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2010



# 兩岸四地法律發展

法學教育與法治教育

上冊

湯德宗、鍾 騏  
主 編

中央研究院 法律學研究所

中央研究院法律學研究所

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法學叢書系列之三

# 2010 兩岸四地法律發展

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湯德宗、鍾騏

主編

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Legal Education for  
Lawyers and the Public

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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過審慎研議之後，載在本所〈設所規劃書〉中的六大重點研究領域之一。蓋兩岸四地（台灣、大陸、香港、澳門）本同文同種，只因歷史之偶然，而繼受並發展出多元法律制度，形成豐富法律文化；復以兩岸四地交流日益頻繁，衍生許多特有法律問題，亟待研究解決，實「區域法律研究」(area legal study)之絕佳場域。

惟所謂「區域法律研究」終究是個嶄新的研究領域，其內涵及方法尚待摸索。是本所籌備處成立後，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校法學院領導，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」於 2006 年 6 月 2 日、3 日順利在台北召開，以兩岸四地「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，研討會論文於會後經審查出版為《2006 兩岸四地法律發展》上、下兩冊。2007 年第二次會議由廣州中山大學舉辦。2008 年第三次會議由香港大學舉辦，會議論文於 2009 年集結為《兩岸四地法律發展與互動》一書出版。2009 年第四次會議由澳門大學舉辦，並由澳門大學法學院高級法律研究所於 2010 年將研討會論文集結出版《法學論叢》第 13 期。「2010 兩岸四地法律發展學術研討會」再次輪由本所主辦，計有來自大陸、香港、澳門法界代表 120 餘人，及台灣本地學者專家總計近 400 人參加。目睹兩岸四地 5 年來持續舉辦法律發展學術研討會，且欣欣向榮，倍感欣慰。

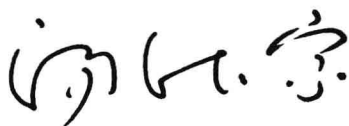
本次會議之籌劃始自 2009 年夏天。首先確定會議主題為「法學教育」，並分為「法律專業學校教育」、「法律專業職前教育」、「法律專業在職教育」、「社會大眾法治教育」等四個子題；隨即製作「徵稿啟事」，展開宣傳，公開徵稿。其次，為確保論文之品質，由本所陳淳文教授（本所與臺大政治系合聘）、王鵬翔教授（本所助研究員，時任成功大學法律學系助理教授）、黃丞儀教授（本所助研究員）、鍾騏教授（本所助研究員）與我等 5 人，組成「籌劃委員會」，前後經過三次（階段）評選——即「提交會議論文摘要」（2010 年 1 月 15 日截止收件，共收到 120 篇摘要，選出 32 篇）；「提交論文初稿」（請摘要入選者於 3 月 31 日前，提出論文初稿，嗣選出論文初稿 22 篇）；「提交論文定稿」（請入選者開始撰寫論文定稿，5 月 15 日截止收件，按各場次主題選出會議論文，其餘邀請擔任評論人），是獲邀發表論文與評論者，皆為一時之選。鑑於會議場次有限，為稍減遺珠之憾，「策劃委員會」決定在大會論文集集中特別收錄論文 4 篇。另，若干場次主題之來稿較少，「策劃委員會」乃主動邀稿，希儘量兼顧兩岸四地法學教育各個面向。為促進交流、激勵對話，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稿，會議討論熱烈。

本書收錄「2010 兩岸四地法律發展學術研討會」論文 28 篇及評論文 32 篇。皆作者參酌會議討論意見修改後投稿，繼由本所送請學者專家採開放式審查，再將審查意見送請作者參考改正，最後集結成本書上、下二冊，列為本所「法學叢書」之三。至盼本書能忠實而完整地呈現兩岸四地法學教育與法治教育的現況與展望，為持續深化兩岸四地學術交流略盡棉薄。

本書並收錄會議主題演說人 Jacques deLisle（戴傑）教授（美國賓夕法尼亞大學法學院教授暨該校東亞研究中心主任）主題演說“The Internationalization of Law and Implications for Legal Education: Lessons from Interactions Between the American and Chinese Legal

Worlds”全文，希有助拓展吾人法學教育之視野。另，承蒙戴東雄（司法院前大法官、臺灣大學法律學院名譽教授）、施文森（司法院前大法官、前政治大學法律系系主任、政治大學法學院與商學院風險管理與保險學系兼任教授）、吳庚（司法院前大法官、台灣大學政治學系兼任教授）、林雅鋒（考試院考試委員、曾任地方法院院長）、朱石炎（前司法官訓練所所長、東吳大學法學院兼任客座教授）、范光群（司法院前祕書長、律師、臺北大學法律學院名譽教授）、蘇俊雄（司法院前大法官、臺灣大學法律學院名譽教授）及王仁宏（臺灣大學法律學院名譽教授、高雄大學首任校長）等諸位法學先進，惠允擔任審查，備極辛勞，特此致謝。

本次會議執行秘書鍾騏博士（本所助研究員）、副執行秘書張永健博士（本所助研究員）及許家馨博士（本所助研究員）、專案助理陳珮蓉小姐及本所出版室助理葉欣怡小姐、陳妍小姐等，於本書問世協力甚多，併此致謝。



特聘研究員兼所長

2011年9月

## Preface

The “Law Developments of Mainland China, Hong Kong, and Macau” is one of the six core research fields designated by its Founding Advisory Committee in the Founding Proposal for Institutum Iurisprudentiae, Academia Sinica (IIAS). Although Taiwan, Mainland China, Hong Kong, and Macau share a common linguistic and ethnic background, the vicissitudes of history made these four areas adopt and develop different legal systems and legal cultures. Besides, although the exchanges among these four areas become increasingly frequent, some unique legal problems that arise have not yet been studied and resolved. For these reasons, Taiwan, Mainland China, Hong Kong, and Macau offer a fertile ground for conducting area legal studies.

However, as “area legal study” constitutes a new field of research, its meaning and methods are not yet quite clear. After being appointed as the director of the Preparatory Office of the IIAS in 2004, I began to consult the scholars and experts working in relevant fields. In 2005, I and the deans of the law schools at Peking University, Tsinghua University, East China University of Political Science and Law, Sun Yat-Sen University at Guangzhou, University of Hong Kong, University of Macau and Jilin University, agreed to form a steering committee for holding academic conferences annually to explore and examine the legal developments in Taiwan, Mainland China, Hong Kong, and Macau. Thanks to the wide support we received, the inaugural conference, the “2006 Conference on the Law Developments in Taiwan, Mainland China, Hong Kong, and Macau” was held at Academia Sinica in June



2006. The theme of the 2006 Conference was “judicial system,” and was further divided into four narrower sub-themes—judicial review of constitutionality, administrative litigations, criminal procedure, and civil procedure. Afterwards, conference articles went through peer review and were formally published in a two-volume book “2006 Cross-Strait, Four Region: Law Developments in Taiwan, China, Hong Kong, and Macau” by the IIAS in 2007. The 2007 Conference was held at Sun Yat-Sen University at Guangzhou. The 2008 Conference was held at the University of Hong Kong, and the articles presented at the 2008 Conference were published in the book “Cross-Strait, Four-Region Legal Developments and Interactions.” The 2009 Conference was held at the University of Macau, and the articles presented in that conference were published in Número 13 of *Cadernos de Ciência Jurídica*, a journal of the *Instituto de Estudos Jurídicos Avançados*, The Faculty of Law, the University of Macau. The 2010 Conference was again hosted by the IIAS. Approximately 120 of the 400 conference participants came from Mainland China, Hong Kong, and Macau. It is a great pleasure to see the four regions holding academic conferences annually without interruption.

The IIAS began to prepare for the 2010 Conference in summer 2009. First of all, the theme of the 2010 Conference was set to be “legal education,” which was further divided into four sub-themes—professional school education, professional qualification and training, continuing professional education, and legal education for the general public. Then a call for papers was widely circulated. In order to ensure the quality of the articles presented at the 2010 Conference, the IIAS established a preparatory committee to take charge of the three-phase selection of conference articles. The preparatory committee consists of

five members: Dr. Chwen-Wen Chen, Associate Professor at the Department of Political Science, National Taiwan University, and Co-employed Associate Research Professor of this Institute, Dr. Peng-Hsiang Wang, now Assistant Research Professor of this Institute and then Assistant Professor at the Department of Law, National Cheng Kung University, Dr. Cheng-Yi Huang, Assistant Research Professor of this Institute, Dr. Chi Chung, Assistant Research Professor of this Institute, and myself. First, all interested scholars were kindly invited to submit abstracts of their articles for preliminary screening. By the deadline, January 15, 2010, the preparatory committee received 120 abstracts, 32 of which were selected. Their authors then were asked to submit their first drafts by March 31, 2010 to the preparatory committee for the second-round screening. A total of 22 first drafts were selected. Finally, the preparatory committee reviewed the full-length articles received by May 15, 2010, invited some authors to present their articles, and other authors to be commentators. The three phases of screening and selection ensured that all presenters and commentators are indeed the best in their respective fields. In light of the time limits imposed by the Conference (two days) and for the purpose of encompassing the most comprehensive and diverse perspectives as possible, the Committee decided to include four articles in the Conference Materials, in addition to the 24 articles to be presented in the Conference. Furthermore, for the sub-themes that attracted fewer submissions, the Committee decided to reach out to the experts by inviting papers. In order to promote exchanges and encourage dialogues, the commentators were asked to comment on the articles about jurisdictions that were different from their own, and also to prepare their comments in writing in advance. Consequently, the discussions at the Conference turned out to be most fruitful and enjoyable.

This book includes the 28 articles and 32 comments originally presented at the “2010 Conference on the Law Developments in Taiwan, Mainland China, Hong Kong, and Macau.” After the Conference, the authors considered the comments and discussions in the Conference and were offered an opportunity to revise their articles and comments. Then, the IIAS asked several renowned scholars and experts to review all the articles and comments. After receiving the review opinions, the authors had the opportunity to again revise their articles and comments. We hope this book presents faithfully the status quo and future prospects of the legal education in Taiwan, Mainland China, Hong Kong, and Macau, and facilitates the continued academic exchanges between the four regions.

Proudly, the keynote address of the 2010 Conference, “The Internationalization of Law and Implications for Legal Education: Lessons from Interactions Between the American and Chinese Legal Worlds,” delivered by Jacques deLisle, Stephen A. Cozen Professor of Law at the University of Pennsylvania Law School, and Director of the Center for East Asian Studies at the University of Pennsylvania, is also included in this book to enrich our understanding of legal education. In addition, I would like on behalf of the IIAS to thank the following eight distinguished scholars and experts for their kind assistance in reviewing the articles and comments: Tong-Hsiung Tai (former Grand Justice; Professor Emeritus of the College of Law, National Taiwan University), Wen-Sen Shi (former Grand Justice; former Dean of the College of Law, National Chengchi University), Geng Wu (former Grand Justice; Adjunct Professor of the Department of Political Science, National Taiwan University), Ya-Feng Lin (Minister without Portfolio, Examination Yuan; former President of Tainan District Court), Shih-Yen Chu

(former Director of the Training Institute for Judges and Prosecutors; Adjunct Visiting Professor of Law, Soochow University School of Law), Kuang-Chun Fan (former Secretary General of the Judicial Yuan; an experienced attorney; Professor Emeritus of the College of Law, National Taipei University), Jyun-Hsiung Su (former Grand Justice; Professor Emeritus of the College of Law, National Taiwan University), and Jen-Huong Wang (Professor Emeritus of the College of Law, National Taiwan University; former President of the National University of Kaohsiung).

Finally, I would like to express my sincere appreciation to the Executive Secretary for the Conference, Dr. Chi Chung, Assistant Research Professor of this Institute, and two Vice Executive Secretaries for the Conference, Dr. Yun-Chien Chang, Assistant Research Professor of this Institute, and Dr. Jimmy Chia-Shin Hsu, Assistant Research Professor of this Institute, Ms. Pei-Rong Chen, Special Assistant for the Conference, and Ms. Hsin-I Yeh and Ms. Yen Chen, both assistants at the IAS Publication Office, for their dedication to the publication of the book.



Dennis Te-Chung Tang

Director & Distinguished Research Professor  
Institutum Iurisprudentiae  
Academia Sinica  
September 2011

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