

The Death Penalty in Taiwan
A Report on Taiwan's legal obligations under the International Covenant on
Civil and Political Rights

Saul Lehrfreund*

7th December 2014

Introduction

All the 106 countries that have now abolished the death penalty accept that capital punishment inevitably violates human rights norms, in particular the right not to be arbitrarily deprived of life and the prohibition on torture, cruel and inhuman and degrading treatment or punishment. Most of the States that resist the trend towards abolition and continue to retain the death penalty (even if they do not carry out executions), dismiss the human rights argument and instead maintain that the death penalty is a sovereign matter of national criminal justice policy, shaped by the cultural expectations of its citizens and is in any event still permitted by international law. The prevailing political view in Taiwan is that the Government must represent “the will of the people” and that the death penalty cannot be abolished until there is sufficient public support for abolition.¹

In March 2009, the Government of Taiwan announced the ratification, as a matter of domestic law, of the International Covenant on Civil and Political Rights (ICCPR)²

* Co-Executive Director, The Death Penalty Project.

¹ See ‘*Abolition of the Death Penalty: Public Opinion and Human Rights*’, paper presented at the International Conference Against the Death Penalty: Life and Death in Taiwan, R. Hood, December 2014.

² International Covenant on Civil and Political Rights, (1976) 999 UNTS 171.

and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³ In December 2009, the Implementation Act 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 government has voluntarily and commendably agreed to conform to the standards and objectives of the ICCPR, not only in restricting the scope of the death penalty, but also to ensure all the fair trial provisions and other provisions guaranteeing the protection of the rights of those facing the death penalty, including the right to seek clemency, are respected in capital cases.⁴

Whilst it is true that international law does not entirely prohibit capital punishment it does nonetheless seek an end to the death penalty. Abolition of the death penalty is clearly an aspiration and goal of all international human rights treaties, in particular the ICCPR, and as I will go on to explain, a proper understanding of international law reveals that the death penalty should be incrementally restricted pending its gradual disappearance. Until such time, international norms impose safeguards⁵ that must be respected in all capital cases, including the right to *super* due process and the requirement that there must be a heightened sense of scrutiny in all cases where the death penalty could be imposed. These exacting standards apply in all retentionist

³ International Covenant on Economic, Social and Cultural Rights, (1976) 999 UNTS 3.

⁴ See *Taiwan's obligations under the ICCPR: Ratification as a matter of domestic law: Introduction to the ICCPR and international norms on the death penalty*, 'The Death Penalty in Taiwan: A report on Taiwan's legal obligations under the International Covenant on Civil and Political Rights' (hereinafter The Taiwan Report), July 2014, page 2.

⁵ '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).

countries without exception, however, there are serious concerns that Taiwan has not in fact taken sufficient steps to reform incompatible laws and practices so as to meet the requirements of the ICCPR. The evidence is that the minimum standards prescribed by international law are not being complied with in all cases, even though the understanding is that those facing the death penalty should be afforded special protection and guarantees to ensure a fair trial above and beyond those afforded in non-capital cases.

These significant developments since 2009 motivated us to produce a report examining Taiwan's current use of the death penalty and its binding obligations under the ICCPR. The report is a collaborate effort with the Taiwan Alliance to End the Death Penalty (TAEDP) with extensive contributions from Professor Wen Chen Chang from the National Taiwan University College of Law, HsinYi Lin, the Executive Director of TAEDP and Professor David Johnson of the University of Hawaii, a highly respected expert on criminal justice in Asian countries.

The report was published in June 2014, shortly after the sudden executions in April 2014 of five death row prisoners which brought Taiwan's policy on capital punishment into sharp focus and attracted International criticism affecting the nation's reputation. The report was therefore timely as there were serious concerns that the provisions of the ICCPR were not adhered to in these five cases, nor in fact in respect of all the 21 people who have been put to death since executions resumed in 2010.

The report aims to inform a wider audience than just government officials of Taiwan's obligations as regards the standards to be set and upheld under the ICCPR as well as the Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty, which were first adopted unanimously by the United Nations in 1984.

The implementation process:

The Implementation Law 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. 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.

In 2012, the government issued its first report on the implementation of the ICCPR and, as part of the implementation process, a panel of 10 international experts were invited in February 2013, to review the report in light of information from all available sources, including civil society. In the concluding observations and recommendations adopted by the experts,⁶ it was strongly recommended that the Taiwanese government should intensify its efforts towards abolishing capital punishment. The experts 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 are scrupulously adhered to.

⁶ 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.

Nevertheless, during this transitional period the death penalty has continued to be enforced with vigour, and since 2010, more than 20 executions have been carried out in Taiwan. The experts concluded that Taiwan has not, in fact, taken sufficient steps to reform incompatible laws and practices with the requirements of the ICCPR and as such, 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.⁷

Scheme of the ICCPR and the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty

I. Scheme of the ICCPR:

Taiwan has now committed itself to respect the rights enshrined in the ICCPR and to provide effective remedies to individuals whose rights are, have been, and will be violated.

As I have already stated, the retention of the death penalty by Taiwan is not itself a breach of the Covenant. However, the treaty does assume that abolition of the death penalty will be the ultimate goal. Since 2009, Taiwan has therefore been under an obligation to develop domestic laws and practices that progressively restrict the use

⁷ See *Bridging the gap in Taiwan – the reporting and review process: Introduction to the ICCPR and international norms on the death penalty*, The Taiwan Report, pages 4-5.

of the death penalty pending its abolition and the report assesses whether the law and practice in Taiwan is consistent with this progressive approach to abolition underpinning the ICCPR.

The fact that national law does not at present recognise all of these rights is not a sufficient response to the ICCPR. To continue to carry out the death sentence regardless is clearly a serious flaw and a grave misunderstanding of the obligations that Taiwan must now respect.

The right to life enshrined in Article 6 and freedom from torture in Article 7 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.⁸

Article 6 of the ICCPR lists various safeguards in the application and implementation of the death penalty which are worth repeating. 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 to individuals for crimes committed under the age of 18.

It is too simplistic for states to maintain that the death penalty is permissible under international law by relying on Article 6(1) of the ICCPR which proclaims the right to life, but does not exclude capital punishment, and also by claiming that Article 6(2) of the ICCPR legitimates the use of capital punishment as long as it is restricted to the

⁸ See *Preliminary observations on the right to life and the prohibition of torture and related ill-treatment: Introduction to the ICCPR and international norms on the death penalty*, The Taiwan Report, pages 6-7.

most serious crimes. Reliance on Articles 6(1) and 6(2) of the ICCPR as justification for keeping the death penalty indefinitely is, however, misplaced. Articles 6(2) should be read in the context of Article 6(6) which places 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”⁹

Taiwan’s ratification of the ICCPR should therefore only be seen as a prelude to abolition as the question is no longer *whether* the death penalty should be abolished, but rather *when* and *how* this should take place.

II. 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 which, I quote “ ... *constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment.*”

The Safeguards were adopted in 1984 by the U.N. Economic and Social Council and were further developed by the Council in 1989 and again in 1996, recommending (amongst other things) 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

⁹ See *The Right to Life*, The Taiwan Report, pages 10-11.

punishment. The significance of the Safeguards has subsequently been reaffirmed by the Commission on Human Rights in 2005, and more recently by the General Assembly. 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.¹⁰

The detailed findings are set out in the report, but I would like to focus on the right to clemency and the norms relating to due process and the right to fair trial under the Covenant and comment on the specific concerns that arise in relation to vulnerable individuals who are mentally disordered.

Mercy

In relation to mercy, the ICCPR 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.”

Signatories to the ICCPR are under an obligation, in accordance with Article 6(4) of the ICCPR and the Safeguards, 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,

¹⁰ See *Safeguards guaranteeing protection of the rights of those facing the death penalty: Introduction to the ICCPR and international norms on the death penalty*, The Taiwan Report, pages 6-7.

transparent, and fair system that allows for the proper consideration of clemency in all cases.

Domestic courts and international tribunals have found that 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.

They have established and applied 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. The applicable standards under Article 6(4) of the ICCPR should be interpreted in a similar fashion and as such signatories to the Covenant should take steps to ensure that condemned prisoners are provided with adequate and *effective* mercy procedures.¹¹

According to Article 40 of the Constitution of Taiwan, the President shall – in accordance with law – exercise the power of granting amnesties, pardons, remission of sentences, and restitution of civil rights. This is carried out in accordance with Article 6 of the Amnesty Law. However, the details of the procedure regarding amnesty or pardons are not fully prescribed in the Amnesty Law and no clear rules of procedure have been established for the consideration of petitions for pardon or

¹¹ See *Pardons and petitions of mercy: The right to life*, The Taiwan Report, pages 20-21.

mercy in Taiwan, let alone the criteria by which such petitions may be reviewed and decided. 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 the requirement of 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.¹²

In 2010, 44 prisoners awaiting execution filed petitions for pardon, however, in 2010, 2011, and 2012, there were, respectively, four, five and six executions. None of these prisoners had ever received a reply or notification that their petitions for pardon had been considered and rejected by the President and this serious violation of the right to life was noted by the international experts in 2013 as a fundamental breach of the right to life.¹³

Right to a fair trial

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.

¹² See *Taiwanese law and practice: Pardons and petitions of mercy: The right to life*, The Taiwan Report, pages 21-23.

¹³ *Ibid*, page 22.

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”. 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.” 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 United Nations Human Rights Committee has consistently held that if Article 14 (fair trial) of the ICCPR is violated during a capital trial, Article 6 (1)— ‘nobody shall be arbitrarily deprived of his life’ —is also breached. The Committee has added 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” than in other criminal trials.

Unless and until States can meet these universally accepted standards, the death penalty should not be enforced, but the evidence is that too many countries seek to retain the death penalty without assuming responsibility for the proper administration of criminal justice. The present report suggests that Taiwan is failing to comply with its obligations under Article 14 of the ICCPR.

Retentionist countries also need to face up to the reality that the risk of innocent people being executed can never be eliminated. The overwhelming evidence from

around the world is that even when procedural guarantees are improved and the protection of law is provided to all individuals, wrongful convictions and miscarriages of justice will still occur. The likelihood of wrongful convictions can be decreased by strict adherence to Article 14 and the Safeguards, but the risk that innocent people will be executed can never been removed altogether as there is simply no guarantee that a criminal justice system can be perfected.¹⁴

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-Ching¹⁵ 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 many other cases cited in the report.

Countries need to face up to the reality of wrongful convictions and unfair trials as it cannot be acceptable on the one hand to implement the death penalty, but on the other hand accept that innocent persons may be sentenced to death and executed. If the risk exists as we believe it does, there is simply no room for capital punishment in spite of the cultural expectations of citizens and the demands of political and public opinion. Once it is accepted that criminal justice systems are fallible, the question is not whether an individual deserves to be sentenced to death and executed, but whether the State maintains the right to deprive an individual of the

¹⁴ See *Minimum fair trial guarantees in capital cases*, The Taiwan Report, pages 38-47.

¹⁵ See *Taiwanese law and practice: The prohibition of torture and related ill-treatment*, The Taiwan Report, pages 27-28.

most basic human right, namely the right to life if it cannot guarantee that it will never make a mistake.

Vulnerable groups:

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

Safeguard 3 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 safeguards were further developed by eliminating 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 report finds that 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. 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. Overall, the quality of mental assessment has not been satisfactory and there have been erroneous assessments that have failed to establish that defendants have been suffering from a mental illness.¹⁶ 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.

In the Chen Kun-Ming case, the Supreme Court accepted that the defendant was suffering from a form of mental illness. Placing reliance on the ICCPR and relevant international human rights norms it, decided not to impose a death sentence.

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

¹⁶ See *The prohibition of the execution of juveniles, pregnant women and other groups or individuals: The right to life*, The Taiwan Report, pages 17-18.

been sentenced to death as the courts have rejected their claims on the basis that they are malingering and have no real symptoms.¹⁷

Concluding remarks

It is clear from the findings of the report that Taiwan has failed to respond to the concerns raised by international experts, NGOs and the wider international community regarding the use of the death penalty. Until these concerns are addressed, Taiwan will continue to violate its obligations under its domestic law incorporating the ICCPR as well as general binding principles of international law.

The judiciary can play a crucial role in ensuring that domestic law is interpreted and construed consistently with human rights norms restricting the death penalty pending abolition. The wave of recent case law from national courts around the world which have found, for example, that mercy procedures are judicially reviewable reveals an increasing interdependence between different legal systems. It also reveals a willingness by the judiciary to invalidate laws that do not comply with contemporary international norms and to ensure scrupulous respect for fair trials and due process guarantees in capital cases.

While reforms have been made since the ICCPR came into force, Taiwan's system of capital punishment still retains significant room for improvement. The implementation of the ICCPR since 2009 has brought some progress and improvements toward the protection of the right to life and the right to a fair trial for capital defendants. However, the overall conclusion is that the death penalty remains

¹⁷ See *Taiwanese law and practice: The prohibition of execution of juveniles, pregnant women and other groups or individuals: The right to life*, The Taiwan Report, pages 18-20.

a serious human rights issue and urgent reform needs to be made to the criminal and constitutional laws that regulate the use of the death penalty, pending complete abolition, so as to enable Taiwan to fulfil its legal obligations.

Overall, the evidence presented in the 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 well discover, as so many other countries have discovered, that it is impossible to design a system of capital punishment that does not violate human rights and that it should therefore pursue its agreed goal of abolition as swiftly as possible.