;2008年由香港大學主辦;2009年由澳門大學主辦;2010年輪回由本所主辦;2011年由北京大學主辦。猶記會議閉幕時,我曾引宋儒張載的名言:「為天地立心,為生民立命,為往聖繼絕學,為萬世開太平」,與各地與會同仁共勉。我們由衷地

期望，今後能夠經由這個難得的平台，每年一會，相互交流，繼續共同探索區域法學研究的走向與方法，讓兩岸四地的法學研究，深耕茁壯、永續發展，為兩岸人民謀求福祉，為四地法學開創新局！



湯德宗

中央研究院法律學研究所籌備處主任

2007年7月

Preface

The “Law Developments of Mainland China, Hong Kong and Macau” is one of the six core research fields designated in the Foundation Plan for Institutum Iurisprudentiae, Academia Sinica (IIAS) by her Founding Advisory Committee after careful deliberation. Although Taiwan, mainland China, Hong Kong, and Macau share a common linguistic and ethnic background, the vicissitudes of history made these four regions diverge and develop variant legal systems. As a consequence, the legal culture in this huge area is unusually rich. Besides, the exchanges among these four regions are increasingly frequent, causing many unique legal problems to be studied and resolved. For these and other reasons, the Four Regions across the Taiwan Strait become an ideal ground for conducting area legal studies.

However, as this constitutes a new field of research, the meaning and methods of this “area legal study” are not quite clear yet. So, after becoming the director of the Preparatory Office of Institutum Iurisprudentiae at Academia Sinica, I immediately began to consult experts. I started contacting the leaders at the law schools at Peking University, Tsinghua University, East China University of Political Science and Law, Sun Yat-Sen University at Guang Zhou, University of Hong Kong, University of Macau and Jilin University, to organize a steering committee for holding a series of annual academic conferences on the legal developments in these Four Regions. Thanks to the wide support we received, the “2006 Conference on the Law Developments in Taiwan, mainland China, Hong Kong, and Macau,” the first of this series, was

held at Academia Sinica, Taipei, Taiwan, on June 2nd and 3rd, 2006. The theme of the 2006 Conference was the “judicial system” of these four regions; the Conference was divided into four sessions focusing on judicial review of constitutionality, administrative litigations, criminal trials, and civil litigations, respectively. About 60 of the 200 participating scholars came from mainland China, Hong Kong, and Macau. The unprecedented success of this Conference constituted the first step toward the “area legal study” of the Four Regions across the Taiwan Strait.

From November 2005 when I went to mainland China to meet the leaders of law schools there, negotiate an appropriate time, forum and theme for the Conference, and inquire into a list of possible paper presenters and commentators, it took half a year to prepare the Conference. In order to ensure the high quality of this Conference and to set an academic benchmark for the future, Institutum Jurisprudentiae (Preparatory Office) formed a task force. The task force first inquired into the possible scholars in these four regions for their willingness to participate. Then, the scholars who were inclined to participate were asked to submit an abstract of their paper to be presented in the Conference for preliminary screening. Up to three candidates from each of the four regions per session were then invited to submit their preliminary papers for second screening. Finally, one paper written by these two or three candidates from each of the four regions was selected as the Conference paper for each session, and the authors of other papers were invited to become commentators. These three phases of screening ensured that all presenters and commentators ranked among the best in their fields. Besides, in order to promote exchanges and encourage dialogues, the commentators were kindly asked to comment on the papers about different jurisdictions and also to prepare their comments in writing. It

turned out that the elites of the legal circles of Taiwan, mainland China, Hong Kong, and Macau had a fruitful and enjoyable discussion and deliberation.

This book includes the academic papers and comments originally presented at the “2006 Conference on the Law Developments in Taiwan, mainland China, Hong Kong, and Macau”. After the Conference, the authors, taking the comments and discussion in the Conference into consideration, revised their papers and comments and formally submitted them for publication. Institutum Jurisprudentiae then asked several renowned scholars and experts to review these papers and comments by providing suggestions for further revision. Responding to these suggestions, authors were requested to revise their papers and comments again. Then, the Editorial Board of Institutum Jurisprudentiae approved these papers and comments for publication.

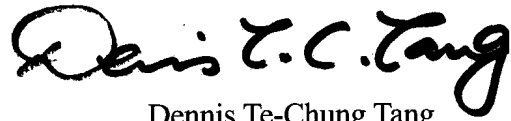
This book is composed of two volumes. Volume One contains papers and comments from the sessions on judicial review of constitutionality and administrative litigations, while Volume Two encompasses papers and comments from the sessions on civil litigations and criminal trials. We hope the two volumes will present a comprehensive picture of the genesis, status quo, and future prospects of four different kinds of litigations, i.e., judicial review of constitutionality, administrative litigations, civil litigations, and criminal trials, in Taiwan, mainland China, Hong Kong and Macau. In order to ignite sparks of wisdom in light of the various viewpoints and to facilitate deepened academic exchanges, we put the papers and comments in this two-volume book back to back.

On behalf of Institutum Jurisprudentiae, I would like to thank Tai-

wan's Former Grand Justice and Emeritus Professor Wu Geng, Professor Chen Hong-Yi of Hong Kong University, Taiwan's Former Grand Justice and Emeritus Professor Ceng Hua-song, Taiwan's Grand Justice Dr. Peng Feng-zhi, Emeritus Professor Luo Yong-jia, Emeritus Professor Lei Wan-lai, Taiwan's Former Director of Training Institute for Judges and Prosecutors Zhu Shi-yan, and Professor Chen Yun-tsai, for their kind assistance in reviewing the papers and comments collected herein. I would like to express appreciation to my colleague Dr. Wang Peng-Hsiang, Assistant Research Fellow of this Institute as well as Executive Secretary for the Conference, Ms. Huang Rui-ya, Special Assistant for the Conference, and Mr. Xiao Xu-dong and Ms. Xu Wei-xin, both assistants at the IIAS Publication Office for their dedication for the publication of the book.

During this Conference, the Steering Committee made the following resolutions: (1) the "2007 Conference on the Law Developments in Taiwan, mainland China, Hong Kong, and Macau" will be held in November at the Sun Yat-Sen University in Guang Zhou; (2) the 2008 Conference will be held at the University of Hong Kong; (3) the 2009 Conference will be held at the University of Macau; (4) the 2010 Conference will again be held at Institutum Jurisprudentiae; and (5) the 2011 Conference will be held at the Peking University. At the conclusion of the 2006 Conference, I recited a famous quote from Zhang Zai, a famous Confucian scholar of the Northern Song dynasty, to suggest the goals for the participants to pursue: "Searching for the balanced spirit between the environment and humankind, inspiring the lives of the ordinary people, passing on and further exploring the wisdom of the sages of the past, creating a peaceful world for coming generations." From the bottom of our hearts, we hope more and more scholars could use this precious plat-

form to meet once a year and exchange ideas. The continued and joint endeavors by us scholars in search of the proper direction and method of “area legal study”, we believe, can advance the legal scholarship in Taiwan, mainland China, Hong Kong, and Macau, and improve the lives of the ordinary people in these regions.

A handwritten signature in black ink, reading "Dennis T.C. Tang". The signature is fluid and cursive, with the first name "Dennis" written in a larger, more prominent script than the last name "Tang".

Dennis Te-Chung Tang

Director

Institutum Jurisprudentiae (Preparatory Office)

Academia Sinica

July 2007

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