Partly Virtual, Partly Real Taiwan’s unique interaction with international human rights instruments

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Abstract

Taiwan's adventures with the international human rights regime can be divided into three stages. It went through not being as a positive participant and double isolation at the first two stages. Since 2000, Taiwan has wished to join the international human rights regime, but has found no channel.

Indeed, after developments of several decades, international human rights instruments are not completely strangers to the Constitutional Court anymore. Especially the UDHR, the ICCPR and ILO conventions have been referred to in several cases. It is my view that whenever there is any opportunity for a constitutional provision to build bridges to international human rights instruments, it should be considered.

Taiwan, being as a monist state, applied an approach of a dualist state to incorporate international human rights treaties because of international isolation. Therefore, two special domestic laws have been enacted to incorporate the ICCPR, the ICESCR and the CEDAW. Whereas there has been no true international human rights monitoring, these human rights treaties make impacts on domestic legal systems and governmental organs.
A general image of this interaction between Taiwan and international human rights instruments presents a unique picture showing partly reality but also a feeling of “virtuality.”
A. 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 ratifications of or accessions to human rights treaties, even those coming from non-UN member states or territories where sovereignty is in doubt. The core issue for most states is whether they wish to join. In some cases the question is how much pressure the international community is applying.

However, for Taiwan the concern is not only what she wishes but also whether she can join international human rights system. The present article therefore discusses Taiwan’s unique interaction with international human rights treaties through

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1 The international human rights treaties referred to in this essay include mainly the
multi-levels legal analysis. Besides this introductory section it includes three main parts.

Section B traces back Taiwan’s adventures with the international human rights regime.

Section C considers interactions between Taiwan’s Constitution and international human rights instruments. Section D reviews how Taiwan incorporates some international human rights treaties without successful depositions of instruments of ratifications or accessions to the UN. Conclusions of this article are presented in section E. The general image of the interaction between Taiwan and international human rights instruments presents a unique picture showing partly reality but also partly a feeling of “virtuality.”

**B. Adventures with the International Human Rights Regime**

I divide Taiwan’s adventures with 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, and Taiwan suffered double isolation in these years. The third stage commenced after 2000, when Taiwan started to wish to join the international human rights regime, but had no opportunity. Instead, special domestic laws were enacted to incorporate international human rights treaties.

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International Bill of Rights and core 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) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 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 individual citizens of states parties to the Protocol the right to bring complaints against governments for rights violations.

Besides the International Bill of Rights, the UN also concluded one core international human rights treaty by 1971, i.e. the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

As a result of the Japanese defeat in August 1945, China, then governed by the Republic of China (ROC) government, took over Taiwan on behalf of the Allies, pursuant to an order issued by General Douglas MacArthur. Two months later, the ROC unilaterally proclaimed Taiwan a province.²

² Hwang Jau-Yuan, Liao Fort Fu-Te and Chang Wen-Chen, Development of Constitutional Law and
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, the ROC representative acted as the vice-chairperson of the Commission. Mr. Chung Peng-Chun\(^3\) was regarded as one of the five key persons who drafted the UDHR. Therefore, it can be argued that the ROC actively participated in drafting the International Bill of Rights and some international human rights treaties in that period of time.

However, this positive participant merely signed the two International Covenants and ICCPR-OP1 in 1967; no ratification of them ever followed by 1971. But the ROC ratified the ICERD in 1970 before she was forced to 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 she did not wish to do so.

\textbf{b. 1971 - 2000: Double Isolation}

Between 1971 and 2000 the international human rights regime continued to


\(^3\) All peoples' names that are translated from Chinese characters in this essay are presented in the sequence of surname first, first name second.
advance, leaving the long-term martial-ruled Taiwan\(^4\) further behind.

In the field of international bill of rights, the two International Covenants and ICCPR-OP1 came into force in 1976. The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty (ICCPR OP2), was proclaimed in 1989.

UN GA also passed several core international human rights treaties in those decades. Those included the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). Also, several optional protocols were 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 was also adopted (CEDAW-OP), Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-AC) and Optional Protocol to the Convention on the Rights of the

\(^4\) The martial law decree went into effect in Taiwan on 20 May 1949. Until its lifting in July 1987, the 38-year-long martial law rule did intrude into many aspects of civilian lives. Martial law order on Taiwan’s offshore islands, including Kinmen, Matsu, Tungsha and Nansha, was not lifted until November 1992. These areas were in fact under martial law rule from 10 December 1948 to 6 November 1992.

However, the situations in Taiwan changed dramatically after 1971, which led to another story. UN GA passed its Resolution No. 2758 and recognized that “the representatives of the Government of the People’s Republic of China are 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.” 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.” Since then, the UN and most states in the world no longer recognized the ROC government as the Chinese government and even not as a sovereign state at all. Thereafter, Taiwan lost almost all of the available opportunities to participate in the evolution of the international human rights regime.

As Taiwan was under decades of authoritarian rule which had a taboo on human rights, 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 double isolation. On one

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6 Ibid.
hand, Taiwan was internationally isolated, with no opportunity to access any international human rights instruments. On the other hand, Taiwan was self-isolated and did not even express her wish to join the international human rights regime or to incorporate international human rights norms into her domestic legal system.

c. After 2000: Having Will, but No Opportunity

After 2000, more core human rights treaties were adopted, such as International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and 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 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CPD), Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR-OP). Again these optional protocols provided new mechanisms of monitoring.

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

(a) **DPP Government: 2000 - 2008**

A new start of returning to the international human rights regime took place after Chen Shui-Bian, a member of the Democratic Progressive Party (DPP),\(^7\) won the presidential election in 2000. Former 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. Ratification of the ICCPR and the ICESCR 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)\(^8\) 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

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\(^7\) 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.”

\(^8\) Taiwanese Parliament.
dominated by Kuomintang (KMT), passed the ratification procedure on 31 December 2002, but with reservations. A declaration to common Article 1 of the two Covenants was also included stating that “self-determination is applied to colonies or non-self-governing territories only, and the ROC is a sovereign state, therefore is not subject to self-determination.”

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 the repeal of this declaration in January 2003. This repeal was finally not even discussed before the expiration of that term of the LY. The ratification procedure was therefore not completed. By the end of May 2008 when the DPP administration had ended, ratifications of the ICCPR and ICESCR did not pass.

However, there was a different story for accession to the CEDAW. The DPP

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9 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. It regained power in 2008, and as the President Ma was reelected in 2012, the KMT will be in power until 2016.

10 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

11 Official Gazette of the LY, vol. 92 no. 3 (3), 4 January 2003, p. 206


13 Ibid.
government did not take accession to the CEDAW as a top priority human rights policy. Nonetheless, because of the promotions from NGOs for women’s rights, this issue also went to the consideration of the DPP government which gradually accepted this idea. In July 2006, the cabinet passed a proposal by the MOFA to submit to the LY to access to the CEDAW without any reservation.

It is interesting that the LY accepted the idea of no reservation and passed accession procedure in January 2007. This accession became the first step of interaction with international human rights instruments in the decades after 1971 in Taiwan.

In my view there are two reasons for this achievement. One reason is that since this accession was not regarded as a top priority, there was less political conflict. Although KMT held a majority in the LY, it accepted the proposal by the DPP government. The second reason was that women’s organizations in Taiwan played an important role when the LY negotiated the 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 the other political parties, tried not to have any confrontations with those NGOs supportive of women’s rights so to gain more support and votes.

A difficulty came with the success of the domestic procedure of accession to the
CEDAW: whether to deposit instrument of accession with 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 also be bound by the Convention. In legal terms, Taiwan should waste no time in completing the procedures. Therefore, supporters argue that depositing is to formally declare before the international community Taiwan’s commitment to be bound by the CEDAW. Deposit not only brings strengthening human rights guarantees but also gets Taiwan back on track internationally. As Article 25 paragraph 4 of the CEDAW rules that the Convention “shall be open to accession by all States,” those in support believe that whereas deposition, necessarily implicating Taiwan’s sovereignty and independence, would be opposed by the PRC, whether or not the UN accepted it would not be important.

On the other hand, those who are opposed offer views in political terms. They believe that there is no urgency to deposit, and questioned whether or not they could be respected, as well as whether a failed attempt at deposition could damage national dignity and relations with China. It could, moreover, draw criticism about the human rights standards of Taiwan’s diplomatic allies and the direction of foreign relations.

As a general rule, there shall be no problem for states who wish to deposit their instruments of accessions to international human rights treaties directly to the UN SG.
Furthermore, one special case should be noted. According to its Article 48 the CRC shall be open for accession by any state and its instrument of accession shall be deposited with the UN SG. Niue and Cook Islands accessed to the CRC in 1995 and 1997 respectively. 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.”\(^\text{14}\) There was even doubt whether they were sovereign states. But, the UN accepted them as contracting states to the CRC.

It is, however, a pity that Taiwan was not a UN member state, or even worse, not recognized as a sovereign state. Therefore, in March 2007 the DPP government chose a unique way by sending the deposition of instrument of accession with the help of Taiwan’s diplomatic allies.\(^\text{15}\) 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 situation of unsuccessful depositing ratification instrument triggered a puzzle: whether the CEDAW bound Taiwan and whether it had domestic legal status. Again Taiwan created a unique approach by enacting a special domestic law to solve this


problem, which will be further reviewed in section D.

(b) KMT Government: after 2008

The 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 ratifications of the ICCPR and the ICESCR were not included. Unlike Chen’s inaugural speech in 2000, there were no bold human rights policy objectives outlined and no further mention to human rights was made in Ma’s inauguration speech. One possible reason was that ratifications of the ICCPR and the ICESCR were a core human rights policy of former President Chen. Taking the same policy as Chen’s could politically mean following his path.

However, Ma suddenly declared his commitment to ratify the two Covenants on 10 December 2008, in the occasion of the 60th anniversary of the UDHR.\textsuperscript{16} Interestingly, Ma’s objective was the same as Chen’s in 2000. While the KMT had 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 conclusion as that of Chen.

As the KMT occupied almost three fourths of the LY at that time, they had no difficulty passing the ratifications proposed by the president of the same political party. On 31 March 2009, the LY approved the ratifications. It also has to be noted, while the KMT dominated LY had insisted on reservations and declaration to the Covenants in 2002, it gave up this insistence in 2009 when the ratifications were proposed by the same political party.

An Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (Act to Implement the ICCPR and the ICESCR) was also enacted by the LY on the same day that the ratifications were passed. The details of the Act, which will be reviewed in section D, were in fact originally proposed by Chen’s administration. The KMT changed the last article only by adding a “sun-rise clause” to allow the Act coming into force on 10 December 2009 to provide dates for preparation.

After passing the ratification procedure of the two Covenants, the KMT government also faced a similar puzzle: to deposit instruments of ratifications or not. The problem was why Taiwan could ratify the two Covenants in 2009? As mentioned, the Covenants were adopted in 1966. The ROC signed them in 1967, but she was
forced to leave the UN in 1971. The only reason that Taiwan could ratify the Covenants in 2009 was that Taiwan could continue 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 considered that she could continue signatures by the ROC before 1971. As we can find from above, in fact both the DPP and the KMT governments took the same position. It was believed that following this path could be a way to interact with international human rights regime.

Second, the People’s Republic of China (PRC) has insisted that signatures or ratifications by Taiwan’s authority are illegal and void. One typical example is when PRC made this declaration when she accessed to the ICERD in 1981. Again, when PRC signed the ICCPR in 1998 she 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.”17 However, PRC’s report under the ICERD did not include Taiwan.18 Since PRC has not ratified the ICCPR, its

\[\text{If needed, insert relevant footnotes here.}\]
reports covered only Hong Kong and Macau,\textsuperscript{19} but not Taiwan. Neither did Chinese reports under the ICESCR\textsuperscript{20} and the CEDAW\textsuperscript{21} include the situation of Taiwan.

Third, in the UN those signatures to and ratifications of international human rights instruments by the PRC were registered. All those done by the ROC were deleted.

However, it worth noting that those states of the former Yugoslavia such as Croatia, Slovenia and Macedonia, succeed international human rights treaties to which Yugoslavia was a contracting party. Czech and Slovakia also succeed those human rights treaties that were 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 was independent in 1975, but she 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

\textsuperscript{19} See, for example, CCPR/C/HKSAR/99/1/Add.1 and CCPR/C/HKSAR/99/1.

\textsuperscript{20} See, for example, Initial reports submitted by States parties under articles 16 and 17 of the Covenant, People’s Republic of China, E/1990/5/Add.59, 4 March 2004.

\textsuperscript{21} See, for example, Combined fifth and sixth periodic report of States Parties, CEDAW/C/CHN/5-6, 10 June 2004.
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 party designed to divest them of the rights guaranteed by the Covenant."\(^{22}\) 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.”\(^{23}\)

It can therefore be argued that Taiwan may declare successions of signatures of the ICCPR and the ICESCR in 1967 by the ROC, and move ahead on the ratifications and depositions. All states mentioned above took the same approach of making a notice to the UN SG to declare their successions of human rights treaties. This can also be a way for Taiwan to make such notices.

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

\(^{22}\) Human Rights Committee, General Comment 26, Continuity of obligations, 08/12/97, paragraph 4.

\(^{23}\) Concluding Comments of the Human Rights Committee, CCPR/C/79 Add.14 to 16.
Those were conditions that Taiwan could not fulfill. But, the KMT government adopted the same method as that tried by the DPP relying on the help of diplomatic allies to deliver the ratification instruments to the UN SG on 8 June 2009. Again, the UN SG did not accept such instruments. Ma’s government acknowledged this and announced: “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.”

It, therefore, can be argued that after 2000 the situation was that Taiwan had a strong commitment to join the international human rights regime, while the reality was that the UN did not give her any opportunity. Here, it should be emphasized again 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 right treaties as possible. It is obviously unfair to turn Taiwan down when she wishes to abide by the international human rights regime. If the international community takes universal human rights seriously, it

24 See Article 48 of the ICCPR and Article 26 of the ICESCR.
26 Emphases added by the author.
should make Taiwan’s accession available. There will be no universal human rights without Taiwan.

C. Not always two Strangers: Constitutional Frame and Human Rights

Treaties

This section focuses on the interaction between Taiwanese Constitution and international human rights instruments, and is divided into three sub-sections. First, I trace back to the original drafting history to see whether there was any idea concerning 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

Notably, the current Constitution of Taiwan did not originate from Taiwan. Instead, it was promulgated in China in 1947 and has been imposed on Taiwan since then. Not until the outbreak of the “228 Massacre,” which occurred on 28 February

27 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 were 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
1947 and many people were killed, did China changed its mind to allow Taiwan a primitive degree of constitutional rule.\textsuperscript{28} 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 Constitution, designed for China, has since been imposed on Taiwan regardless of the compatibility problems.

It is therefore necessary to examine whether original constitutional provisions made in 1947 express any ideas concerning international human rights treaties. Two articles in the constitution may be related with international human rights treaties. One is Article 22, which rules: “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 decided 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. A document, “Principles for Drafting the Constitution” (Principles) which was produced through 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 an additional rule so rights and freedoms not listed in other provisions were also protected. The reason that this Article was added was to avoid omission of rights and to adapt to the needs of the coming future. The examples cited were the Ninth Amendment of the US Constitution and Article 20 of Portuguese Constitution. Obviously, the emphasis was on rights not listed, not on rights guaranteed by international human rights treaties. In fact, it is quite reasonable to reach this conclusion from the angle of time frame, as the UN was founded in 1945 and the UDHR was adopted in 1948 which was the starting point of international human rights system. It can reasonable be established that when the constitution was being drafted there was no international human rights system and the drafters could not “foresee” there would be such system.


The other provision that may concern international human rights treaties is Article 141, which asserts 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; does “treaties” include international human rights treaties; 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 ... “.32 However, there was resistance from KMT’s official newspaper, the Central Daily News, saying that “it is difficult to expect that the UN will exist forever.”33 It therefore asked whether “the constitution would dependent on changes of the UN.” It also asserted that while the constitution merely enshrined our obligations to fulfill treaties, the state would have no standing in case other parties denied our rights in the treaties.34 That sentence was

32 Miu Chen-Gi (ed.), supra note no. 29, p. 594.
34 Ibid., p. 101.
then amended into “respect treaties and the Charter of the United Nations.”\textsuperscript{35} 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.”\textsuperscript{36} The result of which was that 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 obligation. I therefore argue that in Taiwan interaction between the constitution and international human rights treaties should be observed through both Articles 22 and 141. Even though the drafters did not state clearly whether treaties had higher legal status than domestic laws, international human rights treaties had their constitutional status.

\textbf{b. Constitutional Interpretation}

According to Article 78 of Taiwan’s Constitution, the Judicial Yuan (JY) shall interpret the Constitution. It is the Constitutional Court (CC) of the JY, which consists of 15 justices, including chairperson and deputy chairperson of the JY, to interpret the Constitution. The first part of this subsection reviews how the CC interprets Articles

\begin{footnotesize}
\begin{enumerate}
\item Hwang Shan-San (ed.), supra not no. 30, p. 156.
\item Hu Shih might not have foreseen that the first state to introduce the UN Charter into her Constitution would thereafter be forced to leave the UN. It is also difficult to maintain that a non-UN member state has a constitutional duty to respect the UN Charter.
\end{enumerate}
\end{footnotesize}
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 drafters of the Constitution could not be able to foresee the international human rights system when they wrote its Article 22. The CC extended the term “other freedoms and rights” in Article 22 to include some rights, such as right to select 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. In my view, this interpretation makes three major points. First, it defines the term “treaty” in the Constitution to include three elements. 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

37 JY Interpretation No. 399, 22 March 1996.
groups or international organizations); it applies directly to important national issues, such as defense, diplomacy, finance, the economy or people’s rights and duties; and 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 laws. 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 laws or pre-determined by the LY, should also be sent to the LY for deliberation.

It can be inferred that Taiwan adopts a monist approach, meaning that a ratified international human rights treaty, which can be regarded as directly involving people’s rights and duties as ruled by JY Interpretation No. 329, has domestic legal status.41 From this constitutional perspective no special domestic law is needed to incorporate a human rights treaty.

(b) Referring to International Human Rights Treaties

The CC has functioned since 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 referred to international human rights instruments in its reasoning and holdings.

(i) No Response to Application

In some cases, the applicants introduced international human rights instruments, especially the UDHR and the ICCPR, as the basis of their arguments.

In JY Interpretation No. 483 the applicant quoted “all human beings are born free and equal in dignity and rights” in Article 1 of the UDHR as the foundation of 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 “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.

42 JY Interpretation No. 483, 14 May 1999.
43 JY Interpretation No. 469, 20 November 1998.
44 JY Interpretation No. 517, 10 November 2000.
The problem with these applications was that those applicants did not offer any 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, even though the CC, as explained in the coming sub-sections, had already made reference to international human rights instruments. Of course these interpretations did not make any specific contribution to the interaction between the Constitution and international human rights instruments.

(ii) Opinions of Individual Justices

Some justices tried to extend ambits of rights already guaranteed by the Constitution or to grant more rights that have not 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 preamble and Article 1 of the UDHR guarantees universal human dignity. He emphasized that as “a signatory state of the UDHR,” Taiwan had the 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 that are not listed at the Constitution can be guaranteed according to the UDHR and other international human rights instruments.”46 One of his reasons was that “constitutional amendments in Taiwan did not offer more rights, but international human rights instruments have been greatly developed.”47 He also expressed his worry of not applying international treaties because of international isolation in JY Interpretation No. 547.48 His approach was to incorporate international human rights through the interpretation of Article 22 of the Constitution. It was believed that the constitutional court’s approach of reviewing domestic legislation by referring to international treaties was a faithful interpretation of constitutional principles.49 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 minority views in the respective interpretations. These supportive views of applying international human rights treaties did not receive agreement among most justices.

46 JY Interpretation No. 514, 13 October 2000.
47 Ibid.
48 JY Interpretation No. 547, 28 June 2002.
49 Ibid.
(iii) Views in Reasoning and Holdings

JY Interpretation No. 372,\textsuperscript{50} which was made in 1995, was the first interpretation to cite international human rights instruments in its reasoning. After seven years, in 2002, JY Interpretation No. 549\textsuperscript{51} became the first case in which international human rights instruments were referred to in a JY holding.

JY Interpretation No. 372 emphasized human dignity; therefore, it cited that this 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{52} where the CC had to decide whether the “court” provided 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 argument. However, JY Interpretation No. 392 refuted this argument. Its reasoning claimed that, “it is not appropriate to invoke the provisions of ‘international covenant’, ‘conventions’ and

\textsuperscript{50} JY Interpretation No. 372, 24 February 1995.
\textsuperscript{51} JY Interpretation No. 549, 2 August 2002.
\textsuperscript{52} JY Interpretation No. 392, 22 December 1995.
claims that the court in the Article 8, Paragraph 2, first sentence, of the Constitution 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.” Then, the Interpretation emphasized that this 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 differed from that in Interpretation No. 392. A possible reason was that, as the MOJ had cited the ICCPR, the CC was obligated to decide on this matter. The CC had no choice but to state clearly that a 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 in which 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

53 JY Interpretation No. 582, 23 July 2004.
54 Ibid.
55 JY Interpretation No. 587, 30 December 2004.
protected under Article 22 of the Constitution. Again, in JY Interpretation No. 623, where the CC cited Articles 19 and 34 of the CRC to establish “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 “the State should be obligated to take appropriate measures to safeguard the mental and physical health and sound development of children and juveniles” and Article 29 of the Child and Juvenile Sexual Transaction Prevention Act, which found it constitutional to imprison and fine a person who put information on the media to induce a person to engage in unlawful sexual transaction.

International human rights instruments appeared on holdings of two constitutional interpretations, JY Interpretation No. 549 and JY Interpretation No. 578. Both cases concerned labor rights. 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

57 JY Interpretation No. 578, 21 May 2004.
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
again required the Act be amended by taking account of “the fundamental principle of
the Constitution to protect workers” 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 totally strangers to the CC anymore. Especially the UDHR, the
ICCPR and ILO conventions were referred to in several cases. However, a common
problem of 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 binding this obligation was. In case the government and the
LY did not follow, there will be further constitutional conflicts.

It seems that the CC can pick up whatever human rights document it feels
suitable; but leave out documents it does not think necessary. A consistent and clear
approach of interpretation on whether, when and how to apply international human rights instruments should be constructed by the CC. We can expect the CC to develop its comprehensive approach on this matter, but it could take much time.

c. Constitutional Amendments

Another approach is to add an amendment to the Constitution so to make a clear rule. I first trace back to past paths of constitutional amendments in Taiwan. Then, I review comparative models of constitutional provisions, providing their connections with international human rights regime, so as to offer my proposal for Taiwan.

(a) Past Paths

After the original Chinese Constitution was brought into Taiwan, there was a long period when nobody dared to add amendments to it, 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 as the President. The Constitution has thereafter been amended seven times in twenty years.\(^{58}\) Those amendments focused mainly on governmental structure and election system. Though amendments in 1991, 2000 and 2005 did not focus on human

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rights at all, some of these amendments focused 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 was also mandated that the State should maintain cultural diversity, and should promote the cultures and languages of indigenous peoples. In 1999, a provision to protect soldiers was also added.

Notably, these amendments mainly focused on equal protection and culture diversity. The idea of “bringing international human rights home” into the Constitution was not even mentioned during those seven occasions in twenty years.

(b) Four Models

After many years of interaction between domestic and international laws, especially after the 1990s, on many occasions international human rights treaties were adopted into constitutional provisions. I classify them into four models.

(i) Preambles

The first model expresses obeying international human rights norms in the preambles of constitutions. One sub-model offers this guarantee in general terms. For
example, the preamble to the Constitution of Morocco affirms the “determination to abide by the universally recognized human rights.” The other sub-model expresses their constitutional will to be bound by specific international human rights instruments in their preambles. The preamble to 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 Mauritanian Constitution, which proclaims its attachment to the principles of democracy as 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 ratified.

(ii) Into 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. It is Article 7 of the Constitution of Georgia, which 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 also affirms that the state shall abide by the UDHR.

The third sub-model focuses on specific treaties and those a state has ratified. Article 75 Section 2 of the Argentina Constitution lists many international human rights instruments, including those of 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, as having constitutional hierarchy.

(iii) Constitutional Interpretation

A third model rules that constitutional implementation or interpretation should comply with international human rights standards. Section 10.2 of the Spanish Constitution rules 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.” Also, Article 93 paragraph 2 of the Constitution of Columbia 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.”

(c) A Proposal

Comparative analyses of above-mentioned models reveal several issues. First, as it expresses obeying international human rights norms in the preambles, the key puzzle of the first model was whether preambles have such power to grant rights to the people. No matter whether they reference international human rights treaties in general or specific term, preambles could have a declarative function, while not providing substantial protection.

Second, the third model in fact focuses more on constitutional rights. What has been achieved by this model is 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
Third, a pre-condition of the fourth model is that states shall join the international system which grants individual communications, such as 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. Three reasons can be offered. 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 of such states rule that international human rights treaties have higher status than domestic laws. Whenever they are in conflict, international human rights treaties prevail. Third, once 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.

Comparative experience demonstrates that a comprehensive approach will be possible 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 which a state has ratified. However, it is a pity that Asia, where Taiwan is situated, does not have a regional human rights treaty. Therefore, there is no possibility for Taiwan to adhere to a regional human rights treaty. Taiwan also suffers difficulty of depositing instruments of ratification to the UN SG. A constitutional provision connecting international human rights instruments would be very helpful. In addition, establishment of a national human rights institute, which has long been promoted by the UN, can be a mechanism of domestic implementation of international human rights treaties. Therefore, I propose a new constitutional provision for Taiwan:

1. Rights and freedoms guaranteed in the Constitution should be interpreted as in compliance 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 be made to comply with those international human rights standards.

3. The National Human Rights Commission, which shall exercise its functions independently, should be established to implement the 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 the 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 will prevail. In order to avoid the problem of depositing, it rules that when the LY passes human rights treaties, they gain domestic legal status, no matter whether the deposit is successful or not. The third paragraph grants constitutional foundation to the proposed National Human Rights Commission. It also enshrines that the Commission should be independent and should implement both constitutional and international rights.

In Taiwan, it is quite difficult to pass a constitution amendment. It needs 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 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.\(^59\) However, it should be emphasized that the issue of bridging the connection between the constitution and international human rights treaties is not and should not

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\(^{59}\) See Article 12 of Additional Articles to the Constitution of Taiwan.
be regarded as a political matter. My view is that once there is any opportunity, this issue should be brought into consideration, and consensus among different political parties and the public may be reached.

D. I did it My Way: Incorporation without Successful Ratification or Accession

When there were obstacles to access 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 was developed in Taiwan by incorporating some international human rights treaties through her own domestic laws. The followings 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

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

(a) Judicial Views

The international law has no power to decide whether a state should adopt her position as a monist or dualist state. Normally this issue is determined by a state’s
As Taiwan’s Constitution merely states that the state should respect treaties it is 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 accordance with above procedures hold the same status as laws.

The JY Interpretation No. 329 in fact holds that treaties concluded according to constitutional procedure have the same status as domestic laws. 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 laws,” it expresses two meanings at the same time. 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 laws. The CC however has not made it clear whether a treaty is superior to a domestic law.
(b) Requirements in Treaties

However, due to her unique international status, Taiwan has to confront the 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 accesses to a treaty after it comes into force, the treaty will enter into force on this state in a few days after it deposits its instrument of ratification or accession. Taking the ICCPR and the ICESCR as an example, both Covenants rule that each Covenant will come into force in three months after a state deposits its ratification instrument.\(^60\) There is a similar rule at the CEDAW. For those states that ratify or accede 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.\(^61\)

Observing from this rule, as Taiwan could not deposit her ratification instruments, the two Covenants and the CEDAW will not come into force on Taiwan. Even though Taiwan is a monist state, a treaty cannot come into force over her if she cannot deposit instruments of ratification or accession successfully. The result is that, even if

\(^{60}\) See Article 49 of the ICCPR and Article 27 of the ICESCR.

\(^{61}\) See Article 27 of the CEDAW.
domestically the LY and the President conducted a treaty review procedure according to the Constitution, a treaty cannot obtain domestic legal status if there is an international obstacle.

**(c) Standards for Handling of Treaties**

However, if we observe from the view of Taiwan’s Constitution, there stands a different view. As Interpretation No. 329 does not refer to 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, regrettably, Taiwan still has no law clarifying this issue; but, a special law 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 has been passed by the LY and signed by the President, gains domestic legal status, even without depositing ratification instrument to the UN SG. After regaining power the KMT government amended Article 11 paragraph 2 of the Standards again in 2009 to state that “under special circumstances” the President may announce a treaty coming into force after the LY
passes it even if there is no procedure of depositing 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 passed them. On the other hand, the KMT’s approach is to offer the President the power to decide whether it is a special circumstance. However, a more important point is that its common position of these two approaches is to offer a treaty domestic legal effect even when there is difficulty to deposit 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 its process of depositing the instrument of ratification is not successful. However, the LY adopted a different approach. The LY enacted an implementing act for when it passed a treaty and it was difficult to deposit 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, being as a monist state, applies an approach of a dualist state to incorporate international human rights treaties because of international isolation. I will move on to review details of two cases concerning Taiwan’s ratifications of the ICCPR and the ICESCR and accession to the CEDAW.
b. Incorporating ICCPR, ICESCR and CEDAW

Taiwan accessed to the CEDAW in 2007, but her deposition of instrument of accession was not successful. When considering accession to the CEDAW, there was a debate over whether to enact a special domestic law to solve the problem of not being able to deposit the instrument of accession within the DPP government. The MOJ then argued that this law was not necessary. The MOJ gave two principle reasons. One reason was that, after the LY passes a treaty and the President signs it, the treaty shall have domestic legal status. Therefore, there was no need to enact a domestic law to authorize its domestic legal effect. The other was that CEDAW was not part of the International Bill of Rights but only one of core international human rights treaties; it did not stand sufficient significance for a special domestic law. The consequence of that decision was that no governmental organs affirmed that they were bound by the CEDAW between 2007 and 2011. Nor did the courts apply the CEDAW in any 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 that the Act to Implement the ICCPR and the ICESCR was adopted at the same day when ratifications of the two Covenants were passed. It was the MOJ which took this
responsibility. Since the MOJ agreed with enacting a special domestic law to implement the International Bill of Rights, the procedure moved smoothly within the administrative branch. The KMT also dominated the LY at that time; therefore no obstacle occurred during the Act’s legislative process.

With this successful experience, the KMT then moved on for a new law to implement the CEDAW, as in fact its accession had been passed. This time the Executive Yuan (EY)\(^{62}\) asked the Ministry of Interior Affairs (MIA) to take charge. The MIA fully agreed and prepared a draft to the cabinet which was submitted to the LY in May 2010. The LY passed the Act to Implement the Convention on the Elimination of all Forms of Discrimination against Women (Act to Implement the CEDAW) on 20 May 2011; the Act came into force on 1 January 2012.

Such backgrounds and procedures of incorporating the ICCPR, the ICESCR and the CEDAW into the domestic legal system triggered several issues, which will be discussed in details in the following sub-sections.

(a) Past and Present Steps

The first issue is that when Taiwan ratified the two Covenants in 2009, it declared its successions to signatures of the ROC in 1967. However, even supposing Taiwan

\(^{62}\) The Executive Yuan is the administrative government in Taiwan.
could be regarded as a sovereign state, she would find it difficult to be qualified to fulfill the requirements of Article 48 of the ICCPR and Article 26 of the ICESCR. However, as the ROC left the UN in 1971 and the CEDAW was concluded in 1979, Taiwan’s accessing to the CEDAW was completing a new step. The core point became that the UN did not regard Taiwan as a sovereign state.

A related point is when Taiwan declared to succeed the ROC’s signatures of the two Covenants, it followed that Taiwan should also admit that she was bound by all 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, Taiwan governments never officially declared her view. It is my opinion that this should be done at once.

(b) 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 Act to Implement the ICCPR and the ICESCR rules that human rights protection provisions in the two Covenants have domestic legal effect. Article 2 of Act to Implement the CEDAW establishes the same rule saying 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 noted that domestic legal effect extends merely to the two Covenants’ “human rights protection 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 as President Ma claimed. As to the CEDAW, Articles 1 to 16 have domestic legal effect.

(c) Domestic Legal Status

A third issue concerns, even if human rights protection provisions in the two Covenants and provisions protecting sexual equality in the CEDAW have domestic legal effect, what is their domestic legal status? When the two Acts do not rule on this issue, the judicial branch must make a decision. The problem is that different courts could have different views. As mentioned, JY Interpretation No. 329 rules that treaties concluded in accordance with constitutional procedures hold the same status as laws. But, the core puzzle is that it has not clearly stated whether the treaties standing above domestic laws.

There may be three theories to solve 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,

no matter whether treaty or domestic law, the newer one applies. A third one concerns conflict of laws: when there are conflicts between treaties and domestic laws, courts 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, the treaty takes precedence.” Some of Taiwan’s domestic courts ruled that when there were conflicts, treaties should be applied according to the lex specialis rule. However, it seems that this view has not been the definite position of the MOJ and courts.

After the two Covenants obtained domestic legal effect on 10 December 2009, courts have been gradually applying the human rights protection provisions in the two Covenants in their judgments. But, there seems to be very few judgments that offer a view in 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 January 2012, there is still no judgment

64 See, for instance, MOJ letter No. 1813 in 1983.
65 See, for example, judgment of Taiwan High Court Gan (1) No. 128 in 1990.
66 See Kaohsiung domestic court, judgment of civil summary appeal no. 201 of 30 October 2009. It is interesting that this judgment was delivered before the Act to Implement the ICCPR and the ICESCR came into force.
ruling on this point. Therefore, it might take a long time for courts to take a final position. The puzzle is that different courts could have different views, and people in Taiwan may suffer from such uncertainty.

(d) Interpretations

A fourth issue is how to interpret contents of rights protected by the two Covenants and the CEDAW. Article 3 of Act to Implement the ICCPR and the ICESCR rules: “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 make sure of the legislative purpose of the two Covenants and the CEDAW. In my view, it could refer to the preambles of the two Covenants, both of which 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.” Of course, it also covers the preamble of the CEDAW. It is, however, regrettable that in no case was reference made to the

67 See the second paragraph of preambles of the two Covenants.
legislative purpose of the two Covenants and the CEDAW, no matter from governmental organs or 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 the Committee on Economic, Social and Cultural Rights (CESCR). One possible reason the CESCR was not included could be that it did not appear in the provisions of the ICESCR. It is difficult to interpret the words “interpretations by the HRC” shown 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 would be to amend Article 3 of the Act to Implement the ICCPR and the ICESCR to implicitly 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. The reality is that there is no penalty in the two Acts. It could be regarded as a “soft duty” of governmental institutes. In Taiwan’s system, outside monitors of the administrative branch are the Control Yuan (CY)\(^68\) and the courts. However, it can be argued that even the CY and courts themselves have not fully made

\(^68\) 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.
reference to interpretations by those Committees, so it is difficult to ask them to monitor the administrative government 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 the extent to which how far both these two provisions of the Acts will be implemented will depend on how many of Taiwan’s governmental organs know about them and how willing they are to apply them in individual cases.

(e) Who is bound

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

Of course, the core idea is the ambit, “all levels of governmental institutions and agencies.” In Taiwan’s laws, when the term “all levels of governmental institutions and agencies” is applied, it includes all five governmental branches, including not only administrative, legislative and judicial ones but also the CY and the Examination Yuan
Therefore, the two Covenants and the CEDAW have many impacts on all branches of governmental organs.

(f) Obligations

A sixth issue is what the obligations of governmental institutes are. It can be argued that the two Acts to implement the ICCPR, the ICESCR and the CEDAW impose two kinds of obligations onto governmental organs.

(i) All Governmental Organs

On one hand, the two Acts require all governmental organs to meet four obligations. First, in general terms both Article 4s of the two Acts require, whenever exercising their functions, all levels of governmental institutions and agencies should confirm to 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; positively promote realization of human rights.

The Act to Implement the CEDAW came into force in 2012, so it will still take time to observe whether and how governmental organs apply the CEDAW. On the other hand, all governmental organs have been gradually applying the two Covenants. It can be

69 The independent power of examination branch is a unique feature of the political system in Taiwan. According to Amendment Article 6 of the Constitution, the EY is the highest examination authority, responsible for the examination and management of all civil service personnel.
observed that once the “snowball” starts, it can be expected to grow.

Second, both Article 5s of the two Acts ask 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 that are governed by existing laws and regulations. After the two Acts went into effect, some governmental organs tried to emphasize their obligations to implement and protect rights. However, it is difficult to judge whether governmental organs have in fact carried out their responsibility.

Third, both the two Acts’ Article 7 ask that all governmental institutions preferentially allocate funds to implement human rights protection provisions in the two Covenants and the CEDAW, according to their financial status, and to take steps to enforce them. But so far, it has not been found that any governmental organ has intentionally allocated funds to implement the human rights protection provisions in the two Covenants and the CEDAW. An easier way was to put one more label onto the original works to indicate that such works were also to include implementing the two Covenants and the CEDAW.

Fourth, Article 8 of the Act to Implement the ICCPR and the ICESCR rules: “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 with reviewing existing laws. Consequently, 263 cases were listed. By the end of two-year deadline on 9 December 2011, the MOJ declared that 187 cases (71%) had been finished.\textsuperscript{70} Obviously, the 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.\textsuperscript{71} The MOJ emphasized that it will continue to carry out such works. However, no definite time limitation was set. It seems that after the passing of two-year deadline set by Article 8 of the Act, the administrative government and the LY do not have further obligation to continue this responsibility.

A 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 Human Rights Act 1998 of the United Kingdom. Article 19 of the Act requires the


\textsuperscript{71} Ibid.
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, on one hand, that the LY amended old laws to comply with the two Covenants; but, on the other hand, that the LY enacted new laws not following the standards of human rights protections set 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 of Article 19 of the Human Rights 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.

But, 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 this work. It could repeat what happened in the work comply local law with the two Covenants. As a three-year period will also pass, a provision of imposing “statement of compatibility” may be also needed in the Act to Implement the CEDAW after 2015.
(ii) Administrative Branch

On the other hand, the two Acts specially impose the administrative branch two obligations. First, both Article 5 Paragraph 2s 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 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 been proposed by the administrative government to implement these 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 to invite related scholars and NGOs to review the report and set up a 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. That was the MOFA, which was in charge of the promotion from the Committee of Promoting Women’s Rights of the EY.\textsuperscript{72} The initial report\textsuperscript{71} was completed in March 2009, two years after passing the accession procedure.\textsuperscript{74} 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 deposition of instrument of accession, it is almost impossible that it would accept Taiwan’s CEDAW reports. The result was that in fact Taiwan did not have a channel to get into 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 offer some recommendations. This approach followed an international route partially. This proposal was accepted by the DPP.

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\textsuperscript{72} The Committee of Promoting Women’s Rights has been reorganized as the Department of Sexual Equality of the Executive Yuan since 1 January 2012.
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\textsuperscript{73} The bilingual report can be accessed at http://www.womenweb.org.tw/doc/CEDAW\_Initial\_Report.pdf (visited on 28 January 2012)
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\textsuperscript{74} The report was written between March 2007 and 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.
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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.

Under the two Covenants, both Article 40 of the ICCPR and Article 16 of the ICESCR require 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 human rights reports system required by the Act to Implement the ICCPR and the ICESCR should be understood as the approach required by the two Covenants. However, the current KMT government, even though it took part in preparing the CEDAW report, did not know many details about it. It did not even follow the required 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 state. 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 on the state. This means that, since the Act to

75 Such as Dr. Hanna Beate Schöpp-Schilling, Dr. Heisoo Shin and Dr. Anamah Tan.
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 that of the ICESCR by 9 December 2011. However, by the end of January 2012 Taiwan’s government still had not completed her reports.

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

As to the circle of reporting, Article 6 of the Act to Implement the CEDAW requires that every four-year term to comply with Article 18 1 (b) of the CEDAW. As the initial report was delayed one year, the next CEDAW report shall be due in 2012. Even supposing its calculation point started from March 2009, the next report would be due by March 2013.

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77 As Taiwan accessed to the CEDAW in March 2007, her initial report should have been submitted by the end of March 2008. But in fact it was not completed until March 2009.
However, although the Act to Implement the ICCPR and the ICESCR does not rule on this point, its Article 6 requires the government to set up a human rights reports system in accordance with the two Covenants. In fact, both the HRC and the CESCR have established a five-year reporting circle. Therefore, it can be argued that Taiwan should follow this path. Of course it would be acceptable if the government wished to accelerate the frequency.

E. Conclusions

Taiwan’s adventures with the international human rights regime can be divided into three stages. In the first stage, the ROC had opportunities but did not act as a positive participant. Between 1971 and 2000, Taiwan suffered double isolation, when she was both internationally isolated and self-isolated. Since 2000, Taiwan has wished to join the international human rights regime, but has found no channel.

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

Taiwan, being as a monist state, applied an approach of a dualist state to
incorporate international human rights treaties because of international isolation.
Therefore, two special domestic laws have been enacted to incorporate the ICCPR, the
ICESCR and the CEDAW. Whereas there has been no true international human rights
monitoring, these human rights treaties make impacts on domestic legal systems and
governmental organs.

A general image of this interaction between Taiwan and international human
rights instruments presents a unique picture showing partly reality but also a feeling of
“virtuality.”

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