

# The Death Penalty in Taiwan

A report on Taiwan's legal  
obligations under the  
International Covenant on  
Civil and Political Rights



In association with:



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# Foreword

In 2009, Taiwan took the bold step of ratifying the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as a matter of domestic law. In the same year, the Implementation Act came into force, giving the rights enshrined in the Covenants legal force in Taiwan. As a result, Taiwan has an obligation to respect the rights defined in the ICCPR, and the application of capital punishment is strictly limited by both the ICCPR and related international norms, which impose binding standards on all countries that still retain the death penalty.

The retention of capital punishment by Taiwan is not itself a breach of the ICCPR. However, the ICCPR does assume that the eventual abolition of the death penalty will be the ultimate goal and, in the meantime, Taiwan has an obligation to develop domestic laws and practices to restrict the death penalty progressively.

In April 2012, Taiwan's government issued its first report on the implementation of the ICCPR. In addressing the right to life under Article 6, it stated that the aim is gradually to abolish the death penalty. The question remains whether, pending abolition, Taiwan has in fact taken sufficient steps to reform incompatible laws and practices within the requirements of the ICCPR.

Between 2010-13, 21 executions were carried out in Taiwan and, most recently in April 2014, a further five people were executed and, as this report highlights, there are serious concerns that the provisions of the ICCPR were not strictly adhered to in these cases. Worldwide, only 39 countries have carried out an execution since 2003, and only seven countries have executed 10 or more citizens each year for the past decade. The use of the death penalty in Taiwan is thus of great concern and sends out a message that contrasts starkly with the progressive measures it took to ratify the ICCPR.

It is hoped that this report will produce a greater understanding of the strict limitations on capital punishment that Taiwan has voluntarily accepted since taking commendable steps to bring the ICCPR within the domestic legal system. Consequently, immediate steps must be taken to address the concerns raised in this report.

**Saul Lehrfreund and Parvais Jabbar**  
**Executive Directors, The Death Penalty Project**  
**May 2014**

# Introduction

**David T. Johnson\***

Taiwan has been somewhat isolated from other nations, and from the international human rights community, as a result of its exclusion from the UN in 1971, yet its leaders and NGOs have tried hard to convince the world that it is a democracy committed to respecting human rights. In this sense, ‘the quest for human rights invented modern Taiwan.’<sup>1</sup> Taiwan’s death penalty reforms over the past two decades reflect its ongoing invention as a progressive nation, and its determination to demonstrate this identity to an international audience – partly by distinguishing itself from its huge sibling to the west, the People’s Republic of China (PRC).

The changes that have occurred in Taiwan’s death penalty policy and practice are as remarkable as those in any other nation. In the White Terror campaign of the 1950s, for example, there was as much per capita state killing in Taiwan – judicial and extra-judicial – as there was in the PRC under Mao Zedong and Deng Xiaoping. But as Taiwan democratised, the death penalty declined, reaching a nadir of zero executions during the four years from 2006 through 2009. This decline had several causes, including revisions to Taiwan’s capital statutes – and the abolition of mandatory death sentences – that significantly narrowed the scope and scale of capital punishment, and amendments to the Code of Criminal Procedure that altered the balance of power in the criminal process between prosecutors, judges, and defence lawyers.

Ultimately, the force driving the downsizing of Taiwan’s death penalty has been ‘leadership from the front’ by Taiwanese elites, especially those in high offices of government. Public opinion in Taiwan supports capital punishment, much as it has throughout the recent decades of democratisation, but at many points in recent history, political leaders have tried to reduce the country’s reliance on state killing – despite public opinion that did not approve of their reforms. In ‘leading from the front’ in this fashion, Taiwan’s leaders have been motivated by two main forces: a desire to pull away from the excesses and associations of the country’s authoritarian past, and a desire to push toward a different identity in the world as a state committed to human rights.<sup>2</sup>

Near the end of its recent moratorium on executions, Taiwan’s government seemed to take another significant step toward the ultimate abolition of capital punishment when it ratified the International Covenant on Civil and Political Rights in 2009. But executions resumed the following year, and a total of 21 persons were executed between 2010 and 2013. As recently as 29 April 2014, a further five death row prisoners were executed. This report is therefore timely, for it is published at a time when there appears to be a renewed appetite for capital punishment in Taiwan’s society and polity. This report is also a thorough attempt to document how the actual practice of capital punishment in Taiwan contradicts the country’s commitments to human rights. Notably, much of this report comes from Wen-Chen Chang, National Taiwan University Professor of Law and one of the country’s leading authorities on the death penalty and human rights.

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<sup>1</sup> Brian Kennedy, ‘Restraint and Punishment,’ *Taiwan Review* (2004), Vol.54, No.8, pp.24–27.

<sup>2</sup> On the recent history of death penalty reform in Taiwan, see David T. Johnson and Franklin E. Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford University Press, 2009), pp.191–223.



In a sentence, the present report suggests that Taiwan is failing to comply with its obligations under the ICCPR. The greatest mistake that a criminal justice system can make is the wrongful execution of an innocent person. In 2011, Taiwan's government acknowledged that this occurred, when Chiang Kuo-Ching was executed in 1997 for a murder he did not commit. Taiwan's government apologised for this grievous wrong and paid compensation to Chiang's survivors, but the problem of false confession that led to this gross violation of the right to life continues to plague the practice of capital punishment in Taiwan – as it has in the cases of Cheng Hsing-Tse, Chiu He-Hsun, and the Hsichih Trio. Despite the real danger of coercive interrogation, Taiwan's legal system remains deeply reliant on confessions for evidence. This inordinate reliance sometimes leads to extreme efforts to obtain them – in violation of Articles 7 and 10 of the ICCPR.

This report also identifies serious problems in the practice of capital punishment at the trial and appellate stages. For example, from 2000 to 2009, 93 persons had their death sentences finalised by Taiwan's Supreme Court, and 61 of them had no legal representation when their cases were heard by this highest tribunal. Similarly, of the nine persons executed in Taiwan in 2010 and 2011, seven received no legal representation when their cases were heard by Taiwan's Supreme Court. More generally, a panel of 10 international experts has concluded that there were major deficiencies in the appellate processes, resulting in the deaths of all 15 persons who were executed in Taiwan in 2010, 2011, and 2012.<sup>3</sup>

Overall, the evidence presented in this report suggests that until Taiwan can satisfy the human rights standards to which it is committed, the death penalty should not be enforced. At a minimum, Taiwan must undertake reforms to make the administration of capital punishment as fair and humane as possible. In trying to live up to its commitments under the ICCPR and other human rights instruments, Taiwan may discover that it is impossible to design a system of capital punishment that does not violate human rights. The only effective way to protect prisoners from violation of their human rights may well be the complete abolition of the death penalty.<sup>4</sup>

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<sup>3</sup> Concluding Observations and Recommendations adopted by the international group of independent experts, Review of the Initial Reports of the Government of Taiwan on the Implementation of the International Human Rights Covenants ('Concluding Observations and Recommendations'), Taipei, 1 March 2013.

<sup>4</sup> See 'The Death Penalty in Japan: A Report on Japan's Legal Obligations under the International Covenant on Civil and Political Rights and an assessment of public attitudes to capital punishment' (London: The Death Penalty Project, in association with the Centre for Prisoners' Rights, 2013).



# PART ONE

Introduction to the ICCPR and  
the safeguards guaranteeing  
protection of the rights of those  
facing the death penalty

# Introduction to the ICCPR and international norms on the death penalty

The international community's concern with human rights in the modern era goes back to the foundation of the United Nations and the adoption of the Universal Declaration of Human Rights (UDHR) by the General Assembly of the United Nations in 1948. To some extent, the activities of the international community – in negotiating and adopting treaties and conventions on human rights at the regional and international plane – may be seen as a development of the principles and aspirations set out in the Declaration. The International Covenant on Civil and Political Rights 1966<sup>5</sup> (ICCPR) – the first universal treaty-based human rights instrument – came into force a decade after it was signed.

## Taiwan's obligations under the ICCPR: Ratification as a matter of domestic law

The government of the Republic of China (ROC), which had retreated from Mainland China to Taiwan in 1949, signed the ICCPR in 1966. However, the ROC government was expelled as a result of the resolution by the UN General Assembly in 1971<sup>6</sup> and the ICCPR ceased to apply to Taiwan from that date onwards.

In March 2009, the government of Taiwan, whilst unable to officially sign or ratify the ICCPR, announced the ratification as a matter of domestic law, of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In December 2009, the Implementation Act (*hereinafter* the Implementation Law) came into force, giving the rights enshrined in the two Covenants legal force in Taiwan, binding on all levels of government including the judiciary. As a result of the Implementation Law, the provisions of the Covenants form part of Taiwanese Law and prevail over inconsistent domestic laws other than the constitution. The Implementation Law also provides for a reporting system to monitor the government's compliance with the obligations it has undertaken, giving legal effect to the provisions of the Covenants. In 2012, the government issued its first report on the implementation of the ICCPR and invited a panel of international experts to examine its report.<sup>7</sup>

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<sup>5</sup> International Covenant on Civil and Political Rights, (1976) 999 UNTS 171.

<sup>6</sup> G.A. Res. 2758 (XXVI), U.N. Doc. A/RES/2758, 1967th plenary session, (Oct 25, 1971).

<sup>7</sup> On the reporting system and review process see *The Hidden Face of Taiwan – lessons learnt from the ICCPR/ICESCR review process*. A report by the International Federation for Human Rights (FIDH) and Taiwan Association for Human Rights (TAHR), 2013.

## The obligation on states under the ICCPR

The basic obligation imposed on states is to ensure that national law permits an effective remedy for individuals subject to its jurisdiction to secure that the rights afforded are effectively respected. Article 2 of the ICCPR provides:

1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*
3. *Each State Party to the present Covenant undertakes:*
  - a) *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
  - b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
  - c) *To ensure that the competent authorities shall enforce such remedies when granted.*

A number of points emerge from the above that inform the interpretation of this instrument whether by a national court or the United Nations Human Rights Committee (HRC)<sup>8</sup>:

- i. All individuals are protected, not just citizens or lawful residents but everybody. These are *human rights* and not constitutional rights. Even irregular aliens may have rights that need protecting.
- ii. The view of the HRC and the settled jurisprudence of the European Court of Human Rights, is that individuals who are subject to the jurisdiction of contracting states have human rights claims, whether or not they are also within the sovereign territory of those states.<sup>9</sup>
- iii. All branches of the state must respect these rights, national, federal and local, executive, administrative and judicial. A state cannot evade its obligations by contending that an independent branch of government is committing the violation.

<sup>8</sup> Most of these points are drawn from General Comment 31 adopted May 2004, available at <http://www.unhcr.org/refworld/pdfid/478b26ae2.pdf>

<sup>9</sup> 'This principle also applies to those within the power or effective control of the forces of a state party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a state party assigned to an international peace-keeping or peace-enforcement operation.' GC 31 para 10.

- iv. There can be no discrimination in application of the rights. This emphasises not merely the point about citizens and aliens, but differential treatment on grounds of sex, race or social status. These terms are to be given a broad meaning, developing as societies become more complex.
- v. Where laws have not been passed to give effect to the rights, there is a duty to do so.
- vi. Depending on the constitutional traditions, judges may be able to fill the gap in legal measures by creative interpretation, strike down incompatible laws, or grant declarations that laws need to be amended to bring them into compliance. What is not satisfactory is to remain indifferent to a failure to secure the rights in question.

These principles lie at the heart of human rights law and inform the nature of the obligation that states undertake when they introduce these provisions into their own legal systems. There is considerable discretion over how states incorporate the ICCPR rights and principles into law: Taiwan has through domestic legislation incorporated the provisions of the ICCPR (and the ICESCR) into the national legal order; in some states international treaties are automatically incorporated without further legislation; in others they are presumed to be respected unless the terms of national law prevent such a conclusion.

The obligation, however, is to respect the rights and give effective remedies to individuals whose rights are, have been and in some cases will be violated. The fact that national law does not at present recognise these rights is not a sufficient answer to the ICCPR. States need to do something to bridge the gap between the incompatible laws and practices and the rights promised by either accession or incorporation into law.

## Bridging the gap in Taiwan – the reporting and review process

In order to monitor the government's compliance with the legally binding provisions of the ICCPR, the Implementation Law provides for a reporting and review process with active engagement from all sectors of government and civil society. In April 2012, the government issued its first report on implementation of the ICCPR (the Initial State Report) looking in detail at the rights contained in each of the Covenants.<sup>10</sup> Addressing the protection of the right to life under Article 6 of the ICCPR, it stated that the government's goal is to abolish the death penalty *gradually*,<sup>11</sup> but the question remains whether pending abolition *'the substantial measures... taken so far to gradually minimize the imposition of the death sentence'*<sup>12</sup> go far enough to ensure that the provisions of the ICCPR are strictly adhered to in all capital cases. The Initial State Report highlights a number of measures that have been taken in Taiwan to reduce the number of death sentences imposed. These include, *inter alia*:

- (1) abolition of the mandatory death penalty
- (2) exclusion of minors from the death penalty

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<sup>10</sup> Implementation of the International Covenant on Civil and Political Rights, Initial report submitted under article 40 of the Covenant, September 2012, (*Initial State Report*).

<sup>11</sup> *Ibid*, *supra* Note 10, at para 7.

<sup>12</sup> *Ibid*.

- (3) increasing the parole thresholds for repeat offenders imprisoned for life, so that judges are more willing to impose a life sentence rather than the death sentence
- (4) advising prosecutors not to request a death sentence<sup>13</sup>

The report states that other measures are under review. For example, the Ministry of Justice is considering a requirement that there must be a unanimous decision by judges before a death penalty verdict can be reached. Also under consideration is an amendment to Article 289 of the Code of Criminal Procedure to create a separate sentencing hearing focusing on mitigating circumstances before a death sentence can be imposed.<sup>14</sup>

In May 2012, a shadow report was issued by a collective of NGOs in response to the Initial State Report. The shadow report underlines the lack of concrete proposals for abolition and notes serious shortcomings in law and practice on the application of capital punishment, thus placing Taiwan in breach of the ICCPR. Concerns raised include the lack of adequate or effective legal representation on appeal, and the systematic failure to prevent the execution of those who are mentally ill or impaired.<sup>15</sup>

As part of the implementation process, the government invited a panel of 10 international experts to review its report in light of information from all available sources, including civil society. In February 2013, the independent experts carried out the review to monitor the government's compliance with the obligations it had undertaken by ratifying the ICCPR and ICESCR.<sup>16</sup> In the concluding observations and recommendations adopted by these experts, it was strongly recommended that the Taiwanese government should intensify its efforts towards abolishing capital punishment.<sup>17</sup> It was also advised that until the final abolition of capital punishment, the Taiwanese government should ensure that all relevant procedural and substantive safeguards relating to the imposition and execution of capital punishment be scrupulously adhered to.<sup>18</sup>

The reporting and review requirements of the Implementation Law make provision for a valuable and transparent monitoring process to measure compliance and to identify where gaps exist between incompatible laws and practices and the rights that must be respected. Since 2010, more than 20 executions have been carried out in Taiwan and the experts concluded that Taiwan has not, in fact, taken sufficient steps to reform incompatible laws and practices with the requirements of the ICCPR. As such, the experts found that all executions carried out in Taiwan – since the ICCPR formed part of the domestic legal order – had violated the right to life. The government's incremental approach of restricting the death penalty leading to its elimination accords with the spirit and aspiration of the ICCPR, but as long as the requirements of the ICCPR are not respected or routinely given proper effect, Taiwan will continue to apply the death penalty in breach of its obligations as defined by the ICCPR.

<sup>13</sup> Ibid, *supra* Note 10, at para 92.

<sup>14</sup> Ibid.

<sup>15</sup> Covenants Watch, Taiwan Human Rights Report: Parallel Report on the Implementation of the International Covenant on Civil and Political Rights, <http://covenants-watch.blogspot.com>, Nov. 30, 2012.

<sup>16</sup> Concluding Observations and Recommendations, *supra* Note 3.

<sup>17</sup> Concluding Observations and Recommendations, *supra* Note 3, at para 56 (2013).

<sup>18</sup> Concluding Observations and Recommendations, *supra* Note 3, at para 57 (2013).

## Rights which cannot be derogated

Not all rights are of the same importance in the scheme of the ICCPR, but certain rights are non-derogable, even in time of war or national emergency. Article 4 provides:

- 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*
- 2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.*

No derogations can be made from Articles 6 (life), 7 (torture), 8 (slavery), 11 (imprisonment for debt), 15 (retrospective criminal offence), 16 (recognition as a person in law) and 18 (freedom of thought conscience and religion). These rights must always be respected although what amounts to a violation of them may depend on the context. Other rights (e.g. Article 9 detention) may be interfered with in a time of national emergency, but only if that is permissible under other international obligations, it is done without discrimination and because it is strictly necessary.

## Preliminary observations on the right to life and the prohibition of torture and related ill-treatment

The right to life and freedom from torture are two rights that are non-derogable in times of war or national emergency. Together they impose restrictions on the use of deadly force by the state, including the application of the death penalty. Article 6 is in these terms:

- 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
- 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.*
- 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*
- 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*



5. *Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.*

6. *Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*

The right to life must be protected by law. The circumstances in which it may be legitimate to deprive someone of life have to be clearly set out in law, and this applies to the laws of homicide, self-defence, the use of reasonable force to quell disorder or prevent crime, or the use of capital punishment for grave crimes.

Deprivation of life must not be arbitrary. Thus, any discretion to inflict lethal force or punishment must be narrowly circumscribed by clear, transparent principles that are not contrary to the other terms of the ICCPR.

Whilst it is not itself a breach of the ICCPR for states to retain capital punishment for a period after accession or ratification if it already exists in a state, accession to the ICCPR implies that a state is moving towards abolition when it can sign the Optional Protocol to that effect. In the meantime, the application of capital punishment is strictly limited by the ICCPR.

## Safeguards guaranteeing protection of the rights of those facing the death penalty

The restrictions on capital punishment set out in Article 6 of the ICCPR are reflected and further developed in the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty (hereinafter 'the safeguards') which, '*...constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment.*'<sup>19</sup>

The safeguards were adopted in 1984 by the UN Economic and Social Council Resolution 1984/50.<sup>20</sup> In 1989, these standards were further developed by the Council which recommended *inter alia* that there should be a maximum age beyond which a person could not be sentenced to death or executed and that persons suffering from mental retardation should be added to the list of those who should be protected from capital punishment.<sup>21</sup> The Council in its Resolution 1996/15, called upon member states in which the death penalty had not been abolished '*...to effectively apply the safeguards guaranteeing the rights of those facing the death penalty.*'<sup>22</sup> The significance of the safeguards has subsequently been reaffirmed by the Commission on Human Rights in 2005<sup>23</sup> and the General Assembly in its resolutions 62/149 and 63/168.

All states are bound by the international standards set out in the safeguards, which should be considered as the general law applicable to the death penalty.<sup>24</sup>

<sup>19</sup> 'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General', UN Doc. E/2010/10, at p.33.

<sup>20</sup> 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', ESC Res 1984/50, U.N. Doc. E/1984/84 (endorsed by GA Res 39/118).

<sup>21</sup> 'Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', ESC Res 1989/64 at para 1(d).

<sup>22</sup> UN Economic and Social Council Resolution 1996/15, adopted on 23 July 1996 at para 2.

<sup>23</sup> UN Commission on Human Rights resolution 2005/59, adopted on 20 April 2005.

<sup>24</sup> See Report of the Secretary-General, Note 19, above at p.55.



# **PART TWO**

The right to life

# The right to life

Article 6(2) of the International Covenant on Civil and Political Rights provides that:

*In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the offence and not contrary to the present Covenant... This penalty can only be carried out pursuant to a final judgment rendered by a competent court.*

Although an exception to the right to life, Article 6 of the ICCPR lists various safeguards in the application and implementation of the death penalty. It may only be imposed for the *most serious crimes*, it cannot be pronounced unless *rigorous procedural rules* are respected, and it may not be imposed on pregnant women, or on individuals for crimes committed under the age of 18. The scope of the death penalty, and the groups or individuals protected from capital punishment are discussed in detail below.

Article 6(6) goes on to place the death penalty in its real context and assumes its eventual elimination:

*Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*

Professor William A. Schabas has noted that these ‘important references to abolition’ were added to the draft text of the ICCPR when it was under consideration at the Third Committee of the UN General Assembly.<sup>25</sup> He explains that the reference in Article 6(2) ‘indicated not only the existence of abolitionist countries but also the direction which the evolution of criminal law should take’, while the reference in Article 6(6) ‘...set a goal for parties to the Covenant. The *travaux préparatoires* indicate that these changes were the direct result of efforts to include a fully abolitionist stance in the Covenant. They represented an intention... to express a desire to abolish the death penalty, and an undertaking by States to develop domestic criminal law progressively towards abolition of the death penalty’.<sup>26</sup>

Professor Roger Hood has also characterised the exception to the right to life in Article 6(2) of the ICCPR as a creature of its time and in no way a permanent justification for the retention of the death penalty when read alongside Article 6(6), which makes abolition the ultimate goal. In short, with the drafting taking place as early as 1957, when there were still only a small minority of abolitionist states, Article 6 was a compromise. In order to achieve agreement, an exception had to be made in Article 6(2) allowing for the death penalty for those countries that had not yet abolished it

In 1971, the United Nations General Assembly endorsed an approach of progressive restriction of the death penalty with a view to its eventual abolition. Furthermore, in its General Comment on Article 6 of the ICCPR, the UN Human Rights Committee (HRC) stated that Article 6 ‘refers

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<sup>25</sup> The Third Committee of the UN General Assembly held 12 meetings between 13 November and 26 November 1957.

<sup>26</sup> William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3<sup>rd</sup> ed., Cambridge University Press, 2002, at p. 70.

generally to abolition [of the death penalty] in terms which strongly suggest... that abolition is desirable. The Committee concluded that all measures of abolition should be considered as progress in the enjoyment of the right to life...'<sup>27</sup>

The following limitation on capital punishment can be noted from Article 6:

- i. It must be limited to the gravest of crimes and the possibility of retention shall not be used to delay or prevent eventual abolition.
- ii. Only courts of competent jurisdiction can impose the death penalty for conduct that was a capital offence at the time of its commission.
- iii. Capital punishment cannot be imposed on people who were under 18 at the time the crime was committed. It cannot be carried out on pregnant women.
- iv. There must be a right to seek pardon or commutation before the sentence is executed (see below at page 20 for commentary on Article 6(4)).

The case law of the HRC identifies when capital punishment and other deprivations of life are considered contrary to other provisions of the ICCPR. These include a breach of the fair trial provisions or where imposition of the death penalty can be considered as a form of inhuman or degrading treatment. These provisions cannot be read in isolation as a complete code. Under the ICCPR as well as the regional conventions there are optional protocols to abolish the death penalty without reservation. As stated above, international human rights scholars agree that this indicates the direction of travel: the death penalty should be restricted in its application until its final abolition.

Whilst retention of the death penalty is permitted, its use cannot by itself constitute cruel or unusual punishment or torture or inhuman treatment and punishment. However, use of the death penalty *may* become an arbitrary violation of the right to life if capital punishment is imposed in circumstances that breach other rights under the ICCPR. For present purposes, the most significant of those other rights are the right to a fair trial and the prohibition on torture.

## The Republic of China Constitution – the legality of the death penalty

The Republic of China Constitution (*hereinafter* the ROC Constitution or the Constitution) that became effective in the Chinese mainland in 1947 and has applied to Taiwan since 1949, is the supreme law that guarantees the fundamental rights of individuals and ensures separation of powers and imposes checks and balances on the exercise of government powers. Similar to other constitutions of the world, the ROC Constitution guarantees the protection of physical personal freedoms in Article 8 and ensures the protection of the right to life or the right to subsistence in Article 15. Although neither article specifically deals with issues concerning the death penalty, the Constitutional Court (which has the final and exclusive power to interpret the constitution) has considered the legality of the death penalty under both articles. According to the Constitutional Court, the right to life or

<sup>27</sup> General Comment 6 on Article 6 of the International Covenant on Civil and Political Rights, adopted on 27 July 1982, para 6; UN Doc HRI/GEN/1/Rev.9 (Vol. I) p.188 (April 30, 1982), available at [http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.1%29\\_%28GC6%29\\_en.pdf](http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.1%29_%28GC6%29_en.pdf)

subsistence or the protection of physical personal freedoms is not absolute. However, restrictions to these rights must always be made by statutes satisfying the principle of proportionality.<sup>28</sup>

On 31 March 2009, the Legislative Yuan, a functional equivalent of the parliament, ratified the ICCPR and the ICESCR that the ROC government had signed in 1966 before being expelled by the United Nations General Assembly. Together with the ratification of both Covenants, the Implementation Law was also enacted and became effective on 10 December 2009. Article 2 of the Implementation Law stipulates that the provisions regarding the protection of the rights enshrined in the two Covenants have the same effects as domestic statute.<sup>29</sup> By virtue of the Implementation Law, the government is obliged to comply with the two Covenants in executing all actions, including capital punishment.

Before the implementation of the two Covenants, the constitutionality of the death penalty had been adjudicated on three occasions by the Constitutional Court. In *J.Y. Interpretation 194* and *J.Y. Interpretation 263*, the Constitutional Court upheld the constitutionality of the mandatory death penalty.<sup>30</sup> In *J.Y. Interpretation 476*, the issue was the constitutionality of the death penalty itself, and the Constitutional Court held that capital punishment is constitutional, but stated that the imposition of any death sentence must comply with due process, as demanded by the protection of physical personal freedoms in Article 8 of the Constitution, and that it should accord with the principle of proportionality enshrined in Article 23 of the Constitution. In the 1990s, there were more than 50 different offences punishable by a mandatory death sentence.<sup>31</sup> It was not until 2006 that the mandatory death penalty was abolished.<sup>32</sup>

## The scope of the death penalty

Article 6(2) of the ICCPR restricts the imposition of the death penalty to the ‘most serious crimes’. The first of the *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*<sup>33</sup> emphasises that the death penalty may only be imposed for ‘intentional crimes with lethal or other extremely grave consequences’.

According to the recent case law of the HRC, the definition of the ‘most serious crimes’ should be interpreted as narrowly as possible. There is a strong argument that capital punishment should (pending abolition) only be imposed for the most serious offences of intentional homicide, but it may not be mandatory for such crimes. The Committee has said that the death penalty should not be enforced for crimes that do not result in the loss of human life, such as drug-related or economic crimes, which is contrary to the ICCPR. In order to clarify the vaguely defined term ‘the most serious

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<sup>28</sup> In *J.Y. Interpretation 443* the Constitutional Court indicated that ‘Article 8 of the Constitution, in which those rights reserved in the Constitution shall not be limited even by the legislative authority (See *J.Y. Interpretation No. 392*), whereas freedom and rights under Articles 7, 9-18, 21 and 22 may be limited by the law upon meeting the conditions stipulated in Article 23 of the Constitution’. The principle of proportionality can be inferred from Article 23 of the Constitution.

<sup>29</sup> Jaw-Perng Wang, *The Current State of Capital Punishments in Taiwan*, 6(1) NTU L. REV 143, 170 (2011).

<sup>30</sup> *J.Y. Interpretation 194* held that Article 5, Paragraph 1, of the Drug Control Act during the Period for Suppression of the Communist Rebellion is not contrary to either Article 7 or 23 of the Constitution; *J.Y. Interpretation 263* held that Article 2, Paragraph 1, Sub-paragraph 9, of the Robbery Punishment Act – which is a special criminal law imposing a mandatory death penalty on those who commit kidnapping with the intention of receiving a ransom regardless of the details and results of their crimes – is constitutional.

<sup>31</sup> Wang, *supra* Note 29, at 146-147.

<sup>32</sup> Wen-Chen Chang, ‘Case dismissed: Distancing Taiwan from the international human rights community’, in *My Country Kills: Constitutional Challenges to the Death Penalty in Taiwan*, 47, 63 (2011).

<sup>33</sup> *Supra* Note 20, Safeguards Article 3.

crimes' and to give effect to its contemporary meaning, Professor Roger Hood has suggested that the first of the safeguards should be re-written to limit the death penalty 'to intentional murder, but only of the gravest kind, and ensure that it is never mandatorily enforced'.<sup>34</sup>

## Taiwanese law and practice

In Taiwan, offences punishable by the death penalty include three categories of crimes based on their severity. The first group of offences mandates a death sentence or life imprisonment for aggravated crimes such as felony murder. The second group imposes a death sentence or life imprisonment or imprisonment for not less than 10 years for offences such as murder. For the third group, a death sentence or imprisonment for not less than seven years is imposed for offences such as kidnapping to extort ransom.<sup>35</sup>

General Comment No. 6 of the HRC states that '*the deprivation of life by the authorities of the State is a matter of utmost gravity*'.<sup>36</sup> However, in Taiwan, there are more than 50 offences in the Criminal Code and other statutes that are punishable by the death penalty,<sup>37</sup> although some of these offences clearly do not meet the threshold of the *most serious crimes*. The Statute for Narcotics Hazard Control, and the Controlling Guns, Ammunition and Knives Act both include several provisions allowing for the imposition of a death sentence and, whilst the constitutionality of these statutes have been upheld by the Constitutional Court, the imposition of the death penalty under these acts and many other statutes listed below violates Article 6(2) of the ICCPR. Taiwan therefore needs to take steps to restrict the death penalty in law to only the *most serious crimes* as defined by the HRC and a contemporary understanding of the safeguards.

**Table 1: The criminal statutes of Taiwan permitting the imposition of capital punishment**

Criminal Law		
Civil disturbance	Death or life imprisonment	Article 101(1)
Treason	Death or life imprisonment	Article 103 Article 104 Article 105 Article 107
Offences of malfeasance in office	Death, life imprisonment or imprisonment for not less than 10 years	Article 120

<sup>34</sup> See Roger Hood, 'Statement to the International Commission against the Death Penalty', October 2010.

<sup>35</sup> Wang, *supra* Note 29, at 148-149.

<sup>36</sup> *Supra* Note 27: Human Rights Comm., *General Comment No. 6: The Right to Life (Article 6)*, para 3.

<sup>37</sup> See Table 1.

Offences against public safety	Death, life imprisonment or imprisonment for not less than seven years	Article 185-1(1)
	Death or life imprisonment	Article 185-1(2)
	Death, life imprisonment or imprisonment for not less than 10 years	Article 185-1(2) Article 185-2(3)
Sexual offences	Death or life imprisonment	Article 226-1(1)
Offences of homicide	Death, life imprisonment or imprisonment for not less than 10 years	Article 271
	Death or life imprisonment	Article 272
Offences of abrupt taking, robbery and piracy	Death or life imprisonment	Article 332(1) Article 334(1)
	Death or imprisonment for not less than seven years	Article 333(1)
	Death, life imprisonment or imprisonment for not less than 10 years	Article 328(3) Article 332(2)
	Death, life imprisonment or imprisonment for not less than 12 years	Article 334(2) Article 333(3)
Offences of extortion and kidnapping for ransom	Death or life imprisonment	Article 348(1)
	Death, life imprisonment or imprisonment for not less than seven years	Article 347(1)
	Death, life imprisonment or imprisonment for not less than 10 years	Article 347(2)
	Death, life imprisonment or imprisonment for not less than 12 years	Article 347(2) Article 348(2)



<b>Criminal code of the armed forces</b>		
Offences against the allegiance to the nation	Death, life imprisonment or imprisonment for not less than 10 years	Article 14 Article 19 Article 24
	Death or life imprisonment	Article 15 Article 17 Article 18 Article 20
Offences against the military duty or service	Death, life imprisonment or imprisonment for not less than 10 years	Article 26 Article 31(4) Article 41
	Death or life imprisonment	Article 27
Offences against the military duty of officer	Death or life imprisonment	Article 42
Offences against the military duty of subordinate	Death or life imprisonment	Article 47
	Death, life imprisonment or imprisonment for not less than 10 years	Article 48 Article 49
	Death, imprisonment for not less than seven years	Article 50
Offences of kidnapping military vessel, aircraft, or controlling its navigation	Death, life imprisonment or imprisonment for not less than 10 years	Article 53
Offences of destroying or making the military facilities and materials for military use useless in wartime	Death or life imprisonment	Article 58(3)
Offences of manufacturing, selling, or transporting military arms or ammunition without authorisation	Death, life imprisonment or imprisonment for not less than 10 years	Article 65(1)
Offences of making any false military order, document, or other statement while knowing it to be false in wartime	Death or life imprisonment	Article 66(2)
<b>Civil Aviation Act</b>		
Offences of hijacking an aircraft by force or threat/Offences of hijacking an aircraft by force or threat that result in the death of a person	Death, life imprisonment or imprisonment for not less than seven years/Death, life imprisonment or imprisonment for not less than 10 years	Article 100

Offences of endangering flight safety or aviation facilities by force, threat, or other means and causing death	Death, life imprisonment or imprisonment for not less than 10 years	Article 101
Offences by the responsible person of a manufacturer or repair station, their employees or hired person of undertaking the manufacture or maintenance with unapproved aviation products, appliances, and parts and causing death	Death, life imprisonment or imprisonment for not less than 10 years	Article 110
<b>Statute for Narcotics Hazard Control</b>		
Offences of manufacturing, selling, or transporting category one narcotics <sup>38</sup>	Death or life imprisonment; if sentenced to imprisonment, a fine of not more than NT\$20,000,000 may be imposed	Article 4
Offences of compelling others to use category one narcotics by means of violence, menace, fraud or other illegal means	Death, life imprisonment or imprisonment for not less than 10 years; if sentenced to life imprisonment or not less than 10 years of imprisonment, a fine of not more than NT\$10,000,000 may be imposed	Article 6
Civil servants convicted of committing offences described in Article 4 Paragraph 2 or Article 6 Paragraph 1 under the pretexts of their authority, opportunities, or means given to the position	Death or life imprisonment; if sentenced to imprisonment, a fine of not more than NT\$10,000,000 may be imposed	Article 15
<b>Punishment Act for Violation to Military Service System</b>		
Offences of carrying weapons by group and obstructing a military service and causing death to a person	Death, life imprisonment or imprisonment for not less than 10 years	Article 16
Offences of carrying weapons by group and fighting publicly against a military service and causing death to a person	Death, life imprisonment or imprisonment for not less than 10 years	Article 17

<sup>38</sup> Category includes Acetorphine, Cocaine, Desomorphine, Dihydroetorphine, Etorphine, Heroin, Ketobemidone, Opium and Morphine. See Art. 2 of the Statute for Narcotics Hazard Control.

Child and Youth Sexual Transaction Prevention Act		
Offences of having a person under the age of 18 engage in sexual transaction by violence, menace, medicament, control, hypnogenesis or other means against the will of the victim and purposely killing the victim	Death or life imprisonment	Article 26
Genocide Penal Code		
Crimes of genocide	Death, life imprisonment or imprisonment for not less than seven years	Article 2
Controlling Guns, Ammunition and Knives Act		
Without authorisation, manufacturing, selling, transporting, transferring, leasing or lending guns, shoulder-fired weapons, machine guns, submachine guns or carbines with intent to facilitate himself or others to commit a crime	Death or life imprisonment and a fine of not more than NT\$50,000,000	Article 7
Punishment of Smuggling Act		
Committing the crime of smuggling and refusing inspection or arrest by force which results in the death of a person	Death, life imprisonment or imprisonment for not less than 10 years, and, in addition thereto, a fine of not more than NT\$10,000,000 may be imposed	Article 4

Source: Laws and Regulations Database of the Republic of China, <http://law.moj.gov.tw/Law/LawSearchLaw.aspx> (Last Visited Mar 10, 2014).

## The prohibition of the execution of juveniles, pregnant women and other groups or individuals

According to Article 6 of the ICCPR, the death penalty may not be imposed on pregnant women or on individuals for crimes committed under the age of 18.

Safeguard 3 of the safeguards states: *Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor should the death penalty be carried out on pregnant women, or on new mothers, or on persons who have become insane*. In 1989, these standards were further developed by the Council who recommended that UN member states eliminate the death penalty for persons suffering from mental

retardation or extremely limited mental competence, whether at the stage of sentence or execution'. In 2005, the UN Commission on Human Rights urged all states that maintain the death penalty 'not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person'.

The safeguards establish minimum standards to be applied in countries that still impose capital punishment and Taiwan should abide by these standards pending abolition. The safeguards clearly prohibit the imposition of capital punishment on, or the execution of, persons suffering from mental illness or intellectual disability.

### *Taiwanese law and practice*

Taiwan's Criminal Code places restrictions on the imposition of death penalty on certain groups of individuals. According to Article 63 of the Criminal Code, a death penalty or life imprisonment shall not be imposed on offenders who are under the age of 18 or over the age of 80. In addition, Article 19 of the Criminal Code provides that an offence is not punishable if it is committed by a person who is suffering from a mental disorder or defect and, as a result, is unable or less able to judge his or her act or lacks the ability to act according to his or her judgment. It should be noted however that Taiwan's Criminal Code does not prohibit the imposition of a death penalty on pregnant women; only the execution of a pregnant woman is prohibited. Article 57 of the Criminal Code also provides judges with the discretion to determine the most appropriate sentence based on the circumstances of the offence and the offender. A wide range of factors are listed, including the motive and purpose of the offence, special circumstances faced by the offender at the moment of committing the offence, the means used for the commission of the offence, the offender's living conditions, the disposition of the offender, the education and intelligence of the offender, the relationship between the offender and the victim, the seriousness of the crime, the danger or damage caused by the offence, and the offender's attitude after committing the offence.<sup>39</sup>

The imposition of capital punishment on those suffering from mental illness and/or intellectual disability is still a reality in Taiwan and remains a serious human rights concern. In criminal trials, defendants with mental illness, or those with intellectual disability, are often portrayed as attempting to deceive the court in order to receive a more lenient sentence. Psychiatric and/or psychological examinations are not always made available to the court and when produced they are often inadequate. The assessment of the mental condition of criminal defendants remains a challenging issue in Taiwan. The Code of Criminal Procedure has not explicitly stipulated any rules or procedures concerning such assessments. At present, while an attorney may request that the court conducts a mental assessment, the permission for, and the method of the mental state evaluation are solely at the discretion of the court. Overall, the quality of mental assessment has not been satisfactory and there have been erroneous assessments failing to establish when a defendant has a mental illness.<sup>40</sup> The rights of defendants facing the death penalty with mental illness or intellectual disability are thus being infringed.<sup>41</sup>

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<sup>39</sup> Article 57, the Criminal Code.

<sup>40</sup> TAHR, *supra* Note 7, at p.38.

<sup>41</sup> Thomas Shun-Kuei Chan & Kuo-Yen Weng, *The Criminal Procedure Protection for Mental Disabled Persons: Two Real Cases Study*, 14 Taiwan Bar J. 1, 9-10 (2010) (in Chinese) at 7.

Medical experts not only need to participate actively within the criminal justice system, but they also need the necessary training, expertise and skills to enable them to do so. As a result, in far too many cases in Taiwan, individuals suffering from mental illness and/or intellectual disability impacting on the safety of their convictions and their sentences, have been sentenced to death and then executed. Recently there were two widely reported cases concerning the imposition of the death penalty on defendants with mental illness: the case of the Lin brothers, and the case of Chen Kun-Ming.

The Lin brothers – Lin Shin-Hung and Lin Meng-Kai – were convicted in 2001 of the murder of a neighbour, and causing serious injury to another. At trial, the younger brother expressed no regret for his actions and even claimed that if he were to be released he would also kill the injured victim. The lawyers for the defendants made a statement to the court explaining that the younger brother was mentally ill, but no psychiatric assessment was carried out to substantiate this claim and no medical evidence was produced for the defendant. The elder brother was remorseful, but demanded the same punishment as his brother. Both defendants were sentenced to death by the Supreme Court and executed in December 2005.

In the Chen Kun-Ming case, the defendant killed a woman who had applied for a job as a so-called 'betel-nut beauty' in the shop he rented. Before this homicide, Chen Kun-Ming had served a 12-year prison sentence for killing two sisters aged eight and nine on April 16, 2004. Chen had been released in 2009 on provisional parole. At trial, the defendant stated that he was suffering from a form of mental illness and that there existed a devil in his mind that urged him to kill. Having relied on the ICCPR and relevant international human rights norms, the Supreme Court decided not to impose a death sentence on Chen. According to the Supreme Court:

*.....The government ratified the ICCPR and ICESCR (the Two Covenants) on May 14, 2009. Following this, the Legislative Yuan passed the Act to Implement the Two Covenants which became effective on December 10, 2009. Article 2 of the Act states that "the provisions regarding human right protection in the Two Covenants have the same binding force as domestic law," and Article 3 states that "applications of the two Covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee". In addition, Article 6, Paragraph 1 of ICCPR provides that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". Furthermore, the UN Commission on Human Rights resolution 2005/59 urges all states that still maintain the death penalty not to impose a death penalty on a person suffering from any mental or intellectual disabilities, and not to execute any such person. Moreover, in 2013, Paragraph 57 of Concluding Observations and Recommendations Adopted by the International Group of Independent Experts in the Review of the Initial Reports of the Government of Taiwan on the Implementation of the International Human Rights Covenants urged the Taiwanese government to ensure that all relevant procedural and substantive safeguards relating to the imposition and execution of capital punishment are scrupulously adhered to. In particular, persons with mental or intellectual disabilities shall never be sentenced to death and/or executed until the final abolition of capital punishment.....*

This decision of the Supreme Court was widely praised as it directly applied the ICCPR and related international human rights norms protecting those suffering from mental illness/impairment from the death penalty. Nonetheless, there are still many other cases in which defendants with mental illness or intellectual disability have been sentenced to death as the courts have rejected their claims on the basis that they are malingering and have no real symptoms. If mental illness or insanity develops post conviction, or is found to exist at the time of execution, Article 465 of the Code of Criminal Procedure demands the execution be suspended by an order issued by the Ministry of Justice. The same should apply to the execution of pregnant women. Notwithstanding such legal protections, inappropriate executions have occurred because the relevant authorities have not been made aware of these issues. The level of medical facilities and mental health services for prisoners have been inadequate and lawyers are not as a rule adducing or relying on expert medical evidence at court to substantiate mental health defences, or to challenge the death penalty. For example, in the case of the Lin brothers mentioned above, despite the argument made by the lawyer that the younger brother was mentally ill, no psychiatric or psychological examination was conducted at the time of trial nor prior to execution. The younger brother was thus executed without ever having his mental state assessed and cogent medical evidence presented to the courts or the authorities.

## Pardons and petitions of mercy

Article 6(4) of the ICCPR states:

*Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*

The seventh safeguard reinforces this norm:

*Anyone sentenced to death shall have the right to seek pardon or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.*

Thus, international law provides for a 'right' to seek pardon or commutation of sentence, and in order for this to be meaningful, states are under an obligation to provide *effective* measures for the proper consideration of clemency in all cases. No person may be executed while a petition for mercy or pardon is pending. This principle derives from the eighth safeguard which states that: '*Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceedings relating to pardon or commutation of the sentence.*' Filing an appeal or a petition for mercy should always provide a basis to suspend execution.

In recent years, the right to seek clemency, amnesty or pardon has been carefully examined in the Caribbean context, both by domestic courts and by regional human rights tribunals.

Article 4(6) of the American Convention on Human Rights is stated in terms very similar to Article 6(4) of the ICCPR:

*Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases.*

The Inter-American Commission on Human Rights has considered the effect of Article 4(6) of the American Convention in a number of death penalty cases. In *Desmond McKenzie et al v. Jamaica*<sup>42</sup> the Commission held that procedures for granting mercy or pardon must guarantee condemned prisoners an effective and adequate opportunity to participate in the process:

*In the Commission's view, the right to apply for amnesty, pardon or commutation of sentence... encompasses certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. These protections include the right on behalf of condemned prisoners... to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel... and to receive a decision from the authority within a reasonable period of time prior to his or her execution.'*<sup>43</sup>

In the case of *Neville Lewis and others v. Attorney General of Jamaica*,<sup>44</sup> the Privy Council ruled in a seminal judgment that fairness was a fundamental requirement of the proceedings before the Jamaican Mercy Committee, the body which ultimately decides who should be executed and who should be granted mercy or a pardon. The Court adopted an approach to constitutional interpretation that was consistent with Jamaica's international human rights obligations:

*'...Jamaica ratified the American Convention on Human Rights... and it is now well established that domestic legislation should as far as possible be interpreted so as to conform to the state's obligations under any such a treaty.'*<sup>45</sup>

Bearing in mind the obligations of Jamaica under Article 4(6) of the American Convention on Human Rights, the Court held that:

*'...it seems... that the State's obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subjected to judicial review.'*<sup>46</sup>

The decision in *Neville Lewis* clearly establishes and applies the principle that public authorities that make such important decisions as whether or not a person sentenced to death should be executed must observe basic rules of fairness. There is no reason to suggest that the applicable standards under Article 6(4) of the ICCPR are any different, and signatories to the ICCPR should take steps to ensure that condemned prisoners are provided with adequate and *effective* mercy procedures. The decision is one of life or death and, as such, domestic law is required to make provision for a proper functioning, transparent, and fair system that allows for the proper consideration of clemency in all cases.

## Taiwanese law and practice

According to Article 40 of the Constitution, the President shall – in accordance with law – exercise the power of granting amnesties, pardons, remission of sentences, and restitution of civil rights. To

<sup>42</sup> Inter-American Commission on Human Rights, Case 12.023, Report 41/00, 13 April 2000.

<sup>43</sup> *Ibid*, at para 228.

<sup>44</sup> [2001] 2 AC 50.

<sup>45</sup> *Ibid* at para 78F.

<sup>46</sup> *Ibid* at para 79B.

exercise this power, the President may order the Executive Yuan – the functional equivalent of a cabinet – to set a deliberation session with the relevant ministries in accordance with Article 6 of the Amnesty Law.<sup>47</sup>

However, the details of the procedure regarding amnesty or pardons are not fully prescribed in the Amnesty Law. No clear rules of procedure have been established for the consideration of petitions for pardon or mercy, let alone the criteria by which such petitions may be reviewed and decided. The Amnesty Law has rendered the decision to grant a pardon or mercy entirely discretionary, even without the necessity to reply to the petitions. Basic principles of natural justice and procedural fairness are absent from the process and since the ratification of the ICCPR, the Amnesty Law has been criticised for failing to comply with Article 6(4) of the Covenant. There have been calls for reform to enable death row inmates to have an effective opportunity to seek pardons or commutation of sentence, and for the President to convene a commission to consider such applications and to substantively reply to those petitions. Most importantly, whilst a petition for mercy remains pending determination, death row inmates should not be executed.<sup>48</sup>

After the Implementation Law became effective in December 2009, some death row inmates – with the aid of public interest lawyers – filed a petition for constitutional interpretation to the Constitutional Court in early 2010. These death row inmates argued – among other things – that they had not been given a proper opportunity to apply for clemency or to receive official replies to their pardon petitions in contravention of Article 6(4) of the ICCPR. Regrettably, the Constitutional Court dismissed their request for interpretation, relying on the ground – amongst others – that the Implementation Law provided a two year period for the legislature to revise relevant laws, which had not yet expired.<sup>49</sup>

Unsuccessful in their constitutional petitions, these death row prisoners filed petitions to the Office of the President for pardon. In 2010, a total of 44 prisoners awaiting execution filed petitions for pardon. However, in 2010, 2011, and 2012, there were, respectively, four, five and six death row inmates executed, none of whom had received replies or notification that their petitions for pardon had been determined by the President. This serious violation was noted by the international experts in 2013 as a fundamental breach of Article 6(4) of the ICCPR<sup>50</sup>:

*According to Article 6(4) ICCPR, anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. This implies that the execution of the sentence of death must be postponed at least until the proper conclusion of the relevant procedure. In the opinion of the experts this provision of the Covenant seems to have been violated in all 15 cases of executions carried out in Taiwan during the last three years.'*

In April 2013, the remaining prisoners on death row filed an administrative appeal to the President, pleading for a determination on their earlier petitions for pardon. On the same day, six death row inmates were executed, and among those who were executed, two had joined the earlier petitions for pardon in 2010, but were executed without receiving any reply or indication that their petitions had been considered and determined. The Ministry of Justice explained that prior to the executions,

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<sup>47</sup> See Yiu Chen Su, *On the Pardon of Death Penalty*, Feb. 5, 2010, available at <http://www.taedp.org.tw/story/1669#sthash.B8cHveiU.dpuf> (accessed 2013.11.26) (in Chinese).

<sup>48</sup> See International Federation for Human Rights (FIDH), *The Death Penalty in Taiwan: Towards Abolition?*, 29 (2005).

<sup>49</sup> J.Y. Dismissal Resolution No. Hui-Tai 8409, 1358th Meeting of the Constitutional Court.

<sup>50</sup> *Supra* Note 3, Concluding Observations and Recommendations, at para 57.



the Ministry had enquired with the Office of the President about the pardon and was told that the President had not considered granting pardon to any persons on death row.<sup>51</sup>

In August 2013, the Office of the President dismissed the administrative appeal that the remaining death row inmates had filed in April of that year. The main reason given was that presidential pardons are an executive privilege and as such are not reviewable under the Administrative Appeal Act.<sup>52</sup> Following this dismissal, 26 death row inmates – with the aid of public interest lawyers – filed a suit in the Taipei High Administrative Court, requesting the court to nullify the dismissal, or alternatively, to repeal the dismissal and order the President to grant a favourable decision upon their appeal. Regrettably this suit was again dismissed by the court on the similar ground that the exercise of the power of pardon is an executive privilege which cannot be reviewed by judicial authority.<sup>53</sup> Death row inmates have made a further appeal to the Supreme Administrative Court, but at the time of writing this appeal is still pending determination.

According to Article 6(4) of the ICCPR, the right to seek pardon and amnesty should be guaranteed, and Taiwan is under a strict obligation to provide effective measures for the proper consideration of clemency in all cases. Furthermore, death sentences cannot be executed whilst mercy procedures remain pending determination, something that keeps happening in Taiwan. It is thus evident that Article 6(4) of the ICCPR guaranteeing the right of death row inmates to seek pardon is not being complied with.

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<sup>51</sup> Ministry of Justice, Press Release, available at <http://www.moj.gov.tw/public/Attachment/34191921116.pdf> (accessed 2014.01.20) (in Chinese).

<sup>52</sup> Decision of Administrative Appeal, Office of the President, Hua-tsung-su 10200077944 (2013) (Taiwan).

<sup>53</sup> Taipei High Administrative Court, 102 Su 1526 (2013) (Taiwan).



# **PART THREE**

The prohibition of torture and related ill-treatment

# The prohibition of torture and related ill-treatment

## Position under the ICCPR

Freedom from torture is a non-derogable right. Article 7 of the ICCPR prohibits subjecting people to treatment or punishment that amounts to torture or that is cruel, inhuman or degrading. Scientific experimentation without consent is prohibited under this Article.

It is also important to note Article 10 of the ICCPR in the context of punishment:

- 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*
- 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.*
- 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*

Even where a person faces a capital charge, or has been sentenced to death by a court applying the highest standards of process, the treatment of a person in custody or following sentence may deprive him of dignity or be considered inhumane. Such treatment is not merely a violation of the ICCPR in its own right, but also prevents effect being given to the sentence of death. Compliance with Article 6 requires any deprivation of life to be in accordance with the ‘other provisions of this Covenant’.

The HRC’s General Comment dates from 1992<sup>54</sup> and is somewhat out of date. However, that comment combined with the subsequent case law particularly of the European Court of Human Rights<sup>55</sup> (ECtHR) suggests that inhuman treatment is where severe suffering is caused irrespective of intention. Cruel treatment means the same, and degrading treatment is where a person is disproportionately humiliated and deprived of dignity. Whilst capital punishment, imprisonment, and being restrained at trial all have the capacity to humiliate and degrade, there will only be a violation of this norm, in the context of detention and punishment if the treatment is either done with the purpose of inflicting humiliation over and above the legitimate acts themselves, or does humiliate without objective justification.

The ninth safeguard states that where capital punishment occurs, ‘...it shall be carried out so as to inflict the minimum possible suffering’. This requirement is relevant once a death sentence has been imposed. Issues may arise with respect to the conditions of detention on death row, and the HRC has

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<sup>54</sup> GC No 20 (1992).

<sup>55</sup> See for example *Peers v Greece* (2001) and the extensive subsequent case law including *Dougoz v Greece*, *Kalashnikov v Russia*, and *Onofriou v Cyprus* (2010) ECtHR.

expressed concern *inter alia* about poor living conditions, including undue restrictions on visits and correspondence,<sup>56</sup> small cell sizes, lack of proper food and exercise, and inadequate time spent outside cells. The Committee Against Torture has addressed the issue of conditions of detention for those under sentence of death, and recognised that the mental anguish caused by spending an excessive length of time on death row may amount to cruel, inhuman, and degrading treatment.<sup>57</sup>

In resolution 1996/15, the UN Economic and Social Council urged member states in which the death penalty may be carried out 'to effectively apply the [UN] Standard Minimum Rules for the Treatment of Prisoners, in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering.'<sup>58</sup>

### Taiwanese law and practice

According to Article 158-4 of Taiwan's Code of Criminal Procedure, the admissibility of evidence, if obtained in violation of law or legal procedure, may be denied. Unless otherwise explicitly provided by law, a balance must be struck between the protection of human rights and the preservation of public interest in deciding the admissibility of evidence.

Under the Code of Criminal Procedure, torture or illegal treatment shall be prohibited. According to Article 156 of the Code, the confession of an accused extracted by violence, threat, inducement, fraud, exhausting interrogation, unlawful detention, or other improper means shall not be admitted as evidence before the court. The same provision also stipulates that confessions should not be relied upon as the sole basis of conviction.<sup>59</sup> The prosecutor must now prove that statements were made voluntarily and a video recording must be made of interrogations relating to serious crimes.<sup>60</sup> Moreover, the accused's guilt shall not be presumed merely because of his refusal to make a statement or remaining silent.<sup>61</sup> In their Review of the Initial State Report in 2013, the experts stressed that capital punishment must never be imposed on the basis of a confession extracted by torture.<sup>62</sup>

Notwithstanding these recently improved provisions in the Code of Criminal Procedure, the imposition of the death penalty on the basis of confessions extracted by torture still occurs. In recent years, there have been four widely known cases which have drawn attention to serious human rights concerns: the case of Chiang Kuo-Ching, the case of the Hsichih Trio, the case of Cheng Hsing-Tse, and the case of Chiu He-Hsun.

In the case of Chiang Kuo-Ching, the defendant was a former air force member convicted of the rape and murder of a five-year-old girl. He was sentenced to death by the military court and executed in 1997.<sup>63</sup> After a seven-year investigation by the Control Yuan, the functional equivalent of an ombudsman, the Ministry of Justice reinvestigated this case. The Military Supreme Court Prosecutor's

<sup>56</sup> Concluding observations of the Human Rights Committee: Japan < UN Document CCPR/CO/8/Add.102, 19, November 1998 at para 21.

<sup>57</sup> *Supra* Note 19, Report of the Secretary-General, at p.54.

<sup>58</sup> *Supra* Note 22, at para 7.

<sup>59</sup> Article 156(2), the Code of Criminal Procedure.

<sup>60</sup> *Supra* Note 7, FIDH/TAHR *The Hidden Face of Taiwan*, at p.17.

<sup>61</sup> Article 156(4), the Code of Criminal Procedure.

<sup>62</sup> *Supra* Note 3, Concluding Observations and Recommendations, at para 57 (2013).

<sup>63</sup> Ministry of National Defence (86 Fu-Kao-Tse-Chian No. 6 original final decision); Ministry of National Defence (100 Sheng-Tsai No. 1 re-trial decision).

Office filed an extraordinary appeal with the Military Supreme Court to reopen the case in 2010. The authorities acknowledged that Chiang's statement 'confessing' to the crime had been made as a result of torture by military investigators.<sup>64</sup> It was accepted that the trial court had ignored Chiang's allegations of torture and his pleas of innocence and that his conviction had been rushed through by the military court. Eventually, in September 2011, the military court formally acquitted Chiang and the Ministry of Defence agreed to NT\$103,185,000 (US\$3.4m) in compensation to Chiang's relatives.<sup>65</sup>

Chiang's case has drawn much international attention to the use of the death penalty in Taiwan as his verdict and death sentence were based on a forced confession extracted by torture. Several international and domestic human rights groups have voiced their grave concerns. When Chiang's innocence was finally accepted and his family compensated by the state, the International Commission against the Death Penalty (ICDP) – which has long pushed for the reinvestigation of this case – received a note of formal apology from President Ma Ying-Jeou as well as from the Ministry of National Defence. In an open statement, the ICDP emphasised that criminal justice systems must avoid the condemnation to death of innocent persons.<sup>66</sup>

The case of the Hsichih Trio involves three defendants: Su Chien-Ho, Liu Bin-Lang, and Chuang Lin-Hsun. In March 1991, a married couple were found murdered in their bedroom in Hsichih, Taipei County (currently known as New Taipei City). In August 1991, Wang Wen-Hsiao was arrested because his fingerprints were found at the crime scene. During the interrogation, Wang informed the investigating authority that his brother and the trio – Su, Liu, and Chuang – were involved as accomplices, resulting in their arrest. Wang Wen-Hsiao and his brother, due to their status as soldiers, were convicted by a military court and Wang was executed soon after.<sup>67</sup> Wang's brother received a lighter sentence as he was alleged to have played a lesser role as a lookout during the commission of the crime. The trio were tried in an ordinary criminal court and were convicted and sentenced to death on the basis that they had confessed during their interrogation to participating in the rape of the female victim and the murder of the couple. Nevertheless, they later retracted their confession and claimed they had been tortured.<sup>68</sup>

In 2000, the trio were granted a re-trial. Since then, the case has been tried and retried on numerous occasions and in 2010, the court finally granted the request by the defence to order a fresh analysis of the evidence, to be carried out by internationally renowned forensic scientist Henry Chang-Yu Lee. Lee used the enlarged original photographs from the crime scene and with the autopsy reports he was able to reconstruct the murders at the original location in Hsichih. Lee concluded that the scenario laid out by the prosecutor was 'highly improbable'.<sup>69</sup> Due to his finding, the trio – after having undergone 21 years of criminal proceedings – were acquitted.<sup>70</sup> The Criminal Speedy Trial Act, which came into force in 2010, meant that the prosecutor was not permitted to pursue any further appeals in the case, because the Act stipulates that where a defendant has been acquitted

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<sup>64</sup> Taiwan Alliance Against the Death Penalty, 'Doubts raised over soldier's execution', 30 January 2011 at <http://www.taedp.org.tw/en/story/1875>

<sup>65</sup> The National, 'Taiwan 'child rapist' cleared 14 years after his execution, 2 February 2011 at <http://www.thenational.ae/news/world/asia-pacific/taiwan-child-rapist-cleared-14-years-after-his-execution>

<sup>66</sup> See ICDP, *Statement by the International Commission against the Death Penalty on the execution of Chiang Kuo-Ching in Taiwan*, available at <http://www.taedp.org.tw/en/story/1886#sthash.a18qLS04.dpuf> (accessed 2013.11.29).

<sup>67</sup> See Celia Llopis-Jepsen & Wu Jiazhen, *Su Chien-Ho, Liu Bin-Lang and Chuang Lin-Hsun 'The Hsichih Trio'*, available at <http://www.taedp.org.tw/en/story/2405#sthash.jq1SzzwS.dpuf> (accessed 2013. 11. 29).

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> Taiwan High Court, Criminal Division, 100 Chu-Tsai-Keng (3) No. 1 (2011) (Taiwan).

on three occasions no further appeals can be made by the prosecuting authority. After almost two decades of legal process, the trio's case was finally resolved.<sup>71</sup>

In the Cheng Hsing-Tse case in 2002, Cheng Hsing-Tse went to a Karaoke club in Fengyuen city with his friends and, whilst there, a local gang leader, Lo, fired his gun in the Karaoke room and the police came to intervene. Subsequent shooting resulted in the deaths of Lo and a policeman. Cheng was charged with the murder of the policeman and was convicted and sentenced to death in 2006. However, his fingerprints were not found on the gun, and a reconstruction of the bullet route and the crime scene was never performed.<sup>72</sup> Moreover, Cheng's attorney later found evidence indicating that during the investigation, Cheng had been tortured with electric shocks to his fingers and genitals, and water was forcefully poured into his mouth.<sup>73</sup> The confession had been extracted by torture and should not have been admitted into evidence, but Cheng remains on death row awaiting execution.

The case of Chiu He-Hsun involved the kidnapping of a child named Lu Cheng in 1988.<sup>74</sup> The kidnappers demanded a ransom of NT\$1m but did not release the child upon receipt of the ransom money. The child was never found. In 1989, Chiu He-Hsun and his co-accused were charged with kidnapping with the only evidence being their own confessions. Chiu was tried, found guilty and sentenced to death. Subsequently, the Control Yuan conducted an investigation into the case and released a report in 1994, in which the tapes of the interrogation sessions were disclosed revealing that the police had tortured Chiu in order to extract his confessions.<sup>75</sup> In spite of this, judgment was delivered in 2011, and the death sentence was upheld.<sup>76</sup> With the aid of public interest lawyers Chiu filed for retrial, but his petition was dismissed by the Taiwan High Court and then the Supreme Court.<sup>77</sup> Both courts held that the new evidence presented showing that his confession was involuntary could not overrule the original verdict. Chiu then pursued a constitutional petition arguing that the dismissal of his retrial was in violation of his right to life. Regrettably, on 18 January 2013, this petition was also dismissed by the Constitutional Court.<sup>78</sup>

Notwithstanding the ratification and domestic implementation of the ICCPR and reforms to the Criminal Code of Procedure, there are too many cases revealing a practice whereby confession evidence has been extracted by torture or other improper means. Death sentences have been imposed and continue to be upheld even where evidence comes to light that improper practices have taken place. In the circumstances, Taiwan needs to take urgent measures to address this fundamental issue for it is beyond doubt that the death penalty can never be imposed on the basis of confessions that have been extracted by torture.

<sup>71</sup> Llopis-Jepsen & Wu, *supra* Note 67.

<sup>72</sup> Amnesty International, UA 358/12 Taiwan - Execution of Taiwanese Man is Imminent, available at <http://www.amnesty.se/upload/apps/webactions/urgentaction/2012/12/17/33800612.pdf> (accessed 2014. 11. 18).

<sup>73</sup> *Ibid.*

<sup>74</sup> Manfred Nowak, *Torture: Perspective from UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment*, 7 NTU L. Rev 2, 466, 485-486 (2012).

<sup>75</sup> Taiwan High Court, Criminal Division, 98 Chu-Shang-Chung-Keng (11) No. 7 (2011) (Taiwan).

<sup>76</sup> *Ibid.*

<sup>77</sup> Supreme Court, Criminal Division, 101 Tai-Kang No. 113 (2012) (Taiwan).

<sup>78</sup> J.Y. Dismissal Resolution No. Hui-Tai 11201, 1400<sup>th</sup> Meeting of the Constitutional Court.





# **PART FOUR**

## Pre-trial rights

# Pre-trial rights

## The right to liberty

The right to liberty is a fundamental right in international and domestic law. It is enshrined in all international human rights instruments (Article 3 of the Universal Declaration on Human Rights, Article 9 of the ICCPR, Article 7 of the ACHR and Article 5 of the ECHR) and guaranteed in all of the Commonwealth Constitutions. There is no right not to be detained; the purpose of the right to liberty is to protect individuals from arbitrary detention. In this context, the prohibition on arbitrary detention means that any detention must conform both to domestic and international standards. Hence the insistence of all the international human rights bodies that the final determination of whether detention is arbitrary is for the international body itself.

Article 9 of the ICCPR provides detailed provisions on pre-trial rights, and failure to comply with this article can have an influence on whether the death penalty is permissible in any given case.

## Taiwanese law and practice

Pre-trial detention was a controversial issue prior to the 1990s, as the power to detain criminal suspects was given to prosecutors but not to judges. In December 1995, however, the Constitutional Court ruled that the power to detain should be given to judges in order to be consistent with the wording of Article 8 of the Constitution, which deals with the protection of physical personal freedoms and the principle of both procedural and substantive due process.<sup>79</sup> Articles 101 & 101-1 of the Code of Criminal Procedure provide the rules governing detention. If the judge considers that the defendant is involved in a serious crime, and is likely to escape or to fabricate evidence, or the judge believes that the defendant is involved in such a serious crime as rape or arson and is likely to commit the offence again, the judge may prescribe detention.<sup>80</sup> In a constitutional interpretation, the Constitutional Court has stressed that:

*'...based on the constitutional guarantee of people's personal freedom, in order to satisfy the statutory requirements, prior to ordering a detention the trial court shall have a reasonable ground to believe that the defendant is likely to escape, to destroy, forge, or alter evidence, or to conspire with accomplices or witnesses, and at the same time the court shall have a reasonable ground to believe that the less harmful measures such as a bail, a consignment to custody, and the limitation on residence are not sufficient to preserve the prosecution, the trial process, or the execution of the final judgment. When the trial court has those two reasonable grounds, an order of the detention of a defendant in fact serves as the last and necessary resort to preserve the effective implementation of state's power of criminal justice.'*<sup>81</sup>

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<sup>79</sup> J.Y. Interpretation 392, 7 ROC Const. Ct. 377, 377 (1995).

<sup>80</sup> Article 100-1, the Code of Criminal Procedure.

<sup>81</sup> J.Y. Interpretation 665, ROC Const. Ct. 560, 560 (2007-2009).

Prior to this interpretation, trial courts in Taiwan routinely detained defendants involved in serious crimes, where the punishment might be the death penalty.<sup>82</sup> This interpretation was particularly significant as the Constitutional Court stressed that severity of crimes committed should not be the only reason for restricting personal freedoms.

## Reasons for arrest and access to a lawyer

### Reasons for arrest

Article 9(2) of the ICCPR states that:

*Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*

The requirement that an individual deprived of his liberty be given the reasons for his arrest is common to both international human rights instruments and the Constitutions of the Commonwealth Caribbean. What is required is that the individual is told, 'in simple, non-technical language' that he can understand 'the essential legal and factual grounds for his arrest' (*Fox, Campbell and Hartley v. United Kingdom*).<sup>83</sup> So, for example, the Constitution of Trinidad and Tobago refers to 'reasonable particularity'.

The sufficiency of the information given to a detainee is measured by the purpose of the provision: to enable anyone deprived of his liberty to challenge the lawfulness of his arrest. And this is the essential distinction between the requirement of *reasons for arrest* and the additional (but later) requirement that everyone charged with a criminal offence be *notified of the 'charge'* against him, which is intended to be an important aspect of the right to prepare an effective defence. In *Kelly v. Jamaica*,<sup>84</sup> the HRC found a violation of Article 9(2) of the ICCPR where the applicant was told merely that he had been arrested for murder, and only found out the details some weeks later.

The time-frame within which reasons have to be given is more complicated. Some of the international human rights bodies have been a little more relaxed – so, for example, the ECtHR in *Fox, Campbell and Hartley*<sup>85</sup> found no breach of the European Convention where the reasons for the applicants' arrest was brought to their attention several hours after their detention – and some of the Commonwealth Caribbean Constitutions are (on paper at least) more relaxed still, mentioning periods such as 24 or 48 hours, for example.

### Access to a lawyer

Early access to a lawyer and, in particular, access before questioning is an aspect of international human rights law where standards are tightening. Principle 1 of the UN Basic Principles on the

<sup>82</sup> *FIDH*, *supra* Note 48, at p.26.

<sup>83</sup> European Court of Human Rights, [1991] 14 EHRR 108 at para 40.

<sup>84</sup> CCPR/C/4/D/253/1987, 10 April 1991.

<sup>85</sup> *Supra* Note 83, above.

Role of Lawyers<sup>86</sup> establishes the right to assistance at all stages of criminal proceedings, including interrogation. Also, in the context of the right to silence (or, more accurately, drawing adverse inferences from silence during questioning), the ECtHR has effectively ruled out questioning suspects in the absence of their lawyers (see *Murray v. UK*<sup>87</sup>; affirmed in *Condron v. UK*<sup>88</sup>).

In a similar vein, the HRC has emphasised that ‘all persons arrested must have immediate access to counsel’ (Concluding Observations of the HRC: Georgia).<sup>89</sup> The Inter-American Commission on Human Rights has stated that the right to defend oneself requires that an accused person be permitted to obtain legal assistance when first detained. It concluded that a law which prohibited a detainee from access to a lawyer during detention and investigation would seriously impinge upon defence rights.<sup>90</sup>

Moreover, communications between a detainee and his lawyer must be confidential. In *S v. Switzerland*, the ECtHR noted that:

*‘...an accused’s right to communication with his advocate out of the hearing of a third person is one of the basic requirements of a fair trial in a democratic society ... If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness...’*<sup>91</sup>

The ECtHR accepted that confidentiality could be restricted if, for example, there was a risk of collusion between a client and his lawyer. However, the mere risk of collaboration between defence counsel is not enough.

## Taiwanese law and practice

In Taiwan, the arrest of an accused or a suspect is regulated by law. Arrest is governed by Articles 75-93 of the Code of Criminal Procedure. In accordance with Article 77 of the Code of Criminal Procedure, the arrest warrant shall be signed by prosecutors. Under urgent circumstances set out in Article 88-1 or arresting in *flagrante delicto* under Article 88 of the Code of Criminal Procedure, a prosecutor can arrest a suspect without a warrant. If the arrest is performed by police, the police have to apply for an arrest warrant immediately after the arrest. In addition, an accused, who without good reason fails to appear after he has been legally summoned, may be arrested with a warrant.<sup>92</sup>

In relation to access to a lawyer, Article 31 of the Code of Criminal Procedure stipulates that any defendant facing a serious charge, including a charge carrying a death sentence, shall be provided with legal assistance. A suspect should also have a right to access a lawyer during interrogation. When individuals are detained in police stations for questioning, they may be accompanied by a lawyer from

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<sup>86</sup> Adopted by 8<sup>th</sup> UN Congress on Prevention of Crime and Treatment of Offenders, 7 September 1990.

<sup>87</sup> [1996] 22 EHRR 29.

<sup>88</sup> European Court of Human Rights, No. 35718/97.

<sup>89</sup> UN Doc. CCPR/C/79/Add.74, 9 April 1997.

<sup>90</sup> Annual Report of the IACmHR, 1985-86.

<sup>91</sup> (1992) 14 EHRR 670 at [48].

<sup>92</sup> Article 75, the Code of Criminal Procedure.

the moment they are taken into custody. According to Article 95 of the Code of Criminal Procedure, police are required to inform suspects of their right to be accompanied by a lawyer.

The Legal Aid Act was promulgated in January 2004. This Act created the Legal Aid Foundation, which receives government funding but operates independently without any outside intervention,<sup>93</sup> and has set up rules regarding the application of legal aid.<sup>94</sup>

In order to ensure human rights protections for those who could be subject to capital punishment, the Legal Aid Foundation has decided that legal aid must be made available to all those facing the death penalty, regardless of their financial or other circumstances.<sup>95</sup> Recently, several human rights organisations have initiated a discourse to revise the Legal Aid Act. The proposed revisions included – among others things – a provision for more attorneys to be appointed to represent defendants at risk of receiving a death sentence, as these cases are generally more complicated.<sup>96</sup> The shortage of lawyers prepared to provide legal assistance to the accused in capital cases has remained a serious problem, which, in the view of human rights organisations, should be dealt with as a matter of urgency.<sup>97</sup>

## The right to be brought promptly before a court

Article 9(3) of the ICCPR states:

*Anyone arrested or detained on a criminal charge shall be brought promptly before a judge... and entitled to trial within reasonable time or to release...*

The length of permitted detention in police custody before a first appearance in court has practical implications for the effective enjoyment of other rights of the detainee. All international human rights instruments therefore provide that anyone arrested or detained must be brought promptly before a judge or other officer authorised by law to exercise judicial power. While no time limits are expressly stated within the standards, and they are to be decided on a case by case basis, the HRC has stated that ‘... delays should not exceed a few days’ (UNHRC General Comment 8(2)).<sup>98</sup> In a Caribbean death penalty case, the HRC ruled that a delay of one week from time of arrest before the detainee was brought before a judge was incompatible with Article 9(3) of the ICCPR.<sup>99</sup> Likewise, in *Rarwle Kennedy v. The Republic of Trinidad & Tobago*<sup>100</sup>, the HRC considered that a six-day delay in bringing the applicant before a judge was a violation of Article 9(3). The HRC held that the word promptly in Article 9(3) should not exceed a few days. The ECtHR has ruled that detaining a person for four days and six hours before bringing him before a judge was not prompt access (*Brogan and others v. UK*).<sup>101</sup>

<sup>93</sup> Article 5, Legal Aid Act.

<sup>94</sup> Article 13-23, Legal Aid Act.

<sup>95</sup> Cheng-Chieh Lin, *Experience in Reviewer of Legal Aids Application and obligatory lawyer of Legal Aids Foundation*, 13 Taiwan Bar J. 6, 9 (2009) (in Chinese).

<sup>96</sup> Correspondence with the Executive Director of the Taiwan Alliance to End the Death Penalty, Nov. 26, 2013.

<sup>97</sup> See *FIDH*, *supra* Note 48, at 28.

<sup>98</sup> CCPR General Comment no.8 ‘right to liberty and security of persons’ (Art. 9), 30/06/82.

<sup>99</sup> *McLawrence v Jamaica*, CCPR/C/60/D/702/1996, 29 September 1997.

<sup>100</sup> CCPR/C/74/D/845/1998, 26 March 2002.

<sup>101</sup> [1988] 11 EHRR 117.

All states have an obligation to ensure that the judicial control mechanisms articulated in Article 9(3) and 9(4) of the ICCPR are accessible and effective, in order that these provisions are operative. The basic principle, in relation to police custody and detention pending trial, is that restriction to the right to liberty must be exceptional and the initial judicial control of the lawfulness of the deprivation of liberty must be conducted as soon as possible. Article 9(3) stipulates that it 'shall not be the general rule that persons awaiting trial shall be detained in custody'. The starting point of the period under consideration is the actual arrest and the first court appearance must be conducted as soon as possible.

In addition to reviewing the lawfulness of detention and ascertaining the treatment in detention, the purpose of the initial judicial control is also to determine whether the person should be placed on remand, to prevent an on-going or an increased risk of ill-treatment. This means that detention on remand must take place in a facility under a different authority from the one responsible for the investigation. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that: *'Those legally arrested should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, should not exceed a period of 48 hours. They should accordingly be transferred to a pre-trial facility under a different authority at once, after which no further unsupervised contact with the interrogators or investigators should be permitted.'*<sup>102</sup>

## Taiwanese law and practice

Article 8 of Taiwan's Constitution guarantees personal freedoms. When a person is arrested or detained on suspicion of having committed a crime, the procedure prescribed by law shall be observed.<sup>103</sup> When an individual is arrested or detained, the authority shall in writing inform the said person and his or her designated relative or friend of the grounds for the detention and shall, within 24 hours, be brought before a judicial authority. The individual, or any other persons, have the right to petition the competent court for a writ to be served within 24 hours on the authority making the arrest for the surrender of the said person for trial.<sup>104</sup> As stated earlier, in *J.Y. Interpretation 392*, the Taiwanese Constitutional Court has decided that the power to detain should be determined by judges and not the prosecuting authorities, and that anyone under arrest should be entitled to a judicial determination before a court.<sup>105</sup>

According to Article 101 and 101-1 of the Code of Criminal Procedure, *'accusation of a serious crime'*, as such constitutes a valid reason for ordering pre-trial detention. According to the group of international experts, *'in 2012, 3,373 persons were detained solely under the reason of being accused of a serious crime.'* Article 5 of The Criminal Speedy Trial Act 2010, further stipulates a maximum period of eight years of pre-trial detention which – in the opinion of the experts – violates the 'reasonable time' limit of article 9(3) ICCPR. The experts recommended that *'taking into account the exceptional nature of pre-trial detention... persons accused of a serious crime shall only be held in pre-trial detention if additional grounds such as risk of flight, risk of destroying evidence or the risk of re-committing an offence, have been established by the courts.'*<sup>106</sup>

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<sup>102</sup> Report to the Commission on Human Rights, E/CN.4/2003/68, para 26(g).

<sup>103</sup> See Article 8(1) of the Constitution.

<sup>104</sup> Article 8(2) of the Constitution.

<sup>105</sup> *J.Y. Interpretation 392*, 7 ROC Const. Ct. 377, 377 (1995).

<sup>106</sup> *Supra* Note 3, above, Concluding Observations and Recommendations at para 67.

# **PART FIVE**

Minimum fair trial guarantees  
in capital cases

# Minimum fair trial guarantees in capital cases

The comprehensive provisions of Article 14 of the ICCPR set out in detail the minimum guarantees for a fair trial. These provisions must be respected in all capital cases.

The fifth safeguard states: ‘*Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the ICCPR, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.*’

The UN Special Rapporteur on extrajudicial, summary, or arbitrary executions has stated that fair trial guarantees in death penalty cases ‘must be implemented in all cases without exception or discrimination’.<sup>107</sup> The Special Rapporteur has reiterated that ‘proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, in accordance with the pertinent international legal instruments.’<sup>108</sup> The general understanding is that those facing the death penalty should be afforded special protection and all guarantees to ensure a fair trial (sometimes referred to as ‘*super*’ *due process*) above and beyond the protection afforded in non-capital cases.

The HRC has consistently held that if Article 14 (fair trial) of the ICCPR is violated during a capital trial, then Article 6 (right to life) of the ICCPR is also breached. In *Carlton Reid v. Jamaica* the HRC held that:

*[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes ... a violation of Article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the present Covenant implies that “the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal”.*<sup>109</sup>

The Committee went on to add that in death penalty cases: ‘*the duty to observe rigorously all the guarantees for a fair trial set out in Article 14 of the Covenant is even more imperative.*’

The HRC has found violations of Article 14 – and consequently Article 6 – in scores of capital cases, in particular, from Jamaica and Trinidad & Tobago. In so doing, the Committee has declared that defendants in a capital trial have the absolute right to *effective* counsel and must have *adequate time*

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<sup>107</sup> *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur...*, UN Document E/CN.4/2001/9, 11 January 2001, para 86.

<sup>108</sup> *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur...*, UN Document E/CN.4/1997/60, 24 December 1996, para 81.

<sup>109</sup> (Communication No. 250/1987), U.N. Doc. CCPR/C/39/D/250/1987, at para 11.5.



and *facilities* for the preparation of the defence. The Inter-American Commission and Court have adopted a similar approach to due process in capital cases.

## Adequate time and facilities to prepare a defence and effective legal assistance

Article 14(3)(b) of the ICCPR states that a person shall be entitled:

*...to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.*

Before a trial starts, the central aspect of the right to a fair trial is the right to have adequate time and facilities to prepare a defence. This is the springboard for other fair trial rights, such as legal representation and discovery.

The time needed to prepare a defence inevitably depends on the nature of the proceedings and the factual circumstances of each case. Relevant factors include the complexity of the case, the accused's access to evidence and to his lawyer.

In *Aston Little v. Jamaica* the HRC found that the requirements of Article 14(3)(b) of the ICCPR had been breached in a capital case from the Caribbean. The Committee held that:

*In cases in which capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for trial; this requirement applies to all stages of the judicial proceedings ... In the instant case it is uncontested that the author did not have more than half an hour for consultation with counsel prior to the trial and approximately the same amount of time for consultation during the trial.*<sup>110</sup>

In that case, the Committee also concluded that Article 14(3)(e) of the ICCPR had been violated as the lack of sufficient time for the adequate preparation of the defence had clearly affected counsel's ability to trace or call defence witnesses to trial. The defendant was therefore unable to obtain the testimony of a witness on his behalf under the same conditions as testimony of witnesses against him.

The right to adequate facilities to prepare a defence includes the right of the accused to obtain the opinion of *independent experts* in the course of preparing and presenting a defence. Article 8(2)(f) of the ACHR guarantees the right of the defence *'to examine witnesses present in the court and to obtain the appearance ... of experts or other persons who might throw light on the facts.'*

In relation to medical experts and, in particular, the responsibility of the state to provide psychiatric assessments in capital trials, the Inter-American Court of Human Rights recently addressed this point for the first time in their judgment in the case of *DaCosta Cadogan v. Barbados*. The Court re-emphasised that in capital cases the procedural requirements for a fair trial must be strictly observed and in this regard were specifically asked to consider whether the accused person's right to a fair trial

<sup>110</sup> (Communication No. 283/1988), U.N. Doc. CCPR/C/43/D/283/1998 at para 8.3.

was violated in light of the fact that that no detailed evaluation of his mental health was made during his criminal trial:

*[E]very judge has the obligation to ensure that proceedings are carried out in a manner that guarantees and respects those due process rights necessary to ensure a fair trial in each case. Accordingly, Article 8(2) of the Convention specifies which of these constitute “minimum guarantees” to which all persons have an equal right during proceedings. Specifically, Article 8(2)(c) of the Convention requires that individuals are able to adequately defend themselves against any act of the State that may affect their rights. Additionally, Article 8(2)(f) recognises the right of defendants to examine witnesses against them and those testifying on their behalf, under the same conditions as the state, with the purpose of defending themselves’.*

*[T]he Court observes that the supposed mental illnesses that the representatives alleged Mr. DaCosta Cadogan suffered or suffers are alcohol dependence and anti-social personality disorder, which could have allowed Mr. DaCosta Cadogan to raise a defence of diminished responsibility ... Consequently, Mr. DaCosta Cadogan’s mental health at the time of the offence was never fully evaluated by a mental health professional for the purpose of preparing his defence in a case where the death penalty was the only possible sentence’.<sup>111</sup>*

The Court held that taking into account the strict procedural requirements that the state is obliged to observe in all capital cases, the judge had a duty to adopt a more active role in ensuring that all necessary measures were carried out in order to guarantee a fair trial. The failure by the judge to ensure that the accused’s mental health was fully evaluated was held to constitute a violation of the right to a fair trial. As a measure of reparation, and in order to guarantee that events such as those analysed in the case are not repeated, the Court ordered the state to ensure that all persons accused of a crime whose sanction is the (mandatory) death penalty are duly informed, at the initiation of the criminal proceedings against them, of the right to obtain a psychiatric evaluation carried out by a state-employed psychiatrist recognised under domestic law.

Article 14(3)(d) of the ICCPR states that a person shall be entitled:

*to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing ... and to have legal assistance assigned to him where the interests of justice so require ...*

In Resolution 1989/64,<sup>112</sup> the UN Economic and Social Council recommended that Member States afford ‘special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases’.

In *Frank Robinson v. Jamaica* the HRC considered whether a state party is under an obligation itself to make provision for effective representation by counsel in a capital case, should the counsel selected by the defendant decline to appear. The Committee held that ‘it is axiomatic that legal assistance be

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<sup>111</sup> Inter-American Court of Human Rights, Judgment of 24 September 2009. Series C. No. 203. at para’s 84-86.

<sup>112</sup> *Supra* Note 20, above, at para 1(a).

made available in capital cases'<sup>113</sup> and that Jamaica was in breach of Article 14(3)(b) of the ICCPR as the applicant had faced a capital trial without legal representation.

In *Trevor Collins v. Jamaica*, counsel effectively abandoned the appeal against a capital conviction without prior consultation with the author. The HRC stated that:

*'While article, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice.'*<sup>114</sup>

Similarly in *John Campbell v. Jamaica*<sup>115</sup> the HRC noted that the complainant was only notified of the name of his court-appointed lawyer after the appeal was dismissed, meaning that he had no opportunity to prepare his defence, thus violating Article 14(3)(d) of the ICCPR.

## Legal aid

Under Article 8(2)(e) of the ACHR, appointed counsel is to be paid by the state only if domestic law so provides. However, the IACtHR has held that states must provide counsel free of charge for a person who cannot afford to pay, if counsel is necessary to ensure a fair hearing (advisory opinion, 10 August 1990).<sup>116</sup>

Principle 3 of the Basic Principles on the Role of Lawyers, require states to make sufficient funding and other resources available to legal counsel and to the poor and disadvantaged.

The HRC have held that state parties to the ICCPR have an obligation to make remedies in the constitutional courts available and effective in relation to claims of violations of the rights set out in the ICCPR. In *Rawle Kennedy v. Trinidad and Tobago*, the HRC held that the denial of legal aid for the applicant to pursue a constitutional motion, relating to an alleged violation of his right to a fair trial, constituted a violation of Article 14(1) read together with Article 2(3) of the ICCPR:

*'The Committee notes that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in all cases, but only in the determination of a criminal charge where the interests of justice so require (article 14(3)(d)). It is further aware that the role of the Constitutional Court is not to determine the criminal charge itself, but to ensure that applicants receive a fair trial. The State party has an obligation, under article 2, paragraph 3, of the Covenant, to make the remedies in the Constitutional Court... available and effective in relation to claims of violations of Covenant rights. As no legal aid was available to the author before the Constitutional Court in relation to his claim of a violation of his right to a fair trial, the Committee considers that the denial of legal aid constituted a violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3.'*<sup>117</sup>

<sup>113</sup> (Communication No. 223/1987), U.N. Doc. CCPR/C/35/D/223/1987 at para's 10.3 and 10.4.

<sup>114</sup> CCPR/C/47/D/356/1989, 12 May 1993 at [8.2].

<sup>115</sup> CCPR/C/47/D/307/1988, 20 June 1988.

<sup>116</sup> OC-11/90.

<sup>117</sup> CCPR/C/74/D/845/1998, 26 March 2002 at [7.10].

## Taiwanese law and practice

To prepare a defence, the accused may be entitled to have legal counsel under certain circumstances. In Taiwan, the Legal Aid Act stipulates that the defendant – on trial for a crime punishable with a sentence of more than three years, including the death penalty – may apply for legal aid without considering his or her financial capability.<sup>118</sup> Since the promulgation of the Legal Aid Act, most defendants in capital cases receive legal aid. However, there have been a few cases where legal aid has been denied by the local branches of the Legal Aid Foundation.<sup>119</sup> For these defendants, the courts must appoint public defenders.

According to the Legal Aid Act, defendants in capital cases suffering from mental illness/ impairment are entitled to legal aid because the Act provides legal aid to those receiving more than three years imprisonment for a minimum punishment, and to those considered ‘unable to make a complete statement due to unsoundness of mind’.<sup>120</sup> However, legal aid has been denied to defendants with mental illness/impairment in capital cases, due to a lack of expertise in the local branches of the Legal Aid Foundation in assessing the mental-state condition of legal aid applicants.<sup>121</sup>

In addition, as the Legal Aid Act only became effective in 2004, defendants facing capital punishment prior to that time were only entitled to choose an attorney at his or her own expense, or could choose a public defender if specific requirements were met according to Article 31 of the Code of Criminal Procedure.<sup>122</sup> Notably, however, according to Article 388 of the Code of Criminal Procedure, Article 31 does not apply to legal defence in the third instance.<sup>123</sup>

There are two important issues in Taiwan that impact on the provision of effective legal assistance to defendants in capital cases, which require more detailed examination. The first is the lack of mandatory legal assistance for the defence in third instance trials, and the second is the lack of oral arguments for capital defendants on the assessment of the appropriate sentence.

### The lack of mandatory defence in the third instance

As stated earlier, pursuant to Article 388 of the Code of Criminal Procedure, defendants in capital cases may not have legal counsel for the trials of the third – usually the last – instance.<sup>124</sup> This has been long criticised as a serious violation of the right of capital defendants to legal assistance as the requirement is that no trial should take place without the presence of an advocate.<sup>125</sup> As the third instance of criminal trials is a trial of law, it is of critical importance that criminal defendants be provided with legal assistance.<sup>126</sup> The ICCPR requires that the accused must have the effective assistance of a lawyer at all stages of the proceedings.<sup>127</sup> In the view of the Human Rights Committee, the imposition of capital punishment upon the conclusion of a trial, in which the provisions of Article

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<sup>118</sup> Article 14, Legal Aids Act.

<sup>119</sup> Correspondence with the Executive Director of the Taiwan Alliance to End the Death Penalty, Nov. 26, 2013.

<sup>120</sup> Article 31(1)(3), the Code of Criminal Procedure

<sup>121</sup> Chan & Weng, *supra* Note 41, at 7.

<sup>122</sup> Article 31(1)(1) of Criminal Procedure provides that in cases where the minimum punishment is not less than three years' imprisonment, the presiding judge shall appoint a public defender or a lawyer to defend.

<sup>123</sup> Article 388, the Code of Criminal Procedure.

<sup>124</sup> Article 388, the Code of Criminal Procedure.

<sup>125</sup> Jaw-Peng Wang, *An Empirical Study of Death Penalty in Taiwan*, 183 TAIWAN L. REV. 115-117 (2010) (in Chinese).

<sup>126</sup> Chan & Weng, *supra* Note 41, at 7.

<sup>127</sup> ICCPR General Comment No. 32, para 38.

14 of ICCPR have not been respected, constitutes a violation of the right to life stated in Article 6 of ICCPR.<sup>128</sup>

The lack of a mandatory defence in the third instance, particularly for capital defendants, has resulted in two petitions before the Constitutional Court. The petitioners alleged that Article 388 of the Code of Criminal Procedure was unconstitutional. The first petition was raised in 2007, when 14 defendants who had been sentenced to death had no lawyers or public defenders in the third instance.<sup>129</sup> However, this petition did not receive a response from the Constitutional Court.<sup>130</sup> After the implementation of the ICCPR in December 2009, another group of capital defendants raised a new petition.<sup>131</sup> This petition not only argued that Article 388 of the Code of Criminal Procedure violated the constitution, but also violated Article 6(1) ('No one shall be arbitrarily deprived of his life') and Article 14(3)(d) ('To defend himself in person or through legal assistance of his own choosing') of the ICCPR.

In 2010, the Constitutional Court dismissed both petitions.<sup>132</sup> The Court found that Article 388 of the Code of Criminal Procedure did not restrict the right to substantial defence for capital defendants.<sup>133</sup> In the view of the Constitutional Court, notwithstanding Article 388, capital defendants may still appoint lawyers at their own expense, apply for public defenders under the Act of Public Defender,<sup>134</sup> apply for legal aid under the Legal Aid Act,<sup>135</sup> or seek further assistance under the Code of Criminal Procedure.<sup>136</sup> Notably, the alleged violations of the ICCPR were not addressed in the dismissal.<sup>137</sup>

The decision of the Constitutional Court was heavily criticised. As a matter of fact, from 2000 to 2009, 93 defendants were sentenced to death and had their death sentences confirmed by a judgment in the third instance of the Supreme Court. Of these defendants, 61 had no assistance from legal counsel.<sup>138</sup> In addition, according to the *Parallel Report on the Implementation of the ICCPR* issued by non-government organisations, seven of the nine persons executed in April 2010 and March 2011 did not have defence counsel at the third instance.<sup>139</sup> Recent statistics prepared by the Taiwan Alliance to End the Death Penalty also indicate that 27 out of 52 capital defendants were not represented by legal counsel in the third instance.<sup>140</sup> It is evident that the right to life of those defendants facing the death penalty, and their rights to substantial defence, have been gravely violated.

In 2012, the Judicial Yuan – the highest judicial organ charged with judicial administration and housed within the Constitutional Court – finally proposed a draft revision to the Code of Criminal Procedure aimed at providing mandatory legal defence in the third instance. The draft stipulates

<sup>128</sup> ICCPR General Comment No. 32, para 59.

<sup>129</sup> Chuan-Fen Chang, *A shuttle run between the Constitutional Court and death row*, in *My Country Kills: Constitutional Challenges to the Death Penalty in Taiwan*, 11, 20 (2011).

<sup>130</sup> Chang, *supra* Note 32, at 50.

<sup>131</sup> *Ibid.*, at 51.

<sup>132</sup> J.Y. Dismissal Resolution No. Hui-Tai 9741, 1,358<sup>th</sup> Meeting of the Constitutional Court.

<sup>133</sup> Chang, *supra* Note 32, at 55.

<sup>134</sup> Article 2(3) of the Act of Public Defender states that '[t]he court shall appoint a public defender to the defendant who is indigent to afford an attorney and applies to the court for the appointment of a public defender'. Article 3 provides that '[f]or the case that is ordered by the Supreme Court to go verbal argument, a defendant who is indigent to hire an attorney in accordance with the Code of Criminal Procedure Article 389, Section 2, may apply to the Supreme Court to order the subordinate court to appoint a public defender for defence'. Article 17 stipulates that '[i]f an appeal is filed for the case assigned to the public defender, he or she shall prepare the appeal statement or written argument upon the request of the defendant'.

<sup>135</sup> Article 14, Legal Aid Act.

<sup>136</sup> Article 346 of the Code of Criminal Procedure provides that '[a]n agent or defence attorney in the original trial may appeal for the interests of the defendant; provided that it may not be contrary to defendant's express will'.

<sup>137</sup> Chang, *supra* Note 32, at 51.

<sup>138</sup> Wang, *supra* Note 125, at 115.

<sup>139</sup> TAHR, *Parallel Report on the Implementation of ICCPR in 2011*, *supra* Note 15 (2012).

<sup>140</sup> Correspondence with the Executive Director of the Taiwan Alliance to End the Death Penalty, Nov. 26, 2013.

that in cases where defendants are charged with a minimum punishment of not less than three years' imprisonment, no judgment can be rendered without the attorney submitting the written grounds of appeal or a written defence. This draft revision was reviewed in the legislative session in 2013, but at the time of writing has not yet been passed into law.

### **The lack of oral argument on the assessment of the appropriate sentence**

In Taiwan, Article 57 of the Criminal Code includes 10 factors that should be taken into account in the assessment of a sentence.<sup>141</sup> It is thus important for criminal defendants to have an opportunity to make submissions before the court on these factors before sentence is determined. However, the Code of Criminal Procedure makes no provision for such oral arguments on sentence. In 2003, Article 289 of the Code of Criminal Procedure was revised to provide criminal defendants with an opportunity to state opinions regarding the imposition of penalty after the courts had come to a conclusion on the relevant law and facts,<sup>142</sup> but members of the legal community and human rights organisations were still discontent as this revision does not provide an opportunity to present oral arguments on sentence or to conduct cross-examination.

In 2006, a petition for constitutional interpretation was filed with the Constitutional Court to challenge the constitutionality of the absence of an oral hearing on the imposition of the sentence, particularly for the death penalty.<sup>143</sup> The petition argued that the failure to provide criminal defendants with an opportunity to make oral arguments on sentence gravely violated the constitution.<sup>144</sup> However, the Constitutional Court dismissed the petition by holding that there was no such failure.<sup>145</sup> In the view of the Constitutional Court, the opinions of criminal defendants on the assessment of sentence have usually been included in general oral arguments, and the Court found that the opportunity to make a final statement has been guaranteed since 2003.

In 2010, another petition for constitutional interpretation was filed.<sup>146</sup> The petition argued that the failure to stipulate a mandatory oral hearing on the assessment of sentence (particularly a death sentence) in the relevant articles of the Code of Criminal Procedure amounted to a grave constitutional violation.<sup>147</sup> The petition also stated that the impugned provisions also violate the right to life and due process enshrined in the ICCPR, which had become effective in Taiwan in December 2009.<sup>148</sup>

The Constitutional Court, once again, dismissed the petition. The Court referred to Article 288(4) of the Code of Criminal Procedure, stating that the presiding judge's consideration of information regarding the assessment of penalty – including the death penalty – should be conducted after the examination and investigation of facts, which would allow both sides to state their opinions. In addition, the finding of guilt should include the circumstances specified in Article 57 or Article 58 of the Criminal Code taken into consideration during the assessment of the sentence. Hence, in the view of the Constitutional Court, there would have been sufficient opportunity for a criminal

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<sup>141</sup> These 10 issues are: the motive and purpose of the offence, the stimulation perceived at the moment of committing the offence, the means used for the commission of the offence, the offender's living condition, the disposition of the offender, the education and intelligence of the offender, relationship between the offender and the victim, the seriousness of the offender's obligation violation, the danger or damage caused by the offence, and the offender's attitude after committing the offence.

<sup>142</sup> Article 289(3), the Code of Criminal Procedure.

<sup>143</sup> J.Y. Dismissal Resolution No. Hui-Tai 8282, 1,295<sup>th</sup> Meeting of the Constitutional Court.

<sup>144</sup> Article 16 of the Constitution provides the right to suit, while Article 15 enshrines the right to existence.

<sup>145</sup> J.Y. Dismissal Resolution No. Hui-Tai 8282, 1,295<sup>th</sup> Meeting of the Constitutional Court.

<sup>146</sup> J.Y. Dismissal Resolution No. Hui-Tai 9741, 1,358<sup>th</sup> Meeting of the Constitutional Court.

<sup>147</sup> Chang, *supra* Note 32, at 51.

<sup>148</sup> Chang, *supra* Note 32, at 56.

defendant to state opinions on the assessment of the penalty.<sup>149</sup> The alleged violations of the ICCPR were not addressed, but the Constitutional Court did recognise that the two Covenants had become part of the domestic law and binding to all state organs.<sup>150</sup>

In contrast with the conservative attitude of the Constitutional Court, the Supreme Court has been much more progressive towards the realisation of mandatory oral hearings on sentencing.<sup>151</sup> After the ICCPR became effective in December 2009, the Supreme Court remitted a capital case back to the High Court in 2010 on the ground that the defendant had not been given the opportunity to make submissions on sentencing.<sup>152</sup> This was the first case in which the Supreme Court referred to Article 6(1) of the ICCPR and affirmed the existence of such a right. In 2011, the Supreme Court also remitted a judgment imposing a death sentence on the same ground,<sup>153</sup> and this was followed in many other cases. More importantly, in reliance on the ICCPR, the Supreme Court decided that there should be an oral hearing on the issue of sentencing, particularly concerning the death penalty.<sup>154</sup> In a watershed Supreme Court judgment, 100 Tai-Shang No. 3790, the Supreme Court required a more comprehensive oral debate on the assessment of the sentence in order to ensure the protection of the right to life and the right to fair trial enshrined in the ICCPR.<sup>155</sup>

Along with this progress in the Supreme Court, a revision to the relevant provisions in the Code of Criminal Procedure was proposed in 2012. The draft revision requires oral arguments on the assessment of the appropriate sentence and provides that defendants, victims, or victims' family members present in the trial should have the opportunity to make submissions on the assessment of the sentence. The draft revision is still awaiting legislative approval.

It is noteworthy that in October 2012, the legislature boycotted part of the judicial budget due to the absence of oral arguments in the third instance, particularly concerning capital cases. In response, the Supreme Court declared that it would permit oral arguments in every capital case in order to improve the protection of the right to life. The first such case was the case of Wu Ming-Cheng, with oral arguments on sentence held in December 2012.<sup>156</sup> Subsequently, in other cases, defendants were also permitted to conduct oral arguments and this change in practice has been one of the notable developments since the ratification and implementation of the ICCPR.

## Disclosure

Few international instruments expressly provide a right of disclosure, but it has consistently been read into the right to a fair trial generally, and the right to adequate time and facilities to prepare a

<sup>149</sup> J.Y. Dismissal Resolution No. Hui-Tai 9741, 1,358<sup>th</sup> Meeting of the Constitutional Court.

<sup>150</sup> Chang, *supra* Note 32, at 57.

<sup>151</sup> See Wen-Chen Chang, *An Examination on the Implementation of the Two Covenants After Two Years: With a Focus on Judicial Practice*, 50 *Thought and Words J. Human. & Soc. Sci.* 4, 28-29 (2012) (in Chinese).

<sup>152</sup> Supreme Court, Criminal Division, 99 Tai-Shang 8223 (2010) (Taiwan).

<sup>153</sup> Supreme Court, Criminal Division, 100 Tai-Shang 3447 (2011) (Taiwan).

<sup>154</sup> Supreme Court, Criminal Division, 100 Tai-Shang 2261 (2011) (Taiwan); Supreme Court, Criminal Division, 100 Tai-Shang 3790 (2011) (Taiwan); Supreme Court, Criminal Division, 100 Tai-Shang 4944 (2011) (Taiwan).

<sup>155</sup> Chang, *supra* Note 151, at 28-29.

<sup>156</sup> Chian-Rong Chien, *Compulsory Oral Arguments in Cases Concerning Death Penalty and its Meaning for Judicial Reform*, in *Feihua E-Newspaper* 22, Nov. 23, 2012, available at <http://www.taedp.org.tw/> (accessed 2013.11.26) (in Chinese).

defence under Article 14(3)(b). The classic statement comes from the ECtHR in the case of *Edwards v. UK*<sup>157</sup>:

*‘... it is a requirement of fairness [under Article 6]... that the prosecution authorities disclose to the defence all material evidence for or against the accused, and that failure to do so [can] give rise to a defect in the trial process.’*

While it is permissible to withhold material from the defence that does not have the potential to assist the defence on grounds of public interest immunity, only such measures as are ‘strictly necessary’ are permissible (*Van Mechelen v. Netherlands*<sup>158</sup>; *Rowe and Davis v. UK*<sup>159</sup>).

## Taiwanese law and practice

In 2007, the Code of Criminal Procedure was revised to ensure the right of criminal defendants to examine case files. Prior to 2007, only the lawyers or agents appointed by criminal defendants had access to the files in specific cases. If criminal defendants did not appoint an attorney or an agent, he or she could not access the case files except for those records and documents disclosed or read to them by the presiding judge during trials.<sup>160</sup> In any event, it had been difficult for lawyers or criminal defendants to access case files.<sup>161</sup>

The revision of 2007 was sought with the intention of resolving this problem. The revised provision, Article 32(2) of the Code of Criminal Procedure, now provides that the defendant without an attorney may request a copy of the records. If the content of the records is irrelevant to the case, or if the disclosure may jeopardise the investigation of another criminal case, or if the information concerns privacy or secrecy in business by the parties or third persons, the requests for access may be denied. Despite the limitations, this revision nevertheless improved the right of access to files by the defendant.

## The right of appeal

The right of appeal is guaranteed under Article 14(5) of the ICCPR:

*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*

Safeguard six adopted by the UN Economic and Social Council in 1984, states: *‘Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.’*

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<sup>157</sup> (1993) 15 EHRR 417.

<sup>158</sup> (1993) 15 EHRR 647.

<sup>159</sup> (2000) 30 EHRR 1.

<sup>160</sup> Article 164(1) of the Code of Criminal Procedure states that ‘[t]he presiding judge shall show the exhibit to the party, agent, defence attorney, or assistant and ask him to identify it’. Article 165(1) provides that ‘[r]ecords and other documents in the file which may be used as evidence shall be read, by the presiding judge, to the party, agent, defence attorney, or assistant, or their essential points explained’.

<sup>161</sup> Correspondence with the Executive Director of the Taiwan Alliance to End the Death Penalty, Nov. 26, 2013.



The importance of a *mandatory* right of appeal was confirmed by the UN Economic and Social Council in its resolution 1989/64.<sup>162</sup> Furthermore, in resolution 2005/59, the UN Commission on Human Rights urged all states that still maintain the death penalty '[t]o ensure that all legal proceedings, including those before special tribunals or jurisdictions, and particularly those related to capital offences, conform to the minimum procedural guarantees contained in Article 14 of the ICCPR.'<sup>163</sup>

## Taiwanese law and practice

In Taiwan, the right of appeal in capital cases may involve an appeal to the third instance, an appeal for retrial, and an extraordinary appeal. In addition, petitions to the Constitutional Court or to the Control Yuan – the functional equivalent of an ombudsman – may also be considered as part of the appellate process, or as an available remedy for capital defendants after their cases have become final.

It is important to note that upon the strong advocacy of the Taiwan Alliance to End the Death Penalty, the Legal Aid Foundation – with the support of the Judicial Yuan – now provides legal aid to capital defendants for their appeals, including the applications for retrial, extraordinary appeal, and constitutional petitions. However, not all applications for legal aid are approved.<sup>164</sup>

### Appeals for the third instance

According to Article 344(1) of the Code of Criminal Procedure, 'a party who disagrees with the judgment of a lower court may appeal to the appellate court'.<sup>165</sup> In cases imposing the death penalty or lifetime imprisonment, the original trial court should refer such cases to the appellate court *motu proprio* (of its own accord) even where the parties have not filed an appeal and shall notify the parties.<sup>166</sup> When such judicial referrals occur, it is considered that a defendant has appealed.<sup>167</sup> As a result, the right to appeal for those facing the death penalty is guaranteed. Such a mandatory appeal may still have a disadvantage, especially for those who had initially been sentenced to life imprisonment, but whose sentences were then increased in the final trial to death sentences. Without a mandatory appeal, the individual would have served a life sentence.<sup>168</sup>

In addition to mandatory appeals in the cases of capital punishment or life imprisonment, a prosecutor acting as an impartial "minister of justice" is permitted to appeal in the interests of the defendant as stipulated by Article 344(4) of the Code of Criminal Procedure. This is quite unique and may be based on the civil law tradition in Taiwan that sees prosecutors as impartial and faithfully executing criminal laws of the state, rather than merely acting as an opponent in an adversarial system. These appeals, however, can greatly prolong criminal proceedings, at times for more than 20 years. The Hua Ting-kuo case was a dramatic example of such a lengthy process. Hua was accused of killing his mother in 1974. His case was remitted by the Supreme Court 18 times, with Hua sentenced to death on 12 occasions and to life

<sup>162</sup> *Supra* Note 21, above at para 1(b).

<sup>163</sup> See also *Nicholas Henry v. Jamaica*, para 8.4, CCPR/C/64/D/610/1995, 21 October 1998.

<sup>164</sup> Correspondence with the Executive Director of the Taiwan Alliance to End the Death Penalty, Nov. 26, 2013.

<sup>165</sup> English translation available at <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=C0010001> (accessed 2014.01.22).

<sup>166</sup> Article 344(5), the Code of Criminal Procedure.

<sup>167</sup> Article 344(6), the Code of Criminal Procedure.

<sup>168</sup> See TAHR, *supra* Note 15, at 28-29. For example, Wang Hung-Wei, Chen His-Ching, Liu Yen-Kuo, and Teng Kuo-Liang were sentenced to life imprisonment, but sentenced to the death penalty in the final judgment. This information comes from correspondence with the Executive Director of the Taiwan Alliance to End the Death Penalty, Nov. 26, 2013.

imprisonment on seven occasions. His case became final in 1986 and he was eventually sentenced to life imprisonment.

In 2010, The Criminal Speedy Trial Act was promulgated, putting an end to such lengthy trials.<sup>169</sup> As stated above, having taken advantage of this Act, the case of the Hsichih Trio was finally ended with a not guilty verdict after approximately 20 years of trials and legal process.

### **Appeals for retrial, extraordinary appeal, and constitutional petitions**

After the death sentence has been confirmed at the end of the appellate process, remaining remedies such as retrial, extraordinary appeal, and constitutional petitions may still be available. According to Article 420 of the Code of Criminal Procedure, under certain circumstances (such as evidence of fabricated exhibits or false expert opinion), a motion for retrial may be filed in the interests of the convicted person.<sup>170</sup>

Extraordinary appeals may be filed – by the Chief Prosecutor of the Supreme Prosecutor’s Office to the Supreme Court – if the trial is found to be in contravention of laws after a final judgment is rendered.<sup>171</sup> In addition, according to Rule 4 of the Implementation Rules for Reviewing Cases Concerning Capital Punishment – if a case is found to have a proper basis to file for retrial or extraordinary appeal – the executive prosecutor may, within three days after the discovery of such circumstances, request that the Ministry of Justice reviews the case.

Constitutional petitions to the Constitutional Court may also be filed if an individual, whose constitutional rights have been infringed – and for whom remedies provided by law for such infringement have been exhausted – has questions on the constitutionality of the statute or regulation relied upon by the court of last resort in the final judgment.<sup>172</sup> It is important to note that the Constitutional Court only reviews the laws ‘*in abstract*’, which means that the Constitutional Court cannot review facts or decide on concrete cases.

It is also important to note that the initiation of appeals for retrial, extraordinary appeal, or constitutional petitions has not stopped executions from being carried out. This practice has been criticised by human rights organisations as a violation of the right to life, and of the right to appeal. In response, Rule 2 of the Implementation Rules for Reviewing Cases Concerning Capital Punishment requires that when a capital case is under consideration for retrial, extraordinary appeal, or constitutional petition, the Supreme Prosecutor’s Office shall not submit the case to the Ministry of Justice for execution. As a result, the signing of the execution warrants must be suspended upon the filing of retrial, extraordinary appeal, or constitutional petition.

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<sup>169</sup> Article 8 of The Criminal Speedy Trial Act states that no appeal can be brought to the Supreme Court under the following circumstances: (1) where the case has been pending before the court of first instance for more than six years and after the case has been remitted by the Supreme Court three times, the court of second instance upholds the non-guilty verdict of the lower court; or (2) the non-guilty verdict has been upheld by courts of the same instance more than twice’.

<sup>170</sup> According to Article 420(1) of the Code of Criminal Procedure, after a guilty verdict has been reached, a motion for retrial can be filed in the interests of the convicted individual if: (1) it is proven that evidence relied on in reaching the guilty verdict has been fabricated or altered; (2) it is proven that witness testimonies, expert opinions or translations relied on in reaching the guilty verdict are untrue/false; (3) the convicted individual has been maliciously accused; (4) where the judgment by a common court or special court has been overruled in the final judgment; (5) it is proven that (during the course of the case) an offence has been committed by the judge who participated in the delivery of the original judgment or pre-trial judgment or pre-judgment investigations; or the prosecutor who participated in the investigation of the case; or that the judge or the prosecutor has been negligent in the management of the case and has been subsequently held responsible for their negligent actions; (6) there is sufficient new evidence to demonstrate that the convicted individual can be acquitted, is exempt from prosecution, or can be re-sentenced for a lesser offence.

<sup>171</sup> Article 441, the Code of Criminal Procedure.

<sup>172</sup> Article 5(1)(2), Constitutional Interpretation Procedure Act.

Regrettably, however, this rule has not always been observed. In some recent cases, death row inmates have been executed even though their appeals were pending.

### **Obstacles in the appeal for retrial, extraordinary appeal, and constitutional petitions**

Notwithstanding their theoretical availability, in reality, there are obstacles in bringing appeals and obtaining remedies. In making an appeal for retrial, the major difficulty lies in the discovery or reconstruction of evidence, as demonstrated in the case of the Hsichih Trio. The final judgment in this case was rendered by the Supreme Court in 1995. After two failed appeals for retrial, the third appeal for retrial was accepted in 2000. During this retrial, a forensic scientist, Dr Henry Chang-Yu Lee, provided new evidence favourable to the defendants. With this fresh evidence casting doubt upon the safety of the convictions, the High Court delivered a non-guilty verdict. However, it was only due to the passage of The Criminal Speedy Trial Act that this non-guilty verdict became final and cannot be appealed against.

For extraordinary appeals, the main obstacle is that the power to file extraordinary appeals lies solely with the Chief-Prosecutor of the Supreme Prosecutor's Office and, in practice, it has been quite difficult to convince the Chief-Prosecutor to file such extraordinary appeals. The case of Cheng Hsing-Tse provides a telling example. Cheng had applied for an extraordinary appeal 22 times since his case was rendered final. All of these applications were denied by the Chief-Prosecutor, despite the discovery of a tape indicating that his confession was extracted by torture. Cheng and his lawyers are still in the process of trying to have the extraordinary appeal recognised.<sup>173</sup> A few cases have, however, succeeded by virtue of the process of extraordinary appeals. For example, Chang Chih-Wen was sentenced to death in the final judgment, but his counsel argued that the defence submitted to the court was not found to be part of the record. Upon such allegation, the Chief-Prosecutor filed an extraordinary appeal on the ground that the case had not been tried with substantial defence. The Supreme Court agreed with the Chief-Prosecutor and reversed the original judgment.<sup>174</sup>

The Constitutional Court has looked into the question of the constitutionality of the death penalty in *J.Y. Interpretation Nos. 194, 263, and 476*. None of these constitutional interpretations led to the death penalty being declared unconstitutional. After the implementation of the ICCPR, petitions were again filed for constitutional interpretation, arguing that Articles 271-1, 289, 332-1, 388, 389 of the Code of Criminal Procedure were unconstitutional. However, on each occasion the Constitutional Court dismissed the petitions. In spite of the ratification of the ICCPR and its domestic legal effect in Taiwan, with the prior interpretations of the Court upholding the constitutionality of the death penalty, it remains a difficult challenge for capital defendants to use constitutional interpretation to obtain a meaningful remedy.

### **Investigation by the Control Yuan**

As stated earlier, the Control Yuan in Taiwan functions similarly to that of an ombudsman. Although its investigation is not deemed an exercise of judicial power, the Control Yuan may still investigate a capital case, especially as to whether the judges have made any errors. Yet, similar to the above appeals, an investigation by the Control Yuan does not guarantee that an execution will be suspended. In recent practice, however, when a petition to the Control Yuan is filed and accepted, it does tend to act as a stay of execution as the Ministry of Justice cannot sign the execution warrant without the documents in the case being transferred from the Control Yuan back to the Ministry of Justice.<sup>175</sup>

<sup>173</sup>The information available at <http://www.taedp.org.tw/content/i-am-innocent-i-am-cheng-hsing-tse> (accessed 31.01.2014).

<sup>174</sup>The relevant discussion available at the Judicial Reform Foundation [http://www.jrf.org.tw/newjrf/rte/myform\\_detail.asp?id=1448](http://www.jrf.org.tw/newjrf/rte/myform_detail.asp?id=1448) (accessed 31.01.2014)

<sup>175</sup>FIDH, *supra* Note 48, at 29.



# **PART SIX**

## Conclusion and Recommendations

## Conclusion

Taiwan knows better than it does with respect to capital punishment. Its leaders know that death is the ultimate criminal sanction, and they know from past and recent experience – including the wrongful execution of Chiang Kuo-Ching in 1997 – that the death penalty can and does violate human rights. The present report identifies some ways in which the actual practice of capital punishment in Taiwan has improved since the country turned toward democracy in the 1980s, but it also documents many ways in which the death penalty remains a serious human rights problem. Until the concerns described in this report are addressed, Taiwan will continue to violate its own commitments to human rights and – politically and practically – it will hamstring its efforts to be seen as a different (and better) kind of China.

There will always be cases that seem to cry out for ultimate punishment, and there will always be members of the public who want the state to execute certain offenders. But this is not the central issue. The pivotal question about capital punishment is whether a system of justice can be constructed that reaches only the rare, right cases, without also occasionally condemning the innocent or the undeserving – and without violating human rights.<sup>176</sup> The evidence in this report reveals that Taiwan remains unable to answer this question in the affirmative, and the evidence from other developed democracies that retain the death penalty suggest that the most informed answer to this question is ‘no’.<sup>177</sup>

Taiwan’s system of capital punishment is seriously flawed. In the face of the domestic evidence, and in the context of major death penalty failures in the rest of the world, the wisest course of action for Taiwan is to end it, not mend it. This course of action would require political courage; Taiwan’s leaders have exercised that at several points in the recent past. The future of capital punishment in Taiwan is in their hands.

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<sup>176</sup> Scott Turow, *Ultimate Punishment: A Lawyer’s Reflections on Dealing with the Death Penalty* (Farrar, Straus, and Giroux, 2003), p.114.

<sup>177</sup> On failures of performance in American capital punishment, see James S. Liebman, Jeffrey Fagan, and Valerie West, ‘A Broken System: Error Rates in Capital Cases, 1973–1995’ (2000), at <http://www2.law.columbia.edu/instructionalservices/liebman>, and James S. Liebman, Jeffrey Fagan, Andrew Gelman, Valerie West, Garth Davies, and Alexander Kiss, ‘A Broken System II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It’ (2002), at <http://www2.law.columbia.edu/brokensystem2>. And on failures of aspiration and political will in Japanese capital punishment, see David T. Johnson, ‘Progress and Problems in Japanese Capital Punishment,’ in Roger Hood and Surya Deva, editors, *Confronting Capital Punishment in Asia: Human Rights, Politics, and Public Opinion* (Oxford University Press, 2013), pp.168–184.

# Recommendations

The implementation of the two Covenants in Taiwan since December 2009 has brought progress towards the protection of the right to life and the right to fair trial for capital defendants. Taiwan's courts have become more willing to ensure procedural rights are respected in the relevant proceedings. But, in contrast with this progress, substantive reviews on the appropriateness of capital punishment have not yet begun. As described in the body of this report, there are far too many criminal provisions in Taiwan punishable by the death penalty, and the vast majority are not consistent with contemporary understanding of 'the most serious crimes' provision under Article 6(2) of the ICCPR. Of great concern is that the implementation of the ICCPR has not resulted in the suspension of executions. Indeed, there have been more than 20 executions since December 2009. This is a serious problem, for Article 6(6) of the ICCPR clearly stipulates that 'nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the present Covenant'. It is evident that many additional steps – and bolder ones – must be taken in order to guarantee the right to life and the rights of capital defendants.

To achieve a measure of conformity with the obligations of Taiwan under the ICCPR, the following reforms to the country's criminal and constitutional laws that regulate the use of the death penalty need to be implemented:

- Eliminate the death penalty for crimes that do not involve a deliberate intention to kill
- Provide sufficient protection for all suspects in detention, to ensure that confessions cannot be extracted by coercive interrogation or torture
- Ensure that all persons are provided with effective legal representation at all stages of the trial and appellate process
- Ensure that persons with mental or intellectual disabilities are never sentenced to death and/or executed
- Provide full access to a fair and functioning process of judicial clemency that is subject to judicial review
- Stay all executions while a retrial, review, or application for clemency is pending
- Ensure that separate sentencing hearings are held to allow all defendants facing the death penalty an opportunity to be heard on the question of sentence
- In keeping with the government of Taiwan's stated desire to move toward the abolition of capital punishment, immediately introduce a moratorium on executions as an incremental step in the direction of that goal





## Contributors

**Wen-Chen Chang** is Professor of Law at the National Taiwan University College of Law. Her teaching and research interests include comparative constitutional law, international human rights, administrative law, and law and society. She is the author of *Constitutionalism in Asia: Cases and Materials* (Hart Publishing, 2014, with Li-Ann Thio, Kevin YL Tan and Jiunn-Rong Yeh).

**David T. Johnson** is Professor of Sociology at the University of Hawaii at Manoa. He is author of *The Japanese Way of Justice: Prosecuting Crime in Japan* (Oxford University Press, 2002), *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford University Press, 2009, with Franklin E. Zimring), and *Koritsu Suru Nihon no Shikei* [Japan's Isolated Death Penalty] (Gendai Jinbunsha, 2012, with Maiko Tagusari).

**Saul Lehrfreund** and **Parvais Jabbar** are the founders and Executive Directors of The Death Penalty Project. They specialise in constitutional and international human rights law, and for more than 20 years have represented prisoners under sentence of death before domestic courts and international tribunals. They are members of the UK Foreign and Commonwealth Office Expert Group on the Death Penalty and have participated in a number of international delegations on the death penalty in China, Taiwan, Japan and Thailand.

# About the Death Penalty Project

For more than 20 years, The Death Penalty Project has worked to protect the human rights of those facing the death penalty. Although the Project operates in all jurisdictions where the death penalty remains an enforceable punishment, its actions are concentrated in those countries that retain the Judicial Committee of the Privy Council in London and in other Commonwealth countries, principally in the Caribbean, Africa and Asia.

The Project's main objectives are to promote the restriction of the death penalty in line with international minimum legal requirements; to uphold and develop human rights standards and the criminal law; to provide free and effective legal representation and assistance for those individuals who are facing the death penalty; and to create increased awareness and encourage greater dialogue with key stakeholders on the death penalty.

The provision of free legal representation for men and women on death row has been vital in identifying and redressing a significant number of miscarriages of justice, promoting minimum fair trial guarantees, and establishing violations of domestic law. The Project has also submitted numerous complaints on behalf of prisoners sentenced to death to the United Nations Human Rights Committee, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights alleging breaches of international human rights standards.

Some of the Project's landmark cases, which have restricted the implementation of the death penalty in the Caribbean, include *Pratt & Morgan v the Attorney General of Jamaica* [1994] 2 AC 1, *Lewis v the Attorney General of Jamaica* [2001] 2 AC 50, *Reyes v the Queen* [2002] 2 AC 235, *The Queen v Hughes* [2002] 2 AC 259, *Fox v the Queen* [2002] 2 AC 284 and *Bowe & Davis v the Queen* [2006] 1 WLR 1623. Other seminal cases include *Mutiso v Republic*, judgment of the Court of Appeal at Mombasa, 30 July 2010 (abolition of the mandatory death penalty for murder in Kenya); *Attorney General v Kigula et al.*, judgment of the Supreme Court of Uganda, 21 January 2009 (abolition of the mandatory death penalty and delay on death row in Uganda); *Kafantayeni et al. v Attorney General* 46 ILM 564 (2007) (abolition of the mandatory death penalty in Malawi); *Boyce et al. v Barbados*, decision of the Inter-American Court, 20 November 2007 (savings clause, mandatory death penalty and prison conditions found to be in violation of the American Convention on Human Rights) and *Johnson v Republic of Ghana*, decision of the United Nations Human Rights Committee, 27 March 2014 (the right to life and the mandatory death penalty).

Since 2000, the Project has been involved in a broad range of activities in Asia, in terms of capacity building, legal advice and direct legal assistance to prisoners under sentence of death. In 2013, the Project published two reports on capital punishment in Asia: *The Death Penalty in Malaysia: Public Opinion on the Mandatory Death Penalty for Drug Trafficking, Murder and Firearms Offences* by Professor Roger Hood and *The Death Penalty in Japan: A Report on Japan's legal obligations under the International Covenant on Civil and Political Rights and an Assessment of Public Attitudes to Capital Punishment*, co-authored with Maiko Tagusari, David Johnson and Dr Mai Sato.



# Summary

This report examines Taiwan's death penalty, based on human rights principles enshrined in international law, which have been recently incorporated into Taiwan's national legal system. It is timely, for it is published only a matter of days after the execution by Taiwan, on 29 April 2014, of five prisoners under sentence of death. This recent spate brings the total number of executions since 2010 to 26, after a four-year period – 2006-2009 – when there was a *de facto* moratorium. The evidence is that Taiwan's current policy on capital punishment is clearly going against the worldwide trend to restrict the use of the death penalty, and to reduce the number of executions, pending total abolition.

Since 2009, The International Covenant on Civil and Political Rights (ICCPR) has had domestic legal force in Taiwan, binding on all levels of government, including the judiciary. This report details how the actual law and practice of capital punishment contradicts Taiwan's commitment to human rights and its obligations under the ICCPR, and the *Safeguards Guaranteeing the Protection of the Rights of Those facing the Death Penalty*, first agreed by the United Nations in 1984. It makes recommendations for change, including:

- Eliminating the death penalty for crimes that do not involve a deliberate intention to kill
- Providing sufficient protection for all suspects in detention, to ensure that confessions cannot be extracted by coercive interrogation or torture
- Ensuring that all persons are provided with effective legal representation at all stages of the trial and appellate process
- Ensuring that persons with mental or intellectual disabilities are never sentenced to death and/or executed
- Providing full access to a fair and functioning process of judicial clemency that is subject to judicial review
- Staying all executions while a retrial, review, or application for clemency is pending
- Ensuring that separate sentencing hearings are held to allow all defendants facing the death penalty an opportunity to be heard on the question of sentence
- In keeping with the government of Taiwan's stated desire to move toward the abolition of capital punishment, immediately introducing a moratorium on executions as an incremental step in the direction of that goal

In sum, this report demonstrates an urgent need for Taiwan to stop executions and for the government and judiciary to reform several of their current positions on capital punishment, prior to its complete abolition.



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