Partly Virtual, Partly Real: Taiwan’s Unique Interaction with International Human Rights Instruments

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I. INTRODUCTION

One major purpose of the United Nations (UN) is to promote and encourage respect for human rights for all. The UN and its members, in pursuit of this purpose, shall act in accordance with the principle that all persons are endowed with fundamental human rights, regardless of the country in which they live. The Universal Declaration of Human Rights (UDHR), which was adopted in 1948 by the UN General Assembly (GA), has been proclaimed as a common standard of achievement for all peoples and all nations. Therefore, no distinction shall be made on the basis of the international status of the country or territory to which a person belongs.

The UN has always been urging states to join international human rights treaties. It accepts all instruments of ratification or accessions to human rights treaties, even those coming from non-UN member states or territories of which sovereignty is in doubt. The primary issue for most states is whether they wish to join. In some cases, the question is how much pressure the international community is willing to exert to push for inclusion.

However, for Taiwan, the question is not only whether it wants to join, but also whether it even has the ability to join the international human rights system. This article therefore discusses Taiwan’s unique interaction with international human rights treaties. Apart from this introductory section it includes three main parts. Section II traces back Taiwan’s adventures in the international human rights regime. Section III considers interac-

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2 The international human rights treaties referred to in this essay mainly include the International Bill of Rights and core international human rights treaties.
tions between the Taiwanese Constitution and international human rights instruments. Section IV reviews how Taiwan incorporated international human rights treaties without the successful deposition of the instruments of ratifications or accessions to the UN. The conclusions of this article will be presented in section V. A general image of such interaction between Taiwan and international human rights instruments presents a unique picture that is part reality, but that is also something that akin to virtual reality.

II. ADVENTURES IN THE INTERNATIONAL HUMAN RIGHTS REGIME

I divide Taiwan’s adventures in the international human rights regime into three stages. In the first stage, between 1945 and 1971, Taiwan did not act as a positive participant. The second stage ran from 1971 to 2000, when Taiwan suffered double isolation. In the third stage since 2000, Taiwan has desired to join the international human rights regime but has had no opportunity. Instead, special domestic laws have been enacted to incorporate international human rights treaties.

A. 1945–1971: Not Really a Positive Participant

After the UDHR was adopted in 1948, both the International Covenant on Civil and Political Rights (ICCPR)\(^3\) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)\(^4\) were concluded in December 1966. The UDHR, ICCPR, and ICESCR are collectively known as the “International Bill of Rights.” Together they represent the most basic set of international human rights standards. This set of international human rights regulations is the basis for many other human rights treaties. The Optional Protocol to the ICCPR (ICCPR-OP1), which was also adopted in 1966, confers on the individual citizens of state parties to the Protocol the right to bring complaints against governments for rights violations. Apart from the International Bill of Rights, the UN also concluded one core inter-


national human rights treaty by 1971, i.e., the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).  

As a result of Japan’s defeat in August 1945, China, then governed by the Republic of China (ROC) government, took over Taiwan on behalf of the Allied Powers, pursuant to an order issued by General Douglas MacArthur. Two months later, the ROC unilaterally proclaimed Taiwan a province. The ROC, representing China, was a member state of the UN and permanent member of the Security Council between 1945 and 1971. Moreover, the ROC was a long-term member of the UN Commission on Human Rights, and for many years acted as the vice-chair of the Commission. Mr. Chung Peng-Chun, representative of the ROC to the Commission, was regarded as one of the five key people who drafted the UDHR. Therefore, it can be argued that the ROC actively participated in drafting the International Bill of Rights and some of the significant international human rights treaties at that period of time.

However, this formerly active participant merely signed the two international covenants and the ICCPR-OP1 in 1967 with no ratification following 1971. The ROC ratified the ICERD in 1970 before she was forced to eventually leave the UN.

It can therefore be argued that during the period between 1945 and 1971, the ROC had opportunities to fully join the international human rights regime, but it did not wish to do so.

B. 1971–2000: Double Isolation

Between 1971 and 2000, the international human rights regime continued to advance, leaving the long-term martial-ruled Taiwan further behind.

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7 All peoples’ names that are translated from Chinese characters in this essay are presented surname first, first name second.

8 The martial law decree went into effect in Taiwan on May 20, 1949. Until its lifting in July 1987, the 38-year-long martial law rule did intrude into many aspects of civilian lives. Martial law orders on Taiwan’s offshore islands, including Kinmon,
Among the International Bill of Rights, the two international covenants and the ICCPR-OP1 came into force in 1976. The Second Optional Protocol to the ICCPR (ICCPR-OP2), aiming at the abolition of the death penalty, was proclaimed by the UN GA in 1989.

The UN GA also passed several core international human rights treaties in this period including the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),9 the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). There were also several optional protocols concluded to offer more procedural and substantial protections, including the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW-OP), the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-AC), and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography (OP-CRC-SC).

However, the situation in Taiwan had changed dramatically since 1971 which told another story. The UN GA passed Resolution No. 2758 that recognized “the representatives of the Government of the People’s Republic of China [as] the only lawful representatives of China to the United Nations and that the People’s Republic of China is one of the five permanent members of the Security Council.”10 It also decided “to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.”11 Since then, the UN and most states in the world no longer recognize the ROC government neither as the Chinese government nor even as a sovereign state. Consequently, Taiwan has practically lost almost all of the

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11 Id.
available opportunities to participate in the evolution of the international human rights regime.

As Taiwan was under decades of authoritarian rule which made human rights taboo, coupled with international isolation, the importance of the international human rights treaties, as well as the related international legal issues of accession, were not given weight. It can therefore be argued that Taiwan suffered a double isolation. On one hand, Taiwan was internationally isolated, having no opportunity to accede to international human rights instruments. On the other hand, Taiwan was self-isolated, not even expressing a wish to join the international human rights regime or to incorporate international human rights norms into its domestic legal system.

C. After 2000: Having Will But No Opportunity

After the year 2000, additional core human rights treaties were adopted, such as the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and the Convention on the Rights of Persons with Disabilities (CRPD). Another key development of the international human rights regime in the 21st century was the adoption of several optional protocols to those core human rights treaties. They include the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT), the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD), and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR-OP). These optional protocols provided new mechanisms of monitoring.

In Taiwan, it was not until the year 2000 that a democratic transfer of power from one political party to another occurred. This transfer of power happened again in 2008. Therefore, developments of acceding to international human rights treaties and bringing them into the domestic legal system can be divided into two periods.


There was a new start in returning to the international human rights regime after Chen Shui-Bian, a member of the Democratic Progressive Party
(DPP),\textsuperscript{12} won the presidential election in 2000. President Chen put forth the ideal of “building a human rights state” in his first inaugural speech on 20 May 2000. He stressed the importance of catching up with international human rights standards through this process. Ratifications of the ICCPR and the ICESCR therefore became one of his key human rights policies.

In April 2001, the cabinet passed a proposal by the Ministry of Foreign Affairs (MOFA) to submit to the Legislative Yuan (LY), the Taiwanese Parliament, to ratify the ICCPR and the ICESCR. The DPP government believed that regulations not conforming to the covenants could be dealt with through revisions in the law, and thus no reservation was required.

However, there was an enormous debate in the LY. The LY, which was then dominated by the Kuomintang (KMT),\textsuperscript{13} passed the ratification procedure on 31 December 2002, but with reservations.\textsuperscript{14} A declaration to common Article 1 of the two covenants was also included stating that “self-determination is applied to colonies or to non-self-governing territories only, and since the ROC is a sovereign state, therefore it does not subject itself to self-determination.”\textsuperscript{15}

The DPP was of the view that such declaration did not comply with common Article 1 of the two covenants. Therefore, the DPP applied for repealing such declaration in January 2003.\textsuperscript{16} This repeal was not even discussed before the expiration of that term of the LY.\textsuperscript{17} The ratification

\textsuperscript{12} The DPP was established in 1986, and claimed that its establishment “marked the culmination of 100 years of struggle and sacrifice by the Taiwanese people for self-government.” See website of the DPP, available at http://dpptaiwan.blogspot.tw/p/history.html.

\textsuperscript{13} The KMT was founded by Sun Yat-Sen in Hawaii in 1894. It ruled China from 1928 until its retreat to Taiwan in 1949 after being defeated by the Communist Party of China during the Chinese Civil War. The ROC took over Taiwan in 1945; therefore the KMT in fact ruled Taiwan between 1945 and 2000. Since Ma Ying-Jeou of the KMT won the presidential election in 2008 and was reelected in 2012, the KMT will be in power until 2016.

\textsuperscript{14} Those included reservations to Article 6 (right to life) and Article 12 (right to liberty of movement and freedom to choose residence) of the ICCPR and Article 8 (right to form trade unions) of the ICESCR.

\textsuperscript{15} Official Gazette of the Legislative Yuan, Jan. 4, 2003, vol. 92 no. 3(3), at 206.

\textsuperscript{16} Official Gazette of the Legislative Yuan, Jan. 15, 2003, vol. 92 no. 5, at 694.

\textsuperscript{17} \textit{Id.}
procedure was therefore not completed. By the end of May 2008, when the DPP administration ended, ratifications of the ICCPR and ICESCR still had not been accomplished.

However, there was a different story for accession to the CEDAW. The DPP government did not make accession to the CEDAW a top priority of its human rights policy. Nonetheless, because of the promotion from women’s rights NGOs, this issue also went to the consideration of the DPP government, which gradually accepted the idea. In July 2006, the cabinet passed a proposal by the MOFA to submit to the LY a plan to accede to the CEDAW without any reservation. It is noteworthy that the LY accepted the idea of including no reservations and passed accession procedures in January 2007. This accession became the first step towards interaction with international human rights instruments in the decades after 1971.

There are two possible reasons for this achievement. One was that such accession was not regarded as a top priority, therefore there were fewer political conflicts. Although the KMT held the majority in the LY, it accepted a proposal from the DPP government. The other reason was that women’s organizations in Taiwan played an important role when the LY negotiated a bill concerning women’s rights. Unless it concerned a very controversial issue, members of the LY, no matter whether they belonged to the DPP, the KMT, or other political parties, tried not to conflict with those women’s rights NGOs so as to gain more support and votes.

A difficult question came with the success of the domestic procedure of accession to the CEDAW: whether or not to deposit the instrument of accession to the UN Secretary-General (SG). On one hand, it was ruled that a state has to deposit its instrument of accession to become a contracting state and be bound by the Convention. By legal terms, Taiwan should have wasted no time in completing this procedure. It was argued that the deposit is to formally declare before the international community Taiwan’s commitment to be bound by the CEDAW. Deposit not only brings strengthened human rights guarantees, but it also gets Taiwan back on track internationally. Article 25, paragraph 4 of the CEDAW states that the Convention “shall be open to accession by all States.” Those who supported depositing reasoned that the UN’s acceptance of Taiwan’s accession would
not be important. However, deposit would necessarily implicate Taiwan’s sovereignty and independence and would be opposed by the PRC.

Those opposed to deposit offer views in political terms. They believe that there is no urgency to deposit, and questioned whether or not their actions could be respected. They also feared that a failed attempt at deposit could damage national dignity and relations with China and draw criticism about the human rights standards of Taiwan’s diplomatic allies and negatively impact the direction of foreign relations.

It can be regarded as a general rule that there is no problem for states that wish to deposit their instruments of accession to international human rights treaties directly to the UN SG. Nevertheless, one special case should be noted. According to Article 48, the CRC is open for accession by any state, and its instrument of accession shall be deposited with the UN SG. The Niue and Cook Islands acceded to the CRC in 1995 and 1997 respectively. The Niue and Cook Islands were not member states of the UN at that time. Both of them were in the situation of “self-governing in free association with New Zealand.”18 There was even a doubt about whether they were sovereign states. Nevertheless, the UN accepted them as contracting states to the CRC.

It is a pity that Taiwan is not a UN member state or, even worse, not even recognized as a sovereign state. In March 2007, the DPP government attempted to deposit an instrument of accession with the help of Taiwan’s diplomatic allies.19 However, at the end of March 2007, the UN SG returned the instrument to Taiwan’s allies, stating that Taiwan was not regarded as a sovereign state by the UN.

The unsuccessful deposit of instruments of accession triggered a puzzle: Whether the CEDAW bound Taiwan and whether it had domestic legal


19 See MOFA Taiwan, Newsletter no. 065, (April 30, 2007); See also Ho Bih-Jen, The Strategies and Efforts for Promoting Taiwan’s CEDAW Bid, 32 Bi-month J. Res. & Evaluation 4, 43-53 (2008).
status. Again, Taiwan adopted a unique approach by enacting a special domestic law to solve this problem that will be further reviewed in section III.

2. After 2008: KMT Government

Former Taipei City Major and KMT member, Ma Ying-Jeou, was elected president in March 2008. During his campaign, Ma released a nine-point declaration on human rights, but the ratifications of the ICCPR and the ICESCR were not included. Unlike Chen in 2000, there were no bold human rights policy objectives outlined, and no further mention of human rights was made in Ma’s inauguration speech. One possible reason was that the ratifications of the ICCPR and the ICESCR were core human rights policies of former President Chen. Taking the same policy as Chen’s could politically mean to follow his path.

However, Ma suddenly declared his commitment to ratify the two covenants on 10 December 2008, the 60th anniversary of the UDHR. It was also noteworthy that Ma’s objective was the same as Chen’s in 2000. While the KMT blocked attempts under Chen’s administration, a KMT president was now proposing the very same policy. Ma’s decision was based on bringing Taiwan’s human rights position up to international standards, which was also a fundamental part of Chen’s motivation. Ma proposed ratifications without reservation and declaration in 2009, which was the same approach as that of Chen.

As the KMT occupied almost three fourths of the LY at that time, there was no difficulty in passing the ratifications proposed by a president of the same political party. On 31 March 2009, the LY approved the ratifications. It also should be noted that the KMT-dominated LY insisted on reservations and declarations to the covenants in 2002, but gave up such insistence in 2009 when the ratifications were proposed by President Ma.

An Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights was also enacted by the LY on the same day the treaties were ratified. The very details of the Act, which will be reviewed in section III, were in fact originally proposed by Chen’s administration. The KMT changed

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the last article only to add a “sun-rise clause” to allow for preparation in advance of the Act’s effective date of 10 December 2009.

After completing the ratification procedure for the two covenants, the KMT government faced a similar dilemma: whether to deposit the instruments of ratifications or not? As mentioned earlier, the ICCPR and the IECSCR were adopted in 1966. The ROC signed them in 1967, but was forced to leave the UN in 1971. The only reason that Taiwan could ratify the covenants in 2009 was that Taiwan could continue to use the signatures of the ROC in 1967.

Therefore, the first core issue is whether those signatures by the ROC in 1967 are still effective. I consider this issue from three angles: Taiwanese, Chinese, and international.

First, Taiwan believed that signatures by the ROC before 1971 were still valid. As seen above, both the DPP and the KMT governments took the same position. It was believed that following this path could be a means to interact with the international human rights regime.

Second, the People’s Republic of China (PRC) has insisted that signatures or ratifications by Taiwanese authority were illegal and void. The PRC made such a declaration when Taiwan acceded to the ICERD in 1981. Again, when the PRC signed the ICCPR in 1998, it made a similar declaration, stating that “the signature that the Taiwan authorities affixed, by usurping the name of ‘China,’ to the [Convention] on 5 October 1967, is illegal and null and void.”21 However, the PRC’s report under the ICERD did not include Taiwan.22 Since the PRC has not ratified the ICCPR, its reports covered only Hong Kong and

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Macau, but not Taiwan. Neither did Chinese reports under the ICESCR and the CEDAW include the situation of Taiwan.

Third, the UN registered all signatures to and ratifications of international human rights instruments by the PRC, while all those done by the ROC were deleted. However, it is worth noting that the states of the former Yugoslavia, such as Croatia, Slovenia, and Macedonia, succeed to all international human rights treaties to which Yugoslavia was a contracting party. The Czech Republic and Slovakia also succeed to those human rights treaties ratified by Czechoslovakia.

Several colonies also succeeded to human rights treaties many years after their independence. For example, Antigua and Barbuda became independent in 1981, but succeeded to the ICERD in 1988. Saint Lucia became independent in 1975, but did not succeed to the ICERD until 1990.

In fact, the Human Rights Committee (HRC) has consistently taken the view, “as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State

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party designed to divest them of the rights guaranteed by the Covenant.” 26 Therefore, before the former Yugoslavia states succeeded to the ICCPR, the HRC declared that “all the peoples within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant.” 27

It can therefore be argued that Taiwan may declare succession of signatures on the ICCPR and the ICESCR in 1967 by the ROC, and move on to ratification and deposit. All of the states mentioned above took the same approach of asking the UN SG to declare their succession to human rights treaties. It can also be a way for Taiwan to make such a request.

However, Taiwan has to face the second core problem: both covenants stipulate that they may be ratified by “any State Member of the United Nations or member of any of its specialized agencies … and by any other state which has been invited by the General Assembly…” 28 Taiwan could not fulfill those conditions. While the KMT government adopted the DPP’s method of relying on the help of diplomatic allies to deliver its ratification instruments to the UN SG, the UN SG did not accept such instruments. Ma’s government acknowledged this and stated, “Though not able to deposit its instruments of ratification with the UN Secretariat, the ROC government is committed to full implementation of the provisions of the covenant.” 29

After 2000, it can be argued that Taiwan had strong commitment to join the international human rights regime, but the UN did not give Taiwan any opportunity. One thing that should be emphasized is that international human rights treaties are for all peoples and all nations regardless of the country in which they live and without distinction of the international status of the country. International human rights monitoring mechanisms have been urging states to participate in as many international human rights treaties as possible. It is obviously unfair to turn down Taiwan when it wishes to abide by the international human rights regime. If the international com-

28 See ICCPR, supra note 3, art. 48; ICESCR, supra note 3, art. 26.
29 Press Release, Office of the President, President Ma Attends Ceremony to Bestow 2009 Asia Democracy and Human Rights Award (Dec. 10, 2009).
munity takes universal human rights seriously, it should make Taiwan’s accession available. There will be no universal human rights without Taiwan.

III. TWO STRANGERS: CONSTITUTIONAL FRAME AND HUMAN RIGHTS TREATIES

This section focuses on the interaction between the Taiwanese Constitution and international human rights instruments and is divided into three subsections. First, I trace back to the original constitutional drafting history to see whether there was any idea concerning the international human rights regime. Second, I examine those constitutional interpretations in relation to international human rights instruments. Third, I review constitutional amendments in Taiwan and offer a new constitutional provision by referring to comparative constitutional models.

A. Views in Drafting History

It is quite special that the current Constitution of Taiwan in fact did not originate from Taiwan. Instead, it was promulgated in China in 1947 and has been imposed on Taiwan since then. It was not until the outbreak of the “228 Massacre,”30 during which many people were killed on 28 February 1947, that China changed its mind by allowing Taiwan a primitive degree of constitutional rule.31 In 1949, the exiled ROC government took refuge on Taiwan, but claimed to continue representing China including Taiwan, Tibet, and even Mongolia. It chose to hold on to the 1947 Constitution in order to support its self-claimed legitimacy. As a result, the 1947 Consti-

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30 On 28 February 1947, about two thousand people gathered in front of the Bureau of Monopoly in Taipei to protest the brutal beating of a woman cigarette peddler and the killing of a bystander by the police the previous evening. The Chinese Governor, Chen Yi, responded with machine guns, killing several people on the spot. Uprisings erupted. What ensued was a series of massacres on the island by the troops sent from China by Chiang Kai-Shek that resulted in the deaths of more than 30,000 Taiwanese people.

31 See Liao Fort Fu-Te & Hwang Jau-Yuan, Think Globally, Do Locally – Internationalizing Taiwan’s Human Rights Regime, in Taiwan’s Modernization in Global Perspective 80 (Peter C.Y. Chow ed., 2002).
stitution, designed for China, has been imposed on Taiwan, regardless of compatibility problems.

It is therefore important to examine whether the original constitutional provisions made in 1947 express any ideas concerning international human rights treaties. There are two articles in the Constitution that may relate to international human rights treaties. The first is Article 22, which provides that “All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.” What should be determined is whether “other freedoms and rights” include those rights guaranteed by international human rights treaties.

The original Chinese Constitution was drafted between 15 November and 25 December 1946 in China. The document, Principles for Drafting the Constitution (Principles), which was reached by political compromises by the major political parties at that time, was taken as a foundation. Article 9.1 of the Principles stated that, “rights and freedoms enjoyed by people in democracy should be guaranteed by the Constitution, and should not be illegally violated.” It was not clear whether “rights and freedoms enjoyed by people in democracy” included those protected by international human rights treaties. It was reported that this Article was added so that rights and freedoms not listed in other provisions were also protected, to avoid omission of rights, and to adapt to the needs of the future. Examples cited as similar provisions include the Ninth Amendment of the US Constitution and Article 20 of the Portuguese Constitution. It is obvious what was emphasized were rights not listed, not rights guaranteed by international human rights treaties. In fact, this conclusion is quite reasonable based on the time frame, as the UN was founded in 1945 and the UDHR was adopted in 1948, which was the starting point of the international human rights system. It can be reasonably established when the Constitution was drafted that there

32 Article 9.1 of the Principles for Drafting the Constitution, in DOCUMENTS OF CHINESE CONSTITUTIONAL HISTORY 593 (Miu Chen-Gi ed., 1991).
33 Report of constitutional drafts by the President of the Legislative Yuan, in ISSUE ON THE NATIONAL ASSEMBLY 24 (Hwang Sahn-San ed., 1947).
34 Committee of Promotion of Constitutional Draft of the ROC, EXPLANATIONS OF CONSTITUTIONAL DRAFT OF THE ROC 21 (1940).
was no international human rights system and the drafters could not have foreseen the creation of such a system.

The other provision that may concern international human rights treaties is Article 141, which provides that the state’s foreign policy shall “respect treaties and the Charter of the United Nations, in order to … promote international cooperation, advance international justice and ensure world peace.” The issues here include: what is the meaning of “respect treaties and the Charter of the United Nations?”; does “respect” mean that treaties have domestic legal status?; do “treaties” include international human rights treaties?; and can human rights clauses in the UN Charter be directly applied in the domestic legal arena.

Article 11.2 of the Principles states that “principles of diplomacy include…fulfilling obligation of treaties and complying with the UN Charter….” However, there was resistance from the KMT’s official newspaper, the Central Daily News, which stated that “it is difficult to expect that the UN will exist forever.” It therefore inquired whether “the constitution will [be] dependent on changes of the UN.” It also expressed that while the Constitution merely enshrined the obligations of fulfilling treaties, the state would have no standing in cases where other parties denied rights in the treaties. That sentence was then amended to “respect treaties and the Charter of the United Nations.” Although some members insisted on deleting this sentence, the chairperson of the drafting assembly, Hu Shih, emphasized that “this is the first state that includes the UN Charter into her constitution, to which the world pays much attention.” As a result, the sentence was kept as it stands now.

We may observe from the drafting history that, although the word “respect” was applied, the real intention was to fulfill treaty obligations. I therefore argue that the interaction between the Constitution and interna-

35 Miu Chen-Gi, supra note 34, at 594.
37 Id. at 101.
38 Hwang Shan-San, supra note note 35, at 156.
39 Hu Shih might not think that the first state that introduced the UN Charter into her Constitution was thereafter forced to leave the UN. It is also difficult to find that a non-UN member state has a constitutional duty to respect the UN Charter.
tional human rights treaties in Taiwan should be observed through both Articles 22 and 141. Even though the drafters did not state clearly whether treaties had a higher legal status than that of domestic law, international human rights treaties did have constitutional status.

2. Constitutional Interpretation

According to Article 78 of the Taiwanese Constitution, the Judicial Yuan (JY) shall interpret the Constitution. It is the Constitutional Court (CC) of the JY, which consists of 15 justices, including the chairperson and deputy chairperson of the JY, to interpret the Constitution. The first part of this sub-section reviews how the CC interprets Articles 22 and 141 of the Constitution. The second part probes how the CC makes reference to international human rights treaties.

A. TWO RELATED ARTICLES

It has been argued that the drafters of the Constitution could not have been able to foresee the international human rights system when they drafted Article 22. The CC extended the term “other freedoms and rights” in Article 22 to include rights such as the right to select one’s name, freedom of contract, and right to privacy. But the CC never made it clear that it covered those rights guaranteed by international human rights treaties.

The key interpretation of the meaning of “respect treaties and the Charter of the United Nations” in Article 141 by the CC is JY Interpretation No. 329. There are three major points in this interpretation. First, it defines the term “treaty” in the Constitution to include three elements: (1) a treaty is an international agreement concluded between Taiwan (including those institutions and groups authorized by governmental agencies) and other states (including their authorized institutions and groups or international organizations); (2) it involves directly in important national issues such as defense, diplomacy, finance, the economy, or people’s rights and duties; and

40 J.Y. Interpretation No. 399 (1996) (Taiwan).
(3) it has legal effect. Second, as to the legal status of a treaty, it rules that a treaty reviewed by the LY has the same status as law. Third, agreements that employ the title of treaty, convention, or agreement, and have ratification clauses should be sent to the LY for deliberation. Other international agreements, except those authorized by law or pre-determined by the LY, should also be sent to the LY for deliberation.

It can therefore be concluded that Taiwan adopts a monist approach, meaning that any ratified international human rights treaty that directly involves people’s rights and duties as ruled by JY Interpretation No. 329, has domestic legal status. From a constitutional perspective, no special domestic law is needed to incorporate a human rights treaty.

B. Referring to International Human Rights Treaties

The CC began functioning in 1948, but it did not make reference to international human rights instruments until 1995. I classify its path into three groups. In the first group, applicants quoted international human rights instruments, but justices of the CC did not respond. In the second group, some justices took international human rights instruments as references for their arguments in their dissenting or concurring opinions. The third group came after 1995, when the CC officially referenced international human rights instruments in its reasoning and holdings.

i. No Response to Application

There were some cases where applicants introduced international human rights instruments, especially the UDHR and the ICCPR, as their basis of argument. In JY Interpretation No. 483, the applicant quoted “all human beings are born free and equal in dignity and rights,” from Article 1 of the UDHR as the foundation of the protection of the people’s right to hold public office. The applicant in JY Interpretation No. 469 also took the UDHR for his argument. It was argued that, as Article 10 of the UDHR guarantees

45 J.Y. Interpretation No. 483 (1999) (Taiwan).
“full equality to a fair and public hearing by an independent and impartial tribunal,” the Constitution should be interpreted in accordance with this provision. In JY Interpretation No. 517, the applicant referred to Article 10 of the ICCPR and emphasized that freedoms of residence and migration were fundamental rights.

The problem with these applications was that these applicants did not offer the reason why international human rights instruments could or should be taken into consideration. They merely cited related provisions in international human rights instruments to ask for more constitutional protections of rights. It was also regrettable that the justices did not offer any response to these applications — although the CC, as will be explained in the coming sub-sections, had already made reference to international human rights instruments. Of course these interpretations did not contribute to the interaction between the Constitution and international human rights instruments.

ii. Opinions of Individual Justices

Some justices tried to extend the ambit of rights already guaranteed by the Constitution or to grant more rights than are listed in the Constitution by referring to international human rights treaties. In JY Interpretation No. 372, former justice Su Jyun-Hsiung presented his concurring opinion expressing that the preamble and Article 1 of the UDHR guarantee universal human dignity. He emphasized that as “a signatory state of the UDHR,” Taiwan had an obligation to “protect international human rights” so as to maintain democratic constitutionalism.

In JY Interpretation No. 514, former justice Hwang Tueh-Chin expressed that “those rights and freedoms are not listed at the Constitution can be guaranteed according to the UDHR and other international human rights instruments.” One of his reasons was that “constitutional amendments in Taiwan did not offer more rights, but international human rights instruments have been greatly developed.” He also expressed his worry about not applying international treaties because of international

50 Id.
isolation in JY Interpretation No. 547.\textsuperscript{51} His approach was to incorporate international human rights through the interpretation of Article 22 of the Constitution. It was believed that the CC’s approach of reviewing domestic legislation by referring to international treaties was a faithful interpretation of constitutional principles.\textsuperscript{52} Therefore he, being a labor law scholar, cited many conventions of the International Labor Organization (ILO) to grant more protection of labor rights.

However, these views were in the minority among the respective interpretations. These supportive views toward applying international human rights treaties did not receive agreement among most justices.

\textit{iv. Views in Reasoning and Holdings}

JY Interpretation No. 372,\textsuperscript{53} which was made in 1995, was the first interpretation to cite international human rights instruments in its reasoning. Seven years later in 2002, JY Interpretation No. 549\textsuperscript{54} became the first case to refer to international human rights instruments in its holding.

JY Interpretation No. 372 emphasized human dignity, citing the fact that such an idea was enshrined in the UDHR to support its reasoning. But JY Interpretation No. 372 did not mention why the UDHR could be a resource for constitutional interpretation.

Another case was JY Interpretation No. 392,\textsuperscript{55} where the CC had to decide whether the “court” provided for in Article 8 of the Constitution included the prosecutor’s office, hence empowering the prosecutor to detain a person beyond 24 hours. The applicant did not make reference to international human rights instruments. The Ministry of Justice (MOJ) cited Article 9 of the ICCPR as a basis of its argument. However, JY Interpretation No. 392 refuted such an argument, stating that “it is not appropriate to invoke the provisions of ‘international covenant,’ ‘conventions,’ and claims that the reference to ‘court’ in Article 8, Paragraph 2, first sentence, of the Constitu-

\textsuperscript{51} J.Y. Interpretation No. 547 (2002) (Taiwan).
\textsuperscript{52} \textit{Id}.
\textsuperscript{53} J.Y. Interpretation No. 372 (1995) (Taiwan).
\textsuperscript{54} J.Y. Interpretation No. 549 (2002) (Taiwan).
\textsuperscript{55} J.Y. Interpretation No. 392 (1995) (Taiwan).
tion shall include ‘other officers authorized by law to exercise judicial power’ such as a prosecutor.”

It is interesting that JY Interpretation No. 582 referred to Article 14-III(v) of the ICCPR to establish “the universal and fundamental right of an accused to examine a witness.” The Interpretation emphasized that such a right is also protected by Articles 16 and 8 of the Constitution. Its approach was to make reference to the ICCPR to support its constitutional interpretation, which was different from that of Interpretation No. 392. A possible reason was that, since the MOJ cited the ICCPR, the CC was obligated to decide on this matter. The CC had no choice but to say clearly that the domestic constitutional provision had a different context from that of the ICCPR. A normal approach for the CC was to make reference to international human rights instruments to support its reasoning.

A similar approach was adopted in JY Interpretation No. 587. The CC cited in its reasoning Article 7 of the CRC, which guarantees a child’s right to identify his/her blood filiations, to establish that the right to establish paternity shall be protected under Article 22 of the Constitution. Again, in JY Interpretation No. 623, the CC cited Articles 19 and 34 of the CRC to establish that “to protect a child or juvenile from engaging in any unlawful sexual activity is a universally recognized fundamental right and thus a significant public interest” in its reasoning. Therefore, the CC ruled that: (1) “the State should be obligated to take appropriate measures to safeguard the mental and physical health and sound development of children and juveniles;” and (2) Article 29 of the Child and Juvenile Sexual Transaction Prevention Act, which imprisons and fines a person who puts information in the media to induce a person to engage in unlawful sexual activity, was constitutional.

International human rights instruments also appeared in the holdings of two constitutional interpretations concerning labor rights, JY Inter-

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57 Id.
pretation No. 549 and JY Interpretation No. 578.\footnote{J.Y. Interpretation No. 578 (2004) (Taiwan).} Former justice Hwang Tueh-Chin’s idea was further endorsed in these two interpretations.

JY Interpretation No. 549 ruled that “Articles 27, 63, 64, and 65 of the Labor Insurance Act should be amended within two years.” It further required that “an overall examination and arrangement, regarding the survivor allowance, insurance benefits, and other relevant matters, should be conducted” in accordance with not only “principles of this Interpretation” but also “related international labor conventions.” JY Interpretation No. 578 emphasized that the Labor Standards Act was enacted and implemented in 1984, and therefore should be reviewed at appropriate times. It then required the Act to be amended by taking account of “the fundamental principle of the Constitution to protect workers,” the constitutional principle of protection of labor, and related provisions of “international labor conventions.”

Indeed, after developments of several decades, international human rights instruments are not total strangers to the CC anymore — especially the UDHR, the ICCPR, and ILO conventions that were referenced in several cases. However, a common problem with these interpretations was that the CC did not say why it could cite international human rights instruments for its reasoning. The CC did not ever clarify the UDHR’s legal nature and status. When the CC applied the ICCPR, Taiwan was not a contracting party. Neither did the CC explain why international labor conventions should be taken into consideration when amending domestic laws. Nor did the CC rule on how strong this obligation was. In the event that the government and the LY do not follow up, there will be further constitutional conflicts.

It seems that the CC can pick up whatever human rights document whenever it feels suitable and leave those documents if it does not think it is necessary. The CC should construct a consistent and clear approach of interpretation on whether, when, and how to apply international human
rights instruments. We can expect the CC to develop its comprehensive approach on this matter, but it could take much time.

3. Constitutional Amendments

Another way to make a clear rule of interaction between the constitutional frame and the international human rights regime is to amend the Constitution. I first trace back to the paths of past constitutional amendments in Taiwan. Then I review comparative models of constitutional provisions providing their connections with international human rights regime and offer my own proposal for Taiwan.

1. PAST PATHS

After the original Chinese Constitution was brought into Taiwan, a long period of time passed during which no amendments were dared to be introduced, as Chiang Kai-Shek and Chiang Ching-Kuo, who dominated Taiwan for almost four decades, wished to bring the original text back to China.

Amending the Constitution did not begin until 1991 after Lee Teng-Hui was elected President. The Constitution has thereafter been amended seven times in twenty years.61 Those amendments focused mainly on governmental structure and the election system. Amendments in 1991, 2000, and 2005 did not focus on human rights. Other amendments did focus on human rights issues. In 1992, a new provision to maintain women’s dignity and security was added. It also ruled that the state should eliminate sexual discrimination. In 1994, the name “mountain people” was changed to “indigenous people” to prevent discrimination. For similar reasons, “handicapped” was changed to “people with disability” in 1996. It also determined that the state should maintain cultural diversity and should promote the culture and language of indigenous peoples. In 1999, a provision to protect soldiers was also added.

It can be observed that these amendments mainly focused on equal protection and cultural diversity. The idea of “bringing international

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human rights home” into the Constitution was not even mentioned during any of those seven occasions in twenty years.

2 FOUR MODELS

After many years of interaction between domestic and international law, especially after the 1990s, there are many examples that demonstrate that international human rights have been adopted into constitutional provisions. I classify them into four models.

a. Preambles

In the first model, obedience to international human rights norms is expressed in the preambles of constitutions. One sub-model offers such guarantees in general term. An example is the preamble of the Constitution of Morocco, which expresses “determination to abide by the universally recognized human rights.” The other sub-model expresses the constitutional will to be bound by specific international human rights instruments in their preambles. The preamble of the Constitution of Bosnia and Herzegovina declares that the Constitution is inspired by the UDHR, the ICCPR, the ICESCR, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments. Another example can be found in preamble of the Mauritanian Constitution, which proclaims its attachment to the principles of democracy as they have been defined by the UDHR and by the African Charter of Human and Peoples Rights as well as in the other international conventions which Mauritania has signed.

ii. Constitutional Texts

A second model adopts international human rights treaties into constitutional texts. Three sub-models can also be found. The first sub-model enshrines protection of universal rights as a general principle. Article 7 of the Constitution of Georgia states that “the state shall recognize and protect universally recognized human rights and freedoms as eternal and supreme human values.” The second sub-model puts much more emphasis on the UDHR. Article 5 of the Constitution of Principality of Andorra rules that the state is bound by the UDHR. It can also be found in Article 7 of Afghanistan Constitution, which expresses that the state shall abide by the
UDHR. The third sub-model focuses on specific treaties and those that a state has ratified. Article 75, Section 2 of Argentine Constitution lists many international human rights instruments as having constitutional hierarchy, including the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the UDHR, the ICESCR, the ICCPR, ICERD, CEDAW, CAT, and CRC.

iii. Constitutional Interpretation

A third model provides that constitutional implementation or interpretation should comply with international human rights standards. Section 10.2 of the Spanish Constitution states that “provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the UDHR and international treaties and agreements thereon ratified by Spain.” Article 93 paragraph 2 of the Constitution of Colombia states that “the rights and duties mentioned” in the Constitution “will be interpreted in accordance with international treaties on human rights ratified by Colombia.”

iv. Right to International Remedies

A fourth model grants a right to their people to international remedies. Article 55, paragraph 4 of the Constitution of Ukraine states that “after exhausting all domestic legal remedies, everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organizations of which Ukraine is a member or participant.” Article 46 of the Constitution of Russia also guarantees that “everyone shall have the right to turn to interstate organs concerned with the protection of human rights and liberties when all the means of legal protection available within the state have been exhausted.”

A PROPOSAL

A comparative analyses of the above-mentioned models reveal several issues. First, as it expresses obeying international human rights norms in a preamble, the key issue of the first model is whether a preamble has the power to grant rights to the people. Whether referencing international
human rights treaties in general or specific terms, a preamble could serve a declarative function but is without substantial protection.

Second, the third model in fact focuses more on constitutional rights. What has been achieved by this model is that those rights guaranteed by the constitution can be interpreted as complying with international human rights instruments. However, this model does not bring all related international human rights treaties into the constitution.

Third, the pre-condition of the fourth model is that states shall join the international system, which grants individual communications, such as found in the ICCPR-OP, CEDAW-OP, or others. States also have to set up mechanisms to implement those decisions by international human rights monitoring bodies. Therefore, the fourth model cannot be achieved merely by constitutions; it needs to follow the international human rights system.

I therefore argue that the second model is a more ideal approach for Taiwan for three reasons. First, it is much clearer to adopt international human rights treaties into constitutional texts. This model also grants those treaties domestic legal status. Second, most states rule that international human rights treaties have a higher status than domestic law. Whenever they are in conflict, international human rights treaties prevail. Third, as the rule is included into constitutional text, international human rights treaties can be enforced directly. Those treaties can also be sources of constitutional interpretation, and constitutional rights should be interpreted to comply with international human rights standards.

It can also be observed from comparative experience that this will be a comprehensive approach if a constitution can include the UDHR, important regional human rights treaties, such as the European Convention on Human Rights (ECHR), and those UN human rights treaties that a state has ratified. However, it is a pity that Asia, where Taiwan is situated, does not have a regional human rights treaty. Taiwan also faces the difficulty of depositing instruments of ratification to the UN SG. A constitutional provision connecting international human rights instruments will be very helpful. In addition, the establishment of a national human rights institute, which has long been promoted by the UN, can be a mechanism for domestic
implementation of international human rights treaties. Therefore, I propose a new constitutional provision for Taiwan the text of which is as follows:

(1) Rights and freedoms guaranteed in the Constitution should be interpreted to comply with the Universal Declaration of Human Rights and other international human rights instruments.

(2) The Universal Declaration of Human Rights and international human rights treaties passed by the Legislative Yuan shall have domestic legal status. When domestic laws are in conflict with the Universal Declaration of Human Rights and international human rights treaties passed by the Legislative Yuan, they should comply with those international human rights standards.

(3) The National Human Rights Commission, which shall exercise its functions independently, should be established to implement rights and freedoms guaranteed by the Universal Declaration of Human Rights, international human rights treaties passed by the Legislative Yuan, and the Constitution.

The first paragraph builds a connection between constitutional rights and international human rights instruments and avoids conflicts between them. The second paragraph clearly rules that the UDHR and those international human rights treaties passed by the LY shall have domestic legal status, and when conflicts occur, international human rights instruments prevail. In order to avoid the problem of deposit, it rules that when the LY passes human rights treaties, they gain domestic legal status, no matter if the deposit is successful or not. The third paragraph provides a constitutional foundation to the proposed National Human Rights Commission. It also establishes that the Commission should be independent and should implement both constitutional and international rights.

In Taiwan, it is quite difficult to pass a constitutional amendment. It needs to be initiated upon the proposal of one-fourth of the total members of the LY; passed by at least three-fourths of the members present at a meeting attended by at least three-fourths of the total members of the LY; and agreed by electors at a referendum held upon the expiration of a six-month period of public announcement of the proposal, wherein the number
of valid votes in favor exceeds one-half of the total number of electors. However, it should be emphasized that the issue of bridging a connection between the Constitution and international human rights treaties is not and should not be regarded as a political matter. My view is that once there is any opportunity, this issue should be brought into consideration so that consensus among different political parties and the public may be reached.

IV. I DID IT MY WAY: INCORPORATION WITHOUT SUCCESSFUL RATIFICATION OR ACCESSION

When there have been obstacles to acceding to international human rights instruments, and no constitutional provision to rule on the interaction between domestic and international laws, an “I did it my way” approach has been developed in Taiwan by incorporating some international human rights treaties through its own domestic laws. The following sections will first examine the general structure, and then review in detail the incorporation of the ICCPR, the ICESCR, and the CEDAW.

A. Monist State, Dualist Approach

Here, the first issue that should be reviewed is whether Taiwan is a monist or dualist state. A related question is, if Taiwan is a monist state, what is the legal status of an international human rights treaty in Taiwan?

1. JUDICIAL VIEWS

International law has no power to decide whether a state should adopt a monist or dualist position. Normally, this issue is determined in a state’s constitution. As the Taiwanese Constitution merely expresses that the state should respect treaties, it is very important to note how the CC interprets this clause. One paragraph of JY Interpretation No. 329 deserves to be emphasized:

According to the Constitution the President has the power to conclude treaties. The Premier and Ministers shall refer those treaties that should be sent to the Legislation Yuan for deliberation to the Committee of the Executive Yuan. The Legislative Yuan has the power to review those treaties. All these are explicitly enshrined in

Article 38, Article 58 Paragraph 2 and Article 63 of the Constitution respectively. Treaties concluded in according to above procedures hold the same status as laws.

JY Interpretation No. 329 in fact has held that treaties concluded according to constitutional procedure have the same status as domestic law. If a treaty does not have domestic legal effect, there is no need to decide its domestic legal status. At the same time, if a treaty has domestic legal status, it surely means that it has domestic legal effect. Therefore, I argue that, when the CC says that treaties “hold the same status as domestic law,” it expresses two meanings at the same. First, it says that Taiwan is a monist state, i.e., once a treaty is concluded through constitutional procedure, it has domestic legal effect automatically even without a special domestic law saying so. Second, ratified treaties have the same legal status as domestic law. The CC however has not made it clear whether a treaty is superior to domestic law.

2. REQUIREMENTS IN TREATIES

However, due to its unique international status, Taiwan has to confront a second issue: if the deposit of the ratification instrument of a treaty has yet to be consummated, would the treaty have any domestic legal effect?

From the view of international law, a state ratifies or accedes to a treaty after it comes into force. The treaty will enter into force on this state a few days after it deposits its instrument of ratification or accession. Taking the ICCPR and the ICESCR as examples, both covenants rule that it will come into force three months after a state deposits its ratification instrument.63 There is a similar rule in the CEDAW. For those states ratifying or acceding to the CEDAW after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.64

Observing from this rule, as Taiwan could not deposit its ratification and accession instruments, the two covenants and the CEDAW will not come into force in Taiwan. Even though Taiwan is a monist state, a treaty cannot come into force if the state cannot deposit its instrument of ratification or accession successfully. The result is that, even if domestically the LY and the President have gone through the treaty reviewing procedure

63 See ICCPR, supra note 3, art. 49; ICESCR, supra note 4, art. 27.
64 See CEDAW, supra note 9, art. 27.
according to the Constitution, a treaty cannot obtain domestic legal status if there is an international obstacle.

3. STANDARDS FOR HANDLING OF TREATIES

However, if we observe from the perspective of the Taiwanese Constitution, there is a different view. As Interpretation No. 329 does not refer to the deposit procedure, it is believed that once an international human rights treaty has been passed by the LY and signed by the President, it has domestic legal effect and holds the same status as a law. But it is regrettable that in Taiwan there is still no law clarifying this issue, as a special law ruling on issues of signing and ratifying treaties is still under consideration by the LY. Such related issues are currently regulated by the Standards for Handling of Treaties and Agreements (Standards), which is an administrative regulation written by the MOFA.

In 2002, the DPP government amended Article 11 paragraph 2 of the Standards. According to this amended provision, a treaty, if it had been passed by the LY and signed by the President, gained domestic legal status, even without depositing a ratification instrument with the UN SG. After regaining power, the KMT government amended Article 11 paragraph 2 of the Standards again in 2009. It empowers that “under special circumstances” the President may announce a treaty coming into force after the LY passes it, even if there is no procedure for depositing an instrument of ratification or its process is not successful. The DPP’s approach is to rule that all treaties gain domestic legal status after the LY passes it. On the other hand, the KMT’s approach is to offer the President the power to decide whether domestic legal status exists under special circumstances. However, a more important issue is that a common position of the two approaches is to offer a treaty domestic legal effect when there is difficulty in depositing the instrument of ratification to the UN.

It seems that, according to the Standards, the President has the power to decide that “under special circumstances” a treaty comes into force after the LY passes it, even though the process of depositing an instrument of ratification is not successful. However, the LY adopted a different approach. The LY enacted an implementing act when it passed a treaty and it was difficult to deposit an instrument of ratification or accession to the UN. Such an implementing act can be regarded as an approach similar to that of a dualist state. The result is that Taiwan, though a monist state, applies
the approach of a dualist state to incorporate international human rights treaties because of its international isolation.

B. Incorporating ICCPR, ICESCR and CEDAW

Taiwan acceded to the CEDAW in 2007, but its deposit of the instrument of accession was not successful. When considering to accede to the CEDAW, there was a debate within the DPP government over whether to enact a special domestic law to resolve the problem of the inability to deposit the instrument of accession. The MOJ argued that such a law was not necessary. The MOJ based this on two major reasons. One was that after the LY passes a treaty and the President signs it, such treaty shall have domestic legal status. Therefore, there was no need to enact a domestic law to establish domestic legal effect. The other was that the CEDAW was not part of the International Bill of Rights but only one of the several core international human rights treaties and thus, it did not have sufficient significance for a special domestic law. As a consequence of that decision, no governmental organs expressed that they were bound by the CEDAW between 2007 and 2011, and the courts did not apply the CEDAW in individual cases.

After the KMT gained power in 2008, it again pushed for a special domestic law to implement an international human rights treaty. The first successful case was when the Act to Implement the ICCPR and the ICESCR was adopted on the same day that ratifications of the two covenants were passed. It was the MOJ who took on such responsibility. As the MOJ agreed with enacting a special domestic law to implement the International Bill of Rights, the procedure moved smoothly within the administrative process. The KMT also dominated the LY at that time; therefore there were no obstacles that existed during the Act’s legislative process.

With this successful experience, the KMT then moved on for a new law to implement the CEDAW, as its accession had been approved. This time, the Executive Yuan (EY)\(^\text{65}\) asked the Ministry of Interior Affairs (MIA) to take charge. The MIA fully agreed and prepared a draft to the cabinet and submitted it to the LY in May 2010. The LY passed the Act to Implement the Convention on the Elimination of all Forms of Discrimination against

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\(^{65}\) The Executive Yuan is the administrative government in Taiwan.
Women (Act to Implement the CEDAW) on 20 May 2011, and the Act came into force on 1 January 2012.

The background and procedures for incorporating the ICCPR, the ICESCR, and the CEDAW into the domestic legal system triggered several issues, which will be discussed in detail in the following sub-sections.

1. PAST AND NEW STEPS

The first issue to note is that when Taiwan ratified the two covenants in 2009, it in fact declared its successions to the signatures of the ROC in 1967. However, even supposing Taiwan could be regarded as a sovereign state, it would be difficult for Taiwan to qualify to fulfill the requirements of Article 48 of the ICCPR and Article 26 of the ICESCR. As the ROC left the UN in 1971 and the CEDAW was concluded in 1979, Taiwan’s accession to the CEDAW was a completely new step. The core point was that the UN did not regard Taiwan as a sovereign state.

A related point is that when Taiwan declared to succeed to the ROC’s signatures of the two covenants, it follows that Taiwan should also admit that it is bound to all the international human rights treaties that the ROC had signed and ratified by 1971. As mentioned above, the ROC ratified the ICERD in 1970 before it was forced to leave the UN. However, Taiwanese governments never officially declared this view. It is my view that this should be done at once.

2. DOMESTIC LEGAL EFFECT

A second issue is whether the two covenants and the CEDAW have domestic legal effect. In order to solve this problem, Article 2 of the Act to Implement the ICCPR and the ICESCR provides that human rights protection provisions in the two covenants have domestic legal effect. Article 2 of the Act to Implement the CEDAW included the same rule, stating that provisions protecting sexual equality in the CEDAW have domestic legal effect.

After the Act to Implement the ICCPR and the ICESCR was adopted, President Ma once noted that “84 articles of the two covenants have become part of the life of the people.” However, it should be argued that domestic legal effect extends to merely the two covenants’ “human rights protection

66 Press Release, Office of the President, President Ma Signs Instruments of Ratification of Two Covenants on Human Rights (May 14, 2009).
provisions,” which in fact cover only Articles 1 to 27 of the ICCPR and Articles 1 to 15 of the ICESCR. The reality is not the situation as President Ma stated. As to the CEDAW, Articles 1 to 16 have domestic legal effect.

3. DOMESTIC LEGAL STATUS

Even if the human rights protection provisions in the two covenants and provisions protecting sexual equality in the CEDAW have domestic legal effect, the third issue concerns their domestic legal status. When the two provisions are not determinative of the issue, it leaves it to the judicial branch to make such a decision. The problem is that different courts could have different views. As mentioned previously, JY Interpretation No. 329 rules that treaties concluded in accordance with constitutional procedures hold the same status as laws. But the core problem is that it has not clearly expressed whether treaties stand above domestic law.

There may be three rules of statutory interpretation to resolve this problem. One is the *lex specialis* rule taking a treaty as a special law. A second rule is *lex posterior derogat lex priori*, which means regardless of whether it is a treaty or a domestic law, the newer one is applied. The third concerns conflict of laws; when there are conflicts between treaties and domestic laws, courts therefore have to decide whether domestic laws may protect rights guaranteed by the two covenants.

In fact the MOJ once interpreted that “when a treaty conflicts with a domestic law, it is the treaty [that takes] precedence.” Some Taiwanese domestic courts ruled that when there were conflicts, treaties should be applied according to the *lex specialis* rule. However, it seems that such views have not been a definite position of the MOJ and the courts.

After the two covenants had domestic legal effect on 10 December 2009, courts have been gradually applying human rights protection provisions in the two covenants in their judgments. But it seems that very few judgments offer a view on this issue. One special case was a judgment by the Kaohsiung domestic court which clearly found that the ICESCR was superior to domestic laws. As the Act to Implement the CEDAW came into effect in

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68 See Gan (1) No. 128 (Taiwan High Ct., 1990) (Taiwan).

It is interesting that this judgment was delivered before the Act to Implement the
January 2012, there is still no judgment dispositive on this point. It therefore can take a long time for courts to take a final position. The problem is that different courts could have different views, and Taiwan may suffer from such uncertainty.

4. INTERPRETATIONS

A fourth issue is how to interpret the content of rights protected by the two covenants and the CEDAW. Article 3 of the Act to Implement the ICCPR and the ICESCR provides that “Applications of the two covenants should make reference to their legislative purposes and interpretations by the HRC.” Again, Article 3 of the Act to Implement the CEDAW also rules that applications of the CEDAW should make reference to its legislative purposes and interpretations by the Committee on the Elimination of Discrimination against Women (CEDAW Committee).

However, the first problem is how to be sure of the legislative purposes of the two covenants and the CEDAW. In my view, it could refer to the preambles of the two covenants, both of which commonly emphasize that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”70 Of course, it also covers the preamble of the CEDAW. It is however regrettable that there was no case ever referring to the legislative purposes of the two covenants and the CEDAW, no matter if such application came from governmental organs or the courts.

The second problem is that Article 3 of the Act to Implement the ICCPR and the ICESCR merely refers to interpretations by the HRC, but not to the Committee on Economic, Social and Cultural Rights (CESCR). One possible reason why the CESCR was not included could be that it did not appear in the provisions of the ICESCR. It is difficult to interpret the phrase “interpretations by the HRC” as seen in Article 3 of the Act to Implement the ICCPR and the ICESCR to include those views of the CESCR. Therefore, in my view, a better approach is to amend Article 3

70 ICCPR, supra note 2, Preamble, ¶ 2; ICESCR, supra note 3, Preamble, ¶ 2.
of the Act to Implement the ICCPR and the ICESCR to explicitly include interpretations by the CESCR.

A third problem is what the legal effect is, if a governmental organ, when applying the two covenants and the CEDAW, does not make reference to interpretations by the three committees. In reality, there is no penalty found in the two acts. It could be regarded as a “soft duty” of governmental institutions. In the Taiwanese system, outside monitors of the administrative branch are the Control Yuan (CY)\textsuperscript{71} and the courts. However, it can be argued that even the CY and the courts themselves have not fully made reference to interpretations by those committees. So far, it is difficult to ask them to monitor the administrative process in detail. A typical way of applying the two covenants was to mention particular provisions, but without further referring to interpretations by the HRC or the CESCR. However, it is still too early to say whether governmental organs will apply decisions of the CEDAW Committee. It seems that how far both these two provisions of the Acts will be fully implemented depends on how many Taiwanese governmental organs know about them and how willing they are to apply them in individual cases.

1. **Who Is Bound**

A fifth issue concerns who is bound by the two covenants. Article 4 of the Act to Implement the ICCPR and the ICESCR states, “Whenever exercising their functions, all levels of governmental institutions and agencies should conform to human rights protection provisions in the two Covenants.” Article 4 of the Act to Implement the CEDAW has similar language.

Here, the core idea is the ambit of all levels of governmental institutions and agencies. In Taiwanese law, when the term “all levels of governmental institutions and agencies” is utilized, it includes all five governmental branches, including not only the administrative, legislative, and judicial branches but also the CY and the Examination Yuan (EY)\textsuperscript{72}. Therefore, the

\textsuperscript{71} According to Amendment Article 7 of the Constitution, the CY shall be the highest control body of the state and shall exercise the powers of impeachment, censure, and audit.

\textsuperscript{72} The independent power of examination is a unique feature of the political system in Taiwan. According to Amendment Article 6 of the Constitution, the EY is the
two covenants and the CEDAW impact all branches of the governmental organs.

2. Obligations

A sixth issue is what are the obligations of governmental institutions. It can be argued that the two acts that implement the ICCPR, the ICESCR and the CEDAW impose two kinds of obligations on governmental organs.

a. All Governmental Organs

On one hand, the two acts require all governmental organs to meet four obligations. First, in general terms, Article 4 of both acts require that, whenever exercising their functions, all levels of governmental institutions and agencies should conform to the human rights protection provisions in the two covenants or provisions protecting sexual equality in the CEDAW, avoid violating human rights, protect the people from infringement by others, and positively promote the realization of human rights. The Act to Implement the CEDAW came into force in 2012, so time is needed to observe whether and how governmental organs will apply the CEDAW. On the other hand, all governmental organs have been gradually applying the two covenants. It can be observed that once the “snowball” starts, it is expected to continue growing.

Second, both Article 5 of the two acts requests all levels of governmental institutions to take the responsibility for preparing, promoting, and implementing human rights protection provisions in the two covenants and the CEDAW within their functions, as governed by existing laws and regulations. After the two acts became effective, some governmental organs tried to emphasize their obligations of implementation and protection of rights. However, it is difficult to judge whether governmental organs have undertaken their responsibility.

Third, Article 7 of both acts ask all governmental institutions to preferentially allocate funds to implement human rights protection provisions in the two covenants and the CEDAW according to their financial status and take steps to enforce them. But so far, it has not been found that there was ever a governmental organ intentionally allocating funds to implement
human rights protection provisions in the two covenants and the CEDAW. An easier way was to put one more label onto previous efforts to indicate that such efforts were also to implement the two covenants and the CEDAW.

Fourth, Article 8 of the Act to Implement the ICCPR and the ICESCR provides that “All governmental institutions should review laws and regulations within their functions according to the two covenants, and all laws and regulations incompatible to the two covenants should be amended within two years after the Act enters into force.” The MOJ took this tough task of coordinating governmental organs for reviewing existing laws. Consequently, there were 263 cases listed. By the end of the two-year deadline on 9 December 2011, the MOJ indicated that 187 cases (71%) had been finished. Obviously it can be seen that such incorporation of the two covenants has had a great impact on the domestic legal system.

The MOJ also revealed that those unfinished 76 cases (29%) included amendments to 54 laws, 21 administrative regulations, and 1 administrative order. The MOJ emphasized that it will continue its endeavors. However, there was no definite time limitation set. It seems that after passing the two-year deadline set by Article 8 of the Act, the administrative government and the LY have no more obligations to follow up on such responsibility.

Another related issue is whether the LY, when enacting new laws, shall also review whether they comply with the two covenants. One comparative experience is the United Kingdom’s Human Rights Act 1998. Article 19 of the Act requires the administrative branch to make a “statement of compatibility” expressing that the proposed bill is compatible with the rights guaranteed by the ECHR. However, no similar provision can be found in the Act to Implement the ICCPR and the ICESCR. It then could happen that the LY amends old laws to comply with the two covenants on the one hand, but on the other, the LY enacts new laws not following the standards of human rights protections in the two covenants. A good way to take those rights in the two covenants seriously is to enact new laws obeying such standards. In my view, as the two-year time limitation has passed, a new provision with similar contents to Article 19 of the Human Rights

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74 Id.
Act 1998 should be inserted into the Act to Implement the ICCPR and the ICESCR so as to make sure that all proposed laws meet such standards.

Article 8 of the Act to Implement the CEDAW allows three years after the Act enters into force to amend existing laws, regulations, and orders to comply with the CEDAW. The deadline will come at the end of 2014. The government has not yet begun such an effort. It could repeat those done to comply with the two covenants. As three years will also pass, so a provision of imposing a “statement of compatibility” may also be needed in the Act to Implement the CEDAW after 2015.

b. Administrative Branch

The two acts specially impose two obligations on the administrative branch. First, both Article 5, Paragraph 2 of the two acts require that the administrative government should cooperate with other national governments and international non-governmental organizations and human rights institutions to realize the promotion and protection of human rights provisions in the two covenants and the CEDAW. This is a duty of international human rights cooperation. It is however, again a soft obligation. So far no project has ever been proposed by the administrative government to implement the special paragraphs of the two acts.

Second, Article 6 of the Act to Implement the ICCPR and the ICESCR pushes the administrative government to set up a human rights reports system in accordance with the two covenants. Article 6 of the Act to Implement the CEDAW asks the administrative government to submit a report according to the CEDAW every four years. It is also required the government to invite related scholars and NGOs to review the report and set up its follow-up mechanism.

Article 18 of the CEDAW requires a state party to submit its initial report within one year. Therefore, after passing the accession to the CEDAW, the administrative government tried to write its initial report even before the Act to Implement the CEDAW was enacted. The MOFA was in charge of the promotion from the Committee of Promoting Women’s Rights of
the EY. The initial report was completed in March 2009, two years after passing the accession procedure. NGOs also wrote shadow reports, especially on the issues of human trafficking and migrant workers.

Article 18 of the CEDAW also requires a state party to submit its reports to the UN SG for the consideration of the CEDAW Committee. However, as the UN SG did not even accept Taiwan’s deposit of its instrument of accession, it is almost impossible that he would accept Taiwan’s CEDAW reports. As a result, Taiwan did not have a channel through which to engage the international human rights monitoring system. An alternative way proposed by human rights NGOs was to invite experts to come to Taiwan to review the report and to provide recommendations. This is an approach that substantially follows international practice. This proposal was accepted by the DPP government and followed by the KMT government. Thereafter, several experts, including former members of the CEDAW Committee, were invited to deliver their comments and recommendations.

In both covenants, Article 40 of the ICCPR and Article 16 of the ICESCR ask a state party to submit reports on the measures it has adopted which give effect to the rights recognized in the covenants. It is argued that the human rights reporting system required by the Act to Implement the ICCPR and the ICESCR should be understood as the approach required by the two covenants. However, it seems that the current KMT government, although it had partly prepared its CEDAW report, did not know many details about this. It did not follow this approach until human rights NGOs recommended that it do so.

Article 40 of the ICCPR requires that a state party should submit its initial report within one year of the entry into force of the Covenant for the

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75 The Committee of Promoting Women’s Rights has been reorganized as the Department of Sexual Equality of the Executive Yuan since January 1, 2012.


77 The report was written from March 2007 to March 2009. As the administrative power turned from the DPP to the KMT in May 2008, both the DPP and the KMT governments participated in this process.

It is a rule that a state party should submit its initial report according to the ICESCR within two years after the Covenant comes into force for the state. It means that since the Act to Implement the ICCPR and the ICESCR came into force on 10 December 2009, the administrative government should submit its ICCPR initial report by 9 December 2010 and the ICESCR report by 9 December 2011. However, the Taiwanese government did not finish the reports until April 2012.

Like those of the CEDAW, state reports under the ICCPR and the ICESCR shall also be submitted to the UN SG, who shall transmit them to the HRC and the CESCR. Again, it is a great challenge for Taiwan. Using the similar approach of inviting current or former members of the HRC and the CESCR to come to Taiwan could also be adopted. The Taiwanese government had not yet decided whether to adopt this proposal as of the end of January 2012. This approach is a unique way that no other state has ever adopted, so it could be regarded as a special Taiwanese way. It is a means towards virtual international monitoring with partial reality.

As to the cycle of reporting, Article 6 of the Act to Implement the CEDAW requires a party to demonstrate compliance with Article 18(1)(b) of the CEDAW every four years. As the initial report was delayed one year, the next CEDAW report shall be due in 2012. Even supposing the starting point was March 2009, the next report would be due by March 2013.

The Act to Implement the ICCPR and the ICESCR does not provide guidance on this point, but Article 6 requires the government to set up a human rights reporting system in accordance with the two covenants. In fact, both the HRC and the CESCR have established a five-year reporting cycle. It therefore can be argued that Taiwan should follow this path. It is of course acceptable if the government wishes to accelerate the frequency.

V. CONCLUSIONS

Taiwan’s adventures in the international human rights regime can be divided into three stages. The ROC had opportunities but did not act as a positive participant. Between 1971 and 2000, Taiwan suffered from...
double isolation; both international and self-inflicted isolation. Since 2000, Taiwan has wished to join the international human rights regime but has had no channel.

Interaction between Taiwan’s Constitution and international human rights treaties should be observed through both Articles 22 and 141 of Taiwanese Constitution. Indeed, after developments of several decades, international human rights instruments are not complete strangers to the Constitutional Court anymore. The UDHR, the ICCPR, and ILO conventions were specifically referred to in several cases. However, the CC has not yet constructed a consistent and clear approach to interpretation on whether, when, and how to apply international human rights instruments. It is also my view that once there is any opportunity for a constitutional provision to build bridges between international human rights instruments and domestic law, it should be considered.

Taiwan, being a monist state, applied the approach of a dualist state to incorporate international human rights treaties because of its international isolation. Therefore, two special domestic laws have been enacted to incorporate the ICCPR, the ICESCR, and the CEDAW. Whereas there was not a true international human right monitoring system, these human rights treaties impacted the domestic legal systems and governmental organs. A general image of the interaction between Taiwan and international human rights instruments presents a unique picture showing partial reality but also a sense of the virtual.