

# Civil Law Development:

## CHINA AND TAIWAN

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Though the People's Republic of China (PRC) and Taiwan share a common cultural heritage, their political separation since the late nineteenth century has led to divergent paths of development, evident in their distinct civil legal systems. This article examines the historical development of these civil legal systems, compares their similarities and differences, and evaluates the possibilities for future cooperation between PRC and Taiwanese legal systems.

### *TAIWAN'S CIVIL LEGAL HISTORY*

Since the 17<sup>th</sup> century, successive waves of immigrants have brought the island of Taiwan under Chinese control. During the Qing dynasty, the legal system seldom intervened in civil matters, mainly focusing on public administration and criminal punishments.<sup>1</sup> Extra-legal mediation arranged by kin or community elders served as the main solution for civil disputes.<sup>2</sup>

Japanese state law became the prime principle for civil matters after Japan gained control of Taiwan following the Sino-Japanese War of 1894-1895. Adopted from European continental codes, Japanese civil code for the first time applied a Western legal system to Taiwanese society.<sup>3</sup>

With the defeat of Japan in 1945, the

Republic of China took control of Taiwan and formally transferred its seat of power to the island in 1949. The Republican civil code, like the Japanese state law, was adopted from continental European law. A Western legal system has thus continued to influence Taiwanese legal practices; however, the rapid industrialization and commercialization that has taken place since the 1960s has increased the quantity and complexity of civil disputes. Urbanization has dismantled traditional dispute resolution methods such as kin and community mediation, encouraging a greater use of the court system. Taiwanese society has internalized Western-adopted civil code principles, such as exclusive property rights, freedom of contract, autonomy of contract, and gender equality through their continual practice. Though Chinese traditions still play a role in civil matters such as women's right of inheritance, Taiwan has established an industrialized society and a Westernized legal system that greatly differ from those of traditional China.<sup>4</sup>

### *CHINA'S CIVIL LEGAL HISTORY*

Traditional China lacked the concept of a separation of civil and criminal law. The statutes mainly concerned administrative and

<sup>1</sup> Tai-sheng Wang, "Jindai Xifangfa Dui Taiwanren De Yingxiang," (Influence of Western Laws on Taiwanese Civil Society) *Taidah Faxue Luntan* 28, no.3 (1999), 18.

<sup>2</sup> Philip C. Huang, *Civil Justice in China*, (Stanford: Stanford University Press, 1996), 9.

<sup>3</sup> Tai-sheng Wang, *Jindai Xifangfa Dui Taiwanren De Yingxiang*, 18.

<sup>4</sup> Tai-sheng Wang, *Jindai Xifangfa Dui Taiwanren De Yingxiang*, 25-26.

criminal matters. Civil matters, termed “minor matters” in the Qing code, were supposed to be settled by society itself through extra-legal mechanisms such as kin and community mediation.<sup>5</sup>

Reform of the Chinese legal system began in the late Qing dynasty. The legal reformers of the late Qing drafted a civil code modeled on the German Civil Code of 1900.<sup>6</sup> The first three books of the Draft Civil Code of the Great Qing—General Principles, Obligation, and Rights Over Things were finished by 1911, shortly before the fall of the dynasty. They were thus never promulgated under the Qing.<sup>7</sup>

Instead of adopting the new civil code drafted in the late Qing, the Republic of China continued to use the civil portions of the Criminal Code of the Great Qing until 1930. The Republican Civil Code, adopted from the late-Qing draft civil code, was finally promulgated in 1930. The code marked a conceptual departure from Chinese tradition, with the individual replacing the family as the basic social unit. It was meant to serve “a capitalist economy organized around contract-makers.”<sup>8</sup> Nevertheless, the Republican code was hardly implemented and internalized in the vastness of China, due to the chaotic political situation and the brief rule of the Nationalist regime.

After the Chinese Communist Party came to power in 1949, China abandoned Republican legal systems and adopted certain Soviet legal forms in the 1950s. Nationalist legal professionals were purged during the 1957-58 anti-rightist campaign. Law became a tool of Party control under Leninist-Maoist totalitarianism. The primary way to settle civil matters was through politicized mediation.<sup>9</sup> In sum, China was a lawless state during the Mao years.

Since 1979, the National People’s Congress and its Standing Committee have enacted

and amended a huge number of laws and decisions. The State Council has also promulgated hundreds of new administrative regulations.<sup>10</sup> Legal personnel such as judges, clerks, and lawyers have also multiplied to meet the demand of a dramatically increased caseload.<sup>11</sup> In the realm of civil law, the General Principles of Civil Law (GPCL), promulgated and enacted in 1985, now provides the foundation for all laws concerning civil matters. As a continuation of the late-Qing and the Republican civil codes, the GPCL is modeled after the continental-European civil law, especially the German code.

However, the GPLC contains only the first part of general provisions and fails to specify different types and contents of property rights and contracts. Separate laws have been drafted and enacted at different times to govern some civil matters, including the 1981 Economic Contract Law, the 1985 Foreign Economic Contract Law, the 1987 Technology Contract Law, and the 1999 Contract Law. The post-Mao era also has experienced rapid development in family law. The Marriage Law was revised in 1980, accompanied by the reformed Marriage Registration Regulations. The Inheritance Law was promulgated and enacted in 1985, followed by the Adoption Law and Law Safeguarding Women’s Rights in 1992.

#### *A COMPARATIVE PERSPECTIVE*

Despite the considerable influence of Western civil and economic laws, the PRC laws still retain several socialist vestiges, such as the sanctity of state ownership and the instrumental view of law.<sup>12</sup> In comparison, Western civil doctrines, including private autonomy, freedom in contract, private ownership, and exclusiveness of property rights, have been more thoroughly

<sup>5</sup> Philip C. Huang, *Code, Custom, and Legal Practice in China*, (Stanford: Stanford University Press, 2001), 26.

<sup>6</sup> Huang, *Code, Custom, and Legal Practice*, 2.

<sup>7</sup> Huang, *Code, Custom, and Legal Practice*, 16.

<sup>8</sup> Huang, *Code, Custom, and Legal Practice*, 2.

<sup>9</sup> Stanley Lubman, *Bird in a Cage*, (Stanford: Stanford University Press, 1999), 43.

<sup>10</sup> “The NPC and its Standing Committee enacted about 80 new laws and statutes, and amended and supplemented 58 laws and decisions, while the State Council promulgated about 550 administrative regulations.” Karen G. Turner, James V. Feinerman, and R. Kent Guy, eds., *The Limits of the Rule of Law in China*, (Seattle: University of Washington Press, 2000), 21.

<sup>11</sup> Turner, Feinerman, and Guy, *The Limits*, 21.

<sup>12</sup> Turner, Feinerman, and Guy, *The Limits*, 25.

reflected in the Taiwanese civil code.

Taiwan and China also differ with regard to family law. Taiwan places marriage and inheritance matters along with property matters under the civil code, whereas the PRC separates marriage law and inheritance law from the civil code because of their personal characteristics.<sup>13</sup>

The following section examines the differences and similarities between Taiwanese civil code and PRC laws in the four domains of civil matters: property, contract, family, and inheritance with special reference to the General Principles of Civil Law, Economic Contract Law, Foreign Contract Law, Marriage Law, and Inheritance Law.

### PROPERTY RIGHTS

Under the section dealing with property rights, one of five sections, the Taiwanese civil code specifies and details property rights, including ownership, mortgages, pledges, superficies, emphyteusis, servitudes praediorum, right of impawn, and right of retention. Because the PRC code arises out of a socialist ideology of state ownership, however, the PRC General Principles of Civil Law does not detail the types and contents of property rights. Nonetheless, the GPCL generally addresses a few quasi-property rights, including: “the rights of neighboring users of land; rights to use and obtain benefits from state-owned land and other natural resources; rights to mine state-owned mineral resources; rights to operate state-owned mineral resources; rights to operate state-owned land under collective responsibility contracts; and rights to operate state enterprises.”<sup>14</sup>

The principle of exclusive and unitary property rights, evident in the Taiwanese

civil code due to its German origins, is noticeably absent in PRC legal provisions and practice. In the PRC, the separation of ownership and the right to use, benefit, and possess have been formalized since Deng’s economic reform introduced “the Contract Responsibility System” in 1978.<sup>15</sup> To retain the principle of state-ownership as a symbol of socialism and to transfer state property under more efficient private management at the same time, the PRC employs various forms of contracts and leases. According to a 1993 CCP Central Committee decision, collective-owned rural land can be leased to peasants for thirty years and may be transferred by inheritance.<sup>16</sup> As for urban land, the term of use may be as long as seventy years, in order to encourage long-term investment.<sup>17</sup> The long-term separation of ownership and the right to use, possess, and benefit greatly weakens the exclusiveness of property rights in the PRC.

Provisions relating to “first possession of ownerless property” also reflect the difference between the PRC’s state-ownership and Taiwan’s private-ownership systems.<sup>18</sup> According to Article 79 of the General Principles of Civil Law, “if the owner of a buried or concealed object is unknown, the object shall belong to the state.” In contrast, Article 802 of the Taiwanese civil code articulates that the person who finds and possesses an ownerless property acquires its ownership.

In essence, the socialist principle of state-ownership is strongly upheld in the General Principles of Civil Law of the PRC. As Article 73 states, “state property shall be owned by the whole people. State property is sacred and inviolable, and no organization or individual shall be allowed to seize, encroach upon, privately divide, retain, or destroy it.”<sup>19</sup> The sanctity and inviolability of state ownership is reflected in usucaption, the transferring of own

<sup>13</sup> Tai-qian Wang, “*Dangqian Liangan Falu Wenti Fenxi*” (Analysis of Contemporary Cross-strait Legal Issues), (Taipei: Wunan, 1997), 84.

<sup>14</sup> Lubman, *Bird*, 179.

<sup>15</sup> Pitman B. Potter, ed., *Domestic Law Reforms in Post-Mao China*, (New York: M.E. Sharp, Inc., 1994), 226.

<sup>16</sup> Anthony Dicks, “The Chinese Legal System: Reforms in the Balance,” *The China Quarterly*, 119 (1989), 556.

<sup>17</sup> Lubman, *Bird*, 184.

<sup>18</sup> Tai-qian Wang, *Dangqian Liangan Falu Wenti Fenxi*, 82.

<sup>19</sup> GPCL, Article 73.

ership from the original owner to the possessor of the object over a period of time, which is inapplicable to state property.

### CONTRACTS

Freedom of contract and party autonomy are the main principles for contracts in the Taiwanese civil code. Contracts are usually made voluntarily between two equal private parties without government intervention.

In the PRC, different laws are applied to domestic contracts and contracts involving foreign parties.<sup>20</sup> In order to promote foreign trade and investment, the PRC adopted the Foreign Economic Contract Law in 1985, which heavily draws upon “Western notions of freedom of contract and party autonomy.”<sup>21</sup> Moreover, international treaties and practices are applicable to matters not covered by Chinese law, with the exception of PRC reservation.<sup>22</sup>

In the area of domestic contract legislation, the Economic Contract Law (ECL) and dozens of related state administrative and local regulations govern contracts between Chinese legal persons, other economic organizations, self-employed workers or traders, and rural households.<sup>23</sup> Contractual relationships range from individual vs. individual, individual vs. collective, collective vs. collective, collective vs. state, and individual vs. state.

Among the above contractual relationships, those between collectives and individual peasants account for the vast majority of rural contracts. In rural agricultural reform, “chengbao” contracts place state-owned land and means of production under the management of peasant households. In practice, “county governments print standard forms and

distribute them to all households that sign contracts with their teams for responsibility plots. The team distributes the land according to each household’s population, labor power, or both. It then assigns obligations to deliver produce, cash, or both.”<sup>24</sup> Since the state and collectives still own the land and major means of production, and since local cadres have the power to allocate responsibilities and resources, peasants hardly enjoy equal status and bargaining power in chengbao contracts. Moreover, the institution of contracts and private sectors is meant to implement state economic policies.<sup>25</sup> The government often intervenes in formulating the content of contracts, resulting in a lack of autonomy and freedom in contracts. Although the Economic Contract Law upholds “the principles of equality and mutual benefit” between contractual parties<sup>26</sup>, the ECL functions more like administrative law than civil law. It takes priority in implementing Party policies, such as ensuring the development of the socialist market economy, safeguarding the social economic order, and promoting socialist modernization. In other words, protecting private contractual rights is not a major concern.<sup>27</sup>

### FAMILY

In marriage just like in property rights, the two codes are quite different, the Taiwanese civil code accepting de facto marriage, while PRC family law accepts de jure marriage. According to the Taiwanese civil code, a valid marriage requires only a public ceremony and more than two witnesses. Registration is not requisite. On the other hand, the PRC Marriage Regulations require registration in order for a marriage to be official.<sup>28</sup> In practice, however, many PRC couples avoid registration not only

<sup>20</sup> Charles D. Paglee, “Contract Law in China: Drafting a Uniform Contract Law,” 21 Nov. 2001, <http://www.qis.net/chinalaw/prcontract.htm>.

<sup>21</sup> Potter, *Domestic Law*, 231.

<sup>22</sup> GPCL, Article 142.

<sup>23</sup> ECL, Article 2.

<sup>24</sup> David Zweig, Kathy Hartford, James Feinerman, and Deng Juanxu, “Law, Contract, and Economic Modernization: Lessons from the Recent Chinese Rural Reforms,” *Stanford Journal of International Law*, 23, no.2 (1987), 331-332.

<sup>25</sup> Turner, Feinerman, and Guy, *The Limits*, 22.

<sup>26</sup> ECL, Article 5.

<sup>27</sup> ECL, Article 1.

<sup>28</sup> Marriage Registration Regulations, Articles 9 and 19.

as a result of traditional customs, but also because of the restrictive birth control policy. To avoid such reproduction restrictions, many families intentionally evade marriage registration. Indeed, in certain regions of rural China, as many as 80 percent of “unions” are unregistered.<sup>29</sup> Whether to recognize de facto marriage or adhere to the principle of de jure marriage has thus become a dilemma for PRC officials and judges.

The PRC Marriage Law, also influenced by the birth limitation policy, promotes late marriage and late reproduction. In addition, the law raises minimum marriage ages: men cannot marry before 22 years old; women before 20 years of age.<sup>30</sup> In comparison, Taiwan’s minimum marriage ages, 18 for men and 16 for women, are considerably lower than those of China.<sup>31</sup>

In divorce, too, the laws differ substantially. The Taiwanese civil code limits causes of judgment divorce by enumeration.<sup>32</sup> Most of the causes require one spouse to demonstrate that the other is morally to blame. In contrast, the PRC Marriage Law accepts “no-fault divorce.” Breakup is the only cause of a divorce suit.<sup>33</sup> Nevertheless, in practice, PRC judges tend to maintain marriages rather than end them, and furthermore, encourage the rehabilitation of marriages between divorced couples.<sup>34</sup>

Differences in legal views of the sexes manifest themselves clearly in the two matrimonial regimes, the set of regulations governing the economic relationship between the parties and their property. While the Taiwanese civil code retains strong paternal char-

acteristics in this area, PRC law upholds the principle of gender equality. Article 1018 of the Taiwanese civil code places joint matrimonial property under the management of the husband. Moreover, the husband has the rights to use, benefit from, and dispose of the wife’s original properties.<sup>35</sup> In contrast, the PRC marriage law articulates equal rights to dispose shared properties of the couple.<sup>36</sup> The PRC marriage law, though simple, ensures greater gender equality compared to the Taiwanese civil code.<sup>37</sup>

Nonetheless, in the past decade, Taiwan has launched several amendments of family law to promote gender equality and protect children’s interests.<sup>38</sup> The amendments removed Article 1051, which granted custody to the father, and revised Article 1055 to authorize the court to judge for the best interest of the child. The amendments also equalized rights to choose surname and residence between husband and wife.<sup>39</sup> Article 987, “date of pending marriage,” which prohibited women to remarry for a period of time after divorce, has also been abolished.

#### INHERITANCE RIGHTS

The Taiwanese civil code, based on private ownership, defines the object of inheritance with a presumptive provision. All rights and obligations of the deceased, except exclusive personal rights, can be succeeded. On the other hand, the PRC Inheritance Law limits inheritable properties through enumeration.

<sup>29</sup> Michael Palmer, “The Re-emergence of Family Law in Post-Mao China: Marriage, Divorce, and Reproduction,”

*The China Quarterly*, 141 (1995), 119.

<sup>30</sup> Marriage Law, Article 5.

<sup>31</sup> Taiwanese Civil Code, Article 980.

<sup>32</sup> Taiwanese Civil Code, Article 1052.

<sup>33</sup> Marriage Law, Article 25.

<sup>34</sup> Palmer, “The Re-emergence of Family Law,” 122-3.

<sup>35</sup> Taiwanese Civil Code, Articles 1019 and 1020.

<sup>36</sup> PRC Marriage Law, Article 3.

<sup>37</sup> Guang-qun Fan, “Haixia Liangan Hunyinzhidu Ji Xiangguan Minshicaipan De Xianghuchengren Wentitiantao” (Marriage Systems across the Strait and the Recognition of Civil Court Judgments) in Sueng-ran Ueng, ed., *Liangan Falu Shiyong Zhi Lilun Yu Shiwu* (Theory and Practice of Cross-strait Conflict of Laws), (Taipei: Weilifalu, 1992), 95.

<sup>38</sup> Huei-ling Shi, “Lun Woguo Jiatingfa Zhi Fazhan Yu Yanjiu – Yige Jiatingfalushehuixue De Guandian” (Development and Study of Taiwanese Family Law – From the Perspective of the Sociology of Family Law), *Zhengdafxuepinglun*, 63 (2000), 262.

<sup>39</sup> Taiwanese Civil Code, Article 1000, 1002.

Article 3 of the PRC Inheritance Law lists inheritable personal properties: (1) income; (2) houses, savings, and articles of everyday use; (3) forest trees; (4) cultural objects, books, and reference materials; (5) means of production lawfully owned by the deceased; (6) property rights pertaining to copyrights and patent rights; and (7) other lawful property. A breakthrough is revealed in the fifth enumeration. Under the socialist system, where most means of production belong to the state, the fifth enumeration exceptionally allows “means of production” to be privately inherited. However, concrete cases remain rare.<sup>40</sup>

### **COOPERATION BETWEEN TAIWANESE AND PRC CIVIL LAWS**

Political separation and ideological conflict have given rise to two legal systems in Taiwan and Mainland China. Whereas Taiwan follows the Western capitalist model, China pursues a mixed system utilizing both socialist principles and a market economy. The two civil societies came into contact in 1987, when the Taiwanese regime for the first time since 1949 allowed its citizens to visit Mainland China. For its part, the PRC enacted “Provisions on Encouraging Investment from Taiwan” in 1988 to attract Taiwanese investment and foster economic reform. According to this provision, the economic laws and regulations governing foreign businesses and investors are applicable to those Taiwanese doing business in China.<sup>41</sup> Principles of Western civil law, such as freedom of contract and autonomy of private law, thus regulate most contracts between people across the Strait.

However, a comprehensive regulation of cross-strait civil matters remains controversial. Since both the People’s Republic of China

and the Republic of China (Taiwan) claim to be the only China, international private law, which governs civil matters between different nations, is inapplicable. At the same time, both regimes claim sovereignty beyond their actual territories, thus avoiding the application of interregional law. Interregional law, such as U.S. interstate law, regulates provincial matters within a country. In the case of the U.S., since all states are under the sovereignty of the central government, conflict among state laws is resolved according to the United States Constitution.<sup>42</sup> The situation with China and Taiwan is clearly different. A unified supreme power over both regions is absent, whereas the two regimes claim sovereignty on an overlapped jurisdiction. For example, under the One China Principle, Taiwan drafted “Regulation of Cross-Strait Civil Matters”<sup>43</sup> in 1988 and promulgated it in 1992. This regulation applies several rules of private international law, but takes the form of domestic law.<sup>44</sup> The PRC has criticized the regulation for its unilateral bias.<sup>45</sup>

Many scholars across the Strait have proposed that the best solution for the current legal conflict lies in bilateral negotiation.<sup>46</sup> Using realistic principles while striving to maintain political equilibrium, authorities from both China and Taiwan should work together to draft and enact a special law regulating cross-strait matters. In the arena of civil law, which concerns itself less with politics or sovereignty issues than both administrative law and criminal law, civil relations and private rights should override political and ideological considerations.

### **CONCLUSION**

Due to long-term political separation and ideological antagonism, Taiwan and China

<sup>40</sup> Ze-jian Wang, “Haixialiangan Renminxucheng De Ruogan Wenti” (Several Issues of Cross-strait Inheritance), in Sueng-ran Ueng, ed., *Liangan Falu Shiyong Zhi Lilun Yu Shiwu*, 114.

<sup>41</sup> Provisions on Encouraging Investment from Taiwan, Article 5.

<sup>42</sup> Tai-qian Wang, *Dangqian Liangan Falu Wenti Fenxi*, 7.

<sup>43</sup> *Liangan Renmin Guanxi Tiaoli*.

<sup>44</sup> Ueng, *Liangan Falu Shiyong Zhi Lilun Yu Shiwu*, 4.

<sup>45</sup> Song, Jun, ed., “Taiwan ‘Lianganrenminguanxitaoli’ Pingxi” (Critique of Taiwan’s *Regulation of Cross-Strait Civil Matters*), (Beijing: Zhongguorenmingongan Daxue Chubanshe, 1994).

<sup>46</sup> See, for example, Tai-qian Wang, *Dangqian Liangan Falu Wenti Fenxi*, 10; Song, Jun, ed., *Taiwan ‘Lianganrenminguanxitaoli’ Pingxi*, 87; and David Wang, “Haixialianganjie Faluwentu Zhi Jiejuemoshi” (Solutions of Cross-strait Legal Problems), in Ueng, *Liangan Falu Shiyong Zhi Lilun Yu Shiwu*, 24-26.

have developed different civil legal systems. While Taiwan has thoroughly adopted a Western and capitalist legal system over the past century, China only began to incorporate Western laws into its socialist system in the 1980s. In the domestic arena, China retains the socialist principle of public ownership, while it leases public property to private parties through myriads of contracts. The separation of ownership and usufruct (rights to possess, use, and benefit) weakens the exclusiveness of property rights. Contracts, which usually involve the government and private parties, lack private autonomy and equilibrium. In contrast, China has adopted most Western legal notions in for-

eign contracts, including contracts with Taiwanese investors. However, this measure is more like a temporary economic policy than a stable and comprehensive regulation. For cross-strait civil matters, international private law is inapplicable due to the One China Principle. Moreover, both the PRC and Taiwan claim sovereignty on the overlapped jurisdiction, thus avoiding the application of interregional law. A feasible solution may lie in bilateral negotiation. With a firm basis in reality, and without touching on issues dealing with national sovereignty, authorities across the Strait should enact a special law to regulate cross-strait civil matters.

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