# A Model for Solving Legal Problems Between Taiwan and the Mainland

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During the forty years of political division between Taiwan and the mainland,[1] several specific legal problems have eluded reasonable and effective solutions. Chief among these is the issue of inheritance for people on both sides of the Taiwan Strait. Lately, however, all kinds of complicated civil, criminal, and business law problems have surfaced because of the recent acceptance by both governments of open communication between the people on Taiwan and the mainland. Both governments face the urgent task of solving these problems and promulgating legal regulations. This article will analyze and investigate the special characteristics and reasons behind the formation of the legal problems concerning the two sides and will also propose solutions to the problems.

It must be emphasized that while the two sides are currently politically separated, they each claim that their domestic laws apply to citizens on the other side of the Taiwan Strait. There are numerous mainland Chinese laws that include Taiwan in their scope of applicability. For example, the preamble to the Constitution of the People's Republic of China explicitly states: "Taiwan is part of the sacred territory of the People's Republic of China."[2] Other mainland laws currently in effect which purport to extend their scope to Taiwan include: PRC Criminal Law, article 3;[3] the General Principles of the Civil Code, article 8;[4] and the Individual Income Tax Law, article 1.[5] Like-

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1. In order to avoid political controversy arising from this matter, this article specifically uses the two geographic names, Taiwan and mainland China, to represent the two current political entities.

2. ZHONGHUA RENMIN GONGHEGUO XIANFA (Constitution of the People's Republic of China) preamble (1982).

3. The Criminal Law of the People's Republic of China stipulates that it is applicable to offenses committed "[w]ithin the territory of the People's Republic of China" except for those offenses specially provided for by other laws. Zhonghua Renmin Gongheguo Xingfa (The Criminal Law of the People's Republic of China) art. 3, sec. 1 (adopted July 1, 1979) LAW IN THE PEOPLE'S REPUBLIC OF CHINA 945 (1989).

4. This article of the General Principles of the Civil Code provides: "except as otherwise stipulated by law, the law of the People's Republic of China shall apply to all civil activities within the People's Republic of China." Zhonghua Renmin Gongheguo Minfa Tongze (The

wise, the current laws in Taiwan are, in principle, applicable in scope to all areas in mainland China. For example, article 3 of Taiwan's current Criminal Code stipulates: "[t]his code shall apply to an offense committed within the territory of the Republic of China. An offense committed on board a vessel or aircraft of the Republic of China, outside the territory of the Republic of China, shall be treated as an offense committed within the Republic of China."[6] Moreover, according to the current official position, Taiwan's current legal authority applies both in Taiwan and on the mainland.

In Taiwan, however, there are exceptions to this expansive jurisdictional policy. These can be divided into three categories. The first is where the law itself clearly stipulates its scope. For example, article 23 of Taiwan's current Regulations for Investment by Foreign Nationals clearly stipulates that "the area in which this statute shall be enforced is temporarily limited to the resolution of the Legislative Yuan."[7] The second are laws in which the Legislative Yuan authorizes and the Executive Yuan designates the areas to which the laws shall apply. For example, article 85 of the Land Reform Act stipulates that "the area in which this statute shall be effective shall be decided and announced by the order of the Executive Yuan."[8] In accordance with this legislative authorization, the Executive Yuan promulgated an order on January 29, 1953, designating Taiwan as the area governed by the statute. The third category of exceptions covers cases in which the title of the statute and its textual connotations imply that the effectiveness of the laws and their applicable scope are limited to Taiwan. For example, article 1 of the Tobacco and Alcohol Monopoly Statute expressly states that "The Taiwan Tobacco and Alcohol Monopoly" will be regulated by this statute. Except for the three exceptions mentioned above, current Taiwan law in general is not limited in scope to Taiwan.

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General Principles of the Civil Code of the People's Republic of China) art. 8, sec. 1 (adopted Apr. 12, 1986), *id.* at 1053.

5. Article 1, section 1 states: "[a]n individual income tax shall be levied in accordance with the provisions of this law on the incomes gained within or outside China by any individuals residing for one year or more within the People's Republic of China." Zhonghua Renmin Gongheguo Geren Suode Shuifa (The Individual Income Tax Law of the People's Republic of China) art. 1, sec. 1 (promulgated on Sept. 10, 1980) COLLECTION OF LAWS AND REGULATIONS OF CHINA CONCERNING FOREIGN ECONOMIC AND TRADE RELATIONS VI-53 (1983).

6. Chunghua Minkuo Hsingfa (The Criminal Code of the Republic of China) art. 3 (promulgated Jan. 1, 1935) CHUNGHUA MINKUO HSIENHSING FAKUI HUIPIEN (Collection of Laws and Regulations of the Republic of China) 20197 (1981).

7. Waikuojen T'outzu T'iaoli (The Regulations For Investment by Foreign Nationals) art. 23 (July 14, 1954), *id.* at 12761.

8. Kengche Yuch'it'ien T'iaoli (The Land Reform Act of the Republic of China) art. 85 (promulgated Jan. 26, 1953), *id.* at 3976.

Although both sides insist that their respective laws affect all of China, the actual reach of the laws has nevertheless been subject to varying degrees of restrictions. In reality, unless a Taiwan citizen goes to the mainland on business or to visit relatives or a mainland citizen visits Taiwan, the only effect that the legal norms of either side has on a citizen of the other side is illusory. This illusion is a result of the special legal phenomenon created by the recognition of "one China," namely, "one country, two laws." This phenomenon of illusory legal scope is not the principle cause of the problems between the two sides; rather, because of the political split, the two sides have actually established two systems of legal norms which are vastly different. Furthermore, in theory, each system's scope of applicability and effectiveness reaches the people and territory under the political power of the other side. For example, officially, Taiwan authorities claim that for whatever purpose Taiwan citizens visit the mainland, they are still under Taiwan's legal jurisdiction. In fact, however, once Taiwan citizens set foot in the mainland, they must simultaneously abide by the mainland's legal norms. The reverse of this situation is also true. Under the present situation of "one country, two laws," the effectiveness of legislation ultimately depends upon which law is chosen. Not only is this confusing for all parties, but also the same legal issues could create problems of "double" legal norms, "double" legal obligations, and even "double" punishment. Consequently, interested parties are unsure which law to follow and this is inconvenient and unfair to the people of both sides. Moreover, the relationship of the people's rights and obligations could thus sink into a state of uncertainty.

Some scholars have advocated using a private international law model to solve these legal problems. However, it is impossible to adopt such an approach because in principle, the norms of private international law only relate to cases involving foreigners or foreign territories and to use it in this case would conflict with the two sides' recognition of "one China." Although under certain exceptional circumstances it is possible for a single country to develop private international law or conflict of law problems, this type of legal phenomenon generally occurs in a federal republic or a country with multiple legal jurisdictions. According to the terminology used when discussing private international law, the phenomenon of multiple jurisdictions within a single country is referred to as "one country, multiple laws." The situation in Taiwan and mainland China of "one country, two laws" is easily confused with and associated with this private law phenomenon. However, the two concepts are quite different. In the situation of "one country, multiple laws," there are

numerous jurisdictions within a single country; for example, the individual state in the United States or Scotland and England in the United Kingdom. However, as far as specific private legal matters are concerned, they are subject to the norms of a single jurisdiction and the resolution of the matter has legal ramifications for conflicts of laws in other jurisdictions. Furthermore, the phenomenon of "one country, multiple laws" in private international law did not evolve out of dividing up a single country. Under this model the laws of every country's individual jurisdiction enjoy equal legitimacy. The whole system of "one country, two laws" differs fundamentally from the system of "one country, multiple laws" however, because of the hard fact that the latter is the product of a political split between mainland China and Taiwan. Also, neither Taiwan nor mainland China recognizes that they belong to two separate legal jurisdictions.

There are two additional obvious shortcomings involved in using the model of private international law to solve the current legal problems of the two sides. First, private international law is intended to resolve choice of law problems for civil disputes involving foreign parties or different legal jurisdictions. But legal problems arising between Taiwan and the mainland are not limited to civil disputes. Second, the principles of private international law (such as The Law Governing the Application of Taiwan Foreign Civil Law and the General Principles of Civil Law of the People's Republic of China) are procedural laws. Yet the existing legal disputes between the two sides actually involve procedural as well as substantive aspects.

This article proposes that the two sides should use a model of "specially established law" (hereinafter "special law") to solve some of the existing legal problems between the two sides. Under the structure of this "special law," the authorities on each side can treat laws, legal documents, and legal relationships formed in accordance with the laws of the other side as first hand proof of the underlying event or fact. Then they can authorize their own judicial and administrative organs to go forward based on those facts. Unless contrary facts or evidence are brought forth, the two sides should allow as much substantive recognition as possible of events or facts represented by the law. Thus, under this "special law" model, it is certainly possible to diminish or eradicate the differences in the legal norms of the two sides, and this "special law" seems helpful in resolving certain aspects of the legal problems of the two sides. However, it may not be possible to immediately realize this expectation. Consequently, one of the legislative aims of this "special law" is to incrementally bring about substantive unification of the legal norms of the two sides.

Of course, the principles of this "special law" do not represent "recognition" of the other side's laws or legal documents. The emergence of the results from this "special law" which itself adopts a particular method of handling legal problems, are not directly dependent on the effect of each side's laws and legal documents. In fact, this "special law" acts, in form, as a "filter" for laws and legal relationships created by the laws of the other side while allowing each side to maintain a relative degree of legal sovereignty. The "special law" model has the means to avoid addressing the difficult issue of mutual recognition while partially resolving the dilemma of "one country, two laws."

Furthermore, before drafting the norms of this "special law," we should, to the extent possible, divide the legal issues both sides hope to resolve into categories and list them under legal subject matter areas such as civil, criminal, substantive, and procedural. Moreover, within the structure of "special law" norms, the two sides must investigate and revise the parts of their respective laws which have an illusory effect and are merely political symbolism in order to accurately reflect the reality of the political division of mainland China and Taiwan.

Given the current situation characterized by the emergence of exchange between the two sides, authorities on Taiwan and the mainland should mutually solicit legal consultation on a wide range of topics in order to compare the similarities and differences between their laws. This solicitation and comparison will provide a reference point for handling problems needed to be resolved immediately. Currently, the Legal Research Institute at the Chinese Cultural University in Taipei is offering a course entitled "The Research of Legal Problems Between the Two Sides." Also, many non-governmental scholarship foundations and associations in Taiwan have commenced studying and drafting preliminary regulations concerning the affairs between the two sides. As for the mainland, it is reported that a research foundation pertaining to Taiwan legal problems there has already been established. Moreover, in July 1989, the Beijing Legal Society held a symposium related to legal problems between the two sides. If in the future, as legal scholars take part in increased scholarly exchange, it will have the effect of pooling ideas from both sides. During the process of exchange, the role of intermediary third parties (such as Hong Kong) will be increasingly important. Also, if the two sides can both adopt essentially similar models of the "special law," and properly design the structure and content of legal norms, then it should not be

difficult to systematically solve the legal problems between the two sides.[9]

9. For further background material on relations between the two sides, the author provided the following references: (a) *Ts'ung Ch'ing Li Fa K'an Haihsia Liang-an Wanglai T'anch'in Went'i,* Tzuli Wanpao, July 4, 1987, at 2; (b) *Tanqin Kaifang Cuoshi zhi FaLu Zhengyi*, Zhongguo Shibao, Sept. 15, 1987, at 2; (c) *Ruhe Miandui Tanqin Yinfa de Falu Wenti*, Zhongguo Shibao, Jan. 7, 1988, at 3; (d) *T'iaocheng Talü Chengts'e Chihsü K'aolü te Falü Yinsu*, Lien-ho Pao, March 7, 1988, at 2; (e) *Ts'ung Falü Kuantien K'an Talü Liuhsüeh-sheng Lai Tai Fangwen*, Lien-ho Pao, March 12, 1988, at 9; (f) *Liang-an Falu Went'i Chitai Chiehchüeh*, CHUNGKUO LUNT'AN, Vol. 26, second issue; (g) *Talü Chengts'e yü Liang-an Kuanhsi*, Tzuyu Shihpao, July 10, 1988, at 2; (h) Chengshih Fenlieh tui Wokuo Falü Kuifan Chuangt'ai chih Yinghsiang, paper delivered at a discussion meeting called "The Social and Cultural Changes Between the Two Sides of the Straits" sponsored by CHUNGKUO LUNT'AN, Dec. 27-29, 1988, in Taipei.